I. Introduction

Northern and Southern Sudan have been embroiled in civil war practically since the day Sudan first gained its independence from Britain and Egypt in 1956. On July 9, 2011, after years of fighting and failed peace initiatives led by the international community, Southern Sudan officially gained its independence and seceded from the North—creating the Republic of South Sudan.

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The first Sudanese civil war took place between Northern and Southern Sudan from 1955-1972 and the second from 1983-2003. Both wars had a devastating effect on Sudan and the Sudanese people. The violence between the North and South only escalated in 1989 when Omar Hassan al-Bashir, backed by the National Islamist Front (NIF) came to power in a bloodless coup. Once in power, the NIF and President al-Bashir instituted Islamic law and forcibly converted Sudan’s Christian and Animist populations—both of which are located primarily in the South. After the coup, fighting continued to rage between Northern and Southern Sudan and thus far an estimated two million people have died and another four million people displaced. Indicative of how the war was fought, in 2010, the International Criminal Court indicted President Bashir, charging him with inciting war and abusing human rights.

Sudan. Ninety-nine percent of Southerners voted in favor of independence. Despite the secession, the border separating Sudan from South Sudan is unclear. To this day, the centrally-located, resource-rich, and hotly-contested Abyei region remains caught in the middle of a border dispute.

Prior to the secession, international organizations and various nation-states made numerous attempts to broker a peace agreement between Northern and Southern Sudan and end the violence devastating the country and its people. Border disputes, including ascertaining ownership of the Abyei region, formed a central part of the negotiations. Ultimately, the various peace talks and accords failed to ascertain

3 Sudan: Recent Developments, supra note 2.
4 Id.
5 Boswell, supra note 1.
6 Id. (explaining that Sudan’s “border is disputed in at least seven places, the most dangerous of which is the town of Abyei, which for years has endured sporadic violence between the two sides.” The Abyei region was promised its own vote, but the event was delayed over a disagreement involving who constitutes a resident of the Abyei region, specifically whether the transient northern Misseriya who pass through each year to graze their animals should be able to take part in the vote.)
7 Id.
ownership of Abyei; eventually, both Northern and Southern Sudan agreed to bring the issue before the Permanent Court of Arbitration (PCA) at The Hague. While one of the Abyei arbitrators, Judge Awn Al-Khasawneh, predicted that the arbitration award would “in all likelihood, have a profound impact on the future of the Sudan as a State and the peace and well-being of all its long-suffering citizens regardless of their ethnicity or creed,” arbitration actually did little to resolve the Abyei issue or stem fighting between Northern and Southern Sudan.

The failure of arbitration to bring lasting resolution to the Abyei border dispute highlights a larger problem—the inadequacy of international arbitration to resolve border disputes in Africa. Alternative Dispute Resolution (ADR) processes, as realized in Africa, are criticized for being “ad hoc, uncoordinated, poorly planned, and largely ineffective,” and the Abyei arbitration was no exception. Throughout this paper, the Abyei arbitration will serve as a backdrop for analyzing the effectiveness of international arbitration forums when used to resolve African border disputes.

In order to better appreciate the complex and arduous task facing the arbitrators in a border dispute, Part II will provide a brief background of the various failed peace negotiations and agreements between Northern and Southern Sudan concerning Abyei. These events eventually


9 Id.; GOS-SPLM/A Final Award, Permanent Court of Arbitration, July 22, 2009 at ¶1.


led to arbitration at the PCA. Part III analyzes the Abyei arbitration agreement and subsequent arbitration proceedings in order to determine whether arbitration was the most appropriate forum for resolving the Abyei boundary dispute by focusing on three key characteristics of arbitration: (1) secrecy, (2) arbitrator selection, and (3) enforcement mechanisms. Part III then goes on to consider the Abyei arbitration in light of other arbitrations involving African border disputes.

II. Brief Overview of Sudanese History: Leading up to Secession

In order to analyze the effectiveness of the Abyei arbitration, one must grasp the complexity of the dispute that was presented to the arbitrators, as evidenced by the numerous failed attempts of the international community to intercede and forge a compromise between the Parties. The Abyei arbitration traces its history back to negotiations led under the auspices of the Intergovernmental Authority on Development (IGAD) in September of 1994. The IGAD-led peace talks had little momentum until 1998 because Northern Sudan refused to accept the IGAD’s Declaration of Principles. During the four years of stalling, relations between Northern and Southern Sudan seriously deteriorated. Nevertheless, IGAD persisted with its mediation efforts and after stalling twice, they finally gained momentum in 2002. The third round of IGAD-led negotiation and mediation lasted for approximately two years.

