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The Abyei Arbitration: Procedural Aspects of an Intra-state Border Arbitration

BROOKS DALY*

Abstract
With a looming referendum on the secession of South Sudan, the drafters of the Abyei Arbitration Agreement were faced with a complex intra-state dispute and a limited time to resolve it. The parties to the dispute agreed on a procedural regime to govern the arbitration, combining both traditional and innovative provisions on procedural rules, the constitution of the tribunal, the schedule of pleadings, transparency, financing of the proceeding, and the role of the Permanent Court of Arbitration. This article examines the key provisions of the Abyei Arbitration Agreement and their implementation during the course of the arbitration, and evaluates the case's significance as procedural precedent for future intra- or inter-state arbitration. The article does not provide an analysis of the substantive findings of the tribunal.

Key words
Abyei; arbitration agreement; boundary delimitation; Permanent Court of Arbitration; transparency

The arbitration relating to the delimitation of the Abyei area in the Sudan was a remarkable proceeding in numerous respects. The arbitral tribunal was confronted with both the review of another international body's binding decision and the determination of an internal boundary of a sovereign state. The first, when a review procedure was not foreseen in the parties' original agreement,[1] is a rare occurrence and the tribunal's search for the appropriate standard of review reveals the complexity of the question put to them (i.e. what is the appropriate standard of review for an excess of mandate by the Abyei Boundaries Commission?).[2] The second is a particularly sensitive undertaking when it relates to the territory that is the setting of one of Africa's longest-running civil conflicts, in which millions have died. The tribunal's completion of its work in record time was impressive in itself, but the acceptance of the award by the parties to the dispute and the potential for the award as a building block in the Sudanese peace process have won the tribunal acclaim in

* Deputy Secretary-General, Permanent Court of Arbitration [b.daly@pca-cpa.org]. Opinions expressed in this article reflect the personal views of the author.

1 Typical of instruments that foresee a 'final and binding' decision on delimitation, the Parties' Comprehensive Peace Agreement of 9 January 2005 (hereafter CPA) does not provide a mechanism for review of the Abyei Boundaries Commission decision.

2 *The Government of Sudan v. The Sudan People's Liberation Movement/Army*, Final Award, 22 July 2009 (Abyei Final Award), paras. 486–536; Memorial of the SPLM/A, 18 December 2008, paras. 692–791; Memorial of the GoS, 18 December 2008, paras. 129–191.

the international community and increased interest in international arbitration as a means of resolving complex disputes.

This article focuses primarily on procedural aspects of the case. While the tribunal's award deserves to be analysed carefully for its treatment of substantive law,[3] the procedural regime within which the tribunal functioned is as distinctive as its substantive findings. Much of the procedural framework for the arbitration was created or adapted to suit the needs of this specific case and then tested in the course of the proceedings. As will be discussed, the parties' choices with respect to procedural matters help to explain their choice of arbitration as a dispute resolution mechanism in the first place. With the case now completed, the relative success of the choices as implemented by the tribunal, the parties, and the Permanent Court of Arbitration can be evaluated to determine the extent to which they are worthy of replication in future proceedings.

1. Background of the dispute and the submission to arbitration

The dispute over the boundaries of the Abyei area in Sudan forms part of the long-running conflict between Northern and Southern Sudanese. Following years of warfare and failed peace efforts, an agreement was signed in 2002 by the government of Sudan (GoS) and the Sudan People's Liberation Movement/Army (SPLM/A), providing for a peace process that would include a referendum entitling the people of Southern Sudan to vote on whether to secede from Sudan and form an independent country.[4] The Abyei area, although north of the 1956 colonial boundary of Southern Sudan, had a population that had been allied with the South in the civil war. In subsequent negotiations it was agreed that once the Abyei area had been defined and demarcated by a boundaries commission (the Abyei Boundaries Commission, or ABC), a referendum would be held allowing the Abyei population to choose to become part of South Sudan or remain with the North. These agreements formed part of the 2005 Comprehensive Peace Agreement (CPA), and completion of the demarcation of the Abyei borders became a critical step in the path to both the Abyei referendum and the referendum in Southern Sudan. Accordingly, when the GoS did not accept the Report of the Abyei Boundaries Commission Experts on the demarcation of Abyei[5] on the basis that the ABC Experts had exceeded their mandate, it called into question the timeline for the implementation of the peace process foreseen in the CPA. An impasse was averted in July 2008 when the parties signed the Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting the Abyei Area.[6] Pursuant to the

3 The Abyei decision won OGEMID's award for Arbitration Decision of the Year 2009: Kyriaki Karadelis, 'Abyei and Hrvatska Win OGEMID Awards', *Global Arbitration Review*, 8 January 2010.

4 The Machakos Protocol, signed 20 July 2002. The referendum is scheduled to take place between 9 and 11 January 2011. A simultaneous referendum will take place in which the people of Abyei will vote on whether to remain a part of Northern Sudan or to become a part of Southern Sudan.

5 ABC Experts' Report, dated 14 July 2005.

6 In the CPA, *supra* note 1, Ch. IV, 'Resolution of the Abyei Conflict', Art. 8(1) provides for 'an Abyei Referendum Commission to conduct the Abyei referendum simultaneously with the referendum of Southern Sudan'.

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Arbitration Agreement, the parties agreed to submit the question whether the ABC Experts has exceeded their mandate for decision by an arbitral tribunal. In the event that the tribunal found an excess of mandate, it was further empowered to delimit the boundaries of the Abyei area.

2. Why arbitration?

The parties' choice of arbitration to resolve the Abyei boundaries dispute followed failed attempts at a military solution and a negotiated settlement. The binding expert determination within the Abyei Boundaries Commission procedure also failed to produce a decision that was acceptable to both sides. In these circumstances, arbitration could have been arrived at through a process of elimination, but it in fact possessed attractive qualities distinguishing it from a number of other methods of dispute resolution, making it more than just a last resort.

First, in contrast to open-ended negotiations, the parties could with arbitration design rapid proceedings leading to a binding decision. In this case, a binding decision was necessary to reduce the chances that the dispute over Abyei would excessively delay and derail the implementation of the CPA. Third-party adjudication through arbitration or court proceedings may also be more attractive to political leaders who may more easily distance themselves from a decision that is imposed than from acceptance of a negotiated settlement that may subject them to accusations of having given away too much.

Second, as the dispute arising from the ABC Experts' Report involved questions of fact and law, a fully reasoned decision made by a tribunal composed of respected international jurists may have been expected to have greater weight than a further expert determination. Given its extensive experience with territorial boundaries, a judgment of the International Court of Justice (ICJ) would have fulfilled this goal, but the Statute of the ICJ does not allow it to decide cases between states and non-states.[7] Although Southern Sudan may eventually become an independent country, it was not at the time of the arbitration.

Third, arbitration offers the prospect of greater legitimacy by allowing the parties to design a highly transparent procedure granting the public access to all written pleadings and oral hearings, and avoiding *ex parte* communications that had been a focus of criticism in the work of the ABC Experts.[8] That the process would be deemed legitimate, not only in the eyes of the representatives of the parties, but in the constituencies that would be directly affected, indeed whose nationality might be determined, by the eventual arbitral award, is critical. Finally, arbitration has on numerous occasions played a principal role in the successful restoration or

7 Art. 34(1) of the Statute of the International Court of Justice provides that '[o]nly States may be parties in cases before the Court.'

8 Abyei Final Award, *supra* note 2, paras. 146–149, 153–155, 158–160 and 436–437, where the GoS alleges that certain procedural violations on the part of the experts constitute an excess of mandate. These alleged violations included, *inter alia*, the experts engaging in *ex parte* communications in the gathering of evidence that would later form the basis of conclusions in the ABC Experts' Report.

