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## TABLE DES MATIÈRES



* Maps 1–5 attached to the Award are located in the front pocket of this volume.

** Les cartes N^os. 1 – 5 qui ont trait à cette Sentence arbitrale sont classées dans la pochette au dos de la première page de couverture de ce volume.

*** The maps attached to the Award as well as the Dissenting Opinion are located in the rear pocket of this volume.

**** Les cartes qui ont trait à cette Sentence arbitrale sont classées dans la pochette au dos de la dernière page de couverture de ce volume.

# FOREWORD

The present volume reproduces the awards in two arbitration cases, namely, the case between Guyana and Suriname concerning the delimitation of their shared maritime boundary, and the case between the Government of Sudan and the Sudan People's Liberation Movement/Army regarding the delimitation of the Abyei Area.

This publication was originally conceived in 1948 as a collection of international awards or decisions rendered between States, including cases involving espousing or respondent Governments on behalf of individual claimants. In principle, awards between a private individual or body and a State or international organization were excluded. However, some awards between a State and other entities, or between non-State entities, have exceptionally been included, given the significance of the issues of general international law addressed. The present volume includes one such award, rendered in a case between a State and a non-State entity, in the general context of the subsequent secession of South Sudan* from the Sudan.

In accordance with the practice followed in this series, the awards are presented in chronological order. Awards in English or French are published in the original language, as long as the original language text was available. Those in both languages are published in one of the original languages. Awards in other languages are published in English. A footnote indicates when the text reproduced is a translation made by the Secretariat. In order to facilitate consultation of the awards, headnotes are provided in both English and French.

The present volume also includes two tables listing in alphabetical and chronological order, respectively, all the cases published in volumes I to XXX, with an indication of the volume and page number for each case. The title of each case is reproduced in the form and language in which it appeared in this series.

This volume, like volumes IV to XXIX, was prepared by the Codification Division of the Office of Legal Affairs.

* South Sudan was admitted to the United Nations as its 193rd member on 14 July 2011.

# AVANT-PROPOS

Le présent volume reproduit les sentences rendues dans deux affaires d'arbitrage, à savoir, l'affaire entre le Guyana et le Surinam concernant la délimitation de leur frontière maritime commune, et l'affaire entre le Gouvernement du Soudan et le Mouvement/Armée populaire de libération du Soudan portant sur la délimitation de la région de l'Abyei.

La présente publication a été conçue en 1948 comme un recueil de sentences ou de décisions internationales rendues dans des affaires opposant des États, y compris des affaires dans lesquelles des gouvernements prenaient fait et cause pour des particuliers ou se portaient défendeurs à leur place. Les sentences rendues dans des affaires opposant un particulier ou un organisme privé à un État ou à une organisation internationale en étaient, en principe, exclues. Certaines sentences rendues dans des affaires opposant un État à d'autres entités, ou des entités non-étatiques entre elles, y ont toutefois été exceptionnellement inclues, compte tenu de l'importance des questions de droit international général qu'elles traitaient. Le présent volume contient une telle sentence, rendue dans une affaire opposant un État à une entité non-étatique, dans le contexte général ayant conduit à la sécession ultérieure du Soudan du Sud[*] du Soudan.

Conformément à la pratique suivie dans le présent *Recueil*, les sentences sont reproduites ci-après par ordre chronologique. Les sentences rendues en anglais ou en français sont publiées dans la langue originale, dès lors que le texte dans cette langue originale était disponible. Celles qui ont été rendues en anglais et en français ont été reproduites dans une des deux langues originales. Le *Recueil* fournit une version anglaise des sentences rendues dans d'autres langues en spécifiant, le cas échéant, dans une note de bas de page, si la traduction émane du Secrétariat de l'Organisation des Nations Unies. Pour faciliter autant que possible la consultation de ces sentences, celles-ci sont précédées de notes sommaires rédigées à la fois en anglais et en français.

Le présent volume contient également deux tableaux énumérant, par ordres alphabétique et chronologique respectivement, l'ensemble des affaires publiées dans les volumes I à XXX, avec l'indication du volume et du numéro de page correspondant à chaque affaire.

A l'instar des volumes IV à XXIX, le présent volume a été préparé par la Division de la codification du Bureau des affaires juridiques.

[*] Le Soudan du Sud a été admis comme 193ème Membre des Nations Unies le 14 juillet 2011.

# PART I

## Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname

**Award of 17 September 2007**

# PARTIE I

## Sentence arbitrale relative à la délimitation de la frontière maritime entre le Guyana et le Surinam

**Sentence du 17 septembre 2007**

# Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname

# Sentence arbitrale relative à la délimitation de la frontière maritime entre le Guyana et le Surinam

Delimitation of the territorial sea—article 15 of the United Nations Convention on the Law of the Sea (UNCLOS) places primacy on median line in case of opposite or adjacent States—special circumstances that may affect a delimitation to be assessed on a case-by-case basis—special circumstances of established practice of navigation justify deviation from the median line from the starting point to the three nautical mile limit—no obligations created by uncompleted treaties—the three to twelve nautical mile limit line drawn, taking into account the special circumstance of determining such line from a point at sea fixed by historical arrangements, to the point at which the equidistance line established for the continental shelf and the exclusive economic zone intersects the 12 nautical mile point.

Determination of a continental shelf and the exclusive economic zone—concept of a single maritime boundary not found in UNCLOS, but in practice and case law–provisional equidistance line subject to adjustment in light of relevant circumstances in order to achieve equitable solution—certainty, equity, stability integral parts of process of delimitation—coastal geography may be relevant to the extent that it generates "the complete course" of the provisional equidistance line—angle bisector methodology rejected—international courts and tribunals dealing with maritime delimitation should be mindful of not remaking or wholly refashioning nature—absent an express or tacit agreement between the parties oil concessions and oil wells irrelevant to the delimitation of maritime boundary—boundary negotiations with a third State irrelevant—no factors rendering the provisional equidistance line inequitable.

Admissibility of claim of unlawful threat or use of force—Tribunal has jurisdiction under article 293 of UNCLOS to apply rules of international law not incompatible with the Convention—the incident to be considered in the context of the whole dispute—no obligation to engage in separate exchanges of views on threat or use of force–Tribunal's jurisdiction over disputes concerning a coastal State's enforcement of its sovereign rights with respect to non-living resources not excluded—no generally accepted definition of the doctrine of clean hands in international law—a violation must be ongoing for the doctrine of clean hands to apply—claims relating to the use of force in a disputed area not incompatible under UNCLOS with claim for maritime delimitation of that area.

Claim of unlawful threat or use of force—action taken by Suriname not a law enforcement activity but a threat of use of force in contravention of UNCLOS, the Charter of the United Nations and general international law—in international law force may be used in law enforcement activities provided such force is unavoidable,

reasonable and necessary—claim that action constituted a countermeasure precluding wrongfulness not accepted—countermeasures may not involve use of force.

State responsibility—no need to assess extent of Suriname's international responsibility—injury to Guyana "sufficiently addressed" by Tribunal's delimitation decision granting it undisputed title to the area of the incident.

Obligation under articles 74(3) and 83(3) of UNCLOS to make every effort to enter into provisional arrangements–duty to negotiate in good faith—obligation to "make every effort" to reach such arrangements.

Obligation under articles 74(3) and 83(3) of UNCLOS to make every effort not to jeopardize or hamper the reaching of final agreement—unilateral activity that might affect the other party's rights in a permanent manner not permissible—distinction drawn between activities leading to a permanent physical change, such as exploitation of oil and gas reserves, and those that do not, such as seismic exploration.

Remedy—declaratory relief.

Délimitation de la mer territoriale—article 15 de la Convention des Nations Unies sur le droit de la mer (CNUDM) donne primauté à la ligne médiane dans les cas concernant des États se faisant face ou adjacents—circonstances spéciales pouvant avoir un effet sur une délimitation considérées au cas par cas—circonstance spéciale concernant une pratique de navigation établie justifiant une déviation de la ligne médiane du point de départ fixé à la limite des trois milles marins—absence d'obligation résultant d'un traité incomplet—ligne tracé entre les limites des trois et douze milles marins, en prenant en considération les circonstances spéciales relevant de la détermination d'une telle ligne à partir d'un point en mer fixé par des arrangements historiques jusqu'au point d'intersection entre la ligne d'équidistance établie pour le plateau continental et la zone économique exclusive et le point situé à douze milles marins.

Délimitation du plateau continental et de la zone économique exclusive—Concept de frontière maritime unique ne figurant pas dans la CNUDM, mais présent dans la pratique et la jurisprudence—ligne provisoire d'équidistance étant sujette à ajustement, au regard des circonstances pertinentes aux fins d'aboutir à une solution équitable—certitude, équité et stabilité comme parties intégrantes du processus de délimitation—géographie côtière pouvant être pertinente dans la mesure où elle permet de générer « le tracé complet » de la ligne provisoire d'équidistance—rejet de la méthode de la bissectrice—juridictions internationales traitant de délimitations maritimes devant être attentives à ne pas refaire ou refaçonner entièrement la nature—concessions pétrolières et puits de pétrole non pertinents dans la délimitation de la frontière maritime, en l'absence d'accord exprès ou tacite entre les Parties—négociations frontalières avec un Etat tiers non pertinentes—absence de facteurs rendant la ligne provisoire d'équidistance inéquitable.

Recevabilité de la demande portant sur la menace ou l'emploi illicite de la force—Tribunal compétent en vertu de l'article 293 de la CNUDM pour appliquer des règles de droit international qui ne sont pas incompatibles avec celle-ci—incident à considérer dans le contexte du différend dans son ensemble—absence d'obligation d'initier des échanges de vues distincts concernant la menace ou l'emploi de la force—compétence du Tribunal sur les différends concernant la mise en œuvre par un Etat côtier de

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Demande portant sur la menace ou l'emploi illicite de la force—mesure prise par le Surinam ne pouvant être qualifiée d'activité d'exécution de la loi, mais constituant une menace d'emploi de la force en violation de la CNUDM, de la Charte des Nations Unies et du droit international général—en droit international, possibilité de recourir à la force, selon le droit international, dans le cadre d'activités d'exécution de la loi, à condition qu'un tel recours soit inévitable, raisonnable et nécessaire—rejet de l'allégation selon laquelle la mesure constituait une contre-mesure excluant l'illicéité—contre-mesures ne pouvant pas impliquer l'emploi de la force.

Responsabilité de l'État—détermination de l'étendue de la responsabilité internationale du Surinam n'étant pas nécessaire—dommage subi par le Guyana étant « suffisamment traité » par la décision du Tribunal en matière de délimitation lui accordant un titre incontestable sur la zone de l'incident.

Obligation des États en vertu des articles 74(3) et 83(3) de la CNUDM de faire tout leur possible pour conclure des arrangements provisoires—devoir de négocier de bonne foi—obligation de « faire tout leur possible » pour conclure de tels arrangements.

Obligation des États en vertu des articles 74(3) et 83(3) de la CNUDM de faire tout leur possible pour ne pas compromettre ou entraver la conclusion de l'accord définitif—inadmissibilité de toute activité unilatérale susceptible d'affecter les droits de l'autre partie de manière permanente—distinction établie entre les activités conduisant à une modification physique permanente, telle que l'exploitation des réserves gazières et pétrolières et celles n'ayant pas un tel effet, comme l'exploration sismique.

Remède—constatation judiciaire valant satisfaction.

* * * * *

ARBITRAL TRIBUNAL CONSTITUTED PURSUANT TO ARTICLE 287, AND IN ACCORDANCE WITH ANNEX VII, OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

**in the matter of an arbitration between:**

GUYANA

**and**

SURINAME

# AWARD OF THE ARBITRAL TRIBUNAL

**The Arbitral Tribunal:**

H.E. Judge L. Dolliver M. Nelson, President
Professor Thomas M. Franck
Dr. Kamal Hossain
Professor Ivan Shearer
Professor Hans Smit

**Registry:**

Permanent Court of Arbitration

The Hague, 17 September 2007

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— Ambassador Elisabeth Harper, Director General, Ministry of Foreign Affairs
— Mr. Keith George, Head, Frontiers Division, Ministry of Foreign Affairs
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MAPS*



* Secretariat note: the maps are located in the front pocket of this volume.

## Chapter I. Procedural History

1. By its Notification and Statement of Claim dated 24 February 2004, Guyana initiated arbitration proceedings concerning the delimitation of its maritime boundary with Suriname, and concerning alleged breaches of international law by Suriname in disputed maritime territory. Guyana has brought these proceedings pursuant to Articles 286 and 287 of the 1982 United Nations Convention on the Law of the Sea (the "Convention") and in accordance with Annex VII to the Convention. Guyana and Suriname (the "Parties") ratified the Convention on 16 November 1993 and 9 July 1998, respectively.

2. In its Notification and Statement of Claim, Guyana stated that the Parties are deemed to have accepted arbitration in accordance with Annex VII of the Convention by operation of Article 287(3) of the Convention. Guyana noted that neither Party had made a declaration pursuant to Article 287(1) of the Convention regarding their choice of compulsory procedures, and that neither Party had made a declaration pursuant to Article 298 regarding optional exceptions to the applicability of the compulsory procedures provided for in Section 2.

3. In its Notification and Statement of Claim, Guyana appointed Professor Thomas Franck as a member of the Arbitral Tribunal in accordance with Article 3(b) of Annex VII. In its 23 March 2004 "Notification under Annex VII, Article 3(c) of UNCLOS Regarding Appointment to the Arbitral Tribunal with Reservation", Suriname appointed Professor Hans Smit in accordance with Article 3(c) of Annex VII, but reserved its right "to present its views with regard to jurisdiction and any other preliminary matters to the full Arbitral Tribunal when it is constituted".

4. By joint letter to the Secretary-General of the Permanent Court of Arbitration ("PCA") dated 15 June 2004, the Parties noted that they had agreed to the appointment of the remaining three members of the Tribunal in accordance with Article 3(d) of Annex VII, being:

H.E. Judge L. Dolliver M. Nelson (President);

Dr. Allan Philip; and

Dr. Kamal Hossain.

5. In their 15 June 2004 joint letter to the Secretary-General of the PCA, the Parties also requested that the PCA serve as Registry to the Tribunal.

6. On 16 June 2004, the Secretary-General of the PCA responded that the PCA was willing to serve as Registry for the proceedings. Ms. Bette Shifman was appointed to serve as Registrar with Mr. Dane Ratliff acting as assistant. Ms. Shifman was subsequently replaced by Ms. Anne Joyce, who was in turn replaced by Mr. Brooks W. Daly.

7. On 30 June 2004, the Parties sent draft Rules of Procedure for the conduct of the proceedings to the Tribunal for consideration at a procedural meeting to be held on 30 July 2004 in London.

8. At a procedural meeting held on 30 July 2004 in London, the Tribunal adopted its Rules of Procedure and Terms of Appointment with the Parties' consent. The Rules of Procedure specified that Guyana should submit its Memorial on or before 15 February 2005, Suriname should submit its Counter-Memorial on or before 1 October 2005, Guyana could submit a Reply on or before 1 March 2006, and that Suriname could submit a Rejoinder on or before 1 August 2006.

9. On 3 September 2004, Dr. Allan Philip tendered his resignation. Dr. Philip died later that same month. The Tribunal regrets the loss of his commendable service.

10. In a letter dated 3 September 2004, the President of the Tribunal asked the Parties to attempt to agree on a replacement for Dr. Philip in accordance with Article 6(1)(b) of the Tribunal's Rules of Procedure and Article 3(d) of Annex VII to the Convention.

11. In a joint letter dated 29 September 2004, the Parties informed the Tribunal that they had agreed that hearings should be held in Washington, D.C., at the headquarters of the Organization of the American States ("OAS").

12. In a further joint letter dated 30 September 2004, the Parties informed the Tribunal that they had not been able to agree on a substitute arbitrator for Dr. Philip and requested the Arbitral Tribunal to select the substitute arbitrator in accordance with Article 6(b) of the Tribunal's Rules of Procedure.

13. In its letter to the President dated 1 October 2004, Guyana set out its views on the replacement procedure for Dr. Philip, and, in its letter to the President dated 6 October 2004, Suriname did the same.

14. In a letter to the Parties dated 27 October 2004, the President of the Tribunal communicated the Tribunal's selection of Professor Ivan Shearer as substitute arbitrator for Dr. Philip in accordance with Article 6(1)(b) of its Rules of Procedure.

15. Guyana, in its letter to the President dated 28 October 2004, and Suriname, in its letter to the President dated 29 October 2004, indicated their acceptance of Professor Shearer as substitute arbitrator for Dr. Philip.

16. In a letter to the President dated 4 November 2004, Guyana stated that Suriname had objected to Guyana's access to specific files located in the archives of The Netherlands Ministry of Foreign Affairs, and reserved its right to petition the Tribunal to require Suriname to withdraw its objection to Guyana having access to those files.

17. In a letter to the President dated 22 December 2004, Guyana set out its views on Suriname's refusal of access to certain files in the archives of The Netherlands Ministry of Foreign Affairs, and requested the Tribunal to "require Suriname to take all steps necessary to enable the parties to have

access to historical materials on an equal basis and immediately to advise The Netherlands that it withdraws its objection of 7 December [2004]".

18. In its letter to the President dated 27 December 2004, Suriname responded to Guyana's 22 December 2004 letter, stating that "this is not a case of 'equal access' to public records. The records in question are not public", and, "[t]hey cover many sensitive subjects including national security matters and matters pertaining to Suriname's other territorial disputes with Guyana". Further, Suriname stated that access to the files was restricted under a general policy of The Netherlands regarding records relevant to ongoing international boundary disputes.

19. Guyana responded by letter to the President dated 4 January 2005 and requested that the Tribunal "adopt an Order requiring both parties to cooperate and to refrain from interference with each other's attempts to obtain documents or other information from non-parties; and, in the case of any interference already consummated, to take all necessary action to undo the effects of such interference".

20. In a letter to the Parties dated 17 January 2005, the President solicited Suriname's comments on Guyana's letter dated 4 January 2005 and emphasized to both Parties the importance of equality of arms and good faith cooperation in international legal proceedings, recalling that these principles are laid down in the instruments governing the arbitration, including Articles 5 and 6 of Annex VII to the Convention, and Articles 7(1) and (2) of the Tribunal's own Rules of Procedure.

21. In its letter to the President dated 18 January 2005, Suriname requested an extension to the deadline set for its response to the President's 17 January 2005 letter, from 21 January 2005 to 24 January 2005. This request was granted.

22. In its letter to the President dated 24 January 2005, Guyana requested an extension of two weeks for the submission of its Memorial, from 15 February 2005 until 1 March 2005, which the Tribunal granted.

23. In its letter to the President dated 26 January 2005, Suriname assented to Guyana's request for an extension noting a reciprocal offer made by Guyana to agree to an extension of two weeks to the deadline for submission of the Counter-Memorial to 1 November 2005. The Tribunal consented to the extension.

24. On 27 January 2005, Suriname responded to the Tribunal by providing comments on Guyana's letter dated 4 January 2005, observing, *inter alia*, that some of the files in question are "unrelated to the maritime boundary dispute" and involve third party States.

25. In a letter to the President dated 1 February 2005, Guyana reiterated its request for an Order in the terms set out in its letter of 4 January 2005.

26. On 7 February 2005, the President invited Guyana to submit a "list of the specific documents and information in the archives of The Netherlands

Ministry of Foreign Affairs it is seeking to access, indicating in general terms the relevance of each item solely as it pertains to the maritime boundary dispute before this Arbitral Tribunal", and invited Suriname to "communicate . . . Suriname's position as to whether the specific items sought by Guyana in that list should be released to Guyana, and if not, on what basis they should be withheld" following receipt of the list.

27. In a letter to the President dated 14 February 2005, Guyana responded to the Tribunal's letter dated 7 February 2005 by providing a list of documents to which it sought access at The Netherlands Ministry of Foreign Affairs, and a list of subjects those documents "consist of, discuss or relate to, . . . all of which self-evidently pertain directly to the maritime boundary dispute presently before the [T]ribunal".

28. In a letter to the President dated 21 February 2005, Suriname stated that "Guyana has not identified a single specific document that it needs nor has it even attempted to explain why it needs the documents in question", and that "Suriname's position is that none of the items on Guyana's list . . . is a file or document that Suriname has an obligation under international law to make available to Guyana".

29. On 22 February 2005, Guyana submitted its Memorial.

30. In a letter to the President dated 2 March 2005, Guyana stated that "since access to [the] files was denied, Guyana [was] not in a position to identify the documents with any greater precision", and suggested modalities by which the Tribunal might examine the documents in question.

31. In a letter to the President dated 9 March 2005, Suriname stated that Guyana had not complied with the Tribunal's 7 February 2005 request, and that Guyana's request should "be denied or at least held in abeyance until after Suriname's Counter-Memorial is submitted".

32. In a letter to the President dated 28 March 2005, Guyana argued that it required "access to the documents at the earliest possible time, so as to allow sufficient time for their precise translation from Dutch to English, careful review of their contents, and their potential use in connection with the submission of Guyana's Reply", adding that "[d]ue to the shortness of time . . . Guyana requires access to the documents before Suriname's Counter-Memorial is filed".

33. In a letter to the President dated 30 March 2005, Suriname noted that Guyana's letter was "highly inappropriate" and that "[t]his matter has been fully discussed".

34. In a letter to the Parties dated 2 May 2005, the President invited the Parties to set out their positions in full concerning Guyana's request for an Order and the Tribunal's power to make such an Order, and established 6 and 7 July 2005 as dates for a hearing on the matter in The Hague.

35. On 4 May 2005, Suriname wrote to the President, to note that it would be likely to file Preliminary Objections, to request an oral hearing on any

such Preliminary Objections should they be filed, and to request that the deadline for submissions on access to documents be extended from 23 May 2005 to 13 June 2005.

36. By letter dated 6 May 2005, the President extended the deadline for submissions on access to documents from 23 May 2005 to 13 June 2005.

37. In a letter dated 6 May 2005, Guyana set out its views on the proposed hearing dates and noted that it would oppose any proposal to bifurcate the proceedings to hold a separate hearing on Suriname's Preliminary Objections.

38. On 13 May 2005, Suriname indicated that it would file Preliminary Objections on jurisdiction and admissibility pursuant to Article 10(2)(a) of the Tribunal's Rules of Procedure, and requested suspension of proceedings on the merits and an oral hearing on its Preliminary Objections.

39. In a letter to the President dated 17 May 2005, Guyana opposed Suriname's proposals as to a separate pleading schedule and an oral hearing to decide the issues raised in Suriname's Preliminary Objections.

40. On 20 May 2005, Suriname filed Preliminary Objections on jurisdiction and admissibility.

41. In a letter to the Parties dated 24 May 2005, the President invited submissions by 10 June 2005 on "whether or not the preliminary objections should be dealt with as a preliminary matter and the proceedings suspended until these objections have been ruled on" and noted that the Tribunal would on the basis of those views determine whether to reserve time at the hearing on 7 and 8 July 2005 to discuss the procedure for dealing with Suriname's Preliminary Objections.

42. Suriname, in its letter to the President dated 26 May 2005, submitted its views in response to the President's letter to the Parties dated 24 May 2005, and, *inter alia*, requested that its Preliminary Objections "be dealt with as a preliminary matter and that the proceedings on the merits remain suspended until there has been a decision on those Preliminary Objections".

43. In a letter to the President dated 10 June 2005, Guyana responded to the President's 24 May 2005 request, submitting, *inter alia*, that none of Suriname's Preliminary Objections could "be said to be preliminary (or exclusively preliminary) in character, and none [could] properly be said to go exclusively to the question of the Tribunal's jurisdiction". Guyana submitted that the proceedings should not be suspended, and that consideration of Suriname's Preliminary Objections should be joined to the merits.

44. On 13 June 2005, the Parties submitted further views on Guyana's application for an Order requesting access to documents in the archives of The Netherlands Ministry of Foreign Affairs.

45. By letter dated 23 June 2005, the President of the Tribunal invited the Parties to a meeting in The Hague on 7 and 8 July 2005, at which each Party

would 1) "be given [the opportunity] to present its case on access to documents held in [The Netherlands' National Archives]", and 2) be given an opportunity to present its arguments on whether Suriname's Preliminary Objections should be "ruled on as a preliminary issue, or whether a ruling on these Objections should be made in the Tribunal's final [a]ward". The President informed the Parties of the Tribunal's intention to issue an Order disposing of these matters subsequent to the meeting.

46. The Tribunal met with the Parties in The Hague on 7 and 8 July 2005 and heard the Parties' arguments on the issues identified in the President's 23 June 2005 letter.

47. On 18 July 2005, the Tribunal issued Order No. 1 entitled "Access to Documents", which sets out in operative part:

> **The Arbitral Tribunal unanimously decides and orders:**
>
> 1. the Tribunal shall not consider any document taken from a file in the archives of The Netherlands to which Guyana has been denied access;
>
> 2. Suriname shall take all measures within its power to ensure that Guyana have timely access to the entire file from which any such document already introduced or to be introduced into evidence was taken, either by withdrawing its objections made to The Netherlands government, or, if this proves unsuccessful, by providing such file directly to Guyana;
>
> 3. each Party may request the other Party, through the Tribunal, to disclose relevant files or documents, identified with reasonable specificity, that are in the possession or under the control of the other Party;
>
> 4. the Tribunal shall appoint, pursuant to article 11(3) of the Tribunal's Rules of Procedure and in consultation with the Parties, an independent expert competent in both the Dutch and English languages;
>
> 5. the expert shall, at the request of the Party producing the file or document, review any proposal by that Party to remove or redact parts of that file or document [as each Party may have a legitimate interest in the non-disclosure of information that does not relate to the present dispute, or which, for other valid reasons, should be regarded as privileged or confidential].
>
> 6. any disputes between the Parties concerning a Party's failure or refusal to produce, in whole or in part, any document or file referred to in paragraphs 1 and 2, shall be resolved in a timely manner by the expert referred to in paragraph 4 of this Order;
>
> 7. as provided in article 11(4) of the Tribunal's Rules of Procedure, the Parties shall cooperate fully with the expert appointed pursuant to paragraph 4 of this Order.

48. On 18 July 2005, the Tribunal also issued Order No. 2 entitled "Preliminary Objections", which sets out in operative part:

> **The Arbitral Tribunal unanimously decides and orders:**
>
> 1. under article 10 of the Tribunal's Rules of Procedure, the submission of Suriname's Preliminary Objections did not have the effect of suspending these proceedings;
>
> 2. because the facts and arguments in support of Suriname's submissions in its Preliminary Objections are in significant measure the same as the facts and arguments on which the merits of the case depend, and the objections are not of an exclusively preliminary character, the Tribunal does not consider it appropriate to rule on the Preliminary Objections at this stage;
>
> 3. having ascertained the views of the parties, the Tribunal shall, in accordance with article 10(3) of the Tribunal's Rules of Procedure, rule on Suriname's Preliminary Objections to jurisdiction and admissibility in its final award;
>
> 4. after the Parties' written submissions have been completed, the Tribunal shall, in consultation with the Parties, determine the further procedural modalities for hearing the Parties' arguments on Suriname's Preliminary Objections in conjunction with the hearing on the merits provided for in article 12 of the Tribunal's Rules of Procedure.

49. By letter to the President dated 20 July 2005, Guyana requested certain "relevant files" in the possession or under the control of Suriname, pursuant to the Tribunal's Order No. 1.

50. On 25 July 2005, Suriname asked the Tribunal to reject Guyana's request for access to documents made on 20 July 2005, but stated that it would comply with its obligations under paragraph 2 of Order No. 1.

51. Suriname wrote to the President again on 29 July 2005, setting out the manner in which it intended to implement paragraph 2 of Order No. 1, and agreed to give Guyana access to certain files and documents, provided they did not exclusively concern the maritime boundary between Suriname and French Guiana or exclusively concern the land boundary dispute between British Guiana and Suriname.

52. On 2 August 2005, Guyana renewed its request, by letter to the President, for disclosure of the files it had identified on 20 July 2005 pursuant to paragraph 3 of Order No. 1 and set out its reasons why Suriname's proposal for the handling of File 169A would violate paragraph 2 of Order No. 1.

53. On 8 August 2005, Suriname clarified by letter to the President that it interpreted paragraph 3 of Order No. 1 to mean that "if Suriname chooses not to present any documents from The Netherlands files, the paragraph 2 procedure does not apply and Guyana will have no right of access to those files unless it can make a showing of specific need for specific documents,

beyond a general claim of 'relevance' ", and asked the Tribunal to confirm that Suriname's reading was correct. Suriname also stated that documents concerning the boundary between French Guiana and Suriname "have nothing to do with the case before the Tribunal", and that, if the independent expert was expected to make determinations of relevance on his own, it would be appropriate for the Parties to ask the Tribunal to review those determinations. Suriname agreed nonetheless to arrange for Files 161 and 169A to be submitted to the independent expert.

54. In its letter dated 12 August 2005, Guyana explained its view that the role of the independent expert was "to review any proposal by a Party to remove or redact a file or document, and to resolve in a timely manner any dispute between the Parties over the failure or refusal of a Party to produce, in whole or in part, any such file or document". Guyana stated that it was "ready and willing" to disclose documents to Suriname in accordance with paragraph 3 of Order No. 1.

55. By an e-mail dated 23 August 2005, the President circulated draft terms of reference for the independent expert, inviting the Parties' comments.

56. On 25 August 2005, Guyana set out its comments by letter to the President on the role of the independent expert and on the draft terms of reference.

57. In a letter to the President dated 30 August 2005, Suriname commented on the role of the independent expert and on the draft terms of reference, reiterating its request for interpretation of Order No. 1.

58. By letter to the President dated 31 August 2005, Guyana expressed its concern that the expert should act expeditiously regarding Guyana's request for access to documents.

59. In his e-mail to the Parties dated 13 September 2005, the President proposed to appoint Professor Hans van Houtte as the independent expert pursuant to paragraph 4 of Order No. 1.

60. On 16 September 2005, both Parties wrote to the President endorsing the appointment of Professor van Houtte as the independent expert pursuant to paragraph 4 of Order No. 1.

61. Suriname notified the Tribunal, by letter to the President dated 4 October 2005, that it would be represented by a new Agent, the Honourable L.I. Kraag-Keteldijk, Minister of Foreign Affairs for the Republic of Suriname, who replaced the Honourable Maria E. Levens.

62. On 12 October 2005, the Tribunal issued Order No. 3, the operative part of which provides as follows:

> **The Arbitral Tribunal unanimously orders:**
>
> 1. Prof. Hans van Houtte is appointed to serve the Arbitral Tribunal as the independent expert pursuant to paragraph 4 of Order No. 1;

2. the attached terms of reference for the independent expert appointed pursuant to paragraph 4 of Order No. 1 are adopted; and

3. the Arbitral Tribunal shall finally resolve any disputes that the independent expert cannot resolve pursuant to paragraph 2.12 of the terms of reference.

***

## Independent Expert's Terms of Reference in accordance with Tribunal Order No. 1

### 1. Background

1.0. In the context of the arbitration before the Arbitral Tribunal concerning the delimitation of the maritime boundary between Suriname and Guyana ("the Parties"), the Parties are in dispute concerning access to certain documents in the archives of The Netherlands Ministry of Foreign Affairs. The Tribunal's "Order No. 1 of 18 July 2005, Access to Documents" ("the Order") summarizes the arguments of the Parties regarding "Guyana's application for an Order requesting access to documents in The Netherlands' archives, and is attached hereto as "Annex 1".

1.1. Paragraph 4 of the Order provides:

*the Tribunal shall appoint, pursuant to article 11(3) of the Tribunal's Rules of Procedure and in consultation with the Parties, an independent expert competent in both the Dutch and English languages.*

1.2. The Expert has signed a confidentiality undertaking and declared that he "will, as directed by the Arbitral Tribunal, perform his duties honourably and faithfully, impartially and conscientiously, and will refrain from divulging or using, outside the context of the tasks to be performed by him in this arbitration, any documents, files and information which may come to his knowledge in the course of the performance of his task."

1.3. The Parties are to cooperate with the Expert pursuant to paragraph 7 of the Order, which reads:

*as provided in article 11(4) of the Tribunal's Rules of Procedure, the Parties shall cooperate fully with the expert referred to in paragraph 4 of this Order.*

1.4. The Expert or the Tribunal may terminate this agreement at any time by providing notice of intent to terminate one month before the termination should become effective.

1.5. The Tribunal reserves the right to modify these Terms of Reference from time to time as it determines necessary.

## 2. Scope

*General*

2.0. The Expert shall consult the Tribunal when in doubt regarding questions of procedure. The Expert shall follow such guidelines for determining relevance as may be communicated to him by the Tribunal, including attempting to distinguish between files and documents that relate exclusively to the land boundary between the Parties, other disputes or boundaries with third Parties, and those that relate to the maritime boundary between the Parties to this dispute. In light of the Parties' arguments, and in accordance with the Rules of Procedure of the Arbitral Tribunal, the United Nations Convention on the Law of the Sea ("UNCLOS"), and the relevant Tribunal Orders, the Expert shall not, in carrying out any tasks associated with this section 2, be bound by strict rules of evidence and may evaluate documents or files in any form permitted by the Arbitral Tribunal. The Tribunal, in its final award, will decide on the relevance, cogency and weight to be given to any files or documents, or parts thereof, ultimately disclosed and relied upon by the Parties in their pleadings.

*Procedure to be followed pursuant to paragraph 5 of the Order 12*

2.1. Paragraph 5 of the Order provides:

*the expert shall, at the request of the Party producing the file or document, review any proposal by that Party to remove or redact parts of that file or document for the reasons set forth under (c) in the last preambular paragraph of this Order.*

2.2. Sub-paragraph (c) of the last preambular paragraph of the Order provides:

*each Party may nevertheless have a legitimate interest in the non-disclosure of information that does not relate to the present dispute, or which, for other valid reasons, should be regarded as privileged and confidential.*

2.3. In accordance with paragraphs 2, 3 and 5 of the Order, where a Party has invoked paragraph 5 of the Order, and produced a file or document, but proposed removal or redaction of it for the reasons set forth in sub-paragraph (c) of the last preambular paragraph of the Order, the Party proposing removal or redaction shall produce the entire un-redacted file or document for the Expert's inspection. After having satisfied himself that the file or document before him is complete, the Expert may invite the Party seeking to redact or remove the files or documents, to set out, and/or elaborate on reasons already given, why those documents or files (or parts thereof) should be removed or redacted. Where the Expert so invites the Party seeking to redact or remove files or documents, he shall thereafter invite the Party seeking access to the documents or files, to comment on the reasons given by the Party seeking to withhold the documents or files.

2.4. The Expert shall produce a report on his findings, preserving to the fullest extent possible the confidential nature of the files or documents at issue, and setting out the reasons for his conclusions. The report shall be communicated to the Parties and the Tribunal. The Tribunal will consider the report and determine whether redaction or removal is appropriate.

*Procedure to be followed pursuant to paragraph 3 of the Order*

2.5. Paragraph 3 of the Order provides:

*each Party may request the other Party, through the Tribunal, to disclose relevant files or documents, identified with reasonable specificity, that are in the possession or under the control of the other Party.*

2.6. The Tribunal may engage the Expert to review a request made pursuant to paragraph 3 of the Order, in order to aid the Tribunal in its determination of whether the files or documents which are the subject of the request, are indeed *prima facie* relevant, and have been identified with reasonable specificity. To that end, the Tribunal may ask the Party in possession or control of the files or documents to produce them to the Expert for his inspection.

2.7. The Expert shall produce a report on his findings, preserving to the fullest extent possible the confidential nature of the files or documents at issue, and setting out the reasons for his conclusions. The report shall be communicated to the Parties and the Tribunal. The Tribunal will consider the report and determine whether access is to be granted or denied.

*Procedure to be followed pursuant to paragraph 6 of the Order*

2.8. Paragraph 6 of the Order provides:

*any disputes between the Parties concerning a Party's failure or refusal to produce, in whole or in part, any document or file referred to in paragraphs 1 and 2, shall be resolved in a timely manner by the expert referred to in paragraph 4 of this Order.*

2.9. The Expert shall be free to propose his own solution to resolve a dispute between the Parties pursuant to paragraph 6 of the Order. The Expert shall at every stage afford both Parties an opportunity to set out their position, and shall fully take into account the arguments of the Parties.

2.10. The Expert shall keep the Tribunal apprised of his progress in resolving a dispute pursuant to paragraph 6 of the Order. The Expert shall consult the Tribunal regarding his proposed solution to such a dispute, before such solution is communicated to the Parties.

2.11. Once the Tribunal has acted upon the Expert's proposed solution, it shall be communicated to the Parties.

2.12. Where the Expert determines that a dispute cannot be resolved in a timely manner by him, he shall refer it to the Tribunal.

63. On 12 October 2005, the Tribunal also issued Order No. 4, the operative part of which provides:

**The Arbitral Tribunal unanimously orders:**

1. (a) Suriname shall cooperate fully with the independent expert appointed pursuant to The Tribunal's Order No. 3, and facilitate his immediate access to the entire File 169A and entire File 161 in The Netherlands' Foreign Ministry archives ensuring that such access is granted within two weeks from the date of this Order, indicating which documents, and on what basis, it wishes to remove or redact from those files before they are to be given to Guyana; and
   (b) the independent expert shall, in accordance with paragraph 5 of Order No. 1 and the Terms of Reference, review Suriname's proposal(s) for removal or redaction of documents mentioned above.
2. (a) The independent expert shall review Guyana's request in its letter dated 20 July 2005 for access to documents pursuant to paragraph 3 of Order No. 1, in order to determine whether those files have been identified with reasonable specificity and appear relevant; and
   (b) Suriname shall facilitate the independent expert's timely access to the files identified in Guyana's letter dated 20 July 2005, to the extent the expert may deem such access necessary to determine reasonable specificity and relevance in accordance with paragraph 3 of Order No. 1.
3. The independent expert shall endeavour to report on his findings as soon as possible.

64. In a letter dated 14 October 2005, Suriname informed the President that it had requested The Netherlands Ministry of Foreign Affairs to provide the independent expert access to Files 161 and 169A, pursuant to Order No. 4.

65. On 24 October 2005, Suriname sent a Memorandum to the President proposing which documents in Files 161 and 169A Guyana could be given access to, and which should be withheld, but it did not disclose that Memorandum to Guyana on grounds that its contents were confidential.

66. By letter dated 27 October 2005, Guyana objected to Suriname not disclosing its 24 October 2005 Memorandum to Guyana and proposed a method of disclosure to preserve the confidentiality of the documents.

67. On 28 October 2005, Guyana sent a letter to the independent expert providing its views "in connection with paragraph 2 (a)" of Order No. 4, as to which documents and files the independent expert should review and why.

68. On 31 October 2005, Suriname filed its Counter-Memorial, dated 1 November 2005, with the PCA Registry.

69. By letter to the President dated 2 November 2005, Suriname responded to Guyana's letter of 27 October 2005, asking that the Tribunal dis-

regard Guyana's objection and requesting that the independent expert review all the documents being withheld from Guyana in The Netherlands Ministry of Foreign Affairs archives.

70. By letter to the President dated 4 November 2005, Guyana responded to Suriname's letter dated 2 November 2005, submitting that the Terms of Reference allow for disclosure of Suriname's Memorandum to Guyana.

71. On 8 November 2005, Suriname wrote to the President in response to Guyana's 4 November 2005 letter and reiterated its objections to disclosure to Guyana of Suriname's Memorandum or the files in The Netherlands Ministry of Foreign Affairs archives before the independent expert had made his determination in respect of them.

72. On 10 November 2005, Guyana wrote to Suriname agreeing to disclose to Suriname, in accordance with Order No. 1, documents that Suriname had requested in a letter to Guyana dated 8 November 2005, which had not been copied to the Tribunal.

73. On 10 November 2005, Guyana wrote to the President in response to Suriname's letter of 8 November 2005 addressed to the President and reaffirmed the views it had set out in its letters dated 4 November 2005 and 28 October 2005.

74. In a letter to the Parties dated 28 November 2005, the President rejected Guyana's request for disclosure of Suriname's 24 October 2005 Memorandum, but allowed Guyana's request made in its letter dated 28 October 2005 that the independent expert inspect certain files in The Netherlands Ministry of Foreign Affairs archives.

75. On 12 December 2005, Guyana wrote to Professor van Houtte asking to "be afforded a timely opportunity to present its comments pursuant to paragraph 2.3 [of the Terms of Reference] before any decisions relating to disclosure or withholding of documents are made".

76. On 18 January 2006, following an examination of the files in question, the independent expert submitted a report of his findings and recommendations to the Tribunal.

77. Guyana set out its views in a letter to Suriname dated 18 January 2006 on documents it had been requested to disclose to Suriname and requested certain further documents from Suriname. On 24 January 2006, Suriname requested further documents from Guyana by letter.

78. At the President's request, the Registrar provided the Parties with a copy of the independent expert's report on 26 January 2006, and invited comments on it by 31 January 2006.

79. On 31 January 2006, Suriname sent two letters to the President concurring with several of the independent expert's findings and recommendations but objecting to the disclosure of a specific document in File 161. Suriname disagreed with the independent expert's finding that its position and

practice with regard to its eastern maritime boundary "might be relevant" to the present dispute concerning Suriname's western maritime boundary.

80. In a letter to the President dated 31 January 2006, Guyana concurred with the independent expert's findings and requested that the Tribunal immediately adopt his recommendation "to the effect that this material should be disclosed to the Tribunal and Guyana".

81. Suriname and Guyana wrote to the President on 1 February 2006 and 2 February 2006, respectively, further elaborating their views as to the relevance of documents concerning Suriname's eastern maritime boundary.

82. The Parties each wrote to the President on 3 February 2006, setting out their proposals for the scheduling of the oral hearing.

83. In a letter to Suriname dated 10 February 2006, Guyana responded to Suriname's requests for documents made on 8 November 2005 and 24 January 2006 and reiterated its own requests for documents from Suriname.

84. On 16 February 2006, the Tribunal issued Order No. 5, the operative part of which provides:

> **The Arbitral Tribunal unanimously orders:**
>
> 1. The recommendations of the independent expert in Sections 5 and 6 of his report (concerning documents in Files 161 and 169A) are hereby adopted, and Suriname is hereby requested to grant Guyana immediate access to the files in accordance with those recommendations;
>
> 2. The documents compiled from Files 162, 311, 2022, and 2949 and referred to by the independent expert, in Section 7 of his report, shall be sent immediately to Suriname for comment and possible redaction;
>
> 3. Suriname, on an expedited basis and in any case no later than 22 February 2006, shall transmit directly to Guyana any documents that it does not propose to redact or withhold, and shall indicate to the independent expert any proposals for redaction or withholding and the reasons therefor.

85. Suriname wrote to Guyana on 17 February 2006, responding to Guyana's letter dated 18 January 2006 and disclosing some of the requested documents. Suriname produced further requested documents on 21 February 2006.

86. Suriname produced certain documents pursuant to the Tribunal's Order No. 5 under cover of two letters to Guyana dated 22 February 2006, and noted that it would submit others to the independent expert for possible redaction "in accordance with paragraph 3 of the Tribunal's Order No. 5".

87. On 22 February 2006, Suriname provided the Registrar with documents that it wished to have redacted by the independent expert, which were in turn forwarded to the independent expert on 24 February 2006.

88. In a letter to the President dated 24 February 2006, Guyana noted that, according to its understanding of the schedule of pleadings, Guyana's Reply would be due on 1 April 2006 and Suriname's Rejoinder on 1 September 2006, and requested confirmation from the Tribunal as to these dates.

89. On 27 February 2006, Suriname provided a "Memorandum for the independent expert setting forth Suriname's reasons for the proposed redactions in the documents that were sent to you by letter dated 22 February 2006" under cover of a letter to the Registrar. This Memorandum was not sent to the Co-Agent for Guyana in accordance with the Tribunal's decision in its letter dated 28 November 2005.

90. In a letter to the President dated 27 February 2006, Suriname stated that it had no objection to Guyana's understanding of the pleading schedule and noted that, "except for the eighteen pages containing Suriname's proposed redactions that were sent to you on 22 February 2006, all of the remaining documents that Suriname had been ordered to produce to Guyana have now been produced".

91. The independent expert set out his recommendations on Suriname's 22 February 2006 proposals for redaction in a letter to the President dated 28 February 2006.

92. On instruction of the President, the Parties were informed by the Registry on 1 March 2006 that their understanding of the pleading schedule was correct, thereby confirming the due date for Guyana's Reply as 1 April 2006 and for Suriname's Rejoinder as 1 September 2006.

93. In a letter to Guyana dated 2 March 2006, Suriname requested production of any further documents that might pertain to Suriname's 8 November 2005 request for documents.

94. On 6 March 2006, Guyana confirmed by letter that it had produced all documents requested of it.

95. The President wrote to the Parties on 6 March 2006, noting his full agreement with the independent expert's recommendations, and instructing Suriname to implement those recommendations "without delay".

96. On 6 March 2006, Suriname requested by e-mail certain clarifications from the independent expert regarding his recommendations.

97. Suriname disclosed documents, under cover of a letter to Guyana dated 7 March 2006, in accordance with the decision of the Tribunal of 6 March 2006, but withheld others pending clarification from the independent expert.

98. Suriname disclosed further documents, under cover of a letter to Guyana dated 10 March 2006, in accordance with clarifications received from the independent expert.

99. Suriname provided the independent expert with the full set of documents it had disclosed to Guyana from Files 161 and 169A under cover of a letter to the independent expert dated 22 March 2006.

100. Guyana filed its Reply dated 1 April 2006 with the Registry on 31 March 2006.

101. The Registrar wrote to the Parties on 4 April 2006, to communicate the Tribunal's proposal that the oral hearings be held in Washington, D.C. from 7 to 20 December 2006 and asking the Parties to confirm their availability on those dates.

102. On 4 April 2006, the Registrar forwarded a letter to Suriname from the independent expert dated 30 March 2006 requesting Suriname to "indicate the references for the enclosed documents, which [the independent expert] was unable to find in the bundle [he] received from [Suriname] of documents submitted to Guyana".

103. In a letter to the Parties dated 6 April 2006, the Registrar confirmed that the oral hearings would be held at the headquarters of the OAS from 7 to 20 December 2006.

104. Suriname wrote to Guyana on 14 April 2006 proposing a schedule for the oral hearings, and Guyana proposed a different schedule in a letter to Suriname dated 28 April 2006.

105. Suriname noted its disagreement with Guyana's proposed schedule in a letter to Guyana dated 28 April 2006.

106. On 2 May 2006, Guyana wrote to Suriname modifying its proposed schedule in response to Suriname's letter of 28 April 2006.

107. Suriname filed its Rejoinder dated 1 September 2006 with the Registry on 30 August 2006.

108. On 27 November 2006, after consultation with the Parties, the Tribunal issued Order No. 6 appointing a hydrographer, Mr. David Gray (the "Hydrographer"), as an expert to assist the Tribunal pursuant to Article 11(3) of the Tribunal's Rules of Procedure. The operative part of Order No. 6 provides as follows:

> **The Arbitral Tribunal unanimously orders:**
>
> Mr. David H. Gray is appointed to serve the Arbitral Tribunal as a hydrographic expert pursuant to Article 11(*3*) of the Tribunal's Rules of Procedure;
>
> the attached terms of reference for the hydrographic expert are adopted.

***

## Hydrographer's Terms of Reference

### In accordance with Article 11(3) of the Rules of Procedure

*1. Background*

1.1. As set out in Guyana's "Statement of the Claim and the Grounds on Which it is Based," dated 24 February 2004, Guyana has initiated an arbitration pursuant to Articles 286 and 287 of the 1982 United Nations Convention on the Law of the Sea (the "Convention") and Article 1 of Annex VII to the Convention with regard to a dispute concerning the delimitation of its maritime boundary with Suriname.

1.2. The Parties to the Arbitration are:

(a) Guyana, represented by H.E. Samuel Rudolph Insanally, as Agent, and Sir Shridath Ramphal and Mr. Paul S. Reichler, as Co-Agents.

(b) Suriname, represented by the H.E. Lygia L.I. Kraag-Keteldijk, as Agent, and Mr. Paul C. Saunders and Mr. Hans Lim A Po, as Co-Agents.

1.3. Addresses for the Agents and Co-Agents are on file with the Permanent Court of Arbitration ("PCA"), which is serving as Registry for the Arbitration.

1.4. The Arbitral Tribunal, which has been validly constituted in accordance with Article 3 of Annex VII to the Convention, is composed of:

H.E. Judge L. Dolliver M. Nelson (*President*)

Dr. Kamal Hossain

Professor Thomas M. Franck

Professor Ivan Shearer

Professor Hans Smit

1.5 Rules of Procedure for the Arbitration were adopted on 30 July 2004. Written pleadings have been submitted by the Parties in accordance with the Rules of Procedure, as amended. Oral hearings are to be held from 7 December 2006 to 20 December 2006 in Washington D.C.

1.6. The Expert or the Tribunal may terminate this agreement at any time by providing written notice of intent to terminate one month before the termination should become effective.

1.7. The Tribunal reserves the right to modify these Terms of Reference from time to time as it determines necessary.

*2. The Expert*

Pursuant to Article 11(*3*) of the Rules of Procedure, Mr. David H. Gray (the "Expert"), hydrographer, shall serve as an expert to assist the Arbitral Tribunal in accordance with these Terms of Reference.

2.2. The Expert hereby declares that he will, as directed by the Arbitral Tribunal, perform his duties honourably and faithfully, impartially and conscientiously, and will refrain from divulging or using, outside the context of the tasks to be performed by him in this arbitration, any documents, files and information, including all written or oral pleadings, evidence submitted in the Arbitration, verbatim transcripts of meetings and hearings, or the deliberations of the Arbitral Tribunal, which may come to his knowledge in the course of the performance of his task.

*3. Scope*

3.1. The Expert shall assist the Arbitral Tribunal, should it determine that it has jurisdiction to do so, in the drawing and explanation of the maritime boundary line or lines in a technically precise manner.

3.2. The Expert will make himself available to assist the Arbitral Tribunal as required by it in the preparation of the Award.

3.3. The Expert shall perform his duties according to international hydrographic and geodetic standards.

109. Oral hearings were held in Washington, D.C., at the headquarters of the OAS, from 7 to 20 December 2006.

110. The Hydrographer, on 20 December 2006, requested the following in writing:

> [T]hat the Parties provide the position of Marker "B", and other points in this 1960 survey within the geographic area of the mouth of the Corentyne River, their geodetic datum, and the WGS-84 datum position of these points if they have been determined by re-computation of the 1960 survey.

111. Guyana, in a letter dated 28 December 2006, provided World Geodetic System 1984 ("WGS-84") coordinates for Marker "B" obtained from a 2004 GPS Survey conducted at the site of what Guyana claimed to be Marker "B".

112. The Hydrographer, in a communication from the Registrar to the Parties dated 7 January 2007, requested clarification of Guyana's response to his 20 December 2006 request as it appeared that Guyana had provided the WGS-84 coordinates of Marker "A" and not those of Marker "B" and that the coordinates given did not exactly correspond to those of Marker "A" as stated in Guyana's Memorial, paragraph 2.10.

113. Guyana, in a communication dated 10 January 2007, confirmed that it had mistakenly provided coordinates for Marker "A" in its letter dated 28 December 2007 and that those coordinates had been rounded off for the sake of simplicity, and provided WGS-84 coordinates for Marker "B" obtained from a 2004 GPS Survey conducted at the site of what Guyana claimed to be Marker "B".

114. Suriname, in a letter dated 12 January 2007, informed the Tribunal that it had been unable to find any information in response to the Hydrographer's request of 20 December 2006, contested the use of the WGS-84 coordinates for Marker "A" provided in Guyana's Memorial, paragraph 2.10, claiming that it "does not have the ability to verify those coordinates" as Guyana could not provide any evidence as to the discovery or location of Marker "B", and urged the Tribunal to use the astronomical coordinates previously used by both Parties as the WGS-84 coordinate values.

115. Guyana, in a letter dated 19 January 2007, argued that the Tribunal should reject Suriname's proposal to use astronomical coordinates for Marker "A", as these coordinates were inaccurate and represented a difference of more than 411 metres with the WGS-84 coordinates, and claimed that there was no ground to assume that Marker "B" was no longer in its original location and that there was no need for any data in support of its determination of the coordinates of Marker "A".

116. Suriname, in a letter dated 29 January 2007, argued that there was no evidence that what Guyana alleged was Marker "B" was indeed Marker "B" or that what Guyana alleged was Marker "B" was in the location where the 1936 Mixed Boundary Commission ("Mixed Boundary Commission")[1] placed Marker "B", and contended further that a site visit would have no value as it "would not provide any enlightenment on the question of whether the current location of Marker "B" is the same as its original location".

117. Guyana, in a letter dated 13 February 2007, offered further arguments regarding the discovery and location of Marker "B" and evidence in the form of two affidavits.

118. Suriname, in a letter dated 16 February 2007, requested that the Tribunal disregard Guyana's letter dated 13 February 2007 on the grounds that the Parties "have no right to introduce any new material".

119. Guyana, in a letter dated 21 February 2007, argued that "all correspondence concerning the coordinates of Marker 'B' has been proper" as it was submitted in response to a request made by the Hydrographer.

120. The Tribunal, on 12 March 2007, issued Order No. 7, which provided in operative part:

> 1. The correspondence and materials submitted to date by the Parties regarding the discovery and location of Marker "B" were submit-

[1] *See* paras. 137 and 138.

ted in response to the Hydrographer's inquiry of 20 December 2006 and form part of the record in this matter;

2. The Parties shall not make further communications to the Tribunal or Registrar relating to the location of Markers "A" and "B" except after first seeking leave of the Tribunal or upon request of the Tribunal;

3. The Hydrographer shall, after inviting the Parties' representatives to be present, conduct a site visit in Guyana. The modalities for the Hydrographer's site visit shall be established through one or more orders in coming days.

121. The Tribunal issued Order No. 8 on 21 May 2007, which provided in operative part:

1. The Hydrographer's terms of reference for the site visit are to inspect what Guyana alleges to be Marker "B" and the surrounding area, as he deems appropriate, and to gather data relevant to the issues that have arisen as a result of his question to the Parties of 20 December 2006 and the Parties' subsequent correspondence;

2. Unless otherwise agreed with the Hydrographer, the Parties, the Hydrographer, and the Registrar shall travel to the site from Georgetown on the mornings of 31 May and 1 June 2007, returning to Georgetown in the afternoon or evening of each day;

3. As soon as possible, Guyana shall propose a time and place for participants in the site visit to meet in Georgetown on the mornings of 31 May and 1 June for transportation to the site;

4. The Parties' representatives shall cooperate fully with the Hydrographer;

5. Following the site visit, the Hydrographer shall submit a written report to the Tribunal, which shall be shared with the Parties. The Tribunal shall provide the Parties an opportunity to comment on the Hydrographer's report.

122. On 31 May 2007, the Hydrographer conducted a site visit in Guyana, accompanied by the Registrar and the representatives of the Parties.

123. On 4 July 2007, the Hydrographer's "Report on Site Visit" was sent to the Parties, who were invited to provide comments on it.

124. On 24 July 2007, Suriname submitted its comments on the Hydrographer's Report accepting the Hydrographer's conclusions and suggesting the correction of certain typographical errors and the addition of one clarification.

125. On 25 July 2007, Guyana submitted its comments on the Hydrographer's Report, accepting the Hydrographer's conclusions and stating no objection to the changes suggested by Suriname.

126. On 30 July 2007, the Hydrographer submitted a "Corrected Report on Site Visit" reflecting Suriname's suggested changes, which was circulated to the Parties.

# Chapter II. Introduction

## A. Geography

127. Guyana and Suriname are situated on the northeast coast of the South American continent and are separated by the Corentyne (in Dutch, Corantijn) River, which flows northwards into the Atlantic Ocean.

128. The territory of Guyana spans approximately 214,970 square kilometres and its approximate population is 769,000. Guyana's land boundaries, which in part follow the course of rivers, are shared with Venezuela to the west and south, Brazil to the south and east, and Suriname to the east. To the north, it faces the Atlantic Ocean. Guyana became an independent State in 1966, after more than 160 years of British colonial rule.

129. The territory of Suriname is approximately 163,270 square kilometres and its approximate population is 438,000. Suriname shares borders with Guyana to the west, Brazil to the south, and French Guiana to the east. To the north, it also faces the Atlantic Ocean. Suriname gained independence from The Netherlands in 1975, after more than 170 years of Dutch colonial rule.

130. The coastlines of Guyana and Suriname are adjacent. They meet at or near to the mouth of the Corentyne River and together form a wide and irregular concavity. There are no islands in Guyana and Suriname's territorial seas.

131. Neither Guyana nor Suriname has signed international maritime boundary agreements with their neighbouring States.

132. The length of the straight-line coastal frontage of Guyana as calculated from the approximate coordinates of the land boundary terminus with Venezuela to the approximate coordinates of the mouth of the Corentyne River is 223 nautical miles ("nm"), and the length of the straight-line coastal frontage of Suriname as calculated from the approximate coordinates of the land boundary terminus with French Guiana to the approximate coordinates of the mouth of the Corentyne River is 191 nm.

133. The seafloor off the coasts of Guyana and Suriname consists of soft mud out to the 20 metre depth contour and is constantly subjected to erosion and accretion. The horizontal distance between the high water line and the low water line, i.e. the area of tidal flats, low tide elevations and drying areas, is as much as 3 nm in several places along both coasts. The seafloor does not attain a 50-metre depth contour (25 fathoms) until about 50 nm offshore, and does not attain a 200-metre depth contour (often considered the geological continental shelf break) until 80 nm offshore.

134. The Corentyne River is navigable inland for about 50 miles and is also tidal for many miles inland. At Bluff Punt, Suriname, where the river is about 4 nm wide, the river begins to widen out considerably so that just 5 nm farther seaward, the low water lines are 12 nm apart. In that trapezoidal area, the river exhibits large tidal flats, drying areas and shoals such that most marine traffic follows a channel along the east side of the river estuary; there is a shallower navigation channel in the western half.

135. Navigation into the Corentyne River from seaward is normally in the deeper channel, which is closer to the east bank of the river. However, there were, at least in 1940, navigational aids to assist passage through the shallower channel that is closer to the west bank of the river. For example, prior to 1928 and ending prior to 1940 there was a leading line of 190½° through this channel using the chimneys at Skeldon and Springlands as a set of range markers.[2] From sometime after 1928 until sometime prior to 1949, there were also buoys along the west side of this channel.[3] Additionally, there was a 10-metre high beacon built in 1938 as part of the 1936 boundary survey and it is still shown on both the British and Dutch charts, although the beacon ceased to exist prior to 2004.[4]

136. The vertical range of the tide between high water and low water is generally in the order of three metres along the coast. In the Corentyne River, the effect of the tide is felt several miles inland. In the mouth of the river, the in-going tidal stream sets southwest whilst the out-going stream sets north. In the rainy season, the out-going stream attains rates of 3 to 3½ knots and its influence is felt 10 or 12 nm offshore; the edge of the stream is distinctly marked by discoloured water.

## B. Historical background

137. The efforts to establish a border between Guyana and Suriname date back to colonial times. In 1799, the border between Suriname and Berbice, a colony then situated in the eastern part of modern Guyana, was agreed by colonial authorities to run along the west bank of the Corentyne River. A Mixed Boundary Commission including members from the United Kingdom, The Netherlands, and Brazil was formed in 1934 to establish the southern and northern points of the boundary with greater precision. The southern point, being a tri-junction between the boundaries of British Guiana, Suriname, and

[2] The leading line was printed on the 1928 edition of NL chart 222, and was cancelled by a Notice to Mariners in 1940.

[3] The buoys were added by hand on the 1928 edition of NL chart 222 (unknown date), and the buoys were noted as "not present" in 1949.

[4] Guyana Memorial, Annex 11, para. 6. and Minutes of 3rd Conference of the Mixed Commission for the Definition of the Boundary between British Guiana and Surinam, 21 December 1938. Suriname's Judge's binder Tab C-5. The beacon was not there when Counsel for Guyana visited the site in 2004.

Brazil, was established at the source of the Kutari River, a tributary of the Corentyne River. In 1936, the Mixed Boundary Commission made its recommendation that the northern end of the border between British Guiana and Suriname should be fixed at a specific point on the west bank of the Corentyne River, near to the mouth of the river, a point then referred to as "Point 61" or the "1936 Point". The rationale for locating the border along the western bank of the Corentyne River rather than its thalweg and locating the border terminus on the western bank was to enable The Netherlands to exercise supervision of all traffic in the river.

138. In 1936, the British and Dutch members of the Mixed Boundary Commission also concluded that the maritime boundary in the territorial sea should be fixed at an azimuth of N10°E from Point 61 (the "10° Line") to the limit of the territorial sea.

139. In 1939, the United Kingdom prepared a draft treaty on the delimitation of the boundary between British Guiana and Suriname, which provided that the boundary of the territorial sea would lie along the 10° Line; however, the Second World War intervened and the Dutch government did not respond to the United Kingdom's draft treaty.

140. In 1957, the United Kingdom Foreign Office decided that it would delimit the British Guiana-Suriname maritime boundary from that time onwards by means of an equidistance line, which it understood would follow the 10° Line up to the three mile limit from the coast and then an azimuth of N33°E to its intersection with the 25 fathom line. In 1958, British Guiana granted exploration rights to the California Oil Company in an area up to a line following N32°E from Point 61. Later, in 1965, a concession in an almost identical geographical area was granted to Guyana Shell Limited, a subsidiary of Royal Dutch Shell. Between that time and the year 2000, Guyana granted several other concessions allowing operations in the area disputed in these proceedings.[5] For instance, in 1988, it granted a concession for oil exploration to a consortium of LASMO Oil (Guyana) Limited and BHP Petroleum (Guyana) Inc. (the "LASMO/BHP Consortium").

141. Suriname has also granted concessions for oil exploration in an area of competing claims in these proceedings.[6] In 1957, a concession agreement was entered into with the Colmar Company and in 1964, the concession

[5] Between 1965 and 2000, Guyana issued nine concessions to various companies and consortiums: to Oxoco (1971), Major Crude (1980), Seagull-Denison (1979–81), Lasmo-BHP (1988), Petrel (Albary concession, 1989), Petrel (Berbice concession, 1989), Maxus (1997), CGX (1998), and Esso (1999). *See* Guyana Memorial, paras. 4.9, 4.21–4.43; Suriname Counter-Memorial, paras. 5.7–5.44.

[6] Suriname issued one concession directly to Colmar in 1957, and later entered into service contracts through Staatsolie with five other companies or consortia: Suriname Gulf Oil Company (1980), Pecten (1993), Burlington Resources (1999), Repsol (2003), and Maersk (2004). *See* Suriname Counter-Memorial, paras. 5.7–5.44; Guyana Memorial, paras. 4.9, 4.21–4.43.

agreement was amended to clarify the western limit of the concession area as the 10° Line in respect of the territorial sea and, beyond that, in respect of the continental shelf.

142. In 1961, the United Kingdom prepared a new draft delimiting the territorial seas along the 10° Line and the contiguous zones, as well as the continental shelf, by means of what it regarded as an equidistance line. In 1962, The Netherlands responded to the United Kingdom draft treaty with a draft of its own, providing, without reference to specific maritime zones, that the maritime boundary was to follow the 10° Line.

143. In 1965, the United Kingdom prepared a new draft treaty, providing this time that the entire maritime boundary, in the territorial sea as well as the continental shelf, would extend along an equidistance line, seaward from Point 61 to the outer limits of the continental shelf; however, it was not accepted by The Netherlands.

144. In 1966, shortly after Guyana achieved independence, the United Kingdom hosted direct talks between Guyana and Suriname referred to as the "Marlborough House talks". The negotiations failed due to the Parties' inability to reach agreement on the location of the land boundary. With regard to the maritime boundary, Guyana advocated use of the equidistance principle for delimitation resulting in a line of N33°E to N34°E, whereas Suriname's position was that the demarcation of the boundary should be carried out in accordance with other geographic considerations.

145. In 1971, Guyana prepared a draft boundary treaty providing for Guyanese sovereignty over an inland area in the region of the sources of the Corentyne River disputed by the Parties, and Surinamese sovereignty over the Corentyne River itself. With regard to the maritime boundary, the draft treaty adopted the same approach as the United Kingdom's draft treaty of 1965 as it relied on an equidistance line seaward from Point 61. This proposal was rejected by Suriname.

146. In 1977 and 1978, Guyana and Suriname each adopted domestic legislation relating to their maritime boundaries. On 30 June 1977, Guyana enacted its Maritime Boundaries Act 1977, which defined Guyana's maritime boundaries as those determined by agreement with adjacent States or, in the absence of agreement, by means of equidistance lines (Article 35(1) of the Act). On 14 April 1978, Suriname enacted the Law Concerning the Extension of the Territorial Sea and the Establishment of a Contiguous Economic Zone, which did not define the lateral boundaries of the territorial sea or the exclusive economic zone.

147. In 1980, Suriname established its national petroleum company, Staatsolie. From that year to the present, Staatsolie has held the exclusive right to obtain concessions to all of Suriname's open offshore area, limited to its west by the 10° Line. During this period, three of Staatsolie's concessions were granted in the area in dispute between the Parties.

148. In 1989, the maritime boundary between Guyana and Suriname was discussed during the talks held in Paramaribo between President Hoyte of Guyana and President Shankar of Suriname. They agreed that modalities for joint utilization of the border area should be established pending settlement of the border question and that concessions that had already been granted should remain in force. Representatives of the Guyana Natural Resources Agency and Staatsolie met in 1990 and 1991 pursuant to the agreement reached by Presidents Hoyte and Shankar, but no agreement was reached by them. The Parties, however, signed a Memorandum of Understanding governing "Modalities for Treatment of the Offshore Area of Overlap Between Guyana and Suriname as it Relates to the Petroleum Agreement Signed Between the Government of Guyana and the LASMO/BHP Consortium on 26 August 1988", which was a preliminary document stating that the rights granted to the LASMO/BHP consortium in the "area of overlap" were to be fully respected. The Memorandum of Understanding provided that, within thirty days, representatives of both governments would meet to conclude discussions on modalities for joint utilization of the area, pending the conclusion of a final boundary agreement. The Memorandum of Understanding, however, was never implemented by Suriname, and the negotiations on joint utilization did not progress any further.

149. Both Parties submit that they have been issuing fishing licences and patrolling the waters belonging to the area of overlapping claims in these proceedings between 1977 and 2004.

150. Among the concessions issued by Guyana for oil exploration in the disputed area of the continental shelf was a concession granted in 1998 to CGX Resources Inc. ("CGX"), a Canadian company. In 1999, CGX arranged for seismic testing to be performed over the entire concession area, the eastern border of which was a line following an azimuth of N34°E. On 11 and 31 May 2000, Suriname demanded through diplomatic channels that Guyana cease all oil exploration activities in the disputed area. On 31 May 2000, Suriname ordered CGX to immediately cease all activities beyond the 10° Line. On 2 June 2000, Guyana responded to Suriname, stating that, according to its position, the maritime boundary between Guyana and Suriname lay along an equidistance line.

151. On 3 June 2000, two patrol boats from the Surinamese navy approached CGX's oil rig and drill ship, the *C.E. Thornton*, which was located at 7°19'37"N, 56°33'36"W, approximately 15.4 miles west of the eastern limit of the concession area. The Surinamese patrol boats ordered the ship and its service vessels to leave the area within twelve hours. The crew members aboard the *C.E. Thornton* detached the oil rig from the sea floor and withdrew from the concession area. The Surinamese patrol boats followed them throughout their departure. CGX has not since returned to the concession area.

152. Also operating in the disputed area under licences from Guyana were the oil companies Maxus Guyana Ltd. ("Maxus") (concession granted in 1997) and Esso Exploration and Production (Guyana) Company ("Esso") (con-

cession granted in 1999). On 8 June and 18 August 2000, Staatsolie informed Esso that it was operating in Surinamese waters without a licence, and that this was unacceptable to Suriname. In September 2000, Esso invoked the *force majeure* clause in its concession agreement with Guyana and ceased its operations in the concession area. Citing the approach taken by Suriname, Maxus also refrained from carrying out exploration activities in its concession area.

153. On 6 June 2000, the Prime Minister of Trinidad and Tobago offered and subsequently provided his good offices at a meeting between the Guyanese and Surinamese foreign ministers. Both foreign ministers expressed a desire to resolve the dispute peacefully. Guyana's draft Memorandum of Understanding, which would have allowed all existing exploration concessions and licences to be respected until a final agreement on the maritime boundary could be reached, was not accepted by Suriname. The foreign ministers of Guyana and Suriname agreed that a Joint Technical Committee should begin working immediately and that they should reconvene the joint meetings of their respective national border commissions ("National Border Commissions"). The Joint Technical Committee held several meetings in June 2000; however, no agreement was reached.

154. At the Twenty-First Meeting of the Heads of Government of the Caribbean Community and Common Market ("CARICOM"), held at St. Vincent and the Grenadines from 2 to 5 July 2000, the Presidents and Prime Ministers of CARICOM issued a statement affirming the importance of settling the dispute by peaceful means and offering the good offices of Prime Minister Patterson of Jamaica to that end. Talks were held between Presidents Jagdeo of Guyana and Wijdenbosch of Suriname from 14 to 17 July 2000 at Montego Bay and Kingston. No agreement was reached during these negotiations.

155. In 2000 and 2002, President Jagdeo met with the new Surinamese President Venetiaan and the Parties agreed to reconstitute their respective National Border Commissions. The National Border Commissions held a joint meeting in 2002 and formed a joint Subcommittee on Hydrocarbons. Having met several times in 2002, the Subcommittee on Hydrocarbons reported that it could not find common ground even in interpreting its mandate. The National Border Commissions likewise held several more joint meetings in 2002 and 2003, but were not able to reach agreement.

156. Eleven months after the last meeting of the National Border Commission and in view of the lack of progress in diplomatic negotiations, Guyana initiated the present proceedings on 24 February 2004.

## C. The Parties' claims

157. Guyana sets forth its claims in its Notification and Statement of Claim dated 24 February 2004, which were further specified in its Memorial and Reply. Guyana, in its Reply, requests that the Arbitral Tribunal adjudge and declare that:

> (1) Suriname's Preliminary Objections are rejected as being without foundation;
>
> (2) from the point known as Point 61 (5°59'53.8" north and longitude 57°08'51.5" west), the single maritime boundary which divides the territorial seas and maritime jurisdictions of Guyana and Suriname follows a line of 34° east and true north for a distance of 200 nautical miles;
>
> (3) Suriname is internationally responsible for violating its obligations under the 1982 United Nations Convention on the Law of the Sea, the Charter of the United Nations, and general international law to settle disputes by peaceful means because of its use of armed force against the territorial integrity of Guyana and/or against its nationals, agents, and others lawfully present in maritime areas within the sovereign territory of Guyana or other maritime areas over which Guyana exercises lawful jurisdiction; and that Suriname is under an obligation to provide reparation, in a form and in an amount to be determined, but in any event no less than U.S. $33,851,776, for the injury caused by its internationally wrongful acts;
>
> (4) Suriname is internationally responsible for violating its obligations under the 1982 United Nations Convention on the Law of the Sea to make every effort to enter into provisional arrangements of a practical nature pending agreement on the delimitation of the continental shelf and exclusive economic zones in Guyana and Suriname, and by jeopardising or hampering the reaching of the final agreement; and that Suriname is under an obligation to provide reparation, in a form and in an amount to be determined, for the injury caused by its internationally wrongful acts.[7]

158. In the course of its oral pleadings, Guyana reaffirmed its claims as set forth in its Reply, and modified its fourth submission as follows:

> in relation to submission 4, that is in relation to our allegation that Suriname was in breach of its obligations concerning provisional measures, Guyana . . . limits its claim which it advances with utmost strength, but limits its claim to one for declaratory relief.[8]

159. In its Reply, Guyana described the course of its claim line as commencing "from the outer limit of the territorial sea boundary at a point located at 6°13'46"N, 56°59'32"W, and should from there follow a line of N34°E up to the 200-mile limit to a point located at 8°54'01.7"N, 55°11'07.4"W."[9]

160. Suriname, in its Memorandum setting out Preliminary Objections of 23 May 2005, requested the Tribunal to adjudge and declare that:

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[7] Guyana Reply, para. 10.1.

[8] Transcript, p. 1465.

[9] Guyana Reply, para. 7.59.

1. The Tribunal does not have jurisdiction to determine Guyana's Claim;

2. In the event the Tribunal does not uphold Suriname's first submission, Guyana's second and third submissions are inadmissible; [and]

For the foregoing reasons, the Tribunal should bring these proceedings to a close forthwith.

161. Suriname, in its Counter-Memorial, further specified its claims, which it subsequently modified in its Rejoinder and reaffirmed during the oral proceedings:

Suriname respectfully requests the Tribunal

1. To uphold Suriname's Preliminary Objections, filed 23 May 2005, as reaffirmed in its Counter-Memorial, filed 1 November 2005, in accordance with the Rules of Procedure.

Alternatively, Suriname respectfully requests the Tribunal:

2. A. To reject Guyana's three submissions set forth at page 135 of its Memorial and Guyana's four submissions set forth at page 153 of its Reply.

2. B. To determine that the single maritime boundary between Suriname and Guyana extends from the 1936 Point as a line of 10° east of true north to its intersection with the 200-nautical mile limit measured from the baseline from which the breadth of Suriname's territorial sea is measured.

2. C. To find and declare that Guyana breached its legal obligations to Suriname under Articles 74(3) and 83(3) of the 1982 Law of the Sea Convention, by authorizing its concession holder to drill an exploratory well in a known disputed maritime area thereby jeopardizing and hampering the reaching of a maritime boundary agreement.

2. D. To find and declare that Guyana breached its legal obligations to Suriname under Articles 74(3) and 83(3) of the 1982 Law of the Sea Convention, by not making every effort to enter into a provisional arrangement of a practical nature.

162. Suriname's N10°E claim line (the "Suriname Claim Line"), contrasted with Guyana's N34°E claim line (the "Guyana Claim Line"), is illustrated in Map 1* at the end of this Chapter.

163. The arguments of the Parties with respect to their claims are summarized in the following Chapter.

* Secretariat note: Map 1 is located in the front pocket of this volume.

# Chapter III. Arguments of the Parties

## A. Submissions on jurisdiction

### Guyana's position

164. It is Guyana's position that it has complied fully with all requirements for the submission of this dispute to resolution under Part XV of the Convention. Guyana states that it brings the claim to uphold its rights under Articles 15, 74, 83 and 279 of the Convention and that the dispute concerns exclusively the maritime boundary between Guyana and Suriname.[10]

165. Guyana sets out the attempts between the two States to resolve the maritime boundary dispute following June 2000, referring in particular to the establishment of a Joint Technical Committee and negotiations under the good offices of the Prime Minister of Jamaica.[11] It submits that the Parties' efforts to settle their maritime boundary dispute from 1975 to 2000 and the acceleration of these efforts after June 2000, discharge the requirement in Article 279 of the Convention to seek a solution by peaceful means in accordance with the UN Charter.[12] Guyana maintains that there has been a full exchange of views between the two States[13] and that Guyana has complied with the requirement of Article 283(1) of the Convention to proceed expeditiously with such an exchange.[14]

166. In Guyana's view, all possibility of settlement by direct negotiation or third party facilitation had been exhausted by February 2004, and there is no requirement for it to continue attempts to negotiate where it concludes that the possibilities of settlement are exhausted.[15]

167. According to Guyana, it is entitled under Article 286 of the Convention to pursue recourse to binding decisions under Section 2 of Part XV, and as neither Guyana nor Suriname has made a written declaration pursuant to Article 287(1) of the Convention as to a choice of means for the settlement of disputes, arbitration under Annex VII is deemed to be accepted by both

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[10] For Guyana's submissions on jurisdiction, *see* Guyana Memorial, Vol. I, Chapter 6.

[11] Guyana Memorial, paras. 6.5–6.6; for a general description of those negotiations, *see* Guyana Memorial, paras. 5.13–5.19.

[12] Guyana Memorial, para. 6.7.

[13] Guyana Memorial, para. 5.13-5.19.

[14] Guyana Memorial, para. 6.8.

[15] Guyana Memorial, para. 6.9, citing the following cases: *Southern Bluefin Tuna* (*New Zealand* v. *Japan*; *Australia* v. *Japan*), Order of 27 August 1999, ITLOS Reports 1999, p. 280, at para. 60 ("*Southern Bluefin Tuna*"); *MOX Plant* (*Ireland* v. *United Kingdom*), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95 ("*MOX Plant*"); *Land Reclamation by Singapore in and around the Straits of Johor* (*Malaysia* v. *Singapore*), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10, at para. 48 ("*Land Reclamation*"); *see also* Transcript, pp. 59–60.

States by operation of Article 287(3).[16] Guyana adds that neither Guyana nor Suriname has made a declaration pursuant to Article 298 of the Convention that it does not accept one or more of the possible procedures provided for in Section 2 of Part XV.[17]

168. Guyana contends that the dispute concerns the interpretation and the application of Articles 15, 74, 83 and 279 of the Convention and does not concern any matter other than the delimitation of the maritime boundary, making it unnecessary for an Annex VII Tribunal to reach a finding of fact or law regarding land or riverine boundaries.[18] Guyana disputes Suriname's assertion that the Tribunal would be required to determine the unresolved status of the land boundary terminus in delimiting the maritime boundary[19]. Guyana's position is that the Parties have always been in agreement as to the status of Point 61 as the land boundary terminus and the starting point of maritime boundary claims, as is evidenced by the conduct of the Parties and their colonial predecessors over 70 years.[20] Guyana maintains that the purpose of the Mixed Boundary Commission was to fix the boundary definitively and considers that Suriname has itself accepted, and relied upon, Point 61 as the land boundary terminus.[21]

169. Guyana does not agree with Suriname that Point 61 and a territorial sea delimitation following N10°E from that point were identified by the Parties in combination.[22] Guyana argues instead that the Mixed Boundary Commission first identified Point 61 and then adopted a territorial sea delimitation. Guyana maintains that the N10°E line dividing the territorial seas was chosen despite previous instructions to continue the boundary in a N28°E direction and was considered to be a provisional arrangement solely to allow for the possibility that the western channel approach to the Corentyne River might be used for navigation,[23] a purpose it states had disappeared by the early 1960s.[24]

170. Guyana argues that under Article 9 of the Convention:

> the Tribunal has jurisdiction to determine the location of the mouth of the Corentyne River, where the Parties agree that their land boundary terminus was established. Guyana submits that a determination under Article 9 would lead the Tribunal to the same conclusion that the conduct of the Parties for 70 years establishes: that Point 61 is

[16] Guyana Memorial, paras. 6.10–6.12; Transcript, p. 60.

[17] Guyana Memorial, para. 6.14.

[18] Guyana Memorial, para. 6.15.

[19] Guyana Reply, paras. 1.19–1.21, Chapter 2.

[20] Guyana Reply, paras. 4.8–4.11.

[21] Guyana Reply, paras. 2.9–2.28.

[22] Guyana Reply, paras. 2.1–2.8, 2.29–2.36.

[23] Guyana Reply, paras. 1.20, 2.29–2.36.

[24] Guyana Reply, paras. 5.57–5.67.

> located at the mouth of the river. However, even if, for the sake of argument, the Tribunal were to determine that the mouth of the river is at another point, it would have jurisdiction to start the delimitation of the maritime boundary at that point.[25]

171. Guyana further contends that "even Suriname's erroneous argument that the mouth of the Corentyne River should be determined under Article 10, rather than Article 9, confirms the Tribunal's jurisdiction under Article 288 (1)".[26]

172. Guyana also submits that "the Tribunal can still interpret and apply Articles 74 and 83 of the Convention, and at the very least affect a partial delimitation of the maritime boundary in the exclusive economic zone and continental shelf without deciding on any dispute over the land boundary terminus".[27] In support of this argument, Guyana cites the *Gulf of Maine* case, in which a Chamber of the ICJ effected a partial maritime delimitation between Canada and the United States from a point at sea designated as Point A.[28]

173. Regarding Suriname's additional submission that Guyana's second and third claims are inadmissible as Guyana acted in bad faith and lacks clean hands, Guyana argues that Suriname's submission has no factual basis[29] and is not supported by legal authority.[30]

## Suriname's position

174. Suriname contends that the Tribunal has no jurisdiction in respect of Guyana's first claim regarding the maritime delimitation between Guyana and Suriname if there is no agreement on the 1936 Point,[31] and that Guyana's second and third claims are inadmissible.[32] Suriname has however conceded that if there is an agreed maritime boundary in the territorial sea, the 1936 Point "provides a perfectly adequate starting point" and as a result, the Tribunal would have jurisdiction in respect of Guyana's first claim.[33]

175. Suriname agrees with Guyana that the Tribunal's jurisdiction is founded on Part XV of the Convention, but contends that Article 288(1) of the Convention, which provides that "a court or tribunal referred to in Article 287 shall have jurisdiction over any dispute concerning the interpretation or appli-

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[25] Guyana Reply, para. 2.37.

[26] Guyana Reply, para. 2.38.

[27] Guyana Reply, para. 2.42.

[28] Guyana Reply, para. 2.46, citing *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, *I.C.J. Reports 1984*, p. 246 ("*Gulf of Maine*").

[29] Transcript, pp. 581–582.

[30] Guyana Reply, paras. 2.6, 2.47–2.48.

[31] Transcript, pp. 795–796.

[32] Suriname Preliminary Objections, para. 1.1.

[33] Transcript, pp. 795–796.

cation of this Convention" precludes the Tribunal from having jurisdiction over Guyana's first claim if there is no agreement on the 1936 Point.[34] Suriname maintains that the drafting history of the dispute resolution clauses of the Convention demonstrates that its dispute resolution provisions were never intended to give rise to jurisdiction to determine territorial issues.[35] Moreover, Articles 15, 74 and 83 of the Convention do not admit the determination of land boundary termini[36] so the Tribunal should exercise caution when considering its jurisdiction in these circumstances.[37]

176. Suriname's position is that if there is no agreement on the maritime boundary in the territorial sea, there has been no agreement between the Parties or their colonial predecessors as to the location of the land boundary terminus, and that the Tribunal therefore lacks jurisdiction to resolve Guyana's first claim.[38] Suriname's interpretation of the history of negotiations and other practices of the Parties and their colonial predecessors is that the 1936 Point has never been regarded as definitive,[39] as evidenced by, *inter alia*, the British draft treaty proposal of 1939 and the opinion of the Prime Minister of The Netherlands on Surinamese independence in 1975 regarding the territorial extent of Suriname.[40]

177. Suriname maintains that, in the absence of an agreement on the maritime boundary in the territorial sea, the 1936 Point amounted only to a recommendation in preparation for agreement by treaty and that the actual location of the land boundary terminus was open to doubt at the time of the Boundary Commission's work.[41] In Suriname's view, the precise location of the land boundary terminus makes a substantial difference to the maritime entitlements in this case,[42] referring in particular to an analysis using Point X (6°08'32"N, 57°11'22"W), the position Suriname considers to be the most northerly possible location for a land boundary terminus. Suriname contends that the 1936 Point is not located where the western bank of the Corantijn River joins the sea, being the reference point established in the 1799 Agreement of Cession, and cites, *inter alia*, instances where the land boundary terminus has been referred to without mention of the 1936 Point.

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[34] Suriname Preliminary Objections, para. 4.1.

[35] Suriname Preliminary Objections, paras. 4.2–4.7.

[36] Suriname Preliminary Objections, para. 4.11; Transcript, pp. 772–773.

[37] Suriname Rejoinder, paras. 2.70–2.80; Transcript, pp. 767–768.

[38] Suriname Preliminary Objections, paras. 1.8–1.11, 4.14; Suriname Rejoinder, paras. 2.6–2.9; Transcript, pp. 761–762, 778–779.

[39] Suriname Rejoinder, paras. 2.15–2.29.

[40] Suriname Preliminary Objections, paras. 2.1–2.12.

[41] Suriname Preliminary Objections, paras. 2.1–2.10; Suriname Rejoinder, paras. 2.15–2.23.

[42] Suriname Preliminary Objections, paras. 2.19–2.22.

178. Suriname argues that, in the absence of an agreement on the maritime boundary in the territorial sea, the location of the 1936 Point inland from the low water mark means that it cannot, by definition, be the land boundary terminus in any event.[43] According to Suriname, the Tribunal would need to select a land boundary terminus on the low water line, thereby prejudicing the position of the land boundary, as Suriname contends Guyana does by selecting base point G1 (6°00'27.9"N, 57°08'21.1"W) as its point of commencement of the maritime boundary at the low water line.

179. It is Suriname's position that the land boundary terminus and the disputed maritime and land claims have been part of a broader dispute between the Parties, which is supported by the historical record of the Parties' negotiations and practice.[44] Suriname maintains that the work of the Boundary Commission in the 1930s was to recommend a settlement of the land boundary as a whole and therefore rejects Guyana's view that the location of the 1936 Point should be accepted as a land boundary terminus, given that other parts of the boundary remain in dispute.[45]

180. Suriname maintains that, in the absence of an agreement on the maritime boundary in the territorial sea, the 1936 Point could only bind it by agreement, by acquiescence, or by Suriname's actions and reliance on them estopping it from claiming an alternative location for the land boundary terminus.[46] Suriname points to the absence of a treaty and argues that, to acquiesce, Suriname must have remained consistently silent in the face of Guyana's assertion of a contrary position, which the historical record does not evidence. Suriname argues that it cannot be estopped from questioning the status of the 1936 Point, since representations regarding the 1936 Point were made only in the context of negotiations, and that Guyana's awareness of Suriname's overall claim necessarily precluded Guyana from relying on any statement, action or inaction to its detriment.[47]

181. It is Suriname's submission that the Tribunal lacks jurisdiction to delimit a boundary by determining a closing line across the mouth of the Corantijn River under Articles 9 and 10 of the Convention.[48] Suriname maintains that it is Article 10, relating to bays, which would apply in respect of the Corantijn mouth in any event. It further argues that the drawing of any baseline or closing line is for the coastal State and not for a court or tribunal, although a court or tribunal can find that the manner in which those lines

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[43] Suriname Rejoinder, paras. 2.10–2.14.

[44] Suriname Preliminary Objections, paras. 3.4–3.15.

[45] Suriname Rejoinder, para. 2.22.

[46] As to Suriname's submissions on these points in general, *see* Suriname Preliminary Objections, paras. 5.1- 5.15.

[47] Suriname Preliminary Objections, paras. 5.10–5.15.

[48] Suriname Rejoinder, paras. 2.55–2.61.

are drawn violates international law.[49] Moreover, Suriname disputes Guyana's argument that the Tribunal would have jurisdiction to make a partial delimitation from a point at 15 nm from coastal baselines should it not have jurisdiction to make a full delimitation, submitting that Guyana wrongly relies upon the *Gulf of Maine* case and fails to establish that such partial delimitations are possible in the instant case in which a starting point has not been agreed upon.[50]

182. Suriname contends that Guyana's second and third claims are inadmissible, as Guyana did not act in good faith and lacks clean hands.[51] Suriname maintains that the doctrine of clean hands has been recognized since the early jurisprudence of the Permanent Court of International Justice and that recent International Court of Justice ("ICJ") judgments and opinions leave it open to parties to invoke the doctrine.[52] In Suriname's view, even if these claims are found to be admissible, clean hands should be considered in determining the merits of Guyana's claims. According to Suriname, Guyana lacks clean hands as it authorized drilling in the disputed area, gave no notice to Suriname (press reports being insufficient), and failed to withdraw support for the activity following Suriname's first complaints.[53]

183. Suriname maintains that Guyana's second claim, that it engaged in a wrongful act by expelling the CGX vessel in June 2000, must fail as Suriname has not acquiesced in Guyana's claim to maritime territory[54] and Guyana cannot claim that it exercises lawful jurisdiction in the disputed area. Suriname points out that the ICJ has never in the same judgment awarded reparations for violation of State sovereignty in a case in which it was requested to delimit a boundary determining such sovereignty.[55] According to Guyana, such a claim would amount to an *ex post facto* application of Guyana's first claim and would encourage States in the future to engage in activity designed to create facts on the ground in support of their claims. Suriname asserts that based on the oil concession practice of the Parties, Guyana's actions were in breach of the 1989 *modus vivendi* and signalled an aggressive posture by Guyana.[56]

184. With respect to Guyana's third claim, Suriname contends that Guyana lacks clean hands and that the record demonstrates Guyana's failure

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[49] Transcript, pp. 800–801.

[50] Suriname Rejoinder, paras. 2.62–2.69, citing *Gulf of Maine*, Judgment, *I.C.J. Reports 1984*, p. 246.

[51] Suriname Preliminary Objections, paras. 7.1–7.9; Suriname Rejoinder, paras. 2.81–2.120; Transcript, pp. 1100–1101.

[52] Suriname Rejoinder, paras. 2.91 -2.109.

[53] Suriname Rejoinder, paras. 2.110–2.115.

[54] Suriname Preliminary Objections, paras. 6.7–6.11.

[55] Suriname Rejoinder, paras. 2.84–2.90.

[56] Suriname Preliminary Objections, paras. 6.3–6.6.

to negotiate in good faith.[57] Suriname argues, with reference to the Parties' negotiating history since the June 2000 incident, that Guyana unreasonably demanded the reinstatement of the CGX operation while offering little in return, thereby jeopardizing resolution of the dispute and breaching Articles 74(3) and 83(3) of the Convention. Suriname further argues that Guyana withheld information regarding its oil concessions in bad faith and maintains that Guyana's core request, that exploration activities resume, amounted to a request that Suriname acquiesce in Guyana's prejudicial activity.[58]

185. Accordingly, Suriname requests that the Tribunal find that it does not have jurisdiction to determine Guyana's maritime delimitation claim and that Guyana's second and third claims are inadmissible.[59]

## B. The Parties' interpretation of the factual record

### Guyana's position

186. Guyana bases its claims in part on an account of the record of the practices of Guyana and Suriname and their colonial predecessors. Guyana refers to the work of the Mixed Boundary Commission, constituted by The Netherlands and the United Kingdom in 1934, and argues that the historical record demonstrates that the northerly point of the boundary it established, Point 61, was treated as the northern land boundary terminus between the colonies until the independence of Guyana and Suriname. It argues further that Point 61 has been recognized expressly by Guyana and Suriname since independence.[60]

187. Guyana refers to the work of the Mixed Boundary Commission and to the positions taken by The Netherlands and the United Kingdom at the time, and submits that the *de facto* delimitation of the territorial sea recommended by the Commission along an azimuth of N10°E from Point 61 was reached to accommodate The Netherlands' practical concern at the time that both navigable approaches to the mouth of the Corentyne River should remain under its authority to allow it to carry out its administration of shipping on the river. Guyana emphasized that this delimitation did not purport to follow an equidistance line, and was provisional and liable to change, being "motivated solely by considerations of administrative and navigational efficiencies."[61]

188. Guyana maintains that the attempts in 1939 by the United Kingdom and The Netherlands to draft a treaty settling the entire length of the boundary, based on a delimitation of the territorial waters along an azimuth

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[57] Suriname Preliminary Objections, paras. 6.39–6.44.

[58] Suriname Rejoinder, paras. 2.116–2.120.

[59] Suriname Preliminary Objections, Chapter 8.

[60] Guyana Memorial, para. 3.10.

[61] Guyana Memorial, para. 3.16.

of N10°E from a beacon to be erected at the northern terminus of the land boundary,[62] reflected a consensus between the two countries at that time.[63] Guyana argues it was the outbreak of war in 1939 and the occupation of The Netherlands in 1940 that prevented signature of the treaty and that the English text proposed by the United Kingdom for a treaty settling the boundary in 1949 was identical to the 1939 draft treaty.

189. Guyana refers to the United Kingdom's own 1957–1958 delimitation, which was carried out in order to enable an oil concession to be granted to the California Oil Company in 1958. The United Kingdom delimited the territorial sea along a line following an azimuth of N10°E from Point 61 to a distance of three miles from the coast and then an azimuth of N33°E thereafter until intersection with the 25 fathom depth line (45.7 metres), which Guyana argues reflected a good faith attempt to establish a boundary based on the equidistance principle.[64] Guyana states that this is demonstrated by the intention of the British to conduct this exercise in accordance with the principles embodied in the UN International Law Commission's ("ILC") 1956 Draft Articles on Maritime Delimitation[65] (the "ILC Draft Articles"), which were subsequently adopted in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone (the "1958 Territorial Sea Convention") and the 1958 Geneva Convention on the Continental Shelf (the "1958 Continental Shelf Convention" and together, the "1958 Conventions").[66]

190. Guyana points to the British use of Dutch maps in support of its contention that the exercise was carried out in good faith and submits that The Netherlands did not object to the California Oil Company concession, having been informed of it and knowing that the grant of the concession was made in reliance on the equidistance principle. Guyana also refers to Dutch willingness in 1958 to delimit the maritime boundary in conformity with Article 6(2) of the 1958 Continental Shelf Convention, the United Kingdom's positive response to such a proposal, and Dutch charts illustrating a "median line" dating from 1959 as evidence for The Netherlands' support for such an approach.

191. Guyana submits that the segmented line adopted by the United Kingdom in its 1961 draft treaty reflected an attempt to track the course of a true equidistance line more closely in proposing the prolongation of the territorial sea delimitation along an azimuth of N10°E to a distance of six miles from the coast and the continuation of the boundary along an azimuth of

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[62] Guyana Memorial, paras. 3.17–3.19.

[63] Guyana Memorial, para. 3.19.

[64] Guyana Memorial, paras. 3.22–3.31.

[65] *Report of The International Law Commission to the General Assembly*, Yearbook of the International Law Commission 1956, Vol. II, Doc. A/3159 ("YBILC").

[66] Guyana Memorial, para. 3.24.

N33°E for 35 miles, N38°E for a further 28 miles, and along an azimuth of N28°E to the edge of the continental shelf as defined by international law.[67]

192. Guyana argues that The Netherlands' draft treaty proposed in 1962 did not reject the concept of using an equidistance line to delimit the continental shelf area, which it failed to address, as the true focus of the dispute rested on competing territorial claims inland.[68] According to Guyana, the record relating to the exchange of draft treaties in 1961–1962 reflects a common understanding that Point 61 represented the northern land boundary terminus and a commitment to delimitation of the continental shelf based on equidistance.[69]

193. It is Guyana's contention that the United Kingdom took an approach consistent with its position in the 1961–1962 exchange in delimiting British Guyana's western maritime boundary, and that this approach was also embodied in the United Kingdom's draft treaty of 1965, which dispensed with the earlier use of a N10°E azimuth to delimit the territorial sea, proposing an equidistance delimitation from Point 61 to the edge of the continental shelf. Guyana submits that the United Kingdom considered the original rationale for delimiting the territorial sea in this way was no longer applicable as commercial ships could not use the western channel accessing the Corentyne River. In Guyana's view, the Dutch were in agreement that the old rationale was no longer valid, but did not sign the treaty due to disagreements over the competing inland claims,[70] objecting to the proposed change as a negotiating tactic. Guyana points out that The Netherlands supported delimitation based on the principle of equidistance in other contexts, referring, *inter alia*, to the position taken by The Netherlands in its maritime boundary dispute with Germany in 1965,[71] and with respect to the treaty concerning the North Sea maritime boundary concluded with the United Kingdom in the same year.[72]

194. For Guyana, the record of negotiations between the Parties in 1966 demonstrates its consistent assertion that delimitation should be according to the equidistance principle and reveals that Suriname's approach was rooted in political considerations rather than the applicable law. Guyana submits that Suriname's proposal to adopt a boundary following a N10°E azimuth from Point 61 to the edge of the continental shelf, reflecting the direction of the thalweg of the Corentyne River's western channel, was at odds with the position

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[67] Guyana Memorial, paras. 3.37–3.39.

[68] Guyana Memorial, para. 3.42.

[69] Guyana Memorial, para. 3.43.

[70] Guyana Memorial, para. 3.46.

[71] *North Sea Continental Shelf* (*Federal Republic of Germany* v. *Denmark*; *Federal Republic of Germany* v. *Netherlands*), Judgment, *I.C.J. Reports 1969*, p. 3 ("*North Sea Continental Shelf*").

[72] Guyana Memorial, paras. 3.45–3.48.

previously accepted by The Netherlands.[73] Further, the Dutch Prime Minister's advice to Suriname as to the extent of its territory on independence is cited by Guyana as consistent with the principle of equidistance in its description of Suriname's eastern maritime boundary.

197. Guyana argues that the practice of the Parties between 1966 and 2004 reflects a mutual recognition that the boundary should follow an equidistance line "to a very great extent the line of N34E". This is evidenced by the grant of oil concessions and the conduct of seismic testing[74] based upon an equidistance line matching that developed by the United Kingdom in 1957–1958. Guyana asserts that its practice from 1966 to the present day, and the United Kingdom's practice from 1957–1958, has been largely unopposed by The Netherlands[75] and that it has maintained a position based on delimitation by equidistance in negotiations with Suriname, in domestic legislation, in the grant of concessions for oil exploration, in the exercise of fisheries, and in law enforcement activities.[76] For Guyana, Suriname has conducted itself since independence in a manner "generally respectful" of the line delimited by the United Kingdom in 1957–1958, as did its colonial predecessor over a greater historical period,[77] largely refraining from granting oil concessions, sanctioning exploration, exercising fisheries jurisdiction or otherwise enforcing its laws in the continental shelf area to the west of an equidistance line.[78]

196. Guyana refers to the Parties' domestic legislation enacted in 1977–1978 and argues that territorial definitions used in the legislation reflect Guyanese acceptance of a boundary following an azimuth of N34°E. While Surinamese legislation remained silent on the matter, Guyana maintains that an explanatory memorandum to its 1978 Act indicates acceptance of delimitation by the equidistance principle wherever possible.[79] The Parties' domestic laws regulating petroleum exploitation in 1980–1986 are also described by Guyana as reliant on such an understanding.[80] Guyana maintains that its own initiatives to advertise petroleum exploration opportunities, manifest in its 1986 Petroleum Act, were based on a delimitation following a N34°E azimuth and were not objected to by Suriname or Staatsolie.

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[73] Guyana Memorial, paras. 4.6–4.8.

[74] Guyana Memorial, Chapter 4.

[75] Guyana Memorial, para. 4.1.

[76] Guyana Memorial, para. 4.1.

[77] Guyana Memorial, para. 4.2.

[78] Guyana Memorial, paras. 4.2.

[79] Guyana Memorial, paras. 4.12–4.14, referring to the Law Concerning the Extension of the Territorial Sea and the Establishment of a Contiguous Economic Zone of 14 April 1978 ("Surinamese April 1978 law").

[80] Guyana Memorial, paras. 4.15–4.20.

197. Referring to graphical depictions,[81] Guyana states that the pattern of oil concessions granted by the Parties in the continental shelf area makes "abundantly clear" that a boundary situated along an azimuth of N34°E was generally respected.[82] Guyana contends that it has pursued a consistent practice of allowing surveying activities and granting oil concessions in areas up to the Guyana Claim Line,[83] referring in particular to the activities of Royal Dutch Shell in 1966–1975, the oil concession granted by Guyana to Seagull-Denison in 1979–1981, and its concession granted to LASMO/BHP in 1988, as well as what it sees as Surinamese complicity with this practice.[84] Guyana argues, *inter alia*, that Royal Dutch Shell's exploration activities under a Surinamese concession were to the east of the Guyana Claim Line, while its activities to its west were conducted under a Guyanese concession.[85] While both the licence issued by Staatsolie to Gulf in 1981 and the 1989 proposed concession to IPEL extended to territory to the west of the Guyana Claim Line, resulting in Guyanese protests, Guyana maintains that activities under Surinamese concessions in fact took place to the east of the Line.[86]

198. Guyana maintains that Suriname did not object to two of Guyana's concessions covering areas up to or approaching the Guyana Claim Line following the Joint Communiqué agreed between the Presidents of Guyana and Suriname in 1989[87] and continued to respect Guyana's concessions west of the line despite failed negotiations in 1991 and 1994. As further evidence of its respect for the Guyana Claim Line, Suriname did not protest against activity under the eleven concessions issued in the maritime area subject to this arbitration before May 2000, including frequent requests for entry into Surinamese waters by seismic survey ships.

199. Guyana submits that Staatsolie's activities and public statements have an official and public character and "are to be treated as reflecting . . . the views of Suriname", due to its State ownership and regulatory remit.[88] In Guyana's view, Staatsolie's concession agreements are also broadly consistent with a Guyana Claim Line delimitation[89] and its activities, including materials used to promote oil concessions, also reflect such a delimitation.

200. The exercise of fisheries jurisdiction by Guyana and Suriname between 1977 and 2004 is said by Guyana to reflect a recognition or acquies-

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[81] Guyana Memorial, Plate 9, Plate 13; Vol. V, Plate 11, Plate 12.

[82] Guyana Memorial, paras. 4.3–4.5.

[83] Guyana Memorial, paras. 4.21 -4.43

[84] Guyana Memorial, paras. 4.25–4.29.

[85] Guyana Memorial, para. 4.26.

[86] Guyana Memorial, paras. 4.38–4.39.

[87] Guyana Memorial, para. 4.32.

[88] Guyana Memorial, para. 4.15.

[89] Guyana Memorial, para. 4.43.

cence in a boundary along the Guyana Claim Line.[90] Guyana refers, *inter alia*, to Suriname's alleged admission that it has not exercised fishing jurisdiction east of the line, to Guyana's establishment of a fishery zone, to its grants of fishing licences, and to its practices regarding the seizure of unlicensed fishing vessels as evidence of consistent conduct supporting its claim.[91] Guyana also refers to the activities of its coast guard, defence force, and Transport and Harbours Department in areas west of the line, and claims that Surinamese agencies have engaged in no such activities to the west of the line.

201. Regarding the activity of CGX under its 1998 concession, Guyana maintains that Suriname did not protest against this activity and expressly consented to crossings into the Surinamese side of the Guyana Claim Line.[92] Guyana contends that Suriname expressed no concern at CGX's presence west of the line until May 2000, when anti-Guyana rhetoric in the run-up to Surinamese parliamentary elections placed political pressure on its government to move against the CGX concession.[93] According to Guyana, Surinamese demands for Guyana to cease oil exploration activities in areas west of the Guyana Claim Line, including its 31 May 2000 demand that CGX cease its activities, were also the product of political change in Suriname.[94]

202. Guyana avers that on 2 and 3 June 2000 Suriname used its navy and air force to intimidate the CGX oilrig and drill ship, the *C.E. Thornton*, in defiance of Guyana's immediate proposal for dialogue and complaints that the action was taking place while Guyana was calling for diplomatic negotiations regarding the matter.[95] Guyana further contends that the 14 September 2000 apprehension of Guyanese-licensed fishing trawlers in an area previously understood to be Guyanese waters was Suriname's first action of this type.[96]

## Suriname's position

203. Suriname argues that to the extent that there was an agreement regarding the 1936 Point and the land boundary terminus, that agreement was established only with reference to the maritime boundary in the territorial sea along an azimuth of N10°E from that point.[97] Suriname reviews the genesis of the delimitation in the territorial seas and the 1936 Point and asserts that the location of the latter was determined largely by the need for a stable location

[90] Guyana Memorial, paras. 4.44–4.52.

[91] Guyana Memorial, paras. 4.45–4.49.

[92] As to Guyana's arguments regarding Surinamese expulsion of a CGX vessel in 2000 in general, *see* Guyana Memorial, Chapter 5.

[93] Guyana Memorial, paras. 5.3–5.7.

[94] Guyana Memorial, paras. 5.4–5.7.

[95] Guyana Memorial, paras. 5.8–5.9.

[96] Guyana Memorial, para. 5.12.

[97] Suriname Counter-Memorial, para. 3.2.

away from the shore and the former by the need to secure Dutch responsibility for shipping traffic in the approaches to the Corantijn River.[98]

204. According to Suriname, there was little agreement between the Parties and their colonial predecessors as to the adoption of an equidistance line and Suriname and Guyana have never worked jointly to identify a line based upon this principle.[99] Suriname maintains that The Netherlands' policy on national resources from the end of the 1950s, as well as Suriname's own since independence, have reflected the view that Suriname's western limit of the continental shelf area was not bounded by an equidistance line.[100] Suriname argues that its domestic law is consistent with its continental shelf claim and distinguishes the explanatory memorandum to its April 1978 law,[101] contending that Suriname after independence did not become a party to the 1958 Conventions and, in its view, neither did Guyana.[102]

205. It is Suriname's contention that the United Kingdom relied on the N10°E azimuth territorial sea boundary following completion of the work of the Mixed Boundary Commission in attempts to delimit the maritime boundary as a whole during the 1950s.[103] Suriname argues that the Parties' conduct shows acknowledgement of special circumstances justifying the territorial sea boundary, and disagrees that delimitations proposed in the 1950s were based on equidistance principles.[104] Suriname suggests that the United Kingdom's abandonment of the N10°E azimuth territorial sea boundary from 1965 related to an aim to achieve an equidistance settlement similar to that achieved over the North Sea continental shelf.[105] However, Suriname submits that following 1965, a need continued for Surinamese sovereignty over the western approach to the Corantijn River to allow for the regulation of lighter shipping vessels.[106]

206. Suriname does not accept that the United Kingdom believed that The Netherlands was likely to agree to a territorial sea and continental shelf boundary based on equidistance.[107] Suriname maintains, *inter alia*, that Guyana's first proposal to delimit the continental shelf along an azimuth of N34°E was made at the Marlborough House talks in 1966[108] and that Guyana's practice regarding the eastern limit of its continental shelf has been inconsistent, with

[98] Suriname Counter-Memorial, paras. 3.3–3.13.

[99] Suriname Counter-Memorial, para. 3.14.

[100] Suriname Counter-Memorial, paras. 3.19–3.21.

[101] Suriname Counter-Memorial, paras. 3.22–3.26.

[102] Suriname Counter-Memorial, para. 3.24.

[103] Suriname Counter-Memorial, paras. 3.28–3.29.

[104] Suriname Counter-Memorial, para. 3.30.

[105] Suriname Counter-Memorial, paras. 3.31–3.32.

[106] Suriname Counter-Memorial, para. 3.33.

[107] Suriname Counter-Memorial, paras. 3.34–3.35.

[108] Suriname Counter-Memorial, para. 3.36.

reference to the differing eastern boundaries of Guyanese oil concessions.[109] Suriname submits that an inconsistency of approach is reflected in Guyanese legislation, such as its 1977 Maritime Boundaries Act and Guyana's definition of its fishery zone pursuant to that Act, and Guyana's activities in enforcing its fisheries jurisdiction.[110] Suriname illustrates this variance graphically[111] and contends that the Guyana Claim Line is unrelated to the various equidistance lines Guyana argues the Parties have historically favoured.[112]

207. Suriname agrees that the Dutch chart 217 and British chart 1801 were the most accurate available in the 1950s, but submits that the equidistance line set out in Guyana's Memorial based on these charts and recent U.S. National Imagery and Mapping Agency ("NIMA") charts is not calculated accurately and does not represent an historical equidistance line.[113] Suriname disagrees that the Guyana Claim Line approximates modern equidistance lines and lines based on the principle of equidistance historically proposed by the Parties,[114] and that the Parties' conduct has been consistently based on such a line.[115] Suriname disputes the allegation that The Netherlands and Suriname made no objection to Guyana's reliance on the Guyana Claim Line, referring in particular to the position taken at the 1966 Marlborough House talks that the maritime boundary followed a N10°E line from a land boundary terminus yet to be established.[116]

208. Suriname argues that it has consistently maintained that the position of its maritime boundary with Guyana should follow the Suriname Claim Line with respect to the territorial sea, continental shelf, and exclusive economic zone[117] and that only for a brief period was delimitation of the continental shelf by the equidistance method considered.[118] Suriname cites, *inter alia*, the diplomatic record as evidence that from 1954 onwards, Suriname advanced its own position within The Kingdom of The Netherlands and that The Netherlands acted only as its advisor. Suriname further points out that the 1958 Dutch proposal based on Article 6 of the 1958 Continental Shelf Convention was not acted upon by the United Kingdom.[119] According to Suriname, Guyana and the United Kingdom have not consistently proposed the Guyana Claim Line, as evidenced by a number of proposals that incorporated a

[109] Suriname Counter-Memorial, paras. 3.36–3.42.

[110] Suriname Counter-Memorial, paras. 3.39–3.42.

[111] Suriname Counter-Memorial, Figures 3, 4 and 5.

[112] Suriname Counter-Memorial, paras. 3.43–3.51.

[113] Suriname Counter-Memorial, paras. 3.15–3.18 and 3.45–3.46.

[114] Suriname Counter-Memorial, paras. 3.52–3.58.

[115] Suriname Counter-Memorial, para. 3.58.

[116] Suriname Counter-Memorial, para. 3.59.

[117] Suriname Counter-Memorial, paras. 3.26 and 3.60–3.62.

[118] Suriname Counter-Memorial, paras. 3.44 and 3.61.

[119] Suriname Rejoinder, paras. 3.90–3.121.

delimitation of the territorial sea following an azimuth of N10°E and other equidistance lines not adopting a N34°E course.

## C. Guyana' s delimitation claim

### 1. Applicable law and approach to delimitation

*Guyana's position*

209. Guyana refers to Article 293 of the Convention directing the Tribunal to apply the law embodied in the Convention and "*other rules of international law not incompatible with this Convention*". Guyana also submits that the conduct of the Parties must be seen in the context of international law relating to maritime boundaries as it has developed since the Parties and their predecessor colonial powers have sought to delimit the boundary and that its evolution falls into the following periods: prior to 1958, 1958–1982, and 1982 onwards.[120]

210. Guyana's view is that international law, as it developed from the period prior to 1958, has reflected the principle that delimitation between adjacent States should be carried out according to equidistance, as reflected in the 1956 ILC Draft Articles, embodied in the 1958 Conventions, including the 1958 Territorial Sea Convention and the 1958 Continental Shelf Convention now forming the basis of delimitation under the Convention on the Law of the Sea.[121]

211. Guyana reviews what it argues was the law applicable to maritime boundary delimitation during the periods prior to 1982 and asserts, referring to its account of the historical record, that the Parties and their colonial predecessors understood that the applicable law required an equidistance approach to be adopted. Guyana refers, *inter alia*, to legislation passed by the Parties following independence, which it argues was enacted in response to the requirements of the 1958 Conventions, thereby demonstrating acceptance of the principles reflected in the 1958 Conventions in the years prior to 1982.[122] Such principles, Guyana argues, included an approach based on equidistance, such as that required under Article 6 of the 1958 Continental Shelf Convention.[123]

212. Guyana submits that the territorial sea should be delimited in accordance with Article 15 of the Convention to the distance specified in Article 3.[124] Guyana contends that Part VI of the Convention is applicable to the

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[120] For Guyana's submissions regarding the applicable law, *see* Guyana Memorial, paras. 7.1–7.37. *See also* Transcript, pp. 237–305.

[121] Transcript, pp. 244–250.

[122] Guyana Memorial, paras. 7.18–7.19. *See* Transcript, pp. 247–249.

[123] Guyana Memorial, para. 7.19, with reference in particular to the explanatory memorandum accompanying the Surinamese April 1978 law.

[124] Guyana Memorial, paras. 7.22–7.23.

Parties as to their rights over, and the delimitation of, the continental shelf as defined in Article 76(1) of the Convention.[125] Guyana refers to the provisions of Part VI of the Convention it considers relevant to the determination of the outer extent of the continental shelf, and asserts that the sovereign rights to exploration and exploitation of natural resources provided for under that Part are inherent rights. Guyana submits that Part V of the Convention is applicable to the Parties as to their rights regarding the exclusive economic zone and its delimitation and refers to the provisions of PartV of the Convention it considers relevant to the determination of the outer extent of the exclusive economic zone.[126]

213. Guyana requests that the Tribunal decide on the course of a single boundary line delimiting the territorial sea, continental shelf, and exclusive economic zone so as to avoid the disadvantages inherent in a plurality of separate delimitations.[127] Guyana maintains that this approach does not preclude the Tribunal from delimiting the territorial sea prior to the continental shelf and exclusive economic zone.[128]

214. In Guyana's view there is a difference in approach as to how the territorial sea and the exclusive economic zone and continental shelf are to be delimited, stemming from the differences in accepted practice between the application of Article 15 of the Convention using the "equidistance/special circumstances rule" and the application of Articles 74 and 83 of the Convention under which delimitation is effected in accordance with the "equitable principles/relevant circumstances rule".[129] Guyana argues that the approach adopted by the ICJ recognizes this distinction, but finds the approaches to be closely related.[130]

215. Regarding each of the maritime zones in dispute, Guyana considers that the Tribunal should follow what it identifies as the delimitation practice of the ICJ and arbitral tribunals. Pursuant to this practice, the Tribunal would draw a provisional equidistance line, consider whether there are any special circumstances that justify a shift in that equidistance line to achieve an equitable solution, and then decide whether historical special circumstances or the conduct of the Parties justify a shift in the equidistance line to achieve

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[125] Transcript, p. 238.

[126] Transcript, p. 238.

[127] Guyana Memorial, para. 7.30, citing *Gulf of Maine*, Judgment, *I.C.J. Reports 1984*, p. 246, at p. 327, para. 194.

[128] Guyana Memorial, para. 7.31, citing *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, *I.C.J. Reports 2001*, p. 40, at pp. 93–94, paras. 174, 176 ("*Qatar/Bahrain*").

[129] Transcript, pp. 260–261.

[130] Guyana Memorial, para. 7.32, citing *Qatar/Bahrain* and *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon* v. *Nigeria: Equatorial Guinea intervening*), Judgment, *I.C.J. Reports 2002*, p. 303, at para. 288 ("*Cameroon/Nigeria*").

an equitable solution.[131] In Guyana's submission, equidistance should be calculated by identification of the relevant coasts of the Parties and the identification of relevant baselines and base points from which an equidistance line can be measured.[132] According to Guyana, the relevant coast of Guyana facing the region over which the delimitation is to be effected spans 255 kilometres along its low-water line and that of Suriname spans 224 kilometres along its low-water line on the same basis and it depicts these coastlines respectively on U.S. NIMA charts 24380 and 24370.[133]

216. Guyana argues that the Tribunal should not apply an equidistance line derived from modern charts, as such a delimitation would ignore the conduct of the Parties since the 1960s and lead to an inequitable result.[134] Guyana points out that international tribunals have long taken into account the conduct of the parties, in particular their grant of oil and gas concessions, as circumstances to be taken into account in boundary delimitation.[135]

217. Guyana's position is that the Convention does not admit the approach advanced by Suriname calling for a delimitation of maritime areas by reference to general principles of equity.[136] Guyana distinguishes Suriname's approach, which it argues is aimed at the apportionment of maritime space de novo, from the delimitation of maritime areas that already appertain to the coast of a State. Guyana argues that neither the Convention, nor the jurisprudence of the ICJ support the former approach or the concept that a State might be disadvantaged by its geography in the manner suggested by Suriname.[137]

### *Suriname's position*

218. Subject to its preliminary objections on jurisdiction, Suriname agrees to the application of a single maritime boundary.[138] Suriname submits, with reference to international jurisprudence relating to the use of single maritime boundaries, that such a maritime boundary may be applied notwithstanding oil concession or fisheries practice at variance with it.[139] Suriname contends that such practice is not likely to be of legal relevance unless it demonstrates express or tacit agreement as to the location of a boundary.[140]

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[131] Guyana Reply, para. 1.22. Transcript, pp. 263–268.

[132] Guyana Memorial, para. 8.33.

[133] Guyana Memorial, para. 8.35.

[134] Guyana Memorial, para. 8.50.

[135] Guyana Memorial, paras. 7.34–7.35.

[136] Guyana Reply, paras. 5.24–5.28.

[137] Guyana Reply, paras. 5.29–5.32.

[138] Suriname Counter-Memorial, para. 4.3.

[139] Suriname Counter-Memorial, paras. 4.4–4.17.

[140] Suriname Counter-Memorial, paras. 4.54–4.55; Transcript, pp. 896–899.

219. Suriname maintains that delimitations based on the equidistance method are subject to adjustment or abandonment if an equitable solution is not achieved[141] and that, as a matter of practice, any initial step of identifying a provisional equidistance line should be subordinate to that objective.[142] In Suriname's view the various equidistance lines presented by Guyana illustrate that changes to coastal geography over time have a disproportionate effect on the location of an equidistance line; therefore, this method does not lead to an equitable result with regard to the delimitation between Guyana and Suriname.[143]

220. Suriname refers to the findings in the award of the arbitral tribunal constituted under Annex VII of the Convention in *Barbados/Trinidad and Tobago*[144] in support of its position on the approach applicable to delimitation of a single maritime boundary. According to Suriname, this case illustrates that relevant circumstances taken into consideration in delimiting a single maritime boundary are geographic in nature. Suriname submits that the *Barbados/Trinidad and Tobago* tribunal treated resource–related considerations cautiously (distinguishing the *Jan Mayen* case),[145] and accepted that the ratio of adjacent States' relevant coastal lengths are relevant for an equitable delimitation. Suriname further argues that the tribunal in *Barbados/Trinidad and Tobago* correctly regarded a provisional equidistance line as "hypothetical" only.

221. Suriname's position is that the present dispute can and should be resolved on the basis of the geographical characteristics of the coast and that the relationship between such characteristics and the maritime delimitation area should be the primary relevant special circumstance.[146] For Suriname, the maritime boundary should divide the area of overlap created by the frontal projection of neighbouring States' coastlines and the delimitation within this area should be based on equitable principles aimed at an equal division,[147] avoiding a "cut-off" of the seaward projection of the coast of either neighbouring State.[148] Suriname contends that this approach avoids distortions to the

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[141] Suriname Counter-Memorial, para. 4.17–4.18.

[142] Suriname Counter-Memorial, para. 4.42, citing, *inter alia*, *Continental Shelf* (*Tunisia/Libyan Arab Jamahiriya*), Judgment, *I.C.J. Reports 1982*, p. 18, at p. 79, para. 109 ("*Tunisia/Libya*").

[143] Suriname Counter-Memorial, paras. 3.50–3.51.

[144] Suriname Rejoinder, paras. 3.9–3.22, citing *Arbitration between Barbados and the Republic of Trinidad and Tobago*, Award (11 April 2006), 45 I.L.M. p. 798 (2006), online: <http://www.pca-cpa.org> ("*Barbados/Trinidad and Tobago*").

[145] Suriname Rejoinder, paras. 3.12–3.13; *Maritime Delimitation in the Area between Greenland and Jan Mayen* (*Denmark* v. *Norway*), Judgment, *I.C.J. Reports 1993*, p. 38 ("*Jan Mayen*").

[146] Suriname Counter-Memorial, paras. 4.19–4.22.

[147] Suriname Counter-Memorial, paras. 4.27–4.36.

[148] Suriname Counter-Memorial, paras. 4.29–4.30, citing *North Sea Continental Shelf*, Judgment, *I.C.J. Reports 1969*, p. 3, at p. 53.

line of the boundary that are inherent in the equidistance method and allows for flexibility in achieving an equitable solution.[149] Suriname finds precedent for use of bisector angles drawn between coastal fronts in the *Gulf of Maine* and the *Tunisia/Libya* cases and submits that the "angle bisector" method is the most appropriate in the current proceedings as it gives rise to a straight line boundary from the coast and reflects the overall geographic relationship between the Parties.[150]

222. In disputing Guyana's reliance on equidistance, Suriname argues that the two-step process advanced by Guyana is to be used only where appropriate, and that principles of non-encroachment and avoidance of a "cut-off" effect are also pertinent.[151] Suriname denies that there is a legal presumption in favour of equidistance delimitation, such a presumption having been rejected by the drafters of the Convention.[152]

223. Suriname rejects the proposition that the Parties' calculations of equidistance lines reflect agreement between them, citing the Parties' disagreement as to the location of the starting point of the line, the charts used, and the effect of Vissers Bank on an equidistance projection.[153] Suriname also contends that other South American delimitations depart in varying degrees from true equidistance lines, and questions the relevance of the Suriname/French Guiana maritime boundary in the absence of a binding agreement between those States.[154]

## 2. The role of coastal geography

### *Guyana's position*

224. Guyana disputes Surinamese claims regarding the coastal geography of the Parties.[155] Guyana asserts that there are no configurations along the coastlines of the Parties that have a material prejudicial effect on the course of a provisional equidistance line, except for a protrusion in the coast of Suriname at Hermina Bank that Guyana argues causes the line to follow a northerly course to the prejudice of Guyana.[156] In Guyana's view, its relevant coast-

[149] Suriname Counter-Memorial, paras. 4.35–4.36, citing *Gulf of Maine*, Judgment, *I.C.J. Reports 1984*, p. 246.

[150] Suriname Rejoinder, paras. 3.230–3.241; Transcript, pp. 976–982.

[151] Suriname Rejoinder, paras. 3.26–3.44.

[152] Suriname Rejoinder, paras. 3.45–3.52.

[153] Suriname Rejoinder, paras. 3.206–3.219; Transcript, pp. 958–963.

[154] Suriname Rejoinder, paras. 3.220–3.229.

[155] Guyana Reply, paras. 1.24–1.27, Chapter 3, paras. 5.33–5.52.

[156] Transcript, pp. 157–158.

line is modestly concave[157] and Suriname's is convex[158] (due to the protrusion of Hermina Bank) rather than vice versa, and Guyana's relevant coastline is materially longer than Suriname's rather than shorter, as Suriname claims.[159] Guyana contends that the relevant coastal configurations and lengths presented by Suriname are inaccurate due to the exclusion of relevant basepoints further west on the Guyana coast (Devonshire Castle Flats), the inclusion of a new base point on the Surinamese coast (Vissers Bank) that, it argues, charts existing prior to the date of Guyana's Memorial do not support, and the inaccurate contention that the coastline west of the Essequibo River is disputed by Venezuela.[160] In this connection Guyana made clear that its land boundary with Venezuela was fixed in 1899 by a competent international arbitral tribunal and as a member of CARICOM, Suriname itself has repeatedly confirmed its full support of Guyana's sovereignty over this territory.[161]

225. Guyana also disputes Suriname's method of representing the facing coasts of the Parties by their approximation to single axis façades, which it argues are not representative, and by the use of perpendiculars to those axes to project the Parties' appurtenant maritime areas.[162] According to Guyana, the jurisprudence of the ICJ regarding maritime boundary delimitation does not support the approximation or "refashioning" of the geographical reality of coastlines, nor has the ICJ recognized a right to delimitation by coastal front projection, distinguishing situations where such a method has been used and where a "cut-off" has been avoided on the basis of disproportionate encroachment on a maritime area.[163] Further, Guyana's calculation of the maritime areas appurtenant to the Parties' relevant coasts using the relevant coastal lengths presented by Guyana reveals Guyana to have a larger appurtenant maritime area than Suriname, rather than a smaller one as Suriname claims.[164]

226. In Guyana's view, both Suriname's maritime claim line and its proposed provisional equidistance line would fail to divide the maritime areas appurtenant to the Parties' relevant coasts equitably,[165] in part because of the distorting effects of the coastal headland at Hermina Bank.[166] Guyana rejects Suriname's contention that its provisional equidistance line is prejudicial to Suriname and "cuts off" its coastal area, arguing, *inter alia*, that Suriname's position is at odds with the equidistance delimitation achieved between Suri-

[157] Transcript, pp. 161, 194.

[158] Transcript, pp. 161–162, 195.

[159] Guyana Reply, paras. 3.10–3.24.

[160] Guyana Reply, paras. 3.19–3.24.

[161] Guyana Reply, paras. 3.19–3.24; Transcript, pp. 170–172.

[162] Guyana Reply, paras. 3.28–3.34; Transcript, pp. 233–234.

[163] Guyana Reply, paras. 5.33–5.52; Transcript, p. 200.

[164] Guyana Reply, paras. 3.28–3.34.

[165] Guyana Reply, paras. 3.35–3.51; Transcript, p. 199.

[166] Transcript, p. 214.

name and French Guiana and that the angle of the Corentyne River thalweg does not amount to a relevant special circumstance. Guyana's position is that the Guyana Claim Line divides these maritime areas equitably, representing a division of appurtenant maritime areas more closely reflecting the ratio of the relevant coastal lengths of the Parties. Guyana also argues that equidistance delimitation reflects practice in South America generally.[167]

### *Suriname's position*

227. Suriname asserts that, when plotting a boundary based on the equidistance method in the present case, micro-geography of the coastal configurations gives rise to unwanted distortions, which are caused by reliance on coastal baselines.[168] For Suriname, the equidistance method is overly reliant on micro-geography, rather than dominant coastal features, and has been properly criticized for this reason.[169] Suriname therefore prefers the determination of relevant coasts, in order to avoid what are asserted to be distortions caused by the use of coastal baselines.

228. Disputing Guyana's basis for determining the relevant coasts[170] Suriname submits that between adjacent States, the relevant coast for calculation of an equidistance line is the part of the coast facing the area being delimited, rather than the outer extent of the baselines.[171] Suriname contends that the relevant coasts identified by Guyana are excessive in length and that broader equitable principles can be taken into account in identifying them. In Suriname's view, the length and direction of the Parties' coastlines are relevant factors as they illustrate whether a delimitation line is equitable.[172] While the disparity is not as great as that found to be significant in *Barbados/Trinidad and Tobago*, Suriname argues that the disparity in relative relevant coastal lengths favours Suriname in this case.[173] Suriname also disputes the basis on which Guyana calculates appurtenant maritime areas, asserting that the area of overlapping maritime entitlements is to be determined using lines perpendicular to the angles of the States' coastal fronts.[174]

229. According to Suriname, the section of its provisional equidistance line nearer to the coast cuts across the coastal front of Suriname due to the effect of a coastal convexity on the western side of the mouth of the Coran-

[167] Guyana Reply, paras. 3.50, 3.51–3.58.

[168] Suriname Counter-Memorial, paras. 4.44–4.49.

[169] Suriname Counter-Memorial, paras. 4.44–4.53; Transcript, p. 976.

[170] Suriname Rejoinder, paras. 3.160–3.170.

[171] Transcript, p. 935.

[172] Suriname Rejoinder, paras. 3.171–3.182.

[173] *See* Transcript, p. 935.

[174] Suriname Rejoinder, paras. 3.195–3.199.

tijn River, and a concavity on the east side exaggerates this effect.[175] For Suriname, this is an example of the undue influence of coastal irregularities that, with Guyana's arguments regarding the same effect caused by Hermina Bank, make the case against equidistance delimitation. Suriname, however, denies that Hermina Bank is an irregularity with reference to the overall aspect of its coast.

## 3. Conduct of the Parties

### *Guyana's position*

230. For Guyana, the conduct of the Parties is relevant in determining whether there has been a tacit agreement on the location of the boundary, but may also be evidence of whether the Parties have considered a boundary line to be equitable.[176] Guyana maintains that there is no evidence that the Parties considered the Suriname Claim Line to be equitable,[177] arguing, *inter alia*, that it was rejected by the United Kingdom from the early 1960s and that it was advanced merely as a negotiation tactic by Suriname in the context of the disputed land boundary. With reference to certain contemporary sources, Guyana argues in particular that The Netherlands did not support the Suriname Claim Line.

231. Guyana asserts that the Parties' conduct shows that they considered delimitation using an equidistance method appropriate and therefore accepted the Guyana Claim Line as equitable.[178] According to Guyana, the record demonstrates that The Netherlands found it acceptable or desirable to approach delimitation using an equidistance method, referring in particular to negotiations in 1958 and to Suriname's behaviour with regard to Guyana's grant of oil concessions,[179] and distinguishing the position taken by The Netherlands and Suriname in the 1966 negotiations in London. Guyana maintains that Suriname overstates the geographical extent of Suriname's oil concessions, and argues that those extending west of the Guyana Claim Line were inactive in that area or were material on paper only.[180] Guyana argues that Suriname also misrepresents the status of the 1991 Memorandum of Understanding, which it did not implement.[181] For Guyana, its adherence to an equidistance position, represented by the Guyana Claim Line, is manifest from its legislation, fisheries and oil practice; while oil concessions were not all granted up to a line of N34°E, their eastern limits were generally consistent with it.

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[175] Suriname Rejoinder, paras. 3.183–3.194; Transcript, pp. 936–937.

[176] Guyana Reply, paras. 4.3–4.7.

[177] Guyana Reply, paras. 4.12–4.22.

[178] Guyana Reply, paras. 4.23–4.49.

[179] Transcript, pp. 283–284.

[180] Guyana Reply, paras. 3.31–3.39.

[181] Guyana Reply, para. 4.36.

232. Guyana contends that it would be inequitable to ignore the existence of an historical equidistance line reflected by the Guyana Claim Line and the conduct of the Parties in respecting that line.[182] Regarding oil concessions, Guyana maintains that its concessions were granted having regard to the Guyana Claim Line and that Suriname has offered or granted oil concessions respecting a similar delimitation; Guyana distinguishes from their habitual practice the occasions since independence when Suriname has granted concessions on the Guyanese side of the Guyana Claim Line.[183] Guyana further argues that fishing practice and the exercise of other forms of governmental authority show recognition of the line in question.[184]

### *Suriname's position*

233. The conduct of the Parties is, in Suriname's submission, of limited legal relevance, in the context of a single maritime boundary,[185] as it must demonstrate the Parties' mutual intention to accept a specific delimitation.[186] Suriname argues that international tribunals have only considered party conduct relevant where it is "mutual, sustained, consistent, and unequivocal" and that the conduct referred to by Guyana does not meet this standard,[187] but in fact demonstrates the existence of a "notorious, long-lived, public and contentious" maritime boundary dispute.[188]

234. Suriname contends that the approach to party conduct taken by the ICJ in the *Tunisia/Libya* case[189] is not applicable in the present case.[190] There, Suriname argues, the ICJ had reference to a *modus vivendi* only in respect of a part of the *Tunisia/Libya* maritime boundary and only by reason of the colonial powers' (France and Italy) demonstration of consistent acceptance of a boundary[191] as part of an intentional effort to avoid overlapping oil concessions over an extended period.[192] Suriname also cites ICJ precedent rejecting similar

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[182] Guyana Memorial, para. 8.51; Transcript, pp. 337–338.

[183] Guyana Memorial, para. 8.51; Transcript, p. 338.

[184] Guyana Memorial, paras. 8.51–8.56.

[185] Suriname Counter-Memorial, paras. 4.37–4.41.

[186] Suriname Counter-Memorial, para. 4.37.

[187] Suriname Rejoinder, paras. 3.90–3.143, 3.144–3.157.

[188] Suriname Rejoinder, para. 3.84.

[189] Suriname Counter-Memorial, para. 5.1, citing *Tunisia/Libya*, Judgment, *I.C.J. Reports 1982*, p. 18.

[190] As to Suriname's submission on this point generally, *see* Suriname Counter-Memorial, Chapter 5; Transcript, pp. 999–1010.

[191] Suriname Counter-Memorial, paras. 5.45–5.55.

[192] Suriname Counter-Memorial, paras. 5.49–5.53.

arguments that States should be bound by acquiescence or estoppel by reason of its oil concession practices.[193]

235. Suriname disputes Guyana's reference to forty years of consistent oil concession practice as not grounded in fact.[194] According to Suriname, the geographical extent of oil concessions from 1965 until 2000[195] shows that both of the Parties had concessions in operation in the area of overlapping claims for the majority of the period since the 1950s. Suriname maintains that from 1957, with Suriname's earliest offshore petroleum concession, a N10°E azimuth line bounded the western limit of the concession area granted by Suriname[196] and that Guyana's oil concessions adopted various eastern limits not tending to demonstrate consistent use of the Guyana Claim Line.[197]

236. Suriname's position is that the concerns of concession holders and operators as to the overlapping nature of concessions gave rise to negotiations in 1989, the 1989 *modus vivendi*,[198] and ultimately the 1991 Memorandum of Understanding.[199] For Suriname, Staatsolie's grant of concessions outside of the area of overlapping claims does not reflect Suriname's acceptance of the Guyana Claim Line.[200] Instead, Suriname maintains that its position regarding its claim to the Suriname Claim Line has historically been well known to Guyana, so no action of Staatsolie could be taken as a renunciation of Suriname's claim. Suriname submits that its oil concession practice demonstrates its consistent assertion of the Suriname Claim Line and rejects Guyana's suggestion that its conduct demonstrated respect for the Guyana Claim Line, distinguishing its restraint from 1999 onwards as reflecting a wish not to exacerbate the dispute and a lack of interest by concessionaires in disputed areas.[201] Regarding the legal significance of its restraint, Suriname asserts that the ICJ has not taken restraint pending the resolution of a dispute as prejudicing the position of a party exercising such restraint.[202] As to Guyana's fisheries conduct, Suriname disputes Guyana's contention that it refrained from carrying out enforcement

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[193] Suriname Counter-Memorial, para. 5.71; Transcript, pp. 1010–1014, citing *Gulf of Maine*, Judgment, *I.C.J. Reports 1984*, p. 246. Suriname in its oral pleadings also dealt with *Continental Shelf* (*Libyan Arab Jamahiriya/Malta*), Judgment, *I.C.J. Reports 1985*, p. 13 ("*Libya/Malta*") (Transcript, pp. 1014–1016) and the *Jan Mayen* case (Transcript, pp. 1016–1022).

[194] Suriname Counter-Memorial, para. 5.4.

[195] Suriname Counter-Memorial, paras. 5.9–5.44.

[196] Suriname Counter-Memorial, paras. 5.7, 5.13.

[197] Suriname Counter-Memorial, para. 5.13.

[198] Suriname Counter-Memorial, para. 5.36.

[199] Transcript, pp. 1058–1059.

[200] Suriname Counter-Memorial, paras. 5.56–5.72.

[201] Suriname Rejoinder, paras. 3.122–3.133.

[202] Suriname Counter-Memorial, paras. 5.73–5.79.

west of the Guyana Claim Line, maintaining the converse to be true and also citing its conduct of marine biology research as supportive of its own claim.[203]

## 4. Delimitation of the territorial seas

### *Guyana's position*

237. The delimitation of the territorial seas should, in Guyana's view, follow an "historical equidistance line" following an azimuth of N34°E from Point 61 for a distance of 12 nm to a point at the outer limit of the territorial sea[204] (the "Guyana Territorial Sea Line").[205] Guyana maintains that there are no grounds admissible under Article 15 of the Convention for departing from the Guyana Territorial Sea Line.

238. According to Guyana, an equidistance line delimiting the territorial sea along a line following the course of the Guyana Territorial Sea Line has historically been given effect by the Parties.[206] Further or alternatively, Guyana submits that even if the Guyana Territorial Sea Line were not to be regarded as the relevant equidistance line, then the conduct of the Parties since 1966 in following it would be sufficient to constitute a "special circumstance" justifying an adjustment to the equidistance line.[207]

239. Point 61 is Guyana's starting point for maritime delimitation because, Guyana argues, the Parties' conduct reflects a long-standing agreement that it should be treated as such[208] and both Guyana's and Suriname's claims rely on this point.[209]

240. Relying on Article 5 of the Convention, Guyana maintains that the low-water line along the coast marked on charts officially recognized by the coastal State provides the normal baseline for measuring the breadth of the territorial sea, and that no reason exists to depart from this approach.[210] Guyana refers to various charts used by the Parties and cites the U.S. NIMA charts 24370 and 24380 as the most recent charts on which it relies.

241. With regard to the location of a provisional equidistance line in the territorial sea, Guyana states that both Parties' calculations give rise to lines

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[203] Suriname Rejoinder, paras. 3.135–3.143.

[204] Guyana identifies two different coordinates for this point: 6°13'49.0"N, 56°59'21.2"W (Guyana Reply, para. 6.44) and 6°13'46"N, 56°59'32"W (Guyana Reply, paras. 7.1, 7.59).

[205] As to Guyana's arguments concerning delimitation of the territorial sea, *see* Guyana Memorial, Chapter 8. *See also* Transcript, pp. 276–365.

[206] Guyana Memorial, para. 8.3 1(b); Transcript, pp. 337–338.

[207] Guyana Memorial, para. 8.3 1(c); Transcript, pp. 338–339.

[208] Guyana Memorial, para. 8.3 1(a); Transcript, pp. 76–136, 289.

[209] Guyana Reply, paras. 6.5–6.6.

[210] Guyana Memorial, para. 8.39.

that "closely track the N34°E historical equidistance line", at least with regard to the part of the line beyond the first 3 nm.[211]

242. Guyana contends that both the United Kingdom's delimitation of the equidistance line in 1957, based on Dutch chart 217 and British chart 1801, and equidistance lines extended to a distance of twelve miles from Point 61 on the recent U.S. NIMA charts, follow azimuths ranging from N34°E to N36°E; to Guyana there is no material difference between the equidistance lines based on these three charts.[212]

243. In its analysis, Guyana finds no special circumstances that would justify an adjustment to an equidistance line delimiting the territorial seas.[213] Guyana argues that neither Party has claimed historic title[214] and disputes Suriname's reliance on the navigational requirements giving rise to the use of a line following an azimuth of N10°E as a special circumstance justifying an adjustment.[215] Guyana asserts that the Tribunal should be cautious in finding that navigational requirements could amount to a special circumstance, distinguishing the *Beagle Channel* case as precedent for the relevance of navigational requirements and maintaining that any such decision in the present case would be the first of its kind.[216]

244. Guyana submits, in the alternative, that the accommodation of the potential need for navigational access to the Corentyne western channel was provisional in any event, had become irrelevant through lack of use by the early 1960s,[217] and had been expressly rejected by the United Kingdom since that time.[218] In Guyana's view, such a circumstance could not require alteration to the course of the territorial sea boundary beyond 3 nm in any event.[219] Guyana disputes that as a matter of law it is possible for the Parties to have inherited a delimitation of the territorial seas along the Suriname Claim Line, distinguishing the present case from one where the principle of *uti possidetis* or Article 62 of the Vienna Convention on the Law of Treaties might be applicable, or where colonial practice might constitute a special circumstance meriting adjustment to an equidistance line.[220]

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[211] Guyana Reply, paras. 1.23, 6.13–6.22.

[212] Guyana Memorial, paras. 8.41–8.43.

[213] Guyana Reply, paras. 6.23–6.43.

[214] Guyana Memorial, para. 8.44; Guyana Reply, para. 6.23.

[215] Transcript, pp. 351–358.

[216] Guyana Reply, paras. 6.24–6.34, citing *Controversy concerning The Beagle Channel Region* (*Argentina/Chile*), Award of 18 February 1977, 17 I.L.M. p. 634, at p. 673, para. 108 (1978), R.I.A.A., Vol. 21, p. 53 (1997) ("*Beagle Channel*").

[217] Guyana Reply, paras. 6.35–6.37; Transcript, p. 342.

[218] Guyana Memorial, para. 8.46; Transcript, p. 343.

[219] Guyana Reply, paras. 6.38–6.43.

[220] Guyana Reply, paras. 5.57–5.67.

*Suriname's Position*

245. Suriname maintains that the territorial sea boundary has in fact been long established along the Suriname Claim Line.[221] In Suriname's view, the position of the 1936 Point and the direction of the N10°E Line to the limit of the territorial waters were established in combination and, should the Tribunal find that the 1936 Point is established, it must also find that the N10°E Line is binding on the Parties to the limit of the territorial sea.[222] The navigational requirement for Surinamese control of the approaches to the Corantijn River would, for Suriname, remain a special circumstance requiring the adoption of such a boundary in any event.[223]

## 5. Delimitation of the Continental Shelf and Exclusive Economic Zone

*Guyana's position*

246. Guyana invites the Tribunal to find that the delimitation of the continental shelf and the exclusive economic zone should follow the Guyana Claim Line along an azimuth of N34°E up to 200 nm from coastal baselines from the terminus point of the boundary it proposes in the territorial sea.[224] Guyana reserves its rights in respect of any delimitation of the continental shelf beyond the 200 nm limit.[225]

247. With respect to the continental shelf, Guyana submits that application of the "equitable principles/relevant circumstances rule" in accordance with the practice of international tribunals and States[226] requires the Tribunal to calculate an equidistance line across the continental shelf by reference to coastal basepoints starting from the northern terminus of the agreed land boundary, in the same way as for delimitation of the territorial sea.[227] Guyana submits further that in the same way as for the line delimiting the territorial seas, the Tribunal should adjust the equidistance line to reflect any special circumstances that might exist in order to achieve an equitable outcome.[228]

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[221] Suriname Counter-Memorial, paras. 4.56–4.72.

[222] Suriname Counter-Memorial, paras. 4.60–4.61; Transcript, p. 830.

[223] Suriname Counter-Memorial, paras. 6.50–6.53; Suriname Rejoinder, paras. 3.256–3.273.

[224] Guyana identifies two different coordinates for this point: 6°13'49.0"N, 56°59'21.2"W (Guyana Reply, para. 6.44) and 6°13'46"N, 56°59'32"W (Guyana Reply, paras. 7.1, 7.59).

[225] Guyana Memorial, para. 9.1.

[226] Guyana Memorial, paras. 9.3–9.4.

[227] Guyana Memorial, para. 9.8.

[228] Guyana Memorial, para. 9.4.

248. Guyana describes the Guyana Claim Line in the continental shelf and the exclusive economic zone as an "historical equidistance line" and argues that the Parties' conduct is significant in this case as the Parties have sought to identify and agree upon an equidistance line for a period in excess of forty years, a period over which international law has been developing with respect to the delimitation of maritime boundaries.[229] Guyana reviews the attempts to agree on delimitation made by the colonial powers prior to independence, and subsequently by Guyana and Suriname, in support of its argument that the Guyana Claim Line reflects historical acceptance of a line based on principles of equidistance.[230]

249. Guyana contends that the equidistance line drafted by the United Kingdom in 1957-1958 reflected British efforts to ensure that the California Oil Company concession was granted on the basis of a unilateral delimitation that adhered as closely as possible to the principle of equidistance embodied in the ILC Draft Articles.[231] Guyana refers to the reasoning of British officials on the matter to argue that the equidistance calculation, based on Dutch chart 217 of February 1939, was made to give as little ground for objection from The Netherlands as possible.[232]

250. Guyana argues that the efforts of the United Kingdom in 1957–1958 later formed the basis of the British draft treaty proposals, which in turn were based on the principle of equidistance.[233] According to Guyana, The Netherlands' own projection, prepared in 1959 on the basis of Dutch chart 222, was also charted on the basis of equidistance.[234] The British draft treaty proposal of 1961 is cited by Guyana as amounting to a simplification of the equidistance line, extending it from the limit of the 3 nm territorial sea to the 200-metre isobath.[235] Guyana submits that the concession given in 1965 to Royal Dutch Shell, in an area extending up to the 200-metre isobath, was based on the United Kingdom delimitation and did not elicit an objection from The Netherlands.[236] Guyana also relies upon correspondence from the Dutch Prime Minister to the new Surinamese government in 1975, which in its view makes clear that The Netherlands did not support a claim delimiting the continental shelf along a N10°E azimuth.[237]

251. In Guyana's view, the Guyana Claim Line also emerged over time as an historical equidistance line by reason of its use as a basis for the grant of

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[229] Guyana Memorial, para. 9.5.

[230] Guyana Memorial, paras. 9.6–9.25.

[231] Guyana Memorial, paras. 9.9–9.17.

[232] Guyana Memorial, paras. 9.9–9.17.

[233] Guyana Memorial, para. 9.18; Transcript, p. 400.

[234] Guyana Memorial, para. 9.19.

