
Arbitrary Peace? Consent Management in International Arbitration

Bart L. Smit Duijzentkunst* and Sophia L.R. Dawkins**

Abstract

When a peace process involves contention over land boundaries, parties may consent to resolve their dispute through arbitration. Yet while tribunals resolve disputes on paper, their awards often fail to bring peace in practice. Initial consent to arbitration does not guarantee a successful outcome: once granted, consent can wax and wane, it can be delivered under duress and it can be withdrawn as fast as it is given. This article explores the consent management dynamics that shape – and are shaped by – the arbitral process. Drawing on scholarship from peacekeeping and relational contract theory, it develops a model that explains why consent to arbitration differs from consent to a peace process. It then applies the model to examine strategies that tribunals have used to bridge this gap. Case studies involving the Brčko District in Bosnia and Herzegovina, the Eritrea–Ethiopia Boundary Commission and the Abyei arbitration demonstrate how arbitrators manipulate procedural and substantive law to maintain consent. The three cases also offer insights into the varying success of consent management strategies. The article plots these cases onto the model to draw lessons for future arbitrations on the basis of one simple but crucial question: ‘Who should consent to what?’.

1 Introduction

In violent conflicts involving land boundary disputes, political and military tensions may run so high that the parties to the dispute are unable to resolve their differences themselves. Even when parties have concluded a cease-fire agreement to halt hostilities, the delimitation of a boundary can prove to be too sensitive and too technical

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to be settled through bilateral dispute settlement techniques, such as negotiation or mediation. In these cases, parties may seek the involvement of an outside actor to move the peace process forward. Increasingly, the instrument of choice is international arbitration. Yet while tribunals make awards that are final and binding, their decisions rarely end political disputes – in fact, they can feed conflict. It is this issue that concerns us. Why are some arbitrations legal success stories but political failures? And how can tribunals use law to bring peace in practice?

This article starts from the premise that a successful peace process depends on the consent of the parties. It is the same for arbitration: without the consent of parties, the proceedings are doomed. The challenge is that consent is dynamic; once granted, consent can wax and wane, it can be delivered under duress and it can be withdrawn as fast as it is given. Procedural and substantive aspects of arbitration affect who consents to what, when consent is given and whether consent is genuine. In short, consent is endogenous – it shapes and is shaped by the arbitral process. This article looks at what tribunals can do to successfully manage consent to produce peaceful outcomes, arguing that peace negotiators, arbitrators and those assisting with the implementation of awards should consider consent management as their top priority.

To achieve this conclusion, the article is divided into three parts. First, it presents a model to analyse the consent management dynamics at play in arbitration. The model draws on recent work fusing two bodies of scholarship on consent: peacekeeping doctrine and relational contract theory.¹ Peacekeeping evokes some of the thorniest legal and political challenges regarding third party involvement in conflict resolution. Groomed by practice, peacekeeping strategists and scholars have progressively developed advanced notions of consent. While no formal doctrine exists, the principles proposed present lessons about who should consent to dispute resolution for peace to succeed.² In turn, relational contract theory shows how the nature of consent shapes agreements' durability. The application of this theory to peace processes sheds light on what parties must consent to for peace to materialize. Together, the two dimensions of *who* should consent to *what* form a matrix, against which we can plot, compare and assess arbitrations that take place in the context of complex peace processes.

Second, this article applies the model to three case studies, which show how arbitral tribunals have manipulated legal process to manage consent – both successfully and unsuccessfully. All three cases involve boundary disputes resulting from complex secession conflicts. They include Brčko, an autonomous district in the Republic of Bosnia and Herzegovina; Eritrea–Ethiopia, a long-standing boundary dispute in the Horn of Africa and the Abyei Area, a contested pocket of land that remains central to

¹ Johnstone, 'Managing Consent in Contemporary Peacekeeping Operations', 18(2) *International Peacekeeping* (2011) 168.

² Report of the Panel on United Nations Peace Operations (Brahimi Report), UN Doc. A/55/305-S/2000/809, 21 August 2000; UN Department of Peacekeeping Operations and the UN Department of Field Support, *United Nations Peacekeeping Operations: Principles and Guidelines (Capstone Doctrine)*, 2008, available at pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf (last visited 4 October 2013). None of these documents have been formally adopted by the UN General Assembly, although following the Brahimi Report the UN Security Council adopted some peacekeeping principles in SC Res. 1327 (2000).

the dispute between the Sudan and South Sudan.³ In each case, the tribunal or boundary commission delivered a final and binding award.⁴ The procedures were heralded as success stories, and provisions were made for the implementation of the decisions. Yet only one of these cases supported a peaceful outcome, a second fed conflict and a third had no effect at all.

Third, the article plots these cases onto the model to reflect on how consent management dynamics affect the outcome of arbitrations. By comparing the strategies employed by the different tribunals, the article draws conclusions about the capacities and limits of arbitration to manage consent in a broader peace process. It urges tribunals to keep a close eye on conflict dynamics on the ground. It also suggests that arbitration may not always be the best way to resolve a political conflict. Indeed, parties may use arbitration to undermine a broader peace process.

2 Managing Consent

This section presents the model that guides our inquiry into how tribunals can manage consent to build peace. We commence by discussing why consent matters and examine two questions about consent that challenge tribunals: Who should consent and to what? The section then uses these two dimensions of consent to build a model, which can be used to assess how tribunals' activities shape political outcomes.

A *Why Consent Matters*

In many forms of legal dispute settlement, such as commercial arbitration, initial consent to be bound by a third party is all that is practically required – consent to being bound implies consent to continuing to be bound, and this can be enforced in a court of law. This is not true for arbitration in the context of a peace process. Here, initial consent by parties does not necessarily mean that they will maintain this consent throughout the arbitral process. When successful dispute resolution depends on the political will of the parties, tribunals often face obsolescing consent – changes in political realities and parties' perceptions of the arbitration continuously reshape the consent initially granted.⁵ Tribunals must be careful to ensure its continuation, both during the arbitration and in the implementation phase. Parties may walk away from arbitration, reject an award or simply fail to live up to their commitments, while a tribunal remains powerless to enforce a penalty. Arbitration contains certain features that may persuade parties to give initial consent to the process: parties can appoint their own arbitrators; they may

³ Prior to the independence of South Sudan on 9 July 2011, the parties to the conflict over Abyei were the former government of the Sudan (GoS) and the Sudan People's Liberation Movement/Army (SPLM/A), which led the government in the semi-autonomous region of Southern Sudan.

⁴ In the case of Eritrea–Ethiopia, the arbitral body was referred to as the Boundary Commission, see section 4 in this article. One of the bodies in the Abyei case was the Abyei Boundaries Commission (ABC), see section 5 in this article. If not otherwise indicated, this article applies the term 'tribunal' to all of these bodies.

⁵ Johnstone, *supra* note 1, at 174, 179; M. Doyle and N. Sambanis, *Making War and Building Peace* (2006), at 309; R. Vernon, *Sovereignty at Bay: The Multinational Spread of US Enterprises* (1971), at 46.

determine the time frame of the arbitration; they can draft distinct procedural rules for the tribunal⁶ and the arbitration can accommodate a range of actors, not merely states.⁷ Yet none of these decisions guarantees the continuation of the parties' political commitment, and such commitment cannot be enforced. Thus, consent to arbitration in a peace process requires not only initial commitment but also efforts to ensure continuation of that commitment throughout the arbitral proceedings and during the implementation of the award. These conditions raise the question of who should commit from the outset and to what for that commitment to continue. Both of these dimensions of consent matter because, collectively, they determine the validity of the arbitration and its practical effect on the ground. We shall address who should consent to what in turn.

B *Consent by Whom?*

In complex conflicts, especially where a boundary dispute flows from a secession bid, the question of who should consent becomes a delicate matter. One or both of the parties to arbitration may not (yet) constitute a state. Competing factions may claim governing authority. Local parties, particularly where they operate as proxies, can prove more influential than they first appear, with power to uphold or thwart the implementation of an award. Peacekeeping doctrine offers lessons about whose consent a tribunal must secure in these circumstances.

Peacekeeping shares with arbitration legal and operational demands associated with third party involvement. Like arbitration, the legal consent requirements for peacekeeping are narrowly defined.⁸ However, in conflict contexts, where it is unclear which parties control territory and people, the identification of the agents that can legitimately give consent becomes contentious. Legal considerations aside, which parties consent to a mission's presence has an acute impact on operational outcomes and the mission's ability to dispense its mandate in practice. Without the consent and commitment of key parties who control territory or the pulse of a political process, a peacekeeping operation may find itself held hostage.⁹ It is the same for arbitration – without the participation of the right parties, failure is guaranteed.

Initially, peacekeeping doctrine treated consent as something that only state parties could give, and could ignite or extinguish like a flame.¹⁰ For example, when Egypt

⁶ J.G. Merrills, *International Dispute Resolution* (2011), at 111–115.

⁷ E.g., the Brčko arbitration was conducted between two sub-state entities; Ethiopia and Eritrea were both sovereign states at the time of arbitration; while the Abyei arbitration was between the GoS and an opposition movement, the SPLM/A. The International Court of Justice (ICJ), in contrast, is only open to states. Statute of the International Court of Justice 1945, 1 UNTS 993, Art. 34.

⁸ Consent of the parties is the first of three basic principles of UN peacekeeping, the others being impartiality and non-use of force except in self-defence and defence of the mandate. See Capstone Doctrine, *supra* note 2, at 31–35.

⁹ A very literal example was the hostage crisis in the context of the United Nations Mission in Sierra Leone, when the Revolutionary United Front took hostage scores of UN peacekeepers. See Berman and Labonte, 'Sierra Leone', in W.J. Durch (ed.), *Twenty-First Century Peace Operations* (2006) 141, at 178–181.

¹⁰ Good faith aide-memoire, 1956, cited in UN Department of Peacekeeping Operations, 'Middle East – UNEF I', available at www.un.org/en/peacekeeping/missions/past/unef1backgr2.html#two (last visited 4 October 2013); UN Secretary-General, Summary Study of the Experience Derived from the Establishment and Operation of the Force: Report of the Secretary General, UN Doc. A/3943, 9 October 1958, para. 155.

demanded the withdrawal of the first peacekeeping force, UN Emergency Force I (UNEF I), in 1967, the Secretary-General recalled the force instantly.¹¹ In the post-Cold War period, this traditional conception proved problematic as it failed to address the problem of ‘spoilers’ to peace processes. The term ‘spoilers’ refers to a range of parties who, while not the traditional consent-giving actors, have the power to derail a peace process.¹² Over the course of a conflict, spoilers may change in number, form and scope of control. The spoiler problem makes the question of whose consent is required more complicated to determine than the architects of UNEF I proposed.

Peacekeeping doctrine deals with spoilers by distinguishing between players at the strategic and tactical level of a conflict.¹³ Players at the strategic level have the most significant control over land, resources and people. Typically, these are governments, but they could be major rebel groups. Players at the tactical level are local parties who do not have a monopoly on power but may spoil or disrupt a peace process. These may include grassroots players from tribal chiefs to militia groups. In theory, peacekeeping missions require the consent of strategic players but not all tactical players – they may use force against local actors that threaten to spoil the peace process.¹⁴ In practice, however, the relative importance of consent from tactical and strategic players forms a spectrum rather than a rigid distinction. Where strategic players have tenuous authority and are fragmented into factions, tactical players’ consent may tip the balance. In this respect, most missions require consent from a mixture of strategic and tactical players. Therefore, when considering whose consent matters, we can conceive of a political process, a mandate or an arbitral process along the spectrum illustrated in Figure 1.