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preservation of peace in boundary disputes that had provoked armed conflict or where armed conflict was threatened.[9]

3. The terms of the Arbitration Agreement and its implementation

3.1. The choice of procedural rules

Although Southern Sudan is not a state, the subject matter of the dispute and the political – if not legal – status of the parties to the dispute most resembles an inter-state dispute. In considering the approaches to the adoption of procedural rules followed in other inter-state arbitration agreements, the drafters of the Abyei Arbitration Agreement were faced with three options: (i) to draft an entire set of procedural rules specifically for the case and include them in the arbitration agreement; (ii) to defer the adoption of a full set of procedural rules until the tribunal is constituted and allow the tribunal to then adopt its rules of procedure; and (iii) to incorporate an existing set of procedural rules by reference in the arbitration agreement, and add any necessary modifications to suit the needs of the case.

3.1.1. Procedural rules from scratch

The first approach, as taken in the Eritrea–Yemen arbitration,[10] has the advantage that the rules can be tailored precisely to fit the case. This avoids any confusion that may arise when a previously existing set of rules is incorporated by reference in the agreement, on one hand, and a number of amendments to those rules are scattered throughout the arbitration agreement, on the other. When this is done without clear references to the articles or portions of the arbitration rules that have been amended, the potential for confusion is multiplied.

Another advantage of drafting rules specifically for the case is that the exercise should focus the parties on the meaning of each article as it is drafted and adopted. In contrast, when existing rules are incorporated by reference, it is not always certain that all relevant participants in the proceedings will have read them, article by article, and understood exactly what is foreseen.[11] While the drafting process can be time-consuming, taking into account that procedural rules may count 40 or more articles, many with multiple sub-paragraphs, where boundary and nationality of a people is at stake, every aspect of the procedural regime to be applied to the case

9 The Eritrea–Yemen arbitration was preceded by skirmishes: see, e.g., Jean-Pierre Queneudec, 'The Eritrea–Yemen Arbitration: Its Contribution to International Law', in *The Eritrea–Yemen Arbitration Awards 1998 and 1999* (2005), 1; Eritrea–Ethiopia Boundary Commission proceedings followed the 1998–2000 war: *The State of Eritrea v. The Federal Democratic Republic of Ethiopia*, Decision Regarding Delimitation of the Border, 13 April 2002, para. 2.13; the Guyana–Suriname arbitration (concerning a maritime delimitation), where the commencement of proceedings was preceded by an unlawful threat of force: *Guyana v. Suriname*, Award, 17 September 2007, para. 151.

10 *The Government of the State of Eritrea v. The Government of the Republic of Yemen*, Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation), 3 October 1996, Annex I – The Arbitration Agreement.

11 In the most sensitive arbitrations it may be worth meeting and discussing each article of the procedural rules to be adopted, even where parties intend to adopt a set of pre-existing rules.

should be carefully considered. Perhaps to save time, or perhaps due to confidence in the available procedural rules, the drafters of the Abyei Arbitration Agreement chose not to draft a new set of procedural rules for their case.

3.1.2. Deferral of rules adoption until the constitution of the tribunal

Another approach to the selection of procedural rules is to agree only on the procedure for the appointment of the arbitral tribunal in the arbitration agreement and leave the adoption of procedural rules for the tribunal. This is the approach of the UN Convention on the Law of the Sea (UNCLOS), which provides for arbitration as one of the methods of dispute resolution for disputes arising under the convention, but includes only a few brief articles dealing mainly with the constitution of the tribunal.[12] This simplifies the drafting of the arbitration agreement and may make sense when an arbitration agreement is designed to cover future disputes that may arise under a complex treaty such as UNCLOS. This approach also has the advantage of allowing the tribunal to adopt a procedure after taking into account the case at hand and any views of the parties, although it lacks the predictability of inserting a full set of procedural rules at the outset.[13] It also defers what may be a time-consuming process until a dispute arises and the tribunal is appointed, thereby potentially delaying the tribunal's consideration of urgent matters submitted to it.[14] In the case of Abyei, the parties knew exactly the intricacies of their dispute and so would have gained little by deferring the adoption of procedural rules until the tribunal was appointed, unless they could not reach an agreement on the rules and needed to refer the matter to the tribunal in order to allow the arbitration to go forward.[15] Moreover, the urgency of the resolution of the Abyei dispute required that the parties agree as much as possible of the procedure as quickly as possible, including the necessary time limits for various procedural steps in the case if they were to have confidence that an arbitral award would be rendered within their time constraints.

12 United Nations Convention on the Law of the Sea, opened for signature 10 December 1982 (entered into force 16 November 1994) (UNCLOS), Annex VII, Art. 5, which provides that '[u]nless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own procedure, assuring to each party a full opportunity to be heard and to present its case.' This is also common in state–state dispute resolution provisions of investment treaties: see, e.g., Energy Charter Treaty, opened for signature December 1994 (entered into force April 1998), Art. 27; Investment Incentive Agreement, 19 November 1997, U.S.-India, 1997 U.S.T. LEXIS 19, Art. 6.

13 Among its various gaps, UNCLOS Annex VII contains no provision pertaining to the challenge of arbitrators should justifiable doubts as to an arbitrator's independence or impartiality arise.

14 In the five UNCLOS arbitrations administered by the PCA, the adoption of procedural rules has taken the tribunal from as little as six weeks (in the Guyana–Suriname arbitration) to as long as ten months (in the Malaysia–Singapore arbitration): see, respectively, *Guyana v. Suriname*, Award of the Arbitral Tribunal, 17 September 2007, paras. 4 and 7; *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Award on Agreed Terms, 1 September 2005, paras. 14 and 16, both available at www.pca-cpa.org.

15 The Algiers Peace Agreement of 2000 between Eritrea and Ethiopia took an interim position, referring to existing procedural rules, but saying that the tribunal would 'adopt its own rules based on the 1992 Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States': Art. 5(7).

3.1.3. Incorporation by reference

Incorporating an existing set of procedural rules by reference is the safest all-round approach to devising a procedural regime. Using long-established rules that have been successfully used in similar international disputes reduces the chances that a procedural problem will arise that is not adequately provided for in the rules.[16] If such an issue does arise, there are typically numerous books and articles and jurisprudence available on the proper interpretation and application of the rules to assist the parties and the tribunal.[17] The parties to the Abyei dispute were under significant pressure to resolve the dispute over the ABC Experts' Report as soon as possible, so rather than defer the selection of procedural rules until the tribunal was constituted or draft an entirely new set of procedural rules, their arbitration agreement incorporates an existing set of procedural rules. Article 1 of the Abyei Agreement provides,

1. The ***Parties*** agree to refer their dispute to final and binding arbitration under this Arbitration Agreement (Agreement) and the Permanent Court of Arbitration (PCA) Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State (PCA Rules), subject to such modifications as the ***Parties*** agreed herein or may agree in writing.
2. The ***Parties*** shall form an arbitration tribunal (***Tribunal***) to arbitrate their dispute in accordance with this Agreement and the PCA Rules; provided that the PCA Rules shall not apply when excluded or modified by this Agreement.
3. The ***Parties*** agree on the International Bureau of the (PCA) to act as the registry and provide administrative support in accordance with this Agreement and the PCA Rules.
4. The ***Parties*** designate the Secretary General of the PCA as the appointing authority to act in accordance with this Agreement and the PCA Rules.

While the parties' haste in getting their proceedings under way may explain the adoption of existing procedural rules, the rules they chose would, at least at first glance, be unknown to most arbitration practitioners. To the PCA's knowledge, in fact, the PCA Optional Rules for Arbitration of Disputes between Two Parties of Which Only One is a State (the 'PCA State/non-State Rules'), dating from 1993, had only been used in one arbitration before the Abyei arbitration.[18] A closer look reveals that these PCA rules contain some of the most familiar provisions in international

16 The danger in trying to reinvent the wheel is evident from many ad hoc arbitration clauses in treaties: see, e.g., Treaty between His Majesty's Government of Nepal and the Government of India concerning the Integrated Development of the Mahakali River including Sarada Barrage, Tanakpur Barrage and Pancheshwar Project, 12 February 1996, 36 ILM 531, where Art. 11, although empowering the Secretary-General of the PCA to appoint the third arbitrator if the parties fail to agree on this appointment, does not provide that the Secretary-General may be requested to appoint an arbitrator on behalf of one of the parties should it fail to make the necessary appointment of one of the first two arbitrators.