[235] Guyana Memorial, para. 9.18.

[236] Guyana Memorial, para. 9.20.

[237] Guyana Memorial, para. 9.21.

oil concessions by the United Kingdom and subsequently by Guyana until the present time. To Guyana, this line was based on broad agreement and consistent practice between the United Kingdom and The Netherlands, also reflecting an understanding that delimitation would be effected by the application of the equidistance principle.[238] Guyana submits that there has been no record of a formal objection to such a delimitation until the year 2000.[239] The Guyana Claim Line therefore reflects a reasonable and equitable delimitation that has served as a basis for a "*de facto modus vivendi*" between Guyana and Suriname, initially up to the 200-metre isobath and latterly up to a 200 nm limit.[240]

252. Guyana maintains that there are no grounds for departing from the Guyana Claim Line, which it considers to be an "equitable solution" within the meaning of Article 83 of the Convention.[241] For Guyana, contemporaneous and modern charts where relevant circumstances such as islands or other geographic features are absent provide no support for accepting the Suriname Claim Line as equidistance.[242] As argued in the context of the delimitation of the territorial seas, Guyana again asserts that ease of navigation as the original justification for a N10°E azimuth line has disappeared, and, in any event, a N10°E line has never been followed beyond the historic 3 nm limit to the territorial seas.

253. Guyana accepts that the Guyana Claim Line is at modest variance to an equidistance line calculated on the basis of modern U.S. NIMA charts, but submits that modern projections closely approximate historical equidistance lines.[243] Guyana argues that while equidistance projections based on the most recent charts depart from the Guyana Claim Line between the 200-metre isobath and the 200 nm limit of the continental shelf,[244] they would not achieve an equitable solution, as they would ignore the practice of the two States over a forty-year period.[245] Guyana contends that international tribunals have long recognized the conduct of the parties as relevant in achieving an equitable solution[246] and that the Guyana Claim Line reflects what the Parties have believed to represent equidistance since the 1950s[247] and therefore constitutes, unlike the Suriname Claim Line, an equitable outcome.[248]

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[238] Guyana Memorial, para. 9.22; Guyana Reply, paras. 7.38–7.44.

[239] Guyana Memorial, para. 9.24.

[240] Guyana Memorial, para. 9.25.

[241] Guyana Memorial, paras. 9.29–9.31.

[242] Guyana Memorial, paras. 9.32–9.33.

[243] Guyana Memorial, paras. 9.26–9.28.

[244] Guyana Memorial, para. 9.34

[245] Guyana Memorial, paras. 9.34–9.37.

[246] Guyana Memorial, paras. 9.35–9.37.

[247] Guyana Memorial, para. 9.37.

[248] Guyana Reply, paras. 7.45–7.57.

254. As to the exclusive economic zone, Guyana's position is that the approach to be taken in delimiting the zone is the same as that to be taken with respect to the continental shelf,[249] with the aim of achieving an equitable solution. Guyana submits that there is a representative body of practice supporting the determination of a single maritime boundary for both the continental shelf and the exclusive economic zone.[250]

255. Guyana rejects Suriname's analysis melding the delimitation of the territorial sea, continental shelf, and exclusive economic zone into one.[251] Guyana's view is that, while the basepoints are not all agreed, the Parties are in fact in agreement as to the location of the provisional equidistance line for the continental shelf and exclusive economic zone.[252] Guyana argues such agreement confirms acceptance of the coastal starting point of the delimitation and shows that the coastline creates no material complication to delimitation.

256. In Guyana's view, geographical circumstances justify an adjustment of the equidistance line in favour of the Guyana Claim Line.[253] According to Guyana, the Parties' coastal configurations are not unusual and, with the exception of Hermina Bank, the relevant coasts do not give rise to special circumstances accepted in international jurisprudence as warranting adjustment to an equidistance line.

### *Suriname's position*

257. Suriname submits that the coastline of Guyana is characterized by coastal convexities between the Corantijn, Berbice, Essequibo rivers and beyond, while the Suriname coast is characterized by concavities between its river estuaries.[254] For purposes of an equidistant boundary, Suriname considers that its relevant coast runs east from the west bank of the mouth of the Corantijn River to the east end of the Warappa bank and the relevant coastline of Guyana is the coastline east of the Essequibo river.[255]

258. Without prejudice to its overall claim, Suriname presents a graphical and descriptive representation of a provisional equidistance line using base points on what it submits are the relevant coasts of Guyana and Suriname.[256] Suriname submits that the coastal fronts of Guyana and Suriname, which it

[249] Guyana Memorial, paras. 9.43–9.45.

[250] Guyana Memorial, para. 9.45.

[251] Guyana Reply, paras. 7.6–7.14.

[252] Guyana Reply, paras. 7.15–7.22.

[253] Guyana Reply, paras. 7.23–7.37; Transcript, pp. 437–444.

[254] Suriname Counter-Memorial, paras. 6.4–6.7, citing *North Sea Continental Shelf*, Judgment, *I.C.J. Reports 1969*, p. 3, at p. 17, para. 8; Suriname Counter-Memorial, paras. 6.8–6.9, 6.24–6.35.

[255] Suriname Counter-Memorial, paras. 6.8–6.12.

[256] Suriname Counter-Memorial, paras. 6.13–6.18, Figure 31.

contends face N34°E and 0° respectively, produce an overlapping area when projected seaward to a distance of 200 nm[257] and that its provisional equidistance line fails to divide this area of overlap in an equitable manner.[258]

259. Suriname argues that its provisional equidistance line excessively "cuts off" the maritime area abutting Suriname's coast in breach of the "non-encroachment" principle, particularly with respect to the first section of the line (to shortly beyond the 200-metre isobath)[259] due to the effect of convexities and concavities, a trend, Suriname states, that employing a river closing line would not totally alleviate.[260] In Suriname's analysis, the Guyana Claim Line cuts off a still greater area of Suriname's coastal front projection than does its provisional equidistance line.[261]

260. Suriname calculates that a line dividing the area of overlapping coastal projections calculated equally would adopt an azimuth of N17°E from the 1936 Point, but submits that it is necessary to consider whether such a line should be adjusted in order to achieve an equitable delimitation.[262]

261. The need to prolong the existing Suriname-Guyana boundary along what it sees as its current course is also pointed to by Suriname as a relevant circumstance in the establishment of a single maritime boundary beyond the territorial sea.[263] According to Suriname, a N10°E azimuth extending the land boundary into the sea would reflect the "geographical reality" of the relationship between the two countries.[264] Moreover, the relative length of the relevant coasts of Suriname and Guyana is also a relevant circumstance that has been taken into account by previous international tribunals.[265] Suriname holds out the Suriname Claim Line as an equitable division, asserting that it would be based on a method reliant on coastal fronts rather than the selection of isolated base points, would not be influenced by protruding incidental features, and would not project towards the coast of either Party.[266]

262. Regarding the Guyana Claim Line, Suriname considers that Guyana's position has not been consistent, that the line is not equidistant, and that it is not equitable.[267] Suriname disagrees that the coastlines of Guyana and

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[257] Suriname Counter-Memorial, paras. 6.24–6.26, 6.41–6.44, Figure 33.

[258] Suriname Counter-Memorial, paras. 6.27–6.30.

[259] Suriname Counter-Memorial, para. 6.20.

[260] Suriname Counter-Memorial, paras. 6.20–6.21; Transcript, pp. 964–965.

[261] Suriname Counter-Memorial, para. 6.36.

[262] Suriname Counter-Memorial, paras. 6.48–6.49.

[263] Suriname Counter-Memorial, paras. 6.54–6.57.

[264] Suriname Counter-Memorial, paras. 6.56–6.57.

[265] Suriname Counter-Memorial, para. 6.59, citing *Gulf of Maine* (Judgment, I.C.J. *Reports 1984*, p. 246), *Libya/Malta* (Judgment, *I.C.J. Reports 1985*, p. 13), and *Jan Mayen* (Judgment, *I.C.J. Reports 1993*, p. 38); Suriname Rejoinder, paras. 3.274–3.279.

[266] Suriname Counter-Memorial, para. 6.60.

[267] Suriname Rejoinder, paras. 3.242–3.253.

Suriname do not lend themselves to an approach using generalizations of the coastlines in straight segments[268] and rejects Guyana's view that the Suriname Claim Line is advanced for strategic reasons, arguing that the claim has been maintained since 1962. Suriname further contends that the Guyana Claim Line is perpendicular to Guyana's coast, does not divide the area of overlap and accordingly, cannot be regarded as equitable.

## D. Guyana's third submission: alleged unlawful threat and use of force by Suriname

### Guyana's position

263. Guyana claims that Suriname's actions in June 2000 represented a breach of the requirement in Article 279 of the Convention to resolve disputes by peaceful means, a breach of Article 2(3) of the UN Charter requiring Member States to settle international disputes by peaceful means not endangering international peace and security, and Article 33(1) of the UN Charter requiring recourse to judicial settlement, negotiation and other forms of dispute resolution methods in such circumstances.[269] Guyana also claims that Suriname has breached Article 2(4) of the UN Charter in using or threatening to use force in its international relations against the territorial integrity of Guyana, which it argues remains applicable in the context of territorial or maritime boundary disputes.[270]

264. Guyana asserts that Suriname's 11 May 2000 complaint was its first formal protest against exploratory activity by Guyanese licensees and that Suriname adopted a military option notwithstanding Guyana's offers to negotiate made in response to Suriname's initial demands for termination of exploration activity.[271]

265. According to Guyana, the CGX rig operators were sufficiently threatened by Suriname's actions that a return to the area was considered unsuitable[272] and subsequent intimidation of the licensee Esso E & P Guyana similarly prevented its continued operations and caused it to terminate all exploration activities in its Guyanese concession area.[273] Guyana also maintains that Suriname threatened its licensee Maxus with respect to operations

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[268] Suriname Counter-Memorial, paras. 6.37–6.38, citing the approach taken in *Gulf of Maine* (Judgment, *I.C.J. Reports 1984*, p. 246).

[269] Guyana Memorial, para. 10.3; Transcript, pp. 573–576.

[270] Guyana Memorial, paras. 10.4–10.5; Transcript, pp. 576–581.

[271] Guyana Memorial, paras. 10.12–10.23; Transcript, pp. 551–556.

[272] Transcript, pp. 562–564, 571.

[273] Guyana Memorial, paras. 10.17–10.21.

in the disputed area and that this in turn caused Maxus not to carry out further exploration in the area of its concession.[274]

266. In the context of the small-scale military capabilities of Guyana and Suriname, Guyana sees Suriname's threat or use of armed force as significant and amounting to an internationally wrongful act, engaging the international responsibility of Suriname.[275] Guyana claims to have suffered material injury in the form of loss of foreign investment in offshore exploration, loss of licensing fees, and other sources of income and foregone benefits in the development of Guyana's offshore resources.[276] In addition, Guyana claims an entitlement to compensation for losses occasioned by the adverse effect of Suriname's action on Guyana's standing as a nation.[277]

267. Guyana rejects Suriname's assertion that it took action against CGX, Esso E & P Guyana, and Maxus' operations in order to maintain the *status quo*, as well as Suriname's characterization of its operations as police action.[278] Guyana contends that the activities it authorized in the disputed maritime area were in line with a *status quo* represented by 40 years of oil practice by the Parties, that it gave notice of the proposed activities, and that drilling was accelerated in response to positive geological findings rather than in order to change the *status quo*. According to Guyana, force used in a disputed area of territory cannot be reconciled with the requirement to act with restraint under Articles 74(3) and 83(3) of the Convention. Guyana rejects Suriname's contention that Surinamese actions were lawful countermeasures in response to an unlawful act, stating that there was no unlawful act on the part of Guyana, and that such countermeasures would be illegal in any case as violations of the obligation to refrain from threatening to use force.[279] Guyana disputes that Suriname had "no choice" but to take the action, citing the possibility of requesting ITLOS to prescribe provisional measures,[280] and submits that such action was at variance with the requirements under Article 279 of the Convention and Article 33(1) of the UN Charter to resort first to alternative means.

## Suriname's position

268. According to Suriname, Guyana's claim that Suriname's escort of the CGX vessel from its location in June 2000 was unlawful is based on the erroneous premise that Guyana has title to the disputed maritime area.[281]

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[274] Guyana Memorial, para. 10.21; Transcript, pp. 570–571.

[275] Guyana Memorial, paras. 10.23–10.24.

[276] Transcript, p. 572.

[277] Guyana Memorial, paras. 10.27–10.33.

[278] Guyana Reply, paras. 8.1–8.19.

[279] Transcript, pp. 582–586.

[280] Transcript, pp. 556–557.

[281] Suriname Counter-Memorial, para. 7.1; Transcript, pp. 1076–1079.

Suriname posits that Guyana must wait for the establishment of legal title to the disputed area prior to seeking any judicial benefit from it. Suriname also asserts that Guyana's conduct in the disputed area constitutes an internationally wrongful act and that as a result Guyana lacks clean hands with respect to this submission.[282]

269. In Suriname's view, Guyana's second claim must also fail because no breach of the Convention has occurred. Suriname maintains that Article 279 of the Convention prohibits the use of force in the context of an attempt to resolve a "dispute . . . concerning the interpretation or application of th[e] Convention" and that Article 301 of the Convention prohibits the use of force in the context of a party "exercising [its] rights and performing its duties under th[e] Convention". Suriname contends that neither circumstance applies and points to the requirement to exchange views under Article 283 of the Convention[283] as well as its view that Guyana did not consider there was a dispute until 2000. Moreover, according to Suriname, the breach of the UN Charter pleaded by Guyana cannot form the basis of a claim under the Convention alone.[284]

270. Suriname submits that Guyana exaggerates the nature of its naval operation[285] and characterizes it as a law enforcement measure of no greater force than was strictly necessary to achieve legitimate objectives.[286] Suriname further submits that the circumstances surrounding the action, including, *inter alia*, its instructions not to use or threaten force, are consistent with law enforcement under its domestic legislation and consistent with the type of force considered acceptable on arrest of a ship.[287] Suriname denies that a use or threat of force has been proven or that any action was directed at Guyana because of the foreign nationality of the flag and crew of the vessel, and takes the position that exercise of coastal jurisdiction does not amount to armed force.[288] In the alternative, Suriname claims that its actions would constitute a lawful countermeasure against Guyana's actions.[289]

271. Suriname disputes that State responsibility was engaged by its acts and asserts that there has been no case in the context of a territorial dispute where a State found not to have title to territory has been held responsible for its actions in an area which had been the subject of dispute.[290]

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[282] Suriname Counter-Memorial, para. 7.3.

[283] Transcript, pp. 1193–1198.

[284] Suriname Rejoinder, paras. 4.5–4.11; Transcript, p. 1092.

[285] Suriname Counter-Memorial, paras. 7.13–7.16.

[286] Suriname Counter-Memorial, para. 7.23; Transcript, pp. 1106–1110.

[287] Suriname Rejoinder, paras. 4.32–4.56.

[288] Suriname Rejoinder, paras. 4.57–4.73; Transcript, pp. 1110–1111, 1116–1126.

[289] Transcript, pp. 1126–1131.

[290] Suriname Counter-Memorial, paras. 7.17–7.21; Transcript, pp. 1101–1106.

272. According to Suriname, a decision was taken, in a departure from the established CGX concession work program initially agreed upon, to accelerate the drilling of a well and to locate it deliberately in the disputed area. This decision, it argues, was made in breach of the 1989 *modus vivendi* and 1991 Memorandum of Understanding.[291] Suriname submits that Articles 74(3) and 83(3) of the Convention create two obligations: to "make every effort to enter into provisional arrangements of a practical nature" and "not to jeopardize or hamper the reaching of a final agreement", the latter specifically requiring restraint.[292] Suriname distinguishes between transitory or occasional actions characterizing the *status quo* and those representing irreparable prejudice,[293] and argues that exploratory drilling is an invasive exercise of sovereign rights over natural resources causing such prejudice.[294] Suriname contends that Guyana authorized drilling without adequate notice, consent or acquiescence in disputed waters in breach of Articles 74(3) and 83(3) of the Convention, and that its own actions in response were necessary.[295]

273. In Suriname's estimation, Guyana has suffered no loss and alone bears the consequences of offering contracts concerning areas for which it does not have secure title.[296] The calculation of Guyana's claim[297] and Guyana's method of valuation of work to be performed under terminated concessions are disputed by Suriname. Suriname also disputes that the claims advanced relate to losses suffered by Guyana rather than its licensees and submits that the claim for loss of licensing fees is speculative.[298] Regarding Esso's invocation of a *force majeure* clause, Suriname argues that it may have been related to factors other than the dispute with Suriname[299] and that the concession areas in question concerned maritime territory that was for the larger part outside of the disputed area in any event.

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[291] Suriname Counter-Memorial, para. 7.11.

[292] Suriname Rejoinder, para. 4.13.

[293] Suriname Counter-Memorial, paras. 7.42–7.43, citing *Aegean Sea Continental Shelf* (*Greece* v. *Turkey*), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976, paras. 30–31 ("*Aegean Sea*").

[294] Suriname Rejoinder, paras. 4.13–4.16.

[295] Suriname Counter-Memorial, paras. 7.40–7.45; Suriname Rejoinder, paras. 4.17–4.31.

[296] Suriname Counter-Memorial, paras. 7.26–7.39; Transcript, pp. 1131–1132.

[297] Suriname Counter-Memorial, paras. 7.29–7.39.

[298] Suriname Counter-Memorial, paras. 4.74–4.79.

[299] Suriname Counter-Memorial, paras. 7.35–7.36.

## E. Guyana's Fourth Submission and Suriname's Submissions 2.C and 2.D: Breach of Articles 74(3) and 83(3) of the Convention

### Guyana's position

274. Guyana claims that Suriname breached Articles 74(3) and 83(3) of the Convention by failing to seek resolution by resort to practical provisional arrangements and by conducting itself in a manner that jeopardized reaching a final agreement.[300] Guyana submits that these breaches represent a serious threat to international peace and security[301] and that a forcible expulsion of a licensee's vessels from a disputed maritime area cannot be likened to the arrest of a ship on the high seas for law enforcement purposes.[302]

275. Guyana disagrees with Suriname's account of the negotiations between the Parties following the 1989 *modus vivendi*, the 1991 Memorandum of Understanding, and the events of June 2000.[303] Guyana maintains that Suriname rejected the 1991 Memorandum of Understanding by disavowing it, failing to ratify it, and thwarting efforts to establish modalities of operation subsequently. According to Guyana, Suriname similarly failed to cooperate following the action it took in June 2000, while Guyana did provide information regarding its oil concessions, but could not proceed further in the absence of agreement by Suriname on modalities for operation. In response to Suriname's claim that events prior to 1998 (the year of Suriname's accession to the Convention) are irrelevant to the Tribunal's determination as to a breach of Articles 74(3) and 83(3) of the Convention, Guyana argues that those events are relevant to the interpretation of post-1998 conduct as they demonstrate a consistent pattern of negative conduct.[304]

### Suriname's position

276. Suriname submits that only conduct after 8 August 1998, being the date on which the Convention came into force between the Parties, can be relevant to Guyana's allegation of breach of Articles 74(3) and 83(3) of the Convention. Further, Suriname maintains that to the extent that the obligations to make every effort to enter into provisional arrangements of a practical nature pending a final agreement under those Articles are enforceable, these have been breached by Guyana, rather than Suriname, through its unyielding approach in negotiations following the events of early June 2000.[305]

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[300] Guyana Memorial, para. 10.6.

[301] Guyana Memorial, para. 10.7.

[302] Guyana Memorial, para. 10.8.

[303] Guyana Reply, paras. 9.1–9.14.

[304] Transcript, pp. 607–609.

[305] Suriname Rejoinder, paras. 5.6–5.14.

277. Regarding the negotiations attempted by the Parties, Suriname complains that Guyana's proposals were unworkable and that disclosure as to the commercial arrangements under the Guyana-CGX concession was lacking.[306] Suriname contends that Guyana's approach was to avoid formal commitments relating to anything other than the recommencement of operations under its concession agreements. Suriname submits that the 1989 *modus vivendi* and 1991 Memorandum of Understanding themselves amounted to provisional arrangements of a practical nature pending resolution of the dispute, and that Guyana's entry into contracts with oil companies covering much of the disputed area constituted an unreasonable departure from those agreements.[307]

278. Suriname invites the Tribunal to find that Guyana lacks entitlement to a remedy in any event and, in the alternative, that Guyana has forfeited the right to bring this claim by acting in an obstructive manner.[308]

## Chapter IV. Jurisdiction to determine the maritime boundary

279. The Parties' positions regarding the Tribunal's jurisdiction to determine the maritime boundary are set out above in Chapter III(A) of this Award. Pursuant to its Procedural Order No. 2 (*supra*), the Tribunal deferred its decision on Suriname's Preliminary Objections to the Final Award.

280. The Tribunal takes note of Suriname's statement at the hearing that:

> If . . . there is indeed an agreed boundary in the territorial sea . . . then the terminus of the maritime boundary provides a perfectly adequate starting point, and every issue that this Tribunal would have to decide would be governed by the provisions of the Law of the Sea Convention.[309]

In light of the Tribunal's finding in Chapter V of the Award that the starting point of the maritime delimitation between the Parties is the intersection of the low water line of the west bank of the Corentyne River and the geodetic line of N10°E which passes through Marker "B" established in 1936, the Tribunal need not consider further Suriname's jurisdictional objection with respect to Guyana's maritime delimitation claim. Accordingly, the Tribunal finds that it has jurisdiction to delimit the maritime boundary in dispute between the Parties.

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[306] Suriname Counter-Memorial, paras. 8.2–8.10.

[307] Suriname Counter-Memorial, paras. 8.11–8.16.

[308] Suriname Rejoinder, paras. 5.15–5.21.

[309] Transcript, pp. 795–796.

# Chapter V. Delimitation in the territorial sea

## A. The Parties' positions

### Suriname's N10°E Line to 12 nm

281. Suriname submits that the delimitation of the territorial sea should proceed along an azimuth of N10°E from the 1936 Point/Point 61 (the "10° Line") and that this boundary delimits the twelve-mile territorial sea of Suriname. Suriname posits that the 10° Line "began as an agreed boundary for the territorial sea",[310] and maintains that the Parties have never worked jointly to identify the equidistance line, much less agreed on its use to delimit their maritime boundary.[311]

#### *Special circumstances and historical evidence of an agreement*

282. According to Suriname the consistent and concerted behaviour of The Netherlands and the United Kingdom in their dealings with each other over many years established their mutual acceptance of that boundary through tacit or *de facto* agreement, acquiescence or estoppel.[312] Suriname contends that the need to guarantee The Netherlands' sole responsibility for the care for and supervision of all shipping traffic in the approaches to the Corentyne, a river under its sovereignty, constitutes a special circumstance under Article 15 of the Convention.[313]

283. For Suriname, the meaning of Article 15, including its reference to special circumstances, is to be understood in the context of the regime in which it appears. Article 2 of the Convention provides that the sovereignty of a coastal State extends beyond its land territory to an adjacent belt of sea described as the territorial sea, so that all activities in the territorial sea are subject to control and regulation by the coastal State, except as expressly provided otherwise.[314] Consequently, Suriname posits that "such navigational considerations", namely the control of shipping by the coastal State, are special circumstances for the purposes of Article 15.[315]

284. In 1936 the Mixed Boundary Commission established the location of what Suriname called the 1936 Point, on the ground near the mouth of the Corentyne. Its purpose was "to indicate the direction of the boundary line in

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[310] Suriname Rejoinder, para. 3.259.

[311] Suriname Counter-Memorial, para. 3.14.

[312] Transcript, p. 829.

[313] Suriname Counter-Memorial, para. 3.12, Suriname Rejoinder, paras. 3.263, 3.264.

[314] Transcript, p. 835.

[315] Suriname Counter-Memorial, paras. 6.51–6.52; Suriname Rejoinder, para. 3.265.

the territorial waters on a True bearing of N10°E, this direction being parallel to the mid-channel as indicated on the chart".[316] The bearing of N10°E was a modification by the Mixed Boundary Commission to the proposals of the Governments of the United Kingdom and The Netherlands of a line following a bearing of N28°E. Suriname notes that this modification was accepted by The Netherlands and the United Kingdom by an exchange of notes of 22 November 1937 and 25 July 1938.[317]

285. Suriname maintains that, although they did not reach an agreement binding on the Parties, the United Kingdom and The Netherlands respected the 10° Line as the territorial sea boundary in their mutual relations from 1939 to 1965. Support for this position is found in the United Kingdom's acceptance of the 10° Line through its failure to protest when The Netherlands provided details of its territorial sea boundary between Suriname and British Guiana to the International Law Commission in 1953. Suriname argues that the determination of the 10° Line was, among other things, "motivated solely by considerations of administrative and navigational efficiencies".[318] The 1936 Point in combination with the 10° Line guaranteed The Netherlands' sole control over the territorial waters in the approach to the Corentyne River.[319] Suriname contends that this navigational consideration still exists as a special circumstance under Article 15 of the Convention.

### *Evolution of historical territorial sea agreement from 3 to 12 nm*

286. The historical acceptance of the 10° Line as the boundary of the territorial sea was in Suriname's view not altered by the extension of the breadth of the territorial sea to twelve miles. Suriname argues that where a text specifies the location and direction of the territorial sea boundary without reference to geographic limit, the correct interpretation is the ordinary meaning of the text, so that the boundary applies to the entire territorial sea up to the limits claimed by the parties at any given time in accordance with international law.[320] Suriname relies on the finding of the ICJ in the *Aegean Sea* case that an agreement "must be interpreted in accordance with the rules of international law as they exist today, not as they existed in 1931".[321] This is known as the inter-temporal law.

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[316] Suriname Counter-Memorial, para. 3.8, citing Report on the Inauguration of the Mark at the Northern Terminal of the Boundary Between Surinam and British Guiana, Guyana Memorial, Annex II, at para. 4.

[317] Suriname Counter-Memorial, para. 3.9.

[318] Suriname Counter-Memorial, para. 3.12, citing Guyana Memorial, para. 3.16.

[319] Suriname Counter-Memorial, para. 3.13.

[320] Transcript, p. 850.

[321] Transcript, p. 851; *Aegean Sea*, Judgment, *I.C.J. Reports 1978*, p. 3, at p. 33, para. 80.

### *Application of the inter-temporal law*

287. For Suriname, if the only reason for using the 10° Line in the present delimitation is that it was agreed in 1936, the Tribunal must apply the inter-temporal law in order to determine whether the 1936 agreement applies to the present-day extent of the territorial sea.[322] Where the location and direction of a territorial sea boundary is specified in an agreement but its seaward boundary is not specified, Suriname maintains that the question of whether the territorial sea boundary established by the Parties applies to all or only part of the territorial sea depends on the agreement's object and purpose.[323] Suriname's position is that the object and purpose of the territorial sea boundary established by the Parties was "clearly to limit the extent of Guyana's territorial sea",[324] for reasons of Suriname's having control over the approaches to the Corentyne.

### *Guyana's N34°E line to 12 nm*

288. Guyana's position is that the delimitation of the territorial sea should follow an "historical equidistance line" along an azimuth of N34°E from Point 61 for a distance of 12 nm to a point at the outer limit of the territorial sea (being the Guyana Territorial Sea Line).[325] Guyana considers Point 61 as the appropriate starting point for maritime delimitation because the Parties' conduct reflects a long-standing agreement, over seventy years, that this point should be treated as such and both Guyana's and Suriname's claims rely on it. Guyana contends that both the United Kingdom's delimitation of the equidistance line in 1957, based on Dutch chart 217 and British chart 1801, and equidistance lines extended to a distance of twelve miles from Point 61 on the recent U.S. NIMA charts follow azimuths ranging from N34°E to N36°E.

### *Historical evidence of an agreement on an equidistance line*

289. Guyana argues that the Guyana Territorial Sea Line is an equidistance line which should be followed when delimiting the territorial sea under Article 15 of the Convention as this line has historically been given effect by the Parties. Alternatively, Guyana submits that even if the Guyana Territorial Sea Line were not to be regarded as the relevant equidistance line, then the conduct of the Parties since 1966 in following it would be sufficient to constitute a special circumstance justifying an adjustment to the equidistance line.

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[322] Transcript, p. 852.

[323] Transcript, p. 853.

[324] Transcript, p. 854.

[325] Guyana identifies two different coordinates for this point: 6°13'49.0"N, 56°59'21.2"W (Guyana Reply, para. 6.44) and 6°13'46"N, 56°59'32"W (Guyana Reply, paras. 7.1, 7.59).

290. Guyana takes the view that the arrangement made by the Mixed Boundary Commission resulting in the adoption of a 10° Line in 1936 was provisional in nature. Guyana accepts that during the period between 1936 and 1965, the conduct of the Parties generally followed a line of N10°E, but submits this was limited to a distance falling within the three-mile territorial sea as permitted by international law. Guyana notes that in 1965 the United Kingdom first proposed a draft treaty which departed from the 10° Line, and that this was due to the United Kingdom's decision to implement the median line principle enshrined in Article 12(1) of the 1958 Territorial Sea Convention. Further, explanatory documents prepared contemporaneously by officials from the United Kingdom and British Guiana indicate that the original navigational reasons put forward by The Netherlands for the 10° Line in the territorial sea were no longer applicable.[326] Guyana maintains that in 1966 on achieving independence Guyana informed The Netherlands that it shared this view. Guyana contends that thereafter its practice was predicated on the equidistance line as required by Article 12(1) of the 1958 Territorial Sea Convention.[327] According to Guyana, after Suriname achieved independence in 1975, its conduct was generally consistent with that of Guyana rather than with the 10° Line.[328] Guyana puts forward that the conduct of the parties in the grant of oil concessions respected the historical equidistance line of N34E within the territorial waters up to the three-mile limit and then up to the twelve-mile limit once that was established.[329]

291. Guyana argues that "special circumstances" for the purposes of maritime delimitation include the conduct of the Parties, particularly the existence, if there is one, of a *modus vivendi* reflected in a pattern of oil and gas concessions, as well as the conduct of the former colonial powers.[330] Guyana submits that:

> the special circumstances in the territorial sea or beyond do not include land mass and geographic and geological factors which pertain to the seabed. Seabed special circumstances do not come within the Article 15 definition of special circumstances and that is long established, since at least 1985, and stated very clearly at paragraph 39 of the Libya-Malta case. That case, of course, was dealing with the continental shelf but the principle enunciated by the Court applies equally to the territorial sea.[331]

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[326] Guyana Memorial, para. 8.26.

[327] Guyana Reply, para. 8.20.

[328] Guyana Memorial, para. 8.30.

[329] Guyana Reply, para. 6.41.

[330] In support of this argument, Guyana cites *Tunisia/Libya*, Judgment, *I.C.J. Reports 1982*, p. 18, at paras. 84, 94, 119.

[331] Transcript, p. 332.

### *Absence of navigation by early 1960s*

292. Guyana contends that by the early 1960s any potential need for navigational access to the Corentyne western channel had disappeared, in view of the lack of actual usage by that time. In that connection, Guyana cites the draft treaty proposed by the United Kingdom in 1965, which took Point 61 as the starting point, but in Draft Article VII(1) proposed the use of a line to be drawn "in accordance with the principle of equidistance from the nearest points of the base lines from which the territorial sea of British Guiana and Surinam respectively is measured".[332] Contemporaneous documents prepared by officials of the United Kingdom and British Guiana indicate that the original reasons given by The Netherlands no longer applied since the western channel of the Corentyne River was no longer navigable by commercial ships, which had become much larger and heavier than those operating in the 1930s.

### *The N10°E Line, if it governed relations between the parties, did not exist beyond 3 nm*

293. Guyana disputes that even if there were a navigational factor to be treated as a special circumstance, it could not require alteration to the course of the territorial sea boundary beyond 3 nm. Guyana maintains that "the United Kingdom and The Netherlands agreed that any delimitation outside the territorial sea beyond three miles from Point 61 was to be carried out in accordance with the principle of equidistance".[333] The United Kingdom in 1957 calculated the methodology to be applied in establishing an equidistance line using Dutch chart 217 and British chart 1801, and proposed a segmented line with a general bearing of N34°E. Guyana argues that The Netherlands did not object to this line or to its adoption by the United Kingdom and Guyana as an equidistance line in the territorial sea and eventually up to a limit of 12 nm.[334] Thus, according to Guyana, as a matter of law it was impossible for the Parties to have inherited a delimitation of the territorial seas beyond three miles along the 10° Line.[335]

### *No justification for departure from the provisional equidistance line*

294. Guyana maintains that there is no justification admissible under Article 15 of the Convention for departing from the provisional equidistance line in Suriname's favour, and notes that Suriname has never claimed that it has an historic title to any maritime territory east of the 10° Line.[336] Guyana dis-

[332] Guyana Memorial, para. 8.26.

[333] Guyana Memorial, para. 8.24.

[334] Guyana Memorial, para. 8.24.

[335] Guyana Memorial, para. 8.28.

[336] Guyana Reply, para. 6.23.

putes that the arrangement made in 1936 between the Parties' colonial predecessors is a special circumstance. Guyana argues that there is very limited judicial authority for the proposition that navigational requirements can be treated as a special circumstance "having so decisive an effect" as that argued for by Suriname[337] and it distinguishes the *Beagle Channel* award on the grounds that the deviation accepted in that case was "relatively unimportant".[338] In the alternative, Guyana argues that navigational factors should not be treated as a special circumstance in the absence of an actual navigational need as opposed to a "purely hypothetical one", as in the western channel of the Corentyne River.[339]

## B. The Tribunal's findings pertaining to the delimitation of the territorial sea

295. The Tribunal recalls Article 15 of the Convention, which is based on Article 12 of the 1958 Territorial Sea Convention. Article 15 of the Convention provides that:

> Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

296. Thus, Article 15 of the Convention places primacy on the median line as the delimitation line between the territorial seas of opposite or adjacent States.

### Special circumstances and historical evidence of an agreement

297. There is no evidence before the Tribunal to suggest that some form of historic title to the territorial waters in dispute had inured to either Party, nor are there any geographical features such as low-tide elevations or islands that the Tribunal would have to consider in delimiting the territorial sea.

298. The question remaining before the Tribunal is whether there are any special circumstances which might justify a departure from the median line approach prescribed by Article 15 of the Convention.

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[337] Guyana Reply, para. 6.26.

[338] Guyana Reply, para. 6.30, *Beagle Channel*, 17 I.L.M. p. 634, Annex IV, para. 4, XXI R.I.A.A. p. 57.

[339] Guyana Reply, para. 6.33.

299. As has been recalled above, The Netherlands claimed control over the approaches to the Corentyne River by virtue of the fact that the waters of the River were under its exclusive sovereignty. At the time, an additional motivation for the United Kingdom to accept the claim of The Netherlands was that the burden of administering the maritime area would fall upon Suriname. Although the proposed treaty embodying this agreement was not signed, in large part because of the advent of the Second World War, the parties acted upon it for thirty years and, in their relations, regarded the 10° Line as the proper delimitation line in the territorial sea.

300. There is disagreement between the Parties as to what constitutes a special circumstance, and in particular, whether navigational considerations, such as those cited by Suriname to support the N10°E line in the territorial sea, can constitute a special circumstance.[340] Guyana reasons that the authorities for varying the median line to accommodate special circumstances of navigation are scarce and that where they do exist, for such a variation to take place there must be:

> a known navigational channel or an established practice of navigation, and not the situation (as arises in the present case) where the navigational interest identified in 1936 was both hypothetical and recognised to be subject to change, and in respect of which for over 40 years there has been no evidence of any navigational use.[341]

301. In the Commentary accompanying the International Law Commission's ("ILC") proposals concerning the delimitation of the territorial sea, it was said that the presence of a navigable channel could make a boundary based on equidistance inequitable and could indicate the appropriateness of utilising the thalweg as the boundary.[342] This is not the situation in the present case, where the thalweg is to the east of a line based on equidistance and where, indubitably, a binding agreement between the Parties places the boundary in the river on the western bank. Moreover, the equidistance line is to the east of the N10°E line. The ILC Commentary is instructive, however, in that it broadly indicates that navigational interests may constitute special circumstances.[343]

302. International courts and tribunals are not constrained by a finite list of special circumstances. The arbitral tribunal in the UK-French Continental Shelf arbitration took the approach that the notion of special circumstances generally refers to equitable considerations rather than a notion of defined or limited categories of circumstances:

> The role of the 'special circumstances' condition in Article 6 is to ensure an equitable delimitation; and the combined 'equidistance-

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[340] Guyana Reply, paras. 1.6, 3.51–3.53; Suriname Counter-Memorial, paras. 3.32–3.33, 6.51–6.53.

[341] Guyana Reply, para. 6.30.

[342] YBILC, 1952, Vol. II, Doc.A/CN.4/53.

[343] See also *ibid*., Doc. A/CN.4/61/Add.1/Annex.

> special circumstances rule', in effect, gives particular expression to a general norm that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles. In addition, Article 6 neither defines 'special circumstances' nor lays down the criterion by which it is to be assessed whether any given circumstances justify a boundary line other than the equidistance line.[344]

303. The ICJ has followed a similar approach in its jurisprudence. The Court in the *Libya/Malta* case found that there is "assuredly no closed list of considerations".[345] Furthermore, in the *Jan Mayen* case, after having found that it was appropriate "to begin the process of delimitation by a median line provisionally drawn",[346] the ICJ stated that it was "now called upon to examine *every particular factor* of the case which might suggest an adjustment or shifting of [that] line" [emphasis added].[347] The Court continued by stating that an adjudicative body called upon to effect a delimitation of a maritime boundary "will consult not only 'the circumstances of the case' but also previous decided cases and the practice of States",[348] and will be mindful of the need to achieve "consistency and a degree of predictability".[349] The Tribunal agrees that special circumstances that may affect a delimitation are to be assessed on a case-by-case basis, with reference to international jurisprudence and State practice.

304. Navigational interests have been found to constitute such special circumstances. Indeed, at the first Geneva Conference on the Law of the Sea, Commander Kennedy expressed the view that a special circumstance may consist in "the presence of a navigable channel."[350] Arbitral tribunals subsequently adhered to this view, notably in the *Beagle Channel* arbitration. The tribunal in that case stated that it had been guided:

> in particular by mixed factors of appurtenance, coastal configuration, equidistance, and also of convenience, navigability, and the desirability of enabling each Party so far as possible to navigate in its own waters. None of this has resulted in much deviation from the strict

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[344] *UK-French Continental Shelf*, 54 I.L.R. p. 5 (1979), para. 70.

[345] *Libya/Malta*, Judgment, *I.C.J. Reports 1985*, p. 13, at p. 40, para. 48. However, it should be noted that that statement was limited; the Court found in that case that "only [considerations] that are pertinent to the institution of the continental shelf as it has developed within the law, and to the application of equitable principles to its delimitation, will qualify for inclusion."

[346] *Jan Mayen*, Judgment, *I.C.J. Reports 1993*, p. 38, at para. 53.

[347] *Jan Mayen*, Judgment, *I.C.J. Reports 1993*, p. 38, at para. 54.

[348] *Jan Mayen*, Judgment, *I.C.J. Reports 1993*, p. 38, at para. 58.

[349] The Court in *Jan Mayen* (*I.C.J. Reports 1993*, p. 38, at para. 58) quoting the *Libya/Malta* Judgment (*I.C.J. Reports 1985*, p. 39, at para. 45).

[350] Proceedings of the Geneva Conference on the Law of the Sea, Thirty-second meeting, 9 April 1958, in *United Nations Conferences on the Law of the Sea: Official Records* (Buffalo: Hein, 1980), p. 93.

> median line, except . . . near Gable Island where the habitually used navigable track has been followed.[351]

305. Guyana attempted to limit the relevance of the finding of the tribunal in that case. Guyana argued that there is no habitual use of the western channel, that the deviation from the median line would not be minor, and that there are no islands in the territorial sea of the Parties.[352] The Tribunal does not agree with Guyana's submission on the significance of the *Beagle Channel* award. The *Beagle Channel* tribunal's statement that there was little deviation from the strict median line was merely descriptive; it was not prescribing that any deviation from the median line based on navigational concerns need be minor. On the contrary, the tribunal's finding prescribes that factors such as "convenience, navigability, and the desirability of enabling each Party *so far as possible* to navigate in its own waters" [emphasis added], be taken into account.[353]

306. The Tribunal concludes that special circumstances of navigation may justify deviation from the median line, and that the record amply supports the conclusion that the predecessors of the Parties agreed upon a N10°E delimitation line for the reason that all of the Corentyne River was to be Suriname's territory and that the 10° Line provided appropriate access through Suriname's territorial sea to the western channel of the Corentyne River. Contrary to Guyana's assessment above, Suriname has presented evidence of navigation in the western channel, albeit of small local craft, rather than large ocean-going vessels. The fact is that there is an "established practice of navigation"[354] in the western channel, not only a hypothetical one. Furthermore, the Tribunal must take account of Guyana's own admissions that there was recognition of a N10°E line for 3 nm:

> from the late 1930s to the late 1950s – when a 'navigation channel' was thought to be a 'possibility', it was understood by both colonial powers to extend no farther than 3 nm from the Guyana coast. Thus, even if such a channel had existed, there is no basis for treating it as a

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[351] *Beagle Channel*, 17 I.L.M. p. 634, at p. 673, para. 110 (1978).

[352] Guyana Reply, paras. 6.29–6.30.

[353] The arbitral tribunal in the UK-French Continental Shelf arbitration similarly considered the navigational, defence and security interests of both parties in its delimitation (54 I.L.R. p. 5, at para. 188 (1979)). Those considerations included defence plans, sea rescue, control of navigation, and responsibility for lights and buoys (para. 163). Although the arbitral tribunal considered those interests, it found that they did not exercise "a decisive influence on the delimitation of the boundary" in that case due to the "very particular character of the English Channel as a major route of international maritime navigation serving ports outside the territories of either of the Parties" (para. 188). However, the tribunal did find that even in that case, they could "support and strengthen . . . any conclusions that are already indicated by the geographical, political and legal circumstances of the region" (para. 188).

[354] Guyana Reply, para. 6.30.

> special circumstance affecting maritime delimitation beyond 3 nm, let alone for a distance of 200 nm;[355] and,
>
> To the extent that there ever was any agreement in relation to a 10-degree line, it was, in any event, limited to a distance of no more than 3 nautical miles. At no point during which United Kingdom and the Dutch appeared to have followed the line did the territorial sea ever exceed 3 miles. The 10-degree line was rejected by the United Kingdom in the early 1960s, well before the extension of the breadth of the territorial sea to 12 nautical miles by Guyana in 1977 and by Suriname in 1978. There are no grounds for now claiming that a 10-degree line should automatically extend 12 nautical miles as a result of a change in the law.[356]

307. The Tribunal holds that the 10° Line is established between the Parties from the starting point to the 3 nm limit. As the Tribunal accepts the 10° Line to the 3 nm limit, it also accepts the 1936 Point/Point 61 as a reference point for drawing the maritime delimitation line. Indeed, the Tribunal agrees with Suriname that the 1936 Point/Point 61 is inextricably linked to the Parties' agreement on a maritime boundary following the 10° Line.[357]

308. An additional source of disagreement between the Parties has been the question of how to use the 1936 Point/Point 61 to determine the starting point of the maritime boundary. Guyana argued that the proper starting point was on the low water line at the shortest distance from the 1936 Point/Point 61,[358] a proposition disputed by Suriname.[359] As the 1936 Point/Point 61 was the reference point for the 10° Line which the Tribunal has accepted up to the 3 nm limit, the Tribunal finds that the starting point of the boundary ("Point 1") is the intersection of the low water line of the west bank of the Corentyne River and the geodetic line of N10°E which passes through Marker "B", a marker placed by the 1936 Mixed Boundary Commission 220 metres distant on an azimuth of 190° from Marker "A", also known as the 1936 Point/Point 61. The Tribunal recalls that Suriname argued that it does not have jurisdiction to determine any question relating to the land boundary between the Parties.[360] The Tribunal's findings have no consequence for any land boundary that might exist between the Parties, and therefore, in light of Suriname's statement at the hearing discussed in Chapter IV,[361] this jurisdictional objection does not arise.

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[355] Guyana Reply, para. 3.53.

[356] Transcript, p. 344.

[357] Suriname Preliminary Objections, para. 5.7.

[358] Transcript, pp. 179–180.

[359] Transcript, p. 691.

[360] Suriname Preliminary Objections, para. 4.14.

[361] "If . . . there is indeed an agreed boundary in the territorial sea . . . then the terminus of the maritime boundary provides a perfectly adequate starting point, and every issue that this Tribunal would have to decide would be governed by the provisions of the Law of the Sea Convention." (Transcript, pp. 795–796)

309. The Tribunal also recalls that the Parties were unable to agree on the coordinates of Marker "B". The Tribunal Hydrographer requested, on 20 December 2006, "that the Parties provide the position of Marker 'B'."[362] In response, Guyana provided a set of WGS-84 coordinates which Suriname disputed,[363] urging the Tribunal to refer to the astronomical coordinates previously used by both Parties.[364] The Hydrographer therefore made a site visit to the location of Marker "B", and determined its WGS-84 coordinates to be 5°59'46.21"N, 57°08'50.48"W.[365] The Parties accepted these coordinates as the location of Marker "B" and so does the Tribunal.

## The boundary between 3 and 12 nm

310. When Guyana and Suriname, as independent nations, extended the breadth of their territorial seas from 3 to 12 nm (in 1977 and 1978, respectively), neither addressed directly the question of the continuation of the 10° Line from the previous to the current limit of their territorial seas. That question appeared to have been subsumed within the wider question of the delimitation of the continental shelf and exclusive economic zone and the difference in approach between the Parties on this question.

311. Rather surprisingly, the question of whether and how, in the absence of an agreement to do so, a delimitation should be extended from the previous limit of territorial seas to a newly established limit, does not appear to have engaged the attention of States, courts, or commentators. The Tribunal agrees with Guyana that the *Guinea-Bissau–Senegal* case cited by Suriname does not support the view that there should be automatic extension of the territorial sea from the previously accepted limit of 3 nm, to the current limit of 12 nm. Indeed, the difference between this case and *Guinea-Bissau–Senegal* is that there was a written agreement between the parties in the latter case, given effect by the tribunal in that case. No authority was cited to the Tribunal of a comparable situation in any other case, although Suriname states:

> The object and purpose of choosing the 10° Line was that navigation entering the river would be regulated by The Netherlands/Suriname and would not be subject to regulation by the United Kingdom/Guyana. Thus, the question is not just a technical issue of intertemporal law regarding the breadth of the territorial sea, but rather one of applying the contemporary law of the sea in light of the object and purpose of the agreement on the 10° Line. In this connection, an examination of the broad unilateral regulatory and enforcement powers of the coastal state with respect to navigation in the territorial

[362] Written Question to the Parties from the Tribunal Hydrographer, 20 December 2006.

[363] Letter from Guyana to the Tribunal, 10 January 2007.

[364] Letter from Suriname to the Tribunal, 12 January 2007.

[365] Tribunal Hydrographer Corrected Report on Site Visit, 30 July 2007, para. 42.

> sea in the 1982 Convention, as set forth in articles 19, 21, 22, 23, 25, 211(4) and 220(2)-(6), suggests that the application of the 10° Line to the full 12-nautical-mile territorial sea is required in order to achieve the object and purpose of the agreement.[366]

312. In the above submission, Suriname raises the conduct of the Parties over some thirty years to the level of a perfected instrument, a notion that the Tribunal rejects. Uncompleted treaties, such as the 1939 or 1949 British draft treaty, do not create legal rights or obligations merely because they had been under consideration. This point was decided by the ICJ in the *Sovereignty over certain Frontier Lands* case.[367] There, the Court considered efforts in 1889 and 1892 "by the two States to achieve a regular and continuous frontier between them" which ended in the drafting of a convention, but not in its ratification. The Court concluded that "[t]he unratified Convention of 1892 did not, of course, create any legal rights or obligations".[368]

313. However, the Tribunal accepts that it must apply the Convention to the entirety of the case before it, and Article 15 allows the Tribunal to consider historic title and special circumstances as reasons for varying the median line in conducting a delimitation of the territorial sea. The Tribunal is also persuaded that coastal States need to exercise regulatory and enforcement powers with respect to navigation in the territorial sea under the Articles cited by Suriname. These regulatory enforcement powers extend to both Parties, although Suriname's control over the approaches to the Corentyne River further justify the line the Tribunal has taken in delimiting the territorial sea along the N10°E azimuth to the 3 nm limit.

314. An automatic extension of the line, as it proceeds seaward, would however rapidly cease to have relevance to the special circumstances of navigation and control that brought it about.

315. Beyond the 3 nm limit to the 12 nm limit it is necessary to find a principled method by which the 10° Line may be connected to the single maritime boundary line determined by the Tribunal to delimit the continental shelves and exclusive economic zones of the Parties.

316. In a general sense, the extension of the territorial sea from its former limits to a distance of 12 nm from territorial sea baselines recognised by the Convention favours greater coastal State control over navigation, pollution, customs, and other coastal State laws, including its general criminal law. Such was recognised, for example, in the United States when a report was issued by the 105th Congress on the Coast Guard Authorization Act of 1997. Noting that Presidential Proclamation 5928 of December 27, 1988, had defined the territorial sea of the United States as extending to 12 nm, the Report stated:

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[366] Suriname Rejoinder, para. 3.75.

[367] *Case concerning Sovereignty over certain Frontier Land* (*Belgium* v. *Netherlands*), Judgment, *I.C.J. Reports 1959,* p. 209.

[368] *Ibid*., at p. 229.

> This will enable the Coast Guard to establish vessel operating requirements including vessel traffic systems, for all U.S. and foreign vessels within the 12-mile territorial sea. This will also clarify the area in which the Captain of the Port can direct a vessel to operate or anchor, establish safety zones to protect the navigable waters, protect the nation from terrorism, and investigate vessel casualties. In addition, the Coast Guard will be able to keep out of the expanded territorial sea vessels with a history of accidents, pollution incidents, or serious repair problems and vessels that discharge oil or hazardous substances or that are improperly manned. Currently, these substandard vessels may approach as close as three nautical miles to our coast before they can be instructed not to enter our waters. This additional area of legislative jurisdiction will enable the Coast Guard, through its Port State Control Program, to deal more effectively with substandard foreign flag vessels seeking to enter our ports.[369]

317. In an age of increased security and safety concerns regarding international boundaries, certainly navigational concerns have been imbued with greater significance. As cited above, similar arguments were advanced by Suriname in support of its view that the 10° Line had been accepted as the boundary between the two territories at a time when the territorial sea limit had been recognised by both The Netherlands and the United Kingdom as extending to 3 nm, and that the previous limit should automatically be regarded as extending on the same azimuth to the currently recognised territorial sea limit of 12 nm.[370] In its view, the logic behind the choice of a 10° Line in place of an equidistance line applied as strongly to the currently claimed and permissible 12 nm limits in the territorial seas.

318. Suriname also argued that not extending the 10° Line beyond the 3 nm limit would cause Guyana's territorial sea to "wrap-around" the northern limit of Suriname's territorial sea, thus defeating what it claimed was the "object and purpose" of the choice of the 10° Line in the first place, when the areas beyond were regarded by the international law of the time as high seas. In that connection, appeal was also made by Suriname to the inter-temporal law principle, applying it in this case to submit that references to the territorial sea in the earlier instruments and instances of conduct should be regarded as references to the "limits claimed by the parties at any given time in accordance with international law."[371] The Tribunal, however, cannot accept this submission in the present case, where the issue turns on conduct of the Parties justifying an adjustment based on special circumstances. The portion of the decision

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[369] United States Congress, From 1st Session, Report of the 105th Congress, 105–236, Coast Guard Authorization Act of 1997.

[370] It should be noted that Guyana ratified the United Nations Convention on the Law of the Sea, 1982, on 31 July 1993 and has declared a 12 nm territorial sea and a contiguous zone extending to 24 nm. Suriname ratified the Convention on 9 July 1998 and has declared a 12 nm territorial sea. It has not declared a contiguous zone.

[371] Transcript, p. 850.

in the *Aegean Sea* case quoted by Suriname to support its submission,[372] where the ICJ regarded the definition of "territory", appearing in an instrument dated 1931, as now including the continental shelf,[373] is not relevant.

319. The evidence in the case of the navigational and other interests of Suriname extending beyond 3 nm is, however, of some consequence. These considerations appear to have been present in the mind of British government experts, such as Commander Kennedy and Mr. Scarlett, who raised the new issue of the contiguous zone in internal discussions of the boundary.[374] It appears to have been a result of these discussions that the 1961 British draft treaty submitted to The Netherlands proposed that the N10°E line extend to 6 nm before turning to other directions beyond that point.

320. It is to be noted that, at the time of the discussions leading up to the United Kingdom's draft treaty of 1961, there was no stated outer limit to the territorial sea contained in the 1958 Territorial Sea Convention. The limit of 12 nm established for the outer limit of the contiguous zone, however, effectively put a cap on any claims to territorial waters beyond that limit, in which event the claiming State would forego a claim to a contiguous zone.

321. It should also be noted that Article 24 of the 1958 Territorial Sea Convention specifies a median line in the delimitation of overlapping adjacent or opposite contiguous zones, in the absence of agreement, without regard to special circumstances. This provision does not appear in Article 33 of the Convention which is modelled on Article 24 of the 1958 Territorial Sea Convention.

322. Much attention was devoted at the hearing to the problem of the so-called wrap-around, or cut-off, effect of a delimitation of the territorial seas extending only to 3 nm. Such a delimitation line along the N10°E azimuth would allow Guyana's territorial sea to cut across the approaches to the river and thus defeat the purpose of that line to protect Suriname's navigational interests. A solution suggested by Suriname, based on the angle bisector method of delimitation, would be to extend the 10° Line to 12 nm and thereafter to proceed on a direction line of N17°E, the effect of which would be to divide equally the area of overlap. However, Suriname did not urge this solution on the Tribunal since its central argument was to promote a single maritime boundary on an azimuth of N10°E to the 200 nm limit. In its view, the N17°E line would have to be adjusted by reason of geographical circumstances and equitable criteria to a N10°E line for a distance of 200 nm. This line would, of course, remove the overlap altogether.

323. The Tribunal considers that, in determining a delimitation line dividing the Parties' territorial seas from the point at which the N10°E line

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[372] Transcript, p. 851.

[373] *Aegean Sea*, Judgment, *I.C.J. Reports 1978*, p. 3, at pp. 35–36, para. 86.

[374] Commander Kennedy to Mr. Scarlett, 15 January 1959, Guyana Memorial, Annex 24; Mr. Scarlett to Commander Kennedy, 11 February 1959, Guyana Memorial, Annex 25.

ends at 3 nm to the 12 nm limit, a special circumstance is constituted by the very need to determine such a line from a point at sea fixed by historical arrangements of an unusual nature. Bearing this special circumstance in mind, the Tribunal arrives at a line continuing from the seaward terminus of the N10°E line at 3 nm, and drawn diagonally by the shortest distance to meet the line adopted later in this Award to delimit the Parties' continental shelf and exclusive economic zone.

324. In the judgment of the Tribunal, this line is in conformity with the relevant provisions of the Convention. It avoids a sudden crossing of the area of access to the Corentyne River, and interposes a gradual transition from the 3 nm to the 12 nm point. It also ensures that the line is convenient for navigational purposes.

325. The Tribunal therefore concludes that the territorial sea delimitation must be drawn from the point at which the N10°E line intersects the 3 nm limit to the point at which the equidistance line drawn by the Tribunal in Chapter VI of this Award intersects the 12 nm limit.

326. For illustrative purposes only, Map 2* at the end of this Chapter shows the course of the delimitation line through the territorial sea.

327. The verbal description of the international maritime boundary through the territorial sea is as follows. The delimitation line commences at Point 1, being the intersection of the low water line of the west bank of the Corentyne River and the geodetic line of N10°E which passes through Marker "B" established in 1936. Marker "B" has a WGS-84 position of 5°59'46.21"N, 57°08'50.48"W.[375]

328. From Point 1, the delimitation line proceeds along geodetic lines to the following points in the order given:

| | | |
|---|---|---|
| Point 2 | 6°08.33'N, | 57°07.33'W |
| Point 3 | 6°13.47'N, | 56°59.87'W. |

Geographic coordinates refer to the World Geodetic System 1984 (WGS-84).

329. From Point 3 onward, the delimitation line continues as described in Chapter VI.

## Chapter VI. Delimitation of the continental shelf and exclusive economic zones

330. Both the Republic of Guyana and the Republic of Suriname are parties to the United Nations Convention on the Law of the Sea, which they

[375] Tribunal Hydrographer Corrected Report on Site Visit, 30 July 2007, para. 42.

* Secretariat note: Map 2 is located in the front pocket of this volume.

ratified on 31 July 1996 and 9 July 1998 respectively. They are therefore bound by the relevant provisions of the Convention and especially by the Articles concerning the delimitation of the exclusive economic zone and the continental shelf between States.[376] Neither Guyana nor Suriname has made declarations under Article 298 excluding maritime boundary disputes from the compulsory procedures specified in Part XV of the Convention.

331. These Articles provide that the delimitation of the continental shelf and the exclusive economic zone between States with opposite or adjacent coasts "shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution".[377]

332. Emphasis is placed in both of these Articles on the equitable result.[378] The Court in the *Tunisia/Libya* case made this quite clear. It stated that:

> In the new text (i.e. the official draft convention before the Conference the text of which has remained unchanged), any indication of a specific criterion which could give guidance to the interested States in their effort to achieve an equitable solution has been excluded. Emphasis is placed on the equitable solution which has to be achieved. The principles and rules applicable to the delimitation of the continental shelf areas are those which are appropriate to bring about an equitable result.[379]

333. The tribunal in the *Barbados/Trinidad and Tobago* arbitration has cast some useful light on the significance of this text. It remarked that:

> This apparently simple and imprecise formula allows in fact for a broad consideration of the legal rules embodied in treaties and customary law as pertinent to the delimitation between the parties, and allows as well for the consideration of general principles of international law and the contributions that the decisions of international courts and tribunals and learned writers have made to the understanding and interpretation of this body of legal rules.[380]

334. It is particularly important to note that this Tribunal has to determine a single maritime boundary delimiting both the continental shelf and the exclusive economic zone. These regimes are separate, but to avoid the difficult practical problems that could arise were one Party to have rights over the water

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[376] Articles 74 and 83.

[377] Articles 74(1) and 83(1).

[378] *Eritrea/Yemen*, Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation), 119 I.L.R. p. 417, at para. 116 (1999), *The Eritrea-Yemen Arbitration Awards of 1998 & 1999* (Permanent Court of Arbitration Award Series 2005), online: <http://www.pca-cpa.org> ("*Eritrea/Yemen II*").

[379] *Tunisia/Libya*, Judgment, *I.C.J. Reports 1982*, p. 18, at para. 50.

[380] *Barbados/Trinidad and Tobago*, 45 I.L.M. p. 798 (2006), at para. 222, online: <http://www.pca-cpa.org>.

column and the other rights over the seabed and subsoil below that water column, a single maritime boundary can be drawn. It is generally acknowledged that the concept of the single maritime boundary does not have its origin in the Convention but is squarely based on State practice and the law as developed by international courts and tribunals.[381] That is why the Tribunal has to be guided by the case law as developed by international courts and tribunals in this matter. This Tribunal has also taken into account the dictum of the *Barbados/Trinidad and Tobago* tribunal's award in drawing a single maritime boundary where it states:

> Within those constraints imposed by law, the Tribunal considers that it has both the right and the duty to exercise judicial discretion in order to achieve an equitable result. There will rarely, if ever, be a single line that is uniquely equitable. The Tribunal must exercise its judgment in order to decide upon a line that is, in its view, both equitable and as practically satisfactory as possible, while at the same time in keeping with the requirement of achieving a stable legal outcome. Certainty, equity, and stability are thus integral parts of the process of delimitation.[382]

335. In the course of the last two decades international courts and tribunals dealing with disputes concerning the delimitation of the continental shelf and the exclusive economic zone have come to embrace a clear role for equidistance. The process of delimitation is divided into two stages. First the court or tribunal posits a provisional equidistance line which may then be adjusted to reflect special or relevant circumstances. It was in the *Jan Mayen* case that the ICJ clearly espoused this approach when it stated:

> Thus, in respect of the continental shelf boundary in the present case, even if it were appropriate to apply, not Article 6 of the 1958 Convention, but customary law concerning the continental shelf as developed in the decided cases, it is in accord with precedents to begin with the median line as a provisional line and then to ask whether "special circumstances" require any adjustment or shifting of that line.[383]

336. With respect to the boundary of the fishery zone, it went on to add:

> It thus appears that, both for the continental shelf and for the fishery zones in this case, it is proper to begin the process of delimitation by a median line provisionally drawn.[384]

337. The same approach was followed by the ICJ in the *Qatar/Bahrain* case. It expressly stated that

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[381] *See Qatar/Bahrain*, Merits, Judgment, *I.C.J. Reports 2001*, p. 40, at para. 173; and *Cameroon/Nigeria*, Judgment, *I.C.J. Reports 2002*, p. 303, at para. 286.

[382] *Barbados/Trinidad and Tobago*, 45 I.L.M. p. 798 (2006), at para. 244, online: <http://www.pca-cpa.org>.

[383] *Jan Mayen*, Judgment, *I.C.J. Reports 1993*, p. 38, at para. 51.

[384] *Ibid*., at para. 53.

> for the delimitation of the maritime zones beyond the 12-mile zone (i.e. the exclusive economic zone and the continental shelf) it will first provisionally draw an equidistance line and then consider whether there are circumstances which must lead to an adjustment of that line.[385]

338. It is important to note that recent decisions indicate that the presumption in favour of equidistance, established in the case law relating to States with opposite coasts, also applies in the case of States with adjacent coasts. In the *Cameroon/Nigeria* case, the ICJ applied this method to determine a lateral boundary between States with adjacent coasts.[386] It also should be recalled that this delimitation process was used in the northern sector of the boundary between Qatar and Bahrain "where the coasts of the two States are no longer opposite to each other but are rather comparable to adjacent coasts".[387]

339. Arbitral tribunals have also adhered to this approach. In the maritime boundary dispute between Newfoundland and Labrador and Nova Scotia, the Tribunal stated:

> In the context of opposite coasts and latterly adjacent coasts as well, it has become normal to begin by considering the equidistance line and possible adjustments and to adopt some other method of delimitation only if the circumstances justify it.[388]

340. The *Barbados/Trinidad and Tobago* tribunal described a two-step approach to delimitation:

> The determination of the line of delimitation thus normally follows a two-step approach. First, a provisional line of equidistance is posited as a hypothesis and a practical starting point. While a convenient starting point, equidistance alone will in many circumstances not ensure an equitable result in the light of the peculiarities of each specific case. The second step accordingly requires the examination of this provisional line in the light of relevant circumstances, which are case specific, so as to determine whether it is necessary to adjust the provisional equidistance line in order to achieve an equitable result. This approach is usually referred to as the "equidistance/relevant circumstances" principle. Certainty is thus combined with the need for an equitable result.[389]

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[385] *Qatar/Bahrain*, Merits, Judgment, *I.C.J. Reports 2001*, p. 40, at para. 230.

[386] *Cameroon/Nigeria*, Judgment, *I.C.J. Reports 2002*, p. 303, at para. 290.

[387] See *Qatar/Bahrain*, Merits, Judgment, *I.C.J. Reports 2001*, p. 40, at para. 170.

[388] Award of the Tribunal in the Second Phase, 26 March 2002, para. 2.28. See also *Eritrea/Yemen II*, 119 I.L.R. p. 417 (1999), *The Eritrea-Yemen Arbitration Awards of 1998 & 1999* (Permanent Court of Arbitration Award Series 2005), online: <http://www.pca-cpa.org>.

[389] *Barbados/Trinidad and Tobago*, 45 I.L.M. p. 798 (2006), at para. 242, online: <http://www.pca-cpa.org>. The *Barbados/Trinidad and Tobago* tribunal refers to the ICJ decisions in *Cameroon/Nigeria* (Judgment, *I.C.J. Reports 2002*, p. 303) and *Qatar/Bahrain* (Judgment, *I.C.J. Reports 2001*, p. 40), as well as Prosper Weil's text *Perspectives du droit de la délimitation maritime* (p. 223 (1988)), in support of its two-step approach.

341. As noted above, that tribunal went on to add "[c]ertainty, equity, and stability are thus integral parts of the process of delimitation"[390] – a proposition which accords with the view of this Tribunal.

342. Articles 74 and 83 of the Convention require that the Tribunal achieve an "equitable" solution. The case law of the International Court of Justice and arbitral jurisprudence as well as State practice are at one in holding that the delimitation process should, in appropriate cases, begin by positing a provisional equidistance line which may be adjusted in the light of relevant circumstances in order to achieve an equitable solution. The Tribunal will follow this method in the present case.

## A. Relevant coasts

343. The Tribunal will now turn its attention to the coasts of the Parties which are relevant to this maritime boundary delimitation – the relevant coasts "from which will be determined the location of the baselines and the pertinent basepoints which enable the equidistance line to be measured".[391]

### The Parties' positions

344. In its Memorial, Guyana contends that the determination of the relevant coasts involved the identification of the coastal fronts that generate legal entitlement to the maritime area in dispute based on the principle that "the land dominates the sea" citing the *North Sea Continental Shelf* cases;[392] the *Aegean Sea* case;[393] and *Qatar/Bahrain*.[394]

345. Guyana considered:

> the relevant coastline for each Party to be the length of coast that lies between the outermost points along the coastal baseline that control the direction of the provisional equidistance line to a distance of 200 nm. These coastal basepoints define the limits of each Party's area of legal entitlement. No other portions of the coastline beyond either outer basepoints are relevant because they do not generate legal entitlement to any maritime areas subject to delimitation by the Tribunal.[395]

346. Guyana explained that:

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[390] *Barbados/Trinidad and Tobago*, 45 I.L.M. p. 798 (2006), at para. 244, online: <http://www.pca-cpa.org>.

[391] *Qatar/Bahrain*, Judgment, *I.C.J. Reports 2001*, p. 40, at para. 178.

[392] *North Sea Continental Shelf*, Judgment, *I.C.J. Reports 1969*, p. 3, at para. 96.

[393] *Aegean Sea*, Judgment, *I.C.J. Reports 1978*, p. 3, at para. 86.

[394] Guyana Memorial, para. 8.35; *Qatar/Bahrain*, Merits, Judgment, *I.C.J. Reports 2001*, p. 40, at para. 185.

[395] Guyana Reply, para. 3.17.

> [its] relevant coast – the portion responsible for 'generating the complete course of the median line' – lies between Point 61 (its easternmost basepoint) and Devonshire Castle Flats (its westernmost basepoint). . . . Guyana and Suriname are in agreement on the locations of these outer basepoints, as confirmed by Figure 31 in the Counter-Memorial. The distance between them is 215 km. In like manner, Suriname's relevant coast extends from Point 61 in the west to the easternmost point along the Suriname coast that controls the direction of the provisional equidistance line. In Guyana's view, this point is located on Hermina Bank at 55°45'55.1"W; 6°0'39.8"N. Suriname refers to this basepoint as S13. Suriname's coastline between Point 61 and basepoint S13 . . . measures 153 km. The ratio of the lengths of the Parties' relevant coastlines is thus 1.4 to 1 (215 km to 153 km) in Guyana's favour.[396]

347. Guyana's contention is based on the dictum in the *Jan Mayen* case which treated certain sections of the coast as relevant, "in view of their role in generating the complete course of the median line provisionally drawn which is under examination".[397]

348. Suriname has argued that, since the area being delimited in the *Jan Mayen* case was the area between two opposite coasts, it was of little use in a case where the adjacent relevant coasts have somewhat different general directions and thus form an angle where they meet.[398]

349. In the view of Suriname:

> the relevant coasts are coasts that face onto or abut the area to be delimited. And this means that the relevant coasts are those that extend to a point where the coasts face away from the area to be delimited. On the Suriname side, the relevant coast extends from the Corentyne River to the Warrapa Bank. From there on, the coasts turn southeasterly, and since it no longer faces or abuts onto the area to be delimited, it is no longer relevant.[399]

350. Suriname continues:

> On the Guyana side, the relevant coast extends from the Corentyne River to the Essequibo River, and . . . after a short turn northwards, the coast returns to [a] northwesterly trend, but from Devonshire Castle Flats on, it no longer faces or abuts into the area to be delimited.[400]

351. This criterion for determining the relevant coasts finds its basis in the *Tunisia/Libya* Judgment where the Court observed that:

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[396] Guyana Reply, para. 3.18.

[397] *Jan Mayen*, Judgment, *I.C.J. Reports 1993*, p. 38, at para. 67.

[398] Suriname Rejoinder, para. 3.164.

[399] Transcript, p. 920.

[400] Transcript, pp. 920–921.

> [i]t is clear from the map that there comes a point on the coast of each of the two Parties beyond which the coast in question no longer has a relationship with the coast of the other Party relevant for submarine delimitation. The sea-bed areas off the coast beyond that point cannot therefore constitute an area of overlap of the extensions of the territories of the two Parties, and are therefore not relevant to the delimitation.[401]

### The Tribunal's findings

352. As the Tribunal proposes to begin this delimitation process with a provisional equidistance line, it seems logical and appropriate to treat as relevant the coasts of the Parties which generate "the complete course" of the provisional equidistance line.[402] "The equidistance line is the line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured",[403] a definition which is itself based on article 15 of the 1982 Convention. In the view of the Tribunal, the relevant coast of Guyana extends from Devonshire Castle Flats to a point just seaward of Marker "B", and the relevant coast for Suriname extends from Bluff Point, the point on the east bank of the Corentyne River used in 1936 as the mouth of the river, to a point on Vissers Bank.

## B. Coastal geography

353. As noted above, both Parties have requested the Tribunal, if it finds that it has jurisdiction, to determine a single maritime boundary delimiting the territorial seas, exclusive economic zones and continental shelves of Guyana and Suriname.[404] The Tribunal was not invited to delimit maritime areas beyond 200 miles from the baselines of Guyana and Suriname. Both Parties reserved their rights under Article 76(4) of the Convention. Thus in the present case the Tribunal is not concerned with matters concerning the delimitation of the outer continental shelf of the Parties.

354. It should be pointed out that the Parties themselves have agreed that geological or geophysical factors are of no relevance in this case.[405]

355. The Chamber of the ICJ in the *Gulf of Maine* case was the first international judicial body to be faced with the delimitation of a single mari-

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[401] *Tunisia/Libya*, Judgment, *I.C.J. Reports 1982*, p. 18, at para. 75.

[402] *Jan Mayen*, Judgment, *I.C.J. Reports 1993*, p. 38, at para. 67; *Arbitration between Newfoundland and Labrador and Nova Scotia*, Second Phase (2002), at para. 4.20 ("*Newfoundland and Labrador and Nova Scotia*").

[403] *Qatar/Bahrain*, Merits, Judgment, *I.C.J. Reports 2001*, p. 40, at para. 177.

[404] Guyana Memorial, p. 135; Suriname Counter-Memorial, Chapter 6.

[405] Guyana Memorial, para. 7.35; Suriname Counter-Memorial, para. 2.6.

time boundary–establishing a line which in that case divided both the exclusive fishing zone and the continental shelf. The Chamber explained that:

> a delimitation which has to apply at one and the same time to the continental shelf and to the superjacent water column can only be carried out by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of these two objects to the detriment of the other, and at the same time is such as to be equally suitable to the division of either of them. In that regard, moreover, it can be foreseen that with the gradual adoption by the majority of maritime States of an exclusive economic zone and, consequently, an increasingly general demand for single delimitation, so as to avoid as far as possible the disadvantages inherent in a plurality of separate delimitations, preference will henceforth inevitably be given to criteria that, because of their more neutral character, are best suited for use in a multi-purpose delimitation.[406]

The Chamber proceeded to make clear what was meant by criteria of a "more neutral character":

> it is, accordingly, towards an application to the present case of criteria more especially derived from geography that it feels bound to turn. What is here understood by geography is, of course mainly the geography of the coasts which has primarily a physical aspect, to which may be added, in the second place, a political aspect.[407]

356. Geography, in particular coastal geography, provided the Chamber with a neutral criterion which favoured neither one nor the other of the two realities – the seabed of the continental shelf and the water column of the exclusive economic zone. "The quest for neutral criteria of a geographical character", as was stated in the *Barbados/Trinidad and Tobago* arbitral award, "prevailed in the end over area-specific criteria such as geomorphological aspects or resource-specific criteria such as the distribution of fish stocks, with a very few exceptions (notably *Jan Mayen*, ICJ Reports 1993, p. 38)".[408]

357. Both Parties are in agreement that geography (coastal geography) is of "fundamental importance" in the delimitation of the maritime boundary. In fact Suriname considers that the dispute should be resolved exclusively on the basis of the coastal geography of the delimitation area. Guyana relies not only on coastal geography but on history, including the conduct of activities by the Parties.[409]

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[406] *Gulf of Maine*, Judgment, *I.C.J. Reports 1984*, p. 246, at para. 194.

[407] *Ibid*., at para. 195.

[408] *Barbados/Trinidad and Tobago*, 45 I.L.M. p. 798 (2006), at p. 837, para. 228, online: <http://www.pca-cpa.org>.

[409] Guyana Reply, para. 3.1; Suriname Counter-Memorial, para. 2.18.

## C. The provisional equidistance line

358. The Tribunal will now begin its examination of the provisional equidistance line to determine whether the line needs to be adjusted or shifted in order to achieve an equitable result. The Tribunal will first consider the arguments of the Parties with respect to the provisional equidistance line.

### The Parties' positions

359. For its analysis of the provisional equidistance line, Suriname divides the line into three sections. The first section starts from the coast up to the 200 metre isobath. The second section commences shortly after the provisional equidistance line leaves the 200 metre isobath, and the third section starts just as the provisional equidistance line approaches the 200-nautical-mile limit.

360. Suriname, in its Counter-Memorial, argues that:

> due to geographical circumstances, the first section of the provisional equidistance line thrust east northeast in front of the mouth of the Corantijn River and continues in a northeasterly direction across the coastal front of Suriname.[410]
>
> . . .
>
> The cut-off effect is caused by a combination of Suriname's concavity pulling, and Guyana's convex coastline west of the mouth of the Corantijn River pushing, the provisional equidistance line toward and in front of Suriname's coast. . . . The intense congregation of Guyana's basepoints just west of the Corantijn River on the convex coast of Guyana direct the provisional equidistance line in segment after segment as it extends into the sea. On the adjacent Suriname coast the controlling basepoints are spread out and indeed are largely absent from Suriname's recessed coast reaching toward the Coppename River. Thus, the coastal configuration of Guyana from the mouth of the Corantijn River west to the Berbice River pushed the first segment of the provisional equidistance line eastward. At the same time, the concave coast of Suriname does not offer any countervailing protuberance, and thus there are no basepoints on Suriname's coast to counter those of Guyana in order to turn the provisional equidistance line away from the front of the coast of Suriname. Out as far as the 200-meter depth contour, the relative position of the basepoints on the adjacent coasts continues to direct the provisional equidistance line in this way: the provisional equidistance line continues to be pushed by Guyana's convex coast near the mouth of the

[410] Suriname Counter-Memorial, para. 6.20.

> Corantijn River and pulled by the concave nature of Suriname's coast toward and in front of the coast of Suriname.[411]

From this Suriname concludes that a line is created "that violates the principle of non-encroachment."[412]

361. The provisional equidistance line changes direction in the second section and then veers towards the north, owing to the fact, according to Suriname, that the eastern headland of Suriname's concavity (Hermina Banks) begins to take effect on the line. Thus, in Suriname's words:

> for the first time basepoints on Suriname's coast counter the influence of the basepoints on Guyana's protruding convex coast just west of the mouth of the Corantijn River and turn the provisional equidistance line so that it ceases its swing in front of Suriname's coastal front. While the northward direction of the provisional equidistance line in this second sector might suggest that it is a reasonable line, it is in fact not an equitable delimitation line in this sector since it starts from an eastward point that has been determined by the convex/concave relationship between the neighboring coasts.[413]

362. It noted that the provisional equidistance line "begins in the wrong place too far to the east to mitigate the encroachment that is the result of the first segment of the provisional equidistance line".[414]

363. In the third sector, as the provisional equidistance line approaches the 200 nm limit, Suriname claims that the "basepoints on Guyana's prominent convex coastline west of the Essequibo River cause the provisional equidistance line [to] change direction and veer to the east across Suriname's coastal front" to Suriname's disadvantage.[415]

364. Suriname concluded that the provisional equidistance line does not produce an equitable delimitation and that it must be adjusted, or another method employed, in order to achieve an equitable delimitation result.[416]

365. Guyana, for its part, responded with its own analysis of the provisional equidistance line. With respect to the first section of the line it agrees that:

> it is true that the provisional equidistance line heads out from Point 61 for a very short distance in a direction toward Suriname's coast. But this is not caused by any alleged "convexity" along Guyana's coast. Rather, it is due to the fact that Point 61 is located on Guyana's coast and not in the middle of the Corentyne River. Once the provisional equidistance line encounters the first basepoints along Suriname's

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411 Suriname Counter-Memorial, para. 6.21.

412 Suriname Counter-Memorial, para. 6.27.

413 Suriname Counter-Memorial, para. 6.22.

414 Suriname Counter-Memorial, para. 6.28.

415 Suriname Counter-Memorial, para. 6.23.

416 Suriname Counter-Memorial, para. 6.30.

> coast, it is pushed northward and away from Suriname. Thereafter, the corresponding coastal basepoints on each side of the Corentyne River provide a countervailing effect. Thus, after the first few km the provisional equidistance line is no longer affected by the fact that it starts from a point on Guyana's coast, and it proceeds thereafter without any further effect from its starting point or from any localised convexities on either bank at the mouth of the Corentyne River to the end of its first segment. Accordingly, the first segment of the provisional equidistance line does not produce a cut-off effect on Suriname any more than it produces on Guyana.[417]

366. As to the second section, Guyana agreed with Suriname that this section of the line represented the "first pronounced change in direction of the provisional equidistance line" and that that change was caused "by the fact that the eastern headland of the Suriname concavity (Hermina Bank) begins to take effect on the line".[418] But it argues that Suriname "understates the pronounced effects produced by the headland or convexity at Hermina Bank".[419] In Guyana's view, "the Suriname basepoints on Hermina Bank control the direction of the entire provisional equidistance line in its second section".[420]

367. Guyana argued that the first section of the provisional equidistance line:

> follows a relatively straight course for approximately 100 nm. But for the coastal change from concavity to convexity at Hermina Bank, the relatively constant course of the equidistance line would likely continue along the same course all the way to the 200 nm EEZ limit.[421]

This coastal change as a consequence "gives Suriname more than 4,000 km² at Guyana's expense."[422] Guyana considered itself "prejudiced by the purported hypersensitivity of the provisional equidistance line".[423]

368. In reply to Suriname's claims that in the third section the provisional equidistance line "veers 'to the east to Suriname's disadvantage' because 'Guyana's controlling basepoints are located on the protruding coast west of the Essequibo River, '" Guyana pointed out that its "basepoints at Devonshire Castle Flats are not located on a 'protruding coast', but on the main body of the coastline where it changes to a more southeasterly direction".[424] It stated that "[t]he third segment of the provisional equidistance line cannot credibly be

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[417] Guyana Reply, para. 3.45.

[418] Guyana Reply, para. 3.46, citing Suriname Counter-Memorial, para. 6.22.

[419] Guyana Reply, para. 3.46.

[420] *Ibid*.

[421] *Ibid*.

[422] *Ibid*.

[423] *Ibid*.

[424] Guyana Reply, para. 3.47.

described as 'inequitable' to Suriname" and concluded that "*none of the three segments* of the line is in any way inequitable to Suriname".[425]

## The Tribunal's findings

369. The Tribunal will deal first with the following argument submitted by Suriname.

Suriname contends that:

> the equidistance method does not produce an equitable result when employed in these geographic circumstances. The reason it does not do so is that it responds to incidental coastal features of the geographical situation. In doing so, as it often does in adjacent state situations, it cuts off the projection of the coastal front of one of the states – in this case it cuts off the projection of Suriname's coastal front. Accordingly, *another delimitation method* is required to create an equitable solution.[426] [emphasis added]

and has put forward the argument:

> that when the equidistance method is not suitable in a delimitation between adjacent states, a method that employs coastal fronts and methods such as bisectors of the angle formed by adjacent coastal fronts or perpendiculars to the general direction of the common coastal front will do so.[427]

370. Suriname's preferred method was the bisection of the angle formed by the adjacent coastal fronts of Suriname and Guyana which extends from the coast at N17°E.[428] In support of its argument Suriname cited a number of cases which it claimed illustrated the utility of delimitation methods adopted to give effect to the relationship between neighbouring coastal fronts and thus taking into account the principle of non-encroachment to avoid the cut-off effect. These cases were *Tunisia/Libya*, *Gulf of Maine*, and *St-Pierre et Miquelon* (*Canada* v. *France*).[429] Suriname contended that all these cases made use of simplified representation. It chose the *Gulf of Maine* as the best example of angle bisectors which it considered appropriate when the neighbouring coastal fronts form an angle "as often occurs in the case of adjacent States where the land boundary meets the sea in a coastal indentation or cavity":[430]

> The best example is the first segment of the single maritime boundary prescribed in *Gulf of Maine*. In that situation, the adjacent neighbor-

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[425] *Ibid*.

[426] Suriname Rejoinder, p. 69, para. 3.79.

[427] Suriname Counter-Memorial, p. 103, para. 6.46.

[428] Suriname Counter-Memorial, paras. 6.47–6.48.

[429] *St-Pierre et Miquelon* (*Canada* v. *France*), 95 I.L.R. p. 645 ("*St-Pierre et Miquelon*").

[430] Suriname Counter-Memorial, para. 4.34.

> ing coasts form an approximate right angle with an apex at the land boundary. The Chamber established coastal fronts drawn from Cape Elizabeth to the land boundary terminus, representing the general direction of the Maine coast and from the land boundary terminus to Cape Sable, representing the general direction of the portion of the Canadian coast facing the *Gulf of Maine*. The angle bisector between these two coastal front lines runs from the initial point of the maritime boundary established by the Chamber toward the central part of the Gulf. The use of an angle bisector in that type of configuration achieves the objective of an approximately equal division of the offshore area, coupled with what the Chamber termed "the advantages of simplicity and clarity.[431]

371. In its oral pleadings Guyana argued that:

> When the provisional equidistance line does not, on its own, create an equitable solution, the consequence of that is to make adjustments to the provisional equidistance line that are required to achieve an equitable solution[,] [n]ot to abandon the equidistance methodology or the provisional equidistance line altogether, and certainly not to substitute an entirely unorthodox and highly subjective methodology in its place.[432]

372. The Tribunal is bound to note that the coastlines at issue in these cited cases cannot be compared to the configuration of the relevant coastlines of Guyana and Suriname. For instance, the *Gulf of Maine* case where the angle bisector was utilised in the maritime delimitation between Canada and the United States bears little resemblance to the maritime area which is of concern in this delimitation. It seems to this Tribunal that the general configuration of the maritime area to be delimited does not present the type of geographical peculiarities which could lead the Tribunal to adopt a methodology at variance with that which has been practised by international courts and tribunals during the last two decades. Such peculiarities may, however, be taken into account as relevant circumstances, for the purpose, if necessary, of adjusting or shifting the provisional delimitation line.[433] The Tribunal is therefore not persuaded that it should adopt in the present case what may be called the "angle bisector methodology".

373. The Tribunal has noted that neither Guyana nor Suriname considers that the provisional equidistance line represents an equitable delimitation as required by international law, due to the geographical circumstances of the maritime area to be delimited. Here, the Tribunal must recall the statement made by the International Court of Justice in *Cameroon/Nigeria* with respect to coastal geography which because of its relevance is quoted in full:

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[431] Suriname Counter-Memorial, para. 4.32.

[432] Transcript, p. 198.

[433] *Cameroon/Nigeria*, Judgment, *I.C.J. Reports 2002*, p. 303, at para. 295. See UK-French Continental Shelf, 54 I.L.R. p. 5 (1979), at para. 249.

> The geographical configuration of the maritime areas that the Court is called upon to delimit is a given. It is not an element open to modification by the Court but a fact on the basis of which the Court must effect the delimitation. As the Court had occasion to state in the *North Sea Continental Shelf* cases, "[e]quity does not necessarily imply equality", and in a delimitation exercise "[t]here can never be any question of completely refashioning nature". Although certain geographical peculiarities of maritime areas to be delimited may be taken into account by the Court, this is solely as relevant circumstances, for the purpose, if necessary, of adjusting or shifting the provisional delimitation line. Here again, as the Court decided in the *North Sea Continental Shelf* cases, the Court is not required to take all such geographical peculiarities into account in order to adjust or shift the provisional delimitation line: "[i]t is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result".[434]

374. In short, international courts and tribunals dealing with maritime delimitation should be mindful of not remaking or wholly refashioning nature, but should in a sense respect nature.

375. In their written and oral pleadings, both Parties agree that in the maritime delimitation area "there are no major promontories, islands, or other coastal features that render that coastline extraordinary";[435] and that the coastal geography is "unremarkable".[436] They both agree also that "there are no offshore islands and the coastlines on either side of the land boundary terminus are although not completely regular throughout their course, do not contain features such as peninsulas, major bays, island fringes or other such configurations.[437] It is fair to point out that Suriname uses this representation of the coastline to support its bisector approach. However, the Tribunal takes the view that the characterisation of the coastline as "unremarkable" only strengthens the methodology adopted by the Tribunal.

376. Turning to the question of whether there are any features in the geographical configuration of the relevant coastlines which justify an adjustment of the equidistance line, the Tribunal must mention the following observation found in the report of the independent expert appointed by Guyana:

> An important geographic reality in this case is that there are no offshore features, such as islands or low-tide elevations that influence the drawing of an equidistant line. Nor are there are large peninsulas

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[434] *Cameroon/Nigeria*, Judgment, *I.C.J. Reports 2002*, p. 303, at para. 295, citing *North Sea Continental Shelf*, Judgment, *I.C.J. Reports 1969*, p. 50, para. 91.

[435] Suriname Rejoinder, para. 3.183; Transcript, p. 162.

[436] Transcript, pp. 162, 227, 904; Guyana Reply, para. 3.2.

[437] Transcript, p. 162; Suriname Rejoinder, para. 3.183.

> or protrusions from one of the coastlines that dramatically skew the course of an equidistant line.[438]

377. The Tribunal agrees with this assessment of the coastal geography. In its view, the relevant coastlines do not present any marked concavity or convexity. After careful examination the Tribunal accordingly concludes that the geographical configuration of the relevant coastlines does not represent a circumstance that would justify any adjustment or shifting of the provisional equidistance line in order to achieve an equitable solution.

## D. Conduct of the Parties

378. The Tribunal will now turn its attention to the question of the relevance of the conduct of the Parties with respect to the shifting or adjustment of the provisional equidistance line. Guyana has stated that:

> in respect of the delimitation of the territorial sea and the continental shelf and exclusive economic zone, international courts and tribunals have long recognised that the conduct of the parties – and in particular the existence of a *modus vivendi* reflected in a pattern of oil and gas concessions – is an important circumstance to be taken into account in effecting a boundary delimitation. In the present case, the parties' oil concessions date back nearly 50 years and are based on a serious and good faith effort to identify a historical equidistance line which was plotted on the basis of the best British and Dutch charts available at the time (British chart 1801 and Dutch chart 217). The concessions reflect a *de facto* pattern of acceptance that the line extending from Point 61 on a bearing of approximately N34E has long been treated as reflecting an equidistance line which divides the parties' maritime spaces.[439]

379. Suriname, for its part, contended that:

> [t]he conduct of the parties to a maritime boundary dispute, and in particular one that concerns a single maritime boundary, is generally not relevant to the maritime delimitation. Only if that conduct meets a very high legal standard may it be taken into account. The alleged conduct must be consistent and sustained and it must display clearly an intention by both parties to accept a specific line as an equitable basis of delimitation. The adopted line therefore must be the result of an express or tacit agreement. Conduct that does not meet that legal standard is simply irrelevant. Guyana has seriously misstated the law in this respect. Guyana has elevated the ephemeral conduct of the parties to a level of controlling legal importance, which plainly is not correct.[440]

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[438] Guyana Reply, Annex R.1, para. 4.

[439] Guyana Memorial, para. 7.34.

[440] Suriname Counter Memorial, para. 4.37.

380. This Arbitral Tribunal must first examine the case law of international courts and tribunals with respect to the conduct of activities, especially oil practice, in the relevant area.

381. The International Court of Justice examined for the first time the relevance of oil practice in the maritime boundary delimitation dispute between Tunisia and Libya. The Court in that case noted that "it is evident that the Court must take into account whatever indicia are available of the line or lines which the parties themselves may have considered equitable or acted upon as such".[441] It was thus acknowledged that the conduct of the parties themselves with regard to oil concessions may determine the delimitation line.

382. In the *Gulf of Maine* case, Canada had requested the Chamber to find that the conduct of the parties proved at least the existence of a "*modus vivendi* maritime limit" or a "*de facto* maritime limit" based on the coincidence between the Canadian equidistance line (the "strict equidistance" line) and the United States "BLM line" (U.S. Bureau of Land Management) which it claimed was respected by the two parties and by numerous oil companies from 1965 to 1972. Canada relied on the findings of the Court in the *Tunisia/Libya* case. The United States denied that oil practice respected any particular line, but also denied the very existence of the "BLM line".

383. The Chamber in the *Gulf of Maine* case had this to say on the oil practice of the parties throwing into relief a distinctive feature of the T*unisia/Libya* case:

> [T]he Chamber notes that, even supposing that there was a de facto demarcation between the areas for which each of the Parties issued permits (Canada from 1964 and the United States from 1965 onwards), this cannot be recognized as a situation comparable to that on which the Court based its conclusions in the *Tunisia/Libya* case. It is true that the Court relied upon the fact of the division between the petroleum concessions issued by the two States concerned. But it took special account of the conduct of the Powers formerly responsible for the external affairs of Tunisia – France – and of Tripolitania – Italy –, which it found amounted to a *modus vivendi*, and which the two States continued to respect when, after becoming independent, they began to grant petroleum concessions.[442]

384. In the *Libya/Malta* case, the ICJ expressly referred to "its duty to take into account whatever indicia are available of the (delimitation) line or lines which the Parties themselves may have considered equitable or acted upon as such"[443] – which was of course the criterion introduced by the ICJ in the *Tunisia/Libya* case. It, however, concluded that it was:

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[441] *Tunisia/Libya*, Judgment, *I.C.J. Reports 1982*, p. 18, at para. 118.

[442] *Gulf of Maine*, Judgment, *I.C.J. Reports 1984*, p. 246, at para. 150.

[443] *Libya/Malta*, Judgment, *I.C.J. Reports 1985*, p. 13, at p. 29, para. 25.

> unable to discern any pattern of conduct on either side sufficiently unequivocal to constitute either acquiescence or any helpful indication of any view of either Party as to what would be equitable differing in any way from the view advanced by that Party before the Court. Its decision must accordingly be based upon the application to the submissions made before it of principles and rules of international law.[444]

385. This Tribunal finds that, with respect to the role of oil practice in maritime delimitation disputes, the Judgment in the *Cameroon/Nigeria* case is of particular significance. It should be noted that the delimitation line had to be determined "in an area of very highly concentrated petroleum exploration and exploitation activity".[445] Nigeria had contended that State practice with respect to oil concessions was "a decisive factor in the establishment of maritime boundaries" and added it was not the business of the Court to "redistribute such oil concessions between the States party to the delimitation".[446] On the other hand, Cameroon held the view that "the existence of oil concessions has never been accorded particular significance in matters of maritime delimitation in international law".[447]

386. The ICJ for its part having made an analysis of the case law relating to the role of oil practice in maritime delimitation declared that "although the existence of an express or tacit agreement between the parties on the siting of their respective oil concessions may indicate a consensus on the maritime areas to which they are entitled, oil concessions and oil wells are generally not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line. Only if they are based on express or tacit agreement between the parties may they be taken into account. In the present case there is no agreement between the Parties regarding oil concessions".[448]

387. Arbitral tribunals have supported this approach. The *St-Pierre et Miquelon* arbitration paid little regard to the oil practice of the parties. In this case, permits for exploration had been issued by both parties in areas of overlapping claims but "after reciprocal protests no drilling was undertaken". The tribunal held that in the circumstances it had no reason "to consider the potential mineral resources as having a bearing on the delimitation".[449]

388. In the view of the tribunal in the arbitration between Newfoundland and Labrador and Nova Scotia, "in order to establish that a boundary (not settled or determined by agreement) has been established through conduct, it

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[444] *Ibid*.

[445] Suriname Rejoinder, para. 3.147; Suriname Rejoinder, Annex 41.

[446] *Cameroon/Nigeria*, Judgment, *I.C.J. Reports 2002*, p. 303, at p. 447, para. 303.

[447] *Ibid*.

[448] *Ibid*., at pp. 447–448, para. 304.

[449] *St-Pierre et Miquelon*, 95 I.L.R. p. 645.

is necessary to show an unequivocal pattern of conduct as between the two parties concerned relating to the area and supporting the boundary, which is in dispute", citing the dictum in the *Libya/Malta* case, already referred to.[450]

389. The dictum that oil wells are not in themselves to be considered as relevant circumstances unless based on express or tacit agreement between the parties was expressly applied in the award in the *Barbados/Trinidad and Tobago* arbitration.[451] The award also made clear that the tribunal did "not consider the activities of either Party, or the responses of each Party to the activities of the other, themselves constitute a factor that must be taken into account in the drawing of an equitable delimitation line".[452]

390. The cases reveal a marked reluctance of international courts and tribunals to accord significance to the oil practice of the parties in the determination of the delimitation line. In the words of the Court in the *Cameroon/Nigeria* case, "oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line. Only if they are based on express or tacit agreement between the parties may they be taken into account".[453] The Tribunal is guided by this jurisprudence. Having carefully examined the practice of the Parties with regard to oil concessions and oil wells, the Tribunal has found no evidence of any agreement between the Parties regarding such practice. The Tribunal takes the view that the oil practice of the Parties cannot be taken into account in the delimitation of the maritime boundary in this case.

391. Guyana, in support of the use of the equidistance method, had argued that it was of "material significance" that the draft agreement between Suriname and France (French Guiana) on the maritime boundary applies the principle of equidistance and follows a line of N30°E.[454] For its part, Suriname contended that its boundary negotiations with French Guiana had no relevance to this case. It made clear that there was no maritime boundary agreement in force between Suriname and France with respect to French Guiana, and even if there were, Suriname averred such would be "totally irrelevant to these proceedings".[455] It held that the case between Guyana and Suriname took place in a different locale and the relevant considerations are notably different.[456] Suriname found support for its argument that the draft agreement between Suriname and French Guiana had little to do with the present case

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[450] *Newfoundland and Labrador and Nova Scotia*, Award Second Phase (2002), at para. 3.5.

[451] *Barbados/Trinidad and Tobago*, 45 I.L.M. p. 798 (2006), at para. 364, online: <http://www.pca-cpa.org>.

[452] *Ibid*., at para. 366.

[453] *Cameroon/Nigeria*, Judgment, *I.C.J. Reports 2002*, p. 303, at para. 304.

[454] Guyana Memorial, para. 3.50.

[455] Suriname Counter-Memorial, para. 2.20.

[456] *Ibid*.

in the *Jan Mayen* case between Norway and Denmark where the Court stated that:

> By invoking against Norway the Agreements of 1980 and 1981, Denmark is seeking to obtain by judicial means equality of treatment with Iceland. It is understandable that Denmark should seek such equality of treatment. But in the context of relations governed by treaties, it is always for the parties concerned to decide, by agreement, in what conditions their mutual relations can best be balanced. In the particular case of maritime delimitation, international law does not prescribe, with a view to reaching an equitable solution, the adoption of a single method for the delimitation of the maritime spaces on all sides of an island, or for the whole of the coastal front of a particular State, rather than, if desired, varying systems of delimitation for the various parts of the coast. The conduct of the parties will in many cases therefore have no influence on such a delimitation. The fact that the situation governed by the Agreements of 1980 and 1981 shares with the present dispute certain elements (identity of the island, participation of Norway) is of no more than formal weight. For these reasons, the Court concludes that the conduct of the Parties does not constitute an element which could influence the operation of delimitation in the present case.[457]

This Tribunal accepts the contention of Suriname and therefore takes no account in the present case of the boundary negotiations which have been conducted between Suriname and France with respect to French Guiana. In the view of the Tribunal, this conduct is not relevant to the present case.

## E. Conclusion of the Tribunal

392. In light of the foregoing, the Tribunal does not consider that there are any relevant circumstances in the continental shelf or exclusive economic zone which would require an adjustment to the provisional equidistance line. There are no factors which would render the equidistance line determined by the Tribunal inequitable. The Tribunal has checked the relevant coastal lengths for proportionality and comes up with nearly the same ratio of relevant areas (Guyana 51% : Suriname 49%) as it does for coastal frontages (Guyana 54% : Suriname 46%); likewise there are no distortions caused by coastal geography. As the Parties have not chosen to argue the relative distribution of living and non-living natural resources throughout these zones, the Tribunal did not take these matters into account.

393. The Tribunal accepts the basepoints for the low-water lines of Suriname and Guyana provided by the Parties that are relevant to the drawing of the equidistance line beyond the territorial sea.[458]

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[457] *Jan Mayen*, Judgment, *I.C.J. Reports 1993*, p. 38, at para. 86.

[458] *See* Suriname Counter-Memorial, Annex 69; Guyana Reply, Annex 26.

394. Guyana has argued that Suriname's location of basepoint S1 is "inconsistent with the requirements of the [Convention], Article 5 of which provides that the normal baseline for measuring the breadth of the territorial sea is 'the low-water line along the coast.'"[459] The Tribunal accepts the equidistance line beyond the 12 nm limit. As S1 does not affect the equidistance line beyond 12 nm,[460] the Tribunal does not need to consider point S1 further, nor any other basepoints that would affect only the equidistance line within the 12 nm limit.

395. Guyana also objected to Suriname's basepoint S14, which Suriname had identified relying on what Guyana claimed to be an inaccurate chart. The chart in question, NL 2218, was produced by the Netherlands Hydrographic Office (with the assistance of the Maritime Authority Suriname) in June 2005 after the proceedings in this arbitration had commenced.[461] In addition, Guyana claims that another Dutch chart, NL 2014, as well as satellite imagery, "disprov[e] the existence of a low-tide coast at Vissers Bank where Suriname placed its purported basepoint S14."[462]

396. The Tribunal is not convinced that the depiction of the low-water line on chart NL 2218, a chart recognised as official by Suriname, is inaccurate. As a result, the Tribunal accepts the basepoint on Vissers Bank, Suriname's basepoint S14.

397. Each Party provided its computed results of the provisional equidistance line based on the basepoints that it indicated. As described in the Appendix to the Award analysing the data provided by both Parties, the turning points indicated by the Parties have been recomputed because certain of them were not equidistant from the supposed basepoints within the limits of the rounding-off of the positional values and because neither Party computed the equidistance line using all the basepoints accepted by the Tribunal.

398. The Tribunal concludes that the single maritime boundary delimiting the exclusive economic zone and continental shelf between Guyana and Suriname shall be as shown for illustrative purposes only on Map 3* at the end of this Chapter. The precise, governing coordinates are set forth below and are explicated in the Appendix to the Award.

399. The delimitation of the exclusive economic zone and continental shelf shall commence at Point 3, being the intersection of the 12 nm limit with the boundary delimiting the territorial sea.

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[459] Guyana Reply, para. 6.14.

[460] *See* Technical Report of the Tribunal's Hydrographer in the Appendix to this Award.

[461] Guyana Reply, paras. 1.10, 3.19; Transcript, pp. 170–172; Suriname Rejoinder, Annex SR43.

[462] Guyana Reply, para. 3.19.

*Secretariat note: Map 3 is located in the front pocket of this volume.

400. The coordinates of the turning points of the delimitation line through the exclusive economic zone and continental shelf are as follows:

a. The delimitation line is a series of geodetic lines joining the points in the order listed:

| Point # | Latitude | Longitude |
|---|---|---|
| 3. | 6°13.47'N | 56°59.87'W |
| 4. | 6°16.19'N | 56°58.63'W |
| 5. | 6°19.17'N | 56°57.01'W |
| 6. | 6°28.01'N | 56°51.70'W |
| 7. | 6°32.12'N | 56°49.22'W |
| 8. | 6°35.13'N | 56°46.92'W |
| 9. | 6°43.99'N | 56°42.34'W |
| 10. | 7°24.45'N | 56°21.74'W |
| 11. | 7°26.11'N | 56°20.88'W |
| 12. | 7°28.98'N | 56°19.69'W |
| 13. | 7°39.96'N | 56°14.99'W |
| 14. | 7°53.48'N | 56°12.31'W |
| 15. | 8°35.61'N | 56°03.99'W |
| 16. | 8°36.76'N | 56°03.75'W |
| 17. | 9°00.03 'N | 55°56.09'W |
| 18. | 9°06.27'N | 55°52.88'W |
| 19. | 9°20.66'N | 55°45.42'W |

b. From Point 19, the delimitation line proceeds on a geodetic azimuth of N23°57'10"E to the 200 nautical mile limit of the exclusive economic zones of Guyana and Suriname, having an approximate position of:
Point 20 9°21.35'N, 55°45.1 1'W.

c. Geographic coordinates and azimuths refer to the World Geodetic System 1984 (WGS-84) geodetic datum.

## Chapter VII. Guyana's third submission

401. Guyana's third submission seeks recovery for damages suffered as a result of Suriname's allegedly unlawful actions in the 3 June 2000 incident concerning the *C.E. Thornton* drilling rig (the "CGX incident") as well as action subsequently taken by Suriname with respect to two additional Guyanese concession holders:

> Suriname is internationally responsible for violating its obligations under the 1982 United Nations Convention on the Law of the Sea, the Charter of the United Nations, and general international law to settle

> disputes by peaceful means because of its use of armed force against the territorial integrity of Guyana and/or against its nationals, agents, and others lawfully present in maritime areas within the sovereign territory of Guyana or other maritime areas over which Guyana exercises lawful jurisdiction; and that Suriname is under an obligation to provide reparation, in a form and in an amount to be determined, but in any event no less than U.S. $33,851,776, for the injury caused by its internationally wrongful acts.[463]

## A. Jurisdiction and admissibility

### 1. The Tribunal's jurisdiction over claims relating to the UN Charter and general international law

402. Guyana stated in its third submission, *inter alia*, that Suriname was "internationally responsible for violating its obligations under the Convention, the Charter of the United Nations, and general international law to settle disputes by peaceful means because of its use of armed force".[464] Suriname is of the view that the Tribunal had no jurisdiction to adjudicate alleged violations of the UN Charter or customary international law and declared that "to the extent that Guyana's claims are based on those violations, they must be dismissed".[465]

403. The law which this Tribunal is authorised to apply is contained in Article 293, paragraph 1, of the Convention, which reads as follows: "A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention".

404. In addition, this Tribunal notes that the preamble of the Convention itself has preserved the applicability of general international law, when, in its ultimate paragraph, it affirmed "that matters not regulated by this Convention continue to be governed by the rules and principles of general international law".[466]

405. The International Tribunal for the Law of the Sea ("ITLOS") has interpreted Article 293 as giving it competence to apply not only the Convention, but also the norms of customary international law (including, of course, those relating to the use of force). It made this clear in its findings in the *Saiga* case:

> In considering the force used by Guinea in the arrest of the Saiga, the Tribunal must take into account the circumstances of the arrest in

[463] Guyana Reply, para. 10.1.

[464] Guyana Reply, para. 10.1.

[465] Transcript, p. 1092.

[466] The Convention, preamble.

> the context of the applicable rules of international law. *Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention*, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law. [emphasis added][467]

406. In the view of this Tribunal this is a reasonable interpretation of Article 293 and therefore Suriname's contention that this Tribunal had "no jurisdiction to adjudicate alleged violations of the United Nations Charter and general international law"[468] cannot be accepted. Furthermore, as the Tribunal will find (see paragraph 486 *infra*), the conduct of Suriname in the disputed area constituted a breach of its obligations under Articles 74(3) and 83(3) of the Convention over which the Tribunal has jurisdiction by virtue of Article 293, paragraph 1, of the Convention.

## 2. The obligation to exchange views

407. Suriname has raised another jurisdictional issue. It stated that:

> In the period from the time of the CGX incident, June 3rd, 2000, up until the point where the application was filed before this Tribunal in February 2004, Guyana never informed Suriname that Guyana believed that Suriname had violated Articles 279 or 301, or even that it had violated the Law of the Sea Convention generally by Suriname's conduct in June 2000.[469]

408. Suriname contends that Guyana was under an obligation as specified in Article 283 of the Convention to inform Suriname of any alleged breach of the Convention, in particular Articles 279 and 301. "By failing to fulfill that obligation, Guyana did not undertake recourse to the Section 1 Procedures, and because of that failure to take recourse to Section 1 procedures, Guyana cannot avail itself of the Section 2 compulsory dispute jurisdiction".[470]

409. Suriname made reference to the case law of ITLOS to highlight the importance of the procedural requirements provided for in Article 283(1), that is the obligation to exchange views. It cited in particular the *Southern Bluefin*

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[467] *M/V "SAIGA"* (*No. 2*) (*Saint Vincent and the Grenadines* v. *Guinea*), Judgment, ITLOS Reports 1999, p. 7, at para. 155 ("*Saiga*").

[468] Suriname Rejoinder, para. 4.7.

[469] Transcript, pp. 1093–1094.

[470] Transcript, p. 1094.

*Tuna cases*,[471] the *MOX Plant* case,[472] and the *Land Reclamation* case.[473] It will be recalled that in these cases ITLOS held that a party was under no obligation to exchange views when it concluded that the possibilities of reaching agreement had been exhausted.

410. This dispute has as its principal concern the determination of the course of the maritime boundary between the two Parties – Guyana and Suriname. The Parties have, as the history of the dispute testifies, sought for decades to reach agreement on their common maritime boundary. The CGX incident of 3 June 2000, whether designated as a "border incident" or as "law enforcement activity", may be considered incidental to the real dispute between the Parties. The Tribunal, therefore, finds that in the particular circumstances, Guyana was not under any obligation to engage in a separate set of exchanges of views with Suriname on issues of threat or use of force. These issues can be considered as being subsumed within the main dispute.

### 3. Article 297 and the characterisation of Guyana's claim

411. Suriname in its oral pleadings has raised another jurisdictional objection. It declared that since Guyana's claims relate to a dispute concerning a coastal State's enforcement of sovereign rights with respect to non-living resources, the claim falls outside this Tribunal's jurisdiction pursuant to Part XV, section 3 of the Convention. Suriname explained that:

> Article 297 says that section 2, compulsory dispute settlement, is only available for certain kinds of disputes that relate to the exercise by a coastal state of its sovereign rights or jurisdiction.[474]

412. Suriname further asserted that:

> Among the three kinds of disputes listed in Article 297, there is no reference to a dispute concerning a coastal state's enforcement of its sovereign rights with respect to nonliving resources. Since Guyana's submission is a dispute concerning a coastal state's enforcement of its sovereign rights with respect to nonliving resources, the dispute is not encompassed in Section 2 of the Law of the Sea Convention.[475]

413. As noted above, Article 293 of the Convention gives this Arbitral Tribunal jurisdiction over any dispute concerning the interpretation and application of the Convention. This jurisdiction is subject to the automatic

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[471] *Southern Bluefin Tuna*, Order of 27 August 1999, ITLOS Reports 1999, p. 280.

[472] *MOX Plant*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95, at para. 60.

[473] *Land Reclamation*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10, at para. 47.

[474] Transcript, p. 1099.

[475] Transcript, p. 1099.

limitations set out in Article 297 and the optional exceptions specified in Article 298. Article 286 reads as follows:

> Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

414. Thus, any dispute concerning the interpretation or application of the Convention which is not excluded by the operation of Part XV, Section 3 (Articles 297 and 298) falls under the compulsory procedures in Section 2. Article 297, paragraph 3(a), which is relevant here, reads as follows:

> Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, *except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise*, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations. [emphasis added]

415. Sovereign rights over non-living resources do not fall under this exception.

416. This Tribunal is therefore unable to entertain Suriname's argument that a dispute concerning a coastal State's enforcement of its sovereign rights with respect to non living resources lies outside its jurisdiction.

### 4. Good faith and clean hands

417. Suriname challenges the admissibility of Guyana's Third Submission on the grounds of lack of good faith and clean hands. It also argues in the alternative that the clean hands doctrine must be considered in deciding the merits of Guyana's Third Submission.

418. The doctrine of clean hands, as far as it has been adopted by international courts and tribunals, does not apply in the present case. No generally accepted definition of the clean hands doctrine has been elaborated in international law. Indeed, the Commentaries to the ILC Draft Articles on State Responsibility acknowledge that the doctrine has been applied rarely[476] and, when it has been invoked, its expression has come in many forms. The ICJ has

[476] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, p. 162 (2002).

on numerous occasions declined to consider the application of the doctrine,[477] and has never relied on it to bar admissibility of a claim or recovery. However, some support for the doctrine can be found in dissenting opinions in certain ICJ cases, as well as in opinions in cases of the Permanent Court of International Justice (the "PCIJ"). For example, Judge Anzilotti's 1933 dissenting opinion in the *Legal Status of Eastern Greenland* case states that "an unlawful act cannot serve as the basis of an action at law".[478] In the *United States Diplomatic and Consular Staff in Tehran* case, in which the ICJ declined to consider the issue of clean hands, Judge Morozov wrote in his dissent that the United States had "forfeited the legal right as well as the moral right to expect the Court to uphold any claim for reparation". However, Judge Morozov went to great lengths to stress that "[t]he situation in which the Court has carried on its judicial deliberation in the current case has no precedent in the whole history of the administration of international justice either before this Court, or before any international judicial institution",[479] citing the United State's coercive and military measures against Iran which were carried out simultaneously with its application to the ICJ.[480] In the *Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo* v. *Belgium*), *ad hoc* Judge Van den Wyngaert states that the Democratic Republic of Congo ("DRC") did not come to the ICJ with clean hands, citing its violation of the Geneva Conventions in failing to prosecute a Government Minister suspected of breaching humanitarian law.[481] The finding with respect to clean hands was not however dispositive; it was merely included in Judge Van den Wyngaert's discussion of immunity under international law and her conclusion that a Minister's immunity does not extend to war crimes and crimes against humanity. The doctrine was therefore neither used as a bar to the admissibility of the DRC's claim, nor as a ground to deny recovery. These cases indicate that the use of the clean

[477] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, *I.C.J. Reports 2004*, p. 136 at para. 63; *Oil Platforms* (*Islamic Republic of Iran* v. *United States of America*), Judgment, *I.C.J. Reports 2003*, p. 161, at para. 100; *Legality of Use of Force* (*Serbia and Montenegro* v. *Belgium*), Preliminary Objections, Judgment, *I.C.J. Reports 2004*, p. 279: in this case Belgium raised the question of clean hands in its preliminary objections (Preliminary Objections of the Kingdom of Belgium, *Legality of Use of Force* (*Serbia and Montenegro* v. *Belgium*), (5 July 2000), available at http://www.icj-cij.org/docket/files/105/8340.pdf), but the Court did not address the argument in its judgment.

[478] *Legal Status of Eastern Greenland*, P.C.I.J. Series A/B, No. 53, p. 95 (Dissenting Opinion of Judge Anzilotti).

[479] *Diplomatic and Consular Staff*, Judgment, *I.C.J. Reports 1980*, p. 3, at p. 53 (Dissenting Opinion of Judge Morozov) [emphasis in original].

[480] *Diplomatic and Consular Staff*, Judgment, *I.C.J. Reports 1980*, p. 3, at p. 54 (Dissenting Opinion of Judge Morozov).

[481] *Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo* v. *Belgium*), Judgment, *I.C.J. Reports 2002*, p. 3, at para. 35 (Dissenting Opinion of Judge *ad hoc* Van den Wyngaert).

hands doctrine has been sparse, and its application in the instances in which it has been invoked has been inconsistent.

419. Judge Schwebel's dissenting opinion in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, which Suriname characterises as "the strongest affirmation of the clean hands doctrine",[482] has also been relied on in support of the application of the clean hands doctrine.[483] In his dissent, Judge Schwebel reasoned that Nicaragua "had deprived itself of the necessary *locus standi*" to bring its claims, as it was itself guilty of illegal conduct resulting in deaths and widespread destruction.[484] In doing so, he relied heavily on Judge Hudson's individual opinion in the *Diversion of Water from the Meuse* case,[485] which states:

> It would seem to be an important principle of equity that where two parties have assumed an identical or reciprocal obligation, one party which is engaged in a *continuing* non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party.[486] [emphasis added]

420. An important aspect of Judge Hudson's expression of the doctrine is the continuing nature of the non-performance of an obligation. In the *Diversion of Water from the Meuse* case, The Netherlands was seeking an order for Belgium to discontinue its violation of a treaty between the two countries while The Netherlands itself was engaging in "precisely similar action, similar in fact and similar in law" at the time its claim was brought before the PCIJ.[487] The fact that a violation must be ongoing for the clean hands doctrine to apply is consistent with the doctrine's origins in the laws of equity and its limited application to situations where equitable remedies, such as specific performance, are sought. Indeed, Judge Hudson reminds us that it is a principle of international law that any breach leads to an obligation to make reparation, and that only special circumstances may call for the consideration of equitable principles.[488] Such circumstances arise, in his opinion, where a claimant is seeking not reparation for a past violation, but protection against a continuance of that violation in the future, in other words a "kind of specific performance of a recipro-

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[482] Suriname Rejoinder, para. 2.102.

[483] *See, e.g., Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo* v. *Belgium*), n. 82 (Dissenting Opinion of Judge *ad hoc* Van den Wyngaert).

[484] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America)*, Merits, Judgment, *I.C.J. Reports 1986*, p. 14, at para. 272 (Dissenting Opinion of Judge Schwebel) ("*Nicaragua*").

[485] *Nicaragua*, Merits, Judgment, *I.C.J. Reports 1986*, p. 14, at paras. 269–270 (Dissenting Opinion of Judge Schwebel).

[486] *Diversion of Water from the Meuse*, P.C.I.J. Series A/B, No. 70, p. 22, at p. 77 (Individual Opinion by Judge Hudson).

[487] *Diversion of Water from the Meuse*, p. 78 (Individual Opinion by Judge Hudson).

[488] *Ibid*.

cal obligation which the demandant itself is not performing".[489] Judge Hudson also stresses the limited applicability of the doctrine in more general terms:

> The general principle is one of which an international tribunal should make *a very sparing application*. It is certainly not to be thought that a complete fulfillment of all its obligations under a treaty must be proved as a condition precedent to a State's appearing before an international tribunal to seek an interpretation of that treaty. Yet, in a proper case, and with scrupulous regard for the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness.[490] [emphasis added]

421. The Tribunal holds that Guyana's conduct does not satisfy the requirements for the application of the doctrine of clean hands, to the extent that such a doctrine may exist in international law. First, Guyana is seeking, with respect to its Third Submission, reparations for an alleged past violation by Suriname. Guyana is therefore not seeking a remedy of the type to which the clean hands doctrine would apply, even if it were recognised as a rule of international law. Secondly, the facts on which Suriname bases its assertion that Guyana has unclean hands do not amount to an ongoing violation of Guyana's obligations under international law,[491] as in the *Case Concerning the Arrest Warrant of 11 April 2000, the United States Diplomatic and Consular Staff in Tehran case,* and the *Water from the Meuse* case. Guyana had not authorised any drilling activities subsequent to the CGX incident and was as a result not in violation of the Convention as alleged at the time it made its Third Submission to the Tribunal. Finally, Guyana's Third Submission claims that Suriname violated its obligation not to resort to the use or threat of force, while Suriname bases its clean hands argument on Guyana's alleged violation of a different obligation relating to its authorisation of drilling activities in disputed waters. Therefore, there is no question of Guyana itself violating a reciprocal obligation on which it then seeks to rely.

422. The Tribunal's ruling on this issue extends both to Suriname's admissibility argument based on clean hands and to its argument that clean hands should be considered on the merits of Guyana's Third Submission to bar recovery.

## 5. The admissibility of a State responsibility claim in a maritime delimitation case

423. The Tribunal does not accept Suriname's argument that in a maritime delimitation case, an incident engaging State responsibility in a disputed

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[489] *Ibid*.

[490] *Ibid*., at p. 77.

[491] Suriname Rejoinder, paras. 2.110–2.115.

area renders a claim for reparations for the violation of an obligation provided for by the Convention and international law inadmissible. A claim relating to the threat or use of force arising from a dispute under the Convention does not, by virtue of Article 2(3) of the UN Charter, have to be "against the territorial integrity or political independence" of a State to constitute a compensable violation. Moreover, the Convention makes no mention of the incompatibility of claims relating to the use of force in a disputed area and a claim for maritime delimitation of that area. As the Eritrea-Ethiopia Claims Commission explained, if the law recognised such an incompatibility, it would significantly weaken the fundamental rule of international law prohibiting the use of force:

> border disputes between States are so frequent that any exception to the prohibition of the threat or use of force for territory that is allegedly occupied unlawfully would create a large and dangerous hole in a fundamental rule of international law.[492]

424. In *Cameroon/Nigeria*,[493] a case in which the International Court of Justice was called on to delimit a boundary between the two parties, the Court entertained several claims engaging Nigeria and Cameroon's State responsibility for the use of force within the disputed area. The Court found however that for all but one of these claims, insufficient evidence had been adduced to prove them.[494] With respect to the final claim by which Cameroon requested an end to Nigerian presence in a disputed area, the Court found that the injury suffered by Cameroon would be sufficiently addressed by Nigeria's subsequent pull-out as a result of the delimitation decision, rendering it unnecessary to delve into the question of whether Nigeria's State responsibility was engaged.[495] Even so, the Court clearly considered questions of State responsibility relating to use of force, and the admissibility of Cameroon or Nigeria's claims was never put into question on the grounds submitted here by Suriname.[496]

## B. The threat or use of force

425. Guyana's claims, as formulated in its Third Submission, seek reparations for Suriname's alleged violation of its obligations under the Convention, the UN Charter, and general international law because of its use of armed

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[492] *Eritrea-Ethiopia Claims Commission*, Partial Award, *Jus ad Bellum*: Ethiopia's Claims 1–8 (19 Dec. 2005), 45 I.L.M. p. 430 (2006), at para. 10, online: <http://www.pca-cpa.org>.

[493] *Cameroon/Nigeria*, Judgment, *I.C.J. Reports 2002*, p. 303.

[494] *Ibid*., at paras. 323–324.

[495] *Ibid*., at paras. 310, 319.

[496] In the jurisdiction and admissibility phase, Nigeria had argued that the State responsibility claims were inadmissible, but only on the grounds that Cameroon did not adduce enough evidence to support them. That challenge was rejected by the Court: *Cameroon/Nigeria*, Preliminary Objections, Judgment, *I.C.J. Reports 1998*, p. 275.

force against the territorial integrity of Guyana and against its nationals, agents and others lawfully present in maritime areas within the sovereign territory of Guyana or other maritime areas over which Guyana exercises lawful jurisdiction. Guyana's claims in this respect arise from the CGX incident.

426. Guyana's position on the question of the threat or use of force can be summarized as follows. Guyana has claimed that Suriname has rejected Guyana's repeated offers of immediate high level negotiations concerning offshore exploratory activities by Guyana's licensee CGX. Instead it resorted to the use of force on 3 June 2000 to expel Guyana's licensee – the CGX exploratory rig and drill ship *C.E. Thornton* – and threatened similar action against other licensees, namely Esso E & P Guyana and Maxus. According to Guyana, Suriname's conduct has resulted in both material and non-material injury to Guyana, including the considerable loss of foreign investment and licensing fees. This has blocked the development of Guyana's offshore hydrocarbon resources, for which injuries Guyana is entitled to full reparation in accordance with international law.[497]

427. For Guyana the obligation to settle disputes by peaceful means is not subsumed under the prohibition of the use of force but "possesses a specific substance of its own".[498] Guyana declared that "the Tribunal need not conclude that Suriname's conduct amounted to use of force in order to find that it has violated its obligation to settle this dispute by peaceful means".[499]

428. In this respect Guyana has called attention to the various international instruments which have imposed upon States the obligation to settle disputes by peaceful means. It cites Article 279 of the Convention as embodying the central purpose of Part XV of the Convention which reads as follows:

> States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.

429. Guyana invokes the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, citing in particular the provision which reads:

> the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, *including territorial disputes and problems concerning frontiers of States*.[500] [emphasis added]

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[497] Guyana Memorial, Chapter 10.

[498] Transcript, pp. 573–574, citing Bruno Simma, ed., *The Charter of the United Nations: A Commentary*, p. 587 (2nd ed., 2002).

[499] Transcript, pp. 575–576.

[500] Guyana Memorial, para. 10.5.

430. For Guyana this reflects an authoritative interpretation of the United Nations Charter falling within the ambit of Article 2(4) of the UN Charter.

431. In its oral pleadings, Guyana found further support for its argument in the 1982 Manila declaration on the peaceful settlement of international disputes, Article VII of which stated that "neither the existence of a dispute nor the failure of a procedure of peaceful settlement of disputes shall permit the use of force or threat of force by any of the states' parties to the dispute".[501]

432. With respect to the question of whether the CGX incident constituted a threat of force, the Tribunal considers it helpful to examine the statements of some of the main participants in that incident.

433. Mr Edward Netterville, the Rig Supervisor on the *C.E. Thornton*, described the incident in these terms in his witness statement:

> Shortly after midnight on 4 June 2000, while this coring process (drilling for core samples) was underway, gunboats from the Surinamese Navy arrived at our location. The gunboats established radio contact with the *C.E. Thornton* and its service vessels, and ordered us to "leave the area in 12 hours," warning that if we did not comply "the consequences will be yours." The Surinamese Navy repeated this order several times. I understood this to mean that if the *C.E. Thornton* and its support vessels did not leave the area within twelve hours, the gunboats would be unconstrained to use armed force against the rig and its service vessels.[502]

434. Mr. Netterville made the following observations on this incident:

> In my experience, Suriname's threat to use force against the *C.E. Thornton* is unprecedented. I have been employed for over forty years in the marine and oil industry during which time I have served aboard oil rigs throughout the world. I have never experienced, nor heard of, any similar instance in which a rig has been evicted from its worksite by the threat of armed force. Nor, in discussions with others in the industry after June 2000, has anyone told me of a similar incident.[503]

435. Mr. Graham Barber, who served as Reading & Bates Area Manager for the project and had overall responsibility for its rig and shore-based operations, gave similar testimony. He stated that:

> After midnight on 3 June 2000, during the jacking-up process, two gunboats from the Surinamese Navy approached us and shined their search lights on the rig. A Surinamese naval officer informed us by

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[501] Transcript, p. 575; G.A. Res. 37/10, Annex, U.N. Doc. A/RES/37/10 (15 Nov. 1982).

[502] Guyana Memorial, Annex 175.

[503] Guyana Memorial, Annex 175.

> radio that we "were in Surinamese waters" and that we had 12 hours to leave the area or "face the consequences." He repeated this phrase, or variations of it, several times. . . . Faced with these threats from the Surinamese Navy, in the early morning hours of 4 June 2003,I convened a meeting with other persons in authority aboard the *C.E. Thornton*. We decided that we had no alternative other than to evacuate the rig from the Eagle location.[504]

436. Major J.P. Jones, Commander Staff Support of the LUMAR (the Suriname Air Force and Navy), recorded this exchange between himself and the drilling platform:

> This is the Suriname navy. You are in Suriname waters without authority of the Suriname Government to conduct economic activities here. I order you to stop immediately with these activities and leave the Suriname waters.
>
> The answer to this from the platform was: "we are unaware of being in Suriname waters". I persisted saying that they were in Suriname waters and that they had to leave these waters within 12 hours. And if they would not do so, the consequences would be theirs. They then asked where they should move to. I said that they should retreat to Guyanese waters. He reacted by saying that they needed time to start up their departure. I then allowed them 24 hours to leave the Suriname waters. We then hung around for some time and after about one hour we left for New Nickerie.[505]

437. Major Jones added:

> If the platform had not left our waters voluntarily, I would definitely not have used force. I had no instructions to that effect and anyhow I did not have the suitable weapons to do so. I even had no instructions to board the drilling platform and also I did not consider that.[506]

438. The captains of the two Surinamese patrol boats, Mr. M. Galong and Mr. R.S. Bhola, both confirmed that the drilling platform was ordered to leave Suriname waters within 12 hours and if this order was not complied with, the consequences would be theirs. With respect to what the consequences would be, both Captain Galong and Captain Bhola noted that they had no instructions with regard to the use of force. Captain Bhola stated that:

> In the periods May 1989–1990 and 1997 up to now I have performed at least 30 patrol missions off the coast of Suriname. These patrol missions also involved the sea area between 10° and 30° North which is disputed between Suriname and Guyana. The patrols had mainly to do with expelling fishermen without a licence from Suriname waters. This has always been achieved by issuing summons. In such cases the commander of the vessel is in command of the operation. My

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[504] Guyana Memorial, Annex 176.

[505] Suriname Rejoinder, Annex 20.

[506] Suriname Rejoinder, Annex 20.

> instructions never imply that I may use force. And I have never used force. All things considered the course of the removal of the drilling platform, as far as I am concerned, does not differ essentially from the course taken during other patrols.[507]

439. The testimony of those involved in the incident clearly reveals that the rig was ordered to leave the area and if this demand was not fulfilled, responsibility for unspecified consequences would be theirs. There was no unanimity as to what these "consequences" might have been. The Tribunal is of the view that the order given by Major Jones to the rig constituted an explicit threat that force might be used if the order was not complied with. The question now arises whether this threat of the use of force breaches the terms of the Convention, the UN Charter and general international law. The ICJ has thrown some light on the circumstances, where a threat of force can be considered illegal. It has declared that:

> Whether a signalled intention to use force if certain events occur is or is not a "threat" within Article 2, paragraph 4, of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of "threat" and "use" of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal – for whatever reason – the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter.[508]

440. The Tribunal also takes into consideration the findings of the ICJ in the *Nicaragua* case where it had occasion to refer to the application of the "customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations"[509] to what the Court termed "less grave forms of the use of force".[510] The Court stated that:

> As regards certain particular aspects of the principle in question, it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms. In determining the legal rule which applies to these latter forms, the Court can again draw on the formulations contained

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[507] Suriname Rejoinder, Annex 16.

[508] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports 1996*, p. 226, at para. 47. Scholarly opinion is in line with this proposition: *see* Ian Brownlie, *International Law and the Use of Force*, p. 364 (1964).

[509] *Nicaragua*, Merits, Judgment, *I.C.J. Reports 1986*, p. 14, at para. 190.

[510] *Ibid*., at para. 191.

> in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) . . . ). As already observed, the adoption by States of this text affords an indication of their opinio juris as to customary international law on the question. Alongside certain descriptions which may refer to aggression, this text includes others which refer only to less grave forms of the use of force.[511]

## C. Law enforcement activities

441. Suriname has maintained that the measures it undertook on 3 June 2000 were of the nature of reasonable and proportionate law enforcement measures to preclude unauthorized drilling in a disputed area of the continental shelf. It asserted that it was quite normal for coastal States to undertake law enforcement activities in disputed areas (usually in relation to fisheries) and also to do so against vessels under foreign flags including the flag of the other party to the dispute, unless specific arrangements exist. Suriname's practice in respect of fisheries enforcement in the disputed area is evidence of this. Suriname noted that it has drawn the Tribunal's attention to Article 2, paragraph 6, of its mining decree which provides that "he who undertakes mining activities without a licence can be punished by imprisonment for a maximum of two years, and/or fine of a maximum of 100,000 Suriname guilders."[512] The fact that the Attorney General was consulted before the 3 June 2000 action indicated that that action was a law enforcement measure.

442. Suriname has made much use of the case law of international courts and tribunals to support its claim. It has significantly relied on the judgment of the ICJ in the *Fisheries Jurisdiction* case (*Spain* v. *Canada*).[513] Suriname, in its Rejoinder, recalled that:

> Spain contends that an exercise of jurisdiction by Canada over a Spanish vessel on the high seas entailing the use of force falls outside of Canada's reservation to the Court's jurisdiction. Spain advances several related arguments in support of this thesis. First, Spain says that the use of force by one State against a fishing vessel of another State on the high seas is necessarily contrary to international law; and as Canada's reservation must be interpreted consistently with legality, it may not be interpreted to subsume such use of force within the phrase "the enforcement of such measures". Spain further asserts that the particular use of force directed against the *Estai* was in any

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[511] *Ibid.*

[512] Suriname Rejoinder, para. 4.34; Decree of 8 May 1986, Suriname Counter-Memorial, Annex 54 (translation provided in Suriname Rejoinder, Annex SR31).

[513] *Fisheries Jurisdiction* (*Spain* v. *Canada*), Jurisdiction of the Court, Judgment, *I.C.J. Reports 1998*, p. 432 ("*Fisheries Jurisdiction*").

> event unlawful and amounted to a violation of Article 2, paragraph 4, of the Charter, giving rise to a separate cause of action not caught by the reservation.
>
> In rejecting Spain's argument, the Court stated that the "Court finds that the use of force authorized by the Canadian legislation and regulation falls within the ambit of what is commonly understood as enforcement of conservation and management measures and thus falls under the provisions of paragraph 2(d) of Canada's declaration. This is so notwithstanding that the reservation does not in terms mention the use of force. *Boarding, inspection, arrest and minimum use of force for those purposes are all contained within the concept of enforcement of conservation and management measures according to a 'natural and reasonable' interpretation of the concept*."
>
> The Court's reasoning squarely supports Suriname's position that a coastal state's instruction to an oil rig that it not conduct drilling on the continental shelf claimed by the coastal state, and that the oil rig depart the area, is an exercise of the law enforcement jurisdiction of the coastal state, not a violation of the prohibition on the international use of force.[514]

443. Suriname also relied on the judgment of ITLOS in the *Saiga* case to show that stopping and communicating with a vessel did not in themselves constitute "a use of force or threat to use force". It cited the Tribunal's views on the use of force in law enforcement activities:[515]

> The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered.[516]

444. Guyana for its part considered the *Fisheries Jurisdiction* case as wholly irrelevant as a precedent to the present case. Guyana contended, *inter alia*, that that case concerned enforcement measures against fishing vessels on the high seas and not the use of force directly arising from a maritime dispute between two sovereign States. In addition the case solely concerned the interpretation of Canada's reservation to the Court's jurisdiction with respect to disputes arising out of or concerning management measures taken by Canada and the enforcement of such measures. Guyana affirmed that it was very clear that this precedent is irrelevant because the Court was not purporting to define

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[514] Suriname Rejoinder, paras. 4.59–4.61.

[515] Suriname Rejoinder, para. 4.61.

[516] *Saiga*, Judgment, ITLOS Reports 1999, p. 7, at para. 156.

the meaning of the term armed force, but was simply attempting to define the scope of Canada's reservation to the Court's jurisdiction.[517]

445. The Tribunal accepts the argument that in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary.[518] However in the circumstances of the present case, this Tribunal is of the view that the action mounted by Suriname on 3 June 2000 seemed more akin to a threat of military action rather than a mere law enforcement activity. This Tribunal has based this finding primarily on the testimony of witnesses to the incident, in particular the testimony of Messrs Netterville and Barber. Suriname's action therefore constituted a threat of the use of force in contravention of the Convention, the UN Charter and general international law.

446. Suriname also argued that "should the Tribunal regard [its 3 June 2000] measures as contrary to international obligations owed by Suriname to Guyana, the measures were nevertheless lawful countermeasures since they were taken in response to an internationally wrongful act by Guyana in order to achieve cessation of that act".[519] It is a well established principle of international law that countermeasures may not involve the use of force. This is reflected in the ILC Draft Articles on State Responsibility at Article 50(1)(a), which states that countermeasures shall not affect "the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations". As the Commentary to the ILC Draft Articles mentions,[520] this principle is consistent with the jurisprudence emanating from international judicial bodies.[521] It is also contained in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,[522] the adoption of which, according to the ICJ, is an indication of State's *opinio juris* as to customary international law on the question.[523] Peaceful means of addressing Guyana's alleged breach of international law with respect to exploratory drilling were available to Suriname under the Convention. A State faced with a such a dispute should resort to the compulsory procedures provided for in Section 2 of Part XV of the Convention, which provide among other things that, where the

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[517] Transcript, p. 580.

[518] See *S.S. "I'm Alone"* (*Canada/United States*), R.I.A.A. Vol. 3, p. 1615; *Red Crusader* (*Commission of Enquiry, Denmark-United Kingdom*), 35 I.L.R. p. 199; *Saiga*, Judgment, ITLOS Reports 1999, p. 7.

[519] Suriname Rejoinder, para. 4.32.

[520] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002).

[521] *Corfu Channel*, Judgment, *I.C.J. Reports 1949*, p. 4, at p. 35; *Nicaragua*, Merits, Judgment, I.C.J. Reports 1986, p. 16, at p. 127, para. 249.

[522] "States have a duty to refrain from acts of reprisal involving the use of force.": G.A. Res. 2625 (XXV) of 24 October 1970, first principle, para. 6.

[523] Nicaragua, Merits, Judgment, *I.C.J. Reports 1986*, p. 14, at para. 191.

urgency of the situation so requires, a State may request that ITLOS prescribe provisional measures.[524] As it involved the threat of force, Suriname's action against the *C.E. Thornton* cannot have been a lawful countermeasure.

447. Having reached this conclusion the Tribunal must now deal with the question of whether Suriname's action has raised an issue of State responsibility.

## D. State responsibility

448. In addressing Suriname's State responsibility and Guyana's request that this Tribunal grant compensation and an order precluding Suriname from resorting to further threats of force against Guyana or its licensees, the Tribunal considers it useful to look at the *Nigeria/Cameroon* case. In that case, the Court entertained several claims engaging Nigeria and Cameroon's State responsibility for the use of force within the disputed area. Although the claims were deemed to be admissible, in the same way this Tribunal has found Guyana's Third Submission to be admissible, the Court did not assess Nigeria's State responsibility. In its Rejoinder, Suriname argued the relevance of the *Cameroon/Nigeria* judgment:

> In the *Cameroon v. Nigeria* case before the International Court of Justice, Cameroon alleged that Nigeria used force, in violation of UN Charter Article 2(4) and customary international law, by militarily occupying parcels of Cameroonian territory in the area of Lake Chad and the Peninsula of Bakassi. Even though the Court ultimately awarded to Cameroon certain areas along the border that were occupied by Nigerian military forces, the Court decided that its delimitation judgment (along with the anticipated evacuation of the Cameroonian territory by Nigeria) sufficiently addressed the injury allegedly suffered by Cameroon. Consequently, the Court did not further determine whether and to what extent Nigeria's responsibility to Cameroon had been engaged as a result of the occupation. On similar reasoning, even if the Tribunal in this case concludes that the incident occurred in waters that are now determined to be under Guyana's jurisdiction, the Tribunal should decline to pass upon Guyana's claim for alleged unlawful activities by Suriname.[525]

449. Guyana for its part contended that Suriname has disregarded the rule set forth in Article 1 of the ILC Draft Articles that every internationally wrongful act of a State entails the responsibility of that State. It was, in Guyana's view, very clear that Article 279 of the Convention imposed an obligation on States parties that is independent of the laws applicable to maritime boundary delimitation and the obligations under the Convention. "To argue otherwise", it said "would mean that a boundary dispute, *ipso facto*, justifies

[524] Article 290(5) of the Convention.

[525] Suriname Rejoinder, para. 4.3.

recourse to armed force". It maintained that Suriname's reliance on the *Cameroon/Nigeria* case was misplaced. In that case, it held, the Court did not enumerate a general principle that State responsibility is irrelevant to boundary disputes but limited itself solely to the relief sought by Cameroon.

450. The Tribunal agrees with Guyana's characterisation of the ICJ's judgment in *Cameroon/Nigeria*, but considers that, as was the case in *Cameroon/Nigeria*, Guyana's request for an order precluding Suriname from resorting to further threats of force is sufficiently addressed by this Tribunal's delimitation decision. The findings in the *Cameroon/Nigeria* case may be recalled:

> In the circumstances of the case, the Court considers moreover that, by the very fact of the present Judgment and of the evacuation of the Cameroonian territory occupied by Nigeria, the injury suffered by Cameroon by reason of the occupation of its territory will in all events have been sufficiently addressed. The Court will not therefore seek to ascertain whether and to what extent Nigeria's responsibility to Cameroon has been engaged as a result of that occupation.[526]

451. In a like manner this Tribunal will not seek to ascertain whether and to what extent Suriname's responsibility to Guyana has been engaged as a result of the CGX incident of 3 June 2000. This dictum of the ICJ is all the more relevant in that as a result of this Award, Guyana now has undisputed title to the area where the incident occurred – the injury done to Guyana has thus been "sufficiently addressed".

452. This Tribunal will now deal with Guyana's claim for compensation. It is to be noted that the *Cameroon/Nigeria* judgment held that a declaratory judgment sufficed to satisfy the claim for compensation advanced by Cameroon. The circumstances of the claims in that case, however, are not entirely congruent with the claim made by Guyana with respect to the CGX incident. The Tribunal is of the view that the damages, in these proceedings, have not been proved to the satisfaction of this Tribunal and the claim for compensation, accordingly, is rejected on that ground.

## Chapter VIII. Guyana's fourth submission and Suriname's submissions 2.C and 2.D

453. Guyana and Suriname have both made claims regarding breaches of Articles 74(3) and 83(3) of the Convention. Each Party alleges that the other breached its obligation to make every effort to enter into provisional arrangements. Guyana also claims that Suriname hampered or jeopardised the reaching of a final agreement by its conduct relating to the CGX incident. Suriname makes the same claim in respect of Guyana authorising its concession holder CGX to undertake exploratory drilling in the disputed area.

454. Guyana's Fourth Submission is set out as follows:

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[526] *Cameroon/Nigeria*, Judgment, *I.C.J. Reports 2002*, p. 303, para. 319.

> Suriname is internationally responsible for violating its obligations under the 1982 United Nations Convention on the Law of the Sea to make every effort to enter into provisional arrangements of a practical nature pending agreement on the delimitation of the continental shelf and exclusive economic zones in Guyana and Suriname, and by jeopardising or hampering the reaching of the final agreement; and that Suriname is under an obligation to provide reparation, in a form and in an amount to be determined, for the injury caused by its internationally wrongful acts.[527]

455. The Tribunal notes that Guyana withdrew its claim for reparation in respect of its Fourth Submission during the hearings.

456. Suriname's Submissions 2.C. and 2.D. are set out as follows:

> 2.C. To find and declare that Guyana breached its legal obligations to Suriname under Articles 74(3) and 83(3) of the 1982 Law of the Sea Convention, by authorizing its concession holder to drill an exploratory well in a known disputed maritime area thereby jeopardizing and hampering the reaching of a maritime boundary agreement.
>
> 2.D. To find and declare that Guyana breached its legal obligations to Suriname under Article 74(3) and 83(3) of the 1982 Law of the Sea Convention, by not making every effort to enter into a provisional arrangement of a practical nature.[528]

## A. Jurisdiction and admissibility

457. Suriname challenges the Tribunal's jurisdiction over Guyana's Fourth Submission as well as its admissibility. It argues, as it did for Guyana's Third Submission, that Article 283(1) constitutes a bar to jurisdiction. For the same reasons that the Tribunal rejected the notion that Article 283(1) could bar its jurisdiction to hear Guyana's Third Submission, the Tribunal rules that it cannot bar its jurisdiction to hear Guyana's Fourth Submission. Suriname also contends that the claim is inadmissible as Guyana lacks clean hands.[529] The Tribunal rejects this argument for the same reasons the Tribunal rejected it in relation to Guyana's Third Submission.

458. Furthermore, Suriname claims that only conduct of the Parties after 8 August 1998, being the date of entry into force of the Convention between Guyana and Suriname,[530] is relevant to Guyana's Fourth Submission.[531] In this respect, the Tribunal recalls that an act of a State can constitute a breach of

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[527] Guyana Reply, para. 10.1.

[528] Suriname Rejoinder, Chapter 6.

[529] Suriname Preliminary Objections, paras. 7.1–7.9.

[530] 8 August 1998 is the thirtieth day after Suriname ratified the Convention on the 9 July 1998: Transcript, p. 608.

[531] Suriname Rejoinder, para. 5(2)(i).

an international obligation only if the State is bound by that obligation at the time of the act. However, although acts prior to 8 August 1998 cannot form the basis of a finding by the Tribunal that Suriname violated an obligation under the Convention, such acts are relevant to the Tribunal's consideration of Suriname's subsequent conduct to the extent that they provide the background for that conduct and inform the Tribunal's interpretation of it.

## B. The obligations provided for by Articles 74(3) and 83(3)

459. Articles 74(3) and 83(3) of the Convention impose two obligations upon States Parties in the context of a boundary dispute concerning the continental shelf and exclusive economic zone respectively. The two obligations simultaneously attempt to promote and limit activities in a disputed maritime area. The first obligation is that, pending a final delimitation, States Parties are required to make "every effort to enter into provisional arrangements of a practical nature." The second is that the States Parties must, during that period, make "every effort . . . not to jeopardize or hamper the reaching of the final agreement."

### 1. Provisional arrangements of a practical nature

460. The first obligation contained in Articles 74(3) and 83(3) is designed to promote interim regimes and practical measures that could pave the way for provisional utilization of disputed areas pending delimitation.[532] In the view of the Tribunal, this obligation constitutes an implicit acknowledgment of the importance of avoiding the suspension of economic development in a disputed maritime area, as long as such activities do not affect the reaching of a final agreement. Such arrangements promote the realisation of one of the objectives of the Convention, the equitable and efficient utilisation of the resources of the seas and oceans.[533]

461. Although the language "every effort" leaves "some room for interpretation by the States concerned, or by any dispute settlement body",[534] it is the opinion of the Tribunal that the language in which the obligation is framed imposes on the Parties a duty to negotiate in good faith. Indeed, the inclusion of the phrase "in a spirit of understanding and cooperation" indicates the drafters' intent to require of the parties a conciliatory approach to negotiations, pursuant to which they would be prepared to make concessions in the

[532] Myron H. Nordquist, ed., *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. II. p. 815 (Nijhoff) ("Virginia Commentary"); Rainer Lagoni, *Interim Measures Pending Delimitation Agreements*, 78 Am. J. Int'l L. p. 345, at p. 354 (1984).

[533] Thomas A. Mensah, *Joint Development Zones as an Alternative Dispute Settlement Approach in Maritime Boundary Delimitation*, in Rainer Lagoni & Daniel Vignes, *Maritime Delimitation*, p. 143, at p. 143 (Nijhoff 2006); the Convention, preamble.