We can use this spectrum to plot and compare who should consent to fulfil legal requirements for third party involvement and who should consent to dispute settlement to result in peace in practice. However, where the strategic parties wage war through proxies or where factions of government forces sabotage a political process, it can prove difficult to distinguish tactical parties from strategic ones.¹⁵ Players can move between categories: a military loss by a strategic player might relegate them to the tactical level and vice versa. The challenge to distinguishing between these players results from the fact that parties to a conflict, and third parties involved in

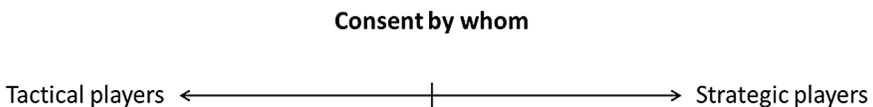


Figure 1: *Tactical–strategic Consent Spectrum*

¹¹ The Secretary-General could have decided to bring the issue to the attention of the UN Security Council under Art. 99 of the UN Charter, but it chose not to do so. See UN Secretary-General, *supra* note 10.

¹² See Stedman, ‘Spoiler Problems in Peace Processes’, 22(2) *International Security* (1997) 5, at 5–12; Greenhill and Major, ‘Perils of Profiling: Civil War Spoilers and the Collapse of Intrastate Peace Accords’, 31(3) *International Security* (2007) 7; Brahimi Report, *supra* note 2, para. 21.

¹³ Capstone Doctrine, *supra* note 2, at 19; Johnstone, *supra* note 1, at 171.

¹⁴ Capstone Doctrine, *supra* note 2, at 32–33.

¹⁵ Johnstone, *supra* note 1, at 171–172.

its resolution, operate in the context of complex relations. For the strategic–tactical spectrum to retain analytic power, we need to examine how these complex relations shape the nature of consent and determine what parties ought to consent to for peace to prevail. It is to this second dimension of consent that we now turn.

C *Consent to What?*

Ian Johnstone offers a useful lens to assess the nature of what parties consent to and what this means for political outcomes. In his work on managing consent in peace-keeping operations, he adopts insights from relational contract theory (RCT), initially developed to study private law relations, to assess consent in peace processes. This application of RCT:

envisages peace agreements as embodying a dynamic set of relationships among multiple actors. ... Original consent to the agreement ... matters, but the terms of the agreement should be understood as also encompassing the shared expectations that emerge from the ongoing relationship and the normative context in which it is embedded.¹⁶

In other words, parties to a peace process enter relationships that are necessarily open-ended and open-textured. They commit to a shared, long-term project, which is expected to deviate from the original agreement and to implicate stakeholders other than the immediate parties. This analysis of enduring but potentially fickle relationships, underpinned by repeated bargaining, also fits the description of arbitral proceedings in the context of peace processes.

According to RCT, a contract or agreement entails ‘exchange relations’ or ‘relations among people who have exchanged, are exchanging, or expect to be exchanging in the future’.¹⁷ Consent to such a contract lies on a spectrum. While every contract entails a certain kind of relationship, some transactions occur as if they are discrete.¹⁸ A discrete transaction is an apparent one-time exchange of a limited duration, like a handshake or the sale of an ice-cream cone.¹⁹ On the other end of the spectrum sit fully relational contracts, which are open-ended and open-textured agreements – open-ended since the relationship seems indefinite and open-textured because the agreement evolves organically. Contracts qualify as relational:

to the extent that parties are incapable of reducing important terms of the arrangement to well-defined obligations ... [either] because of the inability to identify uncertain future conditions or because of inability to characterize complex adaptations adequately even when the contingencies themselves can be identified.²⁰

For such transactions to persist, the parties must have a stake in upholding the contract and moderate their expectations as the relationship alters over time.

¹⁶ *Ibid.*, at 168.

¹⁷ Macneil, ‘Relational Contract Theory: Challenges and Queries’, 94(3) *Northwestern University Law Review* (2000) 877, at 878.

¹⁸ *Ibid.*, at 895–896; see also I.R. Macneil, *The New Social Contract* (1980), at 11.

¹⁹ Johnstone, *supra* note 1, at 172.

²⁰ Goetz and Scott, ‘Principles of Relational Contracts’, 67 *Virginia Law Review* (1981) 1091, cited in Johnstone, *supra* note 1, at 172.

We can think of it in this way: a discrete transaction is a one-night stand; a relational contract is marriage.²¹ Still, all (as if) discrete transactions have relational qualities, while most relational contracts have discrete dimensions. A one-night stand may have unexpected consequences and implicate stakeholders not involved in the original transaction. Conversely, a marriage incorporates discrete transactions, including the giving of rings and the signing of a marriage certificate – rendered especially discrete if the parties later choose to divorce. Similarly, commitments to peace processes range from the discrete to the fully relational, but they always contain elements of both. Thus, consent to any transaction – whether a handshake, marriage, peace agreement or arbitral proceeding – sits on a spectrum, as demonstrated in [Figure 2](#).

This spectrum offers one lens through which to assess what parties consent to in arbitration. It can help us to identify the deviations between what parties need to consent to for a successful political outcome to materialize and what they have committed to in practice.

D A Consent Management Model

When we draw the two axes of who consents to what, we can visualize consent management dilemmas relevant to arbitration in peace processes by plotting the minimum requirements for consent to arbitration and peace processes ([Figure 3](#)). Arbitration is a discrete, self-contained process. The tribunal has to issue a decision within a particular time frame, applying a well-defined set of norms. Typically, it only engages strategic players. In the model, the minimum consent for arbitration lies in the north-western quadrant. Peace processes, on the other hand, often have an undefined scope and duration and implicate all sorts of stakeholders, not just strategic players. For a peace process to succeed, parties have to consent to a relational arrangement. This necessity places most peace processes at the eastern end of the spectrum.

When we plot these consent requirements, the model highlights a dilemma: the formal criteria for consent to arbitration diverge significantly from the requirements for a successful peace process. This is a major challenge for tribunals seeking to translate a legal process into peace in practice: how can they ensure both strategic and tactical players are represented in the arbitration? And how can the arbitral process achieve a relational arrangement between the parties?

Tribunals have experimented with these challenges, with variant levels of success. To study tribunals' consent management strategies, we shall turn to the three cases of Brčko, Ethiopia–Eritrea and Abyei. We shall consider how each tribunal manipulated legal process to manage consent, how each dealt with strategic and tactical players and whether the arbitrations arrived at open-textured and open-ended arrangements.

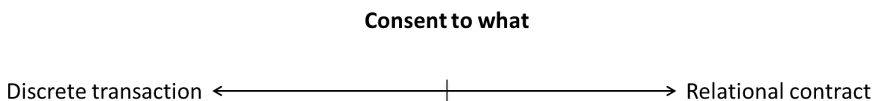


Figure 2: *Discrete–relational Spectrum*

²¹ Johnstone, *supra* note 1, at 172.

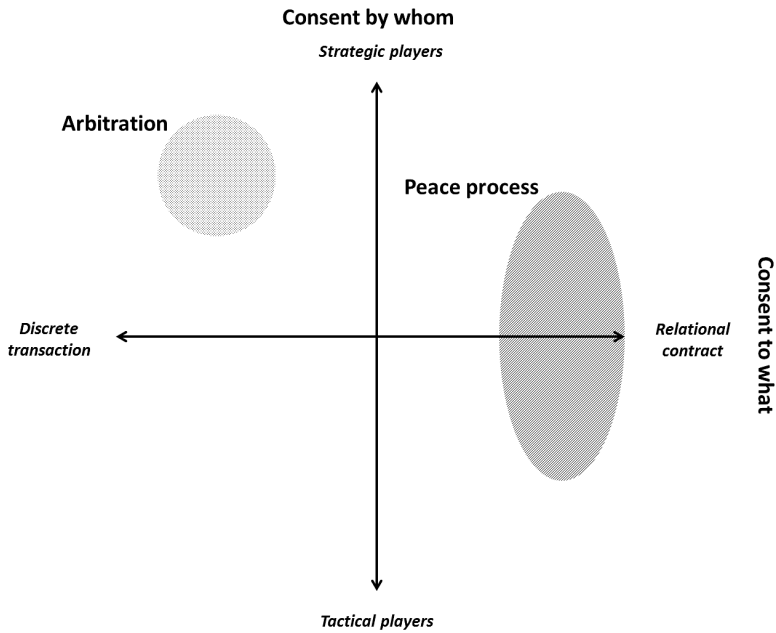


Figure 3: *Consent Management Model*

3 Case Study: The Brčko District

The Brčko arbitration presents one of the more successful examples of a tribunal bringing peace in practice. It is a process that took two decades to conclude, a robust military presence on the ground and an all-powerful international supervisor. The tribunal engineered creative strategies to push a peace process forward in spite of serious spoiler activity.

A *The Dispute*

During the civil war following secession from the Socialist Federal Republic of Yugoslavia, the Republic of Bosnia and Herzegovina was divided into two entities: the Federation of Bosnia and Herzegovina (FBH) and the Republika Srpska (RS). The General Framework Agreement for Peace in Bosnia Herzegovina (Dayton Peace Agreement), negotiated in Dayton, Ohio, and signed in Paris on 14 December 1995, delimited an inter-entity boundary line (IEBL) between them.²² In Dayton's final hours, the negotiations came close to failure due to a deadlock over the location of the IEBL in one area of northern Bosnia: the Brčko district, a 493-square-kilometres area on the Sava river, bordering Croatia.²³

²² General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement), UN Doc. S/1995/999, 14 December 1995, 35 ILM 75 (1996), Annex 2.

²³ Arbitral Tribunal for Dispute over Inter-Entity Boundary in Brčko Area, *Arbitration for the Brcko Area (Republika Srpska v. Federation of Bosnia and Herzegovina)* (1997 Award), UN Doc. S/1997/126, 14 February 1997, 36 ILM 396 (1997), para. 37.

Before the war, Brčko had been a regional economic centre and transportation hub in an ethnically diverse area.²⁴ After the war, its location made it a strategic corridor, vital to the interests of both entities. The FBH considered Brčko its main connection to European markets and claimed strong historical and socio-economic ties to the district.²⁵ It also contended that the RS's alleged 'ethnic cleansing' precluded it from controlling the district.²⁶ For the RS, Brčko formed the only territorial link between its two halves.²⁷ The RS argued that the Dayton Peace Agreement gave it a right to exercise sovereignty over 49 per cent of all of Bosnia and Herzegovina and that Brčko constituted an integral part of this territory.²⁸ Unable to reach a settlement, the parties opted to submit the matter to binding arbitration rather than derail the entire Dayton Peace Agreement.²⁹

B The Arbitration

The agreement to arbitrate consisted of one article in an annex to the Dayton Peace Agreement. Article V of Annex 2 sets out the arbitration's parameters, including the identity of the parties, the appointment of arbitrators, the applicable law and a provisional time line. The Annex gave the Tribunal a broad mandate to rule on 'the disputed portion of the Inter-Entity Boundary Line in the Brčko area'. Moreover, it explicitly allowed the Tribunal to apply 'legal *and* equitable principles'.³⁰ The FBH and the RS both appointed one arbitrator. In the face of the parties' disagreement, the presiding arbitrator was appointed by the president of the International Court of Justice.³¹

While the Annex called for the Tribunal to render its award one year from the entry into force of the Dayton Peace Agreement, on 14 December 1996, the presiding arbitrator delayed a final ruling twice. Arguing that the political situation was so volatile that 'it would be inappropriate to make a judgment at [that] time',³² the Tribunal delivered a preliminary award on 14 February 1997, followed by a supplemental award on 15 March 1998³³ and a final award on 5 March 1999.³⁴ Instead of

²⁴ *Ibid.*, paras 44–47.

