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Abyei Arbitration – Final Award

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Introduction

On July 22, 2009 a Tribunal of five leading international lawyers rendered their Award in a complex arbitration between the Government of Sudan and the Sudan People's Liberation Movement/Army ("SPLM/A", together "the Parties").[1] The Award determines the boundaries of the Abyei region, which is to conduct a referendum in 2011 to determine whether to join south Sudan. As established by the Tribunal, Abyei's borders contain a population mainly composed of Ngok Dinka, a politically powerful tribe sympathetic to the south. They exclude a large Chinese-run oil field at Heglig and other fields, but include at least one working field. Both Parties expressed satisfaction with the Award, as did the European Union, the United Nations and the United States. Many observers see the Award as a necessary, if not sufficient, step in ending the Parties' long-running conflict.[2]

The case is an important use of arbitration shaped by international law to address a major dispute between a state and a region seeking to end a long and bitter internal conflict. The Award reinforces the principle that the task of an international tribunal reviewing decisions made by another institution is to assess the institution's process, not the correctness of its decisions. And, the proceedings were unusually rapid and transparent. The pleadings, transcripts and other documents are available on the website of the Permanent Court of Arbitration ("PCA").[3] The April 2009 hearings were web-streamed live on the PCA's website, and remain available for viewing.[4]

Origins of the Dispute

Sudan's history has been marked by conflict between the desert north (largely Muslim and culturally Arabic[5]) and the tropical south, (largely Christian or animist and culturally sub-Saharan[6]). Divisions were heightened in colonial times when the Anglo-Egyptian administration governed the regions separately. As colonial rule ended in 1956, the First Sudanese Civil War erupted between the central government and rebel

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southern forces seeking greater autonomy. Half a million people died in the war, which ended with the 1972 Addis Ababa Agreement granting considerable autonomy to the south. In 1983, government efforts to increase control over the south and to enforce Shari'a there led to the Second Sudanese Civil War, which claimed more than two million lives.[7]

In 2002, the Parties concluded the Machakos Protocol, providing for progressive implementation of a peace agreement and an eventual referendum to determine whether southern Sudan should become independent.[8] However, they could not agree on the border of the oil-rich Abyei area, located where north and south meet.[9] The late Dr. Robert Hodgson, the U.S. State Department Geographer, developed "Hodgson's Law", a facetious but powerful principle: "where there is jurisdictional uncertainty, there is oil." His observation applied with special force in Abyei, with "three major oilfields in the area, whose 2005 to 2007 revenues were estimated in the region of US$1.8 billion."[10]

The Abyei Protocol and the Abyei Boundaries Commission

In 2004, with the assistance of international mediators, the Parties agreed on the Abyei Protocol, creating a special transitional regime for Abyei, and defining it as "the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905."[11] According to the Tribunal, the reference to the nine chiefdoms reflected that the agro-pastoralist Ngok Dinka people were intended as the Protocol's principal beneficiaries.[12] Before 1905, the Ngok Dinka fell under the colonial southern administration; Kordofan was in the northern administration. The tribe's transfer to Kordofan was primarily intended to better protect its members from raids by other tribes in Kordofan.[13]

To delimit Abyei, the Parties agreed to create the Abyei Boundaries Commission, which included a body of Experts ("the Experts"). Following extensive hearings and research,[14] the Experts reported in July 2005 that Abyei encompassed a large area extending well to the north of the Bahr el-Arab River,[15] and including Heglig and other producing oil fields to the east. Sudan attacked and rejected the report. In its view, the Experts significantly exceeded their mandate, and Abyei included only a narrow strip of land south of the Bahr el-Arab with no oil fields.[16]

The Arbitration under PCA's Optional Rules

In July 2008, following violence including the burning of Abyei town, the Parties agreed to settle their dispute regarding the Experts' report and Abyei's delimitation through final and binding arbitration by an *ad hoc* tribunal of five arbitrators.[17] Their agreement provided that if the tribunal determined that the Experts did not exceed their mandate under the Abyei Protocol and other specified documents, it should so state and call for immediate implementation of the borders the Experts identified. If it found excess of mandate, it was to "proceed to define (i.e. delimit) on map the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905...."[18]