17 Users of the UNCITRAL Arbitration Rules 1976, for example, can refer to numerous publications to assist in the conduct of proceedings under those rules, including David D. Caron, Lee Caplan, and Matti Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (2006); S. Abercrombie Baker and M. D. Davis, *UNCITRAL Arbitration Rules in Practice* (1992); and James Castello, *UNCITRAL Rules, Chapter 16, Practitioner's Handbook on International Commercial Arbitration* (2009).

18 The other is another unorthodox case: *Larsen v. Hawaiian Kingdom*, Award, 5 February 2001, Tribunal Members James Crawford SC (Chair), Gavan Griffith QC, and Christopher Greenwood QC, available on the PCA

arbitration procedure, as they are based on the 1976 Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL),[19] with modifications made to account for the presence of a state in the proceedings,[20] and to give the PCA a role in the administration of the proceedings. The UNCITRAL Rules have been tested in thousands of cases, and would be familiar to the counsel acting in the arbitration.[21] The PCA State/non-State Rules are also virtually identical to the PCA's Optional Rules for Arbitrating Disputes between Two States (the 'PCA State–State Rules'), which have been used in designing the procedural regimes in a number of inter-state arbitrations, such as the Eritrea–Ethiopia Boundary Commission,[22] the Eritrea–Ethiopia Claims Commission,[23] the Belgium/Netherlands Arbitration (so-called 'Iron Rhine Arbitration'),[24] and, most recently, the Slovenia–Croatia Arbitration Agreement.[25]

The parties presumably felt uncomfortable adopting the PCA's more frequently used State–State Rules, containing five-member tribunal option, which was more attractive to the parties[26] as compared with the State/non-State Rules' one- or three-member tribunal options, seeing that South Sudan was not a state. This could have been dealt with through amendments introduced in the Arbitration Agreement, although political sensitivities and the potential for confusion may well have closed off this option.[27]

It is unclear whether the parties' choice of the PCA State/non-State Rules over the State–State Rules was influenced by a desire for supervisory jurisdiction of the courts of the place of arbitration. The drafters of the PCA's State–State Rules assumed that states would not necessarily wish to waive their immunity and submit to the jurisdiction of any national court, particularly the courts of the place of arbitration exercising jurisdiction under an international arbitration act, by virtue

website at www.pca-cpa.org/showpage.asp?pag_id=1159. These rules were adopted by the PCA Administrative Council on 6 July 1993.

19 UNCITRAL Arbitration Rules (1976), available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html. UNCITRAL has just completed the revision of the 1976 Rules; the new Rules became effective on 15 August 2010.

20 Amendments directed at the participation of states include the addition of the waiver of sovereign immunity provision contained in Art. 1(2) and the doubling of all 15-day time limits imposed on parties: see PCA State/non-State Rules, Notes to the Text, available at www.pca-cpa.org/showpage.asp?pag_id=1188.

21 These rules have been used in thousands of contracts and treaties, particularly treaties for the protection of investments; see, e.g., North American Free Trade Agreement (entered into force 1 January 1994) and Energy Charter Treaty, signed December 1994 (entered into force April 1998), and were the model for the rules of procedure adopted by the Iran–US Claims Tribunal, the United Nations Compensation Commission, and the rules of the arbitral institutions of the Asian–African Legal Consultative Organization.

22 See Eritrea–Ethiopia Boundary Commission, Rules of Procedure, 11 April 2002, Art. 1(1): available at www.pca-cpa.org/showpage.asp?pag_id=1150.

23 See Eritrea–Ethiopia Claims Commission, Rules of Procedure, October 2001, Art. 1(1): available at www.pca-cpa.org/showpage.asp?pag_id=1151.

24 See *The Kingdom of Belgium v. The Kingdom of The Netherlands*, Rules of Procedure regarding the 'Ijzeren Rijn': available at www.pca-cpa.org/showpage.asp?pag_id=1155; *The Kingdom of Belgium v. The Kingdom of The Netherlands*, Award of the Arbitral Tribunal, 24 May 2005, para. 5.

25 See www.vlada.si/fileadmin/dokumenti/si/projekti/2010/Arbitrazni_sporazum/10.a_Arbitra%C5% BEni_sporazum_-_podpisan_EN.pdf. By its terms, proceedings under the Slovenia–Croatia Arbitration Agreement will commence following the signature of an instrument of accession to the European Union by Croatia.

26 As discussed later, the parties modified the PCA State/non-State Rules by providing for a five-member tribunal.

27 It was just as easy to modify the State/non-State Rules to provide for a five-member tribunal as it would have been to amend the State–State Rules to apply to an intra-state dispute.

of their agreement to arbitrate and choice of procedural rules. When adapting the UNCITRAL Rules, which were designed with commercial disputes between private parties in mind, to inter-state disputes, the drafters deleted the provisions that appeared to indicate the supervisory jurisdiction of a national court. In the Abyei arbitration such jurisdiction would have been exercised by Dutch courts pursuant to the Netherlands Arbitration Act 1986 in view of the choice of The Hague as the place of arbitration in Article 6 of the Arbitration Agreement.[28] It is unclear whether the parties were conscious of this procedural difference in the PCA Rules, as no application was made to Dutch courts at any stage in the proceedings.[29]

3.2. The constitution of the Arbitral Tribunal

The parties introduced multiple modifications to the PCA State/non-State Rules in the Arbitration Agreement as allowed by the final clause of Article 1(1): 'subject to such modifications as the parties agreed herein or may agree in writing'. The superfluous Article 1(2) only reiterates matters already addressed in Article 1(1).[30] One of the most significant modifications to the PCA State/non-State Rules and one of the most distinctive provisions of the Arbitration Agreement is the procedure for appointment of the arbitral tribunal set forth in Article 5(1–14):

1. The ***Parties*** agree that the ***Tribunal*** shall be composed of five arbitrators. Each ***Party*** shall appoint two arbitrators, and the four Party-appointed arbitrators shall appoint the fifth.
2. The ***Parties*** shall not designate as Party-appointed arbitrators persons other than current or former members of the PCA or members of tribunals for which the PCA acted as registry who shall be independent, impartial, highly qualified and experienced in similar disputes.
3. The Secretary General of the PCA shall provide the two ***Parties***, within five days of depositing this Agreement with him, with a full list of members and arbitrators (PCA Arbitrators List) as stated in section 2 herein. The PCA Arbitrators List shall also include information on qualifications and experience.
4. Each ***Party*** shall appoint, within thirty days of receiving the PCA Arbitrators List, two arbitrators from the list by written notice to the Secretary General of the PCA.

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28 Missing from the PCA State–State Rules and the PCA Optional Rules for Arbitration Involving International Organizations and States is the content of Art. 1(2) of the UNCITRAL Arbitration Rules, which provides that 'These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.' See also Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration', (2003) 74 *British Year Book of International Law* 151.

29 If the application of the Netherlands Arbitration Act is allowed, then a fourth option for procedural rules should be considered, that being an ad hoc clause referring to arbitration in the Netherlands, whereby the Netherlands Arbitration Act would provide the procedural rules for the conduct of the proceedings.

30 The agreement to the application of the PCA Rules in Art. 1(1) requires that a tribunal be formed, so the first clause of Art. 1(2) adds nothing, while Art. 1(2)'s provision 'that the PCA Rules shall not apply when excluded or modified by this Agreement' does no more than Art 1(1)'s 'subject to such modifications as the Parties agreed herein or may agree in writing'.

