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HAGUE INTERNATIONAL TRIBUNALS

The Abyei Award: Fitting a Diplomatic Square Peg into a Legal Round Hole

MARKUS BÖCKENFÖRDE*

Abstract
On 22 July 2009 a Tribunal of five leading international lawyers rendered their award at the Permanent Court of Arbitration (PCA), thereby redrawing the boundaries of Abyei, a small patch of land in the centre of Sudan and source of violent conflict throughout recent years. The arbitration was initiated by the two signatories of the Comprehensive Peace Agreement (CPA) that in 2005 brought an end to the longest civil war in Africa. Both parties, the government of Sudan and the Sudan People's Liberation Army/Movement, expressed satisfaction with the award, which conceivably saved the CPA from potential collapse. This article examines the legal oddities which accompanied the settlement of the dispute over the Abyei area. It analyses both the referral of the dispute to the PCA through the lens of the Sudanese Constitution and the legal ambiguities of the award itself.

Key words
Abyei; arbitration; Comprehensive Peace Agreement; Interim National Constitution; Sudan

1. Introduction

Abyei is a small patch of land in the centre of Sudan. It is geographically, ethnically, and politically caught between the north and the south of the country. Various aspects related to the region of and around Abyei were a major bone of contention during the peace negotiations between the government of Sudan and the Sudan People's Liberation Army/Movement (SPLA/M) in their attempt to end the longest civil war in Africa. Even after the Comprehensive Peace Agreement[1] (CPA) was signed in 2005, including a distinct protocol on the Abyei area, Abyei has offered one of the most volatile aspects of the CPA's implementation. One of the crucial issues was the precise definition and demarcation of the Abyei area, with several implications:

* LL M (UMN), Dr. jur. (University of Heidelberg); Legal Expert of the Assessment and Evaluation Commission, Khartoum/Juba, 2006–7; presently Programme Officer in the Constitution Building Programme at International IDEA, Stockholm, and member of TransMIT [boeckenfoerde@transmit.de]. The author would like to thank Sarah Nouwen and an anonymous reviewer of the LJIL for very valuable comments on earlier drafts. Any remaining errors are the author's own.

1 The Comprehensive Peace Agreement between the Government of the Republic of Sudan and the Sudan People's Liberation Movement /People's Liberation Army (hereinafter CPA), 2005, available at the MPIL Sudan site, www.mpil.de/shared/data/pdf/cpa_complete.pdf (last visited 30 January 2010). The CPA comprises six protocols (*inter alia* the Machakos Protocol, the Protocol on Power Sharing, the Abyei Protocol), their annexes (*inter alia* the Abyei Annex), and the implementation modalities.

since the people of Southern Sudan will decide in a referendum scheduled for 2011 whether or not they want to remain a part of Sudan, some borders of Abyei soon might become internationally relevant. In addition, simultaneously with the above-mentioned referendum, the residents of Abyei will have to decide in another referendum whether they prefer to remain in the north or become part of the potentially independent south. Thus the delimitation of the oil-rich Abyei area also has an impact on the respective territorial size and wealth of Sudan and Southern Sudan (regardless of whether Southern Sudan remains an autonomous region in Sudan or even becomes an independent state in 2011). After the solution provided for in the CPA to define the Abyei area was applied and the Abyei Boundary Commission presented its report to the presidency, the report was rejected by one of the signatories and the issue became contested again.[2]

In July 2008 both parties to the CPA referred their dispute to the Permanent Court of Arbitration (PCA) in order to overcome this impasse. One year later a Tribunal of five eminent international lawyers rendered an award that redrew the boundaries of the Abyei area, one arbiter vigorously dissenting from most of the findings of his four colleagues. The award proved to be a sophisticated piece of diplomatic and political pragmatism, considering the political realities on the ground and searching for an approach to 'make everyone a winner'.[3] If the tribunal was meant to be a reconciliation committee, it did a remarkable job; its decision was accepted by both sides and saved the CPA from collapse. But it was not such a committee. It was meant to be a judicial body. Legal scholars might argue that the award was rendered at the expense of legal accuracy. Sound legal reasoning based on a coherent line of arguments is not always easy to detect in the award. But it was not the first legal incongruity with regard to the issue of Abyei. Instead, it was just another legal oddity that followed the misapplication of the CPA and the Interim National Constitution of the Republic of Sudan (INC)[4] in relation to Abyei.[5]

This article aims to highlight the legal oddities both in the process of implementing the Abyei Protocol as part of the CPA and the INC, and in the tribunal's award. Section 2 provides a brief overview of the historical background of Abyei, while section 3 discusses the negotiations that led to the Abyei Protocol and its Annex as part of the CPA. Section 4 addresses the legal effects of constitutionalizing the CPA. 'Constitutionalizing' in this context means that the CPA was intended to be integrated into the INC, which is considered the 'supreme law of the land'.[6] Thereby, any amendment of the CPA had to comply with the amendment procedures of the INC. Section 5 examines the referral of the Abyei issue to the PCA from a constitutional perspective. Section 6 analyses the Tribunal's award and highlights its legal ambiguities. Section 7 offers a conclusion.

2 *Infra* at note 29.
3 S. Srinivasan, 'Abyei: Is Everyone a Winner? ', 22 July 2009, on file with the author.
4 The Interim National Constitution of the Republic of Sudan (hereinafter INC), 2005, available at www.mpil.de/shared/data/pdf/inc_official_electronic_version.pdf (last visited 30 January 2010)
5 See below at notes 46–51.
6 INC, *supra* note 4, Art. 3.