[534] Virginia Commentary, Vol. II, p. 815.

pursuit of a provisional arrangement. Such an approach is particularly to be expected of the parties in view of the fact that any provisional arrangements arrived at are by definition temporary and will be without prejudice to the final delimitation.[535]

462. There have been a number of examples of arrangements for the joint exploration and exploitation of maritime resources, often referred to as joint development agreements. Joint development has been defined as "the cooperation between States with regard to exploration for and exploitation of certain deposits, fields or accumulations of nonliving resources which either extend across a boundary or lie in an area of overlapping claims".[536]

463. Joint exploitation of resources that straddle maritime boundaries has been particularly encouraged by international courts and tribunals. In the *Eritrea/Yemen* arbitration, the arbitral tribunal, although no mineral resources had yet been discovered in the disputed waters, wrote that the parties "should give every consideration to the shared or joint or unitised exploitation of any such resources."[537] The ICJ in the *North Sea Continental Shelf* cases, in addressing the question of the unity of deposits as it relates to delimitation, noted that State practice in dealing with deposits straddling a boundary line has been to enter into undertakings with a view to ensuring the most efficient exploitation or apportionment of the products extracted.[538] Furthermore, the Court stated that agreements for joint exploitation were particularly appropriate where areas of overlapping claims result from the method of delimitation chosen and there is a question of preserving the unity of deposits.[539]

464. Provisional arrangements of a practical nature have been recognised as important tools in achieving the objectives of the Convention, and it is for this reason that the Convention imposes an obligation on parties to a dispute to "make every effort" to reach such arrangements.

### 2. Hampering or jeopardising the Final Agreement

465. The second obligation imposed by Articles 74(3) and 83(3) of the Convention, the duty to make every effort . . . not to jeopardise or hamper the reaching of the final agreement", is an important aspect of the Conven-

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[535] The Convention, Articles 74(3), 83(3).

[536] Rainer Lagoni, *Report on Joint Development of Non-living Resources in the Exclusive Economic Zone*, I.L.A. Report of the Sixty-Third Conference, p. 509, at pp. 511–512 (1988), quoted in Mensah, *Joint Development Zones as an Alternative Dispute Settlement Approach in Maritime Boundary Delimitation*, in Rainer Lagoni and Daniel Vignes, *Maritime Delimitation*, p. 143, at p. 146 (Nijhoff, 2006).

[537] *Eritrea/Yemen II*, 119 I.L.R. p. 417 (1999), *The Eritrea-Yemen Arbitration Awards of 1998 & 1999* (Permanent Court of Arbitration Award Series 2005), online: <http://www.pca-cpa.org>.

[538] *North Sea Continental Shelf*, Judgment, *I.C.J. Reports 1969*, p. 3 at para. 97.

[539] *North Sea Continental Shelf*, Judgment, *I.C.J. Reports 1969*, p. 3 at para. 99.

tion's objective of strengthening peace and friendly relations between nations and of settling disputes peacefully. However, it is important to note that this obligation was not intended to preclude all activities in a disputed maritime area. The Virginia Commentary for example states that the obligation "does not exclude the conduct of some activities by the States concerned within the disputed area, so long as those activities would not have the effect of prejudicing the final agreement."[540]

466. In the context of activities surrounding hydrocarbon exploration and exploitation, two classes of activities in disputed waters are therefore permissible. The first comprises activities undertaken by the parties pursuant to provisional arrangements of a practical nature. The second class is composed of acts which, although unilateral, would not have the effect of jeopardizing or hampering the reaching of a final agreement on the delimitation of the maritime boundary.

467. The Tribunal is of the view that unilateral acts which do not cause a physical change to the marine environment would generally fall into the second class. However, acts that do cause physical change would have to be undertaken pursuant to an agreement between the parties to be permissible, as they may hamper or jeopardise the reaching of a final agreement on delimitation. A distinction is therefore to be made between activities of the kind that lead to a permanent physical change, such as exploitation of oil and gas reserves, and those that do not, such as seismic exploration.

468. The distinction adopted by this Tribunal is consistent with the jurisprudence of international courts and tribunals on interim measures. The ICJ's decision in the *Aegean Sea* case between Greece and Turkey distinguishes between activities of a transitory character and activities that risk irreparable prejudice to the position of the other party. Greece had requested that Turkey be ordered to refrain from all exploratory activity or scientific research without its consent pending a final judgment. In particular, Greece requested that Turkey be ordered to cease its seismic exploration in disputed waters, an activity involving the detonation of small explosions aimed at sending sound waves through the seabed. The Court declined to indicate interim measures, citing three factors: (1) the fact that seismic exploration does not involve any risk of physical damage to the seabed or subsoil, (2) that the activities are of a transitory character and do not involve the establishment of installations, and (3) that no operations involving the actual appropriation or other use of the natural resources were embarked upon.[541] In the circumstances, the Court found that Turkey's conduct did not pose the risk of irreparable prejudice to Greece's rights in issue in the proceedings.[542]

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[540] Virginia Commentary, Vol. II, p. 815.

[541] *Aegean Sea*, Interim Protection, Order, *I.C.J. Reports 1976*, p. 3, at para. 30.

[542] *Ibid*. at para. 31.

469. It should be noted that the regime of interim measures is far more circumscribed than that surrounding activities in disputed waters generally. As the Court in the *Aegean Sea* case noted, the power to indicate interim measures is an exceptional one,[543] and it applies only to activities that can cause irreparable prejudice. The cases dealing with such measures are nevertheless informative as to the type of activities that should be permissible in disputed waters in the absence of a provisional arrangement. Activities that would meet the standard required for the indication of interim measures, in other words, activities that would justify the use of an exceptional power due to their potential to cause irreparable prejudice, would easily meet the lower threshold of hampering or jeopardising the reaching of a final agreement. The criteria used by international courts and tribunals in assessing a request for interim measures, notably the risk of physical damage to the seabed or subsoil, therefore appropriately guide this Tribunal's analysis of an alleged violation of a party's obligations under Articles 74(3) and 83(3) of the Convention.

470. It should not be permissible for a party to a dispute to undertake any unilateral activity that might affect the other party's rights in a permanent manner. However, international courts and tribunals should also be careful not to stifle the parties' ability to pursue economic development in a disputed area during a boundary dispute, as the resolution of such disputes will typically be a time-consuming process. This Tribunal's interpretation of the obligation to make every effort not to hamper or jeopardise the reaching of a final agreement must reflect this delicate balance. It is the Tribunal's opinion that drawing a distinction between activities having a permanent physical impact on the marine environment and those that do not, accomplishes this and is consistent with other aspects of the law of the sea and international law.

## C. The Tribunal's findings on the duty to make every effort to enter into provisional arrangements of a practical nature

471. Suriname claims that Guyana violated its duty to make every effort to enter into provisional arrangements as it persistently demanded that Suriname permit CGX to resume exploratory drilling and that Suriname accept Guyana's concessions in the disputed area.[544] Guyana, on its side, claims that Suriname, both before and after the CGX incident, failed to make serious efforts to negotiate provisional arrangements.[545]

472. The efforts by Guyana and Suriname to arrive at provisional arrangements appear to have started in 1989. The Joint Communiqué of 25 August 1989 between the President of Guyana and the President of Suriname recorded that the two Presidents expressed concern over the potential

[543] *Ibid*.

[544] Suriname Rejoinder, paras. 5.12–5.14.

[545] Guyana Reply, paras. 9.1–9.14.

for disputes "with respect to petroleum development within the area of the North Eastern and North Western Seaward boundaries of Guyana and Suriname respectively".[546] They agreed that pending settlement of the boundary question, representatives of the Agencies responsible for petroleum development within the two countries should agree on modalities which would ensure that the opportunities available within the disputed area could be jointly utilised. Moreover, the Presidents agreed that concessions already granted in the disputed area would not be disturbed.[547]

473. The 1989 agreement led to the 1991 "Memorandum of Understanding – Modalities for Treatment of the Offshore Area of Overlap between Guyana and Suriname" (the "MOU"). The Staatsolie representatives negotiating the MOU however claimed that they lacked the authority to negotiate an agreement on the actual utilisation of resources in the disputed area. The MOU was therefore limited in scope: it applied only to one Guyanese oil concession, the 1988 concession to Lasmo/BHP, and provided that further discussions would have to occur if the concession holder made any discoveries.[548] The MOU provided further that representatives of both governments would meet within thirty days to conclude discussions on modalities for joint utilisation of the disputed area awaiting a final boundary agreement. Suriname, however, never sent a delegation or representative to conclude discussions, as contemplated by the MOU.[549] In 1994, Guyana submitted a new draft of proposed "Modalities for Treatment of the Offshore Area of Overlap between Guyana and Suriname"; however Suriname failed to respond to it.[550] Over the following years, Suriname did not engage in further discussions on the topic despite certain efforts by Guyana. There are also indications that the already limited MOU was disavowed by Suriname during that time.[551]

474. For the Tribunal, the evidence demonstrates that Suriname did not make every effort to enter into provisional arrangements before 8 August 1998. Although this alone cannot form the basis of a finding that Suriname violated the Convention, Suriname's subsequent conduct, which was consistent with its pre-1998 conduct, did constitute a failure to meet its obligations under Articles 74(3) and 83(3) and constituted a violation of the Convention.

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[546] Joint Communiqué Signed at the Conclusion of the State Visit to Suriname by Hugh Desmond Hoyte, President of the Cooperative Republic of Guyana and Ramsewak Shankar, President of the Republic of Suriname (25 December 1989): Guyana Memorial, Annex 72.

[547] Guyana Memorial, para. 4.32.

[548] Suriname Preliminary Objections, paras. 6.26–6.28.

[549] Suriname Preliminary Objections, para. 6.28.

[550] Guyana Memorial, paras. 4.36–4.37.

[551] Cable 94 Georgetown 2405 from the United States Embassy in Georgetown, Guyana to the United States Secretary of State (21 July 1994), Guyana Reply, Annex R11: "Mungra responded that the MOU had no validity because it had never been approved by the Surinamese Parliament."

475. Indeed, in the build-up to the CGX incident of 3 June 2000, Suriname did not fulfil its obligation to make every effort to enter into provisional arrangements relating to the exploratory activities of Guyana's concession holder CGX. While it was conducting seismic testing in the disputed area in 1999, CGX announced publicly that it had received approval from Guyana for its drilling programme,[552] and later the company announced a drilling schedule.[553] Less than three weeks after the latter announcement, which occurred on 10 April 2000, "the drilling plans had become known in Suriname via the 'grapevine'."[554] Suriname's first reaction came in the form of a diplomatic note dated 10 May 2000, in which it cautioned Guyana against its proposed course of conduct.[555] Following Guyana's response on 17 May 2000, asserting that all activities were taking place within Guyanese territory,[556] Suriname again issued a note verbale objecting to the planned drilling, insisting on termination of all activities in the disputed waters, and informing Guyana of its intention to "protect its territorial integrity and national sovereignty".[557] On 2 June 2000, hours before the CGX incident occurred, Guyana invited Suriname to "send a high level delegation to Georgetown within twenty-four (24) hours to commence dialogue" on matters relating to the maritime boundary.[558]

476. At all times Suriname was under an obligation to make every effort to reach a provisional arrangement. However, this obligation became particularly pressing and relevant when Suriname became aware of Guyana's concession holder's planned exploratory drilling in disputed waters. Instead of attempting to engage Guyana in a spirit of understanding and cooperation as required by the Convention, Suriname opted for a harder stance. Even though Guyana attempted to engage it in a dialogue which may have led to a satisfactory solution for both Parties, Suriname resorted to self-help in threatening the CGX rig, in violation of the Convention. In order to satisfy its obligation to make every effort to reach provisional arrangements, Suriname would have actively had to attempt to bring Guyana to the negotiating table, or, at a minimum, have accepted Guyana's last minute 2 June 2000 invitation and negotiated in good faith. It notably could have insisted on the immediate cessation of CGX's exploratory drilling as a condition to participating in further talks. However, as Suriname did not opt for either of these courses of action, it failed, in the build-up to the CGX incident, in its duties under Articles 74(3) and 83(3) of the Convention.

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[552] CGX Press Releases, 29 September 1999, reproduced in Guyana Memorial, Annex 158.

[553] Guyana Memorial, Annex 158.

[554] Suriname Preliminary Objections, paras. 6.34–6.35.

[555] Guyana Memorial, Annex 48.

[556] Guyana Memorial, Annex 77.

[557] Guyana Memorial, Annex 78.

[558] Guyana Memorial, Annex 79.

477. The Tribunal rules that Guyana also violated its obligation to make every effort to enter into provisional arrangements by its conduct leading up to the CGX incident. Guyana had been preparing exploratory drilling for some time before the incident,[559] and should have, in a spirit of cooperation, informed Suriname directly of its plans. Indeed, notification in the press by way of CGX's public announcements was not sufficient for Guyana to meet its obligation under Articles 74(3) and 83(3) of the Convention. Guyana should have sought to engage Suriname in discussions concerning the drilling at a much earlier stage. Its 2 June 2000 invitation to Suriname to discuss the modalities of any drilling operations, although an attempt to defuse a tense situation, was also not sufficient in itself to discharge Guyana's obligation under the Convention. Steps Guyana could have taken consistent with efforts to enter into provisional arrangements include (1) giving Suriname official and detailed notice of the planned activities, (2) seeking cooperation of Suriname in undertaking the activities, (3) offering to share the results of the exploration and giving Suriname an opportunity to observe the activities, and (4) offering to share all the financial benefits received from the exploratory activities.

478. Following the CGX incident in June of 2000, numerous meetings and communications between the Parties took place in which, in the opinion of the Tribunal, they both engaged in good faith negotiations relating to provisional arrangements. Already on 6 June 2000 the Parties expressed their determination to "put in place arrangements to end the current dispute over the oil exploration concessions".[560] Further discussions then took place, including on 13 June 2000 at a meeting of the Joint Technical Committee,[561] as well as on 17–18 June 2000[562] and 28–30 January 2002.[563] A meeting of the Subcommittee of the Guyana-Suriname Border Commission was held on 31 May 2002, at which modalities for negotiating a provisional arrangement were discussed.[564] Subsequently, two joint meetings of the Suriname and Guyana Border Commissions were held (on 25–26 October 2002 and 10 March 2003).[565] Although they were ultimately unsuccessful in reaching a provisional arrangement, both Parties demonstrated a willingness to negotiate in good faith in relatively extensive meetings and communications.[566] As a result, the Tribunal is

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[559] Guyana appears to have authorised CGX to drill in the disputed area on 10 August 1999, almost a full year before the CGX incident: Press Releases, Guyana Memorial, Annex 158.

[560] Guyana Memorial, Annex 81.

[561] Guyana Memorial, Annex 82.

[562] Guyana Memorial, Annex 83.

[563] Suriname Counter-Memorial, Annex 8, p. 6.

[564] Guyana Memorial, Annex 85.

[565] Guyana Memorial, Annexes 87–88.

[566] See Suriname Daily Judge's Folder, Vol. II, Tab H5 for a list of diplomatic post-August 1998 exchanges between Suriname and Guyana concerning a provisional arrangement or final delimitation of the maritime boundary.

satisfied that both Parties respected their obligation relating to provisional arrangements after the CGX incident.

## D. The Tribunal's findings on the duty not to hamper or jeopardise the reaching of a final agreement

### 1. Suriname's submission 2.C

479. Suriname claims that Guyana violated its obligation to make every effort not to hamper or jeopardise the reaching of a final agreement by allowing its concession holder to undertake exploratory drilling in the disputed waters.[567] With respect to this claim, the Tribunal finds that there is a substantive legal difference between certain oil exploration activities, notably seismic testing, and exploratory drilling.

480. The question that the Tribunal has to address here is whether a party engaging in unilateral exploratory drilling in a disputed area falls short of its obligation to make every effort, in a spirit of understanding and cooperation, not to jeopardise or hamper the reaching of the final agreement on delimitation. As set out above, unilateral acts that cause a physical change to the marine environment will generally be comprised in a class of activities that can be undertaken only jointly or by agreement between the parties. This is due to the fact that these activities may jeopardize or hamper the reaching of a final delimitation agreement as a result of the perceived change to the *status quo* that they would engender. Indeed, such activities could be perceived to, or may genuinely, prejudice the position of the other party in the delimitation dispute, thereby both hampering and jeopardising the reaching of a final agreement.

481. That however is not to say that all exploratory activity should be frozen in a disputed area in the absence of a provisional arrangement. Some exploratory drilling might cause permanent damage to the marine environment. Seismic activity on the other hand should be permissible in a disputed area. In the present case, both Parties authorised concession holders to undertake seismic testing in disputed waters, and these activities did not give rise to objections from either side. In the circumstances at hand, the Tribunal does not consider that unilateral seismic testing is inconsistent with a party's obligation to make every effort not to jeopardise or hamper the reaching of a final agreement.

482. To the extent that Suriname believed that Guyana's authorisation of its concession holder to undertake exploratory drilling in disputed waters constituted a violation of its obligation to make every effort not to jeopardise or hamper the reaching of a final agreement on delimitation, and if bilateral negotiations failed to resolve the issue, a remedy is set out in the options for

[567] Suriname Rejoinder, Chapter 6, Submission 2.C.

peaceful settlement envisaged by Part XV and Annex VII of the Convention. The obligation to have recourse to these options is binding on both Guyana and Suriname.

### 2. Guyana's fourth submission

483. Guyana claims Suriname violated its obligations under Article 74(3) and 83(3) to make every effort not to hamper or jeopardise the reaching of a final agreement by its use of a threat of force to respond to Guyana's exploratory drilling.[568]

484. Suriname had a number of peaceful options to address Guyana's authorisation of exploratory drilling. The first, in keeping with its other obligation under Articles 74(3) and 83(3), was to enter into discussions with Guyana regarding provisional arrangements of a practical nature to establish the modalities of oil exploration and potentially of exploitation. In the event of failure of the negotiations, Suriname could have invoked compulsory dispute resolution under Part XV, Section 2 of the Convention. That course of action would also then have given Suriname the possibility to request provisional measures "to preserve [its] rights . . . or to prevent serious harm to the marine environment, pending the final decision."[569] The Tribunal finds that Suriname's threat of force in a disputed area, while also threatening international peace and security, jeopardised the reaching of a final delimitation agreement.

## E. Declaratory relief

485. Both Parties have requested the Tribunal to declare that violations of the Convention have taken place. The Tribunal notes that in certain circumstances, "reparation in the form of satisfaction may be provided by a judicial declaration that there has been a violation of a right" or an obligation.[570]

486. The Tribunal therefore declares that both Guyana and Suriname violated their obligations under Articles 74(3) and 83(3) of the Convention to make every effort to enter into provisional arrangements of a practical nature. Furthermore, both Guyana and Suriname violated their obligations, also under Articles 74(3) and 83(3) of the Convention, to make every effort not to jeopardise or hamper the reaching of a final delimitation agreement.

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[568] Guyana Reply, para. 8.1.

[569] The Convention, Article 290.

[570] *Saiga*, Judgment, ITLOS Reports 1999, p. 7, at para. 171.

## Chapter IX. Dispositif

487. For the reasons stated in paragraphs 280, 406, 410, and 457 of this Award, the Tribunal holds that:

(i) it has jurisdiction to delimit, by the drawing of a single maritime boundary, the territorial sea, continental shelf, and exclusive economic zone appertaining to each of the Parties in the waters where their claims to these maritime zones overlap;

(ii) it has jurisdiction to consider and rule on Guyana's allegation that Suriname has engaged in the unlawful use or threat of force contrary to the Convention, the UN Charter, and general international law; and

(iii) it has jurisdiction to consider and rule on the Parties' respective claims under Articles 74(3) and 83(3) of the Convention relating to the obligation to make every effort to enter into provisional arrangements of a practical nature and the obligation not to jeopardise or hamper the reaching of a final agreement.

488. Accordingly, taking into account the foregoing considerations and reasons,

The Arbitral Tribunal unanimously finds that

1. The International Maritime Boundary between Guyana and Suriname is a series of geodetic lines joining the points in the order listed as set forth in paragraphs 328 and 400 of this Award and shown for illustrative purposes only in Map 4* on the preceding page;

2. The expulsion from the disputed area of the CGX oil rig and drill ship *C.E. Thornton* by Suriname on 3 June 2000 constituted a threat of the use of force in breach of the Convention, the UN Charter, and general international law; however, for the reasons set out in paragraphs 450 and 452 of this Award, Guyana's request for an order precluding Suriname from making further threats of force and Guyana's claim for compensation are rejected;

3. Both Guyana and Suriname violated their obligations under Articles 74(3) and 83(3) of the Convention to make every effort to enter into provisional arrangements of a practical nature and to make every effort not to jeopardise or hamper the reaching of a final delimitation agreement; and

The claims of the Parties inconsistent with this Award are rejected.

Done at The Hague, this 17th day of September 2007.

[*Signed*]
H.E. Judge L. Dolliver M. Nelson, President
[*Signed*]
Professor Thomas M. Franck
[*Signed*]
Dr. Kamal Hossain

* Secretariat note: Map 4 is located in the front pocket of this volume.

[*Signed*]
Professor Ivan Shearer
[*Signed*]
Professor Hans Smit
[*Signed*]
Mr. Brooks W. Daly, Registrar

## Appendix

### Technical report of the Tribunal's hydrographer

**David H. Gray**
**M.A.Sc., P.Eng., C.L.S.**

1. The full description of the line of delimitation, together with the necessary geographical coordinates, is given in the Award. All computations have been made on the Geodetic Reference System (1980) ellipsoid and all geographical coordinates are referenced to the World Geodetic System 1984 (WGS-84). The International Nautical Mile of 1852 metres has been used.

2. In compliance with the Tribunal's Procedural Orders No. 7 and 8, I obtained Global Positioning System (GPS) data at Marker "B" of the 1936 Mixed Commission Boundary Survey over a period of 4 ½ hours. These data resulted in a World Geodetic System 1984 (WGS-84 ITRF05[571]) position of:

| | | |
|---|---|---|
| Latitude | = 5°59'46.2059"N | (± 0.077 metres) |
| Longitude | = 57°08'50.4824"W | (± 0.101 metres) |
| Ellipsoid Height | =-24.022 metres | (± 0.180 metres) |

Given the indicated accuracy of the results, it would be appropriate to round off the results to:

| | |
|---|---|
| Latitude | = 5°59'46.21"N |
| Longitude | = 57°08'50.48"W |

These values were computed using the Geodetic Survey of Canada's on-line Precise Point Positioning software and are based on the GPS satellite orbital parameters as derived from actual observations taken at tracking stations world-wide. The final values for the orbital parameters became available 21 days after the day on which the observations were taken.

The GPS survey data, in the form of RINEX files, have been provided to the Registry for permanent storage.

3. The location of Point 1 of the Award is the intersection of Low Water Line (LWL) along the west bank of the Corentyne River and a geodetic line through Marker "B" which has an initial azimuth of N10°E. Since this point

[571] Specifically, the International Terrestrial Reference Frame – 2005 version of WGS-84.

moves with any movement of the Low Water Line, no geographical coordinates can be provided.

4. The geographic coordinates of base points along the Low Water Line of the coast of Suriname are:

| Source and Number | Renumber | Latitude | Longitude |
|---|---|---|---|
| Annex CM69 S-1 | S1 | 6°01'34.0" | 57°08'22.0" |
| Annex CM69 S-2 | S2 | 6°01'19.0" | 56°59'02.0" |
| Annex CM69 S-3 | S3 | 6°01'40.0" | 56°57'24.0" |
| Annex CM69 S-4 | S4 | 6°01'41.0" | 56°57'21.0" |
| Annex CM69 S-5 | S5 | 6°01'41.0" | 56°57'15.0" |
| Annex CM69 S-6 | S6 | 6°00'10.0" | 56°45'10.0" |
| Annex CM69 S-7 | S7 | 6°00'09.0" | 56°44'48.0" |
| Annex CM69 S-8 | S8 | 6°00'08.0" | 56°44'29.0" |
| Annex CM69 S-9 | S9 | 5°57'25.0" | 56°29'57.0" |
| Annex CM69 S-10 | S10 | 5°57'21.0" | 56°29'18.0" |
| Annex CM69 S-11 | S11 | 6°00'17.0" | 55°46'44.0" |
| Annex CM69 S-12 | S12 | 6°00'22.0" | 55°46'22.0" |
| Annex CM69 S-13 | S13 | 6°00'22.0" | 55°45'56.0" |
| Annex CM69 S-14 | S14 | 6°01'35.0" | 55°23'19.0" |

These geographic coordinates were provided by Suriname in Counter Memorial Annex 69, and were stated to be related to World Geodetic System 1984 (WGS-84).

5. The geographic coordinates of the pertinent turning points along the Low Water Line of the coast of Guyana are:

| Source and Number | Renumber | Latitude | Longitude |
|---|---|---|---|
| Annex R26 G-1 | G3 | 6°00'27.9" | 57°08'21.1" |
| Annex R26 G-2 | G9 | 6°02'42.9" | 57°08'51.6" |
| Annex R26 G-3 | G12 | 6°03'07.6" | 57°08'54.0" |
| Annex R26 G-4 | G13 | 6°04'26.3" | 57°09'13.8" |
| Annex R26 G-5 | G16 | 6°05'26.8" | 57°09'26.6" |
| Annex R26 G-6 | G18 | 6°06'12.9" | 57°09'43.3" |
| Annex R26 G-7 | G19 | 6°06'43.2" | 57°09'52.8" |
| Annex R26 G-8 | G21 | 6°07'42.8" | 57°10'27.3" |
| Annex R26 G-9 | G23 | 6°09'21.1" | 57°11'28.2" |
| Annex R26 G-10 | G25 | 6°10'45.0" | 57°12'31.8" |
| Annex R26 G-11 | G28 | 6°16'22.3" | 57°16'28.0" |
| Annex R26 G-12 | G30 | 6°17'12.7" | 57°17'30.4" |

| | | | |
|---|---|---|---|
| Annex R26 G-13 | G32 | 6°18'32.1" | 57°19'06.4" |
| Annex R26 G-14 | G33 | 6°20'12.8" | 57°22'06.3" |
| Annex R26 G-15 | G35 | 6°40'44.1" | 57°50'17.7" |
| Annex R26 G-16 | G38 | 7°22'53.8" | 58°28'08.2" |

These geographic coordinates were provided by Guyana in Reply Annex 26, and were stated to be related to World Geodetic System 1984 (WGS-84).

6. The geographic coordinates of the pertinent turning points along the Low Water Line of the coast of Guyana are:

| Source and Number | Renumber | Latitude | Longitude |
|---|---|---|---|
| Annex CM69 G-1 | G6 | 6°01'36.0" | 57°08'33.0" |
| Annex CM69 G-2 | G7 | 6°02'35.0" | 57°09'06.0" |
| Annex CM69 G-3 | G8 | 6°02'45.0" | 57°09'04.0" |
| Annex CM69 G-4 | G10 | 6°02'52.0" | 57°09'04.0" |
| Annex CM69 G-5 | G11 | 6°02'58.0" | 57°09'05.0" |
| Annex CM69 G-6 | G14 | 6°05'00.0" | 57°09'35.0" |
| Annex CM69 G-7 | G15 | 6°05'14.0" | 57°09'37.0" |
| Annex CM69 G-8 | G17 | 6°06'05.0" | 57°09'54.0" |
| Annex CM69 G-9 | G20 | 6°07'33.0" | 57°10'32.0" |
| Annex CM69 G-10 | G22 | 6°07'48.0" | 57°10'41.0" |
| Annex CM69 G-11 | G24 | 6°10'44.0" | 57°12'19.0" |
| Annex CM69 G-12 | G26 | 6°10'50.0" | 57°12'24.0" |
| Annex CM69 G-13 | G27 | 6°16'20.0" | 57°16'31.0" |
| Annex CM69 G-14 | G29 | 6°17'12.0" | 57°17'29.0" |
| Annex CM69 G-15 | G31 | 6°18'28.0" | 57°19'06.0" |
| Annex CM69 G-16 | G34 | 6°20'15.0" | 57°22'11.0" |
| Annex CM69 G-17 | G36 | 6°40'44.0" | 57°50'21.0" |
| Annex CM69 G-18 | G37 | 7°22'02.0" | 58°27'32.0" |
| Annex CM69 G-19 | G39 | 7°23'04.0" | 58°28'14.0" |

These geographic coordinates were provided by Suriname in Counter Memorial Annex 69, and were stated to be related to World Geodetic System 1984 (WGS-84).

7. Both Parties provided the geographical coordinates of the base points for determining the provisional equidistance line. Guyana objected to Suriname's points S1 and S14. Since the Tribunal has ruled that the delimitation within the territorial sea will be based on special circumstances, there is no need for the Tribunal to rule on the validity of Points S1 to S3 inclusive, and on the validity of Points G1 to G18 inclusive and Point G20. The Tribunal has

ruled on the validity of point S14 in its Award. The Tribunal accepted the other base points provided by the Parties.

8. The turning points along the equidistance line between Guyana and Suriname from the outer limit of the Territorial Sea (12 nm) to the outer limit of Exclusive Economic Zone (200 nm) are:

| Number | Controlling Points | Latitude | Longitude |
|---|---|---|---|
| Point 3 | G21, S4 | 6°13'28.45161"N | 56°59'52.26218"W |
| DHG-13 | G21, S4, G23 | 6°16'11.10279"N | 56°58'37.51896"W |
| DHG-14 | G23, S4, S5 | 6°18'37.68430"N | 56°57'17.99996"W |
| DHG-15 | G23, S5, G24 | 6°19'10.47780"N | 56°57'00.33300"W |
| DHG-16 | G24, S5, G26 | 6°28'00.46428"N | 56°51'42.18096"W |
| DHG-17 | G26, S5, G28 | 6°32'07.38098"N | 56°49'13.06749"W |
| DHG-18 | G28, S5, S6 | 6°35'07.68334"N | 56°46'55.20724"W |
| DHG-19 | G28, S6, S7 | 6°42'35.21247"N | 56°43'03.39402"W |
| DHG-20 | G28, S7, S8 | 6°43'59.56866"N | 56°42'20.14577"W |
| DHG-21 | G28, S8, G29 | 7°24'27.15434"N | 56°21'44.54451"W |
| DHG-22 | G29, S8, S9 | 7°26'06.50731"N | 56°20'52.94196"W |
| DHG-23 | G29, S9, S10 | 7°27'15.41697"N | 56°20'24.14252"W |
| DHG-24 | G29, S10, G32 | 7°28'59.03779"N | 56°19'41.27176"W |
| DHG-25 | G32, S10, S11 | 7°39'57.89461"N | 56°14'59.67507"W |
| DHG-26 | G32, S11, S12 | 7°53'28.79027"N | 56°12'18.58596"W |
| DHG-27 | G32, S12, G33 | 8°35'36.59110"N | 56°03'59.52666"W |
| DHG-28 | G33, S12, G35 | 8°36'45.54470"N | 56°03'45.09377"W |
| DHG-29 | G35, S12, G37 | 9°00'01.60724"N | 55°56'05.23673"W |
| DHG-30 | G37, S12, G39 | 9°06'16.33399"N | 55°52'52.78138"W |
| DHG-31 | G39, S12, S13 | 9°19'15.26503"N | 55°46'08.99996"W |
| DHG-32 | G39, S13, S14 | 9°20'39.70398"N | 55°45'25.31202"W |
| DHG-33 | G39, S14 | 9°21'21.26226"N | 55°45'06.72306"W |

9. A line N10°E (geodetic azimuth) through Marker "B" intersects the envelope of 3 nautical mile arcs about the Guyanese controlling points (see paragraphs 5 and 6 above)- specifically point G19-at:

Point 2 6°08'19.76727"N, 57°07'20.00890"W.

10. Points DHG-14, DHG-19, DHG-23 and DHG-31 are all less than 11 metres from the geodetic line between DHG-13–15, DHG-18–20, DHG-22–24, and DHG-30–32, respectively, and can be excluded as turning points of the delimitation line because of the rounding off of all geographical coordinates to the nearest 0.01 minutes of arc.

11. Because the coordinates used in the Award are to be expressed in 0.01 minutes of arc of Latitude and Longitude, and because selected points have now been omitted, the correlation of points in this Technical Report and the Award are interrelated in the following table:

| Award Pt. | Technical Report Pt. | Latitude | Longitude |
|---|---|---|---|
| 1. | 1. | Intersection of LWL and N10°E line through Marker "B" | |
| 2. | 2. | 6°08.33'N | 57°07.33'W |
| 3. | 3. | 6°13.47'N | 56°59.87'W |
| 4. | DHG-13 | 6°16.19'N | 56°58.63'W |
| 5. | DHG-15 | 6°19.17'N | 56°57.01'W |
| 6. | DHG-16 | 6°28.01'N | 56°51.70'W |
| 7. | DHG-17 | 6°32.12'N | 56°49.22'W |
| 8. | DHG-18 | 6°35.13'N | 56°46.92'W |
| 9. | DHG-20 | 6°43.99'N | 56°42.34'W |
| 10. | DHG-21 | 7°24.45'N | 56°21.74'W |
| 11. | DHG-22 | 7°26.11'N | 56°20.88'W |
| 12. | DHG-24 | 7°28.98'N | 56°19.69'W |
| 13. | DHG-25 | 7°39.96'N | 56°14.99'W |
| 14. | DHG-26 | 7°53.48'N | 56°12.31'W |
| 15. | DHG-27 | 8°35.61'N | 56°03.99'W |
| 16. | DHG-28 | 8°36.76'N | 56°03.75'W |
| 17. | DHG-29 | 9°00.03'N | 55°56.09'W |
| 18. | DHG-30 | 9°06.27'N | 55°52.88'W |
| 19. | DHG-32 | 9°20.66'N | 55°45.42'W |
| 20. | DHG-33 | 9°21.35'N | 55°45.11'W |
| | | Approximate value | Approximate value |

Map 5*

* Secretariat note: Map 5 is located in the front pocket of this volume.

# PART II

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## Award in the Arbitration regarding the delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army

**Award of 22 July 2009**

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# PARTIE II

## Sentence arbitrale relative à la délimitation de la région de l'Abyei entre le Gouvernement du Soudan et le Mouvement/Armée populaire de libération du Soudan

**Sentence du 22 juillet 2009**

# Award in the arbitration regarding the delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army

# Sentence arbitrale relative à la délimitation de la région de l'Abyei entre le Gouvernement du Soudan et le Mouvement/Armée populaire de libération du Soudan

Review of validity of Boundary Commission delimitation of Abyei Area—*de novo* review only permissible once "excess of mandate" established—principles of review applicable in public international law and national legal systems relevant as "general principles of law and practices"—established case law regarding *excès de pouvoir* of arbitral tribunals may *mutatis mutandis* inform the interpretation of "excess of mandate"—scope of review in international proceedings leading to the annulment of a prior decision generally very limited—reviewing body's task cannot take the form of an appeal with respect to the "correctness" of the findings of the original decision-maker when the reviewing body's methodology differs from that of the original decision-maker—partial annulment within the authority of a court or tribunal seized with a review function—contracting out of the general principle of law allowing for severability and partial nullity to be evidenced by a clear and unequivocal expression of intention of the Parties—Tribunal's scope of review limited to decisions made *ultra petita*, and not including putative violations of procedural rights—procedural irregularity alone cannot invalidate a decision; a significant injustice must have also occurred as a result of the irregularity.

Standard of review for interpretation and implementation of Boundary Commission's mandate—fundamental misinterpretation of Boundary Commission's competence qualifies as an "excess of mandate"—reasonableness standard applies both to Boundary Commission's interpretation and implementation of mandate—an instance of review must defer to the interpretation of a jurisdictional instrument by the decision-making body designated under that instrument (*Kompetenz-Kompetenz*) as long as that interpretation is reasonable—review for "substantive errors" outside the Tribunal's competence—lack of any reasons or obviously contradictory or frivolous reasons amounts to an "excess of mandate".

Boundary Commission did not exceed its mandate with respect to the delimitation of the northern and southern boundaries of the Abyei Area—reasonable to adopt a primarily tribal (as opposed to territorial) approach to delimitation—Boundary Commission's definition of shared-rights area as well as its determination of western and eastern boundary lines of the Abyei Area, unsupported by sufficient reasons—delimitation by Tribunal of western and eastern boundaries of the Abyei Area by resort to lines of longitude—transfer of sovereignty in the context of boundary delimitation did not extinguish traditional rights to the use of land (or maritime resources).

Examen de la validité de la délimitation de la région de l'Abyei par la Commission de délimitation des frontières—réexamen *de novo* autorisé uniquement dès lors qu'un « excès de mandat » est établi—principes applicables au réexamen issus du droit international public et des systèmes juridiques nationaux pertinents en tant que « principes généraux de droit et usages »—jurisprudence en vigueur relative à l'excès de pouvoir du tribunal arbitral pouvant servir *mutatis mutandis* à l'interprétation de l'expression « excès de mandat »—étendue du réexamen dans le cadre de procédures internationales d'annulation d'une décision antérieure étant généralement très limitée—tâche de l'organe de réexamen ne pouvant constituer un appel quant à la « justesse » des conclusions de l'organe décisionnel initial lorsque la méthodologie de l'organe de réexamen diffère de celle de l'organe décisionnel initial—annulation partielle relevant de la compétence de la cour ou du tribunal investi d'une fonction de réexamen—renonciation au principe général de droit autorisant la divisibilité et l'annulation partielle devant ressortir de l'expression claire et non équivoque de l'intention des Parties—étendue du réexamen par le Tribunal étant limitée aux décisions prises *ultra petita,* et n'incluant pas les violations putatives de droits procéduraux—irrégularité procédurale ne pouvant à elle seule invalider une décision ; irrégularité devant également avoir causé une injustice significative.

Critères applicables au réexamen de l'interprétation et de la mise en œuvre du mandat d'une Commission de délimitation des frontières—erreur fondamentale d'interprétation de la compétence d'une Commission de délimitation des frontières constituant un « excès de mandat »—critère du caractère raisonnable applicable à la fois à l'interprétation et à la mise en œuvre par la Commission de délimitation des frontières de son mandat—instance de réexamen devant déférer l'interprétation d'un instrument régissant la compétence à l'organe décisionnel désigné par cet instrument (*Kompetenz-Kompetenz*), pour autant que cette interprétation est raisonnable—examen d'« erreurs substantielles » ne relevant pas de la compétence du Tribunal—absence de motivation ou motifs manifestement contradictoires ou futiles équivalant à un « excès de mandat ».

Commission de délimitation des frontières n'ayant pas excédé son mandat en ce qui concerne la délimitation des frontières septentrionale et méridionale de la région de l'Abyei—caractère raisonnable de l'adoption d'une approche essentiellement tribale (et non territoriale)—absence de motifs suffisants au soutien de la définition de territoire sous droits partagés et de la détermination des frontières occidentale et orientale de la région de l'Abyei adoptées par la Commission de délimitation des frontières—délimitation par le Tribunal des frontières occidentale et orientale de la région de l'Abyei en ayant recours à des lignes longitudinales—transfert de souveraineté dans le contexte de la délimitation des frontières n'ayant pas mis fin aux droits traditionnels d'usage des terres (ou des ressources maritimes).

* * * * *

# 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

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## FINAL AWARD

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**The Arbitral Tribunal:**

Professor Pierre-Marie Dupuy (Presiding Arbitrator)
H.E. Judge Awn Al-Khasawneh
Professor Dr. Gerhard Hafner
Professor W. Michael Reisman
Judge Stephen M. Schwebel

**Registry**:

Permanent Court of Arbitration

The Peace Palace, The Hague
July 22, 2009

## Agents, Counsel and Other Representatives of the Parties

*Government of Sudan*

— Ambassador Dirdeiry Mohamed Ahmed, Dirdeiry & Co., Khartoum, Sudan, as Agent

— Dr. Faisal Abdel Rahman Ali Taha, Permanent Boundaries Committee, Abu Dhabi, United Arab Emirates, as Co-Agent

— Dr. Abdelrahman Ibrahim Elkhalifa, Khartoum, Sudan, as Co-Agent

— Professor James Crawford, Q.C., SC, F.B.A., Whewell Professor of International Law, University of Cambridge, member of the Institut de droit international, as Counsel and Advocate

— Dr. Nabil Elaraby, former Judge of the International Court of Justice, Director of the Cairo Regional Centre for International Commercial Arbitration, as Counsel and Advocate

— Professor Alain Pellet, University of Paris Ouest, Nanterre-La Défense, member and former Chairman of the International Law Commission, associate member of the Institut de Droit International, as Counsel and Advocate

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— Mr. Paul Baker, Trainee Solicitor, Eversheds LLP, Paris, as Legal Advisor

— Mr. Charles Alexander, Research Assistant, Lauterpacht Centre for International Law, University of Cambridge, as Legal Advisor

— Mr. Alastair Macdonald, former Director of Surveys and Production, former acting Director General at the Ordnance Survey of Great Britain, former Member of Council of the Royal Geographical Society and former President of Commission IV of the International Society of Photogrammetry and Remote Sensing, as Expert

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— Ms. Eleanor Scudder, Research Associate, International Boundaries Research Unit, Durham University, UK, as Technical Advisor

— Mr. Abdel-Rasul El-Nour, Former Governor of Kordofan

— Professor Yousif Fadl Hasan, Professor of Arab and Islamic History, Former Vice Chancellor, University of Khartoum

— Dr. Hasan Abdin, Associate Professor of African History, University of Khartoum, Former Under-Secretary, Ministry of Foreign Affairs

— Dr. Mohamed Osman El-Sammani, Associate Professor of Geography and Environmental Studies, University of Khartoum

— Dr. Suliman El-Debailo, Associate Professor, Gerzira University

— Mr. Mohamed Nimir Babu Nimir, Advocate and Commissioner, Sudan Bar

— Mr. El-Amin Mohamed Bannaga, Surveyor

*Sudan People's Liberation Movement/Army*

— Dr. Riek Machar Teny, Vice President, Government of Southern Sudan and Deputy Chairman, Sudan People's Liberation Movement, Juba, Sudan, as Agent

— Dr. Luka Biong Deng, Minister of Presidential Affairs, Government of Southern Sudan, Juba, Sudan, as Agent

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— Ms. Wendy Miles, Wilmer Cutler Pickering Hale and Dorr LLP, London, United Kingdom, as Counsel

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— Ms. Courtney Nicolaisen, Public International Law & Policy Group, Arlington, Virginia, USA, as Assistant Counsel
— Mr. Anand Shah, Public International Law & Policy Group, Arlington, Virginia, USA, as Assistant Counsel
— Professor Martin Daly, Maine, USA
— Dr. Peter Poole, Quebec, Canada
— Professor John Anthony Allan, Professor of Geography at King's College, London, United Kingdom
— Mr. Richard Schofield, Senior Lecturer in Boundary Studies, Department of Geography, King's College, London, United Kingdom and Director of Menas Borders Limited
— Mr. Scott Edmonds, President, International Mapping
— Mr. Alex Tait, Vice-President, International Mapping

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Maps*



* The maps attached to the Award as well as the Dissenting Opinion are located in the rear pocket of this volume.

## GLOSSARY OF NAMES

This Glossary contains key terms used in the Award. Some place names, geographic features, and locations have varied spellings; these are also identified below.

| | |
|---|---|
| **1898 Gleichen Handbook** | "Handbook of the Sudan" compiled in the Intelligence Division, War Office by Captain Count Gleichen (1898) |
| **1905 Gleichen Handbook** | "The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government" edited by Lieutenant-Colonel Gleichen (1905) |
| **ABC** | Abyei Boundaries Commission |
| **ABC Experts or Experts** | The five experts nominated by the United Kingdom, the United States of America and the IGAD to the ABC (Ambassador Donald Patterson, Dr. Kassahun Berhanu, Prof Shadrack B.O. Gutto, Dr. Douglas H. Johnson, Prof. Godfrey Muriuki) |
| **ABC Experts' Report or Report** | Report presented by the ABC Experts to the Sudanese Presidency on July 14, 2005 |
| **Abyei Appendix or Abyei Annex** | Appendix to the Abyei Protocol relating to the Parties' "Understanding on Abyei Boundaries Commission" |
| **Abyei Area or Formula** | The area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 |
| **Abyei Protocol** | Protocol on "The Resolution of Abyei Conflict" signed by the Parties on May 26, 2004 |
| **Abyei Referendum** | A referendum to be held among the residents of Abyei (simultaneously with the referendum of Southern Sudan) allowing them to vote on whether Abyei shall retain its special administrative status in the north or become part of Bahr el Ghazal |

| | |
|---|---|
| **Abyei Road Map** | "Road Map for the Return of IDPs and Implementation of Abyei Protocol" signed by the Parties on June 8, 2008 |
| **Abyei Town** | Town of Abyei located north of the Bahr el Arab river |
| **Anglo-Egyptian Condominium (or Condominium)** | Joint British and Egyptian Government of Sudan (1899-1956) |
| **Arbitration Agreement** | Arbitration Agreement between the GoS and the SPLM/A on delimiting the Abyei Area signed on July 7, 2008 |
| **Babanusa** | Sandy area in southern Kordofan, north of Muglad |
| **Baggara** | Arab nomadic tribes of Western Sudan (Southern Kordofan and Darfur) and Eastern Chad |
| **Bahr el Arab** | Also referred to as Kir in Dinka, Bahr ed Deynka, Bahr el Homr, Bahr el Jange, Chonyan or Gurf; river that runs from Southern Darfur through Southern Kordofan, and flows into the Bahr el-Ghazal river in the Upper Nile Province |
| **Bahr el Ghazal** | Also known as Bahr el Gazal or Nam; river that runs through the Upper Nile Province; Province of Sudan bordering the southwest corner of Kordofan |
| **Bahr el Ghazal Annual Reports** | Any of the "Reports on the Finances, Administration, and Condition of the Sudan, Annual Report Bahr El Ghazal Province," including those published from 1902 to 1905 |
| **Bahr el Homr** | A reference to either the Bahr el Arab or the Ragaba ez Zarga in the early 20th century |
| **Bayldon, Sub-Lieutenant R.N.** | Military officer who explored a portion of the Bahr el Arab in early 1905 |
| **Boulnois, W.A.** | Governor of Bahr el Ghazal Province (1904-1905) |

| | |
|---|---|
| **CivSec or Civsec** | A reference to the Sudan Civil Secretary's files in Khartoum during the period of the Anglo-Egyptian Condominium |
| **Community Mapping Project** | Community mapping project conducted in a portion of the Abyei region with the involvement of a professional community mapping expert, Dr. Peter Toole, and members of the Ngok Dinka community |
| **CPA** | Comprehensive Peace Agreement signed by the Parties on January 9, 2005 |
| **Cunnison, Professor Ian** | Professor of social anthropology who lived with and wrote about the Baggara Humr in the 1950s |
| **Dar** | Arabic word for homeland or tribal region |
| **Darfur** | Province of Sudan bordering the west of Kordofan |
| **Dinka** | Also known as Jange; a collection of tribes of Nilotic origin including, *inter alia*, the Ngok, the Rueng and the Twic |
| **Dupuis, Inspector C.J.** | District Commissioner of West Kordofan in 1921 |
| **GoS** | Government of Sudan |
| **Goz** | Sandy area of transit south of Muglad |
| **Henderson, K.K.D. (1903-1988)** | Governor of Darfur Province from 1949-1953 |
| **Howell, P.P.** | Anthropologist and District Commissioner at Nahud (Kordofan) in 1948 |
| **Humr** | Also known as Homr; cattle-owning nomadic Arab tribe of southern Kordofan, subgroup of the Messiriya |
| **Humr omodiya** | Administrative term referring to a sub-group of Humr under a tribal headman (*omda*) |

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| **Inter-Governmental Authority on Development or IGAD** | Regional African organization comprised by the seven countries in the Horn of Africa (Djibouti, Ethiopia, Kenya, Somalia, Sudan, Uganda, and Eritrea) |
| **Interim National Constitution** | Interim National Constitution of the Republic of Sudan adopted on July 6, 2005 |
| **Khartoum** | Capital of Sudan, located in the north of Sudan |
| **Kordofan** | Also referred to as Kurdufan; Western Province of Sudan bordering Darfur in the west, Bahr el Ghazal in the southwest and Upper Nile in the southeast |
| **Kordofan Annual Reports** | Any of the "Reports on the Finances, Administration, and Condition of the Sudan, Annual Report Kordofan Province," including those published from 1902 to 1905 |
| **Lloyd, Captain H.D.W. (1872-1915)** | Governor of Kordofan Province (1908) |
| **Mahdiyya** | Time of Mahdist rule of the Sudan (1885-1898) |
| **Mahon, B.T. (1862-1930)** | Governor of Kordofan Province (1901-1906) |
| **March 1905 SIR** | The Sudan Intelligence Report, No. 128 (March 1905) |
| **Mardon, H.W.** | Author and cartographer who wrote "A Geography of Egypt and the Anglo-Egyptian Sudan"(1906) |
| **MENAS Expert Report** | "The Boundaries and Hydrology of the Abyei Area, Sudan" by Menas Borders Ltd. (February 2009; expert report commissioned by the SPLM/A for this arbitration) |
| **Misseriya** | Also known as Messeria or Messiria; nomadic tribe of Baggara Arabs |

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|---|---|
| **Muglad** | Home and cultivation area of the Humr, south of the Babanusa and north of the goz |
| **Nine Ngok Dinka Chiefdoms** | Abyior, Achaak, Achueng, Alei, Anyiel, Bongo, Diil, Manyuar, Mareng |
| **Nuers** | A nilotic tribe |
| **O'Connell, J.R.** | Governor of Kordofan in 1906 |
| **Parties** | GoS and the SPLMA, collectively |
| **PCA** | Permanent Court of Arbitration |
| **PCA Financial Assistance Fund** | A fund established by PCA Member States that helps developing countries meet part of the costs involved in international arbitration or other means of dispute settlement offered by the PCA |
| **Percival, Captain C.** | British officer who traveled to the Abyei region in 1904 and 1905 |
| **Ragaba** | Also spelled regaba or regeba; seasonal watercourse |
| **Ragaba ez Zarga** | Also known as Ragaba ez-Zarga, Ngol, Ragaba Zarga; also referred to, in the early 20th century, as Bahr el Arab due to geographic confusion; watercourse located north of the Bahr el Arab and the Ragaba Umm Biero |
| **Ragaba Umm Biero** | Also known as Nyamora, Yamoi, Umm Rebeiro, Umm Bieiro, Umbieiro, Umm Bioro; watercourse located north of, and flowing into, the Bahr el Arab |
| **Rizeigat** | Also referred to as Rezeigat; Baggara tribe located mostly in the Province of Darfur |
| **Robertson, J.W. (1899-1983)** | District Commissioner of Western Kordofan (1933-1936); Civil Secretary (1945-1953) |

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| **Rules of Procedure** | Rules of procedure prepared by the ABC Experts pursuant to Section 4 of the Abyei Appendix and agreed to by the Parties on April 11, 2005 |
| **Sheikh Rihan Gorkwei** | Also known as Sultan Rihan; chief of the Twic Dinka in 1905 |
| **SPLM/A** | Sudan People's Liberation Movement/Army |
| **Sultan Rob** | Paramount Chief Arop Biong; chief of the Ngok Dinka of southwest Kordofan in 1905 |
| **Terms of Reference** | Terms of reference adopted by the Parties on March 12, 2005 |
| **Territorial Interpretation** | The GoS interpretation of the Formula (see paras. 232 *et seq.*) |
| **Tibbs, Michael** | Assistant District Commissioner of the Western Kordofan District (1952-1953); District Commissioner of the Dar Messeria District (1953-1954) |
| **Tribal Interpretation** | The SPLM/A interpretation of the Formula (see paras. 232 *et seq.*) |
| **Turkiyya** | Period of Turkish-Egyptian rule of Sudan (1821-1881) |
| **Upper Nile** | Province of Sudan bordering Kordofan in the east and the southeast |
| **Wilkinson, Major E.B.(1864-1946)** | Governor of Gezira Province (1903); Governor of Kassala Province (1903-1908); Governor of Berber Province (1908-1910) |
| **Wingate, Sir. R. (1861-1953)** | Governor-General of Sudan (1899-1916) |
| **Wingate's 1904 Memorandum** | Report entitled "Reports on the Finances, Administration, and Condition of the Sudan, Memorandum by Major General Sir R. Wingate" published in 1904 |
| **Wingate's 1905 Memorandum** | Report entitled "Reports on the Finances, Administration, and Condition of the Sudan, Memorandum by Major General Sir R. Wingate" published in 1905 |

# Chapter I. Procedural history

## A. The Arbitration Agreement

1. On July 7, 2008, the Government of Sudan ("GoS") and the Sudan People's Liberation Movement/Army ("SPLM/A," and together with the GoS, the "Parties") signed the "Arbitration Agreement between The Government of Sudan and The Sudan People's Liberation Movement/Army on Delimiting Abyei Area" ("Arbitration Agreement").

2. As stated in the Arbitration Agreement, a dispute has arisen between the Parties regarding whether or not the experts ("ABC Experts" or "Experts") of the Abyei Boundaries Commission ("ABC"), established pursuant to the Comprehensive Peace Agreement signed by the Parties on January 9, 2005 ("CPA"), exceeded their mandate as per the provisions of the CPA, the Protocol signed by the Parties on May 26, 2004 on the Resolution of Abyei Conflict ("Abyei Protocol"), the appendix to the Abyei Protocol ("Abyei Appendix" or "Abyei Annex")[1], and the ABC's terms of reference ("Terms of Reference") and rules of procedure ("Rules of Procedure").

3. 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 Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State ("PCA Rules"), subject to such modifications as the Parties agreed in the Arbitration Agreement or may agree in writing. Under Article 1.2, the Parties agreed to form an arbitration tribunal ("Tribunal") to arbitrate their dispute.

4. In accordance with Article 12.1 of the Arbitration Agreement, on July 11, 2008, the Parties deposited the Arbitration Agreement with the Secretary-General of the Permanent Court of Arbitration ("PCA").

5. Under Article 1.3 of the Arbitration Agreement, the Parties agreed that the International Bureau of the PCA is to act as registry and provide administrative support in accordance with the Arbitration Agreement and the PCA Rules. Pursuant to Article 1.4, the Parties designated the Secretary-General of the PCA as the appointing authority for the proceedings.

6. Under Article 2 of the Arbitration Agreement, the issues to be determined by the Tribunal are 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 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.

[1] The Parties use the terms interchangeably to refer to the same instrument.

(*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.

## B. Constitution of the Arbitral Tribunal

7. Under Article 5 of the Arbitration Agreement, the Parties agreed that the Tribunal shall be composed of five arbitrators, that each Party shall appoint two arbitrators, and that the four Party-appointed arbitrators shall appoint the fifth arbitrator. The Parties agreed not to designate persons other than current or former members of the PCA or members of tribunals for which the PCA acted as registry. Party-appointed arbitrators were to be independent, impartial, highly qualified, and experienced in similar disputes.

8. On July 16, 2008, in accordance with Article 5.3 of the Arbitration Agreement, the Secretary-General of the PCA provided the Parties with a full list of current or former members of the PCA or members of tribunals for which the PCA acted as registry ("PCA Arbitrators List").

9. On August 14, 2008, in accordance with Articles 5.2 and 5.4 of the Arbitration Agreement, the GoS appointed as arbitrators His Excellency Judge Awn Al-Khasawneh and Professor Dr. Gerhard Hafner.

10. On August 15, 2008, in accordance with Articles 5.2 and 5.4 of the Arbitration Agreement, the SPLM/A appointed as arbitrators Professor W. Michael Reisman and Judge Stephen M. Schwebel.

11. Before August 22, 2008, in accordance with Article 5.6 of the Arbitration Agreement, each of the four Party-appointed arbitrators signed declarations of independence, impartiality, and commitment, and such declarations were immediately communicated by the PCA to the Parties.

12. On September 6, 2008, in accordance with Article 5.7 of the Arbitration Agreement, the four Party-appointed arbitrators met in The Hague, The Netherlands, to consider candidates for the fifth arbitrator. Article 5.8 of the Arbitration Agreement provides that the fifth arbitrator might be selected from or outside the PCA Arbitrators List, and shall be a "renowned lawyer of high professional qualifications, personal integrity, and moral reputation" with experience in similar disputes.

13. On September 24, 2008, in accordance with Article 5.9 of the Arbitration Agreement, the four Party-appointed arbitrators communicated to the Parties, through the Secretary-General of the PCA, an identical list of five

candidates for the fifth arbitrator, attaching full curricula vitae of the candidates.

14. On October 12, 2008, in accordance with Article 5.10 of the Arbitration Agreement, the Parties returned the candidates list after having deleted the name or names to which they objected and numbered the remaining candidates in order of preference. All the candidates on the list were objected to by either Party or by both Parties. Article 5.12 was then triggered, requiring the Secretary-General of the PCA to appoint, in consultation with the four arbitrators, within fifteen days of receiving the objections, the fifth arbitrator from outside the candidates' list, having due regard to Article 5.8 of the Arbitration Agreement.

15. The Secretary-General of the PCA consulted with the four Party-appointed arbitrators in accordance with Articles 5.8 and 5.12 of the Arbitration Agreement and, on October 27, 2008, the Secretary-General appointed Professor Pierre-Marie Dupuy as the fifth and presiding arbitrator ("Presiding Arbitrator").

16. On October 30, 2008, in accordance with Article 5.13 of the Arbitration Agreement, the Presiding Arbitrator signed a declaration of independence, impartiality, and commitment which was then immediately communicated by the PCA to the Parties.

## C. Commencement and timing of arbitration proceedings

17. Pursuant to Article 4.1 of the Arbitration Agreement, the arbitration process was deemed to have commenced on June 8, 2008.

18. Article 4.2 of the Arbitration Agreement provides that the arbitration proceedings "shall commence on the date of the formation of the Tribunal which shall start its work as soon as it is constituted". For purposes of Article 4.2, the date of the formation of the Tribunal was October 30, 2008, the date on which the declaration of the fifth and presiding arbitrator was signed and communicated to the Parties.

19. According to Article 4.3 of the Arbitration Agreement, the Tribunal "shall endeavor to complete the arbitration proceedings including the issuance of the final award within a period of six months from the date of the commencement of arbitration proceedings subject to three months extension". Article 9.1 refers specifically to the award, stating: "Subject to Article 8(7) . . . the final award shall be rendered by the Tribunal within a maximum of ninety days from the closure of submissions".

20. Article 8.7 of the Arbitration Agreement provides that, notwithstanding Article 4.3, the Tribunal shall be empowered to extend for good cause the periods established for the arbitration proceedings on its own motion or at the request of either Party. The total cumulative extension of the periods

granted by the Tribunal at the request of either Party could not exceed thirty days for each Party.

## D. Preliminary procedural meeting

21. On November 24, 2008, the Tribunal held a preliminary procedural meeting with the Parties at the Peace Palace in The Hague.

22. Present at the Preliminary Procedural Meeting were:

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|---|---|
| Tribunal: | Professor Pierre-Marie Dupuy<br>Judge Awn Al-Khasawneh<br>Professor Dr. Gerhard Hafner<br>Judge Stephen M. Schwebel<br>Professor W. Michael Reisman |
| For the GoS: | Professor James Crawford SC |
| For the SPLM: | Mr. Gary Born<br>Ms. Wendy Miles<br>Professor Paul R. Williams<br>Ms. Vanessa Jiménez<br>Dr. Luka Biong Deng<br>Hon. Deng Arop Kuol<br>Mr. Kuol Dueim Kuol<br>Mr. Mathew Otoromoi Martinson |
| Registry: | Ms. Judith Levine<br>Mr. Aloysius Llamzon |

23. The Parties and Members of the Tribunal signed the Terms of Appointment at the Procedural Meeting.

24. Pursuant to the Terms of Appointment, the Parties confirmed, among other things, that the members of the Tribunal had been validly appointed in accordance with the Arbitration Agreement and the PCA Rules, and that the Parties had no objection to the appointment of each member of the Tribunal on the grounds of conflict of interest or lack of independence or impartiality.

25. The Parties further confirmed that the PCA would serve as Registry and that the Tribunal may appoint a member of the PCA International Bureau to act as Registrar for the proceedings, and for this purpose the Tribunal appointed Ms. Judith Levine, PCA Legal Counsel, as Registrar. From March 13, 2009, Mr. Aloysius Llamzon, PCA Legal Counsel, was designated as Acting Registrar.

26. At the Preliminary Procedural Meeting, the Tribunal (in consultation with the Parties) set a schedule for the written and oral phases of the proceedings consistent with the timelines set by Article 8 of the Arbitration Agreement. At the request of the GoS, an extension of 14 days for the submission of Counter-Memorials was granted pursuant to Article 8.7 of the Arbitration Agreement.

27. In accordance with Article 8.6 of the Arbitration Agreement, shortly after the Preliminary Procedural Meeting, copies of the Terms of Appointment, Transcript of Proceedings, and the schedule for the written and oral phases of the proceedings were published on the PCA's website (www.pca-cpa.org).

## E. Deposits and the PCA Financial Assistance Fund

28. Article 11 of the Arbitration Agreement provides:

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

29. On July 11, 2008, the Presidency of the Republic of Sudan submitted a request to the PCA Secretary-General for financial assistance from the PCA Financial Assistance Fund.

30. A preliminary deposit of EUR 40,000 was requested from the Parties on August 28, 2008 for purposes of covering the expenses associated with the meeting in The Hague pursuant to Article 5.7 of the Arbitration Agreement. The Presidency of the Republic of Sudan duly paid this amount on September 6, 2008.

31. On November 24, 2008, in accordance with Article 41 of the PCA Rules and pursuant to paragraph 7.1 of the Terms of Appointment, the Tribunal requested that the Presidency of the Republic of Sudan establish an initial deposit of EUR 1,000,000.00 (equivalent to EUR 500,000 for each Party) as an advance on costs of the arbitration.

32. Shortly thereafter, on December 4, 2008, the PCA transmitted the request for financial assistance from the Presidency of the Republic of Sudan to the Board of Trustees of the PCA Financial Assistance Fund. On December 18, 2008, the Board of Trustees approved an allocation of EUR 400,000 to be made from the PCA Financial Assistance Fund towards the deposit in this case. The remaining portion of the initial deposit, EUR 600,000, was received by the PCA from the Presidency of the Republic of Sudan on January 15, 2009.

33. In accordance with Article 41(2) of the PCA Rules and Paragraph 7.3 of the Terms of Appointment, the Tribunal requested a supplementary deposit of EUR 750,000 on March 10, 2009. By letter dated April 13, 2009 addressed

to the PCA, the GoS confirmed that the requested supplementary deposit had been transferred to the PCA to meet the expenses of the Tribunal. The PCA acknowledged receipt of EUR 750,000 on April 17, 2009.

34. On May 8, 2009, the Tribunal, in further reliance on Article 41(2) of the PCA Rules and Paragraph 7.3 of the Terms of Appointment, and in view of the work already completed and currently anticipated in relation to the proceedings, requested a supplementary deposit of EUR 500,000. By letter dated June 3, 2009 addressed to the PCA, the GoS confirmed that the requested supplementary deposit was transferred by wire on that date. The PCA acknowledged receipt of EUR 500,000 on June 9, 2009.

35. As of the date of this Award, Norway, The Netherlands, and France have made Financial Assistance Fund contributions towards the financing of part of the costs of these proceedings.

## F. Written pleadings phase of the proceedings

36. In accordance with Article 8.3(i) of the Arbitration Agreement and the schedule set by the Tribunal, the Parties filed written Memorials on December 18, 2008, accompanied by witness statements, expert reports, maps, documentary evidence and legal authorities.

37. The GoS made the following formal submissions in its Memorial:

For the reasons set out in this Memorial, the Government of Sudan respectfully requests the Tribunal to adjudge and declare:

> (*a*) pursuant to Article 2(a) of the Arbitration Agreement, that the ABC Experts exceeded their mandate as stated in the Abyei Protocol, and reiterated in the Abyei Appendix and the ABC Terms of Reference and Rules of Procedure;
>
> (*b*) pursuant to Article 2(c) of the Arbitration Agreement, that the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 are as shown on Figure 17 (page 159), being the area bounded on the north by the Bahr el-Arab and otherwise by the boundaries of Kordofan as at independence.

38. The map referenced in paragraph (b) of GoS Submission is:*

39. The SPLM/A made the following formal submissions in its Memorial:

For the reasons set forth in this Memorial, the SPLM/A respectfully requests that the Arbitral Tribunal make an Award granting the following relief:

> (*a*) A declaration that the ABC Experts did not, on the basis of the agreement of the Parties as per the CPA, exceed their mandate which is "to define (*i.e.*, delimit) and demarcate the area of the nine

* Secretariat note: the map contained in Figure 17 is located in the rear pocket of this volume.

Ngok Dinka chiefdoms transferred to Kordofan in 1905" as stated in the Abyei Protocol, and reiterated in the Abyei Annex and the ABC Terms of Reference and Rules of Procedure;".

(*b*) On the basis of relief in the terms of sub-paragraph (a) above, a declaration that the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 are as defined and delimited by the ABC Experts in the ABC Report, and that definition and delimitation, and the ABC Report shall be fully and immediately implemented by the Parties;

(*c*) In the alternative, if the Tribunal determines that the ABC Experts exceeded their mandate and makes a declaration to that effect, a declaration that the boundaries of the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905 are the current boundary of Kordofan and Bahr el-Ghazal to the south extending to 10°35'N latitude to the north and the current boundary of Kordofan and Darfur to the west extending to 32°15'E longitude to the east;

(*d*) A declaration that the Tribunal's Award is final and binding on the Parties;

(*e*) Costs, including the direct costs of the arbitration, as well as fees and other expenses incurred in participating in the arbitration, including but not limited to, the fees and/or expenses incurred in relation to the Tribunal, solicitors and counsel, and any ABC Experts, consultants and witnesses, internal legal costs, the costs of translations, archival research and travel; and

(*f*) Such additional or other relief as may be just.

40. In accordance with Article 8.3(ii) of the Arbitration Agreement and the schedule set by the Tribunal, the Parties filed their respective Counter-Memorials on February 13, 2009, accompanied by witness statements, expert reports, maps, documentary evidence and legal authorities.

41. In its Counter-Memorial, the GoS, for the reasons set out in its Counter-Memorial, "and rejecting the arguments contained in the Memorial of the SPLM/A [ . . . ] reaffirm[ed] the Submissions appearing in its Memorial." Similarly, the SPLM/A reaffirmed the formal submissions and request for relief made in its Memorial.[2]

42. In accordance with Article 8.3(iii) of the Arbitration Agreement and the schedule set by the Tribunal, the Parties filed their respective Rejoinders on February 28, 2009.

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[2] Notably, the SPLM/A modified submission (c) of its Memorial. In both its Counter-Memorial and Rejoinder, SPLM/A's submission (c) reads: "In the alternative, if the Tribunal determines that the ABC Experts exceeded their mandate and makes a declaration to that effect, a declaration that the boundaries of the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905 are the current boundary of Kordofan and Bahr el-Ghazal to the south extending to 10°35'N latitude to the north and the current boundary of Kordofan and Darfur to the west extending to 29°32"15' E longitude to the east."

43. The GoS, for the reasons set out in its Rejoinder, "and rejecting the arguments contained in the Memorial and Counter-Memorial of the SPLM/A [ . . . ] reaffirm[ed] its previous Submissions." On its part, the SPLM/A similarly reaffirmed the formal submissions and request for relief made by it in its Memorial.[3]

44. In accordance with Article 8.6 of the Arbitration Agreement, copies of the Parties' pleadings were published on the PCA's website (www.pca-cpa.org).

45. Summaries of the Parties' written pleadings are found *infra* in Chapter III.

## G. Tribunal's request for certain documents; access to the archives of Sudan

46. On March 17, 2009, the following communication from the Tribunal was conveyed by the PCA to the Parties:

> The Tribunal notes the statements made by the Sudan People's Liberation Movement/Army ("SPLM/A") in its Rejoinder of February 28, 2009 ("Rejoinder") that the Government of Sudan ("Government") has had full access to archives containing the sketch maps and cartographic records prepared by or for Messrs. Wilkinson, Percival, Hallam, and Whittingham, while the SPLM/A has not, in its view, been fully provided with or given access to these documents. (*See, for example,* paragraphs 432(g), 458, 460, 485, 564, 569, 571–72, and 574–76 of the Rejoinder.)
>
> The Tribunal appreciates that the Government has disclosed portions of the aforementioned maps in its written pleadings. The Tribunal also acknowledges that the Parties were entitled to submit extracts of documents in the exhibits to their written pleadings (*see* Transcript of the Nov. 24, 2008 Procedural Hearing, pp. 34–35).
>
> However, in light of the potential importance of these contemporaneous documents, and recalling the need for a final and peaceful settlement of this dispute and the principle of equality that the Tribunal has a duty to accord to the Parties (as reflected in Article 15(1) of the PCA Rules):
>
> > 1. The Tribunal requests, pursuant to Article 24(*3*) of the PCA Rules, that the Government of Sudan provide the Tribunal and the SPLM/A, by *March 30, 2009*, with copies of the full sketch maps/records prepared by or for Messrs. Wilkinson, Percival, Whittingham, and Hallam that are within the Government's possession or control, including specifically the full sketch maps and cartographic records relating to the following maps found in Volume III of the Government's Counter-Memorial:
> >
> > a. Map 13b (Wilkinson's Sketch Map);
> >
> > b. Map 14a (Percival 1904 Route Map – Lake Leilak to Wau);

[3] *See* note 2 above.

c. Map 14b (Percival's Sketch Map – River Kir to Wau);

d. Map 16b (Hallam's Sketch Map); and

e. Map 18b (Wittingham's Sketch Map).

2. The Tribunal is prepared to hear from both Parties as to the necessity of granting the SPLM/A full access to relevant archival documents within the Government's control (including access to the Sudan Survey Department), through the following process:

a. The SPLM/A may, by *March 27, 2009,* send a written request ("Request") to the Government, with a copy to the Tribunal, containing a reasonably specific description of documents, maps and/or cartographic records sought.

b. The Government may either: (*i*) facilitate full and timely access to the archival documents sought in the Request, or (ii) file before the Tribunal, with a copy to the SPLM/A, by *April 6, 2009*, a written objection to the Request ("Objection"), containing its specific grounds for objection.

c. The Tribunal will then consider the Request and Objection, and may issue the appropriate order.

47. By letter to the PCA on the same date, the SPLM/A stated that it had previously made requests for access to both the Sudan Survey Department ("Survey Department") and the Sudan National Records Office ("NRO") and was granted access to the NRO on March 2, 2009. The SPLM/A reiterated its request for "full and unhindered access to the SPLM/A and [its] counsel to the relevant archival documents at the Survey Department, including those specified in the [correspondence enclosed with this letter] to the Survey Department and the NRO."

48. On March 19, 2009, Mr. Bakri Hasan Salih, the Minister of the Presidency of the Republic of Sudan, by letter addressed to the PCA, explained that the Presidency and the Government of National Unity of the Republic of Sudan are composed of both the National Congress Party and the SPLM/A as main partner-parties, and both are responsible for all Government Departments in the Sudan, including the NRO and the Survey Department. He further explained that "the archives in Sudan, be they in the NRO, the Survey Department or any other Department, are open to the public. There is no requirement of obtaining prior access to any of them." He rejected the allegation that the SPLM/A was denied access to the NRO and the Survey Department and maintained that the SPLM/A's counsel were welcome to visit the NRO, the Survey Department and any other archive unit in the country.

49. By letter dated March 19, 2009 addressed to the PCA, the SPLM/A explained that, although the NRO itself may be open to the public (subject to first obtaining necessary permits and passes), access to the documents within those archives is not straightforward. The SPLM/A remained deeply concerned that its representatives would not be granted full or proper access to the materi-

als it required. It also requested "written confirmation from the [GoS] that [it] will make the necessary arrangements to ensure the security of [the SPLM/A's] legal team [during] their visit to Khartoum." The SPLM/A further requested the GoS to provide complete copies of: (1) the 1903 Wilkinson sketch map; (2) the 1904 Percival sketch map segment from the Bahr el Arab/Kir to Keilak; (3) the 1905 Percival sketch map segment from "Golo" to Taufikia; (4) the 1910 Whittingham sketch maps and route notes; and (5) the 1907 Hallam sketch map and route notes.

50. In reply to the Tribunal's communication dated March 17, 2009, the GoS, by letter dated March 19, 2009, stated that "the [GoS] has always sought to cooperate with the SPLM/A fully in the conduct of this arbitration. This is evidenced by the fact that it provided a number of documents promptly in spite of the additional burden this represented at the time of finalization of the Rejoinder. If some documents and maps were not supplied following the SPLM/A's requests, this was simply because they had not been found." The GoS noted that when the SPLM/A formally applied for access to the Survey Department and the NRO by two letters dated February 19, 2009, it was already after the February 13, 2009 exchange of Counter-Memorials and nine days before the filing of the Rejoinders. According to the GoS, "it was no longer appropriate at [that] point for any of the Parties to file any new documents without the specific leave of [this] Tribunal." The GoS also alleged that representatives of the SPLM/A were expected to visit the NRO on February 28, 2009 but failed to appear, and that "it is significant that the date coincides with the filing date of the Rejoinder, in which the SPLM/A complained of not having had access to the Sudan Archives, while it had only sought access on February 19, 2009 and had not thereafter followed up on its request."

51. Noting that the GoS would be providing access to the Survey Department archives, the SPLM/A stated through its letter dated March 20, 2009 that it did not consider it necessary for the Tribunal to hear the Parties any further on point two of the Tribunal's communication dated March 17, 2009, but requested the opportunity to make further submissions on the issue following its inspection of the NRO and Survey Department archives. The SPLM/A also expressed surprise that the GoS had been unable to locate complete copies of certain records and thus reiterated its request for an order from the Tribunal instructing the GoS to produce the full and complete sketch maps, cartographic records and route reports relating to the requested maps and records, or to procure that the Sudan Survey Department produce them. Further, it sought an order from the Tribunal instructing the GoS to provide complete copies of the full sketch maps, cartographic records and route reports prepared by or for Mr. Percival in relation to his 1905 trek from River Pongo to Taufilia, or to arrange for the Sudan Survey Department to produce them.

52. On March 23, 2009, the GoS accused the SPLM/A of "attempt[ing] to seek leave to embark on an unfettered fishing expedition" and noted that

"SPLM/A's own failure to exercise due diligence is no justification for a late request to seek access to such a potentially wide array of documents."

53. On March 24, 2009, the Tribunal sent the following communication to the Parties through the PCA:

> The Tribunal thanks the Parties for the following letters in response to its communication of March 17, 2009 ("Communication"):
>
> *From the Government of Sudan* (*"GoS"*)
>
> 1. Letter dated March 19, 2009 from the Minister of the Presidency of the GoS
> 2. Letter dated March 19, 2009 from the Agent of the GoS
> 3. Letter dated March 23, 2009 from the Agent of the GoS
>
> *From the Sudan People's Liberation Movement/Army* (*"SPLM/A"*)
>
> 1. Letter dated March 17, 2009
> 2. Letter dated March 19, 2009
> 3. Letter dated March 20, 2009
>
> The Tribunal expresses its appreciation at the GoS' assurances that the SPLM/A continues to enjoy full access to the Archives of Sudan (last paragraph, p. 3, letter of the Agent of the GoS dated March 19, 2009; first paragraph, p. 5, letter of the Agent of the GoS dated March 23, 2009). The Tribunal also takes note of the SPLM/A's statement that, "[a]t the present, the SPLM/A does not consider it necessary for the Tribunal to hear the Parties any further on point two of the PCA's letter dated 17 March 2009." (third paragraph, p. 1, letter of the SPLM/A dated March 20, 2009). In view of the positions expressed by the Parties, the Tribunal shall take no further action at this time in relation to Point 2 of its Communication.
>
> On Point 1 of its Communication, where the Tribunal requested that the GoS provide it and the SPLM/A with copies of the full sketch maps/records listed therein, the Tribunal notes that "the Government of Sudan will respond further by 30 March 2009." (last paragraph, p. 4, letter of the Agent of the GoS dated March 23, 2009). The Tribunal requests that the additional documents sought by the SPLM/A in the penultimate paragraph of its March 20, 2009 letter (*i.e.*, the "full sketch map(s), cartographic records and route reports prepared by or for Mr. Percival in relation to his 1905 trek from River Pongo to Taufikia.") be considered a further document to be provided by March 30, 2009 under Point 1 of the Tribunal's Communication.
>
> The Tribunal looks forward to the GoS' response to Point 1, and expects that the GoS will provide these maps/records or, if necessary, provide satisfactory reasons for the unavailability of those documents not produced. The Tribunal is thankful for the spirit of cooperation the GoS has demonstrated in this matter.

54. On March 26, 2009, the SPLM/A sent a letter to the GoS (with copies to the Tribunal and the PCA) noting that "the statements in your letters regarding the past accessibility of the NRO and Sudan Survey Department archives are inaccurate. In fact, both the SPLM/A and its expert have prior

experience in the NRO of being denied access to documents. [ . . . ] As for the Sudan Survey Department archive, as soon as the SPLM/A legal representatives became aware that there existed a separate archive of documents outside of the NRO that contained additional (and previously unseen) historic records directly relevant to the issues in dispute in this arbitration, to which the [GoS's] expert has been granted apparent unfettered access, the SPLM/A directly requested the same. The SPLM/A's requests in February 2009 were simply ignored." The SPLM/A also alleged that its legal representatives sent to the Survey Department in Khartoum have been "wholly obstructed from viewing a single relevant document" and have been "prohibited from carrying out any of their own independent research." It further alleged that these documents have been removed and deliberately withheld from them. In a letter dated March 27, 2009 addressed to the Agent for the GoS (copying the Tribunal and the PCA), the SPLM/A requested confirmation that its legal team would be granted free access to the Survey Department archive, including to those documents allegedly removed by the GoS from the archive.

55. In a letter dated March 30, 2009 addressed to the PCA, the GoS, with reference to the Tribunal's requests dated March 17, 2000 and March 24, 2009 for complete copies of certain sketch maps/records that are within the GoS's possession or control, provided certain sketch maps requested by the Tribunal, noted that full sketch maps of certain journeys had already been provided, and explained that certain other sketch maps could not be located.

56. In a letter dated April 1, 2009 addressed to the PCA, the GoS denied the allegations made by the SPLM/A that it did not enjoy free access to the archives and was not afforded full assistance and cooperation by the staff of the NRO and the Survey Department. The GoS explained that all documents requested by SPLM/A's legal team at the Survey Department archives were made available to them as soon as possible and that no documents were removed from the archives.

57. The SPLM/A, by letter dated April 3, 2009 addressed to the PCA, alleged the denial of access to a significant number of documents held by the Survey Department that fall squarely within the relevant geographic area and time period central to these proceedings. It further stated that "it is impossible to determine the extent to which other materials, also directly relevant to the issues in these proceedings, continue to be withheld." The SPLM/A then stated that it will be inviting the Tribunal to infer from the GoS's failure to make available this allegedly relevant evidence and to provide satisfactory explanation for such failure, that such evidence would be adverse to the interests of the GoS in these proceedings.

58. On April 4, 2009, through a letter from the PCA, the Presiding Arbitrator requested that the GoS respond to each point contained in the April 3, 2009 SPLM/A letter no later than 1:00PM (The Hague time), April 7, 2009.

59. On April 7, 2009, the GoS, by letter addressed to the PCA, stated that "there has been no denial of access to the SPLM/A to the archives and nothing has been withheld. Requests could and would have been handled in time had the SPLM/A acted in a timely fashion and not made unreasonable, last-minute demands on archive staff." It emphasized that "no fact has come to light in the sketches that the SPLM/A has supplied that would justify [inferring that] the [GoS] deliberately suppress[ed] such evidence." In addition, the GoS noted that as to the introduction of new documentary evidence, "[t]he proper way under the agreed procedure for the SPLM/A to produce the new sketch maps attached to their letter would have been first to seek the leave of the Tribunal to do so. The [GoS] has no objection to the introduction of these materials which in no way advance the SPLM/A's case. The [GoS] will respond as necessary to the substance of the materials filed during the oral hearings. However, the [GoS] would hope that the agreed procedure for introducing late documents will be respected."

60. In a letter dated April 8, 2009 addressed to the PCA, the SPLM/A alleged that the GoS's account of the factual occurrences between March 25 and 31, 2009 in its letter dated April 7, 2009 was inaccurate. It claimed that the GoS's conduct gave rise to certain inferences, and that "the SPLM/A will indicate in the course of its oral presentations where such inferences should be drawn."

61. On April 11, 2009, the Tribunal issued the following communication to the Parties through the PCA:

> The Tribunal thanks the Government of Sudan ("GoS") for its letter dated April 7, 2009 pursuant to the Presiding Arbitrator's request for comment (contained in the PCA's letter dated April 4, 2009), and acknowledges with thanks the letter dated April 8, 2009 from the Sudan People's Liberation Movement/Army ("SPLM/A"). Both these letters relate to allegations that the SPLM/A continues to be denied full access to the Archives of Sudan, that "it is impossible to determine the extent to which other materials, also directly relevant to the issues in these proceedings, continue to be withheld," and that the SPLM/A "will be" inviting the Tribunal to draw certain adverse inferences from the GoS' alleged conduct (pp. 2–3, SPLM/A letter dated April 3, 2009; see also p. 2, SPLM/A letter dated April 8, 2009).
>
> The Tribunal notes that the SPLM/A is not asking the Tribunal to issue a ruling now and to draw any adverse inferences on account of the GoS' alleged conduct. In effect, the SPLM/A has put the GoS on notice about the adverse inferences that the former will seek from the Tribunal over the course of their argument during the oral pleadings. Accordingly, at this juncture in the proceedings, the Tribunal will take all the arguments made thus far by the Parties under advisement and has decided to remain seized of the issue. In light of the arguments presented at the oral pleadings, the Tribunal will decide, in the fullness of these proceedings, whether any adverse inferences or other appropriate conclusions should be drawn.

62. At the oral pleadings, the GoS reiterated its commitment to ensuring that the Tribunal is given access to all the documentary records the Tribunal may require. It repeated its assertion that it did not fail in disclosing relevant documents.[4]

## H. Allegations of witness intimidation

63. The GoS, by letter dated March 30, 2009 addressed to the PCA, informed the Tribunal that a news item on March 29, 2009 in the Sudanese daily newspaper *Al-Ayam* alleged that one of the Ngok Dinka witnesses for the GoS, Mr. Majid Yak, Secretary of Local Administration of Abyei, was threatened with being "physically eliminated" by members of the SPLM/A if he were to leave for The Hague to testify at the hearings. In addition to Mr. Yak, the GoS further claimed that, upon inquiry, its other Ngok Dinka witnesses, Messrs. Zakaria Atem, Majak Matit and Ayom Matit admitted to being repeatedly harassed by SPLM/A members either to deter them from testifying at the hearings or to convince them to change their testimony.

64. The SPLM/A, by a letter of the same date addressed to the PCA, denied such allegations but nevertheless endeavoured to investigate the allegations further and to inform the Tribunal as soon as relevant information became available.

65. On April 14, 2009, the SPLM/A issued a letter to the PCA stating that it had investigated the allegations reported by the Sudanese press and found these to be without basis. To substantiate its claim, the SPLM/A attached to its letter a report from Lt. Col. Mayen Tap Mayen, the Chief Executive Officer of the National Security and Intelligence Organ of the Abyei Security Unit who investigated the incident, and a letter from Nyol Pagout Deng Ayei, Chief of the Bongo Chiefdom.

66. At the oral pleadings, a member of the Tribunal, H.E. Judge Awn Al-Khasawneh, asked four witnesses of the GoS to testify whether they were intimidated by agents of the SPLM/A. The witnesses

[4] *See* GoS Oral Pleadings, April 18, 2009, Transcr. 19/04–21/05.

Mr. Zakaria Atem Diyin Thibek Deng Kiir[5], Mr. Majid Yak Kur[6], Mr. Ayom Matit Ayom[7],

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[5] The pertinent portion of Mr. Zakaria's testimony is as follows:

Judge Al-Khasawneh: […] First, there have been allegations that you had been intimidated and threatened. Those allegations have been denied. Could you briefly tell us the truth or otherwise of those allegations?

A: When I came here I was pretty sure for the fact that anyone who is not giving testimony in favour of the [SPLM/A], that person is not a good one.

Judge Al-Khasawneh: Please translate correctly. What he said was, "I'm threatened with [my] life." This is very important. Can you ask him again to repeat. The translation has to be correct and precise

The Interpreter: Repeat the question, please.

Judge Al-Khasawneh: It's not my question. I asked a question. You did not translate the answer as fully as you should have. Could you translate it as he said: a person who does not give evidence in support of the SPLM/A is thought of as a bad person, and would be threatened in his life. That is literally the translation. So, please, be careful with the next.

The Interpreter: Okay.

Judge Al-Khasawneh: Thank you very much. . . .

(*See* GoS Oral Pleadings, April 21, 2009, Transcr. 43/04-44/05)

[6] The pertinent portion of Mr. Majid's testimony is as follows:

Judge Al-Khasawneh: […] First of all I should like to ask you, as I asked other witnesses before you, whether you have been intimidated in any way or put under pressure not to testify before us, or to modify your testimony?

A. Yes, I've been threatened.

Judge Al-Khasawneh: Would you kindly elaborate a little bit on it?

A. Well, after this change of the testimony records, two came to me in my house, namely Nyol Pagout and Deng Monyluak, and they came to me as representatives of [SPLM/A], and they came and told me, "Majid, your statement is a clear manifest of a sellout of Dinka land to Government of Sudan. We are coming here for two main purposes: one, either you change the course of your statements and testimony, or create, by a way or another, some means to disable you not to go The Hague. Otherwise you will face consequences.

Judge Al-Khasawneh: Thank you very much. . . .

(*See* GoS Oral Pleadings, April 21, 2009, Transcr. 54/13 - 55/09)

[7] The pertinent portion of Mr. Ayom's testimony is as follows:

Judge Al-Khasawneh: Mr Ayom Matit Ayom, thank you very much for agreeing to testify before us. Thank you for testifying before us. I would be grateful if you could answer only one question that I would like to put to you, and that question is: have you been intimidated with regard to your testimony or asked not to appear before us or to modify it? Thank you.

A. Actually it is not me who has been actually threatened, but my brother who is coming after me. He was told: if you go to The Hague you will do one of the two things, either change your statements or refuse to go; otherwise you will bear the consequences. And don't ask us, you will be responsible for that.

Judge Al-Khasawneh: If that's all, that's the only thing that I wanted to ask about.

(*See* GoS Oral Pleadings, April 21, 2009, Transcr. 51/04 - 51/19)

and Mr. Majak Matet Ayom[8] gave varying answers.

## I. Request for funding

67. By letter to the PCA dated April 7, 2009, the SPLM/A informed the Tribunal that the Presidency of the Republic of Sudan had allegedly not yet provided any portion of a US$1,000,000 sum previously requested as funding for the SPLM/A's costs. Further, the SPLM/A stated that, on March 24, 2009, it was informed by the Presidency of the Republic of Sudan that only US$200,000 of the requested US$1,000,000 would be allocated to it, and to date, it had not received any portion of this allocated amount. In view of the impending hearings, the SPLM/A requested that the Tribunal order, pursuant to the Arbitration Agreement, that the GoS "direct the Presidency [of the Republic of Sudan] to approve and transfer the funding required by the SPLM/A as a matter of urgency."

68. Through the PCA's letter of April 8, 2009, the Presiding Arbitrator requested that the GoS comment on the allegations contained in the SPLM/A letter dated April 7, 2009 by April 9, 2009.

69. Replying to the Presiding Arbitrator's request, the GoS, by letter addressed to the PCA on April 9, 2009, explained that the Parties had previously agreed on the procedure to be used for the allocation of funds, *i.e.*, "joint requests [had to be made by] the Parties to the Presidency [of the Republic of Sudan]". The GoS maintained that this procedure should be followed by both the SPLM/A and the GoS for any further requests for disbursements. The GoS also asserted that it had already provided a $200,000 allocation to the SPLM/A.

70. On April 11, 2009, the Tribunal issued the following communication:

> Tribunal thanks the Government of Sudan ("GoS") for its letter dated April 9, 2009 pursuant to the Presiding Arbitrator's request for comment (contained in the PCA's letter dated April 8, 2009) on the Sudan People's Liberation Movement/Army's ("SPLM") request "that the Tribunal order pursuant to the Abyei Arbitration Agreement that the Government of Sudan [ ] direct the Presidency to approve and transfer the funding required by the SPLM/A as a matter of urgency (p. 2, SPLM/A letter dated April 7, 2009)".

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[8] The pertinent portion of Mr. Majak' s testimony is as follows:

Judge Al-Khasawneh: Mr Majak Matet Ayom, I would like to thank you for agreeing to answer my questions. I would like first to ask you whether you were in any way intimidated or threatened in an attempt to cause you not to testify before us, or to change your testimony. We heard something to this effect from your brother, but I would like to hear it from you.

A. For me, I don't find myself subject to threat by any person. I only can feel threatened by God. But any person, I don't see that there is room for any person to threaten me. Please go ahead. If you have anything to ask me, ask me.

(*See* GoS Oral Pleadings, April 21, 2009, Transcr. 51/25 - 52/12)

> The Tribunal recalls the obligation of the Presidency of Sudan to fund the "cost of arbitration from the Unity Fund" on behalf of both Parties (Article 11(1), Abyei Arbitration Agreement) and is conscious of its own obligation to ensure that the parties are treated with equality and that, at any stage of the proceedings, each party must be given a full opportunity to present its case (Art. 15, PCA Rules). To realize this, and to ensure the integrity of this arbitral process, the Tribunal believes that adequate funding on the part of both Parties is critical. Considering the complexity of this case, its compressed schedule and lengthy submissions, and the critical stage that these proceedings are currently in (among other factors), the Tribunal believes that the amount of US$1,000,000 requested by the SPLM/A is reasonable and should immediately be released. The Tribunal therefore expects that the GoS will facilitate and ensure the immediate release by the Presidency of the Republic of Sudan of the US$1,000,000 in funding sought by the SPLM/A on or before April 14, 2009, and to confirm to the Tribunal no later than April 13, 2009 that the process of transmitting the funds has begun.

71. By letter dated April 13, 2009 addressed to the PCA, the GoS confirmed that the requested US$800,000 had been transferred to the account of SPLM/A while reiterating that US$200,000 had previously been transferred.

72. On April 14, 2009, the SPLM/A wrote to the GoS, claiming that it had not received any part of the US$1,000,000 allocated to them, and that such funds were needed "as a matter of urgency".

73. On April 15, 2009, the GoS wrote to the SPLM/A, attaching the bank transfer note for US$800,000 dated April 13, 2009. The GoS explained that the US$200,000 was also previously transferred, and the bank transfer note "is being currently traced".

## J. Appointment of experts

74. By letter dated March 10, 2009, the PCA informed the Parties that:

> Mindful of the stringent time limitations established by Article 4.3 and Article 9.1 of the Arbitration Agreement, the Tribunal has requested, without prejudice of any kind, that the PCA make enquiries as to the availability of possible cartographers and geographers in the event that their assistance might be required for preparation of the Award. Arranging beforehand for the possibility of such assistance (which is envisaged under Article 27 of the PCA Rules) would enable the Tribunal to operate within the prescribed time limits, were it to make a determination under Article 2(c) of the Arbitration Agreement. Such an outcome can in no way be predicted at this stage of proceedings, but such enquiries are being made only out of prudent caution in light of the time restrictions imposed by the Parties' Arbitration Agreement.

75. On April 2, 2009, the PCA sent the following communication to both Parties:

> As indicated in [ . . . ] the PCA's letter dated March 10, 2009, the PCA has, at the Tribunal's request, made enquiries as to the availability of experts in

the event and to the extent that their assistance might be required for the preparation of the Award (which can in no way be predicted at this stage). Having reviewed a number of potential candidates, the Tribunal has decided to appoint Messrs. Bill Robertson and Douglas Vincent Belgrave to serve as experts in this arbitration. The CVs of Messrs. Belgrave and Robertson are attached for your information.

The experts were appointed at this stage in the proceedings to enable the Tribunal to operate within the time limits prescribed by the Parties' Arbitration Agreement.

The Tribunal has instructed the PCA to circulate to the Parties the attached draft Terms of Reference, which articulates the role the Tribunal envisages for the experts within this Arbitration. The Tribunal invites the Parties to submit any comments they may have on the draft Terms of Reference no later than April 8, 2009.

76. After receiving responses from both Parties, on April 9, 2009, the PCA communicated to both Parties that it had received no comments on the draft terms of reference.

77. On April 16, 2009, the Tribunal issued Procedural Order No. 2, the operative part of which provides:

**The Tribunal unanimously orders:**

That Messrs. Douglas Vincent Belgrave and Bill Robertson be appointed to serve as experts and provide assistance to the Arbitral Tribunal in this arbitration;

That the attached Terms of Reference for the experts be adopted.

**Experts' Terms of Reference**

. . .

*The Experts*

2.1 Messrs. Bill Robertson and Douglas Vincent Belgrave (the "Experts") shall serve as experts to assist the Tribunal in accordance with these Terms of Reference.

2.2. The Experts hereby declare that they will, as directed by the Tribunal, perform their duties honorably and faithfully, impartially and conscientiously, and will refrain from divulging or using, outside the context of the tasks to be performed by them in this arbitration, any confidential documents, files and information, including the deliberations of the Tribunal, which may come to their knowledge in the course of the performance of their task.

*Scope*

3.1. The Experts shall assist the Tribunal, should it determine that the ABC experts exceeded their mandate pursuant to Article 2(a) of the Arbitration Agreement, in defining (*i.e.*, delimiting) on a map the boundaries of the

area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, in accordance with Article 2(c) of the Arbitration Agreement.

3.2. The Experts will also make themselves available to assist the Tribunal as required by it in the preparation of the Award.

3.3 The Experts shall perform their duties according to best international practices in their fields of expertise.

. . .

## K. Oral pleadings phase of the proceedings

78. On April 7, 2009, the Tribunal issued Procedural Order No. 1, setting forth the time and place of oral pleadings, the procedure to be followed, the witnesses to be examined, and the daily agenda. The schedule allocated equal time as between the issues specified in Article 2 of the Arbitration Agreement and allocated equal time as between the Parties.

79. On the matter of Arabic/English and Dinka/English translation, on April 8, 2009, the Tribunal issued the following communication following consultation with the Parties:

> The Permanent Court of Arbitration ("PCA") acknowledges electronic receipt of letters dated April 6 and April 7, 2009 from the Government of Sudan ("GoS"), and a letter dated April 7, 2009 from the Sudan People's Liberation Movement/Army ("SPLM/A"), all relating to the Parties' commitment to determine the appointment of Dinka and Arabic interpreters for the oral pleadings.
>
> On Arabic-English and English-Arabic interpretation, the PCA notes that the Parties have agreed to the appointment of Mr. Yahia Mo'lla Mofarih as interpreter. The PCA would appreciate being furnished with a copy of Mr. Mofarih's CV and contact details.
>
> On Dinka-English and English-Dinka interpretation, the PCA notes that the Parties have not agreed to any appointment. The GoS proposes Mr. Abingo Akok Kshwal, while the SPLM/A proposes Messrs. Charles Deng Majok and Kwaja Yai Kuol Arop.
>
> After consultations with the Presiding Arbitrator, the PCA has determined that each Party may employ its own Dinka-English/English-Dinka interpreter(s) for the examination of its witnesses (for example, Dinka interpretation for each of the relevant GoS witnesses' direct, cross, re-direct, and re-cross examinations shall be conducted by Mr. Abingo Akok Kshwal). Any corrections to the Court Reporter's transcription arising from a perceived error in translation may be brought to the Tribunal's attention no later than one week from the conclusion of the oral pleadings, *i.e.*, April 30, 2009.

80. On April 16, 2009, the PCA issued the following press release concerning the availability of a live webcast of the oral pleadings for interested members of the public:

> In the matter of an arbitration pursuant to the Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area, oral pleadings will be held at the Peace Palace in The Hague from April 18 to April 23, 2009. The oral pleadings will be open to the public and the media, and will be webstreamed live on the Permanent Court of Arbitration ("PCA") website beginning at 9:30 am (CET) on April 18, 2009 (http://www.pca-cpa.org/showpage.asp?pag_id=1306).
>
> The PCA International Bureau is acting as Registry and providing administrative support to the Arbitral Tribunal, which is composed of the following members:
>
> Professor Pierre-Marie Dupuy (Presiding Arbitrator)
> H.E. Judge Awn Al-Khasawneh
> Professor Gerhard Hafner
> Professor W. Michael Reisman
> Judge Stephen Schwebel
>
> The Parties have agreed to make the pleadings, transcripts, decisions and certain other documents public. These are available at the PCA website.
>
> The PCA was established by treaty in 1899 and is the oldest intergovernmental organization devoted to the peaceful resolution of disputes through arbitration in the world. Its seat is at the Peace Palace, The Hague, The Netherlands. Further information on the PCA is available at http://www.pca-cpa.org.

81. Pursuant to Article 8.4 of the Arbitration Agreement, public hearings were held from Saturday, April 18, 2009 until Thursday, April 23, 2009 at the Great Hall of Justice, the Peace Palace, The Hague. The attendees were:

**The Tribunal:**

1. Professor Pierre-Marie Dupuy
2. Judge Awn Al-Khasawneh
3. Professor Dr. Gerhard Hafner
4. Judge Stephen M. Schwebel
5. Professor W. Michael Reisman

**For the Registry:**

1. Mr. Aloysius Llamzon
2. Mr. Paul-Jean Le Cannu
3. Mr. Dirk Pulkowski
4. Ms. Catherine Quinn
5. Ms. Genevieve Reyes
6. Ms. Evelien Pasman
7. Ms. Gaëlle Chevalier
8. Ms. Willemijn van Banning
9. Mr. Paulo Perassi
10. Mr. Thomas Levi

**For the GoS:**

*Agent*

1. Ambassador Dirdeiry Mohamed Ahmed

*Co-Agents*

2. Dr. Faisal Abdel Rahamn Ali Taha
3. Dr. Abdelrahman Ibrahim Elkhalifa

*Counsel and Advocates*

4. Professor James Crawford SC
5. Professor Alain Pellet
6. Mr. Rodman R. Bundy
7. Ms. Loretta Malintoppi
8. Prof. Nabil Elaraby

*Legal Advisors*

9. Ms. Angelynn Meya
10. Mr. Jacques Hartmann
11. Ms. Céline Folsché
12. Mr. Paul Baker
13. Mr. Charles Alexander

*Witnesses & Expert*

14. Ayom Matet Ayom
15. Zakaria Atem Diyin Thibek Deng Klir
16. Mukhtar Babu Nimir
17. Maj ak Matit Ayom
18. Majid Yak Kur
19. Mr. Alastair MacDonald

*Technical Advisors*

20. Mr. Martin Pratt
21. Ms. Eleanor Scudder

*Other*

**Representatives of the Government of Sudan**

22. General [Rtd] Mahdi Babo Nimir Ali, Former Chief of Staff
23. Fathi Khalil Mohamed, Chairman Sudan Bar Association
24. Abd Elgadir Monim Mansour Mohamed, MP, Hamar Paramount Chief
25. Mohamed Aldoreek Bakht, Commissioner
26. Fadlalla Burma Nasir, Deputy Chairman, Umma Party
27. Elkheir Elfahim Elmaki HamId. Chairman, Kordofan Reconciliation Committee
28. Mariam Elsadig Elsiddig Almahdi, Political Secretary, Umma Party
29. Safieldin Galaleldin Gibreil Omer, Member, CPA Evaluation Commission

30. Siddig El Hindi, Secretary General UDP
31. Hasan Kantabai, Political Bureau, East Sudan Front
32. El Bagir Ahmed Abdalla, Political Bureau, UDP
33. Dr. El Tayeb Haj Atia, All Sudan Initiative
34. Hussein Braima Elnour Algozuli
35. Azhari Mohamed Summo Shaaeldin
36. Sami Eldai Bushara Goda

**Interested Persons and Non-Testifying Witnesses**

37. Herika Iz-Aldin Humeda Khamis, Former Governor
38. Ahmed Assalih Sallouha, Former Governor
39. Rahma Abdel Rahman El-Nour, Abyei D/Chief Administrator
40. Yahia Hussain Babiker, Director, Unity Fund
41. Salman Suliman El-Safi, State Minister
42. Prof. Abdalla El Sadig, Director Survey
43. Kabbashi Eltom Kabbashi
44. Ashahab Elsadig Daif Allah
45. Mohammed Mahmoud Raj ab Elradi
46. Deng Balaiel Bahar Hamadean
47. Mohamed Basheir Adam Elmoalim
48. Saeed Mohammed Bakkar Degais
49. Khalid Ibrahim Ali Ibrahim
50. Maria Mayut Ayoak Gweing
51. Ahmed Abdalla Adam
52. Abdelrahman Mukhtar Hassab Alla
53. Hamadi Ad'dood Ismael Hammad
54. Abd Elgaleel Bakkar Ismail Elsakin
55. Shummo Hurgas Marida
56. Ali Hmdan Kir
57. Alsadig Ibrahim Ahmed Ibrahim
58. Hamid Bushra Godat Mohamed
59. Mohamed Elnil Mohamed
60. Hassan Mohamed Ibrahim
61. Daoud Mohamed Abdalla
62. Bashtana Mohammed Salem Suliman
63. Yagoub Abuelgasim Touri Yagoub
64. Adil Hassan Abdelrahman Mohamed
65. Abdelmonm Musa Elshiwen Aldaif
66. Ismail Hamdean Humaidan
67. Elnazir Gebreil Elgouni Abdelaziz
68. Ogeil Godtalla Abdelhamid Khamis
69. Gadim Mohamed Azaz Gamaella
70. Abdelrahman Hasan Omer
71. Abdulrahman Salih El Tahir
72. Dr. Hassan Abdin
73. Prof. Yousuf Fadl
74. Mr. Abdel Rasoul Elnour
75. Mr. Mahdi Babo Nimir

76. Dr. Suliman Eldabalo

**Members of the Media**

77. Hassan Makki Mohamed Ahmed, Political Analyst
78. Elhindi Omer, Columnist
79. Ishag Ahmed Fadl Allah Elfahal, Columnist
80. Sarra Taha Mohi Aldin Mohamed, TV Crew
81. Mahgoub Mohamed Salah, Editor in Chief
82. Awad Elkarim Ahmed Mustafa, TV Crew
83. Tarig Eltegany Ballal, Journalist
84. Asma El-Suhaili, Political Analyst
85. El Tayeb Zainalabdin, Editor-in-Chief
86. Khalid El Tigani, Editor-in-Chief
87. Adil El Baz, Journalist
88. El Sir Sidahmed, Journalist
89. Adil El Biali, Journalist
90. El Sadig El Rizaigi, Journalist
91. Khalid El Mubarak, Journalist

**Staff from the Embassy of the Sudan**

92. H.E. Ambassador A.A. Shikh Idris
93. Minister plenipotentiary Sayed. A. Ahmed
94. Mr. Chol Ajongo, Counselor
95. Mr. Baha Aldien Mohamed Khamis, Agricultural Counselor
96. Mr. Abbas Mohamed Alhaj, Counselor
97. Mr Abd Alrahman Abdalla Abd Alrahman, Second Secretary
98. Miss Nada Awad Omer, Administrative Attaché
99. Mrs. Awatif Osman, Financial Attaché

**For the SPLM/A:**

*Agents*

1. Dr. Riek Machar Teny
2. Dr. Luka Biong Deng

*Counsel and Advocates*

3. Mr. Gary Born
4. Ms. Wendy Miles
5. Dr. Paul Williams
6. Ms. Vanessa Jiménez

*Legal Advisers*

7. Hon. Deng Arop Kuol
8. Maj. Gen. Kuol Deim Koul
9. Hon. Arop Madut Arop
10. Ms. Bridget Rutherford
11. Mr. Anand Shah
12. Ms. Courtney Nicolaisen
13. Mr. Charlie Caher
14. Ms. Kate Davies

15. Ms. Anna Holloway
16. Ms. Daisy Joye
17. Ms. Inken Knief
18. Mr. Timothy Lindsay
19. Mr. Oliver Spackman
20. Ms. Anna-Maria Tamminen
21. Ms. Lisa Tomas
22. Mr. Kevin Mottram
23. Mr. Daniel Harris

*Technical Advisors and Assistants*

24. Mr. Alex Tait
25. Mr. Scott Edmonds
26. Ms. Joanne Gilpin
27. Ms. Kathleen Kundt
28. Mr. Shakeel Sameja

*Witnesses & Experts*

29. Mr. Deng Chier Agoth
30. Mr. Ring Makuac Dhel Yak
31. Professor J. A. Allan
32. Dr. Peter Poole
33. Professor Martin Daly
34. Mr. Richard Schofield

*Observers*

35. Mr. Paul Mayon Akec, Observer
36. Mr. Deng Alor Kuol
37. Mr. Michael Makuei Lueth
38. Mr. Ambrose Riny Thiik
39. Mr. Kuol Deng Mijok Kuol
40. Mr. Nyol Pagout Deng
41. Mr. Kuol Alor Makuac
42. Mr. Ajak Malual Beliu
43. Mr. Akonon Ajuong Deng
44. Mr. Arop Kuol Kon
45. Mr. Bagat Makuac Abiem
46. Mr. Mijok Kuol Lual
47. Mr. Belbel Chol Akuei
48. Mr. Chol Por Chol
49. Mr. Jacob Madhol Lang
50. Hon. Benjamin Majak Dau
51. Hon. Peter Beshir Gbandi
52. Hon. James Lual Deng Kuel
53. Hon. Zakaria Bol Deng
54. Hon. Mary Nyaulang
55. Hon. Kom Kom
56. Mr. Victor Akok Anei Magar
57. Mr. Juac Agok Anyaar

58. Mr. Edward Abyei Lino
59. Mr. Chol Changath Chol
60. Hon. Charles Abyei Jok
61. Hon. Nyankuac Ngor
62. Hon. Nyianawut Miyan
63. Ms. Asha Abbas Akwai
64. Dr. Zakaria Bol Deng
65. Hon. Bol Gatkuoth
66. Hon. Charles Abyei Kon
67. Mr. Michael Majak Abiem
68. Mr. Mathew Oturomoi Martinson
69. Mr. Biong Deng Kuol
70. Mr. Mangok Atem Piyin
71. Mr. Luka Chen Chen Atem
72. Mr. Ezekiel Lol
73. Ms. Apuk Ayuel
74. Mr. Daniel Jok
75. Mr. Victor Bullen Baba
76. Mr. Gordon Morris
77. Mr. Alfred Taban
78. Dr. Francis G. Nazario
79. Mr. Wilson Deng Peter
80. Mr. Akoc Wol Akoc
81. Mrs. Florence A. Andrew
82. Mr. Arkanjelo Ngoth
83. Mr. William Vito Akwar
84. Mr. Thomas Wako
85. Mr. Christopher Brale
86. Mr. Salvatore Ali
87. Mr. Majok Mading
88. Mr. Deng Biong Mijak
89. Mr. Stephen Kang Elario
90. Mr. Jeremiah Swaka Moses
91. Mr. Bella Kodi
92. Mr. Peter Makoi
93. Mr. Ali Alfred
94. Mr. Ater Andrew
95. Mr. Robert Lenny
96. Ms. Pani Lado
97. Mr. Nicknora Gongich
98. Nyanyol Mathiang
99. Mr. Miyong G. Kuon
100. Ms. Elizabeth Carlo

82. As notified by the PCA on March 20, 2009 and March 30, 2009, and as revised in accordance with the Tribunal's instructions that "[ . . . ] all the witnesses of the GoS that have not been identified for cross-examination by the

SPLM/A or inquiry by the Tribunal [ . . . ] may be excused,"[9] the GoS presented the following expert and witnesses for cross-examination by the SPLM/A:

Mr. Alastair MacDonald
Mr. Zakaria Atem Diyin Thibek Deng Klir
Mr. Mukhtar Babu Nimir

83. Pursuant to Procedural Order No. 1,[10] the GoS presented the following witnesses to answer questions propounded by the Tribunal:

Mr. Ayom Matet Ayom
Mr. Majak Matit Ayom
Mr. Majid Yak Kur

84. As notified on March 20, 2009 and March 30, 2009, the SPLM/A presented the following experts and witnesses for direct examination and for cross-examination by the GoS:[11]

Mr. Deng Chier Agoth
Professor J. A. Allan
Dr. Peter Poole
Professor Martin Daly
Mr. Richard Schofield

85. In addition to the Parties' representatives, members of the public, diplomatic corps and media were in attendance at the hearings in accordance with Article 8.6 of the Arbitration Agreement. A live webcast of the oral pleadings was made available at the PCA website. Along with the webcast of the oral pleadings, transcripts of the hearing were made publicly available on the PCA's website immediately after each day of the hearing.[12]

86. At the conclusion of the oral pleadings on April 23, 2009, the Tribunal declared closure of submissions in accordance with Article 8.9 of the Arbitration Agreement.

## L. Rendering of the Final Award

87. Under Article 9(1) of the Arbitration Agreement, the Tribunal is required to render its final award "within ninety days from the closure of submissions," *i.e.*, on July 22, 2009. The Tribunal is also required, under Article

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[9] Procedural Order No. 1, para. 3.8.

[10] Procedural Order No. 1, para. 3.7 stated :

> The GoS intends to cross-examine each of the six witnesses and experts to be presented by the SPLM/A. The SPLM/A intends to cross-examine Zakaria Atem Diyin Thibek Deng Kiir, Mukhtar Babu Nimir, and Alastair Macdonald. In addition, the Tribunal wishes to propound questions to Ayom Matet Ayom, Majak Matit Ayom, and Majid Yak Kur.

[11] In its March 20 and March 30, 2009 communications, the SPLM/A notified the Tribunal that Mr. Ring Makuac Dhel Yak would be presented as a witness at the hearings. However, Mr. Ring was not called upon to testify at the hearings.

[12] The webcasts and pleadings continue to be available at http://www.pca-cpa.org.

9(3) of the Arbitration Agreement, to "communicate the final award to the [agents] of the Parties on the day of its rendering," and to "make public the award as of the same day."

88. By a letter dated June 30, 2009 addressed to the PCA, the SPLM/A requested that "the [T]ribunal consider providing the [P]arties with at least one week notice of the date that the [T]ribunal intends to communicate the Award to the [P]arties" in order to allow the Parties "to put in place arrangements for communication of the Award in Abyei and wider Sudan," to "immediately implement the award," and to "educate the people of the Abyei area prior to the award, facilitate dissemination of the award, and take steps to prevent violence, enhance security, and consolidate peace in and around Abyei area at the time the award is communicated."

89. On July 1, 2009, the Tribunal requested that the GoS provide any comments it may have on the SPLM/A's letter. The GoS, by letter dated July 7, 2009 addressed to the PCA, was "of the view that, as is normal practice, the Tribunal or the PCA [should] provide appropriate notification of the rendering of the award to the Agents of the Parties so as to enable the actual communication of the award to be made to the [Parties] in The Hague on the day of its rendering." The GoS also stated that it does not subscribe to the views expressed in the SPLM/A's letter, as the "implementation of the award is not contingent on the Parties receiving advance notice of its rendering," and that neither Party is authorized to take unilateral steps in connection with the security situation in the Abyei area. It noted that one of the points of agreement between the Parties at their recent talks in Washington, D.C. was that "the Parties agree[d] to develop a plan with assistance from [the United States of America] to facilitate dissemination of the arbitration decision at the local level in anticipation of the decision," and it was of the opinion that "it would be appropriate for such a plan to be developed and agreed, and for the agreed substantiation of [the United Nations Mission in Sudan] to be effected, with the view [of paving] the way for rendering the award in these proceedings in a conducive atmosphere."

90. On July 9, 2009, the SPLM/A, by letter addressed to the PCA, stated that "[i]n the present context the SPLM/A does not consider it appropriate to respond to the majority of the matters raised by the [GoS] in its letter," as the purpose of its letter was "merely to propose that advance notification of the award would be helpful to the [P]arties." It explained that "the SPLM/A would be agreeable to the Tribunal convening a small meeting in the Hague at which the Award would be communicated to the [Parties] if such a meeting [would not] delay the communication of the Award."

91. On July 10, 2009, the Presiding Arbitrator, through the PCA, issued the following communication to the Parties:

> Having considered the SPLM/A's letter of June 30, 2009, the Government of Sudan's ("GoS") comments of July 7, 2009, and the SPLM/A's reply of

July 9, 2009, the Presiding Arbitrator has instructed the PCA to inform the Parties of the following:

- Pursuant to Article 9(1) of the Arbitration Agreement, the final award "shall be rendered within a maximum of ninety days from the closure of submissions," *i.e.*, no later than July 22, 2009. While Article 8(7) of the Arbitration Agreement empowers the Tribunal to extend this period for good cause, the Tribunal has not done so at present.
- The Arbitration Agreement does not explicitly provide for any ceremony or meeting at the rendering of the final award. Nevertheless, after receiving comments from the Agents of both Parties, the Tribunal finds it appropriate to conduct a formal event at the Peace Palace in The Hague on the day the award is rendered.
- Consistent with Paragraph 10.3 of the Terms of Appointment, the Tribunal invites the Parties to confer and jointly propose a date for the ceremony, together with any other particulars they may deem appropriate. The Parties are requested to report to the Tribunal on the outcome of their discussions no later than 8:00 PM (CET) on Monday, July 13, 2009. In the absence of an agreement, the Tribunal will decide the matter in due course.

92. On July 13, 2009, both Parties informed the Tribunal that they were unable to reach agreement on this matter. The GoS, by letter dated July 13, 2009 addressed to the PCA, proposed that "the award rendering ceremony be held on [August 21,] 2009, after a reconciliation ceremony that the Government of Sudan has asked the Government of the Netherlands to organize in conjunction with the reading of the award on [August 19–20, 2009]." It explained that it is essential that the chiefs of both the Misseriya and Ngok Dinka communities be invited and be given an opportunity "to listen to the award in person," and that logistical constraints would render it impracticable to have an award ceremony before August 10, 2009. The SPLM/A, on the other hand, by letter dated July 13, 2009 addressed to the PCA, stated that "it does not wish for the communication of the Award to be delayed in any way," and that "if any delay was to result from convening a meeting in the Hague then the SPLM/A would strongly prefer that the Award simply be communicated to the Agents and their legal counsel by email."

93. On July 14, 2009, the following communication from the Tribunal was sent by the PCA to the Parties:

Having considered the Parties' positions, the Presiding Arbitrator has instructed the PCA to inform the Parties of the following on behalf of the Tribunal:

- Due to the inability of the Parties to agree on a new date for the rendering of the award, the Tribunal considers that it must adhere to the 90-day period provided under Article 9(1) of the Arbitration Agreement. The Tribunal will therefore render its Award in a short ceremony on July 22, 2009, 10:00 a.m., at the Great Hall of Justice, The Peace Palace, The

Hague. The Tribunal has instructed the PCA to issue a press release today to inform members of the public accordingly.

- Consistent with Article 9(3) of the Arbitration Agreement, the Tribunal invites the Agents and counsel of the Parties to be present at the award-rendering ceremony, along with any number of party representatives they deem appropriate. While the Parties are free to compose their respective delegations as they see fit, the Tribunal extends a particular invitation to the chiefs of the Misseriya and Ngok Dinka communities to be present at the ceremony. The Parties are requested to inform the PCA of the composition of their respective delegations no later than 1:00 PM (CET), Monday, July 20, 2009.
- Consistent with Article 9(4) of the Arbitration Agreement, the Tribunal has also instructed the PCA to invite representatives of the States and other entities who witnessed the signing of the Comprehensive Peace Agreement, and a representative of the Assessment and Evaluation Commission, to attend the ceremony.
- Consistent with Article 8(6) of the Arbitration Agreement and the practice followed in these proceedings, the award-rendering ceremony will be made open to the public and will be webstreamed live at the PCA website. The Tribunal authorizes the Parties to invite members of the Sudanese and international media to be present at the ceremony. The Tribunal has also instructed the PCA to prepare a press release, in both English and Arabic, designed to provide a short summary of the most critical aspects of the Tribunal's award. The Press Release will be issued immediately after the ceremony.
- The Tribunal will be represented at the ceremony by the Presiding Arbitrator, who will give a brief statement summarizing the Award.

94. On July 14, 2009, the PCA issued a press release concerning the rendering of the final award, which provides in part:

> In the matter of an arbitration pursuant to the Arbitration Agreement Between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting the Abyei Area, the arbitral Tribunal will render its final award ("Award") on July 22, 2009, 10:00A.M. (CET; GMT +2), at the Peace Palace, The Hague.
>
> During this ceremony, the Presiding Arbitrator will personally deliver the Award to representatives from both Parties and deliver a brief statement summarizing the Award. The ceremony will be webstreamed live on the Permanent Court of Arbitration ("PCA") website beginning at approximately 10:00 am (CET; GMT+2) on July 22, 2009 (http://www.pca-cpa.org/showpage.asp?pag_id=1306). Representatives of the States and other entities who witnessed the signing of the Parties' Comprehensive Peace Agreement have been invited to attend the ceremony. Members of the Sudanese and international media are also invited to be present.
>
> Immediately after the ceremony, the Award will be made public through the PCA website. The PCA will also issue a press release (in both English and

Arabic), which will provide a short summary of the most critical aspects of the Award.

The PCA emphasizes that until the Award is rendered at the ceremony on July 22, 2009, its contents will continue to be absolutely confidential. No person or entity has or will be given advanced notice of the Tribunal's decision.

## Chapter II. Introduction

95. The GoS and the SPLM/A agreed in 2004 to define the "Abyei Area" in the following terms: "The territory [of the Abyei Area] is defined as the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905."[13] (In appropriate instances, this phrase is also referred to in this Award as the "Formula") However, the Parties do not agree on the boundaries of the Abyei Area that the application of that Formula should produce. It is this disagreement that constitutes the essence of the dispute submitted for arbitration to the Tribunal.

## A. Geography

### 1. The Republic of Sudan

96. The Republic of Sudan ("Sudan") is located in north-east Africa, situated between latitudes 3°53'N and 21°55'N and longitudes 21°54'E and 37°30E.[14] It borders Egypt to the north, Chad, Libya and the Central African Republic to the west, the Democratic Republic of the Congo, Uganda and Kenya to the south, and Ethiopia and Eritrea to the east.[15] The largest country in Africa, it comprises 2,376,000 square kilometers of land and 129,810 square kilometers of water. Below is a map[16] of Sudan and its international boundaries:

97. Sudan is divided into twenty-five states, of which fifteen are located in northern Sudan ("*Northern Sudan*") and ten in southern Sudan ("*Southern Sudan*"). Northern Sudan comprises the states of Blue Nile, Gezira, Gadarif, Kassala, Khartoum, Northern, North Darfur, North Kordofan, Red Sea, Nile, Sinnar, South Darfur, South Kordofan, West Darfur and White Nile.[17] Southern Sudan comprises Central Equatoria, Eastern Equatoria, Jonglei, Lakes, Northern Bahr el Ghazal, Unity, Upper Nile, Warab, Western Bahr el Gahazal and Western Equatoria.[18]

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[13] Abyei Protocol, section 1.1.2

[14] SPLM/A Memorial, para. 69.

[15] *Ibid.*

[16] *Source*: United Nations Cartographic Section. Secretariat note: the map is located in the rear pocket of this volume.

[17] *See* United Nations Mission in Sudan website, at http://www.unmis.org.

[18] SPLM/A Memorial, para. 77.

98. Sudan has some 40 million inhabitants with an average population density of approximately 14 persons per square kilometer.[19] There are 19 major ethnic groups and almost 600 subgroups, amounting to more than 100 languages and dialects spoken.[20] In a census on ethnicity in 1956, it was reported that Arabs constituted 39 percent and Africans 61 percent of the population. Generally, the Arabs are located in Northern Sudan while the Africans are located in the South. At 12 percent of the national population, the Dinka was at that time the largest single group from Southern Sudan. Seventy percent of the population reportedly follow Islam while the remainder, predominantly in Southern Sudan, follow local faiths (25 percent) or Christianity (5 percent).[21]

99. The climate is arid in the north, whereas the south-west is characterized by tropical wet and dry seasons. Temperatures do not vary greatly throughout the year. However, the length of the dry season differs in various regions, dependent upon the flows of the dry, north easterly winds from the Arabian Peninsula and moist south-westerly winds from the Congo River basin.[22]

## 2. Northern Sudan

100. North Sudan constitutes three-quarters of the surface area of Sudan and is inhabited by the same proportion of its population, approximately 31 million people.[23] The majority are Muslim, and Arabic is the dominant language. As much of North Sudan is desert, the majority of its population lives in just over 15 percent of the land.[24] Some Arab tribes such as the Baggara are nomadic while others, including Ja'aliyyin and Danagla, farm along the Nile and further south.[25]

## 3. Southern Sudan

101. Southern Sudan has an estimated population of 8.99 million and a surface area of 640,000 square kilometers.[26] It is a predominantly rural, subsistence economy and is fertile throughout the year. It is served by a number of major river systems and dense tropical evergreen forests, which sustain a wide range of cereals, vegetables and tree crops.[27] The largest group in South Sudan is the Dinka, comprising 12 percent of the national population, followed

[19] SPLM/A Memorial, para. 70.

[20] SPLM/A Memorial, para. 72.

[21] *Ibid.*

[22] SPLM/A Memorial, para. 71.

[23] SPLM/A Memorial, para. 83.

[24] SPLM/A Memorial, paras. 81–82.

[25] SPLM/A Memorial, para. 83.

[26] SPLM/A Memorial, para. 77.

[27] SPLM/A Memorial, para. 76.

by the Azande and Nuer.[28] The most widely-spoken languages are Dinka, Juba Arabic, Nuer and English. The SPLM/A political party holds a distinct majority in the Southern Sudan Legislative Assembly.

## 4. The Abyei location, the Ngok Dinka, and the Misseriya

102. The Abyei location is located between the north and the south of Sudan. It has been referred to by the Parties as "a bridge between the north and the south, linking the people of Sudan."[29]

103. The township of Abyei ("Abyei Town") is located north of the river Bahr el Arab/Kir.[30] This river runs through the adjoining provinces of Bahr el Ghazal, Darfur and Kordofan.[31] The Bahr el Arab is known by other names, attributable to the different tribes living along its course.[32] Thus, the Ngok Dinka refer to the Bahr el Arab as the Kir[33] or the Gurf,[34] while other references (including by Arabic speakers) identified the same river as "the Bar el Jange" or the "Bahr ed Deynka."[35]

104. The Bahr river basin contains the Bahr el Arab/Kir, the Ngol/Ragaba ez Zarga, the Nyamora/Umm Rebeiro, and the Nam/Bahr el Gazal.[36] To the south of this is the Sudd, one of the world's largest swamps.[37] The clay plains of the Abyei region are characterized by thick forest, bushes, and vegetation, which combined with the extreme wet and dry seasons support the many fruits and plants which can be found there.[38] There are three major oilfields in the area, whose 2005 to 2007 revenues were estimated in the region of US$1.8 billion.[39]

105. As described by the SPLM/A, Abyei Town is the ancestral homeland of the Ngok Dinka.[40] However, the GoS alleges that there is no documentary evidence that Abyei existed as a settlement in 1905, and claims that the earliest map that shows Abyei in its present location dates from 1916.[41]

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[28] SPLM/A Memorial, para. 78.

[29] Abyei Protocol, section 1.1.1.

[30] GoS Memorial, para. 6.

[31] GoS Memorial, para. 2.

[32] GoS Memorial, para. 3.

[33] SPLM/A Memorial, para. 91.

[34] GoS Memorial, para. 3.

[35] SPLM/A Memorial, para. 91.

[36] SPLM/A Memorial, para. 89.

[37] SPLM/A Memorial, para. 96.

[38] SPLM/A Memorial, para. 98.

[39] SPLM/A Memorial, paras. 109–110.

[40] SPLM/A Memorial, para. 85.

[41] GoS Oral Pleadings, April 18, 2009, Transcr. 40/15–23.

106. The Ngok Dinka, one of the 25 tribes which comprise the Dinka people,[42] are reportedly a highly cohesive tribal unit of an estimated 300,000 people, with a well-defined, centralized political structure. They are divided into nine Chiefdoms, under a single "Paramount Chief":[43] Abyior, Achaak, Achueng, Alei, Anyiel, Bongo, Diil, Mareng and Manyuar.[44] Each Chiefdom has an area of permanent habitation and seasonal grazing areas.[45] They cultivate the land[46] and, through tribal law and custom, grant individuals and families exclusive right to use certain lands.[47] The Ngok are said to have a spiritual connection with the land through their tribes' ancestors.[48] The present-day Abyei Town is the centre of their political and commercial affairs.

107. Living to the north of the Ngok Dinka are the Misseriya, Arab nomads who have their base in the region of Muglad.[49] The Misseriya are said to be cattle-herders whose nomadic existence takes them across a wide territory, ranging from the area around Muglad in the north, where they spend much of each year, to the Bahr river system of the Abyei region during parts of the dry season.[50]

## B. Historical context

### 1. First and Second Civil Wars

108. Sudan obtained independence on January 1, 1956. Soon thereafter civil war erupted between Northern Sudan and Southern Sudan. By 1965, the Misseriya and the Ngok Dinka were said to be participating in the civil war, with the former allied with Northern Sudan and the latter with Southern Sudan. In 1972, the civil war was ended by the Addis Ababa Agreement, which provided for a referendum to allow "any other areas that were culturally and geographically a part of the Southern Complex" to choose to remain in Northern Sudan or to join a new autonomous Southern Sudan.[51]

109. However, subsequent disputes over power, resources, religion, and self-determination led in 1983 to a second civil war.[52] The Abyei Area is said to be at the geographical center of this civil war, which is the longest running

[42] SPLM/A Memorial, para. 115.
[43] SPLM/A Memorial, paras. 111–112.
[44] SPLM/A Memorial, para. 150.
[45] SPLM/A Memorial, para. 152.
[46] SPLM/A Memorial, paras. 176.
[47] SPLM/A Memorial, paras. 171–172.
[48] SPLM/A Memorial, para. 168.
[49] SPLM/A Memorial, para. 217.
[50] SPLM/A Memorial, para. 218.
[51] SPLM/A Memorial, paras. 381–405.
[52] SPLM/A Memorial, paras. 424.

conflict in Africa and has caused some two million deaths, significant economic destruction and untold suffering, particularly for the people of Southern Sudan.[53]

## 2. Negotiations for peace

### *(a) Machakos Protocol 2002*

110. On July 20, 2002 the Parties signed the Machakos Protocol ("Machakos Protocol"). The Machakos Protocol provided that a peace agreement was to be implemented in accordance with the sequence, time periods, and processes set out therein.[54] It also provided for an internationally monitored referendum, organized jointly by the GoS and the SPLM/A, entitling the people of Southern Sudan to vote on whether to secede from Sudan.[55]

111. The referendum was to be preceded by two transition phases. The first phase, the "Pre-Interim Period,"[56] would last for six months and would establish, among others: (i) a constitutional framework for the peace agreement; (ii) mechanisms to implement and monitor the Peace Agreement; (iii) if not already in force, a cessation of hostilities with appropriate monitoring mechanisms; and (iv) preparations for the implementation of a comprehensive ceasefire.[57]

112. The next phase, the "Interim Period," would commence at the end of the Pre-Interim Period and last for six years.[58] During this time, the institutions and mechanisms established during the Pre-Interim Period were to operate in accordance with the arrangements and principles set out in the peace agreement, and if not already accomplished, the negotiated ceasefire was to be fully implemented and put into operation.[59]

### *(b) The Abyei Protocol*

113. The Abyei Protocol ("Abyei Protocol") was signed on May 26, 2004 and provided for agreed principles in administering the Abyei Area upon signing of the peace agreement. Notably, Section 1.1.2 of the Abyei Protocol defined the territory as "the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905." The Abyei Area was to be accorded special administrative status and was to be administered by a local executive council elected by the

[53] CPA, Preamble, p. xi, para. 2.

[54] Machakos Protocol, Part B.

[55] Machakos Protocol, Article 2.5.

[56] The Pre-Interim Period commenced on January 9, 2005, the day the Comprehensive Peace Agreement was signed.

[57] Machakos Protocol, Article 2.1.

[58] Machakos Protocol, Article 2.2.

[59] Machakos Protocol, Article 2.3.

residents of the Abyei Area.[60] These residents were to be dual citizens of Western Kordofan and Bahr el Ghazal, with representation in the two legislatures.[61] Residents were defined as members of the Ngok Dinka community and other Sudanese residing in the Abyei Area.[62]

114. The Abyei Protocol also provided for the establishment of the ABC, which was given the task of "defin[ing] and demarcat[ing]" the Abyei Area.[63]

### *(c) The Abyei Appendix*

115. On December 17, 2004, the Parties signed an "Understanding on Abyei Boundaries Commission" ("Abyei Appendix"), which determined the composition of the ABC as follows:

> (*a*) one representative from each of the GoS and the SPLM/A;
>
> (*b*) "five impartial experts knowledgeable in history, geography and any other relevant expertise" nominated by the United States, the United Kingdom and the Inter-Governmental Authority on Development ("IGAD");
>
> (*c*) two nominees of the GoS and two nominees of the SPLM/A "from the present two administrations of the Abyei Area;"
>
> (*d*) two nominees of the GoS from the Messiriya; and
>
> (*e*) two nominees of the SPLM/A from the "neighboring Dinka tribes to the South of the Abyei Area."[64]

116. In determining the Abyei Area, the ABC was required "to listen to representatives of the people of Abyei Area and their neighbours, [as well as to] listen to presentations of the two Parties"[65] and to "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."[66] The ABC Experts were also required to determine the rules of procedure of the ABC.[67]

117. The Abyei Appendix further prescribed that the ABC should present its report to the Presidency before the end of the Pre-Interim Period, and that the "report of the [ABC Experts], arrived at as prescribed in the ABC rules of procedure" would be "final and binding on the Parties."[68]

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[60] Abyei Protocol, sections 2.1–2.2

[61] Abyei Protocol, section 1.2.1.

[62] Abyei Protocol, section 6.1 (a).

[63] Abyei Protocol, section 5.1.

[64] *See* Abyei Appendix, section 2.

[65] Abyei Appendix, section 3.

[66] Abyei Appendix, section 4.

[67] *Ibid.*

[68] Abyei Appendix, section 5.

### *(d) Comprehensive Peace Agreement*

118. On January 9, 2005, the Parties signed the Peace Agreement (the "Comprehensive Peace Agreement" or "CPA") that initiated the Pre-Interim Period.[69] They reconfirmed their commitment to the following instruments previously agreed upon, which were integrated into the CPA: the Machakos Protocol, the Protocol on Security Arrangements of September 25, 2003, the Protocol on Wealth-Sharing of September 25, 2003, the Protocol on Power-Sharing of May 26, 2004, the Protocol on the Resolution of Conflict in Southern Kordofan and the Blue Nile States of May 26, 2004 and the Abyei Protocol (with its annex, the Abyei Appendix).[70]

### *(e) Interim National Constitution*

119. Subsequently, on July 6, 2005, the Sudanese National Assembly adopted the Interim National Constitution of the Republic of Sudan ("Interim National Constitution"). This Constitution recognized the commitment of Sudan to comply with the CPA[71] and to give constitutional support to the Abyei Protocol.[72]

## 3. ABC Terms of Reference and Rules of Procedure

120. The Parties met in Nairobi between March 10–12, 2005 to draw up the Terms of Reference, which documented a "joint understanding [of] all the issues" by the Parties.[73] The Terms of Reference contain the Parties understanding of the "Mandate," the "Structure" of the ABC, the "Functioning of the ABC," the "Program of work" and "Funding."

121. The Rules of Procedure were drawn up by the ABC Experts[74] and approved by the Parties on April 11, 2005. The Rules of Procedure set forth, among other matters, the schedule to be followed by the ABC Experts and the method to be followed for public meetings and field visits. The Rules of Procedure also provided that the ABC Experts would "examine and evaluate all the material they have gathered and will prepare the final report."[75] They also state that "[the] Commission will endeavour to reach a decision by consensus,"

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[69] CPA, Chapeau, p. xii., para. 1.

[70] CPA, Preamble, p. xi., para. 6.

[71] *See* Interim National Constitution, Preamble.

[72] Article 183(1) of the Interim National Constitution provides:

> Without prejudice to any of the provisions of this Constitution and the Comprehensive Peace Agreement, the Protocol on the Resolution of the Conflict in Abyei Area shall apply with respect to Abyei Area.

[73] *See* Terms of Reference, Preamble.

[74] *See* Abyei Appendix, para. 4.

[75] Rules of Procedure, para. 13.

but if "an agreed position by the two sides is not achieved, the [ABC Experts] will have the final say."[76]

## 4. ABC Experts' Report

122. The ABC Experts officially presented their report ("ABC Experts' Report" or "Report") to the Sudanese Presidency on July 14, 2005. The ABC Experts' Report was signed by the ABC Experts, namely, Ambassador Donald Petterson (as Chair), Professor Kassahun Berhanu, Professor Shadrack B.O. Gutto, Dr. Douglas H. Johnson and Professor Godfrey Muriuki.

123. The ABC Experts' Report notes that the ABC Experts listened to presentations from the GoS and the SPLM/A and heard testimony from "Sudanese in Abyei Town, areas to the northeast and northwest of there, Agok and Muglad" as well as to "a group of Ngok Dinka living in Khartoum and a group of Twich Dinka residing there."[77] The formal testimonies of 104 persons (47 Dinka and 57 Misseriya) were given under oath in public meetings. Witnesses and a large non-witness audience were reportedly able to listen to the testimony as they were being given.[78]

124. In the Preface to the ABC Experts' Report, the ABC Experts explained their process of research:

> No map exists showing the area inhabited by the Ngok Dinka in 1905. Nor is there sufficient documentation produced in that year by the Anglo-Egyptian Condominium government authorities that adequately spell out the administrative situation that existed in that area at that time. Therefore, it was necessary for the [ABC Experts] to avail themselves of relevant historical material produced both before and after 1905, as well as during that year, to determine as accurately as possible the area of the nine Ngok Dinka chiefdoms as it was in 1905.[79]

125. Further noting that the GoS and SPLM/A presentations and oral testimony "largely contradicted each other and did not conclusively prove either side's position," the ABC Experts sought to obtain as much evidence as they could from archives and sources in Sudan, the United Kingdom, South Africa and Ethiopia, concentrating on records contemporaneous with or referring to the period of the Anglo-Egyptian Condominium (*i.e.* 1899–1956).[80] Thus, the ABC Experts reviewed historic documents at the Sudan National Records Office, maps at the Sudan National Service Authority, and additional documents at the University of Khartoum library.[81] Three of the ABC Experts

[76] Rules of Procedure, para. 14.

[77] ABC Experts' Report, Part 1, pp. 3–4.

[78] ABC Experts' Report, Part 1, p. 9.

[79] ABC Experts' Report, Part 1, p. 4.

[80] ABC Experts' Report, Part 1, p. 11.

[81] ABC Experts' Report, Part 1, p. 4.

traveled to England to examine additional maps and documents at the Rhodes House Library and the Bodleian Library at Oxford University, as well as at the Sudan Archive of the University of Durham. They also met former District Commissioner Michael Tibbs in Sussex and anthropologist Ian Cunnison in Hull.[82] The two other ABC Experts undertook additional research in Addis Ababa and Pretoria.[83]

126. The ABC Experts state that they analyzed the material applying "the generally accepted historical method of comparing oral with written material," as well as "established legal principles in determining land rights in former British-administered African territories, including the Sudan."[84]

127. In conducting their research, the ABC Experts were mindful of what the official United States Government proponents of the Formula for the "Abyei Area" stated: "[I]t was clearly our view when we submitted our proposal that the area transferred in 1905 was roughly equivalent to the area of Abyei that was demarcated in later [years]."[85] They maintain that "[t]his position was, according to the American participants, conveyed to the two sides at the Naivasha talks."[86]

128. The GoS and the SPLM/A representatives made final presentations to the ABC on June 16-17, 2005. The ABC Experts' Report states:

> The Government of Sudan's position is that the only area transferred from Bahr el-Ghazal to Kordofan in 1905 was a strip of land south of the Bahr el-Arab/Kir; that the Ngok Dinka lived south of the Bahr el-Arab/Kir prior to 1905, and migrated to the territory north of the river only after coming under the direct administration of Kordofan. Therefore the Abyei Area should be defined as lying south of the Bahr el-Arab/Kir, and excluding all territory to the north of the river, including Abyei Town itself. This is opposed by the SPLM/A position which is that the Ngok Dinka have established historical claims to an area extending from the existing Kordofan/Bahr el-Ghazal boundary to north of the Ragaba ez-Zarga/Ngol, and that the boundary should run in a straight line along latitude 10°35'N.[87]

129. The ABC Experts completed their deliberations on June 20, 2005.[88] The ABC Experts' Report was presented to the Sudanese Presidency on July 14, 2005.

130. The ABC Experts made the following determinations in the "Conclusions" section of the ABC Experts' Report:

- In 1905 there was no clearly demarcated boundary of the area transferred from Bahr el-Ghazal to Kordofan;

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[82] *Ibid.*

[83] ABC Experts' Report, Part 1, p. 5.

[84] ABC Experts' Report, Part 1, p. 12; *see also* ABC Experts' Report, Appendix 2.

[85] ABC Experts' Report, Part 1, p. 4.

[86] *Ibid.*

[87] ABC Experts' Report, Part 1, p. 11.

[88] ABC Experts' Report, Part 1, p. 5.

- The GOS belief that the area of the nine Ngok Dinka chiefdoms placed under the authority of Kordofan in 1905 lay entirely south of the Bahr el-Arab is mistaken. It is based largely on a report by a British official who incorrectly concluded that he had reached the Bahr el-Arab when in fact he had only come to the Ragaba ez-Zarga/Ngol. For several years afterwards maps, some of which were cited by the GOS in its presentation to the ABC Experts, manifested this error;
- The Ngok claim that their boundary with the Misseriya should run from Lake Keilak to Muglad has no foundation;
- The historical record and environmental factors refute the Misseriya contention that their territory extended well to the south of the Bahr el-Arab, an area to which they never made a formal claim during the Condominium period;
- Although the Misseriya have clear "secondary" (seasonal) grazing rights to specific locations north and south of Abyei Town, their allegation that they have 'dominant' (permanent) rights to these places is not supported by documentary or material evidence;
- There is compelling evidence to support the Ngok claims to having dominant rights to areas along the Bahr el-Arab and Ragaba ez-Zarga and that these are long-standing claims that predated 1905;
- There is no substance to the Misseriya claim that because the Abyei Area was included in 'Dar Messeria' District, it belongs to the Misseriya people. The Ngok and the Humr were put under the authority of the same governor solely for reasons of administrative expediency in 1905. After that action, the Ngok retained their identity and control over their local affairs and maintained a separate court system and hierarchy of chiefs;
- The administrative record of the Condominium period and testimony of persons familiar with the area attest to the continuity of Ngok Dinka settlements in, and use of, places north of the Bahr el-Arab between 1905 and 1965, as claimed by the Ngok and the SPLM/A;
- The ABC Experts considered the presentation by the SPLM/A that their dominant claim lies at latitude 10°35'N, but found the evidence in support of this to be inconclusive; and
- The border zone between the Ngok and Misseriya falls in the middle of the Goz, roughly between latitudes 10°10'N and 10°35'N. [89]

131. The "Final and Binding Decision" of the ABC Experts' Report is as follows:

1) The Ngok have a legitimate dominant claim to the territory from the Kordofan-Bahr el-Ghazal boundary north to latitude 10°10' N, stretching from the boundary with Darfur to the boundary with Upper Nile, as they were in 1956;

[89] ABC Experts' Report, Part 1, pp. 20–21.

2) North of latitude 10°10'N, through the Goz up to and including Tebeldia (north of latitude 10°35'N) the Ngok and Misseriya share isolated occupation and use rights, dating from at least the Condominium period. This gave rise to the shared secondary rights for both the Ngok and Misseriya;

3) The two Parties lay equal claim to the shared area and accordingly it is reasonable and equitable to divide the Goz between them and locate the northern boundary in a straight line at approximately latitude 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 the Kordofan-Upper Nile boundary at approximately longitude 29°32' 15" E northwards until it meets latitude 10°22'30"N;

4) The northern and eastern boundaries will be identified and demarcated by a survey team comprising three professional surveyors: one nominated by the National Government of the Sudan, one nominated by the Government of the Southern Sudan, and one international surveyor nominated by IGAD. The survey team will be assisted by one representative each from the Ngok and Misseriya, and two representatives of the Presidency. The Presidency shall send the nominations for this team to IGAD for final approval by the international ABC Experts;

5) The Ngok and Misseriya shall retain their established secondary rights to the use of land north and south of this boundary. [90]

132. A map of the Abyei Area, as delimited by the ABC Experts,[91] is reprinted below:*

## 5. Abyei Road Map and Arbitration Agreement

133. Upon the delivery of the ABC Experts' Report, disagreements arose between the Parties as to whether the ABC Experts exceeded their mandate.

134. On June 8, 2008, the Parties signed "The Road Map for Return of IDPs and Implementation of Abyei Protocol" (the "Abyei Road Map") in Khartoum. Through the Abyei Road Map, the Parties committed, among other matters, to refer this dispute to arbitration, and to "abide by and implement the award of the arbitration tribunal."[92] They also agreed, without prejudice the outcome of the arbitration, on interim boundaries for the Abyei Area for administrative purposes.[93]

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[90] ABC Experts' Report, Part 1, pp. 21–22.

[91] ABC Experts' Report, Part I, Map 1.

* Secretariat note: Map 1 is located in the rear pocket of this volume.

[92] Abyei Road Map, Section 4.

[93] *See* Abyei Road Map, Section 3 and SPLM/A Map Atlas vol. 1, Map 58 (Abyei Area: Area Calculations).

135. The Abyei Road Map's agreement to arbitrate was implemented shortly thereafter through the Arbitration Agreement, which was signed on July 7, 2008.

## Chapter III. Summary of the Parties' arguments

136. Consistent with Article 2 of the Arbitration Agreement and the Parties' presentations at the oral pleadings, this chapter is organized into two sections: (1) the Parties' arguments on whether the ABC Experts exceeded their mandate, and (2) the Parties' arguments concerning the delimitation of the Abyei Area.

### A. Excess of mandate

137. This section summarizes the Parties' arguments relating to whether the ABC Experts had "exceeded their mandate." As the GoS claims such excess of mandate and the SPLM/A's arguments on this matter are mostly cast in response to the GoS's contentions, the summary will be primarily organized using the framework contained in the GoS Memorial.[94]

#### 1. "Excess of Mandate" conceptions

138. Article 2(a) of the Arbitration Agreement provides that the Tribunal is to determine, at the outset:

> [w]hether or not the ABC Experts had, on the basis of the agreement of the Parties as per the CPA, *exceeded their mandate* which is "to define (*i.e.,* delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905" as stated in the Abyei Protocol, and reiterated in the Abyei Appendix and the ABC Terms of Reference and Rules of Procedure. (emphasis added)

139. There is disagreement between the Parties on the content and meaning of "excess of mandate" within the context of these proceedings. The GoS contends that the phrase should be interpreted in its ordinary meaning, given that the Parties did not agree on any special meaning.[95] The GoS would liken the phrase to the concepts of "excess of jurisdiction," decisions taken *ultra vires* or

[94] GoS Memorial, paras. 192–276. While this summary is arranged in accordance with arguments as presented in the GoS Memorial, the GoS later re-classified its arguments, and as per the Rejoinder, the headline arguments for Excess of Mandate were (a) Gross Breaches of Applicable Procedural Rules and (b) Misinterpretation and Misapplication of the Substantial Mandate. The GoS explains that it "deemed it clearer to group together [the] grounds in a more systematic way in [its] counter-memorial and in [its] rejoinder, if only not to have to repeat the same explanations when they apply to several grounds." GoS Oral Pleadings, April 18, 2009, Transcr. 70/16–71/02.