13 Young, supra note 8.
14 Id.
United Kingdom, and Norway all provided mediation services; Sudan’s neighboring states, including Kenya and Ethiopia, and various European states actively encouraged the process.17

In January of 2005, IGAD’s mediation efforts culminated in the signing of the Comprehensive Peace Agreement (CPA), which officially ended Sudan’s second civil war.18 Importantly, the CPA provided that Sudan: (1) establish a democratic system of governance by elections in 2009 (but these elections were ultimately delayed until April 2010), (2) work to find a comprehensive solution to the country’s economic and social woes, (3) find a peaceful solution emphasizing social and economic justice, fundamental freedoms, and human rights, (4) develop a


17 Danforth, supra note 15, at 1-2. The Abyei mediations were lead by UGAD appointed Chief mediator Lt. General Lazaro Sumbeiywo and two secondary mediators who handled the nuts and bolts of the issues. Due to the heavy involvement of third parties, Mediator Sumbeiywo’s main duty was to maintain respect for the process and act as a doorkeeper ensuring that only those individuals providing helpful influences took place in the mediations. The negotiations involved the top echelons of the two parties (John Garang for the South and Ali Taha for the North) so that those at the negotiating table had great decisionmaking power. The mediation process itself was described as an example of “facilitative, formulative, and manipulative mediation, where approaches involving both pressure and assertiveness were used.” Third parties did not propose solutions, but rather adopted the role of “being receptive, listening, understanding, and then reflecting perceptions of common ground.” The negotiations covered a wide variety of subjects including land issues, military questions, banking and oil. In order to balance the power between the two parties, when the mediators perceived an imbalance of knowledge, experts were employed as coaches for the disadvantaged party to equalize the level of expertise. Mason, supra note 12, at 75.

18 Id. While the peace agreement led to the (1) drafting of an interim constitution ending President al-Bashir’s state of emergency in place since 1999, (2) banned the application of Islamic law to Southern Sudan, and (3) removed the requirement that the president be Muslim, its future viability came into serious question when the newly appointed Vice-President John Garang of the SPLMA died mysteriously in a plan crash several weeks after he was sworn in. See Human Rights Watch, supra note 16.
reconstruction and development plan for areas affected by war, and (5) make the unity of Sudan an attractive option.\textsuperscript{19} In addition to the above provisions, the CPA established a process for creating a semi-autonomous government in the South (GOSS) and provided for a 2011 referendum for the South to separate from the North if unity was ultimately not an attractive option.\textsuperscript{20} Finally, the CPA created a process for determining the borders between Northern and Southern Sudan, including the Abyei region.\textsuperscript{21}

Originally, the CPA required a separate referendum to determine whether Abyei belonged to North or South Sudan.\textsuperscript{22} However, a dispute arose over exactly what area constituted the Abyei region and, thus, what tribes could vote in the referendum.\textsuperscript{23} In order to prevent a negotiations deadlock, U.S. presidential envoy John Danforth negotiated an agreement that immediately placed Abyei under a special administrative-status government directed by President al-Bashir.\textsuperscript{24} The new agreement did not delineate the exact borders of the Abyei region, but mandated that an international Abyei Boundaries Commission (ABC) be created to determine the ownership of Abyei.\textsuperscript{25}


\textsuperscript{20} Id. For clarification, unity was not achieved and the South ultimately voted to secede from the North in 2011.

\textsuperscript{21} CPA, supra note 19, at 81-87. Note: the parties actually signed a protocol on May 26, 2004 on the Resolution of Abyei Conflict, which was then later incorporated into the CPA. See Final Award, supra note 9, at 1.

\textsuperscript{22} P.M. Holt & M. W. Daly, A HISTORY OF THE SUDAN: FROM THE COMING OF ISLAM TO THE PRESENT DAY (6th ed. 2011), at 163.

\textsuperscript{23} Id.

\textsuperscript{24} Id.