²⁵ *Ibid.*, paras 62, 64.

²⁶ *Ibid.*, paras 58–61. The arbitrator rejected this contention, ruling that the Republic of Bosnia and Herzegovina, rather than the Federation of Bosnia and Herzegovina (FBH), was the injured party in this case (see paras 76–78).

²⁷ *Ibid.*, paras 71, 90–91.

²⁸ *Ibid.*, paras 71, 81–82.

²⁹ *Ibid.*, para. 37.

³⁰ (Emphasis added). On the use of equitable principles in boundary disputes, see M. Miyoshi, *Considerations of Equity in the Settlement of Territorial and Boundary Disputes* (1993).

³¹ The FBH appointed Cazim Sadikovic and the Republika Srpska (RS) selected Vitomir Popovic as its arbitrator. Roberts B. Owen, former US Legal Advisor to the State Department under the Carter administration, was appointed as presiding arbitrator. See 1997 Award, *supra* note 23, para. 2.

³² *Ibid.*, para. 104 (II)(A).

³³ Arbitral Tribunal for Dispute over Inter-Entity Boundary in Brčko Area, *Arbitration for the Brcko Area (Republika Srpska v. Federation of Bosnia and Herzegovina)* (Supplemental Award), UN Doc. S/1998/248, 15 March 1998, available at www.ohr.int/ohr-offices/brcko/arbitration/default.asp?content_id=5345 (last visited 4 October 2013).

³⁴ Arbitral Tribunal for Dispute over Inter-Entity Boundary in Brčko Area, *Arbitration for the Brcko Area, (Republika Srpska v. Federation of Bosnia and Herzegovina)* (Final Award), 5 March 1999, 38 ILM 534 (1999).

ruling on the final delimitation of the IEBL, the 1997 award sought to stabilize the tense political situation by establishing an interim administrative regime headed by an international supervisor.³⁵ The Brčko supervisor was vested with wide-ranging powers, including the authority to promulgate binding regulations and orders that would ‘prevail as against any conflicting law’.³⁶ The 1998 supplemental award continued the regime of the supervisor and increased his authority, granting the office such wide-ranging powers as the ability ‘to remove from office any public official considered by the Supervisor to be inadequately cooperative with his efforts to achieve compliance with the Dayton Accords’.³⁷

When it came to the final award in 1999, the presiding arbitrator concluded that both the FBH and the RS had failed to fully cooperate with the Dayton peace process and refused to allocate the territory to either one of the parties.³⁸ Instead, he found that ‘the more equitable and wise course’ was to pursue a change in local governance by establishing ‘a new multi-ethnic democratic District government under international supervision’.³⁹ The final award ordered the creation of an autonomous administrative unit, the Brčko District, as part of the Republic of Bosnia and Herzegovina but held in condominium by the FBH and the RS.⁴⁰ It also established a Law Revision Commission to draft a new constitutional structure for the district and overhaul its tax regime, criminal justice system, health care and property laws.⁴¹ Rather than delimiting the IEBL through the district, the presiding arbitrator foresaw a mere transitory role for the boundary line, which would be abolished after the establishment of the district.⁴²

In the annex to the final award, the presiding arbitrator vested the supervisor with wide-ranging responsibilities, including managing the return of refugees, law enforcement and the revision of virtually all local laws.⁴³ The supervisor was also given the power to formulate penalties for non-compliance. Perhaps most remarkable was the decision of the presiding arbitrator not to dissolve the tribunal but, rather, to retain jurisdiction to reform the governance structure once more, until Brčko’s institutions ‘are functioning, effectively and apparently permanently’. The presiding arbitrator warned the parties that non-compliance with the final award might result in ‘transferring the District entirely out of the

³⁵ 1997 Award, *supra* note 23, para. 104 (I)(B). The first supervisor for Brčko, US Ambassador Robert W. Farrand, was appointed by High Representative Carl Bildt on 7 March 1997. See Chairman’s Conclusions, Brcko Implementation Conference (7 March 1997), available at www.ohr.int/pic/default.asp?content_id=5863 (last visited 4 October 2013).

³⁶ 1997 Award, *supra* note 23, para. 104 (I)(B)(1).

³⁷ Supplemental Award, *supra* note 33, para. 24.

³⁸ Final Award, *supra* note 34, para. 56.

³⁹ *Ibid.*

⁴⁰ *Ibid.*, paras 9–11.

⁴¹ See Karnavas, ‘Creating the Legal Framework of the Brčko District of Bosnia and Herzegovina: A Model for the Region and Other Postconflict Countries’, 97 *American Journal of International Law* (2003) 111.

⁴² *Ibid.*, para. 39.

⁴³ *Ibid.*, Annex.

territory of the non-complying entity and placing it within the exclusive control of the other'.⁴⁴

C Consent Management Dynamics

1 Consent by Whom?

The Brčko case highlights the difficulties of determining which players at the strategic and tactical level matter and how to deal with spoilers. The Dayton Peace Agreement was negotiated by the most influential actors of the conflict, the presidents of the Federal Republic of Yugoslavia (Slobodan Milosevic), the Republic of Croatia (Franjo Tudjman) and the Republic of Bosnia and Herzegovina (Alija Izetbegovic). Radovan Karadzic, the leader of the Bosnian Serbs, was not present; Milosevic was authorized to sign for the RS.⁴⁵ The IEBl arrangements, however, concerned an internal Bosnian affair. As a result, Annex 2 was signed by the FBH, the RS and Izetbegovic; Tudjman and Milosevic 'endorsed' the Annex. While the Republic of Bosnia and Herzegovina naturally had an interest in the proceedings, only the FBH and the RS were parties to the arbitration. At the same time, these two entities were the main spoilers. At the strategic level, the RS took a highly uncooperative stance,⁴⁶ and both party-appointed arbitrators refused to sign any of the awards. Meanwhile, the FBH and the RS both manipulated tactical players to support or spoil the Tribunal's operations on the ground.⁴⁷

This dynamic demanded a creative approach by the Tribunal. At the strategic level, the presiding arbitrator managed unreliable consent by refusing to be stalled by uncooperative behaviour; he kept proceedings moving by holding 'that if a majority decision of the Tribunal is not reached, "the decision of the presiding arbitrator will be final and binding upon both parties."' ⁴⁸ Concurrently, the presiding arbitrator kept control over the tactical players in the RS and the FBH by installing a supervisor and

⁴⁴ *Ibid.*, paras 67–68. The arbitrator did, in fact, issue a new ruling after the Final Award, relating to the collection and allocation of indirect tax revenues between the FBH, the RS and Brčko: Addendum to Final Award, 25 June 2007, available at www.ohr.int/ohr-offices/brcko/arbitration/default.asp?content_id=42479 (last visited 4 October 2013).

⁴⁵ Dayton Peace Agreement, *supra* note 22, preamble.

⁴⁶ E.g., the RS filed a 'Special Appearance and Jurisdictional Statement' and an 'Emergency Request for an Expedited Interim Award', which was denied by the Tribunal; tried to withdraw its arbitrator and stated that it would consider any Tribunal decision to be invalid. Its arbitrator failed to turn up to a number of preliminary conferences. However, all arbitrators and both parties, represented by legal counsel, attended the hearings on the merits in January 1997, February 1998 and February 1999. See 1997 Award, *supra* note 23, paras 8, 14, 16, 18–22, 26; Supplemental Award, *supra* note 33, para. 1; Final Award, *supra* note 34, para. 4.

⁴⁷ See, e.g., Final Award, *supra* note 34, paras 33, 56.

⁴⁸ 1997 Award, *supra* note 23, para. 30. While highly unusual in international arbitrations, various commentators have deemed this step a practical necessity. See Schreuer, 'The Brčko Award of 14 February 1997', 11 *Leiden Journal of International Law (LJIL)* (1998) 71, at 74; Baros, 'The Arbitral Tribunal's Award for the Dispute over the Inter-Entity Boundary in the Brcko Area: A Devastating Blow to the Principle of Consensuality or an Ephemeral Adjudicative Episode?', 3 *Journal of Armed Conflict Law* (1998) 223, at 243.

postponing a final decision.⁴⁹ He then sought to maintain compliance of players at both levels by retaining the Tribunal's jurisdiction after issuance of the final award.

By establishing international supervision over Brčko, the presiding arbitrator treated the 'international community' as a relevant strategic-level player. It considered its interests in the awards,⁵⁰ referring to it by name and making recommendations to international institutions.⁵¹ Even though it may not be meaningful to speak about the 'consent' of the 'international community', a coalition of the willing actively intervened to aid the dispute resolution process. Outside pressure – notably, the August 1995 bombing campaign of the North Atlantic Treaty Organization (NATO) – had brought about the Dayton negotiations.⁵² After Dayton, a NATO-led implementation force (IFOR) was deployed to assist in its implementation.⁵³ The presence of an outside military force not only influenced the parties' strategic behaviour, but it also shaped their tactical conduct by supporting the supervisor's local initiatives.⁵⁴ In this respect, the 'international community' proved an important strategic-level player, whose commitment determined conflict outcomes on the ground while shaping the consent of other strategic-level players.

Yet it would be a mistake to ascribe Brčko's success primarily to foreign intervention. If this were the determinative factor, what explains the presiding arbitrator's efforts to install a supervisor, establish a condominium and retain jurisdiction after rendering his final award? Why did he not provide a straightforward delimitation of the IEBL? The Brčko case suggests that outside force may be instrumental to a peaceful outcome by suppressing spoiler activity during the arbitration and the implementation of an award. Yet for peace to succeed in the long term, arbitration must result in a relational arrangement that accommodates both strategic and tactical players.

2 *Consent to What?*

The Tribunal took a forward-looking approach to the procedure, substance and outcome of the arbitration and went to great lengths to justify an open-textured interpretation of its mandate. Noting that the demands of the parties were mutually exclusive, it argued that its remedial authority should be understood to be sufficiently broad to resolve the overall dispute before it.⁵⁵ It did so by relying primarily on equitable considerations. While the 1997 award still considers the relevant legal arguments, the final

⁴⁹ 1997 Award, *supra* note 23, paras 52–57, 104; Supplementary Award, *supra* note 33, paras 5–22.

⁵⁰ 1997 Award, *supra* note 23, paras 94, 100; Final Award, *supra* note 34, para 57.

⁵¹ Final Award, *supra* note 34, paras 47–49.

⁵² R. Holbrooke, *To End a War* (1998), at 101–105.

⁵³ Dayton Peace Agreement, *supra* note 22, Art. 1(a), Annex 1-A. The Implementation Force (IFOR) was succeeded by a NATO-led Stabilization Force (SFOR), established by SC Res. 1088, 12 December 1996, which was replaced in 2004 by EUFOR Althea, a military deployment by the European Union (EU) that continues its presence in Bosnia and Herzegovina up to this day.

⁵⁴ Farrand, 'Lessons from Brcko: Necessary Components for Future Internationally Supervised Territories', 15 *Emory International Law Review* (2001) 529, at 574–577.