5. In the event that a ***Party*** fails to name one or both Party-appointed arbitrators within the specified time, the Secretary General of the PCA shall make, within ten days, such appointment from the PCA Arbitrators List.
6. Each of the four Party-appointed arbitrators shall sign, within seven days of notification of appointment by the Secretary General of the PCA, a declaration of impartiality, independence and commitment that shall be presented to them by the Secretary General of the PCA. The declaration shall include an affirmation that there exist no circumstances likely to give rise to justifiable doubts to the arbitrator's independence, impartiality or readiness to avail himself/herself throughout the arbitration proceedings. Copies of the signed declaration shall be immediately communicated to the ***Parties***.
7. The four arbitrators shall meet, within thirty days of their appointment, in The Hague, The Netherlands to consider candidates for the fifth arbitrator.
8. The fifth arbitrator, who shall be appointed in accordance with this Agreement to chair the tribunal, might be selected from or outside the PCA arbitrators list. However, he/she shall be a renowned lawyer of high professional qualifications, personal integrity and moral reputation. He or she shall have experience in similar disputes.
9. The four arbitrators shall communicate, within twenty days of their first meeting, to the two ***Parties***, through the Secretary General of the PCA, an identical list of at least three candidates for the fifth arbitrator to be prioritized in order of preference if possible. Full curricula vitae of the candidates shall be attached.
10. Each ***Party*** may return, within fifteen days of the communication referred to in section (9) herein, the candidates list through the Secretary General of the PCA, after having deleted the name or names to which they object and numbered the remaining candidates in order of preference.
11. The four arbitrators shall appoint, within fifteen days of receiving the returned lists from the two ***Parties***, or of the expiry of the period mentioned in section (10) herein, the fifth arbitrator from the names to which no objection was indicated and, as far as practicable, in compliance with the preferences shown by the ***Parties***.
12. If the four arbitrators fail to communicate a candidate list during the time specified in section (9) herein or if all candidates are objected to by either ***Party*** or by the two ***Parties***, the Secretary General of the PCA shall appoint, in consultation with the four arbitrators, within fifteen days of the expiry of the specified time or of receiving the objections, the fifth arbitrator from outside the candidates list having due regard to section (8) herein.
13. The fifth arbitrator shall sign, within seven days of notification of appointment by the Secretary General of the PCA, a declaration of independence, impartiality and commitment that shall be presented to him/her by the Secretary General of the PCA. The declaration shall include an affirmation that there exist no circumstances likely to give rise to justifiable doubts to the arbitrator's independence, impartiality or readiness to avail himself/herself throughout the arbitration proceedings. Copies of the signed declaration shall be immediately communicated to the ***Parties***.

14. If one or two arbitrators fail to participate in the arbitration, the other arbitrators shall in lieu of timely appointment of substitute pursuant to section (5) or (6) herein and unless the **Parties** agree otherwise, have the power in their sole discretion to continue the arbitration and to make any decision, ruling or award, notwithstanding such non-participation. In determining whether to continue with the arbitration or render any decision, ruling or award without the participation of such arbitrator(s), the other arbitrators shall take into account the stage of the arbitration, the reasons, if any, expressed for non-participation and such other matters as they consider appropriate in the circumstances of the case. In the event that the other arbitrators determine not to continue the arbitration without the non-participating arbitrator(s), the **Tribunal** shall declare the office(s) vacant and substitute(s) shall be appointed pursuant to the sections (4) and (5) herein, unless the **Parties** otherwise agree on a different method of appointment.

The first modification to the PCA State/non-State Rules, in Article 5(1), was to provide for the appointment of five arbitrators rather than one or three arbitrators. Five-member tribunals are common in inter-state arbitrations on matters as significant as boundary delimitations, where the increased cost and time of the proceedings may be justified by the increased legitimacy of a decision made by a larger panel.[31] Parties may also be attracted by the opportunity to have a greater influence on the composition of the tribunal, assuming the choice of a procedure like that used in the Abyei case, where each party was allowed to appoint two arbitrators and the presiding arbitrator was to be appointed by agreement or, failing that, an appointing authority. The procedure stands in contrast, however, to the more recent provisions of UNCLOS (1982) and the PCA State–State Rules (1993), where the two states parties to a dispute appoint one arbitrator each, and three arbitrators are appointed by agreement[32] or by an appointing authority.[33] Both procedures can claim

31 The rarity of arbitral tribunals with more than five arbitrators would indicate that the relative increase in legitimacy is less than the increased cost and delay encountered with more than five arbitrators. Seven-member tribunals are, however, constituted from time to time. At the time of writing, a seven-member tribunal was being constituted in the Indus Water Treaty dispute between India and Pakistan under the Indus Waters Treaty 1960, signed 19 September 1960: see Tom Toulson, 'Arbitrators Appointed in Indus Water Treaty Dispute', *Global Arbitration Review* (London, 21 June 2010), available at www.globalarbitrationreview.com/news/article/28486/.

32 The PCA State–State Rules provide that the two party-appointed arbitrators are to agree on the remaining arbitrators, while UNCLOS provides for an agreement by the parties. In practice, it is generally accepted that the party-appointed arbitrators may consult with the party that appointed them before agreeing on the remaining arbitrators, meaning that these provisions operate in a similar manner in practice.

33 UNCLOS Annex VII, Art. 3, entitled 'Constitution of arbitral tribunal', provides,

> For the purpose of proceedings under this Annex, the arbitral tribunal shall, unless the parties otherwise agree, be constituted as follows:
> (a) Subject to paragraph (g), the arbitral tribunal shall consist of five members.
> (b) The party instituting the proceedings shall appoint one member to be chosen preferably from the list referred to in article 2 of this Annex, who may be its national. The appointment shall be included in the notification referred to in article l of this Annex.
> (c) The other party to the dispute shall, within 30 days of receipt of the notification referred to in article l of this Annex, appoint one member to be chosen preferably from the list, who may be its national. If the appointment is not made within that period, the party instituting the proceedings may, within two weeks of the expiration of that period, request that the appointment be made in accordance with subparagraph (e).
> (d) The other three members shall be appointed by agreement between the parties . . .

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a long history, with two appointments per party having been adopted in the PCA's 1899 and 1907[34] founding conventions and one appointment per party having been followed in the Alabama Claims arbitration.[35]

UNCLOS has become the most likely source of five-member inter-state arbitration tribunals in coming years (it has already produced six arbitrations in recent years), and recent analysis of the role of the party-appointee may lead to the eventual acceptance of UNCLOS as a model preferable to that in the Abyei Arbitration Agreement. Powerful criticism supported by anecdotes and statistical evidence has been levelled at the use of party-appointed arbitrators. Several eminent scholars and practitioners find that counsel too often seek to appoint arbitrators who will disregard their duty to decide cases independently and impartially and instead become 'a species of advocate' for the party that appointed them:

> Disputants tend to be interested in one thing only: winning. They exercise their right of unilateral appointment, like everything else, with that overriding objective in view. The result is speculation about ways and means to shape a favourable tribunal, or at least to avoid a tribunal favourable to the other side – which is logically assumed to be speculating with the same fervour, and toward the same end. Forgotten is the ideal of an arbitrator trusted by both sides.[36]

Concerns about the neutrality of party-appointments are as old as modern international arbitration. Reflecting on the Alabama Claims Commission, where only two of the five commissioners were party-appointed,[37] Professor James Lorimer wrote in 1874,

> [A] larger infusion of the neutral element . . . certainly was an improvement. But for the presence of the neutral judges it is doubtful if the work would have been brought to a successful issue, and I think it very worthy of consideration whether, on all future occasions, the Commissioners ought not to be appointed exclusively from neutrals.[38]

To the extent that the risk of the non-neutral party-appointee exists, its consequences for the tribunal were attenuated under the appointment procedure of the Alabama Claims Commission as well as under UNCLOS and the PCA State–State

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34 1899 Convention for the Pacific Settlement of International Disputes (hereinafter 1899 Convention), Art. 24; 1907 Convention for the Pacific Settlement of International Disputes (hereinafter 1907 Convention), Art. 45; however, these conventions lacked an agreed appointing authority. Where there was no agreement, the 1899 Convention deadlocked while the 1907 Convention solved the problem through the drawing of lots.

35 Art. I, Treaty between Her Majesty and the United States of America for the Amicable Settlement of all Causes of Difference Between the Two Countries ('Alabama' Claims; Fisheries; Claims of Corporations, Companies or Private Individuals; Navigation of Rivers and Lakes; San Juan Water Boundary; and Rules Defining Duties of a Neutral Government during War), signed in Washington, 8 May 1871 (hereinafter Treaty of Washington (1871)). (Ratifications exchanged in London, 17 June 1871.)