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2. Historical overview

The heart of the Abyei area is home to the Ngok Dinka tribe, relatives of the Dinka, the largest ethnicity in the southern part of Sudan. The area is also used seasonally by a section of the Misseriya, Arab cattle herders who pass through the area every year to graze their animals.[7] Both groups of peoples were able to live in relatively peaceful coexistence. In 1905 the British transferred the authority over the Ngok Dinka from Bahr el-Ghazal province to Kordofan province, thereby creating the anomaly of administering a southern Sudanese group as part of northern Sudan.[8] On 1 January 1956, Sudan gained independence, maintaining the provincial structure and borders inherited from the British colonial administration. Soon after, the first civil war broke out between the central government in Khartoum and southern forces. The Ngok Dinka and Misseriya were pulled to opposite sides. Whereas the Misseriya received preferential treatment from the government and identified with the north, the Ngok Dinka aligned increasingly with the southern rebel Anya-Nya and the south.[9] In 1972 the Addis Ababa Peace Agreement ended the first civil war. It included a clause that provided for a referendum to allow 'any other areas that were culturally and geographically a part of the Southern Complex'[10] to become part of the newly established Southern Region. In the meantime, Abyei was given a special administrative status under the office of the president.[11] However, the referendum was never held. The failure to implement this clause with respect to Abyei caused grievances among the Ngok Dinka. President Nimieri's continuing refusal to respect the Addis Ababa Agreement led to the outbreak of the second civil war, which started with the birth of the SPLA in 1983. Many frustrated Ngok Dinka joined this new rebel group and were instrumental in its formation under Dr John Garang.[12] The prominence of the Ngok Dinka in the SPLA/M made the issue of Abyei a key element in any future peace negotiations.

3. Abyei in the peace negotiations

The Machakos Protocol (MP) signed in July 2002 established the framework for a future peace agreement and the basis of a new state structure. Several years of peace negotiations between the government of Sudan (represented by the National Congress Party (NCP)) and the SPLA/M resolved many issues, but not Abyei. Notably, however, it already envisaged the adoption of a constitution as the supreme law of

7 International Crisis Group (ICG), 'Sudan: Breaking the Abyei Deadlock', Africa Briefing No. 47, October 2007.
8 D. Petterson, 'Abyei Unresolved: A Threat to the North–South Agreement', paper contributed to the 11 September 2006 symposium, 'Sudan's Peace Settlement: Progress and Perils', available at www.ndu.edu/inss/symposia/sudan2006/pettersonpaper.pdf. This point is especially noteworthy, since throughout the upcoming decades, the southern and northern parts of Sudan were administrated as two distinct entities with limited exchange between the two.
9 ICG, *supra* note 7, at 3.
10 1972 Addis Ababa Peace Agreement, Art. 3(c), available at http://madingaweil.com/addis-ababa-peace-agreement-1972.htm (last visited 30 January 2010).
11 D. H. Johnson, 'Why Abyei Matters – The Breaking Point of Sudan's Comprehensive Peace Agreement?', 2008 107 (426) *African Affairs* 1, at 5.
12 Ibid., at 7.

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the land. It further stipulated that the future peace agreement, later to be known as the CPA, should be incorporated into such a constitution.[13]

When negotiations resumed later in 2002, the issue of Abyei was included and resolving it became one of the most difficult tasks throughout the CPA negotiations. Unlike the other five protocols of the CPA, the Abyei Protocol was not drafted by the two parties. In order to break the impasse in negotiations, it had been presented to them by the US envoy, John Danforth, a former senator. Under pressure from Washington, the government eventually agreed to it,[14] and the Abyei Protocol was signed in May 2004. Taking up the commitment of the Addis Ababa Agreement, it stipulates that at the end of the interim period, concurrently with the referendum for Southern Sudan, the residents of Abyei will decide in a separate ballot whether Abyei retains its special administrative status in the north which was assigned to it in the protocol or becomes part of Bahr el Ghazal, a southern state.[15] In the meantime, residents of Abyei are considered citizens of both Bahr el Ghazal state and Western Kordofan state (located in northern Sudan), and are represented in the legislature of both states. In addition, the protocol outlines provisions for local administration and self-governance in Abyei, the sharing of local oil revenues exploited in the area, and the guarantee of continued access to traditional grazing areas by both the Ngok Dinka and Misseriya, but leaves undefined the area to be administered. Instead, it vaguely described the Abyei area as 'the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905'.[16] The exact delimitation of the Abyei area included several far-reaching implications for the future: if in the two referenda scheduled for 2011 the people of Southern Sudan vote for secession and the residents of Abyei vote for being part of that new state, then the territory of Abyei would become part of a new state. The size of Abyei also has an enormous economic dimension: if Abyei were not to include the Heglig oilfields, the revenues would not be subject to Abyei's wealth-sharing formula (allocating only 50 per cent of the revenues at national level), but would remain entirely at the national level rather than potentially going to the south as a result of the referenda. In order to 'define and demarcate' the Abyei area, the protocol envisaged the establishment by the presidency of an Abyei Boundary Commission (ABC), which had to prepare a report[17] within the first two years of the interim period.[18]

The Abyei Annex on the ABC, adopted on 17 December 2004, introduced a major shift with regard to the above set-up by refining and redefining the composition, timing, and task of the ABC. With respect to the composition of the ABC, it sets forth that both parties (the government of Sudan and the SPLA/M) shall each nominate five members. Another five members, referred to as 'Experts,' were to be nominated