⁵⁵ 1997 Award, *supra* note 23, para. 38–41.

award reads more like a policy paper than an arbitral decision.⁵⁶ At various stages in the proceedings, the Tribunal emphasizes the need for an ‘equitable’ – or even ‘wise’ and ‘just’ – solution; hardly any mention is made of the law.⁵⁷ Instead, the Tribunal focused on the socio-political interests of the parties to find a solution ‘that has the strongest likelihood of promoting a long-term peaceful solution.’⁵⁸

The open-ended nature of the process was underlined by the double delay in the issuance of the final award; the installation of an international supervisor with near-absolute powers; the establishment of the Brčko district as a condominium and the keeping in place of the Tribunal after the final award. These actions guaranteed stable governance while the Tribunal considered its final decision and while the basic structures of the Brčko administration were being rebuilt. The presiding arbitrator left the timing of these developments mainly to the supervisor, who formally established the Brčko district on 8 March 2000⁵⁹ and abolished the IEBL on 8 April 2006.⁶⁰

The approach of the Tribunal has been controversial. The Federal Republic of Yugoslavia declared the final award ‘a gross violation of the Dayton/Paris Accords’,⁶¹ and commentators have suggested that the Tribunal ‘took its mandate not so much from the disputing parties’ agreement’ but, instead, exercised a ‘public order function as an agent of the international community’.⁶² Moreover, some argue that international supervision has made Brčko excessively reliant on external involvement, breeding corruption and political perversion by shielding local leaders from full accountability.⁶³

On the other hand, the Brčko arbitration can claim success for bringing ‘peace in practice’. The conditions under which the agreement to arbitrate was reached, the

⁵⁶ See Schreuer, ‘The Brčko Final Award of 5 March 1999’, 12 *LJIL* (1999) 575, at 577; Baros, *supra* note 48, who argues that the arbitrator decided the case *ex aequo et bono* rather than on the basis of equitable principles. For the distinction between equity and adjudication *ex aequo et bono*, see Miyoshi, *supra* note 30, at 12.

⁵⁷ 1997 Award, *supra* note 23, paras 87–88, 101; Supplementary Award, *supra* note 33, paras 17, 20; Final Award, *supra* note 34, paras 4, 56.

⁵⁸ 1997 Award, *supra* note 23, para. 96.

⁵⁹ *Decision on the Establishment of the Brčko District of BiH*, 8 March 2000, available at www.ohr.int/decisions/statemattersdec/default.asp?content_id=359 (last visited 4 October 2013); *Supervisory Order on the Establishment of the Brcko District of Bosnia and Herzegovina*, 8 March 2000, available at www.ohr.int/ohr-offices/brcko/bc-so/default.asp?content_id=5267 (last visited 4 October 2013).

⁶⁰ *Supervisory Order Abolishing Entity Legislation within Brcko District and Declaring the Inter-Entity Boundary Line to Be of No Further Legal Significance within the District*, 8 April 2006, available at www.ohr.int/ohr-offices/brcko/bc-so/default.asp?content_id=37764 (last visited 4 October 2013).

⁶¹ Letter from the Chargé d’affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General, UN Doc. A/53/861. S/1999/270, 11 March 1999. See also Letter from the Chargé d’affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the President of the Security Council, UN Doc. S/1999/243, 7 March 1999.

⁶² Schreuer, *supra* note 56, at 580. See also Baros, *supra* note 48, at 248, suggesting that ‘a substantial re-allocation of the territory would ... require a new *compromis* or mutual consent of the parties giving the Tribunal authority to that effect’.

⁶³ International Crisis Group (ICG), *Brcko Unsupervised*, Europe Briefing no. 66, 8 December 2011, at 5–7, 14, available at [www.crisisgroup.org/~media/Files/europe/balkans/bosnia-herzegovina/B66%20Brcko%20Unsupervised.pdf](http://www.crisisgroup.org/~/media/Files/europe/balkans/bosnia-herzegovina/B66%20Brcko%20Unsupervised.pdf) (last visited 4 October 2013).

prevalence of equitable considerations in the presiding arbitrator's reasoning and the creative way in which he dealt with the volatile political situation suggest that none of the parties considered the arbitration to be a purely legal matter. Instead, all saw it as an extension of the political negotiations at Dayton.⁶⁴ Upon its issuance, the final award received broad local support, and major reforms were implemented swiftly and expertly.⁶⁵ Though much delayed, the supervisor did suspend his activities in August 2012, and, at the time of writing, neither party to the arbitration had sought to reclaim the area.⁶⁶ While tensions remain at the local and inter-entity levels,⁶⁷ as of January 2015 there had been no open violence in Brčko for almost two decades.⁶⁸

4 Case Study: The Eritrea–Ethiopia Boundary Dispute

Turning to our second case study – Eritrea–Ethiopia – we shall see that not all arbitrations end happily. This case presents an example of a tribunal that was ‘strait-jacketed’ by its mandate and unable to respond to spoiler activity by strategic players in the implementation phase of the award.

A *The Dispute*

The Eritrea–Ethiopia arbitration arose out of a boundary dispute that had lingered since the Eritrea's independence in 1993. It came to a head when Eritrean and Ethiopian forces clashed around the town of Badme in 1998. The dispute centred on three boundary treaties, which Ethiopia, one of the oldest states in the world, had concluded with Italy, the colonizer of Eritrea, in 1900, 1902 and 1908. Ethiopia had declared these treaties null and void when it annexed Eritrea in 1952. The violent resistance struggle that followed lasted more than forty years, but on 27 April 1993 Eritrea became an independent state.⁶⁹ Nevertheless, acute tensions remained. Violent conflict erupted again five years later, ignited by the clash over Badme, a border town in the western sector of the inter-state boundary. Following pressure from the USA, the European Union (EU), the United Nations (UN) and the Organization of African

⁶⁴ See also Farrand, *supra* note 54, at 544; M. Parish, *A Free City in the Balkans: Reconstructing a Divided Society in Bosnia* (2010), at 205.

⁶⁵ Parish, *supra* note 64, at 118–127.

⁶⁶ ICG, *supra* note 63, at 9–11; Peace Implementation Council Steering Board Communiqué, 13 December 2011, available at www.ohr.int/pic/default.asp?content_id=46664 (last visited 4 October 2013). This did not terminate the office of the supervisor; the incumbent supervisor is Ambassador David M. Robinson. See Office of the High Representative, David M. Robinson, 1 September 2014, available at www.ohr.int/ohr-info/hrs-dhrs/default.asp?content_id=48799 (last visited 20 January 2015).

⁶⁷ See, e.g., Clark, ‘Bosnia's Success Story? Brcko District and the “View from Below”’, 17 *International Peacekeeping* (2010) 67.

⁶⁸ ‘Welcome to Brčko, Europe's Only Free City and a Law unto Itself’, *The Guardian* (14 May 2014), available at www.theguardian.com/cities/2014/may/14/brcko-bosnia-europe-only-free-city (last visited 20 January 2015).

⁶⁹ See Eritrea–Ethiopia Boundary Commission, *Decision Regarding the Delimitation of the Border (Delimitation Decision)*, UN Doc. S/2002/423, 13 April 2002, 41 ILM 1057 (2002).

Unity (OAU),⁷⁰ the parties consented to the intervention of a peacekeeping mission (June Agreement)⁷¹ and concluded a comprehensive peace agreement in December 2000 (December Agreement).⁷²

B The Arbitration

The December Agreement foresaw the establishment of a Boundary Commission mandated to ‘delimit *and* demarcate’ the entire boundary between the two states.⁷³ Notwithstanding this broad mandate, the parties clearly envisaged a legal procedure. They selected the Permanent Court of Arbitration (PCA) rules to govern the proceedings,⁷⁴ appointed renowned international lawyers as commissioners⁷⁵ and explicitly prohibited the Commission from deciding ‘*ex aequo et bono*’.⁷⁶ The December Agreement restricted the Commission’s focus to ‘pertinent colonial treaties (1900, 1902 and 1908) and applicable international law’ and emphasized the application of the principle of *uti possidetis*.⁷⁷ The Commission was to work fast and to issue a decision ‘within six months of its first meeting.’⁷⁸ The December Agreement also established a Claims Commission, which was to assess – independently from the Boundary Commission – claims of loss, damage and injury by individuals and the two governments.⁷⁹

The Boundary Commission was swiftly constituted and, apart from a challenge to one of the commissioners,⁸⁰ made smooth progress. In its deliberations, the Commission

⁷⁰ ICG, ‘Ethiopia and Eritrea: War or Peace’, ICG Africa Report no. 68, 24 September 2003, at 4, available at www.crisisgroup.org/~media/Files/africa/horn-of-africa/ethiopia-eritrea/Ethiopia%20and%20Eritrea%20War%20or%20Peace.pdf (last visited 6 March 2012).

⁷¹ Agreement on Cessation of Hostilities between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (June Agreement), UN Doc. S/2000/601, 18 June 2000. The Security Council established the United Nations Mission in Ethiopia and Eritrea (UNMEE) on 31 July 2000 by SC Res. 1312 (2000).

⁷² Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (December Agreement), UN Doc. A/55/686-S/2000/1183, 12 December 2000.

⁷³ December Agreement, *supra* note 72, Art. 4(2) (emphasis added).

⁷⁴ Permanent Court of Arbitration, Optional Rules for Arbitrating Disputes between Two States 1992, 32 ILM 572 (1993); see December Agreement, *supra* note 72, Art. 4(11).

⁷⁵ Ethiopia appointed Prince Bola Adesumbo Ajibola (Nigeria) and Sir Arthur Watts (UK); Eritrea appointed Judge Stephen M. Schwebel (USA) and Jan Paulsson (Sweden). The latter withdrew after a challenge from Ethiopia and was replaced by W. Michael Reisman (USA). Both sides agreed to appoint Sir Elihu Lauterpacht (UK) as president of the Commission. *Delimitation Decision*, *supra* note 69, paras 1.3, 1.5–1.6, 1.12–1.14. None of the commissioners was a national of either of the parties.

⁷⁶ December Agreement, *supra* note 72, Art. 4(2).

⁷⁷ This legal maxim mandates that, in situations of decolonization, colonial borders are to be transformed into international boundaries in order to ensure the stability of newly independent states. See ‘Border Disputes among African States’, Res. AHG 16(I) (21 July 1964), adopted by the OAU Summit in Cairo from 17–21 July 1964; see also *Case Concerning the Frontier Dispute (Burkina Faso/Mali)*, Judgment, 22 December 1986, ICJ Reports (1986) 557, at 566; *Case Concerning Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)* Judgment, 11 September 1992, ICJ Reports (1992) 351, at 387; M.N. Shaw, *International Law* (2011), at 525–528.

⁷⁸ December Agreement, *supra* note 72, Art. 4(12).

⁷⁹ *Ibid.*, Art. 5; see also Gray, ‘The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?’, 17 *European Journal of International Law* 4 (2006) 699.

