



# **African Border Dispute Settlement**

The User's Guide



African Union Border Programme (AUBP)

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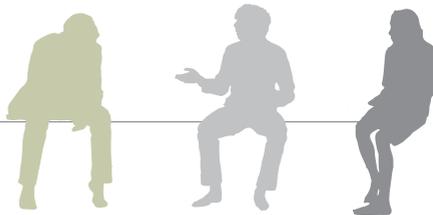
# **African Border Dispute Settlement**

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## Acknowledgement



This User's Guide is the result of the combined effort by a great number of actors with heterogeneous professional backgrounds. The document was prepared with input from a team of experts from the African Union Member States and edited by H.E. Judge Abdul G. Koroma, Judge of the International Court of Justice, and legal expert Naomi Briercliffe.

Upon completion of a first draft, the African Union Border Programme (AUBP) invited comments from experts that were integrated into the draft. Under the overall guidance and leadership of H.E. Judge Abdul G. Koroma, the Guidebook was validated during a second workshop held in May 2015 in Addis Ababa, Ethiopia, where final editorial comments were received.

# Table of Contents

Acknowledgement .....	4
List of Abbreviations .....	6
Foreword by Ambassador Smail Chergui .....	7
An Overview of the African Union Border Programme by Ambassador Aguibou Diarrah .....	9
I. Introduction .....	14
II. Aims and Objectives of the Guidebook .....	16
III. Boundary Disputes in Africa .....	18
A. Definition of a Boundary Dispute .....	18
B. Causes and Different Types of Boundary Disputes in Africa .....	19
Case Study: Boundary Dispute between Burkina Faso and Mali .....	21
C. The Relevance of Maps .....	22
IV. Mechanisms for the Settlement of Border Disputes between African States .....	25
A. Principle of the Free Choice of Means .....	25
B. Role of the African Union and the United Nations Security Council in Boundary Dispute Settlement .....	26
1 The African Union .....	27
2 The UN Security Council .....	28
Case Study: Ethiopia / Eritrea .....	28
C. Negotiation .....	30
1 What is it? .....	30
2 Advantages .....	31
3 Limitations .....	33
4 Other Considerations .....	34
Case Studies: The Role of Negotiation .....	35
D. Diplomatic Methods of Dispute Resolution .....	36
1 Mediation .....	37
Case Study: the Algeria / Morocco Border Dispute of 1962 .....	39
2 Good Offices .....	40
3 Inquiry .....	40
4 Conciliation .....	41
Case Study: African Union Team of Experts on the South Sudan and Sudan border .....	43
E. Judicial Methods of Dispute Resolution .....	43
1 The International Court of Justice .....	44
2 Arbitration .....	49
3 Dispute Resolution under the United Nations Convention on the Law of the Sea (UNCLOS) .....	54
Conclusion by El Ghassim Wane: A Combination of Mechanisms for Dispute Resolution .....	58
Annexes .....	60
Annex I: The International Court of Justice (ICJ) .....	61
Annex II: Arbitration .....	76
Annex III: Achievements of the AUBP .....	80
Annex IV: Overview of Procedures .....	83

## List of Abbreviations

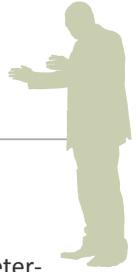
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- AU** >>> African Union
- AUBIS** >>> African Union Border Information System
- AUBP** >>> African Union Border Programme
- OAU** >>> Organisation of African Unity
- AUTE** >>> African Union Team of Experts
- GIZ** >>> Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH
- ICJ** >>> International Court of Justice
- IGN** >>> *Institut Géographique National* (National Geographic Institute, France)
- ITLOS** >>> International Tribunal of the Law of the Sea
- PCA** >>> Permanent Court of Arbitration
- REC** >>> Regional Economic Community
- UNCLOS** >>> United Nations Law of the Sea
- UN** >>> United Nations

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## Foreword by Ambassador Smail Chergui

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Borders, which constitute a core security interest of the State, determine the extent of the geographical area under the exclusive jurisdiction of a State.

The absence of clearly defined territorial control and the ill management of border zones favour the eruption of grave disputes, especially when the said entities are rich in natural resources, which are subjected to conflicting claims.

It is in acknowledgement of this issue that the Declaration<sup>1</sup> for the creation of the AUBP was adopted by the African Ministers' Conference on Border Issues in Addis Ababa, Ethiopia, on 7th June 2007. The AU Commission has thus recognised the extreme sensitivity of border issues, which are recurrent sources of disputes on the African continent. Moreover, it recognises that these disputes have taken an important toll on human lives and constitute an obstacle to socio-economic development. Tackling these issues is an essential component of the collective effort to pacify the continent.

AUBP's activities serve the vision of a united and integrated Africa with peaceful, open and prosperous borders. The Programme, which rests on the principle of subsidiarity, aims to encourage and assist AU Member States to delimitate and demarcate their land and maritime borders in order to prevent the occurrence of tensions and disputes. The Programme also aims to promote State borders as bridges through cross-border cooperation. In this regard, the AU Convention on Cross-Border Cooperation (Niamey Convention), which promotes the peaceful settlement of disputes, has recently been adopted and submitted to the Member States for ratification.<sup>2</sup>

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<sup>1</sup> 'Declaration on the African Union Border Programme and its Implementation Modalities' as adopted by the Conference of African Ministers in Charge of Border Issues, Addis Ababa, Ethiopia, 4-7 June 2007, *BP/MIN/DECL. (II)*.

<sup>2</sup> Niamey Convention. *Ex.CL/726 (XXI), Annex III, 17 May 2012, Article 13(1) and 13(2)*.

The structural prevention of disputes is one of the central axes of the AUBP's activities; the publication of this Guidebook is fully part of this dynamic. In accordance with the spirit of the Constitutive Act of the AU, the AUBP has published this Guidebook in order to assist Member States to evaluate the tools at their disposal to peacefully settle their border disputes. As has been seen in recent history, the imprecision of international borders that were inherited from colonisation has often been the source of violent conflicts in Africa. However, let it be emphasised that the obligation to observe the interdiction of the use of force and the obligation to peacefully solve conflicts are essential components of international and continental law. These principles have been enshrined in the UN Charter [Art.2 (3) and 33(1)] as well as in the Constitutive Act of the AU [Art4 (f)].<sup>3</sup> These obligations are corollaries of the unlawfulness of the use of force as established in the UN Charter. Therefore, the signatories of these legal instruments should resort to the various peaceful mechanisms of dispute resolution.

This document has a practical purpose, and is addressed to national decision makers in charge of border issues. We expect this Guidebook to contribute to the collective effort to prevent violent border disputes by promoting awareness of judicial and non-judicial dispute settlement methods as defined by the UN Charter and the AU Constitutive Act. Each of these dispute resolution mechanisms is presented in the chapters of this Guidebook with case studies to illustrate their advantages and disadvantages, their costs and implementation timeframes. In conformity with the States' sovereignty, the authors have scrupulously avoided to explicitly influence the decision makers' choice of dispute settlement mechanisms.

The AU Commission, through the Peace and Security department, hopes that the publication of this AUBP Guidebook will allow AU Member States to resolve their border disputes in a peaceful manner to the benefit of African peoples.

*Ambassador Smaïl Chergui  
Commissioner, Peace and Security  
African Union Commission*

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<sup>3</sup> AU Constitutive Act, Article 4 – *Principles: (f) prohibition of the use of force or threat to use force among Member States of the Union.*

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# An Overview of the African Union Border Programme by Ambassador Aguibou Diarrah

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## Introduction – Challenge of Border Issues in Africa

The issue of borders in Africa shows that imprecise delimitation and unfinished demarcation can result in friction, which can be prevented in future by engaging in the processes of the politics of delimitation, demarcation and reaffirmation of boundaries. Far from taking part in a Balkanisation of the continent, these tasks contribute to specifying the area of State sovereignty and reinforce the climate of mutual trust, which is essential for peaceful coexistence necessary for the implementation of dynamic cross-border cooperation across the continent. Good border management and the improvement of border regimes on the continent meet three imperatives. The first is geopolitical in nature and concerns maintaining peace, security and stability, resulting in the prevention of conflicts. The second imperative is geo-economic: a visible and effectively-managed border allows economic exchange, benefiting all parties. The third imperative is socio-economic as it helps to support local initiatives originating from the commitment of neighbouring communities. Boundaries constitute a vector of the continent's peace, security and integration. When functioning harmoniously, they take into account all relevant factors, including legal determinants and human realities on the ground, and operate in a spirit of promoting the values shared by the involved populations.

A well-demarcated and tension free boundary must be open to and promote non-detrimental trade flows. When State borders are understood as interfaces, they become resources for the intra-border populations. The modernisation of the infrastructure of inter-State relations and of border regimes can act as leverage for the consolidation of integrated regional areas, of which the border zones are cornerstones.

It is in light of this issue that the Declaration on the AUBP and the modalities of its implementation by the Conference of Ministers in Charge of Border Issues (BP/MIN/DECL. (II)) were adopted in Addis Ababa, Ethiopia, on 7 June 2007. This declaration was endorsed by the 11th Ordinary Session of the Executive Council of the AU, held in Accra

(Ghana) on 29 June 2007 (Decision EX.CL/Dec. 370 (XI)). Subsequently, in July 2010, the Council endorsed the work of the Second Conference of African Ministers in Charge of Border Issues, held in Addis Ababa on 25 March 2010 (Decision AUBP / EXP-MIN / 7 (II)). This declaration of the second Ministerial Conference covers the terms of continuation and acceleration of the implementation of the Programme. A third conference of African Ministers in Charge of Borders, held in Niamey (Niger) on 17 May 2012, adopted the AU Convention on Cross-border Cooperation (Niamey Convention), EX. CL / 726 (XXI).

## Political and Legal Foundations of the AUBP

The political instruments and legal foundations of the AUBP are the following:

- ▶ Charter of the Organisation of African Unity (OAU) from 1963, Paragraph 3 of the Article III: *“Respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence”*;
- ▶ Assembly of Heads of State and Government, Resolution AHG / Res.16 (I) on disputes between African States on the subject of borders (Principle of the inviolability of borders inherited at the time of independence), Cairo (Egypt) 17-21 July 1964;
- ▶ The 44th Ordinary Session of the Council of Ministers of the OAU, Resolution Cm / Res. 1069 (XLIV) on peace and security in Africa Resolution on peace and security in Africa through negotiated settlements of border disputes, Addis Ababa (Ethiopia), July 1986;
- ▶ Constitutive Act of the African Union (AU) reaffirming in its Article 4(b) the principle of *“respect of borders existing on achievement of independence”*, July 2000;
- ▶ Memorandum of Understanding on the Security, Stability, Development and Cooperation in Africa, adopted by the 38th Ordinary Session of the Assembly of Heads of State and Government, Durban (South Africa) in July 2002;
- ▶ Declaration on the African Union Border Programme (AUBP) including the modalities of its implementation, adopted by the Conference of African Ministers in Charge of Border Issues BP / MIN / DECL. (II), on 7 June 2007 in Addis Ababa (Ethiopia); endorsed by the 11th Ordinary Session of the Executive Council, 25 until 29 June 2007 in Accra (Ghana) DOC EX.CL / 352 (XI);

- ▶ Declaration on the African Union Border Programme by the African Ministers in Charge of Border Issues AUBP / EXP-MIN / 7(II), made in Addis Ababa (Ethiopia) on 25 March 2010. This declaration covers the terms of continuation and acceleration of the implementation of the Programme;
- ▶ Declaration on the African Union Border Programme adopted by the 3rd Conference of African Ministers in Charge of Border Issues AUBP / EXP-MIN / 7(5), held in Niamey (Niger) on 17 May 2012. This declaration led to the adoption of the African Union Convention on Cross border Cooperation (Niamey Convention).

Nearly six decades of work on the declarations cited above resulted in capturing a vision of the AUBP's overarching goal – that of a “united and integrated Africa with peaceful, open and prosperous borders.” The AUBP contributes to structural conflict prevention through delimitation and demarcation of borders. For this purpose, it is based in the Department for Peace and Security, in the Conflict Prevention and Early Warning Division. It also provides a platform for negotiated resolution of border disputes and the promotion of regional and continental integration through dynamic cross-border cooperation. The African Union Border Programme is therefore both the product and an integral part of the African Union's architecture for the structural prevention of conflicts.

## **Strategic Objectives and Missions of the AUBP**

The first major sector of activities of the African Union Border Programme is the assistance to Member States of the AU for the delimitation and demarcation as well as the reaffirmation of all African borders by 2017, in accordance with the decision taken by the 17th Ordinary Session of the AU Assembly, held from 30 June to 1 July 2011 in Malabo (Equatorial Guinea): Assembly / AU / Dec.369 (XVII). The delimitation and demarcation of borders are essential operations for peace and security, and essential conditions for stability, development and African integration.

To allow for familiarisation with certain technical terms, it seems appropriate to define relevant concepts relating to the process of determining the boundary line.

What is delimitation? This is a legal process sanctioned by a treaty, convention or other legal instrument by which two sovereign nations establish and describe in writing the location of their common border on a given map. It is a complex process based on political will and mutual confidence. The determination of the precise boundaries of the territory of a State is more than a technical or legal exercise. Once a favourable climate is established and once political support is acquired in all steps of the process, it is for the legal and technical experts (administrators, cartographers, surveyors, hydrographers, engineers, lawyers and ordinary workers) to conduct the demarcation process.

What is demarcation? This is the technical operation aimed at making the boundary shown on a delimitation map visible on the ground. This exercise involves the construction of boundary pillars between two adjacent States, in accordance work carried out by a mixed joint demarcation commission.