36 Draft of concluding chapter in Jan Paulsson, *The Idea of Arbitration* (forthcoming); other authors have pointed out that virtually all dissenting opinions in international arbitration are made by arbitrators appointed by the losing party. See Albert Jan van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration', in Mahnoush Arsanjani et al. (eds), *Looking to the Future: Essays on International Law in Honor of Michael Reisman* (forthcoming). Adding to this statistical trend, the dissenting opinion in the Abyei arbitration was critical of decisions that were unfavourable to the party that had appointed the dissenting arbitrator.

37 'One [arbitrator] shall be named by the President of the United States; one shall be named by Her Britannic Majesty; His Majesty the King of Italy shall be requested to name one; the President of the Swiss Confederation shall be requested to name one; and His Majesty the Emperor of Brazil shall be requested to name one.' Treaty of Washington (1871), Art. I.

38 Professor James Lorimer, letter to Thomas Balch, *New York Tribune*, 11 April 1874., cited in T. W. Balch, *The Alabama Arbitration* (1900), 49 n. 35.

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Rules, where the two party-appointed arbitrators are diluted by the three other arbitrators, including the presiding arbitrator, who are appointed by agreement or by a neutral third party. In contrast, assuming the appointment of advocate arbitrators by the parties, the Abyei procedure, with four party-appointed arbitrators, leaves the presiding arbitrator in a lonely position as the only neutral arbitrator on the tribunal.[39]

Abyei is not alone among modern five-member tribunals in having four party-appointees. The Eritrea/Yemen compromise, the rules of procedure of the Eritrea–Ethiopia Boundary and Claims Commissions, and the Belgium/Netherlands Rules of Procedure all provide that each side will appoint two arbitrators.[40] Abyei falls within this group of recent arbitrations, where advocates already engaged by the parties to represent them in the specific dispute were involved in negotiation of the procedural rules to be applied in the arbitration. The fact that advocates are likely to seek the greatest control possible over the appointment process explains the four party-appointments in Abyei and the other cases mentioned. The contrasting two party-appointments adopted in the PCA State–State Rules and UNCLOS may be explained by the fact that they are the product of multilateral negotiation and adoption of a procedure for future disputes where the neutrality of the tribunal was more present in the minds of the drafters than party control.[41] This is not to say that we should expect the UNCLOS or PCA procedure to be adopted only in instruments dealing with future disputes. The Alabama Claims arbitration still constitutes a revered precedent in international arbitration, and the recent Slovenia/Croatia arbitration agreement[42] proves that parties may still recognize the potential for enhanced neutrality by limiting themselves to one party-appointment each.

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39 Despite this risk, several recent arbitrations have opted for four party-appointees and only one mutually agreed arbitrator: Eritrea–Yemen, Eritrea–Ethiopia Boundary and Claims Commissions, and the Belgium–Netherlands Iron Rhine arbitration. The last three modified the PCA State–State Rules to provide for four party-appointees.

40 Although pursuant to the terms of the respective arbitration agreements the Eritrea–Ethiopia and Belgium/Netherlands arbitrations were to base their procedural rules on the PCA State–State Rules, the parties amended the appointment procedure so that each would appoint two arbitrators rather than one.

41 The author speculates that experience in the intervening years led the PCA to abandon the approach taken in the 1899 and 1907 Conventions when drafting the 1993 State–State Rules. It is unclear why the Alabama precedent was not followed in 1899. Recorded comments from the Hague Peace Conference on the question are limited: 'it is very important to provide for the case where there may be no such agreement [on the identity of arbitrators], and to determine, in that event, an easy and sure method of forming the arbitral tribunal. The first rule would naturally appear to be: the nomination by each party of an equal number of arbitrators and the designation, by all of the latter, of an umpire, whose function is most important in prospective cases of equal division of votes'. Annexes of the Seventh Meeting of the Plenary Conference of The Hague Peace Conferences, 25 July 1899, paras. 93–94, available in *The Proceedings of the Hague Peace Conferences: The Conference of 1899* (1920).

42 Composition of the Arbitral Tribunal, Arbitration Agreement between Government of the Republic of Slovenia and the Government of the Republic of Croatia, dated 4 November 2009, Art. 2:

> (1) Both Parties shall appoint by common agreement the President of the Arbitral Tribunal and two members recognized for their competence in international law within fifteen days drawn from a list of candidates established by the President of the European Commission and the Member responsible for the enlargement of the European Commission. In case that they cannot agree within this delay, the President and the two members of the Arbitral Tribunal shall be appointed by the President of the International Court of Justice from the list.
>
> (2) Each Party shall appoint a further member of the Arbitral Tribunal within fifteen days after the appointments referred to in paragraph 1 have been finalised. In case that no appointment has been made within this delay, the respective member shall be appointed by the President of the Arbitral Tribunal.

Possibly in an attempt to ensure that all appointments would be of individuals who would inspire the mutual confidence[43] of the parties, Article 5(2) of the Abyei Arbitration Agreement limits the parties' unilateral appointments to 'current or former members of the PCA or members of tribunals for which the PCA acted as registry who shall be independent, impartial, highly qualified and experienced in similar disputes'. The PCA State/non-State Rules and other PCA rules do not require the restriction of appointments to members of the PCA. Nor do the PCA's founding conventions exclude the appointment of arbitrators other than members of the court.[44] So the parties' agreed restrictions on potential candidates were a novelty in PCA practice, and also presented some challenges in implementation. Pursuant to Article 5(3) the PCA had to provide 'a full list of members and arbitrators . . . as stated in Section 2' within five days of the deposit of the Arbitration Agreement with the PCA. Following deposit of the Agreement with the PCA on 11 July 2008, the PCA set about preparing this list. Providing the list of current Members of the Court was straightforward,[45] but the PCA was also required to provide a full list of 'former members of the PCA'. The PCA lists of Members of the Court stretch back over a century, therefore it was clear to the PCA that a 'full list' of former Members (i.e. including the Members appointed in the early 1900s) would be of little use to the parties. Even with the recent former Members of the Court, the PCA kept no record of their availability to serve as an arbitrator. The requirement also to include 'members of tribunals for which the PCA acted as registry' on the list raised similar

(3) If, whether before or after the proceedings have begun, a vacancy should occur on account of the death, incapacity or resignation of a member, it shall be filled in accordance with the procedure prescribed for the original appointment.

43 Paulsson, *supra* note 36, calls mutual confidence in arbitrators the fundamental premise of arbitration.

44 'The Permanent Court is competent for all arbitration cases, unless the parties agree to institute a special Tribunal.'1899 Convention, Art. 21; 1907 Convention, Art. 42.

45 The PCA maintains a regularly updated list of Members of the Court, whom the PCA member states (110 at the time of writing) may appoint.

Art. 23, 1899 Convention, provides:

> Within the three months following its ratification of the present Act, each Signatory Power shall select four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrators.
> The persons thus selected shall be inscribed, as Members of the Court, in a list which shall be notified by the Bureau to all the Signatory Powers.
> Any alteration in the list of Arbitrators is brought by the Bureau to the knowledge of the Signatory Powers.
> Two or more Powers may agree on the selection in common of one or more Members.
> The same person can be selected by different Powers.
> The Members of the Court are appointed for a term of six years. Their appointments can be renewed.
> In case of the death or retirement of a Member of the Court, his place shall be filled in accordance with the method of this appointment.