[95] GoS Oral Pleadings, April 18, 2009, Transcr. 73/21–25.

decisions involving an excess of power (*excès de pouvoir).*[96] The GoS maintains that *excès de pouvoir* has always been interpreted as including all serious misuses of jurisdiction as well as gross violations of procedural rules.[97] The GoS thus asserts that "if the ABC Experts exceeded their mandate *in any respect,* this is sufficient to trigger Article 2(c) of the Arbitration Agreement."[98]

140. The SPLM/A, on the other hand, contends that an "excess of mandate" is a specific, identifiable type of defect,[99] which is already particularly defined by Article 2(a) of the Arbitration Agreement by reference to that category of disputes which the Parties submitted to the ABC (*"their mandate WHICH IS . . ."*).[100] Taking this definition into consideration, an "excess of mandate" would be narrower than the GoS's conception (which includes an *excès de pouvoir)*[101] and would be confined to a decision *ultra petita*[102]*, i.e.*, a decision that went beyond the ambit of the issues argued by the parties. The SPLM/A also believes that this reading would be in line with the more contemporary understanding of "excess of mandate."[103]

## 2. Procedural excess of mandate arguments

### *(a) Preliminary argument: procedural excesses as a basis for claiming excess of mandate*

#### (i) GoS arguments

141. The GoS places emphasis on the fact that the Parties took care in drafting Terms of Reference according to which the ABC Experts were obliged to carry out their mandate. The ABC Experts also drew up Rules of Procedure to guide their proceedings. If the ABC Experts materially deviated from the Terms of Reference and Rules of Procedure in carrying out the task conferred on them, the GoS maintains that this would be inconsistent with the conditions laid down for the exercise of their mandate.[104] The specific inclusion by the Parties of the Terms of Reference and Rules of Procedure in Article 2(a) of the Arbitration Agreement[105] is said to be evidence of the importance the Par-

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[96] GoS Memorial, para. 135.

[97] GoS Oral Pleadings, April 18, 2009, Transcr. 74/10–13.

[98] GoS Memorial, para. 95.

[99] SPLM/A Counter-Memorial, para. 165.

[100] SPLM/A Counter-Memorial, para. 100.

[101] SPLM/A Oral Pleadings, April 19, 2009, Transcr. 43/10.

[102] SPLM/A Oral Pleadings, April 19, 2009, Transcr. 37/12–20.

[103] SPLM/A Oral Pleadings, April 19, 2009, Transcr. 43/10–44/16.

[104] GoS Rejoinder, para. 100.

[105] Article 2(a) of the Arbitration Agreement provides:

> . . .
> The issues that shall be determined by the *Tribunal* are the following:

ties placed on these instruments, and confirms their intention to incorporate any serious procedural violation within the Tribunal's mandate.[106]

142. The GoS also contends that the ABC Experts were not endowed with broad procedural discretion. Citing Section 5 of the Abyei Appendix,[107] the GoS maintains that the Parties premised the final and binding character of the ABC Experts' Report on the proper application of the Rules of Procedure.[108] The GoS also emphasizes that the procedural rules apply to the ABC as a whole, not to the ABC Experts in isolation. The fact that the essential tasks were assigned to the Commission as a whole and not to the ABC Experts alone was a guarantee of transparency and of equality in the Parties' treatment. Insofar as the ABC Experts worked separately without notice to the Parties, these guarantees have been ignored and a fundamental rule of procedure has been violated.[109] Such serious procedural irregularities are grounds for an excess of mandate, as recognized by numerous international conventions and instruments.[110]

### (ii) SPLM/A arguments

143. The SPLM/A rejects any reading of Article 2(a) of the Arbitration Agreement[111] that would permit the ABC Experts' Report to be challenged based on purported violations of "procedural conditions" or procedural rights, as the scope of the Tribunal's review pursuant to Article 2(a) is narrowly defined;[112] the "mandate" of the ABC, which the Tribunal must analyze for purported excess, is "to define (*i.e.,* delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905." Further, the formulation makes no reference to violations of the ABC Rules of Procedure or any other arbitration procedures and reading these into the provision would be impermissible.[113]

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> Whether or not the ABC Experts had, on the basis of the agreement of the Parties as per the CPA, exceeded their mandate which is "to define (*i.e.,* delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905" as stated in the Abyei Protocol, and reiterated in the Abyei Appendix and the ABC Terms of Reference and Rules of Procedure.
>
> . . .

[106] GoS Oral Pleadings, April 18, 2009, Transcr. 87/07–18.

[107] Section 5 of the Abyei Appendix provides :

> The ABC shall present its final report to the Presidency before the end of the Pre-Interim Period. The report of the [ABC Experts], arrived at as prescribed in the ABC rules of procedure, shall be final and binding on the Parties.

[108] GoS Rejoinder, para. 104.

[109] GoS Rejoinder, para. 106.

[110] *See* GoS Memorial, paras. 180–84, *citing* the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article V(1)(d); ICSID Arbitration Rules, Article 50(1)(c)(iii); UNCITRAL Model Law, Article 36(1)(a)(iv).

[111] *Supra* note 105.

[112] *See* SPLM/A Counter-Memorial, paras. 162–71.

[113] SPLM/A Counter-Memorial, paras. 167–68.

144. Moreover, the SPLM/A asserts that the ABC was a *sui generis* body with a unique set of procedures intended to give the ABC Experts the freedom to conduct the proceedings as they thought fit;[114] there were very few mandatory procedural restrictions on the ABC Experts.[115] The ABC Experts were recognized by both Parties as experts in history, geography, culture, and African law and were called upon to apply the procedures of "scientific analysis and research."[116] They were not international arbitration practitioners and were not subject to rules of procedural conduct based on arbitral principles.[117]

145. Citing a number of authorities, the SPLM/A also contends that a dispute regarding "jurisdiction" or excess of mandate does not extend to procedural complaints.[118] The SPLM/A further emphasizes that a party seeking to invalidate an arbitral award or other adjudicative decision on procedural grounds must show serious prejudice, such that the Tribunal would have decided otherwise had the Tribunal not made the particular mistake.[119] It contends that the GoS has not satisfied its burden of proof in this respect.[120]

### *(b) The ABC Experts allegedly took evidence from Ngok Dinka informants without procedural safeguards and without informing the GoS*

#### (i) GoS arguments

146. The GoS maintains that the ABC Experts arranged three unscheduled meetings with Ngok Dinka informants at the Hilton Hotel, Khartoum without informing it.[121] Because the Terms of Reference were said to be unu-

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[114] SPLM/A Counter-Memorial, para. 234.

[115] These were listed in the SPLM/A Counter-Memorial, para. 239–40 ("The foregoing provisions of the Parties' agreements imposed very few, and very limited, constraints on the ABC Experts' procedural discretion. In particular, the Parties' procedural agreements provide only for: (a) the constitution of a tribunal of ABC Experts with specified expertise; (b) a time limit for submission of the ABC's final report; (c) presentations by the Parties of their respective positions; (d) hearing representatives of the people of the Abyei Area; and (e) consultation of the British Archives and other relevant sources wherever available.")

[116] SPLM/A Counter-Memorial, paras. 236–37.

[117] SPLM/A Counter-Memorial, para. 234.

[118] SPLM/A Rejoinder, para. 146, citing *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal* (*The Peter Pázmány University* v. *Czechoslovakia)* Ser. A/B 61, 208,222 (P.C.I.J 1933), SPLM/A Exhibit-LE 24/6. Nonetheless, the SPLM/A states in its Counter-Memorial that for an allowable procedural excess of mandate to have occurred, there must be a serious departure from a fundamental rule of procedure. *See* SPLM/A Counter-Memorial, paras. 287–88, citing ICSID Convention, Article 52(1)(d).

[119] SPLM/A Oral Pleadings, April 19, 2009 Transcr. 86/02–11

[120] SPLM/A Counter-Memorial, paras. 309–10.

[121] GoS Memorial, paras. 71–79.

sually detailed and specific with respect to the ABC Experts' conduct in relation to oral testimony,[122] and carefully distinguished between acts of the ABC as a whole and that of the ABC Experts, those terms must be taken seriously.[123]

147. The GoS points out that a meeting could have been arranged in Khartoum either with or without the Parties (*i.e.,* by the ABC Experts alone), provided that the Parties consented and appropriate safeguards were instituted. However, instead of approaching the Parties prior to holding meetings in Khartoum, the ABC Experts allegedly took it upon themselves to convene meetings without the knowledge of the GoS. On April 21, 2005, the ABC Experts had a "secret meeting" with Ngok Dinka informants at the Hilton Hotel, Khartoum. This meeting was followed by two additional unscheduled meetings on May 6 and 8, 2005.[124] At these meetings, the GoS alleges that the ABC Experts obtained maps and other documents that were never shown to the Parties, even though some of these materials were used in the preparation of the ABC Experts' Report.[125]

148. The GoS also claimed that on April 25, 2005, the ABC Experts issued a note to the Commission detailing the testimony they obtained during their field visits and informed the Commission of their decision to stop collecting oral testimony and to resort to archival research. The GoS found it disturbing that the note did not mention the Hilton meeting on April 21, 2005, nor did their alleged decision deter them from scheduling the subsequent May 6 and May 8 meetings.[126]

149. By arranging interviews without the knowledge of the Parties, the GoS argues that the ABC Experts not only deliberately circumvented the

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[122] Section 3 of the Terms of Reference provides in part:

> Functioning of the ABC
>
> . . .
>
> 3.2 The ABC shall thereafter travel to the Sudan to listen to the representatives of the people of Abyei Area and the neighbors as indicated hereunto:
>
> A. The ABC shall conduct one meeting in Abyei Town with 54 representatives of the Nine Ngok Dinka Chiefdoms (five from each plus nine chiefs)
>
> B. One meeting in Muglad Town with 45 Messiriya representatives (25 from Muglad sub tribes, 15 from Fulla and five from Lagawa, however the ABC shall make field visits to (Dambaloya/Dak Jur), (Pawol/Fawol), (Abugazala/Mabec) etc.
>
> C. One meeting to be held in Agok with 30 representatives of the neighbors of Abyei to the South (Twich, Goral West, Aweil East, Biemnhum and Panaraou), which shall be represented by six each.

[123] GoS Memorial, para. 199.

[124] These meetings are mentioned in Appendix 4.2 of the ABC Experts' Report, but not in their summary of their work. GoS Memorial, para. 201.

[125] GoS Memorial, para. 73.

[126] GoS Memorial, paras. 74–76.

agreed work program, they also demonstrated a propensity to side with the SPLM/A and thus deprived the GoS of the right to a fair procedure. This is especially so since no information of these meetings was provided to the GoS until the final presentation of the ABC Experts' Report. Because a serious departure from a fundamental rule of procedure constitutes, in the view of the GoS, a ground for finding an excess of mandate, the taking of evidence by the ABC Experts without procedural safeguards and without informing the GoS constitutes an excess of mandate.[127]

### (ii) SPLM/A arguments

150. The SPLM/A asserts that the agreed framework regarding the ABC proceedings imposed no prohibition on meetings between the ABC Experts and additional members of the public.[128] On the contrary, Section 7 of the ABC Rules of Procedure is said to expressly ensure that the ABC members – and not just the entire Commission – would be able to conduct such meetings if they chose[129] without any prior notice requirement.[130] The Parties' express contemplation was to allow the ABC Experts to conduct their own independent investigations, and to consult "other relevant sources,"[131] rather than being dependent on the Parties to present testimony or information to them.[132] The SPLM/A also maintains that, in fact, the GoS was informed about the ABC Experts' meetings with both Ngok Dinka and Twic Dinka members[133] in Khartoum, that no objections were raised,[134] and that this objection should be thus considered waived.[135]

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[127] GoS Memorial, para. 208.

[128] SPLM/A Counter-Memorial, para. 315.

[129] Section 7 of the Rules of Procedure provides :

> As occasions warrant, Commission members should have free access to members of the public other than those in the official delegations at the locations to be visited. The Commission will accept written submissions.

[130] SPLM/A Counter-Memorial, para. 316.

[131] The SPLM/A relies on Section 4 of Abyei Appendix which provides:

> In determining their findings, the [ABC Experts] in the Commission shall 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 specific analysis and research. The [ABC Experts] shall also determine the rules of procedure of the ABC.

[132] SPLM/A Counter-Memorial, para. 317.

[133] The SPLM/A further claims that the meeting held on May 8, 2005 was with the Twic Dinka, and not the Ngok Dinka. *See* SPLM/A Oral Pleadings, April 19, 2009, Transcr. 122/24–123/02.

[134] SPLM/A Counter-Memorial, para. 342.

[135] SPLM/A Counter-Memorial, para. 353.

151. Even assuming that a violation of procedural rules did occur, the SPLM/A maintains that any such breach does not rise to the level of a "serious departure from a fundamental rule of procedure."[136] In their view, any breach of procedure needs to be considered within the context of the ABC Experts' broad, independent investigative authority and the ABC Experts' wide procedural discretion, and the deliberately informal and non-technical nature of the ABC proceedings.[137] At most, any violation would have been an unintentional omission inconsistent with implied provisions of the ABC Experts' own procedural rules, which they were free to alter or amend.[138]

152. Finally, the SPLM/A believes that these meetings caused no prejudice to the GoS because they did not alter the outcome of the ABC Experts' decision. Quoting the GoS's acknowledgment that procedural breaches must be material, both in themselves and as to the result reached,[139] the SPLM/A maintains that the person who arranged the meeting and the witnesses interviewed in Khartoum were likely to be supporters of the GoS's position on the Abyei Area or to testify on Dinka matters that had little to do with the question at hand.[140] Moreover, the only map that was recorded as being given to the ABC Experts during the meetings (described as a copy of a sketch map) was not relied upon in the final decision.[141] Finally, the SPLM/A sought to clarify that the April 25, 2005 note on testimony issued by the ABC Experts related to field visits between April 14 and April 20, 2005, before the contentious meetings took place.[142]

### *(c) The ABC Experts allegedly unilaterally sought and relied on the Millington e-mail, without notice to the GoS, to establish their interpretation of the Formula*

#### (i) GoS arguments

153. The GoS alleges that, to establish their interpretation of the Formula, the ABC Experts unilaterally sought and then relied on an e-mail from an official at the Embassy of the United States of America in Nairobi, Mr. Jeffrey Millington. The response in question from Mr. Millington, which purportedly set out the US Government's understanding of the Formula, was:

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[136] SPLM/A Counter-Memorial, para. 330.

[137] SPLM/A Counter-Memorial, para. 332.

[138] SPLM/A Counter-Memorial, para. 333.

[139] SPLM/A Counter-Memorial, para. 364, citing GoS Memorial, para. 193.

[140] *See* SPLM/A Counter-Memorial, paras. 368–73.

[141] SPLM/A Counter-Memorial, para. 377.

[142] SPLM/A Oral Pleadings, April 20, 2009, Transcr. 64/16-65/05.

> It was clearly our view when we submitted our proposal [that] the area transferred in 1905 was roughly equivalent to the area of Abyei that was demarcated in later years.[143]

154. The GoS argues that such unilateral actions involved a serious departure from a fundamental rule of procedure in three distinct ways:

> (*a*) The ABC Experts were not authorized to consult the US Government nor any other third party.[144] Mr. Millington's e-mail allegedly had nothing to do with the "independent investigations and scientific research" that the ABC Experts were supposed to conduct.[145]
>
> (*b*) The Parties were given no notice of the request or the response and thus had no opportunity to comment. This was, in the GoS's view, a clear failure of due process and a patent breach of Section 14 of the Rules of Procedure.[146]
>
> (*c*) The ABC Experts failed to see that Mr. Millington's response raised more questions than it resolved. The GoS sees no relation between "the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905" and "the area of Abyei that was demarcated in later years." [147]

155. The GoS contends that Mr. Millington's e-mail affected the outcome of the ABC decision, as it strengthened the ABC Experts' manifestly wrong interpretation of the substance of their mandate: in the ABC Experts' Report, mention of the disputed e-mail immediately succeeds the interpretation of the Formula by the ABC Experts, from which the word "transferred" had been carefully deleted.[148]

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[143] ABC Experts' Report, Part I, p. 4.

[144] GoS Memorial, para. 210.

[145] GoS Rejoinder, para. 127.

[146] GoS Memorial, para. 211. Section 14 of the Rules of Procedure provides:

> The Commission will endeavour to reach a decision by consensus. If, however, an agreed position by the two sides is not achieved, the [ABC Experts] will have the final say.

[147] GoS Memorial, para. 213. The GoS observes that no such later demarcation ever took place.

[148] GoS Rejoinder, para. 129. The GoS refers to a statement in the Preface of the ABC Experts' Report which provides in relevant part:

> . . . Therefore, it was necessary for the [ABC Experts] to avail themselves of relevant historical material produced before and after 1905, as well as during that year, to determine as accurately as possible the area of the nine Ngok Dinka chiefdoms as it was in 1905. In doing this the [ABC Experts] are mindful that the drafters of the American proposal which was incorporated into the Abyei Protocol have stated: "It was clearly our view when we submitted our proposal that the area transferred in 1905 was roughly equivalent to the area of Abyei that was demarcated in later [years]. . . ."

**(ii) SPLM/A arguments**

156. In the SPLM/A's view, the Parties' procedural agreements and the Rules of Procedure granted the ABC Experts broad procedural discretion and investigatory powers, including the power independently to conduct such research as they deemed appropriate, without imposing any prohibitions against interviews with third parties such as Mr. Millington.[149] In fact, there are other third parties who assisted the ABC Experts and who are acknowledged at the beginning of the ABC Experts' Report, but their participation was not objected to by the GoS in any way.[150]

157. Further, even if one assumed that the Millington e-mail was inconsistent with the Parties' procedural agreements, the SPLM/A argues that this breach was not a serious violation of a fundamental procedural guarantee. Any such violation would at most have been an inadvertent misunderstanding of the limits of the ABC Experts' investigative authority, no different in character than contacts with other third parties against which the GoS has not protested.[151] In any event, the SPLM/A believes that the GoS does not identify any procedural injury arising from the Millington e-mail, much less the sort of grave prejudice required to set aside an adjudicative decision. The Millington e-mail, in SPLM/A's view, was a single communication, barely a line long, which, at most, did nothing but conform to the interpretation that the ABC Experts had previously reached.[152]

*(d) The ABC Experts allegedly failed to act through the Commission, and to seek consensus, in reaching their decision.*

**(i) GoS arguments**

158. The GoS claims that Section 14 of the Rules of Procedure[153] was violated when the ABC Experts did not endeavor to reach a decision by consensus. Instead, the ABC Experts purportedly made no attempt to reach a consensus among the members of the ABC as a whole.[154] While the ABC Experts were to prepare the ABC Experts' Report and had the "final say," the ABC Experts' Report was to be the report of the entire Commission and not just the ABC Experts.[155] In the GoS's view, the proper procedure set out in the Parties'

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[149] *See* SPLM/A Counter-Memorial, paras. 394–403.

[150] SPLM/A Counter-Memorial, para. 398.

[151] *See* SPLM/A Counter-Memorial, paras. 404–407.

[152] *See* SPLM/A Counter-Memorial, paras. 408–418.

[153] Section 14 of the Rules of Procedure, text *supra* at note 146.

[154] GoS Counter-Memorial, para. 198.

[155] Section 5.3 of the Abyei Protocol states that:

> [t]he Abyei Boundaries Commission (ABC) shall present its final report to the Presidency as soon as it is ready. Upon presentation of the final report, the Presi-

procedural agreements was first to submit the (draft) Report to the ABC, after which the ABC as a whole would present the Report to the Presidency.

159. Further, the GoS argues that is was neither informed nor consulted on the final outcome of the ABC Experts' Report despite the clear language and intent of the Abyei Protocol and the Rules of Procedure. No meeting was ever called to try to reconcile the views of the Parties. By excluding other ABC members from the decision-making process and by presenting the ABC Experts' Report to the Presidency without any consultation, the GoS asserts that the ABC Experts changed the very spirit of the special mechanism of dispute resolution that the ABC was supposed to embody.[156] The GoS also emphasizes that it had consistently expressed its objection to this way of proceeding; in fact, following the presentation of the Report to the Presidency, the head of the GoS delegation immediately made clear its protest against the manifest violation of the ABC's mandate by the ABC Experts. Hence, the GoS argues that no waiver can be implied from their conduct.[157]

160. In response to the SPLM/A's allegations that the GoS itself thwarted attempts at achieving a consensus by not agreeing to compromise during the ABC proceedings, the GoS contends such refusal to "compromise" did not entail a principled objection to achieving a "consensus," to which it was not opposed. According to the GoS, refusing a negotiated political "compromise" is clearly different from achieving a "consensus" on reasonable scientific findings.[158]

### (ii) SPLM/A arguments

161. The SPLM/A maintains that the Parties' procedural agreements specifically provided that the ABC Experts were to prepare the final ABC Experts' Report, without restricting the ABC Experts' discretion as to when and how they might seek to achieve consensus. In its view, Section 14 of the Rules of Procedure merely contemplates that the ABC Experts shall make reasonable efforts to that effect ("will endeavor"), and does not prescribe any particular mandatory procedural steps. The SPLM/A claims that the Rules of Procedure left no room, as a practical matter, for the various procedural steps that the GoS suggests should have occurred.[159]

162. The SPLM/A also maintains that the Parties repeatedly discussed the presentation of the ABC Experts' Report to the Presidency during the weeks before that presentation occurred. Throughout those discussions, the GoS purportedly did not object or state that the course being adopted by the ABC Experts was improper (or that the GoS preferred a different approach).

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dency shall take necessary action to put the special administrative status of Abyei Area into immediate effect.

156 GoS Rejoinder, para. 134.

157 GoS Rejoinder, para. 150.

158 GoS Rejoinder, paras. 144–145.

159 SPLM/A Counter-Memorial, paras. 423–438.

On the contrary, the SPLM/A argues that the GoS made it clear that it expected no further efforts to achieve a consensus and that such efforts would have been futile.[160] Thus, the SPLM/A believes that the GoS waived any possible objection to the ABC Experts' approach towards achieving consensus and manner of presenting the final ABC Experts' Report to the Presidency, as it had not raised any objections at any point when it could have done so.[161] Moreover, the SPLM/A argues that any distinction made by the GoS between "compromise" and "consensus" is "empty and desperate" semantics.[162]

163. Assuming however that the ABC Experts' efforts to achieve a consensus (or any lack of such efforts) was inconsistent with the Parties' procedural agreements, any failure was not, in the SPLM/A's view, a "serious violation of a fundamental procedural guarantee" that would allow the ABC Experts' Report to be set aside. In its reading of Section 14 of the Rules of Procedure, only reasonable efforts by the ABC Experts to achieve consensus were contemplated; further, the requirement in Section 14 to endeavor to reach consensus was prescribed by the ABC Experts themselves. Any violation of such a provision would thus at most be an inadvertent misunderstanding of the ABC Experts' own Rules of Procedure.[163]

## 3. Substantive excess of mandate arguments

### *(a) Introduction*

#### (i) GoS argument

164. Broadly, the GoS submits that the ABC Experts misinterpreted and misapplied their mandate by (i) using manifestly inadmissible justifications,[164] (ii) deciding *ultra petita,* and (iii) deciding *infra petita*.[165]

165. Specifically, the GoS argues that an excess of mandate under Article 2(a) of the Arbitration Agreement[166] occurred when the ABC Experts acted *ultra petita,* by deciding on matters outside the scope of the dispute submitted by the Parties.[167] The ABC Experts were also said to have substantively

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[160] *See* SPLM/A Counter-Memorial, paras. 439–54.

[161] *See* SPLM/A Counter-Memorial, paras. 472–75.

[162] SPLM/A Oral Pleadings, April 19, 2005, Transcr. 152/11–17.

[163] *See* SPLM/A Counter-Memorial, paras. 455–71.

[164] While this ground ("using manifestly inadmissible justifications") appears in the GoS Rejoinder, it was later merged with discussions on decisions *ultra petita.* See GoS Oral Pleadings, April 18, 2009, Transcr. 136/25 *et seq.* This will be discussed in the next Section 4 'Violation of Mandatory Criteria' in keeping with the original structure of the GoS's Arguments.

[165] *See* GoS Rejoinder, paras. 151–152.

[166] *See supra* note 105.

[167] *See* GoS Oral Pleadings, April 18, 2009, Transcr. 137/04–09.

exceeded their mandate when they decided *infra petita,* by not answering the questions asked to it by the Parties.[168] The GoS claims that the ABC Experts decided *ultra petita* by purporting to confer rights on the Ngok Dinka outside the Abyei Area and by limiting the Misseriya's traditional rights,[169] and they decided *infra petita* by: (i) refusing to decide the question asked, (ii) answering a different question than that asked, and (iii) ignoring the stipulated date of 1905.[170]

**(ii) SPLM/A arguments**

166. The SPLM/A does not agree with the GoS's claims that the ABC Experts acted *ultra petita* by purporting to confer rights on the Ngok Dinka outside the Abyei Area and by limiting the Misseriya's traditional rights. It asserts that the GoS's claim that the ABC Experts acted outside their mandate rests on implausible and distorted readings of the ABC Experts' Report; the SPLM/A claims that the ABC Experts were merely making explicit that they had delimited the Abyei Area's territorial boundaries without purporting to affect the retained rights of usage of the Ngok or the Messiriya.[171] Further, assuming *arguendo* that the ABC Experts did indeed confer or limit such rights, they still would not have exceeded their mandate.[172]

167. The SPLM/A further asserts that the grounds put forward by the GoS to support its *infra petita* claims are in truth substantive disagreements with the ABC Experts' interpretation of the Abyei Area definition in Section 1.1.2 of the Abyei Protocol.[173] As such, these are not grounds for challenging the ABC Experts' Report as an excess of mandate.[174] While consistently asserting that the ABC Experts' interpretation of the Abyei Area is correct, the SPLM/A contends that errors of law or interpretation do not give rise to an excess of mandate,[175] nor are factual and evidentiary disagreements with the ABC Experts' conclusions valid grounds for claiming an excess of mandate.[176] The SPLM/A also submits that the ABC Experts' interpretation of their mandate is entitled to a substantial presumption of correctness and accordingly could only be invalidated in a rare and exceptional case.[177] Moreover, even assuming that the ABC Experts incorrectly interpreted their definition of the

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[168] GoS Rejoinder, paras. 209, 211.

[169] *See* GoS Rejoinder, para. 195.

[170] *See* GoS Rejoinder, paras. 209–227.

[171] *See* SPLM/A Oral Pleadings, April 19, 2009, Transcr. 197/20–198/03.

[172] *See* SPLM/A Oral Pleadings, April 19, 2009, Transcr. 185/18–186/13.

[173] Section 1.1.2 of the Abyei Protocol provides: "The territory is defined as the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905."

[174] SPLM/A Counter-Memorial, para. 488.

[175] *See* SPLM/A Counter-Memorial, paras. 577–586.

[176] *See* SPLM/A Counter-Memorial, paras. 599–608.

[177] SPLM/A Counter-Memorial, para. 613.

Abyei Area, the SPLM/A argues that an excess of mandate can only be sustained where the adjudicatory authority purported to act beyond its authority in a glaring, manifest, or flagrant manner.[178]

### *(b) The ABC Experts allegedly refused to decide the question asked*

#### (i) GoS arguments

168. The premise of this GoS argument is its rejection of the ABC Experts' interpretation of the Formula: instead of interpreting the definition of the Abyei Area as referring to the area of the nine Ngok Dinka chieftains *transferred* to Kordofan in 1905 (which it calls the "territorial interpretation"), the GoS believes that the ABC Experts interpreted the Formula as referring only to the area the nine Ngok Dinka chieftains used and occupied in 1905 (which it calls the "tribal interpretation").[179]

169. The GoS contends that the mandate of the ABC Experts was clear, *i.e.,* to define an area transferred in 1905. However, the ABC Experts, according to the GoS, allegedly declined to answer the question they were charged with answering.[180] Instead, they "sought to determine as accurately as possible the area of the nine Ngok Dinka Chiefdoms as it was in 1905."[181] By deviating from the question of defining "the area of the nine Ngok Dinka Chiefdoms *transferred to Kordofan* in 1905" to that of "the area of the nine Ngok Dinka Chiefdoms as it was in 1905" – the transfer being left aside – the ABC Experts allegedly decided in excess of their mandate. Put differently, the ABC was tasked to find the "lines" constituting the boundary of the area transferred to Kordofan in 1905, and not to define the territory that the Ngok Dinka used and occupied in 1905.[182] The GoS submits that the question of an area *transferred* at a given date is different from that of an area *occupied* by particular peoples or chiefdoms at the same date. The ABC Experts thus effectively substituted their question for that agreed and asked by the Parties.[183]

#### (ii) SPLM/A arguments

170. In the SPLM/A's view, the ABC Experts clearly defined and demarcated the Abyei Area, doing so both with specific latitudinal and longitudinal coordinates, and by delimiting the same coordinates on Map 1 of the ABC Experts' Report, thus showing the Abyei Area boundaries. The SPLM/A asserts

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[178] SPLM/A Counter-Memorial, para. 622.

[179] *See* GoS Oral Pleadings, April 18, 2009, Transcr. 25/07–17. For a more expansive treatment of these respective interpretations of the mandate, *see infra* at para. 232 *et seq.*

[180] GoS Memorial, para. 230.

[181] GoS Rejoinder, para. 212, citing ABC Experts' Report, Part I, p. 4.

[182] GoS Rejoinder, para. 223.

[183] GoS Rejoinder, para. 215.

that this was precisely the task that the ABC Experts were mandated to perform.[184] Moreover, the SPLM/A submits that the definition of the Abyei Area as interpreted by the ABC Experts, (*i.e.,* by reference to the entire historic territory of the Ngok Dinka people in 1905), was consistent with the ABC Experts' explanations during the ABC's proceedings which had been received without objection by the Parties.[185] It further asserts that the ABC Experts' interpretation of the Abyei Area is the natural, grammatically correct meaning.[186]

171. The SPLM/A repeatedly states that the ABC Experts' interpretation of the Abyei Area definition was a matter of substantive interpretation of the Abyei Protocol, which cannot form the basis of an excess of mandate claim.[187] It submits that the real complaint of the GoS is with the substance of the answer, rather than a failure to provide an answer.[188]

### *(c) The ABC Experts allegedly answered a different question than that asked*

#### (i) GoS arguments

172. Instead of determining "the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905" (which the GoS posits to be a question of fact), the GoS submits that the ABC Experts reformulated the question in terms of dominant and secondary rights by the Ngok Dinka and the Misseriya over the territory.[189] For this reason, the GoS criticizes the ABC Experts' consideration of "territorial occupation and/or use rights" and "population dynamics" in determining the Abyei Area.[190]

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[184] SPLM/A Counter-Memorial, para. 504.

[185] SPLM/A Counter-Memorial, para. 497.

[186] SPLM/A Oral Pleadings, April 20, 2009, Transcr. 70/03–18.

[187] SPLM/A Rejoinder, para. 285.

[188] SPLM/A Counter-Memorial, para. 506.

[189] The GoS claims that this reformulation of the question is evident from the primary conclusion of the ABC Experts:

> 1) The Ngok have a legitimate dominant claim to the territory from the Kordofan-Bahr el-Ghazal boundary north to latitude 10°10'N, stretching from the boundary with Darfur to the boundary with the Upper Nile, as they were in 1956. (ABC Experts' Report, Part I, p. 21, SM Annex 81)

The GoS also claims that it is evident from the reasoning of the ABC Experts:

> It is therefore incumbent upon the [ABC Experts] to determine the nature of established land or territorial occupation and/or use rights by all the nine Ngok Dinka chiefdoms, with particular focus on those in that northernmost areas the formed the transferred territory. (ABC Experts' Report, Appendix 2, p. 21 (SM Annex 81)

*See* GoS Memorial, paras. 235–237.

[190] GoS Memorial, para. 241.

173. In the GoS's view, it was not necessary to determine the nature of the established land or territorial occupation and/or use rights by all nine Ngok Dinka chiefdoms in order to delimit and demarcate the boundaries of the transferred area.[191] The ABC Experts had at their disposal official documents that would have allowed them to determine the transferred area, but they allegedly set these aside in favor of the disputed methodology.[192]

174. Further, even assuming that the ABC Experts were entitled to consider land use rights, the failure of the ABC Experts to consider the land use rights of any of the Humr omodiyas is for the GoS an indication of the partisan nature of their inquiry.[193]

**(ii) SPLM/A arguments**

175. For the SPLM/A, this line of argumentation is simply the converse or mirror image of the previous argument that the ABC Experts refused to answer the question that was addressed to them.[194] It reiterates that the argument does not actually point to an excess of mandate, but rather to a substantive disagreement with the ABC Experts' reasoning and factual appreciation of the evidence.[195]

176. In the SPLM/A's view, the ABC Experts could hardly determine what the boundaries of the Abyei Area were without determining what was included in the 'area of the nine Ngok Dinka Chiefdoms.[196] Thus, in order for them to determine the boundaries of the Ngok Dinka that were transferred for administrative reasons in 1905, they needed to determine the nature of the established land or territorial occupation and/or use rights by all the nine Ngok Dinka chiefdoms.[197]

177. The SPLM/A also contests the assertion that the ABC Experts did not consider "any of the Humr omodiyas,"[198] arguing that the ABC Experts considered "with great care and diligence the land use of the Misseriya."[199]

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[191] GoS Rejoinder, para. 217.

[192] GoS Rejoinder, paras. 222–223.

[193] GoS Memorial, para. 238.

[194] SPLM/A Counter-Memorial, para. 516.

[195] SPLM/A Rejoinder, para. 278.

[196] SPLM/A Counter-Memorial, para. 518.

[197] SPLM/A Counter-Memorial, para. 522.

[198] SPLM/A Counter-Memorial, para. 534, referring to GoS Memorial, para. 238(d).

[199] SPLM/A Counter-Memorial, paras. 534–537, citing ABC Experts' Report, Part I, at pp. 10–20.

### *(d) The ABC Experts allegedly ignored the stipulated date of 1905*

#### (i) GoS arguments

178. The GoS maintains that the ABC Experts virtually ignored the agreed date for determining the transferred area (*i.e.,* 1905). In particular, they allegedly did not provide any information as to the position of tribes in 1905 which would warrant a line anywhere north of the Bahr el Arab, still less one as far north as latitude 10°22'30"N. Instead, they purportedly made reference to other wholly irrelevant dates, ignoring that their mandate was restricted to determining what area was transferred in 1905.[200] The GoS points out that despite repeated references to "1905" in the ABC Experts' Report, the critical date does not appear once in the "Final and Binding Decision."[201]

179. The GoS takes specific exception to the ABC Experts' reliance on the 1965 Peace Agreement between the Messiriya Humr and the Ngok Dinka.[202] The GoS notes that the 1965 agreement was superseded by the Abyei Agreement of 1966, and that the ABC Experts were not empowered to refer to the 1966 agreement at all "except as [it] may have shed light on the position in 1905." The GoS contends that the 1966 Agreement does not do this.[203] Further, the GoS claims that the 1965 agreement was only used to provide absolute evidence of "the continuity of Ngok Dinka settlements in, and use of, places north of the Bahr el-Arab between 1905 and 1965" which, even if it were true, would still not be relevant to the question which the ABC Experts were mandated to answer.[204]

#### (ii) SPLM/A arguments

180. According to the SPLM/A, the ABC Experts' Report makes perfectly clear that the ABC Experts in no way ignored the 1905 date; instead, they based their determination of the Abyei Area's boundaries precisely on their assessment of the extent of the area of the nine Ngok Dinka Chiefdoms in 1905.[205] Counting 48 separate references to the 1905 date in the 45-page ABC Experts' Report, it asserts that "[i]t is impossible to read the ABC Experts' Report and conclude that the ABC Experts somehow 'ignored' or 'virtually ignored' the 1905 date."[206]

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[200] *See* GoS Memorial, paras. 242–243.

[201] GoS Rejoinder, para. 224.

[202] GoS Memorial, para. 244, quoting ABC Experts' Report, Part I, p. 19.

[203] GoS Memorial, para. 246.

[204] GoS Rejoinder, para. 225.

[205] SPLM/A Counter-Memorial, para. 546.

[206] SPLM/A Counter-Memorial, para. 556.

181. In the SPLM/A's view, there were evidentiary difficulties in determining the extent of the Ngok Dinka territory in 1905. It was thus necessary for the ABC Experts to avail themselves of materials produced both before and after 1905, as well as during that year. The materials from earlier and later periods were considered only to determine circumstantially and indirectly what the territory of the Ngok Dinka had been in 1905.[207]

182. The SPLM/A also notes that the GoS itself cited and relied on events occurring after 1905 as evidence of the location of the Ngok Dinka and Misseriya in 1905,[208] and that the GoS used these in its presentations before the ABC as well.[209]

### *(e) The ABC Experts allegedly allocated grazing rights*

#### (i) GoS arguments

183. The GoS submits that the ABC Experts exceeded their mandate by purporting to allocate secondary grazing rights to the Ngok Dinka and the Misseriya. In the GoS's view, the ABC's mandate was strictly limited to drawing the line constituting the border of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, and this task cannot be interpreted as encompassing any findings regarding allocation or limitation of grazing rights.[210] By making a pronouncement regarding grazing or other secondary rights, the decision clearly exceeded the ABC Experts' mandate.[211]

184. The GoS asserts that the recognition of such secondary rights is a clear "decision" on the part of the ABC Experts, and could not have been a mere

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[207] SPLM/A Counter-Memorial, paras. 548–550.

[208] SPLM/A Counter-Memorial, para. 567, referring to GoS Memorial, paras. 385-396.

[209] SPLM/A Counter-Memorial, para. 568, citing GoS First Presentation, dated April 10, 2005, at p. 24 (citing Dupuis' Report, "Note on the Ngok Dinka of Western Kordofan" (1922): "in 1922, Dupuis was able to locate them at Khor Alal, north of Lol River . . ."), and at p. 36 *et seq.* (citing post 1905 maps), SPLM/A Exhibit-FE 14/2; GoS Final Presentation, dated June 16, 2005, at p. 27 (citing Cunnison (1954)), at p. 28 (citing excerpts from Willis, "Notes on Western Kordofan Dinkas" (1909), SPLM/A Exhibit-FE 14/18); GoS Additional Presentation, dated June 17, 2005, at p. 16 (citing a letter from the Governor of Bahr el-Ghazal dated July 21, 1927), at p. 14 (citing a report of the District Commissioner of Western Kordofan from 1950), p. 20 (citing Kordofan Province Monthly Diary, 1951), SPLM/A Exhibit-FE 14/17; Transcript of Ambassador Dirdeiry, Taped Recording GoS Final Presentation, File 1, at p. 2, ("the second area of focus is how the contemporary maps since 1908 and up to 1936 had reflected the 1905 transfer"), at p. 5 ("maybe you recall Mr Chairman that during our first presentation we had made a presentation of a report written in 1922 indicating the nine Ngok Dinka chieftains"), SPLM/A Exhibit-FE 19/15; Ambassador Dirdeiry, transcript of Oral Evidence Submitted to the ABC April 14 to 21, 2005, at p. 21, SPLM/A Exhibit-FE 14/5a.

[210] GoS Counter-Memorial, para. 144.

[211] GoS Oral Pleadings, April 18, 2009, Transcr. 145/04–14.

"rationale" for the ABC Experts' boundary delimitation. The GoS contends that if the allocation had been mere rationale, it would not have been included in the "Final and Binding Decision" featured at the end of the Report.[212] Moreover, even if the allocation were mere rationale, it would confirm that the ABC Experts' decision was based not on the territorial transfer that occurred in 1905, but on the "arbitrary or equitable division of tribal rights."[213]

185. The GoS rejects the argument that the allocation was a justifiable exercise of incidental or ancillary authority derived from the ABC Experts' primary mandate.[214] It asserts that while "the purpose of incidental or ancillary powers is to provide for the full and orderly settlement of disputes submitted by the parties," the allocation of secondary rights was not part of the dispute submitted to the ABC, and a pronouncement on this matter was not necessary to provide for the "orderly settlement of all matters in dispute."[215]

186. The GoS also argues that this pronouncement cannot simply be brushed aside as an unintentional or minor excess that does not affect the remainder of the Report. As an alleged excess of mandate, the allocation supposedly triggers the operation of Article 2(c) of the Arbitration Agreement.[216]

187. In addition, the GoS argues that the ABC Experts exceeded the geographical scope of their mandate by conferring on the Ngok secondary rights to land outside the Abyei Area and by limiting the Misseriya's traditional grazing rights to the southern part of the shared area.[217] The GoS submits that there is no trace in the applicable instruments – whether the Abyei Protocol, the Abyei Appendix or the Terms of Reference of the ABC – of any mandate given to the Commission or to its ABC Experts to ascertain, attribute, regulate or share grazing rights on both sides of the alleged boundary.[218]

### (ii) SPLM/A arguments

188. In response, the SPLM/A contends that the ABC Experts did not commit an excess of mandate by purporting to confer rights on the Ngok Din-

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[212] GoS Rejoinder, para. 198.

[213] GoS Oral Pleadings, April 20, 2009, Transcr. 21/08–15.

[214] GoS Rejoinder, para. 199.

[215] GoS Rejoinder, paras. 199–201.

[216] *See* GoS Rejoinder, paras. 202–208. Article 2(c) of the Arbitration Agreement provides:

> 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*. (emphasis in original).

[217] GoS Memorial, paras. 249–253.

[218] GoS Rejoinder, para. 196.

ka outside the Abyei Area.[219] For the SPLM/A, the ABC Experts' Report merely set forth in summary form the ABC Experts' historical conclusions, which in turn provided the rationale for their subsequent boundary delimitation. The SPLM/A believes that the ABC Experts simply sought to make clear, for the avoidance of any doubt, that their decision only defined the Abyei Area's territorial boundaries and did not affect other pre-existing rights which either the Ngok or the Messiriya already possessed and retained.[220] The SPLM/A claims that the ABC Experts, during their public meetings, encountered popular misconceptions about the effect that setting a boundary would have. This supposedly led the ABC Experts to emphasize the limited scope of their territorial decision in order to assuage popular misconceptions about traditional rights.[221]

189. In the alternative, the SPLM/A argues that even if there were some ambiguity as to the meaning of the ABC Experts' Report or in its treatment of the issue of grazing rights, the ABC Experts' statements regarding the Ngok Dinka's retention of their rights are to be interpreted consistently with the ABC Experts' mandate, and not as overstepping that mandate. Accordingly, if there is some doubt, the ABC Experts' decision should be read in a manner that does not purport to alter or affect the rights of the Ngok Dinka or Misseriya outside the boundaries of the Abyei Area.[222] Also, even if the ABC Experts were considered to have attempted to confer rights on the Ngok Dinka outside Abyei Area proper, the SPLM/A submits that this would merely be a valid "exercise of incidental or ancillary authority, which was included in the ABC Experts' primary mandate."[223]

190. The SPLM/A also maintains that an excess of mandate only exists where the adjudicatory authority purported to act beyond its authority in a glaring, manifest or flagrant manner.[224] It submits that any findings by the ABC Experts in relation to Ngok Dinka grazing rights would not have been such an egregious excess of mandate, and that the rights would have affected "only a very specific and limited right of usage" due to the seasonal conditions there.[225]

191. Finally, even assuming the ABC Experts did exceed their mandate by purporting to confer grazing rights they were not permitted to grant, the SPLM/A contends that this portion of the Report would be severable from the remainder of the ABC Experts' Report.[226]

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[219] SPLM/A Counter-Memorial, para. 626.

[220] SPLM/A Oral Pleadings, April 19, 2009, Transcr. 187/03–10.

[221] SPLM/A Oral Pleadings, April 19, 2009, Transcr. 196/15–198/03

[222] SPLM/A Counter-Memorial, para. 644.

[223] SPLM/A Counter-Memorial, para. 645.

[224] SPLM/A Counter-Memorial, para. 654.

[225] SPLM/A Counter-Memorial, paras. 655–656.

[226] SPLM/A Counter-Memorial, para. 661.

## 4. Violation of mandatory criteria in carrying out the mandate

### *(a) Introduction*

192. In its Memorial, the GoS submits that as a general principle of law, the failure of a panel charged with deciding a dispute to state any reasons on the basis of which its decision can be supported, constitutes an excess of mandate.[227] It identified four acts by the ABC Experts which allegedly violated "mandatory criteria" in carrying out their mandate: (i) failure to give reasons; (ii) rendering a decision based on "equitable division" or taken *ex aequo et bono,* (iii) applying unspecified "legal principles in determining land rights," and (iv) attempting to allocate oil resources under the guise of the transferred area.

193. In its Counter-Memorial, the SPLM/A responds that none of the violations of supposed "mandatory criteria" alleged by the GoS fall within the definition of an excess of mandate. It argues that the GoS derives its "mandatory criteria" from sources external to the Parties' agreements,[228] including the ICSID Convention, UNCITRAL Model Law, and various institutional arbitration rules.[229]

194. In its later pleadings, the GoS merged its discussion of the four alleged violations with its substantive excess of mandate arguments, arguing that the ABC Experts decided *ultra petita*.[230] The SPLM/A continues to assert that there is nothing in the Parties' agreements forbidding the four alleged violations; as such, there is, in its view, no conceivable way to characterize these as *"ultra petita"* of what was agreed between the Parties.[231]

### *(b) The ABC Experts allegedly failed to provide reasons capable of forming the basis of a valid decision*

#### (i) GoS arguments

195. For the GoS, it is a general principle in modern systems of law that an adjudicative decision be motivated (that is, supported by reasons). In its view, a decision can be provided without disclosing the reasons behind it

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[227] GoS Memorial, para. 254.

[228] SPLM/A Counter-Memorial, para. 678.

[229] SPLM/A Counter-Memorial, para. 680.

[230] The GoS Rejoinder divided its substantive excess of mandate arguments into three categories, (i) use of manifestly inadmissible justifications, (ii) decisions *ultra petita* and (iii) decisions *infra petita*. The four acts originally alleged as "violations of mandatory criteria" were discussed under the category "use of manifestly inadmissible justifications." At the oral hearings, however, this specific category was not discussed separately and distinctly, but was instead discussed with the GoS arguments relating to decisions *ultra petita*. *See* GoS Oral Pleadings, April 18, 2009, Transcr. 135/01 *et seq.* and *supra* note 94.

[231] SPLM/A Rejoinder, para. 121.

only when the parties to a dispute have expressly waived this requirement.[232] Thus, the GoS does not request that the Tribunal determine whether the ABC Experts were right or wrong, but only whether they had given any reasons in support of their decision.[233]

196. The GoS cites decisions by the ABC Experts that purportedly lacked justification: (a) the rejection of the Bahr el Arab as the southern boundary of Kordofan; (b) the assertion that latitude 10°10'N constitutes the southern boundary of Misseriya rights/northern boundary of Ngok rights;[234] and (c), following from (b), the assertion that latitude 10°35'N constitutes the northern boundary of Ngok Dinka rights.[235] The GoS asserts that these were three absolutely crucial decisions of the ABC Experts that were unsupported by reasoning.[236]

197. With respect to decision (a) above, the GoS notes the ABC Experts found that the "Ragaba ez-Zarga/Ngol, rather than the river Kir, which is now that Bahr el-Arab, was treated as the province boundary [between the provinces of Kordofan and Bahr el Ghazal], and that the Ngok people were regarded as part of the Bahr el Ghazal Province until their transfer in 1905."[237] The GoS argues that *assuming arguendo this is true* (it later argues that it is not), the transferred area should have been south of the Ragaba ez Zarga. Instead, the GoS alleges, the ABC Experts fixed the northern boundary of the Abyei area further north (and not south) of the Ragaba ez Zarga without providing any reason.[238]

198. With respect to decision (b) above, the GoS observes that the ABC Experts fixed "Ngok claims to permanent rights southwards roughly from 10°10'N [latitude] and of Ngok secondary rights extending north of that line."[239] However, while this latitude is mentioned several times in the ABC Experts' Report, the GoS contends there is nothing in the Report explaining

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[232] GoS Rejoinder, para. 154. At the oral pleadings, the GoS further explains:

> The Experts' Report had mandatorily to be reasoned "because it was an adjudicative body, because the object of the dispute was of a nature that it is simply unthinkable that it could have been otherwise, and it had mandatorily also to be established on the basis agreed by the parties, mandatorily too, not at the good will of the [ABC Experts]."
>
> GoS Oral Pleadings, April 18, 2009, Transcr. 80/24–81/05.

[233] GoS Rejoinder, para. 156.

[234] GoS Memorial, para. 255.

[235] The GoS Memorial initially referred only to items (a) and (b), but item (c) was cited as a third example of an unmotivated decision during later pleadings. *See* GoS Oral Pleadings, April 18, 2009, Transcr. 149/03 *et seq.*

[236] GoS Oral Pleadings, April 18, 2009, Transcr. 149/09–12.

[237] ABC Experts' Report, Part I, p. 39.

[238] *See* GoS Memorial, paras. 256–259 and GoS Rejoinder, para. 158.

[239] GoS Memorial, para. 260.

how this latitude was arrived at and why Ngok Dinka dominant rights were fixed here.[240]

199. With respect to decision (c) above, the GoS notes that the ABC Experts fixed the 10°35'N latitude as the northern limit of the Misseriya rights. Again, the GoS argues that other than noting that the line corresponds more or less with Dinka names on certain maps, there is no justification as to how this latitude was fixed.[241]

### (ii) SPLM/A arguments

200. In response, the SPLM/A submits that the GoS arguments ignore the following: (i) nothing in the Parties' agreements or applicable law required the ABC Experts to give reasons;[242] (ii) even where reasons are required, international and national arbitration instruments permit arbitral awards to be invalidated only in rare and exceptional cases;[243] (iii) the ABC Experts' Report provided extensive, well-considered, and erudite analysis which fully satisfy any conceivable requirement for reasons;[244] (iv) the GoS's two "illustrations" of inadequate reasoning are misconceived and irrelevant;[245] and (v) the GoS's complaints about the ABC Experts' reasons are nothing more than objections to the substance of the ABC Experts' Report.[246]

201. For decision (a), the SPLM/A argues that: for the ABC Experts, the decisive issue was determining the territory of the nine Ngok Dinka chiefdoms as they stood in 1905, and not the location of the putative provincial boundary. They thus defined the Abyei Area as "the area of the nine Ngok Dinka chiefdoms as it was in 1905," and the location of the Kordofan/Bahr el Ghazal boundary (whether at the Bahr el Arab or the Ragaba ez Zarga) was not determinative of the question of the territory of the nine Ngok Dinka chiefdoms.[247]

202. For decisions (b) and (c), the SPLM/A argues that the ABC Experts found evidence showing that Ngok villages were located widely throughout the Bahr river basin, extending up to the southern boundary of the goz at 10°10'N. The GoS claim that there is no reference to this latitude (other than as a decision) is said to ignore the fact that the ABC Experts' Report expressly equates latitude 10°10'N with the southern boundary of the goz, while the northern boundary was found to be at 10°35'N. The ABC Experts' Report accepted the

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[240] *See* GoS Oral Pleadings, April 18, 2009, Transcr. 149/13–151/12.

[241] *See* GoS Oral Pleadings, April 18, 2009, Transcr. 152/01–12.

[242] SPLM/A Counter-Memorial, paras. 707–730.

[243] SPLM/A Counter-Memorial, paras. 731–743.

[244] SPLM/A Counter-Memorial, paras. 744–754.

[245] SPLM/A Counter-Memorial, paras. 755–759.

[246] SPLM/A Counter-Memorial, para. 760.

[247] SPLM/A Oral Pleadings, April 19, 2009, Transcr. 232/09–234/22.

existence of both Ngok and Misseriya secondary rights to the area between 10°10'N and 10°35'N and explained why the character of the goz, not being occupied by either tribe, made it an appropriate boundary strip. Reasoning that this gave the Parties' equal secondary rights in the goz, the ABC Experts found it appropriate to divide that area equally between the Parties with the boundary drawn at 10°22'30"N.[248]

### *(c) The ABC Experts allegedly decided based on "equitable division"/ taken* ex aequo et bono

#### (i) GoS arguments

203. The ABC Experts found that in the goz (the area between the latitudes 10°10'N and 10°35'N) the Misseriya and the Ngok Dinka communities exercised equal secondary rights to use of the land on a seasonal basis. They concluded that "[t]he two Parties lay equal claim to the shared areas and accordingly it is reasonable and equitable to divide the Goz between them,"[249] and bisected equally the band between latitudes 10°10'N and 10°35'N at latitude 10°22'30"N. The GoS submits that the ABC Experts completely disregarded and thereby exceeded their mandate by dividing the goz on an "equitable" basis in this way.[250] It claims that the ABC Experts were not mandated to establish shared areas and, moreover, they were not mandated to divide the shared area by way of a decision taken *ex aequo et bono*.[251] Because of this determination (and in particular, the choice of the 10°22'30"N latitude), the GoS argues that the conclusion of the ABC Experts on the delimitation of the Abyei Area is illegitimately based on pure equity.[252] The GoS asserts that an adjudicative body can only decide *ex aequo et bono* when it is expressly authorized to do so, and this requirement is particularly cogent when a sovereign state is involved.[253]

204. The GoS also refutes the allegation that the ABC Experts acted upon the "legal principle of the equitable division of shared secondary rights," as this legal principle does not appear to exist.[254] Further, should such a principle exist, the GoS contends that the ABC Experts were instructed to decide based on "scientific analysis and research," which excludes reliance on the alleged legal principle.[255]

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[248] SPLM/A Oral Pleadings, April 19, 2009, Transcr. 239/01–241/07.

[249] ABC Experts' Report, Part I, p. 22.

[250] GoS Memorial, para. 265.

[251] *Ibid.*

[252] GoS Rejoinder, para. 185.

[253] GoS Oral Pleadings, April 18, 2009, Transcr. 161/10–13.

[254] GoS Rejoinder, para. 167.

[255] GoS Rejoinder, para. 169.

#### (ii) SPLM/A arguments

205. The SPLM/A rejects the argument that the ABC Experts decided *ex aequo et bono.* According to the SPLM/A, where two parties enjoy "equal" rights to the same territory, it is not a decision *ex aequo et bono* to divide the territory "equally" between them. Rather, it is said to simply be a decision made on the basis of the two parties' respective, and equal, historical use of and rights to the same territory.[256]

206. The SPLM/A emphasizes that the ABC Experts relied on "the legal principle of the equitable division of shared secondary rights" in mandating this equal division. Thus, even if they erred in their understanding or application of those legal principles, the SPLM/A argues that the ABC Experts plainly did not render a decision *ex aequo et bono.* Instead, they applied what they took to be the law to a very carefully defined circumstance of shared and equal secondary rights in a specific territory.[257]

207. In the alternative, the SPLM/A asserts that even if the decision was based on principles of equity, it would not amount to a decision *ex aequo et bono.* For the SPLM/A, equity is a general principle of law, distinguishable from a decision *ex aequo et bono,* which may properly be applied by an international tribunal even without express or specific consent by the Parties.[258] Further, even assuming that the decision was taken *ex aequo et bono,* it argues that there is nothing in the Parties' agreements or in any general principles of law that forbids a decision *ex aequo et bono*.[259] Nor is there a need for the Parties to consent before a decision *ex aequo et bono* can be made.[260]

### *(d) The ABC Experts allegedly applied unspecified legal principles in determining land rights*

#### (i) GoS arguments

208. In dividing the goz between the latitudes 10°10'N and 10°35'N, the ABC Experts based their decision on the "legal principle of the equitable division of shared secondary rights."[261] The GoS alleges that despite such reliance, the ABC Experts failed to identify with precision what this principle was or where it came from.[262]

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[256] SPLM/A Counter-Memorial, para. 795.

[257] SPLM/A Counter-Memorial, para. 797.

[258] SPLM/A Counter-Memorial, para. 803.

[259] SPLM/A Counter-Memorial, para. 814.

[260] *See* SPLM/A Oral Pleadings, April 19, 2009, Transcr. 248/17–249/12.

[261] GoS Memorial, para. 268. *See also* discussion at paras. 204 and 206.

[262] GoS Memorial, para. 268.

209. Moreover, the GoS submits, the ABC Experts were supposed to base their decision on "scientific analysis and research," and not on legal principles for determining land rights in former British-administered African territories, as they purported to have done.[263]

#### (ii) SPLM/A arguments

210. Preliminarily, according to the SPLM/A, the GoS makes no effort to reconcile its claim that the ABC Experts rendered their decision *ex aequo et bono* with its complaint that the ABC Experts' decision wrongly relied on legal principles; nor does the GoS cite any legal authority that might establish the mandatory principles on which it relies.[264] In the SPLM/A's view, there was nothing in the Parties' agreements that forbade the ABC Experts from considering legal principles – indeed, the logical predicate for the GoS *ex aequo et bono* argument is that the ABC Experts were required to consider legal principles. Moreover, nothing in the Parties' agreements required the ABC Experts to specify the source of the legal principles they applied or to write a lengthy description of what those alleged legal principles were.[265]

211. In any event, the SPLM/A submits that the ABC Experts identified the legal principles that they referred to as applicable in "former British colonies and protectorates, including Sudan (a Condominium)" and "Sudan" at the "time of the Condominium" and moreover cited a number of secondary sources about Sudanese and British colonial law. For the SPLM/A, the GoS's objections to the accuracy of the legal analysis is not relevant to the excess of mandate question, while its objections to supposedly undefined legal principles are unfounded because the terms of the ABC Experts' Report identified the sources of the legal principles the ABC Experts relied upon.[266]

### *(e) The ABC Experts allegedly took into account the location of oil fields in deciding on the transferred area*

#### (i) GoS arguments

212. The GoS observes that the northern boundary determined by the ABC Experts makes a perfect straight line, and the eastern boundary runs southwards in a perfect 90° angle to that northern boundary. As a consequence, all the major oilfields of Sudan are "conveniently" included in the Abyei Area.[267] The GoS alleges that the ABC Experts took into full con-

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[263] GoS Counter-Memorial, para. 159.

[264] SPLM/A Oral Pleadings, April 19, 2009, Transcr. 251/19–24.

[265] SPLM/A Counter-Memorial, para. 839.

[266] SPLM/A Counter-Memorial, para. 840.

[267] *See* GoS Oral Pleadings April 18, 2009, Transcr. 163/24–164/11 and GoS Rejoinder, para. 189.

sideration the "Wealth Sharing" provisions in the CPA and Section 3 of the Abyei Protocol, which they strictly had no competence to take into account.[268] According to the GoS, this constituted an obvious excess of mandate.[269] The GoS also claims that, as admitted by the SPLM/A, the eastern boundary of the Abyei Area was "created" by the 90° southern turn, and the "created" eastern boundary was an excess of the ABC Experts' mandate, which was merely to define the boundary resulting from an executed transfer.[270]

213. The GoS also argues that evidence of partiality on the part of the ABC Experts is found in an interview given by Dr. Douglas Johnson, one of the ABC Experts, to the *Sudan Tribune* on May 29, 2006,[271] as well as in the fact that Dr. Johnson was later engaged as an expert consultant by the Government of South Sudan.[272] The ABC Experts allegedly knew about the location of the oil fields in Abyei at the time they wrote the report, as such information was already available in 2005.[273] Because of such purported lack of impartiality, the GoS argues that its fundamental right to equal and impartial treatment was violated.[274] Further, such considerations are also allegedly indicative of

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[268] *See* GoS Counter-Memorial, paras. 155–156.

[269] GoS Memorial, paras. 270–271.

[270] GoS Oral Pleadings, April 20, 2009, Transcr. 18/06–16.

[271] The quoted text reads:

> The other aspect is that the Abyei area is contained within one of the oil blocks, and there has been quite a lot of exploration and drilling of oil wells in the area. Now, we were not shown a map of where these oil wells were. We were told our mandate was to define the area in 1905–of course there were no oil wells in 1905. There was no mechanised farming; there was no railway; there were no towns. If we had taken into consideration these developments since 1905, we would have been violating our mandate.
>
> But there is a lot of oil there–the Abyei Protocol stipulates that the oil revenues that come from the sale of oil in the Abyei area be divided between the Misseriya and the Ngok Dinka, the government and the SPLM. If the boundary is defined one way, it puts quite a lot of oil in the Abyei area, and therefore more of that oil revenue has to be shared. If we had accepted the government's claim that the boundary was the river, there would have been no oil revenue to share.
>
> The other thing is that if the boundary defines a certain area and that area contains oil and active oil wells, [and] if the people of Abyei vote in a referendum to join the south and the south votes to become independent, then that oil becomes southern oil and is not northern oil.[152]
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> [152] Interview with Douglas Johnson, expert on the Abyei Boundary Commission, *Sudan Tribune,* Monday 29 May 2006. Source: http://www.sudantribune.com/spip.php? article15913 (SM Annex 85).
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> *As quoted in* GoS Memorial, para. 274.

[272] GoS Oral Pleadings, April 18, 2009, Transcr. 98/02.

[273] GoS Rejoinder, para. 191.

[274] GoS Rejoinder, para. 190.

the fact that the ABC Experts did not decide on the basis of "scientific analysis and research."[275]

### (ii) SPLM/A arguments

214. For the SPLM/A, the ABC Experts' Report explains in detail the reason for the choice of borders, and the suggestion that the north-east turning point was motivated by partiality cannot be sustained.[276] While the ABC Experts accepted the specific co-ordinates of the eastern boundary proposed by the SPLM/A,[277] the SPLM/A notes that these co-ordinates were not challenged by the GoS, which offered no evidence and made no claims regarding where the eastern boundary of the Abyei Area should lie if the ABC Experts concluded that the northern boundary was above the River Kir.[278]

215. The SPLM/A also attempts to show how, in its view, the ABC Experts selected the eastern boundary (and the north eastern turning point): as a result of the Abyei Protocol, the southern and western boundaries of the Abyei Area were expected to follow existing boundaries, and only the northern and eastern boundaries remained to be identified, defined and demarcated by the ABC. After determining the northern boundary at approximately the 10°22'30"N latitude, the ABC Experts were purportedly faced with the situation in which no natural "cut-off line" existed to create an eastern boundary, as this latitude continues uninterrupted by other internal boundaries all the way to the Kordofan-Upper Nile boundary (approximately 260 kilometers further east than the point at which the north-east corner of the boundary as determined by the ABC Experts lies). According to the SPLM/A, the ABC Experts had little alternative but to draw a "dog-leg" extending south from the northern boundary to some appropriate place in order to complete the Abyei Area. The "dog-leg" chosen extended the existing line of the Kordofan-Upper Nile boundary at 29°32'15"N longitude (where the boundary makes an approximate 60° turn east) due northwards to meet latitude 10°22'30"N (this appears as a perpendicular line). Further, the SPLM/A asserts that the ABC Experts had been presented with evidence that the Ngok Dinka were located in 1905 in areas very close to 29°32'15"N.[279]

216. Finally, the SPLM/A submits that Dr. Johnson's interview could not be evidence that the ABC Experts acted partially. On the contrary, as he explained in the interview, the ABC Experts were not shown a map of where the oil wells were.[280]

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[275] GoS Rejoinder, para. 193.

[276] *See* SPLM/A Counter-Memorial, paras. 843–847.

[277] SPLM/A Counter-Memorial, para. 848.

[278] SPLM/A Oral Pleadings, April 19, 2009, Transcr. 254/15–21.

[279] SPLM/A Counter-Memorial, paras. 848–854.

[280] SPLM/A Counter-Memorial, paras. 855 and 856.

## 5. Admissibility of excess of mandate claims

217. As a counter to the GoS's claims that the ABC Experts exceeded their mandate, the SPLM/A raises a number of claims of its own, contending that: (a) that the GoS excluded or waived any rights to claim that the ABC exceeded their mandate, and (b) the ABC Experts' Report is entitled to presumptive finality.

### *(a) The GoS allegedly waived its objections to the ABC Experts' Report*

#### (i) SPLM/A arguments

218. The SPLM/A submits that the GoS waived its objections to the ABC Experts' Report by agreeing that the Report would be final and binding and would be given immediate effect without any possibility for appeal or other challenge.[281] The SPLM/A notes that this agreement was recorded specifically in the Abyei Appendix, the Abyei Protocol, the Terms of Reference and the Rules of Procedure; none of these instruments provides that the ABC Experts' Report would be subject to any sort of review or possible delay in implementation by either Party.[282]

219. Furthermore, the SPLM/A believes it well-settled that jurisdictional and procedural objections must be raised at the earliest opportunity; otherwise they are waived. For the SPLM/A, the GoS raised no objections at any time during the ABC's work (instead, it actively participated); moreover, the GoS repeatedly and explicitly affirmed that the ABC's decision would be final and binding.[283]

220. The SPLM/A also posits that it cannot be prevented (or estopped) from claiming that GoS waived its rights to claim an excess of mandate, as the choice of law clause in the Arbitration Agreement allowed the application of general principles of law and practice, such as the rules of waiver and exclusion, to govern this dispute.[284]

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[281] SPLM/A Rejoinder, para. 322. *See* e.g. Section 5 of the Abyei Appendix, text *supra* at note 107.

[282] SPLM/A Memorial, para. 798.

[283] SPLM/A Rejoinder, para. 323. The SPLM/A quotes the GoS's Ambassador Dirdeiry:

> When a decision is agreed and accepted before hand to be final and binding, it is not acceptable by anybody to deny the right of that committee or body to issue that decision. And, its unmanly of any person not to accept that decision and respect it.
>
> (*See* Ambassador Dirdeiry, Taped Recording of GoS Final Presentation, dated June 16, 2005, File 2 *as quoted in* SPLM/A Memorial, para. 59)

[284] SPLM/A Rejoinder, para. 329.

#### (ii) GoS arguments

221. In response, the GoS argues that it was precisely because there were serious doubts about respect for their mandate by the ABC Experts that both Parties agreed, pursuant to the Arbitration Agreement, to submit the present dispute to the Tribunal. Since it has agreed to these proceedings, it is the SPLM/A that is now estopped from raising objections against the jurisdiction of the Tribunal.[285]

222. The GoS also asserts that it had fully and completely complied with the requirement that jurisdictional objections must be raised at the earliest opportunity. It immediately objected to the ABC Experts' Report when it was presented to the Presidency on the ground that the ABC Experts failed to respect their mandate. As for other procedural violations, the GoS claims that it protested as soon as such violations were brought to its knowledge.[286] A waiver of rights by a State cannot be presumed lightly, and the GoS argues that it expressly and vigorously protested as soon as it came to know of violations of its rights.[287]

### *(b) The GoS is allegedly bound by the principles of presumptive finality*

#### (i) SPLM/A arguments

223. For the SPLM/A, the ABC conducted itself in the manner of an adjudicative body and rendered an adjudicative decision, leaving no doubt that the principles of finality and *res judicata* were applicable to the ABC Experts' Report.[288] Moreover, the presumptive finality and validity of international adjudicatory decisions is especially compelling where boundary determinations are at issue.[289] The principle of presumptive finality and validity means that an adjudicative decision or an award can be set aside solely in rare, narrow and exceptional circumstances,[290] such as when the relevant parties agree.[291] Here, SPLM/A submits that the Arbitration Agreement has not set aside the ABC Experts' Report and the principle of presumptive finality and validity still applies.[292]

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[285] GoS Rejoinder, para. 73. *See also* GoS Oral Pleadings, April 18, 2009, Transcr. 54/13–56/07.

[286] GoS Rejoinder, para. 74.

[287] GoS Rejoinder, paras. 75–76.

[288] SPLM/A Memorial, para. 729.

[289] SPLM/A Counter-Memorial, para. 132.

[290] *See* SPLM/A Oral Pleadings, April 19, 2009, Transcr. 63/22.

[291] *See* SPLM/A Oral Pleadings, April 19, 2009, Transcr. 66/05–16.

[292] *Ibid.*

### (ii) GoS arguments

224. The GoS agrees that, in principle, boundary settlements enjoy a particular stability and permanence. However, the GoS maintains that the boundary has not been definitely settled in this case. According to it, the Tribunal has been charged by the Parties with determining whether there has been an excess of mandate, and, if the answer is in the affirmative, with defining the boundaries of the Abyei Area. It is only after the Tribunal has performed its duty that principles of *res judicata* and finality will apply.[293]

## B. Delimitation of the Abyei Area

225. If, as a result of its "excess of mandate" inquiry under Article 2(a) of the Arbitration Agreement, the Tribunal were to decide that the ABC Experts did exceed their mandate, then it would "proceed to define (*i.e.*, delimit) on map the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905" in accordance with Article 2(c) of the Arbitration Agreement. Within the ambit of Article 2(c) inquiry, the GoS submits that "the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 are as shown on Figure 17 on page 159 of the GoS Memorial, being the area bounded on the north by the Bahr el-Arab and otherwise by the boundaries of Kordofan as at independence."[294]

226. According to the GoS, the question of delimiting the Abyei Area must first be answered by determining what the provincial boundary between Bahr el Ghazal and Kordofan was before the 1905 transfer, as the transfer to Kordofan could not have included any areas previously located in Kordofan. Second, delimitation must include an identification of the area of the nine Ngok Dinka chiefdoms which previously fell within the province of Bahr el Ghazal and which was transferred to Kordofan in 1905.[295]

227. By contrast, the SPLM/A submits that the putative boundary between Kordofan and Bahr el Ghazal, which it claims was indefinite and indeterminate, does not define the Abyei Area. In the SPLM/A's view, if the Tribunal were to decide that the ABC Experts exceeded their mandate, then it "should go on to define the Abyei Area to encompass all of the territory occupied and used by the Ngok Dinka in 1905"[296]and declare that "the boundaries of the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905 are the current boundary of Kordofan and Bahr el-Ghazal to the south extend-

[293] GoS Counter-Memorial, paras. 122–123.

[294] GoS Memorial, p. 160 ("Submissions"). *See also* GoS Counter-Memorial, last page and GoS Rejoinder, p. 162. A reproduction of that map is found *supra* at para. 37. Secretariat note: the map contained in Figure 17 is located in the rear pocket of this volume.

[295] GoS Counter-Memorial, para. 383.

[296] SPLM/A Memorial, para. 869.

ing to 10°35'N latitude to the north and the current boundary of Kordofan and Darfur to the west extending to 29°32"15'E longitude to the east."[297]

## 1. The scope of the Tribunal's mandate under Article 2(c) of the Arbitration Agreement

### *(a) GoS arguments*

228. According to the GoS, if the Tribunal determines pursuant to Article 2(a) of the Arbitration Agreement that the ABC Experts exceeded their mandate, then it must, under Article 2(c), decide *de novo* and reach its own conclusion on the delimitation of the Abyei Area based on the Parties' submissions.[298] The GoS insists that the triggering of Article 2(c) should occur once the Tribunal finds an excess of mandate "in any respect."[299]

229. Accordingly, as to the probative value of the ABC Experts' Report under Article 2(c) inquiry, the GoS maintains that the Tribunal may take information contained in the Report into account, but only as mere evidence.[300]

### *(b) SPLM/A arguments*

230. By contrast, the SPLM/A submits that in the event that elements of the ABC Experts' Report are found to be in excess of mandate, any portions of the ABC Experts' Report that are not so vitiated must, under general principles of law, remain final and binding on the Tribunal.[301]

231. Moreover, the SPLM/A maintains that the Tribunal is not a *de novo* decision-maker under Article 2(c) of the Arbitration Agreement. Consequently, if the Tribunal were to hold that the ABC Experts exceeded their mandate under Article 2(a), then "it would be appropriate for the Tribunal to rely upon the Commission's determinations concerning the scope of the Abyei Area."[302]

## 2. The interpretation of the definition of the Abyei Area as set out in the Abyei Protocol and the Arbitration Agreement

232. The GoS argues that the definition of the Abyei Area contained in Section 1.1.2 of the Abyei Protocol and Article 2(c) of the Arbitration Agree-

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[297] SPLM/A Rejoinder, para. 885; SPLM/A Counter-Memorial, para. 1601.

[298] *See* GoS Rejoinder, para. 4. *See also* GoS Oral Pleadings, April 23, 2009, Transcr. 29/15–30/01.

[299] *See* GoS Oral Pleadings, April 20, 2009, Transcr. 104/13–25.

[300] *See* GoS Oral Pleadings, April 20, 2009, Transcr. 104/02–08, 105/12–13. *See also* GoS Memorial, para. 278.

[301] *See* SPLM/A Oral Pleadings, April 21, 2009, Transcr. 133/08–21.

[302] *See* SPLM/A Memorial, para. 1198. *See also* SPLM/A Memorial, para. 1201.

ment should be interpreted as referring to the 1905 administrative transfer of a specific, territorially-defined area that previously formed part of the province of Bahr el Ghazal to the province of Kordofan (the "Territorial Interpretation").[303] In contrast, the SPLM/A contends that these provisions should be understood as referring to the transfer of the Ngok Dinka people as a whole, *i.e.,* not merely some of the nine Ngok Dinka Chiefdoms or some of their territory (the "Tribal Interpretation").[304] To support their respective positions, both Parties rely on (a) the plain language and grammatical meaning of the Formula, (b) the purposes underlying the definition chosen by the Parties, and (c) the drafting history of the Abyei Protocol.

### *(a) The plain language and grammatical interpretation of the Formula set out in Section 1.1.2 of the Abyei Protocol and Article 2(c) of the Arbitration Agreement*

#### (i) GoS arguments

233. For the GoS, the plain meaning of the Formula is clear and does not require recourse to any supplementary sources of interpretation.[305] The Formula has a temporal dimension: it refers to a "documented historical event" that took place in 1905,[306] the "critical date [ . . . ] as of which the facts relating to the transfer fall to be assessed."[307] It also has an obvious territorial dimension: it refers to "an area transferred at a defined time and not an area populated or used at some other, undefined time."[308] The GoS thus contends that "the only reasonable and defensible interpretation of the text is that it mandates [this] Tribunal to 'confirm' on map the boundaries of the area of the *[sic]* transferred in 1905."[309]

234. Examining the grammatical structure of the Formula, the GoS argues that in ordinary English, the word "transferred" is equally capable of qualifying the noun "area" as the phrase "nine Ngok Dinka chiefdoms."[310] Read in context – a transfer between two provinces – the phrase "transferred

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[303] *See* GoS Counter-Memorial, para. 90. Notably, in the GoS's view, the issue of interpretation of the mandate should be addressed under both Article 2(a) and Article 2(c) of the Arbitration Agreement. *See* GoS Oral Pleadings, April 18, 2009, Transcr. 24/13–16.

[304] *See* SPLM/A Memorial, para. 1095. Notably, the SPLM/A considers the ABC Experts' and the Tribunal's interpretation of the mandate as a "matter of substance." Thus, under the SPLM/A's theory, the Tribunal only address this issue as part of its Article 2(c) inquiry (*see* SPLM/A Oral Pleadings, April 19, 2009 Transcr. 175/10 *et seq.).*

[305] *See* GoS Memorial, para. 23; GoS Counter-Memorial, para. 115.

[306] GoS Rejoinder, para. 10.

[307] GoS Counter-Memorial, para. 100.

[308] GoS Memorial, para. 24.

[309] GoS Memorial, para. 25. *See also* GoS Memorial, para. 29.

[310] GoS Rejoinder, para. 32.

to Kordofan" is in fact more likely to refer to "the area" rather than "the nine Ngok Dinka chiefdoms."[311] The SPLM/A's application of a self-serving grammatical rule of proximity, instead of relying on euphony,[312] is in the GoS's view utterly artificial.[313] More importantly, the SPLM/A's interpretation allegedly ignores the preposition "to" after the verb "transferred." Even if the SPLM/A's grammatical construction were correct and "transferred" could only relate to "chiefdoms," the GoS maintains that the Formula could not possibly be interpreted as referring to *all* of the territory of the nine Ngok Dinka chiefdoms, including the territory of chiefdoms *already in* Kordofan in 1905.[314]

235. In addition, the SPLM/A purportedly adds words that do not appear in the Formula when it argues that Section 1.1.2 of the Abyei Protocol "referred to all of the area of the nine Ngok Dinka Chiefdoms that were transferred in 1905"[315] or "the area inhabited and used by the nine Ngok Dinka Chiefdoms."[316] The words "all" and "that were" are *ex post facto* additions to the Formula that alter its plain meaning. For the GoS, the words "inhabited" and "used" introduce a demographic dimension otherwise absent from the Formula.[317]

236. The GoS further submits that the SPLM/A misconstrues the language appearing in the 1905 transfer documents in order to corroborate its grammatical analysis and to conclude that all of the territory occupied and used by the Ngok Dinka was transferred to Kordofan in 1905.[318]

237. Contrary to the SPLM/A's assertions, the GoS emphasizes that none of the relevant transfer documents refer to a transfer of the Ngok Dinka "people."[319] Nor do they employ the words "inhabited and used" in referring to the transfer.[320] Instead, they refer to "the country"[321] or "the territories"[322] of Sultan Rob, or the "districts"[323] of Sultan Rob and Sheikh Rihan.[324] The GoS relies in particular on Governor-General Wingate's statement that:

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[311] GoS Rejoinder, para. 32.

[312] GoS Oral Pleadings, April 18, 2009, Transcr. 31/14–17.

[313] GoS Counter-Memorial, para. 106. *See also* GoS Oral Pleadings, April 18, 2009, Transcr. 31/08 *et seq.*

[314] GoS Counter-Memorial, para. 108.

[315] GoS Rejoinder, para. 28 quoting SPLM/A Counter-Memorial, para. 1512.

[316] GoS Rejoinder, para. 21 quoting SPLM/A Counter-Memorial, para. 76.

[317] GoS Rejoinder, para. 23.

[318] GoS Counter-Memorial, para. 513 *et seq.*

[319] GoS Rejoinder, para. 16.

[320] GoS Rejoinder, para. 24.

[321] Sudan Intelligence Reports, No. 128 (March 1905), p. 3 (SM Annex 9).

[322] Reports on the Finances, Administration, and Condition of the Sudan, Annual Report (1905) Report for Bahr el-Ghazal Province, p. 3 (SM Annex 24).

[323] Reports on the Finances, Administration, and Condition of the Sudan, Annual Report (1905) Wingate Memorandum, p. 24 (SM Annex 24).

[324] GoS Rejoinder, paras. 16, 24.

> The districts of Sultan Rob and Okwai, to the south of the Bahr el-Arab and formerly a portion of the Bahr el-Ghazal Province, have been incorporated into Kordofan.[325]

238. For the GoS, Wingate's Memorandum does not contain any reference to the Ngok Dinka "people" or the area "inhabited and used" by them, and clearly locates the "districts of Sultan Rob and Sheikh Rihan" "to the south of the Bahr el-Arab," purportedly the then provincial boundary, thus establishing a "specific geographic limitation to the districts that were transferred."[326]

239. Finally, the GoS contends that the SPLM/A's own submissions before the ABC show that prior to adopting its new tribal reading of the Formula, the SPLM/A considered that the "area" or "territory" was the key criterion to the understanding of Section 1.1.2 and the 1905 transfer documents.[327] Referring to the passage of the March 1905 SIR) concerning the transfer, the GoS points to the SPLM/A's argument before the ABC that

> [ . . . ] the reasons for the transfer of the two areas and not the people are explicitly stated - the occasional raids by the Southern Kordofan Arabs.[328]

240. The GoS concludes that the focus of the Formula in Section 1.1.2 of the Abyei Protocol is on the area transferred to Kordofan, not the people, as contended by the SPLM/A in its declarations before the ABC.[329] In its view, this was also the focus of the Condominium officials in the 1905 transfer documents.[330] The GoS thus submits that the Tribunal should conform to the terms of the Arbitration Agreement by giving full effect to the plain and ordinary language of the Formula,[331] which refers to the transfer of a specific area.[332]

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[325] GoS Rejoinder, para. 16 quoting Reports on the Finances, Administration, and Condition of the Sudan, Annual Report (1905) Wingate Memorandum, p. 24 (SM Annex 24).

[326] GoS Rejoinder, para. 25.

[327] GoS Rejoinder, para. 34 quoting SPLM/A Preliminary Presentation on the Boundaries of the Abyei Area (First SPLM/A Presentation) p. 2, SPLM/A Exhibit-FE 14/1, and para. 36 quoting SPLM/A Preliminary Presentation on the Boundaries of the Abyei Area (First SPLM/A Presentation) p. 4, SPLM/A Exhibit-FE 14/1.

[328] GoS Rejoinder, para. 37 quoting SPLM/A Final Presentation on the Boundaries of the Abyei Area, p. 27, SPLM/A Exhibit-FE 14/13.

[329] GoS Rejoinder, paras. 38–39.

[330] GoS Rejoinder, para. 39.

[331] GoS Rejoinder, paras. 40–41 referring to the following cases: *Arbitral Award of July 31, 1989,* Judgment, *I.C.J. Reports 1991*, p. 70, para. 49, citing *Delimitation of the Maritime Boundary in the Gulf of Maine Area,* Judgment, *I.C.J. Reports 1984*, p. 266, para. 23, and *Competence of the General Assembly for the Admission of a State to the United Nations,* Advisory Opinion, *I.C.J. Reports 1950*, p. 8.

[332] GoS Rejoinder, para. 59.

### (ii) SPLM/A arguments

241. The SPLM/A's reading of the Formula differs. It argues that the phrase "the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905" should be read in light of the "grammatical rule of proximity" whereby a "post-modifying construction in a noun phrase [relates] to the immediately previous noun."[333] The SPLM/A contends that the grammatically correct reading of Section 1.1.2 is to relate the phrase 'transferred to Kordofan' to the noun of 'chiefdoms.'[334] The latter, and not the "area," must be understood to have been transferred to Kordofan.

242. For the SPLM/A, the use of the phrase "area" in turn "serves to describe quantitatively the nine Ngok Dinka Chiefdoms being transferred, indicating that the nine Ngok Dinka Chiefdoms are capable of being properly defined and demarcated."[335] Otherwise, the draftsmen of the Abyei Protocol would have opted for the phrase "that part of the area. . . that was transferred . . ."[336]In addition, it is clear for the SPLM/A that Section 1.1.2 refers to *all* of the area in question, since the Formula includes the terms *"nine* Ngok Dinka chiefdoms."[337] Submitting that *three* of the nine Ngok Dinka Chiefdoms are located entirely to the north of the Kir River,[338] the SPLM/A argues that interpreting Section 1.1.2 in such a way as to exclude certain chiefdoms from the Abyei Area would contradict the plain language of the Section.[339]

243. The SPLM/A goes on to argue that Section 1.1.2 refers to "a transfer of the Ngok Dinka from the administration of Bahr el-Ghazal to the administration of Kordofan."[340] Therefore, contrary to the GoS's allegation, the SPLM/A's interpretation does take into account the phrase "transferred to Kordofan."[341]

244. The SPLM/A also contends that its interpretation finds further support in the language of the 1905 transfer documents, which refer to a transfer

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[333] SPLM/A Memorial, para. 1105.

[334] SPLM/A Memorial, para. 1107. *See also* SPLM/A Counter-Memorial, paras. 1505–1509 and Professor David Crystal Expert Report, Appendix A to SPLM/A Counter-Memorial.

[335] SPLM/A Counter-Memorial, para. 1510. *See also* SPLM/A Memorial, at p. 263, para. 1108.

[336] *See* SPLM/A Counter-Memorial, para. 1511.

[337] *See* SPLM/A Memorial, para. 1110; SPLM/A Counter-Memorial, para. 1512.

[338] *See* SPLM/A Map Atlas vol. 1, Maps 15 (Achaak Chiefdom, 1905), 17 (Alei Chiefdom, 1905) and 19 (Bongo Chiefdom, 1905).

[339] *See* SPLM/A Counter-Memorial, paras. 1513–1514.

[340] SPLM/A Rejoinder, para. 835.

[341] *Ibid.*

of the Ngok Dinka Paramount Chief and/or his territories, not merely some sub-chief or some portion of his territories.[342]

245. The 1905 Wingate Memorandum, which the GoS sees as a crucial document, merely describes the "general location of the Ngok and the Twic"[343] in "an *ex post facto* and general summary of the earlier 1905 transfer decision (as he understood it)."[344] Much more significant for the SPLM/A is the March 1905 SIR, whose plain language shows that the Condominium intended to transfer Sultan Rob, Sheikh Rihan and their people:[345]

> It has been decided that Sultan Rob, whose country is on the Kir river, and Sheikh Rihan of Toj . . . are to belong to Kordofan Province. These people have, on certain occasions, complained of raids made on them by southern Kordofan Arabs, and it has therefore been considered advisable to place them under the same Governor as the Arabs of whose conduct they complain." [346]

246. In the SPLM/A's view, the words "these people" obviously refer to the Ngok Dinka and the Twic people in their entirety, and not merely to two individuals (Sultan Rob and Sheikh Rihan).[347] According to the ABC Experts, this document also provided "[ . . . ] the official principal reason for the transfer of the nine Ngok Dinka chiefdoms [ . . . ]."[348] It is the same document that the GoS clearly interpreted as registering a transfer of people when it referred before the ABC to "The Decision to Transfer the Ngok and Twij to Kordofan," and "The Reason [for] Transferring the Ngok and the Twij to Kordofan."[349] The SPLM/A also notes that the GoS acknowledged in its Memorial that the transfer recorded in the March 1905 SIR was a transfer of "groups," "the Ngok and the Twic."[350]

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[342] *See* SPLM/A Memorial, para. 1112 and SPLM/A Counter-Memorial, at pp. 375–376, para. 1545 both quoting Annual Report of the Sudan, 1905, Province of Kordofan, p. 111, SPLM/A Exhibit-FE 2/13, Annual Report of the Sudan, 1905, Province of Bahr el-Ghazal, p. 3, SPLM/A Exhibit-FE 2/13, and Sudan Intelligence Report, No. 128, March 1905, p. 3, SPLM/A Exhibit-FE 2/8. *See also* SPLM/A Rejoinder, para. 857; SPLM/A Oral Pleadings, April 22, 2009, Transcr. 212/20–24.

[343] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 229/22–24.

[344] SPLM/A Rejoinder, para. 860.

[345] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 212/25 *et seq.*

[346] Sudan Intelligence Report, No. 128, March 1905, p. 3, SPLM/A Exhibit-FE 2/8.

[347] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 213/05 *et seq.*

[348] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 219/19–22 quoting the ABC Experts' Report, Part II, App. 2, at pp. 22–23, Appendix B to SPLM/A Memorial.

[349] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 216/16 *et seq.* quoting GoS First Presentation to the ABC, Slide 31, SPLM/A Exhibit-FE 14/2. *See also* the GoS reference to "The Decision to Transfer the Ngok and the Twij To Kordofan" in GoS first Presentation to the ABC, Slide 32, SPLM/A Exhibit-FE 14/2.

[350] SPLM/A Counter-Memorial, para. 1549 quoting GoS Memorial, paras. 357, 359. *See also* SPLM/A Rejoinder, para. 805.

247. Lastly, the SPLM/A emphasizes the fact that during the ABC proceedings, the GoS never objected to the ABC Experts' unanimous interpretation of the definition of the Abyei Area, which reflects the natural meaning and purposes of Section 1.1.2 of the Abyei Protocol.[351]

248. The SPLM/A thus concludes that the natural meaning and structure of the text in Section 1.1.2 of the Abyei Protocol can only be interpreted as referring to the transfer of the entire Ngok Dinka people.

### *(b) The purposes underlying the definition of the Abyei Area set out in Section 1.1.2 of the Abyei Protocol and Article 2(c) of the Arbitration Agreement*

#### (i) GoS arguments

249. Having stated that "the context and object and purpose of the arbitration agreement provide the guideline for the interpretation,"[352] the GoS focuses on the object and purpose of the 1905 transfer, which is also clear: "[i]t was an administrative decision to transfer an area from one province to another to enable better administrative control over tensions between Baggara Arab and Dinka tribes."[353] The SPLM/A's reliance for its interpretation on other factors that are alien to the way the Condominium officials viewed the situation in 1905 is ill-founded.[354]

250. Thus, the SPLM/A's argument that the GoS's reading of the Formula would arbitrarily divide the territory of the Ngok Dinka Chiefdoms is misplaced. The GoS insists that "[t]here was no intent by Sudanese Government officials at the time to 'arbitrarily divide' the Ngok Dinka."[355] To the extent that there were any Ngok Dinka north of the Bahr el Arab, the provincial boundary in 1905, they were already in Kordofan and did not need to be transferred.[356]

251. Similarly, the SPLM/A's complaint that the GoS's interpretation would exclude three of the nine Chiefdoms (the Alei, the Achaak and the Bongo) from the Abyei Area finds no support in the contemporary documents.[357]

252. Further, the SPLM/A's contention that the GoS's interpretation would also exclude Abyei from the Abyei Area is at odds with both the contemporary evidence and the intention of the Anglo-Egyptian administrators

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[351] *See* SPLM/A Memorial, para. 1142–1146 and Counter-Memorial, paras. 1560–1564, referring to the ABC Experts' Report, Part II, App. 4, at pp. 41, 53, 58 and 79, Exhibit 15/1.

[352] GoS Memorial, para. 34.

[353] GoS Counter-Memorial, para. 115.

[354] GoS Rejoinder, paras. 41–42.

[355] GoS Rejoinder, para. 46.

[356] GoS Rejoinder, para. 46.

[357] GoS Rejoinder, para. 48.

at the time.[358] The GoS points out that Abyei Town did not exist in 1905 and "played no role whatsoever in the thinking of Sudanese officials in 1905 when they decided the transfer [ . . . ],"[359] pointing further to Section 7 of the Abyei Appendix which contemplates that Abyei Town may not be located in the Abyei Area.[360]

253. Lastly, the GoS dismisses as being "based on present day demographics" the SPLM/A's argument that the purpose of the Abyei Area's definition is to uphold the Ngok Dinka's right to self-determination, a concept that was not referred to in the Formula or taken into account in transferring the Ngok Dinka districts to Kordofan in 1905.[361] Invoking the principle of self-determination now "is in effect to re-open the negotiated settlement of the Abyei Protocol for the benefit of one of the parties and to the detriment of the other."[362]

254. In sum, "it is by reference to the events that took place in 1905 relating to the area that was transferred that the resolution of the present dispute should be based," not by reference to other factors irrelevant in 1905.[363]

### (ii) SPLM/A arguments

255. The SPLM/A argues that its Tribal Interpretation of the Formula is in accordance with "the central purpose of the definition of the Abyei Area [which] was to specify that region whose residents would be entitled to participate in the Abyei Referendum."[364] The Abyei Referendum being designed to permit the Ngok Dinka to vote on whether or not to be included in the South, the SPLM/A contends that it would be absurd to define the Abyei Area as including only some of the Ngok Dinka territory or some of the nine Chiefdoms.[365] Such a definition would be contrary to the "basic principles of self-determination underlying the Abyei Protocol."[366]

256. The SPLM/A maintains that, instead of addressing this issue, the GoS addresses the dissimilar question of the purpose of the 1905 transfer,

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[358] GoS Rejoinder, paras. 52–53.

[359] GoS Rejoinder, para. 53. *See also* GoS Oral Pleadings, April 18, 2009, Transcr. 40/15 *et seq.*

[360] GoS Rejoinder, para. 55 referring to Abyei Appendix, attached to the ABC Experts' Report, paragraph 7 (SM Annex 81).

[361] GoS Rejoinder, para. 57.

[362] GoS Oral Pleadings, April 18, 2009, Transcr. 39/11–16. *See also* GoS Counter-Memorial, para. 89.

[363] GoS Rejoinder, para. 59.

[364] SPLM/A Memorial, para. 1124. The SPLM/A refers to Section 8 of the Abyei Protocol.

[365] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 202/22 *et seq.*

[366] SPLM/A Memorial, para. 1125; *see also* paras. 111–113, paras. 133–136 and paras. 206–216. *See also* SPLM/A Counter-Memorial, para. 1519.

which is "completely irrelevant to the purposes of the GoS and the SPLM/A in concluding the 2005 Abyei Protocol."[367] The GoS's interpretation of Section 1.1.2 of the Abyei Protocol, which reduces the Abyei Area to a 14-mile wide strip of swamp land along the Bahr el Arab's southern bank, runs counter to the fundamental purpose of the Abyei Protocol and the CPA ~ resulting in the exclusion of the majority of territory occupied and used by the nine Ngok Dinka Chiefdoms, including three chiefdoms in their entirety,[368] and arbitrarily dividing Ngok Dinka lands on the basis of what was an uncertain, provisional and approximate boundary in 1905.[369] Similarly, if the Abyei Area were to be limited to territory south of the Bahr el Arab/Kir, it would not be the "bridge" between the north and the south, as contemplated by Section 1.1.1 of the Abyei Protocol.[370]

257. Further, the GoS's interpretation of the Formula excludes Abyei Town, which has been "the undisputed center of Ngok Dinka political, cultural and commercial life for more than a century," from the Abyei Area.[371] The SPLM/A further argues that this inconceivable result would be incompatible with Section 7 of the Abyei Appendix. The GoS's argument that Abyei town did not exist in 1905 misses the point;[372] it is a fact that the Ngok Dinka Paramount Chief resided in Burakol at the time, near present day Abyei Town.[373]

258. The SPLM/A goes on to argue that the witness testimony of the individuals involved in the drafting of the Abyei Protocol (Lieutenant General Lazaro Sumbeiywo, Mr. Jeffrey Millington and Minister Deng Alor Kuol) confirms that the purpose behind the definition of the Abyei Area was to encompass the entirety of Ngok Dinka territory and all of the nine Chiefdoms.[374]

259. Lastly, the SPLM/A stresses that the composition of the ABC, as contemplated in the Abyei Annex, included specialists "with complementary expertise precisely tailored to the task before them – defining the area used

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[367] SPLM/A Rejoinder, para. 849.

[368] SPLM/A Counter-Memorial, paras. 1523, 1530–1531.

[369] SPLM/A Counter-Memorial, paras. 81, 1538, 1543–1544.

[370] SPLM/A Memorial, para. 1129.

[371] SPLM/A Memorial, para. 1126.

[372] SPLM/A Rejoinder, paras. 851–853. *See also* SPLM/A Counter-Memorial, para. 1521.

[373] SPLM/A Rejoinder, para. 853.

[374] *See* SPLM/A Memorial, at paras. 1140–1141, SPLM/A Memorial, at para. 1140(a) quoting Witness Statement of Lt. Gen. Sumbeiywo, para. 53 (SPLM/A Memorial, Witness Statements, Tab 4); SPLM/A Memorial, at para. 1140(b) quoting Witness Statement of Mr. Millington, para. 9 (SPLM/A Memorial, Witness Statements, Tab 3); *See* SPLM/A Memorial, at para. 1140(c) and (d) quoting Witness Statement of Minister Deng Alor Kuol, paras. 54 and 56 (SPLM/A Memorial, Witness Statements, Tab 1). *See also* SPLM/A Counter-Memorial, at paras. 1556–1559.

and occupied by the Ngok Dinka in 1905".[375] In the same way, the Parties "provided a set of procedures that were equally well-tailored to the same task."[376]

260. The SPLM/A concludes that "the obvious purposes of Section 1.1.2 and the other provisions of the Abyei Protocol and Abyei Appendix require defining the Abyei Area to include all of the territory of the nine Ngok Dinka Chiefdoms in 1905."[377]

### *(c) The drafting history of the Abyei Protocol*

#### (i) GoS arguments

261. According to the GoS, the negotiating history of the Formula confirms that the 1905 transfer was not a transfer of people and thus supports the GoS's Territorial Interpretation.[378]

262. During the 1999–2005 peace talks, Southern Sudan was granted the right to self-determination and, in January 2000, the SPLM/A requested that this right be exercised in a referendum that would include, *inter alia,* "the District of Abyei whose population is of Ngok Dinka."[379] The GoS rejected the SPLM/A's request, arguing that Abyei was not part of the South[380] and that the 1956 boundaries were "sacrosanct."[381] The SPLM/A maintained that the boundary should be drawn further north to include "all the land allegedly inhabited by Ngok Dinka before the Abyei Agreement of 1966."[382]

263. The GoS goes on to observe that it was the SPLM/A that introduced the concept of an area "annexed to the north for administrative purposes" for the first time in 2000.[383] The GoS then notes that Dr. Douglas Johnson pre-

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[375] SPLM/A Counter-Memorial, para. 1572.

[376] *Ibid.*

[377] SPLM/A Memorial, para. 61. *See also* SPLM/A Memorial, para. 1147.

[378] *See* GoS Memorial, paras. 39–40. *See also* GoS Oral Pleadings, April 18, 2009, Transcr. 35/17 *et seq.*

[379] GoS Memorial, para. 44 quoting SPLM/SPLA Position for the Political Committee on Sudan Peace Talks: 15th-20th January 2000, available at www.vigilsd.org/adoc01.htm (SM Annex 64).

[380] GoS Memorial, paras. 45–49 referring to First Meeting of the Political Committee between Government of Sudan and the Sudanese People's Liberation Movement/Army, Nairobi, 15th-20th January, 2000, p. 3. *See also* Second Meeting of the Political Committee between Government of Sudan and the Sudanese People's Liberation Movement/Army, Nairobi, 26th February, 2000, p. 7.

[381] SPLM/A Oral Pleadings, April 18, 2009, Transcr. 36/01–03.

[382] GoS Memorial, para. 52 referring to the Abyei Agreement between Tribes of Messeria and Mareg Dinka, March 22, 1966 (SM Annex 62) which replaced an interim Agreement of March 3, 1965.

[383] GoS Memorial, para. 50 referring to Second Meeting of the Political Committee between Government of Sudan and the Sudanese People's Liberation Movement/Army, Nairobi, 26th February, 2000, p. 8.

sented a paper at a workshop organized by IGAD in 2003 in which he explicitly referred to the passage of the March 1905 SIR concerning the transfer of Sultan Rob to the province of Kordofan.[384] The GoS insists that "it was precisely this passage which led to the formulation of the ABC's mandate and that of the Tribunal [ . . . ]."[385] Indeed, on March 19, 2004, the US Special Envoy to Sudan, Senator Danforth, broke the deadlock with a proposal entitled "Principles of Agreement for Abyei" containing the agreed Formula.[386] All attempts by the SPLM/A to qualify the Formula by reference to later dates so as to recuperate Ngok territorial gains subsequent to 1905 were rejected.[387] The Formula was eventually enshrined in the Abyei Protocol[388] and regarded as "self-explanatory" by the Parties.[389]

264. The GoS concludes that the drafting history of the Formula warrants a Territorial Interpretation on at least three grounds:

1. The Abyei Protocol constituted an exception to the territorial principle of the *uti possidetis* of 1956, repeatedly affirmed in the CPA.
2. The territorial integrity of Kordofan was upheld against a claim to an extensive tribal boundary of 1966.
3. But an exception was made for an area administratively added to Kordofan in 1905. That area, once identified, could in principle be returned to Bahr el–Ghazal if the inhabitants preferred that course of action.[390]

### (ii) SPLM/A arguments

265. The SPLM/A contends that its Tribal Interpretation of Section 1.1.2 of the Abyei Protocol is fully corroborated by the drafting history of the Abyei Protocol.[391]

266. When the peace negotiations resumed between the Parties, the SPLM/A consistently emphasized in a number of papers that the Ngok Dinka had a right to self-determination[392] and constituted a "single cultural unit," which "up to 1905 [ . . . ] was administratively and politically a part of the

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[384] GoS Memorial, para. 51 referring to Sudan Intelligence Report, No. 128 (March 1905), p. 3 (SM Annex 9).

[385] GoS Memorial, para. 359.

[386] GoS Memorial, para. 53.

[387] GoS Oral Pleadings, April 23, 2009, Transcr. 23/13 *et seq. See also* Witness Statement, para. 23 (SCM WS 2).

[388] GoS Memorial, para. 53.

[389] GoS Memorial, para. 54.

[390] GoS Oral Pleadings, April 18, 2009, Transcr. 36/24–37/08. *See also* GoS Oral Pleadings, April 23, 2009, Transcr. 22/15 *et seq.*

[391] *See* SPLM/A Counter-Memorial, at para. 1565.

[392] SPLM/A Memorial, para. 1161; *see also* paras. 1156–1160.

South,"[393] before its annexing to Kordofan.[394] The GoS was for its part primarily concerned by the alleged Ngok Dinka northern expansion following 1905.[395] It argued that the Abyei Area should only include the "traditional Abyei,"[396] without putting forward an actual definition of the Area.[397]

267. In its written submissions and at the hearings, the SPLM/A agreed however with the GoS that while the key passage from the March 1905 SIR – a document which clearly demonstrates that the 1905 transfer was the transfer of the Ngok Dinka people – was examined by the negotiators in 2003 and "led to the formulation of the ABC's mandate,"[398] the Wingate Memorandum was not considered.[399]

268. The SPLM/A goes on to note that, in March 2004, U.S. Senator Danforth presented to the Parties a U.S. proposal entitled "Principles on Agreement on Abyei," which defined Abyei as the "area of the nine Ngoc [sic] Dinka Chiefdoms transferred to Kordofan in 1905," thereby reproducing an important aspect of the SPLM/A's proposed formulation in its previous draft agreements.[400] Further discussions eventually led to the production of a joint draft which mirrored the Danforth proposal and became Section 1.1.2 of the Abyei Protocol.[401]

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[393] SPLM/A Memorial, para. 1163 quoting Minutes of IGAD Peace Talks, Naivasha, dated 10 October 2003, at p. 2, SPLM/A Exhibit-FE 10/38.

[394] *See* SPLM/A Memorial, para. 1167 quoting Draft Agreement between the Government of Sudan (GoS) and The Sudan People's Liberation Movement/Army (SPLM/SPLA) on the Three Areas of Abyei, The Nuba Mountains and Southern Blue Nile (FUNJ Region), dated 21 October 2003, at p. 1, SPLM/A Exhibit-FE 10/40; *See also* SPLM/A Memorial, para. 1168 quoting Witness Statement of Minister Deng Alor Kuol, para. 41 (SPLM/A Memorial, Witness Statements, Tab 1).

[395] *See* SPLM/A Memorial, para. 1149.

[396] SPLM/A Memorial, para. 1164 quoting Minutes of IGAD Peace Talks, Naivasha, dated 10 October 2003, at p. 2, SPLM/A Exhibit-FE 10/38.

[397] SPLM/A Memorial, para. 1172 referring to *GOS Elaborated Position on Abyei*, dated 24 January 2004, at p. 1, SPLM/A Exhibit-FE 11/10. *See also* SPLM/A Memorial, para. 1175 referring to GoS, Draft Framework for Resolution of Outstanding Issues, pp. 3 *et seq.*, SPLM/A Exhibit-FE 12/3.

[398] GoS Memorial, para. 359; SPLM/A Counter-Memorial, para. 1547; SPLM/A Rejoinder, para. 804. *See also* SPLM/A Oral Pleadings, April 22, 2009, Transcr. 208/11 *et seq.*

[399] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 208/11 *et seq.*

[400] SPLM/A Memorial, para. 1176 quoting Principles of Agreement on Abyei (undated) presented on March 19, 2004, at p. 1, SPLM/A Exhibit-FE 12/4.

[401] *See* SPLM/A Memorial, paras. 1180–1183. *See* in particular para. 1182 referring to Draft Protocol between the Government of the Sudan and the Sudan People's Liberation Movement/Army on the Resolution of the Abyei Conflict, dated May 20, 2004, (Section 1.1.2) SPLM/A Exhibit-FE 12/11; Joint Draft Protocol Between the Government of the Sudan and the Sudan People's Liberation Movement/Army on the resolution of the Abyei Conflict, dated May 20, 2004, (Section 1.1.2) SPLM/A Exhibit-FE 12/12; Joint Draft Protocol Between the Government of the Sudan and the Sudan People's Liberation Move-

269. In the SPLM/A's analysis, it is clear that the final text was tailored to give effect to the unity of the Ngok Dinka people and its aspiration to self-determination,[402] and not to truncate the Ngok Dinka traditional homeland by reference to the 1905 provincial boundaries of Sudan.[403]

## 3. The relevance of the Kordofan/Bahr el Ghazal boundary to the delimitation of the area transferred in 1905

### *(a) Did the Bahr el Arab constitute a precise and proclaimed provincial boundary between Kordofan and Bahr el Ghazal and the northern limit of the area transferred in 1905?*

270. The GoS argues that the Condominium administration was present in the Abyei region and explored it prior to and in 1905. Despite limited and short-lived uncertainty surrounding the location of the Bahr el Arab, it is clear that there was a precise boundary between Kordofan and Bahr el Ghazal on that river prior to the transfer and that the highest-ranking official, who knew where the Bahr el Arab was, considered it to be both the provincial boundary and the northern limit of the transferred area in 1905.[404]

271. In contrast, the SPLM/A contends that, in 1905, at a time when there was virtually no administration in Southern Kordofan and Bahr el Ghazal, there was widespread and prolonged confusion as to the location of the Bahr el Arab. Contrary to the GoS's position, the provincial boundary between Kordofan and Bahr el Ghazal was indeterminate in 1905 and irrelevant to a transfer that concerned a people as opposed to a specific area.

#### (i) The state of Condominium knowledge and administration of the Abyei region in 1905

*(x) GoS arguments*

272. The GoS submits, relying on the writings of Francis Deng, that the remoteness of the Abyei region, and its inaccessibility to government officials in the early twentieth century, is greatly exaggerated.[405] As indicated in the report of one of the GoS's experts for these proceedings, Mr. Alistair Macdonald, the early 20th century was, on the contrary, a period of exploration designed to

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ment/Army on the Resolution of the Abyei Conflict, dated May 21, 2004, (Section 1.1.2) SPLM/A Exhibit-FE 12/13; Joint Draft Protocol between the Government of the Sudan and the Sudan People's Liberation Movement/Army on the Resolution of the Abyei Conflict, dated May 21, 2004, (Section 1.1.2) SPLM/A Exhibit-FE 12/14.

[402] SPLM/A Memorial, para. 1184.

[403] SPLM/A Memorial, para. 1189.

[404] GoS Counter-Memorial, paras. 468, 471, 479, GoS Rejoinder, paras. 341, 387.

[405] GoS Counter-Memorial, para. 362, quoting Deng, F., *White Nile, Black Blood* (2000), p. 136.

give the Condominium a better understanding of the Abyei area.[406] Bayldon was expressly sent by Wingate[407] to the region with the instructions to explore the Bahr el Arab, and his progress was monitored closely by Governmental officials.[408] It is obvious that the authorities wanted to elucidate the "river situation."[409] In opposition to the view of Professor Martin Daly, one of the SPLM/A's experts for these proceedings, that "British knowledge of the Ngok was based on a few hours' path crossing,"[410] the GoS notes that between 1901 and 1904, Sultan Rob was visited at least once a year by British officials who even bestowed on him a Second Class Robe of Honor.[411] Other important evidence of administration is the fact that the 1905 transfer itself was officially recorded in the Annual Reports for both the provinces of Kordofan and Bahr el Ghazal.[412]

*(y) SPLM/A arguments*

273. The SPLM/A submits that there was no effective administration of the regions of northern Bahr el Ghazal and southwestern Kordofan before the transfer in 1905.[413]

274. In the early twentieth century, the region of southwestern Kordofan and northern Bahr el Ghazal was extremely remote and difficult to access, especially in the rainy season.[414] Even in 1908, after the transfer, Condominium officials reported that the "whole Dinka country is difficult to traverse at any time."[415] As stated by Professor Daly in his Report, the Sudan Government at that time was under-staffed and devoted most of its resources to more popu-

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[406] GoS Counter-Memorial, para. 363; *See* Macdonald Report, paras. 3.2–3.28, discussing the exploratory journeys in the first decade of the 20th century, and referring to Saunders, Wilkinson, Percival, Bayldon, Lloyd, Lyons, Comyn, Huntley-Walsh (Appendix to GoS Memorial).

[407] GoS Memorial, para. 313 referring to Reports on the Finances, Administration and Condition of the Sudan, Annual Report (1904), p. 8 (SM Annex 23); GoS Oral Pleadings, April 21, 2009 Transcr. 9/20 *et seq.*

[408] GoS Rejoinder, para. 323; GoS Oral Pleadings, April 22, 2009, Transcr. 189/15–20 *et seq.*

[409] GoS Oral Pleadings, April 22, 2009, Transcr. 190/13–19; *See also* April 21, 2009, Transcr. 10/10–20.

[410] Daly Expert Report, p. 43, Appendix to SPLM/A Memorial.

[411] GoS Counter-Memorial, para. 250. The GoS refers to visits by Mahon, Wilkinson and Bayldon.

[412] *See* Reports on the Finances, Administration, and Condition of the Sudan, Annual Report (1905) Report for Bahr el-Ghazal Province (GoS Annex 24); Reports on the Finances, Administration, and Condition of the Sudan, Annual Report (1905) Report for Kordofan Province (GoS Annex 24).

[413] SPLM/A Memorial, paras. 280–296, SPLM/A Counter-Memorial, para. 1463, quoting the MENAS Report, para. 76 (Appendix to Counter-Memorial).

[414] Daly Expert Report, p. 4, Appendix to SPLM/A Memorial.

[415] Sudan Intelligence Report 171, October 1908, at Appendix D, at p. 60, SPLM/A Exhibit-FE 3/5 (emphasis added). *See also* Notes on the Military Situation in the Southern Sudan and British East Africa, War Office 5 (1905) SPLM/A Exhibit-FE 2/10.

lous and accessible areas, such as Khartoum and the Nile Valley.[416] The local tribes, including the Ngok Dinka, were under some form of self-governance, and "were in effect sovereign"[417] and "left on their own."[418] The British made no effort to effectively administer them.[419] The officials did not establish any permanent post, schools or health clinics in the Abyei area.[420] Their role was limited to "pacification" and maintaining order between the tribes.[421] Therefore, "there was [ . . . ] no point in delimiting a boundary"[422] since "provincial boundaries simply did not matter."[423] Even if some British officials were sent on expeditions in this area, the goal was not to explore or establish administrative control but to inform the local population that the British were now in charge of Sudan.[424]

### (ii) The extent of the confusion regarding the location of the Bahr el Arab

*(x) GoS arguments*

275. The GoS acknowledges that Wilkinson, who traveled from El Obeid to Sultan Rob's in 1902, mistook the Ragaba ez Zarga for the Bahr el Arab.[425] His mistake was reflected on the 1904 Sudan Intelligence Office Map[426] and repeated by Percival.[427]

276. The GoS further notes that the ABC Experts extensively relied upon Wilkinson's account to reject the Bahr el Arab as the northern boundary of Bahr el Ghazal[428] and conclude that the Ragaba ez Zarga was treated as

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[416] *See* Daly Expert Report, p. 5, Appendix to SPLM/A Memorial.

[417] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 99/02–03.

[418] *Ibid.*, at 103/8–9.

[419] *See* SPLM/A Oral Pleadings, April 22, 2009, Transcr. 101/18–102/24.

[420] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 101/12–16, 103/5–7.

[421] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 99/24–100/7, 103/10–13. *See also* Daly Expert Report, pp. 33-34, Appendix to SPLM/A Memorial.

[422] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 102/02–03.

[423] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 102/24. *See* Daly Expert Report, p. 33 (Appendix to SPLM/A Memorial); *See also* Second Daly Expert Report, pp. 17, 59, Appendix to SPLM/A Counter-Memorial.

[424] *Ibid.*, at 104/4–10. *See also* Second Daly Expert Report, p. 18, Appendix to SPLM/A Counter-Memorial.

[425] *See* GoS Memorial, para. 317 and Macdonald Report, paras. 3.7–3.9 (Appendix to GoS Memorial).

[426] *See* GoS Memorial, para. 317; Macdonald Report, para. 3.9 (Appendix to GoS Memorial); GoS Memorial Map Atlas, Map 7 (The Anglo-Egyptian Sudan, 1904). *See also* GoS Oral Pleadings, April 20, 2009, Transcr. 110/20 *et seq.* (Macdonald presentation).

[427] *See* GoS Counter-Memorial, para. 272 and Macdonald Report, paras. 3.8–4.4 (Appendix to GoS Memorial) and Percival, A., Route Report: Keilak to Wau, December 1904 (SCM Annex 26).

[428] GoS Memorial, para. 314 *et seq.*

the provincial boundary in 1905.[429] However, the GoS submits that the confusion was short-lived[430] and ended before the transfer in February 1905 with Bayldon's report.[431] The GoS cites to other contemporaneous reports[432] and maps that promptly corrected Wilkinson's mistakes and showed the Bahr el Arab at the right location.[433] The GoS therefore agrees with Mr. Macdonald's conclusion that: "a true understanding of which river was the Bahr el-Arab had been reached in published form in 1907, although men such as Comyn had determined this a year or two earlier."[434]

277. The GoS further insists that the very document on which the ABC Experts relied to demonstrate the confusion between the Ragaba ez Zarga and the Bahr el Arab, the 1905 Gleichen Handbook, contains a reference to Bayldon's correction of Wilkinson's mistake.[435]

278. In addition, while much was known about the Bahr el Arab, the Ragaba ez Zarga was unknown both before and in 1905 and did not appear on a map before 1907.[436] Given its indeterminate and seasonal nature, it could not have formed the boundary between Kordofan and Bahr el Ghazal up to

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[429] ABC Experts' Report, Part I, p. 38.

[430] *See* GoS Memorial, para. 318 referring to Macdonald Report, paras. 3.20–3.28 (Appendix to GoS Memorial).

[431] GoS Memorial, para. 313, 321 referring to Gleichen, Handbook of the Sudan (1905), Vol. I, p. 168 (SM Annex 38).

[432] *See* GoS Memorial, para. 318. referring to Comyn, D, *The Western Sources of the Nile* (1907) 30 *The Geographical Journal*, p. 524 (GoS Memorial, Annex 50) and Comyn's map (Map 9 in GoS Memorial Map Atlas); GoS Memorial, para. 319 referring to Walsh's report in the Sudan Intelligence Reports, No. 1605 (November 1907) Appendix B., p. 5 (SM Annex 15) and Sudan Intelligence Reports, No. 140, (March 1906), Appendix D, p. 14 (SM Annex 12); GoS Memorial, para. 313 and Macdonald Report, paras. 3.18–3.19 (Appendix to GoS Memorial) referring to Lloyd, W., (Percival, C.) *Correspondence: The Dar Homr* (1907) 30 *The Geographical Journal* p. 219 (SM Annex 55); GoS Memorial, para. 320 referring to Garstin, W., *Fifty Years of Nile Exploration, and Some of its Results,* (1909) 33 *The Geographical Journal* 117, 142 (SM Annex 51).

[433] *See* GoS Memorial, paras. 327–329. They include a 1907 map prepared by the Sudan Survey Office, (Map 10 in GoS Memorial Map Atlas; *See also* GoS Oral Pleadings, April 20, 2009, Transcr. 134/16–22 (Macdonald presentation), a 1910 map on the province of Kordofan based on papers by Captain Lloyd, then Governor of Kordofan (Map 11 in GoS Memorial Map Atlas), and another 1910 map on the Anglo-Egyptian Sudan prepared by the Sudan Survey Office (Map 12 in GoS Memorial Map Atlas).

[434] Macdonald Report, para. 4.3 (Appendix to GoS Memorial); *See also* GoS Oral Pleadings, April 20, 2009, Transcr. 134/06 *et seq.* (Macdonald presentation).

[435] *See* GoS Memorial, para. 321; Gleichen, *Handbook of the Sudan* (London, 1905), Vol. I, p. 168 (SM Annex 38); *See also* GoS Memorial Map Atlas, Map 8 (*The Anglo-Egyptian Sudan,* War Office, 1903 in 1905 Gleichen Handbook).

[436] *See* GoS Memorial, para. 327–329; GoS Oral Pleadings, April 20, 2009, Transcr. 111/19–22, 118/01–10 (Macdonald presentation); GoS Memorial, para. 328; GoS Oral Pleadings, April 20, 2009; Map 10 in GoS Memorial Map Atlas (*Northern Bahr el Ghazal Sheet-65,* Survey Office (Khartoum), 1907).

the boundary with Darfur. Indeed, maps and travel accounts of the period all indicate that there was a tripoint on the Bahr el Arab between the provinces of Darfur, Bahr el Ghazal and Kordofan.[437]

279. Finally, the GoS suggests that even if the ABC Experts were correct in determining that the Ragaba ez Zarga was the provincial boundary between Kordofan and Bahr el Ghazal before 1905, this would mean that the areas located north of the Ragaba ez Zarga were already part of Kordofan at the moment of the transfer, and as such could not have formed part of the area transferred. Therefore, the ABC erred in allocating areas to the Ngok Dinka that were north of the Ragaba ez Zarga.[438]

*(y) SPLM/A arguments*

280. The SPLM/A first points out that the Ragaba ez Zarga and the Bahr el Arab, which shared many of the same features and characteristics,[439] were easily confused with each other.[440] These similarities are confirmed by the historical record, and in particular the observations of Percival,[441] Wilkinson[442] and Lloyd,[443] Cunnison,[444] witness evidence[445] and modern expertise.[446]

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[437] *See* GoS Memorial, para. 327–329; *See* GoS Memorial Map Atlas, Map 17 (*Anglo-Egyptian Sudan,* War Office, 1914 rev. 1920); *See* GoS Memorial paras. 302 and 303, referring to Condition of the Sudan, Annual Report (1904) Annual Report for Kordofan Province, p. 101 (SM Annex 23); *See* GoS Memorial paras. 305 and 328, referring to Slatin Pasha's accounts in Sudan Intelligence Reports, No. 114, January 1904, Appendix A, p. 5 (SM Annex 6); *See* GoS Memorial paras. 328 and 368 referring to MacMichael, H.A., *The Tribes of Northern and Central Kordofan* (1912), p. 21, fn 1 (SM Annex 42) and the Reports on the Finances, Administration, and Condition of the Sudan, Annual Report (1904) Annual Report for Kordofan Province, p. 101 (SM Annex 23); *See* GoS Memorial Map 5 (*The Anglo-Egyptian Sudan,* drawn by H.W. Mardon, 1901 rev. 1903, in 1905 Gleichen Handbook).

[438] GoS Counter-Memorial, para. 388.

[439] *See* SPLM/A Counter-Memorial, paras. 1400 *et seq.*

[440] *See* SPLM/A Counter-Memorial, para. 1410.

[441] *See* SPLM/A Counter-Memorial, para. 1402 quoting Percival, Keilak to Wau (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), SPLM/A Exhibit-FE 17/13.

[442] *See* SPLM/A Counter-Memorial, para. 1402 quoting Wilkinson, El Obeid to Dar El Jange (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 155 (1905), SPLM/A Exhibit-FE 2/15.

[443] *See* SPLM/A Counter-Memorial, para. 1402 quoting Sudan Intelligence Reports, No. 160, dated November 1907, Appendix B, at p. 5, SPLM/A Exhibit-FE 17/29. *See also* Map 38 of SPLM/A Map Atlas, vol. 1 (*Kordofan: Map of Dar Homr,* Watkiss Lloyd, 1907).

[444] *See* SPLM/A Counter-Memorial, para. 1403 quoting I. Cunnison, *Baggara Arabs–Power and the Lineage in a Sudanese Nomad Tribe* 18 (1966), SPLM/A Exhibit-FE 4/16.

[445] *See* SPLM/A Counter-Memorial, para. 1407 quoting Witness Statement Weiu Dau Nouth (Mareng elder), at p. 3, §14.

[446] *See* SPLM/A Counter-Memorial, para. 1408 quoting the MENAS Expert Report, para. 122, Appendix to SPLM/A Counter-Memorial; SPLM/A Counter-Memorial, para. 1409

281. In addition, the SPLM/A argues that, contrary to the GoS's assertions, the confusion regarding the location of the Bahr el Arab was neither isolated, nor quickly resolved. Indeed, even though certain Condominium officials may have known where the real Bahr el Arab was, there was no general agreement as to its location.[447] The confusion created by Wilkinson , who mistook the Ragaba ez Zarga for the Bahr el Arab,[448] was shared by other officials such as Mahon,[449] Percival,[450] Boulnois,[451] O'Connell,[452] and Lloyd[453] and reflected on maps, including the 1904 official Anglo-Egyptian Sudan Intelligence Office map reproduced in the 1905 Gleichen Handbook.[454] It was also included in the 1906 Annual Report for Kordofan.[455]

282. The SPLM/A further argues that the confusion was "in full force exactly at the time of the 1905 transfer of the Ngok Dinka."[456] Contrary to the GoS's claim that Bayldon's correction of Wilkinson's mistake occurred in February 1905, the SPLM/A maintains that the documentary record clearly shows that the error "was not corrected until 1907 or 1908, two or three years after the

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quoting the MENAS Expert Report, para. 125, Appendix to SPLM/A Counter-Memorial; *see also* SPLM/A Rejoinder, para. 758. *See also* SPLM/A Rejoinder, paras. 757, 759, 773–775.

[447] SPLM/A Rejoinder, para. 777.

[448] *See* SPLM/A Memorial, para. 919; Wilkinson, El Obeid to Dar El Jange (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 155 (1905), SPLM/A Exhibit-FE 2/15. *See also* Map 29 of SPLM/A Map Atlas, vol. 1 (Wilkinson's Route, 1902) and SPLM/A Counter-Memorial, para. 955.

[449] *See* SPLM/A Counter-Memorial, para. 945 quoting Sudan Intelligence Report, No. 92, dated 31 March 1902, Appendix F, at p. 19, SPLM/A Exhibit-FE 1/16. *See also ibid.,* para. 980 and Sudan Intelligence Report, No. 104, dated March 1903, Appendix E, at p. 19, SPLM/A Exhibit-FE 1/21.

[450] *See* SPLM/A Counter-Memorial, para. 988 quoting Percival, Keilak to Wau (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25, 26 (1905), SPLM/A Exhibit-FE 17/13. *See also* SPLM/A Counter-Memorial, para. 1018 and Sudan Intelligence Report, No. 130, dated May 1905, Appendix A, at p. 4–6, SPLM/A Exhibit-FE 17/16.

[451] *See* SPLM/A Counter-Memorial, para. 1012 quoting Letter from W.A. Boulnois, Governor Bahr el-Ghazal province, to Governor-General Wingate, dated December 23, 1904, SPLM/A Exhibit-FE 17/10. *See also* SPLM/A Counter-Memorial, para. 1415.

[452] *See* SPLM/A Rejoinder, para. 755 quoting Annual Report on the Sudan, 1906, Province of Kordofan, at p. 689, SPLM/A Exhibit-FE 2/19.

[453] *See* SPLM/A Counter-Memorial, para. 1037 quoting Lloyd, *Some Notes on Dar Homr,* The Geographical Journal, 29 (January to June 1907), at p. 649, SPLM/A Exhibit-FE 3/4.

[454] *See* SPLM/A Counter-Memorial, para. 1416 and Map 36 of SPLM/A Map Atlas, vol. 1 (*The Anglo-Egyptian Sudan,* Intelligence Office Khartoum, 1904).

[455] SPLM/A Rejoinder, para. 763, referring to Annual Report on the Sudan, 1906, Province of Kordofan, at p. 689, SPLM/A Exhibit-FE 2/19.

[456] *See* SPLM/A Counter-Memorial, para. 1419.

1905 transfer of the Ngok Dinka."[457] The SPLM/A notes that the Bayldon report was not available in February 1905 as it was clearly dated 20 March 1905,[458] and that Wingate's 1905 Memorandum indicates that "much of the course of these rivers is still unknown [ . . . ] and doubt still exists as to the correct names of the intricate waterways which intersect this part of the Sudan."[459]

283. The SPLM/A thus argues that the conclusion of the ABC Experts as to when the confusion about the Bahr el Arab was resolved (*i.e.,* 1908) "is not materially different from the GoS's view that 'a true understanding of which river was the Bahr el-Arab had been reached in published form in 1907.'"[460]

284. The SPLM/A further notes that the GoS misinterprets the conclusions that the ABC drew from the confusion surrounding the Bahr el Arab. The GoS indeed contends that the ABC Experts concluded that "the southern boundary of Kordofan before 1905 was the Ragaba ez-Zarga"[461] when, in reality, the ABC Experts considered, on the basis of the administration's understanding, that the Ragaba ez Zarga "was treated" as the provincial boundary.[462]

285. The SPLM/A also dismisses the GoS's criticism of the ABC Experts' decision to include in the Abyei Area a large area north of the Ragaba ez Zarga.[463] This criticism is in fact based on the wrong premise that the Abyei Area's northern boundary should necessarily be the Kordofan/Bahr el Ghazal boundary.[464] Instead of attempting to infer what the Condominium authorities transferred to Kordofan by reference to this putative border, the GoS should have examined what the authorities considered they had transferred.[465]

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[457] SPLM/A Counter-Memorial, para. 1419, 1425; SPLM/A Rejoinder, para. 761, 762 (referring to Lloyd, *Some Notes on Dar Homr,* The Geographical Journal, 29 (January to June 1907), at p. 649, SPLM/A Exhibit-FE 3/4) and 763 (referring to Annual Report on the Sudan, 1906, Province of Kordofan, at p. 689, SPLM/A Exhibit-FE 2/19). *See* Macdonald Report, para. 3.13 (Appendix to GoS Memorial).

[458] SPLM/A Rejoinder, para. 766; Sudan Intelligence Reports, No. 128 (March 1905), Appendix C, p. 10–11 (SM Annex 9).

[459] Reports on Finances, Administration, and Condition of the Sudan in 1905; Memorandum of Major General Sir R. Wingate; Province of Bahr el-Ghazal, Province of Kordofan, p. 10, SPLM/A Memorial, SPLM/A Exhibit-FE 2/13.

[460] SPLM/A Counter-Memorial, para. 1435 quoting GoS Memorial, at para. 329 (itself quoting the Macdonald Report, at para. 4.3). *See also* Second Daly Expert Report, pp. 19–22, Appendix to SPLM/A Counter-Memorial.

[461] SPLM/A Counter-Memorial, para. 1466 quoting GoS Memorial, at para. 324(b).

[462] SPLM/A Counter-Memorial, para. 1474 quoting ABC Experts' Report, Part I, at p. 39, Appendix B to SPLM/A Memorial. *See also* Second Daly Expert Report, p. 22, Appendix to SPLM/A Counter-Memorial.

[463] *See* SPLM/A Counter-Memorial, para. 1477.

[464] *See* SPLM/A Counter-Memorial, paras. 1481–1482.

[465] *See* SPLM/A Counter-Memorial, para. 1484.

### (iii) The Bahr el Arab as the alleged definitive boundary between Kordofan and Bahr el Ghazal prior to 1905

*(x) GoS arguments*

286. The GoS submits that a number of pre-1905 documents describe the Bahr el Arab as the provincial boundary between Bahr el Ghazal and Kordofan, including: Frank Lupton's 1884 writings;[466] an 1884 report by the Intelligence Branch of the War Office;[467] the 1898 first edition of the 1898 Gleichen Handbook;[468] Mardon's 1903 revised map (first issued in 1901);[469] the 1902 to 1904 Bahr el Ghazal Annual Reports;[470] the 1904 Kordofan Annual Report (which states that "the Darfur Frontier [ . . . ] runs southwards, west of Dar Homr to the Bahr el-Arab *which is the northern boundary of the Bahr el-Ghazal Province*");[471] the 1905 Bahr el Ghazal Annual Report (which no longer refers to the provincial boundaries as being "vaguely defined");[472] and the 1905

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[466] *See* GoS Memorial, para. 292, referring to "Mr. Frank Lupton's (Lupton Bey) Geographical Observations in the Bahr-el-Ghazal Region: With Introductory Remarks by Malcolm Lupton. Read at the Royal Geographical Society 10 March 1884," (1884) 6 Proceedings of the Royal Geographical Society 245, p. 245 (SM Annex 57). *See also* Lupton's 1884 Map which shows the Bahr el Arab (called "Bakara el Homr") (GoS Memorial, Figure 7, p. 105; GoS Memorial Map Atlas, Map 2, *The Province of Bahr el Ghazal,* The Royal Geographic Society, 1884). The GoS also refers to the writings of Naum Shoucair, an historian who served as Chef-de-bureau of the Sudan Agent General in Cairo: *see* GoS Counter-Memorial, paras. 21–22, 440–442, 446 Shoucair, N., History and Geography of the Sudan, (1903), p. 71 (SCM Annex 1).

[467] *See* GoS Memorial, para. 293; Report of the Egyptian Province of the Sudan, Red Sea, and Equator (1884), p. 91 (SM Annex 28).

[468] *See* GoS Memorial, paras. 296–297 referring to Gleichen, *Handbook of the Sudan* (HMSO, London, 1898), p. 35-36 (SM Annex 37).

[469] *See* GoS Memorial, para. 304; GoS Memorial Map Atlas, Map 5 (*The Anglo-Egyptian Sudan,* drawn by H.W. Mardon, 1901 rev. 1903, in 1905 Gleichen Handbook); Figure 9 on p. 111 of GoS Memorial. The GoS also refers to the 1898 Carte du Bahr el Ghazal by Marchand; *see* GoS Memorial, para. 295 and GoS Memorial Map Atlas, Map 4 (*Carte du Bahr el Ghazal,* Bulletin du Comité de l'Afrique française, 1898).

[470] GoS Memorial, paras. 299–302; Reports on the Finances, Administration, and Condition of the Sudan, Annual Report Bahr el-Ghazal Province (1902), p. 230 (SM Annex 21); Finances, Administration, and Condition of the Sudan, Annual Report Bahr el-Ghazal Province (1902), p. 315 (SM Annex 21); Reports on the Finances, Administration, and Condition of the Sudan, Annual Report Bahr el-Ghazal Province (1903), p. 71 (SM Annex 22); Reports on the Finances, Administration, and Condition of the Sudan, Annual Report Bahr el-Ghazal Province (1904), p. 3 (SM Annex 23).

[471] GoS Memorial, para. 302 quoting Reports on the Finances, Administration, and Condition of the Sudan, Annual Report Kordofan Province (1904), p. 101 (SM Annex 23) (Emphasis added by the GoS).

[472] *See* GoS Memorial, para. 299, GoS Counter-Memorial, para. 436; Reports on the Finances, Administration, and Condition of the Sudan, Annual Report Bahr el-Ghazal Province (1902), 230 (emphasis added) (SM Annex 21).

Gleichen Handbook[473] which includes two maps showing the Bahr el Arab as the northern border of the Bahr el Ghazal.[474]

287. According to the GoS, it is clear from the contemporary record that the boundary between Kordofan and Bahr el Ghazal before the 1905 transfer was the Bahr el Arab.[475] The fact that the provincial boundaries were not prescribed in any kind of constitutional, legislative or executive document is immaterial, as no such legal requirement existed.[476] Contrary to Professor Schofield's position, what mattered was that Condominium officials, including Governor-General Wingate, considered the Bahr el Arab to be the boundary.[477]

*(y) SPLM/A arguments*

288. According to the SPLM/A, when the Bahr el Arab was referred to in the documentary record as the provincial boundary prior to and during 1905, "the Anglo-Egyptian administrators simply did not have a clear or common understanding of where that boundary was in fact located."[478]

289. The GoS itself acknowledges "that the location and course of the Bahr el-Arab was 'ill-defined,' 'vaguely-defined,' 'uncertain,' and 'bewildering.' "[479] More generally, the GoS concedes that "'provincial boundaries at this period [1902–1922] were not laid down or recorded in any very formal way, and they were often stated to be approximate'" [480] and fails, for want of adequate documentary support, in its attempt retrospectively to "create" a clear or official boundary between Bahr el Ghazal and Kordofan prior to 1905.[481]

290. The SPLM/A also relies on Professor Schofield to argue that the three requirements for boundary delimitation, namely allocation, delimita-

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[473] *See* GoS Memorial, para. 307, referring to Gleichen, Handbook of the Sudan (1905), Vol. II, pp. 153 (SM Annex 38).

[474] *See* GoS Memorial, para. 321 referring to one map (Map 8 of the GoS Memorial Map Atlas, *The Anglo-Egyptian Sudan,* Intelligence Division, War Office, 1905).

[475] GoS Counter-Memorial, para. 452.

[476] GoS Counter-Memorial, paras. 450–451. *See also* GoS Oral Pleadings, April 21, 2009, Transcr. 30/05 *et seq.*

[477] GoS Oral Pleadings, April 22, 2009, Transcr. 128/22 *et seq.* (Cross-examination of Professor Schofield)

[478] SPLM/A Counter-Memorial, para. 1448. *See also* MENAS Expert Report, at paras. 50–51, Appendix to SPLM/A Counter-Memorial.

[479] SPLM/A Counter-Memorial, para. 1442.

[480] SPLM/A Counter-Memorial, para. 1440 quoting GoS Memorial, at para. 368. *See also* Second Daly Expert Report, pp. 33–37, Appendix to SPLM/A Counter-Memorial, for the proposition that Darfur's and Kordofan's pre-1905 southern boundaries were similar, as the GoS alleges, but only in so far as they did not exist (Appendix to SPLM/A Counter-Memorial).

[481] Second Daly Expert Report, p. 12, Appendix to SPLM/A Counter-Memorial. *See also ibid.,* pp. 9–12, pp. 13–24, pp. 54–57, p. 59 (Appendix to SPLM/A Counter-Memorial).

tion and demarcation, were never fulfilled.[482] Since the references to the Bahr el Arab in 1905 were only approximate, there cannot have been any definitive identification of a boundary.[483] There was never any governmental act identifying geographically a specific boundary line capable of being demarcated and mapped.[484] Even references in official documents to the general term "Bahr el-Arab," the specific location of which was unclear, could not have constituted "a central defining action by the Condominium government allocating or establishing a boundary."[485]

291. The SPLM/A goes on to contend that the cartographic evidence confirms that the boundary was indefinite and indeterminate in 1905. The SPLM/A contends that there "was no official Sudan Government map as of 1905 that delimited a provincial boundary between Kordofan and Bahr el-Ghazal; on the contrary, the only official map that existed (*i.e.*, the 1904 Anglo-Egyptian Sudan map prepared by the Intelligence Office in Khartoum)[486] "conspicuously *omitted* any such boundary, while identifying the boundaries of other Sudanese provinces."[487] The 1901 Mardon map[488] relied upon by the GoS does not purport to show the boundary.[489] Mardon himself noted in 1906 that "'[t]he exact limits of the provinces, especially those in the south, are not yet definitely fixed."[490]

### (iv) The alleged description in the 1905 transfer documents of the provincial boundary as the northern limit of the transferred area

*(x) GoS arguments*

292. The GoS places great emphasis on the 1905 transfer documents, namely the March 1905 SIR and the 1905 Annual Reports of the Kordofan and

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[482] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 121/07 *et seq.*

[483] *Ibid.*, at 122/12–22.

[484] SPLM/A Memorial, para. 322.; *See also* SPLM/A Oral Pleadings, April 22, 2009, Transcr. 122/07–11.

[485] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 122/19–123/7.

[486] *See* Map 36 of SPLM/A Map Atlas vol. 1 (*The Anglo-Egyptian Sudan,* Intelligence Office Khartoum, 1904, in 1905 Gleichen Handbook).

[487] SPLM/A Counter-Memorial, para. 1452. *See also* Appendix B to SPLM/A Counter-Memorial.

[488] GoS Memorial Map Atlas, Map 5 (*The Anglo-Egyptian Sudan,* drawn by H. W. Mardon, 1901 rev. 1903, in 1905 Gleichen Handbook).

[489] *See* SPLM/A Oral Pleadings, April 20, 2009, Transcr. 166/14 *et seq. See also* SPLM/A Counter-Memorial, para. 1454; Second Daly Expert Report, pp. 14–15, Appendix to SPLM/A Counter-Memorial.

[490] *See* SPLM/A Memorial, para. 308 and SPLM/A Counter-Memorial, para. 1455 quoting H. Mardon, *A Geography of Egypt and the Anglo-Egyptian Sudan* 174 (1906), SPLM/A Exhibit-FE 2/20.

Bahr el-Ghazal provinces,[491] both of which no longer mention the Bahr el Arab as the boundary of the two provinces,[492] and the 1905 Memorandum by Governor-General Wingate, the senior government official in Sudan at the time.[493]

293. According to the GoS, the relevant passage of the Wingate Memorandum[494] indicates that the northern limit of the transferred area was the Bahr el Arab. Wingate, who the GoS maintains knew the exact location of the river,[495] unequivocally states that the tribal districts that were incorporated in Kordofan were located south of the Bahr el Arab and had been formerly part of Bahr el Ghazal.[496] There is no reference in his report to an area north of the Bahr el Arab being transferred.[497]

294. The GoS also stresses that the reference to the transfer in the Wingate Memorandum is under a section entitled "Changes in Provincial Boundaries and Nomenclature"[498] while in the 1905 Annual Reports of both Bahr el Ghazal and Kordofan, the transfer is discussed under the sections entitled "Provinces Boundaries."[499]

295. The GoS concludes that the four transfer documents make it clear that Condominium officials transferred a territory from one province to another, bounded to the north by the Bahr el Arab.[500]

*(y) SPLM/A arguments*

296. According to the SPLM/A, the analysis of the transfer documents demonstrates that Governor-General Wingate himself considered that there

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[491] GoS Memorial, paras. 361–362 referring to Sudan Intelligence Report, No. 128, dated March 1905, Appendix C, at p. 3 (SM Annex 9), Reports on the Finance, Administration and Condition of the Sudan, Annual Reports, Bahr el-Ghazal Province (1905), p. 3 (SM, Annex 24) and Reports on the Finance, Administration and Condition of the Sudan, Annual Reports, Kordofan Province (1905), p. 113 (SM, Annex 24).

[492] *See* GoS Counter-Memorial, paras. 461–463.

[493] *See* GoS Counter-Memorial, para. 466; Reports on the Finances, Administration, and Condition of the Sudan, Memorandum by Major General Sir R. Wingate (1905), p. 24 (SM Annex 24).

[494] *See supra* para. 237 *et seq.*

[495] *See* GoS Oral Pleadings, April 20, 2009, Transcr. 206/17 *et seq.* and April 21, 2009, Transcr. 1/18 *et seq.*

[496] GoS Counter-Memorial, para. 468; Rejoinder, para. 342.

[497] *See* GoS Counter-Memorial, para. 416.

[498] *See* GoS Counter-Memorial, para. 467 quoting Reports on the Finances, Administration, and Condition of the Sudan, Memorandum by Major General Sir R. Wingate (1905), p. 24 (SM Annex 24).

[499] GoS Counter-Memorial, para. 464; *See* Reports on the Finances, Administration, and Condition of the Sudan, Annual Report, Bahr el Ghazal Province, (1905), p. 3 (SM Annex 24); Reports on the Finances, Administration, and Condition of the Sudan, Annual Report, Kordofan Province (1905), p. 113 (SM Annex 24).

[500] GoS Oral Pleadings, April 20, 2009, Transcr. 175/03–20, 188/19–190/22.

was still uncertainty surrounding the course of the Bahr el Arab in 1905.[501] He did not state that it was the provincial boundary[502] and he "certainly did not purport to fix 'the northern limit of the area that was transferred in 1905.'"[503] His reference to the "Bahr el-Arab" was "merely a general geographic description, and not the delimitation or definition of a boundary."[504] Indeed, the provincial boundary was irrelevant to the delimitation of the northern limit of the transferred area. What occurred was a transfer of people, not territory, from the Bahr el Ghazal administration to the Kordofan administration.[505] This is evidenced, in particular, by the March 1905 SIR.[506]

297. It is obvious that the transfer of the Ngok and Twic people entailed territorial consequences.[507] However, the boundaries of Kordofan were not extended in the years following the transfer precisely because the Condominium officials, who did not know what territory the Ngok Dinka inhabited, transferred the administration of a people rather than a specific area.[508]

298. The SPLM/A therefore agrees with the ABC Experts' conclusion that "the Ngok people were regarded [by the Anglo-Egyptian administration] as part of the Bahr el-Ghazal Province until their transfer in 1905"[509] and that "the government's claim that only the Ngok Dinka territory south of the Bahr el-Arab was transferred to Kordofan in 1905 is therefore found to be mistaken."[510]

### *(b) Post-1905 depictions of the alleged boundary and transferred area*

#### (i) GoS arguments

299. The GoS points to the first description of the post-1905 boundary in a 1908 report issued by Captain Lloyd, then Governor of the province of Kordo-

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[501] *See supra* para. 282. *See also* SPLM/A Oral Pleadings, April 22, 2009, Transcr. 126/04 *et seq.*

[502] *See supra* para. 244.

[503] SPLM/A Rejoinder, para. 861.

[504] SPLM/A Rejoinder, para. 861.

[505] *See supra* para. 243. *See also* SPLM/A Oral Pleadings, April 22, 2009, Transcr. 247/12 *et seq.*

[506] *See supra* para 245.

[507] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 221/15 *et seq.; See also* SPLM/A Rejoinder, paras. 807–811.

[508] *See* SPLM/A Oral Pleadings, April 22, 2009, Transcr. 222/17 *et seq. See also supra* para. 243.

[509] ABC Experts' Report, Part I, at p. 39, Appendix B to SPLM/A Memorial.

[510] SPLM/A Counter-Memorial, para. 1486 quoting ABC Experts' Report, Part I, at p. 39, Appendix B to SPLM/A Memorial.

fan.[511] While this report still identifies the Bahr el Arab as the southern boundary of Kordofan, a map published by Lloyd in 1910[512] shows the border between the Kordofan and Bahr el Ghazal provinces to be south of the Bahr el Arab.[513]

300. Between 1905 and 1909, no other changes were recorded regarding the location of the boundaries in the Annual Reports for the provinces of Bahr el Ghazal and Kordofan, except a minor change in the Darfur/Kordofan boundary in 1908. Only the 1905 transfer can therefore justify the curved line in Lloyd's 1910 map.[514] The only reason this map (and the whole series of Sheet-65 maps) labels the boundary as "approximate" is that the "southern limits of the transferred areas were not defined in 1905, either in Wingate's Memorandum or elsewhere."[515]

301. The GoS also relies on the 1911 and 1912 editions of the *Anglo-Egyptian Handbook*.[516] The former notes that the northern boundary of the Bahr el Ghazal province was not yet delimited, but indicates that "the boundary divides certain tribal districts to Lake No,"[517] instead of following the Bahr el Arab. The latter describes the southern border of Kordofan, "somewhat indefinitely,"[518] as following a watercourse ten miles to the east of Ghabat el Arab, as shown on the 1914 Ghabat el Arab Office Map.[519] The GoS submits that subsequent maps produced either by Sudan's War or Survey Office all show the transferred area in the same way.[520] The boundary is shown as a curved line,

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[511] *See* GoS Memorial, para. 372; Sudan Intelligence Reports, No. 171, October 1908, Appendix D, pp. 32–35 (SM Annex 18).

[512] *See* GoS Memorial, para. 372 referring to Map 11 in GoS Memorial Map Atlas (*The Sudan Province of Kordofan,* The Sudan Survey Department, Khartoum, 1910).

[513] *See* GoS Memorial, para. 373; Figure 13, p. 143, GoS Memorial; Map 11 in GoS Memorial, Map Atlas (*The Sudan Province of Kordofan,* The Sudan Survey Department, Khartoum, 1910).

[514] *See* GoS Counter-Memorial, paras. 283–288.

[515] GoS Oral Pleadings, April 21, 2009 Transcr. 33/11 *et seq.*

[516] GoS Memorial, paras. 376–379 referring to The Anglo-Egyptian Handbook Series–The Bahr el-Ghazal Province (1911), p. 5 (SM Annex 26) and The Anglo-Egyptian Handbook Series–Kordofan and the Region to the West of the Nile (1912), p. 7 (SM Annex 27).