What is reaffirmation/densification? Reaffirmation and densification are joint works taken on by the neighbouring States on border pillars along already-demarcated segments of the boundary line, often determined by the colonial power to make the boundary more clearly visible. Reaffirmation involves the resurveying and reconstruction of old pillars which have disappeared or have been displaced. Densification involves the erection of new pillars between more remotely spaced existing pillars.

Recognising that border pillars should not be barriers between States but rather bridges, the second component of the AUBP is based on promoting cross-border cooperation. The Commission, acting through the AUBP, assists and encourages African States to strengthen cross-border cooperation through local and large-scale initiatives.

Cross-border cooperation of local initiative, or proximity integration, involves the grassroots communities and mainly concerns the implementation of localised cross-border projects.

States generally initiate large-scale cross-border cooperation to jointly manage, for example, large river basins or other specific geographical areas. Examples include the Maputo Corridor<sup>4</sup>, the Nile Basin Initia-

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<sup>4</sup> Mozambique and South Africa.

tive<sup>5</sup>, and the Senegal River Basin Development Authority<sup>6</sup>. It is up to the AUBP, through cross-border cooperation, to transform the boundaries of States, oftentimes scars from colonial history, into trade areas for the benefit of communities living on both sides of the border.

Finally, the third component of AUBP regards capacity building. The aim is to develop the technical capacity of a competent staff responsible for conducting the delimitation and demarcation exercises and initiating cross-border cooperation projects. This includes, among other things, undertaking research and training workshops aimed at national authorities, universities and institutes.

## Conclusion

The adoption of the African Union Border Programme and the establishment of a unit-in-charge within the Peace and Security Department has enabled the African Union Commission to play its full role in the management of African borders. The AUBP Unit remains a tool in the service of all Member States to facilitate cross-border cooperation and the capacity building of staff in charge of border management. The AUBP remains a key player in the delimitation and demarcation of African borders that have not yet been defined. The fulfilment of the AUBP Unit's work plan is aimed at supporting the efforts of the AU Commission in terms of conflict prevention and continental integration.

*Ambassador Aguibou Diarra  
Head, African Union Border Programme  
African Union Commission*

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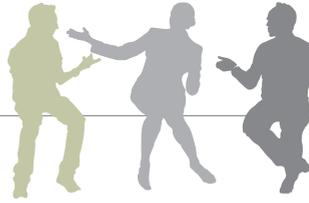
<sup>5</sup> Egypt, Sudan, Ethiopia, Uganda, Kenya, Tanzania, Burundi, Rwanda, the Democratic Republic of Congo (DRC), as well as Eritrea as an observer.

<sup>6</sup> Guinea, Mali, Mauritania, and Senegal.

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## I. Introduction

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The resolution of boundary disputes between African States has been on the agenda of the Organisation of African Unity (OAU) and its successor, the African Union, since their establishment in 1963 and 2002 respectively. One of the purposes of the OAU was to defend the independence and territorial integrity of its Member States. Accordingly, at its First Ordinary Session held in Cairo (Egypt) in 1964, the Assembly of Heads of State and Government of the OAU adopted Resolution AHG/16(1), which proclaimed respect for all existing boundaries acceded to at the time of independence, considering “that border problems constitute a grave and permanent factor of dissension”, and “that the borders of African States, on the day of their independence, constitute a tangible reality”. The Resolution also recognised the necessity of settling, by peaceful means and within a strictly African framework, all border disputes between African States. Thus, the twin principles of respect for existing boundaries and the peaceful settlement of disputes were enshrined in the African legal order.

However, the recognition of the principle of respect for existing boundaries did not result in the total elimination of boundary disputes between African States, nor could it have done because of realities on

the ground. In the first place, at the time of the adoption of the Cairo Resolution, many of the boundaries between the newly independent African States were not clearly delimited and/or demarcated. That lack of precise definition has been the cause of many serious disputes that have sometimes escalated into armed conflict. In other cases, it has prevented the development of normal relations between neighbouring States, impeding their socio-economic integration and the exploitation of natural resources in border areas. In addition, boundary disputes have often had a significant negative effect on population movement and cross-border trade.

It is against this background that the AU established the African Border Day on 7 June 2007 to commemorate the establishment of the AUBP for the specific objectives of:

- ▶ Supporting and facilitating the delimitation and demarcation of all land and maritime boundaries between African States by 2012<sup>7</sup> so that they may cease to be potential sources of disputes, tensions and crises;
- ▶ Reinforcing the integration process within the framework of the Regional Economic Communities (RECs);
- ▶ Developing local cross-border cooperation initiatives, both within the framework of RECs and other regional integration mechanisms; and
- ▶ Increasing and augmenting the capacity of Member States engaged in the delimitation and demarcation process.

The AUBP is also charged with assisting capacity development by publishing practical guides on African boundary delimitation and demarcation, including dispute resolution mechanisms pertaining to African boundaries. It is in the discharge of this function that this Guidebook is being issued, to assist African States by indicating the various mechanisms available for the peaceful resolution of territorial and boundary disputes. It is hoped that African States will use this Guidebook to examine the various peaceful dispute resolution processes available to them and to choose the process that best suits their needs, rather than resorting to non-peaceful means of settlement.

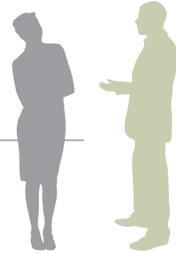
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<sup>7</sup> The deadline was later extended to 2017.

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## II. Aims and Objectives of the Guidebook

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As indicated in the title, this Guidebook presents African States with a summary of the mechanisms available to them for the peaceful resolution of boundary disputes. The objective is that, if States make use of those mechanisms, either individually or in combination, it will help to prevent armed conflicts or political tensions between them and enable them to comply with their international law obligations.

Robust evidence demonstrates that armed conflict and insecurity, as well as having a high human cost, act as obstacles to development.<sup>8</sup> Although the number of armed conflicts has decreased in the past two decades, the African Development Bank has stated that armed conflicts “have been the single most important determinant of poverty and human misery in Africa.”<sup>9</sup> As noted in the introduction, border disputes in particular can have a devastating impact on States’ economies. It is therefore in the interests of all States to ensure that their disputes, including boundary disputes, are resolved peacefully.

States are also obliged to seek the peaceful settlement of their disputes under international law. As the International Court of Justice has

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<sup>8</sup> World Bank (2011) *World Development Report 2011: Conflict, Security and Development* World Bank: Washington DC.

<sup>9</sup> African Development Bank (2013) MDG Report 2013: *Food security in Africa – Issues, challenges and lessons* African Development Bank, p. 4.

observed, it is a principle of international law that “the parties to any dispute, particularly any dispute the continuance of which is likely to endanger the maintenance of international peace and security, should seek a solution by peaceful means.”<sup>10</sup> That principle is reflected in numerous international treaties and other legal instruments, including the UN Charter. For example, Article 2(3) of the UN Charter requires that all UN Member States shall “settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”

Within the context of the African legal order, the Constitutive Act of the African Union states that one of the fundamental principles of the AU is “the peaceful resolution of conflicts among Member States of the Union...”<sup>11</sup> Under the protocol by which it was established in 2002, the Peace and Security Council of the African Union is mandated to ensure respect of that principle. AU Member States have also confirmed their commitment to the peaceful resolution of disputes directly in various AU conventions and declarations.<sup>12</sup> This principle is also included in the Niamey Convention of May 2012 under which the State parties confirmed that they would attempt to resolve all boundary disputes by direct negotiation and, failing that, by other peaceful means.<sup>13</sup> Examples of such means, as well as their advantages and disadvantages, are provided in this Guidebook.

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<sup>10</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States, Merits, Judgment, I.C.J. Reports 1986, p. 145.*

<sup>11</sup> Article 4(e) of the Constitutive Act of the African Union.

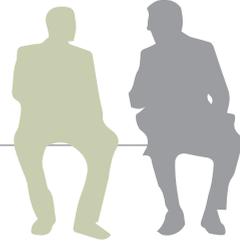
<sup>12</sup> See, for example, Second Declaration on the African Union Border Program and the Modalities for the Pursuit and Acceleration of its Implementation, Addis Ababa, 25 March 2010, Ex. CL/352(XI).

<sup>13</sup> African Union Convention on Cross-Border Cooperation (Niamey Convention) Ex. CL/726 (XXI), Annex III, 17 May 2012, Article 13(1) and 13(2).

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### III. Boundary Disputes in Africa

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#### A. Definition of a Boundary Dispute

A boundary dispute between States, simply defined, is a dispute between two (or more) States concerning the location of the line dividing their respective areas of sovereignty. Boundary disputes thus generally arise where the line between States is ill-defined. In Africa, for example, many boundary disputes have been caused because former colonial powers did not accurately or precisely delimit or demarcate the boundaries between adjacent colonies. Following decolonisation, unclear colonial boundaries became the inherited international boundaries between independent States, leading to uncertainty and, consequently, disputes about the limits of the exercise of sovereign power. The dispute between Burkina Faso and Niger over certain sections of their common border, which was decided by the International Court of Justice in 2013, is an example of such a dispute.

Boundary disputes are commonly distinguished from territorial disputes, i.e. disputes between two (or more) States regarding which State has sovereignty over a particular area of land, such as an island or parcel of territory. The distinction is not, however, always clear-cut. In some cases, disputes over sovereignty and disputes over boundaries are intertwined, or else one dispute may involve issues of both sovereignty and the location of a boundary. For example, the dispute between Cambodia and Thailand concerning sovereignty over a temple (the Temple of Preah Vihear), which came before the ICJ in 1959, also

involved an analysis of where the boundary between the two States was located.<sup>14</sup> Similarly, the dispute settled by the ICJ in 1999 between Botswana and Namibia concerning the correct alignment of the boundary in the Chobe River also impacted on the question of which State had sovereignty over Kaskili/Sedudu Island.

The dispute resolution mechanisms described in this Guidebook can be used to settle both boundary disputes and territorial disputes, as defined above. For the sake of readability, therefore, both types of dispute will be referred to using the term “boundary dispute” in the succeeding sections of the Guidebook.

## B. Causes and Different Types of Boundary Disputes in Africa

As noted above, in Africa, boundary disputes frequently have their origins in the colonial period. They are often the result of conflicting interpretations of often poorly defined boundaries, either between colonies belonging to separate colonial powers, or between colonies or administrative units belonging to the same colonial power.

At the first session of the Assembly of African Heads of State and Government in Cairo (Egypt) in 1964, the Conference declared that all member States of the OAU “solemnly ... pledge themselves to respect the frontiers existing on their achievement of national independence.”<sup>15</sup> That basic principle of international law on the respect for boundaries inherited from colonisation is known as *uti possidetis juris* (as one possessed, thus shall one rule), and has been adopted virtually unanimously by African States. As a result, in determining a boundary between States, to the extent that there has been any agreement on the location of the boundary subsequent to the dates of independence of the States concerned, the pertinent legal question is where the

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<sup>14</sup> Although the question of the location of the boundary was not put to the Court and, therefore, not determined.

<sup>15</sup> Resolution of the Assembly of Heads of State and Government Meeting in its First Ordinary Session in Cairo (AGH/Res 16(1)).

boundary was between the two States at the moment of independence.

In attempting to answer that question, three common causes for boundary disputes to arise between African States frequently include:

- ▶ First, a dispute may arise where two or more contesting descriptions or depictions of boundary alignments exist and boundaries have been defined, but the relevant States disagree on which boundary applies. The origin of this type of dispute is usually a situation in which two colonial powers each claimed and /or administered the same piece of oftentimes remote or inhospitable territory. Examples include the dispute between Chad and Libya over the Aouzou Strip and the dispute between Cameroon and Nigeria over the Bakassi Peninsula.
- ▶ Second, where States agree upon a certain boundary that has been defined or described, a dispute may still arise over the demarcation of that boundary on the ground. This type of dispute has been particularly common in Africa, and frequently arises between States whose territory was once administered by a common colonial power. The boundaries set by colonial powers between the departments administered by them were often imprecisely plotted and appeared differently on different maps or in legal documents. A representative example of this type is the dispute which arose between Burkina Faso and Mali following their respective dates of independence from France (which will be discussed further below).
- ▶ Third, a dispute may arise in circumstances where there has never been any agreement on the boundary between the territories of two States and both States have asserted claims to a particular area. Disputes of that nature were particularly common in the nineteenth and early twentieth centuries, when centralised State power had not yet established control over certain areas of the State territory. An example would be the dispute between the United States and Great Britain (now Canada) over large areas of western North America in the 1840s. Such disputes over land boundaries have been less common in recent decades and have not typically arisen in Africa. However, they are becoming increasingly frequent in the context of maritime boundary delimitation.

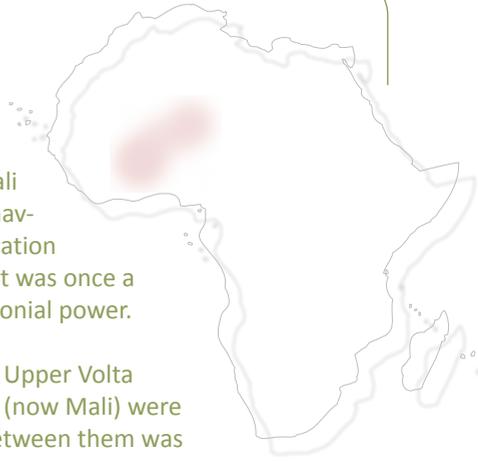
### Case Study: Boundary Dispute between Burkina Faso and Mali

As mentioned above, the boundary dispute between Burkina Faso and Mali is an example of a boundary dispute having its origins in the imprecise demarcation of administrative departments of what was once a unified area governed by a foreign colonial power.