\textsuperscript{25} Id.
A. Delineating the Abyei Borders: Not as Easy as ABC

The CPA describes Abyei as a bridge linking North and South Sudan and defines the territory as the land of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905. The ABC was tasked with defining and demarcating the exact area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905. While President al-Bashir determined the composition and timeframe of the ABC, he was required to include experts, representatives of the local Abyei communities, and the local Abyei administration. The ABC was required to finish its work within two years. Once the ABC commission made a determination concerning Abyei’s boundaries, it was to present a final report to President al-Bashir, who would immediately take the necessary action to implement its findings.

The ABC Commission was comprised of: (1) one representative from the Northern Government and one from the Sudan People’s Liberation Movement/Army (SPLM/A), (2) five impartial experts “knowledgeable in history, geography and any other relevant expertise” nominated by the United States, the United Kingdom, and IGAD, (3) two nominees of the Northern Government and SPLM/A “from the present administration of the Abyei area,” (4) two nominees of the Northern Government from the Misseriya, and (5) two nominees of the SPLM/A from the neighboring Dinka tribes to the South of the Abyei Area. In determining whether Abyei belonged to Northern or Southern Sudan, the ABC would “listen to representatives of the

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26 CPA, supra note 19, at 68.
27 Id.
28 Id.
29 Id.
30 Id.
31 Final Award, supra note 9, at ¶116.
people of the Abyei Area and their neighbors, listen to presentations of the two Parties,” and “consult the British Archives and other relevant sources on Sudan wherever they may be available, with a view to arriving at a decision that shall be based on scientific analysis and research.”  

After concluding its research, the ABC issued a report considered by many experts as favorable to the South; the report defined the Southern Ngok Dinka’s homeland as compromising 18,559,000 kilometers of Abyei.  This area included all of the major oilfields.  

A dispute immediately arose between Northern and Southern Sudan over the ABC’s findings, with Northern Sudan alleging that the commission had exceeded its mandate. Instead of implementing the ABC report, President al-Bashir and his government explicitly rejected the commission’s findings.  

After the ABC report failed to resolve the Abyei issue, the international community once again intervened, and on June 8, 2008, Northern and Southern Sudan signed “The Map for Return of IDPs and Implementation of Abyei Protocol” (hereinafter “Abyei Road Map”) in Khartoum.  

Within the Abyei Road Map, the Parties agreed to refer their Abyei dispute to  

32 Id.  
34 Holt & Daly, supra note 22, at 164.  
35 Muhlendahl, supra note 33.  
36 Final Award, supra note 9, at ¶134. The agreement is also referred to as the “Abyei Road Map.”
arbitration at the PCA and to accept and implement the findings of the arbitration tribunal. The agreement to arbitrate was signed on July 7, 2008.

B. The Abyei Arbitration

1. Location: The Permanent Court of Arbitration at The Hague

The PCA describes itself as “an intergovernmental organization with over one hundred member states providing arbitration and other various dispute resolution services on an international scale for states, state entities, intergovernmental organizations and private parties.” The PCA was created in 1899 at the Convention for the Pacific Settlement of International Disputes, which was convened at the initiative of Czar Nicolas II of Russia “with the object of seeking the most objective means of ensuring to all peoples the benefits of a real and lasting peace, and above all, of limiting the progressive development of existing armaments.”

Prior to the Abyei dispute, the PCA had previously arbitrated several other land and border disputes involving African countries, including a 1985 maritime delimitation between Guinea and Guinea-Bissau and a 2000 boundary dispute between Eritrea and Ethiopia. The PCA claims that arbitration proved a “most effective tool” for resolving land disputes and further

37 *Id*.

38 *Id*.


asserts that arbitration has led to strengthened peace and stability in those areas. The fact that land disputes still comprise roughly twenty-five percent of all disputes referred to arbitration may buttress PCA’s assertion and perhaps reflects a strong belief in arbitration’s effectiveness.

However, despite land dispute’s prevalence on the arbitration docket, other reviews of arbitration for resolving land disputes are critical of the process and point out that arbitration awards are often not respected by states, especially when the arbitration agreement lacks an enforcement mechanism. As further evidence of arbitration’s ineffectiveness, violence often continues following the issuance of an arbitration award in many of the disputed areas. Additionally, some critics cite the diminishing docket of the PCA as evidence of a growing disfavor with arbitration and emphasize that PCA has only arbitrated a trickle of disputes in the latter half of the twentieth century. In light of these critiques, the question arises whether arbitration provides the best forum for resolving African border disputes, or if not, whether arbitration can be modified to increase its effectiveness in resolving border disputes.