[517] GoS Memorial, para. 377; The Anglo-Egyptian Handbook Series–The Bahr el-Ghazal Province (1911), p. 5 (SM Annex 26).

[518] GoS Memorial, para. 378.

[519] *See* GoS Memorial, para. 379 and GoS Memorial Map 13 (*Ghabat el Arab Sheet 65-L,* Survey Office Khartoum, 1914).

[520] *See* GoS Memorial, para. 380 and Figure 14, p. 146. *See also* GoS Memorial Map Atlas, Map 13 (*Ghabat el Arab Sheet 65-L,* Survey Office (Khartoum) 1914); Map 14 (*Anglo-Egyptian Sudan,* Geographical Section (Intelligence Division) War Office, 1914); Map 15 (*Achwang Sheet 65-K,* Survey Office (Khartoum) 1916); Map 16 (*Darfur,* Geographical Section (Intelligence Division), War Office, 1916); Map 17 (*Anglo-Egyptian Sudan,* Geographical Section (Intelligence Division), War Office, 1920); Map 18 (*Abyor Sheet 65-K,* Survey Office (Karthoum) 1922); Map 19 (*Ghabat el Arab Sheet 65-L,* Survey Office (Khartoum) 1922); Map 20 (*Twic Dinka Sheet 65-K,* Survey Office (Khartoum) 1925); Map 21 (*Ghabat*

never more than 25 km from the Bahr el Arab, following the course of the river until it is depicted as a straight-line in 1925 to account for, *inter alia,* the modification of the Darfur boundary in 1924 and the re-transfer of the Twic Dinka to Bahr el Ghazal.[521]

### (ii) SPLM/A arguments

302. The SPLM/A contends that Sudan Government maps did not identify any definite provincial boundary between Kordofan and Bahr el Ghazal until well after 1905.[522] The Survey Office's 1907 map of northern Bahr el Ghazal[523] thus omits the depiction of the boundary between the two provinces.[524] Further, Lloyd's 1910 map, an unofficial map relied on by the GoS, clearly describes the boundary between Bahr el Ghazal and Kordofan to be approximate.[525] It is not until 1913 that the Sudan Government itself attempted to identify the boundary in a map of Kordofan which still contained a number of inaccuracies.[526]

303. The SPLM/A refers the Tribunal to Figure 14 in the GoS Memorial and Map 60 in the SPLM/A Map Atlas vol. 2, which both show the wide and continuing variations in the boundary in the first decades of the 20th century and illustrate its indeterminate nature. The SPLM/A finally argues that "even

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*el Arab Sheet 65-L,* Survey Office (Khartoum) 1925); Map 22 (*Ghabat el Arab Sheet 65-L,* Survey Office (Khartoum) 1929); Map 23 (*Abyei Sheet 65-K,* Survey Office (Khartoum) 1931); Map 24 (*Ghabat el Arab Sheet 65-L,* Survey Office (Khartoum) 1935); Map 25 (*Abyei Sheet 65-K,* Survey Office (Khartoum) 1936); Map 26 (*Ghabat el Arab Sheet 65-L,* Survey Office (Khartoum) 1936).

[521] GoS Memorial, para. 381; *See also* Figure 14 on p. 146 of GoS Memorial; GoS Counter-Memorial para. 499.

[522] *See* SPLM/A Counter-Memorial, para. 1459–1460 *See also* Appendix B to SPLM/A Counter-Memorial. The SPLM/A thus observes that both the Survey Department's 1907 map of "The White Nile and Kordofan" (Map 42 of SPLM/A Map Atlas vol. 1) and the Survey Office's 1907 map of northern Bahr el-Ghazal (Map 40 of SPLM/A Map Atlas vol. 1) omit the depiction of the boundary between the two provinces.

[523] Map 40 of SPLM/A Map Atlas vol. 1 (*Northern Bahr el-Ghazal: Sheet 65,* Survey Office Khartoum, 1907).

[524] *See* SPLM/A Counter-Memorial, para. 1460 and Appendix B, para. 50. *See also* Map 42 of SPLM/A Map Atlas vol. 1 (White Nile and Kordofan, Survey Department Cairo, 1907).

[525] *See* SPLM/A Counter-Memorial, Appendix B, p. 399. *See also* Second Daly Expert Report, pp. 37–43, Appendix to SPLM/A Counter-Memorial, for a critical review of the material relied upon by the GoS in depicting the allegedly transferred area.

[526] Map 48 of SPLM/A Map Atlas vol. 1 (*Kordofan Province,* Survey Office Khartoum, 1913). The SPLM/A notes that it labels the Regaba ez Zarga as the "Bahr el Homr," the Regaba Umm Bieiro is marked as the Bahr el Arab later in its course, and the Bahr el Arab is named the "Lol" for part of its course. *See* SPLM/A Counter-Memorial, Appendix B, p.400.

when a Kordofan/Bahr el-Ghazal boundary was depicted between 1914 and 1930, the boundary was consistently labeled 'Approx. Province Bdy.'"[527]

## 4. The location of the nine Ngok Dinka chiefdoms in 1905

304. The GoS's position remains that the Abyei Area must be delimited by determining the area of the nine Ngok Dinka chiefdoms that previously fell within the province of Bahr el Ghazal and that were transferred to Kordofan in 1905. However, assuming for the sake of argument that the SPLM/A's Tribal Interpretation is right, the GoS warns that determining the area occupied and used by the nine Ngok Dinka Chiefdoms in 1905 is a very complicated question of anthropological fact.[528] In any event, the SPLM/A fails in its attempt to prove any significant Ngok Dinka presence north of the Bahr el Arab/Kir in 1905.[529]

305. For its part, SPLM/A maintains that the "area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905" is proved to encompass all of the territory occupied and used by the Ngok Dinka people in 1905 extending north to 10°35'N.[530] Both Parties examine the location of the Ngok Dinka prior to, and after, the 1905 transfer.

### *(a) The location of the Ngok Dinka prior to 1905*

#### (i) The migration to, and settlement in, the Abyei region of the Ngok Dinka in the 18th and 19th century

*(x) GoS arguments*

306. The GoS acknowledges that there might have been a limited presence of Ngok Dinka ancestors north of the Bahr el Arab before the 1905 transfer, but insists that this situation was short-lived.[531] In this regard, the GoS relies, *inter alia,* on the research of scholar Stephanie Beswick[532] and submits that there was never any permanent Ngok presence around the Ragaba ez Zarga, since the Dinka tribes who migrated north of the Bahr el Arab in the 18th century were pushed back south by the Baggara before the end of that century.[533]

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[527] SPLM/A Counter-Memorial, para. 1462, Appendix B to SPLM/A Counter-Memorial, pp. 401–402; SPLM/A Rejoinder, para. 791.

[528] GoS Oral Pleadings, April 21, 2009, Transcr. 63/09 *et seq.*

[529] GoS Oral Pleadings, April 21, 2009, Transcr. 95/10 *et seq.*

[530] SPLM/A Rejoinder, para. 345.

[531] GoS Counter-Memorial, para. 218.

[532] GoS Counter-Memorial, paras. 217–220; Beswick, S., *Sudan's Blood Memory* (2006) pp. 51–52, 154–156 (SPLM/A Memorial, SPLM/A Exhibit-FE 12/18).

[533] GoS Counter-Memorial, para. 221.

307. The SPLM/A's reliance on Henderson and Deng to defend its claim to a pre-1905 permanent Ngok Dinka settlement around the Ragaba ez Zarga and to a boundary at 10°35'N is misplaced and fails to quote Henderson's and Deng's relevant passages regarding the Ngok Dinka's movement southwards.[534]

*(y) SPLM/A arguments*

308. The SPLM/A stresses that Beswick, contrary to the GoS's claim, confirms that the Ngok Dinka were present well to the north of the Bahr el Arab and the Ragaba ez Zarga.[535] Beswick's indication that, after their mid-1800s alliance with the Misseriya, the Ngok Dinka "returned with their herds to the Kir/Bahr el Arab River region for grazing"[536] in no way suggests that the Ngok Dinka abandoned the territories north of the Bahr el Arab/Kir, but corroborates the "undisputed locations of the Ngok Dinka's dry season activities."[537]

309. Further, while Deng did write that the Alei were pushed southwards under Arab pressure,[538] the GoS fails to mention Deng's indication that "most of the Ngok settled on the Ngol River" and that the Alei, who remained further north, were therefore moving south from Muglad towards the Ngol/Ragaba ez Zarga.[539]

**(ii) The effects of the Mahdiyya on the Ngok Dinka and Misseriya**

*(x) GoS arguments*

310. The GoS dismisses as purely speculative the SPLM/A's claim that " . . . the asymmetric effects of the Mahdiyya[540] on the Ngok and the Misseriya enabled the Ngok to expand their historic territories at the end of the

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[534] *See* Henderson, K.D.D., *A Note on the Migration of the Messiria Tribe into South West Kordofan* (1939) 22(1) *Sudan Notes and Records* 49, p. 58 (SM Annex 52); quoted in SPLM/A Memorial, para. 885; Deng, F., *War of Visions: Conflicts of Identities in the Sudan* (1995), p. 254, SPLM/A Exhibit-FE 8/13.

[535] SPLM/A Rejoinder, at para. 375. SPLM/A refers to S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan*, p. 52 (2004), SPLM/A Exhibit-FE 12/18.

[536] SPLM/A Rejoinder, at para. 376 quoting S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* p. 156 (2004), SPLM/A Exhibit-FE 12/18.

[537] SPLM/A Rejoinder, at para. 376.

[538] SPLM/A Rejoinder, at para. 393 quoting F. Deng, *War of Visions: Conflict of Identities in the Sudan* 254 (1995), SPLM/A Exhibit-FE 8/13.

[539] SPLM/A Rejoinder, at para. 394 quoting F. Deng, *War of Visions: Conflict of Identities in the Sudan* 254 (1995), SPLM/A Exhibit-FE 8/13. *See also* SPLM/A Memorial, Witness Statement of Belbel Choi Akuei Deng, Tab 15 at p. 2.

[540] The Mahdiyya is the time of the Mahdist rule of the Sudan (1885–1898) (*See* GoS Memorial, p. vii).

19th century."[541] Contrary to Professor Daly's position,[542] Collins and Peel show that the slave and cattle raids that had started during the Turkiyya continued during the Mahdiyya.[543]

311. In addition, the GoS notes that during this period, the Baggara were not the only ones threatening the territory of the Ngok Dinkas. Indeed, there were inter-Dinkas wars and repeated raiding by the Nuers to the East.[544] The GoS therefore submits that the claim that the relatively small impact of the Mahdiyya on the Ngok Dinka allowed them to migrate north has no substance.

*(y) SPLM/A arguments*

312. The SPLM/A submits that Ngok Dinka demography and occupation of the Abyei region were little affected by the Mahdiyya, while the Misseriya suffered heavy casualties in the conflict with the Anglo-Egyptian forces,[545] in part because the Misseriya sided with the Mahdists.[546] The SPLM/A cites Henderson[547] and Deng who, relying on Henderson's conclusions, explained that "[although the Mahdiya was one of the most violent chapters in southern history, it was a relatively peaceful period for the Ngok."[548] The SPLM/A infers from this that "the Ngok would not have retreated from prior settlements in the Bahr region and that the Misseriya would have been in no position to expand at the expense of the Ngok" in the years preceding the transfer of the Abyei Area.[549]

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[541] SPLM/A Memorial, para. 898.

[542] Daly Expert Report, pp. 48–49, Appendix to SPLM/A Memorial.

[543] GoS Counter-Memorial, paras. 241–242, 246–274; Collins, R., *The Southern Sudan, 1883–1898: A Struggle for Control* (1962), p. 42, (SPLM/A Memorial, SPLM/A Exhibit-FE 4/12) and Peel, S., *The Binding of the Nile and the New Soudan* (1904), p. 194 (SM Annex 44). *See also* a map prepared by Collins showing the location of the tribal districts on page 93 of the GoS Counter-Memorial, Figure 2.

[544] GoS Memorial, para. 246, referring to Collins, R., *The Southern Sudan, 1883–1898: A Struggle for Control* (1962), p. 42, (SPLM/A Memorial, SPLM/A Exhibit-FE 4/12).

[545] *See* SPLM/A Memorial, at paras. 897–903. *See also* SPLM/A Memorial, at paras. 128–132.

[546] SPLM/A Oral Pleadings, April 21, 2009, Transcr. 180/06–07.

[547] *See* SPLM/A Rejoinder, at para. 411 quoting Henderson, "A Note on The Migration of the Messiria Tribe into South West Kordofan," 22 (1) SNR 69, 71 (1939), SPLM/A Exhibit-FE 3/15. *See also* SPLM/A Memorial, at para. 231.

[548] SPLM/A Rejoinder, at para. 404 quoting F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change*, p. 47, n. 20 (1986), SPLM/A Exhibit-FE 7/4; *See also* SPLM/A Oral Pleadings, April 21, 2009, Transcr. 180/18–181/03. *See also* Daly Expert Report, p. 26, Appendix to SPLM/A Memorial.

[549] SPLM/A Counter-Memorial, at para. 915; *See also* SPLM/A Oral Pleadings, April 21, 2009, Transcr. 180/10–17.

313. The SPLM/A submits that the GoS's reliance on Peel and Collins is misplaced.[550] In fact, Collins even contradicts the GoS's position.[551]

### (iii) The location of the Ngok Dinka from the late 19th century through 1905

*(x) Alleged limitations affecting the pre-1905 documentary record*

(1) GoS arguments

314. The GoS disagrees with the SPLM/A's claim that the pre-1905 documentary record is limited by such factors as the lack of British knowledge in the region, the limited expeditions in the area and the remoteness of the zone.[552]

315. In response to the SPLM/A's claim that no negative inferences can be drawn from the fact that certain British explorers did not observe any Ngok Dinka when they went to the region, the GoS argues that although it is fair not to draw negative inference based on a single visit, "the comprehensive absence of evidence" in this case becomes "evidence of absence."[553] According to the GoS, "[t]here are parts of the [region] that remain, even today, permanently uninhabited. That doesn't mean they're terra nullius."[554]

(2) SPLM/A arguments

316. The SPLM/A submits that the pre-1905 documentary record is affected by many limitations and shortcomings.[555] Firstly, the record is meager and sparse[556] and while it does attest to Ngok Dinka presence extending north from the Bahr el Arab to, and beyond, the Ragaba ez Zarga,[557] its reliability and comprehensiveness should not be exaggerated.[558]

317. The SPLM/A thus points out that, at the beginning of the twentieth century, the contacts of the few Anglo-Egyptian administrators with the

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[550] *See* SPLM/A Rejoinder, at para. 413 quoting GoS Counter-Memorial, at para. 242 (citing S. Peel, *The Binding of the Nile and the New Sudan*, p. 194 (2004)); SPLM/A Rejoinder, at para. 417–418 quoting R. Collins, *Land Beyond the Rivers: The Southern Sudan 1898–1918*, p.189,190 (1971), SCM Annex 24.

[551] *See* SPLM/A Rejoinder, para. 415.

[552] GoS Counter-Memorial, para. 250.

[553] GoS Oral Pleadings, April 21, 2009, Transcr. 89/11–17; *See also* GoS Oral Pleadings, April 22, 2009, Transcr. 169/14–23; *See also* GoS Rejoinder, paras. 271–281.

[554] GoS Oral Pleadings, April 21, 2009, Transcr. 118/24–119/01.

[555] *See* SPLM/A Counter-Memorial, para. 920.

[556] SPLM/A Oral Pleadings, April 21, 2009, Transcr. 181/19–24.

[557] SPLM/A Memorial, paras. 908–912.

[558] *See* SPLM/A Memorial, at paras. 908–912; SPLM/A Counter-Memorial, at para. 919; SPLM/A Rejoinder, at para. 432(c).

region "were in the nature of exploratory treks,"[559] all made during the dry season, when the Ngok Dinka would move to the south of the region to graze their cattle herds. They were therefore unable to observe the Ngok Dinka's occupation and use of land in the wet season.[560] The officials followed very limited routes and "virtually never ventured to the north of the Ngol/Ragaba ez-Zarga, save along a single corridor extending from Fauwel to Keilak covered by Mahon's, Wilkinson's, and Percival's treks."[561] The SPLM/A also emphasizes the Anglo-Egyptian officials' lack of personnel,[562] the language barrier,[563] and inaccessibility of the region.[564]

318. The SPLM/A identifies other factors accounting for this lack of knowledge, such as the efforts of the Ngok Dinka to conceal the location of their villages for fear of slave-raiding.[565]

319. Therefore, one should not infer from the reports of the Anglo-Egyptian officials that the Ngok Dinka were located only in the places where they were observed,[566] particularly when the GoS fails to provide complete copies of potentially relevant maps.[567]

*(y) Location of the nine Ngok Dinka chiefdoms in the documentary record from the late 19th century through 1905*

(1) GoS arguments

320. The GoS submits that the Ngok Dinka were considered to be living around and south of the Bahr el Arab before and in 1905.[568] The GoS refers

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[559] SPLM/A Counter-Memorial, at para. 921. *See also* SPLM/A Rejoinder, at para. 432(a); SPLM/A Oral Pleadings, April 21, 2009, Transcr. 182/10–18.

[560] *See* SPLM/A Counter-Memorial, at para. 922; *See also* SPLM/A Oral Pleadings, April 21, 2009, Transcr. 185/15-186/13.

[561] *See* SPLM/A Counter-Memorial, para. 923–924. The SPLM/A refers to Map 28 which depicts the excursions of British authorities at the beginning of the 20th century, Map 29 describing Wilkinson's route in 1902 and Map 71 detailing the excursions of Saunders (1900) and Percival (1904) and Figure 5 attached to the Macdonald Report. (Appendix to GoS Memorial); *See also* SPLM/A Counter-Memorial, at para. 956 (concerning Wilkinson's route); *See also* SPLM/A Oral Pleadings, April 21, 2009, Transcr. 185/07–14.

[562] *See* SPLM/A Rejoinder, para. 432(b).

[563] *See* SPLM/A Rejoinder, para. 432(f).

[564] *See* SPLM/A Counter-Memorial, para. 926; SPLM/A Rejoinder, para. 432(a); SPLM/A Oral Pleadings, April 21, 2009, Transcr. 184/21–185/06.

[565] *See* SPLM/A Counter-Memorial, para. 931. *See also* SPLM/A Rejoinder, at para. 432(e).

[566] SPLM/A Counter-Memorial, para. 924.

[567] SPLM/A Rejoinder, paras. 434–437; *See also* SPLM/A Oral Pleadings, April 21, 2009, Transcr. 189/15–191/18.

[568] GoS Counter-Memorial, para. 281.

in particular to the reports of Mahon, Wilkinson, and Percival.[569] In those reports, there is no indication of Ngok Dinka permanent presence around and north of the Ragaba ez Zarga.[570] They only refer to the existence of Arab settlements in this otherwise uninhabited area[571] and contend that it was the Baggara Arabs who were using the area to the north of the Bahr el Arab on a seasonal basis.[572] This is also consistent with the seasonal grazing patterns of the Ngok Dinka, who were observed by Percival (on his way south from the Ragaba ez Zarga) driving their cattle in a southerly direction.[573]

321. In addition, the northernmost areas where officials reported on the presence of Ngok Dinka were at Etai (9°29'N 28°44'E), located around five kilometers north of the Bahr el Arab, and at Bongo/Bombo (9°32'N 28°49'E), both uninhabited during the dry season.[574]

322. Further, the GoS asserts that the evidence indicates that Sultan Rob's country was on and south of the Bahr el Arab before and in 1905.[575] Sultan Rob, the Paramount Chief of the Ngok Dinka, was observed residing south

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[569] GoS Memorial at paras 312–321; GoS Counter-Memorial, paras. 252–277; GoS Rejoinder, paras. 412–418.

[570] GoS Memorial, para. 315; GoS Counter-Memorial, paras. 253–262; Wilkinson's report in Gleichen, Handbook of the Sudan (1905), Vol. II, pp. 154–156 (SM Annex 38). GoS Memorial, para. 348; GoS Counter-Memorial, paras. 263–268; GoS Rejoinder, para. 414; Mahon's 1903 report in Sudan Intelligence Reports, No. 104 (March 1903), p. 19 (SM Annex 5); GoS Oral Pleadings, April 22, 2009, Transcr. 185/10–17; *See also* GoS Oral Pleadings, April 22, 2009, Transcr. 117/11–20 (Prof. Daly's cross-examination). GoS Counter-Memorial paras. 271–277; GoS Rejoinder paras. 415–418, referring to Percival's report in Sudan Intelligence Reports, No. 126 (January 1905), pp. 3, 4 (SCM Annex 25) and Percival, A., *Route Report: Keilak to Wau,* December 1904, p. 2 (SCM Annex 26).

[571] GoS Counter-Memorial at para. 273; GoS Rejoinder para. 415, referring to Percival, A., *Route Report: Keilak to Wau,* December 1904, p. 2. (SCM Annex 26); *See also* GoS Oral Pleadings, April 21, 2009, Transcr. 91/02–12.

[572] GoS Memorial, para. 355.

[573] GoS Counter-Memorial at para. 275, referring to Percival, A., *Route Report: Keilak to Wau,* December 1904, p. 2 (SCM Annex 26); *See also* GoS Counter-Memorial para. 257, referring to Gleichen, Handbook of the Sudan, Vol. I (1905), p. 155 (SM Annex 38)

[574] GoS Memorial, para. 316, GoS Counter-Memorial para. 257; Gleichen, Handbook of the Sudan, Vol. I (1905), p. 155 (SM Annex 38); GoS Oral Pleadings, April 21, 2009, Transcr. 88/14–90/05 and April 22, 2009, Transcr. 184/16–25; GoS Counter-Memorial para. 281, referring to *Index Gazetteer of the Anglo-Egyptian Sudan* (Sudan Survey Department, Khartoum. 1931) p. 102 (SCM, Annex 28) and Percival's Sketch Map, Figure 5, p. 105 and Map 14(b) in GoS Counter-Memorial Map Atlas (Percival Sketch Map, River Kir to Wau, 1904).

[575] GoS Counter-Memorial, para. 276–277 referring to Percival, A., *Route Report: Keilak to Wau,* December 1904, p. 3 (SCM Annex 26) and Percival, A., *Route Report: Pongo River to Taufikia,* March/April 1905, p. 2, SCM Annex 27); Percival's Sketch Map (1904), Figure 5 in GoS Counter-Memorial on p. 105 and Map 14a in GoS Counter-Memorial Map Atlas. *See also* GoS Memorial, para. 352 referring to Comyn D., *The Western Sources of the Nile* (1907) 30 The Geographical Journal 1524 at. 529 (SM, Annex 50) and GoS Counter-Memorial, para. 290, referring to Comyn's Sketch Map of 1906 (Figure 6 on p. 110 of GoS Counter-Memorial); GoS Memorial, para. 353 and GoS Rejoinder, para. 425, referring to

of the Bahr el Arab, at his old village of Mithiang, in 1902[576] and in 1903,[577] and in Burakol (located two miles north of the Bahr el Arab/Kir[578]) in 1904.[579] The GoS notes that Sultan Rob's presence in Burakol does not mean that he had abandoned his old village. In any event, Burakol is not in the same location as modern day Abyei town and cannot be equated with it.[580]

323. In addition, the GoS insists that according to Sultan Rob himself, there were only Arabs west of his country[581] which was bounded by the Shilluks to the east, the Chak Chak to the west and to the north by the Bahr el Arab, Sultan Rob's "Arab frontier."[582]

(2) SPLM/A arguments

324. The SPLM/A preliminarily notes that the GoS fundamentally changed its case.[583] While the GoS originally claimed that the Ngok Dinka were located entirely to the south of the Bahr el Arab/Kir, it now concedes that "they were instead indisputably located in villages extending at least as far north [ . . . ] as 'Bombo,' 'Etai,' 'Burakol,' 'Achak,' an unidentified location near the Ngol/Ragaba ez-Zarga, and 'Bongo . . . at 9.32'N."[584]

325. In spite of the above-noted reservations regarding the pre-1905 Condominium record, the SPLM/A argues, relying on the pre-1905 trek reports of Mahon, Wilkinson and Percival, that "the Ngok Dinka were located

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Lloyd, W., *Some Notes on Dar Homr* (1907) 29 The Geographical Journal pp. 649–654 (SM Annex 54).

[576] GoS Memorial, para. 316; referring to Percival in Gleichen, Handbook of the Sudan (1905), Vol. II, pp. 154–156 (SM Annex 38).

[577] GoS Counter-Memorial, para. 265–267, quoting Mahon in Sudan Intelligence Reports, No. 104 (March 1903), p. 19 (SM Annex 5); Macdonald Report, para. 25 (Appendix to GoS Memorial); Third Macdonald Report, para. 70 (GoS Rejoinder, Appendix I).

[578] GoS Counter-Memorial, para. 276; referring to Percival, A., *Route Report: Keilak to Wau,* December 1904, p. 3 (SCM Annex 26); *See also* Percival's Sketch Map (1904), Figure 5 in GoS Counter-Memorial on p. 105 and Map 14a in GoS Counter-Memorial Map Atlas.

[579] GoS Counter-Memorial at para. 275, referring to Percival, A., *Route Report: Keilak to Wau,* December 1904, p. 3–4 (SCM Annex 26).

[580] GoS Counter-Memorial, para. 276; cf. SPLM/A Memorial, para. 997.

[581] GoS Counter-Memorial at para. 275, referring to Percival, A., *Route Report: Keilak to Wau,* December 1904, p. 3 (SCM Annex 26); GoS Oral Pleadings, April 21, 2009, Transcr. 90/17–91/02.

[582] GoS Memorial, paras. 349–350 and GoS Counter-Memorial at para. 421, referring to Percival's report in Sudan Intelligence Reports, No. 130 (May 1905), Appendix A, p. 4 (SM Annex 10).

[583] SPLM/A Oral Pleadings, April 21, 2009, Transcr. 191/23–192/07.

[584] SPLM/A Rejoinder, at para. 426. *See also* SPLM/A Rejoinder, at para. 428.

well above the Bahr el-Arab/Kiir, with permanent villages extending north up to the Ngol/Ragaba ez Zarga and further north."[585]

326. According to the SPLM/A, the evidence suggests that there was Ngok Dinka presence between the Ngol/Ragaba ez Zarga and the Bahr el Arab/Kir[586] in the form of villages and permanent settlements, in places such as Achak,[587] Bombo (uninhabited during the dry season) and Etai, as well as dura cultivation,[588] (consistent with the Ngok Dinka's agricultural practices[589]).

327. There are also indications of Ngok Dinka presence on the Ragaba ez Zarga in the dry season.[590] While Percival may have found no trace of inhabitants on the river, the SPLM/A noted that he traveled with the Arab Mounted

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[585] SPLM/A Counter-Memorial, at para. 932.

[586] *See* SPLM/A Counter-Memorial 1029; SPLM/A Oral Pleadings, April 22, 2009, Transcr. 25/03–11; SPLM/A Counter-Memorial, para. 1201, *see* Map 72 of SPLM/A Map Atlas vol. 2 (*Map of Darfur,* Browne, 1799); SPLM/A Counter-Memorial, paras. 1202–1203, *see* Maps 73 and 73a of SPLM/A Map Atlas vol. 2 (*Sources du Nil,* Speke and Grant, 1863; *Sources du Nil,* Speke and Grant, 1863–Overlay); SPLM/A Counter-Memorial, paras. 1204–1205, *see* Maps 77 and 77a of SPLM/A Map Atlas vol. 2 (*Eastern Equatorial Africa,* Ravenstein, 1883; *Eastern Equatorial Africa,* Ravenstein, 1883–Overlay); SPLM/A Counter-Memorial, paras. 1206–1207 and SPLM/A Memorial, paras. 979–980, referring to Map 30, Map 30a and Map 31 (*The Egyptian Sudan,* War Office, 1883; *The Egyptian Sudan,* War Office, 1883–Detail; *The Egyptian Sudan,* War Office, 1883–Overlay); SPLM/A Counter-Memorial, para. 1208, citing GoS Memorial, para. 292; GoS Memorial Map 2 (*The Province of Bahr el Ghazal,* The Royal Geographic Society, 1884); SPLM/A Counter-Memorial, para. 1209, referring to Map 78a of SPLM/A Map Atlas vol. 2 (*Carte du Bahr el Ghazal,* Marchand, 1898–Overlay); SPLM/A Counter-Memorial, para. 1210, *see* Maps 79 and 79a of SPLM/A Map Atlas vol. 2 (*Mission Marchand de 1896 à 1899; Mission Marchand de 1896 à 1899*–Overlay).

[587] SPLM/A Counter-Memorial, at para. 999 quoting Percival, Keilak to Wau (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), SPLM/A Exhibit-FE 17/13.); The SPLM/A further observes that Percival's own Sketch Map, only partially produced by the GoS, identifies "many more Ngok settlements above the Kiir/ Bahr el-Arab than below." *See* SPLM/A Rejoinder, para. 459; Percival Sketch Map (GoS Counter-Memorial Map Atlas, Map 14b); SPLM/A Oral Pleadings, April 22, 2009, Transcr. 04/19–23, 17/08–19/12.

[588] SPLM/A Memorial, paras. 917–928; SPLM/A Counter-Memorial, paras. 953–972, (paras. 964–965 in particular); SPLM/A Rejoinder, paras. 442–446; Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 151–157 (1905) (SPLM/A Exhibit-FE 2/15). The SPLM/A notes that, bearing in mind the Ngok's seasonal grazing movements, the Ngok presence would have been even more obvious in the rainy season: *see* SPLM/A Counter-Memorial, para. 959.

[589] SPLM/A Memorial, para. 926.

[590] The SPLM/A refers to Mahon's 1902 and 1903 trek reports. *See* SPLM/A Memorial, at para. 913 and SPLM/A Counter-Memorial, at para. 945, referring to Sudan Intelligence Report, No. 92, dated March 31, 1902, Appendix F, at p. 19 (SPLM/A Exhibit-FE 1/16). Mahon puts Sultan Rob's country on the Bahr el Homr, approximately two days from Lake Ambady. The SPLM/A maintains that this is certainly a reference to the Ragaba ez Zarga. *See* SPLM/A Counter-Memorial, at para. 945; SPLM/A Oral Pleadings, April 21, 2009, Transcr. 195/13–22.

Infantry who would certainly have frightened the Ngok Dinka villagers who feared Arab slave raiders.[591] In addition, when Sultan Rob stated that the river was uninhabited, he probably referred to the dry season desertion of the Ngol/Ragaba ez Zarga or tried to conceal the location of Ngok villages to protect them from potential danger.[592] The conclusion that Sultan Rob's "Arab frontier" was on the Bahr el-Arab should be understood, given the confusion with the Ragaba ez-Zarga at the time, as merely referring to "the southern extent of dry season grazing by the Misseriya."[593]

328. There is also strong, albeit indirect, evidence of Ngok Dinka presence north of the Ragaba ez Zarga in the form of small villages made up of three or four huts at El Jaart and Um Geren, which the SPLM/A contrasts with the "badly built" tukls used by the Homr Arabs in this area.[594] Similarly, the description of grass fires and cattle tracks near the Ragaba ez Zarga and that of the Ngok Dinka driving cattle south as hard as they could in Amokok is consistent with the Ngok's seasonal movements and suggests that the Ngok Dinka's permanent villages were located to the north of that river.[595]

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[591] SPLM/A Counter-Memorial, at paras. 989–992, referring to Percival, Keilak to Wau (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), SPLM/A Exhibit-FE 17/13; SPLM/A Oral Pleadings, April 22, 2009, Transcr. 06/16–07/24.

[592] SPLM/A Counter-Memorial, at paras. 1004–1005, referring to Percival, Keilak to Wau (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), SPLM/A Exhibit-FE 17/13; SPLM/A Oral Pleadings, April 22, 2009, Transcr. 14/21–17/07. The SPLM/A refers to Huntley Walsh's complaints that Sultan Rob had deliberately and repeatedly sought to mislead expeditions sent to explore the region: *See* SPLM/A Counter-Memorial, at paras. 1006–1007; Sudan Intelligence Report, No. 140, dated March 1906, at p. 14, SPLM/A Exhibit-FE 17/22; SPLM/A Oral Pleadings, April 22, 2009, Transcr. 15/12-16/08.

[593] SPLM/A Rejoinder, para. 467; *See also* SPLM/A Counter-Memorial, at paras. 1014–1018, referring to quoting Sudan Intelligence Report, No. 130, dated May 1905, Appendix A, at p. 4, SPLM/A Exhibit-FE 17/16 and to GoS Memorial, at para. 349.

[594] SPLM/A Counter-Memorial, paras. 968–969, referring to Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 151–157 (1905) (SPLM/A Exhibit-FE 2/15); *See also* Map 29 of SPLM/A Map Atlas vol. 1 (Wilkinson's Route 1902) and GoS Counter-Memorial Map 13b (Wilkinson's Sketch Map 1902); *See also* SPLM/A Oral Pleadings, April 21, 2009, Transcr. 200/08–203/08. The SPLM/A further notes that Wilkinson's dry season descriptions are also consistent with the Ngok's seasonal migrations and the centralized character of their political structure: *See* SPLM/A Memorial, at paras. 206–212, 917–918 and SPLM/A Counter-Memorial, at para. 953. *See* SPLM/A Rejoinder, at paras. 442–3 and SPLM/A Counter-Memorial, at para. 959 quoting Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol.II, 155 (1905) (SPLM/A Exhibit-FE 2/15); SPLM/A Oral Pleadings, April 21, 2009, Transcr. 197/07–198/19.

[595] *See* SPLM/A Counter-Memorial, paras. 993, 994 (quoting Percival, Keilak to Wau (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), SPLM/A Exhibit-FE 17/13), para. 995; SPLM/A Rejoin-

329. Finally, the pre-1905 Condominium record demonstrates that there was Ngok Dinka presence on both sides of the Bahr el Arab/Kir. Sultan Rob's old village was located on the southern bank at Mithiang as noted by Wilkinson in 1902,[596] and his new village north of the river at Burakol as noted by Mahon in 1903,[597] Percival in 1904,[598] and Bayldon in 1905.[599] There were also Ngok Dinka settlements west of Burakol, as shown by the location of the Abyior and Achueng Chiefdoms.[600] When Sultan Rob told Percival that there were no Dinkas west of Burakol, he clearly meant that "there were Humr Arabs directly to the west."[601]

### (iv) Alleged centrality of Abyei town prior to the 1905 transfer

*(x) GoS arguments*

330. The GoS argues that modern-day Abyei town did not become the centre of Ngok Dinka until well after 1905.[602] The sources relied upon by the

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der, para. 461; SPLM/A Oral Pleadings, April 22, 2009, Transcr. 04/19–23, 08/24–12/09. *See also* SPLM/A Counter-Memorial, para. 1027 referring to Bayldon's report in Sudan Intelligence Report, No. 128, dated March 1905, Appendix C, at p. 11, SPLM/A Exhibit-FE 2/8. *See also* SPLM/A Counter-Memorial, para. 949 and Mahon's report in Sudan Intelligence Report (No. 92), dated March 31, 1902, Appendix F, SPLM/A Exhibit-FE 1/16.

[596] SPLM/A Counter-Memorial, para. 960 quoting Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 156 (1905) (SPLM/A Exhibit-FE 2/15); *See also* SPLM/A Counter-Memorial, at para. 963 and SPLM/A Oral Pleadings, April 21, 2009, Transcr. 198/20–199/23. SPLM/A refers to the following maps at footnote 1126 of its Counter-Memorial to indicate that the location is sometimes identified on maps as "Sultan Rob's Old Village": Map 36 of SPLM/A Map Atlas vol. 1 (*The Anglo-Egyptian Sudan,* Intelligence Office Khartoum, 1904 (in 1905 Gleichen Handbook)); Map 36a (*The Anglo-Egyptian Sudan,* Intelligence Office Khartoum, 1904 (in 1905 Gleichen Handbook)–Detail), Map 37 (*The Anglo-Egyptian Sudan,* Intelligence Office Khartoum, 1904 (in 1905 Gleichen Handbook)–Overlay); Map 40 (*Northern Bahr El Ghazal: Sheet 65,* Survey Office Khartoum, 1907); Map 46 (*Hasoba: Sheet 65-L,* Survey Office Khartoum, 1910); Map 46a (*Hasoba: Sheet 65-L,* Survey Office Khartoum, 1910–Detail); Map 48 (*Kordofan Province,* Survey Office Khartoum, 1913).

[597] *See* SPLM/A Counter-Memorial, at paras. 977–979; MENAS Expert Report, paras. 27–29, Appendix to SPLM/A Counter-Memorial; SPLM/A Rejoinder, para. 449; Map 40 of SPLM/A Map Atlas, Vol. 1 (*Northern Bahr el Ghazal: Sheet 65,* Survey Office, Khartoum, 1907); SPLM/A Oral Pleadings, April 22, 2009, Transcr. 02/11-03/18.

[598] SPLM/A Counter-Memorial, paras. 999, 1008, quoting Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25–26 (1905), SPLM/A Exhibit-FE 17/13); SPLM/A Rejoinder, at paras. 453–455.

[599] SPLM/A Counter-Memorial, at para. 1026. *See also* Sudan Intelligence Report, No. 128, dated March 1905, Appendix C, at p. 11, SPLM/A Exhibit-FE 2/8.

[600] *See* Map 13 of SPLM/A Map Atlas vol. 1 (Ngok Dinka Chiefdoms, 1905).

[601] SPLM/A Counter-Memorial, para. 1003; *See also* SPLM/A Counter-Memorial, paras. 1002–1004, referring to Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol.II, 25 (1905), SPLM/A Exhibit-FE 17/13).

[602] GoS Rejoinder, paras. 487–488.

SPLM/A in no way establish the centrality of the Abyei town as a political, cultural or administrative Ngok Dinka centre before the 1920s.[603] Similarly, the SPLM/A's witness Kuol Deng Kuol Arop concedes that Abyei did not exist, nor did it have a central role in 1905 when it refers to a settlement "*known now* as Abyei town" which became the seat of government *"after the wars,"* thus later in the 20th century.[604]

331. According to the GoS, Whittingham's route map of 1910 is the first document that refers to "Abyia" but locates it in a different place than Burakol and modern-day Abyei Town. [605] It is only in 1920 that Abyei was shown on an official map for the first time.[606] G.W. Thitherington's sketch map of 1924 also indicates that Sultan Kwal Arob moved to Abyei in 1918.[607] However, as late as 1933, the Paramount Chief was located in Naam, 15 km north of Abyei.[608] Abyei only became the centre of a Native Administration Unit in 1938, the event which provided a basis for its subsequent political history.[609]

332. Having observed that Wilkinson, Percival and Whittingham each located the Ngok Paramount Chief in a different place,[610] the GoS concludes that there was movement in this area before and after 1905 and that Abyei Town was not the centre of anything in 1905.[611]

*(y) SPLM/A arguments*

333. The SPLM/A argues that Abyei Town has been "the center of Ngok Dinka political, commercial and cultural life for nearly two centuries."[612] Abyei Town became the home of the Paramount Chief, the location of the burial sites of the Chiefs[613] and the seat of the "central government" by the

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[603] GoS Rejoinder, para. 487.

[604] GoS Rejoinder, para. 490 referring to Witness Statement of Kuol Deng Kuol Arop, para. 30 (SPLM/A Memorial, Witness Statements, Tab 5).

[605] *See* GoS Counter-Memorial, paras. 299–306; GoS Oral Pleadings, April 21, 2009, Transcr. 93/17 *et seq. See also* Map 18a of GoS Counter-Memorial Map Atlas and Figure 9 of GoS Counter-Memorial, p. 116 (Whittingham 1910 Route Map).

[606] *See* GoS Rejoinder, para. 493; *See* GoS Memorial Map 17 (*Anglo-Egyptian Sudan*, War Office, 1914 rev. 1920).

[607] GoS Rejoinder, para. 493; *See* GoS Counter-Memorial, para. 313 and Map 38 of GoS Counter-Memorial Map Atlas (Additions and Corrections to Sketch of Dinka Country, 1924); *See also* Figure 13 of GoS Counter-Memorial, p. 125.

[608] *See* GoS Rejoinder, para. 493; *See also* GoS Counter-Memorial, para. 314.

[609] GoS Rejoinder, para. 493; *See also* GoS Memorial Map 27 (*Native Administrations of Kordofan Province,* Sudan Survey Department, 1941).

[610] GoS Counter-Memorial, para. 303.

[611] *See* GoS Oral Pleadings, April 21, 2009, Transcr. 94/12 *et seq.*

[612] SPLM/A Memorial, para. 961. *See also* SPLM/A Memorial, paras. 951, 961–967, Counter-Memorial, paras. 1000, 1137, 1184–1193, Rejoinder paras. 456, 549.

[613] SPLM/A Memorial, paras. 894–895.

middle to late 1800s.[614] A wide range of historical evidence[615] describes Abyei town as the "capital" of the Ngok.[616] As Mahon made clear as early as 1902, Abyei ("Rob's place") was also considered a great commercial centre for Bahr el Ghazal, especially famous for its ivory trade.[617] In fact, it is uncontested that Paramount Chief Kuol Arop, and his predecessor Sultan Rob, resided in the vicinity of modern-day Abyei Town, whether in Sultan Rob's old village or in the new village of Burakol.[618]

334. The fact that the British administration formally recognized Abyei town only in 1914 "suggests nothing about the historic importance of the location to the Ngok Dinka."[619] On the contrary, the historic location of the Ngok Dinka Paramount Chief justified the 1914 decision of the British administration.[620]

### *(b) The location of the Ngok Dinka after 1905*

#### (i) GoS arguments

335. Assuming, arguendo, that the Tribal Interpretation is correct, the GoS accepts that post-1905 evidence may be relevant to determining the location of the Ngok Dinka in 1905, "if and to the extent that it can reasonably be inferred that [this later material] would be or might be equally valid for 1905."[621]

336. The GoS notes that, according to the SPLM/A, the Baggara and Ngok use and occupation of land in the region has not changed at all from 1905 through the inter-war period.[622] While the GoS agrees with this proposition, it goes on to argue that post-1905 maps and trek reports of officials who traveled

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[614] SPLM/A Memorial, paras. 904, 962; Counter-Memorial, para. 1190.

[615] SPLM/A Memorial, paras. 962–963 referring to A. Sabah, *Tribal Structure of the Ngok Dinka of Southern Kordofan Province* 4–5 (1978), SPLM/A Exhibit-FE 6/7, S. Santandrea, *The Luo of the Bahr el-Ghazal* 192 (1968), SPLM/A Exhibit-FE 4/18, C. Treatt, *Out of the Beaten Track* 55 (1931), SPLM/A Exhibit-FE 3/13,I. Cunnison, *The Humr and their Land* 35(2) SNR 50, 61 (1954), SPLM/A Exhibit-FE 4/5, Howell, *Notes on the Ngok Dinka of West Kordofan* 32/2 SNR 239, 243 (1951), SPLM/A Exhibit-FE 4/3.

[616] SPLM/A Memorial, para. 953; Transcr., April 20, 2009, 82/25 *et seq. See* especially S. Santandrea, *The Luo of the Bahr el-Ghazal* 192 (1968), SPLM/A Exhibit-FE 4/18.

[617] SPLM/A Memorial, paras. 915 referring to Sudan Intelligence Report, No. 92, dated 31 March 1902, Appendix F, at p. 20, SPLM/A Exhibit-FE 1/16), 964–965; SPLM/A Counter-Memorial, para. 951.

[618] SPLM/A Counter-Memorial, paras. 1188–1189; SPLM/A Rejoinder, para. 512. *See also* SPLM/A Oral Pleadings, Transcr. April 22, 2009, 13/17 *et seq.*

[619] SPLM/A Counter-Memorial, para. 1187.

[620] SPLM/A Counter-Memorial, para. 1190.

[621] GoS Oral Pleadings, April 21, 2009, Transcr. 70/08 *et seq.*

[622] *See* GoS Counter-Memorial, para. 307.

through the region demonstrate that the Ngok continued to live "on or near the Bahr el-Arab" after 1905.[623]

337. The GoS thus contends as follows:

- "There is a tendency, documented in the reports themselves, for the Ngok villages to move north over time thus Naam (Dupuis, 1921) and Lukji (Henderson, 1933)."[624]
- "But not very far north: Naam and Lukji are both on the Umbieiro."[625]
- The Ngok Dinka remain confined to a small sector of south-eastern Kordofan, well south of latitude 100N;[626] when they leave the Bahr el Arab, they migrate south of the river[627]
- There is ample evidence of Humr presence along the Ngol/Ragaba ez Zarga and further south towards the Bahr el Arab/Kir.[628]

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[623] GoS Rejoinder, para. 433. *See also* GoS Counter-Memorial, para. 308. *See also* GoS Oral Pleadings, April 21, 2009, Transcr. 95/06 *et seq.*

[624] GoS Rejoinder, para. 432. *See also* GoS Counter-Memorial, para. 311 and Maps 39a (Dupuis 1921 Route Map) and 39b (Dupuis' 1921 Sketch) of GoS Counter-Memorial Map Atlas; GoS Counter-Memorial, paras. 314–315 and Henderson, K.D.D., Route Report: Muglad to Abyei, March 1933 (emphasis added) (SCM Annex 38).

[625] GoS Rejoinder, para. 432. *See also* Figure 3 of GoS Rejoinder.

[626] *See* GoS Counter-Memorial, para. 295; *See, inter alia,* GoS Counter-Memorial, para. 290 and Comyn's 1906 Sketch Map (Figure 6 of GoS Counter-Memorial, p. 110); GoS Counter-Memorial, para. 294 and Hallam, H., Route Report: Dawas to Dar Jange, December 1907, (SM Annex 31); GoS Counter-Memorial, para. 298 and Willis' 1909 report in Sudan Intelligence Reports, No. 178 (May 1909), Appendix C, p. 17 (SCM Annex 19); GoS Counter-Memorial at para. 305 and GoS Counter-Memorial Map Atlas, Map 18b (Whittingham 1910 Route Map); GoS Counter-Memorial, para. 310 and Heinekey, G.A., Route Report: Gerinti to Mek Kwal's Village, March 1918 (SCM Annex 36); *See* GoS Counter-Memorial, para. 311 and Dupuis' 1921 Sketch, Figure 12 on p. 123 of GoS Counter-Memorial, Map 39a; GoS Counter-Memorial, para. 317 and GoS Memorial Map Atlas, Map 27 (*Native Administrations of Kordofan Province,* Sudan Survey Department, 1941); GoS Counter-Memorial, para. 322 and Figure 16 of GoS Counter-Memorial, p. 131 (Cunnison's 1966 Map of Humr migration routes); GoS Counter-Memorial, para. 324 and GoS Rejoinder, para. 434 and Howell, P.P., "Notes on the Ngok Dinka of Western Kordofan," (1950) 32 Sudan Notes and Records 239, pp. 241–242 (SM Annex 53); GoS Rejoinder, para. 443 and Figure 16 of GoS Memorial, p. 155 (Lienhardt's 1961 Map of Dinka tribal groups); GoS Oral Pleadings, April 21, 2009, Transcr. 103/19–20 and Figure 5 of GoS Rejoinder (Lebon's 1965 Map) and Figure 2 of GoS Counter-Memorial, p. 93 (Collins' 1971 Tribal Districts Map).

[627] *See, inter alia,* GoS Rejoinder, para. 437 quoting MacMichael, H.A., *A History of the Arabs in the Sudan* (1922), pp. 272, 273, and 287, SPLM/A Exhibit-FE 18/6; *ibid.,* para. 438 quoting Treatt, C, *Out of the Beaten Track, A Narrative of Travel in Little Known Africa* (1931), p. 52, SPLM/A Exhibit-FE 3/13; *ibid.,* para. 435 quoting Davies, R., *The Camel's Back* (1957), p. 130 (SM Annex 35); GoS Oral Pleadings, April 21, 2009, Transcr. 124/13 *et seq.*

[628] *See, inter alia,* GoS Counter-Memorial, para. 293 and Hallam, H., Route Report: Dawas to Dar Jange, December 1907, (SCM Annex 31); GoS Counter-Memorial, at

- By contrast, "[t]here is no contemporary report of permanent Ngok villages on the Ragaba ez-Zarga or north of it;"[629] the mention of the word "cult"[630] and the description of a few solitary dugdugs[631] on certain maps cannot prove Ngok presence in that area.
- "Nor is there any record of permanent Ngok villages to the west, in the vicinity of the Darfur boundary – another point specifically confirmed in the reports."[632]

338. The GoS places great emphasis on the 1933 Civil Secretary colored sketch map ("CivSec map"),[633] the "original document in the record from the Condominium office depicting the nine Ngok Dinka tribes."[634] It shows that Ngok Dinka presence was limited to the basin of the Bahr el Arab, between the Ragaba Umm Biero and the southern boundary of Kordofan, an area of approximately 500 square miles, twenty times smaller than the area claimed by the SPLM/A.[635] The northernmost part of the territory occupied by the Ngok reaches only 9°30'N, nowhere near the Ragaba ez Zarga.[636]

339. The GoS also emphasizes that, in his second Witness Statement, Professor Ian Cunnison indicates with respect to the Ngok northern migration that "there was never, as suggested in the SPLM/A Memorial, any significant collective presence north of the Bahr el-Arab."[637] Nor was there ever "any col-

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para. 296, and Lloyd's 1908 report in Sudan Intelligence Report, No. 171 (October 1908), p. 53 (SPLM/A Memorial, SPLM/A Exhibit-FE 3/5); GoS Counter-Memorial, paras. 309–310 and Heinekey, G.A., Route Report: Mek Kwal's Village to Jebel Shat Safia, March 1918 (SCM Annex 37); GoS Counter-Memorial, para. 322 and Cunnison, I., *Baggara Arabs: Power and the Lineage in a Sudanese Nomad Tribe* (1966), p. 152 (SM Annex 33) Figure 16 of GoS Counter-Memorial, p. 131; GoS Rejoinder, para. 439 and Barbour, K.M., *The Republic of the Sudan* (1961), p. 165, SPLM/A Exhibit-FE 18/24 and Barbour's 1961 map (Figure 4 of GoS Rejoinder).

[629] GoS Rejoinder, para. 432.

[630] *See* GoS Oral Pleadings, April 23, 2009, Transcr. 30/21 *et seq.* referring to Whittingham's 1910 Sketch Map.

[631] *See ibid.* and GoS Oral Pleadings, April 23, 2009, Transcr. 31/12 *et seq.* referring to Dupuis' 1921 sketch.

[632] GoS Rejoinder, para. 432. *See also* GoS Counter-Memorial, para. 310 and Heinekey, G.A., Route Report: Gerinti to Mek Kwal's Village, March 1918 (SCM Annex 36).

[633] *See* GoS Counter-Memorial, para. 316; Civsec 66/4/35, "Minutes of Meeting," October 28, 1933, pp. 92–95 (SCM Annex 39); Figure 14 of GoS Counter-Memorial, p. 127, Map 22a in GoS Counter-Memorial, Map Atlas.

[634] GoS Oral Pleadings, April 21, 2009, Transcr. 78/10–12.

[635] *See* GoS Counter-Memorial, para. 316; GoS Oral Pleadings, April 21, 2009, Transcr. 83/04 *et seq.*

[636] *See* GoS Oral Pleadings, April 21, 2009, Transcr. 81/15 *et seq.*

[637] GoS Counter-Memorial, para. 323 quoting second Witness Statement of Ian Cunnison, paras. 3, 5 (SCM WS 1). *See also* GoS Rejoinder, para. 436 quoting Cunnison, I., *Baggara Arabs: Power and the Lineage in a Sudanese Nomad Tribe* (1966), p. 25 (SM Annex 33).

lective presence north of the area [he] refer[s] to as the Bahr, viz. the area centered on the Bahr el-Arab and the Regaba ez Zarga."[638] The GoS further notes Professor Cunnison's comment that "the Humr spent most of the year, from early January to late May, by the Bahr,"[639] while "the Dinka [were] with their cattle south of the Bahr el-Arab."[640]

340. The GoS also insists that, contrary to the SPLM/A's allegation, Professor Cunnison does not agree with the SPLM/A's analysis concerning the shared rights area. First, he explains that he was informed that "the effect of the ABC's decision would be to exclude the Humr from their summer grazing and living areas in the Bahr," which would be "fundamentally unjust."[641] Secondly, he makes it very clear that he did not observe the goz as an area of shared rights. In reality, the true shared rights area was further south in the Bahr.[642]

341. In the GoS's view, "when *no authority* on the area [ . . . ] shows the Ngok on the Ragaba ez-Zarga (let alone at 10°35N), then the only conclusion to be drawn is that they were not there."[643] The GoS further emphasizes that, because of the alleged limitations of the documentary evidence, the SPLM/A relies extensively on Ngok oral evidence,[644] its only evidentiary source to prove Ngok presence north of the Ragaba ez Zarga.[645] However, the oral evidence produced by the SPLM/A is inaccurate and unreliable[646] and even according to Professor Daly, the SPLM/A's own expert, "there is no way precisely to delimit the northern border of the Ngok territory in the goz."[647]

342. Assuming *arguendo* that there is enough information in the file to draw tribal boundaries, the GoS concludes that these boundaries would roughly correspond to the limits of the CivSec map purple area.[648] In con-

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[638] GoS Rejoinder, para. 442 quoting second Witness Statement of Ian Cunnison, para. 3 (SCM WS 1).

[639] GoS Counter-Memorial, para. 323 quoting second Witness Statement of Ian Cunnison, para. 5 (SCM WS 1).

[640] GoS Rejoinder, para. 440 quoting Cunnison, I., *Baggara Arabs: Power and Lineage in a Sudanese Nomad Tribe* (1966), p. 18 (SM Annex 33).

[641] Witness Statement of Ian Cunnison, para. 11 (Appendix to GoS Memorial).

[642] *See* GoS Oral Pleadings, April 22, 2009, Transcr. 178/08 *et seq. See also* Witness Statement of Ian Cunnison, para. 9 (Appendix to GoS Memorial); second Witness Statement of Ian Cunnison, para. 3 (SCM WS 1).

[643] GoS Rejoinder, para. 444.

[644] GoS Counter-Memorial, para. 33.

[645] GoS Oral Pleadings, April 21, 2009, Transcr. 109/13 *et seq.*

[646] GoS Counter-Memorial, paras. 34 *et seq.*, 326 *et seq. See also* the GoS's arguments on the probative value of oral evidence in the next section.

[647] GoS Oral Pleadings, April 21, 2009, Transcr. 110/18–20 referring to Professor Daly's Expert Report, p. 50, Appendix to SPLM/A Memorial.

[648] GoS Oral Pleadings, April 21, 2009, Transcr. 108/06–09. *See also* GoS Oral Pleadings, April 21, 2009, Transcr. 104/10 *et seq.* for the GoS's description of the approximate

trast to the GoS's description, the boundaries claimed by the SPLM/A are "incomplete"[649] and "hybrid," tribal in the north and the east, and administrative in the south and the west.[650] Although the burden of proof weighs on the SPLM/A to establish Ngok Dinka presence in the area claimed and the corresponding tribal boundaries,[651] the SPLM/A does not even attempt to prove Ngok presence south of the Bahr el Arab[652] and has not been able to do so with respect to any area significantly to the north of the river.[653]

**(ii) SPLM/A arguments**

343. The SPLM/A contends that the post-1905 record, particularly that from the years nearest to 1905, is particularly helpful in determining the location of the Ngok Dinka that year,[654] because "there was a substantial continuity in the historic territories of the Ngok Dinka and the Misseriya, and that the post-1905 locations of the two peoples are highly probative of their pre-1905 locations," subject to the effects of the civil war and certain government-sponsored agricultural projects.[655]

344. This is precisely the conclusion that the ABC Experts had reached[656] on the basis of a number of sources, including Mr. Tibbs and Professor Cunnison.[657] In particular, the SPLM/A underscores the latter's comment that "the area of the Bahr to the south of the goz 'is the traditional

tribal boundaries of the Ngok Dinka.

[649] GoS Oral Pleadings, April 20, 2009, Transcr. 107/04 *et seq.* The GoS also notes repeated typographical errors in the *dispositif of* the SPLM/A memorials (*see* GoS Oral Pleadings, April 20, 2009, Transcr. 106/07 *et seq.*).

[650] *See also* GoS Oral Pleadings, April 20, 2009, Transcr. 107/10 *et seq.;* April 22, 2009, Transcr. 193/04 *et seq.*

[651] *See* GoS Counter-Memorial, paras. 68 *et seq.,* 380; GoS Oral Pleadings, April 23, 2009, Transcr. 29/08 *et seq.*

[652] *See* GoS Oral Pleadings, April 22, 2009, Transcr. 193/18 *et seq.*

[653] *See* GoS Counter-Memorial, para. 325 ; GoS Rejoinder, para. 444.

[654] *See* SPLM/A Memorial, para. 945.

[655] SPLM/A Counter-Memorial, at para. 1070. *See also* SPLM/A Counter-Memorial, at paras. 1079–1080.

[656] SPLM/A Counter-Memorial, at para. 1071 quoting ABC Experts' Report, Part I, at p. 21.

[657] SPLM/A Counter-Memorial, at para. 1072 quoting ABC Experts' Report, Part I, at p. 19, Appendix B to SPLM/A Memorial.

land of Dinka.'"[658] Having noted that the GoS initially argued that the Ngok tended to move north of the Bahr el Arab after 1905,[659] the SPLM/A concludes that the GoS has now abandoned its claim and accepts that there is historical continuity in the locations of the Ngok Dinka and Misseriya, in line with the SPLM/A's position.[660]

345. Arguing that the documentary record should be read in light of the environmental evidence, "profoundly important in the context of this case,"[661] the SPLM/A contends that post-1905 maps and official reports confirm:

- the presence of the Ngok Dinka north of the Bahr el Arab/Kir[662] and throughout the Bahr,[663] including around and north of the Ngol/Raga-

[658] SPLM/A Counter-Memorial, at para. 1125 quoting Cunnison, The Social Role of Cattle, 1(1) *Sudan J. Veterinary Science and Animal Husbandry* 10 (1960), SPLM/A Exhibit-FE 4/8.

[659] *See* SPLM/A Counter-Memorial, at para. 1069 quoting GoS Memorial, at para. 366.

[660] *See* SPLM/A Rejoinder, para. 499 quoting GoS Counter-Memorial, at para. 308; SPLM/A Rejoinder, para. 501.

[661] *See* SPLM/A Oral Pleadings, April 21, 2009, Transcr. 142/19 *et seq. See infra* paras. 357 to 371 on environmental evidence.

[662] *See, inter alia,* SPLM/A Rejoinder, paras. 482 and Hallam, Kordofan Routes: Dawas to Dar Jange, December 1907, pp. 1–2. (GoS Counter-Memorial Annex 31); SPLM/A Counter-Memorial, paras. 1228–1230, referring to Map 46 (*Hasoba: Sheet 65-L,* Survey Office Khartoum, 1910) and SPLM/A Oral Pleadings, April 22, 2009, Transcr. 52/08–09; SPLM/A Counter-Memorial, para. 1218, referring to SPLM/A Map 40 (*Northern Bahr el-Ghazal: Sheet 65,* Survey Office Khartoum, 1907); SPLM/A Memorial, paras. 996–997, referring to Map 50 (Achwang: Sheet 65-K, Survey Office Khartoum, 1916); SPLM/A Rejoinder, para. 504 referring to Heinekey's 1918 Route Reports; SPLM/A Rejoinder, para. 507 and Dupuis' 1921 Sketch; SPLM/A Counter-Memorial, para. 1252, referring to GoS Memorial Map Atlas, Map 21 (*Ghabat el Arab Sheet 65-L,* Survey Office (Khartoum), 1925); SPLM/A Counter-Memorial, para. 1266 referring to the 1938 Map of Native Administrations of Kordofan Province; SPLM/A Counter-Memorial, paras. 1105–1109 and Howell, "Notes on the Ngork Dinka of West Kordofan," 32(2) SNR 239, 243 (1951), SPLM/A Exhibit-FE 4/3 and SPLM/A Oral Pleadings, April 22, 2009, Transcr. 34/23 *et seq.*

[663] *See, inter alia,* SPLM/A Counter-Memorial, para. 1092 quoting Kordofan Province Handbook 73 (1912), SPLM/A Exhibit-FE 3/8a and Kordofan Province Map, Survey Office Khartoum, 1913 (Map 48 of SPLM/A Map Atlas vol. 1); SPLM/A Counter-Memorial, para. 1234, referring Map 14 of GoS Memorial Map Atlas (*Map of Anglo-Egyptian Sudan,* Geographical Section of the War Office, 1914); SPLM/A Counter-Memorial, para. 1175 and Witness Statement of G. Michael Tibbs, Appendix to SPLM/A Counter-Memorial, para. 22.

ba ez Zarga[664] up to the goz,[665] in the form of villages, dugdugs and cultivations;[666]

- the location of the Ngok western frontier "all the way to the boundary with Darfur"[667] and the northern border between the Ngok and the Misseriya at Tebeldiya on 10°35'N;[668]
- the existence of seasonal Arab "camps," and not "settlements," north of the Bahr el Arab, in line with the seasonal cattle grazing patterns of the Misseriya and the Ngok Dinka,[669] the latter moving north to the goz in the rainy season.[670]

346. The SPLM/A further argues that a number of maps and trek reports relied upon by the GoS provide little evidence on the actual location of the Ngok Dinka, either on the ground that they are inaccurate,[671] or because they were based on limited, dry season routes and designed merely to record

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[664] *See, inter alia,* SPLM/A Counter-Memorial, para. 1104 quoting J. Robertson, T*ransition in Africa: from Direct Rule to Independence* 51 (1954), SPLM/A Exhibit-FE 18/28; SPLM/A Counter-Memorial, para. 1181 quoting "The First Peace Agreement Between The Misiriyya Humur And The Ngok Dinka, Concluded At Abyei, March 3, 1965," Appendix 12 to A. D Saeed, *The State and Socioeconomic Transformation in the Sudan: The Case of Social Conflict in Southwest Kurdufan* (January 1, 1982). ETD Collection for University of Connecticut. Paper AAI8213913, SPLM/A Exhibit-FE 18/30. *See also* SPLM/A Oral Pleadings, April 22, 2009, Transcr. 35/07 *et seq.*

[665] *See, inter alia,* SPLM/A Counter-Memorial, para. 1174 quoting Witness Statement of G. Michael Tibbs, Appendix to SPLM/A Counter-Memorial, para. 23; SPLM/A Counter-Memorial, para. 1327 quoting D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 92, 96 (1997), SPLM/A Exhibit-FE 8/14 and SPLM/A Oral Pleadings, April 22, 2009, Transcr. 51/07–09.

[666] *See, inter alia,* SPLM/A Oral Pleadings, April 22, 2009, Transcr. 30/15 *et seq.* referring to a portion of Whittingham's 1910 map regarding his trek from Turda to Koak and Bara to Mellum that the GoS failed to disclose; SPLM/A Counter-Memorial, paras. 1243–1244, referring to Map 85 of SPLM/A Map Atlas, vol. 2 (*Lake Keilak: Sheet 65-H,* Survey Office (Khartoum) 1911, corr. Dec 1922); SPLM/A Counter-Memorial, paras. 1255–1256, referring to SPLM/A Map 92 (1929 Ghabat el Arab Sheet 65-L Map); SPLM/A Memorial, para. 1001 and SPLM/A Counter-Memorial, para. 1264, referring to Map 54 of SPLM/A Map Atlas, vol. 1 (*Ghabat el Arab: Sheet 65-L,* Survey Office (Khartoum), 1936).

[667] SPLM/A Counter-Memorial, at para. 1175 quoting Witness Statement of G. Michael Tibbs, Appendix to SPLM/A Counter-Memorial, para. 22.

[668] *See, inter alia,* SPLM/A Memorial, paras. 1002–1003, referring to Map 56 of SPLM/A Map Atlas, vol. 1 (*Dar El Humr: Sheet NC-35-G,* Sudan Survey, 1936 (rev. 1976); SPLM/A Counter-Memorial, at para. 1175 quoting Witness Statement of Michael Tibbs, Appendix to SPLM/A Counter-Memorial, para. 23.

[669] *See* SPLM/A Rejoinder, paras. 481–483 quoting Hallam, Kordofan Routes: Dawas to Dar Jange, December 1907, pp. 1–2. (GoS Counter-Memorial Annex 31)

[670] *See* SPLM/A Counter-Memorial, para. 1327 quoting D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 92, 96 (1997), SPLM/A Exhibit-FE 8/14.

[671] *See* SPLM/A Counter-Memorial, para. 1213 referring to Comyn's 1907 map (Map 9 in GoS Memorial Map Atlas (*Sketch Map of the Western Sources of the Nile,* The Royal Geographical Society, 1907).

topographical information.[672] The GoS therefore cannot rely on these documents to draw negative inferences from a supposed absence of Ngok Dinka in particular places.[673]

347. More specifically, the 1933 CivSec map relied upon by the GoS is wrong in its depictions of various "waterless areas."[674] In addition, its purpose was to "indicate claims of the 'Malwal,' 'Rizeigat' and Humr *south of the Bahr al-Arab,*"[675] and not to identify the alleged northernmost limit of the area occupied by the Ngok Dinka. Further, the sketch places the Ngok dry season grazing to the north-west of Abyei and describes the Ngok as having significant cattle, twice as much as the Homr.[676] The SPLM/A concludes that only vast permanent settled lands, greater than all of the colored areas on the map, would accommodate all of the Ngok's cattle.[677]

348. Among the various scholarly works it invokes, the SPLM/A places strong emphasis on the writings of Professor Cunnison, the GoS's witness, who, like Mr. Tibbs, spent a long time in the region with the people.[678] The SPLM/A thus relies on Professor Cunnison to confirm that "[m]uch of the Bahr has permanent Dinka settlements [ . . . ] the Nuer and Dinka have permanent homes from which they move for part of the year."[679] Similarly, when asked by the Sudanese Government whether it makes sense to encourage the Misseriya to cultivate in the Bahr, Professor Cunnison responded that the region was the

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[672] *See, inter alia,* SPLM/A Rejoinder, para. 482 referring to Hallam 1907 Route Report; SPLM/A Rejoinder, para. 493 referring to Whittingham's 1910 route (*see* GoS Counter-Memorial Map Atlas, Maps 18a and 18b); SPLM/A Rejoinder, para. 502 referring to Heinekey's 1918 Route Reports; SPLM/A Rejoinder, paras. 508, 510 referring to Dupuis' 1921 route (*see* GoS Counter-Memorial Map Atlas, Map 39a).

[673] *See, inter alia,* SPLM/A Rejoinder, para. 509; SPLM/A Rejoinder, para. 521 referring to Henderson's 1933 Route Report; SPLM/A Counter-Memorial, para. 1176 quoting Witness Statement of G. Michael Tibbs, Appendix to SPLM/A Counter-Memorial, para. 24.

[674] *See* SPLM/A Rejoinder, para. 526; GoS Counter-Memorial Map Atlas, Map 22a.

[675] SPLM/A Rejoinder, para. 526 (emphasis in original).

[676] *See* SPLM/A Rejoinder, paras. 527–529. The SPLM/A quotes a figure of 50,000 to 60,000.

[677] SPLM/A Rejoinder, para. 529.

[678] *See* SPLM/A Oral Pleadings, April 21, 2009, Transcr. 184/17 *et seq.*

[679] SPLM/A Counter-Memorial, at para. 1128 quoting Cunnison, *Some Social Aspects of Nomadism in a Baggara Tribe* in *The Effect of Nomadism on the Economic and Social Development of the People of the Sudan,* Proceedings of the Tenth Annual Conference 11th-12th January 1962, 112, SPLM/A Exhibit-FE 4/11. *See also* SPLM/A Counter-Memorial, at paras. 1129–1131 and SPLM/A Counter-Memorial, at para. 1132 quoting Witness Statement of Ian Cunnison, at p. 1, at para. 6. More generally, *see infra* in paras. 357 to 371 on environmental evidence, Cunnison's definitions of the "Bahr" and the "Bahr el-Arab" relied on by the SPLM/A to confirm that a reference to the Ngok living "on the Bahr el-Arab" should be understood as a reference to inhabitation of the area encompassing the Bahr el Arab *and* the Ragaba ez Zarga.

traditional agricultural land of the Dinka during the rains.[680] This is consistent with Whittingham's 1910 map showing cultivation.[681]

349. On the basis of Professor Cunnison's 1954 statistics, the SPLM/A calculates that the Misseriya spent less time inside the Bahr region (142 days) than outside (223 days) in the Muglad ("their home"),[682] Babanusa and the goz.[683] Having noted Cunnison's comment that "most of the Dinka," but not all, would migrate south to their dry season areas,[684] the SPLM/A concludes that this is consistent both with pre-1905 reports of uninhabited villages in the north and Cunnison's observation of the Misseriya making "brotherhood" and even leaving some of their possessions with those among the Ngok who maintained a presence in the north during the dry season.[685]

350. The SPLM/A goes on to remark that the ABC Experts and Professor Cunnison agree on the definition and extent of the goz, on its role as an area of transit rather than occupation, and on the location and scope of the Misseriya and the Ngok Dinka's traditional homes.[686] In addition, while Cunnison indicates "there was never any *collective presence* [of the Ngok] north of the area I refer to as the Bahr," and that the Ngok did not occupy the goz "in any relevant sense",[687] he "does not state that there were *no* Ngok north of the Bahr"[688] and that the Ngok, like the Humr, did not use the goz for transit.[689]

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[680] *See* SPLM/A Counter-Memorial, para. 1129 quoting Cunnison, The Social Role of Cattle, 1(1) *Sudan J. Veterinary Science and Animal Husbandry* 10 (1960), SPLM/A Exhibit-FE 4/8; *see also* SPLM/A Counter-Memorial, paras. 1130–1131 quoting Cunnison, Hill & Asad, "Settlement of Nomads in the Sudan: A critique of Present Plans," in Agricultural Development in the Sudan, Proceedings of the Thirteenth Annual Conference 3–6 December 1966, 102, 112–113, SPLM/A Exhibit-FE 18/27; SPLM/A Oral Pleadings, April 22, 2009, Transcr. 42/12 *et seq*.

[681] *See* SPLM/A Oral Pleadings, April 22, 2009, Transcr. 41/18 *et seq*.

[682] SPLM/A Counter-Memorial, at para. 1144 quoting Cunnison, *The Humr and their Land* 35(2) SNR 54–55 (1954), SPLM/A Exhibit-FE 4/5.

[683] *See* SPLM/A Counter-Memorial, at paras. 1149–1150; Witness Statement of Ian Cunnison, at p. 2, para. 9.

[684] SPLM/A Counter-Memorial, at para. 1134; Witness Statement of Ian Cunnison, at p. 1, para. 6.

[685] SPLM/A Counter-Memorial, at para. 1135 quoting Cunnison, *The Humr and their Land* 35(2) SNR 62 (1954), SPLM/A Exhibit-FE 4/5; *see also* SPLM/A Counter-Memorial, at para. 1136 referring *inter alia* to I. Cunnison, *Baggara Arabs–Power and the Lineage in a Sudanese Nomad Tribe* 29 (1966), SPLM/A Exhibit-FE 4/16.

[686] SPLM/A Counter-Memorial, at para. 1157–1160.

[687] SPLM/A Rejoinder, para. 538(d) quoting Supplementary Witness Statement of Ian Cunnison, at p. 1, §7.

[688] SPLM/A Rejoinder, para. 538(c) quoting Supplementary Witness Statement of Ian Cunnison, at p. 1, §3 (emphasis added by the SPLM/A).

[689] SPLM/A Rejoinder, para. 538(d). *See also* SPLM/A Counter-Memorial, at para. 1174 quoting Witness Statement of G. Michael Tibbs, Appendix to SPLM/A Counter-Memorial, para. 23.

351. The SPLM/A notes, however, that the GoS has created a point of disagreement between Professor Cunnison and the ABC Experts concerning the "shared rights area."[690] Professor Cunnison indeed states that he was "informed that the effect of the ABC's decision would be to exclude the Humr from their summer grazing and living areas in the Bahr."[691] The SPLM/A agrees that this would be unjust but points out that, in accordance with Section 1.1.3 of the Abyei Protocol, the ABC Experts stressed that "their decision would have no practical effect on the traditional grazing patterns and the two communities."[692] Professor Cunnison was in fact misinformed as to the effects of the ABC Experts' Report.[693]

352. Similarly, when Professor Cunnison states that the "real area of sharing was further south, in the Bahr,"[694] his analysis is in reality not different from that of the ABC Experts.[695] The latter not only referred to "shared secondary rights" in the goz,[696] but also to sharing in the Bahr, in specific locations north and south of Abyei town.[697]

353. The SPLM/A concludes that Cunnison's writings, which describe the presence of Ngok Dinka permanent homes throughout the Bahr, seriously undermine the GoS's case.[698]

354. Due to the limitations of the documentary record, the SPLM/A, like the ABC, also relies on witness evidence in order to obtain a more detailed and comprehensive description of the locations of the Ngok Dinka in 1905. Having noted that the GoS itself insisted on the relevance of specific witness

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[690] *See* SPLM/A Oral Pleadings, April 22, 2009, Transcr. 47/03 *et seq.*

[691] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 47/06 *et seq.* quoting Witness Statement of Ian Cunnison, at p. 3, para. 11. *See also* SPLM/A Counter-Memorial, para. 1155.

[692] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 48/02–04 quoting ABC Experts' Report, Part I, at p. 9, Appendix B to SPLM/A Memorial. *See also* SPLM/A Counter-Memorial, para. 1166.

[693] *See* SPLM/A Counter-Memorial, para. 1166.

[694] SPLM/A Counter-Memorial, para. 1161 quoting Witness Statement of Ian Cunnison, at p. 2, para. 9.

[695] *See* SPLM/A Counter-Memorial, para. 1162.

[696] SPLM/A Counter-Memorial, para. 1163 quoting ABC Experts' Report, Part I, at pp. 16, 19, 20, Appendix B to SPLM/A Memorial.

[697] SPLM/A Counter-Memorial, at para. 1164 quoting ABC Experts' Report, Part I, at p. 21, Appendix B to SPLM/A Memorial.

[698] *See* SPLM/A Oral Pleadings, April 22, 2009, Transcr. 48/12 *et seq.;* SPLM/A Counter-Memorial, at paras. 1168-1170.

evidence before the ABC,[699] the SPLM/A argues that the Ngok Dinka witnesses[700] have described with consistency:

> [ . . . ] permanent settlements with associated agricultural lands throughout the Abyei Area, including:
>
> a. to the north west of Abyei town, inhabiting permanent settlements in the areas between the Ngol/Ragaba ez-Zarga and Kiir/Bahr el-Arab river systems up to the border with Darfur;
>
> b. further to the north-west, inhabiting permanent settlements at Rumthil [Arabic: Antilla], Dhony Dhoul and Wun Deng Awak, with their border at Tebeldiya;
>
> c. due north from Abyei town, inhabiting permanent settlements between the Ngol/Ragaba ez-Zarga and Kiir/Bahr el-Arab river systems, and further north to Thuba, Nyama and Thur [Arabic: Turda];
>
> d. to the east and beyond the Ngol/Ragaba ez-Zarga, inhabiting permanent settlements in the upper Ngol region such as Pariang and Ajaj, extending to Miding [Arabic: Heglig]; and
>
> e. north of Miding, inhabiting permanent settlements at Nyadak Ayueng, Michoor and Niag.[701]

355. The witness evidence coincides with the Community Mapping Project and the Map it produced. The SPLM/A highlights that the Community Map[702] shows approximately 150 permanent settlements, 56 burial sites, 74 cattle grazing sites, 35 cultivation sites, 45 community meeting and court locations, and 11 sacred sites, dating back to 1905 or earlier,[703] in the region centered on the Ngol/Ragaba ez Zarga and Bahr el Arab/Kir.[704]

356. While the pre- and post-1905 evidence establishes the location of the nine Ngok Dinka Chiefdoms in the area claimed, the SPLM/A does not deny that it is difficult to draw precise lines.[705] Given the practical, political and time constraints, the SPLM/A elected "to try to use manageable and practical

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[699] SPLM/A Counter-Memorial, at paras. 1283–1286 and Ambassador Dirdeiry, Taped Recording of GoS Final Presentation, dated June 16, 2005, File 1, at pp. 2–3, SPLM/A Exhibit-FE 19/15.

[700] The SPLM/A refers to the 26 witnesses who submitted statements in these proceedings and the nearly 70 witnesses who testified during the ABC proceedings (*See* SPLM/A Memorial, para. 46).

[701] SPLM/A Memorial, para. 46.

[702] *See* Poole Expert Report, Annex H. *See* SPLM/A Counter-Memorial, at para. 1382.

[703] *See* SPLM/A Counter-Memorial, at para. 1383.

[704] SPLM/A Counter-Memorial, at para. 1376. *See also* SPLM/A Counter-Memorial, at paras. 1387–1388.

[705] *See* SPLM/A Oral Pleadings, April 22, 2009, Transcr. 134/06 *et seq.*

straight-line boundaries" that provide "a fair representation of the extent of the Ngok Dinka territories in all directions" on the basis of the evidence.[706]

### *(c) The relevance of post-1905 demographic, cultural and environmental evidence to the location of the Ngok Dinka in 1905*

#### (i) GoS arguments

357. Having stated that the cultural evidence that the SPLM/A purports to rely on is in fact absent from its submissions,[707] the GoS first points out that environmental considerations were not in the minds of Condominium officials who made the transfer in 1905, as acknowledged by the SPLM/A's expert, Mr. Allan.[708]

358. The GoS further agrees with Mr. Allan that "environmental determinism does not work."[709] Yet, the SPLM/A took precisely the opposite approach by determining that the Bahr and half the goz belonged to the Ngok Dinka on environmental grounds.[710] While the GoS does accept that the environment may have an influence on the cattle grazing patterns or agricultural practices of the tribes living in the region, an ability to adapt to local conditions does not entail that the Ngok Dinka were located in any place where they could grow dura (sorghum) or graze their cattle.[711]

359. In addition, the SPLM/A does not establish the influence of the environment in 1905. In the GoS's view, there are many factors, such as the effects of the Madhiyya, which would explain why the Ngok Dinka were further to the south in 1905 than the environmental capacity of their crop and cattle could have allowed them to be.[712]

360. While the MENAS Report takes the same deterministic approach as the SPLM/A in its description of the Bahr and the goz, the MENAS Report turns out to show that the geographic dividing line between the Bahr and the goz "does not resemble the ABC Experts' delimitation or the SPLM/A's submission,"[713] with the Bahr extending to 10°0'N on the west and beyond

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[706] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 134/22–135/16.

[707] GoS Rejoinder, para. 505.

[708] GoS Oral Pleadings, April 21, 2009, Transcr. 155/08 *et seq.* (Mr. Allan–cross-examination).

[709] GoS Oral Pleadings, April 22, 2009, Transcr. 173/03–09.

[710] GoS Oral Pleadings, April 22, 2009, Transcr. 173/14 *et seq.*

[711] *Ibid. See also* GoS Rejoinder, para. 506.

[712] GoS Oral Pleadings, April 22, 2009, Transcr. 174/08 *et seq.*

[713] GoS Rejoinder, para. 508 referring to the MENAS Report, pp. 37–38, 140, 145, Appendix to SPLM/A Counter-Memorial.

10°35'N on the east.[714] In addition, the evidence shows that "tribal habitation patterns did not follow geographical features at all."[715]

361. The GoS also relies on the MENAS Report's concession that neither the goz nor the Bahr could have supported permanent habitation in 1905[716] to conclude that the SPLM/A's claim to the 10°35'N line utterly lacks credibility.[717]

362. The SPLM/A's criticism of the other environment-related arguments put forward by the GoS are, in the latter's view, equally misguided. The GoS thus asserts that it never argued that the Bahr el Arab/Kir was "impassable,"[718] but maintains that it is a traditional dividing line, "ideological and physical."[719] Having contended in its Memorial that the Ngok Dinka moved south in the wet season,[720] the GoS relies on Willis and Wilkinson to maintain that the Ngok "were more congregated together" than the SPLM/A claims and where they went in the wet season at the time of the transfer was "very much in the south."[721]

363. Turning to the demographic evidence and the size of the Ngok Dinka population in 1905, the GoS argues that the SPLM/A's figure of 50,000 is a "hopeless overestimate."[722] The GoS's approximate figure of 5,000 Ngok Dinka is much more consistent with the area shown on the CivSec Map[723] and later estimates, including the Governor of Kordofan's estimates of 15,000 in 1934[724] and 30,000 in 1951,[725] and the 1955 Sudan census which mentions

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[714] GoS Rejoinder, para. 512.

[715] GoS Rejoinder, para. 512 and Barbour's and Lebon's Maps (Figure 4 and 5 of GoS Rejoinder, respectively).

[716] GoS Rejoinder, para. 515 quoting MENAS Report, para. 149, Appendix to SPLM/A Counter-Memorial.

[717] GoS Oral Pleadings, April 22, 2009, Transcr. 176/03 *et seq.*

[718] GoS Rejoinder, para. 499.

[719] GoS Rejoinder, para. 503 quoting c, S., *Sudan's Blood Memory* 156 (2006), SPLM/A Exhibit-FE 12/18. *See also* GoS Rejoinder, paras. 500–504 quoting Wills, J.T., *Between the Nile and the Congo* (1887) 9/5 Proceedings of the Royal Geographical Society and Monthly Record of Geography 285, p. 294 (SM Annex 61); Warburg, G., *The Sudan Under Wingate, Administration in the Anglo-Egyptian Sudan 1890–1916* (1971) p. 137, SPLM/A Exhibit-FE 5/1; Collins, R.O., *The Nile* (2002) pp. 63–64, SPLM/A Exhibit-FE 10/6; Holt, p.m., & Daly, M.W., *A History of the Sudan* (5th ed., 2000), p. 62, SPLM/A Exhibit-FE 9/3.

[720] *See* GoS Memorial, para. 359.

[721] GoS Oral Pleadings, April 22, 2009, Transcr. 181/22 *et seq.*

[722] GoS Rejoinder, para. 454.

[723] GoS Oral Pleadings, April 21, 2009, Transcr. 82/23 *et seq.,* 85/14 *et seq.*

[724] *See* GoS Rejoinder, para. 454 referring to Letter from Newbold to the Civil Secretary, 8 May 1934, Civsec 1/36/97 (SM Annex 89). *See also* GoS Memorial, para. 339.

[725] *See* GoS Rejoinder, para. 454 referring Letter from G. Hawkesworth (Governor Kordofan) to Editor Kordofan Magazine, dated April 3, 1951, SPLM/A Exhibit-FE 18/17. *See also* GoS Rejoinder, para. 454 referring to the Upper Nile's District Commissioner's figure of 20,000–25,000 in 1948 and the Dar Misseriya's Assistant District Commissioner's figure of 30,000 in 1952.

a figure of 31,135 Ngok.[726] The SPLM/A's figure is based on questionable estimates[727] and would indicate a sharp and implausible decrease in Ngok Dinka population between 1905 and 1934, a period during which the Ngok's living conditions improved.[728]

### (ii) SPLM/A arguments

364. The SPLM/A argues that environmental, climatic and cultural data regarding the Abyei region further corroborate the evidence drawn from Ngok Dinka and Misseriya oral traditions and the documentary record on the location of these tribes.[729]

365. The SPLM/A relies on Professor Cunnison's definition of the Bahr, described as "[t]he southern part of the country," "characterized by dark, deeply cracking clays and numerous winding watercourses,"[730] which include:

a. the Kiir/Bahr el-Arab, being 'all river beds between the Regeba ez Zerga' and the Kiir/Bahr el-Arab;

b. the river system of the Ngol/Ragaba ez-Zarga to its border with the northeastern regabas in the neighborhood of Kwak and Keilak;

c. the river system of the Nyamora/Ragaba Umm Biero to its border with the goz; and

d. Lakes Keylak [Keilak] and Lake Abyad.[731]

366. Professor Cunnison further explains that "[t]he Bahr is the name which the Humr give to the whole of this dry season watering country" and

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[726] GoS Rejoinder, para. 454.

[727] *See* Marchand's estimate of 4 to 5 million Dinka in 1898, against Lienhardt's estimate of about one million in 1952 (GoS Rejoinder, para. 456); Bey's estimate of 2 million in 1906 (GoS Rejoinder, para. 457 quoting Letter from Cook to Bayliss (January 30, 1906), SPLM/A Exhibit-FE 17/20); Governor's Lloyd's estimate of 500,000 which does not expressly refer to the Ngok (*See* GoS Rejoinder, para. 459 quoting Sudan Intelligence Reports, No. 171 (October 1908), Appendix D, p. 52, SPLM/A Exhibit-FE 17/31).

[728] GoS Rejoinder, para. 454. *See also* GoS Oral Pleadings, April 21, 2009, Transcr. 86/13 *et seq.*

[729] *See* SPLM/A Memorial, at para. 1005; SPLM/A Counter-Memorial, at paras. 1307–1308.

[730] SPLM/A Counter-Memorial, para. 1113 quoting I. Cunnison, *Baggara Arabs–Power and the Lineage in a Sudanese Nomad Tribe* 18 (1966), SPLM/A Exhibit-FE 4/16.

[731] SPLM/A Counter-Memorial, para. 1114 quoting I. Cunnison, *The Humr and Their Land* 51, SPLM/A Exhibit-FE 4/5. *See also* SPLM/A Oral Pleadings, April 22, 2009, Transcr. 37/12 *et seq.*

"the Goz" is the area "to the north [of the Bahr]."[732] In light of Cunnison's definitions, the SPLM/A emphasizes the importance of the following factors:

a. the Ngok Dinka agro-pastoral way of life was well-adapted to the fertile soil and the extreme climatic conditions of the Bahr region and the goz;

b. the Ngok sorghum is well-suited to the Bahr region, and parts of the goz, because it is 'drought resistant' – a distinct advantage given the region's climatic conditions;

c. the Ngok Dinka cattle were well-suited physically to the conditions and diseases of the region, particularly during the rainy season;

d. the Ngok Dinka animal husbandry practices (e.g., constructing substantial cattle byres (luaks or dugdugs)) were adapted to protecting their livestock from the region's climate;

e. the soil in the area of Muglad is a non-cracking red clay intersected by numerous sand ridges (described as the "Baggara Repeating Pattern"), ill-suited for agriculture;[733]

f. the Misseriya engaged in little agriculture (thus having no reason to avail themselves of the fertile soil of the Bahr region), with their only crop being millet, which was best grown in the sandier, drier soil near Muglad, rather than in the damper conditions of the Bahr region;

g. the Misseriya's nomadic lifestyle included living in temporary shelters, without protection from rainy conditions for either themselves or their cattle, which "do not have the faculty for moving in the mud that Dinka cattle possess;" and

h. the nomadic Misseriya herders and their lifestyle were best (and only) suited to the dry, sandy regions to the north of the goz.[734]

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[732] SPLM/A 1113–1114 quoting I. Cunnison, *Baggara Arabs–Power and the Lineage in a Sudanese Nomad Tribe* 18–19 (1966), SPLM/A Exhibit-FE 4/16. *See also* SPLM/A Oral Pleadings, April 21, 2009, Transcr. 141/16 *et seq.*

[733] By contrast, the black clay soil which, according to Governor Lloyd, predominates south of latitude 10°30', is fertile (*see* SPLM/A Oral Pleadings, April 21, 2009, Transcr. 145/13 *et seq.*)

[734] SPLM/A Counter-Memorial, para. 1308. *See also* similar list of factors in SPLM/A Rejoinder, para. 612; SPLM/A Oral Pleadings, April 21, 2009, Transcr. 162/08 *et seq.*

367. Importantly, as pointed out by a wide range of authorities,[735] including Professor Cunnison,[736] the Ngok Dinka moved south of the Bahr-river system with their cattle in the dry season, and north of it during the wet season.[737] Similarly, while the Misseriya lived in settled camps to the north of Babanusa in the wet season, they then "moved south through the extensive sandy Goz to the area called the Bahr" and "lived in scattered camps across this region during the summer months."[738]

368. Although the MENAS Report does not identify contemporary satellite evidence showing perennial water sources in the goz in the dry season, the SPLM/A points to early 20th century maps, including Lloyd's 1907 map,[739] which indicate the existence of water in the area.[740]

369. The SPLM/A goes on to argue that the GoS's few comments relating to environmental and demographic evidence are all demonstrably wrong, to the point that most of them have been abandoned.[741]

370. Thus, contrary to the GoS's contention, the Bahr el Arab/Kir has never been a "physical barrier," and was easily forded.[742] Similarly, the GoS's

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[735] *See* SPLM/A Counter-Memorial, at para. 1089 quoting H. MacMichael, *A History of the Arabs in Sudan*, Vol. I, 286 (1922), SPLM/A Exhibit-FE 18/6; *see also* SPLM/A Counter-Memorial, at para. 1091; *See* SPLM/A Counter-Memorial, at para. 1324 quoting R. Davies, *The Camel's Back* 130 (1957), SPLM/A Exhibit-FE 18/21; *See* SPLM/A Counter-Memorial, at para. 1325 quoting Howell, "Notes on the Ngork Dinka of West Kordofan," 32/2 SNR 239, 243–244 (1951), SPLM/A Exhibit-FE 4/3; *See* SPLM/A Counter-Memorial, at para. 1327 quoting M. Niamir, R. Huntington & D. Cole, *Ngok Dinka Cattle Migrations and Marketing* 1, 13 (1983), SPLM/A Exhibit-FE 7/1, and D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 92, 96 (1997), SPLM/A Exhibit-FE 8/14. *See also* SPLM/A Oral Pleadings, April 22, 2009, Transcr. 50/24 *et seq.; See* SPLM/A Counter-Memorial, at para. 1328 quoting A. El Tayab, *Agricultural and Natural Resources Abyei District, West Region Southern Kordofan Province* 6, 8 (1978), SPLM/A Exhibit-FE 6/5.

[736] *See* SPLM/A Counter-Memorial, at para. 1326 quoting I. Cunnison, *Baggara Arabs–Power and the Lineage in a Sudanese Nomad Tribe* 18–19, 25 n. 24 (1966), SPLM/A Exhibit-FE 4/16.

[737] SPLM/A Counter-Memorial, paras. 1324–1329.

[738] SPLM/A Counter-Memorial, para. 1132 quoting Witness Statement of Ian Cunnison, at p. 1, para. 6.

[739] Map 38 of SPLM/A Map Atlas, vol. 1 (*Kordofan: Map of Dar Homr,* Watkiss Lloyd, 1907).

[740] SPLM/A Counter-Memorial, para. 1319.

[741] SPLM/A Rejoinder, paras. 610, 620 *et seq. See also* SPLM/A Counter-Memorial, paras. 1321 *et seq.*

[742] *See* SPLM/A Counter-Memorial, at para. 1359 quoting Second Daly Expert Report, at p. 25, Appendix to SPLM/A Counter-Memorial. SPLM/A also refers to MENAS Expert Report, at para. 110, Appendix to SPLM/A Counter-Memorial. *See also* SPLM/A Oral Pleadings, April 21, 2009, Transcr. 149/13–20 (Mr Allan characterizing the Kiir/Bahr el Arab as a "discontinuous river").

claim that "in the wet season [Sultan Rob and the Ngok Dinka] went south o the River Lol, not north"[743] is clearly disproved by a wide range of authorities.[744]

371. Lastly, the SPLM/A dismisses as mere conjecture the GoS's contention that the Ngok Dinka in 1905 "might" have "numbered less than 5,000 in total."[745] The SPLM/A draws the Tribunal's attention to Marchand, Bey and Lloyd's higher, more contemporaneous figures[746] on the basis of which the SPLM/A concludes that there would have been around 50,000 Ngok Dinka in 1905. It recognizes that they have "no inherently more or less credibility than the figures cited by GoS, except that they were published much closer to 1905."[747] The SPLM/A contends that the 1955 national census, which counted 31,135 Ngok Dinka, used a much criticized sample probability method[748] likely to produce huge discrepancies between estimated and actual population figures and to over-represent nomadic groups.[749]

### *(d) The probative value of post-1905 witness evidence based on oral tradition in relation to early 20th century events*

#### (i) GoS arguments

372. The GoS generally questions the probative value of the witness evidence based on oral tradition presented by the SPLM/A. It argues that these have been contradicted by the documentary and map evidence to the point of being "demonstrably untrue."[750]

373. The GoS insists that the goal of oral evidence, which depends upon repetition,[751] is not "to tell a history of events," but rather "to construct a present tribal identity and to connect that to an indefinite past."[752] The goal

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[743] *See* SPLM/A Counter-Memorial, at para. 1322 quoting GoS Memorial, at para. 359.

[744] *See also* SPLM/A Oral Pleadings, April 21, 2009, Transcr. 167/16 *et seq.*

[745] SPLM/A Counter-Memorial, para. 1368 quoting GoS Memorial, para. 339.

[746] SPLM/A refers to Bulletin du Comité de l'Afrique Française "De L'Oubangui au Nil : Les missions Liotard et Marchand, Octobre 1898, at p. 329, SPLM/A Exhibit-FE 17/20; Letter dated 30 January 1906 from Albert Cook to Mr Baylis, a representative of the Church Missionary Society resident in Bor, Sudan, Church Missionary Society Archives, SPLM/A Exhibit-FE 17/20; Sudan Intelligence Report No. 171, October 1908, Appendix D, at p. 52, SPLM/A Exhibit-FE 17/31. On the basis of the 1908 Sudan Intelligence Report, SPLM/A obtains a figure in the region of 50,000.

[747] SPLM/A Counter-Memorial, at para. 1371.

[748] *See* SPLM/A Counter-Memorial, at paras. 1371–1373.

[749] *See* SPLM/A Counter-Memorial, at paras. 1373–1374.

[750] GoS Counter-Memorial, para. 327.

[751] GoS Counter-Memorial, para. 333.

[752] GoS Oral Pleadings, April 21, 2009, Transcr. 72/09–16. *See also* GoS Counter-Memorial, para. 331.

is certainly not to help a commission or a tribunal delimit a boundary, since "[s]tate boundaries are created by state means, not by oral tradition."[753] It recalls that the ABC Experts, considering that the oral testimony did not conclusively prove either side's position, sought to find "as much evidence from contemporary records" as possible.[754] The GoS also insists that the SPLM/A has not disclosed the methodology used in gathering the oral evidence.[755]

374. The GoS goes on to identify five specific grounds upon which the SPLM/A's witness evidence should not be given any weight.

375. First, the witness statements put forward by the SPLM/A refer to past events to which the witnesses cannot personally testify.[756] This constitutes hearsay evidence and should be excluded.[757]

376. Second, the GoS submits that the witness statements provided by the SPLM/A concern time periods which are not relevant to the year 1905.[758] They refer to events that might have happened in the 1940s or later on.[759] The GoS asserts that in previous boundary disputes in which the need arose to have recourse to oral tradition, "no weight was given to allegations regarding a different period than that relevant to the dispute."[760]

377. Third, the GoS asserts that the SPLM/A witness statements are too vague to give any clear indication as to what territory was considered to be the Abyei area in 1905.[761]

378. Fourth, the GoS submits that the SPLM/A has relied heavily on witness statements taken directly from persons interested in the outcome of the Abyei dispute.[762] The GoS warns that "any relationship between the witness

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[753] GoS Oral Pleadings, April 21, 2009, Transcr. 73/01–02.

[754] GoS Counter-Memorial, paras. 328–329.

[755] *See* GoS Oral Pleadings, April 21, 2009, Transcr. 75/09–77/06.

[756] *See* GoS Counter-Memorial, paras. 48–53.

[757] *See* GoS Counter-Memorial, para. 52.

[758] GoS Counter-Memorial, paras. 54–56.

[759] GoS Counter-Memorial, para. 54. *See* SPLM/A Memorial, Witness Statement of Arop Deng Kuol Arop, (SPLM/A Memorial, Witness Statements, Tab 9); Witness Statement of Mijok Bol Atem, para. 15 (SPLM/A Memorial, Witness Statements, Tab 23); Witness Statement of Ring Makuac Dhel Yak, para. 17 (SPLM/A Memorial, Witness Statements, Tab 11); Witness Statement of Mijak Kuot Kur, paras. 13–17 (SPLM/A Memorial, Witness Statements, Tab 12); Witness Statement of Ajak Malual Beliu, para. 7 (SPLM/A Memorial, Witness Statements, Tab 13); Witness Statement of Jok Deng Kek, paras 13–15 (SPLM/A Memorial, Witness Statements, Tab 14); Witness Statement of Belbel Chol Akuei Deng, paras. 15–16 (SPLM/A Memorial, Witness Statements, Tab 15).

[760] GoS Counter-Memorial, paras. 55–56; *See Island of Palmas* (1928) 4 UNRIAA 831 at 851 and 865.

[761] GoS Counter-Memorial, paras. 57–58.

[762] GoS Counter-Memorial, paras 63–65, 326.

and the party on behalf of which it testifies should be taken into account by a court or tribunal."[763]

379. Finally, the GoS insists that the oral evidence presented is not corroborated by the contemporary documentary and cartographic record.[764] Relying on the writings of Vansina, the GoS argues that oral tradition should be used "in conjunction with writings, archaeology, linguistic or even ethnographic evidence."[765]

380. The GoS mentions, among other examples, the rest house at Tebeldiya (at 10°35'N), which six of the nine Ngok Dinka tribes describe as the actual border between the Ngok and the Misseriya.[766] It points out that this proposition is in blatant contradiction with the relevant Condominium trek reports and scholarly writings.[767]

### (ii) SPLM/A arguments

381. The SPLM/A argues that, contrary to the GoS's position, oral tradition is considered a valuable source of information by historians, especially in oral or part-oral societies.[768] In addition, courts and tribunals confer a "crucial role" to oral tradition.[769] SPLM/A cites to the Supreme Court of Canada and the Inter-American Court of Human Rights[770] to show that oral tradition of tribal peoples is admitted and relied upon by the courts, "and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents."[771]

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[763] GoS Counter-Memorial, para. 65, referring to, *inter alia,* the *Walfish Bay Case,* 11 UNRIAA, p. 302, cited in Amerasinghe, C. F., *Evidence in International Litigation* (2005) p. 202 (SCM Annex 8); *See also Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1986*, para. 70.

[764] GoS Counter-Memorial, paras. 60–62, referring, *inter alia,* to *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, para. 13; *See also* GoS Counter-Memorial, paras. 37–38, 45–46, 357; *See also* GoS Oral Pleadings, April 21, 2009, 74/07–75/08.

[765] GoS Counter-Memorial, para. 355, quoting Vansina, J., *Oral Tradition as History* (University of Wisconsin Press, Madison, 1985), pp. 159–160.

[766] GoS Counter-Memorial, paras. 344–353 and refers to witness statements of tribesmen of the Alei, Abyior, Achaak, Anyiel, Bongo and Diil chiefdoms.

[767] *See* GoS Counter-Memorial, para. 354 referring to the reports of Wilkinson, Mahon, Comyn, Willis, Hallam, Heinekey, Dupuis and Henderson and the writings of Cunnison, Santandrea, Sabah and Beswick. For other examples, *see* GoS Counter-Memorial, paras. 331–354.

[768] SPLM/A Rejoinder, para. 643.

[769] SPLM/A Rejoinder, para. 644.

[770] SPLM/A Rejoinder, para. 651.

[771] SPLM/A Rejoinder, para. 644 quoting *Delgamuukw* v. *British Colombia* (1997) 3 S.C.R. 1010, §87 (Supreme Court of Canada) (1997), SPLM/A Exhibit-LE 40/7.

382. The SPLM/A goes on to address the GoS's five objections to its witness evidence.

383. The SPLM/A first denies that the Ngok witness statements have no value on the ground that they refer to events to which they cannot personally testify. Contrary to the GoS's assertion, hearsay evidence may be admitted in arbitration and tribal knowledge provides "the most reliable proof of the existence of property rights entitled to protection under a state's legal system."[772]

384. Second, the SPLM/A argues that the GoS's claim that the witness statements relate to time periods which have no bearing on the year 1905 is wrong as a matter of fact.[773] The SPLM/A insists that it has presented statements by chiefs and elders who described the occupation of the region by "their fathers, grandfathers and great-grandfathers – before and around 1905"[774] on the basis of first hand accounts passed down through one or two generations.[775]

385. Third, the SPLM/A rejects the GoS's argument that its witness evidence has no value because it is vague as to the specific territory to which it refers.[776] In contrast to the GoS's unreliable witness statements,[777] the SPLM/A points out that the testimony provided by its witnesses is very detailed and descriptive,[778] as well as remarkably consistent.[779] While they do not provide geographical coordinates, the Community Mapping Project achieves this degree of precision.[780]

386. Fourth, the GoS argument that the SPLM/A Ngok Dinka witnesses are interested parties and that this should be taken into account in assessing the probative value of their testimony, is unacceptable. While international arbitration does not prevent a party being a witness, it will be in any event for the Tribunal to determine the value of the evidence.[781]

387. Fifth, the SPLM/A also denies the GoS allegation that oral evidence is deprived of its probative weight if it is contradicted by documentary evi-

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[772] SPLM/A Rejoinder, para. 658 quoting Anaya & Williams Jr., *The Protection of Indigenous People's Rights over Lands and Natural Resources Under the Inter-American Human Rights System* 14 Harv. Hum. Rts. J. 33, 47 (2001), SPLM/A Exhibit-LE 41/8.

[773] SPLM/A Rejoinder, para. 670.

[774] SPLM/A Rejoinder, para. 671; *See* para. 672 for examples of witness statements that relate to the Ngok Dinka's occupation of the Abyei area during the times of the witnesses' fathers, grandfathers and great-grandfathers.

[775] SPLM/A Rejoinder, para. 671.

[776] SPLM/A Rejoinder, para. 685.

[777] *See inter alia* SPLM/A Rejoinder, paras. 729–739.

[778] SPLM/A Rejoinder, para. 687.

[779] SPLM/A Rejoinder, para. 700.

[780] SPLM/A Rejoinder, para. 689.

[781] SPLM/A Rejoinder, para. 703.

dence[782] and the SPLM/A points to a leading author's comment that "[a]t times, oral tradition may prompt significant revisions to the written record that have falsely misconstrued a past occurrence."[783]

388. More generally, the SPLM/A denies the GoS's contention that any of the statements contained in the testimony have been shown to be untrue in light of contemporaneous evidence.[784]

389. The SPLM/A thus maintains, on the basis of the witness statements, that the Ngok were responsible for clearing the road from Abyei Town to Tebeldiya, the border with the Misseriya.[785] Although these statements relate to events that occurred in the mid 20th century, the SPLM/A insists that "there is no reason to conclude that materially different circumstances existed at the beginning of the 20th century [ . . . ]."[786]

390. The SPLM/A agrees that evidence provided on the basis of oral tradition must be examined with care.[787] However, it insists that oral history, which is very specific in this case,[788] is the way in which the Ngok Dinka record their past, and must be respected as such.[789]

### *(e) Probative value of the SPLM/A "tribal maps" and community map*

#### (i) GoS arguments

391. The GoS also questions the probative value of the SPLM/A's "tribal maps," the sources of which are unidentified.[790] In particular, the area of each of the nine Ngok Dinka Chiefdoms shown on Maps 13–22 are in most cases "grossly distended in a northerly direction"[791] and utterly inconsistent with the tribal references gathered from all of the historical maps produced with the Parties' memorials.[792]

392. The GoS also submits that the Community Mapping Expert Report should be given no weight. Most importantly, the study area did not include

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[782] SPLM/A Rejoinder, para. 675.

[783] SPLM/A Rejoinder, para. 684 quoting Borrows, *Listening for Change: the Courts and Oral Tradition,* 39 Osgoode Hall Law Journal 1,19 (2001), SPLM/A-LE 41/10.

[784] SPLM/A Rejoinder, para. 705.

[785] SPLM/A Rejoinder, para. 517, footnote 645.

[786] SPLM/A Rejoinder, para. 722.

[787] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 67/16–17.

[788] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 64/12–15.

[789] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 67/02–25.

[790] *See* GoS Counter-Memorial, para. 374.

[791] *See* GoS Counter-Memorial, para. 377. *See also* GoS Oral Pleadings, April 21, 2009, Transcr. 119/04 *et seq.*

[792] *See* GoS Counter-Memorial, para. 377; Figure 20, p. 153; Figure 21, p. 154, and Figure 22, p. 155; GoS Maps 1–12 of GoS Counter-Memorial Map Atlas.

Abyei Town[793], and did not go up to 10 35'N. In addition, the Mapping Team was made up of interested parties[794] who hastily produced a map[795] on the basis of leading questionnaires,[796] without establishing how features located in 2009 correlated with their locations in 1905.[797]

### (ii) SPLM/A arguments

393. The SPLM/A maintains that the validity of its maps of the nine Ngok Dinka Chiefdoms remains unaffected by the GoS's purported criticism.[798] The GoS's overlaid labels in Maps 20, 21 and 22 of its Counter-Memorial Map Atlas are based on the inaccurate coordinates of the historical maps, founded on limited and dry season observations, and do not align the tribal labels with the river system.[799]

394. The SPLM/A contends that community mapping is a recognized method of determining the historical location of people and tribes who do not have written records and has been accepted by the Supreme Court of Canada and the Inter-American Court of Human Rights.[800] The SPLM/A emphasizes that, although the project was limited in scope due to time constraints and other obstacles, the Mapping Team "drew on the resources of some 200 Ngok Dinka to identify specific sites in the Study Area, [ . . . ] "tagging" each with a GPS coordinate."[801] One may criticize the method but it is a way "to harness modern technology with pre-modern knowledge of an area" in order to identify, in the absence of written records, where people live.[802]

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[793] GoS Oral Pleadings, April 22, 2009, Transcr. 95/08–09. (Dr. Poole's cross-examination).

[794] GoS Rejoinder, Appendix II, The Community Mapping Expert Report, paras 9–13.

[795] *Ibid.,* at paras. 14–16; *See* GoS Oral Pleadings, April 22, 2009, Transcr. 90/15–91/25 (Dr. Poole's cross-examination).

[796] GoS Rejoinder, Appendix II, The Community Mapping Expert Report, paras. 20–27.

[797] *Ibid.,* at paras. 28–29.

[798] *See* SPLM/A Rejoinder, para. 608, *et seq.*

[799] SPLM/A Rejoinder, para. 609.

[800] *See* SPLM/A Oral Pleadings, April 22, 2009, Transcr. 72/23–73/08. *See also* SPLM/A Oral Pleadings, April 22, 2009, Transcr. 72/04–07.

[801] SPLM/A Counter-Memorial, at para. 1378. *See also* SPLM/A Counter-Memorial, at para. 1379.

[802] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 73/03 *et seq.*

# Chapter IV. Analysis of the Tribunal

## A. The Tribunal's task pursuant to the Arbitration Agreement

### 1. The two stages of review under the Arbitration Agreement

395. At the outset, a few preliminary observations regarding the Tribunal's own mandate are in order. The tasks and competence of the Tribunal are based on the Parties' consent, as expressed in the Arbitration Agreement. The critical passage is Article 2, which, as will be recalled, defines the "Scope of Dispute" in the following manner:

> The issues that shall be determined by the Tribunal are the following:
>
> a. Whether or not the ABC [E]xperts had, on the basis of the agreement of the Parties as per the CPA, exceeded their mandate which is "to define (*i.e., delimit*) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905" as stated in the Abyei Protocol, and reiterated in the Abyei Appendix and the ABC Terms of Reference and Rules of Procedure.
>
> b. If the Tribunal determines, pursuant to Sub-article (*a*) herein, that the ABC [E]xperts 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 [E]xperts 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.

396. In addition, the preamble of the Arbitration Agreement explains, in its penultimate recital, that "the Parties differed over whether or not the ABC Experts exceeded their mandate as per the provisions of the CPA, the Abyei Protocol, the Abyei Appendix, and the ABC Terms of Reference and Rules of Procedure." It is this dispute that the Parties have "agreed to refer . . . to final and binding arbitration."[803] Given these provisions, the Tribunal's initial function is to determine whether, in light of its *lex specialis* (Article 3 of the Arbitration Agreement, which, among others, refers to the CPA, the Abyei Protocol and the Abyei Appendix), the ABC Experts' conduct and findings "exceeded their mandate."

397. In accordance with Article 2 of the Arbitration Agreement, the Tribunal is to proceed in two distinct and contingent stages, comprising two distinct juridical tasks. The first enterprise under Article 2(a) is for the Tribunal to determine whether the ABC Experts exceeded their mandate. The second task, which is to be undertaken under Article 2(c) only if it determines "that

[803] Arbitration Agreement, preamble, last paragraph.

the ABC Experts exceeded their mandate," requires the Tribunal to reach its own findings on the specific question that had been submitted to the ABC. The contingent nature of Article 2(c) is somewhat obscured by the consolidated nature of these proceedings,[804] such that the Parties have adduced evidence and presented arguments with respect to an Article 2(c) determination before the Tribunal had made its Article 2(a) determination. Nevertheless, the Tribunal is mindful of the need to maintain the separation between the distinct modes of inquiry called for with respect to Article 2(a) and Article 2(c). It will now turn, as it must, to an examination of the scope and limitations of its Article 2(a) mandate.

## 2. The Tribunal's task pursuant to Article 2(a) of the Arbitration Agreement is limited

### *(a) The sequence of Article 2 prohibits a* de novo *review of the ABC's findings under Article 2(a)*

398. The contingent sequence and distinct inquiries required by Article 2's partition of the Tribunal's jurisdiction provide an important indication of the levels of scrutiny that the Parties intended the Tribunal to undertake with respect to subparagraphs (a) and (c) of Article 2. A *de novo* review of all relevant evidence is sought by the Parties only under Article 2(c), that is, in the event that the Tribunal has found that the ABC Experts exceeded their mandate. Conversely, it appears that the Parties did not expect or authorize the Tribunal to make any definitive substantive determination – for the purpose of its analysis under Article 2(a) of the Arbitration Agreement – as to the ABC Experts' correctness of fact or law with respect to its delimitation of the Abyei Area in 1905.

399. Had the Parties, when drafting the Arbitration Agreement, inverted the sequence of Article 2, thereby charging the Tribunal with first determining the "correct" extension of the Abyei Area and necessarily confirming or correcting the ABC Experts' decision as appropriate, the Tribunal may well have arrived at a different determination from that of the ABC Experts' Report (not least because the Tribunal's composition and fields of expertise are so different from those of the ABC Experts as to virtually ensure a different result). Yet the Parties did not invert the sequence. As Article 2 of the Arbitration Agreement stands, the Tribunal must conclude that the Parties contemplated the possibility that the Tribunal (or some of its Members) might incline to the view that one or more of the ABC Experts' findings were erroneous as a matter of law or fact, without however concluding that the ABC Experts had for that reason exceeded their mandate.

[804] Typically, international courts and tribunals would "bifurcate" proceedings to isolate unrelated substantive points (such as liability and quantum). That option was precluded by the Arbitration Agreement.

400. The sequence of Article 2 of the Arbitration Agreement therefore indicates that the extent of permissible "excess of mandate" analysis pursuant to Article 2(a) is limited: regardless of whether the Tribunal, in 2009 and with the benefit of the Parties' submissions (including factual evidence and expert opinion not submitted to the ABC in 2005), would have reached similar conclusions, the Tribunal must limit itself to considering whether the ABC Experts' definition of the Abyei Area in their 2005 Experts' Report can be understood as a reasonable, or at least a not unreasonable, discharge of their mandate. By contrast, the question of the correct location of the boundaries of the Abyei Area as the Tribunal sees it is outside the scope of permissible Article 2(a) review and will only be addressed should the Tribunal conclude that the ABC committed an excess of mandate.

### *(b) Legal principles of institutional review suggest that the "correctness" of a decision is beyond review*

401. The foregoing conclusion, which is based principally on the wording and sequence of Article 2 of the Arbitration Agreement, is confirmed by general principles of international law. In their discussions of "excesses of mandate," both Parties drew upon these general principles in analogizing and comparing the Tribunal's function with that of a court or tribunal reviewing a prior decision of a different and independent institution for *excès de pouvoir* (or excess of jurisdiction). Given the paucity of authority on what "excess of mandate" concretely represents in law, the Tribunal agrees that principles of review applicable in public international law and national legal systems, insofar as the latter's practices are commonly shared, may be relevant as "general principles of law and practices" to its Article 2(a) inquiry.[805]

402. National courts' process of judicial review in relation to administrative bodies (specifically, regulatory bodies imbued with quasi-judicial and rule-making powers) commonly involves an assessment of whether the original decision-maker exceeded its powers. In situations involving review of the findings of expert groups and specialized bodies, many jurisdictions permit courts to defer to the expertise of those groups and bodies. In the United States of America, for example, the review of agency decision-making and rule-making is marked by a high degree of deference:[806] the judiciary defers

[805] Arbitration Agreement, Article 3(1).

[806] *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council,* 467 U.S. 837 (1984), 843–44 (if Congress has expressly given the agency authority to elucidate a statutory provision through regulations, then such legislative regulations are given controlling weight "unless . . . arbitrary, capricious, or manifestly contrary to the statute." If Congress' statute is silent or ambiguous with respect to the issue in question, then the court must simply ask whether the agency's interpretation is based on a "permissible construction of the statute.")

to the agency's presumed expertise, instead of conducting a *de novo* review.[807] Such judicial restraint is also practiced in the United Kingdom, provided that an issue is within the particular expertise of the prior decision-maker.[808] Certain continental European legal systems, including Germany, accord a more limited degree of deference to the original decision-maker, extending only to the decision-maker's appreciation of the facts and its choice among various permissible decision options.[809] However, this more limited deference presumably results from the fact that in these jurisdictions, the review is conducted by specialized administrative courts which themselves have both substantive expertise and superior knowledge of the legal rules applicable to pertinent areas of activity. The Tribunal notes this national practice only to indicate the extent to which patterns of deference to the decisions of expert bodies are widespread and general.

403. In public international law, it is an established principle of arbitral and, more generally, institutional review that the original decision-maker's findings will be subject to limited review only. The relevant case law draws a clear distinction between an appeal on the merits – to determine whether the original decision was legally and factually "right or wrong" – and a review of whether the decision-maker that rendered a decision exceeded its powers. A reviewing body that is seized of the issue of putative excess of powers will not "pronounce on whether the [original] decision was right or wrong," as this question is legally irrelevant within an excess of powers inquiry.[810]

404. Legal authorities on arbitral review do not directly apply to the present proceedings, because (as will be discussed further *infra)* the ABC was not an adjudicatory body *strictu sensu,* such that it would be inapposite to transpose, without appropriate qualification, the legal principles governing excesses of jurisdiction of powers to the ABC. That said, the established case law regarding *excès de pouvoir* of arbitral tribunals, which was relied on by both Parties in their submissions, may *mutatis mutandis* inform the interpretation of "excess of mandate" pursuant to the Arbitration Agreement.

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[807] *Skidmore* v. *Swift* & *Co.,* 323 U.S. 134, 139 (1944), noting that agencies formulate policy "based upon more specialized experience and broader investigation and information than is likely to come to a judge."

[808] *R* v. *Social Fund Inspector, ex p Ali* (1994) 6 Admin LR 205, 210E (Brooke, J). The English courts have been reluctant to interfere when Parliament has entrusted an expert body, whether the expert body be tribunals or civil servants, or a combination of civil servants and independent inspectors, with the task of fulfilling the intentions of Parliament in a specialist sphere.

[809] *See Judgment of the Federal Supreme Court in Administrative Matters of May 28, 1965,* BVerwGE 21, 184.

[810] *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906,* Judgment, *I.C.J. Reports 1960*, p. 192, 214. Cited with approval in *Case concerning the Arbitral Award of July 31, 1989* (*Guinea-Bissau* v. *Senegal), I.C.J. Reports 1991*, p. 62, para. 25.

405. There is no dearth of international case law confirming that the remedy of annulment of arbitral awards is granted only under exceptional circumstances. Reviewing bodies have noted that only "weighty" or "exceptional circumstances" will justify a finding of invalidity and that the party seeking to impugn an arbitral award bears a "very great" burden of proof.[811] In addition, reviewing bodies have limited their review to *"clear"* cases[812] and have noted that the reviewing body must "not intrude into the legal and factual decision-making of the [original decision-making body]."[813] This body of case law suggests that the scope of review in international proceedings leading to the annulment of a prior decision is generally very limited.

406. It is clear that a reviewing body's task cannot take the form of an appeal with respect to the *correctness* of the findings of the original decision-maker when the reviewing body's methodology differs from that of the original decision-maker. Otherwise, the reviewing body would be prone to strike down the findings of the original decision-maker. The fact that the original decision-making body (the ABC Experts) and the reviewing body (this Tribunal) are each programmed to assess the facts using quite different methodologies (*i.e.*, the methodology of science vis-à-vis the methodology of law) distinguishes these proceedings from proceedings in which the annulment of arbitral awards is sought – the classic field of application of the doctrine of *excès de pouvoir.* This unusual feature further underscores the inappropriateness of applying a standard of correctness in these proceedings.

407. The Tribunal's task under the Arbitration Agreement is essentially a legal one. This is made clear in the "applicable law" clause of Article 3 of the Arbitration Agreement (*see* discussion *infra),* which requires the Tribunal to apply a variety of legal instruments as well as "general principles of law." The Tribunal's proceedings were to be conducted within the framework of the Permanent Court of Arbitration (PCA), using a set of Rules prepared for "Arbitrating Disputes Between Two Parties of Which Only One Is a State." While the Arbitration Agreement does not specify, in terms, that the arbitrators were to be international lawyers, it was agreed that only persons on the PCA's list of arbitrators or persons who had served as arbitrators in PCA proceedings would be eligible for nomination to the Tribunal. Moreover, in the appointment of the Presiding Arbitrator, Article 5(8) of the Arbitration Agreement provides that "he/she shall be a renowned lawyer of high professional qualifications, personal integrity and moral reputation." Consistent with these provisions, the Parties selected jurists and scholars of international law as arbitrators. The

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[811] *See* the compilation of case law in the SPLM/A Counter-Memorial, paras. 613–621.

[812] *See Vivendi* v. *Argentina,* Decision on Annulment, July 3, 2002, Case No. ARB/97/3, paras. 64–65.

[813] *CDC Group plc* v. *Republic of the Seychelles, Decision on the Application by the Republic of the Seychelles for Annulment of the Award dated December 17, 2003,* June 29, 2005, Case No. ARB/02/14, para. 70.

clear implication was that a Tribunal composed of international lawyers will adjudge, using legal standards, whether the ABC Experts exceeded their mandate and, if this is found to be the case, delimit "on map" the Abyei Area by applying the Parties' *lex specialis*.

408. Now plainly, this methodology is not, and was not meant to be, the same as that of the ABC Experts. Section 2.2 of the Abyei Appendix provided for the nomination of "five impartial experts knowledgeable in history, geography and any other relevant experience." No mention was made of lawyers or international lawyers. Section 4 of the Abyei Appendix provided, in relevant part, that "[i]n determining their findings, the Experts in the Commission shall 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*" (emphasis added). The Experts' decision was intended to be guided by scientific, rather than legal, principles. As such, like this Tribunal, the ABC Experts were subjected to methodological constraints – only different ones. The ABC Experts were intended to apply the methodologies of their respective fields of expertise – particularly history and geography.

409. The difference in methodology between the ABC Experts and the Tribunal confirms that, in addressing the question in Article 2(a) of the Arbitration Agreement, this Tribunal cannot have been expected or authorized to determine whether the ABC Experts' findings were "correct." Had the Parties intended to have the correctness of the ABC Experts' findings reviewed, they would have presumably selected a panel of scientists with relevant methodological expertise to review the ABC Experts' Report in the light of scientific principles. If this Tribunal were to determine the "correct" answer in addressing the question in Article 2(a) by application of the applicable law in Article 3 of the Arbitration Agreement, it would almost certainly reach a different conclusion from that of the ABC Experts, for it would be "retro-applying" a method different from that applied by the ABC. That would render the exercise under Article 2(a) the same as Article 2(c) and would fail to give meaning to an arrangement that the Parties had deliberately established.

### *(c) Conclusion*

410. In all instances of institutional review, a delicate balance must be struck between the desire of one Party to decide all matters anew and the interest of the other Party in the finality of litigation. In the present case, the Tribunal has not been authorized to determine where that balance lies. The Parties themselves calibrated the scales for this question through Article 2 of the Arbitration Agreement. The two-stage sequence of Article 2 and the use of the terms "whether the ABC Experts exceeded their mandate" (rather than "whether the ABC Experts' decision was correct") are unequivocal. Thus, the Tribunal's task cannot credibly be interpreted as having required, from the outset, an analysis of the substantive correctness of the ABC Experts' conclusions.

411. Tellingly, *neither Party* has asked the Tribunal to assume a review function akin to a "court of appeals," a clear demonstration of their continued wish to circumscribe this Tribunal's jurisdiction. If the Tribunal were to engage at the outset in an omnibus re-opening of the ABC Experts' appreciation of evidence and their substantive conclusions, then the Tribunal would itself be committing an *excès de pouvoir.* As a creature of the Parties' consent, the Tribunal cannot and must not allow itself to stray down this path. Indeed, the Parties' agreement that this Award be final and binding is explicitly presaged on the Tribunal's "determining the issues of the dispute as stated in Article 2 of this Agreement."[814] In fealty to the Parties' limited allocation of authority, the Tribunal must adhere to the strict limits and sequence of Article 2.

## 3. The scope of the Tribunal's authority under Article 2 to declare an excess of mandate respecting certain parts of the ABC Experts' Report, while retaining the ABC Experts' core conclusions

412. One further clarification of the scope and limits of the Tribunal's mandate under Article 2 of the Arbitration Agreement is in order. Because the ABC Experts' Report is a substantial document in itself, being composed of over 250 pages (including a number of substantive annexes) with a number of distinct substantive conclusions, the Tribunal must consider whether Article 2 requires it, if it were to find a discrete excess of mandate in the ABC Experts' Report, to set aside the entire Report, including those findings and conclusions that were within the ABC Experts' mandate, or, in such a case, whether the Arbitration Agreement empowers it to annul only the excessive portions of the ABC Experts' Report without annulling those discrete parts of the Report which did not exceed the mandate. (For convenience, the Tribunal will refer to this latter possibility as "partial nullity" or "severability").

### *(a) The Arbitration Agreement, properly interpreted, permits partial nullity under appropriate circumstances*

413. In its Memorial, the GoS states that "if the ABC Experts exceeded their mandate *in any respect,"* the Report must be "set aside entirely and the task of determining the boundaries . . . becomes one for the Tribunal."[815] In contrast, the SPLM/A would have the Tribunal annul those parts of the award which are in excess of mandate but "to leave the remainder of the [ABC Experts'] Report intact."[816] It submits that the nullified parts could be "dis-

[814] Under Article 9(2) of the Arbitration Agreement, "[t]he Parties agree that the arbitration award delimiting the "Abyei Area" through determining the issues of the dispute as stated in Article 2 of this Agreement shall be final and binding."

[815] GoS Memorial, para. 95 (emphasis in original).

[816] SPLM/A Counter-Memorial, para. 661.

regarded as void *ab initio* and the remainder of the [ABC Experts' Report] treated as valid and within the ABC Experts' mandate."[817]

414. These arguments rest on two divergent approaches to the interpretation of the Arbitration Agreement. One view of Article 2 would find dispositive the phrase "whether or not" in Article 2(a) and would highlight the wording of Articles 2(b) and 2(c) to conclude that the Tribunal can only provide a binary answer to its Article 2(a) inquiry (*i.e.*, if "no" to whether there was an excess of mandate, then Article 2(b); if "yes," then Article 2(c)). In contrast, a teleological view of the Arbitration Agreement would affirm the Tribunal's authority to determine, on an issue by issue basis, whether the ABC Experts have exceeded their mandate under Article 2(a), and then to apply Articles 2(b) and 2(c) to each instance accordingly. This teleological interpretation would lead to the severance of those parts of the decision which were in excess of the mandate while retaining those parts found to be within the ABC Experts' mandate.

415. The Tribunal believes that the teleological interpretation allows for the proper fulfillment of its task in that it allows for partial severance of discrete findings found to be in excess of mandate, insofar as the most significant findings of the ABC Experts are found to be within the mandate. Unlike a finding of fraudulent conduct which would taint an entire decision, it would be contrary to the object and purpose of the Arbitration Agreement itself (read as a whole) if a discrete excess of mandate on a particular issue were to result in setting aside all those parts of the ABC Experts' decision which were within their mandate. This would involve the Tribunal's reconsideration of all of the evidence pertaining to the borders of the Abyei Area and the displacement of the Experts' prescribed methodology, which had been reasonably and plausibly applied with the different methodology and, most likely, different conclusions of the Tribunal. The sequence of Article 2 makes clear that the ABC Experts – not the Tribunal – were the preferred "arbiters of fact" as to the 1905 boundaries of the Abyei Area. The Tribunal is only secondarily entrusted with this task, if the original decision cannot stand due to an excess of mandate. Moreover, the Tribunal's skills relate more to the legal task involved in the discharge of Article 2(a) than to the task of Article 2(c), for which the skills of the Experts were specifically selected. It would be difficult to reconcile this preference for the ABC Experts' decision, built into the structure of the Arbitration Agreement, with an obligation to annul even those sections of the ABC Experts' Report that were discrete and were plausibly within their mandate.

### *(b) Relevant general principles of law and practices permit partial nullity under appropriate circumstances*

416. The "general principles of law and practices" that the Tribunal must apply to these proceedings pursuant to Article 3 of the Arbitration Agreement

[817] *Ibid.*

also require the annulment of only those parts of the ABC Experts' Report that are in excess of mandate without setting aside those discrete parts of the Report which were within the mandate. Partial annulment of a decision or award has long been recognized by international jurisprudence as within the authority of a court or arbitral tribunal seized with a review function. In *The Orinoco Steamship Company Case,* a PCA-administered arbitration, the arbitral tribunal was asked, in a *compromis* framed in similar terms to that in the present dispute, to determine "whether the decision of Umpire Barge . . . is not void. and whether it must be considered so conclusive as to preclude a re-examination of the case on its merits. If the [a]rbitral [t]ribunal decides that said decision must be considered final, the case will be considered. . . as closed; but on the other hand, if the [a]rbitral [t]ribunal decides that said decision . . . should not be considered as final, said [t]ribunal shall then hear, examine and determine the case and render its decision on the merits."[818] The tribunal considered that:

> following the principles of equity in accordance with law, when an arbitral award embraces several independent claims, and consequently several decisions, the nullity of one is without influence on any of the others, more especially when, as in the present case, the integrity and the good faith of the Arbitrator are not questioned; this being ground for pronouncing separately on each of the points at issue.[819]

417. The principle of severability was judicially considered in the *Case Concerning the Arbitral Award of 31 July 1989* before the International Court of Justice ("ICJ"). The minority judges considered that the arbitral tribunal's failure to demarcate the exclusive economic and fishery zones was an *excès de pouvoir infra petita.* Judge Weeramantry (dissenting) emphasized that "a duty lies upon the court making the declaration of nullity to keep to a minimum the scope of that nullity."[820] He recognized the existence of "cases, including boundary disputes, where different segments of the total matter in dispute can be decided as separate and discrete problems, the answers to which can stand independently of each other. In such cases the segments of the dispute that have been properly determined can maintain their integrity though the findings on other segments are assailed or do not exist."[821] Severability was inappropriate on the facts of that case, as the issues were so intrinsically connected that it was clear the Parties had intended that the circumstances be determined in a "composite process."[822] However, the principle enunciated was unchallenged.

418. Similarly, in *Compañia de Aguas del Aconquija S.A. and Vivendi Universal* v. *Argentine Republic,* an ad hoc annulment committee, in interpret-

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[818] *The Orinoco Steamship Company Case* (*United States/Venezuela*), October 25, 1910, XI RIAA 227, 234.

[819] *Ibid.,* at 238.

[820] *Arbitral Award of July 31, 1989, I.C.J. Reports 1991*, p. 53, 167.

[821] *Ibid.,* at 168.

[822] *Ibid.,* at 169.

ing Article 52 of the ICSID Convention,[823] found that the extent to which an award can be annulled is a matter to be determined by the deciding body itself. The committee wrote:

> *Thus where a ground for annulment is established, it is for the* ad hoc *committee, and not the requesting party, to determine the extent of the annulment. In making this determination, the committee is not bound by the applicant's characterization of the request, whether in the original application or otherwise, as requiring either complete or partial annulment of the award.* This is reflected in the difference in language between Articles 52(1) and 52(3), and it is further supported by the *travaux* of the ICSID Convention. Indeed, Claimants in the present case eventually accepted this view.[824] (emphasis added)

419. The Vienna Convention on the Law of Treaties (the "Vienna Convention"), which provides for the severability of treaty provisions that comply with certain criteria, is indicative of a general international policy favoring the severance of offending portions of legal instruments from their non-offending portions. These criteria are:

> If the ground solely relates to particular causes, it may be invoked with respect to those clauses where:
>
> (a) the said clauses are separable from the remainder of the treaty with regard to their application;
>
> (b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and
>
> (c) continued performance of the treaty would not be unjust.[825]

420. The same economic approach is found in investment and commercial arbitrations. The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides that recognition of an award may be refused where:

> The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, *provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.*[826] (emphasis added)

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[823] *See* Article 52 of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

[824] *Compañia de Aguas del Aconquija S.A. and Vivendi Universal* v. *Argentine Republic,* ICSID Case No. ARB/97/3 (2002), paras. 68–69.

[825] Vienna Convention on the Law of Treaties, Article 44(3).

[826] 1958 New York Convention, Article V(1)(c).

The 1961 European Convention on International Commercial Arbitration,[827] the 1975 Inter-American Convention on International Commercial Arbitration,[828] the 1985 UNCITRAL Model Law on International Commercial Arbitration,[829] the 1966 European Convention providing a Uniform Law of Arbitration,[830] and the 1987 Convention *Arabe d'Amman sur l'Arbitrage Commercial,*[831] to which Sudan is a party, contain provisions to similar effect.

421. The rationale for such an approach is clear. As summarized succinctly in the *travaux préparatoires* of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "1958 New York Convention"), there is a possibility that "the extraneous matter introduced by the arbitrator into the award might be of a very incidental nature. If the enforcing court was not authorized to sever that matter from the remainder of the award and was obliged to refuse enforcement altogether merely because a small detail fell outside the scope of the Arbitration Agreement, the applicant might suffer unjustified hardship."[832] Thus, there is a presumption that bodies of review are both authorized and expected to sever "deficient" parts from "non-deficient" parts of a decision, provided that this exercise does not lead to the separation of "fundamentally interrelated elements."[833]

422. The terms of the Arbitration Agreement (and, in particular, the stringent timeframe to which the Parties have subjected these proceedings) also coincide with the general principle of *economy* applied in appellate adjudicatory proceedings, in which a reviewing authority declines to disrupt the *reasonable* factual and legal findings of the initial decision-maker in order to promote efficiency in the conduct of adjudicatory proceedings.[834] Delimiting

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[827] *See* Article IX(1)(c).

[828] *See* Article 5(1)(c).

[829] Revision 2006. *See* Model Law, Article 34(2)(iii).

[830] *See* Uniform Law, Article 26; Explanatory Note to Article 26.

[831] *See* Article 34(4).

[832] UN ECOSOC, Conference on International Commercial Arbitration, Summary Record of the Seventeenth Meeting, E/CONF.26/SR.17 (June 3, 1958), p. 9.

[833] UN ECOSOC, Report of the Committee on the Enforcement of International Arbitral Awards, E/2704, E/AC.42/4/Rev.1 (28 March 1955), p. 10.

[834] For a recent application of the principle of economy, *see Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia* v. *Serbia),* Preliminary Objections, I.C.J. Judgment, 18 November 2008, para. 89, where the I.C.J. held that "judicial economy" was "an element of the requirements of the sound administration of justice" and provided a justification for disregarding jurisdictional defects, if they could be easily cured by the subsequent action of the applicant or respondent. *See also* the use of the principle of economy to determine the order in which a court or tribunal considers the various issues before it: *Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo* v. *Belgium) I.C.J. Reports 2002*, p. 3. paras 45–46; and Dissenting Opinion of Judge Morelli, *Case Concerning the Barcelona Traction, Light and Power Company Ltd* (*Belgium* v. *Spain),* Preliminary Objections, *I.C.J. Reports 1964*, p. 6, at p. 97, *cited with approval in* Iran-US Claims Tribunal Case No.

an entirely new boundary is a complex task that cannot be vested upon the Tribunal lightly, especially in these proceedings, where the Parties have agreed that the Tribunal's first and potentially only mode of inquiry is Article 2(a)'s "excess of mandate" review. Accordingly, if and to the extent that the ABC did not exceed its mandate in substantial parts of its decision, it would not be proper for the Tribunal to reconsider the entire boundary of the Abyei Area *ab initio* because of a possible excess of mandate in a discrete part of the ABC Experts' Report.

423. Now it is entirely possible for parties to contract out of the applicability of the general principle of law allowing for severability and partial nullity. But given international law's general approach to this matter, such a limitation on the Tribunal's powers would have to be evidenced by a clear and unequivocal expression of intention of the Parties. That is certainly not the case here. Quite to the contrary. The Arbitration Agreement itself, and in particular, the framework of inquiry provided under Article 2, indicate that the Parties intended to allow for the possibility of a finding of partial excess of mandate.

424. For all these reasons, the Tribunal will comply with its duty under general principles of law to keep to a minimum the scope of nullity, subjecting only those parts of the ABC Experts' findings which are discrete and severable to an independent and separate analysis. In accordance with Judge Weeramantry's opinion (quoted above) that "boundary disputes, where different segments of the total matter in dispute can be decided as separate and distinct problems, the answers to which can stand independently of each other," if an excess of mandate is found to have occurred with respect to a particular finding or conclusion of the ABC Experts, "the segments of the dispute that have been properly determined can maintain their integrity though the findings on other segments are assailed or do not exist." If the Tribunal should find that certain discrete and severable findings or conclusions of the ABC Experts are rendered in excess of mandate but which are not fundamentally related to other findings or conclusions, it will set aside only those conclusions, while confirming those parts of the ABC Experts' Report which prove to have been within their mandate.

## 4. The applicable law governing these proceedings

425. Article 3 of the Arbitration Agreement prescribes the law and instruments that must be applied by the Tribunal in the exercise of its mandate:

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823, Award No. 595–823–3 of 16 Nov. 1999, para. 37. *See also* the use of the principle of judicial economy in the jurisprudence of the WTO Appellate Body, where it stands for the proposition that the Appellate Body does not need to rule on every single claim made by complaining parties, but only on those required to settle the dispute in question: Appellate Body Report, *United States–Subsidies on Upland Cotton,* WT/DS267/AB/R, 3 March 2005, para. 510.

1. The Tribunal shall apply and resolve the disputes before it in accordance with the provisions of the CPA, particularly the Abyei Protocol and the Abyei Appendix, the Interim National Constitution of the Republic of Sudan, 2005, and general principles of law and practices as the Tribunal may determine to be relevant.

2. This Agreement, which consolidates the Abyei Road Map signed on June 8th 2008 and the Memorandum of Understanding signed on June 21st 2008 by the Parties with the view of referring their dispute to arbitration, shall also be applied by the Tribunal as binding on the Parties.

426. In contrast with the ABC Experts (who were required to arrive at their decision "based on scientific analysis and research"), Article 3 makes clear that the Tribunal shall decide, by applying legal methods, whether the ABC Experts exceeded their mandate under Article 2(a) of the Arbitration Agreement and, if and to the extent that it finds that there were such excesses, the delimitation of the boundary of the Abyei Area under Article 2(c).

427. In addition to the provisions of the CPA (particularly the Abyei Protocol and the Abyei Appendix) and the Interim National Constitution, the Tribunal must also apply "general principles of law and practices" which it determines to be relevant. Neither the CPA nor the Arbitration Agreement is a treaty. They are, rather, agreements between the government of a sovereign state, on the one hand, and, on the other, a political party/movement, albeit one which those agreements recognize may – or may not – govern over a sovereign state in the near future. But, in addition to the reference to "general principles of law and practice," there are a number of other indications that the Parties intended that international law play a crucial role in the resolution of this dispute.

428. First, the essential purpose of the ABC Experts' delimitation exercise (and of the Tribunal's should it have to proceed to an Article 2(c) inquiry) was to determine a boundary that could potentially become an international boundary. If, during the 2011 referendum prescribed by the CPA, the residents of the Abyei Area were to choose to join Southern Sudan, and further, if the people of Southern Sudan were to elect to exercise their right to self-determination so as to become independent, the boundaries of the Abyei Area would form part of the northern boundary of a new, independent, separate, and sovereign State. Thus the Parties appreciated that the determination of the boundaries of the Abyei Area was, *in posse,* an international legal exercise.

429. Second, the Parties' chosen method and forum for settling the dispute also manifests their intention to have international law apply. The Parties opted for arbitration administered under the auspices of the PCA, an international dispute resolution organization, and in accordance with the PCA Rules.[835] Moreover, the Parties insisted that the four party-appointed arbitra-

[835] Article 1 of the Arbitration Agreement provides:

Rules, Tribunal, Registry and Appointing Authority

tors be "current or former members of the PCA or members of tribunals for which the PCA acted as registry."[836] Each of the Parties was entitled to designate two arbitrators and each designated well-known international lawyers and scholars.

430. Third, and particularly important, there is a widely shared understanding that reference to "general principles of law" within the context of boundary disputes includes general principles of international law. This is especially true in the case of intra-State disputes, where municipal law does not typically make provision for such matters. The tribunal in the *Dubai-Sharjah Arbitration,* for example, held that "in a question concerning the boundaries between members of a Federal State, the applicable law must be Federal law, and, if such does not exist or is incomplete, then recourse must be made to international law."[837] It elaborated:

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1. The *Parties* agree to refer their dispute to final and binding arbitration under this Arbitration Agreement (Agreement) and the Permanent Court of Arbitration (PCA) Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State (PCA Rules), subject to such modifications as the Parties agreed herein or may agree in writing.

2. The *Parties* shall form an arbitration tribunal (*Tribunal*) to arbitrate their dispute in accordance with this Agreement and the PCA Rules; provided that the PCA Rules shall not apply when excluded or modified by this Agreement.

3. The *Parties* agree on the International Bureau of the (PCA) to act as the registry and provide administrative support in accordance with this Agreement and the PCA Rules.

4. The *Parties* designate the Secretary General of the PCA as the appointing authority to act in accordance with this Agreement and the PCA Rules. (emphasis in original)

[836] Article 5 paragraphs (1) to (5) of the Arbitration Agreement provide:

1. The *Parties* agree that the *Tribunal* shall be composed of five arbitrators. Each *Party* shall appoint two arbitrators, and the four Party-appointed arbitrators shall appoint the fifth.

2. The *Parties* shall not designate as Party-appointed arbitrators persons other than current or former members of the PCA or members of tribunals for which the PCA acted as registry who shall be independent, impartial, highly qualified and experienced in similar disputes.

3. The Secretary General of the PCA shall provide the two *Parties,* within five days of depositing this Agreement with him, with a full list of members and arbitrators (PCA Arbitrators List) as stated in section 2 herein. The PCA Arbitrators List shall also include information on qualifications and experience.

4. Each *Party* shall appoint, within thirty days of receiving the PCA arbitrators list, two arbitrators from the list by written notice to the Secretary General of the PCA.

5. In the event that a *Party* fails to name one or both Party appointed arbitrators within the specified time, the Secretary General of the PCA shall make, within ten days, such appointment from the PCA arbitrators list (emphasis in original).

[837] *Dubai-Sharjah Border Arbitration,* October 19, 1981, 91 ILR 543, 586.

> . . . it is scarcely surprising that the constitution of the United Arab Emirates contains no provisions that relate to the law applicable to territorial disputes between the member Emirates; this would be true of the constitutional documents of the majority of Federations. Such territorial disputes are almost always resolved by reference to international law, even though certain tribunals have made such reference by analogy and not directly.[838]

431. Notably, the *Dubai-Sharjah* tribunal relied upon Swiss Federal Court jurisprudence, which confirmed its practice of analogous application of international law in the relations between the Swiss Cantons in the 1980 *Nufenenpass* judgment:

> Finally, [the Court] designates the principles of public international law as applicable in a subsidiary manner. According to the unanimous view in Swiss doctrine and jurisprudence, public international law comes into play in the relationships among Cantons when both federal law and inter-Cantonal contract and customary law are exhausted on a particular disputed issue. In this respect, however, one will appropriately speak of a merely analogous application of international law, not an original one.[839]

432. Fourth, not only did neither Party object to the use of international law but, in fact, both advocated its use and cited to it extensively in their written and oral pleadings.

433. Finally, the Parties selected arbitrators with expertise and experience in public international law. The Parties have similarly appointed counsel expert in international law and dispute resolution.

434. But international law is only one part of the applicable law. The Tribunal is mindful of the entire *lex specialis* prescribed by the Parties and the interrelations between its component parts. Article 3(1) prescribes a functional hierarchy among the applicable sources of law that reflects the specific concerns of the Parties: the CPA (particularly those components of the CPA that directly bear upon Abyei within the North-South peace process) takes precedence in application, followed by the Interim National Constitution, followed by "general principles of law and practices." It should also be emphasized that Article 3(2) explicitly calls for the Tribunal to apply the Arbitration

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[838] *Ibid.,* at 586–87.

[839] *Kanton Wallis* v. *Kanton Tessin,* Judgment of July 2, 1980, BGE 106 Ib 154 at 159–160, MN 29 (references omitted from English translation): "Schliesslich bezeichnet es die Grundsätze des Völkerrechts als subsidiär anwendbar (BGE 26 I 450; ferner 54 I 202 E. 3; vgl. auch 96 I 648 E. 4 c; Birchmeier, a.a.O. S. 288). Nach unbestrittener Auffassung in der schweizerischen Lehre und Rechtsprechung kommt das Völkerrecht im interkantonalen Verhältnis somit zum Zug, wenn in der betreffenden Streitfrage sowohl das Bundesrecht als auch das interkantonale Vertrags-und Gewohnheitsrecht ausgeschöpft sind (Alexander Weber, *Die interkantonale Vereinbarung, eine Alternative zur Bundesgesetzgebung?*, Bern 1976, S. 54 f.; Aubert, Band II, S. 588 N. 1637). Dabei kann allerdings nicht von einer originären, sondern nur von einer analogen Anwendung des Völkerrechts die Rede sein (vgl. Verdross/Simma, *Universelles Völkerrecht*, Berlin 1976, S. 474 mit Verweisen).

Agreement, and Article 2 of the Arbitration Agreement plays a central role in clarifying the scope and limits of the Tribunal's juridical inquiry.

435. The Tribunal is sensitive to the extent to which principles and practices of international law, insofar as they prove applicable, must be adapted to the specific context of this dispute. As the following sections will demonstrate, the special character of the ABC Experts and the specific object and purpose of the ABC's constitutive instruments within the broader Sudan peace process, and a particular source's place in the hierarchy of applicable law sources, will affect the role which legal principles and precedent from other areas of law are to play. Although it is permissible to apply relevant international law where appropriate, the Tribunal will be particularly attentive to the wording, context, object and purpose of the Abyei Protocol, the Abyei Appendix, the Interim National Constitution and the Arbitration Agreement.