The arbitration was conducted using the Permanent Court of Arbitration's

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ORGANIZATIONS OF NOTE

Permanent Court of Arbitration

Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State. These are a slight modification of the UNCITRAL Arbitration Rules, which were designed for private commercial arbitrations, but have proved effective in the Iran-U.S. Claims Tribunal and many other settings. The Parties also agreed that the PCA's International Bureau would serve as Registry and provide administrative support. They designated the PCA's Secretary-General to serve as appointing authority.[19]

As provided in the Arbitration Agreement, each party appointed two arbitrators. Sudan appointed Judge Awn Al-Khasawneh and Professor Dr. Gerhard Hafner. The SPLM/A appointed Professor Michael Reisman and Judge Stephen Schwebel. The four were then to select a presiding arbitrator, utilizing a list procedure.[20] They identified five candidates and presented them to the Parties; either or both of the Parties struck all five. Accordingly, the PCA Secretary General appointed Professor Pierre-Marie Dupuy as the fifth and presiding arbitrator. The Tribunal set a tight schedule for simultaneous Memorials (filed in December 2008), Counter-Memorials (mid-February 2009) and Rejoinders (late February). The oral hearings were held April 18-23, 2009 at the Peace Palace. The Arbitration Agreement required the Tribunal to render its final Award no later than ninety days thereafter, i.e., on July 22, 2009, and it did so – a remarkable achievement, given the length and complexity of the Award.

The Final Award – A Review

The 270-page Award summarizes Sudan's extensive objections to the Experts' work and the SPLM/A's responses.[21] The summaries suggest that both Parties' arguments reflected high legal skill. Sudan's critiques often involved the idea that the Parties had defined Abyei in a territorial sense, to mean a clearly delimited area transferred in 1905. For Sudan, the definition did not (as the SPLM/A and the Experts believed) refer to the transfer of administration of a tribe, the Ngok Dinka, and the larger areas they occupied or used for grazing.[22] Thus, for Sudan, but not for the SPLM/A, the Experts' inquiries into the locations of the Ngok Dinka's settlements and grazing areas exceeded their mandate and were irrelevant. The Parties and the Tribunal described these rival interpretations as "territorial" and "tribal."[23]

Much of the Tribunal's legal analysis concerned the extent to which it could review the Experts' work.[24] It began by considering whether the Experts had exceeded their mandate, viewing the Experts' task as having two components: "interpreting" the mandate, and "implementing" it. It considered that the applicable law, which included "general principles of law and practices," incorporated relevant principles of public international law.[25] In the Tribunal's view, these confirmed that the controlling legal standard was whether the Experts' interpretation of their mandate was "reasonable," not whether it was ultimately "correct." The Tribunal drew on the rich store of learning and practice in arbitration teaching that the task of an institution charged with reviewing an arbitral or other decision-making process is not to assure the correctness of the outcome, but is instead to confirm the integrity of the underlying process.[26] The Tribunal found support in the Arbitration Agreement's structure, which authorized inquiry into delimitation issues only if it first found an excess of mandate.[27] It also concluded that, should it find excess of mandate affecting only some of the Experts' conclusions, it could

nullify just those, leaving the rest intact.[28] Based on the wording of the relevant agreement, its object and purpose and the underlying historical circumstances, the Tribunal concluded that the Experts' primarily tribal interpretation of their mandate was reasonable and not an excess of mandate.[29]