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45 Sudan: Recent Developments, supra note 2. See also McHugh, supra note 41, at 239 (explaining that while arbitration is better than armed conflict and the severing of diplomatic relations, arbitration cannot create international law nor do arbitration tribunals posses their own independent power to enforce arbitration awards).

46 Vidmar, supra note 43, at 93.
2. The Ayei Arbitration Rules and Proceedings

The Ayei Arbitration Agreement designated specific rules for the arbitration proceedings and narrowed the issues presented to the arbitrators. The proceedings of the arbitration were governed by PCA’s “Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State”, but the arbitration agreement allowed for such rule modification as the Parties could agree to in writing. The issues to be settled by the Abyei Arbitration Tribunal (“Tribunal”) included:

(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.
(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.

Under the auspices of the PCA, the Tribunal had six months from the commencement of the proceedings, with a possible extension of up to three months, to issue an award. Additionally, the parties could choose to have one or three arbitrators. However, the Parties chose five arbitrators to comprise the Tribunal, an option available under PCA rules in a dispute involving two nation states. Each Party was entitled to

47 Id. at ¶3, ¶6.
48 Id. at ¶3.
49 Id. at ¶6.
50 Id. at ¶19.
52 Final Award, supra note 9, at ¶7. Interestingly, the PCA Rules for arbitrating between two states specifically allows for one, three or five arbitrators, whereas the rules for arbitration between one state and another party that is
appoint two arbitrators who were either current or former members of the PCA or
members of tribunals for which PCA acted as a registry. The four party-appointed
arbitrators would then choose a fifth arbitrator who was required to be a “renowned
lawyer of high professional qualifications, personal integrity, and moral reputation with
experience in such disputes.” No other qualifications for arbitrators were established.

3. The Arbitrators’ Decision

The Tribunal was presented with the arduous task of determining whether the ABC correctly
decided the appropriate line of demarcation between Northern and Southern Sudan, thus
resolving whether the Abyei region belonged to the former or to the latter. If the Tribunal found
that ABC had correctly decided upon the North/South border, the Tribunal would call for the full
implementation of ABC’s report. On the other hand, if the Tribunal determined that ABC had
exceeded its mandate, the Tribunal was tasked with determining Abyei’s correct borders.

The Abyei arbitration award, published in 2009, emphasized the Tribunal’s reliance on
the sequence of the issues presented before them. Thus, according to the Tribunal, it was first
tasked with deciding whether or not ABC exceeded its mandate, “i.e. to determine whether or not
the Experts’ interpretation and implementation of its mandate was reasonable.” If the Tribunal

not a state only call for one or three arbitrators. Here the parties chose five arbitrators to oversee the Abyei
arbitration. Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States art. 5,

53 Final Award, supra note 9, at ¶7.
54 Id. at ¶12.
55 Id.
56 Final Award, supra note 9.
determined that ABC had in fact exceeded its mandate by leaving its conclusions unsupported by reason, the Tribunal was to define and delimit the borders of Abyei using only the Parties’ submissions during the arbitration proceeding.\textsuperscript{58} Thus, “the Parties did not expect or authorize the Tribunal to evaluate the evidence in such a manner as to amount to a re-determination of the correct boundaries of the Abyei Area in 1905.”\textsuperscript{59} The Tribunal was limited to analyzing the reasonableness of the ABC’s report.