## B. Initial matters: alleged procedural violations; waiver, estoppel, *res judicata* issues

### 1. Alleged procedural violations by the ABC experts

436. Before proceeding to the key aspects of the Tribunal's analysis, a number of issues raised by the Parties may be dealt with in short order. The first of these relates to the alleged procedural violations which one of the Parties claims the ABC Experts committed.

437. The GoS argues that certain acts and omissions of the ABC Experts violated the procedures specified by the Parties in the Abyei Appendix, Terms of Reference, and Rules of Procedure, to wit: (1) they allegedly took evidence from Ngok Dinka informants without procedural safeguards and without informing the GoS; (2) they allegedly unilaterally sought and relied on an e-mail from an official of the United States Government to establish their interpretation of the mandate; and (3) they allegedly failed to act through the ABC (*i.e.,* the Commission as a whole) in reaching their decision and failed to seek a consensus before rendering their Report (collectively, the "alleged acts and omissions").[840] Emphasizing that the Parties specifically defined the issues to be addressed by the Tribunal with reference to the Abyei Appendix, Terms of Reference, and Rules of Procedure,[841] the GoS asserts that the Tribunal should interpret a violation of procedures specified in these instruments as an excess of mandate.

438. The SPLM/A rejects this view, contending that a dispute regarding an excess of mandate does not extend to procedural complaints and that, alter-

[840] *See* discussion on "Procedural Excess of Mandate" in the summary of the Parties' arguments, *supra* paras. 141 to 163.

[841] *See* Article 2(a) of the Arbitration Agreement at para. 395 *supra*.

natively, a party seeking to invalidate an arbitral award on procedural grounds must demonstrate serious prejudice.

439. Having considered the Parties' arguments, the Tribunal finds, as explained below, that the alleged acts and omissions do not individually or collectively fall within the scope of "excess of mandate" review under Article 2(a) of the Arbitration Agreement, which does not permit the review of alleged procedural violations.

440. Article 2(a) restates the ABC Experts' mandate in clear terms: "to define (*i.e.*, delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905." To aid in the "Functioning"[842] of their mandate, the ABC Experts were guided by procedural rules expressed in the Abyei Appendix, Terms of Reference, and Rules of Procedure. These rules are not intrinsic components of the mandate itself; rather, they provided for a flexible[843] process to aid in the implementation of the ABC's mandate. By its plain terms, Article 2(a)'s inquiry as to whether the ABC Experts had "exceeded their mandate, *which is* to define (*i.e.*, and delimit) and demarcate" the Abyei Area, concentrates the Tribunal's scope of review to decisions made by the ABC Experts *ultra petita, i.e.*, purporting to decide matters outside the scope of the dispute submitted by the Parties. That is evident from the Parties' use of the words *"exceeded* their mandate," which referred to situations where the ABC Experts might have gone beyond the scope of the *substantive* issues submitted to them.

441. Thus, Article 2(a) does not recognize putative violations of procedural rights within the concept of "excess of mandate." Nor does Article 2(a) refer more generally to concepts of nullity or invalidity of arbitral awards, or incorporate the well-known grounds for invalidity or nullity based on procedural or due process violations included in instruments such as the 1958 New York Convention, the ICSID Convention, or the International Law Commission's ("ILC") Draft Convention on Arbitral Procedure/ILC Model Rules on Arbitral Procedure 1958. Any of these approaches could have been adopted,

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[842] Notably, a clear distinction between "Mandate" and "Functioning" exists within the text of the Terms of Reference (an instrument drawn up and agreed upon by both Parties). The ABC's "Mandate" as provided in the Terms of Reference is:

> 1.1 The Abyei area is defined in the Abyei Protocol in article 1.1.2 as "The area of the Nine Ngok Dinka chiefdoms transferred to Kordofan in 1905." The ABC shall confirm this definition.
>
> 1.2 The ABC shall demarcate the area, specified above and on land.

A subsequent section in the Terms of Reference, captioned "Functioning of the ABC," defines the principal procedures to be followed by the ABC Experts. *See* Section 3 of the Terms of Reference, with the caption "Functioning of the ABC." Among others, the listed procedures pertain to public hearings, consulting third-party sources, and the preparation of the final report.

[843] *See* Terms of Reference, Sections 3.3 and 3.4; Rules of Procedure, Sections 2, 4, 7, 8, 10, and 11. *See further infra* at paras. 468.

but none of these were. There is no basis for expanding this single ground for invalidity to include other grounds that were not specified.

442. As the alleged acts and omissions fall outside the category of permissible review under Article 2(a) of the Arbitration Agreement, the Tribunal need not proceed further on this line of inquiry.

443. The Tribunal further emphasizes that for a majority of its members, even assuming *arguendo* that the alleged acts and omissions occurred and were departures from rigidly-enforceable procedural rules, such improprieties did not amount to an excess of mandate, not having individually or collectively resulted in a violation of the fundamental rights of either Party. A procedural irregularity alone cannot invalidate a decision; a *significant injustice* must have also have occurred as a result of the irregularity.[844] For the majority, this "prejudice" requirement has not been met, as the GoS has not demonstrated that any of the alleged procedural violations would have affected the decision outcome. Thus, the GoS's submissions on this point cannot be sustained, not having met the "significant injustice" standard.

## 2. Waiver, estoppel, and *res judicata* arguments

444. The Tribunal also considers it convenient to discuss, at this early stage, two specific objections which the SPLM/A raised in connection with the Tribunal's ability to review the ABC Experts' Report.

### *(a) Waiver/estoppel*

445. The SPLM/A argues that the GoS effectively waived its objections to the ABC Experts' Report because it agreed, as provided in the ABC's constitutive instruments, that the Report would be "final and binding."[845] The GoS

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[844] *See* SPLM/A Counter Memorial, p. 76, para. 298, citing J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* §25–37 (2003) ("*The prevailing view is that a procedural irregularity or defect alone will not invalidate an award. The test is that of a significant injustice so that the tribunal would have decided otherwise had the tribunal not made a mistake.*"); C. Schreuer, *The ICSID Convention: A Commentary* Art. 52 §230 (2001) ("In order to be serious, the departure must be more than minimal. It must be substantial. In addition, this departure must have had a material effect on the affected party. It must have deprived that party of the benefit of the rule in question. . . . if it is clear from the circumstances that the party had not intended to exercise the right [said to be breached], *there would be no material effect and the departure would not be "serious"* under this analysis."); D. Sutton, J. Gill & M. Gearing (eds.), *Russell on Arbitration* §8.106 (2007) ("If . . . correcting or avoiding the serious irregularity would make *no difference to the outcome*, substantial injustice will not be shown."); R. Merkin, *Arbitration Law* §20.8 (update 2008) ("there is substantial injustice if it can be shown that the irregularity in the procedure caused the arbitrators *to reach a conclusion which, but for the irregularity, they might not have reached . . .*").

[845] Section 5 of the Abyei Appendix, text at *supra* note 107.

counters that the entire point of these proceedings is to allow the Tribunal to determine whether or not the ABC Experts committed an excess of mandate; hence, in the GoS's view, the Arbitration Agreement precludes the SPLM/A from raising this waiver argument.

446. The claim of a waiver of the GoS's right to seek a review of the ABC Experts' Report is hardly consonant with the GoS's subsequent recourse to this arbitration, to which the SPLM/A has also consented. Moreover, from the initial presentation of the ABC Experts' Report, the GoS has been clear in expressing its disagreement with the ABC Experts, and no evidence of waiver can be found or implied by the course of its conduct.

447. Insofar as there is any ground for a claim of estoppel (which is doubtful), the Tribunal would agree with the GoS that the SPLM/A, as a party to the Arbitration Agreement and, in particular, its Article 2, is estopped from objecting to the Tribunal's review of the ABC Experts' Report. As provided in the Arbitration Agreement, the scope of the dispute submitted to arbitration is covered by Article 2.[846]

448. The language of Article 2 makes clear that both the GoS and the SPLM/A have submitted to the Tribunal the question of whether or not the ABC Experts had exceeded their mandate. To the extent that the Tribunal finds that this is not the case, the Tribunal will make a declaration that no excess of mandate was committed. To the extent that the Tribunal does find that an excess of mandate occurred, it will proceed to the delimitation of the Abyei Area. The mandate of the Tribunal, as agreed by both Parties in the Arbitration Agreement, necessarily requires a review and (if necessary) an annulment and revision of parts of the ABC Experts' decision. This thus estops the SPLM/A from arguing that the ABC Experts' Report was final and binding. Indeed, by agreeing to Article 2 of the Arbitration Agreement, the SPLM/A has specifically accepted the authority of the Tribunal to review the Report, and if necessary, to declare an excess of mandate and proceed with a revision of the findings of the ABC Experts.

### *(b)* Res judicata

449. The SPLM/A further contends that the ABC Experts' Report enjoys *res judicata* status and hence, cannot be impugned by the GoS. It asserts that inasmuch as the ABC conducted itself in the manner of an adjudicative body and rendered an adjudicative decision, the Report's findings are *res judicata* for both Parties. The GoS disagrees, arguing that by agreeing to the Arbitration Agreement, the Parties understood that there was still the possibility that the border was not definitely settled, and that issue is to be finally determined by the Tribunal.

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[846] *See* text at para. 395 *supra*.

450. The Tribunal sees no need to enter into an extended discourse on whether, as a matter of legal theory, the ABC Experts' Report is of such a juridical nature that *res judicata* can attach to it. The critical question is whether the fact that the Parties agreed to the finality of the Report in 2005 precluded them from consenting to submit questions about it to another Tribunal. Whatever the status of the ABC Experts' Report, the Arbitration Agreement concluded by the Parties in 2008 had the effect of reopening questions that had been accepted as "final and binding," thus novating the issues for decision in accordance with the contingencies in Article 2.

451. When both Parties consented to this arbitration, that consent extended to all the matters provided under Article 2 of the Arbitration Agreement, and had the effect of re-opening the ABC Experts' Report to "excess of mandate" review under Article 2(a) and a potential new delimitation exercise under Article 2(c).

## C. Characterization of the ABC

452. Through the Arbitration Agreement, the Parties have asked that the Tribunal determine whether another body (the ABC Experts) exceeded its mandate. As the ABC is quite singular in character, there is no neatly established standard against which to assess the ABC Experts' conduct. Instead, the ABC's nature must be ascertained from its constitutive instruments, its composition, the conduct of the Parties, and the function to be performed by the ABC in the larger peace process. These factors will form the basis for ascertaining the normative framework and proper conduct of the ABC Experts in fulfillment of their mandate.

453. In international law, the spectrum of entities designed to engage in dispute settlement varies widely in terms of institutional permanence, composition, and the procedural regimes according to which these entities operate. Some, such as the ICJ, are composed of legal professionals and have a highly articulated procedural regime. At the other end of the spectrum, entities (often established on an *ad hoc* basis) include non-lawyers and follow very informal procedures, which may not be fully articulated in writing. What is procedurally permissible in some of the decision entities is prohibited in others. Thus, for example, mediators are expected to meet each of the disputing parties separately and to respect, in full confidence, what one party may say, while an arbitral or judicial body would be prohibited from entertaining such *ex parte* communications. International law is creative and innovative in these matters and may sometimes graft some of these procedures onto others in combinations that may appear anomalous to those unfamiliar with international law. For example, in the *Taba* arbitration (discussed in further detail below), three of the five arbitrators were also to function as mediators and to seek a compromise settlement while serving as arbitrators.

454. It is clear from its constitutive instruments that the ABC was designed by the GoS and the SPLM/A, along with others who participated in the process of conceiving and establishing it, to make a specified decision according to criteria specified in the texts. Although the Parties committed themselves to accept the Report as "final and binding," a formulation often found in arbitration agreements, the ABC was plainly not an "arbitration tribunal" and certainly not an international arbitration tribunal. None of the constitutive texts referred to it in those terms. Yet, along with the criteria for making a final and binding decision, the ABC also had a quasi-mediatory role, for its expert members were authorized to try to seek a consensus between the disputing parties in parallel; mediators, as noted above, operate according to procedures very different from those of arbitrators.

455. Taking account of the ABC's constitutive instruments as well as contextual factors, a majority of the members of the Tribunal has no difficulty to conclude that the ABC Experts' essential function was to reach a final decision with regard to the boundaries of the Abyei Area, even in the face of scarce factual evidence. In ascertaining the nature of the ABC, one of the Tribunal's members, Professor Hafner, did not share the view of the other members, preferring to see the ABC as a fact-finding body with a more limited nature (his views are explained in some detail *infra*). Nevertheless, these different views on this matter do not affect the substance of the Tribunal's conclusions.

### 1. The non-uniform nature of boundary commissions

456. The mere fact that the ABC was termed a "boundary commission" does not by itself clarify the scope and nature of the ABC's mandate. Historically, many bodies, with many different titles, have been endowed with the specific task of delineating and/or demarcating boundaries. The role and mandate of such bodies differ as a function of the parties' agreement on what each particular "boundary commission," "boundary committee," "mixed commission," *etc.* was designed to do.

457. Thus, the *Ethiopia-Eritrea Boundary Commission,* though charged with delimitation and demarcation, was clearly in the nature of an international arbitral tribunal; it was composed of international lawyers and jurists and its mandate, functions, and procedures meticulously followed those of a formal arbitral proceeding.[847]

458. By contrast, a chamber of the ICJ in the *Frontier Dispute, Burkina Faso* v. *Mali*[848] constituted a commission of three experts for the specific pur-

[847] *See Decision Regarding Delimitation of the Border between The State of Eritrea and The Federal Democratic Republic of Ethiopia;* 41 ILM 1057 (2002).

[848] *See Frontier Dispute, Burkina Faso* v. *Mali,* Nomination of Experts, Order of April 9, 1987 *I.C.J. Reports 1985*, p. 7.

pose of demarcating the boundary delimited by the ICJ chamber itself; the commission did not undertake any adjudicatory or arbitral functions.

459. Uniquely, in the *Taba Arbitration*[849] (referred to above), before the tribunal constituted to determine the boundary dispute rendered a decision, some of the arbitrators were required to "explore the possibilities of a settlement of a dispute," and the "boundary commission" thus undertook a parallel conciliation function.

460. The Cameroon-Nigeria Mixed Commission, constituted to implement the ICJ ruling in *Land and Maritime Boundary between Cameroon and Nigeria* (*Equatorial Guinea intervening)*[850] had as part of its mandate (in addition to demarcating the land boundary) the development of projects to promote joint economic ventures, troop withdrawal from relevant areas along the land boundary, and the reactivation of the Lake Chad Basin Commission.[851]

461. Finally, despite its name, the Iraq-Kuwait Boundary Demarcation Commission arguably performed delimitation functions as well.[852]

462. These examples demonstrate that the term "boundary commission" has encompassed bodies with a wide spectrum of functions, their mandates, with varying degrees of formality, ranging from pure fact-finding to full adjudication (and many with facets of both). Like other boundary commissions, the ABC is best considered a singular entity whose nature is to be derived from its own, specific features.

## 2. The ABC's singular characteristics

### *(a) The positions of the Parties*

463. While both Parties have characterized the ABC as a *sui generis* body,[853] each Party has sought to emphasize different aspects of its *genus*.

464. The GoS agrees that "the ABC was composed in an unusual manner, was governed by special rules of procedure, and was supposed to base its decision on factual findings precisely described by its constitutive instruments."[854]

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[849] *See* Egypt-Israel Arbitration Tribunal: *Award in Boundary Dispute Concerning the Taba Area,* 27 ILM 1421 (1988).

[850] *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria* (*Cameroon* v. *Nigeria: Equatorial Guinea intervening),* Judgment *I.C.J. Reports 2002*, p. 203.

[851] *See* Meeting between the Secretary-General and President Biya and President Obasanjo on the October 10, 2002 ruling of the I.C.J., Geneva, November 15, 2002, available at http://www.un.org/unowa/cnmc/preleas/sgstmts.htm#3.

[852] *See* Letter From the Secretary-General Transmitting to the Security Council the Final Report on the Demarcation of the International Boundary Between Iraq and Kuwait, 32 ILM 1425 (1993).

[853] *See* GoS Oral Pleadings, April 23, 2009, Transcr. 41/06 and SPLM/A Rejoinder, para. 163.

[854] GoS Oral Pleadings, April 18, 2009, Transcr. 59/07–12.

However, in the GoS's view, the outcome of the ABC's work was similar to that of an arbitral award, and the decision given by the ABC could therefore be challenged on the same grounds as those which may be invoked against arbitral awards.[855] For the GoS, the general principles concerning the validity and annulment of arbitral awards should therefore apply.[856]

465. The SPLM/A also believes that the ABC had adjudicatory characteristics.[857] However, it submits that the ABC was a boundary commission and not an arbitral tribunal or court, and was therefore not expected to follow either a specific set of arbitration rules or some hybrid blend of "general" arbitral practice.[858] It asserts that the only competence granted to the Tribunal is specified in the Arbitration Agreement,[859] and the GoS cannot attempt to import particular rules from specialized legal regimes applicable to other institutional arbitral frameworks.[860]

466. Before analyzing the Parties' arguments in detail, it is appropriate to first recall some of the ABC's defining characteristics.

### *(b) The ABC's composition*

467. The Abyei Appendix prescribes the ABC's distinct composition,[861] including five GoS representatives, five SPLM/A representatives, and five independent experts collectively nominated by the United Kingdom, and the United States, and the IGAD (*i.e.,* the ABC Experts). The ABC Experts were individuals known and recognized in the fields of Sudanese and African history, geography, politics, public affairs, ethnography, and culture.[862]

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[855] GoS Counter-Memorial, para. 129.

[856] GoS Oral Pleadings, April 18, 2009, Transcr. 59/07–19.

[857] SPLM/A Counter-Memorial, para. 118.

[858] SPLM/A Counter-Memorial, para. 125.

[859] SPLM/A Counter-Memorial, para. 127.

[860] SPLM/A Counter-Memorial, para. 115.

[861] Abyei Appendix, Section 2. *See* also para. 115 *supra*. The Tribunal takes note of the important fact that neither Party voiced any objection concerning the composition of the ABC Experts prior to the ABC Experts' Report being presented to the Sudanese Presidency. Both Parties fully participated in the proceedings before the ABC Experts, and neither sought to impugn the credibility or competence of any of the individual [ABC Experts] nor the integrity of the proceedings at any time while the ABC Experts were conducting their work. Given the absence of any directed objection towards the ABC's composition, it can be safely inferred that both Parties accepted the ABC Experts' membership and believed that the ABC Experts collectively had the expertise required to carry out their mandate.

[862] The ABC Experts were: (1) Mr. Donald Petterson, the former U.S. Ambassador to Sudan from 1992 to 1995, with decades of experience working for the U.S. Foreign Service in Sudan and other countries in Africa; (2) Professor Douglas Johnson, a professor of History at Oxford University who has some 40 years of research experience on Sudan; (3) Professor Godfrey Muriuki, a pre-eminent African historian and professor

### *(c) The ABC's procedural framework*

468. The skill set of the Experts appointed to the ABC is also an important indicator of the procedural expectations of the Parties. Had international lawyers been appointed, the absence of any reference to institutional arbitration rules would not necessarily have imported a desire to give the ABC broad procedural freedom; international jurists could be expected to carry with them a model of international legal procedures, for in *ossibus inhaerent*. But the Parties deliberately selected a group of historical, geographical, ethnographical and cultural experts along with a professor of African land law. Those experts were, moreover, to apply the procedures of "scientific analysis and research." There was no reference to the application of international law, whether substantive or procedural.

469. Unlike traditional judicial or arbitral proceedings, the ABC's procedures were markedly informal ("informal yet businesslike"),[863] the proceedings were not conducted in a confrontational fashion, and an atmosphere of cooperation was sought.[864]

470. The ABC's constitutive instruments imposed only a few mandatory procedural obligations on the ABC Experts. In particular, these were the constitution of a tribunal of experts with specified expertise;[865] a time limit for submission of the ABC's final report;[866] presentations by the Parties of their respective positions;[867] hearing representatives of the peoples of the Abyei Area;[868] and consultation of the British Archives and other relevant sources

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of African History at the University of Nairobi; (4) Professor Kassahun Berhanu, one of Africa's leading political scientists and a professor of Political Science at the Addis Ababa University; and (5) Professor Shadrack Gutto, who has published widely on "subjects of regional and international, legal and political economy" and has been, as of 2008, Professor and Chair of African Renaissance Studies and Director of the postgraduate Centre for African Renaissance Studies at the University of South Africa. *See* SPLM/A Memorial, paras. 596–601.

[863] *See* Rules of Procedure, Section 2.

[864] *See e.g.* Section 8 of the Rules of Procedure which provides:

> At each meeting with the public, the Chairman will explain the purpose of the Commission noting that the said purpose is limited to defining and demarcating the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905. The Commission will, of course, pay deference to the members of the public and not try to sharply limit the topics brought up by the public.

*See also* Section 3 of the Abyei Appendix which provides:

> The ABC shall listen to representatives of the people of Abyei Area and the neighbours, and shall also listen to the presentations of the two Parties.

[865] *See* Abyei Appendix, Section 2.

[866] *See* Abyei Appendix, Section 5.

[867] *See* Abyei Appendix, Section 3 and Terms of Reference, Section 3.1.

[868] *See* Abyei Appendix, Section 3 and Terms of Reference, Section 3.2.

wherever available.[869] The ABC Experts themselves were to and did prepare the Rules of Procedure, which set out a limited number of additional, more specific procedural provisions, principally of a logistical nature.[870]

471. None of the foregoing provisions of the Parties' agreements or the Rules of Procedure imposed prohibitions or limitations on the ABC Experts' procedural, investigatory, or fact-finding actions. Although the constitutive instruments set forth a variety of provisions to grant the ABC Experts affirmative access to different types of information – people, sites, documents, archives – nothing in any of the instruments forbade the ABC Experts from taking further or additional actions insofar as they were, in their reasonable view, necessary for the fulfillment of their tasks. The ABC Experts were not restricted to evaluating the evidence offered by the Parties; they were explicitly authorized to investigate the matters they thought relevant in determining the boundary[871] and, without the necessary participation of the entire ABC,[872] to draft the final report[873] and to present it to the Sudanese Presidency.[874]

472. While many of the ABC's defining characteristics are markedly different from most arbitral tribunals or adjudicatory bodies, certain other aspects of the ABC proceedings were akin to those associated with adjudicatory bodies. The constitutive instruments of the ABC incorporated a number of due process-related principles such as equality of treatment,[875]

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[869] *See* Abyei Appendix, Section 4 and Terms of Reference, Section 3.4.

[870] Abyei Appendix, Section 4. *See also* the "Program of Work" in the Terms of Reference.

[871] Section 3.4 of the Terms of Reference provides:

> The [ABC Experts] shall consult the British archives and other relevant sources on the Sudan wherever they may be available, with a view to arriving at a decision that shall be based on research and scientific analysis.

[872] Section 4 of the Abyei Appendix, text *supra* at note 131.

[873] Section 5 of the Abyei Appendix, text *supra* at note 107. *See also* the "Program of Work" in the Terms of Reference.

[874] The "Program of Work" in the Terms of Reference provides that "the [ABC Experts] present in the presence of the whole membership of the ABC their final report to the Presidency" on May 29, 2005.

[875] *See* Section 3 of the Abyei Appendix, text *supra* at note 864. Likewise, Section 4 of the Rules of Procedure provides:

> Beginning at 9.00 a.m. 12th April, the parties, in the order they agree upon will make their presentations. After each presentation the [ABC Experts] will ask questions or make comments as they deem appropriate. Subsequently, a general discussion can take place.

Section 10 of the Rules of Procedure also states:

> In addition to talking with the public, the Commission shall visit sites in the field based on the recommendation of the two sides and any other information that becomes available to the Commission.

contradiction,[876] and neutrality/impartiality[877] of the ABC Experts in both their fact-finding and decision-making functions.

### *(d) The ABC's function within the Sudanese peace process*

473. Finally, the ABC's function cannot be dissociated from the Sudanese peace process as a whole. Pursuant to the Comprehensive Peace Agreement, as implemented through the specific terms of the Abyei Protocol and the Abyei Appendix, the ABC was created with the specific purpose of establishing a necessary "missing link" in the framework of the CPA. While the CPA prescribed numerous specific steps towards peace, including guarantees of the right to self-determination for the people of South Sudan, the Parties were unable to reach agreement on the precise location of the border between the north and the south of the country in the Abyei Area. In the absence of such agreement, the Parties tasked the ABC to determine the geographic boundaries of the Abyei Area.

474. The ABC's decision was a necessary step within the sequence of the implementation of the CPA. As provided in the Abyei Protocol, it was only after the ABC Experts had come to a decision as to the definition and demarcation of the Abyei Area that the Presidency of Sudan could "take necessary action to put the special administrative status of Abyei Area into immediate effect."[878] No alternative method for putting the special administrative status of the Abyei Area into effect was agreed upon.

## 3. Fact-finding powers and the decision-making powers

475. In the Tribunal's view, the ABC's role is best assessed in relation to its two essential features: the ABC's fact-finding powers and the ABC's powers to reach a final and binding decision.

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[876] This is apparent in Section 3.5 of the Terms of Reference which state:

> The ABC shall thereafter reconvene in Nairobi to listen to the final presentations of the two parties, examine and evaluate evidence received[,] and prepare their final report that shall be presented to the Presidency in Khartoum[.]

Similarly, Section 13 of the Rules of Procedure provides:

> [T]he [ABC Experts] will examine and evaluate all the material they have gathered and will prepare the final report.

[877] As opposed to the other members of the ABC, who were representatives of either the GoS and the SPLM/A and were necessarily partisan, the ABC Experts were "impartial experts knowledgeable in history, geography and other relevant expertise" appointed by the United States, the United Kingdom and the IGAD. *See* Section 2 of the Abyei Appendix.

[878] *See* Abyei Protocol, Section 5.3.

### *(a) The ABC's function went beyond that of historical fact-finding bodies*

476. A considerable part of the ABC's mandate was undoubtedly to determine facts. Bodies mandated to ascertain facts are common; such "fact-finding commissions" establish particular facts that are unclear, unknown, or disputed. Examples of such fact-finding commissions are the "International Commissions of Inquiry" created under Title III of the 1907 Convention for the Pacific Settlement of International Disputes (the "1907 Hague Convention")[879] and the PCA Optional Rules for Fact-Finding Commissions of Inquiry (the "Optional Rules").[880] Commissions of Inquiry constituted under the auspices of the PCA include those relating to *Loss of the Dutch Steamer Tubantia*[881] and *The Red Crusader* (1961).[882] The Commissions in these cases were mandated to ascertain particular facts and did not adjudicate, arbitrate, or make any sort of final judgment as to the legal consequences that would follow from these facts.[883]

477. The ABC Experts were not tasked to merely ascertain the facts surrounding a particular incident. Rather, a complex constellation of historical, anthropological and geographic facts (many of which remain obscure to this day) could potentially impact the extension of the "area of the Nine Ngok Dinka chiefdoms transferred in 1905." The Experts were tasked to scientifically

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[879] Article 9 of the 1907 Hague Convention provides:

> *In disputes of an international nature involving neither honour nor vital interests, and arising from a difference of opinion on points of fact*, the Contracting Powers deem it expedient and desirable that the parties who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, *institute an International Commission of Inquiry, to facilitate a solution of these disputes by elucidating the facts by means of impartial and conscientious investigation* (emphasis added).

[880] Article 1 of the Optional Rules provides:

> These Rules shall apply when the parties have agreed to have recourse to a Fact-finding Commission of Inquiry ('Commission') pursuant to the Permanent Court of Arbitration ('PCA') Optional Rules for Fact-finding Commissions of Inquiry, *to establish*, by means of an impartial and independent investigation, *facts with respect to which there is a difference of opinion between them* (emphasis added).

[881] *Report concerning the Loss of the Dutch Steamer "Tubantia" by the International Commission of Inquiry at The Hague,* Permanent Court of Arbitration, 16 Am J. Int'l L. 1922, p. 480 at 485–492 (French language original).

[882] *Investigation of Certain Incidents Affecting the British trawler "Red Crusader,"* Permanent Court of Arbitration, March 23, 1962.

[883] In *Loss of the Dutch Steamer Tubantia,* a Commission of Inquiry was asked to ascertain whether a German submarine launched a torpedo which sank a Dutch steamship. The Commission limited its determination to finding that the German submarine indeed launched the torpedo, and it did not attempt to answer the question of whether or not this was done intentionally. In *The Red Crusader,* a Commission of Inquiry was instituted to investigate the facts leading up to the arrest by Denmark of a British trawler off the Faroe Islands. After the Commission had made certain factual findings, the two Parties decided on a mutual waiver of all claims and charges arising out of the incident.

research, select and weigh such facts on the basis of a Formula that was susceptible to several, contradictory interpretations, with a view to arriving at a "final and binding" decision[884] that "defined (*i.e.*, delimited) and demarcated"[885] the Abyei Area.

478. Thus, the ABC Experts' role went beyond that of historical Commissions of Inquiry in two ways. First, the selection, weighing and processing of substantial, often inconclusive factual evidence required the ABC Experts to exercise a higher degree of judgment in the performance of their duties than is customary with fact-finders. Second, the ABC Experts' decision extended to the consequences of their factual findings; the ABC Experts' decision was intended to be constitutive of the boundaries of the Abyei Area, rather than merely declaratory of certain historical facts occurring in 1905.

### *(b) The ABC's role in the peace process required a final and binding decision*

479. In addition, the ABC's founding instruments as well as the comportment of the Parties during the ABC proceedings demonstrates that the ABC Experts were commissioned to arrive at a conclusive decision that would resolve a specific dispute between the Parties. This implies that the ABC Experts were precluded from returning a factual *non-liquet* based on the paucity of evidence.

480. The inadmissibility of such a *non liquet* becomes particularly clear when the ABC's role in the larger Sudan peace process is taken into account. Not only was the ABC Experts' decision a necessary step for putting the special administrative status of the Abyei Area into effect. The need for the ABC proceedings to result in a final and binding decision is also underscored by the ultimate political objective of delimiting the boundaries of the Abyei Area – to determine the residents of the Abyei Area who would be entitled to vote in the 2011 plebiscite on whether the Abyei Area should retain its special administrative status in the north, or whether it should instead be part of the province of Bahr el Ghazal in the south.[886] No "back-up plan" was contemplated in the event that the ABC Experts found themselves unable to complete their assigned mandate. Considering this important objective, it was imperative that clear boundaries would be drawn by the ABC Experts as a result of the proceedings.

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[884] *See* Section 5 of the Abyei Appendix.

[885] As explained by Professor Schofield, there are three stages in a boundary's evolution: allocation, delimitation and demarcation. Allocation deals with allocating territory and not the actual boundary, while demarcation simply physically marks out the boundary on the ground. Delimitation, quite differently, is when the line is established and specified. It requires "an executive act" of determining where the actual boundary line should be, and calls for a detailed description of the location of a boundary line. *See* SPLM/A Oral Pleadings, April 22, 2009, Transcr. 121/03–122/02.

[886] *See* Abyei Protocol, Section 1.3.

### *(c) The ABC's composition does not exclude a decision-making function*

481. The Tribunal notes that the composition of the ABC does not preclude the attribution of a conclusive decision-making role to the ABC. In the *Treaty of Lausanne Advisory Opinion*[887] the Permanent Court of International Justice ("PCIJ") was asked to determine whether a decision by the Council of the League of Nations drawing the boundary line between Turkey and Iraq would be in the nature of an arbitral award, a recommendation, or simple mediation. The PCIJ explained that even if the Council of the League of Nations was a political body and not an arbitral tribunal, it could still be called upon to give a definitive and binding decision in a particular dispute, especially as the agreement of the parties (*i.e.,* the Treaty of Lausanne of July 24, 1923) sought "to insure a definitive and binding solution of the dispute" which was "the final determination of the frontier" between Turkey and Iraq.

482. Parallels with the ABC Experts can be drawn here. The ABC Experts, though not a tribunal composed of legal experts or arbitral practitioners, were called upon by the Parties to *define* and demarcate the boundary of the Abyei Area. In so doing, the Parties agreed that the decision of the ABC Experts would be "final and binding" upon them. Consequently, by being given the task of defining and demarcating a definite boundary line, the ABC Experts, in addition to their fact-finding function, also had to reach a decision on the basis of these facts. The term "define" clearly laid out the Parties' intention that the ABC Experts delimit the Abyei Area regardless of the strength or weakness of the evidence they uncovered. As discussed *infra,* this task was essentially a new task, as the borders of the Abyei Area had not been defined and demarcated previously.

## 4. Conclusion

483. Given the ABC's singular characteristics, a majority of the Tribunal has no difficulty in concluding that the ABC possessed important decision-making powers in addition to its fact-finding functions. While the ABC Experts were not lawyers but persons recognized in the fields of "history, geography and other relevant expertise," they were required to arrive at a final and binding decision. Although the Parties did not require the ABC Experts to apply international law or legal reasoning to the delimitation of the boundaries of the Abyei Area but scientific methods, they did require the ABC Experts to arrive at a decision that would resolve the dispute with final and binding consequences. It is this essential decision-making function that, in the view of the Majority, is a defining characteristic of the ABC.

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[887] *Article 3, Paragraph 2 of the Treaty of Lausanne* (*Frontier between Turkey and Iraq)* (Advisory Opinion), PCIJ Rep Series B No. 12(1925).

484. Having said this, the Tribunal wishes to record that one of its Members, Professor Hafner, does not wholly share the Majority's conclusions on the nature of the ABC. In Professor Hafner's view, the ABC is not a "boundary commission" within the contemplation of the *Treaty of Lausanne Advisory Opinion*. Rather, the ABC's nature is more akin to that of a pure fact-finding body, as its mandate was limited to ascertaining a set of historical facts and arriving at a final and binding judgment based solely on those facts. For Professor Hafner, the fact that the ABC Experts' decision was binding is not sufficient evidence that they possessed any powers beyond those vested in a fact-finding body (Article 35 of the 1907 Hague Convention and Article 24(2) of the PCA Optional Rules for Fact-finding Commissions of Inquiry both provide for the possibility that the decisions of fact-finding bodies can be made binding).

485. Thus, according to Professor Hafner, the ABC Experts were not empowered to make any decision having an *ex nunc,* constitutive effect. In his view, the final and binding effect of the ABC Experts' Report resulted directly from Article 5 of the Abyei Appendix; it did not result from the mandate of the ABC itself. Furthermore, he does not share the view that the ABC Experts were obliged to delimit the Abyei Area even in the absence of sufficient evidence; a factual *non-liquet* was one possible decision the ABC Experts could have taken, and they would not have acted *infra petita* had they chosen to do so. Nevertheless, as Professor Hafner agrees, none of the foregoing observations affects the substance of the conclusions drawn by the Tribunal.

## D. Reasonableness is the applicable standard for reviewing the interpretation and implementation of the ABC Experts' mandate

486. Recalling the limited scope of the Tribunal's review authority over the ABC Experts' Report under Article 2(a) of the Arbitration Agreement, a consideration of what such a limited review entails in relation to the GoS's alleged grounds for finding an "excess of mandate" is in order. This section will therefore discuss the standard of review that the Tribunal must apply with respect to the ABC Experts' *interpretation* and *implementation* of their mandate. These two aspects – interpretation and implementation – raise slightly different issues, and will be discussed in turn.

### 1. Standard of review regarding the ABC's interpretation of its mandate

487. The Tribunal has no doubt that a fundamental misinterpretation by the ABC Experts of the instruments establishing the ABC's competence could in principle qualify as an excess of mandate. This view is consistent

with the position taken in international arbitral awards such as the *Orinoco Steamship Company* arbitration, where the tribunal found that an excessive exercise of powers could arise from "misinterpreting the express provisions of the relevant agreement in respect of the way in which [the arbitrators] are to reach their decisions."[888]

488. While the Parties seem to agree in principle that a misinterpretation of the ABC Experts' mandate can amount to an excess of mandate, the Parties have put forward different conceptions of the standard of review that the Tribunal should apply in determining whether the ABC Experts in fact "misinterpreted" their mandate.

### *(a) The Parties' positions*

489. A first indication of the Parties' respective positions follows from the way that they chose to structure their arguments: The GoS discussed the interpretation of the "Formula" as a preliminary matter before addressing whether the ABC Experts exceeded their mandate (thus implying that this Tribunal must first determine the "correct" meaning of the Formula before examining whether the Experts complied with it), whereas the SPLM/A presented its views on the interpretation of the Formula under the heading of delimitation (thus implying that the correct meaning of the Formula is irrelevant for this Tribunal's task pursuant to Article 2(a) of the Arbitration Agreement).

490. In its Counter-Memorial, the SPLM/A argued that the ABC Experts' interpretation of their mandate "would at a minimum be entitled to a substantial presumption of correctness and could only be invalidated in rare and exceptional cases."[889] In support of its position, the SPLM/A relied heavily on judgments by national courts and scholarly commentary concerning the setting aside of arbitral awards pursuant to Article V(1) of the 1958 New York Convention. In response, the GoS argued that, in its view, "this is not a case where one party has unilaterally applied to annul or oppose the enforcement of a prior decision of an adjudicating body." Therefore, in the GoS's view, precedents allocating the burden of proof regarding annulment for excess of powers to the applicant "are completely inapposite" in these proceedings.[890]

491. In addition, the SPLM/A argued that the standard of "glaring," "manifest" or "flagrant" excess must also apply to the ABC Experts' interpretation of their mandate (as opposed to its execution).[891] In oral argument, the GoS presented the contrary view, contending that this Tribunal must assess the ABC Experts' findings against what it determines to be "their real mandate,"

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[888] *The Orinoco Steamship Company Case* (*United States/Venezuela)* XI UNRIAA 227, 239 (1910).

[889] SPLM/A Counter-Memorial, para. 613.

[890] GoS Counter-Memorial, para. 74.

[891] SPLM/A Counter-Memorial, para. 622.

not their "self-assigned" or "imaginary, self-given mandate."[892] According to the GoS this Tribunal is "under a strict duty to ensure that the ABC Experts' mandate has been complied with in all and every respect" and that, since "the mandate was a condition for the whole peace settlement," "[t]here cannot be any question that it could be left erroneously interpreted. Its interpretation must have been correct."[893] The GoS further argued, with regard to the particular issue of the interpretation of the ABC's mandate, "that the standard for appreciating whether or not they have complied with their mandate is the same standard as the one you would have to apply on the appeal."[894]

492. Hence, according to the GoS, the Tribunal should determine, first, what the ABC's mandate meant and, second, whether the ABC Experts, in implementing these instructions, exceeded their mandate. The SPLM/A, by contrast, asks the Tribunal to determine whether the ABC Experts' findings as a whole, from the initial appreciation of the Experts' task to the concrete boundary lines proposed, can be considered a discharge of the ABC Experts' mandate. According to both approaches, the question whether the Experts' *implementation* of their task exceeded their mandate is subject to a reasonableness test. However, with regard to the *interpretation* of the mandate, the GoS's approach would require this Tribunal to hold the Experts' understanding of their task against what this Tribunal considers the "real" (or "correct") meaning of the mandate, whereas the SPLM/A's approach would merely authorize this Tribunal to verify that the Experts' understanding of their task was reasonable.

### *(b) The Tribunal's interpretation of Article 2(a) of the Arbitration Agreement*

493. In the Tribunal's view, the structure of Article 2 and the object and purpose of the Tribunal's review of the ABC Experts' findings require the application of the same reasonableness standard both to the ABC Experts' interpretation and the ABC Experts' implementation of their mandate.

#### (i) The wording and structure of Article 2

494. The phrase "[w]hether or not the ABC Experts had, on the basis of the agreement of the Parties as per the CPA, exceeded their mandate" is ambiguous, allowing the Parties to argue, respectively, that the ABC Experts' interpretation of their mandate "must have been *correct*" or need only be *reasonable*. The Arbitration Agreement could have resolved the ambiguity by explicitly instructing the Tribunal to determine "what the ABC Experts' mandate means in light of the ABC's constitutive instruments and whether the ABC Experts

[892] GoS Oral Pleadings, April 18, 2009, Transcr. 170/16–17 and 170/24.

[893] GoS Oral Pleadings, April 23, 2009, Transcr. 2/12–14 and 3/09–12.

[894] GoS Oral Pleadings, April 23, 2009, Transcr. 21/11–14.

have exceeded that mandate" (implementing the GoS's proposed approach) or, alternatively, instructing it to determine "whether the ABC Experts reasonably interpreted and applied their mandate" (implementing the SPLM/A's proposed approach). As it stands, however, the specific wording of Article 2(a) does not, of itself, provide a conclusive answer.

495. But text must be read in context and the Arbitration Agreement, taken as a whole, throws considerable light on the matter. As discussed earlier, the overall structure of Article 2 indicates that two distinct and different modes of inquiry were intended for the Tribunal: Article 2(c), which calls for a *de novo* analysis of all the evidence adduced by the Parties and a new delimitation exercise, is deliberately placed after Article 2(a), which confines the Tribunal, at that phase, to the question of whether the ABC Experts exceeded their mandate. Thus, Article 2 indicates that the Tribunal can only make a positive determination of what the mandate's correct interpretation is within the context of an Article 2(c) inquiry; to interpret Article 2(a) as requiring the Tribunal to already decide what the correct interpretation of the mandate is would eliminate the distinction between Article 2(a) and 2(c).

496. The proper reading of Article 2(a) in, and consistent with the context of Article 2 as a whole, is that, at that phase, the Tribunal must confine itself to determining whether the ABC Experts' interpretation of their mandate was reasonable. However, the Tribunal must stop short of deciding whether one or the other interpretation proffered by the Parties is more correct; the question of which interpretation the Tribunal deems correct is not a question of "excess of mandate" but rather a component of the Tribunal's contingent delimitation inquiry under Article 2(c).

### (ii) The ABC Experts had the authority to interpret their mandate

497. Contextual as well as teleological analyses support the conclusion of the confined inquiry required by Article 2(a). The ABC Experts possessed the authority to interpret their mandate and, thus, the limits of their "jurisdiction," and the Tribunal is required to defer to that interpretation within the context of its Article 2(a) analysis.

498. In an arbitral context, a tribunal's power to interpret the instrument on which its jurisdiction is founded is typically discussed under the heading of *Kompetenz-Kompetenz*. Pursuant to this doctrine, which is accepted with certain variations in most national arbitration laws and is a postulate in international arbitration, an arbitral tribunal must be deemed competent to determine the limits of its own jurisdiction. Allocating decision-making authority to the party-selected arbitrator rather than the courts is more respectful of the parties' intention to have specially-appointed arbitrators (often possessing specific expertise in a particular area) decide disputes over their relationships.

499. In international arbitral proceedings, *Kompetenz-Kompetenz* is even a necessity, as no higher court of law with compulsory jurisdiction exists

to adjudge the limits of a tribunal's competence when one of the parties disputes it. Without a principle of *Kompetenz-Kompetenz,* any form of third party decision in international law could be paralyzed by a party which challenged jurisdiction.

500. The authority of international tribunals to declare their own competence and, to that end, interpret the ***c****ompromis* and other relevant documents was already enshrined in the 1899 and 1907 Hague Conventions.[895] In its first judgment in the *Nottebohm* case dealing with Guatemala's jurisdictional objections, the ICJ affirmed the *Kompetenz-Kompetenz* principle as accepted in international law:

> Since the *Alabama* case, it has been generally recognized, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction.[896]

501. Other notable expressions of the *Kompetenz-Kompetenz* principle subsequent to the ICJ's pronouncement can be found in the 1953 Draft Convention on Arbitral Procedure of the International Law Commission (ILC),[897] the 1958 ILC Model Rules on Arbitral Procedure,[898] the PCA Optional Rules for Arbitrating Disputes between Two States,[899] the PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State,[900] the 1965 ICSID Convention,[901] the UNCITRAL Arbitration Rules[902] and the UNCITRAL Model Law.[903]

502. As noted, because international law lacks a hierarchy of courts endowed with compulsory jurisdiction, the operation of any of the range of decision institutions could be paralyzed by an objection to its competence, if it, too, did not have some form of *Kompetenz-Kompetenz***.** Thus, the fact that the

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[895] Article 48 of the Hague Convention for the Pacific Settlement of International Disputes of 1899, 1 Bevans 230; 1 AJIL (1907) 103; Article 73 of the Hague Convention for the Pacific Settlement of International Disputes of 1907, 1 *Bevans* 577; 2 AJIL Supp. (1908) 43.

[896] *Nottebohm Case* (Preliminary Objection), Judgment, *I.C.J. Reports 1953*, p. 111, 119.

[897] Article 11, Report of the International Law Commission Covering the Work of its Fifth Session, 1 June–14 August 1953, *Official Records of the General Assembly, Eighth Session, Supplement No. 9* (A/2456), A/CN.4/76.

[898] Article 9, Yearbook of the International Law Commission, 1958, vol. II.

[899] *See* Article 21. These rules are available at http://www.pca-cpa.org.

[900] *See* Article 21. These rules are available at http://www.pca-cpa.org; *see also* the 1962 Optional Rules, reprinted in J.G. Wetter, The International Arbitral Process, Public and Private, Vol. V, p. 54 (1979).

[901] Article 41, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 575 UNTS 159.

[902] Article 21, UN Doc. A/RES/31/98; 15 ILM 701 (1976).

[903] Article 16, 24 ILM 1302 (1985).

ABC was not an adjudicatory body *strictu sensu* does not mean that it lacked *Kompetenz-Kompetenz***.** Moreover, a number of features of the ABC proceedings suggest that the ABC was intentionally endowed with the authority to interpret the provisions of its constitutive instruments, which define the scope of its own competence:

- The Parties, faced with a daunting evidentiary situation and unable to resolve the issue themselves, agreed on a specialized – and singularly composed – expert body to delimit the Abyei Area based on a difficult evidentiary situation that they were evidently incapable of doing themselves. In so doing, the Parties knew that neither established case law nor institutional control mechanisms would assist the ABC throughout the proceedings in determining what its mandate meant.
- The ABC was not subjected to the guidance of an institution that could pass judgment on the meaning of its mandate in the event of controversy between the Parties' representatives. In this respect, the ABC's position was comparable to that of an international tribunal, and the presumption established by the ICJ in *Nottebohm* is germane.
- Without the authority to determine its own competence, the ABC could have been paralyzed by argument over its powers. Such paralysis would be incompatible with the Parties' desire to have the dispute definitively settled, following long and difficult negotiations during the peace process. Indeed, arguments ostensibly over competence were really arguments over the essential questions posed in Article 2.

503. For the reasons above, the Tribunal concludes that the ABC was vested with the competence to interpret, and thus necessarily determine the bounds of, its own mandate.

### (iii) The Tribunal must defer to the interpretation of the ABC Experts, as long as that interpretation is reasonable

504. To what extent, if any, is the Tribunal, in the exercise of its own review mandate, obliged to defer and accord special weight to the ABC Experts' interpretation of their mandate? As is clear from the discussion above, the sequential character of Article 2 precludes a *de novo* examination under Article 2(a) but it does not explain, in terms, how much deference is to be accorded to the ABC Experts' determination of their own mandate. Some guidance is available from the cognate situation of a court seized with the request to set aside an arbitral award on the grounds that the arbitrator exceeded his or her jurisdiction. In an arbitral context, the decisive question in such cases is whether the doctrine of *Kompetenz-Kompetenz* encompasses an obligation upon the reviewing court to accord deference to the original decision-maker's interpretation of the instrument establishing that decision-maker's jurisdiction.

505. The practice of courts and tribunals in public international law is broadly supportive of the proposition that an instance of review must defer, and give special weight, to the interpretation of a jurisdictional instrument by the decision-making body designated under that instrument. The ICJ's judgment in the *Case concerning the Arbitral Award of 31 July 1989* is particularly instructive.[904] In that case, the Republic of Guinea-Bissau requested the Court to declare an arbitral award null and void because the original arbitral tribunal allegedly "did not comply with the provisions of the Arbitration Agreement."[905] The Court reaffirmed its previous distinction between appellate review – that the Court is "called upon to pronounce on whether the arbitrator's decision was right or wrong"[906] – and the requested review of the validity of the award. On this basis, the Court noted that, in the context of a *recours en nullité,* it

> has simply to ascertain whether by rendering the disputed Award the Tribunal acted in *manifest breach* of the competence conferred on it by the Arbitration Agreement, either by deciding in excess of, or by failing to exercise, its jurisdiction.[907] (emphasis added)

506. In addition to confirming the applicability of the "manifest breach" standard to decisions on jurisdiction, the Court specifically noted that the reviewing body must accord deference to the original decision-maker in its interpretation of its own competence. The Court noted that "[b]y its argument set out above, Guinea-Bissau is in fact criticizing the interpretation in the Award of the provisions of the Arbitration Agreement which determine the Tribunal's jurisdiction, and proposing another interpretation." The Court rejected Guinea-Bissau's argument and ruled that it was not competent to determine which of several plausible interpretations of the original arbitration agreement was the correct one, explaining that "the Court does not have to enquire whether or not the Arbitration Agreement could, with regard to the Tribunal's competence, be interpreted in a number of ways, and if so to consider which would have been preferable."[908]

507. In the Tribunal's view, the ICJ's analysis in the *Case concerning the Arbitral Award of 31 July 1989,* which is based on explicitly reasoned legal principles that apply by analogy to these proceedings, provides the best method for establishing the appropriate standard of review. The review of arbitral awards on grounds of excess of powers serves to protect the parties from the rendering of binding third-party decisions to which they have not consented. Consistent with this fundamental principle of consent, third-party jurisdictional determinations against the will of the parties cannot

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[904] The Tribunal notes that both Parties repeatedly relied on this judgment in their submissions, thus making the judgment an appropriate consensual reference point.

[905] *Arbitral Award of July 31, 1989, I.C.J. Reports 1991*, p. 56, para. 10.

[906] *Arbitral Award Made by the King of Spain, I.C.J. Reports 1960*, p. 214.

[907] *Arbitral Award of July 31, 1989, I.C.J. Reports 1991* p. 69, para. 47.

[908] *Arbitral Award of July 31, 1989, I.C.J. Reports 1991* p. 56, para. 47.

stand.[909] But as long as a decision can still be reconciled with the parties' consent, the arbitrators who were appointed by the parties constitute the preferred forum for settling the substantive disagreement between the parties, as it is they who were specifically entrusted with this task on the basis of their specific expertise.

508. In this case, the purpose of the review conducted by the Tribunal pursuant to Article 2(a) of the Arbitration Agreement is to determine whether the ABC Experts' conduct and decision are within the range of what the Parties could have expected when consenting to the delimitation and demarcation of the Abyei Area by the ABC. To the extent that the ABC Experts' findings can still be squared with the Parties' consent, the ABC – not the Tribunal – should remain the preferred forum for the delimitation of the Abyei Area. As noted above, the ABC Experts were carefully chosen by the Parties for this task. The ABC Experts also had detailed knowledge of the context in which they would operate (the peace process) and were expected to understand their mandate in light of the Parties' expectations. Moreover, the Parties, too, were members of the ABC and were thus able to bring to the attention of the ABC Experts their own understanding of the ABC mission. In sum, the ABC Experts were indeed considered best placed to interpret the mandate that was entrusted to them.

509. In reaching this conclusion, the Tribunal is mindful that Parties may, by consent, agree to override the principles of strict review laid out in the *Arbitral Award* judgment and require the Tribunal to adopt another standard in its Article 2(a) inquiry instead. Such consent cannot be lightly inferred, however, and must be demonstrated through explicit evidence of such an agreement. Nothing in the "excess of mandate" language of Article 2(a) or in the Arbitration Agreement read as a whole suggests that this is the case.

510. For these reasons, the Tribunal sees no justification for departing from the standard of review established by the ICJ in the *Case concerning the Arbitral Award of 31 July 1989.* Under Article 2(a) of the Arbitration Agreement, the Tribunal must limit itself to assessing whether the ABC Experts' findings can be understood as a not unreasonable discharge of their mandate, that is, as an exercise that does not amount to a manifest breach of the competence assigned to them. To that end, the Tribunal will not inquire into whether another interpretation of the ABC's constitutive instruments would have been preferable. Rather, the Tribunal must assess whether the ABC Experts' interpretation of its mandate remained within the range of not unreasonable and defensible interpretations.

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[909] *See,* for example, *CDC Group plc,* Case ARB/02/14, para. 40. For the overriding importance of the Parties' consent in the interpretation of jurisdictional instruments more generally, *see also Continental Shelf* (*Libyan Arab Jamahiriya/Malta),* Judgment, *I.C.J. Reports 1985*, p. 13, 23 and *Arbitral Award of July 31, 1989, I.C.J. Reports 1991*, p. 53, 70.

## 2. Standard of review regarding the ABC's implementation of its mandate

511. The question of the ABC Experts' interpretation of its mandate must be distinguished from the question of execution or implementation of that mandate. The implementation by the ABC Experts of their mandate, in turn, is potentially subject to review from various angles, including with regard to the question whether the ABC Experts' decision was manifestly incorrect and the question whether the ABC Experts stated appropriate reasons for their decision. The Tribunal finds that only the latter type of review is within the Tribunal's competence pursuant to Article 2(a) of the Arbitration Agreement.

### *(a) Review for "substantive errors" is outside the Tribunal's competence*

512. With regard to substantive error as a potential ground for annulment, the "general principles of law and practices" applied by international tribunals undertaking a review function do not appear to be entirely consistent. On the one hand, relevant international treaties (including the 1958 New York Convention and the 1965 ICSID Convention) and the UNCITRAL Model Law on International Commercial Arbitration do not recognize "manifest error" as a ground for setting aside an award. Recent arbitral decisions within the context of ICSID annulment proceedings confirm the irrelevance of substantive errors at the review stage.[910] On the other hand, the relevance of "essential errors" or "manifest error[s]" of law or fact was acknowledged in several, especially older, decisions, including the *Trail Smelter* case[911] and the *Drier* case.[912]

513. For purposes of the present proceedings, however, the question of whether substantive errors are altogether outside the scope of its review or subject to review in "manifest" cases is academic and without relevance for the Tribunal's decision. The Tribunal notes that while the GoS believes the ABC Experts' findings to be substantively incorrect, these perceived errors are not as such the basis for GoS's excess of mandate claim. The GoS does not ground its claim on "essential error" or "manifest error" but on the proposition that

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[910] *Maritime International Nominees Establishment* (*MINE)* v. *Government of Guinea* (*Guinea),* ICSID Case ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award dated January 6, 1988, *see* especially para. 4.04 and para. 5.08; *AMCO Asia Corp.* v. *The Republic of Indonesia,* ICSID Case ARB/81/1, Decision on the Application by Indonesia for Annulment of the Arbitral Award dated November 20, 1984, May 16, 1986, para. 23.

[911] *Canada* v. *U.S.,* Final Award of March 11, 1941, III UNRIAA 1905, 1957.

[912] *Katharine M. Drier* (*United States)* v. *Germany,* Award of July 29, 1935, VIII UNRIAA 127, 157.

the ABC's findings – whether substantively right or wrong – went beyond or failed to accomplish what the Parties agreed to.[913]

514. This characterization of the GoS's claims was again confirmed during the oral hearings, when the GoS explained that:

> while an essential error of law or fact of an arbitral tribunal is a ground for nullity of the award, this Tribunal has probably no jurisdiction to that effect . . . In other words, the [ABC Experts] have made an essential error of interpretation, but this error . . . bears upon the mandate itself, not on its implementation, not on the answer to the question.[914]

515. Thus, leaving aside other, distinct grounds for excess of mandate (such as alleged procedural violations and failure to state reasons) and criticism of its substance, the GoS's disagreement with the ABC Experts' Report is in essence a disagreement concerning the ABC Experts' interpretation of the mandate, not with its *implementation***.** Similarly, the SPLM/A has consistently argued during these proceedings that substantive errors are beyond the Tribunal's jurisdiction of review.[915]

516. The Tribunal sees no reason for departing from this understanding of its mandate, which is consensual between the Parties. As noted above, the Parties have defined the Tribunal's mandate as comprising two distinct juridical and intellectual tasks, and the first of these tasks, pursuant to Article 2(a), does not authorize the Tribunal to ascertain the correctness of the ABC Experts' findings. The interpretation of the scope of a decision-making body's competence is analytically distinct from the use of that competence, and the Parties authorized the Tribunal, for purposes of the present proceedings, to review only the former but not the latter.

517. The Tribunal's review of the ABC Experts' findings, under Article 2(a), will thus extend neither to the appreciation of evidence by the ABC Experts nor to the ABC Experts' substantive conclusions (except for the determination of an excess of mandate). Consistent with its mandate, the Tribunal will not engage in an academic excursus into the ABC Experts' reading of the evidence or their conclusions.

### *(b) Failure to state reasons for a decision may lead to an "excess of mandate"*

518. A final consideration relates to the GoS's contention that the ABC Experts' committed an excess of mandate by allegedly failing to state reasons for some of their findings. As with the other alleged grounds for excess of mandate, the Tribunal will discuss, as a preliminary matter, to what extent it is

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[913] In its Rejoinder, the GoS groups these allegations under the headings of "Decisions *Ultra Petita*" and "*Infra Petita*."

[914] GoS Oral Pleadings, April 18, 2009, Transcr. 165/20–23 and 166/16–20.

[915] SPLM/A Counter-Memorial, para. 44.

authorized to review the cogency of the reasons advanced by the ABC Experts under Article 2(a). To that end, the Tribunal must address two questions: first, were the ABC Experts under a duty to state the reasons for their decisions in the first place? If so, then what is the threshold that determines when deficient reasoning amounts to an excess of mandate?

**(i) The ABC's mandate included the duty to state reasons**

519. Both Parties, relying on arbitral precedent as, presumably, an expression of "general principles of law and practices," disagree as to whether the ABC Experts were under an obligation to state reasons. The GoS averred a requirement incumbent upon arbitrators to explain the basis for their decision. The SPLM/A adduced evidence of legal systems that stipulate no reasoning requirement.

520. In the Tribunal's view, the primary and secondary authorities adduced by the Parties are not dispositive of the question of whether reasons were required, nor do they establish a presumption that, absent an express agreement by the Parties to the contrary, the ABC Experts were under such an obligation. Whether reasons had to be presented is not conclusively resolved by "general principles of law and practices" but by evidence of the Parties' expectations, which may be inferred from the context in which the ABC was intended to operate and from the function it had been assigned within the peace process. The ABC was created as part of an extraordinarily complex political process, which is not comparable to ordinary commercial or investment arbitrations. Whether reasons are required is therefore a question of proper interpretation of the ABC's constitutive instruments in light of their ordinary meaning and object and purpose.

521. An initial, textual argument (reiterated by the GoS throughout the proceedings) relates to the instructions by the Parties that the decision taken in the ABC Experts' Report be "based on scientific analysis and research."[916] The preference for a scientific methodology suggests that the Parties expected the ABC Experts to disclose the fruits of their research in some manner appropriate to their respective fields of scientific research. While there is nothing in the relevant instruments requiring a comprehensive analytic discussion of all the evidence found, an exposition of the key evidence in support of the ABC Experts' "final and binding decision" was clearly imported in the words "based on scientific analysis and research."

522. The clear purport of the text is confirmed by the object and purpose of the ABC's constitutive instruments. The principal consideration in these instruments is the important role played by the ABC in the context of the Sudan peace process; after years of uncertainty as to the location and boundaries of the Abyei Area, which in turn contributed to the untold hardship of millions of victims in the Civil War, the ABC was to definitively determine the

[916] Section 4 of the Abyei Appendix.

boundaries of the Abyei Area. It was obvious that the ABC Experts' Report, whatever its conclusions, would have a major political impact on the country and especially on the life of Misseriya and Ngok Dinka in and around the Abyei Area. Stakeholders were entitled to know on what grounds the ABC Experts' decision was made. Indeed, such knowledge could be critical to the legitimacy and acceptability of the decision.

523. An additional indication of the expectation of a reasoned decision is found in the contradictory nature of the ABC proceedings.[917] It would be unusual to invite the Parties to make extensive presentations to the ABC and then take a decision that in no way assesses the Parties' respective presentations.

524. Finally, in the absence of a standing and compulsory body in which an appeal may be lodged (which is the normal situation in international law), the requirement to state the reasons on which a decision is based also functions as an informal control mechanism. Since the ABC Experts' findings were not subject to appeal, an explanation of the rationale for the decision would dispel any hint of arbitrariness and ensure the presence of fairness which is indisputably necessary for the acceptability and successful conclusion of the peace process.

525. It follows that a failure to state reasons on the part of the ABC Experts would amount to the contravention of an obligation that was integral to their mandate and, as explained immediately below, could constitute an excess of mandate.

### (ii) Lack of any reasons or obviously contradictory or frivolous reasons would amount to an excess of mandate

526. This does not yet answer the question as to the appropriate minimum standard that applies to the ABC Experts' reasoning. In their submissions, the Parties were in agreement that, assuming that the ABC Experts were required to provide reasons, the Tribunal's review of the "quality" of the ABC Experts' reasons would be constrained. Both Parties quoted (with approval) the standard of review endorsed by the *Vivendi* v. *Argentina* annulment committee,[918] and the GoS explained:

> [T]he GoS maintains the absolute relevance of the *Vivendi* v. *Argentina* annulment decision according to which the failure to state reasons will only constitute grounds for the annulment of a decision if – but only if – it leaves "the decision on a particular point essentially lacking in any expressed rationale" and if that point itself is necessary to the decision.[919]

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[917] *See* Section 3.1 of the Terms of Reference.

[918] GoS Memorial, para. 164; GoS Rejoinder, para. 156; SPLM/A Counter-Memorial, para. 740.

[919] GoS Rejoinder, para. 156.

527. Under general international law, the number of relevant precedents dealing with the minimum standard of "motivation" of arbitral awards is limited. The most authoritative decision in this respect is the ICJ's judgment in the *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906***.** In that case, Nicaragua challenged the award handed down by the King of Spain, *inter alia***,** for the alleged lack or inadequacy of reasons. The Court flatly rejected Nicaragua's argument, noting that

> an examination of the Award shows that it deals in logical order and in some detail with all relevant considerations and that it contains ample reasoning and explanation in support of the conclusions arrived at by the arbitrator. In the opinion of the Court, this ground is without foundation.[920]

528. The most extensive international judicial treatment to date on the scope of the reasons requirement can be found in a series of decisions by ICSID annulment committees pursuant to Article 52 of the 1965 ICSID Convention. While the level of scrutiny applied by different annulment committees has varied, some important points of agreement may provide the beginning of *a jurisprudence constante* in international investment law.

- First, annulment committees are not authorized to compare the original tribunal's reasons with what the committee considers the "correct" or "ideal" argumentation. "It is not for the Committee to imagine what might or should have been the arbitrators' reasons, any more than it should substitute 'correct' reasons for possibly 'incorrect' reasons."[921] Rather, annulment committees must ascertain whether the award is sufficiently reasoned – a standard considerably lower than "fully reasoned."
- Second, there seems to be consensus that ICSID tribunals are not required to deal in a reasoned manner with each and every argument raised by a party. Rather, reasons should "be the basis of the Tribunal's decision, and in this sense 'sufficient.'"[922]
- Third, annulment committees have tended to assess the adequacy of the reasons in support of each decision made in an award, rather than judging the adequacy of the argumentation in an award as a whole.[923]
- Fourth, it is common ground that, in assessing whether the decisions contained in an award are based on reasons, annulment committees must be particularly mindful not to turn

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[920] *Arbitral Award made by the King of Spain,* Judgment of November 18, 1960, *I.C.J. Reports 1960*, p. 216.

[921] *Klöckner Industrie-Anlagen GmbH and Others* v. *Republic of Cameroon,* ICSID Case No. ARB/81/2 (1983), para. 151.

[922] *Ibid.,* at para. 118. *See also Lucchetti* v. *Peru,* Decision on Annulment, ICSID Case No. ARB/03/4 (2007), para. 127.

[923] *Klöckner,* ICSID Case No. ARB/81/2 (1983), para. 130.

annulment proceedings into appeal proceedings.[924]

529. In applying these consensual principles, the annulment committee in *Klöckner* conducted a very strict review, verifying in essence whether the tribunal came to legally defensible conclusions. Subsequent committees declined to follow the *Klöckner* example. The *MINE* annulment committee suggested that:

> the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.[925]

530. The *MINE* standard was later confirmed by the *Mitchell* committee, which added that "a failure to state reasons exists whenever reasons are purely and simply not given, or are so inadequate that the coherence of the reasoning is seriously affected."[926] In relation to the danger of conflating annulment with appeal, the committee noted that contradictions in the reasoning of a tribunal would have to be obvious – "to a point that the *ad hoc* Committee cannot be reproached for engaging in an analysis of the merits."[927] Similar standards were enunciated by the annulment committees in *Amco* and *Vivendi*.[928]

531. As the standards endorsed by the ICJ and the more recent ICSID annulment committees significantly converge, it is possible to draw a tentative conclusion regarding the "general principles of law and practices" applicable to the setting aside of arbitral awards on the ground of failure to state reasons. To meet the minimum requirement, an award should contain sufficient ratiocination to allow the reader to understand how the tribunal reached its binding conclusions (regardless of whether the ratiocination might persuade a disengaged third party that the award is substantively correct). As to the substantive issue, awards may be set aside for failure to state reasons where conclusions are not supported by any reasons at all, where the reasoning is incoherent or where the reasons provided are obviously contradictory or frivolous.

532. Given the very specific context of these proceedings, which do not easily analogize to annulment proceedings in the area of investment arbitration, the Tribunal considers it appropriate to examine the standard it has derived from practice in light of the object and purpose of the ABC's constitutive instruments.

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[924] *Ibid.,* at para. 118; *Mr. Patrick Mitchell* v. *Democratic Republic of Congo,* Decision on Annulment, ICSID Case No. ARB/99/7 (2006), para. 19.

[925] *MINE,* ICSID Case ARB 84/4 (1989), para. 5.09.

[926] *Mitchell,* November 1, 2006, Case No. ARB/99/7, para. 21.

[927] *Ibid.*

[928] *Amco Asia Corp,* ICSID Case ARB/81/1, (1986) paras. 41–44; *CAA* & *Vivendi Universal* v. *Republic of Argentina,* Decision on Annulment, 6 ICSID Rep (2002), paras. 61–65.

533. The Parties subjected the ABC Experts to significant time constraints. Both Parties clearly expected the ABC Experts to be able to complete their Report within the allotted short time frame of three months (from the beginning of their fact-finding procedure until the rendering of the Report).[929] This suggests that the Parties could only have expected a short and concise Report that would be limited to elucidating the key reasons on which the conclusions were based. Even under time constraints, however, the Parties were entitled to expect that the Experts' reasons would be clear, coherent, and free from contradiction.[930]

534. Whatever the constraints the ABC Experts may have experienced in terms of methodology or timing, the Parties reasonably expected and were entitled, as a matter of fairness, that each of the Report's essential rulings be supported by sufficient reasons. The degree of reasoning provided in the Report for each of its conclusions had to be commensurate with the importance of those conclusions, as the articulation of reasons is the principal way by which reviewing bodies such as this Tribunal may ascertain reasonableness. A standard that liberally permits derogation from the obligation to state reasons due to external constraints could not have been expected in the absence of truly unforeseen and compelling reasons (or the Parties' explicit consent that the decision not be reasoned, which is not the case here). The Tribunal realizes, of course, that much of the evidence in this case is marked, in varying degrees, by some imprecision and is often circumstantial, and to that extent, the subjective assessment necessary when evaluating such evidence can be taken into account. This does not dilute the necessity of articulating reasons in itself, however.

535. For these reasons, the Tribunal considers that the foregoing standard, quite similar to the one endorsed by both Parties, is appropriate for the present proceedings. The Tribunal must verify whether the ABC Experts' Report contains sufficient explication to allow the reader to understand how the ABC Experts reached each conclusion of their "final and binding decision" (regardless of whether these explanations are persuasive or the decision was right). The ABC Experts will have exceeded their mandate if some or all

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[929] The Abyei Protocol initially provided that the ABC should complete its work "within the first two years of the Interim Period." (Abyei Protocol, Section 5.2). This schedule was subsequently revised by the Parties, who required that the ABC instead present its final report to the Sudanese Presidency "before the end of the Pre-Interim Period." (Abyei Appendix, Section 5) The Parties gave their preliminary presentations on April 12, 2005, and the report was presented to the Sudanese Presidency approximately three months later, on July 14, 2005. The Terms of Reference, drawn up by the Parties, also prescribe this three month schedule, though the actual schedule followed was delayed by approximately fifteen days. (See "Program of Work" in the Terms of Reference).

[930] Indeed, despite similar time constraints, the Parties have obliged this Tribunal to "comprehensively state the reasons upon which the [A]ward is based." Arbitration Agreement, Article 9(2).

of their conclusions are unsupported by any reasons at all, if the reasoning is incoherent, or if the reasons provided are obviously contradictory or frivolous.

### 3. Conclusion

536. Review proceedings such as the present arbitration are unusual, and the setting aside of all or part of a decision must remain an exceptional remedy which can be applied only in instances in which the decision simply cannot reasonably be squared with the Parties' consent. This standard of reasonableness applies to the review of the ABC Experts' interpretation of their mandate. It is against this standard of reasonableness that the Tribunal will examine in the following sections "whether or not the ABC Experts had, on the basis of the agreement of the Parties as per the CPA, exceeded their mandate."

## E. Assessing the reasonableness of the ABC Experts' interpretation of the Formula

537. Having established that *reasonableness* is the proper standard by which the Tribunal should review the ABC Experts' Report, the Tribunal must now determine whether the ABC Experts' interpretation of their mandate can be considered a reasonable one. The Tribunal stresses that its assessment of the ABC Experts' construction of the Formula must remain within the confines of the reasonableness standard, and cannot amount to a *de novo* decision on the correct meaning of the Formula.

538. Mindful of the limits of its Article 2(a) inquiry, it also bears mentioning that the Tribunal has had the benefit of a full discussion of all issues relating to both Article 2(a) (excess of mandate) and Article 2(c) (delimitation), which overlap to some extent when one addresses the issue of interpretation of the Formula. The Tribunal also has received considerable factual and opinion evidence submitted to it over the course of these proceedings, some of which were not presented before the ABC. While the Tribunal does not believe that any new evidence that has come to light is outcome-determinative, it is aware that certain evidence adduced in these proceedings could not have been part of the ABC's reasonableness calculus and hence, would (while not being relevant in an Article 2(a) inquiry) become relevant if the Tribunal were to advance to an Article 2(c) inquiry.

539. In order to ascertain whether the ABC Experts interpreted their mandate ("to define (*i.e.,* delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905") in a reasonable manner, the Tribunal considers it useful to first highlight the Parties' divergent interpretations of the ABC Experts' mandate as they were submitted to the ABC.

540. Secondly, the Tribunal will consider what the ABC Experts themselves understood the mandate to mean. The ABC Experts did not spell out

in a separate section of their Report what they considered to be the meaning of the mandate, but they made specific comments on what they conceived the mandate to be and, of course, drew conclusions from the analysis of the Parties' various propositions and the evidence they submitted. These elements reveal quite clearly what their interpretation of the mandate was.

541. The Tribunal will then move on to assess the reasonableness of the Expert's construction of the mandate, having regard not only to the text, context, object and purpose of the ABC's mandate as it was set out in the 2004 Abyei Protocol, but also to other means of interpretation such as the historical context of the transfer (abundantly discussed by the Parties), the travaux préparatoires (also relied upon by the GoS and the SPLM/A), and the further agreements between the Parties that led to the Arbitration Agreement. The reasonableness of a predominantly territorial interpretation will also be examined in a subsequent section.

542. The Tribunal will present both possible interpretations of the mandate to demonstrate that a reasonableness calculus can lead to more than one reasonable interpretation of the Formula, especially in view of the paucity of available factual evidence, much of which is also imprecise. That imprecision leaves some considerable margin for interpretation, which in turn, has allowed for a diversity of views on the part of the Tribunal as to what the "correct" interpretation of the Formula would be had the Tribunal been empowered to conduct that form of inquiry under Article 2(a) (which it is not). As will be discussed in some detail, Professor Hafner, in particular, is of the opinion that the predominantly territorial interpretation is a more "correct" appraisal. The other members of the Tribunal do not share that view but believe that such substantive assessments are not relevant to an Article 2(a) inquiry. In any event, divergences of opinion in this regard do not change the Tribunal's conclusions on this matter.

543. To begin the analysis, the Tribunal will first revisit the interpretations of the Formula put forward by the Parties in their submissions to the ABC, as well as the ABC Experts' own construction of the mandate in their Report.

## 1. The ABC Experts' interpretation of the Formula

### *(a) The Parties' interpretation of the mandate before the ABC in its proceedings*

544. Counsel for the GoS coined the phrases "territorial" and "tribal" to characterize the GoS's and the SPLM/A's respective interpretations of the mandate in these proceedings, the former referring to the 1905 transfer of a specific area and the latter to the transfer of a people that same year.[931]

[931] *See, e.g.,* GoS Oral Pleadings, April 18, 2009, Transcr. 25/07 *et seq.*

545. This nomenclature is certainly convenient and helpful, but it may obscure the fact that these interpretations are not entirely mutually exclusive. Whatever the interpretation, the application of that interpretation necessarily results in the definition of an Abyei "Area" – a spatially defined territory. A transfer of people has territorial effects; a transfer of territory has an effect on the people who inhabit it. This applies to the Parties' submissions to the ABC, and may explain why their respective interpretations do not fall squarely within the "tribal" and the "territorial" categories and why each party's interpretation drew from both aspects of the transfer. This being said, the GoS's submissions can still be reasonably understood as supporting a predominantly territorial interpretation of the Formula, and the SPLM/A's as placing the emphasis on the Ngok Dinka people.

### *(b) The SPLM/A's interpretation before the ABC*

546. The SPLM/A's submissions to the ABC show quite clearly that the SPLM/A placed great emphasis on the Ngok Dinka people and the territory occupied and used by the nine Ngok Dinka chiefdoms transferred in 1905. The SPLM/A thus stated in its preliminary presentation to the ABC that the "Abyei area as stipulated in the [Abyei Protocol] is the homeland of the Ngok Dinka, comprising the nine sections of Abior, Achaak, Achueng, Alei, Anyiel, Bongo, Diil, Mareng and Manyuar"[932] and "was administered as part of the Bahr el Ghazal province" prior to the 1905 transfer.[933]

547. In the section of its final presentation to the ABC concerning "[t]he Inclusion and the Retention of the Ngok Dinka in Kordofan,"[934] the SPLM/A again expressed its understanding of the transfer as concerning the Ngok Dinka people as a whole, while only "*part* of the Twic Dinka" were transferred at the same time.[935] More specifically, the SPLM/A argued with reference to the March 1905 SIR that "[a]s a result of complaints received from the Dinka, it was decided to transfer the Ngok and part of the Twic Dinka from the admin-

[932] The SPLM/A Preliminary Presentation on the Boundaries of the Abyei Area (First SPLM/A Presentation), April 10, 2005, p. 3, SPLM/A Exhibit-FE 14/1; the SPLM/A Final Presentation on the Boundaries of the Abyei Area, May 14–16, 2005, p. 18, SPLM/A Exhibit-FE 14/13.

[933] The SPLM/A Preliminary Presentation on the Boundaries of the Abyei Area (First SPLM/A Presentation), April 10, 2005, p. 4, SPLM/A Exhibit-FE 14/1. *See also* the SPLM/A Final Presentation on the Boundaries of the Abyei Area, May 14–16, 2005, p. 3 ("[ . . . ] the Ngok Dinka were administratively carved into Kordofan from Bahr el Ghazal in March, 1905, and continued to be part of Kordofan till the present time.") SPLM/A Exhibit-FE 14/13.

[934] The SPLM/A Final Presentation on the Boundaries of the Abyei Area, May 14–16, 2005, p. 6, SPLM/A Exhibit-FE 14/13.

[935] *Ibid.*, at p. 7 (emphasis added).

istration of Bahr el Ghazal to Kordofan, so that they would be placed under the same governor with the Arabs of whose conduct they complained."[936]

548. Referring to the traditional boundaries of the Ngok Dinka, the SPLM/A defined them repeatedly by reference to neighboring tribes, thereby evincing a predominantly tribal reading of the Formula.[937] Having contrasted the Ngok Dinka's traditional boundaries with the provincial boundaries,[938] which "were not surveyed" at the time of the transfer, and underscored the "lack of accuracy" in the location of the "Bahr el Arab" river,[939] the SPLM/A invited the ABC to examine the true location of "the Ngok Dinka people of Abyei," who were part of Bahr el Ghazal before the transfer,[940] and whose presence extended not only south but also north of the river Kir[941] and beyond the river Ngol.[942]

549. In the section of its final presentation entitled "Land use in Abyei Area," the SPLM/A further explained that both the Misseriya and the Ngok Dinka moved and used the land in accordance with the seasons. It also emphasized that "each tribe has its own area of permanent habitation," distinct from grazing land, and that "the ownership is to the permanent dwellers."[943] The SPLM/A concluded on the basis of Dinka oral history and testimony that "Ngok ownership of the land extends up to latitude 10 degree 35 minutes."[944]

### *(c) The GoS's interpretation before the ABC*

550. The review of the GoS's submissions to the ABC reveals that their primary focus was on the territory of the nine Ngok Dinka chiefdoms and the provincial boundary between Kordofan and Bahr el Ghazal in 1905, the Bahr el Arab/Kir, considered as the northern limit of the transferred area.

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[936] *Ibid.*

[937] The SPLM/A Preliminary Presentation on the Boundaries of the Abyei Area (First SPLM/A Presentation), April 10, 2005, p. 5, 7 (Conclusion), SPLM/A Exhibit-FE 14/1. *See also* Transcript of discussion between ABC Members during meeting at La Mada Hotel, Nairobi, Kenya, April 12, 2005, p. 10 (Minister Deng Alor stating that "[s]ince 1905, we have been in Kordofan, but, we have distinct boundaries between us and the Misseriya."); p. 14 (Mr. James Lual stating that "[o]ur mission is actually to demarcate the boundaries between the Dinka Ngok and the Misseriya"); p. 33 (Mr. James Ajing stating that "[ . . . ] we and the Misseriya were neighbours") SPLM/A Exhibit-FE 14/5a; The SPLM/A Final Presentation on the Boundaries of the Abyei Area, May 14–16, 2005, p. 19, SPLM/A Exhibit-FE 14/13.

[938] *See also* The SPLM/A Final Presentation on the Boundaries of the Abyei Area, May 14–16, 2005, pp. 16, 20, SPLM/A Exhibit-FE 14/13.

[939] *Ibid.*, at p. 13.

[940] *Ibid.*, at p. 12.

[941] *Ibid.*, at p. 13.

[942] *See ibid.*, at 15. *See also ibid.*, at p. 14–17 for a list of the authorities relied upon by the SPLM/A to argue that the Ngok Dinka people were located throughout the Bahr, in an area extending to the north of the Ngol.

[943] *Ibid.*, at p. 18.

[944] *Ibid.*, at p. 19.

551. Referring to the mandate, the GoS argues that the ABC has to "[d]efine the nine Ngok Dinka Chiefdoms territory transferred to Kordofan in 1905."[945] The "pivotal part of this definition is that the concerned area was a southern area transferred to the north in 1905; *i.e.*, it is not any area that was in Kordofan before 1905."[946]

552. The GoS insists that it was clear that the Bahr el Arab was the provincial boundary between Kordofan and Bahr el Ghazal[947] and that its "exact nature and location" had been determined "immediately before the transfer."[948] Similarly, "the alteration of boundaries [after the transfer] in 1905 was very, very specific and clear."[949] In fact, according to the GoS, "both the people and the natural boundary were *accurately* defined before the decision to transfer," each being identically bounded in the north by the Bahr el Arab.[950] The GoS submits that the Ngok Dinka settled in areas north of the river Bahr el Arab only after 1905.[951] The GoS concludes that "the territory of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905" is the triangle that now lies to the South of Bahr-el-Arab."[952]

553. The GoS also stresses that the ABC "shall not invent a new parameter other than the yardstick of the year 1905."[953] In the GoS's view, the "ingenuity of the USA Proposal" was to have chosen "the year 1905, as the date where land rights were vested."[954] As a consequence of the ABC Experts' scientifically

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[945] GoS First Presentation to the Abyei Boundaries Commission, April 11, 2005, Slide 52, SPLM/A Exhibit-FE 14/2.

[946] *Ibid.,* at Slide 7.

[947] *See ibid.,* at Slides 12–20.

[948] GoS Final Presentation to the ABC, June 16, 2005, Slide 21, SPLM/A Exhibit-FE 4/18.

[949] Transcript of discussion between ABC Members during meeting at La Mada Hotel, Nairobi, Kenya, April 12, 2005, p. 20, SPLM/A Exhibit-FE 14/5a. *See also* GoS First Presentation to the Abyei Boundaries Commission, April 11, 2005, Slides 33–40, SPLM/A Exhibit-FE 14/2.

[950] GoS Final Presentation to the ABC, June 16, 2005, Slide 18, SPLM/A Exhibit-FE 14/18. *See also ibid.,* at Slide 20 and GoS First Presentation to the Abyei Boundaries Commission, April 11, 2005, Slide 29, SPLM/A Exhibit-FE 14/2.

[951] GoS Additional Presentation Abyei: A History of Coexistence, June 17, 2005, Slide 15, SPLM/A Exhibit-FE 14/17.

[952] The Abyei Boundaries Commission: Basic Documents of the Government of the Sudan, First Presentation, April 11, 2005, last page (IX *Conclusion).*

[953] GoS First Presentation to the Abyei Boundaries Commission, April 11, 2005, Slide 51, SPLM/A Exhibit-FE 14/2. *See also* Notes on the Mandate of the Abyei Boundaries Commission, April 12, 2005, p. 2, SPLM/A Exhibit-FE 14/5.

[954] GoS First Presentation to the Abyei Boundaries Commission, April 11, 2005, Slide 47, SM Annex 77, SPLM/A Exhibit-FE 14/2. *See also* Notes on the Mandate of the Abyei Boundaries Commission, April 12, 2005, p. 1, SPLM/A Exhibit-FE 14/5.

based decision, "[t]he local communities shall know their boundaries as they stood in 1905, *i.e.*, before they moved into each other territories."[955]

### *(d) The Parties' criticism of the other side's interpretation of the mandate presented to the ABC Experts*

554. Each Party maintains that the other side had in fact adopted the interpretation which it thinks is the correct one in the ABC proceedings. The GoS thus argued before this Tribunal that the SPLM/A was focusing on the area of the Ngok Dinka, rather than the Ngok Dinka people, and relied on the SPLM/A's statement in its preliminary presentation that the "[t]he Protocol [ . . . ] defines [the] Abyei area as an area of the nine Ngok Dinka chiefdoms that was transferred to Kordofan in 1905,"[956] insisting that the use of the phrase "that was transferred" evinced a territorial approach.[957] The GoS also points to references to "specific Dinka lands" being shifted to Kordofan and "Dinka areas" being moved administratively.[958]

555. The Tribunal would note that this particular argument is not persuasive. Suffice it to note that, when the agent of the GoS commented on the SPLM/A's preliminary presentation, he was pleased to see that "the Abyei Protocol that was signed defined the Abyei area as the area of the nine Ngok Dinka chiefdoms *that were transferred* to Kordofan in 1905."[959] In the informal context of the ABC proceedings, these statements cannot be taken in isolation to conclude that either party changed its approach to the mandate. In the same way, the SPLM/A's comment that "the reasons for the transfer of the two areas and not the people are explicitly stated"[960] in the March 1905 SIR derives not from a newly adopted "territorial" approach,[961] but from a rather unconvincing attempt to criticize the GoS's position, in contradiction with the SPLM/A's own interpretation of the same document, clearly set forth a few pages earlier in its presentation.[962]

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[955] GoS First Presentation to the Abyei Boundaries Commission, 11 April 2005, Slide 50, SM Annex 77. SPLM/A Exhibit-FE 14/2. *See also* Notes on the Mandate of the Abyei Boundaries Commission, April 12, 2005, p. 1, SPLM/A Exhibit-FE 14/5.

[956] The SPLM/A Preliminary Presentation on the Boundaries of the Abyei Area (First SPLM/A Presentation), April 10, 2005, p. 2, SPLM/A Exhibit-FE 14/1.

[957] GoS Oral Pleadings, April 18, 2009, Transcr. 32/17 *et seq.*

[958] GoS Rejoinder, para. 36 quoting SPLM/A Preliminary Presentation on the Boundaries of the Abyei Area (First SPLM/A Presentation) p. 4, SPLM/A Exhibit-FE 14/1.

[959] Transcript of discussion between ABC Members during meeting at La Mada Hotel, Nairobi, Kenya, April 12, 2005, p. 6, SPLM/A Exhibit-FE 14/5a (emphasis added).

[960] The SPLM/A Final Presentation on the Boundaries of the Abyei Area, May 14–16, 2005, p. 27, SPLM/A Exhibit-FE 14/13. *See also* GoS Rejoinder, para. 37.

[961] *See* GoS Rejoinder, paras. 37–38.

[962] *See supra* para. 547.

556. Equally unpersuasive are the SPLM/A's efforts to show that the GoS's presentations proved that it understood the Formula to focus on the people and not on the area transferred. The fact that the GoS repeatedly referred before the ABC to "[t]he Decision to Transfer the ngok dinka [sic] and twij [sic] to Kordofan,"[963] or to the transfer of "groups," "the Ngok and the Twic"[964] in its Memorial, may well amount to acknowledging that the March 1905 SIR was couched in tribal terms, but does not allow the inference that the GoS's own conception of its interpretation of the mandate was not primarily territorial. It does illustrate, however, that the so-called "territorial" interpretation has implications for the people.

557. To conclude, there is little doubt that the GoS's interpretation was to be understood as focusing on the transfer of a clearly delimited area with an impact on the Ngok Dinka tribe, and the SPLM/A's as centered on the transfer of a tribe with territorial consequences. The GoS's and the SPLM/A's interpretations were therefore not dissimilar to those expounded before this Tribunal.[965]

## 2. The ABC Experts' interpretation of the mandate

558. While acknowledging the strengths of the GoS's construction of the Formula, the ABC Experts ultimately did not consider that territorial considerations alone were sufficiently dispositive in the interpretation of their mandate.[966] Given the lack of any precise administrative boundary, the ABC Experts focused on the tribal dimension of the transfer and relied on the Ngok Dinka's occupation of land to determine what had been transferred in 1905.

### *(a) The provincial boundary was not the determining factor in the Experts' analysis of the Formula*

559. The ABC Experts pointed out that "[a]t first glance, the evidence adduced by the government in support of its interpretation of the 1905

[963] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 216/16 *et seq.* quoting GoS First Presentation to the ABC, Slide 31, SPLM/A Exhibit-FE 14/2, CB-113. *See also* the GoS reference to "The Decision to Transfer the Ngok and the Twij To Kordofan" in GoS first Presentation to the ABC, Slides 31–32, SPLM/A Exhibit-FE 14/2 and GoS Final Presentation to the ABC, Slide 24, SPLM/A Exhibit-FE 14/18.

[964] SPLM/A Counter-Memorial, para. 1549 quoting GoS Memorial, paras. 357, 359. *See also* SPLM/A Rejoinder, para. 805.

[965] *See supra* the summary of Parties' arguments on the interpretation of the Formula before this Tribunal, paras. 223 *et seq.*

[966] ABC Experts' Report, Part I, pp. 17–18, 35–41.

boundary is persuasive"[967] and "strong."[968] However, when the ABC Experts confronted the evidence of "what the local administrative understanding and practice of the day was on the ground,"[969] it discovered in contemporary reports that there was "considerable geographical confusion" about the location of the real Bahr el Arab river in 1905, and more generally "about the Bahr el Arab and Bahr el Ghazal regions for the first two decades of Anglo-Egyptian Condominium rule."[970] The administrative record and its full context reveal that the Ragaba ez Zarga, and not the Bahr el Arab, was treated as the province boundary.[971] In addition, the boundary was not shown on the map after the transfer, which suggests that "the area had not yet been surveyed."[972]

560. The ABC Experts concluded that the GoS position, though "understandable," was "incorrect."[973] Because of its inaccurate and approximate nature,[974] the provincial boundary was not considered by the ABC Experts as having the decisive role that the GoS sought to confer upon it; it was not seen as the decisive factor in delimiting the transferred area.

### *(b) The ABC Experts' emphasis on the tribal dimension of the transfer*

561. The ABC Experts considered, in addition to the evidence supporting the territorial interpretation, other evidence highlighting the tribal dimension of the transfer and its territorial consequences, and adopted an interpretation focusing on land occupation and "land rights of the people constituting the nine Ngok Dinka chiefdoms as at 1905."[975]

562. At the very beginning of their Report, the ABC Experts observed that there existed no document from the year 1905 describing or showing the area of the nine Ngok Dinka chiefdoms transferred to Kordofan at that time:

> No map exists showing the area inhabited by the Ngok Dinka in 1905. Nor is there sufficient documentation produced in that year by Anglo-Egyptian Condominium government authorities that adequately spell out the administrative situation that existed in that area at that time.[976]

563. The ABC Experts therefore had no choice but to "avail themselves of relevant historical material produced both before and after 1905, as well as

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[967] *Ibid.*, at Part I, p. 17.

[968] *Ibid.*, at Part I, p. 36.

[969] *Ibid.*, at Part I, p. 37.

[970] *Ibid.*, at Part I, pp. 18, 37.

[971] *Ibid.*, at Part I, p. 39.

[972] *Ibid.*

[973] *Ibid.*, at Part I, p. 18.

[974] *Ibid.*, at Part II, App. 2, p. 21.

[975] *Ibid.*, at Part II, pp. 21, 22.

[976] *Ibid.*, at Part I, pp. 4.

during that year, to determine as accurately as possible the area of the nine Ngok Dinka chiefdoms as it was in 1905."[977]

564. Having made those remarks regarding their research methods, which manifested their intention to ensure that 1905 was maintained as the year of reference, the ABC Experts offered their analysis of what occurred in 1905 and emphasized that the transfer concerned the Ngok people:

> What occurred in 1905 was that because of Dinka complaints about Humr raids, the British authorities decided to transfer the Ngok and part of the Twich Dinka from the administrative control of Bahr el-Ghazal Province to Kordofan Province. This action put the Ngok and the Humr under the authority of the same governor (a fact cited in both the GOS and SPLM/A presentations).[978]

565. In the course of the proceedings, the ABC Experts paused to "focus again on what our mandate is"[979] and emphasized that:

> The Peace Agreement, that was mentioned, speaks specifically about the nine sections of the Ngok Dinka. *The Peace Agreement refers to the Abyei area that was occupied by the nine sections of the Ngok Dinka.* [ . . . ] When the British came, a decision was made to make this area part of Kordofan. But we are also looking at the area of the nine sections of the Ngok Dinka. [ . . . ] We want to find out where people lived, where they took their cattle, and where they shared grazing and water with other people.[980]

> The area to be defined is described in the protocol as the area of the 9 Ngok Dinka chiefdoms – no one else. *And we are supposed to discover what territory was being used and claimed by those 9 chiefdoms when the administrative decision was made to place them in Kordofan.*[981]

566. These statements, along with the above reference to the March 1905 SIR, clearly confirm that the Formula's focus, in the ABC Experts' view, was more on a transfer of people with territorial implications, rather than on a transfer of an area south of the approximate provincial boundary.

567. The ABC Experts then considered evidence of Ngok presence north of the Bahr el Arab before the transfer, and concluded that the Ngok Dinka occupied not merely the area south of the Bahr el Arab described by the GoS, but also the area that extended from the Kir/Bahr el Arab north to at least the Ngol/Ragaba ez Zarga.[982] The ABC Experts also examined post-1905 evidence and came to the conclusion that it could be used to establish the location of the Ngok Dinka in 1905, since "[t]he administrative record of

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[977] *Ibid.*

[978] *Ibid.,* at Part I, p. 15. *See also ibid.,* p. 21.

[979] *Ibid.,* at Part II, App. 4, p. 129.

[980] *Ibid.,* at Part II, pp. 129–130 (emphasis added).

[981] *Ibid.,* at Part II, pp. 155–156 (emphasis added).

[982] *See ibid.,* at Part I, p. 18, pp. 39–40. *See also ibid.,* at Part II, App. 4, pp. 167–173 and App. 5, pp. 196–203.

the Condominium period and testimony of persons familiar with the area attest to the continuity of Ngok Dinka settlements in, and use of, places north of the Bahr el-Arab between 1905 and 1965."[983] They relied, *inter alia,* on the testimony and writings of Mr. Tibbs and Professor Cunnison, the latter being "definite in stating that the general area in which the Ngok maintained their permanent settlements remained the same over the years."[984] The ABC Experts further referred to Professor Cunnison for the propositions that "the Bahr, or the Bahr al 'Arab" should not be regarded as a single and separate river but as a region encompassing "all river beds between the Regeba ez Zerga and the main river [*i.e.*, the Kir/Bahr el Arab],"[985] and that "much of the Bahr has permanent Dinka settlements [ . . . ]."[986]

568. The ABC Experts then analyzed the evidence in terms of "land rights of the people constituting the nine Ngok Dinka chiefdoms as at 1905,"[987] so that the boundaries between the Ngok and the Misseriya may reflect "the two communities' effective connection to land."[988] The reasons offered to take an approach based on occupation and land rights included the following "sociological and historical facts as well as the terms of the CPA":

- the provincial boundary was not precisely delimited[989] and an uncertain administrative boundary "did not (and could not have) coincided exactly with the boundaries of land use rights of sedentary or pastoral peasant communities whose tenure rights and obligations overlap in the absence of concrete walls separating the communities;"[990]
- The land used by the communities was "always affected by and responded to variable seasonal rain patterns and climatic changes;"[991]
- The Kordofan and Bahr el Ghazal Annual Reports immediately before and after 1905 may draw lines but "hardly ever demarcate actual boundaries in terms of land rights and population dynamics on the ground;"[992]
- The armed raids on the Ngok Dinka, "the official principal reason for the transfer of the 9 Ngok Dinka chiefdoms to Kordofan" (recorded in the March 1905 SIR), "must have greatly destabilized the Ngok Dinka

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[983] *Ibid.,* at Part I, p. 21. *See also ibid.,* pp. 18–19, 35, 41–44. *See also ibid.,* at Part II, App. 5, pp. 200–203.

[984] *Ibid.,* at Part I, p. 19. *See also ibid.* at Part II, App. 4, p. 162.

[985] *Ibid.,* at Part II, App. 5, p. 172.

[986] *Ibid.,* at Part II, App. 4, p. 161, and App. 5, p. 172.

[987] *Ibid.,* at Part II, App. 2, p. 22.

[988] *Ibid.,* at Part II, p. 21.

[989] *Ibid.,* at Part I, p. 39, and Part II, App. 2, p. 21.

[990] *Ibid.,* at Part II, App. 2, p. 22.

[991] *Ibid.*

[992] *Ibid.*

and thus affected the land use patterns of the two communities prior to the announcement of the transfer;"[993]

- Section 1.1.3 of the Abyei Protocol recognizes "'secondary rights' of access and use of land by one community in the territory of another community that enjoys 'dominant rights;'"[994]
- The Notes on the Mandate of the Abyei Boundaries Commission, which record the Government's concern that 1905 was chosen as the year when land rights were vested, "also refers to the issue of co-existing land rights and land use [ . . . ]."[995]

569. Considering that the notion of "land rights" is better adapted to the communities' "multiple forms of occupation and use rights" than the colonial concept of "land ownership,"[996] the ABC Experts stressed the importance of the "sociological fact that by 1905 there existed three main categories of [ . . . ] occupation, land rights and land use."[997] They were the following:

- Dominant occupation that was exclusive;
- Dominant occupation that allowed non-members of the community to acquire seasonal rights;
- Shared secondary occupation, in the so-called no man's land (the goz).[998]

570. On the basis of the evidence before them, the ABC Experts concluded that the territory where the Ngok Dinka had established dominant occupation "fell squarely within the boundaries that were transferred in 1905" and extended to the 10°10'N line.[999] They also divided the zone between 10°10'N and 10°35'N, which they defined as a shared secondary occupation area and placed the northern boundary of the Abyei Area at 10°22'30"N.[1000]

### 3. The Tribunal's appreciation of the reasonableness of the ABC Experts' interpretation

571. The Tribunal must now assess the reasonableness of the ABC Experts' interpretation of their mandate, "which [was] '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 a sub-

[993] *Ibid.*, at Part II, App. 2, p. 23.

[994] *Ibid.*

[995] *Ibid.*

[996] *Ibid.*, at Part II, App. 2, pp. 23–24.

[997] *Ibid.*, at Part II, App. 2, p. 24.

[998] *See ibid.*, at Part II, App. 2, pp. 24–25.

[999] *Ibid.*, at Part II, App. 2, p. 25.

[1000] *Ibid.*

sequent section, the Tribunal will also assess the reasonableness of the primarily territorial interpretation of the mandate.[1001] Again, it should be emphasized that the Tribunal's task at this stage (an Article 2(a) inquiry) is limited to the assessment of the reasonableness of the mandate's interpretation. Its correctness, a matter over which the Tribunal is not of one view, falls outside the Tribunal's Article 2(a) mandate.

572. Both Parties agree, and the Tribunal considers it appropriate, to use the rules of interpretation of the Vienna Convention as part of the general principles referred to in Article 3 of the Arbitration Agreement.[1002] The Tribunal will thus seek to establish the ordinary meaning of the text of the mandate in its context, in particular the Abyei Protocol, and in light of its object and purpose.

573. The Parties also extensively explored the historical context in 1905 in order to shed light on the natural meaning of the mandate. In addition, they relied on the drafting history of the Abyei Protocol to determine what the mandate was intended to mean. For the sake of completeness, the Tribunal will therefore examine the meaning of the mandate in its broader context.

### 4. "Chiefdoms" as the appropriate object of the transfer

574. As a first question, the Tribunal will discuss whether the ABC Experts could reasonably interpret the Formula as relating to the transfer in 1905 of the nine Ngok Dinka chiefdoms (as opposed to a defined area of land).

#### *(a) Textual interpretation of the Formula*

575. In accordance with the Article 31 of the Vienna Convention, the Tribunal must interpret the text of the Formula by initially looking at the ordinary meaning of the terms used. The Tribunal recalls that the Parties have diverging opinions as to the grammatical meaning of the text. While the GoS acknowledges that the word "transferred" is equally capable of qualifying the noun "area" as the phrase "nine Ngok Dinka chiefdoms",[1003] the SPLM/A insists that "transferred to Kordofan" relates to the noun "chiefdoms."[1004] The Tribunal is of the opinion that both interpretations are tenable.

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[1001] *See infra* paras. 665 *et seq.*

[1002] *See* GoS Oral Pleadings, April 18, 2009, Transcr. 24/17 *et seq.;* SPLM/A Oral Pleadings, April 20, 2009, Transcr. 80/17 *et seq.*

[1003] GoS Rejoinder, para. 32. *See also supra* the summary of the GoS's arguments, para. 225.

[1004] SPLM/A Memorial, para. 1107. *See also supra* the summary of the SPLM/A's arguments, paras. 232–233.

576. The Tribunal notes that the ICJ was faced with a similar situation in the *Anglo-Iranian Oil Co. Case* (*United Kingdom* v. *Iran*). In that case, the Court had to interpret the text of a Declaration made by the Imperial Government of Iran regarding the jurisdiction of the Court in accordance with Article 36(2) of its Statute. The relevant text, in the original French version, read as follows:

> Le Gouvemement imperial de Perse déclare reconnaître comme obligatoire, de plein droit et sans convention spéciale, vis-à-vis de tout autre État acceptant la même obligation, c'est-à-dire sous condition de réciprocité, la juridiction de la Cour permanente de Justice internationale, conformément à l'article 36, paragraphe 2 du Statut de la Cour, sur tous les différends qui s'élèveraient après la ratification de la présente déclaration, au sujet de situations ou de faits ayant directement ou indirectement trait à l'application des traités ou conventions acceptés par la Perse et postérieurs à la ratification de cette déclaration. . . . [1005]

577. Both Parties agreed that the Declaration applied to conventions or treaties accepted by Iran. However, the Parties had opposing views as to whether, based on the grammatical interpretation of the Declaration, the jurisdiction of the Court extended to treaties or conventions accepted by Iran only after the ratification of the Declaration or accepted by Iran at any time. While the Government of Iran claimed that the words "et postérieurs à la ratification de cette déclaration" ("and subsequent to the ratification of this declaration") applied to the immediately preceding words "traités ou conventions acceptés par la Perse" ("treaties or conventions accepted by Persia"), the Government of the United Kingdom argued that the expression "et postérieurs à la ratification de cette déclaration" rather referred to the words "au sujet de situations ou de faits" ("with regard to situations or facts").[1006]

578. The Court observed:

> If the Declaration is considered from a purely grammatical point of view, both contentions might be regarded as compatible with the text. The words "et postérieurs à la ratification de cette déclaration" may, strictly speaking, be considered as referring either to the expression "traités ou conventions acceptés par la Perse," or to the expression "au sujet de situations ou de faits."

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[1005] *Anglo-Iranian Oil Co. Case* (*United Kingdom* v. *Iran)* (Preliminary Objections) Judgment of July 22, 1952, *I.C.J. Reports 1952*, p. 93, 103. The translated English version reads: "The Imperial Government of Persia recognizes as compulsory *ipso facto* and without special agreement in relation to any other State accepting the same obligation, that is to say, on condition of reciprocity, the jurisdiction of the Permanent Court of International Justice, in accordance with Article 36, paragraph 2, of the Statute of the Court, in any dispute arising after the ratification of the present declaration with regard to situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Persia and subsequent to the ratification of this declaration . . ."

[1006] *Ibid.,* at 104.

> *But the Court cannot base itself on a purely grammatical interpretation of the text.* It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text, having due regard to the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court.[1007] (emphasis added)

579. After a careful analysis of the natural reading of the text and the circumstances in which it was adopted by the Government of Iran, including the reasons behind Iran's adoption of a rather restrictive formula, the Court accepted the interpretation proposed by the Government of Iran as reflective of its manifest intention to limit the jurisdiction of the Court to treaties or conventions accepted by Iran after the ratification of the Declaration.[1008]

580. With respect to the Formula establishing the ABC Experts' mandate, the Tribunal notes that a purely grammatical approach to the interpretation of these terms, using for example the rule of proximity or simple euphony, does not yield any determinative conclusion as to their ordinary meaning. There is no conclusive method for determining, by recourse to the text alone, whether "transferred" relates to "area," suggesting a territorial dimension, or whether it relates to "the nine Ngok Dinka chiefdoms," suggesting a more tribal dimension. Both propositions are equally tenable.

581. The Tribunal notes that the Arabic version of the Formula as found in Section 1.1.2 of the Abyei Protocol[1009] is identical to the English text and does not provide further support for either of the two grammatical interpretations.

582. Given the possible interpretations of the Formula, and the textual support for each of them, the Tribunal concludes that the ABC Experts' own construction was not unreasonable and accordingly did not constitute an excess of mandate.

### *(b) The object and purpose of the formula within the meaning of Article 31(1) of the Vienna Convention*

583. In accordance with Article 31 of the Vienna Convention, the Formula must also be interpreted in the context of the relevant instruments in which it was set out and in the light of their object and purposes.

584. As a preliminary matter, the Tribunal notes that the GoS has taken a somewhat restrictive approach to the interpretation of the Formula. The GoS insists that the Tribunal should confine itself to examining the historical event that occurred in 1905 – the administrative transfer of an area – and the clear intention of the Anglo-Egyptian officials at the time, as evidenced by the con-

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[1007] *Ibid.*

[1008] *Ibid.,* at 104–107.

[1009] The Arabic version of the Comprehensive Peace Agreement, of which the Protocol forms an integral part, can be accessed at: http://www.unmis.org/english/documents/cpa-ar.pdf.

temporaneous transfer documents.[1010] Any detailed discussion of the provisions of the Abyei Protocol, including those relating to the Abyei Referendum, is dismissed on the ground that "[ . . . ] the mandate of the [ABC Experts], as of the Tribunal, is not to consider areas according to their demographics, but rather to delimit an area that was transferred from the Bahr el Ghazal to Kordofan in 1905."[1011] The GoS goes on to argue that:

> [ . . . ] the very issue that the Parties could not agree in the Abyei Protocol – the limits of the disputed area – should [not] be influenced by other factors, not mentioned in the relevant provisions of the Protocol and having nothing to do with the way in which the resolution of the definition of the "Abyei Area" was agreed to be determined. If the intention of the Parties had been to include all Ngok Dinka, regardless of where they live, in the "Abyei Area" and thus subject to the referendum, the Parties would have said so and drafted the Formula accordingly. They did not.[1012]

585. By contrast, the SPLM/A argues that instead of focusing on the purpose of the transfer in 1905, one should examine the Parties' purposes in 2004, when they concluded the Abyei Protocol.[1013] The SPLM/A emphasizes, in particular, that:

> [ . . . ] the central purpose of the definition of the Abyei Area was to specify that region whose residents would be entitled to participate in the Abyei Referendum [ . . . ] on the question whether or not they would be included in the South or the North, simultaneous to the main Southern Referendum.[1014]

586. The Tribunal agrees with the GoS that the Formula invited the ABC Experts to determine what was transferred in 1905, and not at any other date. It also agrees that the 1905 transfer documents and "the object and purpose of the transfer"[1015] are relevant to the interpretation of the Formula and these will be examined in due course.[1016] However, the Tribunal cannot ignore the fact that the ABC Experts' mandate was agreed upon by the Parties and enshrined in the Abyei Protocol in 2004, and subsequently reiterated in the Abyei Appendix, the Terms of Reference and the Rules of Procedure, as recalled in Article 2(a) of the Arbitration Agreement.[1017] The CPA, which incorporates the Abyei Protocol,[1018] and the Interim National Constitution,

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[1010] *See* GoS Rejoinder, paras. 10–19; paras. 41–59.

[1011] GoS Counter-Memorial, para. 110. *See also* GoS Rejoinder, para. 57.

[1012] GoS Rejoinder, para. 58. *See also supra* the summary of the GoS's arguments, paras. 249 *et seq.*

[1013] *See* SPLM/A Rejoinder, para. 849.

[1014] SPLM/A Memorial, para. 1124. *See also supra* the summary of the SPLM/A's arguments, paras. 255 *et seq.*

[1015] GoS Counter-Memorial, para. 115.

[1016] *See infra* paras. 616 *et seq.*

[1017] *See* Abyei Protocol, Section 1.1.2 and Section 5.1; Abyei Appendix, Section 1; Terms of Reference, Section 1.1; and Rules of Procedure, Section 1.

[1018] *See* CPA, Chapter IV.

which echoes its main provisions,[1019] should also be taken into account. This context also informs the meaning of the Formula. The Abyei Protocol, and more generally the CPA, whose aim is to achieve durable peace in Sudan, require the Tribunal to interpret the mandate in light of the object and purpose of these contextual instruments.

587. The ABC's task of defining and demarcating the Abyei Area, as provided for in the Abyei Protocol,[1020] was an important step towards achieving the resolution of the conflict and, ultimately, the goals of the broader peace process contemplated in the CPA. Indeed, the Abyei Protocol – the agreement where the Formula first appeared – is one of the six fundamental texts recorded and reconfirmed in the CPA.[1021] The Chapeau of the CPA states that the Parties, the GoS and the SPLM/A, "MINDFUL of the urgent need to bring peace and security to the people of the Sudan [ . . . ]," reached agreement on these texts. . . .

> [ . . . ] IN PURSUANCE OF [their] commitment [ . . . ] to a negotiated settlement on the basis of a democratic system of governance which, on the one hand, recognizes the right of the people of Southern Sudan to self-determination and seeks to make unity attractive during the Interim Period, while at the same time is founded on the values of justice, democracy, good governance, respect for fundamental rights and freedoms of the individual, mutual understanding and tolerance of diversity within the realities of the Sudan.[1022]

588. The Interim National Constitution confirms the duty of the Government of National Unity to implement

> [ . . . ] the Comprehensive Peace Agreement in a manner that makes the unity of the Sudan an attractive option especially to the people of Southern Sudan, and pave the way for the exercise of the right of self-determination according to Part Sixteen of this Constitution.[1023]

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[1019] *See* Interim National Constitution, Article 183.

[1020] *See* in particular Section 1.1.2 and Section 5.1 of the Abyei Protocol. The ABC was one of the four "priority joint task teams" that the Parties agreed to establish for the implementation of the CPA (*See* Chapeau of the CPA, p. (xiii), para. (6)).

[1021] *See* Chapeau of the CPA, p. (xi). The Abyei Protocol is the fourth Chapter of the CPA. The five other chapters include the Machakos Protocol dated July 20, 2002 (Chapter I); the Agreement on Security Arrangements dated September 25, 2003 (Chapter VI of the CPA); the Agreement on Wealth Sharing dated January 7, 2004 (Chapter III of the CPA); the Protocol on Power Sharing dated May 26, 2004 (Chapter II); the Protocol on the Resolution of the Conflict In Southern Kordofan and Blue Nile States dated May 26, 2004 (Chapter V).

[1022] *See* Chapeau of the CPA, p. (xi).

[1023] *See* Interim National Constitution, Article 82(c). The Preamble of the Interim National Constitution also recalls, *inter alia,* that the people of Sudan are committed to the CPA and "to establish a decentralized multi-party democratic system of governance in which power shall be peacefully transferred and to uphold values of justice, equality, human dignity and equal rights and duties of men and women."

589. In furtherance of these objectives and commitments, the Abyei Protocol lays down, at the very beginning of its first section, the following three general principles of agreement on Abyei:

1.1.1 Abyei is a bridge between the north and the south, linking the people of Sudan;

1.1.2 The territory is defined as the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905;

1.1.3 The Misseriya and other nomadic peoples retain their traditional rights to graze cattle and move across the territory of Abyei.

590. Thus, the Abyei Protocol first specifies the nature and function that the Parties ascribe to the Abyei Area (serving as a bridge to link the people of Sudan and fostering reconciliation), and only then provides the definition of the Abyei Area itself ("the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905"). The text finally recognizes the "traditional rights" of the Misseriya and other nomadic tribes to graze cattle and move across the Abyei Area.

591. The Abyei Protocol, in combination with the Abyei Appendix,[1024] divides the peaceful resolution process of the Abyei conflict into three phases. The first phase culminates in the presentation of the ABC Experts' Report to the Presidency, the Commission being tasked "to define and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905, referred to herein as Abyei Area."[1025] Originally, the ABC was to complete its task within two years of the "Interim Period,"[1026] which commenced on July 9, 2005.[1027] However, the Parties agreed to move the deadline to an earlier date, the end of the "Pre-Interim Period,"[1028] a six-month phase directly preceding the six-year long Interim Period.[1029] The tightening of the original timetable confirms both the urgency and the importance of delimiting the Abyei Area for the purposes of the peace process.

592. The second phase starts when the Presidency establishes "the administration of Abyei simultaneously with the Government of South Sudan

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[1024] The Abyei Appendix is also referred to as the Abyei Annex (*see* ABC Experts' Report, Part II, App. 1, p. 12). Section 1 of the Abyei Appendix reiterates the mandate of the ABC Experts.

[1025] *See* Abyei Protocol, Section 5.1.

[1026] *See* Abyei Protocol, Section 5.2.

[1027] *See* Interim National Constitution, Article 226(4).

[1028] *See* Abyei Appendix, Section 5.

[1029] The Machakos Protocol (Chapter 1 of the CPA) distinguishes two periods in the transition process: a Pre-Interim Period during which "[t]he institutions and mechanisms provided for in the Peace Agreement shall be established" (Machakos Protocol, Part B, Article 2.1) and an Interim Period during which "[t]he institutions and mechanisms established during the Pre-Interim Period shall be operating in accordance with the arrangements and principles set out in the Peace Agreement." (Machakos Protocol, Part B, Article 2.3)

and the Governments of Southern Kordofan and Blue Nile States by the beginning of the Interim Period."[1030] During that period, the residents of the Abyei Area will be citizens of both Western Kordofan and Bahr el Ghazal[1031] and elect a local Executive Council in charge of administering the Area.[1032] Abyei's special administrative status also provides, *inter alia,* that net oil revenues from the Area will be shared between six different groups and entities, in accordance with a specific formula.[1033]

593. The third phase corresponds to the "End of Interim Period."[1034] At this stage, the residents of the Abyei Area will be offered the opportunity to vote in a referendum to decide whether "Abyei retains its special administrative status in the north" or becomes part of Bahr el Ghazal.[1035] The "residents of Abyei Area" are defined, in Section 6.1. of the Abyei Protocol, as "the Members of Ngok Dinka community and other Sudanese residing in the area." Section 6.1 significantly singles out "the members of Ngok Dinka community," and merely makes a general reference to "other Sudanese," without mentioning any other specific community, such as the Misseriya (referred to in other provisions of the Abyei Protocol).[1036]

594. The Abyei Referendum will be conducted simultaneously with the referendum of Southern Sudan.[1037] At the end of the Interim Period, the people of South Sudan will be asked either "to confirm the unity of the Sudan by voting to adopt the system of government established under the Peace Agreement" or "to vote for secession."[1038] While the residents of the Abyei Area will be called upon to cast their separate ballot irrespective of the results of the Southern Referendum,[1039] these results will be highly relevant to the consequences of the choice made by the residents of the Abyei Area. Indeed, they may find themselves north or south of an international boundary if South Sudan secedes. The stakes are therefore considerable and should be born in mind when examining the meaning of the Formula laid down in Section 1.1.2. of the Abyei Protocol.

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[1030] Abyei Appendix, Section 6.

[1031] *See* Abyei Protocol, Section 1.2.1. *See also* Interim National Constitution, Article 183(2).

[1032] *See* Abyei Protocol, Section 1.2.2. *See also ibid.,* Section 2.2.

[1033] *See* Abyei Protocol, Section 1.2.3. *See also ibid.,* Section 3.1.

[1034] Abyei Protocol, Section 1.3.

[1035] Abyei Protocol, Section 1.3. *See also ibid.,* Section 8.2; Interim National Constitution, Article 183(3).

[1036] The Abyei Protocol does not establish the criteria of residence. These criteria will be determined by the Abyei Referendum Commission. (*See* Abyei Protocol, Section 6.1)

[1037] Abyei Protocol, Section 1.3. and Section 8.1.

[1038] Machakos Protocol (Chapter 1 of the CPA), Part B, Article 2.5. *See also* Interim National Constitution, Part Sixteen.

[1039] Abyei Protocol, Section 1.3. and Section 8.1.

595. According to a predominantly territorial approach, it would be acceptable and within the logic of this line of interpretation to define the area regardless of the actual proportion of the people of the nine Ngok Dinka sections located in that area, the 1905 provincial boundary (assuming that it could be precisely identified) being the determining criterion. The people would follow the territory only in so far as they reside in that territory. While such a territorial interpretation is entirely plausible as a textual matter, its rigid application could result in splitting the Ngok Dinka community depending on the outcome of the envisaged referendum. A predominantly territorial approach could thus lead to a definition of the Abyei Area that potentially risks defeating the main purpose of the referendum, to empower "[t]he Members of the Ngok Dinka community and other Sudanese residing in the area"[1040] to choose whether the Abyei Area should retain its special administrative status in the north or be part of Bahr el Ghazal in the south.[1041]

596. In light of the structure and purpose of the Abyei Protocol's key provisions, it was not unreasonable to interpret the Formula in a predominantly tribal manner, that interpretation being more likely to encompass the whole of the Ngok Dinka people. The Tribunal recognizes and holds that the object and purpose of the CPA can reasonably be taken to counsel in favor of a tribal perspective.[1042]

### *(c) The context of the Formula*

597. In addition, other provisions of the relevant instruments, which are pertinent to the interpretation of the Formula as context pursuant to Article 31(1) of the Vienna Convention, equally confirm that the predominantly tribal interpretation proposed by the ABC Experts is not unreasonable.

598. Most importantly, the fact that the Parties agreed that the "ABC shall listen to representatives of the people of Abyei Area and the neighbours"[1043] and "should have free access to the members of the public [ . . . ] at the location to be visited"[1044] can reasonably be interpreted as an invitation to explore fully the tribal dimension of the Formula, rather than to discern where the uncertain provincial boundary was located in 1905. As the ABC Experts themselves put it, they conceived these interviews with the people of

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[1040] Abyei Protocol, Section 6.1 (a).

[1041] For an examination of the reasonableness of the predominantly territorial interpretation, *see infra* at paras. 665 to 672.

[1042] The Tribunal would note that taking this risk into account does not substitute present-day demographical considerations to the actual text of the mandate. Rather, it acknowledges the connection between the purpose of the Abyei Protocol in 2004 and the Formula's reference to the 1905 transfer.

[1043] Abyei Appendix, Section 3. *See also* Terms of Reference, Section 3.2.

[1044] Rules of Procedure, Section 7. *See also ibid.,* Section 8.

the region as an instrument "to find out where people lived, where they took their cattle, and where they shared grazing and water with other people."[1045]

599. Thus, having examined the Formula in its context and in light of the relevant instruments' purposes, the Tribunal concludes that the ABC Experts' interpretation of the Formula was reasonable.

### *(d) The drafting history of the Abyei Protocol*

600. That the ABC's interpretation of the Formula was a reasonable one is further confirmed by the drafting history of the Abyei Protocol.

601. It is clear from the record and the Parties' submissions that when the peace negotiations resumed in the late 1990s[1046] and developed in the following years, the GoS's and the SPLM/A's views as to how the Abyei Area should be defined differed sharply. While the GoS insisted that "Abyei, homeland of the Ngok Dinka, Misseria and other people is not part of the South,"[1047] the SPLM/A requested a referendum "for the people of Abyei" to choose "whether to be part of Southern Sudan or remain in the North," claiming that "[t]he Dinka Ngok people and the territory of Abyei shall therefore be administered as part of Southern Sudan"[1048] which had been granted the right of self-determination.

602. Significantly, however, the Parties do agree on the origin of the mandate. Both the GoS and the SPLM/A refer to Dr. Johnson's presentation to the negotiating Parties at a symposium in January 2003 (the "Johnson Presentation").[1049] This presentation elaborated, among other things, on the key passage of the March 1905 SIR, which, according to both Parties, led to

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[1045] ABC Experts' Report, Part II, App. 4, p. 130.

[1046] *See* GoS Memorial, para. 43; SPLM/A Memorial, para. 451. For a summary of the Parties' arguments on the drafting history of the Abyei Protocol, *see supra* paras. 261 *et seq.*

[1047] *See* GoS Memorial, para. 49 quoting Second Meeting of the Political Committee between Government of Sudan and the Sudanese People's Liberation Movement/Army, Nairobi, 26th February, 2000, p. 7.

[1048] *See* GoS Memorial, para. 48 quoting First Meeting of the Political Committee between Government of Sudan and the Sudanese People's Liberation Movement/Army, Nairobi, 15th-20th January, 2000, p. 4. *See also,* for example, the Abyei Peace Committee's submission that "Ngok-Dinka of Abyei area are indisputably part of the Dinka people of southern Sudan and present a natural extension of their shared land, tradition and culture. (APC Paper, The Popular Demand of Ngok-Dinka on Abyei Question, dated October 10, 2002, at p. 4, SPLM/A Exhibit-FE 9/18.)

[1049] *See* GoS Memorial, para. 51; SPLM/A Memorial, para. 461 referring to D. Johnson, Conflict Areas: Abyei – A summary and elaboration of points raised in the presentation and discussion on Abyei, January 18, 2003, at the KCB Management Center, Karen, Nairobi, pp. 1–12, SPLM/A Exhibit-FE 10/13.

the formulation of the mandate.[1050] Although the Parties did not agree immediately on a formula for the Abyei Area, it is very useful to dwell on the actual content of the Johnson Presentation to understand in what context the Parties were introduced to the March 1905 SIR.

603. The Tribunal notes that Dr. Johnson spoke of the transfer in clearly tribal terms. Having stated that "[t]he Ngok and the whole of the Bahr al-Arab system were initially administered under Bahr al-Ghazal," Dr. Johnson explains that:

> In 1905 it was decided to transfer both the Ngok and the Twic to the jurisdiction of Kordofan, the better to deal with their complaints against the Humr.[1051]

604. Dr. Johnson quotes the key passage from the 1905 March SIR and further points out that:

> Altogether three different Dinka groups have been administered by Kordofan at different times: the Ngok, the Twic and the Ruweng.
>
> [ . . . ] The Ngok remained an anomaly as the only Dinka group outside the boundaries of the southern provinces.[1052]

605. It is significant that Dr. Johnson also told the Parties where the Ngok Dinka and the Humr were located and what had been their traditional dividing line. The tribes were described as occupying and using the region's territory as follows:

> The northern part of the region, Dar Humr is composed of four main zones: Babanusa in the north, which is the rainy season pasturage of the Humr; the Muglad is the main cultivation area; the Qoz, or central sandy area, is crossed as a means of getting from one set of pastures to another; and clay plains of the Bahr, or river area, which is used for dry season grazing.
>
> It is the Bahr which is also the area of permanent habitation for the Ngok. It is composed of a network of khors, streams and rivers between the Bahr al-Arab, or Kiir, and the Raqaba al-Zarqa, or Ngol. Along the banks and between these streams are numerous sandy ridges on which permanent villages and cultivations are sited. The Ngok make use of dry season pastures further south, between the Kiir and the Lol.[1053]

606. Dr. Johnson further indicated that the "dividing line" between Humr and Ngok territory "has usually been taken to be the line where the sand

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[1050] *See* GoS Memorial, para. 359; SPLM/A Counter-Memorial, para. 1547. The March 1905 SIR and its relevant extract have already been discussed in the previous section and will not be repeated here. Suffice it to recall that the terms of this document could reasonably be interpreted in its historical context as referring to the transfer of tribes, rather than a fixed territory.

[1051] Johnson Presentation, p. 9, SPLM/A Exhibit-FE 10/13.

[1052] *Ibid.*, p. 10.

[1053] *Ibid.*, p. 7.

of the Qoz meets the clay plains," this division of territory being "of such long duration that it is even reflected in the breeds of cattle" of these two people.[1054]

607. According to Vice-President Taha, it is after this presentation – which unambiguously explains that the Ngok people, who occupied the Bahr and were administered by Bahr el Ghazal, were transferred to Kordofan in 1905 – that the SPLM/A began to refer to 1905.[1055] However, after a further round of talks in October 2003, the Parties were still unable to agree on key issues. They still disagreed on "[t]he definition of the [Abyei] area, the nature of its social complex and its administrative history" and "[w]hether the area shall remain in Western Kordofan or be annexed to Bahr-el-Ghazal."[1056] The question as to "[w]hether to guarantee full rights for all the citizens or to guarantee *only* grazing rights for *non-indigenous* pastoral communities" remained a "grey" area.[1057]

608. Both Parties agree that US Special Envoy Senator Danforth broke the deadlock with the presentation on March 19, 2004 of "Principles of Agreement on Abyei"[1058] (the "Danforth Proposal"). Section 1 of the Abyei Protocol reproduces word for word the Danforth Proposal.

609. Before the Principles of Agreement on Abyei were finally adopted, four additional proposals were exchanged by the Parties in March and May 2004. They contained the following definitions for the Abyei Area:

> [ . . . ] Abyei Area shall be understood as the land owned and inhabited by the nine sections of the Ngok Dinka (Abyor, Achaak, Achueng, Alei, Anyiel, Bongo, Dill, Mannyuar, Mareng) and which was administratively carved out of Bahr el Ghazal Province and annexed to Kordofan Province in 1905 for security and administrative reasons. It is the Area referred to in the 1972 Addis Ababa Agreement and which was administered from 1974 to 1978 under the President's Office during the currency of the said Agreement.[1059]
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> For the purposes of this agreement Abyei Area is defined as the land owned and inhabited by the nine Ngok Dinka sections of Abyor, Alei, Achaak, Anyiel, Achueng, Bongo, Diil, Mannyuar, Mareng. It is the Area referred to in the 1972 Addis Ababa Agreement and which was administered from 1974 to 1978 under the President's Office.[1060]

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[1054] *Ibid.,* p. 7.

[1055] *See* Witness Statement of Vice-President Taha, para. 10 (SCM WS 2).

[1056] *See* The Three Conflict Areas: Points of Agreement and Disagreement, dated 20 October 2003, p. 2, SPLM/A Exhibit-FE 10/39.

[1057] *See ibid.,* p. 2 (emphasis in original).

[1058] *See* GoS Memorial, para. 53; Witness Statement of Vice-President Taha, paras. 16–17 (SCM WS 2); SPLM/A Memorial, paras. 479–480, 1175–1176.

[1059] Draft Agreement Between the Government of the Sudan (GoS) and the Sudan People's Liberation Movement on The Outstanding Issues of the Three Conflict Areas and Power Sharing, dated March 21, 2004, p. 3, SPLM/A Exhibit-FE 12/7a.

[1060] Draft 1 Agreement between The Government of Sudan (GoS) and the Sudan People's Liberation Movement/Army on The Resolution of Abyei Conflict, Based on the

> For the purposes of this agreement Abyei Area is defined as the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905. It is the Area referred to in the 1972 Addis Ababa Agreement and which was administered from 1974 to 1978 under the President's Office.[1061]

610. Vice-President Taha observes that both before and after the Danforth Proposal was submitted, the SPLM/A referred to later dates in its own draft proposals and suggests that the SPLM/A was uncomfortable with the reference to the year 1905 and faced with a dilemma:

> If [the SPLM/A] were to accept the boundary of the annexed area as in 1905, they knew that it would exclude the area in Kordofan into which the Ngok Dinka had expanded after the 1905 transfer. Conversely, they were also finding it difficult to ignore the 1905 transfer and insist on the whole territory covered by the Ngok Dinka up to 1965, the year which witnessed the maximum expansion of the Ngok, and later years, if they want to claim to an exemption from the 1.1.1956 north/south boundary rule in the new context of self-determination.[1062]

611. The declarations of Minister Deng and General Sumbeiywo point to a different conclusion. Minister Deng indeed stated that:

> [w]e understood [the definition of Abyei in Article I (b) of the Danforth Proposal] to define Abyei as encompassing all of the land and people over which the Paramount Chief Arop Biong and then Kuol Arop exercised their tribal authority and jurisdiction, no matter where his people and his lands were located.[1063]

612. General Sumbeiywo confirms Minister Deng's understanding of Article I (b) in the Danforth Proposal:

> 1905 was selected because that was when the historical record indicated and the parties understood that the nine Ngok chiefdoms and the entirety of the Ngok people had been transferred to Kordofan.[1064]

613. In addition, this understanding of the Formula is very much in line with the Johnson Presentation, the content of which does not remotely suggest that the reference to the 1905 transfer would be detrimental to the Ngok Dinka.

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USA Principles of Agreement on Abyei dated March 2004, p. 3, SPLM/A Exhibit-FE 12/8. The same definition was included in Draft Agreement Between The Government of Sudan (GoS) and The Sudan People's Liberation Movement/Army on the Resolution of Abyei Conflict, Based on the USA Principles of Agreement on Abyei, dated May 2004, p. 3, SPLM/A Exhibit-FE 12/9.

[1061] Draft Agreement Between The Government of Sudan (GoS) and The Sudan People's Liberation Movement/Army on Abyei Area, p. 2, SPLM/A Exhibit-FE 12/10.

[1062] Witness Statement of Vice-President Taha, para. 13 (SCM WS 2).

[1063] Witness Statement of Minister Deng Alor Kuol, para. 57 (SPLM/A Memorial, Witness Statements, Tab 1).

[1064] Witness Statement of Lt. Gen. Sumbeiywo, para. 53 (SPLM/A Memorial, Witness Statements, Tab 4).

614. It appears that the reason for repeatedly mentioning the area "referred to in the 1972 Addis Ababa Agreement and which was administered from 1974 to 1978 under the President's Office" derives from different concerns than those advanced by Vice-President Taha. As he himself rightly pointed out, "the Addis Ababa Agreement did not designate Abyei or any other area outside the three southern provinces by name."[1065] Nor did the Agreement "determine any boundary for Abyei."[1066] The inclusion of a reference to the Addis Ababa Agreement did not have any practical significance for the delimitation of an area. However, it did have a symbolic meaning. Not only was it an undefined reference to the Ngok Dinka people and their strong cultural ties with the "Southern complex," but it also recalls 1972's missed opportunity of a referendum that never took place. The preambles of SPLM/A's four draft proposals and the Johnson Presentation itself corroborate this analysis.[1067]

615. There is no indication in the record that these draft proposals, or indeed any other draft agreements on Abyei, were submitted to the ABC Experts. The ABC Experts' Report merely states that "[d]uring the negotiations, there was a disagreement between the [GoS] side and the [SPLM/A] side, on what was meant by the Abyei area."[1068] In any event, the drafting history of the Abyei Protocol does not show that the SPLM/A was dissatisfied with the Danforth Proposal as it was drafted. The SPLM/A was the first to suggest the reference to 1905 on the basis of the Johnson Presentation and eventually did accept the Danforth Formula. What the drafting history reveals, rather, is that despite Dr. Johnson's description of a tribal transfer, each side, including the GoS, seemed to be convinced that it knew the true meaning of the Formula and that it was in line with their views and interests. This does not alter, and in fact confirms, the Tribunal's conclusion that the ABC Experts' own interpretation of the Formula was reasonable. The analysis of the historical context of the 1905 transfer itself, to which the Tribunal now turns, sustains this conclusion.

## 5. The predominantly tribal interpretation of the formula is reasonable in light of the historic facts of 1905

616. This Tribunal agrees with the Parties that the historical context in which the 1905 transfer took place,[1069] and the objective of the Condominium

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[1065] Witness Statement of Vice-President Taha, para. 11 (SCM WS 2).

[1066] *Ibid.*

[1067] *See* Johnson Presentation, pp. 5–6, SPLM/A Exhibit-FE 10/13.

[1068] ABC Experts' Report, Part II, App. 4, p. 129.

[1069] In accordance with Article 2(a) of the Arbitration Agreement, the review of the historical context of the 1905 transfer is carried out at this stage in the analysis for the sole purpose of assessing the reasonableness of the ABC Experts' interpretation.

officials at the time, shed light on the interpretation of the formula.[1070] It is appropriate at this juncture to recall the key passage of the March 1905 SIR, relied upon by the ABC Experts and the Parties (both before the ABC and this Tribunal), which describes the transfer:

> [i]t has been decided that Sultan Rob, whose country is on the Kir river, and Sheikh Rijan of Toj, mentioned in the last Intelligence Report, are to belong to Kordofan Province. These people have, on certain occasions, complained of raids made on them by southern Kordofan Arabs, and it has therefore been considered advisable to place them under the same Governor as the Arabs of whose conduct they complain.

617. As stated above, the ABC Experts interpreted the above text as referring to a transfer of administrative control over a people from one province to another. Several important factors, in particular the confusion surrounding the location and course of the Bahr el Arab and the uncertainty of the provincial boundary, the lack of effective administration and governmental knowledge regarding the extent of territory occupied and used by the nine Ngok Dinka Chiefdoms, as well as the stated object and purpose of the 1905 transfer, converge to confirm that it was reasonable for the ABC Experts to adopt this interpretation.

### *(a) The uncertainty of the provincial boundary*

618. As indicated earlier, the GoS had argued before the Commission that the northern limit of the area transferred was the Kordofan – Bahr el Ghazal provincial boundary which ran along the Bahr el Arab.[1071] The examination of the evidence led the ABC Experts to find that there was confusion as to the identity and location of the Bahr el Arab, a fact which both Parties recalled before this Tribunal (although they disagreed as to the actual extent of the confusion). The ABC Experts thus observed that Wilkinson and Percival mistook the Ragaba ez Zarga for the Bahr el Arab, the latter being distinguished from the Kir.[1072] They did note that "Lt. R.C. Bayldon, R.N. first correctly identified the Kir as the Bahr el-Arab in his survey in March 1905."[1073] However, "local administrators continued to confuse the two waterways" after 1905 and "it was not until 1908 that they consistently described the Ragaba ez Zarga/Ngol as the Bahr el Homr in their official reports."[1074] As pointed out to this Tribunal, Governor-General Wingate himself recognized in 1905 that

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[1070] For a summary of the arguments of the Parties on this point, *see supra* paras. 223 *et seq.*

[1071] *See* summary of the GoS's position before the ABC *supra* paras. 538 *et seq.; see also* ABC Experts' Report, Part I, p. 36.

[1072] ABC Experts' Report, Part I, p. 18.

[1073] ABC Experts' Report, Part I, p. 38.

[1074] ABC Experts' Report, Part I, p. 39.

there was still uncertainty surrounding the Bahr el Arab and other rivers of the region, despite Bayldon's discoveries:

> In the Northern portion of this Province [Bahr el Ghazal] some light has been thrown on the much-vexed question of the Bahr el Arab and Bahr el Homr by the march of Captain Percival (to which I referred in my last Report as well as to the reconnaissances of Lieut. Bayldon R. N.) but much of the course of these rivers is still unknown and a doubt still exists as to the correct names of the intricate waterways which intersect this part of the Sudan.[1075]

619. Wingate's reference in the same Memorandum to "the Arab, the Lol, [and] the Kir"[1076] indicates that he still thought that the Bahr el Arab and the Kir were two separate rivers, thus suggesting that the confusion surrounding the Bahr el Arab was yet to be cleared. This is in line with ABC Experts' reference to evidence from 1912 warning that "'[t]he course of the Bahr el-Arab is entirely unsurveyed.'"[1077]

620. The ABC Experts went on to observe that this uncertainty was echoed by the provincial boundary's own indefiniteness. Indeed, they emphasized that "the boundaries of the Ngok Dinka that were transferred to Kordofan for administrative reasons in 1905 were, like most boundaries in the Sudan at the time, not precisely delimited [ . . . ]"[1078] and maps before and after 1905 did not show the provincial boundary.[1079]

621. Again, the Parties have made submissions to this Tribunal confirming the reasonableness of the Experts' approach. The GoS points out in its Memorial that "provincial boundaries at this period [before and after 1905] were not laid down or recorded in any formal way, and they were often stated to be approximate."[1080] Similarly, Professor Daly notes in his First Report that "[m]ost of the internal and external boundaries of Sudan at the beginning of the twentieth century were poorly defined."[1081] This leading historian of the Anglo-Egyptian Condominium further states that "[s]outhern district boundaries hardly existed"[1082] and adds that "[i]t is indeed arguable that prior to 1905 the boundary between Kordofan and Bahr al-Ghazal was the *least* definite provincial boundary in the Sudan."[1083]

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[1075] Reports on the Finances, Administration and Condition of the Sudan, Annual Report (1905), Memorandum by Major General Sir R. Wingate, p.10 (SM Annex 24, SPLM/A Exhibit-FE 2/13). For the view that Bayldon's findings could be reasonably understood as putting an end to the confusion surrounding the location of the Bahr el Arab, *see infra* paras. 665 to 672.

[1076] *Ibid.,* at 11.

[1077] ABC Experts' Report, Part I, p. 38.

[1078] ABC Experts' Report, Part II, App. 2, p. 21.

[1079] ABC Experts' Report, Part I, p. 39.

[1080] GoS Memorial, para. 368.

[1081] Daly Expert Report, p. 28, Appendix to SPLM/A Memorial.

[1082] *Ibid.,* at 31.

[1083] Second Daly Expert Report, p. 6, Appendix to SPLM/A Counter-Memorial.

622. In addition, both Parties also agree that provincial boundaries continued to be uncertain even after the 1905 transfer.[1084] Having explained that "the southern limits of the transferred areas were not defined in 1905, either in Wingate's Memorandum or elsewhere,"[1085] the Government itself observed that the 1911 edition of the *Anglo-Egyptian Handbook* clearly states that the northern boundary of Bahr el Ghazal is not yet delimited,[1086] while the southern boundary of Kordofan in the 1912 edition is described "somewhat indefinitely."[1087] The post-1905 indeterminacy of the boundary is further reflected at Figure 14 of the GoS Memorial. The Tribunal notes that these continued changes to the provincial boundary are consistent with the fate of other boundaries in Sudan at that time, given the "general geographic confusion" which existed in "the whole of Sudan [ . . . ] for the first two decades of Condominium rule."[1088] Professor Daly remarked that many new provinces were created or divided until 1917, classifications of provinces as first-class or second-class were changed and later abolished, and districts were frequently transferred from one province to another.[1089] The Tribunal refers to the example of the Khartoum Province, which was first subdivided into the provinces of Khartoum City and Khartoum Gezira in 1902. In 1903, the borders of Khartoum City were again modified to account for the re-transfer of some parts of the Gezira Province. Its borders were again changed in 1914 and 1915, to be finally settled in 1917.[1090]

623. Accordingly, it was not unreasonable for the ABC Experts to assume that, despite the progress made by Bayldon in the identification of the true Bahr el Arab before the transfer, the lack of precise knowledge as to the location and course of the different rivers and streams persisted in this area and made the existence of a well-established boundary on the Bahr el Arab appear unlikely. The ABC Experts' conclusion that the administrative officials "treated" the Ragaba ez Zarga as the provincial boundary was tantamount to recognizing the existence of a mere working boundary, which they did not see as a decisive factor in the 1905 context. This Tribunal sees no ground for concluding that the ABC Experts' interpretation of this aspect of the transfer was unreasonable.

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[1084] GoS Memorial, paras. 372–383; GoS Oral Pleadings, April 21, 2009, Transcr. 33/11 *et seq.*; SPLM/A Counter-Memorial, paras. 1459–1463.

[1085] GoS Oral Pleadings, April 21, 2009, Transcr. 33/11 *et seq.*

[1086] *See supra* summary of the Parties' arguments, paras. 290 *et seq.* and The Anglo-Egyptian Handbook Series–The Bahr el Ghazal Province (1911), p. 5 (SM Annex 26, SPLM/A Exhibit-FE 3/8, FE 18/4).

[1087] *See* GoS Memorial, para. 378; *See* also Kordofan and the Region to the West of the White Nile, Anglo-Egyptian Series (1912) p.7 (SM Annex 27, SPLM/A Exhibit-FE 3/8a), which qualifies the northern boundary of Kordofan as approximate.

[1088] ABC Experts' Report, Part I, p. 37.

[1089] Daly Expert Report, pp. 31–32, Appendix to SPLM/A Memorial.

[1090] *Ibid.*

### *(b) The lack of effective administration*

624. Evidence of a very limited administration in this area in 1905 further confirms that it was not unreasonable for the ABC Experts to assume that British officials were not primarily concerned with the definition of internal borders. As pointed out by the ABC Experts, "no British official ever visited the Ngok in the rainy season."[1091] The remoteness and isolation of the region surrounding Abyei town, especially during the rainy season floods, made any attempt at effective administration difficult and ineffectual in the early years of the Condominium. The reclusiveness of the provinces of Kordofan and Bahr el Ghazal is further highlighted in the documentary record submitted by the Parties. Kordofan is described as a "wild and remote province" by the authors of the 1904 Report on the Finances, Administration, and Condition of Sudan,[1092] while Wingate in his 1904 Memorandum states in reference to Bahr el Ghazal that: "[u]nless this region is visited, it is almost impossible to convey an impression of its utter desolation . . ."[1093] Even in the 1950s, access to the region was considered difficult by Condominium officials. In his witness statement, Michael Tibbs, who was the last British District Commissioner for Dar Misseriya, remarks that:

> Movement around the district was difficult. Its size was vast and there were no made up roads though we still moved around the district by lorry for the most part. In the southern part of the district, the seasonal change in weather was extreme. The dry season was parching and, in the rainy season, the roads quickly became impassable, the vast and complex river system flooded and much of the land was water logged.[1094]

625. This is in line with Professor Daly's comment that "[u]ntil long after 1905 there was no British administrative process or presence of any kind in southwestern Kordofan,"[1095] with only three visits by officials in the Abyei region before 1905.[1096] In addition, as the ABC remarked, the Ngok Dinka never paid any taxes to the Bahr el Ghazal Province.[1097] Relying on Mahon, the

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[1091] ABC Experts' Report, Part I, p. 18.

[1092] Reports on the Finances, Administration, and Condition of Sudan, Annual Report (1904) 142 (SM, Annex 23, SPLM/A Exhibit-FE 2/3 and FE 2/4).

[1093] *Ibid.,* at 113.

[1094] Witness Statement of G. Michael Tibbs, para. 10 (SPLM/A Counter-Memorial, Witness Statements, Tab 3).

[1095] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 101/12–17. *See also* Reports on the Finances, Administration and Condition of the Sudan, Annual Report (1905), Annual Report, Bahr-el-Ghazal Province, p.10 (SM Annex 24, SPLM/A Exhibit-FE 2/13), which clearly states that they are no civil hospitals in Bahr el Ghazal and the note by the Senior Medical Officer of Bahr el Ghazal that he did not consider the time was ripe for the construction of such a hospital.

[1096] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 103/20 *et seq.*

[1097] ABC Experts' Report, Part I, p. 33.

ABC further noted that "[t]he administration made a conscious decision not to collect tribute before closer administration could be established."[1098]

626. The lack of effective administration was also recognized by Wingate himself, who stated in his 1905 Memorandum under the section on "Population and Labour":

> I have already remarked that for many reasons I do not think the time opportune for making a census of the Sudan. The absence of an entirely reliable administrative system, and the incomplete Government still existing in the out-lying districts of Kordofan, the Bahr el Ghazal, Upper Nile and other Provinces, would make it practically impossible to arrive at any really accurate results.[1099]

627. The evidence also provides indications that the Condominium administration's role was limited to the maintenance of law and order, and to repeat Professor Daly's words, "[a]s long as the colonial government heard no reports of tribal fighting, the British stayed away."[1100] It appears indeed that the British government's attempts at pacification consisted mostly in the dispatch of punitive patrols in the different provinces in response to recalcitrant or disobeying tribes who sought to defy governmental authority.[1101] For example, Wingate notes in his 1904 Memorandum that a punitive patrol was sent in Kordofan against the Nubas at Jebel Daier after the chief had refused to pay tribute and had subsequently fled.[1102] Wingate also observed that Sir R. von Slatin had commented that:

> Further similar trouble in Southern Kordofan is always possible, but I think the motives which give rise to it may be attributed rather to ignorance than to deliberate hostility to Government, as these districts are not yet fully subject to Government control.[1103]

628. In addition, the different reports produced by British officials at the time suggest that they were still in the process of developing and exploring the country in an attempt to establish the infrastructure necessary for effective administration. However, it is quite clear that by 1905, they were still trying to attain that goal. The sudd cutting expeditions on the Bahr el Arab and the explorations by survey parties carried out around 1905 are a good illustration.

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[1098] ABC Experts' Report, Part 1, p. 33. *See also* ABC Experts' Report, Part 2, Appendix 5, p. 182; *See also* Sudan Intelligence Reports, No. 104 (March 1903), p. 19 (SM Annex 5 and SPLM/A Memorial FE 1/21) in Mahon notes: "It would not be the slightest use trying to collect tribute from them until there is a Mamur and a post in that direction."

[1099] Reports on the Finances, Administration and Condition of the Sudan, Annual Report (1905), Memorandum by Major General Sir R. Wingate, p. 24. (SM Annex 24, SPLM/A Exhibit-FE 2/13).

[1100] SPLM/A Pleadings, April 22, 2009, Transcr. 103/10–11.

[1101] *See* Daly Expert Report, p. 34, Appendix to SPLM/A Memorial.

[1102] Reports on the Finances, Administration, and Condition of Sudan, Annual Report (1904) 10 (SM, Annex 23, SPLM/A Exhibit-FE 2/3 and FE 2/4).