The Tribunal was less forgiving regarding the Experts' implementation of their mandate. It again found that the standard of review was "reasonableness," not the correctness of the Experts' decisions.[30] However, it found that failure to state sufficient reasons can be an excess of mandate. Weighing the terms of the Experts' mandate and the circumstances of its creation in light of International Court of Justice jurisprudence and arbitration practice, the Tribunal concluded that the Experts were obliged to provide explanations sufficient to allow readers to understand how their decisions were reached.[31] It upheld the southern boundary of the area (which was not disputed), and found that the Experts provided a "comprehensible and complete" explanation of their adoption of latitude 10°10'N as the northern limit of Ngok Dinka's permanent settlements in 1905.[32] However, it also found that the Experts failed adequately to explain adoption of 10°35'N as the northern limit of the area where the Ngok Dinka and the adjoining Misseriya people exercised shared rights.[33] The Tribunal also found that the Experts failed sufficiently to explain their selections of the eastern and western boundary lines.[34]

Having found an excess of mandate in the Experts' failure to explain key boundaries, the Tribunal proceeded to make its own determinations. It concluded that the evidence showed the Ngok Dinka's permanent settlements in 1905 were concentrated between longitudes 27°50'00"E and 29°00'00"E, up to latitude 10°10'00"N. While the Tribunal stressed the limited evidence regarding these eastern and western boundaries, including the lack of maps indicating coordinates, it nevertheless concluded that it had a duty to render a decision. In doing so, the Tribunal relied on accounts by District Commissioner Howell and Professor Cunnison, reinforced by other observations and evidence, including oral traditions[35] and ecological evidence.[36] (Although not mentioned in the Award, the Tribunal's change of the eastern boundary places the Heglig and other oil fields outside of Abyei.)[37]

The Tribunal emphasized that the boundaries it determined did not affect the grazing rights of the Misseriya,[38] the Ngok Dinka and other tribes. Instead, both under the Parties' agreements and general principles of law, the territorial delimitations did not affect traditional grazing and other traditional rights.[39]

Judge Awn Al-Khasawneh lodged a vigorous 69-page dissenting opinion finding his colleagues' conclusions "singularly unpersuasive... self-contradicting, result-oriented... cavalier, insufficiently critical and unsupported by evidence, and indeed flying in the face of overwhelming contrary evidence."[40] He believed that the Abyei Protocol had to be interpreted in the territorial sense urged by Sudan, making consideration of the actual location of the Ngok Dinka in 1905 irrelevant. Nevertheless, he parsed the evidence in detail, charging the majority with frequently misquoting or mischaracterizing it.

Judge Al-Khasawneh viewed the Experts as engaging in a "frolic," making up a mandate, and relying on anthropological and other evidence of dubious value,[41] so that the Tribunal was obliged to annul their Report entirely.[42] He opposed according deference to the Experts' findings and drawing on concepts of limited review from commercial arbitration. In his view, the majority's test of "reasonableness" was far too low a test for assessing what might become an international boundary, and its eastern and western boundaries were "an affront to the science of territorial delimitation ... a feeble and modest construct with much to be modest about."[43]

Judge Al-Khasawneh also accused the majority of its own excesses of mandate, by only partially nullifying the Experts' decision,[44] and by adopting boundaries that were not sufficiently explained and conflicted with his reading of the evidence.[45] He saw the majority as "dabbling in compromise," and their compromise as ineffectual because it "failed utterly to take on board the rights of the Misseriya."[46] Judge Al-Khasawneh expressed deep concern that the award could "have a profound impact on the Sudan and its future as a State and on the peace and well-being of all its citizens."[47]

Notwithstanding Judge Al-Khasawneh's concerns, the Parties' initial reactions to the Award appear to have been positive. Both the government in Khartoum and the SPLM/A quickly announced that they would accept the ruling, and the European Union and United States urged its immediate and peaceful implementation.[48]

About the Author

John R. Crook, an ASIL Counselor, edits the *American Journal of International Law*'s section on contemporary U.S. practice in international law. A former State Department lawyer, he is an arbitrator on the Eritrea-Ethiopia Claims Commission and under NAFTA and teaches international arbitration at George Washington University Law School.

Endnotes

[1] Final Award 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 on Delimiting Abyei Area and the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State, between the Government of Sudan and the Sudan People's Liberation Movement/Army (July 22, 2009), *at* http://www.pca-cpa.org/showpage.asp?pag_id=1306 [hereinafter "Award"].