In approaching the reasonableness question, the Tribunal first found that ABC took a reasonable approach to its mandate by adopting a predominantly “tribal” interpretation.\textsuperscript{60} The Tribunal agreed with ABC (and Southern Sudan) that its mandate primarily required it to delimit and demarcate the area of the nine Ngok Dinka Chiefdoms as of 1905. In contrast, Northern Sudan argued that ABC’s mandate required the commission to take a predominantly “territorial” approach and determine the boundaries according to the area of land that was administratively transferred by the Anglo-Egyptians in 1905.\textsuperscript{61}

While the Tribunal did find that some of ABC’s conclusions were unreasonable and unsupported by fact, the Tribunal adopted the majority of ABC’s findings—leaving Abyei primarily in Southern control. However, two of Abyei’s major oil fields, which account for 26% of Sudan’s total oil production and alone raised 1.8 billion dollars in revenue from 2005-2007, were seceded to the North.\textsuperscript{62} Where the Tribunal found that ABC had, in fact, exceeded its mandate (specifically, at the northernmost point, eastern, and western borders), the Tribunal

\textsuperscript{58} \textit{Id.}
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.} at 5.
\textsuperscript{61} \textit{Id.} at 5-7.
\textsuperscript{62} Muhlendahl, supra note 33.
demarcated the boundary lines according to the evidence presented by the parties during arbitration.63

Upon issuing its award, the Tribunal emphasized the conciliatory nature of the arbitration agreement and asked the Parties to accept its findings.64 The Tribunal also urged the Parties to take the next step according to the arbitration agreement, which required President al-Bashir to immediately execute the award.65 The United States and the European Union also issued a joint statement encouraging both Parties to adhere to the ruling immediately.66

The Parties adhered to neither the award nor the pleas for peace and reconciliation; even dissenting arbitrator Al-Khasawneh argued that the award was “self-contradicting, result-oriented, in many respects cavalier, insufficiently critical and unsupported by evidence, and indeed flying in the face of overwhelming contrary evidence.”67 The government of Northern Sudan refused to honor the arbitration award, and despite international pressure, President al-Bashir did not execute the award’s provisions.68

With no enforcement mechanism in the arbitration agreement, implementation of the arbitration award was left solely to the Parties’ discretion—allowing for its ultimate and

63 Id.
64 Final Award, supra note 9, at ¶ 767. Unfortunately it was too late for the people of Abyei. The region had been torn apart by fighting in 2008 forcing its inhabitants to flee the area. Sharon Otterman, Court Redraws Disputed Area in Sudan, N.Y. TIMES, July 22, 2009, available at http://www.nytimes.com/2009/07/23/world/africa/23sudan.html?ref=sudan.
65 Final Award, supra note 9, at ¶ 769.
66 Sudan: Recent Developments, supra note 2.
67 Al-Khasawneh, supra note 10.
foreseeable rejection. Further, the arbitration award failed to fully address ownership of Abyei’s highly contentious oil producing region, giving further credence to the “compromise” accusation leveled by dissenting Arbitrator Al-Khasawneh. U.S. Special Envoy for Peace, John C. Danforth, had previously warned that “there can be . . . no enduring settlement” in Sudan until the oil issues were dealt with. Despite the arbitration award, violence continued to rage between Northern and Southern Sudan over Abyei.

The failure of arbitration to resolve Sudan’s Abyei conflict brings into question the effectiveness of using the PCA and other international arbitration forums to resolve African border disputes. In order to increase an arbitration forum’s effectiveness, international bodies must make modifications to their arbitration processes.

III. Creating an Effective Arbitration Forum

Ultimately, arbitration failed to end the long and bloody battle over Abyei, but the arbitration process provides important insights into how to approach African border disputes in the future. First, the arbitration process as a whole should not be discounted because it has

69 Final Award, supra note 9, at 769.

70 Holt & Daly, supra note 22, at 164. Muhlendahl, supra note 33 (explaining that two of the highest producing areas were awarded to North Sudan).

71 Danforth, supra note 15.

proven effective for resolving international disputes in the commercial sector.\textsuperscript{73} In the commercial sector, arbitration’s unique characteristics, including secrecy and arbitrator selection, are attractive to parties and critical to effectiveness.\textsuperscript{74} However, in the context of African border disputes, these factors may not prove as beneficial or effective.

Ana Spain describes arbitration as “less useful for contexts requiring deeper resolution and reconciliation because it is not designed to elicit and address the identity or emotional aspects of a conflict.”\textsuperscript{75} Arbitration may not provide an appropriate forum for resolving African border disputes because these disputes often involve complicated political and cultural issues.\textsuperscript{76} This reasoning may help explain the failure of the Abyei arbitration. While the Abyei arbitration allowed for a flexible approach to secrecy and arbitrator selection, the agreement did not go so far as to include an enforcement mechanism. Without the latter, parties involved in a contentious border dispute, such as Abyei, likely will not execute unpopular arbitration awards. To create an effective arbitration forum, international arbitration should consider changes to (1) secrecy, (2) arbitrator selection, and (3) enforcement mechanisms.