13 Machakos Protocol, 2002 (hereinafter MP), available at www.mpil.de/shared/data/pdf/cpa_complete.pdf (last visited 30 January 2010), Art. 3(1). See below at note 34 for a detailed analysis.
14 ICG, *supra* note 7, at 4.
15 Abyei Protocol, available at www.mpil.de/shared/data/pdf/cpa_complete.pdf (last visited 30 January 2010), Art. 1(3).
16 Ibid., Art. 1(1)(2).
17 Ibid., Art. 5.
18 The Interim Period was set to start six months after the signing of the peace agreement and after the completion of the Pre-interim Period.

by the United States, the United Kingdom, and the Intergovernmental Authority on Development (IGAD),[19] under whose auspices the negotiations of the peace agreement were organized. The Experts had to be knowledgeable about the area's history and geography and any other relevant field, and were supposed to draft the final report based on scientific analysis and research.[20] The Annex further stipulated that the ABC Experts' report would be 'final and binding on the parties'[21] and had to be presented 'before the end of the pre-interim period'[22] – hence within six months of the signing of the peace agreement. Therefore the final and binding decision on the definition and demarcation of Abyei was to be left to foreign experts, selected by foreign countries and a regional organization. The rationale behind such a delegation of power was probably manifold. It reflected the parties' understanding that their views on the Abyei area were too far apart to be resolved by themselves. Instead of giving in at the negotiation table and coupled with the need to justify the outcome to their respective people on the ground, to be able to blame outsiders for a decision that does not meet all expectations might also have been an incentive. But first and foremost, each side may have believed that it had a cast-iron case. [23]

Pursuant to its mandate, the ABC had to 'define' and 'demarcate' the area in question. Different understandings of the scope of the term 'define' had been a constant source of disagreement.[24] Those who were in favour of a narrow interpretation wanted to read 'define' as 'identify',[25] thereby limiting the commission's task to assessing events that had occurred in 1905. Others preferred a broader interpretation, reading 'define' as 'determine', providing the commission with the mandate to be constitutive with regard to the boundaries of the Abyei area. Dictionaries refer to both elements when defining the term.[26] Since the CPA considers the English text as the authoritative version if a dispute about the meaning of a provision should arise, the Arabic text is of limited guidance in that respect.[27]

Detached from the sphere of the parties' influence and meant to complement one of the few undetermined and highly contested segments of the CPA, the findings of

19 Abyei Protocol, *supra* note 15, Art. 2(2); IGAD nominated three members and the United States and the United Kingdom each nominated one; see Petterson, *supra* note 8.

20 See Abyei Annex, Art. 5: '[T]he report of the experts, arrived at as prescribed in the ABC rules of procedure, shall be final and binding on the Parties', available at www.mpil.de/shared/data/pdf/cpa_complete.pdf (last visited 30 January 2010).

21 Ibid., Art. 5.

22 Ibid.

23 Petterson, *supra* note 8, at. 3.

24 Depending on the reading of the term 'define', the ABC was vested either with fact-finding power (GoS's view) or with decision-making power (SPLA/M's view); see Final Award, paras. 475–478; see also Dissenting Opinion, para. 174

25 The term 'to identify' is described as to 'show, [or] prove who or what somebody or something is', which presupposes that the person/thing to be identified is, or was, already there and just has to be traced; A. Hornby et al. (eds.), *Oxford Advanced Learner's Dictionary of Current English* (1974).

26 Merriam-Webster Online Dictionary, available at www.merriam-webster.com/netdict/define; see also *Websters Dictionary*, available at www.webster-dictionary.net/definition/define.

27 Para. 3 of the Chapeau of the Comprehensive Peace Agreement stipulates, 'The agreed Arabic and English texts of the CPA shall both be official and authentic. However, in the event of a dispute regarding the meaning of any provision of the text, and only if there is a difference in meaning between the Arabic and English texts; the English text shall be authoritative as English was the language of the peace negotiations.'

the report were destined to be challenged. And so it happened. When the ABC Experts presented the report to the presidency on 14 July 2005, defining the Abyei area as including, *inter alia*, the Heglig oilfields,[28] it was immediately rejected by the NCP, which claimed that the ABC had gone beyond its mandate. At that time, five days after the INC entered into force, the CPA was already part of the national constitution and subject to its procedures. Throughout the years to come, the two signatories of the CPA consistently ignored the legal consequences of 'constitutionalizing' the CPA they had drafted. In order to provide a basis for a better understanding of the constitutional absurdities which were caused by the two signatories in addressing the PCA, a legal analysis of the transitional process after the signing of the CPA and its implications for the ABC report is necessary.