In the early to mid-twentieth century, Upper Volta (now Burkina Faso) and French Sudan (now Mali) were territories of France. The boundary between them was delineated by a series of decrees and orders. No clear indication was, however, given as to where exactly the boundary lay on the ground. As an example, the northern terminus of the boundary was defined in one Government document as the “heights of N’Gouma”. The exact location of that point could be (and was), however, subject to different interpretations.<sup>16</sup>

As was later explained by a Chamber of the International Court of Justice, “the frontier [between Upper Volta and French Sudan] lay... in a region of Africa little known at the time and largely inhabited by nomads, in which transport and communications were very sketchy.”<sup>17</sup> Further complicating matters, “not all of [the legislative and regulative texts relating to the boundary] were even published” and “the maps and sketch-maps completed at the time ... are sometimes of doubtful accuracy and reliability [and] contradict one another.”<sup>18</sup> In such circumstances, it is easy to see how, following the French colonies’ independence, a dispute between Burkina Faso and Mali over the location of their ill-defined boundary arose.

The parties initially attempted to resolve their dispute through negotiation.<sup>19</sup> Unfortunately, however, those attempts failed and, as a result, a brief armed conflict broke out between them in 1974. A Mediation



<sup>16</sup> *Frontier Dispute (Burkina Faso/Mali), Judgment, I.C.J. Reports 1986*, p. 590, para. 70.

<sup>17</sup> *Id.* p. 587, para. 64.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Id.* p. 571, para. 35.

Commission comprised of several States was subsequently set up under OAU auspices in 1975, but again the Parties were unable to bring the dispute to an end.<sup>20</sup> Eventually, in 1983, the Parties agreed to bring the dispute to a Chamber of the International Court of Justice, by way of a Special Agreement (a process that is described later in this Guidebook). While at Court, a second armed conflict broke out between the two countries in 1985. The Chamber issued its Judgment resolving the dispute in 1986.

### C. The Relevance of Maps

It is a common misconception that maps are determinative evidence of the course of a particular boundary. While maps can function as important pieces of evidence in boundary disputes, they do not, by virtue simply of being maps, carry legal force. As the Chamber of the International Court of Justice stated in the Judgment concerning Burkina Faso / Republic of Mali :

*“Whether in frontier delimitations or in international territorial conflicts, maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts.”<sup>21</sup>*

<sup>20</sup> *Id.* pp. 571-572, paras. 36-37.

<sup>21</sup> *Id.* p. 582, para. 54.

What this means, in practice, is that the relevance of maps varies considerably according to the circumstances in which they were created. There are several important factors that impact upon the reliability of a map in a particular case. Paramount among these, as the Chamber stated in the quote above, is whether the map is a “physical expression ... of the will of the State or States concerned”. Maps annexed to a boundary treaty, for example, constitute persuasive evidence of the parties’ intent, and are thus of significant legal impact.

If the map does not fall within this narrow category, it cannot be used to contradict or negate other evidence describing the course of a boundary, such as treaties, agreements, communiqués, etc. Nonetheless, in certain circumstances, maps can be of use to assist a court or tribunal in determining the course of a boundary when no other relevant evidence exists, or when the other evidence does not indicate the precise location of the boundary.

A number of other factors will be considered in determining the map’s relevance in such cases. One such factor is the date when the map was made.<sup>22</sup> If the map was created well before or after the date upon which a boundary dispute crystallised between two parties (which is known as the ‘critical date’), it may be of reduced value. Maps created around the critical date will be more useful. Maps created after the critical date will typically be discounted completely.

Another factor is the neutrality of the source.<sup>23</sup> Maps made by private entities or by third (disinterested) States will sometimes be of use, but are typically given little weight. If the map is created by one of the State parties to the dispute, it will typically be of minimal value other than a representation of their position or belief at the time the map was made. Conversely, however, maps made by State parties to a dispute that depict a boundary against their own interest (for example, if it is found that State A created an official map that shows a boundary following the course advocated by State B) can be useful evidence to show the inconsistency of a State’s position over time, and therefore can cast doubt upon the legitimacy of that State’s claim.

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<sup>22</sup> *Id.* p. 586, para. 62.

<sup>23</sup> *Ibid.*

A third factor is the intent or purpose of the map-maker. For example, a map created by a State's Ministry of Foreign Affairs or Ministry of Defence for the purpose (at least in part) of showing the location of the boundary will be of more value than a map created by other State departments for purposes of showing geological features or for purposes of child education.

In addition, maps made by the governing colonial power around the date(s) of independence of the former colonies can be persuasive evidence of a boundary in cases where other evidence is lacking. For example, in the case between Burkina Faso and Mali, the Chamber of the International Court of Justice relied upon a map completed in 1958-1960 (immediately before the dates of independence) by the IGN (the Institut Géographique National of France), which was a body neutral towards either State party to the dispute. The Chamber stated that, although it "cannot uphold the information given by the map where it is contradicted by other trustworthy information concerning the intentions of the colonial power", it considered that "where all other evidence is lacking, or is not sufficient to show an exact line, the probative value of the IGN map becomes decisive."<sup>24</sup>

On the other hand, in Kasikili/Sedudu Island (Botswana/Namibia dispute), the Court stated that it could not draw conclusions from the cartographic material "in view of the absence of any map officially reflecting the intentions of the parties to the 1890 Treaty" and in light of "the uncertainty and inconsistency" of the maps submitted by the parties to the dispute.<sup>25</sup> Thus, while maps may be useful in the delimitation and demarcation of an international boundary, they cannot by themselves determine the legal status of a boundary.

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<sup>24</sup> *Ibid.*

<sup>25</sup> Kasikili/Sedudu Island (Botswana/Namibia), Judgement, I.C.J. Reports 1999, p. 1100, para. 87.

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## IV. Mechanisms for the Settlement of Border Disputes between African States

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### A. Principle of the Free Choice of Means

One of the principal goals of international law is the prevention of conflict. Accordingly, as discussed above, international law calls upon States to resolve their conflicts peacefully. How such resolution is to be achieved, however, is for the relevant States to decide.

That principle, which is known as the ‘principle of the free choice of means’ is enshrined in Article 33(1) of the UN Charter<sup>26</sup>, which reads as follows:

*“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”*

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<sup>26</sup> It is also reaffirmed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States and in the Manila Declaration on the Peaceful Settlement of International Disputes.

Within the African Union, Article 13 of the Niamey Convention reiterates the principle in the specific context of border disputes.

The most common means of peaceful dispute resolution, as set out in Article 33(1) of the UN Charter, are the following: negotiation, enquiry, mediation, conciliation, judicial settlement and resort to regional agencies. While any of these methods can be effective in peacefully resolving boundary disputes, and all are preferable to armed conflict, in choosing among them, parties must carefully consider which is most appropriate to the dispute in the light of the parties' relationship. The succeeding sections of this Guidebook describe each of the above-mentioned methods of dispute resolution in more detail with the goal of facilitating that selection process. It is important to remember that none of them are mutually exclusive. The resolution of complex boundary disputes is likely to require a combination of methods to be exercised in succession or at the same time. In addition, in parallel or as an alternative to the dispute resolution methods addressed in this Guidebook, States may consider exploring other peaceful forms of dispute resolution of their own choosing.

## **B. Role of the African Union and the United Nations Security Council in Boundary Dispute Settlement**



Boundary disputes are not only of concern for the States that directly contest the boundary; they can affect the stability of the international system as a whole. Accordingly, the system of international dispute settlement provides a role for regional and international organisations – such as the African Union and the United Nations – to facilitate boundary dispute resolution.

## 1 The African Union

As previously noted, Article 33(1) of the UN Charter expressly states that a regional organisation, such as the African Union, can help States to resolve disputes peacefully. Article 52(2) of the UN Charter further gives those regional organisations priority over the Security Council, stating that UN Member States that are party to regional organisations shall “make every effort to achieve pacific settlement of local disputes through such regional arrangements or such regional agencies before referring them to the Security Council.” For most African States, therefore, recourse to the AU should be considered in the event of an inter-State dispute.

Pursuant to Article 4(e) of the Constitutive Act of the AU, one of the fundamental principles of the AU is the “peaceful resolution of conflicts among Member States”. The AU has taken this particularly seriously in the context of resolving boundary disputes. Evidence of that is the creation of the AU Border Programme (AUBP).

The AUBP aims to help States in the delimitation and demarcation of their borders and to assist States in creating effective means of border management and cross-border cooperation. In addition, as a regional body, the AU will look to facilitate boundary dispute settlements that promote regional welfare. For example, many border conflicts arise from the discovery of resources. The peaceful settlement of such conflicts, with the AU’s assistance, can increase the likelihood that these resources can be used for the betterment of African people.

In order to engage the assistance of the AUBP, African States facing a boundary dispute or difficulties in positioning their boundaries must make a joint request to the AU Commission. That joint request evidences the parties’ commitment to resolving their dispute peacefully and, upon receipt of it, the AU will ensure that resources are made available to support the parties, as it deems appropriate. For example, in 2012, Comoros, Mozambique, the Seychelles and Tanzania made a joint request to the AUBP for assistance in finalising the maritime delimitation of their shared boundaries. The AUBP reacted by finding a technical expert to support them in the process and provided funding for each party to make use of suitable maritime boundary delimitation technology. Accordingly, the parties achieved an agreement on the final coordinates of the maritime boundaries within a matter of months and signed a multilateral treaty.

## 2 The UN Security Council

There are many ways in which the UN Security Council may become involved in the peaceful resolution of a boundary dispute. It may call upon parties to resolve their disputes under Article 33(2) of the UN Charter, but may exercise a more active role, with the power to investigate disputes and situations that may endanger international peace under Article 34 of the UN Charter.

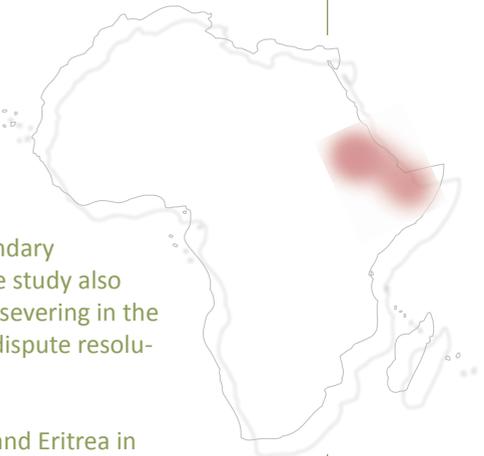
The UN Security Council can also make recommendations aimed at resolving a dispute that threatens peace and security in any stage of dispute resolution under Article 36 of the UN Charter. In doing so, the Security Council should take note of all steps already taken by the parties. The Security Council distinguishes four stages of a conflict: conflict prevention, conflict termination, conflict management and conflict aftercare. While the termination of conflicts is the most directly related to the settlement of disputes, the Security Council may become involved at any stage.

States may also refer international disputes or situations endangering international peace to the Security Council or to the General Assembly of the United Nations under Article 35 of the Charter. When the methods described in Article 33 fail, States are statutorily obliged to bring the dispute to the attention of the Security Council under Article 37 (although in practice this provision is rarely used).

### Case Study: Ethiopia/Eritrea

The role that the UN Security Council and regional organisations, such as the AU, can play in resolving boundary disputes can be seen in the following case study, which describes how the violent conflict between Ethiopia and Eritrea over their mutual boundary came to be referred to arbitration. The case study also demonstrates the importance of States persevering in the resolution of complex boundary disputes; dispute resolution may take several attempts.

After fighting broke out between Ethiopia and Eritrea in their contested border region in May 1998, the UN Secretary-



General immediately contacted the leaders of both countries, urging restraint and offering assistance in resolving the conflict peacefully. He also requested that his Special Envoy in Africa, Ambassador Mohamed Sahnoun of Algeria, assist the mediation efforts of the OAU (a regional organisation and the AU's predecessor).

Following such mediation efforts, in July 1999, Ethiopia and Eritrea concluded an initial agreement on the modalities for the cessation of hostilities. The parties could not, however, agree on the technical means to implement that agreement and, therefore, the OAU's mediation continued. In addition, from 8-9 May 2000, a seven-member mission from the UN Security Council (with representatives from the United States, France, Mali, Namibia, Netherlands, Tunisia, and the United Kingdom) met with the leaders of Ethiopia and Eritrea to try to help them find a peaceful resolution to the two States' dispute.

Despite those efforts, fighting broke out again on 12 May 2000. The UN reacted immediately: on that very day, the UN Security Council adopted a resolution expressing concern about the violence and the UN Secretary-General issued a statement deeply deploring the conflict. Shortly after, on 17 May 2000, the UN Security Council adopted a resolution imposing sanctions on the two countries, preventing the sale of weapons.

In the light of those actions, peace talks resumed in Algiers on 30 May 2000, culminating in an Agreement on Cessation of Hostilities between Ethiopia and Eritrea on 18 June 2000. Those peace talks were held under the auspices of President Abdelaziz Bouteflika of Algeria, as Chairman of the OAU, with the assistance of the envoys of the European Union and of the United States. The agreement not only committed the parties to cease fighting, it also called upon the OAU and the United Nations to provide a peacekeeping mission. Accordingly, on 31 June 2000, the UN Security Council established the United Nations Mission in Ethiopia and Eritrea (UNMEE).