[1103] *Ibid.*

In spite of the progress made by Lieutenants Bayldon and Walsh, the Report explains that:

> To thoroughly open up and deepen the river, a further expedition will be necessary, but before undertaking this it has been decided to despatch a small exploring party under Lieutenant Walsh to penetrate as far as possible along the various waterways known locally as the Arab, the Lul, the Kir, and an unnamed river which the natives state leads to Wau [ . . . ] On the return of this expedition the Government will be in a better position to decide on the steps to be taken to open up these apparently important rivers, with a view to establishing navigable waterways to the North-Western districts of the Bahr el Ghazal and Southern Kordofan Province.[1104]

629. The Tribunal further notes the February 1906 Sudan Intelligence Report's revelation that Walsh's sudd cutting operations on the Bahr el Arab made little headway.[1105] This entry, read in conjunction with Professor Daly's conclusion that "[expeditions and patrols up the tributaries of the Bahr al-Ghazal (river) and Bahr al-Arab had not reached the Ngok from the south before 1905, mainly because *sudd* blocked the channels,"[1106] confirms the Tribunal's view that as of 1905, even the minimal infrastructure required for effective administration (such as transport and communication channels) was yet to be put into place.

630. In light of this administrative context, it is indeed reasonable to infer that the importance of internal boundaries in Sudan, including the Kordofan-Bahr el Ghazal boundary, was secondary, at least during the early years of the Condominium period. In line with the ABC Experts' finding, the indication of boundaries in official documents, such as annual reports, was reasonably understood as a mere reference to a working boundary easily modified or replaced, and not to a boundary in the traditional sense.

### *(c) Limited knowledge of the extent of territory used and occupied by the Ngok Dinka*

631. A consequence of the region's remoteness and of limited administrative presence is the lack of knowledge of the full extent of the territory occupied by the Ngok Dinka. Hence, the official reports' imprecise references to "Sultan Rob" or Sultan Rob's "country," or Sultan Rob's "people" in the

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[1104] Reports on the Finances, Administration and Condition of the Sudan, Annual Report (1905), Memorandum by Major General Sir R. Wingate, p.11 (SM, Annex 24, SPLM/A Exhibit-FE 2/13).

[1105] Sudan Intelligence Report No. 139, February 1906, Appendix F (Progress Reports–Bahr-el-Arab Reconnaissance, by Bimb. Huntley Walsh, 11.1.06) (SM, Annex 11, SPLM/A Exhibit-FE 17/21, SPLM/A MD Exhibit 61).

[1106] Daly Expert Report, p. 34, Appendix to SPLM/A Memorial.

record.[1107] The few trek reports that were available to, and examined by, the ABC Experts[1108] and the Parties in the present proceedings provide only snapshots of what was actually occurring in the region. These treks were conducted during the dry season, when the area was most easily accessible to the officials.[1109] As further noted in the Sudan Intelligence Report, No. 178 (October 1908), "[t]he whole country is difficult to traverse at any time, as during the rains it is swampy and covered with high grass, and in the dry season the surface soil shrinks, and, as a result, traveling with horses or other animals is rendered dangerous by the large cracks that have appeared."[1110]

632. Given the limited nature of the information gathered during these dry-season treks, the British officials around 1905 do not seem to have been fully aware of the seasonal character of the Ngok Dinka's movements and land use patterns and therefore did not have a comprehensive understanding of the extent of Ngok Dinka territory. In that sense, the ABC reasonably concluded that:

> We do not have a detailed and systematic description of Ngok settlement and land use patterns throughout the Condominium period, because of the seasonality of administrative visits to Ngok territory. Since officials came only in the dry season (between December and April: Tibbs in Appendices 5.7 and 5.13), what few descriptions we do have are of Ngok dry season activities, which were concentrated around the rivers.[1111]

633. The ABC Experts' Report went on to note that:

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[1107] *See* for example Sudan Intelligence Reports, No. 128, p. 3 (March 1905) (SM Annex 9, SPLM/A Exhibit-FE 2/8; Reports on the Finances, Administration, and Condition of the Sudan, Annual Report (1905) Report for Kordofan, p. 113 (SM Annex 24, SPLM/A Exhibit-FE 2/13).

[1108] *See* ABC Experts' Report, Part I, p. 18 (last paragraph), p. 43.

[1109] *See* Wilkinson's trek from January to February 1902 in Gleichen, *Handbook of the Sudan,* Vol. I (HMSO, London, 1905) 153. (SM, Annex 38, SPLM/A Exhibit-FE 2/14 and 2/15); Percival, Keilak to Wau (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II (SPLM/A Exhibit-FE 17/13); Percival, A., Route Report: Keilak to Wau, December 1904 (SM Annex 26, SPLM/A Exhibit-FE 3/8 and 18/4); Percival, Pongo River to Taufikia (1905) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, p. 27 (SPLM/A Exhibit-FE 17/13).

[1110] Sudan Intelligence Reports, No. 171 (October 1908), p. 60 (SM Annex 18, SPLM/A Exhibit-FE 3/5; *see also* Kordofan and the Region to the West of the White Nile, Anglo-Egyptian Series (1912) p.74 (SM Annex 27, SPLM/A Exhibit-FE 3/8a); Even later sources describe the isolation and inaccessibility of the region during the rainy season: *see* D. Cole & R. Huntington, *Between A Swamp and a hard place: Developmental Challenges in Remote Rural Africa*, pp. 94–95 (1997), which qualifies the rainy season as the "period when Abyei is cut off from the outside" and further adds that "[f]or many town folk the rainy season is an ordeal. Civil servants from the north serving their time in this outpost despise the rains as a period of intense isolation and boredom amidst an alien cultural and physical setting."

[1111] ABC Experts' Report, Part I, p. 43.

> But there are suggestions from the beginning of the twentieth century that administrators were aware that Ngok Dinka territory extended further north (Mahon 1903, Willis 1909 in Appendix 5.13), and this seems to have been the basis on which settlement and grazing patterns were condoned and managed by subsequent generations of administrators throughout the Condominium period, following the general principle of reviving tribal homelands.[1112]

634. In the Tribunal's view, this additional factor which the ABC Experts took into account when examining the meaning of the formula also indicates that their interpretation was reasonable.

### *(d) The reasons for the 1905 transfer effectuated by the Condominium Administration*

635. The uncertainty of the provincial boundary and its secondary role in the transfer, the existence of a limited administration and knowledge of the Ngok Dinka people's exact location, help in turn to understand the object and purpose underlying the transfer. It appears that the transfer was essentially motivated by three considerations: (i) *pacification* – to protect the Ngok Dinka in order to pacify the area and end the Humr attacks on the Ngok Dinka; (ii) *display of authority* – to demonstrate to the inhabitants of the area that a new sovereign was exerting control over them; and (iii) *administrative rationalization* – to bring feuding tribes under the same administration.

636. The Tribunal first notes that the ABC (like the Parties in these proceedings)[1113] understood the transfer to be a response to Ngok and Twic Dinka complaints of Humr raiding:

> What occurred in 1905 was that because of Dinka complaints about Humr raids, the British authorities decided to transfer the Ngok and part of the Twich Dinka from the administrative control of Bahr el-Ghazal Province to Kordofan Province. This action put the Ngok and the Humr under the authority of the same governor (a fact cited in both the GOS and SPLM/A presentations).[1114]
>
> [ . . . ]
>
> The reasons for considering the land rights of the people constituting the nine Ngok Dinka chiefdoms as at 1905 include, amongst others, sociological and historical facts as well as elements of the terms within the CPA. In particular, the following are relevant:
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> [ . . . ]
>
> (iv) armed raids on the Ngok Dinka by the Misseriya that were the official principal reason for the transfer of the 9 Ngok Dinka chiefdoms to Kordofan must have greatly destabilized the Ngok Dinka and thus affected the

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[1112] *Ibid.*

[1113] *See* GoS Memorial, paras. 356–358 and SPLM/A Memorial, paras. 346–351.

[1114] ABC Experts' Report, Part 1, p.15.

> land use patterns of the two communities prior to the announcement of the transfer . . . [1115]

637. The Tribunal further notes that Condominium officials had recorded Humr attacks on the Ngok Dinka as early as 1903. Sudan Intelligence Report No. 110 (September 1903) notes:

> Two runners who arrived at Fashoda on 13th September, from the Dinka district of Gnak (Sheik Rob Wad Rung), reported that some Homr under one Mohammed Khada had raided their district about a month previously, and had killed two men and carried off 30 men and 1,000 head of cattle. The Mudir of Kordofan investigated and settled this case. The Dinkas received back their men and cattle. One of the Homr was killed in the fighting.[1116]

638. Sudan Intelligence Report No. 127 of February 1905, which is the last Intelligence Report published prior to SIR No. 128, indicates the following:

> Sheik Rihan Gorkwei, of the district of Tweit or Toj, which he says is situated between the Kir and Lol Rivers, reported to Bimbashi Bayldon on the 29th January that a party of Homr Arabs, under Sheikh Ali Gula, armed with some 15 rifles and many spears, had come and raided his district, saying they were sent to collect cattle for Government. Sheikh Rihan, after a journey of 23 days to Taufikia, came into Kodok to see a representative of the Government. The Governor sent him on to Khartoum, where he arrived on the 26th February. He repeated his story of the raids by the Homr, who he says captured some 16 boys of the Toj Dinkas whilst the latter were out fishing. The Camel Corps Company, now in the Bahr el Ghazal, will investigate the case on their return to Kordofan.[1117]

639. The Tribunal observes that the administrative desire to pacify the relations between the Ngok Dinka and the Misseriya is consistent with the limited presence of governmental control in the area and with the Condominium's circumscribed role of maintaining law and order identified above.[1118]

640. The Tribunal notes that the second purpose of the 1905 transfer – the display of British governmental authority – is interconnected with the goal of pacification, as during the early years of the Condominium, many punitive patrols were sent to isolated or troublesome regions in order to show the locals who was in charge. In connection with the punitive patrol sent against the Nubas at Jebel Daier alluded to above, Wingate quotes Slatin Pasha who stated:

> I consider that the primary cause of the punitive measures taken against Jebel Daier in October was their disobedience and open defiance of Govern-

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[1115] ABC Experts' Report, Part 2, Appendix 2, p. 23.

[1116] Sudan Intelligence Reports, No. 110 (September 1903) , p. 1 (SPLM/A Annex FE 1/24).

[1117] Sudan Intelligence Report, No. 127 (February 1905), p. 2 (SM, Annex 8, SPLM/A Exhibit-FE 2/6).

[1118] *See supra,* paras. 623 *et seq.*

> ment Authority. *It is most important to show these Nuba mountaineers that we intend to have our orders obeyed, and that in case of necessity, we are able to enforce our authority.*[1119]

641. In his 1905 Memorandum, Wingate also refers to disturbances caused by semi-independent tribes in the southern Kordofan. He notes that the military officer responsible for punitive patrols in the region had reported on:

> several other small affairs in which the semi-independent Meks of the Southern Districts have been guilty of raiding on each other, of occasionally defying Government authority, and of generally disturbing the peace, but he [did] not advocate a succession of punitive measures though he rightly consider[ed] that a population so wild and ignorant as those in Southern Kordofan can only be impressed with a sense of their comparative insignificance *by a display of force and that they should, when necessary, be given a tangible proof of the power of Government to asserts its authority.*[1120]

642. As noted by Professor Daly in his First Report, British officials were sent on expeditions to the Bahr el Ghazal Province as early as 1900 with an express mission: to display governmental authority. For example, Sudan Intelligence Report No. 76 (November 9 – December 1900)[1121] describes the composition of the expedition party and clearly states that: "[t]he object of the Expedition is to demonstrate practically, by its presence, the right of the Sudan Government to re-occupy the Bahr el Ghazal Province." Professor Daly further observed that: "[t]his demonstration was for the benefit not only of local people encountered along the way, but also for the Belgians, whose established interest in the Upper Nile and the regions of the Congo-Nile watershed Wingate viewed as dangerous."[1122] Professor Daly's analysis is confirmed by the March 1905 SIR, in which the British concerns over the incursion of Belgian troops in the territory of Bahr el Ghazal are discussed.[1123]

643. Finally, the ABC Experts reasonably interpreted the transfer as designed to achieve administrative rationalization, the transfer being made, in the ABC Experts' words, "for reasons of administrative expediency."[1124] Given the tribal tensions between the Ngok Dinka and the Misseriya, it made more sense to the British officials to manage these inter tribal quarrels through a single provincial administration. This is consistent with what Professor Daly

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[1119] Reports on the Finances, Administration and Condition of the Sudan, Annual Report (1904), Memorandum by Major General Sir R. Wingate, p. 10 (SM Annex 23, SPLM/A Exhibit-FE 2/3 and 2/4) (emphasis added).

[1120] Reports on the Finances, Administration and Condition of the Sudan, Annual Report (1905), Memorandum by Major General Sir R. Wingate, p. 15 (SM Annex 24, SPLM/A Exhibit-FE 2/13) (emphasis added).

[1121] Sudan Intelligence Report No. 76 (9 November–9 December 1900) (SPLM/A Memorial, MD Exhibit 53).

[1122] Daly Expert Report, p. 33, Appendix to SPLM/A Memorial.

[1123] March 1905 SIR, p. 3

[1124] ABC Experts' Report, Part I, p. 21.

terms the "hallmark of British imperialism all over the world, dealing with local peoples from whichever post or barracks was closest or most convenient when the need arose."[1125]

644. The Tribunal notes that the British government's practice of transferring a tribe for reasons of administrative expediency was not limited to the 1905 transfer of the nine Ngok Dinka chiefdoms. In 1914, the jurisdiction over the Hawawir tribe of Kordofan was transferred to the province of Dongola "to bring them under more effective control," in response to their "lawless behaviour on and across the western frontier."[1126] The Hawawir had been observed wandering and grazing outside the borders of Kordofan. This is consistent with Professor Daly's statement to the effect that "whole tribes were handed off from one British inspector to another as local habits and administrative convenience dictated."[1127]

645. As illustrated above, transfers of tribes from the control of a given province to another, based on concerns of administrative rationalization, were not infrequent. The practical approach of the Condominium government is further reflected in its practice of administering the Sudanese through tribal chiefs, as opposed to relying solely on territorial districts. Indeed, the review of the documentary record suggests that the British administrators had few contacts with the majority of the locals and preferred to deal only with the ruling chiefs. For example, in the 1904 Annual Report on the Finances, Administration and Conditions of Sudan, Major Boulnois (the Moudir of the Bahr el Ghazal Province) described the attitude of the chiefs toward the British government and stated: "[t]he Chiefs, *through whom the Government administers,* are beginning to grasp their responsibilities . . ."[1128] In a similar fashion, the March 1905 SIR suggests that Sultan Rob, the Ngok Dinka's Paramount Chief, was the administration's contact and the authority through which government control was exercised. The Tribunal notes that Professor Daly shares this analysis of the government's administration techniques:

> Although the administration was technically "direct," legally empowering only its own officials, in practice it was almost everywhere indirect, *with Sudanese tribal shaykhs responsible to British provincial authorities for the governance of their tribes.*[1129]

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[1125] SPLM/A Oral Pleadings, April 22, 2009, Transcr. 102/08–12).

[1126] Letter from F.T.C. Young, Inspector, Southern District to Governor, Merowe, 9 January 1914, SGA, INTEL 2/46/393, and other correspondence in the same file, (SPLM/A Memorial, Exhibit MD-45).

[1127] Daly Expert Report, p. 31, Appendix to SPLM/A Memorial.

[1128] Reports on the Finances, Administration and Condition of the Sudan, Annual Report (1904), p. 142 (SM Annex 23, SPLM/A Exhibit-FE 2/4) (emphasis added).

[1129] Daly Expert Report, p. 28, Appendix to SPLM/A Memorial (emphasis added).

> The Anglo-Egyptian regime, like other colonial governments, looked for local notables through whom it could govern. (This would eventually form the basis of Indirect Rule or Native Administration.)[1130]

646. Mr. Tibbs' Witness Statement also confirms that the Ngok Dinka were administered through their chiefs until at least 1944:

> Although there was a small police presence in Abyei, until the Ngok joined the Dar Messeria Rural Council in January 1944, the Ngok's administration was carried out by Chief Deng Majok Kwal. Disputes within the tribe would be dealt with by him and any disagreements between the Ngok and Messeria were sorted between Deng Majok and Babu Nimr, the Nazir Umun of the Messeria . . . [1131]

647. The Tribunal further observes that the very notion of "Indirect Rule," a British governmental policy which "relied on local and traditional tribal and other mechanisms for most aspects of administration"[1132] and which started with *The Power of Nomad Sheikhs Ordinance 1922*,[1133] is additional evidence that the British officials considered it more expedient to exercise their administration through tribal mediation. This policy was in line with the approach that had been previously adopted by the government by which, for example, "tribal *shaykhs* were left in place but held responsible for collecting taxes levied by the government."[1134]

648. In light of the above-noted observations, the language of the March 1905 SIR and its references to Sultan Rob, Sheikh Rihan of Toj and "these people" can reasonably be interpreted not as reflecting the officials' intent to transfer a clearly delimited, fixed area, as there was none in 1905, but rather, as evincing the British administration's intention to place the *totality* of a semi-nomadic tribe, who moved between two provinces according to the seasons, under a single jurisdiction, in order to protect the whole of the Ngok Dinka people at *all* times, regardless of where they might have been located in each season of the year.

649. The foregoing suggests that it was entirely plausible for the ABC Experts to choose the tribal view as a reasonable and, indeed, the more probable interpretation of what the officials intended when they engaged in the 1905 transfer. Obviously, the Tribunal recognizes that ascertaining the intent of the Condominium officials in 1905 introduces an element of subjectivity in the interpretation of SIR 128 and related texts (especially since there are so few records to parse through). However, a full appreciation of the context of

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[1130] Daly Supplement Expert Report, p. 7.

[1131] Witness Statement of G. Michael Tibbs, Appendix to SPLM/A Counter-Memorial, para. 13.

[1132] SPLM/A Memorial, para. 358.

[1133] Daly Expert Report, p. 45, Appendix to SPLM/A Memorial.

[1134] Daly Expert Report, p. 13, Appendix to SPLM/A Memorial.

the transfer suggests that the ABC Experts' ultimate interpretation of what occurred in 1905 – a tribal transfer – is not unreasonable.

### 6. The interpretation of the formula in light of the 2008 negotiation and signing of the Arbitration Agreement

650. A full analysis of the contextual interpretation of the Formula must include a final and important element not considered by the ABC: the 2008 negotiations, as reflected in The Road Map for Return of IDPs and Implementation of Abyei Protocol, Khartoum, June 8, 2008 (hereinafter, the "Abyei Road Map"), the Joint NCP-SPLM Understanding on Main Issues of the Abyei Arbitration Agreement, June 21, 2008 (hereinafter, the "Abyei Memorandum of Understanding") and the Arbitration Agreement (collectively, the "2008 Agreements").

651. The 2008 Agreements were designed to bring a final settlement to the Parties' dispute over the Abyei Area, thus reaffirming the Parties' pledge to achieve peace as contemplated in the CPA. The Abyei Road Map provides for security arrangements, the return of IDPs to their "former homesteads," interim arrangements for the administration of the Abyei Area, and arrangements for the final settlement of the Parties' disputes over the findings of the ABC. The Abyei Memorandum basically sets out the procedures for the arbitration and the mandate of the Tribunal, while the Arbitration Agreement is a further elaboration of the Abyei Memorandum and consolidates the Parties' agreement to arbitrate, as expressed in the Abyei Road Map and Abyei Memorandum of Understanding.

652. The Tribunal is permitted to take account of these 2008 Agreements in order to determine the reasonableness of the ABC Expert's interpretation of their mandate by virtue of Article 3 of the Arbitration Agreement. As indicated above, Article 3 of the Arbitration Agreement defines the law applicable to these proceedings, which includes, *inter alia,* the CPA, particularly the Abyei Protocol and the Abyei Appendix, the Interim National Constitution and, most relevant for this part of the discussion, the Abyei Road Map and the Abyei Memorandum of Understanding. The 2008 Agreements are also relevant for the interpretation of the CPA by virtue of Article 31(3)(b) or, in any event 31(3)(c), of the Vienna Convention.

653. Article 31(3) of the Vienna Convention states:

> 3. There shall be taken into account, together with the context:
>
> . . .
>
> b. Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> c. Any relevant rules of international law applicable in the relations between the parties.

654. In the Tribunal's view, the 2008 Agreements serve to clarify the meaning of provisions of the CPA as "subsequent practice" pursuant to Article 31(3)(b). The phrase "subsequent practice" has been widely interpreted and is not restricted to specific, interpretative treaties.[1135] The 2008 Agreements constitute relevant subsequent practice, since the Agreements make specific reference to sections of the CPA: the full title of the Abyei Road Map refers to the "Implementation of the Abyei Protocol," while both the Abyei Memorandum of Understanding and the Arbitration Agreement emphasize the applicability of the CPA, the Abyei Protocol and the Abyei Appendix. As such, these 2008 Agreements reaffirm the relevant provisions of these elements of the CPA and must be taken into account in interpreting the CPA. The 2008 Agreements are thus admissible and relevant for purposes of assessing the reasonableness of the ABC Experts' interpretation of the Formula as expressed in the Abyei Protocol.

655. Even if one were to consider that the 2008 Agreements do not constitute relevant "subsequent practice," the 2008 Agreements would still inform the interpretation of the CPA as "relevant rules . . . applicable in the relations between the parties" pursuant to Article 31(3) (c) of the Vienna Convention.

656. It follows that the above discussion regarding the reasonableness of the ABC Experts' interpretation in light of the CPA and associated instruments (see supra paras. 517 *et seq.)* is equally applicable to these 2008 Agreements. Indeed, the 2008 Agreements lend further support to the Tribunal's conclusion that it was not unreasonable for the ABC Experts to adopt a predominantly tribal interpretation of the Formula. As stated above, an approach that primarily focuses on the transfer of all the nine Ngok Dinka chiefdoms as opposed to a specific territory can reasonably be interpreted as furthering a key objective of the CPA, which is to submit, through a referendum, to the whole Ngok Dinka community the choice of either retaining the Abyei Area's special administrative status in the north or joining the South in the event that the South were to secede. The purpose of the 2008 Agreements thus further supports the reasonableness of incorporating in the Abyei Area the entirety of the community that is expressly mentioned in the definition of the Abyei Area as found in Section 1.1.2 of the Abyei Protocol and specifically referred to in Section 8 of the Abyei Protocol (which describes the process of the Abyei Referendum).

657. In addition, the 2008 Agreements (especially the Abyei Road Map) demonstrate an additional commitment by the Parties to the objectives of peace and reconciliation as primarily expressed in the CPA. Indeed, Section 9 of the Abyei Protocol reads:

> Upon signing the Comprehensive Peace Agreement, the Presidency shall, as a matter of urgency, start peace and reconciliation process for Abyei that shall work for harmony and peaceful co-existence in the area.

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[1135] Corten, O. & Klein, P., *Les Conventions de Vienne sur le droit des traités*, Vol. II, (2006), §43, p. 1320.

658. Similarly, Sections 3.7 and 3.8 of the Abyei Road Map state:

> 3.7 The Presidency shall initiate the peace and reconciliation in the area in collaboration with the administration of the area and the surrounding communities.
>
> 3.8 The Presidency shall work at making Abyei area a model of national reconciliation and peace building.

659. In light of these objectives, the adoption by the ABC Experts of a predominantly tribal approach, which would result in the inclusion and the participation in the 2011 referendum of most members of the targeted community, the Ngok Dinka, can plausibly be regarded as furthering the stated goals of peace and reconciliation.

## 7. Respect for the date of 1905

660. As a final question, the Tribunal will consider whether the ABC Experts took sufficient account of the temporal dimension of their mandate, which was tied to a historical event that had occurred in 1905. The Tribunal understands that both Parties accept that, under a predominantly tribal interpretation, in order to determine the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, the location of the Ngok Dinka in 1905 must be established. The ABC Experts consistently repeated that their analysis of the evidence was solely based on the attempt to determine the area predominantly occupied by the nine Ngok Dinka chiefdoms transferred in 1905:

- In assessing the territorial boundaries between the Ngok (who were in Bahr el-Ghazal) and the Misseriya (who were in Kordofan) *in 1905*, the two communities' effective connection to land, evidenced by established land use patterns, must be taken into consideration.[1136]
- The reasons for considering the land rights of the people constituting the nine Ngok Dinka chiefdoms *as at 1905* include [ . . . ][1137]
- It is critical in interpreting the established occupation, land rights and land use of the two communities to appreciate the sociological fact that *by 1905* there existed three main categories of such occupation, land rights and land use.[1138]
- After evaluating the evidence gathered from the maps, the historical records, published studies and the testimonies, the [ABC Experts] have drawn the conclusion that where the territory of the Ngok Dinka had established occupation, land rights and land use of the first and second categories, such areas fell squarely within the boundaries that were transferred

[1136] ABC Experts' Report, Part 2, Appendix 2, p. 21 (emphasis added).

[1137] *Ibid.*, at 22 (emphasis added).

[1138] *Ibid.*, at 24 (emphasis added).

*in 1905*."[1139]

661. Therefore, the ABC Experts had ample legal basis (or what might be referred to figuratively here as the necessary "margin of appreciation") to consider other elements to fulfill their mandate, such as post-1905 evidence and patterns of dominant occupation and land use. The ABC Experts' reasons for examining post-1905 evidence to determine the continuity of the Ngok Dinka historical title are clearly stated at the beginning of the Report: after noting that there was no 1905 map showing the location of the Ngok Dinka in 1905 and no sufficient official documentation, they stated that "it was necessary for the [ABC Experts] to avail themselves of relevant historical material produced both before and after 1905, *as well as during that year,* to determine as accurately as possible the area of the nine Ngok Dinka chiefdoms *as it was in 1905.*"[1140] Moreover, for purposes of admissibility of evidence, it was reasonable to assume continuities in practices in a traditional society operating in an unchanged ecology in the absence of indications to the contrary.

662. Similarly, the ABC Experts took careful note of the variations in the seasonal grazing territories of both the Ngok Dinka and Misseriya that occurred in the Condominium period after 1905. The ABC therefore rejected the subsequent southern expansion of both tribes as evidence of their occupation in 1905. For example, the ABC Experts observed:

> The Ragaba Lau is unquestionably a Ngok Dinka primary settlement area; it was not visited by the Humr at the beginning of the century; the Humr were able to expand their seasonal use of the area only later in the Condominium period, as a result of the stability fostered by the government of the day and the good relations between the ruling families of the Ngok and the Humr.[1141]

663. Finally, when conducting interviews with residents of the Abyei and surrounding areas, as well as in Khartoum, the ABC clearly explained to the speakers and the attendees of the meetings that their purpose was to ascertain the location of the Ngok Dinka in 1905:

- Ambassador Petterson, Abyei Interviews, April 14, 2005: "We would like to remind you that the mandate of the Abyei Boundary Commission is simply to define and demarcate the area of the nine Ngok Dinka chiefdoms transferred to the Kordofan Province in 1905 from Bahr el-Ghazal province. As we told the other groups we met yesterday and today, that you can confine what you say as much as possible to that topic. And again, what areas were the permanent areas for the Ngok Dinka people a hundred years ago?"[1142]

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[1139] *Ibid.,* at 25 (emphasis added).

[1140] ABC Experts' Report, Part 1, p. 4 (emphasis added).

[1141] *Ibid.,* at 35 (referring to Appendix 5.9); *see also* pp. 27–28, where the ABC Experts examine the southern expansion of both tribes in the 1920s and 1930s.

[1142] ABC Experts' Report, Part 2, Appendix 4, p. 142. Throughout the course of these interviews, Ambassador Petterson reminds the audience twice to answer the question

- Ambassador Petterson, Muglad Interviews, April 17, 2005: "I want to emphasize that our job is solely to define and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan province from Bahr el Ghazal in the year 1905."[1143]
- Ambassador Petterson, Muglad Interviews, April 17, 2005: "My question is that we have heard today and we have heard from other Misseriya before coming here that the Ngok Dinka were never in Bahr el-Ghazal province and yet the language of the peace treaty, a part called Protocol states that the authority over the nine Ngok Dinka Chiefdoms was transferred to Kordofan Province from Bahr el Ghazal Province in 1905. So that is my question, how do we reconcile this?"[1144]
- Professor Godfrey Muriuki, Umm Bilael Interviews, April 17, 2005: "Our purpose is to decide on the boundaries that existed in 1905 between the Misseriya and Ngok Dinka."[1145]
- Ambassador Petterson, Agok Interviews, April 18, 2005: "Our job is to define and demarcate the area of the Nine Ngok Dinka Chiefdoms, which were transferred to Kordofan Province from Bahr el Ghazal Province in 1905."[1146]

664. Hence, far from losing sight of the critical date of 1905, the ABC Experts faithfully focused on what was transferred that particular year. In so doing, they respected the temporal dimension of the mandate and thus acted reasonably.

## 8. Reasonableness of the predominantly "territorial" interpretation of the formula

665. In the Tribunal's view, the foregoing discussion establishes that the ABC Experts' recourse to an interpretation of the Formula that focused on tribal elements, rather than on what the Condominium administrators considered to be the province boundaries, was reasonable in light of the wording, object and purpose and context of the Formula. The Tribunal is not bound to go any further, as its Article 2(a) mandate does not authorize a review beyond the threshold of "reasonableness." Having said that, the Tribunal considers it important to state that the ABC Experts could also have reasonably understood the Formula as expressing a predominantly "territorial" meaning.

666. Indeed, one member of the majority of this Tribunal, Professor Hafner, believes that, while the decision of the ABC Experts in this regard

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posed in their mandate, and not to provide information regarding other aspects of the dispute (*see* p. 145–146).

[1143] *Ibid.*, at 79.

[1144] *Ibid.*, at 94.

[1145] *Ibid.*, at 53.

[1146] *Ibid.*, at 58.

was not unreasonable as a substantive matter, the predominantly territorial interpretation which they eschewed was more "correct." Clearly, a territorial appreciation of the Formula would not lead to any of the conclusions made by the ABC in respect of the Abyei Area's northern boundary. Nevertheless, Professor Hafner considers the Tribunal bound strictly by the limits of its Article 2(a) mandate, which in his opinion requires that the Tribunal not review the ABC Experts' findings to the extent that they are not unreasonable, and go no further in matters of substance.

667. As an initial matter, the Tribunal notes the ABC Experts' express recognition that "[t]he evidence presented supporting the [GoS's] interpretation of the 1905 boundary [between the provinces of Bahr el Ghazal and Kordofan having ran along the Bahr el Arab] is strong."[1147]

668. However, due to the considerable confusion surrounding the location of the Bahr el Arab at the relevant period of time, the ABC further considered that "administrative officials mistook the Ragaba ez-Zarga/Ngol for the Bahr el-Arab, and treated it as the boundary between Kordofan and Bahr el-Ghazal."[1148] Based on this reasoning, the ABC Experts concluded that "[t]he government's claim that only the Ngok Dinka territory south of the Bahr el-Arab was transferred to Kordofan in 1905 is therefore found to be mistaken" and went on to consider "[e]vidence of the Ngok presence north of the Bahr el-Arab before 1905" in order to define the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905.[1149]

669. As the Tribunal has noted above, uncertainty as to the frontier between the provinces of Bahr el Ghazal and Kordofan undeniably remained in 1905, and it was therefore not unreasonable for the ABC Experts to take such an approach. At the same time, the Tribunal would also note that the March 1905 SIR can be interpreted as evidence in favor of a "working boundary" situated along the Bahr el Arab, despite the uncertainty surrounding the exact location of the river. This official document can be seen as endowed with a certain probative value since it was signed both by the Assistant Director of Intelligence as well as the Director of Intelligence and can therefore arguably qualify as an official document by a state organ. The Report makes reference to the transfer by noting:

> It has been decided that Sultan Rob, whose country is on the Kir river, and Sheikh Rihan of Toj, mentioned in the last Intelligence Report, are to belong to Kordofan Province.[1150]

670. Annex C of the March 1905 SIR contains a report by Bimbashi Bayldon, who was tasked by Governor General Wingate to reconnoiter the course of

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[1147] ABC Experts' Report, Part I, p. 36.

[1148] ABC Experts' Report, Part I, p. 38.

[1149] ABC Experts' Report, Part I, p. 39.

[1150] Sudan Intelligence Report No. 128 (March 1905), p. 3 (*submitted as FE 2/8 by SPLM/A, SM, Annex 9).*

the Bahr el Arab.[1151] Bayldon's observations annexed to the official description of the transfer identify the true Bahr el Arab as being the Kir river:

> The River Kir is the real Bahr el Arab. It being called Kir by the Nuers and El Gurf by the Riseigat Arabs, who live close to it, on its higher reaches.[1152]

and:

> The river usually spoken of as the Bahr el Arab (I do not refer to the mouth at its junction with the Bahr el Ghazal, but up country) is really the Bahr el Homr. Running through practically uninhabited country but to which in dry weather the Homr Arabs used to come down with their cattle.[1153]

671. Although the documentary record shows that "local administrators continued to confuse the two waterways" after 1905,[1154] Bayldon's report could be reasonably understood as having ended the uncertainty pertaining to the Bahr el Arab's course by the time the transfer occurred. Further, Governor General Wingate's observation that "[t]he districts of Sultan Rob and Okwai, to the South of the Bahr el Arab and formerly a portion of the Bahr el Ghazal province, have been incorporated into Kordofan" could likewise be interpreted as indicating that Wingate knew where the Bahr el Arab was, and considered it to be both the provincial boundary and the northern limit of "Sultan Rob's district."[1155] In view of the uncertainty, the Tribunal acknowledges that a "territorial interpretation" of the Formula, pursuant to which more significance would have been conferred to the provincial boundary (albeit approximate and uncertain), could also have been reasonably justified. However, although the probative value of the March 1905 SIR was not contested during the proceedings, it cannot be established that the transfer of the territory in question was performed in full knowledge of Bayldon's report.

672. The fact that the ABC Experts chose one reasonable interpretation of the Formula "the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905" over another reasonable one cannot be considered an excess of mandate. Even if equally persuasive or even better arguments were to favor a predominantly territorial interpretation according to which the Bahr el Arab would be the northern frontier of territory transferred in 1905 (a conclusion

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[1151] Reports on the Finances, Administration, and Condition of the Sudan, Memorandum by Major General Sir R. Wingate (1904), p. 8 (SM, Annex 23, SPLM/A Exhibit-FE 2/3 and 2/4).

[1152] Summary of Bimbashi Bayldon's Report on the Bahr el-Arab Sudd, Sudan Intelligence Report No. 128 (March 1905) Appendix C, p. 11 (SM, Annex 9, SPLM/A Exhibit-FE 2/8).

[1153] Summary of Bimbashi Bayldon's Report on the Bahr el-Arab Sudd, Sudan Intelligence Report No. 128 (March 1905) Appendix C, p. 10 (SM, Annex 9, SPLM/A Exhibit-FE 2/8).

[1154] ABC Experts' Report, Part I, p. 39. *See also supra* paras. 606–607.

[1155] Reports on the Finances, Administration, and Condition of the Sudan, Memorandum by Major General Sir R. Wingate (1905), p. 24 (SM Annex 24, SPLM/A Exhibit-FE 2/13).

that the Tribunal does not, and is not required to, draw in these proceedings), an error in the evaluation of contemporary documents would not amount to an excess of mandate but to a mere substantive error. As such, it is not within the limits of this Tribunal's authority, pursuant to Article 2(a) of the Arbitration Agreement, to set aside the decision of the ABC Experts relating to the definition of the northern boundary of the Abyei Area as running along latitude 10°10'N.

## F. Failure to state reasons in the implementation of the mandate

673. As discussed earlier, the Tribunal's Article 2(a) mandate does not permit the Tribunal to subject the ABC Experts' reasoning to a "test of correctness." It is not for the Tribunal to confirm (or reject) the substantive conclusions of the ABC Experts on the basis of a full review of the evidence, and it is certainly not the Tribunal's task under Article 2(a) to substitute its own judgment for the ABC Experts. Nor will the Tribunal consider whether the reasons provided by the ABC Experts are scientifically sound, sensible, or even just adequate; the Tribunal's review role is carefully circumscribed. One of the limited criteria of permissible review for the Tribunal is whether each of the binding decisions by the ABC Experts is supported by sufficient reasoning to allow the reader of the ABC Experts' Report to appreciate the key elements of the ABC Experts' justification. Thus, the Tribunal will now turn to examining whether the ABC Experts, when implementing their mandate on the basis of a tribal interpretation, stated reasons in support of their definition of the northern, southern, western and eastern boundaries of the Abyei Area and remained within their mandate.

### 1. The northern boundary of the Abyei Area

674. While the ABC Experts provided sufficient reasons for their decision to adopt latitude 10°10'N as the northern limit of the Area of permanent Ngok Dinka habitation, the motivation for drawing the northernmost limit of a "shared rights' area" at latitude 10°35'N (and, by implication, the northern limit of the Abyei Area at latitude 10°22'N) is deficient.

#### *(a) The ABC has provided sufficient reasons for its determination of the area of Permanent Ngok Dinka habitation*

##### (i) The rejection of the Bahr el Arab and the Ragaba ez Zarga

675. As an example of the ABC Experts' alleged failure to state reasons, the GoS argues that the ABC Experts first established that the Ragaba ez Zarga

(which historically was often confused with the Bahr el Arab)[1156] was treated as the provincial boundary and then, as its succeeding step, abandoned their own conclusion without motivation and drew the northern boundary line of the Abyei Area further north. The GoS's argument points to an instance of allegedly contradictory reasons, which would be within the Tribunal's scope of review.

676. In the Tribunal's view, however, no internal contradiction follows from the fact that the ABC Experts did not consider the line that was treated as the provincial boundary by the Condominium officials to be the boundary of the Abyei area. According to the ABC Experts' interpretation of their mandate (*see supra*. Chapter IV Section E), knowledge of where the Condominium officials may have thought the boundary of Kordofan was located was not sufficient or dispositive of their mission. As the ABC Experts conceived of their mandate, they were to determine the extension of the Ngok Dinka's territory (meaning the area where the Ngok had permanent settlements), and the provincial boundary as it was conceived of by the Condominium officials was only one of many indicators (and not necessarily the determinative one). Consistent with that understanding, the ABC Experts proceeded in Propositions 8 and 9 to examine patterns of population settlements and concluded that Ngok Dinka settlements were also located north of the Ragaba ez Zarga ("along the Ragaba ez-Zarga and the area to its north").[1157]

677. One may agree or disagree with the ABC Experts as to whether such geographical evidence should prevail over historical evidence of the Condominium officials' conception of the Kordofan boundary. However, a disagreement on this point would be a disagreement of substance and not a failure to state reasons. The reasons for the rejection of the Ragaba ez Zarga as the relevant boundary line between the Ngok Dinka and the Misseriya are evident in the ABC Experts' Report and in a sufficiently clear manner.

### (ii) The adoption of 10°10'N as the limit of Ngok Dinka permanent settlements

678. In addition, the GoS argued that "[t]here is simply no justification for latitude 10°10'N in [the ABC Experts'] Report."[1158] In the Tribunal's view, however, the ABC Experts' reasoning on this point is clear enough. As a first step, the ABC Experts observed that above a particular, still unspecified line, the dominant use of land by the Ngok Dinka gives way to shared land use. In the summary discussion of Proposition 8, the ABC Experts noted:

> From the above evidence it stands to reason that the Ngok had established dominant rights of occupation along the Ragaba ez-Zarga and the area to its north, while the Misseriya enjoyed established secondary rights of use in the

[1156] *See supra* paras. 618 *et seq.*

[1157] ABC Experts' Report, Part I, p. 19.

[1158] GoS Memorial, para. 260.

> same region. Further to the north, however, the two communities exercised equal secondary rights to use of the land on a seasonal basis.[1159]

679. Where exactly the line between the two types of areas should be drawn is then explained in the summary discussion of Proposition 9:

> The [ABC Experts], having examined the evidence presented in the preceding propositions, are confident that the area south of latitude 10°10' N contains the territory in which the Ngok have dominant rights, based on permanent settlements and land use.[1160]

680. The more extensive discussion of Proposition 8 later in the Report adds some additional detail as to the evidentiary basis for the ABC Experts' findings. The Experts concede that there is "no clear independent evidence establishing the northern-most boundary of the area either settled or seasonally used by the Ngok."[1161] In the absence of such evidence, the ABC Experts explain that they sought indicators and clues in administrative records as well as human geography – the fact that the goz was not settled by anybody – to draw what seemed the best defensible line under the circumstances.

681. In the Tribunal's view, the Expert's reasoning regarding the selection of latitude 10°10'N is comprehensible and complete. Where the line between Ngok Dinka "dominant rights" and Misseriya and Ngok Dinka "shared rights" runs is a factual question, which the ABC Experts determined based on permanent settlements and land use, as it appeared from administrative records and clues from human geography. The GoS's argument that, on the basis of this evidence, the ABC Experts were not entitled to reach the conclusion that that line should run at latitude 10°10'N, is in reality a disagreement with the ABC Experts' appreciation of the evidence. It is not related to a failure by the ABC Experts to state reasons.

682. The additional considerations presented by the GoS under the same heading also relate to alleged errors of substance. For example, the GoS's argument that the summary overview of the evidence contained in the appendices to the ABC Experts' Report does not contain any reference to latitude 10°10'N goes right to the heart of the ABC Experts' substantive decision function: the connection between evidence and binding conclusions. Similarly, the observation that the ABC Experts may not have taken account of the fact that some of the villages referred to may have moved relates to the ABC Experts' scientific methodology.[1162] The Tribunal is not prepared to review these findings under the heading of an alleged "failure to state reasons."

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[1159] ABC Experts' Report, Part I, p. 19.

[1160] *Ibid.*

[1161] ABC Experts' Report, Part I, p. 43.

[1162] GoS Memorial, para. 261.

### *(b) The line along latitude 10°35'N is unsupported by sufficient reasons*

683. In contrast to the ABC Experts' adequately explained reasoning up to latitude 10°10'N, aspects of the motivation provided in support of the ABC Experts' definition of the shared-rights area, stretching from latitude 10°10'N to latitude 10°35'N, are deficient.

684. The problematic issue under the heading of "failure to state reasons" is not the ABC Experts' use of the concept of "secondary rights" or "shared rights" as such. The relevant sections of the ABC Experts' decision on this point are cogently reasoned. In the section of the ABC Experts' Report relating to Proposition 9, the Experts concluded that dominant rights by the Ngok existed only up to latitude 10°10'N and that the area north of that line "therefore represents the area of secondary rights shared between the Ngok and the Misseriya." Reasons for the Experts' recourse to the category of "shared rights" can in turn be found in Points 4 to 6 of Appendix 2. In this section, the ABC Experts set out their understanding of secondary rights as a category of land rights requiring a less intensive connection with the land, based on principles of African land law. Hence, as far as the use of the concept of shared rights is concerned, it cannot be said that the ABC Experts' decision came "out of the blue."[1163]

685. What is problematic, however, is the ABC Experts' reliance on latitude 10°35'N as the northernmost area of Ngok Dinka and Misseriya "shared rights." While not initially part of the GoS's submissions, the GoS later adduced the ABC Experts' reliance on latitude 10°35'N as a further example of the perceived lack of reasons. In the GoS's words:

> The same [that a finding made without any scientific analysis of the available documentation constitutes an excess of the Experts' mandate] holds true mutatis mutandis concerning the 10 degrees 35 minutes north line which corresponds to nothing but to the extreme claim to the north of the SPLM/A . . . [1164]

686. This northern-most point is crucial to the ABC Experts' decision, as the limit of the "shared-rights area" directly and the location of the Abyei area boundary indirectly depend on it. In this respect, it should be recalled that the ABC Experts "calculated" the boundary line of the Abyei Area by bisecting equally the band between latitude 10°10'N and the northernmost point.[1165] Given the importance of the location of the northern-most point for the definition of the shared rights area and the boundary itself, an exposition of the ABC Experts' reasons similar to the justification of latitude 10°10'N could be expected.

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[1163] GoS Oral Pleadings, April 18, 2009, Transcr. 149/11.

[1164] GoS Oral Pleadings, April 18, 2009, Transcr. 152/01–04; *see also* the discussion in the GoS Rejoinder, para. 161.

[1165] ABC Experts' Report, Part I, pp. 44–5.

687. As the GoS concedes,[1166] the ABC Experts do point out that the line drawn at latitude 10°35'N coincides to some extent with Dinka names on certain maps reviewed by the ABC Experts, and in particular with the settlement of Tebeldia.[1167] Given the permissive standard of review to be applied by the Tribunal, this statement in the ABC Experts' Report, read in isolation, could potentially be considered sufficient for satisfying the reasons requirement. However, in the following paragraph of the Report, the ABC Experts themselves noted that they did *not* consider the fact that several Dinka names appeared on maps close to latitude 10°35'N to constitute sufficient evidence for any boundary line:

> In the absence of a copy of the presidential decree, or verbatim quotation from the text, and a more precise location of the sites mentioned, it is impossible to accept this definition as conclusive.[1168]

688. Similarly, in the section entitled "Conclusion," the ABC Experts noted:

> The [ABC Experts] considered the presentation by the SPLM/A that their dominant claim lies at latitude 10°35'N, but found the evidence in support of this to be inconclusive.[1169]

Hence, the strongest reason for the selection of latitude 10°35'N was expressly disqualified by the ABC Experts themselves, and it cannot serve as a justification for that line.

689. The only remaining justification that the Tribunal is able to find for latitude 10°35'N in the Report is contained in the following short sentence:

> Taking latitude 10°35'N as the northern limit to the Ngok Dinka claims, *and noting that the Goz belt is roughly contained within these limits*, it is reasonable to treat the Goz as a transitional zone where there are shared secondary rights . . . [1170] (emphasis added)

690. The statement just quoted must be read in conjunction with the observation that "the band of Goz intervening between Humr permanent territory and the Ngok permanent settlements is settled by nobody; . . . and that there is regular seasonal use of the Goz by both peoples."[1171]

691. Hence, the only reason offered in support of the northern limit of the shared rights area and, by implication, of the Abyei Area boundary calculated on the basis of that limit, is the northern extension of the goz. In the Tribunal's view, this single reference to the goz does not amount to a reasoned justification.

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[1166] GoS Oral Pleadings, April 18, 2009, Transcr. 152/04–07.

[1167] ABC Experts' Report, Part I, p. 44.

[1168] *Ibid.*

[1169] *Ibid.*, at p.21.

[1170] *Ibid.*, at p. 44.

[1171] *Ibid.*, at p. 43.

692. The Tribunal would not want to exclude as a general matter that the location of geographical phenomena can be part of a rational justification for a boundary marker or even an entire boundary line. By their very nature, boundary delimitation decisions must be capable of practical implementation, requiring on occasion deference to geographical necessities. However, if a decision-maker wishes to base its decision on geographical features, some additional explanation is in order as to why that geographical feature should be determinative for the location of the boundary, thereby overriding other evidence that may have been presented by the parties.

693. The ABC Experts' Report provides no indication why the northern extension of the goz should be relevant for the limits of the Abyei Area. In fact, the Experts' own method of enquiry regarding the extension of the "area of the nine Ngok Dinka chiefdoms" required them to determine the northernmost limit of permanent Ngok Dinka settlements. In the Experts' view, if there was no conclusive evidence of such permanent settlements north of latitude 10°10'N, it is difficult to understand why the Abyei Area was nonetheless extended further north, beyond that line up to latitude 10°22'30"N.

694. The ABC Experts do not provide any reasons for shifting from a "permanent settlement" perspective to a geographical perspective. Nor can it be said that the relevance of the northern limit of the goz would be self-explanatory. To the contrary, if the ABC Experts were satisfied that permanent settlements existed (only) up to latitude 10°10'N, and that latitude line presents the southern limit of the goz, the most intuitive conclusion to draw from these observations is that latitude 10°10'N then represents the northern limit of the Abyei Area.

695. Thus, the ABC Experts' justification of latitude 10°35'N (and, by implication, the northern limit of the Abyei Area at latitude 10°22'30"N) rests on the mere observation that the SPLM/A's northernmost claim happens to coincide in an approximate manner with the northernmost limit of the goz.[1172] Such coincidence, however, cannot replace a searching inquiry and principled decision as to the northernmost area of the nine Ngok Dinka chiefdoms transferred in 1905, as was the ABC Experts' task.

### *(c) Conclusion*

696. In conclusion, the Tribunal is satisfied that the ABC Experts' principal finding that

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[1172] In light of the Tribunal's limited scope of review in the present proceedings, the Tribunal is not called upon to ascertain the correctness of this conclusion. The Tribunal would note, however, that the cartographic evidence adduced by the SPLM/A during these proceedings does not seem to show the northern limit of the goz at latitude 10°35'N (*see* the satellite images of the "Abyei Area" and the Bahr region in SPLM/A Map Atlas vol. 2, Maps 66 to 70).

> [t]he Ngok have a legitimate dominant claim to the territory from the Kordofan-Bahr el Ghazal boundary north to latitude 10°10'N [ . . . ]

is supported by sufficient reasons. Insofar as this finding is concerned, the GoS's arguments must therefore be rejected. However, it has to be recalled that according to one member of the Tribunal, Professor Hafner, the applicability of latitude 10°10'N as the northern boundary of the transferred territory follows exclusively from the fact that the Tribunal is precluded by its mandate from reviewing it.

697. As far as the ABC Experts' selection of latitude 10°35'N and 10°22'30"N is concerned, their decision is not supported by sufficient reasons.

## 2. The southern boundary of the Abyei Area

698. The ABC Experts' Report provides that "[t]he southern boundary shall be the Kordofan-Bahr el-Ghazal-Upper Nile boundary as it was defined on 1 January 1956."[1173] The southern boundary of the Abyei Area was clearly not the focus of dispute between the Parties over the course of the ABC proceedings.[1174] Having reviewed the evidence, the ABC Experts adopted this boundary as the southern limit of the area of the nine Ngok Dinka chiefdoms transferred in 1905.[1175] There is no submission that this conclusion exceeded the mandate and indeed, it does not.

699. The Tribunal recalls that the southern boundary of the Abyei Area remained uncontroversial in these proceedings. As provided in the GoS Counter-Memorial:

> Both Parties accept that the 1956 provincial boundary, which continues to be the boundary today, constitutes the southern limit of the area transferred in 1905. There is accordingly no dispute on this aspect of the case.[1176]

700. The GoS further confirmed in the course of the hearings that:

> [ . . . ] there's no dispute between the parties in this case as to what those southern limits are. They are identical in each of our submissions.[1177]

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[1173] ABC Experts' Report, Part 1, p. 22.

[1174] *See* SPLM/A Final Presentation, p. 18, second paragraph (SPLM/A Exhibit-FE 14/13) referring to latitude 9°21'N, which corresponds in part to the 1956 Kordofan southern boundary, as the southern limit of the area claimed; GoS First Presentation, slide 46 (SPLM/A Exhibit-FE 14/2) referring to the "current triangle to the south of the Bahr el-Arab [representing] the 'area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905'"; GoS Memorial, Figure 5, p. 17. The Parties did disagree, however, as to the definition of the western, eastern, and northern boundaries, as well as the location of the Ngok Dinka north of the Bahr el Arab.

[1175] *See, inter alia,* ABC Experts' Report, Part 2, pp. 18, 22, 36, 45.

[1176] GoS Counter-Memorial, para. 505. *See also,* for example, SPLM/A Rejoinder, para. 885(c).

[1177] GoS Oral Pleadings, April 20, 2009, Transcr. 197/13–16. *See also* GoS Oral Pleadings, April 20, 2009, Transcr. 206/06–10; April 21, 2009, Transcr. 61/23–25.

701. Thus, irrespective of the Parties' concurrence on the manner by which the Formula is interpreted, the Tribunal sees no need to examine the matter any further, and agrees that, to the extent that the 1956 Kordofan southern boundary meets the eastern and western boundaries delimited by this Tribunal below, the southern boundary of the Abyei Area was defined in compliance with the ABC Experts' mandate.

### 3. The eastern and western boundaries of the Abyei Area

702. The ABC Experts' Report and the Parties' pleadings both present arguments and evidence relating to the northern and southern boundary lines of the Abyei Area. In stark contrast, the Tribunal observes that the eastern and western boundaries of the "area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905" were barely discussed. This is surprising, given the fact that the delimitation of these western and eastern lines were just as integral to the ABC's mandate as other components of the Abyei Area. Having carefully considered the evidence presented relating to these boundaries, the Tribunal finds that the ABC Experts' decision regarding the eastern and western boundary lines is insufficiently motivated; this absence of sufficient reasoning constitutes, in turn, an excess of mandate concerning those parts of the ABC Experts' findings. This insufficiency on the part of the ABC Experts may be traced, to an extent, to the scarcity of the evidence, but that of itself does not suffice to validate the findings of the ABC Experts in respect of the eastern and western boundaries.

703. Proposition 9 of the ABC Experts' Report states:

> The Abyei Area is defined as the territory of Kordofan encompassed by latitude 10°35'N in the north to longitude 29°32'E in the east, and the Upper Nile, Bahr el-Ghazal and Darfur provincial boundaries as they were at the time of independence in 1956. (SPLM/A Presentation, Appendix 3.2)[1178]

704. The ABC Experts attempted to explain the eastern boundary line by indicating that it was reasonable to adopt longitude 29°32'E since neither "the Ngok nor the SPLM/A had presented claims to the territory east of longitude 29°32'15."[1179] This terse statement does not constitute a sufficiently reasoned justification of the eastern boundary; rather, it is a mere summary of one of the Parties' positions (the SPLM/A's). The Report remains silent on the GoS's arguments concerning this point, and the ABC Experts do not indicate any independent conclusions that they would have drawn as a result of their analysis.

705. The only other possible justification of the eastern boundary that the Tribunal can discern from the Report stems from the ABC Experts' analysis of a sketch map produced by the SPLM/A. The ABC Experts briefly refer to the

[1178] ABC Experts' Report, Part 1, p. 44.

[1179] *Ibid.*, at 45.

sketch map produced by the SPLM/A during their final presentation to the ABC before proceeding to state that this evidence is "inconclusive" (given the absence of a copy of a 1974 presidential decree). However, although the ABC Experts themselves do not ascribe much probative value to the sketch map, they nevertheless seem to rely on this very map to determine that the villages presented by the SPLM/A as Ngok villages were mostly "contained within the area of latitude 10°35'N and longitude 29°32'15"E . . ."[1180] While the appreciation of evidence by the ABC Experts is beyond the Tribunal's review mandate under Article 2(a), it is contradictory (not to mention inappropriate in its failure to articulate reasons based on the best available evidence) for the ABC Experts to base their decision exclusively on evidence which they themselves have qualified as inconclusive. Beyond these contradictory reasons, the Tribunal finds no further explanation from the ABC Experts relating to the eastern boundary.

706. With respect to the determination of the western boundary line, this Tribunal notes that the selection of the 1956 Kordofan-Darfur boundary is entirely unreasoned. Indeed, it is noteworthy that the ABC Experts did not make any specific pronouncement as to the location of the western boundary line of the Abyei Area; instead, the ABC Experts stated that: "[a]11 other boundaries of the area that coincide with the provincial boundaries as they were at independence on 1 January 1956 shall remain as they are."[1181] No supporting evidence is presented, and no analysis is provided which would expose the line of reasoning adopted by the ABC Experts to reach the conclusion that the 1956 boundary between the provinces of Kordofan and Darfur also represents the westernmost limits of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905. While the Tribunal understands the importance of the 1956 boundaries in the broader context of the peace process and the possible secession of South Sudan (should it choose to do so in the exercise of self-determination), as indicated by Sections 1 and 8 of the Abyei Protocol,[1182] reliance on the Darfur-Kordofan boundary without any

[1180] *Ibid.,* at 44.

[1181] *Ibid.,* at 45.

[1182] Sections 1.3 and 8 of the Abyei Protocol read:

1.3 End of Interim Period;

Simultaneously with the referendum for southern Sudan, the residents of Abyei will cast a separate ballot. The proposition voted on in the separate ballot will present the residents of Abyei with the following choices, irrespective of the results of the southern referendum:

a. That Abyei retain its special administrative status in the north;

b. That Abyei be part of Bahr el Ghazal.

1.4 The January 1, 1956 line between north and south will be inviolate, except as agreed above.

8. Abyei Referendum Commission

8.1 There shall be established by the Presidency an Abyei Referendum Commission to conduct Abyei referendum simultaneously with the referendum of South-

supporting analysis does not allow the Tribunal and the readers of the Report to understand how the Experts arrived at this conclusion.

707. The Tribunal takes note of the ABC Experts' reference in Proposition 9 to the SPLM/A Presentation before the ABC (Appendix 3 of ABC Experts' Report, Part 2). However, Appendix 3 sheds no light on how the ABC Experts arrived at their conclusions regarding the eastern and western longitudes up to 10°10'N. Rather, the SPLM/A Presentation as reproduced in the Report exposes the SPLM/A's claims regarding the presence of the Ngok Dinka north of the river Kir, and makes no attempt at identifying the 1905 location of the nine Ngok Dinka chiefdoms on the east and the west.

708. Thus, the ABC Experts did not provide sufficient reasoning with respect to essential elements of the decision, namely the determination of the eastern and western boundary lines of the Abyei Area. As indicated above in Section D 2.(b)(ii), a failure to state reasons constitutes an excess of mandate when it relates to a point "necessary to the tribunal's decision."[1183] The ABC was expressly tasked with the responsibility of delimiting the Abyei area and the requirement to provide sufficient reasoning with respect to the delimitation of its eastern and western components was an integral part of that responsibility. This Tribunal recalls that the "target audience" of the ABC Experts' Report were the multiple stakeholders of the Sudanese peace process, ranging from the Presidency to the local residents of Abyei. As such, the failure to state sufficient reasons or indeed, to state any reasons at all, as in the case of the western boundary, does not allow the reader to understand the basis on which the ABC Experts decided on the western and eastern boundaries of the Abyei Area.

709. The Tribunal further observes that the whole section comprising Proposition 9 is rather short given that it raises the most central aspect in this case, *i.e.,* the identification and delimitation of the Abyei Area.

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ern Sudan. The composition of the Commission shall be determined by the Presidency.

8.2 The residents of Abyei shall cast a separate ballot. The proposition voted on in the separate ballot shall present residents of Abyei with the following choices; irrespective of the results of the Southern referendum:

a. That Abyei retain its special administrative status in the north;

b. That Abyei be part of Bahr el Ghazal.

8.3 The January 1, 1956 line between north and south shall be inviolate, except as agreed above.

[1183] *Vivendi Universal* v. *Republic of Argentina,* Decision on Annulment, July 3, 2002, 6 ICSID Rep (2002) 358.

## G. The Tribunal's determination of the Abyei Area's eastern and western boundaries pursuant to Article 2(c) of the Arbitration Agreement

710. Having upheld the reasonableness of the ABC Experts' predominantly tribal interpretation of the Formula, this Tribunal considers itself obliged to proceed with the delimitation phase of the mandate without departing from the same predominately tribal approach. This conclusion applies *a fortiori* given the Tribunal's determination that the northern limit of the area of permanent habitation of the nine Ngok Chiefdoms transferred in 1905 (*i.e.*, the ABC Experts' findings and delimitation at latitude 10°10'N) was reasoned and within the ABC Experts' mandate. As discussed above, the retained northern boundary of the Abyei Area was drawn by the ABC Experts on the basis of a predominantly tribal interpretation as opposed to a predominantly territorial interpretation.

711. While the Tribunal finds itself bound to sustain the ABC Experts' interpretation of the Formula, it did find an excess of mandate on a different ground, the Experts having failed to adequately state reasons in support of some of their findings in the implementation of their mandate. By invalidating the 10°35'N and 10°22'30"N lines while upholding the 10°10'N line, the Tribunal has fulfilled its mandate with respect to the northern limit of the Abyei Area and will not address the issue any further.

712. By contrast, the western and eastern boundaries of the Abyei Area were not drawn by the ABC Experts in compliance with their mandate. Thus, in fulfillment of its own mandate, the Tribunal must now proceed to "define (*i.e.,* delimit) on map" the eastern and western boundaries in accordance with Article 2(c) of the Arbitration Agreement.

713. A careful review of the Parties' submissions reveals that the evidence remains scanty. There is no map from 1905, or indeed later years, which provides the specific coordinates of the western and eastern limits of the area occupied by the nine Ngok Dinka Chiefdoms transferred in 1905. As both Parties recognize, drawing these limits is not an easy task.[1184]

### 1. Preliminary remarks on the appreciation of the evidentiary record

714. The Tribunal wishes to emphasize at this stage that it has a duty to render its decision on the basis of what it considers, after careful review and

[1184] GoS Oral Pleadings, April 21, 2009, Transcr. 63/21 ("It's a very complicated question of fact."); SPLM/A Oral Pleadings, April 22, 2009, Transcr. 134/09–114 ("The truth of the matter is [ . . . ]if the Tribunal were to address the question under 2(c) of identifying the precise territory of the Ngok Dinka chiefdoms, that's difficult. It's hard to draw precise lines, we don't deny that."); *See also supra* para. 304 and 356.

within the confines of the predominantly tribal interpretation of the mandate, as the best available evidence. There is no *general presumption* privileging evidence emanating from Condominium officials or witness evidence (or indeed any other source). In this Tribunal's view, what constitutes the best available evidence on a particular point of fact must be determined in light of all circumstances, and not whether it is in written or oral form.

715. The Tribunal notes that both Parties have looked at the evidence with a critical eye. The SPLM/A has convincingly explained the limits of the Condominium record, especially around the crucial date of 1905, highlighting the fact that the Condominium was still undertaking initial explorations of the region at the time. These exploratory treks followed limited routes and were not necessarily conducted for the purpose of collecting information on the people but rather on the topography or the river system. These expeditions were made in the dry season, at a time when the Humr go down to the Bahr in search of water and pastures and the Ngok Dinka move to the south of the Bahr. The nascent state of the administration and, more generally, a persistent difficulty in accessing the area during the rainy season also account for the lack of clarity and comprehensiveness of the information recorded in their reports or on maps.[1185]

716. One cannot conclude from the foregoing, however, that evidence emanating from Condominium officials has no probative value. Rather, these reports should be examined taking into account their limits and other sources of evidence.

717. One other potential source of evidence is witness testimony. For its part, the GoS has criticized the reliability of witness evidence.[1186] This Tribunal agrees that where the witnesses rely on knowledge passed down through one or two generations, the precise dating of the evidence which they supply may sometimes be difficult. Nevertheless, depriving witness evidence *per se* of all probative value would be unjustifiable. When defining the historic area of a tribe, an inherently difficult exercise, it is reasonable, and indeed quite logical, to seek information from the tribe members themselves. The ABC was explicitly structured by the Parties to hear such evidence. The Terms of Reference of the ABC, which were agreed upon by the Parties, provided that "[t]he ABC shall thereafter travel to the Sudan to listen to representatives of the people of Abyei Area and their neighbors"[1187] and both Parties did rely on witness evidence before the Commission. The ABC Experts themselves, as specialists, felt they had to consider this type of evidence.[1188] In these proceedings, the Parties again presented and relied on witness statements in support of their

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[1185] *See supra* the SPLM/A arguments at paras. 273 *et seq.*

[1186] *See supra* the GoS's arguments at paras. 372 *et seq.*

[1187] Terms of Reference, Section 3.2.

[1188] *See* Transcript of discussion between ABC Members during meeting at La Mada Hotel, Nairobi, Kenya, p. 34, SPLM/A Exhibit-FE 14/5a.

arguments. The balanced approach of the Supreme Court of Canada provides useful guidance on the evidentiary value of oral tradition:

> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. This is a long-standing practice in the interpretation of treaties between the Crown and aboriginal peoples.[1189]

718. The Tribunal will accordingly admit oral evidence and will assign it the weight proper to it in each instance. It will be duly taken into account, in particular, in so far as it corroborates other sources of evidence.

719. The Tribunal notes, finally, that in contrast to Condominium records and witness statements, the evidence provided by anthropological experts, in particular Howell and Professor Cunnison, has not been questioned by either Party. Because of this unanimity and for additional reasons explained below, their evidence is central to this Tribunal's decision.

## 2. Howell's western and eastern limits of the area occupied by the Ngok Dinka

720. One document in the record, Paul P. Howell's "Notes on the Ngork Dinka [sic] of Western Kordofan," provides specific longitudes for this area. Significantly, the relevant extract of this document was not only submitted to the ABC[1190] and included in the Report,[1191] but it was also relied upon by both Parties before this Tribunal.[1192]

721. Howell, a British District Commissioner and anthropologist,[1193] located the Ngok Dinka people as follows:

> The Ngork Dinka occupy the area between approximately *Long. 27°50' and Long. 29°* on the Bahr el Arab, extending northwards along the main watercourses of which the largest is the Ragaba Um Biero.[1194]

722. While Howell does not mention any specific latitude for the northern limit of the Ngok Dinka and refers to "the main watercourses" north of the Bahr

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[1189] *Delgamuukw* v. *British Columbia* (1997) 3 S.C.R. 1010, para. 87, SPLM/A Exhibit-LE 40/7.

[1190] SPLM/A Final Presentation on the Boundaries of the Abyei Area, p. 17 (SPLM/A Exhibit-FE 14/13)

[1191] ABC Experts' Report, Part 2, Appendix 5, p. 202.

[1192] *See* GoS Rejoinder, paras. 419, 434, 444, 454, 484 and SPLM/A Rejoinder, paras. 364, 368, 507, 557 (h) 592; *see also* GoS Oral Pleadings, April 23, 2009, Transcr. 33/03–12 and SPLM/A Oral Pleadings, April 22, 2009 Transcr. 34/23–35/06, 52/20–23.

[1193] *See* ABC Experts' Report, Part I, pp. 16, 26.

[1194] P.P. Howell, "Notes on the Ngork Dinka of Western Kordofan" (1951) 32 *Sudan Notes and Records* 239, p. 242 (emphasis added). (SM Annex 53, SPLM/A Exhibit-FE 4/3).

el Arab (*i.e.,* the Ragaba ez Zarga and the Ragaba Umm Biero), he does provide specific indications of where the Ngok Dinka's western and eastern limits lie.

### 3. Continuity of Ngok Dinka settlements

723. The Tribunal is well aware of the fact that Howell's notes are not contemporaneous to the 1905 transfer. Nonetheless, they provide the best and most specific available data, especially in light of the continuity, within a largely unchanged ecology, of the Ngok Dinka's historic settlements and Humr's migrating patterns, which the GoS's witness, Professor Ian Cunnison, convincingly describes. Indeed, on the basis of observations made in the early 1950s, Professor Cunnison explains that the Humr's locations and migratory "pattern of life is of long-standing"[1195] and that "[t]he way in which tribal sections move seems not to have varied much since the Reoccupation."[1196] In addition, Muglad is considered by the Humr as "their home" and that is "where they cultivate and store their grain as their forefathers did."[1197] Professor Cunnison further observes that when the Humr migrated in the dry season, they would go to the Bahr, "the traditional land of Dinka who return there and cultivate during the rains."[1198] In his view, "[t]he substantial nature of Dinka houses means that their settlements have remained similar for a long period – probably from the beginning of the 20th century, or the end of the Mahdiya."[1199]

724. It bears recalling that Professor Cunnison, a specialist of social anthropology,[1200] lived for more than two years in a Humr camp, which "moved to about sixty fresh sites in the course of each year"[1201] and thus extensively explored the region.[1202] He also "knew the Dinka leader, Deng Majok," the Ngok Dinka Paramount Chief, "who was an impressive man."[1203] The Tribunal is therefore inclined to place more reliance on his understanding of the

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[1195] Witness Statement of Ian Cunnison, para. 6. *See also* para. 12: "I believed–and still believe–that the position I describe was of long-standing" (GoS Memorial, pp. 189, 191).

[1196] Cunnison, *Baggara Arabs–Power and the Lineage in a Sudanese Nomad Tribe* 26 (1966), SPLM/A Exhibit-FE 4/16.

[1197] Cunnison, *The Humr and their Land,* 35(2) SNR 54 (1954), SPLM/A Exhibit-FE 4/5.

[1198] Cunnison, "The Social Role of Cattle", 1(1) *Sudan J. Veterinary Science and Animal Husbandry* 10 (1960), Exhibit-FE 4/8.

[1199] Cunnison interview, ABC Experts' Report, Part II, App. IV, p. 162.

[1200] See Witness Statement of Ian Cunnison, para. 1.

[1201] Cunnison, *Some Social Aspects of Nomadism in a Baggara Tribe* in *The Effect of Nomadism on the Economic and Social Development of the People of the Sudan,* Proceedings of the Tenth Annual Conference January 11–12, 1962, p. 105, SPLM/A Exhibit-FE 4/11.

[1202] Professor Cunnison lived among the Misseriya Humr, the Ngok Dinka's northern neighbouring tribe, between August 1952 and January 1955 (*see* First Witness Statement of Professor Ian Cunnison, GoS Memorial, para. 3, p. 189).

[1203] Professor Cunnison's Witness Statement, para. 6.

situation on the ground, of how the Humr and the Ngok lived, moved and interacted, than on reports based on more limited dry-season treks. In addition, his analysis has not been challenged by the Parties. Rather, the GoS itself presented Professor Cunnison as a witness and relied on his writings and statements, thereby clearly indicating that his observations, made in the 1950s, could be transposed and were highly relevant to the year 1905.[1204]

725. Cunnison's analysis has also been confirmed by Michael Tibbs, who "[ . . . ] responded affirmatively when asked if there was continuity in the Ngok Dinka permanent settlements."[1205] Mr. Tibbs maintained this position in his witness statement: "I believe the descriptions I give of the Humr and Ngok Dinka areas within the province to have existed for some considerable time prior to my arrival in Kordofan, with the obvious exception of the increased Humr cultivation of cotton particularly at Nyama and Subu." [1206]

### 4. Evidence corroborating the extent of the "Bahr" region

726. The reliability of Howell's western and eastern limits of the nine Ngok Dinka Chiefdoms is however not solely based on the continuity of Ngok settlements. His calculations are also confirmed both by earlier sources as well as contemporaries of Howell. While less specific than Howell, all authors have in common the fact that they define the location of the Ngok Dinka by reference to the Bahr region, which they describe in a similar fashion.

727. Robertson thus depicted the Bahr as "the great semi-circle from Grinti to Keilak on the Bahr el Arab, and its system of tributary wadis (regebas)."[1207] Howell offers a comparable definition, explaining that the name is taken from "the main perennial river of that region, the Bahr el Arab," and "used loosely to describe a vast tract of country where many variations of topography and vegetation are found," extending to Lake Keilak and Lake Abiad.[1208] As noted by the ABC Experts, Professor Cunnison provides an analogous description of the Bahr:

> [t]he southern part of the country, [i]t is the area in which the Humr spend the latter half of the dry-season. It is characterized by dark, deeply crackling clays and numerous winding watercourses all connected eventually with

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[1204] The SPLM/A endorses Professor Cunnison's (and Mr Tibbs's) analysis on the continuity of Nogk Dinka settlements (*see supra* paras. 343–344). The Government's criticism focuses on the Experts' reliance on a 1965 peace agreement to establish continuity (*see supra* para. 179).

[1205] Tibbs interview, ABC Experts' Report, Part II, App. IV, p. 159.

[1206] Witness Statement of G. Michael Tibbs, Appendix to SPLM/A Counter-Memorial, para. 27.

[1207] ABC Experts' Report, Part II, Appendix 5 at p. 171, *quoting* J.W. Robertson, *Handing over Notes on Western Kordofan District, 1936*, Chapter IV The Humr Administration.

[1208] *Ibid., quoting* P.P. Howell, *Some Observations on the Baqqarah* (1948), p. 11.

> the Bahr el Arab, a tributary of the White Nile. It contains also two almost permanent lakes, Keylak (which lies slightly to the south of east from the Muglad) and Abyad, in the south-east corner of the country. The Bahr is the name which the Humr give to the whole of this dry-season watering country. Within it they recognize different districts: 'the Regeba' is the northern part of the Bahr, where the Humr make their earliest dry-season camps [ . . . ] The 'Bahr' proper is the region where the camps are made towards the end of the dry season, mainly around the largest watercourses, the Regeba Umm Bioro and Regeba Zerga.[1209]

> The Humr recognize the following components in [the Bahr]: (i) the watercourses; (ii) higher, non-cracking clay areas, on which Dinka build permanent homestead . . . [1210]

728. In a previous article, "The Humr and their Land," also examined by the ABC Experts, Professor Cunnison had commented on the Bahr el Arab as follows:

> The river system is known to the Arabs as the Bahr, although they subdivide the area into the Regaba (consisting of Regeba ez Zarga and the Regeba Umm Bioro); and the Bahr, or the Bahr el 'Arab, which consists of all river beds between the Regeba ez Zerga and the main river. [Fn 3: The nomenclature is confusing. The river which is generally shown on maps as the Bahr el 'Arab – and in one section as the Jurf – always known by the Arabs as the Jurf. They point out that it is not the Bahr el 'Arab, for the Arabs do not normally settle by it at this part, but the Bahr ed Deynka.][1211]

729. The Tribunal notes that these descriptions correspond to the satellite photographs of the Bahr region submitted in the file.[1212] They are also consistent with Professor Allan's statement that:

> The Bahr region is hospitable to and consistent with the agro-pastoral lifestyle, and it does extend not only in the area between the two major rivers that we've been talking about [the Kir and the Ragaba ez Zarga], but also in the area to the north and the east.[1213]

730. According to Professor Cunnison, "[ . . . ] *[m]uch of the Bahr has permanent Dinka settlements*, although during most of the time that the Humr

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[1209] Cunnison, I., *Baggara Arabs: Power and Lineage in a Sudanese Nomad Tribe* (1966). *See also ibid.,* at p. 172.

[1210] *Ibid.,* at p. 18.

[1211] I. Cunnison, "Humr and their Land" (1954) 35 *Sudan Notes and Records* 50, 51 (SPLM/A Exhibit-FE 4/5).

[1212] *See* Maps 68 (Bahr Region (on Dry Season Satellite Image)) and 69 (Abyei Area: Wet Season Vegetation (Satellite Image)) of SPLM/A Map Atlas, vol. 2.

[1213] SPLM/A Oral Pleadings, April 21, 2009, Transcr. 153/02–07 (Professor Allan's presentation).

occupy it the Dinka are with their cattle south of the Bahr el Arab."[1214] He further observes that

> *Dinka have permanent housing on the Bahr*, but Humr do not. Dinka settlements are largely unoccupied during the Humr stay in the south, except for caretakers. The bulk of the Dinka and their cattle move over the Bahr -el-Arab. Arabs, during the dry season, camp by the regebas. By contrast *Dinka erect their houses back from the regebas to avoid the flooding during their residence there in the rains*.[1215]

731. The permanent nature of Dinka settlements in the Bahr region is also highlighted in the following extracts from the ABC Expert's interview with Professor Cunnison in May 2005:

> The Humr had no land claims, no permanent settlements, no houses, unlike the Dinka.[1216]

732. It should be emphasized at this stage that resorting to a criterion of permanent housing on the Bahr in determining the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905 by no stretch implies that other tribes cannot, or will not be able to, use the Bahr and its pastures. Quite the contrary. Article 1.1.3 of the Abyei Protocol provides that "[t]he Misseriya and other nomadic peoples retain their traditional rights to graze cattle and move across the territory of Abyei." Consistent with Professor Cunnison's comment that he "never observed the Humr asking permission from Dinka to come to the Bahr,"[1217] Article 1.1.3 enshrines the right of the Misseriya and other nomadic tribes (not subject to "permission") to move freely and graze cattle in the Abyei Area.[1218]

733. Earlier sources closer to 1905 confirm the presence of Ngok Dinka in this area. The 1912 Kordofan Handbook provides a full description of the area occupied by the Ngok Dinka, which encompasses at least the Bahr in Cunnison's terminology:

> Country.- To the south of Dar Nuba and living in the open plains (locally called fawa) which extend to the Bahr el Arab there is a considerable Dinka population. In the rains the tribesmen collect for the most part in the neighbourhood of Lake Abiad and near Doleiba, where they have semi-permanent villages and a little cultivation. As the country dries up and the mosquitoes disappear they move slowly south, watering at the various rain pools, to the

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[1214] I. Cunnison, *Baggara Arabs: Power and the Lineage in a Sudanese Nomad Tribe*, (1966), p. 19 cited in ABC Experts' Report, Part II, App. 5, p. 172.

[1215] ABC Experts, ABC Experts' Report, Part II, App. 4, p. 161 (Ian Cunnison Interview, Hedon, 22 May 2005).

[1216] ABC Experts' Report, Part 2, Appendix 5, p. 161 (Ian Cunnison Interview, Hedon, 22 May 2005).

[1217] Witness Statement of Professor Cunnison, para. 6.

[1218] *See also infra* paras. 748 *et seq.* the section of this Award addressing the issue of traditional rights.

> Arab or Gurf River, along the banks of which they form innumerable small settlements of two or three huts each.[1219]

734. The 1913 Anglo-Egyptian Kordofan Province Map reflects this description and places the labels "Dinka" and "Dar Jange" on a territory encompassing approximately Sultan Rob, the Bahr el Arab and the Ragaba ez Zarga ("Bahr el Homr"), up to Lake Abiad.[1220] Similarly, other maps such as the 1914 Anglo-Egyptian Sudan War Office Map[1221] or the 1916 Darfur War Office Map[1222] mark "Dinka" on an area extending from beneath the Bahr el Arab to the northwest beyond the Ragaba ez Zarga up to approximately latitude 10°20'N, past Lake Abiad. The description of the area again roughly corresponds to the arc described above by Robertson.

735. However, a close reading of the evidence shows that an expansive view of the area occupied by the Ngok Dinka, such as to encompass the whole of the Bahr up to, and as far east as, Lake Keilak and Lake Abiad, is not warranted. Rather, the evidence indicates that Ngok territory occupation was concentrated approximately between the longitudes provided by Howell, up to latitude 10°10'N.

736. In Cunnison's analysis, the Ngok Dinka permanent settlements are in fact mostly located around the Bahr river system, which includes the Bahr el Arab, the Ragaba Umm Biero, and the Ragaba ez Zarga, and "numerous winding watercourses all connected eventually with the Bahr el Arab."[1223] While this area does not go beyond latitude 10°10'N – where, as noted by Professor Cunnison, there is no significant collective presence of the Ngok Dinka (in the northwest, in the goz, in the northeast, in the upper Bahr region (towards lake Keilak and Abiad) – Howell's lines of latitude do encompass and coincide roughly with much of the three main rivers and intricate network of smaller waterways of this portion of the Bahr, as shown on the Tribunal's Award Map.

737. This is confirmed by earlier evidence, including the 1912 Kordofan Handbook, which locates the Ngok Dinka in the center and the west of the area extending from the Bahr el Arab to Lake Abiad:

> The three main divisions are: – On the east, the Ruweng section under Sultan Anot; in the centre, the followers of the late Sultan Rob, who are now

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[1219] Anglo-Egyptian Sudan Handbook Series: Kordofan and the Region to the West of the White Nile, December 1912, p. 73 (SM Annex 27, SPLM/A Exhibit-FE 3/8a).

[1220] *See* Map 49 of SPLM/A Map Atlas, vol. 1; GoS Memorial Map 12 (*Kordofan Province,* Survey Office Khartoum, 1913).

[1221] Map 84 of SPLM/A Map Altas, vol. 2 (*The Anglo-Egyptian Sudan,* War Office, 1914, rev. 1920); GoS Memorial Map 17 (*The Anglo-Egyptian Sudan,* War Office, 1914, rev. 1920).

[1222] GoS Memorial Map 16 (*Darfur,* War Office, 1916).

[1223] *See supra* para. 727 *et seq. See also* the rivers and drainage on the Tribunal's Award Map (Appendix 1). Secretariat note: the map contained in Appendix 1 is located in the rear pocket of this volume.

under his son, Kanoni; and to the west a number of Rob's ex-followers, under another of his sons, named Kwal.[1224]

## 5. Evidence corroborating Howell's western and eastern limits

738. Taken individually, the western and eastern latitudes indicated by Howell are equally corroborated by additional evidence.

739. Howell's location of the western boundary is corroborated by Michael Tibbs' 1954 observation that the area around Grinti, very close to longitude 27°50'E, is "Ngok territory, although the Arabs used to graze in it in the spring." Mr. Tibbs also notes that "while the Dinka tolerated the Messeria, neither of them wanted the Rezigat from Darfur there."[1225]

740. These statements are unambiguous and do contribute to confirming the location of the Ngok people transferred in 1905. The Tribunal notes, similarly, that the 1913 Anglo-Egyptian Kordofan Province Map places the label "Dar Rizeigat" to the west of "Dar Jange," approximately along longitude 27°10'E.[1226] By contrast, Heinekey, who began a trek in Gerinti in March 1918, merely notes the absence of tracks and the necessity to be accompanied by a guide to travel to Mek Kwal's village.[1227] Unfortunately, he does not offer, in this very brief report, any information regarding the population inhabiting the area around Gerinti or the relations between the different tribes there. Similarly, Sultan Rob's indication that there are only Humr "west of him"[1228] is equally unhelpful. The statement is vague *per se* and leaves unresolved the task of determining coordinates of the western limit of the area. In light of Mr. Tibbs' observations, Sultan Rob's statement is best understood as referring to the presence of Misseriya (and Rizeigat) Arabs west of the Ngok Dinka people as a whole, Sultan Rob being their Paramount Chief.

741. Turning to the eastern boundary, Howell's longitude of 29°00'E is corroborated by evidence provided by Robertson's study of Western Kordofan from 1933 to 1936. Robertson reports that in June one year after the rains had begun, the people of the Western Nuer District in Upper Nile Province "had crossed the Ragaba and built their big cattle luarks – thatched huts – on the Kordofan side of the river, thereby trespassing on the Ngok

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[1224] Anglo-Egyptian Sudan Handbook Series: Kordofan and the Region to the West of the White Nile, December 1912, pp. 73–74 (SM Annex 27, SPLM/A Exhibit-FE 3/8a).

[1225] ABC Experts' Report, Part II, App. 5, p. 203 quoting Michael and Anne Tibbs.

[1226] *See* Map 49 of SPLM/A Map Atlas, vol. 1; Map 12 in GoS Memorial Map Atlas (*Kordofan Province,* Survey Office Khartoum, 1913).

[1227] G.A. Heinekey, Route Report: Gerinti to Mek Kwal's village, March 1918, SCM Annex 35.

[1228] GoS Oral Pleadings, April 21, 2009, Transcr. 91/01.

Dinka lands."[1229] Robertson further states that he gave orders to burn the Nuer's huts and "make [them] go back to their own tribal lands."[1230] These comments clearly indicate that the tribal boundary between the Nuer and the Ngok Dinka is crossed at the border between Upper Nile and Kordofan around the Ragaba ez Zarga. Again, Robertson's specific meeting point between the two tribes closely coincides with Howell's longitude of 29°00'E, west of which one enters Ngok territory. This description is more useful to this Tribunal than Dupuis' sketch, which merely suggests that the Ngok Dinka's southeastern border is with the Rueng,[1231] a border in any event confirmed by Howell.[1232] It is also a more reliable and better indication than the village of Etai, which the GoS claims is evidence of the Abyei area's eastern limit.[1233] In fact, Wilkinson, who located Etai, never described it as forming or indicating the Ngok Dinka's eastern boundary.[1234] The Tribunal is similarly very reluctant to equate the eastern and western limits of the area occupied by the Ngok Dinka transferred in 1905 with the 1933 pencil depiction of Ngok Dinka's dry season grazing area on a sketch map, especially when more comprehensive and specific evidence is available.[1235]

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[1229] Robertson, J., *Transition in Africa*, 1974, p. 51, SM Annex 45, SPLM/A Exhibit-FE 5/10.

[1230] *Ibid.*

[1231] *See* GoS Oral Pleadings, April 21, 2009, Transcr. 106/11 *et seq.;* Dupuis' 1921 Sketch (*see* GoS Maps 39b and 39c). As in the case of a number of other maps, Dupuis provides a mere snapshot of the traveler's perception during a single trip in some parts of the region; it does not reflect, among other things, the fact that the Ngok Dinka's occupation and use of land is affected by the very significant changes to the topography of the region brought about by its seasonal ecology. The Tribunal further notes that Dupuis' 1922 brief Note on Dinka of Western Kordofan unfortunately does not provide any useful information or coordinates locating the area occupied and used by the Ngok Dinka (*see* Dupuis 1922 Report: Note on Dinka of Western Kordofan, SCM Annex 52). The same analysis applies to the 1927 Tribal Distribution Map. The Tribunal observes, however, that the map confirms the Ngok Dinka's southeastern border with the Rueng at approximately latitude 29°00'E and shows no tribe between the Ngok Dinka and Kordfan's western boundary (*See* Map 21 in GoS Counter-Memorial Map Atlas (*Kordofan Tribal Distribution Map,* Sudan Survey Department, 1927)).

[1232] *See* P.P. Howell, "Notes on the Ngork Dinka of Western Kordofan" (1951) 32 *Sudan Notes and Records* 239, p. 241 ("They [The Ngok Dinka] border the Rueng Alor Dinka in the south-east [ . . . ]") (SM Annex 53, SPLM/A Exhibit-FE 4/3).

[1233] *See* GoS Oral Pleadings, April 21, 2009, Transcr. 106/20 *et seq.*

[1234] *See* Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, p. 155, SM, Annex 38, SPLM/A Exhibit-FE 2/15.

[1235] *See* GoS Oral Pleadings, April 21, 2009, Transcr. 108/06 *et seq.;* 1933 Grazing Areas Map (GoS Counter-Memorial Map Atlas, Maps 22a and 22b). The minutes of the meeting to which the Grazing Areas Sketch Map is attached do not provide any relevant information on the area inhabited by the Ngok Dinka (*see* Civsec 66/4/35, "Minutes of Meeting," October 28, 1933, pp. 92–95, SCM Annex 39).

742. In addition, the Tribunal notes that the written evidence is corroborated by oral evidence. Naturally, the Tribunal is aware that, like other pieces of evidence submitted in these proceedings, some witness statements lack precision. But this does not mean that they lack all probative value. Indeed, both Parties relied on witness evidence before the ABC and before this Tribunal, knowing that the history of the Ngok Dinka and the Misseriya is largely based on oral tradition.[1236] Given the paucity of the evidence, the oral testimony of the Ngok Dinka regarding their location in 1905 will be taken into account, especially insofar as it confirms scholarly and documentary evidence, such as that provided by Howell or Cunnison.

743. In the west, for example, several witnesses have identified Maper Amaal, a village near the 27°50'E line, around the northern portion Ragaba ez Zarga, as both an Abyior settlement[1237] and a cattle grazing area for members of the Mareng Chiefdom[1238] around 1905. Witnesses appearing before the ABC, including members of other Dinka tribes, also indicated that Maper Amaal was considered as a Ngok settlement and place for grazing.[1239] Similarly, in the east, oral evidence points to Panyang, a one-day walk west of Pariang, and Pariang itself, being Achaak settlements in 1905.[1240]

744. Although there is witness evidence suggesting that there were Ngok settlements west of longitude 27°50'E in such places as Thigei,[1241] Grinti,[1242]

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[1236] The SPLM/A filed twenty-six witness statements from members of all of the nine chiefdoms, including the Ngok Dinka paramount chief, with its Memorial. The GoS also submitted with its Counter-Memorial a substantial number of witness statements, including four witness statements from Ngok Dinka tribe members. As one of the Government's witnesses indicates, the source of the Ngok Dinka's history is found in "oral traditions and Ngok Dinka songs." (Witness Statement of Majid Yak Kur, member of the Bongo Chiefdom, p. 1)

[1237] *See,* for example, Witness Statement of Deng Chier Agoth, Abyior Elder, para. 16 (SPLM/A Memorial, Witness Statements, Tab 7). Deng Chier Agoth was born in 1930. *See also* Witness Statement of Kuol Alor Makuac Biong, Abyior Chief, para. 13 (SPLM/A Memorial, Witness Statements, Tab 6). Kuol Alor Makuac Biong was born in 1963.

[1238] *See* Witness Statement of Kuol Lual Deng Akonon, Former Chief of the Mareng and Mareng Elder, para. 9 (SPLM/A Memorial, Witness Statements, Tab 27). Kuol Lual Deng Akonon was born in 1914.

[1239] *See* ABC Experts' Report, Part II, App. 4, p. 69 (Akol Maywin Kuol, Executive Chief from the Rek Dinka tribe), p. 75 (Naim Manyang, Abiem Dinka Chief), p. 115 (Koul Mithiang Amiyok, Diil Chiefdom).

[1240] *See* Witness Statement of Ring Makuac Dhel Yak, Executive Chief of the Achaak, paras. 5, 11 (SPLM/A Memorial, Witness Statements, Tab 11).

[1241] *See,* for example, Witness Statement of Kuol Alor Makuac Biong, Chief of Abior, para. 13 (SPLM/A Memorial, Witness Statements, Tab 5); Witness Statement of Deng Chier Agoth, Abyior Elder, para. 16 (SPLM/A Memorial, Witness Statements, Tab 7); *see also* ABC Experts' Report, Part II, App. 4, pp. 115, 154.

[1242] *See,* for example, Witness Statement of Deng Chier Agoth, Abyior Elder, para. 21 (b) (SPLM/A Memorial, Witness Statements, Tab 7); *see also* ABC Experts' Report, Part II, App. 4, p. 154.

Meiram,[1243] and east of longitude 29°00'E in such places as well as Ajaj,[1244] Mardhok,[1245] or Miding,[1246] Map 62 of the SPLM/A Map Atlas (vol. 2) confirms that the vast majority of Ngok traditional sites and settlements were concentrated in the portion of the Bahr region located between longitudes 27°50'E and 29°00'E.

## 6. Conclusion

745. In view of the above, the Tribunal defines the western and eastern boundaries of the Abyei Area as indicated on the Tribunal's Award Map (Appendix I).[1247] The western boundary runs along longitude 27°50'E from latitude 10°10'N south until it intersects with the 1956 Kordofan-Darfur boundary. In order to take into account the fact that the Abyei Area's southern boundary, as confirmed by this Tribunal, is the prolongation of the 1956 Kordofan-Darfur boundary, the Abyei Area's western boundary then follows the latter until it meets the former. The eastern boundary of the Abyei Area runs along longitude 29°00'E, from latitude 10°10'N south until it intersects with the Abyei Area's southern boundary.

746. By delimiting the eastern and western boundaries of the Abyei Area in the foregoing manner, the Tribunal adopts the ABC Experts' use of lines of longitude in its delimitation of tribal boundaries, as the Tribunal finds that it was reasonable for the Experts to do so for both logical and practi-

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[1243] *See,* for example, Witness Statement of Deng Chier Agoth, Abyior Elder, para. 11 (SPLM/A Memorial, Witness Statements, Tab 7); Witness Statement of Alor Kuol Arop, Abyior Elder, para. 10 (SPLM/A Memorial, Witness Statements, Tab 8); Witness Statement of Jok Deng Kek, Achueng Elder, para. 11 (SPLM/A Memorial, Witness Statements, Tab 14); *see also* ABC Experts' Report, Part II, App. 4, pp. 48, 148.

[1244] *See,* for example, Witness Statement of Ring Makuac Dhel Yak, Executive Chief of the Achaak Chiefdom, para. 14 (SPLM/A Memorial, Witness Statements, Tab 11); Witness Statement of Mijak Kuot Kur, Achaak Elder, para. 11 (SPLM/A Memorial, Witness Statements, Tab 12); Witness Statement of Nyol Pagout Deng Ayei, Bongo Chief, para. 10 (SPLM/A Memorial, Witness Statements, Tab 20); *see also* ABC Experts' Report, Part II, App. 4, pp. 124, 133, 149, 150.

[1245] *See,* for example, Witness Statement of Ring Makuac Dhel Yak, Exective Chief of the Achaak Chiefdom, para. 11 (SPLM/A Memorial, Witness Statements, Tab 11); Witness Statement of Mijak Kuot Kur, Achaak Elder, para. 11 (SPLM/A Memorial, Witness Statements, Tab 12); *see also* ABC Experts' Report, Part II, App. 4, p. 150.

[1246] *See,* for example, Witness Statement of Ring Makuac Dhel Yak, Executive Chief of the Achaak Chiefdom, paras. 8, 9 (SPLM/A Memorial, Witness Statements, Tab 11); Witness Statement of Mijak Kuot Kur, Achaak Elder, para. 11 (SPLM/A Memorial, Witness Statements, Tab 12); Witness Statement of Mijok Bol Atem, Diil Elder, para. 10 (SPLM/A Memorial, Witness Statements, Tab 23); *see also* ABC Experts' Report, Part II, App. 4, pp. 124, 125, 150, 153, 155.

[1247] *See also* Appendix 2, a map comparing the boundary and area delimited by the Tribunal with that of the ABC Experts. Secretariat note: the maps contained in Appendix 1 and Appendix 2 are located in the rear pocket of this volume.

cal reasons. In cases where a tribunal is required to delimit boundaries based on a meager evidentiary record, the "fewer the points (or points of reference) involved in its definition, the greater the court's 'degrees of freedom' (in the statistical sense)."[1248] And indeed, lines of longitude and latitude when delimiting boundaries have been used in appropriate circumstances by international courts and tribunals and is recognized in public international law.

747. The same reasoning applies in this case, as it has proven impossible for the Tribunal to determine every relevant historical and geographical feature in the area, and then proceed to draw authoritative boundaries, from the sparse amount of decisive evidence and the temporal constraint of 1905. As there are few non-topographic circa-1905 features that survive intact today to aid in delimitation, the Tribunal deems it proper to delimit the eastern and western boundaries based on lines of longitude, as the ABC did.

## H. The boundary delimited by the Tribunal is without prejudice to traditional grazing rights

### 1. The scope of the Tribunal's mandate with respect to traditional rights

748. Through the Arbitration Agreement, the Parties gave expression to their expectation that the Tribunal will bring final resolution to the dispute over the Abyei Area, with all its attendant territorial consequences. As mandated, this Tribunal's Article 2(c) focus has been the delimitation "on map" of the boundaries of the Abyei Area. The Tribunal's attention to territorial boundaries should not, however, be taken to imply that the Parties are entitled to disregard other territorial relationships that people living in and in the vicinity of the Abyei Area have historically maintained. Sovereign rights over territory are not, after all, the only relevant considerations in areas in which traditional land-use patterns prevail. As the ICJ noted in the *Western Sahara* case, there are other "ties which kn[o]w no frontier between the territories" and which are "vital to the very maintenance of the life in the region."[1249]

749. The Tribunal's limited mandate forestalls consideration of the traditional rights applying within or along the boundaries of the Abyei Area in any comprehensive manner. Nonetheless, the Tribunal must address such traditional rights to the extent that the ABC Experts have decided in Point 5 of the Report's "Final and Binding Decision" that "[t]he Ngok and Misseriya shall retain their established secondary rights to the use of land north and south of this boundary"[1250] The GoS alleges that the ABC Experts' pronouncement was

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[1248] Separate Opinion by Judge *ad hoc* Abi-Saab, *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, 662.

[1249] *Western Sahara,* Advisory Opinion, *I.C.J. Reports 1975*, p. 12, 65.

[1250] ABC Experts' Report, Part I, p. 22.

rendered in excess of the ABC Experts' mandate. As explained in the following sections, the Tribunal finds no such excess of mandate with regard to Point 5 of the Final and Binding Decision.

## 2. The CPA guarantees Misseriya grazing rights and other traditional rights

750. At the outset, the Tribunal notes that the CPA (including the Abyei Protocol), which is part of the Tribunal's applicable law pursuant to Article 3 of the Arbitration Agreement, confirms the Parties' intention to accord special protection to the traditional rights of the people settling within and in the vicinity of the Abyei Area.

751. Most importantly, the Abyei Protocol specifically recognizes the need to safeguard the grazing rights of the Misseriya and other nomadic peoples. Pursuant to Section 1.1.3 of the Abyei Protocol, "[t]he Misseriya and other nomadic peoples retain their traditional rights to graze cattle and move across the territory of Abyei." Some other provisions of the CPA equally reaffirm the Parties' intention to protect the exercise of traditional rights.[1251]

752. Hence, the CPA explicitly guarantees traditional rights acquired by populations within the Abyei Area; these rights will not be affected by the Tribunal's boundary delimitation.

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[1251] Section 1.6 of the CPA affirms the application of the African Charter on Human and People's Rights, which (among other things) guarantees the right of every individual to leave any country including his own, and to return to his country (Article 12(2)) and the right of all peoples to freely pursue their economic and social development according to the policy they have freely chosen. (Article 21(1)). The legal principles of the continuation of traditional rights enabling lifestyles that necessitate transboundary migration are consistent with these principles. In Section 2.5 of the CPA, the Parties agree that "a process be instituted to progressively develop and amend the relevant laws to incorporate customary laws and practices, local heritage and international trends and practices." Similarly, Section 2.6.6.2 of the CPA requires the National Land Commission to "accept references on request from the relevant government, or in the process of resolving claims, and make recommendations to the appropriate levels of government concerning: . . . Recognition of customary land rights and/or law." The references to "customary laws and practices" and "customary land rights" in the CPA would seem to include the exercise of traditional rights. Pursuant to Section 3.1.5 of the PCA, land rights are a relevant factor in the allocation and exploitation of natural resources: "Persons enjoying rights in land shall be consulted and their views shall duly be taken into account in respect of decisions to develop subterranean natural resources from the area in which they have rights, and shall share in the benefits of that development."

### 3. According to general principles of law, traditional rights are not extinguished by boundary delimitations

753. The jurisprudence of international courts and tribunals as well as international treaty practice lend additional support to the principle that, in the absence of an explicit prohibition to the contrary, the transfer of sovereignty in the context of boundary delimitation should not be construed to extinguish traditional rights to the use of land (or maritime resources).

#### *(a) Case law by international courts and tribunals*

754. While international courts and tribunals have been reluctant to derive direct territorial title from traditional rights,[1252] the ICJ has confirmed that pre-existing traditional rights may result in spatial adjustments when delimiting boundaries.[1253] In addition, it is an established principle of boundary adjudication that the transfer of territorial sovereignty resulting from the delimitation of a new international boundary does not, in the absence of an explicit intention to the contrary, extinguish traditional rights to the use of transferred territory. An early doctrinal foundation of the principle that customary rights "survive" the transfer of territorial title was provided in the *Right of Passage* case, where the ICJ recognized that Portugal continued to enjoy certain rights of passage over Indian territory that used to be Portuguese.[1254] Customary rights "run with the land," and whichever party in international adjudication is assigned title to a particular territory is bound to give effect to

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[1252] In a number of cases, the I.C.J. considered traditional fishing rights and land rights, without however finding them sufficient to allocate title to territory based on the notion of better established *effectivités. See* recently, *Sovereignty over Pulau Ligitan and Pulau Sipadan* (*IndonesialMalaysia),* Judgment, *I.C.J. Reports 2002*, p. 625; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain,* Merits, Judgment, *I.C.J. Reports 2001*, 40. *See also The Barbados/Trinidad and Tobago Arbitration Award of 2006* (Permanent Court of Arbitration Award Series, TMC Asser Press, forthcoming 2009), *also available at* www.pca-cpa.org.

[1253] In the *Gulf of Maine case,* which concerned a maritime boundary for the continental shelf and fishery zones, the I.C.J. recognised that boundary delimitations may have "catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned" and noted that, in the event of such consequences, adjustments to the median line should be made (*Gulf of Maine* (*Canada* v. *US), I.C.J. Reports 1984,* p. 246 at 342). Similarly, the I.C.J. considered in the *Maritime Delimitation* (*Denmark* v. *Norway)* "whether any shifting or adjustment of the median line as fishery zone boundary would be required to ensure equitable access to the capelin fishery resources for the vulnerable fishing communities concerned." In this respect, the Court's principal concern was whether there existed any delimitation that would "guarantee to each Party the presence in every year of fishable quantities of capelin in the zone allotted to it by the line" (*Maritime Delimitation in the Area between Greenland and Jan Mayen* (*Denmark* v. *Norway), I.C.J. Reports 1993,* p. 38, paras. 72–78).

[1254] *Right of Passage over Indian Territory* (*Portugal* v. *India), I.C.J. Reports 1960*, p. 6, 35–43.

these rights as a matter of international law; customary rights are, so to speak, servitudes *jure gentium* or *"servitudes internationales."*[1255]

755. With regard to land rights, the PCIJ confirmed that the transfer of sovereignty over a particular territory does not extinguish private rights pertaining to the use of that territory: "Private rights acquired under existing law do not cease on a change of sovereignty," the PCIJ held, adding that it was unreasonable to assume that "private rights acquired from the State as the owner of the property are invalid as against a successor in sovereignty."[1256] In the *Frontier Dispute between Burkina-Faso and Mali,* the ICJ Chamber gave attention to the historical reality that administrative lines drawn by colonial powers often bisected organic living spaces. As a consequence, inhabitants moved across administrative or even colonial boundaries in their daily living:

> While under the colonial system a village may, for certain administrative purposes, have comprised a11 the land depending on it, the Chamber is by no means persuaded that when a village was a feature used to define the composition – and therefore the geographical extent – of a wider administrative entity, the farming hamlets had always to be taken into consideration in drawing the boundary of that entity. In the colonial period, the fact that the inhabitants of one village in a French colony left in order to cultivate land lying on the territory of another neighbouring French colony, or *a fortiori* on the territory of another *cercle* belonging to the same colony, did not contradict the notion of a clearly-defined boundary between the various colonies or *cercles*.[1257]

756. The Chamber also ruled that it was not precluded from defining a clear boundary notwithstanding any transboundary rights that may have been acquired by the inhabitants of the border region:

> The Parties have not requested the Chamber to decide what should become of the land rights and other rights which, on the eve of the independence of both States, were being exercised across the boundary between the two pre-existing colonies. If such rights had no impact on the position of that boundary, then they do not affect the line of the frontier, and it is this line alone which the Parties have requested the Chamber to indicate.[1258]

757. However, such judicial restraint was not exercised due to the Chamber's belief that traditional transboundary rights were of lesser importance. Rather, the Chamber did not consider itself compelled to address the question of preexisting transboundary rights because these rights were already safeguarded by bilateral agreements:

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[1255] *Eritrea-Yemen,* Arbitral Award, First Stage of the Proceedings, at para. 126 (Permanent Court of Arbitration, available at http://www.pca-cpa.org).

[1256] *Questions relating to Settlers of German Origin in Poland,* Advisory Opinion, PCIJ Series B, No. 6 at 36.

[1257] *Frontier Dispute* (*Burkina-Faso* v. *Mali),* Judgment, *I.C.J. Reports 1986,* p. 554 at 616–7, para. 116.

[1258] *Ibid.*

> From a practical point of view, the existence of such rights has posed no major problems, as is shown by the agreements which [the parties] have concluded to resolve the administrative problems which arise in the frontier districts of the two States. For example, an agreement of 25 February 1964 deals, among other matters, with the "Problems of land and the maintenance of rights of use on either side of the frontier," and it provides that "Rights of use of the nationals of the two States pertaining to farmland, pasturage, fisheries and waterpoints will be preserved in accordance with regional custom."[1259]

758. The Tribunal would note that the existence of "side agreements" regarding traditional rights in the *Burkina-Faso* v. *Mali* case bears close resemblance to the situation in the present proceedings, in which the Parties committed prior to the arbitration to the safeguard of certain traditional rights in the CPA.

759. The principle of the continuity of traditional rights has also been invoked, with considerable frequency, in maritime delimitations in relation to traditional fishing rights. In the 1893 *Behring Sea Arbitration,* the arbitral tribunal was concerned with traditional "rights of the citizens and subjects of either country as regards the taking of fur-seals in or habitually resorting to the said waters . . ."[1260] The tribunal specifically exempted "Indians dwelling on the coasts of the territory of the United States or of Great Britain" from the legal regimes that otherwise applied, so as to guarantee the continuation of traditional fishing techniques.

760. In *Eritrea-Yemen,* a PCA-administered arbitration, the Tribunal, in determining claims of territorial sovereignty over islands in the Red Sea and the maritime boundary delimitation between Eritrea and Yemen, held that the traditionally prevailing situation of *res communis,* which permitted African and Yemeni fishermen to operate with no limitation throughout the entire area and to sell their catch at local markets on either side of the Red Sea, was compatible with and would remain unaffected by the findings of sovereignty over various of the islands.[1261] The "traditional fishing regimes," operating both within and beyond the parties' territorial waters, "does not depend, either for its existence or for its protection, upon the drawing of an international boundary by this Tribunal."[1262]

### *(b) International treaties*

761. Traditional rights are also recognized in a multitude of international agreements. Early bilateral treaties defining international boundaries

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[1259] *Ibid.*

[1260] *Behring Sea Arbitration, Great Britain* v. *United States,* August 15, 1893, 179 *CTS,* No. 8, 97 at 98.

[1261] *Eritrea-Yemen,* Arbitral Award, First Stage of the Proceedings, at paras. 128 and 526 (Permanent Court of Arbitration, available at http://www.pca-cpa.org).

[1262] *Eritrea-Yemen,* Arbitral Awards, Second Stage of the Proceedings, at para. 110 (Permanent Court of Arbitration, available at http://www.pca-cpa.org).

have routinely included perpetual guarantees of traditional rights, the exercise of which might otherwise be obstructed by the introduction of an international boundary.[1263]

762. Modern treaties governing the delimitation of boundaries contain similar provisions. The 1978 treaty between Australia and Papua New Guinea, for example, sets out a special legal regime for citizens who "maintain traditional customary associations with areas of features in or in the vicinity of the Protected Zone in relation to their subsistence or livelihood or social, cultural or religious activities," which includes traditional fishing rights.[1264] Similarly, in a 1982 agreement between Indonesia and Malaysia, Malaysia recognized the legal regime of the archipelagic state established by Indonesia, while Indonesia accepted the continuation of the existing rights of Malaysian nationals in Indonesia's territorial sea and archipelagic waters, including traditional fishing rights.[1265]

763. Although the underlying principle applies to all populations, guarantees of traditional rights are of particular significance for indigenous populations. Convention No. 169 of the International Labour Organisation (ILO) concerning Indigenous and Tribal Peoples in Independent Countries enshrines a positive duty on the part of states to safeguard the rights of peoples to their traditional land use.[1266] According to Article 13(1),

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[1263] *See* Article 1 of the 1888 Agreement between Great Britain and France, respecting the Somali Coast, signed at London, February, 1888, Hertslet's, Vol. XIX, 204, at 204–205; Article V of the Arrangement between Great Britain and France, fixing the Boundary between the British and French Possessions on the Gold Coast, signed in the French language at Paris, July 12, 1893, Hertslet's, Vol. XIX, 228, at 229–230; Article I of the Treaty between Great Britain and Ethiopia, signed by the Emperor Menelek II, and by Her Majesty's Envoy, at Adis Abbaba *[sic],* May 14, 1897, Hertslet's, Vol. XX, 1 at 2; Article III of the Exchange of Notes between Great Britain and France relative to the Boundary between the Gold Coast and the French Soudan, March 18, 1904, to July 19, 1906, Hertslet's, Vol. XXV, 267, at 271; Convention between Great Britain and France supplementary to the Declaration of March 21, 1899, and the Convention of June 14, 1898, respecting Boundaries West and East of the Niger signed at Paris, September 8, 1919; Convention Supplementary to the Declaration signed at London on March 21, 1899, as an addition to the Convention of June 14, 1898, which regulated the Boundaries between the British and French Colonial Possessions and Spheres of Influence to the West and East of the Niger, Hertslet's, Vol. XXX, 213, 8th para., at 214.

[1264] Treaty on Sovereignty and Maritime Boundaries in the Area between the Countries, December 18, 1978, XVIII ILM (1979) 291 at 293.

[1265] Treaty relating to the Legal Regime of Archipelagic State and the Rights of Malaysia in the Territorial Sea, Archipelagic Waters and the Territory of the Republic of Indonesia lying between East and West Malaysia, cited in R.R. Churchill, A.V. Lowe, *The Law of the Sea* (revised ed., 1988) 109, note 10.

[1266] Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 72 *ILO Official Bull.* 59; 28 *ILM* (1989) 1382. This Tribunal takes note of the fact that the Sudan has not ratified Convention No. 169. In the Tribunal's view, however, the non-ratification of the Convention does not preclude this Tribunal from taking account of the Convention as one piece of evidence among many of relevant "general principles of law and practices."

> governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

764. To further this purpose, pursuant to Article 14(1), governments shall take measures

> to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

765. Finally, to facilitate the protection of traditional rights to land use, including non-exclusive land use, Article 14(2) requires governments to "take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession."

### 4. Conclusion

766. As a matter of "general principles of law and practices" within the meaning of Article 3 of the Arbitration Agreement, traditional rights, in the absence of an explicit agreement to the contrary, have usually been deemed to remain unaffected by any territorial delimitation. Section 1.1.3 of the Abyei Protocol confirms the continued application of the principle with respect to traditional rights to graze cattle and move across the Abyei Area. For these reasons, the Tribunal finds that the ABC Experts decision that "[t]he Ngok and Misseriya shall retain their established secondary rights to the use of land north and south of this boundary" was reasonable and, thus, within the Experts' mandate.

## I. Final observations

767. By constituting these proceedings, the Parties have accorded to this Tribunal a crucial role within the greater Sudanese peace process – a process that seeks to end the long conflict between North and South that has affected all of Sudan. Conscious of its paramount obligation to the people within and around the Abyei Area (particularly the needs of the Misseriya and the Ngok Dinka) and to the Sudanese people themselves, this Tribunal has done its utmost to contribute, through the task assigned to it, to a peaceful resolution of the bitter conflict over the Abyei Area within the time limits prescribed by the Arbitration Agreement and strictly within the confines of its mandate. The Tribunal is confident that no objective claim can be made from any quarter that the Tribunal acted in excess of its mandate.

768. Under the Abyei Road Map, "[t]he parties commit themselves to abide by and implement the award of the arbitration tribunal."[1267] The Arbi-

[1267] Abyei Road Map, Section 4.3.

tration Agreement reiterates: "[t]he Parties agree that the arbitration award delimiting the "Abyei Area" through determining the issues of the dispute as stated in Article 2 of this Agreement shall be final and binding."[1268] Thus, with this Award, a distinct stage in the peace process comes to an end.

769. It is now for the Parties to take the next steps. Pursuant to the Arbitration Agreement, "the Presidency of the Republic of Sudan shall ensure the immediate execution of the final arbitration award."[1269] This involves, among other modalities of implementation, the prompt appointment of a survey team to demarcate the Abyei Area as delimited by this Award. The Tribunal's limited mandate to "define (*i.e.,* delimit) on map" the Abyei Area does not extend to demarcation, but the Tribunal hopes that the spirit of reconciliation and cooperation visible throughout these proceedings, particularly during the oral pleadings last April, will continue to animate the Parties on this matter.

## Chapter V. Dispositif

## A. Decision

770. Having considered all relevant arguments, the Tribunal concludes that:

### (a) Northern boundary

1. In respect of the ABC Experts' decision that "[t]he Ngok have a legitimate dominant claim to the territory from the Kordofan – Bahr el-Ghazal boundary north to latitude 10°10'N," the ABC Experts did *not* exceed their mandate.

2. In respect of the ABC Experts' decision relating to the "shared secondary rights" area between latitude 10°10'N and latitude 10°35'N, the ABC Experts exceeded their mandate.

3. The northern boundary of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 runs along latitude 10°10'00"N, from longitude 27°50'00"E to longitude 29°00'00"E.

### (b) Southern boundary

1. In respect of the ABC Experts' decision that "[t]he southern boundary shall be the Kordofan – Bahr el-Ghazal – Upper Nile boundary as it was defined on 1 January 1956," the ABC Experts did not exceed their mandate.

2. The southern boundary as established by the ABC Experts is therefore confirmed, subject to paragraph (c) below.

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[1268] Arbitration Agreement, Article 9(2).

[1269] Arbitration Agreement, Article 9(5).

### (c) Eastern boundary

1. In respect of the ABC Experts' decision that "the eastern boundary shall extend the line of the Kordofan – Upper Nile boundary at approximately longitude 29°32'15"E northwards until it meets latitude 10°22'30"N", the ABC Experts exceeded their mandate.

2. The eastern boundary of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 runs in a straight line along longitude 29°00'00"E, from latitude 10°10'00"N south to the Kordofan – Upper Nile boundary as it was defined on 1 January 1956.

### (d) Western boundary

1. In respect of the ABC Experts' decision that "[t]he western boundary shall be the Kordofan – Darfur boundary as it was defined on 1 January 1956," the ABC Experts exceeded their mandate.

2. The western boundary of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 runs in a straight line along longitude 27°50'00"E, from latitude 10°10'00"N south to the Kordofan – Darfur boundary as it was defined on 1 January 1956, and continuing on the Kordofan – Darfur boundary until it meets the southern boundary confirmed in paragraph (b) above.

### (e) Grazing and other traditional rights

1. In respect of the ABC Experts' decision that "[t]he Ngok and Misseriya shall retain their established secondary rights to the use of land north and south of this boundary," the ABC Experts did not exceed their mandate.

2. The exercise of established traditional rights within or in the vicinity of the Abyei Area, particularly the right (guaranteed by Section 1.1.3 of the Abyei Protocol) of the Misseriya and other nomadic peoples to graze cattle and move across the Abyei Area (as defined in this Award), remains unaffected.

## B. Map illustrating the delimitation line

771. The boundary as defined above is illustrated on the map appended to this award on a scale of 1:750,000 and based on the WGS84 datum (*see* Appendix 1).*

* Secretariat note: the map contained in Appendix 1 is located in the rear pocket of this volume.

## C. Reference points

772. The coordinates, in terms of WGS84 datum, of selected reference points mentioned in this Award are specified in the following table:

| *Point* | *Latitude* (*N*) | *Longitude* (*E*) | *Description* |
|---|---|---|---|
| 1 | 9°47' N† | 27°50'00" E | Intersection of the Kordofan-Darfur boundary, as it was defined on 1 January 1956, with the line of longitude |
| 2 | 10°10'00" N | 27°50'00" E | Intersection of the lines of latitude and longitude as determined by the Tribunal |
| 3 | 10°10'00" N | 29°00'00" E | Intersection of the lines of latitude and longitude as determined by the Tribunal |
| 4 | 9°40' N* | 29°00'00" E | Intersection of the Kordofan-Upper Nile boundary, as it was defined on 1 January 1956, with the line of longitude |

† *Note: these latitude values are approximate only and have been derived graphically from maps submitted by the Parties.*

## D. Costs

773. Recalling Article 11 of the Arbitration Agreement, the Tribunal finds no need to issue a ruling on costs.

Done at the Peace Palace, The Hague
Dated: July 22, 2009

[*Signed*]
Professor Pierre-Marie Dupuy
Presiding Arbitrator

[*Signed*]
H.E. Judge Awn Al-Khasawneh

[*Signed*]
Professor Dr. Gerhard Hafner

[*Signed*]
Professor W. Michael Reisman

[*Signed*]
Judge Stephen M. Schwebel

[*Signed*]
Mr. Aloysius Llamzon
Acting Registrar

## Appendix 1. Final Award Map*

## Appendix 2. Comparative Map*

* The maps contained in Appendix 1 and Appendix 2 are located in the rear pocket of this volume.

# Dissenting Opinion of His Excellency Judge Awn Shawkat Al-Khasawneh Member of the International Court of Justice

## Introduction

I regret that I am unable to concur with the conclusions of the Tribunal contained in the *Dispositif* of the Award or to agree, in general, with the reasoning deployed by the majority to arrive at those conclusions. Indeed, and I say this with great respect to my learned colleagues, I find the underlying logic of the Award singularly unpersuasive (let alone convincing), self-contradicting, result–oriented, in many respects cavalier, insufficiently critical and unsupported by evidence, and indeed flying in the face of overwhelming contrary evidence. In other words very similar to the ABC Experts' Report itself and like it as far in excess of mandate as it is removed from historical (and contemporary) reality. I must therefore dissent.

I also feel duty–bound to explain my dissent comprehensively not only because the litany of negative observations I have just enumerated would of itself warrant a full exposé but equally because this is no ordinary arbitration. Its outcome will, 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.

## TABLE OF CONTENTS



* Secretariat note: the map contained in the Appendix to the Dissenting Opinion is located in the rear pocket of this volume.

## 1. The Experts went on a frolic of their own

1. The ABC Experts were tasked with a straightforward and specific mandate. It was not to ascertain where the Ngok people lived in 1905 nor to pronounce on land uses in southern Kordofan. Their mandate was simply to ascertain the spatial implications with reference to a single defining date (1905) and a single defining event (the transfer *to* Kordofan of [the area of] [the nine Ngok Dinka Chiefdoms]). To be sure, the provincial boundary between Kordofan and Bahr el Ghazal was not as clear as the provincial boundaries of a late 20th–century, highly centralised State would be, but they were, by the standards of their time and place, clear enough to effect a delimitation, and the mandate itself assumed the existence of such a boundary. At any rate it was the job of the Experts to clarify any confusion or doubts – an achievable task by reference to, and close reading of, Condominium documents and other available evidence. Ironically it was this very confusion that caused the Experts to abandon their mandate and to embark on a frolic of their own1 with no apparent justification.

2. The Report in which the different episodes of this frolic are recounted is a remarkable 250-page interdisciplinary document. The thought process contained in it meanders (like the Bahr el Arab) from that initial fundamental misinterpretation of the Experts' mandate to their ultimate delimitation of the area, which placed the boundaries of the nine Ngok Chiefdoms in areas where they never had any presence in 1905 nor at any other time after that, and where other people, the Misseriya tribe and others, lived.

3. The Report is remarkable also as a mélange containing *clues* from human geography and administrative records; sociological theories about dominant versus secondary rights and uses; and ecological and anthropological evidence, all interspersed with fragmentary quotations from near-contemporaneous official evidence. Also remarkably, despite its varied sources and exotic reasoning (by the dim standard of lawyers), or perhaps because of them, the ultimate delimitation exercise is the least defended part of the Report. One is left with the impression that the Experts were more concerned with testing and putting into use their theories about dominant rights and the clues one can glean from geography, etc., than in the tedious exercise of delimitation itself and the meticulousness it requires. Thus they expressed their findings in the form of straight lines, unperturbed by the obvious fact that tribal territories are never straight. By contrast, Condominium officials, who knew more about local conditions and tribal locations than the Experts or my learned colleagues, never drew straight lines on the same scale to represent tribal boundaries.

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[1] This phrase is borrowed from the English law of vicarious liability, as stated in *Joel* v *Morison* [1834] EWHC KB J39 (Court of Exchequer, 3 July 1834), *per* Parke, B: "The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable."

4. Equally ominously, the Experts included by their delimitation method, which can only be described as cavalier, vast tracts of territory (the size of Belgium), despite overwhelming contrary evidence. And, not being able to deny that this was also the land of Misseriya and others, they reduced them to holders of secondary rights in their own land on the basis of their life style which was not significantly different from the Ngok.

5. The Tribunal has now, for reasons that have more to do with compromise than principle, impugned the northern line which stood at 10°22'N where the Experts had bisected the Goz area on the basis of one of their theories relating to the "equal division of shared natural resources", a concept with which I am not familiar. The Tribunal replaced that line with a shortened line at 10°10'N, which was not the Experts' northern boundary line of the area, but only where the Experts concluded that the Ngok Dinka "dominant rights" stopped. In addition to impugning the northern line, the Tribunal has also impugned the eastern and western lines. But at this point, the Tribunal has not drawn what is the only possible conclusion, namely, that nothing is now left of the Experts' Report except sociological theories and clues from human geography, and that therefore the Report must be set aside. Only after drawing that conclusion should the Tribunal have embarked on its own delimitation on the basis of the submissions of the Parties and the benefit it derived from guidance by learned counsel. Instead, it has opted, without sanction from its own mandate permitting partial nullity, (for this reason it is in excess of mandate), to effect new straight lines. These are unsupported by any "conclusive evidence", the standard the Tribunal has applied in impugning the northern line, or by "adequate reasoning", the standard it has applied to the impugning of the eastern and western boundaries. This is another reason why by drawing boundary lines without the reasoning it required of the Experts, the Tribunal is by the same standards in excess of mandate. To substantiate these assertions, this Dissenting Opinion will begin by examining the evidence for the new boundary lines.

## 2. The supporting evidence and reasoning for the eastern and western boundaries and their intersection with the northern boundary at 10°10'N

6. "The house of hope is built on sand," as Hafiz of Shiraz[2] once wrote, and indeed if we are to look in the Award for a "*fondation solide*" on which to delimit the *tribal* boundaries of the Ngok Chiefdoms we will seek in vain.

[2] Shams-ud-din Mohammed, better known as Hafiz of Shiraz (born circa 1320 A.D.) is one the greatest poets not only of Iran and Islam but of humanity at large. The full quotation is:

"The house of hope is built on sand,
And life's foundations rest on air".

The Tribunal cannot, with all the hopes that the hearts of my learned colleagues may contain, erect its reasoning for allotting such a vast area on such meagre factual evidence. The only source for the 29°E and 27°50'E lines are the imprecise, non-contemporaneous remarks made in 1951 by Howell[3] which the majority quoted out of context and misinterpreted. The ABC Experts were aware of Howell's writings and quoted them at length in their own Report,[4] however they did not base their delimitations of the boundary on those remarks – whether out of recognition of their generality or because they would not have included enough territory especially to the east is a matter of speculation.

7. The relevant extract from Howell's "Notes on the Ngork Dinka of Western Kordofan" reads:

> "The Ngok Dinka occupy the area between approximately long 27°50' and long 29° on the Bahr el Arab, extending northwards *along the main watercourse* of which the largest is the Ragaba Um Biero."[5]

8. *First*, Howell's use of the word "approximately" suggests that he was trying to give a general and approximate appreciation of the area. Surely – for the meticulous at least – that is no basis on which to draw a vertical line stretching due north some 50 kilometres from the Bahr el Arab where it meets the Upper Nile border at around 9°40'N to the 10°10'N line, and to allot the enclosed area to the Ngok. This is simply an affront to the science of delimitation.

9. *Secondly*, the Ngok do extend northwards, but not *ad infinitum* and Howell, who reminded the reader that the longitudes are approximate (as befits a tribe and not a regimented army) indicated that the area of occupation was "*along the middle reaches* of the Bahr el Arab" and its tributaries.[6] Neither the Bahr el Arab nor its Ragabas in their middle reaches are anywhere near 10°10'N. Moreover, neither the Bahr el Arab nor the Ragabas are horizontal or latitudinal, let alone forming straight lines: they follow a north-westerly direction from 9°20'5"N at the eastern border of Kordofan to approximately 9°50'5"N at the Kordofan/Darfur border. The Ragaba Um Biero meets the Bahr el Arab and is filled by it at Chweng approximately at 9°30'3"N; it reaches beyond the 10°N line near the Darfur border (although no one is sure as to where its upper reaches end). The Ragaba ez Zarga, the most northerly of the

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[3] P.P. Howell, "Notes on the Ngork Dinka of Western Kordofan", (1951) 32 Sudan Notes and Records 239, p. 242, cited in Award at paras. 701 *et seq.*

[4] *See, e.g.,* ABC Experts' Report, Appendix 5.13, at p. 201.

[5] P.P. Howell, *supra* note 3 (emphasis added).

[6] *Ibid*., *supra* note 3, at p. 241: "*The Ngork Dinka . . . occupy an area along the middle reaches of the Bahr el Arab*."; ABC Experts' Report, Appendix 5.13, p. 201, citing P.P. Howell, 1948, in P.P. Howell Papers, Sudan Archive, University of Durham ("SAD") 768/2/15 "The Ngork Dinka of Western Kordofan live *along the middle reaches of the Bahr el Arab and its tributaries*. During the dry season the Homr Messiria mingle freely with them in pastures and they have a long history of contact with the Arab world – probably for at least a century." (emphasis added).

Ragabas, enters Kordofan at approximately 9°40'5"N, goes up in a north-westerly direction, meanders at a more or less straight line around 9°50'N and then starts to climb at about 28°30'E to somewhere on or above latitude 10°N (although, again, no one knows whether it reaches the 10°10'N line or above). Thus "*along their middle reaches*", where Howell placed the Ngok, is nowhere near the 10°10'N line. It would follow, by necessary implication, that in 1951 when the Ngok may have reached, in their northward expansion, the Ragaba ez Zarga/Ngol, there is no evidence, even by then, that the vast area north and north-east of the Ragaba ez Zarga, ascribed to the Ngok by the Experts, ever had any collective Ngok Dinka presence in it, and the same applies to the reduced area ascribed by the Award *without a shred of evidence* let alone "conclusive evidence" to the Ngok, that is, the area north of the Ragaba ez Zarga and to the east of it until the 10°10'N line meets, arbitrarily, longitude 29°E and the areas bordering Darfur which have always been traditional Homr lands.

10. Howell, an anthropologist and a British official[7] – who was by all accounts a distinguished civil servant in an exceptionally meticulous civil service – would have been appalled at how his words were twisted by my learned colleagues. He would have been equally appalled by how he was quoted out of context by a Tribunal that has, elsewhere in the Award, stressed the importance of context, such as for example the fact that the Experts were social scientists, if only in that other instance, to prove doubtful propositions or to infuse doubt into clear ones – something to which I shall return later in my Dissenting Opinion – but I shall revert first to Howell and try to put his opinion in context.

11. In his 1951 publication, Howell says about the Ngok:

> "Permanent villages, and cultivations are set along the higher ground north of Bahr el Arab, while dry season grazing grounds are for the most part in the open grassland (*toich*) south of the river. *Villages are usually built close to the river or to one of the main watercourses*, since water is more easily available during the early part of the dry season, either in pools or in shallow wells dug in the river bed. Clusters of homesteads each consisting of several living-huts (*ghot*) and one or more cattle byres (*luak*) are built in an almost continuous line *along these rivers*."[8]

12. And still if any doubt remains as to where the Ngok were located when Howell wrote his Notes, he supplies a general answer at the outset, by way of introduction:

> "The Ngork Dinka . . . occupy an area *along the middle reaches* of the Bahr el Arab. They border the Rueng Alor Dinka in the south-east and the Twij Dinka to the south, and with both of these peoples have close cultural affinities. To the south-west are the Malwal Dinka. North of the Ngok are the Bag-

[7] ABC Experts' Report, Part 1, p. 16.

[8] Howell, *supra* note 3, at p. 243 (emphasis added).

gara Arabs of the Messeria Humr, with whom they have direct and seasonal contact . . .".[9]

13. Yet again Howell makes the observation that the Ngok were along "*the middle reaches of the Bahr el Arab*". As already noted, Howell had observed in 1948 that the area of occupation of the Ngok lies "*along the middle reaches of the Bahr el Arab and its tributaries*" and that "[d]uring the dry season the Homr Messiria mingle freely with them in pastures".[10] A simple exercise in logic would show that the Ngok were in the "middle reaches", not the upper reaches, of the Bahr el Arab, the Ragaba Zarga and the Ragaba Um Biero, and this tallies completely with all contemporaneous cartographic and written evidence and with the evidence of Cunnison on whom the Award rightly heaps justified praise. The idea that they had moved even further north and east beyond the Ragaba ez Zarga, where the Award wishes to place them is, to put it mildly, quite remarkable.

14. I shall deal in Parts 6 and 7 of this Dissenting Opinion with the Experts' "Proposition 8" on continuity of Ngok presence from 1905 until the mid-1950s, and with the evidence that both the Report and the Award chose to neglect, as to where the Ngok were from 1905 to 1965, but for the time being I shall concentrate on the evidence relied on by the Tribunal.

15. Not content with leaving Howell appalled, the majority in the Tribunal goes further in harnessing what looks like a hastily arranged *ex post facto* ensemble of authorities to buttress the misquoted Howell. Thus the reader is told that "[h]is calculations are also confirmed both by earlier sources as well as contemporaries of Howell",[11] with the important caveat that these are "less specific than Howell".[12] According to the Award "all authors have in common the fact that they define the location of the Ngok Dinka by reference to the Bahr region, which they describe in a similar fashion".[13] However those authors describe the location of the Ngok by reference to the Bahr region in the mid-20th century and it is not in dispute that, in the 1950s, the Ngok were in the Bahr region, namely, along the middle reaches of the Ragabas and the river itself. Nothing, even when all allowance is made for the non-specificity of those authors, can be inferred from their writings.

16. Thus Robertson depicts the Bahr as "the great semi-circle from Grinti to Keilak on the Bahr Al Arab and its system of tributary (wadis) regebas".[14] But even if Keilak falls within some expansive definition of the Bahr (Keilak is above 10°50'N, well above the Goz), as documented by Wilkinson, it was a per-

[9] Howell, *ibid.*, p. 241 (emphasis added).

[10] P.P. Howell, 1948, *supra* note 6 (emphasis added).

[11] Award, para. 726.

[12] *Ibid.*

[13] *Ibid.*

[14] Award, para. 727, citing J. Robertson, "Handing over Notes on Western Kordofan District", 1936, Chapter IV "The Humr Administration".

manent Arab settlement in 1902[15] and not even the ABC Experts were ready to assign it to the Ngok Dinka. Apart from that, it is quite perplexing how this expansive definition of the Bahr supports the Tribunal's 29°E and 27°50'E longitudinal lines. Howell, the ever so careful official, has already indicated in unmistakable terms where the Ngok were in his time. He is being used, in what can only be called a desperate attempt to distil from dead men things they never said. In contrast to this expansive definition of the Bahr (which definition Cunnison also makes), the Bahr in the *proper sense*, where the Homr intermingled with the Ngok (the relevant area of the Bahr, so to speak) is a more restricted area between the Ragaba ez Zarga and the Bahr el Arab, and that is the sense in which Cunnison understood the shared-rights area to be.[16] In his expert testimony he states:

> "The real area of shared grazing was further south, in the Bahr. There, the two groups co-existed for a fairly short season – but this was not a 'host-guest' relationship. At this season it was the Dinka who, apart from a few caretakers, left to go south as part of a transhumance pattern rather than one of nomadism."[17]

17. Thus the area of contention was not *the Bahr* in its expansive definition but an area *in the Bahr* where the two tribes co-existed for a season and where the Ngok had a presence.

18. Moreover, the earlier sources cited by the Award,[18] namely, the 1912 Kordofan Handbook; the 1913 Anglo-Egyptian Kordofan Province Map; the 1914 Anglo-Egyptian Sudan War Office Map; and the 1916 Darfur War Office Map all suffer from the fatal flaw that they never refer to the Ngok Dinka but only to "Dinka" or "Dar Jange", and it should not be forgotten that the Dinka is a great tribe of which the Ngok, sometimes referred to as the western Dinka, are but one branch.

19. It is perhaps on account of the uncertainty inherent in these earlier descriptions, and the plain impossibility in realistic terms of the Ngok Dinka being at Keilak in 1905 when they were demonstrably at most on the middle reaches of the Ragabas in the 1950s, that the Award acknowledges this incongruity in the following terms:

> "However, a close reading of the evidence shows that an expansive view of the area occupied by the Ngok Dinka, such as to encompass the Bahr up to, and as far east as, Lake Keilak and Lake Abiad, is not warranted. Rather, the evidence indicates that Ngok territory occupation was concentrated approximately between the longitudes provided by Howell, up to latitude 10°10'N."[19]

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[15] Gleichen Handbook, 1905, p. 157.

[16] *Supra* note 24.

[17] Witness Statement of Professor Ian Cunnison, GoS Memorial, p. 190.

[18] Award, paras. 733–734.

[19] Award, para. 735.

20. But why at latitude 10°10'N? There is no logical link between the premise and the conclusion and not a shred of factual evidence supports the finding for either the eastern or the western "lines", allegedly Howell's,[20] nor their intersection with the northern line at 10°10'N. The leap in reasoning is totally unexplained. There is still no justification for the 10°10'N line.

21. At this point the Tribunal, having exhausted the readily-exhaustible supporting sources, should, in my respectful opinion, have paused and reflected, self-doubt being preferable when we are dispensing justice to doctrinal certainty. Instead the insistence on making Howell's imaginary lines reach 10°10'N has prompted the Tribunal to try another strand of justification in the hope that by repetition its arguments, no matter how weary and unconvincing, will somehow reach 10°10'N.[21] Thus the Award reads:

> "In Cunnison's analysis, the Ngok Dinka permanent settlements are in fact mostly located around the Bahr river system, which includes the Bahr el Arab, the Ragaba Umm Biero, and the Ragaba ez Zarga, and 'numerous winding watercourses all connected eventually with the Bahr el Arab'. While this area does not go beyond latitude 10°10'N – where as noted by Professor Cunnison there is no significant collective presence of the Ngok Dinka (in the north west, in the goz, in north east, in the upper Bahr region towards lake Keilak and Abiad) – Howell's lines of latitude do encompass and coincide roughly with much of the three main rivers and intricate network of smaller waterways of this portion of the Bahr, as shown on the Tribunal's Award Map."[22]

Here, the majority rely on Cunnison's reference to "numerous winding watercourses, all connected eventually with the Bahr el Arab".[23] Remarkably, when Cunnison was describing the Bahr using this phrase, he was doing so in the context of depicting where Homr presence was. Furthermore, within that area under its expansive definition, Cunnison distinguished between the "Regeba" and the "Bahr proper". Cunnison noted that the part of the Homr dry-season watering country known as "[t]he 'Bahr' proper" was located "mainly around the largest watercourses, the Regeba Umm Bioro and Regeba Zerga".[24]

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[20] The Tribunal speaks of "Howell's lines of longitude" and proceeds as if Howell had drawn lines at these longitudes to indicate the area. For example at para. 741 it refers to "Howell's longitude of 29°E, west of which one enters Ngok territory". I would emphasize that Howell never drew lines and had he done so he would have in all probability come up with a differently shaped boundary as close to the reality of his times as it is removed from the wild flight of fancy of 10°10'N, 29°E and 27°50'E.

[21] As Algernon Swinburne once put it, "even the weariest river winds somewhere safely to the sea".

[22] Award, para. 736, citing Cunnison, *infra* note 23 (emphasis added).

[23] Award, para. 727, citing I. Cunnison, *Baggara Arabs: Power and Lineage in a Sudanese Nomad Tribe* (1966), at p. 172.

[24] *Ibid.*

22. The Award continues: "[t]his is confirmed by earlier evidence including the 1912 Kordofan Handbook which locates the Ngok Dinka in the centre and west of the area extending from the Bahr el Arab to Lake Keilak."[25] This exotic reasoning calls for a number of comments.

a. The area of the Bahr in its upper reaches certainly does not go beyond 10°10'N (the Bahr el Arab enters Kordofan from Darfur at 9°52'N, the Ragaba Um Biero's upper reach and the Ragaba ez Zarga's upper reach are not free of controversy)[26] but in any event they do not go to 10°10'N.[27]

b. Even if they did, there is no evidence or suggestion by either Cunnison or Howell that the Ngok had reached the *upper* reaches of these watercourses even in the mid-20th century, let alone in 1905.

c. Howell expressly maintains that the Ngok Dinka are along the "*middle reaches*" of the Bahr and the two Ragabas.

d. Assuming there were Ngok Dinka settlements on the upper reaches of the Ragaba Um Biero, the distance from there to the eastern Howell "line" where it intersects 10°10'N would be roughly 150 kilometres. It would be roughly the same from the upper reaches of the Ragaba ez Zarga and even greater from the Bahr el Arab. What is the special quality of Ngok dug dugs that can generate so much entitlement to territory?

e. Howell's longitudinal references are expressly stated to be approximate. He never described them as extending to 10°10'N. On top of this considerable uncertainty, the defence for the 29°E and 27°50'E lines is that the area coincides *roughly* with Howell's limit. Thus an *approximate* description of an area along the *middle reaches* of the river and the Ragabas is mysteriously understood to reach 10°10'N in the face of contrary evidence from the quoted authority, and, as if this is not enough, an area described by Cunnison is interpreted without reason as *roughly* corresponding to Howell's eastern and western limits, and, by being quoted out of context, is superimposed on the Howell "lines" to produce the eastern and western borders. If this is not frivolous reasoning, nothing is. I do not think the whole history of delimitation has attested a more vague criterion on which to effect territorial delimitation.

f. The habit of quoting out of context and misinterpreting is repeated. The 1912 Kordofan Handbook is misquoted: according to the Award it "locates the Ngok Dinka in the centre and the west of the area extending from the Bahr el

[25] Award, para. 737.

[26] The GoS maps show the start of the Ragaba ez Zarga north of Maper Apaal. The SPLM/A maps show the Ragaba ez Zarga starting to the south east of Rumthil (Antilla) just below 10°N latitude. The Ragaba Um Biero finishes on most maps in south Darfur but Map 62 of the SPLM/A Reply Memorial shows it extending into a network extending some way to the north. There is no evidence that these points have been determined definitively in the field.

[27] *Supra* para. 9.

Arab to Lake Abiad".[28] The statement in the 1912 Kordofan Handbook locating the Ngok Dinka is worth quoting in full:

> "The three main divisions are: ~ On the east, the Ruweng section under *Sultan* Anot; in the centre, the followers of the late *Sultan* Rob, who are now under his son, Kanoni; and to the west, a number of Rob's ex-followers, under another of his sons named Kwal."[29]

It is plain that these words mean that the Rueng, a Dinka but not a Ngok Dinka tribe were to the east, and to the west of them were two Ngok groups: in the centre the followers of Kanoni, son of Sultan Rob (whose presence on the Kiir in 1905 is beyond dispute) and yet to the west of that were the followers of another of his sons. How this is transformed into "additional evidence" to confirm the western and eastern "lines" attributed to Howell[30] is based on anything but contradictory reasoning is beyond my comprehension.

23. The Award goes on to quote what it calls: "Evidence Corroborating Howell's Western and Eastern Limits".[31] These are:

a. A remark recorded in 1954 by Michael Tibbs that the area around Gerinti very close to longitude 27°50'E is "Ngok territory, although the Arabs used to graze in it in the spring".[32] This clearly means that the area was a shared grazing rights area and described the position around his time. It is difficult to see how it can be transposed back to 1905 when more contemporaneous evidence, such as that of Willis,[33] points to a much more limited presence of the Ngok being the case. To fit, at any cost, the 1905 reality with the position around Howell's times, the earlier and naturally more pertinent evidence is either ignored or misinterpreted. Sultan Rob's statement that there "are only Humr" west of him is dismissed as "equally unhelpful" or in the SPLM/A pleadings as "dissembled",[34] words which in themselves reveal how result-driven the exercise is. Of course it is unhelpful because Sultan Rob, the Paramount Chief of the Ngok Dinka, was reflecting the simple truth. He was not interested in being helpful to the Tribunal in trying to build its house of hope by drawing unreasoned straight lines in the sands and ascribing them to Howell.

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[28] Award, para. 737.

[29] Kordofan and the Region to the West of the White Nile, Anglo-Egyptian Handbook Series (London: Her Majesty's Stationery Office 1912), p. 73. See also C.A. Willis, "Notes on the Western Kordofan Dinkas", 10 April 1909, Sudan Intelligence Report No. 178 (May 1909), Appendix C, p. 16: "The Western Kordofan Dinkas seem to be divided into three main heads: on the east the Ruweng, under Sultan Qot; in the middle the followers of the late Sultan Lar, under his son Kanoni, and to the west the followers of the late Sultan Rob, under his son Kwal."

[30] *See supra* note 20.

[31] Award, paras. 738 *et seq.*

[32] Award, para. 739, citing M. and A. Tibbs, *A Sudan Sunset,* pp. 247–8, as cited in ABC Experts' Report, Part 2, p. 203.

[33] Willis, 1909, Sudan Intelligence Report No. 178 (May 1909), Appendix C, p. 16.

[34] Transcript, 22 April 2009, 16/23 (Born).

b. Tibbs's remark that "while the Dinka tolerated the Misseria, *neither of them* wanted the Rizeigat from Darfur there".[35] This means only that two pastoralist tribes from the same "dar" did not want an "intruder" from a different dar (*dar-fur*). This statement relating to the 1940s or 1950s should be read in context. The exact relationship between the Misseriya and the Dinka was explained more thoroughly by Cunnison than anyone else. His explanation merits reproduction in full:

> "The real area of sharing was further south, in the Bahr. There the two groups co-existed for a fairly short season – but this was not a 'host-guest' relationship. At this season it was the Dinka who, apart from a few caretakers, left to go south as part of a transhumance pattern rather than one of nomadism. As I noted in my book (p. 19) 'much of the Bahr has permanent Dinka settlements, although during most of the time that the Humr occupy it the Dinka are with their cattle south of the Bahr al-Arab'. *I never observed the Humr asking permission from Dinka to come to the Bahr, and they did not consider themselves as visitors there. The whole region was regarded by the Humr as their 'dar' or country.*"[36]

24. In a similar vein, Howell, concerning the upper reaches of the Bahr el Arab watercourses during the period from November to February, states that "water supplies dry out early and the Baggara herds from the north begin to enter the area about this time, occupying the remaining water points *which they regard as theirs*".[37]

25. By contrast, earlier evidence that does not support the 27°50'E line is dismissed. Heinekey trek report of 1918, which showed no Ngok Dinka in the same area is dismissed by the words: "[b]y contrast Heinekey who began a trek in Gerinti in March 1918 merely notes the absence of tracks and the necessity to be accompanied by a guide".[38] That is exactly the point: Heinekey did not find Ngok in Gerinti in 1918 but Tibbs did find them, along with the Homr Arabs, in the mid-20th century. To real reasoning (as opposed to frivolous or contradictory

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[35] *Supra* note 32 (emphasis added).

[36] GoS Memorial, Witness Statement of Professor Ian Cunnison, 3 December 2008, para. 6 (emphasis added). In para. 731 of the Award, my learned colleagues refer to Professor Cunnison's statement that he "never observed the Humr asking permission from Dinka to come to the Bahr", a statement that I had myself quoted in support of the proposition that the Homr thought of the Bahr area not in terms of "dominant" Ngok versus "secondary" Homr rights, but in the sense that the area was a shared rights area. In an exotic interpretation, my learned colleagues cite that observation by Cunnison in support of the fact that the rights of the Misseriya are confined to the right to graze cattle and to move in the Abyei area. In fact the purport of Cunnison's remark could only have been that the Homr considered the Bahr area as theirs, as confirmed by Cunnison himself, who in the same Witness Statement also observed that "the whole region was regarded by the Humr as their 'dar' or country". This is yet another example of tendentious and result-driven interpretation of evidence.

[37] P.P. Howell, *supra* note 3, at p. 244, fn. 2 (emphasis added).

[38] Award, para. 740.

reasoning), the implication is clear: the Ngok moved to Gerinti in the intervening period between 1918 and when Tibbs made his remark. When Heinekey saw Dinka he did make a note, thus he mentions Ngok villages along the Bahr el Arab, which is exactly where Willis in 1909 (close to the crucial date of 1905) also confirms their presence, and Heinekey refers to Homr camps and Homr cattle on the way to Gerinti, and north of Mek Kwal's village.

26. I shall revert to this at the appropriate place to indicate where the Ngok were located around 1905. I have cited these examples to show that the evidence harnessed by the Tribunal is inconclusive, tendentious and misinterpreted and so vague that even if we accept it, i.e., even if we accept that Gerinti had a Ngok Dinka presence in 1905, there is no motivation for a line at longitude 27°50'E or extending all the way up to 10°10'N and I would suggest, with respect, that drawing boundaries requires more precision and meticulousness than this.