A. Secrecy of Arbitration Proceedings

While secret arbitration proceedings may encourage party participation and permit both sides to voice arguments without fearing future litigation, public arbitrations also have benefits,

\begin{itemize}
\item \textsuperscript{73} Catherine Rogers, Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration, 39 STAN. J. INT’L L. 1, 12-14 (2003).
\item \textsuperscript{74} For a description of the benefits of arbitration see Jibril, supra note 49, at 65; McHugh, supra note 68, at 230-34; Vidmar, supra note 43, at 95.
\item \textsuperscript{75} Ana Spain, Using International Dispute Resolution to Address the Compliance Question in International Law, 40 GEO. J. INT’L L. 807, 828 (2009).
\item \textsuperscript{76} Id.
\end{itemize}
which are especially salient in African border disputes. First, a public forum may more accurately reflect how disputes are traditionally handled in African culture. In African villages, disputes are not resolved in secret. Instead, entire communities participate in conflict resolution proceedings and work collectively to enforce the outcomes. Second, publicizing arbitration proceedings can prevent parties from withdrawing from the process. Lastly, a public arbitration many encourage party compliance with the arbitration award.

For the Abyei arbitration, the PCA took an entirely novel approach and web-streamed the entire arbitration, thus providing the public with a front row seat to the proceedings. Streaming the arbitration over the internet allowed anyone with internet access to follow the developments at The Hague. Additionally, the arbitration was conducted in three languages—English, Arabic

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77 Laurel L. Rose, Are Alternative Dispute Resolution (ADR) Programs Suitable for Africa?, AFRICA NOTES, 5, 6 (1996) emphasizing that African mediations are characterized by open communication and full public disclosure. Mediators seek an outcome that appeals to the entire community. Their decisions focus on restoring harmony and increasing the viability of the community’s multifaceted social/political relationships, thus placing society’s interests before those of the disputants).

78 Id.

79 McHugh, supra note 41, at 230-31.

80 Id. at 231.

81 Id.


83 Unfortunately, those most affected by the Abyei dispute and may not have had computer access and therefore were unable to watch the proceedings. In 2000, .1% of Sudanese had access to the internet. Just eight years later in 2009, internet access had increased to 10.2% of the population. Internet World Stats, http://www.internetworldstats.com/af/sd.htm (last updated November 5, 2011). Contrast this with the United States
and Dinka—allowing a greater number of individuals to participate.\(^{84}\) Lastly the arbitration award itself was published and widely-available on the internet.\(^{85}\) While the publicity surrounding the Abyei arbitration may have contributed to securing party participation with the proceedings, publicity was not enough to secure compliance with the Abyei arbitration award. PCA’s radical approach to public arbitration demonstrates that publicity alone is enough to secure implementation of an arbitration award in a highly contentious border dispute.

B. Flexibility in Arbitrator Selection

For land dispute arbitrations, arbitrator selection plays a key role in securing party buy-in to the process.\(^{86}\) Parties have the power to choose those arbitrators whom they believe (1) will make wise decisions, (2) possess a general understanding of the dispute, the geographical area, and the cultures involved, and (3) have the desired technical expertise.\(^{87}\) Flexibility in arbitrator selection is perhaps the most important aspect of arbitration lending itself to the resolution of territorial disputes.\(^{88}\) As Srecko Vidmar elaborates,

Since most territorial disputes are deeply rooted in local history and involve neighboring states, an arbitral panel that appreciates such local circumstances will be more likely to utilize the particular legal and cultural norms observed in the area in order to craft an imaginative solution that would not be evident to a panel comprised of jurists without such local knowledge.\(^{89}\)

\(^{84}\) Final Award, supra note 9, at ¶ 79.


\(^{86}\) Jibril, supra note 44, at 662.

\(^{87}\) Vidmar, supra note 43, at 96.

\(^{88}\) Id.

\(^{89}\) Id.
Permitting parties to structure arbitration by choosing their decision-makers makes arbitration a bigger investment for the parties, thus increasing the likelihood of adherence by both parties to an arbitration award.