⁸⁰ See note 75 in this article.

stuck closely to the text of the 1900, 1902 and 1908 treaties but applied a number of legal techniques to allow itself some flexibility in delimiting the treaty line.⁸¹ For example, the Commission noted that, as a matter of treaty interpretation, subsequent conduct of the parties could vary the conclusions derived from the pertinent treaties.⁸² It also held that it could apply principles of customary international law, such as prescription and acquiescence, to modify the final boundary⁸³ and allowed itself ‘to make such adjustments in the boundary as would be necessary to render it manageable and rational’.⁸⁴ In certain instances, it deferred final delimitation to the demarcation phase, to allow adaptation of the boundary ‘to the nature and variation of the terrain’.⁸⁵ Overall, the differences between these techniques were subtle, but they offered the Commission limited discretion to deviate from the text of the century-old treaties. However, strong reliance on the *uti possidetis* principle meant that subsequent conduct could only be taken into account until the independence of Eritrea on 27 April 1993.⁸⁶

On 13 April 2002, the Commission presented its decision. While it awarded Badme to Eritrea, the Commission carefully avoided mentioning the town in its decision or on its maps. Both Ethiopia and Eritrea claimed victory,⁸⁷ and the Commission immediately moved to the demarcation phase.⁸⁸ It established field offices⁸⁹ and issued demarcation directions.⁹⁰ The Commission also concluded a memorandum of understanding with the UN Mission in Ethiopia and Eritrea (UNMEE),⁹¹ whose mandate was adjusted by the Security Council to assist the Commission.⁹²

⁸¹ For a critical analysis of the Commission’s legal reasoning, see Shaw, ‘Title, Control, and Closure? The Experience of the Eritrea-Ethiopia Boundary Commission’, 56 *International and Comparative Law Quarterly* (2007) 755; Kohen, ‘The Decision on the Delimitation of the Eritrea/Ethiopia Boundary of 13 April 2002: A Singular Approach to International Law Applicable to Territorial Disputes’, in M.G. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law: Liber Amicorum Lucius Caflisch* (2007) 767.

⁸² *Delimitation Decision*, *supra* note 69, para. 3.8; see also paras 3.9–3.10. In this context, the Commission held that principles such as ‘estoppel, preclusion, acquiescence or implied or tacit agreement’ allowed it to go beyond the ‘common will’ of the parties when interpreting the treaties.

⁸³ *Ibid.*, paras 3.14–3.15; see also para. 3.29.

⁸⁴ *Ibid.*, para. 6.22.

⁸⁵ *Ibid.*, paras 6.16–6.17, 6.20, 6.34. Delimitation was also deferred in certain cases relating to rivers and the outer edges of towns (see, respectively, paras 7.1–7.3, 8.1).

⁸⁶ *Ibid.*, para. 3.36. Kohen argues that the Commission’s conclusion that ‘colonial *effectivités* could displace the legal title, whereas post-colonial *effectivités* clearly, could not’ runs counter to the ICJ jurisprudence. Kohen, *supra* note 81, at 775.

⁸⁷ ICG, *supra* note 70, at 6.

⁸⁸ Fifth Report of the Eritrea–Ethiopia Boundary Commission to the Secretary-General of the United Nations, UN Doc. S/2002/744, 30 May 2002, Annex, para. 3.

⁸⁹ Third Report on the Work of the Commission, UN Doc. S/2001/1194, 22 November 2001, Annex 1, para. 6; Order Pursuant to Article 27(1) of the Commission’s Rules of Procedure, UN Doc. S/2002/853, 17 July 2002, Enclosure 2.

⁹⁰ *Demarcation of the Eritrea/Ethiopia Boundary Directions*, Decision of 8 July 2002, reprinted in UNRIAA, vol. 25, at 207, as amended in November 2002 and March and July 2003. The directions specified in Art. 14(A) that the boundary line could only be amended ‘on the basis of an express request agreed between and made by both Parties.’

⁹¹ Fifth Report of the Commission, *supra* note 88, para. 11.

⁹² SC Res. 1430 (2002), authorizing administrative, logistic and demining support. See also SC Res. 1344 (2001), 1369 (2001) and 1398 (2002).

Within weeks, however, the parties started showing signs of opposition. First, Ethiopia blocked preparatory work by the Commission's Field Office and raised doubts about the neutrality of the Boundary Commission and its cooperation with UNMEE.⁹³ It then challenged the Commission's methodology, questioning the Commission's assessment of the conduct of the parties and the delimitation criteria to be applied during the demarcation phase.⁹⁴ The Commission stressed that the decision was not open to appeal and rejected the challenges as inadmissible,⁹⁵ but Ethiopia's opposition did not cease.⁹⁶ Eritrea, for its part, complained about Ethiopia's resettlement activities and suggested that the Commission had been influenced by political considerations.⁹⁷ Twice, the Commission found it necessary to clarify its jurisdiction and powers, particularly with regard to varying the boundary line in the demarcation phase.⁹⁸

While the parties' antagonism intensified,⁹⁹ tensions arose between the Boundary Commission and UNMEE. The latter did not allow the contractors tasked with the construction of boundary pillars within its perimeter and refused to provide security services to the Boundary Commission's personnel, arguing that this activity was a matter for the state in control of the particular field location.¹⁰⁰ The situation continued to deteriorate. While the Commission issued fresh demarcation instructions,¹⁰¹ Ethiopia blocked demarcation efforts in the central and western sector around Badme, calling for an alternative mechanism to demarcate these parts of the boundary.¹⁰² Eritrea opposed any attempt to reopen the delimitation process and refused to allow

⁹³ Fifth Report of the Commission, *supra* note 88, para. 4.

⁹⁴ Eritrea–Ethiopia Boundary Commission, *Decision Regarding the 'Request for Interpretation, Correction and Consultation' Submitted by the Federal Democratic Republic of Ethiopia on 13 May 2002*, UN Doc. S/2002/732, 24 June 2002.

⁹⁵ *Ibid.*, paras 16–18.

⁹⁶ Ethiopia filed another lengthy memorandum half a year later, seeking to 'refine' the delimitation. See Eighth Report of the Eritrea–Ethiopia Boundary Commission, UN Doc. S/2003/257, 21 February 2003, Annex I, paras 1–8.

⁹⁷ See Order of the Commission Made Pursuant to Article 20 and Article 27(1) of the Commission's Rules of Procedure, UN Doc. S/2002/853, 17 July 2002, Enclosure 1, reprinted in UNRIAA, vol. 25, at 199; Fifth Report of the Commission, *supra* note 88, para. 6.

⁹⁸ The Commission noted that the demarcation team enjoyed 'a limited margin of appreciation enabling [them] to take account of any flexibility in the terms of the delimitation itself or of the scale and accuracy of the map used in the delimitation process, and to avoid establishing a boundary which is manifestly impracticable'. Observations of the Eritrea–Ethiopia Boundary Commission, 21 March 2003, reprinted in UNRIAA, vol. 25, at 216, para. 8. See also Eritrea–Ethiopia Boundary Commission, *Determinations*, 7 November 2002, reprinted in UNRIAA, vol. 25, at 204–206.

⁹⁹ Eighth Report of the Commission, *supra* note 96, paras 9–15. See also *Decision Pursuant to Article 15B of the Commission's Demarcation Directions*, 7 July 2003, available at www.pca-cpa.org/showfile.asp?fil_id=116 (last visited 10 February 2015).

¹⁰⁰ See Progress Report of the Secretary-General on Ethiopia and Eritrea, Doc. S/2003/257, 6 March 2003, paras 16–18; Eighth Report of the Commission, *supra* note 96, paras 20–21; Letter from the President of the Eritrea–Ethiopia Boundary Commission addressed to the Secretary-General, UN Doc. S/2006/362, 21 May 2006. Apart from security concerns, the drawn-out UN procurement process for hiring pillar construction contractors also held up the Commission.

¹⁰¹ Demarcation Instructions, 21 March 2003 and 22 August 2003, reprinted in UNRIAA, vol. 25, at 225.

¹⁰² Eleventh Report on the Work of the Eritrea–Ethiopia Boundary Commission, UN Doc. S/2003/1186, 19 December 2003, para. 10 and Appendix 1.

demarcation in the eastern sector unless the work continued in the western and central sectors simultaneously. As a result, the Commission's demarcation activities came to a halt. Efforts by the UN Secretary-General's Special Envoy¹⁰³ and a five-point peace plan by the Ethiopian Prime Minister Meles Zenawi failed, largely because Eritrea saw these as attempts to reconsider the delimitation decision.¹⁰⁴ In early 2005, the Commission suspended all of its activities in the area as Ethiopia had halted cooperation and started building up troops along the temporary security zone (TSZ), a demilitarized area endorsed by the December Agreement.¹⁰⁵ In response, Eritrea banned UNMEE helicopter flights in October 2005 and, two months later, asked US, Canadian and European peacekeepers to withdraw from UNMEE.¹⁰⁶ In October 2006, it moved its troops into the TSZ, thus adding a military dimension to the growing political enmity.¹⁰⁷ Due to further restrictions on UNMEE's freedom of movement, the UN reduced UNMEE's troop levels and reconsidered UNMEE's mandate.¹⁰⁸

Prevented from constructing pillars on the ground, the Commission sought other ways to demarcate the boundary. In its statement of 27 November 2006, it found that the most practical way of fulfilling its mandate was to provide the parties with a detailed list of coordinates for boundary points, using modern techniques of image processing, terrain modelling and high resolution aerial photography.¹⁰⁹ While the parties refused to accept this solution, the Commission declared itself *functus officio* on 25 August 2008.¹¹⁰ Meanwhile, the parties continued to obstruct UNMEE's operations to such an extent that the Security Council opted to terminate the mission the

¹⁰³ Eritrea blankly refused to meet Special Envoy Lloyd Axworthy. Progress Reports of the Secretary-General on Ethiopia and Eritrea, UN Doc. S/2004/180, 5 March 2004, paras 2–3 and UN Doc. S/2004/708, 2 September 2004, paras 38–39.

¹⁰⁴ Progress Report of the Secretary-General on Ethiopia and Eritrea, UN Doc. S/2004/973, 16 December 2004, paras 14–15. Eritrean opposition focused on the fifth point of the peace plan, which sought to '[s]tart dialogue' about the *Delimitation Decision*.

¹⁰⁵ Report of the Secretary-General on Ethiopia and Eritrea, UN Doc. S/2005/142, 7 March 2005, paras 2–4; Sixteenth Report on the Work of the Commission, UN Doc. S/2005/142, 24 February 2005, Annex, para. 32.

¹⁰⁶ Report of the Secretary-General on Ethiopia and Eritrea, UN Doc. S/2006/1, 3 January 2006, paras 2–3, 8–9. Eritrea further restricted UNMEE's freedom of movement in the spring of 2006 and refused visas to the Commission's field staff in July 2006.

¹⁰⁷ Special Report of the Secretary-General on Ethiopia and Eritrea, UN Doc. S/2006/992, 15 December 2006, paras 2–8.

¹⁰⁸ *Ibid.*, paras 22–31.

¹⁰⁹ Statement by the Commission, UN Doc. S/2006/992, 27 November 2006, Enclosure, reprinted in UNRIIAA, vol. 26, at 771, paras 20–21. The Commission found that the principle of 'institutional "effectiveness"' authorized it to develop 'constructive' demarcation strategies as long as these were 'directed towards achieving the objective the Parties are deemed to have had in mind'. *Ibid.*, para. 17.