4. The legal dimension of constitutionalizing the CPA

The CPA is comprehensive in one sense only: it covers the core disputes between Sudan's former national government, represented by the NCP, and the SPLA/M. It is anything but comprehensive, because many groups in Sudan were excluded from the negotiations in both the east and the west of the country, as well as various actors in Khartoum and in the South. To put the content of the CPA on a more inclusive basis, the two parties had already agreed in the Machakos Protocol[29] to transform the contents of a peace agreement into a constitutional format, drafted by a representative National Constitutional Review Commission.[30] The new constitution had to incorporate the peace agreement,[31] thereby giving it 'legal and constitutional effect'.[32] The constitution was to become the supreme law of the land and all other laws had to comply with it.[33] The CPA was not considered to be above the constitution, but part of it. This implies that changes to the CPA in its constitutionalized form could no longer be concluded bilaterally by the signatories to the CPA but only through constitutional amendment. Again, the Machakos Protocol was very explicit in this respect. It stipulated that the 'Constitution shall not be amended or repealed except by way of special procedures and qualified majorities in order that the provisions of the Peace Agreement are protected'. Article 224(1) of the INC implemented

28 The ABC report defined the Abyei area as follows: 'locate the northern boundary in a straight line at approximately 10°22′30″ N. The western boundary shall be the Kordofan–Darfur boundary as it was defined on 1 January 1956. The southern boundary shall be the Kordofan–Bahr el-Ghazal–Upper Nile boundary as it was defined on 1 January 1956. The eastern boundary shall extend the line of Kordofan–Upper Nile boundary at approximately longitude 29°32′15″ E northwards until it meets latitude 10°22′30″ N.' D. Petterson et al., Abyei Boundaries Commission Report, 14 July 2005, available at www.sudanarchive.net/cgi-bin/sudan?e=——1025–10-1-0-&a=d&d=Dl1d18.18 (last visited 30 January 2010), at 22

29 *Supra* note 13.

30 Ibid., Art. 3(1)(2).

31 Ibid.; see also INC, *supra* note 4, Art. 225, stipulating that 'the Comprehensive Peace Agreement is deemed to have been duly incorporated in this Constitution; any provisions of the Comprehensive Peace Agreement which are not expressly incorporated herein shall be considered as part of this Constitution.'

32 Protocol on Power Sharing, available at www.mpil.de/shared/data/pdf/cpa_complete.pdf (last visited 30 January 2010), Art. 2(12)(2).

33 MP, *supra* note 13, Art. 3(1)(1).

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this requirement.[34] In addition, the second paragraph of this provision safeguards the position of the signatories to the CPA.[35] As a result, a constitutional amendment that affects the content of the CPA could be introduced only with the consent of the parties. The parties, in turn, were disqualified from altering the constitution and, thereby, the constitutionalized CPA other than through Article 224 of the INC. This also includes provisions of the Abyei Protocol and the Abyei Annex as part of the CPA.

Thus it was constitutionally provided that the ABC report shall be final and binding. As the term 'final and binding' suggests, no other institution was meant to review the substantive findings of the ABC Experts. The only way to challenge the ABC report was to claim that the Experts overstepped their mandate as stipulated in the CPA and did not 'define and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905', but defined something different. In order to verify such an allegation, the INC is to refer the issue to the institution provided for in the INC for settling constitutional disputes; a constitutional court was established as the 'custodian' of the INC. According to Article 122(1)(e) of the INC, the court might 'adjudicate on the constitutionality of laws or provisions in accordance with this Constitution'. Hence the question whether or not the report (as a final and binding 'provision') was drafted within the constitutional mandate (likewise, the Abyei Annex was incorporated into the constitution) fell within its jurisdiction. Again, since the Abyei Annex identified the ABC Experts as the only institution to render a final and binding decision on the Abyei area, the court's standard of review had not allowed for second-guessing of the correctness of the decision, but only whether such a decision had been drafted within the framework of the mandate.

5. The referral to arbitration and the Sudanese constitutional perspective

Almost a year after the NCP's rejection of the ABC report, the SPLM and the NCP created a high-level executive committee to address, *inter alia*, the Abyei deadlock. The committee identified four options on Abyei: (i) referring the issue to the constitutional court; (ii) recalling the ABC's Experts to defend their decision; (iii) reaching a political agreement; or (iv) resorting to third-party arbitration.[36] The first option was ruled out by the SPLM, which considered the constitutional court to be heavily NCP-oriented. This reaction by the SPLM reflected a flaw in the CPA/INC: the only formal dispute resolution mechanism in place turned out to be composed in such a manner that made its consultation unattractive for the SPLM to settle politically

34 According to Art. 224(1) INC, amendments are to be approved by three-quarters of all the members of each chamber of the National Legislature sitting separately and only after introduction of the draft amendment at least two months prior to deliberations.

35 Art. 224(2) INC reads, 'Any amendment affecting the provisions of the Comprehensive Peace Agreement shall be introduced only with the approval of both Parties signatory to the Comprehensive Peace Agreement.'

36 ICG, *supra* note 7, at 5.

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sensitive issues.[37] The recall of the Experts was rejected by the NCP.[38] The search for a political agreement was constantly ongoing in varying degrees of intensity, but did not lead to any substantial result.[39] The parties finally agreed on third-party arbitration. Initial calls by the SPLM for US arbitration due to the previous role played by the United States in the Abyei Protocol were rejected by the NCP.[40] After the temporary suspension of the SPLM's participation in the government of national unity due, *inter alia*, to the NCP's failure to implement the Abyei Protocol and after several violent clashes in Abyei, the NCP and SPLM agreed on a 'Roadmap for Return of IDPs and Implementation of Abyei Protocol' on 8 June 2008.[41] On 7 July 2008, the 'Arbitration Agreement between The Government of Sudan and The Sudan People's Liberation Movement/Army on Delimiting Abyei Area' was signed.[42] Under Article 1.1 of the Arbitration Agreement, the parties agreed to refer their dispute to final and binding arbitration under the Arbitration Agreement and the PCA's Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State.[43] By the end of October 2008, the five arbitrators – all of them world-renowned international lawyers[44] – had been appointed according to Article 5 of the Arbitration Agreement. Under Article 2 of the Arbitration Agreement, the issues to be determined by the arbitrators were the following:

(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

37 Pursuant to Art. 121(2) INC, 'Southern Sudan shall be adequately represented in the Constitutional Court.' In line with the assumed share of 'Southerners' in the population of Sudan, three out of nine justices came from the South, but court decisions are taken by simple majority. During the negotiations of the CPA, it was suggested to follow the model as applied in Bosnia and Herzegovina where six out of nine seats were proportionately assigned among the entities (4–2), while the remaining three seats were allocated to foreign judges selected by the president of the European Court of Human Rights (see the Constitution of Bosnia and Herzegovina, Art. VI(1)(a), (1996) 35 ILM 117). This suggestion was dismissed.

38 Although President al-Bashir was initially in favour of inviting the experts, senior NCP officials urged him to change his mind. They were worried that the experts would simply defend the ABC report and not advance the NCP position. The NCP's reading of the term 'define' was a narrow one, equivalent to the term 'identify'. Since no records or maps have existed that had allowed for the clear identification of the pertinent borders as of 1905, the NCP was of the view that the ABC should have returned to the parties asking for a broader mandate. The five experts explained their findings in a public hearing at the South Sudan Legislative Assembly in Juba in September 2007. See ICG, *supra* note 7, at 15.

39 Reading the figures of oil revenues in the Abyei area as defined by the ABC report might shed some light on the NCP's rejection of the report. Placing various oilfields within Abyei means that the national government must share half the revenues instead of keeping them entirely for the national budget; see ICG, *supra* note 7, at 9–10. Considerable discussions on a political agreement were centred on how a revenue-sharing formula in favour of the national interest could be agreed upon.

40 ICG, *supra* note 7, at 5.

41 The Abyei Roadmap is available at www.sudantribune.com/spip.php?article27519 (last visited 30 January 2010). The four main points outlined were security arrangements, the return of IDPs, an interim administration; and final arbitration. See also United Nations Mission in Sudan, 5 (49) *CPA Monitor* (2009), para. 9, available at http://unmis.unmissions.org/Portals/UNMIS/ CPA%20Monitor/CPA%20Monitor%20December%202009.pdf (last visited 30 January 2010).

42 The Arbitration Agreement is available at www.pca-cpa.org/upload/files/Abyei%20Arbitration%20Agreement.pdf (last visited 30 January 2010).

43 Permanent Court of Arbitration, Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State (1993), available at www.pca-cpa.org/upload/files/1STATENG.pdf (last visited 30 January 2010).

44 The five arbitrators were Professor Pierre-Marie Dupuy (Presiding Arbitrator), HE Judge Awn Al-Khasawneh, Professor Dr Gerhard Hafner, Professor W. Michael Reisman, and Judge Stephen Schwebel.

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 a map the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, based on the submissions of the Parties.

Read against Sudan's supreme law, the INC, the Arbitration Agreement reveals several oddities. First, there is a semantic oddity. The dispute brought to the PCA is not a dispute between the present government of Sudan and the SPLA/M. Since the entry into force of the INC (July 2005), Sudan has been governed by the Government of National Unity (GoNU), a coalition government with the two previous warring parties as the main partners. The term 'Government of Sudan' (GoS) is not once mentioned in the constitution. For example, Ali Osman Mohamed Taha, who signed the Arbitration Agreement on behalf of the 'Government of Sudan', is vice-president not of that government but of the GoNU. What represents the pre-INC GoS is the NCP. Hence the title of the PCA optional rules that the two parties have decided to follow does not reflect the actual legal status of the parties. Furthermore, the first recital of the preamble of the Arbitration Agreement is misleading. It is not the CPA that became the law of the land, but the INC. Consequently, and as stated above, the supreme law of the land is no longer exclusively in the hands of the two signatories to the CPA, but is vested in the constitutional institutions authorized to amend the constitution. Considering that NCP and SPLM still hold the required number of seats in both legislative chambers to meet the necessary majorities for a constitutional amendment, this might be regarded as a mere formality. But it is not, since the INC envisaged general elections at the national and sub-national level that might have changed the composition of the legislative chambers.[45]

The legal dimension of the constitutionalization of the CPA was also misunderstood by the Tribunal while addressing the issue of *res judicata*.[46] Again, it was no longer within the parties' exclusive competence to reopen something that in 2005 they had agreed to be final and binding. Meanwhile, after the CPA was integrated into the INC and became part of it, a constitutional amendment to authorize the

45 The CPA required the parties to have general elections before 9 July 2009. It was not warranted that the existing majorities had to be sustained (if elections had taken place at this date, the Umma party, the DUP, and others might together have gained more than 25 per cent of the seats). The commitment to be bound by the arbitration award might have also required constitutional amendments authorizing its implementation.

46 In the Matter of an Arbitration before a Tribunal Constituted in Accordance with Article 5 of the Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army of Delimiting Abyei Area, Final Award, 22 July 2009, (hereinafter Final Award), para. 450.

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reopening of the Experts' report was required. Such a constitutional authorization never took place.