In the Abyei arbitration, however, even allowing the Parties to select their own arbitrators was not enough to secure their compliance with the subsequent arbitration award. Both Northern and Southern Sudan selected two esteemed scholars who were current or former members of the PCA or members of tribunals where the PCA acted as a registry of arbitrators. Interestingly, not one of the Parties chose an arbitrator from Sub-Saharan Africa, four of the five were American or Western European, and the only arbitrator to dissent was of non-Western descent.

While impossible to know with certainty, not choosing arbitrators from the area in conflict, or even the African Continent, may have made it more difficult for the arbitrators to grasp the conflict’s complexity. The Abyei conflict goes beyond a mere determination of the border between North and South Sudan. As noted by Gerhard Baum, Special Rapporteur on the Sudan: “In view of the links between peace and democracy and human rights, peace talks should be more comprehensive and include all stakeholders in what is not simply a North-South conflict.” The Abyei dispute also involves a clash of religion and culture that is “rooted in

90 Jibril, supra note 44, at 663.
91 Final Award, supra note 9, ¶ 8.
92 The panel was comprised of two Americans, one Austrian, one Frenchman and one Jordanian. All arbitrators were men. Id. ¶¶ 9, 10, 15.
93 Juma, supra note 11, at 466.
northern domination of the non-Muslim, non-Arab southern Sudanese.” 95 The distinct cultures of Sudan’s North and South meet in the Abyei region. 96 While Northerners are primarily Muslim and Arabic in speech, outlook, and culture, Southerners are ethnically diverse and comprised of a multitude of tribes and languages. 97 Christianity and Animism are the dominant religions. 98 Additionally, the majority of Southerners do not claim Arab descent and are generally not Muslim. 99 Two tribes, the southern Dinka Ngok and the northern Misseriya, both claim Abyei. 100 The Dinka Ngok maintain Abyei as their traditional homeland and can trace their presence to at least the eighteenth century, while the Misseriya, a nomadic Arab tribe, spend part of the year in Abyei grazing their cattle. 101

In Abyei, a tribunal full of Western scholars and lawyers may have lacked the required diversity to fully comprehend the complex cultural, political, and religious differences of the Parties and thus, failed to engage their cooperation in a dynamic and durable solution. However, in fairness to the PCA and the arbitrators, any arbitration award reached by the Tribunal could have been rejected by the “losing” party regardless of the publicity associated with the

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95 CIA, supra note 72.
97 Holt & Daly, supra note 22, at 164.
98 Wax, supra note 72.
99 Id.
100 Copnall, supra note 95.
101 Final Award, supra note 9 ¶¶ 105-07; Copnall, supra note 95.
proceedings or the nationality of the arbitrators.\textsuperscript{102} Thus, for arbitration to serve as an effective forum for resolving African border disputes, arbitration agreements must include strong enforcement mechanisms.

C. Enforceability

In the commercial sector, international arbitration "enjoys an institutionalized enforcement framework.\textsuperscript{103} UNCITRAL rules ensure that international commercial arbitration agreements are "reliably and uniformly enforceable in national courts."\textsuperscript{104} These rules are well recognized and adhered to by the participants, thus allowing nation-states to provide support for party-drafted arbitral agreements and subsequent awards.\textsuperscript{105} In contrast, international border disputes have no automatic enforcement mechanisms or treaties.\textsuperscript{106}

For instance, Ethiopia and Eritrea fought for over two years over a shared border.\textsuperscript{107} Similar to Sudan’s Abyei dispute, the Parties submitted their conflict to arbitration at PCA.\textsuperscript{108} The Tribunal consisted of five arbitrators comprised of judges, treaty experts, and international jurists all chosen by the Parties.\textsuperscript{109} Upon issuance of the award, Ethiopia immediately expressed

\textsuperscript{102} Jibril, supra note 44, at 635-36 ("African countries continue to call upon international judicial bodies to mediate present day border disputes. Although some African countries have consented to border rulings by international judicial bodies, other African countries have refused to comply with unfavorable rulings").

\textsuperscript{103} Spain, supra note 75, at 828.

\textsuperscript{104} Id. at 829.

\textsuperscript{105} Rogers, supra note 73, at 15-16

\textsuperscript{106} Jibril, supra note 44, at 659-61.