[2] Sharon Otterman, *Ruling Redraws Disputed Zone in Sudan in Effort to Keep North and South at Peace*, N.Y. TIMES, July 23, 2009, at A6; Stephanie McCrummen, *Ruling Signals Compromise in Border Dispute in Sudan*, WASH. POST, July 23, 2009, at A12, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/07/22/AR2009072202063.html.

[3] The documents can be found at the PCA website, *at* http://www.pca-cpa.org/showpage.asp?pag_id=1306.

[4] *Id.*

[5] Award, *supra* note 1, ¶ 100.

[6] *Id.* ¶ 98.

[7] *Id.* ¶ 109.

[8] *Id.* ¶¶ 110-112.

[9] *Id.* ¶ 102.

[10] *Id.* ¶ 104.

[11] *Id.* ¶ 113.

[12] *Id.* ¶¶ 262-263, 266-269, 595.

[13] *Id.* ¶ 636-639.

[14] *Id.* ¶¶ 123-127.

[15] *Id.* ¶ 132.

[16] *Id.* ¶¶ 37-38, 213 n71.

[17] Arbitration Agreement between the Government of Sudan and The Sudan People's Liberation Movement/Army on Delimiting Abyei Area, July 7, 2008, *at* http://www.pca-cpa.org/showfile.asp?fil_id=1117 [hereinafter "Arbitration Agreement"].

[18] Award, *supra* note 1, ¶ 6.

[19] Arbitration Agreement, *supra* note 17, ¶ 1.4.

[20] Award, *supra* note 1, ¶¶ 9-15.

[21] *Id.* ¶¶ 136-394.

[22] *Id.* ¶¶ 168-169, 233-240.

[23] *Id.* ¶¶ 544-545.

[24] *See* W. MICHAEL REISMAN, NULLITY AND REVISION (1971).

[25] The Arbitration Agreement provided that dispute was to be decided on the basis of the 2005 Comprehensive Peace Agreement, the Abyei Protocol and Appendix, Sudan's 2005 Interim National Constitution, general principles of law and practices that the Tribunal deemed relevant, and the Arbitration Agreement itself.

[26] Award, *supra* note 1, ¶¶ 400-411, 504-510.

[27] *Id.* ¶ 398.

[28] *Id.* ¶¶ 412-424.

[29] *Id.* ¶¶ 537-672. Professor Hafner believed that the territorial interpretation of the mandate advocated by Sudan was correct, but agreed that tribal interpretation adopted by the Experts satisfied the controlling test of reasonableness. *Id.* ¶ 666.

[30] *Id.* ¶ 493.

[31] *Id.* ¶¶ 519-535.

[32] *Id.* ¶ 696.

[33] *Id.* ¶¶ 674, 683.

[34] *Id.* ¶¶ 702-708.

[35] *Id.* ¶ 742.

[36] *Id.* ¶ 727, 729.

[37] MacFarquhar, *supra* note 2; Otterman, *supra* note 2.

[38] The Misseriya are Arabic speaking nomads who live north of the Ngok Dinka. *Id.* ¶ 107.

[39] *Id.* ¶¶ 753-760.

[40] Award, *supra* note 1 at 1 (Al-Khasawneh, J., dissenting).

[41] *Id.* ¶¶ 2-3.

[42] *Id.* ¶ 40.

[43] *Id.* ¶ 200.

[44] *Id.* ¶¶ 43-51.

[45] *Id.* ¶¶ 6-39.

[46] *Id.* ¶ 203.

[47] *Id.* at 1.

[48] MacFarquhar, *supra* note 2; Otterman, *supra* note 2; Press Release, U.S. Dep't of State, ,U.S. - European Union Joint Declaration on the Boundaries of the Abyei Area, Press Release No. 2009/761 (July 22, 2009), *at* http://www.state.gov/r/pa/prs/ps/2009/july/126300.htm.