The suspension of the hostilities created the requisite conditions for Ethiopia and Eritrea to negotiate a meaningful peace agreement. That agreement was signed on 12 December 2000 and allowed for the creation of an Eritrea-Ethiopia Boundary Commission under the auspices of the Permanent Court of Arbitration in The Hague. The dispute was referred to that Commission for arbitration, which issued its last award in August 2009.

## C. Negotiation



Negotiation is generally recognised to be the most flexible and amicable form of dispute resolution. As a result, it should generally be the first recourse of parties to a boundary dispute. Indeed, Article 13(1) of the Niamey Convention on Cross-Border Cooperation requires that States first attempt negotiation before turning to the other methods of peaceful settlement of disputes in Article 13(2). An attempt at negotiation is also often a prerequisite before bringing a legal case to an international court or tribunal.

### 1 What is it?

Negotiation is a process whereby parties discuss various options for the settlement of a dispute with the aim of achieving a settlement that recognises each of their interests (albeit, necessarily, to varying degrees). Negotiation differs from mere bargaining, where parties advance their own positions and hold to them, gradually moderating their positions until they reach a compromise or until the bargaining talks break down entirely. Negotiation can take place between State officials at any level (including between State boundary technicians).

Although typically being far less structured than other dispute resolution methods (and therefore much more flexible), negotiation does require some attention to detail. In order for negotiations to be effective, parties must feel that they are in a position where they can communicate openly and with some degree of trust. When the parties already have a working relationship, this may be relatively easy to achieve. In times of conflict, however, it is likely to be difficult. In either case, adequate preparation is essential. Such preparation should include, at

a minimum, trying to reach agreement between the parties on: (a) who will be present at the negotiation; (b) the degree of authority given to the negotiators; and (c) the ground rules for the negotiating process. Third parties also may be invited to facilitate the negotiations. There is very little distinction between a facilitated negotiation and the dispute resolution methods of mediation and good offices, which are discussed below.

Negotiation is often most effective when the parties are clear about the full range of their interests in a dispute. Such interests include not only control over the disputed territory, but also the establishment of a peaceful and stable settlement and of maintaining a robust system of international dispute resolution. A negotiation should allow the parties to explore multiple options for the resolution of a dispute, rather than committing to pre-existing positions and being unable to back down. Parties should also bear in mind what principled criteria based on the facts of the dispute and on the relevant international law may be used to decide among the options discussed in the negotiation. A resolution of a boundary dispute that is based on principled criteria is more likely to be mutually beneficial and is less likely to break down than one that is based on the use of force.

## **2 Advantages**

### **i. Direct State-to-State Dialogue**

A major advantage of negotiation is that it is built on direct State-to-State dialogue. That ensures that any agreement that is reached will be to the advantage of both parties, which is not necessarily the case with arbitration or litigation. The direct contact between States can also help to build confidence between the parties, which is vital in ensuring long-term compliance with any agreement that is finally formed and may also facilitate the States' future cooperation on other issues.

The State-to-State nature of negotiations also means that the parties have control over the process. Negotiations can occur on a timeframe and in locations that meet the needs of the parties. The size of delegations and the formality of the proceedings can be tailored to the spe-

cific dispute. This can make negotiations faster and less expensive than other methods of dispute resolution, though this is not guaranteed.

## ii. **Scope for Flexible Solutions**

Another important advantage of negotiations is that they can produce more flexible solutions than other methods. When the parties to a negotiation understand the range of their interests and create a process that allows for multiple options to be explored, they can generate creative solutions that meet several interests. They can go beyond the resolution of the immediate dispute by laying the groundwork for a more collaborative relationship going forward. These kinds of solutions can be more beneficial to both parties than those generated in adjudication.

In resolving border disputes, negotiated solutions can go beyond simply resolving the location of the border by also addressing matters of cross-border cooperation regarding the development of natural resources, environmental protection and trade. Negotiated solutions can address the causes of conflict in border regions.

## iii. **No Necessary Impact on Subsequent Litigation/Arbitration**

Parties can engage in negotiation without jeopardising their positions in subsequent arbitration or litigation proceedings. Tribunals typically ask parties to attempt to reach a negotiated settlement before turning to adjudication, and so act as advocates of negotiations.

Negotiations can be conducted confidentially and the parties can decide how much information about the negotiations is made public. This allows for negotiations to have a minimum of domestic political interference and ensures that information about negotiations need not affect the public positions of the parties in subsequent proceedings. Of course, the parties are free to decide jointly that the negotiation should have an effect on subsequent litigation or arbitration if they want to. That kind of situation can occur when the parties to a negotiation reach an impasse on one particular issue and require it to be adjudicated within the framework of a negotiated settlement on other issues.

#### iv. Parallel Processes

Another benefit of negotiation is that, as well as being a dispute resolution method that can be pursued on its own, it can take place alongside other dispute resolution methods. For example, it is possible for States to submit a case for litigation while continuing to have talks aimed at reaching a negotiated settlement. That practice was approved by the International Court of Justice in the *Aegean Sea Continental Shelf case*.<sup>27</sup> Such dual-track efforts may improve the likelihood of successful negotiations as parties face the prospect of a judicial resolution that may favour one party.

### 3 Limitations

#### i. Political Will

Parties are obliged under international law to negotiate in good faith.<sup>28</sup> Negotiations will only succeed if all parties comply with that provision. That is the negative side of the control over process that negotiation gives to the parties; if any of the parties lacks the political will to advance negotiations, the negotiations will fall apart. Less flexible mechanisms of dispute settlement, such as recourse to the ICJ or arbitration (as discussed below), are less dependent on political will and, thus, can often help to achieve the final resolution to a dispute where such will is lacking.

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<sup>27</sup> *Aegean Sea Continental Shelf, Judgment, I.C.J. Report 1978.*

<sup>28</sup> That obligation is reflected in the Manila Declaration on the Peaceful Settlement of International Disputes, which provides that States “should negotiate peacefully, in order to arrive at an early settlement acceptable to [each/all of them].” *Res. AG 37/10, Doc. Off. AGNU, 68<sup>ème</sup> session plénière, 1982.*

## ii. Stalling Tactics

Another limitation due to the procedural flexibility of negotiation is that it can be prone to stalling tactics by the parties. Because negotiations unfold on a timeline that is developed by the parties, it is relatively easy for one party to stall if it wishes to do so. Even when neither party intends for a negotiation to be held up, a negotiation that gives insufficient attention to a given process can end up lacking the momentum to reach a final resolution.

## 4 Other Considerations

As mentioned above, there is often a requirement to first negotiate before turning to other methods of dispute resolution. The United Nations Convention on the Law of the Sea (UNCLOS), for example, requires parties to negotiate maritime boundary disputes before they can be submitted for determination pursuant to the dispute resolution mechanisms provided for in that treaty.<sup>29</sup> The ICJ has similarly required parties to negotiate before submitting cases in certain circumstances<sup>30</sup> and, as noted above, the Niamey Convention also makes negotiation the first resort of States.<sup>31</sup> Negotiations can, however, only succeed when there is an option that will improve the position of both parties relative to the existing situation. When this is not the case, negotiation will not work. In order to improve the chance of success of the negotiations, therefore, it is sometimes advisable for parties to try to expand the range of issues subject to negotiation so that there is more opportunity for each party to gain on at least one point.

Negotiations with more than two parties can be particularly difficult. As noted above, the goal of a negotiation is to agree upon an option that satisfies all parties. This becomes more difficult to achieve when more parties participate. Negotiations between multiple parties may, in particular, be hampered if coalitions form among the parties involved. In order to avoid such problems, it is important that a robust organisation structure is put in place to facilitate multi-party negotiations. If

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<sup>29</sup> Article 283, UNCLOS.

<sup>30</sup> For example, where the treaty out of which the ICJ's jurisdiction has arisen has required the parties to negotiate in good faith before submitting their dispute to the Court.

<sup>31</sup> Article 13(1) of the Niamey Convention.

that is not possible, other dispute resolution mechanisms involving the facilitation of the dispute settlement by third parties may be more appropriate.

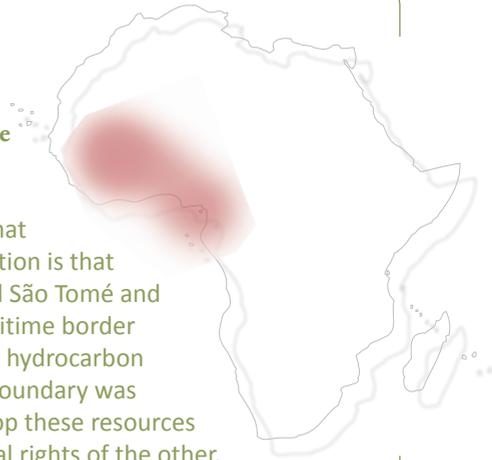
### Case Studies: The Role of Negotiation

#### i. Nigeria/São Tomé and Príncipe Joint Development Zone

An example of a boundary dispute that was successfully resolved by negotiation is that which occurred between Nigeria and São Tomé and Príncipe. The two States share a maritime border in the Gulf of Guinea with significant hydrocarbon reserves. While the location of the boundary was unsettled, neither State could develop these resources without infringing upon the territorial rights of the other. The States faced three options: (i) dispute each other's territorial claims; (ii) leave the resources untapped; or (iii) devise an alternative peaceful solution that would allow the resources to be exploited.

At the time, Nigeria was already involved in litigation before the ICJ with Cameroon regarding its land and maritime borders. Commencing another dispute with São Tomé and Príncipe, therefore, was unattractive. Equally unattractive was the prospect of leaving the resources between the States undeveloped. Therefore, the States decided to commence negotiations.

Those negotiations ran between 1999 and 2000, culminating in a treaty between the two States on 21 February 2001. The treaty established a bilateral Joint Development Authority, which was mandated to develop resources for their joint benefit in a Joint Development Zone covering the disputed region between the two. Nigeria and São Tomé and Príncipe thus resolved the boundary dispute peacefully and directly between their two States and, as a result, the border region's resources are currently being developed. In fact, the creation of a Joint Development Zone as a solution to these parties' dispute has been so successful that Nigeria used this model in its relations with Equatorial Guinea.



## ii. **Burkina Faso/Mali**

The Burkina Faso-Mali border dispute demonstrates how bilateral negotiation and third-party dispute settlement can be used together for effective dispute resolution. As noted above, Burkina Faso and Mali entered into negotiations to delimit their boundary in 1966. In 1968, the two States set up a bilateral commission to survey the border in accordance with pre-independence documentation. However, each side challenged certain documentation, leading to armed conflict in 1974 and again in 1985.

In 1986, the parties referred the dispute to the ICJ, which decided on a particularly contentious 280-km stretch of the border. The parties, however, directly negotiated the remaining 1,000-km stretch of the border, resulting in a treaty signed on 20 May 1989. Thus, while the ICJ was used to assist the parties to address certain irreconcilable issues that were preventing them from pursuing successful negotiations, the parties settled 80% of the border demarcation by negotiation.

## **D. Diplomatic Methods of Dispute Resolution**



“Diplomatic methods of dispute resolution” refer to mechanisms for the peaceful settlement of disputes involving the participation of representatives of a State or international organisation acting as third party to facilitate the conclusion of an agreement between the disputant parties. Diplomatic methods of dispute settlement retain many of the advantages of negotiation: they are typically confidential and a successful settlement will require the assent and cooperation of both parties. In addition, however, the involvement of a third party intermediary (or intermediaries) can promote the settlement of the dispute by propos-

ing non-binding solutions and compromises that could be acceptable to both parties. There are three principal mechanisms of diplomatic dispute settlement: mediation, good offices, and conciliation, each of which is discussed in detail below.

## 1 Mediation

Mediation involves a neutral third party facilitator or multiple facilitators who manage the dispute resolution process. The third party is chosen by both parties to a dispute, and must therefore be acceptable to both parties. In the context of boundary disputes, mediation is typically employed in two types of situations. First, parties often resort to mediation after negotiations have proved unsuccessful. Used in this way, mediation can be seen as a way for parties to have a second chance at resolving a boundary dispute before resorting to arbitration, litigation, or other binding means of dispute settlement. Second, mediation can be used to resolve boundary disputes in cases where negotiation is not feasible due to pre-existing animosity between the parties. In this sense, mediation can be an alternative to armed conflict or other unfavourable escalation of the dispute. For example, when the conflict between Argentina and Chile over the Beagle Channel escalated in 1978, the parties agreed to mediation under the auspices of the Pope (Head of Roman Catholic Church), led by Cardinal Antonio Samoré as mediator. Although the mediation process lasted several years, the parties were eventually able to reach an amicable solution pursuant to which Chile was given sovereignty over several disputed islands, but certain maritime areas were allocated to Argentina.

The role of a mediator can vary significantly depending on what the parties request and require. Generally, however, the mediator is expected to play an active role in the dispute resolution process, speaking regularly with the parties to obtain their views, determining what the most important issues are to all of them, and advancing fresh proposals to both parties in an effort to resolve the dispute. The mediator will work with the parties individually to manage their expectations and explain the mediator's view on whether a party's position on a particular issue will be seen as reasonable by the other party/parties involved. Mediators may also seek to persuade both parties to accept the proposals offered by the mediator. In certain cases, the mediator

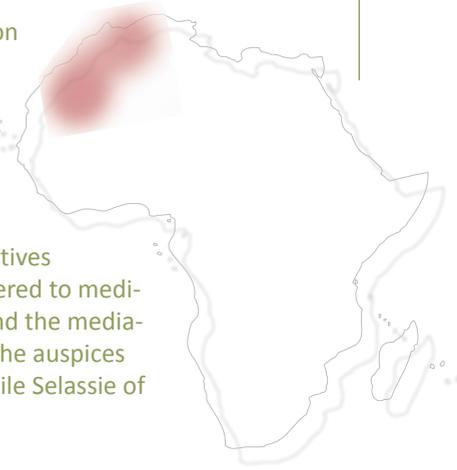
may be asked to play an even more active role, for example, by giving a legal evaluation of the parties' positions on a particular issue.