27. However, before leaving the issue of the boundaries drawn by the Tribunal I should turn, as the Award does to the eastern boundary.[39] And here four remarks are called for.

a. The Award quotes Robertson's study of Kordofan in 1933–1936 in which Robertson describes a tribal incident that occurred in that period when the people of the Western Nuer District in Upper Nile Province "had crossed the Ragaba and built their big cattle luarks – thatched huts – on the Kordofan side of the river, thereby trespassing on the Ngok Dinka lands" and he gave orders to burn the huts and make the intruders "go back to their own tribal lands".[40] The facts are undisputed but they do not support the conclusion drawn. The Nuer, or to be more precise those who came from the western Nuer district, in Upper Nile must have crossed the Ragaba ez Zarga around 29°E, Howell's alleged "line", but they must have crossed around 9°45'N (unless they went up to 10°10'N and then down again to 9°45'N in order to be more helpful to the Tribunal and only then crossed the Ragaba), and by this time there is no disagreement that the Ngok Dinka were (at these locations) on the Ragaba ez Zarga. This is confirmed also by the map bearing the title "Native Administrations of Kordofan Province" and dated 1941.[41] But it is clear that official action was taken only after the intruders from Upper Nile crossed the Ragaba. However, the Ragaba ez Zarga does not go at this longitude up to 10°10'N, which is 50 kilometres due north, but flows in a westerly, then slightly north-westerly direction. Moreover the fact that the Nuer crossed the Ragaba confirms clearly that the Ngok, even at this location, were on the southern side of the Ragaba.

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[39] Award, para. 741.

[40] J. Robertson, *Transition in Africa* (London: C. Hurst, 1974), p. 51, GoS Memorial Annex 45, SPLM/A Exhibit FE 5/10, cited in Award, para. 741 (emphasis added).

[41] "Native Administrations of Kordofan Province" (Khartoum: The Sudan Survey Department, 1941), GoS Memorial Map Atlas, Map 27.

The use of this evidence is not only ill-advised; it is contradictory with the result sought.

b. The second remark I wish to make relates to another inference drawn from this tribal incident. In the same place, the Award goes on to state:

> "This description (of 29°E) is more useful to this Tribunal than Dupuis' sketch which merely suggests that the Ngok Dinka's southeastern border is with the Rueng, a border in any event confirmed by Howell. It is also a more reliable and better indication than the village of Etai, which the GoS claims is evidence of the Abyei area's eastern limit."[42]

28. Contrary to this assertion – and forgetting, for a second time, the Freudian "more useful to this Tribunal", the Award rather than denigrating contemporaneous evidence that does not agree with the result it seeks to achieve, should have appreciated the earlier evidence more objectively. Dupuis wrote in 1921, when the most northerly Dinka presence that he indicated was a dug dug, i.e., a Dinka cattle camp, north of Lukji on the Ragaba Um Biero.[43] The only inference to be drawn from those dates is that the Ngok, if indeed the dug dug in question belonged to Ngok Dinka, were slowly extending northward and westward, taking advantage of better conditions under the Condominium and of the good relations existing between their Paramount Chief and the Nazir Omom of the Misseriya. Again if we go back in time we will find that in 1902 the area occupied and used by the Ngok above the Bahr el Arab was even smaller. Wilkinson says that the first Dinka village he encountered was Bongo, which was however empty, and then Etai.[44] Of course Wilkinson never said that this was the Ngok Dinka boundary, but his description does confirm that this is where they were sighted in 1902. At any rate in 1909 Willis, who gave a very detailed depiction of Ngok Dinka locations, had the following to say: "Just after the rains they [the Ngok] go as far North as they think safe from the Arabs (Bongo or El Myat)".[45] El Mayat, according to the Government[46] is a swamp near Bongo. Just to give an idea of the scale of the discrepancy between contemporaneous depictions of where the Ngok were around 1905 and where the Tribunal put them, the following distances should be considered. Bongo is about 150 kilometres to the south-east of the 10°10'N line where it intersects the western line of the delimited area at 27°50'E. It is about 90 kilometres to the south-west of 10°10'N where it intersects the eastern boundary at 29°E.

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[42] Award, para. 741.

[43] *See* GoS Counter Memorial, Maps 39b and 39c: Dupuis Sketch, 1921 (Sudan Survey Department archives) and Extract. It is not certain that the dug dug sighted was in fact a Ngok dug dug rather than that of another tribe of the Dinka.

[44] Major E.B. Wilkinson, Itinerary, "El Obeid to Dar El Jange" (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government,* Vol. II (1905). SPLM/A FE 2/15.

[45] Willis, *supra* note 33.

[46] Transcript, 21 April 2009, 108/6 (Crawford).

29. There are, scattered throughout the record, statements corroborating the obvious fact that the Ngok were slowly expanding to the North. They were going to places where they had not dared to go the previous year, for example, Mahon Pasha, in 1903 states: "I met several herds of Dinka cattle grazing right in the Arab country, where they were afraid to go last year."[47] To quote another example, there is evidence that they were encouraged by Chief Kwal Arop "to build houses among the Humr in the winter".[48]

30. The job of demolishing the construct the Tribunal seeks to erect is relatively easy, for that construct is a weak one, as weak as a spider's web, and this is so, not because of my learned colleagues' lack of legal imagination but rather despite it. The contemporaneous and near-contemporaneous support for the eastern, northern, and western boundaries is not only utterly lacking, but also contradicted by overwhelming evidence to the contrary, both cartographic evidence and accounts written by disinterested parties, usually State officials, regarding an area under their Condominium in circumstances where international law would be normally satisfied by minimum evidence, a standard surpassed in this case.[49] The question therefore, and it is a disquieting one, is why does a Tribunal, provided with all the available evidence and guided through it by learned counsel on both sides, and moreover provided with the benefit of hindsight that all reviewing bodies have, and in a position to assess the evidence before it comprehensively, elect, instead, to look at reality not in a holistic manner but in a disconnected way, making wild flights of fancy on the basis of misinterpreted sentences taken out of context so as to make dead men say what they never said or intended? All that can be said is that this is not the level of reasoning expected of a Tribunal concerned with the quality of justice and not only with finality of litigation.

31. The Tribunal, wishing to buttress the imaginary with the unreliable, has had to fall back on the evidence of witnesses who testified for the SPLM/A.[50] I find this particularly objectionable and worthless. Objectionable because the accusations by some Ngok Dinka of intimidation by the SPLM/A were never disproved and were indeed reiterated before the Tribunal. Moreover it is worthless because, first, I think it would be frankly fantastic to expect a recollection cali-

[47] Appendix E to the Sudan Intelligence Report No. 104 of March 1903, p. 19.

[48] Kordofan Monthly Diary, 1940, p. 2, cited in ABC Report Appendix 5.13, p. 201 as follows: "Summary of Information: Kwal Arop is suspected of encouraging the Dinka to build houses among the Homr in the winter."

[49] *Legal Status of Eastern Greenland,* PCIJ Series A/B No. 53, Judgment of 5 April 1933, p. 46 (noting that "[i]t is impossible to read the records of decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided the other State could not make out a superior claim"); *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment,* 23 May 2008, para. 67 (noting that "international law is satisfied with varying degrees in the display of State authority, depending on the specific circumstances of each case").

[50] Award, footnotes 1237–1246.

brated with regard to a particular year (1905) of where a tribe was located on the basis of memories of those alive in 2005. Secondly, oral evidence by interested parties after the dispute, although admissible to the extent that the ABC was no more than a fact-finding commission charged with determining an historical fact, should be treated with the utmost care and cannot in any event have the same probative value as older evidence emanating from Condominium officials and other disinterested third parties. In fact the Experts in this respect recognize this,[51] but in another piece of contradictory reasoning ultimately come to depend on oral evidence, but only of the SPLM/A witnesses.

32. Thus the eastern and western boundaries of Abyei as drawn by the Tribunal are not reasoned by the standards of Article 9, paragraph (2) of the Arbitration Agreement which should be understood by the rigour required in an arbitration pertaining to the sovereignty and territorial integrity of the State and on which decisions of peace and war may depend. My respectful conclusion that the Tribunal's reasoning for the eastern and western boundaries and as a consequence for the northern boundary falls short of the standard of reasoning expected from the Tribunal, by the Tribunal's own standards, leads to the inescapable conclusion that on these three boundary lines, the Tribunal is in excess of its mandate.

33. However for the sake of completeness I shall turn to the question of the area of shared rights above 10°10'N and the invalidation by the Tribunal of the Experts' findings and the attendant question of separability.

## 3. The shortened line at 10°10'N and the effect of the changes in the eastern and western boundaries

34. It is not entirely clear, despite statements confirming the 10°10'N line,[52] whether that line is in fact a mere confirmation of the Experts' line or in essence a new line.[53] To start with, it is shortened by some 70 kilometres in the east and nearly 20 kilometres in the west. The point at which quantitative changes become qualitative ones is difficult to verify, but as a matter of common sense, if the new longitudinal lines were closer to each other would it be reasonable, reasonableness being a holy mantra in the Award, to speak any more of a northern line?

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[51] ABC Experts' Report, p. 11: "Because the initial presentations of the GOS and SPLM/A, along with the oral testimony of the two communities, largely contradicted each other, and did not conclusively prove either side's position, the ABC experts set out to obtain as much evidence as they could from archives and other sources in Sudan, the United Kingdom, South Africa and Ethiopia."

[52] Award, para. 696.

[53] Indeed, the members of the Majority are divided on this point. Significantly, in the *Dispositif* in Section (a) (3) the Tribunal does not use the confirmatory language it uses for the southern line in (b) (2). With respect, it cannot confirm the northern line because that line is shorter than the Experts' line.

35. More importantly, inadvertently in all likelihood, by shifting the eastern boundary line west to a new (arbitrary) line and likewise the western boundary east to another (arbitrary) line, the rationale, if ever there was one, of the 10°10'N line collapses. In the process of collapsing it exposes, once more, the futility of drawing longitudinal and latitudinal lines – in the best traditions of the 1878 Berlin Conference, "*prises de possession sur le papier*", as Bismarck famously called them[54] – which bear no resemblance to reality or to local conditions or tribal locations. But at least the plenipotentiaries at the 1878 Conference were not pretending they were drawing tribal boundaries. Thus the Tribunal notes that "lines of longitude and latitude when delimiting boundaries have been used in appropriate circumstances by international courts and tribunals and is recognized in public international law",[55] and "deems it proper to delimit the eastern and western boundaries based on lines of longitude".[56] There may indeed be circumstances in which it is appropriate for international courts and tribunals to delimit boundaries on the basis of lines of longitude and latitude, which on most maps (depending on the projection) appear as straight lines. Where a tribunal has been charged with a task which it interprets as the determination of a tribal area, this is not what I would consider to be an appropriate instance in which to adopt such lines.

36. The Experts, it would be recalled, had admitted that "[t]here is, as yet, no clear independent evidence establishing the northern-most boundary of the area either settled or seasonally used by the Ngok."[57] Instead, according to the Tribunal, the Experts "sought indicators and *clues* in administrative records as well as human geography – the fact that the goz was not settled by anybody – to draw what seemed *the best defensible line under the circumstances*".[58] I am surprised that it did not occur to my colleagues that in the circumstances the proper, the only proper thing to do for the Experts would have been to say that there was not enough evidence to draw the line. Unperturbed by the obviously contradictory reasoning of the Experts (drawing the line while admitting that there was no clear evidence for establishing the northern-most boundary), the Tribunal was satisfied with this reasoning which it described as seeking "indicators and clues in administrative records as well as human geography"[59] and concluded that "[i]n the Tribunal's view, the Experts' reasoning regarding the selection of latitude 10°10'N is comprehensible and complete".[60] Nothing can be more debatable. The whole exercise

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[54] Cited in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002,* p. 303, Separate Opinion of Judge Al-Khasawneh, at p. 499, para. 7 *(d).*

[55] Award, para. 746.

[56] Award, para. 747.

[57] ABC Experts' Report, Part 1, p. 43.

[58] Award, para. 680 (emphasis added).

[59] *Ibid.*

[60] Award, para. 681.

is based on *clues* from administrative officials and human geography to draw *the best defensible line under the circumstances*. This is indeed a lax and novel standard for drawing boundary lines and no government can or should accept it. It is impossible to understand why these "clues" are no longer applicable to those parts of the 10°10'N line that were severed from it in the east and west. In effect, the unity of purpose of the reasoning simply collapses and when a line drawn arbitrarily by the Experts is replaced by another line drawn arbitrarily by the Tribunal, the only outcome is that the total arbitrariness of the two lines is fully exposed.

37. Moreover, the Experts state that "the Ngok assertion that the boundary between the two peoples is the Goz belt that separates them has yet to be tested by a systematic survey".[61] Yet their mandate was to be based on "scientific analysis" of which a systematic survey is a prime example and although such a survey was by their admission "yet to be tested" in the Goz belt, this did not preclude them from proceeding nevertheless to limit the area at 10°10'N. Again, the contradictory reasoning is obvious.

38. A measure of the lack of clarity of whether the 10°10'N line, in its shortened form, is a confirmation of the earlier Experts' line or the Tribunal's brainchild is that the Award includes a number of independent justifications for it some of which are found in explaining the eastern and western boundaries, and these have been commented upon in respect of the alleged Howell lines in Part 2 of this Dissenting Opinion. The Tribunal does not merely say that the 29°E and 27°50'E lines go up to 10°10'N because the Experts' line is reasoned and therefore unreviewable under this Tribunal's mandate[62] but also it tries to justify those lines independently of the Experts' findings on the basis of where the Ngok were situated and the conflation of the area roughly with its own misquoted reading of Cunnison and Tibbs. In effect, Sub-articles 2 (a) and 2 (c) of the Arbitration Agreement are now fused. If the 10°10'N is in fact a new line then it is unreasoned, the same inadequacy of reasoning that applies to the eastern and western line applying to it, and besides, by cutting off its eastern and western extensions, it has lost any underlying rationale. If on the other hand it is the old line then the lack of reasoning of the Experts (by their admission) and the lack of a systematic survey as to whether the Goz forms the boundary and the total lack of contemporaneous or near-contemporaneous evidence suggesting Ngok presence at that particular latitude would also render the decision of the Experts at 10°10'N in excess of their mandate by the same criterion, namely, lack of evidence or lack of reasoning, or both which the Tribunal applies to impugn the eastern and western boundaries and the northern boundary at 10°22'N. Independently of this lack of clarity

[61] ABC Experts' Report, p. 43.

[62] In fact the members of the Majority are divided on this point: supra note 62. One member, Professor Hafner, explains that the Tribunal should follow the Experts' line, i.e., that the Tribunal is precluded by its mandate from enquiry into that line. See Award, para. 696.

in the Award, the line is not the "best defensible line in the circumstances"[63] as the Award proclaims it to be, thus introducing a new standard, not exactly representing the zenith of care and meticulousness in territorial delimitation, but closer to the nadir. The line is not defensible at all and has no basis in law, nor is it supported by one shred of evidence.

39. Formally, of course, it should not be forgotten that the 10°10'N line did not represent the northern boundary decided by the Experts. That was the line at 10°22'N, which bisected the Goz. The 10°10'N line is a new boundary line: according to the logic of the Experts' Report it is merely where the "dominant rights" of the Dinka stop. Thus the Tribunal's 10°10'N line is a new line, although confusedly justified both under Sub-articles 2 (*a*) and 2 (*c*) in the Award. Moreover to the extent that it was based by the Experts on the odious, pseudo-legal concept of dominant rights, the Award nevertheless upholds it.

## 4. Separability

40. I shall now turn to the issue of separability or severability as it is sometimes called and before considering, as a matter of the interpretation of our mandate, whether such separability is permissible, I shall start by observing that it is somewhat remarkable that the eastern, northern, and western boundaries of the area are the least reasoned and defended in the Experts' Report. Considering that the southern boundary, the so-called *uti possidetis* line of 1956 is not in disagreement, it seems obvious – but so many things were so obvious that the Tribunal has not seen them – that when my learned colleagues impugn the whole of the eastern and western boundaries and impugn the northern boundary, or at least a considerable part of it,[64] what is left is so thin and truncated that by any criterion of severability it should also be set aside for it cannot stand on its own.[65] Indeed it would be an act of unparalleled fantasy to expect it to stand on its own. To quote the second hemistich of Hafiz, its "foundations rest on air". The only logical conclusion, indeed duty, of the Tribunal is to annul the Report in its entirety. Having reached this conclusion, I shall now address the question of whether partial severability of the Report is permissible under our Tribunal's mandate according to the Arbitration Agreement.

41. Under Sub-article 2 (*b*) of the Arbitration Agreement, "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 shall

[63] Award, para. 680 (emphasis added).

[64] Depending on whether, as noted in the previous part of this Dissenting Opinion, the 10°10'N line is considered a new line or a confirmation of the Experts' 10°10'N line, the Experts' northern boundary line being 10°22'N.

[65] *Aerial Incident of 10 August 1999* (*Pakistan* v. *India*), Jurisdiction, Judgment, *I.C.J. Reports 2000*, p. 12, Dissenting Opinion of Judge Al-Khasawneh, p. 56, para. 32.

issue an award for the full and immediate implementation of the ABC Report." Under Sub-article (*c*):

> "If the *Tribunal* determines 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."

42. There is therefore a two-stage mandate in Article 2: first, to determine whether there was an excess of mandate, second, if there was no excess, to issue an award for full and immediate implementation, or, if there was excess, to delimit the area.

43. There is no provision for the event of a partial delimitation based on a finding of partial nullity. This is inconsistent with the clear terms of Article 2 of the Arbitration Agreement in context and in the light of their object and purpose. The clear terms of Sub-articles 2 (*b*) and 2 (*c*) show that a finding that there was no excess of mandate must relate to the whole Report and that in the event of an excess of mandate a delimitation must be carried out in relation to the entire boundary.

44. The Award points out that the sequence of Article 2 gives the Tribunal a secondary role – to carry out the delimitation only if the Experts' Report cannot stand due to an excess of mandate.[66]

45. The object and purpose of the Arbitration Agreement must be seen in light of the context of this arbitration, namely, the delimitation of a boundary that could potentially become an international boundary, as the Tribunal recalls.[67] One of the purposes of the present arbitration proceedings is to provide the necessary redress against a decision made on that boundary if it is found to be defective for excess of mandate. In view of the rule of finality and stability accorded to boundaries in international law once delimited, the Parties cannot be assumed to have agreed that a decision, once found to be tainted by excess of mandate in some respects, should otherwise be upheld as far as possible. On the contrary, the decision of the Experts should be subject to careful scrutiny as to whether the rest of the decision can stand in spite of a finding of excess of mandate.

46. It is doubtful whether the treaty texts cited by the Tribunal,[68] which give an express power to make a finding of partial nullity, can be invoked as authority for a presumption in favour of a power of partial annulment, let alone a presumption in favour of partial nullity. The relevant general principles of law and practices may allow a finding of partial nullity under appropriate circumstances, but those circumstances are clearly circumscribed and do not exist in the present case.

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[66] Award, para. 415.

[67] Award, para. 428.

[68] Award, paras. 418, 420.

47. It is apparent from the precedents cited by the Tribunal that the obligation to strive to uphold the rest of the decision under review only applies where there is severability of the part that has been annulled, that is to say, when certain objective conditions for severability have been met. Those conditions are expressed in the decision in *The Orinoco Steamship Company Case*, for example, where it was held that:

> "following the principles of equity in accordance with law, when an arbitral award *embraces several independent claims, and consequently several decisions*, the nullity is one without influence on any of the others, more especially when, as in the present case, *the integrity and good faith of the Arbitrator are not questioned*".[69]

48. It is not necessary to dwell on the question of the "integrity and good faith" of the ABC Experts. Suffice it to note that one of the Parties has made allegations of serious violations of fundamental rules of procedure; that the essential facts giving rise to those allegations are not in dispute; and that the departures from the rules of procedure that took place were, in my opinion, serious improprieties which departed not only from those rules but also from imperative requirements of due process.[70] By *a contrario* argument, when the integrity and good faith of the arbitrator are in question, that is to be contextually taken into account as a factor against separability.

49. The requirement stated in *The Orinoco Steamship Company Case* that for severability of an impugned part, the case under review should concern "several independent claims" rather than one indivisible question was confirmed by Judge Weeramantry in his Dissenting Opinion in the case concerning the *Arbitral Award of 31 July 1989*.[71] It is only in cases "where *different segments* of the total matter in dispute can be decided as *separate and discrete problems, the answers to which can stand independently of each other*" that "the segments of the dispute that have been properly determined can maintain their integrity though the findings on other segments are assailed or do not exist".[72] In other words, "even if the valid and invalid parts are distinct, the invalidity of some will result in the invalidity of the whole, if they all form part of a single scheme intended to operate as a whole".[73]

50. The majority simply assumes that the excess of mandate it has found in the present case relates to issues which are separate. That is not the case here. The present dispute is more properly characterized as one such as the case

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[69] *The Orinoco Steamship Company Case* (*United States/Venezuela*), 25 October 1910, XI RIAA 27, 234 (1910), cited in Award, para. 416 (emphasis added).

[70] *See infra*, notes 238, 239.

[71] *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), I.C.J. Reports 1991*, p. 53, *Dissenting Opinion of Judge Weeramantry*, at p. 168.

[72] *Ibid.,* (emphasis added).

[73] *Aerial Incident of 10 August 1999 (Pakistan* v. *India), Jurisdiction, Judgment, I.C.J. Reports 2000*, p. 12, Dissenting Opinion of Judge Al-Khasawneh, *supra* note 65, at p. 55, para. 30.

concerning the *Arbitral Award of 31 July 1989*, where, on the facts, the issues were so intrinsically connected that it was clear that the Parties intended that the circumstances be determined in a "composite process".[74] The boundary to be delimited in the present case is not, to use the words of Judge Weeramantry, composed of "separate and discrete problems, the answers to which can stand independently of one another".[75]

51. The agreed basis on which the delimitation should be carried out is the boundary of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905: there is only one criterion for the delimitation and it should be applied clearly and consistently. This is not a case where different parts of the boundary are governed by different instruments[76] or where there are different zones subject to differentiated legal regimes.[77] On the contrary, the decision of the Experts was composed of fundamentally interrelated elements, including their findings as to the secondary nature of Misseriya land use and occupation in the region; their reliance on the factual situation beyond the stipulated 1905 date; their projection back in time of the 1965 extent of Ngok Dinka occupation; and their making these findings despite overwhelming evidence to the contrary. Any determination of the extent of the territory transferred or even of those nine Chiefdoms as at 1905 must be composed of elements which are fundamentally interrelated. The question of the geographical extent of the nine Chiefdoms is intrinsically related to the provincial transfer, an administrative act of the Condominium administration; the date of that act, 1905, is the temporal limit; the extent of the territory is limited by the claims of neighbouring tribes; and all of those factors are qualified by the understanding of the Condominium officials as to what was being transferred. No single part of the process by which that delimitation is carried out can be severed such that some segments of the boundary might survive and others be declared a nullity.

## 5. The first pillar of the Experts' reasoning: the dominant/secondary rights paradigm

52. I shall now turn to the question of shared rights in the Goz. As a preliminary remark, it should be noted that the Tribunal does not construct its reasoning for impugning the Experts' decision on the 10°35'N and the 10°22'N line on the use of the "shared rights area" concept, but rather on a

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[74] *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), I.C.J. Reports 1991*, p. 53, *Dissenting Opinion of Judge Weeramantry*, at p. 169.

[75] *Supra* note 72.

[76] *See*, for example, the *Eritrea-Ethiopia Boundary Commission, Decision on Delimitation* of 13 April 2002, (2002) 41 ILM 1057, where different colonial treaties dated 1900, 1902 and 1908 applied respectively to the central, western, and eastern sectors of the boundary.

[77] *See*, for example, the different maritime spaces in the case concerning the *Arbitral Award of 31 July 1989*, *supra* note 71.

different reason namely that "[i]n the Experts' view, if there was *no conclusive evidence* of such permanent settlements north of latitude 10°10'N, it is difficult to understand why the Abyei area was nonetheless extended further north, beyond that line up to latitude 10°22'N".[78] For once, my learned colleagues and I are in perfect accord. If indeed there is *no conclusive evidence* (whether in the Experts' view or otherwise, this is the standard adopted by the Tribunal), no reason can exist to extend the line to 10°22'N.

53. The same criterion of "conclusive evidence" should, if the minimum of consistency is to be maintained, apply to the concepts of secondary rights versus dominant rights. Is there any evidence, let alone conclusive evidence, that the concept was part of the law and practice of Kordofan at the crucial year or indeed at any time? Is the Tribunal precluded by Article 2 (*a*) from making the most basic enquiry about whether the concept really exists? After all legal ideas, especially exotic ones, cannot just be presumed to exist or to be applicable in certain territories or provinces without supporting evidence. We are told that one of the Experts, Professor Shadrack Gutto, is a prominent authority on African land law,[79] and I have not the slightest doubt as to his prominence. However, Africa, where the concept of dominant versus secondary rights allegedly originated, is a vast and varied continent, and the former possessions of the British Empire, another alleged inspiration for that concept, also extensive and not unattuned to heterogeneous local custom. Besides, there is no reason to believe that an African land law exists any more than an Asian land law.

54. It then makes sense to enquire, within the constraints of time and available sources, as to whether the crucial concept of secondary and dominant rights has any existence. This enquiry is crucial because according to the Experts themselves it is *this concept* which served as the justification for abandoning the administrative boundary, since

> "any administrative boundary as may have existed did not or could not have coincided exactly with boundaries of land use rights of sedentary or pastoral peasant communities whose tenure rights and obligations overlap in the absence of concrete walls separating the communities".[80]

55. Notwithstanding the obvious fact that the more arduous and in all probability unachievable task of drawing boundaries between tribal groups whose occupation and land rights overlap, as the Experts themselves recap, should have caused the Experts to go back to their original mandate, which is nowhere near as confused as drawing tribal boundaries, the Experts persisted in trying to effect the delimitation on the basis of what they thought were three types of land rights. The Experts set out their understanding of this concept as follows:

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[78] Award, para. 693 (emphasis added).

[79] *See infra*, note 236.

[80] ABC Experts' Report, Part 2, Appendix 2, para. 3, point (i).

"It is critical in interpreting the established occupation, land rights and land use of the two communities to appreciate the sociological fact that by 1905 there existed three main categories of such occupation, land rights and land use:

(*i*) Dominant occupation, land rights and land use by a community that were 'exclusive' to members of the community and permitted no cession of secondary use rights to non-members of the community;

(*ii*) Dominant occupation, land rights and land use by a community but allowing for non-members of the community to acquire limited land use rights on seasonal basis or sporadic periods – the 'primary' and 'secondary' rights paradigm;

(*iii*) 'Shared secondary' occupation, land rights and land use by members of two or more communities within a territory marking the 'boundaries' between them – the so-called 'conflicting': or 'no man's land' or the 'Goz'."[81]

56. In support of these propositions, the Experts quote only two sources: an "unpublished PhD Dissertation" by Abdalbasit Saeed[82] and a book on the Sudan by Gaim Kibraeb.[83]

57. The latter text, which I have had a chance to consult, describes these dar rights as follows:

" . . . the most articulate and elaborate definition of dar rights has been that of Hayes.

After hearing a great deal of oral evidence concerning the traditional and customary conception of 'Dar rights', and after collecting extensive corroborating evidence from provincial and district files, Hayes, who was a high court judge in the Sudan between 1944 and 1953, defined dar rights as follows:

'If I had to declare what these [Dar] rights comprise, I should have said that, where there is no settled government outside the Dar and with authority over it, Dar rights are almost the same as the right of sovereignty, the only substantial difference from normal State sovereignty being that, with the nomads, boundaries are drawn with less precision. Where, however, there is a settled government, as in the Sudan, Dar rights are restricted to the extent of the State's encroachments upon them. The principal rights brought to my notice, apart from rights of normal user, were:

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[81] ABC Experts' Report, Part 2, Appendix 2, para. 6.

[82] Abdalbaset Saeed, "The State and socioeconomic transformation in the Sudan: The case of social conflict in Southwest Kurdufan", unpublished PhD dissertation, University of Connecticut, USA, 1982, p. 128. Cited in footnote 10 of ABC Experts' Appendix 2, p. 25. It was not possible within the extremely short time available to obtain a copy.

[83] Gaim Kibreab, *State Intervention and the Environment in Sudan, 1889–1989: the Demise of Communal Resource Management*, (NY/Lewiston/Queenston/Lampeter: Edwin Mellen Press, 2002), pp. 21–23, 45–52, Ch. 3. Cited in footnotes 11–13 of ABC Experts' Appendix 2, p. 25.

> The right to admit or refuse strangers to water and graze in the Dar, and the right to impose conditions on such entry.
>
> The right to build permanent buildings in the Dar.
>
> The right to cultivate.
>
> The right to sink new wells, or dig out old ones.
>
> The right to beat the *nuggara* (drum), and to put *wasms* (tribal marks) on trees and rocks.
>
> As to cultivation, the holder of the Dar is entitled to exact from strangers admitted the same tribal dues on cultivation – known as *sharaiya* – as he exacts from his own tribesmen.'
>
> During my field work, I asked the present Nazir, the Paramount Sheikh of the Shukria, Mohamed Hamed Abu Sin, to describe the nomadic pastoralists', the small cultivators' and their leaders' conceptions of dar rights and how these conceptions have been continuing and changing over time. The fit between his definition of dar rights and the definition given by Hayes is astonishingly analogous."[84]

58. Elsewhere in the book Kibreab states "ownership, as we saw before is represented in the power to limit the ability of others to enjoy the benefits to be derived from access to, and enjoyment of, resources"[85] The conclusion that would follow from the asserted premise, that the Ngok held dominant rights of the second type, is that the Homr held only secondary grazing rights. However the evidence in its entirety points in the opposite direction. Thus, to quote Cunnison again: "the real area of sharing was further south in the Bahr",[86] and here, lest some expansionist 10°10'N interpretations of the Bahr creep in, let me add in the same page Cunnison says: "They [the Homr] moved south through the extensive sandy Goz to the area *called the Bahr; this is the area around the Bahr al-Arab and Regeba Zerga*".[87] He adds: "There the two groups co-existed for a fairly short season – but this was not a "host guest" relationship. At this season it was the Dinka who apart from a few caretakers, left to go south as part of a transhumance pattern rather than one of nomadism".[88] He adds, futher:

> "As I noted in my book (p. 19) much of the Bahr region has permanent Dinka settlements, although during most of the time the Humr occupy it the Dinka are with their cattle south of the Bahr al Arab. *I never observed the Humr asking permission from Dinka to come to the Bahr and they did not consider themselves to be visitors there.*"[89]

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[84] Kibreab, *supra* note 83, p. 22.

[85] Kibreab, *supra* note 83, p. 85.

[86] Witness Statement of Professor Ian Cunnison, 3 December 2008, at para. 6, GoS Memorial, p. 190.

[87] *Ibid*., (emphasis added).

[88] *Ibid.,* para. 9.

[89] *Ibid*., (emphasis added).

59. Cunnison refers to his map to indicate that the Dar Homr included areas *south of the River.*[90] This was the situation in the early 1950s and probably for some time before that, save for the fact that the Ngok Dinka had been much closer to the Bahr el Arab and in 1905 were located at the triangle where that river is met by the Ragaba Um Biero.

60. Cunnison also clarifies his earlier remarks that the Homr have no land while the Dinka do by saying that:

> "As I note at pp. 146–147 of the book, the Humr did not have any conception of individual or collective legal title to grazing land. They regarded all the grazing land they used as public land, open and available to them."[91]

61. So much for the dominant rights of the Ngok and the secondary rights of the Homr in what the latter and other observers regarded as their dar.[92] Those observers include some from around 1905 such as Willis who visited the Ngok Dinka in winter 1909 and described their congregations on and just north of the river Kir, noting the fact the Ngok take their cattle north to where they can be safe from the Arabs, such as Bongo or El Mayat.

62. Also remarkable is that Kibreab in fact has an opposite view of the situation of boundaries around Bahr el Arab:

> "Unlike in northern Sudan where dar rights are said to antedate the advent of the Funji kingdom, *in southern Sudan the concept of dar was alien to the culture and land tenure systems of the Nuer and Dinka peoples*. In addition, to borrow Johnson's eloquent formulation, among these societies the border is ' . . . a transitional zone where one system merges into the other: a border without a boundary'."[93]

63. Kibreab notes, further:

> "For the tribes, abstract imaginary lines marked on maps were devoid of meaning. For them not only were boundaries porous, they were also naturally represented in the form of river courses, large trees, mountains or hills. The most natural boundary was one marked by a river course. *That was the reason why in the pre-reconquest period and for some time after the reconquest, both the northern and the southern tribes perceived the Bahr al-*

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[90] *Ibid.*

[91] Witness Statement of Professor Ian Cunnison, 3 December 2008, para. 10.

[92] The utter frivolity of the Experts reasoning can be gleaned from the fact that the origin of the dar rights has nothing to do with the so-called African land law (is there any more African land law than Asian land law?), but from the Islamic Sultanate of Funji and Fur and follows earlier Islamic practices from the Middle East and Central Asia. Moreover Kibreab states in fn. 85 at p. 123: "*the notion of dar rights was never applied to the southern Sudanese people*" (emphasis added).

[93] Kibreab, *supra* note 83, at p. 65, (citing D. Johnson, 'Tribal Boundaries and border wars: Nuer-Dinka relations in the Sobat and Zaraf valleys, c. 1860–1976', *Journal of African History* 23 (1982): 202, 183–203) (emphasis added).

*Arab as forming the natural frontier separating the northern and the southern tribes*."[94]

64. Had the Experts followed what was known by general repute, they would have stayed within their mandate. Instead they ignored what is there and tried to distil from Kibreab's book what is not there and to present it as authority for these pseudo-legal concepts of dominant rights of the first and second type.

65. The next question is whether the fact that Ngok built luaks and dug dugs and the Homr did not in itself give different rights to the same land. At the outset it should be recalled that this was not a case of aimlessly wandering nomads on the one hand versus a sedentary peasant community on the other. Both the Homr and the Dinka have been variously described as pastoralists or as practising transhumance. The 1912 Kordofan Handbook, for instance, describes the Dinkas as "a pastoral people and [they] possess large herds of fine, big cattle".[95] Both are tribes of warrior cattle herders and both practise primitive agriculture: the one millet, the other sorghum. I do not think that the difference between millet and sorghum or between a luak – (there are indications that some were temporary[96]) – and a tent should generate such discrepancy in land rights. Neither principle nor precedent supports the allocation of land rights and consequent territorial delimitation on such "differences" in lifestyle. Indeed, the Experts themselves quoted Cunnison where he stated that "'Humr do not have permanent houses but surras have strong identification with particular camping sites to which they seek to return year after year."[97]

66. The presence of Misseriya Homr which could not be wished away, is instead dealt with by reducing them, under the dominant/secondary paradigm, to second-class citizens in their own land, allowed to graze their animals but nothing more. I find this part of the Report, with regret, objectionable and, frankly, odious. But aside from that, the pseudo-legal principle itself is unsupported by any evidence as to its existence or to its applicability to Kordofan. It was never part of the law or custom of Kordofan.[98] Yet, regardless of the correctness or reasonableness of the Experts' interpretation of their mandate (as tribal or territorial) there is no doubt that the whole Report is based upon this "dominant/secondary rights" distinction. The lack of evidence and misquotation of the authorities in its support, of which I have already spoken; its inapplicability to Kordofan; and its discriminatory nature, besides the fact that it was contradicted by overwhelming evidence, leads me to the conclusion that

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[94] Gaim Kibreab, State Intervention and the Environment in Sudan 1889–1989, p. 83 (emphasis added). The reconquest took place in 1896–1898: see ABC Experts' Report, Part 1, p. 37

[95] *See supra* note 29. See also Howell, *infra* note 166, at p. 245.

[96] *See infra* para. 76.

[97] ABC Experts' Report, Part 2, p. 161.

[98] Kibreab, *supra* note 93, at p. 83.

this is a clear instance of reasoning so flagrantly contradictory and so manifestly flawed that it must be characterized as excess of mandate.

### *a. Mise à point: traditional rights*

67. The Award has devoted a few pages in what looks like a judicial afterthought to traditional rights, and comes to an understandably general conclusion about the effect of territorial change on traditional rights. The Tribunal states that "traditional rights, in the absence of an explicit agreement to the contrary, have usually been deemed to remain unaffected by any territorial delimitation".[99] Whilst this is true – and inconsequential – it misses the point. The issue here is not the subsistence of grazing rights after territorial delimitation. It is that the territorial delimitation itself is based on a baseless allegation by one Party that one group, the Ngok Dinka, are entitled to dominant rights in the concerned area while the other group, the Misseriya, are reduced to the enjoyment of secondary rights in what they consider part of their dar. It is discrimination itself, as a function, which is both invoked as justification and employed as methodology to effect the tribal delimitation. Moreover, the words relating to the right to graze and move in the Abyei area in section 1.1.3 of the Abyei Protocol are not and cannot be interpreted as words of limitation. All those to whom Abyei is home, even if for a season, are entitled to all the rights guaranteed by the rules of international law and human rights standards, especially equal treatment in the enjoyment of those rights.[100]

## 6. The second pillar of the experts' reasoning: the assumption of Ngok Dinka continuity of occupation

68. In Part 5 of this Dissenting Opinion, I analysed the concept of the dominant/secondary rights paradigm and showed it never to have been part of the law and custom of Kordofan nor to have governed relations between the Ngok and the Homr.

69. I shall now turn to a second, central tenet of the Experts' reasoning: an assumption regarding continued Ngok presence in the Bahr area from circa

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[99] Award, para. 766.

[100] *See*, especially, Universal Declaration of Human Rights, Article 2; International Covenant on Civil and Political Rights, Article 2(1); African Charter of Human and Peoples' Rights (to which Sudan became a Party on 18 February 1986), Article 2; International Labour Organization Convention No. 169 on Indigenous and Tribal Peoples, Article 3. The last Convention is not ratified by the Sudan, however see Articles 1 and 2 of the United Nations Declaration on the Rights of Indigenous Peoples, annexed to General Assembly Resolution 61/295 of 13 September 2007. This was adopted by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).

1905 until the mid-1950s or even the early 1960s, which represented the period of maximum Ngok Dinka expansion to the North. The technique used to substantiate this claim was to read history backwards, turning the temporal limitation of the Experts' mandate on its head. Thus, interviews with Cunnison and Tibbs and other modern sources are misquoted or quoted out of context and these are superimposed on fragmentary quotations from third-party sources from around 1905. Given its importance, the relevant parts of the Experts' Report (the claims made in the Summary of Propositions and in the main body of the Report) and the sources relied on by them are reviewed in detail to show that this was not simply a matter of an appreciation of facts, which should normally be left to the discretion of the fact-finder, but a flagrant and easily demonstrable misuse of the evidence to support, in a tendentious way, a certain result.

70. The relevant part of the Experts' Report is found under Proposition 8, which reads as follows:

> "Proposition 8: There was a continuity in the territory occupied and used by the nine Ngok Dinka chiefdoms which was unchanged between 1905 and 1965, when armed conflict between the Ngok and the Misseriya began. (Ngok oral testimony and SPLM/A presentation)" [101]

### *1. The Experts' Summary of Propositions*

71. In their "Summary of Propositions", the Experts stated:

> "The administrative record of the Condominium period, along with the testimony of persons familiar with this area at the end of the Condominium, establishes that there was a continuity of Ngok Dinka settlements in the area of the Bahr el-Arab/Kir, the Umm Bieiro, the Ragaba Lau, and the Ragaba ez-Zarga/Ngol."[102]

72. In the same paragraph, the Experts cited the following evidence:

> "For instance, in 1909 Kordofan official C.A. Willis wrote that Ngok settlements were found all along the Gurf (Bahr et-Arab) and that Dinka influence extended a considerable distance further North at one time. Michael Tibbs states categorically that there was continuity of the Ngok settlements up to the end of the Condominium. Ian Cunnison was equally definite in stating that the general area in which the Ngok maintained their permanent settlements remained the same over the years. At the peace agreement between the Misseriya Humr and the Ngok Dinka in March 1965 both sides agreed that the Ngok could return to their homesteads at 'Ragaba Zarga and other places where they used to live' and that the Arabs would have unrestricted access to all ragabas that they had been frequenting before the outbreak of hostilities."[103]

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[101] ABC Experts' Report, Part 1, p. 19.

[102] *Ibid.*

[103] *Ibid.*

73. On closer examination, the evidence mentioned in the above paragraph does not support the proposition in aid of which it is cited here. Each of those sources will be reviewed in turn below.

### (a) C.A. Willis, 1909

74. As regards the first example cited, the statement of the Experts that "in 1909 Kordofan official C.A. Willis wrote that Ngok settlements were found all along the Gurf (Bahr et-Arab) and that Dinka influence extended a considerable distance further North at one time" is misleading because it is taken out of context and does not accurately reflect the contents of Willis's Report.

75. Concerning the Ngok Dinka, what Willis wrote began as follows:

> "All along the Gurf are villages consisting of perhaps two or three houses each. The ones I saw at the Ferry by Rob's old village were about a mile apart, and I was told they continued all along the Gurf both ways."[104]

76. In the same place, Willis then made some observations about Dinka behaviour and society then noted that: "Just after the rains they go as far North as they think safe from the Arabs (Bongo or El Myat); there they build temporary villages, no doubt owing to the prevalence of mosquitoes."[105] Willis noted, further, that: "As the water dries up and the mosquitoes decrease, the Dinka move towards the Gurf: their camps are much less elaborate, and consist of simply a zeriba with small zeribas inside and the cattle pegs."[106] Following more observations on social and other habits, Willis mentioned slavery and noted:

> "The Dinkas have a certain number of slaves. I gather some were obtained in the famous year of starvation; others from the Rizeigat and Nuer (and possibly Nubas, though I saw none; Dinka influence extended a considerable distance further North at one time)."[107]

77. Willis did not specify in his 1909 Report the area "further North" from which Dinka had influence extended nor did he specify any time period, in fact it is possible that he was speaking about the 18th century. But at any rate, someone in 1909 speaking of 1905 would not, to my mind, use the phrase "at one time". This is certainly not evidence from which one can conclude that there was continuity of occupation by the Ngok Dinka in permanent settlements from 1905 to 1965.

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[104] C.A. Willis, "Notes on the Western Kordofan Dinkas", Sudan Intelligence Report No. 178, May 1908, Appendix C, p. 16, at p. 17.

[105] *Ibid.*

[106] *Ibid.*

[107] *Ibid.*

### (b) Mr. and Mrs. Michael and Anne Tibbs, 2005

78. The statement in the Summary of Propositions that "Michael Tibbs states categorically that there was continuity of the Ngok settlements up to the end of the Condominium" is misleading. The Experts' record of the interview of 21 May 2005 with Mr. and Mrs. Tibbs in Appendix 4.3 states: "Tibbs responded affirmatively when asked if there was continuity in the Ngok Dinka permanent settlements."[108] It says nothing about the time period and certainly does not mention the end of the Condominium. The statement that there was continuity in the Ngok Dinka permanent settlements, without any indication of the time period or any specification of those settlements, no matter how firmly made, is too general to be of any use.

### (c) Professor Ian Cunnison, 2005

79. The statement in the Summary of Propositions that "Ian Cunnison was equally definite in stating that *the general area* in which the Ngok maintained their permanent settlements remained the same *over the years*" is also misleading. The Experts' record in Appendix 4.3 of the Report of their interview with Ian Cunnison notes in relevant part:

> "Quite definite in stating that the *general area* in which the Ngok maintained their permanent settlements remained the same *over the years*. There were a lot of Dinka villages around Lau, and upstream along the Bahr el-Arab, and also eastward.
>
> It is *very likely* that the Dinka lived along the R. Zerga before the Humr came, based on the fact that they were there before the Humr and would have occupied the Zerga as an ecological niche."[109]

80. The Experts then quote Cunnison's response directly:

> "The substantial nature of Dinka houses means that their settlements have remained similar for a long period – *probably* from the beginning of the 20th century, or the end of the Mahdiya.
>
> I said to you that Dinka were on the Regeba Zerga before the Humr. But I do have statement from an old Humnawi which suggests that before the Mahdiya, in the Jellaba period, the regeba was unoccupied. (*It seems unlikely.*)"[110]

81. It may be observed that the evidence of Professor Cunnison, as noted in this record, is too general to be of use: the "general area" of occupation remained the same "over the years". The following sentence refers in indefinite terms to "a lot of Dinka villages around Lau, and upstream along the Bahr el Arab" without specifying the limits of the area. If Lau is the same place as Lou,

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[108] ABC Experts' Report, Part 2, p. 159 (emphasis added).

[109] ABC Experts' Report, Part 2, p. 162 (emphasis added). It would appear that here Professor Cunnison would probably have been speaking about the 18th or the early 19th century: see Professor Cunnison's Witness Statement, *infra* note 216.

[110] ABC Experts' Report, Part 2, p. 162 (emphasis added).

slightly to the South-East of Abyei town, then this by no means confirms that any continuity existed from 1905 to 1965 in the area of the Ragaba ez Zarga. Moreover, the evidence of Ian Cunnison is not "equally definite" to that of Mr. Tibbs: on the contrary, using the words "very likely", "probably", and "seems unlikely", Cunnison limits his evidence to expressions of probability.

82. Moreover it is possible that the Ngok were on the Ragaba ez Zarga in the 18th century but they were subsequently pushed down by the Homr. The 18th century is nowhere near 1905.

83. Thus the testimony of Mr. Tibbs and Professor Cunnison before the Experts is too vague and uncertain to support Proposition 8.

### (d) The Agreement of March 1965

84. This source is the March 1965 Peace Agreement between the Ngok Dinka and the Misseriya. It provides, in Article 9, as follows:

> "Both sides agreed to restore normalcy to relations between them to pre-fighting modes of normal interaction; that is, the return of Dinka to their homesteads at Ragaba Zarga and other localities, and that the Arabs shall have unrestricted access to all Regeba's that they had been frequenting before the outbreak of hostilities.
>
> Both sides have also agreed that each shall hold meetings with the local security authorities at Abyei for the normalization of relations and the execution of the terms of this agreement."[111]

85. As noted above, the Experts stated with regard to this Agreement that:

> "In March 1965 both sides agreed that the Ngok could return to their homesteads at 'Ragaba Zarga and other places where they used to live' and that the Arabs would have unrestricted access to all ragabas that they had been frequenting before the outbreak of hostilities."[112]

86. The Experts relied on this as support for the proposition of continuity of occupation from 1905, but this is not evidence of Ngok Dinka occupation of the Ragaba ez Zarga in 1905: it is only evidence of their location prior to the outbreak of hostilities. However, the only evidence cited by the Experts, apart from the 1965 Agreement itself (which says nothing about the situation in 1905), is a secondary, non-contemporaneous source, namely, the "unpublished PhD Thesis of Abdalbasit Saeed" dating from 1982. The extract cited does not relate to 1905 but to 1966. The notes in the Experts' Report state:

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[111] The First Peace Agreement Between The Misiriyya Humur And The Ngok Dinka, Concluded At Abyei, March 3, 1965", Appendix 12 to A.D. Saeed 'The State And Socio-economic Transformation In The Sudan: The Case Of Social Conflict In Southwest Kurdufan" (January 1, 1982), ETD Collection for University of Connecticut, Paper AAI8213913. SPLM/A FE 18/30.

[112] ABC Experts' Report, *supra* note 103.

"At a peace conference in Abyei in March 1966: Nazir Baboo also claimed that the Ragaba Zarga belonged to the Humur who were kind enough to allow the Ngok to settle there . . . This is the first time claims on the territory known as Ngokland have been tabled by Misiriyya openly in a conference."[113]

87. Even assuming that it is true that the 1966 peace conference was "the first time claims on the territory known as Ngokland have been tabled by Misiriyya openly in a conference", this statement is of limited relevance. It clearly relates only to 1966, post-dating the transfer by six decades, and any territorial claim by the Ngok to the area of the Ragaba ez Zarga could have arisen during time. This statement, assuming that it is true, is also qualified by the words "openly in a conference". Thus it may well have been that the Misseriya considered this territory to be theirs, whether or not they tabled this openly in a conference, and indeed before the outbreak of hostilities they simply had no need to make such a claim in any conference. Moreover, the idea that the Ragaba ez Zarga was in fact "Ngokland" is contradicted by a wide range of sources stating that the territory of the Homr extends south to the Bahr el Arab.[114] It is also contradicted by eye-witness evidence, such as that of Wilkinson locating permanent Homr settlements at Fauwel and Um Semina in 1902.[115]

### *2. The main body of the Experts' Report*

88. In the main body of their Report, where they examine each proposition in more detail, the Experts cite some additional sources in support of Proposition 8.[116] The Experts first cite the non-contemporaneous oral evidence of the Ngok Dinka and the Misseriya. Due to the fact that it was prepared after the dispute had arisen, that will not be examined here. The Experts then state:

"There are strong arguments for the continuity of Ngok Dinka settlement along the main waterways of the Bahr el-Arab basin (the Bahr el-Arab/Kir Itself, the Umm Bierio, the Ragaba Lau, the Ragaba ez-Zarga/Ngoi and its tributaries). This is not only suggested by the evidence cited in the previous propositions, but is confirmed by the testimony of two impartial witnesses who were familiar with the area and the use to which its inhabitants put it immediately prior to independence (Tibbs and Cunnison in Appendix 4.3)."[117]

89. As noted above, the testimony of Tibbs and Cunnison in Appendix 4.3 is too vague and uncertain to support Proposition 8.

The Experts' Report continues:

"We do not have a detailed and systematic description of Ngok settlement and land use patterns throughout the Condominium period, because of the

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[113] Saeed, at p. 235 cited in ABC Experts' Report, Part II, p. 190.

[114] *See, e.g.,* Gleichen, *infra* note 192.

[115] Wilkinson, *infra* note 129.

[116] ABC Experts' Report, Part 1, p. 41 *et seq.*

[117] ABC Experts' Report, Part 1, p. 43.

> seasonality of administrative visits to Ngok territory. Since officials came only in the dry season (between December and April: Tibbs in Appendices 5.7 and 5.13), what few descriptions we do have are of Ngok dry season activities, which were concentrated around the rivers. But there are suggestions from the beginning of the twentieth century that administrators were aware that Ngok Dinka territory extended further north (Mahon 1903, Willis 1909 in Appendix 5.13), and this seems to have been the basis on which settlement and grazing patterns were condoned and managed by subsequent generations of administrators throughout the Condominium period, following the general principle of reviving tribal homelands."[118]

90. The 1903 Report of Mahon Pasha[119] does not relate to the extension of Dinka territory. Mahon merely stated that "I next went west [from Fauwel and Um Semima] to Sultan Rob's"[120] and, further, "[f]rom there I went south to the Riverain country, and north-west to Tosh and the Rizeigat country".[121] Mahon also stated, without any specific geographic reference, "I met several herds of Dinka cattle grazing right in the Arab country, where they were afraid to go last year". It is difficult to see how this report constitutes a suggestion that administrators were aware that "Ngok Dinka territory" extended anywhere near 10°10'N, since it is framed in terms of where the Dinka dared to venture, as is that of Willis.

91. It has already been observed that the statement by Willis in 1909 that Ngok Dinka "influence" extended "further North" was made without specific reference to time or place. Willis made no mention whatsoever of Ngok Dinka territory extending further north than the Bahr el Arab: on the contrary he noted that just after the rains the Dinka "go as far North as they think safe from the Arab (Bongo or El Myat)" where they build *temporary villages* or *camps*.[122]

92. The Experts then note the lack of any clear evidence establishing the northern-most boundary of the area either settled or used by the Ngok as follows:

> "There is, as yet, no clear independent evidence establishing the northern-most boundary of the area either settled or seasonally used by the Ngok. The lack of distinctive physical features and the overlapping use of the area discouraged Condominium administrators from attempting to define such a boundary (see Henderson's 1935 comment, quoted above). There is some evidence in the administrative records of attempts to segregate Ngok and Humr communities in some areas: e.g. the expulsion of Ngok and other Dinka from Hasoba in 1932, at the request of both the Humr and the Ngok leaders (Henderson Diary in Appendix 5.13); the allegation that chief Kwol Arop was encouraging

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[118] *Ibid.*

[119] Sudan Intelligence Report No. 104 (March 1903), Appendix E, p. 18. GoS Memorial, Annex 5, SPLM/A FE 1/21.

[120] *Ibid., p.* 19.

[121] *Ibid.*

[122] *See supra* notes 105, 106.

> the Ngok to settle among the Humr in 1940 (Kordofan Monthly Diary 1940 in Appendix 5.13). But these citations lack either the context or the details that would enable us to draw any firm conclusions from them."[123]

93. The details in individual sources may be lacking, but context certainly is not. Firm conclusions may be safely drawn from those sources taken together, especially as they are corroborated not only by the independent observations of Professor Cunnison, but also by the circumstantial evidence. The improvement in Homr-Ngok relations as a result of Condominium presence or intervention, and Ngok movement in a northerly direction as a corollary of that improvement, is verified *around 1905* by Mahon Pasha already in 1903 and also by Willis in 1909. In the cartographic record, there is a clearly discernable general pattern in the maps: from those produced in the early years with labels placing the Ngok on and south of the Bahr el Arab around 1905, to the tribal administration maps of for instance 1927 and 1941. The cartographic evidence cannot merely be dismissed by claiming that there was insufficient knowledge at the time of Ngok Dinka presence extending to 1965 lines. This does not stand given the availability of highly detailed evidence such as the October 1908 Sudan Intelligence Report[124] describing each tribal group in considerable detail.

94. The fundamental flaw in the Experts' reasoning concerning Proposition 8 on the continuity of Ngok Dinka occupation up to 1965 is the sheer absence of any contemporaneous or even near-contemporaneous basis for concluding that there was *any* occupation of the 1965 area in 1905. It rests entirely on assumption: the assumption that in *all* of the places occupied in 1965, the Ngok had been living continuously from 1905.

95. Based on such flimsy evidence, there is no justification for employing the method of projecting, 60 years backwards in time, the situation as at 1965. This effectively overrides the agreed date specified in the mandate.

96. The Experts then turned to the general agreement in the sources consulted that the Goz is an area settled by neither the Ngok nor the Homr and seasonally used by both. On the status of the Goz, they noted:

> "The Ngok assertion that the boundary between the two peoples is the Goz belt that separates them has yet to be tested by a systematic survey. There is general agreement from other sources, however, that the band of Goz intervening between the Humr permanent territory and the Ngok permanent settlements is settled by nobody; that it is an area to be traversed, rather than occupied; and that there is regular seasonal use of the Goz by both peoples (Cunnison 1954 in Appendix 5.2; Cunnison 1966 in Appendix 5.3; Tibbs 1999 in Appendix 5.13)."[125]

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[123] ABC Experts' Report, Part 1, p. 43.

[124] Sudan Intelligence Report No. 171 (October 1908), Appendix D, GoS Memorial Annex 18, SPLM/A FE 3/5.

[125] ABC Experts' Report, Part 1, p. 43.

97. Finally, the Experts stated their conclusion as follows:

> "The Commission finds sufficient evidence, therefore, to accept Ngok claims to permanent rights southwards roughly from latitude 10°10'N and of Ngok secondary rights extending north of that line."[126]

98. There is thus nothing in the contemporaneous or near-contemporaneous evidence (i.e., from 1905 or within 10–15 years of it) cited by the Experts to support the adoption of latitude 10°10'N as a point of reference.

99. Having shown that the two crucial stages in the Experts' thought processes are built on sand I shall turn now to the important question of the procedural framework within which the Experts' mandate was conferred on them and within which they were expected to operate.

## 7. Locations of the Ngok Dinka and of the Homr around 1905

100. I have maintained throughout this Dissenting Opinion that the results achieved by the Experts and this Tribunal bear no relation to the reality of where the Ngok Dinka were situated around 1905 and that both exercises are contradicted by overwhelming, contemporaneous and near-contemporaneous evidence. The sheer volume of this evidence and its strong probative value are matched only by the degree to which it was neglected by the Experts and the Tribunal. This cannot be properly relegated to the margin of appreciation of facts normally left to the fact-finder or the arbitrators. It must be seen, when regard is had to how obvious the evidence and how reluctant the fact-finder or the arbitrator to see it, as a ground for excess of mandate properly so described.

101. Lest the reader think that an element of exaggeration has crept into what I have written, I have compiled from contemporaneous and near-contemporaneous sources, cited in the written pleadings of the Parties and in their presentations before the Tribunal, a detailed review of where the Ngok and the Misseriya and their camps or settlements were sighted around 1905.[†]

102. I address this evidence in chronological order, to the appropriate extent. As some sources concern both tribal groups, there is some repetition.

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[126] *Ibid.*, at p. 44.

[†] I am grateful for the research assistance of Ms. Fedelma Claire Smith in compiling this review. I would also like to take the opportunity to extend my thanks to Mr. Bill Robertson, Mr. Vincent Belgrave, and Mr. Sam Brown, for their cartographic expertise and timely assistance, and to my secretary, Mrs. Jean van Hamel-Newall, for her invaluable support. This Opinion could not have been produced without their Amazonian and Herculean efforts.

A Map illustrating this review of the evidence is appended to this Dissenting Opinion.[127]

### *1. Evidence of Ngok Dinka occupation*

#### (a) Evidence from up to and including 1905

103. E.B. Wilkinson, who travelled in 1902 from El Obeid to "Sultan Rob's", recorded in a detailed itinerary that the "first Dinka village" he reached was the village of Bombo. This has been marked as Bongo on the map, and is located at 9°32'N, 28°49'E.[128] This village was empty. Wilkinson did not encounter any Ngok before Etai (9°29'N 28°44'E). Both Bongo and Etai are far south of the Ragaba ez Zarga.[129] Wilkinson found only Arab settlements along the Ragaba ez Zarga, the watercourse to which he refers as the Bahr el Arab, five or six miles south-west of the "large Arab settlement" at Fauwel.[130]

104. Wilkinson noted on a sketch map illustrating his route that "the positions of arab settlements marked [with the symbol, ?] are from information supplied by Skeih Ali Gula Nazir of Homr arabs".[131] The watercourse marked as the Bahr el Arab on this sketch was later established as the Ragaba ez Zarga. No Dinka dwellings or settlements are marked by Wilkinson on this watercourse.

105. Mahon Pasha in 1903 reported that the Ngok Dinka lived in the area between the Ragaba ez Zarga and the Bahr el Arab.[132] He wrote:

> "From Muglad I went to Turda. The people here had a lot of cattle and a fair amount of horses. . . . From Turda I went south-east to Dehka and there had all the Sheikhs assembled and gave them 3 days to pay their tribute, which

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[127] *See* Map appended to this Dissenting Opinion, *infra*. This map is intended to illustrate the locations of Ngok Dinka and Homr Arab presence around 1905 using the contemporaneous and near-contemporaneous evidence in the record. Place names that are marked in colour illustrate where first-hand or official accounts from around 1905 identify either Ngok Dinka (shown in pink) or Homr (shown in orange) at the named location. Secretariat note: the map is located in the rear pocket of this volume.

[128] *Gazetteer of the Anglo-Egyptian Sudan* (Sudan Survey Department, Khartoum, 1931), p. 102, GoS Counter Memorial, Annex 28. Locations of places named in the evidence reviewed in this part of the Opinion have been made using the cartographic evidence in the record, with particular reference to the 1936 Mosaic of 250,000 Series Maps in the SPLM/A Reply Map Atlas.

[129] Wilkinson, El Obeid to Dar El Jange (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government,* Vol. II (1905), p. 155. GoS Memorial, Annex 38, SPLM/A FE 2/14 and 2/15.

[130] *Ibid.*

[131] Annex 5 of the GoS Maps produced in response to the Request of the Tribunal. An extract of this map is annexed to GoS CM, Map 13b.

[132] Sudan Intelligence Report No. 104 (March 1903), Appendix E, p. 19. GoS Memorial, Annex 5, SPLM/A FE 1/21.

> they did after a little persuasion. . . . I then went to Fawel and Um Semina, where I had the remainder of the Homr Sheikhs to meet me to collect their tribute . . . I next went west to Sultan Rob's, and was very well received; invested Sultan Rob with a Second Class Robe of Honour. From there I went south to the Riverain country, and north-west to Tosh and the Rizeigat country. . . . The two chiefs, Lor and Rob, who I made make friends last year after 30 years' war, were on the best of terms, and one and all Dinkas said how pleased they were that Government had come, because they had not been raided by the Arabs since I was there last year. As proof of that, I met several herds of Dinka cattle grazing right in the Arab country, where they were afraid to go last year."[133]

Mahon Pasha is unspecific about the latitude of "Sultan Rob's" in his Report. It might be inferred that he had travelled there due west from Fawel and Um Semina, but this impression is contradicted by other contemporaneous evidence also from before 1905.

106. Percival, in his route report from Keilak to Wau, December 1904, described "what I take to be the Bahr el Arab", which is now known to be the Ragaba ez Zarga. He wrote, on 19 November:

> "I have been some miles up and down the river but can find no trace of inhabitants. The country between here and the Jebela would appear to be uninhabited as I should think that I would be bound to have found some traces of natives if any had been about lately."[134]

On 27 November he noted that Sultan Rob was "at present" living in Burakol and noted "There are no Dinkas west of Burakol as far as I could see and Sultan Rob told me that there are only Homr Arabs west of him."[135] He then noted that:

> "The Bahr el Arab [the river which was later identified as the Ragaba ez Zarga] is uninhabited he told us except for occasional wandered parties of Arabs. He knew Chak Chak which he said was the next lot of natives to those he ruled."[136]

107. Percival also reported seeing some Dinka driving cattle south at Amakok. On the most expansive proper view of the evidence, it can be inferred as a possibility, in the absence of any more detailed (or contradictory) contemporaneous evidence on Amakok, that there was Ngok Dinka presence somewhere in its vicinity. However, any attempt to place the Ngok Dinka further north, in the form of a permanent settlement, on the basis of this one sighting, would be pure speculation. One might indeed remark that any incidence of Dinka driving their cattle southwards as hard as they could at that latitude, at

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[133] *Ibid.*

[134] A. Percival, "Route Report: Keilak to Wau", December 1904, p. 2. GoS Counter Memorial, Annex 26.

[135] *Ibid.*, at p. 3.

[136] *Ibid.*

a time when the Dinka only tended to graze their cattle "as far North as they think safe from the Arab", does not seem likely to concern Dinka coming from their own permanent settlements.

108. Percival's 1904 sketch map places Sultan Rob south of the river Kir, not far from the village of Bongo, and mentions the village of Burakol, just north of the Kir.[137]

109. Gleichen's Handbook of 1905 includes an "Itinerary of the Bahr el Ghazal River, Lake No – Mashra El Rek", by "Garstin, Peake, Editor, et al" which notes, regarding Lau: "From 6 miles above the junction a succession of Dinka villages line both banks. Some of these are large and appear to be thickly peopled. The principal village is called Lau.[138]

### (b) Evidence from after 1905

110. In his "Progress Report – Bahr Bahr el Arab Reconnaissance", dated 8 March 1906, Bimbashi Huntley Walsh stated:

> "I have on board now Sheikh Akanon, the son of Sheikh Lar who is dead, he has been a great help to me and wishes to report himself to His Excellency the Governor-General, so, unless I receive a wire to the contrary, I shall bring him to Khartoum with me. He is the biggest Dinka Sheikh in this part of the country and has considerably more people and a much larger stretch of country than Sheikh Rob."[139]

111. Hallam's 1907 route report describes Sultan Rob's new village as "covering the country between the Um Bioru and the Gurf [Bahr el Arab] near their junction".[140] From there, Hallam travelled south-east towards Sultan Rob's old village. He states that "ROB'S old V. is on BAHR EL ARAB". This description does not include any significant extent of territory north of the Bahr el Arab nor does the report evidence any Ngok occupation anywhere near the Ragaba ez Zarga, or north of it. Hallam located one Ngok village on the Umm Biero, namely, Rob's New Village at the Um Biero – Bahr Bahr El Arab junction, and others along both banks of the Bahr el Arab: Chweng; Lar's village; and Sultan Rob's old village.

112. Lloyd wrote in 1907:

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[137] Percival's Sketch Map (River Kir to Wau), (Sudan Survey Department archives, 1904). GoS Counter Memorial, Map 14b.

[138] E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government,* Vol. II (1905), p. 168. GoS Memorial, Annex 38, SPLM/A FE 2/14 and 2/15.

[139] Sudan Intelligence Report No. 140 (March 1906), p. 15. GoS Memorial, Annex 12, SPLM/A FE 17/22.

[140] H. Hallam, *Route Report: Dawas to Dar Jange,* December 1907, p. 2. GoS Counter Memorial, Annex 31. Hallam's sketch map is annexed to the GoS Counter Memorial, Map 16b.

> "Dar Homr, or the country of the Homr Arabs, is situated in the south-west corner of the province of Kordofan. The western boundary is the Darfur frontier, beyond which live the Rizeigat Arabs. On the north, the boundary passes through El Odaiya, now the headquarters of a Merkz, or administrative district, and thence south-eastwards, passing south of Burdia and Jebel Dago to Keilak. El Odaiya is in the Hamr country, the inhabitants being a sedentary tribe of Arabs. Burdia and Jebel Dago are in the Messeria, and Keilak in the Hawazma country. Both these tribes, like the Homr, are Baggara Arabs – that is to say, cattle-owning nomads. The southern boundary is between the Bahr el Arab and the river Kir, the latter being occupied by the Dinkas under Sultan Rob."[141]

In response to Lloyd, Percival submitted an explanation published in the following of the Geographical Journal, stating that "[t]he Bahr el Arab is the river Kir, and takes this name 'Kir' when it enters the Dinka country either before or after joining with the rivers that join the river Lol below Sultan Rob's".[142]

113. Lloyd, in the Sudan Intelligence Report, 1908, recorded that "the Homrs cultivate round Muglad and Baraka, but as soon as the water dries up they migrate southwards to the Bahr el Homr".[143]

114. C.A. Willis made detailed "Notes on the Western Kordofan Dinkas" following a visit in 1909.[144] He stated:

> "The Western Kordofan Dinkas seem to be divided into three main heads: on the east the Ruweng, under Sultan Qot; in the middle the followers of the late Sultan Lar, under his son Kanoni; and to the west the followers of the late Sultan Rob, under his son Kwal."

115. Willis noted, further:

> "Practically speaking, the Dinkas after the rains are scattered about and mixed up, in so far as their private feuds allow. It is only in the rains that they sort themselves out, and more or less combine in families. Even so, they say there is no hard-and-fast rule by which a sub-tribe always lives in the same place. All along the Gurf are villages consisting of perhaps two or three houses each. The ones I saw at the Ferry by Rob's old village were about a mile apart, and I was told they continued all along the Gurf both ways. Total distance from end to end in which these Dinkas live (Lar and Rob) is not more than two days (say 50 miles). They gather together in the rains in order to combine to make their houses . . ."[145]

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[141] Geographical Journal, Vol. 29, 1907. GoS Memorial, Annex 54, SPLM/A FE 17/27.

[142] Geographical Journal, Vol. 30, 1907. GoS Memorial, Annex 55.

[143] Sudan Intelligence Report No. 171, October 1908, p. 53. GoS Memorial, Annex 18, SPLM/A FE 3/5.

[144] C.A. Willis, "Notes on the Western Kordofan Dinkas", 10 April 1909, Sudan Intelligence Report No. 178, May 1908, Appendix C, at p. 16. GoS Memorial, Annex 19.

[145] *Ibid.*, at p. 17.

116. Willis made observations on the habits and locations of the Ngok Dinka in the rainy season, and noted:

> "As I saw their winter camps only (the villages on the Gurf were empty except for a few old men and women); I did not see the Dinkas in full kit – they had with them only their helmets (Filliul) and their arms. . . . Just after the rains they go as far North as they think safe from the Arabs (Bongo or El Myat); there they build temporary villages, no doubt owing to the presence of mosquitoes. The tukls are made with the floor rising to a point in the centre. . . . (the Arabs at Sinut and Burdia do the same for their children owing to the mosquitoes). . . . As the water dries up and the mosquitoes decrease, the Dinkas move towards the Gurf."[146]

117. Willis also noted that "From a piece of rising ground between the Lau and the Gurf one sees the plain of the Gurf extending for miles covered with grass, with here and there big trees and a Dinka village."[147]

118. A sketch by Whittingham, dated 1910, is, as noted by the GoS, the first map to depict something with a name resembling that of Abyei, namely, Abyia.[148] Whittingham measured the position of Abyia and noted "I have struck it three or four times and it is about 3½ miles up the tributary which is shown on the HASOBA sheet".[149]

119. From this evidence, the GoS suggests that the Ngok Dinka were moving slowly north: Burakol was 2 miles up the Um Biero in 1904; Abyia 3 ½ miles up in 1910, and Abyei town 4.7 miles up in 2005.[150] This appears to be supported by other evidence, such as Titherington's sketch map of 1924, where on the left bank of the Um Biero, just north of the Bahr el Arab, there is an annotation stating: "Abyei [Ch Kwol Arob's since 1918]".[151]

120. G.A. Heinekey travelled in 1918 from Muglad to Gerinti,[152] then south along the Bahr el Arab until he came to Mek Kwal's village,[153] where he turned north and travelled towards the Ragaba Um Biero and from there further north.[154] Heinekey only mentioned Ngok villages along the Bahr el Arab.

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[146] *Ibid.*

[147] C.A. Willis, "Notes on the Western Kordofan Dinkas", 10 April 1909, Sudan Intelligence Report No. 178, May 1908, Appendix C, at p. 18.

[148] Transcript, 21 April 2009, 93/20 (Crawford).

[149] Whittingham, Letter to Pearson, 26 April 1910. GoS Memorial, Annex 34.

[150] Transcript, 21 April 2009, 98/12–14 (Crawford).

[151] *Infra* note 159.

[152] G.A. Heinekey, Route Report: Muglad to Gerinti, February 1918. GoS Counter Memorial, Annex 35.

[153] G.A. Heinekey, Route Report: Gerinti to Mek Kwal's Village, March 1918. GoS Counter Memorial, Annex 36.

[154] G.A. Heinekey, Route Report: Mek Kwal's Village to Jebel Shat Safia, March 1918. GoS Counter Memorial, Annex 37.

121. Heinekey noted Homr cattle and Homr camps on his way to Gerinti, and, north of Mek Kwal's village, only Homr. He stated that "From Gerinti to Mek Kwal's village, there is no track of any sort." [155] Later in the same section he noted, "The Arabs when they go down to Kwal to buy grain do not go along the Gurf but along the Ragaba Um Biero which flows parallel to and North of the Gurf."[156] This suggests that Gerinti was populated by Arabs rather than by the Ngok.

122. Dupuis's 1921 sketch of Dar Homr "shows no sign of Ngok presence in the area claimed by the SPLM/A". The "most northerly indication of Ngok" is the word "dugdug" some miles north of Lukji on the Ragaba Um Biero.[157]

123. H.A. MacMichael, an historian, wrote in 1922 that "the Humr country lies on the extreme west of southern Kordofan, from the neighbourhood of el Odaya to the Bahr el Arab, or 'Bahr el Humr'".[158]

124. On the 1924 sketch map by Titherington, in 1924, on the left bank of the Um Biero, just north of the Bahr el Arab, there is an annotation stating: "Abyei [Ch Kwol Arob's since 1918]".[159] The Kordofan Tribal Distribution Map of 1927 shows the "Mareig" (Ngok) Dinka next to Abyei, marked well to the south of the Ragaba ez Zarga.[160]

125. In 1933 Henderson travelled from Muglad to Abyei by way of Tebeldiya, Antilla, Lukji and Na'am. It was not before Lukji, approximately 16 kilometres north of the Bahr el Arab that Henderson reported the first Ngok houses.[161] Lukji is to the south of the Ragaba ez Zarga.

126. The "Grazing Areas Map" produced by the Civil Secretary's Office and dated 1933 places the Ngok grazing area to the south of the Bahr el Arab, south of 10°N, and 40 kilometres south of the 10°10'N line.[162]

127. The map showing Native Administrations of Kordofan Province, dated 1941,[163] shows the Dinka confined to a small, semi-circular area around

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[155] *Supra* note 153.

[156] *Ibid.*

[157] *See* Transcript, 21 April 2009, 98/3–6 (Crawford).

[158] H.A. MacMichael, *A History of the Arabs in the Sudan* (Cambridge: Cambridge University Press, 1922), p. 286. GoS Memorial, Annex 41.

[159] Additions and Corrections to Sketch of Dinka Country (Khartoum: Sudan Survey Department, 1924). GoS Counter Memorial, Map 38.

[160] Kordofan Tribal Distribution Map (Khartoum: Sudan Survey Department, 1927), GoS Counter Memorial, Map 21.

[161] K.D.D. Henderson, "Route Report: Muglad to Abyei", March 1933. GoS Coutner Memorial, Annex 38.

[162] Grazing Areas Map, 1933, Civsec 66/4/35 Vol. I p. 95. GoS Counter Memorial, Map 22a.

[163] Native Administrations of Kordofan Province (Khartoum: Sudan Survey Department, 1941). GoS Memorial, Map 27.

Abyei, on the Bahr el Arab. That area is about 3,000 square kilometres. The area claimed by the SPLM/A is 23,300 square kilometres.

128. As recalled in Part 2 of this Dissenting Opinion, P.P. Howell, who is cited in the Award,[164] wrote in some detail on the locations of the Ngok. In 1948, Howell noted:

> "The Ngok Dinka of Western Kordofan live along the middle reaches of the Bahr el Arab and its tributaries . . . During the dry season the Homr Messiria mingle freely with them in pastures and they have a long history of contact with the Arab world – probably for at least a century."[165]

129. In a work published in 1951, to which reference has also been made in Part 2 of this Dissenting Opinion, Howell noted:

> "The Ngork Dinka, whose population is estimated between 20,000 and 25,000, occupy an area along the middle stretches of the Bahr el Arab. They border the RUENG ALUR Dinka in the south-east and the TWIJ Dinka to the south, and with both these Dinka peoples they have close cultural affinities. To the south-west are the MALUAL Dinka. North of the Ngork are the Baggara Arabs of the MESSIRIA HOMR with whom they have direct seasonal contact and they are therefore on the most northerly extremities of the Western Dinka block, lying between the Nilotics of the south and Muslim peoples of the north . . . Administrative action . . . has placed the Ngork in Kordofan Province and the Rueng in the Upper Nile Province . . . The Ngork Dinka of Western Kordofan occupy an area between approximately Long. 27°50'E and Long. 29° on the Bahr el Arab extending northwards along the main watercourses of which the largest is the Ragaba Um Biero . . ."[166]

130. Professor Ian Cunnison, in a sketch map, dated 1954, shows the Dar Humr, with the word "Ngok" printed to the South of the Bahr el Arab.[167] Cunnison wrote in 1966, in a study based on field work between August 1952 and January 1955:

> "The Bahr is the name which the Humr give to the whole of this dry-season watering country. Within it they recognize different districts: the Regeba is the northern part of the Bahr, where the Humr make their earliest dry-season camps . . . the 'Bahr' proper is the region where the camps are made towards the end of the dry season, mainly around the largest watercourse, the Regeba Umm Bioro and the Regeba Zarga . . . Finally, much of the Bahr has permanent Dinka settlements, although during most of the time that

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[164] Award, paras. 720 *et seq.*

[165] P.P. Howell, 1948, P.P. Howell Papers, Sudan Archives, Durham, 768/2/15, cited in ABC Experts' Report, Part II, Appendix 5.11, at p. 201.

[166] P.P. Howell, "Notes on the Ngork Dinka of Western Kordofan", (1951) 32 Sudan Notes and Records 239, pp. 241–242. GoS Memorial, Annex 53, SPLM/A FE 4/3.

[167] I. Cunnison, "The Humr and their Land", (1954) 35(2) Sudan Notes and Records 50, p. 50. SPLM/A FE 4/5. See also Figure A, *infra*.

> the Humr occupy it the Dinka are with their cattle south of the Bahr el Arab . . ."[168]

Cunnison also wrote that "[t]he way in which the tribal sections move seems not to have varied much since the Reoccupation."[169]

131. R. Davies, a former Sudan civil servant, described the position of the Dinka in a 1957 publication in the following terms:

> "[The] Dinka, the great majority of whom belonged to Bahr el Ghazal Province, though by a freak of organization two sections of the tribe, Mareig and Ruweng, were for administrative purposes part of the Western Kordofan inspectorate.
>
> The reason for this arrangement was that these sections played Cox and Box with the Homr in the occupation of the shallow basin of the Bahr el Arab river, which was the theoretical boundary between the two provinces. When the Homr went south to it in the dry season, the Dinka withdrew still farther south into the Bahr el Ghazal; but when the rains came and the Arabs took their cattle north to the area of El Muglad, the Dinka, whose small bred of cattle had acquired immunity to fly-borne disease, moved up and occupied the river region, where their animals profited from the grass."[170]

132. Sir James Robertson, Civil Secretary of the Sudan Government from 1945 to 1953, wrote on the Humr and Dinka as follows:

> "Further south, the Humr section of the Messeria centred round Muglad and Keilak in the rainy season, migrating in the late autumn southwards to the green pastures of the Bahr el Arab, where water and grass could be found in plenty for their cattle during the dry season. The cattle nomads on the river mingled with the tall Nilotic Dinkas, of whom, one tribe, the Ngok, was administered by Western Kordofan, and other, the Twij and the Malwal, came north from Tonj and Aweil districts of Bahr el Ghazal Province . . . About eighty miles south of El Odaiya is Muglad, the centre of the Humr Administration, where there was a small office and a police post. From Muglad it is still another hundred miles south to Abyei near the Bahr el Arab, where Chief Kwal Arob presided over the destinies of the Ngok Dinkas . . . Chief Arob of the Ngok Dinka lived in a buffer area between the Arabs and the great mass of the Dinka to the south . . ."[171]

133. Michael Tibbs wrote, on taking up his appointment as Assistant District Commissioner for Dar Messeria in the early 1950s:

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[168] I. Cunnison, *Baggara Arabs: Power and Lineage in a Sudanese Nomad Tribe* (Oxford: Clarendon Press, 1966), pp. 18–19, SM Annex 33.

[169] *Ibid.*, at p. 26. "Cox and Box" is a 19th-century operetta with a libretto by F. C. Burnand and music by A. Sullivan, in which a landlord mischievously lets the same room to two lodgers, one of whom works at night and the other during the day.

[170] R. Davies, *The Camel's Back* (London 1957), p. 130. GoS Memorial, Annex 35.

[171] J. Robertson, *Transition in Africa* (London: C. Hurst, 1974), pp. 42, 44, 50. GoS Memorial, Annex 45.

> "As I read through the Messeria section of the District files, the task and the distance seemed formidable, I would be looking after an area of 25,000 square miles. Most of this was the territory of the Messeria tribe. They are cattle owning Arab nomads, some 90,000 of them. Also within the area there were three other ethnic races. In the south on either side of the Bahr (river) el Arab, lived the Ngok Dinka, numbering 30,000 . . ."[172]

134. Professor Martin Daly, in his expert testimony in these proceedings, notes the following concerning the location of the Ngok Dinka in 1905:

> "We are left then with the conclusion that the best documentary evidence so far located for the northern boundary of the area of the nine Ngok Dinka chiefdoms in 1905 remains, in the opinion of this historian and as of the date of the present report, Wilkinson's itinerary of 1902, which establishes a permanent Ngok presence on the Ragaba al-Zarqa."[173]

On being questioned on that statement in cross-examination by Professor Crawford, Professor Daly admitted that he could not point to anything in Wilkinson's itinerary that established, or where Wilkinson said that there had been established, a permanent Ngok presence on the Ragaba ez Zarga.[174]

### *2. Evidence of Homr Occupation*

#### **(a) Evidence from up to and including 1905**

135. Wilkinson made detailed observations on Ngok and on Homr locations, as described in his Itinerary No. 101, "El Obeid to Dar El Jange". [175] In the section beginning on page 153, "From Kadugli to Keilak", Wilkinson noted that the road crosses the outlet from Lake Keilak, and then noted, two miles from that crossing: "Keilak is a series of groups of tukls badly built and inhabited by Homr Arabs who possess few flocks, a few horses, and appear to live on the Nubas."[176] Six and a half miles from Keilak, he noted "El Geref; Homr settlement".[177] After proceeding 35¾ miles south-west from the Homr settlement at El Geref, he noted " . . . El Debekir was reached. Here there was an Arab (Homr) settlement . . .".[178] From El Debekir, 16¾ miles on, he noted: " . . . El Anga on river is reached. Here there is an Arab settlement . . .".[179] Five

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[172] M. Tibbs and A. Tibbs, *A Sudan Sunset* (privately published, Welkin, 1999), "Dar Messeria", p. 55.

[173] SPLM/A Memorial, First Report of Professor Martin Daly, p. 49.

[174] Transcript, 22 April 2009, 117/16–20 (Crawford/Daly).

[175] Wilkinson, *supra* note 129, at p. 154.

[176] *Ibid.*

[177] *Ibid.*

[178] *Ibid,* at p. 155.

[179] *Ibid.*

and a half miles from the Arab settlement at El Anga, he noted that " . . . Kuek is reached . . . Large Arab settlement and many cattle."[180]

136. With the aid of the sketch map drawn by Wilkinson, Kuek has been located at latitude 28°58'E, 10°12'N. Six miles south-west from the large Arab settlement at Kuek, Wilkinson noted: "H. Debib . . . a few Homr Arabs living here . . .".[181] The next mention of the Homr is at Fauwel; between H. Debib and Fauwel, three and a half miles from H. Debib, Wilkinson noted "Fula Hamadai . . . Small villages – mere collection of three or four huts passed at El Jaart and Um Geren" and then, 11¾ miles from Fula Hamadai, "village named Fut was passed". All of these were before "the first Dinka village of Bombo is reached" (just over 14 miles south of what was really the Ragaba ez Zarga), thus it can safely be inferred that Fula Hamadai, El Jaart, Um Geren and Fut were Homr locations.

137. Some 19 miles from H. Debib, Wilkinson noted: "Fauwel is reached. Large Arab settlement; much water in river, and an open expanse 1¾ miles surrounded by reeds. Geese and waterfowl. Homr Arabs here very wild, but possess many cattle, goats and sheep." Fauwel, using Wilkinson's sketch map, can be located at 9°53'N, south of the "shared grazing rights area" of the ABC, about 32 kilometres due south of the 10°10'N line.

138. In his Itinerary No. 102, "River Kir to Fauwel", Wilkinson described his journey starting from Sultan Rob's settlement on the River Kir and going towards Fauwel. Towards the Ragaba ez Zarga, 29¼ miles from Sultan Rob's settlement, he noted reaching "Abu Kareit, on [Ragaba ez Zarga]. Homr settlement." Three and a quarter miles further on, he notes reaching "Mellum, an Arab settlement". These locations are both south of 9°50'N.

139. At the end of that Itinerary, Wilkinson set forth a "General Description of Bahr el Arab and Dar El Homr". In this he stated: "Only in a few places, Fauwel, Keilak, and Kuek, do the Homr Arabs remain throughout the year, as they say that the flies and mosquitoes torment man and beasts to such an extent as to make life unbearable."[182] This statement is significant first because it shows that Homr's presence as far south as Fauwel was not exclusively transitory. But also significant is the fact that some Homr Arabs clearly remained in this area even during unfavourable conditions. In itself, the presence of the Homr Arabs throughout the year at Kuek and Fauwel, in spite of the seasonal conditions rather than because of them, suggests that those people did not have a fully nomadic existence. This theory is corroborated by Howell in 1951 who notes that "the Ngork are no different from other Nilotic cattle-owners, nor indeed in general principle from the Baggara Arabs who live to the north of them."[183]

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[180] *Ibid.*

[181] *Ibid.*

[182] Gleichen Handbook, *supra* note 138, at p. 156.

[183] Howell, *supra* note 166, at p. 245.

140. Mahon Pasha in 1903 described places at which he collected tribute in his report annexed to the Sudan Intelligence Report No. 104 of March 1903. He describes assembling the Sheikhs and collecting tribute from them at Dehka, Fauwel, and Um Semina. These are by necessary implication Arab locations because Mahon Pasha states that it "would not be the slightest use trying to collect tribute" from the Dinka "until there is a Mamur and a post in that direction".[184] It has not been possible to pinpoint the location of Dehka from the map evidence in the record; Mahon Pasha describes it as being Dehka was "south-east" of Turda[185] but it may not have been far from Turda which is at 10°20'N. Fauwel is located according to several sources at about 9°52'N, 28°50'E. Um Semina has been located at around 9°47'N, 28°36'E.

141. Mahon Pasha recorded that, when the Sheikhs at Fauwel and Um Semina failed to pay the colonial tribute within three days, he

> "made some of the Sheikhs prisoners and seized cattle and horses to the value of about three times their tribute. I told them that if they liked they could pay and redeem their property, but must pay 40L extra as a fine. They all paid before I left the country."[186]

It is significant that Fauwel and Um Semina the Homr were not only present, but they were paying taxes to the administration there, and in fact the tax was extracted on pain of imprisonment and confiscation of property.

142. It is thus clear from the reports of Wilkinson and Mahon Pasha that the presence of the Homr Arabs as far south as Fauwel and Um Semina was a fact which the Condominium authorites officially recognized, to the material detriment of those Homr. Mahon Pasha recorded in the same place that there was as yet insufficient infrastructure to collect tax from the Ngok Dinka in that direction. It would be most strange to regard as only fleeting and transitory, and as a matter of grazing by permission in the territory of another, a presence which was recognized for tax purposes by the long arm of the Condominium administration. However, there is no reason to imagine that the administration might have been so heavy-handed as to exact, using force, tax tribute in at sites where the taxpayers were merely temporarily passing through as nomads, there is clear evidence showing that at one of those locations, Fauwel, the Homr remained throughout the year.

143. Percival, who began his trek from Keilak on 12 November 1904, noted that there was "a small Homr Arab settlement at Keilak". Percival was unable to obtain a guide at Keilak; he noted on leaving on 13 November: "Made an Arab accompany me, but he was very unwilling and did not even want to put me on the track out of the village, and on 16 November he noted: "Have let the Arab go back to Keilak as he cannot give me any information." Percival travelled 56 miles south-west before he "Found remains of huts three years

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[184] Mahon Pasha, *supra* note 132, at p. 19.

[185] *Ibid.*

[186] *Ibid.*

old" at a khor.[187] A further 39 miles on, he came to what is now known as the Ragaba ez Zarga, where he noted:

> "I have been up and down the river but can find no trace of inhabitants. The country between here and the Jebels would appear to be uninhabited, as I should think that I would be bound to have found some traces of natives if any had been about lately."[188]

Percival's notes show that from Keilak up to the Ragaba ez Zarga and up and down that Ragaba, he made sightings of neither Homr nor Dinka.

144. After he crossed the Ragaba ez Zarga, at Amakok, on 30 November 1904, Percival noted that he "sent out parties one of whom brought in Dinkas who were driving cattle south as hard as they could. I surprised them and they thought we were Arabs raiding, but I found them very friendly and obtained a guide."[189] After Amakok Percival recorded that he encountered several villages, including Yai, Lahr, and Yamoi. Since he was in the care of a Dinka guide – who was quite possibly of the Ngok tribe, but this is not specified – it would be fair to infer that those were Ngok Dinka villages, and in the case of Lahr this has been independently corrobrated.

145. Percival trekked on 27 November from Bongo to Burakol where he noted that "Sultan Rob is at present living". Percival noted that

> "Sultan Rob told me that there are only Homr Arabs west of him. The [Ragaba ez Zarga] is uninhabited he told me except for occasional wandered parties of Arabs. He knew Chak Chak which he said was the next lot of natives to those he ruled."[190]

Percival also described Sultan Rob's authority:

> "He seemed to have a good deal of authority & is very loyal I should say. He corresponds with El Obeid and says he has not been fighting the Arabs since the Government came to see him & that the Homr Arabs are fairly quiet, but I gathered that they do not trust each other much yet."

The fact that Sultan Rob was able to make such observations on the quietness or otherwise of the Homr corroborates Wilkinson's evidence that the Homr were located on the Ragaba ez Zarga.

146. Lloyd, writing on Kordofan in the Gleichen Handbook,[191] under the sub-heading, "Nomads, Baggara", lists the "most important tribes" of the nomads or Baggara, stating that "[t]he Homr, south of El Eddaiya towards the Bahr El Arab, are a large and fairly rich tribe, and the Gimma, near Gedid, the

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[187] Percival, *supra* note 134, at p. 1.

[188] *Ibid.,* at p. 2.

[189] *Ibid.*

[190] *Ibid.,* at p. 3.

[191] Gleichen, *supra* note 138, at p. 179

majority of whom, however, have permanent houses". The Homr are also listed in a table showing "Tribes and Sheikhs".[192] They appear as follows:

| | | | |
|---|---|---|---|
| Homr | Ali Gula (Nazir) | | Large and comparatively rich Baggara tribe, owning cattle and horses. At present (1903) pay ££450 tribute. |
| Ageria Walad Omran | Muhammed Khadson | Muglad | |
| Agaira Walad Kamil | Masood Iriz | Muglad to Bahr el Arab | |
| Felaita | El Hag Wad Yagob | Keilak and Abiad Lakes | |

147. Appendix G of the Gleichen Handbook is entitled "Boundaries of Provinces (Defined)"[193] Under "Kordofan" it states, in relevant part:

> "From Lake No up the Thalweg of the Bahr el Ghazal and roughly westwards along the 9 degree parallel. Sultan Rob and Dar Jange belonging to Kordofan. The western boundary is the eastern frontier of Darfur, which leaves Um Badr and Foga to Kordofan and Kaja to Darfur, thence in a south-westerly direcion to Dam Jamad, thence southwards, leaving Zernak, Um Bahr, Wad Zarag, Gad El Habub and Sherafa to Kordofan. Thence southwards to the Bahr El Arab, leaving the . . . Rizeigat to Darfur, and the Homr and Dar Jange to Kordofan."

The Homr are thus mentioned in connection with the boundary at the Bahr el Arab so they must have been present on or near the Bahr el Arab for at least some of the year.

### (b) Evidence from after 1905

148. A figure illustrating the continuity from 1927 to 1954 in the general outline of the "dar" of the Homr or Misseriya is appended to this Part.[194]

149. The 1906 sketch map by Comyn situates the Homr on the Bahr el Arab, just above 10°0'N.[195]

150. Huntley Walsh reported hearing that there was a Homr raid on Sheikh Aweng's village "immediately after the last Bahr El Arab expedition

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[192] *Ibid.,* at p. 327.

[193] *Ibid.,* at p. 335.

[194] Figure A, *infra*.

[195] Sketch map of the western sources of the Nile (London: Royal Geographical Society, 1907). GoS Memorial, Map 7.

left for Khartoum" and that Sheikh Rob and Ali Gula work together.[196] He then stated, later:

> "The Arabs, according to the Nuers and Dinkas have been causing trouble again, having taken a lot of cattle and 50 children from the next village above this. . . . I calculate I am only 40 miles roughly from the mouth of the river. Natives tell me it is one day's march to Sultan Rob's across country, and three days by river in canoes."[197]

151. Lloyd wrote extensively on the Homr in several publications. In his "Notes on Dar Homr," of 1907, Lloyd wrote that "[t]he Homr are divided into two chief divisions . . . east of Turda and Fauel".[198] This corroborates the evidence of Wilkinson dated 1902 that the Homr were located around Fauwel.[199] In a Report on a Tour of Inspection of Kordofan Province, Lloyd noted that: "The Walad Omrau section goes to Fawel, Fut, Kuek, and Turda."[200]

152. Hallam, writing in 1907, described Arab camps and dry season camping grounds along the Umm Biero at R. El Sayar, R. El Sorik (dry season), R. Abu Dinat (dry season), R. Fadlulla (dry season), and Saheb.[201]

153. The 1908 "Report on Kordofan Province", edited by Lloyd,[202] includes extensive and detailed notes on the history and the human and physical geography of Kordofan. It describes the dry season camps of the Homr as follows:

> "The Homrs cultivate round Muglad and Baraka, but as soon as the water dries up they migrate southwards to the Bahr El Homr. The Homr Ageira dry season camps and the Badana occupy them as follows, reading down stream from the frontier:

| **Place** | **Badana** | **Remarks** |
|---|---|---|
| Bok | Fairom | Wells when dry. |
| Dawas | " | |
| Bambon | " | |
| Antila | " | |
| Fugara | Dar Um Sheiba | Wells when dry. |

[196] Huntley Walsh, *supra* note 139, at p. 15.

[197] *Ibid.,* at pp. 15–16.

[198] Lloyd, *supra* note 142.

[199] *See* Wilkinson, *supra* note 129, at p. 156.

[200] Sudan Intelligence Report No. 162, (January 1908), Appendix G, p. 56. SPLM/A FE 3/4.

[201] H. Hallam, *Route Report: Dawas to Dar Jange*, December 1907, p. 2. GoS Counter Memorial, Annex 31. Hallam's sketch map is annexed to the GoS Counter Memorial, Map 16b.

[202] Sudan Intelligence Report No. 171 (October 1908), Appendix D. GoS Memorial Annex 18, SPLM/A FE 3/5.

| Place | Badana | Remarks |
|---|---|---|
| Abu Erdu | | |
| Goli | Dar Muta | Wells when dry. |
| Bueidat | Dar Salam | " " " |
| Abu Azala | Dar Muta | " " " |
| Abu Uruf | " " | " " " |
| Damsoi | Kalabina and Mizagina | " " " |
| Fagai | " " " | " " " |
| Mellum | " " " | " " " |
| Hasoba | " " " | " " " |

. . ."[203]

154. The Report continues, in the same section:

> "The Walad Umran section goes to Fauwel, Fut, Koak, and Turda. The Homr Felaita to Keilak and the Abiad. Each Badana has a road of its own from their cultivation and rain camps near Muglad to their dry season camps on 'El Bahr'."[204]

155. Those roads are mentioned in the same Report where it describes the physical geography of Southern Kordofan, and it is worth reproducing that description in full:

> "West of Dar Nuba is Dar Homr, a vast plain extending far beyond the frontier. This plain is sandy north of Muglad, but black soil covered with thick bush to the south. The black mud is, however, crossed by sandy belts running S.E. and N.W. along which are the roads from Muglad and Baraka, where the people have their cultivation, to the Bahr El Homr, where they go in the dry season."[205]

In the same section, the Report states:

> "In the south, about Latitude 10°, is the Bahr El Homr, which rises some thirty miles across the Darfur frontier and flows eastwards to Hasoba, where it turns south-east and joins the Bahr El Ghazal. It flows through a very flat country, but has not a very wide basin. It is on an average about 100 yards wide, and its upper reaches have steep well-defined banks from 10 to 15 feet high; but it is full of grass. When it dries up (about January) wells are dug in the bed, from which the Homr water thousands of cattle, until the rains and fly drive them north to their cultivation area near Muglad. Some thirty miles south is the Bahr El Arab (or Gurf), which forms the southern boundary of the Province."[206]

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[203] *Ibid.*, at p. 53.

[204] *Supra* note 202, at p. 53. GoS Memorial Annex 18, SPLM/A FE 3/5.

[205] *Ibid.*, at p. 34.

[206] Sudan Intelligence Report No. 171 (October 1908), Appendix D, at p. 35.

156. Whittingham, in 1910, produced a sketch map where he noted what he thought was the "probable boundary" between the Dinka and the Homr.

157. As noted above,[207] Heinekey recorded Homr cattle and Homr camps on his way to Gerinti, and, north of Mek Kwal's village, only Homr. He stated that "[f]rom Gerinti to Mek Kwal's village, there is no track of any sort." [208] Later in the same section he noted, "[t]he Arabs when they go down to Kwal to buy grain do not go along the Gurf but along the Ragaba Um Biero which flows parallel to and North of the Gurf."[209] This remark suggests that Gerinti was populated by those "Arabs" rather than by the Ngok.

158. In Sudan Intelligence Report No. 324 of July 1921, F.C.E. Balfour noted:

> "Relations with Arabs – Remain good. Arab and Dinka herds grazing side by side on the lower reaches of the Ragaba Um Biero, and the Dinka (Bongo section) have shown their confidence in the Arabs by extending their permanent villages farther to the North of the Gurf."[210]

159. The historian H. MacMichael, in 1922 placed the Homr "between El Odaya and the Bahr el 'Arab".[211] He noted that "[t]he Humr country lies on the extreme west of southern Kordofan, from the neighbourhood of El Odaya to the Bahr el 'Arab, or 'Bahr el Humr'. In the rains the Homr are between Muglad and the confines of the Hamar to the north, but in the dry season they and their cattle move southwards to the Bahr el 'Arab, where they come into contact with the Dinka."[212]

160. Professor Ian Cunnison wrote in 1966, in a study based on field work between August 1952 and January 1955:

> "The Bahr is the name which the Homr give to the whole of this dry season watering country. Within it they recognize different districts: the Regeba is the northern part of the Bahr, where the Homr make their earliest dry-season camps . . . the 'Bahr' proper is the region where the camps are made towards the end of the dry season, mainly around the largest watercourse, the Regeba Umm Bioro and the Regeba Zarga . . . Finally, much of the Bahr has permanent Dinka settlements, although during most of the time that the Humr occupy it the Dinka are with their cattle south of the Bahr el Arab . . ."[213]

Significantly, Cunnison noted that "[t]he way in which the tribal sections move seems not to have varied much since the Reoccupation."[214] The

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[207] *Supra* notes 152, 153, 154.

[208] *Supra* note 153.

[209] *Ibid.*

[210] Sudan Intelligence Report No. 324 (July 1921), report of F.C.E. Balfour, at p. 6. SPLM/A FE 18/5.

[211] H.A. MacMichael, *supra* note 158, at p. 273.

[212] *Ibid,* at p. 286.

[213] Cunnison, *supra* note 168, at pp. 18–19.

[214] Cunnison, *supra* note 168, at p. 26.

same book includes a sketch map of Homr Migratory Routes, which shows the "areas and migration routes" of the Homr omodiyas (sub-sections), with those of Fayyarin and Salamat (Feilata) situated on the Bahr el Arab and its tributaries; the Ngok Dinka are indicated just south of Abyei and south of the Bahr el Arab.[215]

161. In his witness statement in these proceedings, also cited elsewhere in this Dissenting Opinion, Professor Cunnison described the Homr migration as follows:

> "The indications are that the Humr have lived in this area since at least the early 1800s. Their semi-migratory life revolves around the movement of their cattle (I refer to the 1950s, but there is reason to believe that the pattern of life is of long standing). Attached is a map, taken from my book, which depicts the migratory patterns as I observed it and participated in it. During the wet season the Humr lived in settled camps to the north of the Babanusa, as indicated on the map. As the dry season came, they moved first briefly to the Muglad where the cattle grazed on the remains of the millet harvest. They then moved south through the extensive sandy Goz *to the area called the Bahr: this is the area around the Bahr al-Arab and the Regeba Zarga*. Here, water and good summer grazing are to be found. *They lived in scattered camps across this region during the summer months (January-May). For part of this time they shared the area with Dinka, whose permanent houses were dotted around; but shortly after the arrival of the Humr sections, most of the Dinka would decamp further south to their dry season areas*. During my time in Western Kordofan, there was a good relationship between Humr and Dinka. I knew the Dinka leader, Deng Majok, who was an impressive man."[216]

162. Regarding the ABC Experts' conclusions Professor Cunnison says:

> "The Goz overlaps the so-called 'Shared Rights Area' of the ABC Report. In describing that area in this way it seems to me the ABC was fundamentally mistaken. I did not observe this as an area of shared rights at all; nor was the 'dividing line' drawn by the ABC within that area in any way regarded as a boundary between Humr and Dinka. The Dinka were to the south, as I have said. Some Dinka sought employment in Muglad. It was not unknown for individual families to travel north and be, so to speak, 'adopted' into one or another of the omodiyas of the Humr. They might also take surplus cattle north to market. But they did not exercise regular grazing or similar rights in the so-called 'Shared Rights Area'. The real area of sharing was further south, in the Bahr. There the two groups co-existed for a fairly short season – but this was not a 'host-guest' relationship. At this season it was the Dinka who, apart from a few caretakers, left to go south as part of a transhumance pattern rather than one of nomadism. As I noted in my book (p. 19) 'much

[215] Cunnison, *supra* note 168, at figure facing p. 20, cited *infra,* note 216

[216] Witness Statement of Professor Ian Cunnison, 3 December 2008, para. 6. GoS Memorial, p. 190 (emphasis added).

of the Bahr has permanent Dinka settlements, although during most of the time that the Humr occupy it the Dinka are with their cattle south of the Bahr al-Arab'. *I never observed the Humr asking permission from Dinka to come to the Bahr, and they did not consider themselves as visitors there. The whole region was regarded by the Humr as their 'dar' or country.* On the map on p. 5 of my book (attached) I show the area I knew as 'Dar Humr': it covers the whole south-western corner of Kordofan and includes an area south of the Bahr al-Arab. The table on p. 22 shows that during 1954, the cattle of one section of the Mezaghna omodiya spent more time, and more continuous time, in the Bahr (142 days) than in any other of the four main areas of Dar Humr."[217]

163. The sketch map by Michael Tibbs shows the outline of the Dar Messeria, which extends below the Bahr el Arab about 25 miles south of Abyei.[218]

164. The evidence of Homr occupation, taken together, suggests a strong degree of continuity of Homr occupation of the area shown in the sketch maps of Cunnison and Tibbs and shown also in the Kordofan Tribal Distribution Map of 1927. *Figure A** at the end of this Part of this Dissenting Opinion reproduces the sketch maps of Cunnison (1954) and Tibbs (1999) and the relevant part of the Kordofan Tribal Distribution Map, in order to illustrate the continuity of Homr occupation, in the relevant area, which is apparent on the face of the record.

## 8. Procedural excess

165. Having shown that the two crucial stages in the Experts' thought process have no foundations, I shall turn now to the important question of the procedural framework within which the Experts' mandate was conferred on them and within which they were expected to operate.

166. It is readily apparent that the ABC, whilst a juridical entity, was by no stretch of the imagination a judicial or an arbitral body. It is out of the question to seek to endow its findings with qualities of *res judicata* or finality that it simply did not and could not possess. This is also accepted by the Award. However, the findings of the Commission are not without validity or finality. They are "final and binding" by virtue of Article 5 of the Abyei Appendix, which this Tribunal is mandated to apply under Article 3 of the Arbitration Agreement. Appendix 5 provides:

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[217] Witness Statement of Professor Ian Cunnison, 3 December 2008, para. 6. GoS Memorial, p. 190 (emphasis added).

[218] Michael and Anne Tibbs, *A Sudan Sunset,* at p. 50. GoS Memorial, fig. 12, p. 129.

* Secretariat note: Figure A is located in the rear pocket of this volume.

> "The ABC shall present its final report to the Presidency before the end of the pre-interim period. The report of the experts, *arrived at as prescribed in the ABC rules of procedure*, shall be final and binding on the parties."[219]

167. In other words, the finality and binding nature of the Report is not innate but emanates solely from the Parties decision to accept it which is conditioned.

168. The language of the mandate could not have been clearer. To be final and binding, the Report had to be arrived at as prescribed in the rules of procedure. These rules are therefore mandatory and non-compliance with them would, *per se* and without the need to show prejudice, constitute an excess of mandate. The clarity of the mandate is in inverse relationship to the margin of appreciation of the Commission including its Experts. The obligations of the Experts were not simply to discharge their mandate but to do so in a specific manner, i.e., in accordance with the rules of procedure. This was the condition for the acceptance of the report in advance as final and binding. The Experts, acting in lieu of the Commission, violated these rules of procedure on four counts.

a. By holding meetings at the Khartoum Hilton on 21 April, 6 May and 8 May with Ngok Dinka individuals, they obviously went beyond the procedural framework under which they were mandated to follow a particular schedule.

b. By "sneaking in" their Report before a meeting of the Commission as a whole had a chance to assemble with the aim of arriving at a consensus. This was a safety valve reflecting the fact that the Presidency of Sudan had not given a *carte blanche* to the Experts to make decisions affecting the potential disposition of the territory of Sudan as they wished. The suggestion that the Presidency may not have received the Report had it known in advance its contents, apart from being speculative, does not take cognizance of the fact that the ends do not justify the means and that the Experts' mandate could not go beyond the limits of the Parties' consent which clearly circumscribed their mandate by a clear procedural framework. This procedural framework was aptly summarized by Ms Malintoppi appearing for the GoS, and it is worth reproducing this in full:

> "It is evident from reading the Rules of Procedure that the experts adopted a chronological approach to the tasks that were to be undertaken, starting with a reference in Rule 2 to the Commission's opening meeting on 10th April 2005, and ending with Rule 16, where the experts would, at the end, appoint technical personnel to survey and demarcate the boundary on the land.
>
> In addressing the requirement that the Commission endeavour to reach a decision by consensus, the SPLM/A basically stops at Rules 12 and 13. Rule 12, it will be remembered, states that the Commission will reconvene in Nairobi at a date in May to be determined, and that the parties will make their final presentations at that time.

[219] Emphasis added.

> At the time of the parties' final presentations the proceedings were essentially at the advocacy stage. Each party was setting out or explaining its position.
>
> Then Rule 13 provided that afterwards the experts will examine and evaluate all the material they have gathered and prepare the final report.
>
> However, that was not the end of the process, for Rule 14 then stipulated that the Commission – and again I emphasise the Commission as a whole – would endeavour to reach a decision by consensus. This necessarily meant that the Commission would discuss the report prepared by the experts, and after the parties' final submissions it would endeavour to reach a decision by consensus. It was only if an agreed position at the time was not achieved that the experts would have the final say.
>
> This step, the effort to reach a consensus on the report prepared by the experts, is the missing link in the actual chain of events. The parties never saw the report before it was presented to the presidency. They were given no chance, as part of the Commission, to attempt to reach a consensus on it.
>
> [ . . . ] [T]his was disregard for a fundamental and essential part of the process that was envisaged. And yet, what is the evidence offered by the SPLM/A that there had indeed been efforts at reaching consensus? Nothing other than witness statements which have been refuted by the Government's own witnesses."[220]

c. The Experts committed an excess of mandate also by consulting a U.S. diplomat about the interpretation of their mandate. The argument that this should be excused because no objection was raised to their consulting Cunnison or Tibbs is unconvincing. The consultation of British Archives and other relevant sources on Sudan, namely, the views of individuals informed about the historical facts, was expressly included in the procedural framework under Article 3.4 of the Terms of Reference of the ABC. But to try to verify an interpretation of their mandate from a third party is outside the procedural rules. If the Experts were not sure about the meaning of their mandate, they should have sought clarification from the Parties but should not have sought to rewrite the agreement of the Parties by resort to a third party.

169. It is clear from the above analysis that the obligation on the ABC Experts was an obligation of means. They had, to fulfil their mandate, to follow a certain procedural course. Moreover, compliance with that condition was part and parcel of their mandate and not, as wrongly asserted in the Award, part of their conduct. This is clear from reading together Article 3 of the Arbitration Agreement and Article 5 of the Abyei Appendix.

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[220] Transcript, 20 April 2009, 38/1–25, 39/1–19 (Malintoppi).

## 9. The substantive mandate

170. The Award distinguishes first between the substantive mandate of the Experts and their procedural mandate,[221] a well established distinction in law and a readily discernible one. However it seeks to make a distinction between the Experts' interpretation of their mandate and their implementation of it.[222] This distinction, though often made in legal parlance (perhaps too often made), is in fact almost always impossible to maintain. One example would suffice to illustrate the point. The Experts' decision to rely on "land uses" and "ecological evidence" flows directly from the choice of a "predominantly tribal" interpretation and is therefore a matter of implementation of the mandate rather than of its interpretation. If a "predominantly territorial"[223] interpretation had been chosen instead by the Experts, there would in all likelihood be no place for reasoning based on "land use" or "ecological evidence". That might well be so, but, there is always an element of interpretation of the mandate, even as the implementation of it progresses. In other words, interpretation and implementation are present throughout the Report and they cannot be divided into distinct mental stages. It is preferable to think of the carrying out by the Experts of their mandate, from their choice of "interpretation" to the ultimate delimitation, as a continuous thought process. It would follow that there cannot be two standards, one, of correctness, in the first stage, and another, reasonableness applying in the second.

171. Having made this preliminary remark, I shall turn now to the substantive mandate itself. The Award has made a number of assumptions without basis or supporting evidence; it has chosen standards which, be they from commercial, investor-state or even from inter-State arbitration, are mostly subject to pre-existing treaty or institutional frameworks and are wholly unsuited to the present arbitration. The Award has reduced the scope of review to one ground, lack of reasoning, and even then it has reduced the standard of "reasoning" to formalisms which it has applied inconsistently. Further the Tribunal has tried to shield the Experts' Report from criticism by ascribing to them, as "preferred arbiters of fact", a status wholly inappropriate in the present context. It has made a rigid distinction, with regard to our own mandate, between Sub-articles 2 (*a*) and 2 (*c*) of the Arbitration Agreement, and has tried unconvincingly to substantiate this distinction by a wishful interpretation of the Commission's composition and the expectations of the Parties from this Tribunal. In the event it has contradicted itself by not following this distinction but embarking instead on an uncharted route of "partial nullity" not provided for in the mandate.

172. I shall analyse these assertions in more detail.

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[221] Award, para. 440.

[222] Award, para. 515.

[223] Award, para. 545.

### *a. The proposition that the ABC's singular characteristics included, but went beyond, fact-finding*

173. The mandate of the ABC and its Experts is determined initially by its nature but ultimately by the will of the Parties as expressed in the mandate and as may be distilled from the object and purpose of the mandate and its negotiating history.

174. Regarding the nature of the ABC, it is undoubtedly a fact-finding commission charged in this instance with ascertaining and clarifying an historical event on the basis of scientific research, including archival research. Its Chairman and Members stressed its fact-finding nature on numerous occasions, some in fact cited in the Award.[224] The proposition that in addition to its fact-finding nature it had also an adjudicatory aspect[225] is totally baseless. A presumption entailing that, by implication, the Presidency of Sudan wished to give adjudicatory or prescriptive powers having an *ex nunc* constitutive effect to the Commission is not one to be lightly made. It is clear that the Report's final and binding nature does not *per se* bestow a prescriptive power on the Commission's decisions. Professor Hafner rightly pointed out that provisions both in the 1907 Hague Convention (Article 35) and the PCA Optional Rules on Fact-Finding Commission's of Enquiry (Article 24 (2)) allow for the possibility that the decisions of fact-finding bodies can be made binding.[226] Moreover in the case of the *Treaty of Lausanne* Advisory Opinion,[227] referred to by the Tribunal, the circumstances were totally different: a decision by the Council of the League of Nations to draw the boundary between Turkey and Iraq under an existing treaty is a world apart from asking social scientists to find out, on the basis of scientific study and resort to archives, an historical fact.

175. It is equally clear that the Experts could have returned a factual *non liquet* which would in fact have been the only proper thing to do had they come to the conclusion that the confusion was such that they could not carry out their task. To claim that the exigencies of the peace process dictated that the Experts could not return a *non liquet* is no more than an excuse that the ends justify the means, an excuse which is misplaced in the context of the delimitation of what could potentially become an international boundary.[228] Finally even the reference to the Iraq-Kuwait Boundary Demarcation Commission[229] does not help, indeed it contradicts the Award's conclusions since the *rationale* for characterizing that body as "quasi-arbitral" was that it was conscious of and took

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[224] Award, para. 663.

[225] Award, para. 483.

[226] Award, para. 484.

[227] *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne,* Advisory Opinion of 21 November 1925, PCIJ Rep. Series B, No. 12 (1925), cited in Award, para. 481.

[228] Award, *para. 428.*

[229] Award, para. 461.

into consideration a variety of rules of international law in its decision-making process.[230] Moreover it included distinguished international lawyers.[231]

### *b. The proposition that the Experts are the preferred arbiters of fact*

176. In commercial arbitrations, particularly those of a scientific or technical nature, the deference given to specialists and experts is driven by two important and, in those contexts, understandable considerations. The first is that litigations cannot be left to linger too long and secondly that a body of lawyers cannot hope to possess within a relatively short time-span the experience of experts and their deep knowledge nor to match their familiarity with the subject-matter (the facts). The second of these considerations carries deep epistemological and moral implications which the reader will be relieved to know I am constrained by the extremely short time available from analysing. There is, to be sure, a more general consideration which is not confined to those two spheres but extends to interstate arbitrations, namely, that a degree of discretion and an assumption of good faith should be left to the body making the decision.[232]

177. But, for our immediate purposes, is the test appropriate for a group of experts who can by no stretch of the imagination be thought of as the repositories of some highly specialised branch of knowledge or the votaries of some esoteric science that the juristic mind (limited as I readily acknowledge) cannot penetrate and analyse? Surely the answer must be in the negative. The ABC Experts were two historians,[233] a political scientist,[234]

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[230] K.H. Kaikobad, *Interpretation and Revision of International Boundary Decisions* (2007), p. 7, fn. 6.

[231] These included two Members of the UN International Law Commission, namely Ambassador Riyadh Al Qaisi of Iraq and Minister Ahmed Mukhtar Kusuma-Atmaja of Indonesia.

[232] In the *Case concerning the Arbitral Award of the King of Spain on 23 December 1906 (Honduras* v *Nicaragua), Judgment of 18 November 1960: I.C.J. Reports 1960,* p. 192, the International Court of Justice was categorical in saying "The instances of 'essential error' that Nicaragua has brought to the notice of the Court amount to no more than evaluation of documents and of other evidence submitted to the arbitrator. The appraisal of the probative value of documents and evidence appertained to the discretionary power of the arbitrator is not open to question". In the present case there was not an evaluation of documents or maps, thus the post-1907 official maps are simply declared "inaccurate" or a line is drawn at 10°10'N without evidence. The point is that for excess of mandate and not appeal purposes the discretion of the Experts or arbitrators to evaluate facts cannot be limitless. There has to be some factual evidence to evaluate. As noted above, in the *Orinoco Steamship Company* case, *supra* note 69, the requirements of good faith and procedural propriety were also relevant to the degree of deference to be accorded to the original decision-maker.

[233] Dr. Douglas Johnson, professor of History at Oxford University, and Professor Godfrey Muriuki, professor of African History at the University of Nairobi. See Award, para. 467 and fn. 862.

[234] Professor Kassahun Bernahu, Professor of Political Science, Addis Ababa University. See Award, para. 467 and fn. 862.

a former diplomat[235] and a professor of African land law.[236] Hardly a year passes in which the International Court of Justice, to give only one example, does not resolve territorial and delimitational disputes[237] on the basis of history and geography, including not only the diplomatic history of States but also of local communities be they the sea people of the Malay world or the tribes of Western Sahara, and this in itself should have caused the majority to think before introducing this extra shield to protect further the Experts' Report from criticism.

178. Moreover, considering that the only ground for excess of mandate left by the Award is lack of reasoning, and that this reasoning itself had been reduced into mere formalisms, and considering that the reasoning of the Experts did not consist of pure reasoning but in misinterpretation of evidence and then misquotation (or quotation out of context) of sources, the degree to which the scope of review had been reduced becomes apparent. I do not find it conceivable that this is what the Parties expected when they framed this Arbitration Agreement in terms of excess of mandate. On the contrary, the legitimate expectations of the Parties in subjecting the Experts' Report to a level of scrutiny appropriate to the final determination of what could potentially become an international boundary have been completely frustrated.

179. When one of the Experts admitted to having advised the SPLM/A on north-south borders[238] and when that same Expert suggested in an interview

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[235] Mr. Donald Petterson, former US Ambassador to Sudan from 1992 to 1995. See Award, para. 467 and fn 862.

[236] Professor Shadrack Gutto, widely-published scholar of "subjects of regional and international, legal and political economy", and (since 2008) Professor of African Renaissance Studies, University of South Africa. See Award, para. 467 and fn. 862.

[237] See, for example, cases that culminated in the last decade: *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)* (2009); *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (2008); *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* (2007); *Frontier Dispute (Benin/Niger)* (2005); *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)(El Salvador* v. *Honduras)* (2003); *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (2002); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)* (2002); *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)* (2001); Kasikili/Sedudu Island (Botswana/Namibia) (1999); *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections (Nigeria* v. *Cameroon)* (1999).

[238] Transcript, 18 April 2009, 98/2–18 (Malintoppi).

that giving oil to the south was a consideration in the delimitation[239] should not this Tribunal, which repeats the mantra of context and contextual analysis at every conceivable occasion take those accusations into account, if only as context, before deferring to the Experts as the best arbiters of fact? There is no reason for transposing the presumption favouring experts as arbiters of fact into the totally different context of this arbitration, where procedural propriety and good faith are in question; where there is no pre-existing institutional framework; and where the Parties have expressly authorized the *de novo* review of all the evidence under Sub-article 2 (*c*) of the Arbitration Agreement. I would argue that the very facts of this case, its unusual character and the composition of the Commission and the area of expertise of these Experts not to speak of the close involvement of one of the Experts in local affairs, should all have demanded a more, not less, rigorous standard of review.

180. Lastly I would have understood the introduction of the concept that the Experts are entitled to deference as the "best arbiters of fact" if this had been part of a uniform and uniformly applicable standard, but as I have said it simply is not applicable here and is best seen as no more than a rebuttable presumption.

### *c. The standard of interpretation (reasonableness versus correctness)*

181. The Tribunal, having generously endowed the Experts with adjudicatory powers that the Parties never gave them and having narrowed the scope of its own power of review to very little by excluding appreciation of facts, also choose a low standard of review, euphemistically called a "permissive standard of review" including a "test of reasonableness", rather than a test of correctness, to assess the Experts' interpretation of their substantive mandate. Even

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[239] Full quotation from Douglas Johnson interview to Sudan Tribune of 29 May 2006:

"The other aspect is that the Abyei area is contained within one of the oil blocks, and there has been quite a lot of exploration and drilling of oil wells in the area. Now, we were not shown a map of where these oil wells were. We were told our mandate was to define the area in 1905 – of course there were no oil wells in 1905. There was no mechanised farming; there was no railway; there were no towns. If we had taken into consideration these developments since 1905, we would have been violating our mandate.

But there is a lot of oil there – the Abyei Protocol stipulates that the oil revenues that come from the sale of oil in the Abyei area be divided between the Misseriya and the Ngok Dinka, the government and the SPLM. If the boundary is defined one way, it puts quite a lot of oil in the Abyei area, and therefore more of that oil revenue has to be shared. If we had accepted the government's claim that the boundary was the river, there would have been no oil revenue to share.

The other thing is that if the boundary defines a certain area and that area contains oil and active oil wells, [and] if the people of Abyei vote in a referendum to join the south and the south votes to become independent, then that oil becomes southern oil and is not northern oil."

if a test of correctness would render this Tribunal too much akin to a "court of appeals", which neither Party expects, there remains an important issue concerning our reasoning. Surely it is our duty, for the sake of a balanced Award and in the interests of the due administration of justice, not to remain silent when distinguishing between excess on the one hand and mistakes on the other, After all, the party to whose detriment a mistake not amounting to excess is allowed to stand has, if not a right, a legitimate expectation to know why that is the case. As stated by Lord Justice Bingham, "at the end of the day the party should be left in no doubt as to the basis on which the award has been given against him".[240] This has been the practice in other instances of institutional review.[241]

182. The proposition can be safely advanced that people can and do understand texts in different ways, but it is also said that the truth cannot have two faces. Moreover reasonableness is never a ready-made yardstick against which the limits of the Experts' (and others) powers to interpret can be objectively measured. Indeed it is often a false friend that gives the impression of an objective threshold where none exists. Be all of this as it may, what determines the limits of reasonableness in interpretation of the mandate or the limits of the Experts' *Kompetenz-Kompetenz* is ultimately their mandate itself.

183. The Experts were mandated after long and difficult negotiations regarding the very issue that became their mandate, namely, "to define, i.e.,

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[240] *JH Rayner (Mincing Lane) Ltd* v *Shaher Trading Co* [1982] 1 Lloyd's Rep, 632 at 637.

[241] In the context of ICSID proceedings see: *Patrick Mitchell* v. *Democratic Republic of the Congo,* ICSID Case No. ARB/99/7, Decision on Application for Annulment of Award, 1 November 2006, at para. 45; *CMS Gas Transmission Co.* v. *Argentina,* ICSID Case No. ARB/01/8, Decision on Application for Annulment, 25 September 2007, paras. 123–127,132–136, 146–150, 158.

*See, also*, national jurisprudence on review of arbitral reasoning in the following countries: England (serious irregularity under Article 68(2)(d) of the Arbitration Act: *Weldon Plant Ltd* v *Commission for the New Towns* [2001] 1 All ER 264 (Comm) at 279; *Margulead Ltd* v *Exide Technologies* [2004] EWHC 1019 (Comm) at [42]; *World Trade Corp Ltd* v C *Czarnikow Sugar Ltd* [2004] EWHC 2332 at [20]); France (no annulment for contradictory or unclear reasoning: *Inter Arab Investment Guarantee Corp.* v *Banque Arabe et Internationale d'Investissement* (Cour de Cassation, 14 June 2000, Cass Civ 1re D 2000 IR 95) and *Pawelec* v *SA Pernod Ricard and SA PR Europe* (Paris Cour d'Appel, 2 October 2000, 1reChC)); Switzerland (on the limits of review under the public policy provision in Article 190(2)(e) of the Swiss Private International Law: Decision of the Swiss Federal Tribunal, 10 November 2005, 4P.98/2005/svc); and the USA (on standard of review for 'manifest disregard of the law': *Westerbeke Corp.* v *Daihatsu Motor Co Ltd,* 304 F. 3d 200, 209 (2d Cir. 2002), and *Interdigital Communications Corp* v *Nokia Corp* 407 F.Supp.2d 522 (SDNY 2005)). See, especially, A. Mourre, *Réflexions critiques sur la suppression du contrôle de la motivation des sentences arbitrales en droit française,* (2001) 19(4) ASA Bulletin 652 (criticizing the decision of the French Supreme Court that "the claim of contradiction in reasoning constitutes necessarily a criticism of the award on the merits which is not subject to judicial review", C. Paris, 17 février 2000, Gaz. Pal. 1er – 2 déc. 2000, p. 55).

delimit and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan". The formula spoke of an area and of nine Ngok Chiefdoms with whom this area has a special connection. It spoke also of a transfer to Kordofan in 1905, and we know also that the transfer was effected by Condominium officials for administrative purposes.[242] The remaining question is whether the transfer to Kordofan was by way of a population transfer, as apparently happened to the Twic Dinka or a territorial transfer of an area to Kordofan from what, by necessity, must have been Bahr El Ghazal, which would normally take place by extending the boundary of Kordofan to include the area of the nine Chiefdoms.

184. Here I would pause to recall that the word "chiefdom" itself can be a territorial concept.[243] After all, the whole claim of the SPLM/A to dominant rights is that the land belongs to the permanent settlers. The word "chiefdom" meant for the south Sudanese people what the word "sheikhdom" or "sultanate" meant to the muslims of the north (or the word "emirate", i.e., princedom). It is not without significance that by 1905, Arop Biong had taken the title "sultan" (Sultan Rob) and the area under his authority was chiefdoms as befits a paramount chief, i.e., territorial units. In other words had the formula spoken of the area of the nine Ngok Dinka "tribes" or "clans" or "sub-tribes" one can begin to understand – but only barely – that a tribal interpretation might be possible, although ultimately this would not make any difference. But the word "chiefdom" is as territorial a concept as the word "area". At any rate, in the absence of a population transfer, which both Parties agree did not take place, the formula can only be understood in a predominantly territorial context, not only because the Condominium itself was a territorial entity and the words "delimit" and "demarcate" connote a territorial entity, but also because, by logical elimination, no other interpretation is possible.

185. In any event, what prompted the Experts to depart from the only correct interpretation of the text is not the territorial versus the tribal interpretation. It was their "conclusion" that: "In 1905 there was no clearly demarcated boundary of the area transferred from Bahr El Ghazal to Kordofan".[244] To achieve their mandate they had to clarify the confusion and, if that was impossible, to return a factual *non liquet*. But in fact the confusion they talked of was literally no more than a storm in a teacup: Wilkinson and Percival mistook the Ragaba ez Zarga/Ngol, also referred to as the Bahr el Homr, for

[242] We can also safely assume that preparing the Ngok Dinka for self-determination was not a consideration in the minds of Condominium officials when the decision to transfer was made.

[243] Defined by the Oxford English Dictionary as "the estate, position or dominion of a chief; headship, leadership, chief place".

[244] ABC Experts' Report, Part 1, p. 20. In other words the Experts themselves acknowledge in very clear terms that the 1905 transfer was territorial, i.e., "of the area transferred from Bahr El Ghazal to Kordofan", but the area in question was not clearly demarcated.

the Bahr el Arab/Kir. It was only a short-lived confusion as to nomenclature and not an existential question. Moreover, the Bahr el Arab/Kir was known by general repute to be the dividing line between Kordofan and Darfur in the north and Bahr el Ghazal to the south. There was never any confusion as to the River Kir, hence the reference to "Sultan Rob, whose country is on the Kir river".[245] All the descriptions of Bahr el Ghazal before 1905 speak of its northern boundaries as the Bahr el Arab and it was only after 1905 that the boundary line between Bahr el Ghazal and Kordofan started to be shown running in a curved triangle that ultimately became the 1956 so-called *uti possidetis* line, and we know that there was no other recorded historical event to account for drawing the line south of the river. A simple exercise of logic will lead to the conclusion that the area included in Kordofan which had not been hitherto part of it is the transferred area. Neither by the standard of correctness nor even by the most elastic notions of reasonableness could this change in provincial boundary have been overlooked by the Experts. In any event, the confusion regarding the name of the river which never affected the Dinka name for it, Kiir, was corrected by Bayldon and Walsh and the result of their work was and must have been seen by Wingate, the Governor General of the Sudan, when in his memorandum he wrote "[t]he districts of Sultans Rob and Okwai, to the South of the Bahr el Arab and formerly a portion of the Bahr el Ghazal Province, have been incorporated into Kordofan."[246] It should be noted that the results of Bayldon's exploration were included in the same Report in which the transfer is recorded.[247]

186. One of the measurements of reasonableness is whether a person or a group of persons would in similar situations draw opposite conclusions. One has only to compare the allegation of confusion, which it was the Experts' task to clarify but which instead caused them to abandon their mandate and go on a frolic of their own,[248] with their behaviour regarding the 10°10'N. Thus with regard to the Bahr el Arab the Experts concluded: "In 1905 there was no clearly demarcated boundary of the area transferred from Bahr el Ghazal to Kordofan."[249] With regard to 10°10'N they admitted: "There is, as yet, no *clear independent* evidence establishing the northern-most boundary of the area either settled or seasonally used by the Ngok."[250] This did not preclude them

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[245] Sudan Intelligence Report No. 128 (March 1905), p. 3. GoS Memorial Annex 9, SPLM/A FE 2/8.

[246] Major General Sir Reginald Wingate, in *Reports on the Finances, Administration and Condition of the Sudan, Annual Report* (1905), Part II, Memorandum by Governor General, at p. 24. GoS Memorial, Administration and Condition of the Sudan. GoS Memorial, Annex 24, SPLM/E FE 2/13.

[247] *Ibid,* pp. 10–11.

[248] *Supra* note 1.

[249] *Supra* note 244.

[250] *Supra* note 57 (emphasis added).

from proceeding to delimit a northern front measuring some 240 kilometres at latitude 10°10'N.

187. Reverting to the test of reasonableness with regard to the interpretation by the Experts of their mandate, I should add that the question of defining the Abyei boundaries was a major stumbling block in the peace process. Lack of time precludes a full treatment of the background history but I believe I can encompass all the elements of the dispute when I say that it centred on two arguments.

a. The SPLM/A wanted Abyei, among other areas, to be entitled to participate in the exercise of self-determination which could lead to the secession of the southern provinces of the Sudan. Their argument was that notwithstanding the location of those areas north of the 1956 provincial line as at independence, which was agreed to be the spatial limit to where the right of self-determination was to be exercised, the Abyei area, being of "a southern complexion" was nevertheless entitled to be considered as an exception to that limit.

b. The Government was strongly opposed to this view, arguing that Abyei was the land not only of the Ngok Dinka but also of the Misseriya and others.

188. This deadlock was broken by the Danforth proposal, based as it was on the notion of a "restoration" of a territory to the south as it had been part of the south before 1905. The Government accepted this compromise formula on the understanding that it was defined by reference to a transfer that had taken place in 1905. The SPLM/A may or may not have accepted the same interpretation. The record is not entirely clear. Be this as it may, if the Parties had such opposite interpretations of the formula which was the Experts' mandate, the honest thing, the proper thing for the Experts to have done was to seek clarification or to return a *non liquet,* but not to seek to re-write the agreement of the Parties, much less to embody that re-writing in a secret report, in violation of procedural safeguards.

189. This is why I think the Experts were in excess of their mandate from the very beginning. They fundamentally misunderstood or misconceived their mandate, which is undoubtedly a ground for excess of mandate; they did not comply with mandatory rules of procedure; and their reasoning, leading up to their remarkable finding that 10°10'N was the northern boundary where the Ngok had had dominant rights since 1905, is totally baseless in law, unsupported by evidence, untrue and unreasoned. Moreover what both Parties somewhat confusingly refer to as the application of the mandate and what I think of as both interpretation and application was fundamentally flawed at every crucial step. Thus the concoction of a theory of dominant Ngok rights versus secondary Misseriya rights is not only odious (if only on this basis the Report should be considered worthless) but based on misquotations and inapplicable to Kordofan. A shared grazing area exists in Kordofan, and indeed such areas exist in many countries where nomadism or transhumance is

practised. However, no area of "dominant and secondary rights" existed in south-western Kordofan in 1905, and yet this is the foundation on which the Report is based.

190. The second application or interpretation of the Experts' mandate is the assumption of Ngok continuity, by projection backwards in time from the 1950s to a single year, 1905, and the assemblage of disparate evidence in its support must represent the nadir of reasoning even by the standards of some social scientists.

191. I have no doubt that the only answer to the specific question put to the Experts was that it was the area to the south of the Bahr el Arab/Kiir and bordered in the south by the 1956 provincial line. But I would like immediately to qualify this conclusion by two observations:

a. In 1905 the Ngok Dinka were not just to the south of the Bahr el Arab. They were on the river and north of it, their greatest concentration was in the area between the Bahr el Arab and the Ragaba Um Biero and they were not very far to the west, and were not at 27°50' E in the west where Howell correctly placed them *in 1951*. There is evidence that they were slowly expanding to the north, west and east and that they reached some points on the Ragaba ez Zarga by 1965. In this area and indeed south of the river they co-existed with the Homr for a season every year.

b. There is evidence that in the 18th century the Ngok, newly arrived from the east, settled in the Bahr area and when some Ngok Dinka witnesses, including government witnesses, spoke about their particular sub-sections being on the Ragaba ez Zarga they were right. That was in the 18th and probably the early 19th centuries. However the arrival of the Baggara including the Misseriya pushed the Ngok below the river Bahr el Arab/Kiir, and even there they were not safe from Homr depredations, as evident from the reasons cited by the Condominium officials to transfer their Chiefdoms (*their area*) to Kordofan in 1905.

## 10. Conclusions

192. From the beginning the Tribunal faced a dilemma. Its reasoning was deployed with the avid aim of shielding the ABC Experts' Report from criticism and annulment. Thus, the Tribunal was too generous, at the expense of Sudan, in ascribing to the Experts prescriptive powers that went beyond a strictly fact-finding mission. Such a presumption, totally unsupported, should not have been made too lightly, given that the Sudan never gave the Experts a *carte blanche* to dispose of its territories as they pleased. The Tribunal then went on to endow the Experts with a power of discretion to interpret their mandate that they did not have, all allowance being made for *Kompetenz-Kompetenz*. This so-called reasonableness standard could not have been the expectation of the two Parties when they conferred on the Tribunal its mandate. We

should not assume that the SPLM/A expected that the delimitation of Abyei, which could become an international boundary, would be located not based on a correct interpretation but only on a reasonable one.

193. The Experts knew how vital to breaking the deadlock over Abyei was the territorial interpretation by the Government of their mandate. If they were not sure what their mandate was they should have gone back to the Parties or rendered a factual *non liquet*. To say that they had to proceed on a different interpretation because they were expected to delimit the area as part of the peace process is totally unconvincing. By proceeding as they did, they in fact derailed that peace process and caused a conflict in which Abyei itself was destroyed.

194. Moreover, the Tribunal started by defining its mandate in a rigid manner, then clouded that self-imposed distinction, which could not, in logic, admit of an intermediate solution, by partially invalidating the Experts' decision. It contradicted itself by doing so with regard to the very distinction between Sub-articles 2 (*a*) and 2 (*c*) of its mandate. Equally importantly, by proceeding to a partial annulment without express or implied sanction from its own mandate, the Tribunal committed an excess of mandate. An assertion that highly skilled jurists have committed an excess of mandate, the very accusation they were mandated to investigate and to redress if found to be true, is not an assertion to be made lightly and it is not being made lightly but this is the truth of the matter and it is an inescapable conclusion that neither the Tribunal's reasoning nor its skill and status can hide. The Tribunal, still deploying its intellectual resources to shield the Experts' Report, bestowed upon the Experts the status of "preferred arbiters of fact", a status contextually wholly inappropriate given the area of their expertise and the accusations of procedural improprieties which are not disputed on the facts. These devices and other techniques reveal a low standard of review which excluded fundamental error (a standard that the Tribunal could and indeed should have applied even *proprio motu* if only to account for the fantastic difference between contemporaneous evidence and the results achieved by the Experts). In short all these assumptions devices and techniques should have seen the Experts' Report safely to shore i.e., intact but of course as removed from reality as it is possible to be.

195. However, and this is where a simple mistake metamorphosed into a dilemma, the Tribunal decided to dabble in compromise, always a hazardous and ill-advised venture for tribunals, but especially so in the present case. This compromise took cartographic shape by the impugning, i.e., invalidating, of the eastern and western lines of the Abyei area as delimited by the Experts for lack of reasoning, and this is where the Tribunal committed its second excess of mandate. It redrew the eastern and western boundaries at 29°E and 27°50' E respectively with no "reasoning" or no "adequate reasoning", the very standards it used to invalidate the Experts' eastern and western boundaries, except that its own excess of mandate was more inexcusable than that of the Experts. For it had the benefit of hindsight, of learned and extensive legal arguments, and of being

composed of prominent jurists. Considerable efforts were devoted to support the new lines but any close reading of the evidence will reveal it to be disparate in sources and desperate in tone. Thus dead men are made to say things they never said and the living are misquoted. Unreliable witness evidence is harnessed to support delimitation lines that the witnesses never knew existed. The meticulousness and diligence required to effect delimitation is thrown to the wind. *Approximate*, *imaginary* lines are superimposed on *rough areas*. Any reference to Dar Jange, or to Dinka, no matter how general, is picked and moulded to support these new lines. But there are a few problems. The River and Ragabas simply do not flow due north where they are supposed to by the Tribunal, but rather in a northwesterly direction; too many contemporaneous witnesses are not "helpful" to the Tribunal; and there is total blindness to evidence that the Ngok were not where the Tribunal wishes them to have been but in a much smaller area to the south and the east around the Bahr el Arab. There is even more blindness to overwhelming evidence that these were areas where the Homr were collectively present; where they felt and acted on the knowledge that it was their own country; where they sought no permission to enter from Ngok or anyone else; and where they had permanent settlements, such as at Fauwel, and places to which their surras felt attached and returned annually.

196. Here, what started as a dilemma, namely, how to shield the Experts whilst effecting a compromise that would impugn all their lines, at the same time becomes a fully-fledged trilemma: how to shield the Experts, impugn all their lines, and, acting in its own delimitation, how to draw these lines not only with no evidence, but in spite of contrary evidence as to where the Ngok and the Homr actually were. And this is why I felt that it would be useful, if only in defence of realism and credulity, to review all the evidence I could find on where the Ngok and Homr were located circa 1905. The picture that emerges and which is reflected in the Map appended to this Dissenting Opinion* is totally different from both the Experts' and the Tribunal's lines.

197. In doing this I am assuming, for the sake of exploring all the logical possibilities, that the transfer of 1905 to Kordofan is a tribal one. For me this is only one assumption; for my learned colleagues they consider themselves obliged,[251] by their earlier finding that a predominantly tribal transfer was a

[251] Award, para. 710: "Having upheld the reasonableness of the ABC Experts' predominantly tribal interpretation of the Formula, this Tribunal considers itself obliged to proceed with the delimitation phase of the mandate without departing from the same predominantly tribal approach. This conclusion applies *a fortiori* given the Tribunal's determination that the northern limit of the area of permanent habitation of the nine Ngok Chiefdoms transferred in 1905 (i.e., the ABC Experts' findings and delimitation at latitude 10°10'N) was reasoned and within the ABC Experts' mandate. As discussed above, the retained northern boundary of the Abyei Area was drawn by the ABC Experts on the basis of a predominantly tribal interpretation as opposed to a predominantly territorial interpretation."

* Secretariat note: the map contained in the Appendix to the Dissenting Opinion is located in the rear pocket of this volume.

reasonable interpretation of the "formula", to adopt the same interpretation for the Tribunal's own delimitation. But no reason is given for this conclusion. Under Sub-article (*c*) of the Arbitration Agreement, the mandate of this Tribunal requires it, in the event of a finding of excess of mandate, "to proceed to define (*i.e.*, delimit) on map the boundaries of the area . . . based on the submissions of the Parties", not to adopt and recycle those parts of the Experts' Report that it considers "reasonable". The moment the majority had freed themselves from their self-imposed shackles, they could follow any delimitation i.e., what was more accurate on the basis of the submissions of the Parties and not what was just reasonable.

198. The Tribunal also failed in enquiring into the two key concepts of the Experts' thought process: the assumption of "dominant" (Ngok) rights versus "secondary" (Misseriya) rights. Presumably the reason for this reticence was that the Tribunal would classify such a concept as part of the assessment of facts left to the Experts as "preferred arbiters of fact". But this is not the case, this concept is a crucial step in the Experts' reasoning that was neither reasoned nor supported as to its existence and applicability to Kordofan. The second crucial concept in the reasoning of the Experts, which the Tribunal failed to review, is the assumption of Ngok continuity of occupation which is more than an appreciation of facts. It is a wholesale abandonment of the temporal limitation on the Experts' mandate by turning it on its own head, and it should have been reviewed by the Tribunal, such review on the basis of lack of reasoning being within our mandate. Here the Tribunal may have been acting *infra petita* with regard to not answering questions about two crucial steps in the Tribunal's reasoning.

199. Moreover, having impugned so much, the Tribunal, by any standard of separability, should have set aside the remainder of the Report for, apart from the southern line drawn by Condominium officials, nothing was left. The Report was so thin and truncated that it could not stand on its own. The Tribunal contradicted itself in a fundamental way. It cornered itself by making a sharp distinction between Sub-articles 2 (*a*) and 2 (*c*) of its mandate and then clouded that distinction. The fact that inseparability was the obvious consequence not only of the wording of Sub-article 2 (*b*) but also of the distinction between Sub-articles 2 (*a*) and 2 (*c*) was overlooked by my learned colleagues. The dichotomous distinction between the Tribunal's "enquiry" under Sub-articles 2 (*a*) and 2 (*c*) cannot accommodate the power of partial annulment that it has assumed. Formalism and teleology are words that do not sit together well.

200. Lastly, the Tribunal used "lack of reasoning" to impugn parts of the Experts' reasoning, but did so inconsistently. Thus, with regard to the area north of 10°10'N, it used "lack of conclusive evidence", but it did not use the same lack of conclusive evidence south of 10°10'N and north of Ragaba ez Zarga, although there is no shred of evidence, let alone conclusive evidence, that the Ngok were there in 1905 or indeed at any time after that, not even in 1965,

the year of maximum Ngok Dinka expansion. The majority was inconsistent in demolishing the western and eastern lines for lack of reasoning or adequate reasoning and then replacing them with new lines, which it did on the basis of frivolous reasoning and hastily assembled evidence, without thinking twice about using evidence prepared after the dispute had arisen and tainted by accusations of intimidation. To use evidence tainted by accusations of duress that were not properly answered is not – to put it mildly – the zenith in maintaining evidentiary standards and no court should engage in such practice. To construct straight lines on the basis of *approximate* evidence and *rough areas* is an affront to the science of delimitation and no country should accept such a delimitation. The authors of the Award may congratulate themselves on their Herculean efforts, but the result is, not for lack of cleverness on their part, a feeble and modest construct with much to be modest about.

201. In the introduction to this Dissenting Opinion, I described the considerations that prompted me to explain comprehensively the reasons for my dissent. I believe that I have now substantiated my criticisms of the Award's conclusions and the reasoning deployed by the Majority to reach them. I need therefore say no more regarding the Award but leave it instead to the sand on which it has been built. I do however need to say a few words regarding another aspect of this unusual arbitration. I have already mentioned the likelihood that the Award may have a profound impact on the future of Sudan as a State and the peace and well being of all its citizens regardless of ethnicity or creed.

202. I am saddened that in this arbitration, which provided a perfect and rare chance for the Tribunal to contribute to the process of peace and reconciliation in Abyei and in the Sudan, that chance has been missed because of a wish to marry an ill-advised, misconceived compromise to a self-imposed restrictive interpretation of its mandate, the Tribunal neither maintained the integrity of its reasoning nor contributed to a durable peace. International law and indeed law in general sometimes provide only simple recipes for complex situations where populations and tribes intermingle and where the livelihood of certain groups transcends borders. In such cases, defensible compromises may sometimes bring more acceptable, more durable and indeed fairer solutions. After all Kipling, who knew a few things about the Sudan, and more about human nature, once wrote:

> "Man, a bear in most relations–
> worm and savage otherwise, -
> Man propounds negotiations,
> Man accepts the compromise."[252]

203. This Tribunal could have been a peace-maker had it realised the obvious fact that peace-making is more difficult than law-making and judgment drafting. To be successful a compromise does not have to be a non-principled solution. On the contrary its chances of success increase if it is perceived

[252] Rudyard Kipling, *The Female of the Species.*

by those the Award called the "stakeholders" as a fair and workable scheme. The stakeholders in this case are not only the Government and the SPLM/A, they are also the Ngok and the Misseriya. Today, we are more remote from achieving a durable peace than before the rendering of this Award, because of the very simple fact that the Award failed utterly to take the rights of the Misseriya into consideration and could have the effect of denying them access to the waters of the Bahr, except for a small piece of land on the border of Darfur (and nothing in the Award on traditional rights changes this fact). Therefore the question that will never go away is who, in the process of delimiting the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905. gave the Experts or this Tribunal the right to reduce the Misseriya to second class citizens in their own land and to create conditions which may deny them access to water. This would disrupt the very livelihood of the Misseriya that has depended for as long as they have been in Kordofan on access to the Abyei area. I can only hope that both Misseriya and Ngok Dinka will reach into their traditions and common history to find solutions better suited to their community of existence that should transcend all boundaries.

## Appendix. Map illustrating locations of Ngok Dinka and Homr Arab presence around 1905*

* The map contained in the Appendix to the Dissenting Opinion is located in the rear pocket of the present volume.

# PART III

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# PARTIE III

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