Another oddity is noteworthy. Neither the Abyei Protocol, the Abyei Appendix, the INC, the Terms of Reference of the ABC, nor the ABC's rules of procedure included specifying the meaning of the term 'define' as 'delimit'. Hence what Article 2(a) of the Arbitration Agreement considered to be the ABC's mandate deviated from the original version,[47] despite the explicit reference to it.[48] Considering that the exact reading of the mandate was a bone of contention between the arbitrators, this deviation is more than trivial. One wonders why the arbitrator who so tartly discountenanced his colleagues' interpretation of the ABC mandate failed to address this issue[49] and even misquoted the ABC's original mandate.[50]

6. The arbitration award

6.1. Applicable law

Pursuant to Article 2 of the Arbitration Agreement, the applicable laws to resolve the dispute were the CPA and the INC and general principles of law and practice 'as the Tribunal may determine to be relevant'. Considering that the dispute at hand was a national and not an international one, and taking into account the fact that the applicable law was primarily constitutional law,[51] it is surprising that the arbitrators predominantly referred to general principles and practices of international law as being relevant.[52]

6.2. The arbitration award and its reasoning

6.2.1. The two-stage sequence of Article 2

According to Article 2 of the Arbitration Agreement, the Tribunal had to proceed in two distinct and contingent stages: (i) to determine whether the ABC Experts had

47 In recital 3 of the preamble of the Arbitration Agreement, *supra* note 42, the parties still referred to the original mandate to which they agreed in the CPA.

48 Hence the quotation marks in Art. 2 of the Arbitration Agreement are simply incorrect.

49 See In the Matter of an Arbitration before a Tribunal Constituted in Accordance with Article 5 of the Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army of Delimiting Abyei Area, Dissenting Opinion of His Excellency Judge Awn Shawkat Al-Khasawneh Member of the International Court of Justice (hereinafter Dissenting Opinion), at 1, 3.

50 Ibid., para. 183: 'the very issue that became their [ABC Experts] mandate, namely, "to define, i.e., delimit and demarcate the area of the Nine Ngok Dinka Chiefdoms transferred to Kordofan"'. One can see how Judge Al-Khasawneh could be led to make this error. According to Art. 2(a) of the Arbitration Agreement, the original text of the ABC Experts' mandate reads: '"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'. In fact, according to the Abyei Protocol, the mandate of the ABC Experts was '*to define and demarcate* the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905, referred to herein as Abyei Area' (Art. 5.1 of the Abyei Protocol, emphasis added). No mention is made in the original text of the phrase 'i.e. delimit' which appears in the Arbitration Agreement. See Abyei Annex, *supra* note 20, para. 1.

51 Again, constitutional law in this respect is the INC, which incorporated the CPA (Art. 225 of the INC).

52 The ABC's interpretation of its mandate was reviewed solely on the basis of Art. 31 of the Vienna Convention on the Law of Treaties. Methods of interpretation of national law were not considered. Most of the reasoning was supported by referring to international law cases; see, for instance, Final Award, *supra* note 46, paras. 481, 501 (with regard to the *Kompetenz-Kompetenz* principle), paras. 505–10 and 528–531 (with respect to standard of review), and para. 708 (with respect to the failure to state reasons). The only considerable reference to national law is made while exploring the standard of review; see paras. 401–402.

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exceeded their mandate; and, if that was the case, (ii) to define (i.e. delimit) on a map the area in question, based on the submissions of the parties.

The first stage required the Tribunal to examine three issues: (i) its own standard of review; (ii) the scope of the mandate; and – within the frame of the findings of the two former issues – (iii) the determination of whether the ABC had exceeded its mandate.

6.2.2. The Tribunal's standard of review

The Tribunal found that its standard of review amounts not to a *de novo* review of the ABC's findings, but only to a test of reasonableness. As a consequence, its task was not to scrutinize the substantive 'correctness' of the ABC Experts' report, but to determine whether the report could be understood as a reasonable discharge of the mandate. The Tribunal drew its conclusion from the structure and wording of Article 2 of the Arbitration Agreement and the general principles of review applicable in public international law and national legal systems.[53] The Tribunal states convincingly that the two-stage sequence of Article 2 and the use of the term 'whether the ABC Experts exceeded their mandate' rather than 'whether the ABC Expert's decision was correct' are unequivocal.[54] The reference to several national legal orders – regardless of whether adhering to the common-law or civil-law system – further supports the Tribunal's view that judicial restraint in reviewing the original decision of agencies with specific substantive expertise is a common approach in order to benefit from their distinct methodology and knowledge in areas unfamiliar to judges.[55] By stating that the 'truth cannot have two faces',[56] the dissenting opinion neglects the fact that there are often different methodological approaches to one issue. Relying on 'experts knowledgeable in history, geography and any other relevant expertise',[57] who had to base their findings 'on scientific analysis and research',[58] the drafters of the CPA agreed that the substantive elements of a decision on the Abyei area should not be governed by the methodology of law. Unfortunately the Tribunal did not include another argument, directly deriving from the constitutional setting in Sudan: the ABC Report was considered to be 'final and binding once arrived at the Presidency as prescribed in the ABC rules of procedure'.[59] Reviewing the report's substantive findings and having it overruled by another institution was not foreseen. If this commitment agreed on by the signatories of the CPA were to be taken seriously, the only way for the report to be nullified was to challenge the Experts' violation of the mandate. Thus the Tribunal did not 'generously endow . . . the Experts with adjudicatory powers that the Parties never gave them',[60] but acknowledged the powers that the parties had assigned to them in the CPA.