The parties can choose mediators from a variety of different backgrounds, including United Nations mediators serving under the auspices of the Secretary-General; mediators from a third State, such as a minister of foreign affairs or his/her representatives; mediators from a non-governmental organisation; or mediators from another trusted source of authority, such as the Cardinal of the Catholic Church in the Beagle Channel mediation discussed above. The choice of mediator can be important, and in certain cases decisive. Parties to boundary disputes will often choose mediators that have a certain influence or gravitas in the region, such as those associated with a third party State, or, in the case of African boundary disputes, the African Union. In some cases, the mediator (or mediating State) will itself play a role by offering both parties incentives to reach an agreement. Mediators should have good relations with both parties and be comfortable talking with both sides. Although mediators are often strictly neutral, that does not have to be the case. As long as they are trusted by both parties, mediators with an interest in resolving the conflict can often be effective even in cases where they have closer relations with one party than the other.

Mediation combines some of the best features of negotiation while providing some additional structure that may make it easier for the parties to reach an agreement. Like negotiations, mediation is confidential, flexible and enables the parties to retain a great deal of control over the proceedings. Similarly, parties are free to come to a mutually agreeable settlement based on the terms they choose. Mediation is also relatively inexpensive. The cost of paying a mediator is generally considerably less than the costs associated with arbitration or litigation. Mediators can help bring the parties to an agreement by meeting with parties individually and ascertaining in confidence what each party's bottom line is, or what their most important issues are. Similar to negotiation, however, mediation does not guarantee that the parties will reach a solution. Like negotiation, mediation can be viewed as a good first step toward the resolution of a dispute. There are a few drawbacks toward attempting a mediated settlement, but parties must also be realistic in understanding that mediation will not always provide a successful resolution to the conflict.

### Case Study: the Algeria/Morocco Border Dispute of 1962

Mediation was essential to the resolution of the armed conflict that broke out between Algeria and Morocco in 1962 over the disputed territory of Tindouf. Following several failed attempts by the parties to settle their dispute themselves by negotiation, President Modibo Keita of Mali invited representatives of the two countries to Bamako and offered to mediate the dispute. The parties accepted and the mediation began on 29 October 1963, under the auspices of both President Keita and Emperor Haile Selassie of Ethiopia.



After only three days, an agreement was reached, which provided for a cease fire, withdrawal of troops by the parties, and the establishment of a demilitarised zone to be monitored by a commission comprising representatives from Algeria, Morocco, Ethiopia and Mali. In addition, the agreement provided that, should continued negotiations fail to reach a successful conclusion to the dispute, the dispute should be submitted to arbitration by a commission to be set up by the OAU.

Subsequent negotiation between the two parties ultimately reached a stalemate, as neither of them was willing to cede any territory to the other. Accordingly, the OAU established an arbitration commission. Rather than determine the boundary line as provided for in the Bamako agreement, however, it was agreed that the commission would simply continue mediation efforts between the two parties. The commission annually submitted a mediation report to the OAU outlining the progress that had been made.

By 1969, relations between Algeria and Morocco had significantly improved and, on 15 January of that year, the president of Algeria and the king of Morocco signed a 20-year treaty of cooperation. That agreement was followed by the establishment of a joint boundary commission and, on 27 May 1970, an agreement on the boundary was finally reached. Pursuant to that agreement, the two countries announced that the boundary dispute between them had ended and that, while Tindouf region would remain Algerian, the iron ore deposits of the area were to be exploited jointly by the two countries.

## 2 Good Offices

The use of good offices is a method of dispute resolution by which a third party reaches out to the disputing parties to encourage them to begin or resume negotiations, and/or offers their offices to the parties as a way of facilitating communication and an exchange of views between them. As with mediation, the third party offering their good offices must be acceptable to both parties to the dispute, and either party to the dispute has the ability to decline the third party's offer of good offices. Good offices are, in theory, distinguished from mediation in that, in the case of good offices, the third party does not usually play an active role in the negotiation process between the parties. In reality, however, the line between good offices and mediation can become blurred. In many cases, a third party may initially reach out to parties only to encourage negotiation between them but will subsequently assume a more active role in mediating ensuing negotiations.

## 3 Inquiry

Inquiry is a dispute-resolution mechanism that can be used by parties to a dispute in cases involving a difference of opinion between the parties as to the facts underlying the dispute. In such cases, the States concerned may choose to initiate an inquiry to investigate the disputed facts and report back to the parties with their impartial findings. After the facts have been established, it is up to the parties to resolve the dispute through other means (such as negotiation, arbitration, etc.). However, as a result of the inquiry, a successful outcome in that dispute resolution process may more readily be achieved. Inquiry can also be used, in certain cases, as a means of preventing disputes from arising or escalating by establishing the facts and thus preventing the development of two divergent factual narratives.

The inquiry process typically entails a call from the parties to a dispute for the establishment of an international commission of inquiry, or a group with a similar title, such as a fact-finding commission or investigation commission. Such commissions were specifically called for in the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes, and have also been referred to in the UN Charter and other multilateral treaties.

Typically, such a commission of inquiry will be given a relatively broad mandate, agreed upon by the parties to investigate and clarify questions and determine the facts pertaining to a specific dispute. The inquiry process itself can involve techniques similar to a judicial procedure, including gathering evidence, hearing witnesses, paying visits to the site in question and hearing the views of the parties. As a UN handbook on dispute resolution states, “inquiry is thus capable of combining the benefits of diplomacy and legal techniques to obtain for the parties an impartial report of the issues in dispute, or of suggesting a solution of the problem.”<sup>32</sup>

Although inquiry can be a useful tool for resolving disputes, it has several important limitations. Typically, the inquiry process is only appropriate in situations where the parties disagree on a factual matter, when no other dispute resolution procedure is being used and when the parties are willing to pledge, in advance, to accept a finding by the commission of inquiry that might contradict their version of the facts.

#### 4 Conciliation

Conciliation is a process whereby parties agree to submit a dispute between them to a commission that has been set up by the parties and which will undertake an objective investigation and evaluation of all aspects of the dispute. The commission will then issue specific non-binding recommendations as to how the dispute could be resolved, defining the terms of a proposed solution that could be acceptable to both parties. Such recommendations will often contain elucidations of detailed legal principles and conclusions that the parties could apply in future negotiations. The commission will generally not go as far as fully resolving the dispute by drawing, for example, a boundary line on a map. Conciliation can thus be viewed as a hybrid form of non-binding dispute resolution, containing elements of both negotiation and judicial settlement.

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<sup>32</sup> United Nations, Office of Legal Affairs, Codification Division, Handbook on the Peaceful Settlement of Disputes between States, p. 27 (1992), at <http://legal.un.org/cod/books/HandbookOnPSD.pdf>.

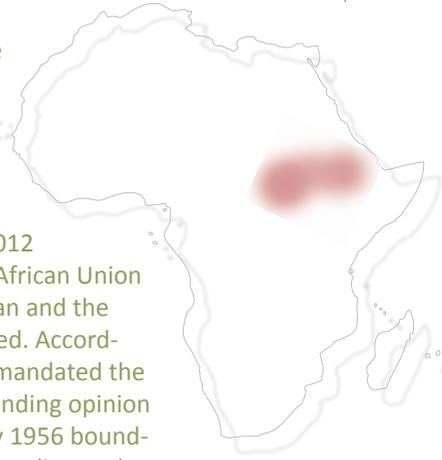
Conciliation is included as a method of dispute settlement in a number of multilateral treaties, including, for example, the United Nations Convention on the Law of the Sea (UNCLOS). The Vienna Convention on the Law of Treaties also contains an annex on conciliation. The relevant treaties often specify the composition of the commission, which will typically include three or five members, one or two of whom are appointed by each party, with the third (or fifth) member being a neutral conciliator appointed by a joint decision of the parties or by the other conciliators. Certain treaties require States to submit their disputes to conciliation under certain conditions, although the outcome of the conciliation itself remains non-binding on the parties. However, nothing prevents parties to a boundary dispute from creating their own *ad hoc* conciliation commission, structured as they see fit, to resolve their dispute.

Conciliation has a number of benefits as a dispute-resolution mechanism. First, it can expedite future negotiations by preliminarily resolving the most contentious legal issues, yet it still gives States the ability to negotiate an ultimate resolution to the dispute. The process also tends to discourage States from persisting with unreasonable claims or claims that are not factually or legally supportable. Like negotiation, conciliation is a relatively flexible process and, if it succeeds, it is likely to result in a settlement that is mutually agreeable and acceptable to both parties. Conciliation is also viewed as a way to protect the rights of smaller States that may have a weaker bargaining position in negotiations with a larger State.

The disadvantages of conciliation are similar to those of negotiation. Because the conciliation commission's report is non-binding, any party can reject the report. Therefore, a conciliated solution to a dispute is not guaranteed. That said, reports by conciliation commissions do carry significant weight, making it more likely that parties will abide by the conclusions of such reports. Even if both parties accept the report, however, there is no guarantee that an ultimate and final solution to the dispute will be agreed upon in subsequent negotiations.

### Case Study: African Union Team of Experts on the South Sudan and Sudan border

Conciliation is currently being used in the context of the dispute between Sudan and South Sudan over the demarcation of areas of their boundary. The conciliation commission in that case, which is known as the African Union Team of Experts (AUTE), was established in July 2012 pursuant to the recommendation of the African Union High Level Implementation Panel on Sudan and the agreement of both State parties concerned. According to its terms of reference, the parties mandated the AUTE to produce an authoritative, non-binding opinion determining the location of the 1 January 1956 boundary between South Sudan and Sudan in the disputed areas along their common borders. In making their determination the AUTE is to be guided by agreed principles of international boundary making. The African Union Peace and Security Council welcomed the establishment of the AUTE in a communiqué issued following its 329th meeting, held on 3 August 2012. The AUTE is now in the process of carrying out its work.



## E. Judicial Methods of Dispute Resolution



Judicial methods of dispute resolution involve the adjudication of a dispute by a court or arbitral tribunal empowered under international law or treaty to consider evidence, determine the facts, evaluate the

application of the relevant law to the facts, and decide upon a resolution to a dispute based upon the facts and the law. Unlike the solution reached in negotiations and other diplomatic methods of dispute resolution, judicial outcomes are imposed rather than agreed upon by the parties. Judicial decisions are also final and binding and, under international law, should be implemented immediately.

There are two primary judicial bodies to which African States may have recourse for the resolution of boundary disputes. The first is the International Court of Justice, the principal judicial organ of the United Nations. The second is an arbitral tribunal constituted by the parties for the purposes of hearing a specific case. Both of these options are discussed below, including their advantages and disadvantages. In addition, a brief summary is provided of the ancillary forms of judicial settlement that may be available in the context of a maritime boundary dispute under the United Nations Convention on the Law of Sea.

## 1 The International Court of Justice

### i. What is it?

The International Court of Justice is the principal judicial organ of the United Nations, established by the UN Charter in 1945. The Court represents a permanent establishment, unlike arbitration tribunals (discussed below).<sup>33</sup>

### ii. Functions of the Court

The Court has two primary functions: (i) to settle, in accordance with international law, disputes submitted to it by States<sup>34</sup>; and (ii) to provide advice on legal questions referred to it by organs of the United Nations or other specialised agencies. This Guidebook will focus on the first

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<sup>33</sup> See Annex I for more details on the composition of the Court and the Registry

<sup>34</sup> Only sovereign States can refer a dispute to the Court.

of these functions. However, the Court's advisory role should not be ignored in boundary matters (as it did in the case of *Western Sahara*<sup>35</sup>). An advisory opinion can only guide parties in coming to their own final solution. A judgment of the Court, by contrast, is final and binding on parties with respect to their dispute.

To bring a dispute before the Court, States must both issue their consent. Unlike domestic courts, the ICJ will only exercise jurisdiction over a dispute to the extent that the parties have consented to it. The way in which parties can give their consent to the court's jurisdiction, as well as how a party may practically commence proceedings before a court, are discussed below (and in greater detail in Annex I). First, however, the following sub-sections describe how the Court is organised and the principal features of the Court's procedure.

### iii. The Court's Statute and Rules

In contrast to arbitration, parties before the Court have no control over the way proceedings are governed: the Statute of the Court (the Statute) and the Court's Rules (the Rules) are the principal documents that regulate Court proceedings and these must be adhered to by parties. In addition, the Court has issued a number of practice directions and notes to guide parties appearing before it.

The Court's Statute and Rules, as well as its practice directions and notes, can be found on the Court's website: [www.icj-cij.org](http://www.icj-cij.org). (Some important elements of the Court's procedure are explained in Annex I.)

### iv. The Court's Jurisdiction

The Court's jurisdiction is based upon the consent of States. Therefore, to bring a case before the Court, both State parties to the case must have given consent to the Court's jurisdiction. This consent can be expressed in one of four ways: by special agreement, by declaring the Court's jurisdiction as compulsory, by signing a bilateral or multilateral

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<sup>35</sup> *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12.

treaty providing for the Court's jurisdiction, and by *Forum Prorogatum*<sup>36</sup>.

A number of different requirements for applications or notifications to the Court need to be considered and are specified in the Annex I. Annex I also notes that the Court's Trust Fund may be able to provide financial assistance to States, and it explains the enforcement mechanisms supporting judgments by the Court.