¹¹⁰ Twenty-Seventh Report of the Eritrea–Ethiopia Boundary Commission, UN Doc. S/2008/630, 25 August 2008, at para. 8. Eritrea accepted the virtual demarcation in principle, but Ethiopia considered it 'legal nonsense'. See Twenty-Fifth Report of the Eritrea–Ethiopia Boundary Commission, UN Doc. S/2007/645, 28 September 2007, paras 15–29; Twenty-Sixth Report of the Eritrea–Ethiopia Boundary Commission, UN Doc. S/2008/40, 7 January 2008, para. 23; ICG, *Beyond the Fragile Peace between Ethiopia and Eritrea: Averting New War*, Africa Report no. 141, 17 June 2008, at 3, available at www.crisisgroup.org/~media/Files/africa/horn-of-africa/ethiopia-eritrea/Beyond%20the%20Fragile%20Peace%20between%20Ethiopia%20and%20Eritrea%20Averting%20New%20War.pdf (last visited 4 October 2013).

same year.¹¹¹ With the Boundary Commission dissolved and the peacekeepers gone, the situation remained tense, and violent clashes continued.¹¹² After years of foreign involvement, Ethiopia continues to control Badme and Eritrea risks being labelled a failed state.¹¹³

C Consent Management Dynamics

1 Consent by Whom?

The Eritrea–Ethiopia peace process and demarcation efforts did not collapse due to local spoilers or lack of formal commitment but, rather, because the main strategic players were permitted to preach cooperation yet practise intransigence. While paying lip service to the decision, Ethiopia presented significant ‘procedural impediments to the demarcation process’.¹¹⁴ In turn, Eritrea’s inflexibility to reconsider any element of the delimitation decision eventually evoked the anger of the Security Council.¹¹⁵ The modes and intensity of obstruction that the Commission and UNMEE faced tell a classic tale of obsolescing consent by strategic players: agreements and awards are never more exalted than at the moment of signing or announcement, but after the fanfare, the parties’ enthusiasm fast fades.¹¹⁶ From formal and informal challenges to the delimitation decision; refusals to attend meetings or speak to mediators; denial of visas and failure to give security assurances or to authorize flight requests to restrictions on the freedom of movement and violation of security arrangements, the spoiler behaviour originated from within the capitals and not from the periphery.

Firm action by the international community might have whipped the parties into line, but certain international developments prevented effective intervention. First, in the crucial months after the delivery of the delimitation decision, the OAU was caught up in its own institutional transformation into the African Union (AU).¹¹⁷

¹¹¹ Report of the Secretary-General on Ethiopia and Eritrea, UN Doc. S/2008/40, 23 January 2008, para. 12; Special Report of the Secretary-General on the United Nations Mission in Ethiopia and Eritrea, UN Doc. S/2008/226, 7 April 2008, para. 35; SC Res. 1827 (2008). See also Letter from the Secretary-General addressed to the President of the Security Council and Annexes, 28 July 2008, UN Doc. S/2008/496, 29 July 2008.

¹¹² See, e.g., ‘Eritrea Says It Killed 10 Ethiopian Troops’, *Reuters* (3 January 2010), available at af.reuters.com/article/topNews/idAFJ0E60206K20100103 (last visited 4 October 2013); ICG, *supra* note 110, at 9–13; Institute for Security Studies, Situation Report: Ethiopia and Eritrea in Turmoil: Implications for Peace and Security in a Troubled Region, 1 December 2008, at 4–6, available at www.issafrika.org/uploads/SITREPETHERIT301108.PDF (last visited 4 October 2013).

¹¹³ ICG, Eritrea: The Siege State, Africa Report no. 163, 21 September 2010, at ii, available at www.crisis-group.org/~media/Files/africa/horn-of-africa/ethiopia-eritrea/163%20Eritrea%20The%20Siege%20State.pdf (last accessed 12 March 2012). Some argue that the conflict fuelled authoritarianism in both states, which in turn led to a border conflict between Eritrea and Djibouti. See Zondi and Réjouis, ‘The Ethiopia-Eritrea Border Conflict and the Role of the International Community’, 6(2) *African Journal of Conflict Resolution* (2006) 69, at 77–81; Institute for Security Studies, Situation Report: Elections, Politics and External Involvement in Djibouti, 14 April 2011, at 7, available at www.issafrika.org/publications/situation-reports/elections-politics-and-external-involvement-in-djibouti (last visited 9 January 2014).

¹¹⁴ Eleventh Report of the Commission, *supra* note 102, para. 20.

¹¹⁵ SC Res. 1640 (2005).

¹¹⁶ Doyle and Sambanis, *supra* note 5, at 309.

¹¹⁷ The African Union was formally launched on 9 July 2002, three months after the Boundary Commission published its decision.

Headquartered in Addis Ababa, Eritrea lost confidence in the neutrality of the new organization and recalled its ambassador to the AU in November 2003.¹¹⁸ Second, the Eritrea–Ethiopia Claims Commission disregarded the treaty line delimited by the Boundary Commission but based its findings on the ceasefire line of 2000.¹¹⁹ While operating independently from each other, the Claims Commission’s controversial findings undermined the efforts of the Boundary Commission to implement its delimitation decision.¹²⁰ Third, a discrepancy of expectations created tensions between the Boundary Commission and UNMEE. Even after the Security Council explicitly authorized it to assist the Commission, UNMEE continued to interpret its mandate restrictively and limited its support primarily to logistical assistance and demining activities, resulting in demarcation delays.¹²¹ All of this action alienated the strategic players – in particular, Eritrea – from the peace process. As it withdrew its consent to further foreign involvement, first the Boundary Commission and then the UN were forced to abort their operations.

2 *Consent to What?*

The failure of the Eritrea–Ethiopia arbitration lies in the different levels of consent that the parties granted to UNMEE and the Boundary Commission. On the one hand, the June Agreement that established UNMEE provided the mission with an open-ended and open-textured mandate, which would only terminate ‘when the delimitation-demarcation process of the border has been completed’.¹²² On the other hand, the December Agreement set out the jurisdiction of the Boundary Commission in painstaking detail, imposing strict procedural and substantive limits on its operations. Surprisingly, the agreements hardly provide for interaction between the two bodies. UNMEE had been deployed for almost five months by the time the December Agreement was concluded, yet the Agreement provides no details on the collaboration between the peacekeeping mission and the Boundary Commission or for their relationship to the Claims Commission.¹²³ These bodies considered themselves to play discrete roles in the peace process, independent from one another. The conflicting parties, however, were well aware of the interdependence of the bodies and used opposition to UNMEE to display their disagreement with the conduct of the Boundary Commission and vice versa.

With respect to the work of the Boundary Commission, the parties clearly envisaged a swift and technical procedure. For this reason, they bundled delimitation and demarcation tasks in one body.¹²⁴ The process was deliberately not open-ended – a

¹¹⁸ Zondi and Réjouis, *supra* note 113, at 76–77.

¹¹⁹ Eritrea–Ethiopia Claims Commission, *Jus Ad Bellum*, Ethiopia’s Claims 1–8, Partial Award, 19 December 2005, reprinted in UNRIIA, vol. 26, at 457. The Claims Commission further alienated Eritrea by finding that it had started the war in 1998, in violation of international law.

¹²⁰ For an extensive critique of the Claims Commission’s decision and reasoning, see Gray, *supra* note 79, at 710–713, 720–721.

¹²¹ Zondi and Réjouis, *supra* note 113, at 74.

¹²² June Agreement, *supra* note 71, at operative para. 5.

¹²³ December Agreement, *supra* note 72, Art. 4(16).

¹²⁴ For criticism of this bundling, see Shaw, *supra* note 81, at 794.

short time frame was deemed necessary to lock in the parties' consent to a fragile peace arrangement. In hindsight, however, the hasty move to a delimitation decision has been criticized for leaving the parties insufficient opportunity to plead their case and for political dust to settle.¹²⁵ The judicialization of the process, so soon after the end of the fighting, created a deadlock with both countries stuck in their original positions. Eritrea and Ethiopia each demanded that the other party move first. The international community, through the Boundary Commission and UNMEE, failed to break the impasse.

Nor was the process open-textured. The text of the December Agreement left the Boundary Commission little discretion, particularly as it ruled out decisions *ex aequo et bono*. Moreover, the Agreement did not explicitly authorize the Commission to modify the boundary line during the demarcation phase. Applying various legal methods, the Commission attempted to maintain a certain degree of flexibility, yet this attempt led to opposition by Ethiopia and created disagreements when it came to the demarcation phase. In turn, the rigidity of the process allowed Eritrea to treat the delimitation phase as a discrete chapter in the peace process and caused it to strike back at any effort that it perceived to threaten the discrete character of the Commission's decision. In sum, while the institutional bundling of the delimitation and demarcation tasks should have underlined the relational nature of the boundary settlement process, the Commission's limited substantive discretion and its relative isolation from other international actors prevented it from benefiting from the combination of its powers. As a result, its work failed to support a durable and peaceful outcome.

5 Case Study: The Abyei Arbitration – a Tragedy in Two Acts

Lastly, this section turns to the Abyei arbitration – a legal success that failed to suppress a recurrence of violence. In this case, it was not the tribunal but, rather, the parties that manipulated legal rules and procedures to get their way.

A *The Dispute*

As one Sudanese proverb puts it, Abyei is the eye of the Sudans – it is so small but has seen so much.¹²⁶ This tiny pocket of land has traditionally served as a crossroads where Arab nomads, the Misseriya, drive their cattle through the lands of the Ngok Dinka, Abyei's sedentary pastoralists. Situated on a confluence of the Bahr-el-Arab, a tributary of the Nile, its clay plains and water make it critical to the survival of both tribes and a strategic bridge where northern Islamic culture intermingles with the

¹²⁵ Pratt, 'A Terminal Crisis? Examining the Breakdown of the Eritrea-Ethiopia Boundary Dispute Resolution Process', 23 *Conflict Management and Peace Science* (2006) 329, at 335–336. See also Shaw, *supra* note 81, at 794; Zondi and Réjouis, *supra* note 113, at 77.

¹²⁶ E. Deng, *Frontiers of Unity: An Experiment in Afro-Arab Cooperation* (2009), at 5.

Animist south.¹²⁷ To add to its complexities, Abyei proved rich in oil. Until the mid-twentieth century, the Misseriya and Ngok Dinka coexisted peacefully.¹²⁸ Yet Abyei has been the subject of some of the most violent episodes of the forty years of civil war that resulted in the secession of South Sudan on 9 July 2011.¹²⁹ Abyei remained a major point of contention when, on 9 January 2005, the government of Sudan (GoS) and the Sudanese People's Liberation Movement/Army (SPLM/A) signed a Comprehensive Peace Agreement (CPA).¹³⁰ The CPA's Abyei Protocol accorded the area a special administrative status and provided for a referendum, in which the residents of Abyei were to decide whether to align themselves with the Sudan (the 'North') or southern Sudan (the 'South'). This left the urgent task of setting the boundaries of the Area – a prerequisite to voter registration, oil revenue sharing and the fulfilment of the CPA at large.

B *The Arbitration*

1 *Abyei Boundaries Commission*

The CPA made no reference to arbitration as a means to settle the boundary dispute over Abyei. Instead, the Abyei Protocol called for an Abyei Boundaries Commission (ABC) to 'define and demarcate' the Abyei Area, described as 'the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905'.¹³¹ Each party appointed five members to the ABC, who were joined by five 'impartial experts', appointed by the Intergovernmental Authority for Development (IGAD), the USA and the United Kingdom.¹³² None of the experts were international lawyers.¹³³ The ABC as a whole was to listen to the people of the Abyei Area and to representatives of the parties, while the experts were mandated to conduct archival studies to ground their decision in 'scientific analysis and research'. As Article 5 of the Abyei Appendix emphasized, the ABC was to present its findings to the presidency of Sudan, but only the report of the experts was final and binding.¹³⁴

¹²⁷ Abyei Protocol, 26 May 2004, part of the Comprehensive Peace Agreement between the Government of the Republic of Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army (CPA), 9 January 2005, available at unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf (last accessed 4 October 2013). Art. 1.1.1. describes Abyei as 'a bridge between the north and the south, linking the people of Sudan.' See note 141 in this article.

¹²⁸ Concordis International, 'More Than a Line: Sudan's North-South Border', September 2010, available at concordis-international.org/wp-content/uploads/pdf/MoreThanALine2010Report.pdf (last visited 4 October 2013) at 51.