53 Ibid., para. 401.
54 Ibid., para. 410.
55 Ibid., para. 402.
56 Dissenting Opinion, *supra* note 49, para. 181.
57 Abyei Annex, *supra* note 20, para. 2.2.
58 Ibid., para. 4.
59 Ibid., para. 5.
60 See Dissenting Opinion, *supra* note 49, para. 181.

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6.2.3. The mandate of the ABC's Experts

According to the Tribunal, the mandate of the ABC's Experts was subject to a two-fold review. First, it had to review the interpretation of the mandate (whether the Experts had misinterpreted the scope of the mandate, thereby exceeding it) and the implementation of the mandate (whether the Experts had executed the mandate accordingly). Whereas the Tribunal confirmed the Experts' interpretation of the mandate, it disagreed with their implementation of the mandate and declared its partial violation due to the Experts' failure to state sufficient reasons for their findings.

6.2.4. The ABC Experts' interpretation of the mandate

Two issues were central in determining the exact scope of the ABC's Experts' mandate as provided for in the CPA: (i) whether the Experts had not only fact-finding but also decision-making powers in 'defining' the area; and (ii) whether the 1905 transfer related to a specific area (territorial interpretation) or to a group of people (tribal interpretation).

6.2.4.1. The functions of the ABC. The Tribunal concluded that the ABC possessed – in addition to its fact-finding functions – important decision-making powers,[61] thereby supporting the SPLA/M's line of argument. The finding is backed by the mere wording of the mandate, which called on the Experts 'to define'[62] and not merely 'to identify' the boundaries of the Abyei area.[63] The assumption that the ABC Experts' report should be constitutive of the boundaries of the Abyei area, even in the face of scarce factual evidence, is further backed by a comparison of the relevant texts of the Abyei Protocol (May 2004) and the Abyei Appendix (December 2004).[64] The tightening of the original timetable, the increased independence from the presidency, and the strengthened legal authority of the report confirmed both the urgency and the importance of delimiting the Abyei area for the purpose of the peace process, as well as the need to have a final say on it, ending the otherwise insurmountable cleavage over Abyei between the parties.

6.2.4.2. The formula of the mandate. The mandate of the ABC was to define the 'area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905'. The Tribunal confirmed that it can be read in two different ways, either as the *area* of the nine Ngok Dinka chiefdoms *that was* transferred to Kordofan in 1905, or as the area of *the nine Ngok Dinka chiefdoms that were* transferred to Kordofan in 1905. By recourse to the text alone, there is no conclusive method for determining whether 'transferred' relates to 'area', suggesting a territorial aspect, or whether it relates to 'the nine Ngok Dinka chiefdoms', suggesting a more tribal aspect. Since the context of the formula and its drafting history did not indicate that either reading was meant to be precluded, the

61 Final Award, *supra* note 46, para. 483.
62 For the definition of 'define', see *supra* at notes 24–8.
63 Final Award, *supra* note 46, para. 482.
64 *Supra* at notes 15–23.

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ABC Experts' own construction along the tribal lines 'was not unreasonable' and in the Tribunal's view did 'not constitute an excess of mandate'.[65]

6.2.4.3. The ABC Experts' implementation of the mandate. The Tribunal found that the ABC Experts exceeded their mandate by failing to state reasons for some of their findings. At the outset, it is doubtful whether the mandate included the duty to state reasons in the report itself. The textual argument of the Tribunal is rather weak. Neither the Abyei Protocol, nor the Abyei Annex, nor any other relevant documents requires the Experts explicitly to state reasons for their findings. The Tribunal deduces this requirement from the instructions of Article 4 of the Abyei Annex. Pursuant to this provision, the decisions of the report 'shall be based on scientific analysis and research'.[66] Indeed, the need to base the report on scientific analysis and research is an obligatory element of the Experts' mandate and might also be subject to the applied standard of review (whether or not the report was based on scientific analysis and research). The Tribunal could have asked the Experts to attend the arbitration hearings or explain their applied methodology. It did not. Interpreting Article 4 of the Abyei Annex to require the Experts to write the reasons for their finding in the report is, contrary to what the award holds, not a 'clear purport of the text'.[67] Following the Tribunal's argument that the parties' preference for a scientific methodology suggests the expectation to disclose the fruits of its research does not inevitably imply an obligation to do so in the written report. Instead, the Experts could have shared their scientific analysis and research, on invitation by the presidency, with the parties, and with the people concerned (especially the Misseriya and Ngok Dinka in and around Abyei). And indeed, when requested, they accepted the invitation.[68]

With the formal requirement to state reasons and the Tribunal's applied margin of interpretation whether those reasons were sufficient or cogent,[69] the Tribunal paved the way to reviewing the findings of the ABC also on matters of substance. By so doing the Tribunal de facto invalidated the judicial restraint it had imposed on itself.[70] Notably, the Tribunal annulled the eastern line on grounds of a lack of reasoning, since the Experts had relied on evidence it had previously considered to be inconclusive. However, in turn, the Tribunal then redrew the eastern line of Abyei, despite its previous acknowledgement of the scanty nature of evidence,[71] without providing more convincing evidence itself. The standards it set for the ABC Experts were not applied to its own findings.

6.2.5. The partial nullity of the ABC report

As a consequence of the Tribunal's finding of a partial exceeding of the Experts' mandate, parts of the borders as defined by the ABC Experts were annulled. However,

65 Final Award, *supra* note 46, para. 582.
66 Abyei Annex, *supra* note 20, Art. 4.
67 Final Award, *supra* note 46, para. 522.
68 *Supra* at note 39.
69 Final Award, *supra* note 46, paras. 684, 704–705.
70 Ibid., paras. 401–409.
71 Ibid., paras. 705, 713.