#### v. Advantages to Using the Court to Resolve a Boundary Dispute

There are several advantages to bringing a boundary dispute to the Court over other means of dispute resolution. Some of these are shared with arbitration, but some of them are unique to the ICJ.

- ▶ Finality. Absent some extraordinary circumstances, the judicial process cannot break down or end in stalemate. As explained above, the Court will issue a judgment resolving the dispute and, providing both parties comply with that judgment, the dispute will be considered resolved. In boundary cases, finality can be particularly important since lingering residual disputes can lead to armed conflict and strained relations between States, as well as difficulties in pursuing the development of contested areas.
- ▶ The Court's power to indicate provisional measures. Those measures, as explained in Annex I, can act to preserve the status quo and prevent opposing States from exploiting the region or from engaging in conflict over the region while the case is under consideration by the Court.
- ▶ Decision cases based on the law and the facts of a case rather than on diplomatic or external factors. This can be an advantage for States that believe the law or particular facts underlying the dispute are favourable to their position.
- ▶ The Court determines the case, rather than the parties. In a heated dispute over territory, States may not be politically able to make the concessions necessary to resolve their dispute through negotiations. By letting a court or tribunal decide the dispute, the State can reduce domestic political repercussions because it was the Court, rather than

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<sup>36</sup> see Annex I.

the State, that created the unfavourable outcome. In that sense, the Court “takes the blame” for decisions that are unpopular with one of the parties.

- ▶ The Court is less vulnerable to sabotage by the opposing party than arbitration. A party that wants to resist arbitration can disrupt the process by withholding cooperation, refusing to appoint their own arbitrators, challenging the impartiality of other tribunal members, and refusing to follow the procedural rules established by the tribunal. The Court minimises the opportunities for such resistance by having pre-established rules and judges.
- ▶ The Court’s experience. Although most arbitrators are well qualified, the Court in particular has many decades of experience managing both land and maritime boundary cases, and most judges have participated in at least one such case in the past.
- ▶ Final nature of the Court’s judgment. The Court’s judgments are final and binding and without appeal. Limited grounds exist for interpretations or revision, as explained in Annex I.
- ▶ Enforcement. Unfortunately, not all States willingly consent to judicial and arbitral awards. However, the Statute of the Court, combined with the worldwide publicity that cases before the Court receive, may function to place additional pressure on parties to comply with the Court’s judgments. In addition, a party seeking its opponent’s compliance with a judgment of the Court can refer the issue to the UN Security Council under Article 94 of the UN Charter, as referenced above.

#### vi. Disadvantages to Using the Court to Resolve a Boundary Dispute

- ▶ The costs of litigating the dispute. As noted above, the Court itself does not charge any fees to States for bringing a dispute to it. States must, however, pay fees to any outside counsel that they hire to represent them before the Court, and these fees are often substantial, amounting to several hundred thousand US dollars or more. These costs have been known to tax the resources even of States with large budgets. For smaller States, the burden can be heavy indeed, although, as discussed above, funding may be available from the Court in certain circumstances.
- ▶ The timeframe of a case, from the filing of the application to the final judgment, can be quite lengthy. Time has to be allotted for the parties to file their written pleadings, for any preliminary objections, for oral hearings to be scheduled, and for the Court to deliberate and issue its judgment. The parties have some control over how much time

a case will require, as they have substantial input as to the time limits for filing their written pleadings. Nonetheless, even at a rapid pace, it will take at least a year for a case to be heard from the time the application is filed to the delivery of the Court's judgment and three to four years is more common. Therefore, having recourse to the Court is not an ideal solution for parties that require a dispute to be settled on an expedited timeframe.

- ▶ Third States may be able to intervene in the proceedings if the Court determines that their interests would be affected by the Court's judgment. In some cases, intervention can be beneficial to all parties, as it enables the Court to resolve a boundary dispute with all the States concerned. In other cases, however, the original parties to the dispute may wish to resolve their differences without the intervention of a third State.
- ▶ Resolution to the dispute is imposed upon the parties, rather than negotiated and agreed, using less binding dispute resolution mechanisms. Because the judicial resolution of the dispute is based upon the law, rather than on negotiation or equitable compromise, it is sometimes the case that the Court agrees largely with one party's position. In such cases, the legal solution imposed by the Court may not be readily accepted by the people most affected, such as the people living in disputed territory. Such a situation occurred following the Court's judgment in the case between Cameroon and Nigeria regarding, among other issues, sovereignty over the Bakassi Peninsula. The Court's judgment awarded sovereignty over the peninsula to Cameroon based upon the language of a 1913 Anglo-German treaty. Substantial portions of that area, however, had been under the control of Nigeria, and many of the residents of the peninsula were Nigerian citizens who did not particularly wish to live under Cameroonian rule. As a result, the Court's judgment, handed down in 2002, was initially resisted by many of the residents of the area, as well as by the Nigerian Government. After extensive discussions and the establishment of a Cameroon-Nigeria Mixed Commission, sovereignty over the peninsula was fully transferred to Cameroon in 2013.

## 2 Arbitration

### i. What is it?

Arbitration is a dispute settlement mechanism whereby the parties submit their dispute to a tribunal that is specially constituted to hear that particular dispute. The tribunal typically consists of a panel of arbitrators who are experienced in international law and have knowledge of the subject in question. Although States can decide to appoint a sole arbitrator if they so choose, panels of three to five arbitrators are most common. Arbitrators are normally required to follow a strict juridical procedure and will be expected to deliver a reasoned decision known as an arbitral award. The arbitral award will be binding on the parties unless they agree otherwise.

### ii. The Arbitration Agreement

The foundation of arbitration is consent: parties must agree to submit their dispute to arbitration in order to commence with arbitration proceedings. The agreement reached by the parties, the so-called “arbitration agreement” (or “*compromis*”), will also govern the shape and scope that the arbitration proceedings take.

The fact that parties have the freedom to choose the ingredients of their arbitration agreement – and therefore how the arbitral process will run – represents a key advantage of arbitration as a form of dispute settlement. Although arbitration agreements vary in length and detail, the key issues that most address include: (a) the scope of the dispute to be decided; (b) the criteria to be applied; (c) the number of arbitrators who will be appointed and how such appointment will take place; (d) the procedural rules that will govern the arbitration; and (e) the confidentiality of the proceeding and the arbitral award.

### a. The Scope of the Dispute

The definition of the scope of the dispute to be determined is important because it establishes the limits of jurisdiction of the arbitral tribunal. Typically, arbitration agreements referenced in treaties between States will be worded broadly, specifying that all disputes arising out of such treaty may be subject to a tribunal's examination. Conversely, parties negotiating an arbitration agreement after a dispute has already arisen tend to define the issue in dispute narrowly with the aim of preventing the tribunal's investigation of wider questions. One motivation for ensuring that certain aspects of a dispute are kept outside of a tribunal's consideration is that one or both of the parties consider that more appropriate alternative means of settling those tangential aspects exist.

Disagreement between parties over the scope of the issue to be determined is a common sticking point between parties in settling upon the terms and scope of an arbitration agreement. In such circumstances, but where there is sufficient political will to have the dispute resolved, parties may submit the determination of the scope of the dispute – as well as the dispute itself – to arbitration. For example, in 1996, Yemen and Eritrea were able to come to an 'agreement in principle' that their dispute over the Hanish Islands archipelago and their maritime boundary in the Red Sea should be settled peacefully. However, when it came to negotiating an arbitration agreement, the parties were unable to come to a common position on the scope of the dispute. The States therefore deferred to the arbitral tribunal, stating that the tribunal should decide on the definition of the scope of the dispute "on the basis of the respective positions of the two Parties."<sup>37</sup>

### b. The Criteria to be Applied

No less important than the definition of the dispute is the parties' directive to the tribunal as to the criteria to be applied in making its decision. The common directive given to tribunals is to decide the relevant dispute in accordance with international law. Other alternatives are,

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<sup>37</sup> Yemen/Eritrea, Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and the Scope of the Dispute), 3 October 1996, para. 73.

however, possible. For example, the parties may instruct the tribunal to arrive at a judgment based on *ex aequo et bono* (equity) or some other basis, including principles enshrined in particular treaties.<sup>38</sup> The parties' choices should be made in the light of the nature of the dispute.

In circumstances where parties have not specified the criteria to be applied to their dispute in an arbitration agreement, the tribunal will try to infer the parties' intentions in this regard. Often these result in a judgment based on international law, but the tribunal will consider evidence of other options to the extent that they are put forward by the parties.

### c. The Arbitrators

Parties' perception of the legitimacy of an arbitral award is likely to depend heavily upon who sits on the arbitral panel. Ensuring that suitable and trusted arbitrators are appointed to the tribunal is, therefore, key. Often parties will agree that each of them shall select one or a number of potentially sympathetic arbitrators and then some neutral arbitrators to create a balanced tribunal panel. The neutral arbitrators may be picked by the party-appointed arbitrators or by a disinterested third party such as the president of the International Court of Justice or the Permanent Court of Arbitration (PCA).

### d. Procedure

The procedural rules that will govern how the arbitration is to be conducted are also for the parties to choose. These rules will determine, among other things, when and how parties should make their submissions, the site of the arbitration hearing(s), language(s) of the arbitration, and the financing of the proceedings. The parties may negotiate and agree on all of these aspects, or a set of established rules devised

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<sup>38</sup> For example, Article 4(2) of the Agreement of 12 December 2000 between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia provided that a specially established Boundary Commission should "delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) and applicable international law."

by an arbitral institution may be referenced in the agreement. The PCA and the International Law Commission have, for example, devised sets of rules particularly suited to inter-State disputes.<sup>39</sup> Choosing to adopt a prepared set of rules is likely to expedite the agreement of an arbitration clause.

#### e. **Confidentiality**

A further key issue is for parties to decide the level of confidentiality in the proceedings and/or the arbitral award in their arbitration agreement. If a dispute is particularly politically sensitive, then a party may insist on confidentiality as a condition of arbitration. A State may also request confidentiality if the award is likely to touch on issues that are relevant to another dispute with a third State.

See Annex II regarding the length and cost of arbitral proceedings, financial assistance and the enforcement of arbitral awards.

#### iii. **Advantages of arbitration**

Arbitration has several advantages for parties wishing to resolve boundary disputes. Like proceedings before the International Court of Justice, arbitration will typically result in a final resolution of a dispute and is an effective method of resolving a dispute in cases where the parties have been unable to reach an agreement through negotiation. In addition, a third party (the tribunal) will determine the issues, thus taking the responsibility (and the potential political liabilities of making concessions in negotiations) away from the disputing States.

One significant advantage of arbitration over other judicial forms of dispute resolution is that the parties retain control over virtually the entire process, except for the final decision(s) of the tribunal. For example, as noted above, parties can choose their own arbitrators; specify

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<sup>39</sup> Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States, 1992 and International Law Commission Model Rules on Arbitral Procedure, 1958.

the procedures to be used and the applicable law, and set timeframes and deadlines for written and oral pleadings. Arbitration can also be a very expeditious means of resolving a dispute, since the parties have considerable control over the pace of proceedings. In addition, unlike proceedings before the ICJ, arbitration pleadings and proceedings may be kept confidential. In some cases, the mere fact that the arbitration is taking place is not a matter of public record. This can be an important consideration for States engaging in the arbitration of particularly politically- or economically-sensitive boundary disputes whose outcome may not want to be shared with third parties. A final advantage of arbitration proceedings over those before the ICJ is that there is no option of a third State intervening in the proceedings.

#### iv. Disadvantages of arbitration

Arbitration also has several drawbacks as a dispute resolution mechanism. Although parties have nearly full control over the process and procedure to be used, as in proceedings before the ICJ, the end result is still imposed upon the parties by the tribunal and is binding upon them. Further, the award is based chiefly on legal grounds rather than an agreed-upon compromise or equitable division of the disputed territory. Parties should therefore refrain from engaging in arbitration unless they are willing to accept a decision that they may find unfavourable.

Another drawback of arbitration is the need for the parties to negotiate an arbitration agreement before proceedings can commence. Parties unable to negotiate an ultimate resolution to their dispute may also have difficulty negotiating the specifics of an agreement on how to arbitrate the dispute. As noted above, however, potential ways exist around this problem. For example, parties may decide to leave certain aspects of an arbitration agreement up to the arbitration tribunal itself to decide.

Another disadvantage of arbitration is the considerable costs involved. As in proceedings before the ICJ, parties will typically hire outside counsel at considerable expense. The entire expenses of the arbitration staff and court fees fall on the parties. As explained above, financial assistance may be available, but only if the arbitration is administered by the PCA.

A final drawback of arbitration concerns the enforceability of the tribunal's award. Although tribunal awards are legally binding upon the parties to which they are directed, there is little formal recourse should one party decide not to comply. Diplomatic pressure as well as political pressure from third States can sometimes be applied. However, decisions of an arbitral tribunal are seen by some as carrying less political weight than those of the ICJ. In addition, unlike for those seeking enforcement of an ICJ judgment, no mechanisms exist under the UN Charter to seek assistance from the UN Security Council to enforce parties' compliance with an arbitral award.