\textsuperscript{108} Id.

\textsuperscript{109} Id.
its disappointment with the PCA award. One year and seven months after issuing its award, the PCA recalled the Parties for a meeting in order to express its concern with the lack of progress in execution. At the same time, the PCA made the determination that there was nothing further it as an organization could do to secure the award’s enforcement. Without an enforcement mechanism the arbitration award failed to end the border dispute. The fighting and hostility between Ethiopia and Eritrea over the border continues to this day.

In another failed example of international intervention, the International Court of Justice (ICJ) heard a land dispute between Nigeria and Cameroon. The ICJ ruled that the disputed territory belonged to Cameroon and gave Nigeria two years to withdraw from the area. Instead of accepting the ICJ’s ruling, Nigeria responded with “anger and contempt.” Returning the area to Cameroon took an additional four years of diplomatic negotiations beyond the two year allowance that was allotted for withdrawal.

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111 Id.
112 Id.
114 Id.
116 Jibril, supra note 44, at 636.
117 Background Note: Cameroon, U.S. Dept. of State, October 28, 2011,
Allowing parties to choose their own arbitrators and structure the proceedings provides a
good start to encouraging party participation in border dispute arbitrations. However, unlike
commercial arbitration agreements, international border dispute arbitration agreements often
have no enforcement mechanisms. Facing no consequences for failing to comply with an
arbitration decision, parties can simply disregard unpopular rulings.\textsuperscript{118} In the case of Nigeria and
Cameroon, after Nigeria rejected the ICJ’s ruling, the UN simply directed the Parties back to the
all-too-familiar mediation table.\textsuperscript{119}

Until the UN, regional international organizations, and first-world nation-states choose to
throw their weight behind arbitrator decisions, the power of international arbitration to resolve
African land disputes remains questionable.\textsuperscript{120} Monetary penalties or a loss of membership in
international and regional organizations may provide sufficient motivation to honor an
unfavorable arbitration award.\textsuperscript{121} Further, the IMF or World Bank could refuse funding to those
countries who disregard an arbitration award as many African countries are dependent on foreign
aid.\textsuperscript{122} For instance, in the Abyei arbitration the African Union could have become involved and
threatened a loss of membership if Sudan refused to execute the arbitration award.

\textsuperscript{118} Jibril, \textit{supra} note 44, at 659.
\textsuperscript{119} \textit{Id.} at 659-60.
\textsuperscript{120} Vidmar, \textit{supra} note 43, at 110.
\textsuperscript{121} Jibril, \textit{supra} note 44, at 673.
\textsuperscript{122} \textit{Id}; William Easterly, \textit{Can Foreign Aid Save Africa?}, 17 CLEMENS LECTURE SERIES, 2005, at 5, available at
Any future arbitration agreements must vigilantly avoid vague clauses and weak, ambiguous enforcement mechanisms. Nejib Jibril suggests that “in a contentious border dispute, the arbitration agreement should spell out the provisions relating to the appeals process and the court’s power to reconsider its prior decision.” In the Abyei arbitration, such a procedural clause could have illuminated the exact circumstances under which the losing party could appeal and have the Tribunal reconsider its award.

Just because “Africa states have displayed some form of preference for diplomatic and informal means of resolution of disputes between themselves,” does not mean that parties will enforce such rulings, without outside pressure. International bodies concerned with peacekeeping cannot simply rely on the disputing parties to execute arbitration awards in contentious border disputes. Harsh and specific enforcement clauses, such as those imposing economic sanctions or providing for an appeal only under specified circumstances, will make it more likely that parties will execute arbitration awards.

IV. Conclusion

Arbitration thus far has failed to provide an effective forum for resolving African border disputes. However, the failure may result more from a lack of enforcement mechanisms than an inherent inability of international arbitration to deal with the complexities innate to border conflicts. Arbitration provides for flexibility and its traditional characteristics, such as secrecy and arbitrator selection, are easily manipulated to suit the needs of the parties, but without enforcement mechanisms arbitration awards are essentially meaningless. Unless international

124 Id.
bodies and other nation states step-up to enforce arbitration awards, parties are free to reject unpopular findings without consequence. Arbitration provides a viable forum for resolving African land disputes; however, the arbitration agreements must have specific enforcement mechanisms to ensure party compliance.