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as correctly stated by the dissenting arbiter,[72] there is no provision for the event of partial nullity. According to the clear terms and structure of Article 2 of the Arbitration Agreement, the Tribunal could only provide a binary answer to its Article 2(a) inquiry: if the finding whether there was an exceeding of the mandate was positive, Article 2(c) required it to delimit the area; if its finding was negative, Article 2(b) required the issuing of an award for full and immediate implementation. By referring directly to a teleological interpretation of Article 2 that would allow 'for the proper fulfilment of its task', the Tribunal misunderstood the concept of interpretation. As A. D. McNair accurately explained, 'Interpretation is a secondary process which only comes into play when it is impossible to make sense of the plain terms of the treaty, or when they are susceptible of different meanings.'[73] This was not the case for the Tribunal. One is tempted to ask the arbitrators what other wording and structure for Article 2 of the Arbitration Agreement the parties should have used in order to be sufficiently clear and explicit. As the dissenting opinion appropriately stated, '[t]he dichotomous distinction between the Tribunal's "enquiry" under sub-articles 2(a) and (c) cannot accommodate the power of partial annulment that it has assumed. Formalism and teleology are words that do not sit together well.'[74]

Had the Tribunal respected its own mandate, it would have no other choice than to annul the report in its entirety. According to its own analysis, the consequence would have been 'a *de novo* review of all relevant evidence . . . in the event that the Tribunal has found that the ABC Experts exceeded their mandate'.[75] It probably shied away from shouldering this immense task because of the short time assigned to it. After annulling large parts of the borders defined by the ABC Experts, it rendered its own determinations based on the 'best available evidence'.[76]

6.2.6. The dissenting opinion

Judge Awn Al-Khasawneh lodged a vigorous 69-page dissenting opinion in which he disagreed with most of his colleagues' conclusions. On the one hand, his sharp analysis revealed some of the Tribunal's conclusions as self-contradicting and result-oriented. On the other hand, he regarded his colleagues' careful examination of the different meanings of a plurivalent term as 'totally baseless'[77] and claimed – in spite of ambiguous wording – to have identified 'the only correct interpretation'.[78] His strong and drastic language might reflect his legal frustration with his colleagues' attempt to fit a diplomatic square peg into a legal round hole. Judge Al-Khasawneh refrained from explicitly putting forward his definition of the Abyei area. However, by collecting locations of the Ngok Dinka and the Homr around 1905, he implicitly indicated his understanding on the size of Abyei at that point in time.[79] Whether

72 Dissenting Opinion, *supra* note 49, para. 43.
73 A. D. McNair, *Law of Treaties* (1961), 365.
74 Dissenting Opinion, *supra* note 49, para. 199.
75 Final Award, *supra* note 46, para. 398.
76 Ibid., para. 714.
77 Dissenting Opinion, *supra* note 49, para. 174, relating to the term 'define'.
78 Ibid., para. 185, with respect to the formula 'the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905'.
79 Ibid., paras 100–164, and Abyei Arbitration: Final Award Map, Appendix 1, available at www.pca-cpa.org/upload/files/Abyei%20Award%20Appendix%201.pdf (last visited 30 January 2010).

this understanding of what the Abyei area is supposed to be is legally more accurate, substantive, and, overall, conclusive than that of his colleagues or the ABC Experts is beyond this author's knowledge.

7. Conclusion

The Tribunal faced a fully fledged dilemma. On the one hand, it had to find a solution both parties could live with. On the other hand, it was expected to base its judgment on legal grounds. In the end, it neglected the latter for the benefit of the former. From a diplomatic or political point of view, it made 'everyone a winner' by pulling Sudan back from the brink of war along parts of its north–south border.[80] It did so by drawing new lines that

- assigned the Heglig oilfields of Abyei to the North;
- assigned to the Ngok Dinka a large area largely corresponding to their ancestral lands which they might take south in the Abyei referendum;
- assigned to the Misseriyya the settlement of Meriam in the west within Sudan's North;
- allowed the South to avoid a major risk of losing their 2011 referendum on secession because of a return to war over a small piece of land; and
- concurrently shielded the ABC Expert's report from criticism and total annulment.

The commitment of the two parties to respect and implement the Final Award immediately after its release underscores the Tribunal's successful mission in this respect. One might therefore question Judge Awn Al-Khasawneh's assumption that his colleagues' approach missed the chance to contribute to a durable peace.[81] The past five years have proved the importance of having the two signatories of the CPA on board if it comes to an effective and peaceful demarcation of a defined area of Abyei. Previous experience indicates that their influence in communicating the findings of experts' decisions on boundaries is pivotal for gaining the acceptance of the respective communities.[82]

However, the diplomatic/political solution was partly achieved at the expense of legal consistency. The Tribunal confirmed the legality of reopening the ABC Experts' decision by the two signatories to the CPA and their subjugation under the final judgment without a previous constitutional amendment. Furthermore, to conclude an exceeding of the Experts' mandate on the grounds of not having provided sufficient reasons in the report seems far-fetched. The tribunal also overstepped its own mandate by concluding a partial annulment of the Experts' report.

80 Srinivasan, *supra* note 3, at 1.
81 Dissenting Opinion, *supra* note 49, para. 202.
82 Johnson, *supra* note 11, at 14.

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