### **3 Dispute Resolution under the United Nations Convention on the Law of the Sea (UNCLOS)**

In addition to *ad hoc* arbitration (as described above) or the commencement of proceedings before the ICJ, there are other options that parties may potentially pursue in respect of the settlement of maritime boundary disputes. The 1982 United Nations Convention on the Law of the Sea (UNCLOS) represents the first comprehensive effort by States to codify legal principles and rules of navigation and the allocation and exclusive rights of States to maritime space and resources in and under the world's oceans to States. UNCLOS represents a substantial modification of and addition to customary law of the sea. The Convention establishes specific limits of national jurisdiction from States' coastlines, including the territorial sea (Article 15), exclusive economic zone (Article 74), and continental shelf (Article 83). UNCLOS furthermore admonishes coastal States to delimit these zones with a maritime boundary or other suitable arrangement where they overlap "to achieve an equitable solution." Only in overlapping territorial seas are States required, failing other agreement, to draw an equidistance line. Complex coastal geography and availability of valuable ocean and undersea resources complicate the allocation of maritime areas, resulting in many delimitation disputes.

For the resolution of such disputes, Article 287 of the UNCLOS sets out two options:

- (i) The commencement of proceedings before the International Tribunal of the Law of the Sea (ITLOS); or

- (ii) Arbitration in accordance with the procedure prescribed in Annex VII to UNCLOS (Annex VII: Arbitration).

If both parties to a dispute have selected the same compulsory and binding dispute resolution forum, then it is to that forum that they may resort for dispute resolution should negotiations or other less binding dispute resolution mechanisms fail. If two disputing parties have selected different fora, or either one has made no declaration, then the parties will both be deemed to have consented to Annex VII Arbitration.<sup>40</sup> States that are not parties to UNCLOS may also agree to submit disputes to ITLOS or to Chapter VII Arbitration.

The key features of ITLOS and Chapter VII Arbitration proceedings are described briefly below. It should be noted that if a dispute is referred to ITLOS or Chapter VII Arbitration under UNCLOS, the jurisdiction of ITLOS or the Chapter VII Arbitration tribunal will be limited to disputes concerning the scope or interpretation of UNCLOS unless the parties otherwise expressly agree to allow the judges or arbitral tribunal to use other sources of international law (Article 288[1]). Therefore, ITLOS or the Chapter VII Arbitration tribunal would have jurisdiction to determine a maritime delimitation dispute, but would not be able to address issues of island and other territorial sovereignty over which UNCLOS has no jurisdiction. The judges or tribunal would then have to call upon other bodies of international law that relate to territorial sovereignty.

#### i. **International Tribunal for the Law of the Sea**

ITLOS, seated in Hamburg (Germany), constitutes a permanent tribunal that was established in 1996 specifically to adjudicate disputes arising under UNCLOS. Its constitution and functioning are governed by its Statute, which is appended to UNCLOS in Annex VI (the ITLOS Statute). ITLOS proceedings are governed by the ITLOS Statute and the ITLOS Rules.

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<sup>40</sup> Provided that neither of the States to the dispute has opted out of the determination of boundary disputes under any of the dispute resolution mechanism provided for in Article 287 of UNCLOS pursuant Article 298 of UNCLOS.

ITLOS is composed of 21 permanent members (judges) elected by secret ballot by the parties to UNCLOS. All 21 judges will hear a dispute submitted to ITLOS, unless the parties to the dispute have elected to have the dispute heard by the Court's special Chamber for Maritime Delimitation Disputes (the Chamber). This Chamber is composed of 11 judges, each of whom is an expert in maritime delimitation.

If ITLOS or the Chamber does not include a judge of the nationality of a party to the dispute, that party may choose a person to sit as a judge (Annex VI, Article 17[2]). Disputes submitted to ITLOS or to the Chamber will be decided in accordance with UNCLOS and rules of international law compatible with UNCLOS, unless the parties agree that the dispute should be decided *ex aequo et bono* (Article 293[1]).

Judgments of ITLOS are considered final and binding on the parties to the disputes in respect of which they were rendered (UNCLOS, Annex VI, Article 33). As in proceedings before the ICJ, in proceedings before ITLOS each party will bear their own costs. Costs of the judges and the administration of the proceedings, however, are covered by ITLOS.

ITLOS has so far decided only one maritime boundary delimitation case: *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*. Given that the judgment in the case was delivered within just two and a half years of the notification of the dispute to ITLOS, State parties may in future view this forum as an appealing alternative to dispute resolution, especially with regard to maritime delimitation disputes, over the ICJ. As noted above, ICJ proceedings typically take between three and four years to reach a conclusion.

## ii. Annex VII Arbitration

UNCLOS Annex VII relating to compulsory and binding arbitration is similar to ad hoc arbitration, as described above in Section IV.E (2) above. However, the arbitration will be governed by the rules set out in Annex VII of the Convention. Furthermore, the law applied to the determination of the dispute will be, in the first instance, based on the rules and principles established within UNCLOS and then other relevant international law.

Annex VII prescribes that the arbitration tribunal shall be composed of five members selected from a list of individuals drawn up by the Secretary-General of the UN. Each party shall select one arbitrator and the remaining three arbitrators shall be selected by the parties together (UNCLOS, Annex VII, Article 3). Unless the parties to a dispute agree otherwise, an Annex VII Arbitration tribunal will determine its own procedure (UNCLOS, Annex VII, Article 5).

An award employing UNCLOS Chapter VII arbitration is considered final and without appeal, unless the parties have previously agreed on an appellate procedure (UNCLOS, Annex VII, Article 10).

## Conclusion by El Ghassim Wane: A Combination of Mechanisms for Dispute Resolution

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As emphasised in this Guidebook, it is a duty incumbent on all African States to attempt to resolve their boundary disputes peacefully. The sections of this document have presented a series of dispute resolution mechanisms that States may consider in a boundary dispute situation.

In general terms, the choice of the most appropriate dispute resolution mechanism will depend on the specific circumstances of each case. However, in most instances, it will be advisable for States to seek to resolve their disputes first through negotiation, on the basis that negotiations are relatively easy to organise, inexpensive to conduct and allow States the flexibility to reach a solution that meets their mutual interest.

If negotiations fail, third party assistance is available through mediation to the conflicting States. States may choose less binding but often effective diplomatic mechanisms of mediation, inquiry and conciliation, or may instead opt for binding judicial methods, such as arbitration or recourse to an international jurisdiction, such as the International Court of Justice. AU Member States will also have the possibility of recourse to the African Court of Justice and Human Rights, once it is in the position to receive complaints pertaining to boundary disputes.

Alternatively, the parties to a dispute may choose to combine several options, all the while pursuing the negotiation process. This way the parties will have the opportunity to resolve disputes in a predictable and mutually consensual manner, with the fallback option of relying on a court or tribunal with a constraining judgment to provide resolution and finality if the negotiations come to a deadlock.

Finally, it is important to note that parties to a dispute can choose to resume or continue negotiations even after submitting their dispute to a Court or a tribunal, and have the ability to reach a negotiated settlement to their dispute at any time before a final decision is rendered in the judicial process. If such settlement is reached, the judicial proceed-

ings become moot and must be discontinued. The parties' agreement will have thus determined the resolution to the dispute.

The AUBP hopes that all future boundary disputes in Africa can be resolved peacefully by pursuing an effective combination of diplomatic and judicial methods of dispute settlement with the assistance from the AU and/or the UN if needed.

The Peace and Security Department remains convinced that this Guidebook constitutes a crucial tool towards the prevention and resolution of border disputes in Africa, and will add to the collective efforts to bring about security, development and continental integration for the benefit of African peoples.

*El Ghassim Wane*

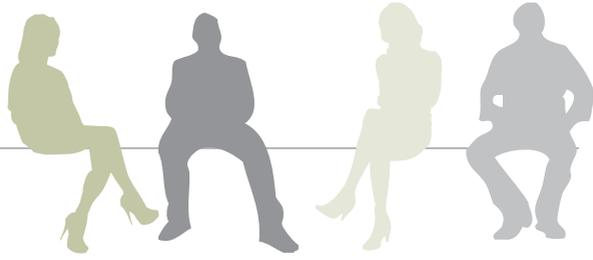
*Director, Peace and Security Department (until January 2016)*

*African Union Commission*

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## **Annexes**

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## Annex I:

# The International Court of Justice (ICJ)

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### Composition of the Court

Unlike an arbitral tribunal, the Court has permanent members (judges) who serve a fixed tenure. Fifteen permanent judges, elected by the General Assembly and the Security Council, each for a term of nine years, serve at the Court at any time. All participate in the determination of any dispute submitted to it.

The judges will not necessarily have been judges in their domestic jurisdictions, but all are required, pursuant to Article 2 of the UN Charter, to be “persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognised competence in international law.” If not judges, therefore, the members of the Court tend to be professors of law, professional lawyers, or legal advisers that have held senior positions in their country’s civil service.

No two members of the Court may be nationals of the same State. In addition, the members of the Court should, at least theoretically, be representative of “the main forms of civilisation and of the principal legal systems of the world” (Article 9 of the Court’s Statute).

Once elected, a member of the Court is a delegate of neither the government of his own country nor of any other State. Indeed, Article 20 of the Court’s Statute provides that: “Every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously.”

Notwithstanding this, should a party come before the Court that does not have a judge of its nationality serving as a member of the Court, it will have a right to choose a judge from a list of candidates to join the Court’s members in respect of, and for the period of, that party’s case. The party-selected judge is referred to as a ‘judge *ad hoc*’. He/she does

not have to be of the same nationality as the party that has selected him/her.

It is often assumed by a party exercising a right to select a judge ad hoc that the benefit of the right is that the judge ad hoc will support its position. This has, however, not always proven to be an accurate assumption. Notably, in *Nicaragua v. Colombia*, Colombia's chosen judge ad hoc voted against the application of Honduras to intervene in the proceedings, despite the fact that the arguments presented by Honduras may have supported Colombia's claim in the main proceedings.<sup>41</sup> He also resisted Costa Rica's application, notwithstanding that Colombia had shown support for Costa Rica's participation.<sup>42</sup>

## The Registry

A key feature of the Court's permanence is that it has its own administrative organ to administer the Court's proceedings (unlike in arbitration, no administering authority need be appointed). The Court's administrative organ is known as the Registry. It is headed by the Registrar, who also often acts as a diplomatic representative for the Court.

## The Procedure of the Court

As explained in Chapter IV, Section E (1), the Court's proceedings are regulated by the Court's Statute and Rules. Some important elements of the Court's procedure include:

### 1 The public nature of the proceedings

Unless the parties demand otherwise, parties' pleadings in cases will be made available to the public (usually on the Court's website) and

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<sup>41</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2011, p. 420.*

<sup>42</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2011, p. 348.*

hearings will be open for the public to attend. The Court's judgment will, in many cases, be delivered in public and it is the Court's practice to publish judgments on its website.

## **2 The language of proceedings**

The official languages of the Court are English and French and, unless the parties agree otherwise, they can make submissions in either language.

## **3 The criteria to be applied**

It is the Court's function to decide disputes submitted to it in accordance with international law. Specifically, Article 38(1) of the Court's Statute prescribes the four following sources of international law that the Court must apply:

### **i. Treaties that are binding on the States to the dispute**

A treaty is an agreement in written form between two States or a group of States that is governed by international law. A treaty is still a treaty even if the parties to it use a different designation, such as "agreement", "act" or "convention". For example, the Niamey Convention of May 2012 is a treaty that may, once it has been ratified and entered into force in future, be a source of international law referred to by the Court in relation to disputes between its African State signatories.

### **ii. Customary international law**

Customary international law is based upon rules derived from the behaviour (or custom) of States. The general practices of States can crystallise into law, provided the following criteria are met: consistency of practice, generality of practice, and acceptance by States of the practice as law.

### iii. General principles of law recognised by “civilised nations”

These are general principles of law derived from municipal jurisprudence that can be applied to the relations of States.

### iv. As a subsidiary means for the determination of rules of law, judicial decisions (such as ICJ judgments) and teachings of “the most highly qualified publicists”

The Court does not observe the doctrine of precedent, but it strives to maintain judicial consistency. It will, therefore, often refer to its previous decisions. It may also refer to the decisions of international tribunals, national courts and the writings of publicists.

## The Role of Equity

As an alternative to deciding a case strictly in accordance with international law and the evidence presented to the Court, parties may agree that the Court may decide a case *ex aequo et bono* (in accordance with fairness and justice) (Article 38(2)). Even if parties do not agree that a case should be decided in this way, the Court may reference equity in determining a case in specific circumstances. In continental shelf delimitation disputes, for example, in the absence of a relevant agreement between States, the Court will look to achieve an equitable solution. This will usually involve drawing a provisional equidistance line between the relevant States and then adjusting that line to take into account “relevant circumstances”, such as small islands, maritime features or coastal geography. Other considerations of equitability will, however, also be taken into account.

The role of equity is frequently addressed in the context of territorial disputes. For example, in the case between Burkina Faso and Mali, the Court was tasked with defining the line of the frontier between the two States in a disputed area that comprised several pools and villages. The parties agreed that the case should not be decided *ex aequo et bono*. Further, Burkina Faso (contrary to Mali’s submissions) emphasised that in territorial boundary delimitation no equivalent existed to the concept of “equitable principles” frequently referred to by the law applica-

ble to the delimitation of maritime areas. However, with regard to one pool, the Court nonetheless considered that it would have to regard to equity in so far as it was a general principle of international law and no precise indication was evident in applicable texts relative to the position of the frontier line. The Court thus decided that the pool should be divided in half.

#### v. The Court's power to indicate provisional measures

One procedural issue which States should contemplate in proceedings before the ICJ is provisional measures. In accordance with Article 41(1) of the Statute, at any point during the proceedings, if it considers that circumstances so require, the Court may indicate that provisional measures should be taken in order to preserve the respective rights of the parties pending the final judgment. Such provisional measures, for example, may include the creation of a demilitarised zone on the frontier between two States in order to prevent the outbreak or escalation of violence (as occurred between Burkina Faso and Mali<sup>43</sup> and Cameroon and Nigeria<sup>44</sup>).