¹²⁹ See Johnson, 'Why Abyei Matters: The Breaking Point of Sudan's Comprehensive Peace Agreement?', 107 *African Affairs* (2008) 1, at 5–7.

¹³⁰ CPA, *supra* note 127. The CPA consists of six agreements, annexes and appendices, including the Abyei Protocol (at 63) and the Abyei Appendix (at 217).

¹³¹ Abyei Protocol, *supra* note 127, Arts 1.1.2, 5.1; Abyei Appendix, *supra* note 130, Art. 1.

¹³² Abyei Appendix, *supra* note 130, Art. 2.

¹³³ The experts consisted of Ambassador Donald Petterson (USA appointed), Kassahun Berhanu (Intergovernmental Authority for Development (IGAD)), Sharack B.O. Gutto, Douglas H. Johnson (UK) and Godfrey Muriuki (IGAD).

¹³⁴ See also Johnson, *supra* note 129, at 9. Only the experts signed the final decision by the ABC.

As the ABC could not find a conclusive map showing the area inhabited by the Ngok Dinka in 1905, it relied on 'relevant historical material'¹³⁵ to find that the northern section of the nine Ngok Dinka chiefdoms intersected with territory where the Misseriya had grazing rights. It ultimately decided to draw the boundary line through the middle of this shared rights area. At the same time, the experts stressed that this was to be considered as a 'soft' boundary, which should neither function as a barrier to the interaction between the different communities nor affect traditional grazing patterns.¹³⁶

On presentation of the ABC's report, disagreement arose over its implementation. While the SPLM/A supported its findings, the GoS claimed that the experts had exceeded their mandate and rejected the report. As the report was to be final and binding, no provisions had been made for its revision or appeal.¹³⁷ Tensions rose, and Abyei was once again hit by violence, which escalated in May 2008.¹³⁸

2 *The Abyei Arbitration*

Following the renewed fighting in Abyei, the parties committed themselves to settle the dispute over Abyei through arbitration.¹³⁹ A detailed Arbitration Agreement provided for a five-member Tribunal that was to issue its final award within a maximum of nine months from the commencement of proceedings.¹⁴⁰ It specified the applicable law as the provisions of the CPA, the Interim National Constitution of Sudan (2005) and the 'general principles of law and practices as the Tribunal may determine to be relevant'.¹⁴¹ The Tribunal concluded that, given the parties' choice of forum and arbitrators, this included public international law.¹⁴² The Agreement also provided for a highly transparent process: the oral proceedings were open to the media, and the written submissions, together with the final award, were made publicly available.¹⁴³

¹³⁵ Abyei Boundaries Commission Report, 14 July 2005, Part I, at 4, available at www.sudantribune.com/IMG/pdf/Abey_boundary_com_report-1.pdf (last accessed 4 October 2013).

¹³⁶ *Ibid.*

¹³⁷ For a discussion, see Böckenförde, 'The Abyei Award: Fitting a Diplomatic Square Peg into a Legal Round Hole', 23 *LJIL* (2010) 555.

¹³⁸ See Human Rights Watch, 'Abandoning Abyei: Destruction and Displacement, May 2008', July 2008, available at www.hrw.org/sites/default/files/reports/sudan0708_1.pdf (last visited 4 October 2013).

¹³⁹ The Road Map for Return of IDPs and Implementation of the Abyei Protocol, 8 June 2008, available at unmis.unmissions.org/Portals/UNMIS/2008Docs/Abyei%20Roadmap.pdf (last visited 4 October 2013).

¹⁴⁰ Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area (Arbitration Agreement), 7 July 2008, Arts 4 and 5, available at pca-cpa.org/upload/files/Abyei%20Arbitration%20Agreement.pdf (accessed 4 October 2013). The government of Sudan appointed Judge Awn Al-Khasawneh and Gerhard Hafner and the Sudanese People's Liberation Movement/Army (SPLM/A) selected W. Michael Reismann and Judge Stephen M. Schwebel as their arbitrators. Together, the parties settled on Pierre-Marie Dupuy as the presiding arbitrator. All arbitrators were distinguished international lawyers.

¹⁴¹ *Ibid.*, Art. 3.1.

¹⁴² *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* (Final Award), 22 July 2009, 48 *ILM* 1245 (2009), paras 425–435.

¹⁴³ Arbitration Agreement, *supra* note 140, Arts 8(6) and 9(3). See also Daly, 'The Abyei Arbitration: Procedural Aspects of an Intra-State Border Arbitration', 23 *LJIL* (2010) 801, at 819–820; Baetens and Yotova, 'The Abyei Arbitration: A Model Procedure for Intra-State Dispute Settlement in Resource-Rich Conflict Areas?', 3(1) *Goettingen Journal of International Law* (2011) 417, at 434–435.

It is important to stress that the Tribunal's first task was not to delimit the Abyei Area but, rather, to review 'whether or not the ABC Experts had ... exceeded their mandate'.¹⁴⁴ The GoS argued that the experts should not have applied a 'tribal' interpretation of their mandate, in examining the consequences of the transfer of the Ngok Dinka people but, instead, should have interpreted their mandate 'territorially', focusing exclusively on the transfer of the land. It claimed that this was the only 'correct' interpretation and that the Tribunal had to strike out any of the expert's findings that deviated from it. The Tribunal disagreed. Adopting the line of the SPLM/A, it held that it could only review the 'reasonableness' of the experts' findings. Given the historical context and the lack of detailed documentation on the 1905 transfer, it concluded that the experts' interpretation of their mandate had indeed been reasonable.¹⁴⁵ However, it distinguished the interpretation from the implementation of the ABC mandate.¹⁴⁶ The Tribunal found that, as a matter of international law, the experts had failed to state clear reasons for the delimitation of the northern boundary in the shared rights area as well as for the eastern and western boundaries.¹⁴⁷ Consequently, the Tribunal replaced the experts' findings with regard to these boundaries with its own delimitation. While it adopted the experts' 'tribal' approach, it engaged in a *de novo* review of the evidence.¹⁴⁸ Like the experts, the Tribunal emphasized that the new delimitation should not affect the traditional grazing rights of the Ngok Dinka and the Misseriya.¹⁴⁹

3 *The Final Award and Its Implementation*

By partly setting aside the experts' report, the Tribunal significantly reduced the territory of the Abyei Area. It drew the northern boundary of Abyei south of the shared rights area and excluded several oil fields to the east of the territory. While delimiting a firm boundary, it left unaddressed some of the most controversial issues, including who was to vote in the Abyei referendum. One of the arbitrators appointed by the GoS appended a strongly worded dissenting opinion to the decision. The dissenter, Judge Al-Khasawneh, criticized virtually all aspects of the boundary settlement process, reserving his most pointed critique for the allegedly formalist attitude of the Tribunal: '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.' He added that 'defensible compromises may sometimes bring more acceptable, more durable and indeed fairer solutions'.¹⁵⁰ In his view, the final award, 'failed utterly to take the rights of the Misseriya into consideration'. Despite this dissent, both the GoS and the SPLM/A formally accepted the final award and expressed their commitment to its

¹⁴⁴ Arbitration Agreement, *supra* note 140, Art. 2(a).

¹⁴⁵ Final Award, *supra* note 142, paras 616–659, 665–672.

¹⁴⁶ *Ibid.*, para. 511.

¹⁴⁷ *Ibid.*, paras 518–536, 673–709.

¹⁴⁸ *Ibid.*, paras 398, 710–747.

¹⁴⁹ *Ibid.*, paras 748–766.

¹⁵⁰ *Ibid.*, at paras 202–203 (dissenting opinion of Judge Awn Shawkat Al-Khasawneh).

implementation.¹⁵¹ To support its implementation, the UN Security Council requested the UN Mission in the Sudan (UNMIS) to assist with the demarcation efforts ‘within its current mandate and capabilities’.¹⁵²

Soon after the award was delivered, the Misseriya chiefs protested the decision, arguing that their interests had been ignored.¹⁵³ When the demarcation team attempted to lay pylons along the northern part of the award line in 2010, the Misseriya threatened violence.¹⁵⁴ UNMIS, which was merely authorized to provide technical and logistical support, was unable to provide protection. As implementation efforts halted, the strategic parties remained deadlocked over how the demarcation should unfold. This deadlock, as well as the inability to mutually agree on who should be defined a resident of the Abyei Area, meant that the Abyei referendum was indefinitely postponed. Tensions escalated.¹⁵⁵ In May 2011, a skirmish erupted between SPLM/A soldiers and the Sudan Armed Forces (SAF), resulting in the SAF’s occupation of the Abyei Area. Abyei Town was burnt to the ground, and more than 100,000 inhabitants fled.¹⁵⁶ On 28 June 2011, the parties signed a new peace agreement, which provided for a new interim administration for the area.¹⁵⁷ In the days after, the UN Security Council mandated deployment of the Ethiopian-led UN Interim Security Force for Abyei (UNISEA).¹⁵⁸ As of January 2015, UNISEA remained entrenched, presiding over a tense truce.¹⁵⁹

C Consent Management Dynamics

1 Consent by Whom?

At face value, the Abyei arbitration presents an exemplary model for engagement of actors at the strategic and tactical level. Justifiably, it has been heralded a legal success story. Both the GoS and the SPLM/A cooperated with the tribunal throughout the proceedings. In spite of their long history of civil war, the delegates treated each other at an individual level with remarkable civility. They mingled openly in the grounds of the Peace Palace, publically took tea together and ventured freely into each other’s party rooms – and, according to some accounts, helped themselves to each other’s

¹⁵¹ Joint Statement by the National Congress Party and the Sudan People’s Liberation Movement Announcing Their Firm Commitment to Implement the Abyei Arbitration Decision, 22 July 2009, available at www.southsudanembassydc.org/PressRelease_Archivedetails.asp?artId=5D58#sthash.TD0E1WNi.dpbs (last visited 4 October 2013).

¹⁵² SC Res. 1919 (2010).

¹⁵³ Report of the Secretary-General, UN Doc. S/2010/528, 14 October 2010, para. 11.

¹⁵⁴ Concordis International, *supra* note 128, at 54–55.

¹⁵⁵ Special Report of the Secretary-General on the Sudan, UN Doc. S/2011/314, 17 May 2011, paras 17–19.

¹⁵⁶ Report of the Secretary-General on the Situation in Abyei, UN Doc. S/2011/451, 26 July 2011, paras 4–5.

¹⁵⁷ Agreement between the Government of the Republic of Sudan and the Sudan People’s Liberation Movement on Temporary Arrangements for the Administration and Security of the Abyei Area, 20 June 2011, available at reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_1449.pdf (last visited 12 October 2013).

¹⁵⁸ SC Res. 1990 (2011).

¹⁵⁹ Report of the Secretary-General on the Situation in Abyei, UN Doc. S/2014/862, 1 December 2014, para. 2–7.

biscuits. Furthermore, the parties at the strategic level actively promoted the openness of proceedings, setting the ‘high-water mark of transparency in international arbitration’.¹⁶⁰ This drive for transparency established conditions for unprecedented outreach to players at the tactical level. Anyone could access the arbitration’s documents online, the proceedings were broadcast live and they have been made permanently available on the PCA website. This was supplemented by public information campaigns on the ground.¹⁶¹

In light of all of these efforts, how could tactical players be allowed to spoil the implementation of the award? It has been rumoured that Misseriya’s objections flowed from allegations propagated by the GoS – and perhaps reinforced by the dissenting arbitrator – that the award was a conspiracy deliberately designed to undermine their livelihoods and that a soft border could never be put into practice. According to this reading, the GoS expressed disingenuous consent at the strategic level while seeking to spoil the award, using the Misseriya as a proxy at the tactical level. Whether this is true or not, UNMIS’s inability to stand up to the Misseriya stifled demarcation efforts and allowed the region to plunge back into violence. The situation became only more complex when UNMIS was disbanded following South Sudan’s independence on 9 July 2011, as the GoS refused to allow new peacekeepers into its territory.¹⁶² Yet even if UNMIS had acted forcefully, it would have only further alienated the Misseriya from the peace process. Lack of control over these tactical players eventually spoiled the award.