Article 44, 1907 Convention, provides:

> Each Contracting Power selects four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrator.
> The persons thus elected are inscribed, as Members of the Court, in a list which shall be notified to all the Contracting Powers by the Bureau.
> Any alteration in the list of Arbitrators is brought by the Bureau to the knowledge of the Contracting Powers.
> Two or more Powers may agree on the selection in common of one or more Members.
> The same person can be selected by different Powers. The Members of the Court are appointed for a term of six years. These appointments are renewable.
> Should a Member of the Court die or resign, the same procedure is followed for filling the vacancy as was followed for appointing him. In this case the appointment is made for a fresh period of six years.

concerns about availability, but had the further complication that in the majority of PCA-administered cases, the parties did not authorize the PCA to disclose any information about the case, including the identity of the parties or arbitrators.[46] The PCA was nevertheless able to list 55 arbitrators from this last category, but many others were not subject to disclosure. The list of arbitrators from pending or past PCA cases had a higher percentage of individuals with significant experience in arbitral proceedings than the list of present and former members of the court. During the long dormancy of the PCA following the Second World War, appointment as a PCA Member of the Court had more honorific than practical significance and seems to have been bestowed too often on the basis of academic or political achievement, without any consideration of prior experience with international arbitration. An additional influence on the process of appointment of Members of the PCA was the role given to the PCA Members of the Court in the nomination of candidates for election as judges of the International Court of Justice:

> Article 4
>
> 1. The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration, in accordance with the following provisions.
> 2. In the case of Members of the United Nations not represented in the Permanent Court of Arbitration, candidates shall be nominated by national groups appointed for this purpose by their governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes . . .
>
> Article 5
>
> 1. At least three months before the date of the election, the Secretary-General of the United Nations shall address a written request to the members of the Permanent Court of Arbitration belonging to the states which are parties to the present Statute, and to the members of the national groups appointed under Article 4, paragraph 2, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court . . .[47]

Many PCA member states appear to select their PCA Court Members with only their role under the ICJ Statute in mind, disregarding the terms of the PCA Conventions requiring the selection of individuals 'disposed to accept the duties of Arbitrator'.[48] It is unlikely, for example, that the legal adviser of the US Department of State, the legal adviser to the Netherlands Ministry of Foreign Affairs, or the head of the legal department of the Ministry of Foreign Affairs of Italy[49] would be available to accept arbitral appointments in view of the time constraints of their government positions, their likely terms of employment, and the conflicts of interest that would

46 To illustrate, at the time of writing the PCA was acting as registry in over 50 arbitrations, but in only four of these pending cases was it agreed that the PCA could make any disclosure about the case on the PCA website.
47 Statute of the International Court of Justice.
48 1907 Convention, Art. 44; 1899 Convention, Art. 23.
49 PCA member states regularly appoint individuals holding these and similar positions as Members of the PCA.

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exclude them from any tribunal where their country is a party[50] or that involves matters with significant national interests at stake. This distortion of the purpose for constituting the Members of the PCA under its founding conventions limits the utility of the list of members of the court to parties seeking appropriate candidates for appointment in a specific dispute; it also explains why the parties to the Abyei arbitration expanded the list of potential arbitrators beyond the PCA Members of the Court.

In a letter of 16 July 2008, the PCA provided its 'PCA Arbitrators List' to the parties, comprising three annexes along with an explanation of how the PCA had sought to comply with Articles 5(2) and 5(3) of the Arbitration Agreement:

> Annex 1: Current List of PCA Members of the Court, as at July 16, 2008
> Annex 2: List of members of tribunals for which the PCA has acted as Registry in the last ten years. (This list includes only individuals who have served in cases where the parties agreed to disclosure of the identity of arbitrators.)
> Annex 3: Lists of PCA Members of the Court as published in PCA Annual Reports for the last ten years:
>
> 3.1 List of PCA Members of the Court from 2007 Annual Report
> 3.2 List of PCA Members of the Court from 2006 Annual Report
> 3.3 List of PCA Members of the Court from 2005 Annual Report
> 3.4 List of PCA Members of the Court from 2004 Annual Report
> 3.5 List of PCA Members of the Court from 2003 Annual Report
> 3.6 List of PCA Members of the Court from 2002 Annual Report
> 3.7 List of PCA Members of the Court from 2001 Annual Report
> 3.8 List of PCA Members of the Court from 2000 Annual Report
> 3.9 List of PCA Members of the Court from 1999 Annual Report
> 3.10 List of PCA Members of the Court from 1998 Annual Report
>
> In light of the fact that PCA archives extend back to 1899, we have limited the PCA Arbitrators List to the last ten years. If either Party wishes to propose an individual who may have been listed or served as arbitrator prior to July 1998, the PCA would be willing to consult its archives and confirm whether the individual was a PCA Member of the Court or a member of a tribunal for which the PCA acted as Registry.
> Please be aware that the lists of PCA Members of the Court are comprised of names supplied by Member States. The PCA relies on its Member States to supply names of individuals who meet the criteria set out in the 1899 and 1907 Conventions for the Pacific Settlement of International Disputes, including (in accordance with Articles 23 and 44 of the respective Conventions) that such individuals are 'disposed to accept the duties of Arbitrators'.[51]

No objection arose from the parties regarding the PCA Arbitrator List, and each appointed two arbitrators within the 30-day time limit set forth in Article 5(4) of the Arbitration Agreement: the GoS appointed HE Judge Awn Al-Khasawneh and Professor Dr Gerhard Hafner, the SPLM/A appointed Professor W. Michael Reisman and Judge Stephen M. Schwebel. The four appointed arbitrators followed the

50 Assuming application of one of the PCA's modern sets of rules of procedure, all of which allow for the challenge (removal) of arbitrators who are not independent and impartial with respect to the parties to the dispute.

51 PCA letter to the parties of 16 July 2010 (unpublished).

procedure foreseen in Article 5(6–11), but all the candidates selected by the four party-appointed arbitrators and communicated to the parties pursuant Article 5(9) were objected to by one or both parties in their comments under Article 5(10). The task of appointing the fifth arbitrator therefore fell to the PCA Secretary-General in accordance with Article 5(12) of the Arbitration Agreement.

The PCA Secretary-General appears in many instruments as the appointing authority,[52] but the Abyei case was nevertheless out of the ordinary. First, the referral of the appointment to the PCA Secretary-General followed a nearly two-month procedure whereby the parties, in consultation with the four party-appointed arbitrators, attempted to identify and appoint a fifth arbitrator that would be acceptable to both sides. This process failed, despite an in-person meeting, at the cost of significant time and expense, of the party-appointed arbitrators in The Hague on 6 September 2008 to identify appropriate candidates. The failure of these efforts demonstrated that the parties had very different ideas about the profile of the ideal presiding arbitrator, which made the appointment by the PCA Secretary-General a delicate matter. While the parties themselves had been unable to identify a mutually acceptable candidate after months of reflection, the PCA Secretary-General was given 15 days to decide the matter. This and several other deadlines in the appointment procedure had no apparent mechanism for extension beyond an agreement of the parties.[53]

A further matter was the interpretation of the Secretary-General's duty to make the appointment 'in consultation' with the four party-appointees. Did this entail requesting their comments on the profile of the candidates for appointment as a general matter, or allowing the four a veto over any candidate identified? This could be resolved through a proposal of the type and timing of consultations that would occur and its acceptance by the four party-appointees. On another provision subject to various interpretations, consultations with the party-appointees, along with review of their own professional backgrounds, could be used to arrive at the appropriate interpretation of the requirement to appoint an individual with 'experience in similar disputes'. Had the candidates for appointment been limited to those with experience in disputes over internal boundaries of a sovereign state, the choices would have been very limited.

These somewhat vague provisions left the PCA Secretary-General with some discretion and, in the end, probably facilitated the appointment process by avoiding

52 For example, he is the appointing authority for state–state disputes under the Energy Charter Treaty (see Energy Charter Treaty, Dec. 17, 1994, 34 ILM 381, Art. 27, at www.pca-cpa.org/showpage.asp?pag_id=1068), was the appointing authority in the Belgium/Netherlands 'Iron Rhine' arbitration (see Procedural Rules, available at www.pca-cpa.org/showpage.asp?pag_id=1155, Art. 5(4)), and is the appointing authority in the Mauritian Arbitration Act for international arbitrations taking place in the territory of Mauritius (Mauritius International Arbitration Act 2008, available at http://supremecourt.intnet.mu/Entry/dyn/GuestGetDoc.Asp?Doc_Idx=7110944&Mode=Html&Search = No., Art. 12). Other examples are available at www.pca-cpa.org/showpage.asp?pag_id=1068.

53 Drafters of dispute resolution mechanisms should typically provide a neutral entity, such as the PCA Secretary-General, the ability to extend deadlines in the procedure for constitution of the tribunal, after which such competence can be vested in the tribunal itself. The co-operativeness of all parties to a proceeding cannot be guaranteed even at this early stage, so a failure to agree on an extension where one proves necessary may threaten to make the conduct of the procedure *ultra vires* the arbitration agreement, potentially requiring the recommencement of proceedings.

unnecessary rigidity. Also welcome was Article 5(12)'s exemption of the Secretary-General from the requirement to make his appointment from the PCA Arbitrators List, thereby giving him freedom to consider a larger pool of potential arbitrators. This is the converse of what is encountered in a number of other arbitration mechanisms, where party autonomy is favoured and unfettered, while the appointing authority's choices are limited to a panel of arbitrators, thereby increasing the predictability and confidence of the parties in the appointing authority's potential appointments.[54] Here, it was the parties that were restricted by a list and the appointing authority who was given broad freedom. On 27 October 2008, the Secretary-General appointed Professor Pierre-Marie Dupuy as the fifth and presiding arbitrator, completing the constitution of the tribunal.

3.3. Fast-track pleading

Arbitrations conducted with faster than usual timelines are often referred to as fast-track proceedings. The Arbitration Agreement's fast-track provisions do not end with the appointment procedure that gave the PCA Secretary-General five days to produce the PCA List of Arbitrators and 15 days to appoint the presiding arbitrator. Far more onerous were the time limits placed on the parties to complete their pleadings and on the Tribunal to render its award. Briefly, following the terms of the Arbitration Agreement, the chronology of the proceedings was as follows:

27 October 2008: appointment of the presiding arbitrator and the date of commencement of the nine-month time limit for completion of the arbitration pursuant to Article 4(3).[55]

24 November 2008: preliminary procedural meeting in The Hague regarding, *inter alia*, the schedule for written and oral pleadings.

18 December 2008: simultaneous filing of written memorials by the parties, accompanied by witness statements, expert reports, maps, documentary evidence, and legal authorities.

13 February 2009: simultaneous filing of countermemorials, accompanied by witness statements, expert reports, maps, documentary evidence, and legal authorities.

28 February 2009: simultaneous filing of rejoinders.

18–23 April 2009: oral pleadings, including witness examination, conducted at a public hearing at the Peace Palace, The Hague.

22 July 2009: The tribunal delivers its 286-page Final Award at a public ceremony at the Peace Palace, The Hague, exactly 90 days after the hearings' closure and less than nine months from the commencement of the proceedings in accordance with Articles 9(1) and 4(3) of the Arbitration Agreement.

54 The ICSID Convention, for example, allows the parties to the dispute broad freedom in the selection of arbitrators, while the appointing authority (chairman of the ICSID Administrative Council) must appoint from a panel: 'Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman pursuant to Article 38.' ICSID Convention, Art. 40(1).

55 Art. 4(3) of the Arbitration Agreement provides: 'The Tribunal shall endeavour to complete the arbitration proceedings including the issuance of the final award within a period of six months from the date of the commencement of arbitration proceedings subject to three months' extension.'

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From the above, lawyers familiar with pleading schedules before international courts and tribunals will already recognize how compressed the pleading schedule was, but a few more facts are worth noting. Most challenging for the limited time provided to complete the arbitration was the parties' agreement to plead both the issues before the tribunal at the same time. These were, as given in Article 2 of the Arbitration Agreement:

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**.

As the need to delimit the Abyei area pursuant to Article 2(c) was contingent on a finding of excess of mandate under Article 2(a), there would be a strong argument for bifurcation of the proceedings to allow the excess of mandate question to be decided first. In the event that the Tribunal found no excess of mandate, this would avoid the wasted time and expense of pleading the complex issue of delimitation. The parties nevertheless agreed to plead the two issues at the same time, reflecting the urgency of a decision for the peace process in Sudan, in the context of which a faster arbitral decision outweighed any potential efficiency to be gained through bifurcation.

As far as the Arbitration Agreement was concerned, the stage was set for speedy proceedings, but the nature of the claims and the resources put into legal representation were of the sort usually encountered in proceedings lasting several years. As for the written submissions, the parties submitted over 20,000 pages of pleadings, exhibits, and authorities. The Tribunal was not left simply to consider the main submissions, but also was called on to address disputes regarding access to documents[56] and witness intimidation.[57] Although it was not known whether the tribunal would need them, the tribunal was also required to identify and engage cartographic experts in the event that they had to delimit the Abyei area, which would require the analysis of historical maps and production of the tribunal's own maps.

At the oral hearings, interpretation of witness examination into Dinka and Arabic had to be conducted consecutively, rather than simultaneously, from time to time

56 Abyei Final Award, *supra* note 2, para. 52.
57 Ibid., para. 66, n. 5.

where it afforded improved comprehension, thereby prolonging the estimated time of examination. The hearing itself was crowded, with each side bringing approximately 100 attendees, including many from the Abyei region, whose admission to the Peace Palace and other needs were seen to by the PCA. The award-rendering ceremony, requested by the parties only days before the scheduled issuance of the final award, had a similar number of attendees.

It is unlikely that so complex and heavily pleaded an arbitration has ever been completed in so short a time period.

3.4. Transparency

Article 8(6) of the Arbitration Agreement provides,

> The oral pleading(s) of the Tribunal shall be open to the media . . . The Parties authorize the PCA to issue periodic press releases regarding the progress of the arbitration proceedings and to make publicly available on its website the final award, as well as Party submissions.

This provision of the Arbitration Agreement, coupled with the parties' general acceptance and promotion of the transparency of the proceedings, is rare in international arbitration. In arbitration between private parties, confidentiality of proceedings is often valued as a means of protecting business secrets or hiding the existence of a legal dispute, which may itself may be damaging to a corporation's reputation. In disputes with a significant public interest, however, there is much support for increased transparency,[58] but many of these disputes are submitted to procedural regimes that retain confidentiality requirements designed for commercial disputes. Although the PCA State/non-State Rules would be expected to be used in cases with a significant public interest, seeing that a state would always be a party to the arbitration, one might expect greater transparency, allowing the public of the concerned state to take cognizance of its involvement in an international dispute. In fact, the PCA Rules preserve the confidentiality regime of the UNCITRAL Arbitration Rules on which they are based, providing that hearings are to be held in camera and that arbitral awards may only be made public with the consent of the parties.[59] Article 8(6) of the Arbitration Agreement was therefore necessary to modify the applicable PCA Rules and allow for the level of transparency desired by the parties to the Abyei dispute.

In preparation for the hearing, the parties made clear their preference for it to be entirely open to the public. It appeared that the legitimacy of the proceedings and the broader objectives of reconciliation and peace in the Abyei region would be served if the hearing could be viewed by the widest possible audience. The PCA was then faced with a practical problem, as the seats at the Great Hall of Justice in the Peace Palace were too few for the hundreds of requests received from individuals wishing to attend the hearing. A live webcast through the PCA website was the solution that

58 See 'CIEL and IISD call for an end to an era of secrecy in investor–State arbitration: UN body must support transparency in new arbitration rules', available at www.ciel.org/Tae/Investor_Secrecy_27Juno8.html, New York, 26 June 2008.

59 PCA State/non-State Rules, Arts. 25(4) and 32(5).

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allowed a wide viewership of both the hearing and the award ceremony.[60] While a few international arbitration hearings have been open to the public in recent years, none has dealt with a matter of as widespread interest as the Abyei case, and so there has been little demand for a webcast.[61] The Abyei webcasts have remained on the PCA website and have attracted the interest of academics and practitioners as being a rare opportunity see some of the leading counsel in international arbitration at work. Within the caseload of the PCA registry, where the parties in fewer than 10 percent of the cases have agreed to allow any public disclosure, the Abyei arbitration, where all pleadings, transcripts, procedural orders, hearing recordings, and the final award are available on the website, is the high-water mark of transparency in international arbitration.