2 *Consent to What?*

At first impression, the Abyei arbitration seems to bring together all of the ingredients for a relational arrangement. The Tribunal decided swiftly and rendered a balanced award, and, at the award ceremony, the parties made a point of speaking and accepting the award before it had been officially delivered.¹⁶³ Why, then, did these exemplary legal proceedings, backed by apparent political will, fail to deflect an escalation of violence?

The first thing to remember is that arbitration was never envisioned in the CPA negotiations. The CPA foresaw final settlement of the boundary by the ABC to pave the way for the Abyei referendum. The ABC was uniquely suited to produce a relational outcome. It consulted with local people and government officials; conducted historical research and accommodated local conditions by adopting a ‘tribal approach’ and

¹⁶⁰ Daly, *supra* note 143, at 819–820. See also V. Lowe and A. Tzanakopoulos, *Introduction to the Abyei Arbitration (The Government of Sudan/The Sudan People’s Liberation Movement/Army): Final Award of 2009* (2012), at 25–26.

¹⁶¹ One of the authors experienced the effectiveness of these public information campaigns through conversations she had with the inhabitants of Noong village and Mijak payam in the Abyei Area in July 2010. People of all ages showed an awareness and understanding of the proceedings and final award, in spite of the low literacy levels and remoteness of Abyei Town.

¹⁶² The UN Security Council established the UN Mission in South Sudan on 8 July 2011, but this mission only operates on the territory of South Sudan. See SC Res. 1996 (2011).

¹⁶³ Baetens and Yotova, *supra* note 143, at 442.

proposing a 'soft' border. The arbitration tribunal was careful not to refute the substance of the ABC's conclusions but, rather, to find procedural grounds to alter the delimitation. Still, its mere existence signalled a failure of the CPA. By rejecting the ABC report and commencing international arbitration, the strategic players indefinitely delayed the referendum. A delimitation that should have been a small step in a larger peace process became a major obstacle on the road to peace.

The short time frame of the arbitration proceedings may have adversely affected the Tribunal's ability to arrive at an open-ended arrangement. On the one hand, quick proceedings were meant to prevent a relapse to violence on the ground. Swift action maintained the momentum of the parties' commitment throughout the arbitration process, ensuring explicit expression of political will to implement the award when it was issued. On the other hand, the short time frame forced the Tribunal to devote all of its attention and resources to the delimitation, leaving no time to consider the wider issues at hand. Yet disagreements over delimitation merely disguised deeper division over Abyei's destiny. The Tribunal might have anticipated some of the issues that eventually blocked implementation of its award, such as voting rights in the Abyei referendum. To do so, however, it needed time that it did not have. In the end, the Tribunal's final award resolved a discrete dispute but failed to establish a relational arrangement.

Another factor may be the open-ended nature of the Sudanese negotiating culture itself. Some mediators and scholars point out that, partly due to the duration of the Sudanese civil wars, both parties have struggled to make long-term commitments, and agreements are shaped by 'tactics but no strategy'. In the words of Alex de Waal, negotiations consist of 'political bargaining using violence' – while expressing 'remarkable civility' at the negotiating table, strategic players continue to attack each other's positions at the tactical level as they seek to alter the price of political loyalty.¹⁶⁴ This analysis helps explain why the work of the ABC – formally agreed to during the CPA negotiations – was undermined and how the arbitration – unforeseen in the CPA but conducted in an exemplary fashion – failed to deliver peace in practice. When the 'rules of the game' bar relational arrangements, political promises always retain a discrete character; agreements are expected to be spoiled as part of the normal course of political relations. In the case of Abyei, the strategic players used arbitration to postpone final settlement of the boundary in order to stall the referendum and the peace process as a whole – the proceedings became just an expensive way to buy time.

6 Conclusion

The three case studies demonstrate that every peace process and arbitration has its own dynamic. However, in all of these cases, success or failure turned on the same question: who consented to what? When we plot them in our model, we can compare consent management dynamics across these cases (see [Figure 4](#)).

¹⁶⁴ de Waal, 'Mission without End? Peacekeeping in the African Political Marketplace', 85(1) *International Affairs* (2009) 99, at 105.

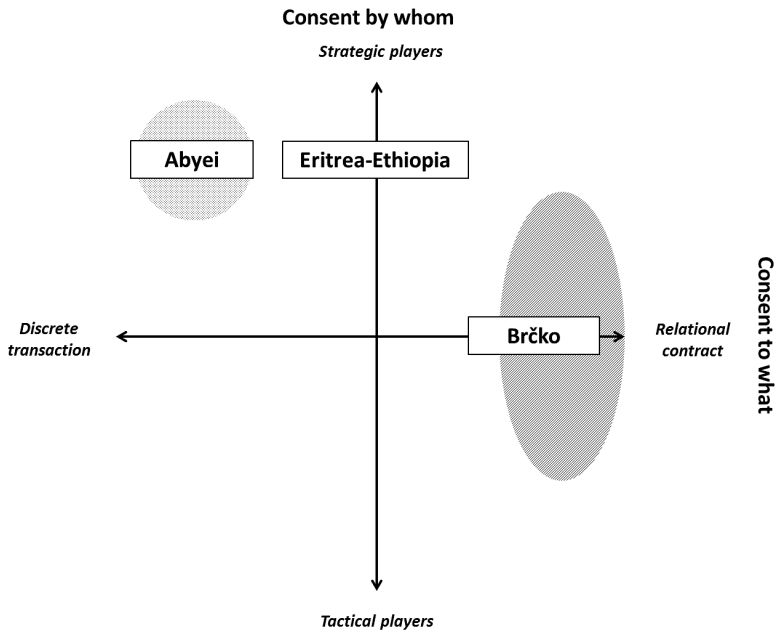


Figure 4: Comparing Cases in the Consent Management Model

Viewed through our model, the Brčko Tribunal was quite successful in bridging the gap between the formal criteria for consent to arbitration and the requirements of consent for enduring peace. On the one hand, it manipulated procedural and substantive rules to arrive at a relational arrangement suited to both strategic and tactical players: the establishment of the autonomous district of Brčko. In our model, the Tribunal managed consent away from the north-western quadrant towards the eastern end of the model. On the other hand, the tight procedural and substantive constraints on the Eritrea–Ethiopia Boundary Commission prevented it from reaching a relational outcome. Tied to its strict mandate and deadline, the Commission could not adequately respond to conflict dynamics, while the parties were allowed to grant and withdraw their consent selectively. As a result, the Commission remained stuck in the northern section of our model. Finally, in the case of Abyei, both the ABC and the Tribunal failed to move the parties towards a relational arrangement. Instead, the parties were allowed to treat these procedures as discrete transactions between strategic players. Since the Tribunal could not prevent the manipulation of the tactical players and was unable to address the underlying issues, the situation of Abyei remains unresolved. It appears that the Tribunal’s final award has fallen into desuetude.

While each case presents its own complexities, a comparison through our model offers some explanations for the differences in outcome. Arbitration is by its very nature a malleable procedure, and our model provides insights into how it may be shaped to aid a peace process. On a procedural level, the case studies suggest that swift proceedings may hinder, rather than help, the overall peace process. The speed of the Eritrea–Ethiopia and Abyei proceedings placated the strategic players and the

international community but prevented the tribunals from nurturing a relational solution. Instead, the tribunals were rushed to a decision while emotions were still raw. In contrast, the Brčko Tribunal bided its time and observed, learned and adjusted its approach along the way. When it finally presented its ruling, the strategic and tactical players were ready to accept it.

On a substantive level, the case studies indicate that tribunals require flexible mandates to move across the consent management spectrum. The success of the Brčko arbitration was largely due to the Tribunal's broad construction of its powers. Not all tribunals enjoy such flexibility, however. When the Eritrea–Ethiopia and Abyei tribunals made modest attempts to give themselves some space, they faced challenges to the validity of their decisions. This is not merely a concern for arbitrators since consent management starts with the negotiation of the arbitration agreement. As the case studies demonstrate, arbitration in the context of a peace process is never a mere matter of law – it is politics by other means, and this should be reflected by the tribunals' mandates. Our model suggests that the more a tribunal's hands are tied, the less likely it is to reach a relational outcome.

Institutionally, our case studies point to the crucial link between the arbitration and implementation phase of a proceeding. Lack of coordination between these phases allows parties to undermine the peace process, as the cases of Eritrea–Ethiopia and Abyei exemplify. Not all situations will demand as radical a solution as was adopted by the Brčko Tribunal, which retained jurisdiction long after the final award had been rendered. Yet implementation considerations should inform the drafting of an arbitration agreement; the conduct of the tribunal throughout proceedings and the communication between the tribunal and third parties aiding implementation efforts, such as peacekeeping forces. In particular, a tribunal should take into account the role of tactical players in the dispute, who, while perhaps not represented during the arbitration, may spoil the implementation phase.

From an international perspective, external pressure and the presence of foreign forces naturally affect consent management dynamics. However, our case studies suggest that this factor cannot be taken in isolation. Arbitration and its aftermath shape parties' perception of foreign military intervention as much as foreign military intervention shapes consent to arbitration. Any foreign involvement requires a certain level of consent from the parties. Otherwise, foreign powers risk becoming a party to the conflict themselves. Foreign military intervention may bring parties together, as in Brčko, but it may also alienate them from the process. When Eritrea lost confidence in the impartiality of third parties, it refused all cooperation and effectively forced UNMEE out. In Abyei, the Misseriya threatened violence against UNMIS when they considered it to act against their interests. Force may be usefully deployed to deter tactical players from spoiling a peace process but not to impose an open-ended arrangement upon parties.

In sum, our model suggests that the success or failure of arbitration in a complex peace process comes down to the ability of the arbitrators to arrive at a relational arrangement that accommodates both strategic and tactical players. The case studies tell us that arbitration does not lock in the consent of the parties – it is merely one

way to manage it in a broader peace process. To achieve a peaceful outcome, it is not enough for parties to offer initial consent to arbitration; tribunals need to maintain the consent of the parties throughout the arbitration process and the implementation phase of the award. Even when a tribunal may seem to play only a discrete role at the strategic level of a peace process, it must always aim for a relational arrangement that respects the interests of strategic and tactical players. In terms of the model, it must find a way to move a dispute from the north-western quadrant to the mid-eastern section. To do so, our case studies indicate that arbitrators must be allowed to interpret their mandates in light of the conflict dynamics on the ground. This will affect how tribunals organize their proceedings; when they deliver their award; how they interpret the applicable law and what measures they take for the implementation of their decision.

Finally, the model suggests that arbitration may not always be the best way to resolve a political conflict. Legal dispute settlement risks creating winners and losers, exacerbating tensions rather than alleviating them. As we saw in the case of Eritrea–Ethiopia, sometimes parties are simply not ready to submit their dispute to arbitration, and the proceedings may make matters worse. From the Abyei example, we learn that strategic players may use arbitration to undermine a broader peace process. In these instances, however, the arbitration is conducted and, whatever strategies the tribunal uses to manage consent, prospects for peace remain arbitrary.