3.5. Financing the proceedings

The costs of the Abyei proceedings included the cost of legal representation of the parties, the fees and expenses of the arbitral tribunal, the fees and expenses of expert cartographers, the fees and expenses of the PCA Registry, the cost of Dinka and Arabic interpretation at the hearing, and the cost of the Arabic translation of the final award. While some of these amounts have not been disclosed to the PCA, it can be estimated that the total cost was in the range of several million US dollars. The financial resources to cover these costs came from several sources, two of which are identified in the Arbitration Agreement in Article 11 (Costs of Arbitration), which provides as follows:

1. The Presidency of the Republic of Sudan shall direct for the payment of the cost of the arbitration from the Unity Fund regardless of the outcome of the arbitration.
2. The Government of the Sudan shall apply to the PCA Financial Assistance Fund and the Parties may solicit additional assistance from the international community.

The Unity Fund mentioned in Article 11(1) was established under the Abyei Roadmap signed on 8 June 2008. Article 3(10) of the Roadmap provides:

> The Government of National Unity and Government of Southern Sudan shall contribute fifty percent (50%) and twenty-five percent (25%) respectively from their oil revenue share from oilfields in the areas under arbitration to a fund to be established by the Presidency for the development of the areas along the North–South border and financing the joint projects presented to the Third Sudan Consortium in Oslo, Norway, May 2008.

60 There were over 2,000 viewers of the hearing through the webcast from 49 countries. The webcasts remain available on the PCA website.

61 'In summer 2004 the Methanex arbitrators further defanged their critics by opening their hearings to the public. Without the aura of concealment, arbitration became boring: Journalists didn't bother to attend the hearings.' From M. D. Goldhaber, 'Balancing Act', *American Lawyer*, 1 August 2009, available at www.law.com/jsp/tal/PubArticleFriendlyTAL.jsp?id = 1202432561749. (On 31 May and 1 June 2010, ICSID reportedly made its first webcast of an investor–state arbitration. Cite CIEL Article on webcast.) 'Webcasting as a Tool to Increase Transparency in Dispute Settlement Proceedings', CIEL, June 2010.

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The Unity Fund was the primary source of funding for the case, but funds were not always as readily forthcoming as the SPLM/A would have liked. As recorded in the final award, one request by the SPLM/A for US$1 million to cover a portion of its costs was not forthcoming. Noting the 'complexity of this case, its compressed schedule and lengthy submissions, and the critical stage [of the] proceedings', the tribunal reminded the GoS of its obligation under the Arbitration Agreement to provide funding from the Unity Fund and communicated its expectation that the GoS would 'facilitate and ensure the immediate release' of the US$1 million.

A second source of funding was the PCA Financial Assistance Fund, mentioned in Article 11(2) of the Arbitration Agreement. The PCA Financial Assistance Fund for Settlement of International Disputes (FAF) was established in 1995 by the Secretary-General of the PCA with the approval of the Administrative Council of the FAF Terms of Reference and Guidance.[62] By its terms, the FAF can provide financial support to PCA member states that are included on the Development Assistance Committee of the Organisation for Economic Co-operation and Development (OECD DAC) List of Aid Recipients for the conduct of dispute resolution proceedings administered by the PCA. Pursuant to a request for financial assistance from the GoS on behalf of both parties, the Board of Trustees approved a grant in the amount of €500,000 towards the costs of arbitration. These funds were available in the FAF by virtue of contributions to the FAF by France, the Netherlands, and Norway in support of the Abyei proceedings. A question arose regarding the use of the word 'international' in the title of the FAF, seeing that the Abyei arbitration was not between two sovereign states. However, with a number of international aspects to the dispute and nothing in the terms of reference of the Board preventing it, the Board was able to find the grant within its mandate, which only seemed appropriate in view of the Dutch, French, and Norwegian contributions made explicitly for the purpose of funding the Abyei proceedings.

Another source of support was the *pro bono* legal assistance provided to the SPLM/A by the Public International Law and Policy Group (PILPG), a non-profit organization which provides free legal assistance to states and governments involved in conflicts, and Wilmer Cutler Pickering Hale and Dorr LLP (WilmerHale), a prominent international law firm with a renowned practice in international arbitration. From the requests for payment made in the course of the proceedings mentioned above, it appears that PILPG and WilmerHale claimed only expenses (e.g. travel, air courier) for their work on the case and were paid no fees for the months spent on the case by a large team of lawyers.[63]

4. Conclusion

Leaving aside the merits of the substantive decisions in the final award, the Abyei Arbitration deserves attention for, among other things, its arbitrator appointment

62 See PCA website at www.pca-cpa.org/showpage.asp?pag_id=1179.

63 The legal team representing the SPLM/A at the public hearing number 27 Counsel, Advocates and Legal Advisers, Abyei Final Award, *supra* note 2, at 25.

procedure, speed, financing, and transparency. A rare sequence of events and alignment of interests led to the submission to arbitration, but nothing in the proceedings reveals an insurmountable barrier to its use as a model for other complex disputes, including inter- or intra-state boundary disputes. With the benefit of hindsight, some refinements can be suggested.

With respect to the speed of the proceedings, many cases begin with serious talk of short deadlines and a rapid decision, but few would have expected at the outset that the ambitious timetable in the Abyei Arbitration Agreement could be preserved. It is a credit to the dedication of counsel and the arbitrators, who were aware of the challenge ahead of them when they accepted the appointment (they could see it in the Arbitration Agreement), and their sensitivity to the importance of a prompt decision in the wider context of the Sudanese peace process. They proved that it could be done, but the incredible strain it put on counsel and arbitrators does not recommend so short a timetable as a model for other proceedings of this complexity. Also, there was great potential waste in avoiding bifurcation of the proceedings, so that that decision cannot be justified in the future except where similar urgency (e.g. the threat of renewed armed conflict) is present.

Regarding constitution of five-member tribunals, parties must consider whether limiting themselves to two party-appointees, or no party-appointees, may result in a higher level of mutual confidence in the tribunal. It is also suggested that a list procedure for the appointment of the presiding arbitrator conducted by a neutral appointing authority rather than by party-appointed arbitrators may have a greater chance of producing a mutually acceptable name. This suggestion is not meant to attribute the failure of the list procedure in the Abyei case to the party-appointees: there may have been no common ground in the parties' respective views of the profile of the appropriate presiding arbitrator, thereby dooming the list procedure to failure and leaving as the only option an appointment imposed by the PCA Secretary-General.

Regarding financing of the proceedings, the fact that an oilfield was part of the subject matter of the dispute and that revenue generated from that field was made available through the Unity Fund for the costs of arbitration distinguishes this proceeding from many other disputes where adequate funds may not be available to one or both of the parties. The interest of the international community also assisted in the financing of the arbitration, through the PCA's Financial Assistance Fund, and the special donations made to it. If a dispute does not attract the attention of the donor community, FAF funding cannot be relied on, as the FAF has no independent source of revenue. Finally, leading practitioners cannot on a regular basis be expected to take such demanding cases without pay. The human resources necessary to conduct extensive research, prepare voluminous written pleadings, and conduct competent witness examination is concentrated in large international law firms that are profit-driven businesses. A high-profile *pro bono* case may add prestige to a particular law practice and be considered good marketing, but vast amounts of *pro bono* work are simply not compatible with the law firm business model. Nor do not-for-profit

entities such as PILPG appear to have the resources to provide legal assistance in every worthy conflict and post-conflict situation.[64]

As to transparency, wherever public access to all written pleadings and hearings may add to the legitimacy of the eventual arbitral award, modern technology should be harnessed to replicate the Abyei model.

64 PILPG reports that it provides over US$2 million in *pro bono* legal assistance annually; see www.publicinternationallaw.org/about/index.html. One lawyer who worked on the Abyei arbitration informed the author that the market price for the services provided to only one side in the arbitration was 'several million dollars'.