Pursuant to Article 75 of the Court's Rules, the Court may indicate provisional measures pursuant to a request from either or both parties, or on its own initiative.

#### vi. Third Party Intervention

Unlike arbitration, there is a possibility for third States – not party to a related dispute with the parties before the Court – to intervene in proceedings. The grounds for such intervention are set out in Article 62 of the Court's Statute: the third State must consider that it has an interest of a legal nature which may be affected by a decision in the relevant case.

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<sup>43</sup> *Frontier Dispute, Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 3.

<sup>44</sup> *Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996*, p. 13.

Applications for permission to intervene by third States are rarely granted by the Court and even if they are permitted, interventions are limited to the submission of written and oral observations relating to the interests which the third State perceives to be potentially affected.<sup>45</sup> The intervening State does not become a party to the proceedings, and the final judgment will not be binding upon that State, or determine its boundaries with either of the two principal parties to the case. Under Article 59 of the Statute, the decision of the Court has no binding force except between the parties and in respect of that particular case.

### vii. The Final Nature of the Court's Judgments

A judgment of the Court is final and without appeal. However, it is possible to request a revision of the judgment under Article 61 of the Statute if, after the judgment is rendered, a fact of a decisive nature is discovered by a party and its ignorance of that fact previously was not due to negligence. The occasions on which a request for revisions has been granted, however, are limited.

In the event of a dispute about the meaning or scope of a judgment of the Court, a party may apply for an interpretation of the judgment.

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<sup>45</sup> For example, when granting Equatorial Guinea permission to intervene in the land and maritime boundary dispute between Cameroon and Nigeria, the Court stated that Equatorial Guinea's intervention was to be made in the manner and for the purpose set out in its application to intervene only. See, *Land and Maritime Boundary between Cameroon and Nigeria, Application to Intervene, Order of 21 October 1999*, I.C.J. Reports 1999, p. 1035.

## The Jurisdiction of the ICJ

State parties to the case can give consent to the Court in one of four ways.

### 1 Special Agreement (or “*Compromis*”)

State parties can mutually agree to bring a particular dispute to the Court. In such cases, the parties express their consent to the Court’s jurisdiction by means of what is called a special agreement also referred to as a *compromis*, which is a written document containing a description of the dispute between the parties and request to the Court to resolve the dispute. Within the special agreement, the parties can expressly define the subject of the dispute, placing limitations or parameters on the aspects of the dispute the Court may resolve. In the case of a boundary dispute, for example, the parties can request the Court to examine only a specific portion of the boundary, if they so wish. The parties can also stipulate the applicable treaties, agreements, or laws it wants the Court to consider in resolving the dispute. For example, in a special agreement by which Botswana and Namibia referred their dispute over their boundary and sovereignty over Kasikili / Sedudu Island to the Court in 1996, the parties specifically asked the Court to render its judgment “on the basis of the Anglo-German Treaty of 1 July 1890 and the rules and principles of international law.”<sup>46</sup>

Since the Court was established in 1945, 17 cases have been submitted to it by means of a special agreement. Those cases include the following boundary disputes between African States, which were referred to the Court in the years indicated:

- Libya / Tunisia (maritime boundaries) (1978)
- Libya / Malta (maritime boundaries) (1982)
- Burkina Faso / Mali (1983)
- Chad / Libya (1990)

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<sup>46</sup> Special Agreement between the Government of the Republic of Botswana and the Government of the Republic of Namibia to Submit to the International Court of Justice the Dispute Existing between the two States concerning the Boundary around Kasikili / Sedudu Island and the Legal Status of the Island jointly notified to the Court on 29 May 1996, General List No. 98.

- Botswana/Namibia (1996)
- Benin/Niger (2002)
- Burkina Faso/Niger (2010)

The special agreements in each of the above cases can be read on the Court's website. The agreement in the recent case submitted to the Court by Burkina Faso and Niger provides a typical example. In that agreement, dated 21 July 2010, the parties requested the Court to:

- 1 Determine the course of the boundary between the two countries in the sector from the astronomic marker of Tong-Tong (latitude 14°25'04" N; longitude 00°12'47" E) to the beginning of the Botou bend (latitude 12°36'18" N; longitude 01°52'07" E);
- 2 Place on record the Parties' agreement on the results of the work of the Joint Technical Commission on Demarcation of the Burkina Faso-Niger boundary with regard to the following sectors:
  - The sector from the heights of N'Gouma to the astronomic marker of Tong-Tong;
  - The sector from the beginning of the Botou bends to the River Mekrou.

The parties specified the applicable law as the following:

- The rules and principles of international law applicable to the dispute are those referred to in Article 38, paragraph 1, of the Statute of the International Court of Justice, including: the principle of the intangibility of boundaries inherited from colonisation and the Agreement of 28 March 1987.

## **2 Declarations Recognising the Jurisdiction of the Court as Compulsory**

States can also accept the jurisdiction of the Court in a more general manner by declaring that they recognise as compulsory, ipso facto and without special agreement, the jurisdiction of the Court in relation to any other State accepting the same obligation, in accordance with Article 36(2) of the Statute of the Court. Such declarations are made on the basis of reciprocity. Thus, States that recognise the jurisdiction of the Court as compulsory can bring to the Court a dispute against any other State that has made such a declaration.

States are free to include reservations in their declarations, excluding certain types of disputes from the jurisdiction of the Court. The reservations can be broad or narrow in scope; for example, a reservation could exclude all boundary disputes from the Court's jurisdiction or only boundary disputes with respect to a particular State or in a particular area. Because such reservations are also made on a reciprocal basis, States that include a reservation in their declaration excluding a particular matter from the Court's jurisdiction will be unable to bring a case to the Court regarding that matter against any other State (unless that State gives its express consent in the context of the particular case, as will be discussed further below). In other words, any State against which the declaring State brings a case can invoke the declaring of a State's reservation against the declaring State itself.

Just over 70 States, to date, have submitted declarations recognising the jurisdiction of the Court as compulsory, and about 30% of the cases before the Court since 1945 have been submitted on the basis of such declarations.

### **3 Treaties providing for the Court's Jurisdiction**

A State can also accept the Court's jurisdiction by signing a bilateral or multilateral treaty that provides for the Court's jurisdiction in certain circumstances. Most treaties with such jurisdictional clauses limit the Court's jurisdiction to questions relating to the interpretation or application of that particular treaty, or to questions concerning the subject matter of the treaty. For example, the Genocide Convention provides that:

*“Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”*

Over 300 bilateral and multilateral treaties providing for the Court's jurisdiction in certain cases are currently in force, and about 40% of the

Court's cases since 1945 have been submitted to the Court on the basis of such a treaty. Boundary disputes, however, are rarely brought to the Court on this basis, as few treaties concerning boundaries provide for the Court's jurisdiction in the event that a dispute arises over a given boundary. Nothing, however, prevents States from agreeing upon a treaty providing for the Court's jurisdiction in such cases.

#### 4 *Forum Prorogatum*

The final way that the Court's jurisdiction can be accepted in a particular case is when a State which has a case filed against it agrees to accept the Court's jurisdiction. Any State that is a party to the Statute of the Court may initiate a case against any other State by filing an Application with the Court. At this point, the Court does not yet have jurisdiction over the case (unless jurisdiction can be established through other means as discussed above). However, the respondent State (the State against which the Application was filed) may, after considering the Application, consent to the Court's jurisdiction for the purposes of that particular case. In such cases, the Court acquires jurisdiction and may proceed with the case, which is known as *forum prorogatum*. If the respondent State does not consent to the Court's jurisdiction, then the Court cannot proceed with the case, and the case will not be entered onto the General List of cases before the Court. Generally however, *forum prorogatum* is not a very common way to establish the Court's jurisdiction.

A *forum prorogatum* application will only be notified to third parties and entered into the General List once the respondent State has accepted the Court's jurisdiction (Article 38(8) of the Rules of Court). The existence of the application (although not its contents), however, may be notified to the public in a press release.

## Contents of an Application or Notification to the Court

### 1 Applications

Applications to the Court can be short. Articles 38(1)-(3) of the Court's Rules set out the only elements that must appear in an application, which include an indication of the following:

- (i) The party making the application and the party against which the claim is brought;
- (ii) The subject matter of the dispute;
- (iii) The legal grounds upon which the jurisdiction of the Court is said to be based;
- (iv) The precise nature of the claim; and
- (v) A concise statement of the facts and grounds on which the claim is based.

Notably, an application does not need to set out in any detail a State's arguments in relation to the relevant dispute. Much more detailed written and oral pleadings, with documentary and other evidence, will be submitted later in the proceedings.

For a *forum prorogatum* application, the most important element is the identification of "the subject matter of the dispute". If the respondent State responds positively to a *forum prorogatum* application, the Court would only have jurisdiction to consider claims raised by the parties in relation to this subject matter as it appears in the application.

Pursuant to Article 38(3) of the Court's Rules, an application needs to be signed either by the agent of the party submitting it, or by the diplomatic representative of the party to the Netherlands, or by some other duly authorised person.

If an application bears the signature of someone other than the diplomatic representative of the relevant State in the Netherlands, the signature must be authenticated by the State's Minister of Foreign Affairs.

## 2 Notifications

Article 39(2) of the Court's Rules prescribes the contents of a notification of a special agreement to the Court. It specifies that the notification must attach an original or certified copy of the special agreement. The notification must also, to the extent that it is not already apparent from the special agreement, indicate the precise subject matter of the dispute and identify the parties to it.

## 3 Appointment of an Agent

In accordance with Article 42(1) of the Court's Statute, a State bringing a dispute to the Court must designate an agent to act as its representative before the Court. The agent's name should be mentioned in the State's application or notification to commence proceedings.

The agent will be the primary point of contact between a State and the Court in respect of a case, and decisions and communications made by the agent will bind the State vis-à-vis the Court.

The agent will also be expected to lead and coordinate the preparation of the State's pleadings before the Court, with the assistance of an expert legal and technical team. A co-agent may also be appointed.

## 4 Length of Proceedings

Proceedings before the Court involve several rounds of written submissions, followed by oral pleadings. After a party has filed its written application / notification to the Registry and the respondent party has been informed, both parties will be called to a meeting with the President of the Court to discuss scheduling the proceedings. In general, cases before the Court take about three to four years to reach their conclusion from the date the application / notification is filed. For example, the case of Botswana / Namibia took three years to conclude.<sup>47</sup> However, this timeframe may be extended if there are

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<sup>47</sup> *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045.

incidental proceedings in the case, such as an application by another State for permission to intervene or a request for provisional measures. For example, the case of *Cameroon v. Nigeria*, concerning their land and maritime boundary, was commenced by an application submitted by Cameroon on 28 March 1994 and the Court did not deliver a final judgment on the merits until 2002.<sup>48</sup>

## 5 The Cost of Proceedings

Participating in a case before the ICJ can be very expensive. The Court will expect parties to handle their cases in a comprehensive and professional manner. Therefore, parties will usually appoint counsels experienced in ICJ proceedings to represent them. The number of such expert counsel in boundary disputes is limited and their fees will usually not be insignificant.

In addition, in territorial and maritime boundary delimitation cases, a party will likely also require the assistance of expert archivists and cartographers.

Aside from the legal and technical team that a party before the Court will need to appoint, costs will be incurred in relation to the preparation of pleadings. The parties will be expected to submit multiple copies of their submissions to the Court. Significant costs will also be incurred by the State departments charged with dealing with the case, as they will inevitably spend considerable time managing and assisting with the case.

Each party to a case before the Court will bear its own costs. Unlike in arbitration, however, there are no costs for the use of the Court's facilities or for the administration of the case by the Registry. As noted above, the parties also do not have to pay the judges. This given, ICJ proceedings are not always more expensive than arbitral proceedings, notwithstanding their length.

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<sup>48</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial New Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 303.

## 6 Financial Assistance

Financial assistance may be available to parties before the Court in certain circumstances from the Court Trust Fund.

The Trust Fund was established in 1989 by the Secretary-General under the Financial Regulations and Rules of the United Nations following consultations with the President of the International Court of Justice.

In accordance with the Terms of Reference of the Fund (revised in 2004), financial assistance is to be provided to States for expenses incurred in connection with:

- (i) a dispute submitted to the ICJ by way of special agreement; and
- (ii) a dispute submitted to the ICJ by means of an application under Articles 36(1) or (2) of the Court's Statute (A) after any preliminary objections to the Court's jurisdiction have been decided; or (B) where the State requesting financial assistance has not made any objection to jurisdiction and undertakes not to do so and, instead, proceeds to plead the case on the merits, or the execution of a judgment by the Court.

An application for financial assistance in respect of any of the above-listed activities will be reviewed by a panel of three legal experts appointed by the Secretary-General. The experts will present their evaluation of the application and recommendations to the Secretary-General, who will then make a final determination of the amount of assistance to be awarded and the amount, which should be paid in advance of costs being incurred.

Reports recording distributions made from the Fund between 2001 and 2012 are available online. As of 30 June 2012, the most recent application for assistance from the Fund was that of Djibouti, made on 20 March 2007, in respect of expenses incurred in connection with proceedings instituted by Djibouti before the ICJ in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*.<sup>49</sup>

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<sup>49</sup> Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice: Report of the Secretary-General (A/62/171 of 31 July 2007).

Djibouti was granted U.S. \$ 290,500, the purpose of which was to defray the following expenses: costs of agents, counsel, experts or witnesses; staff costs; costs of reproduction of maps and production of technical documents; expenses incurred in connection with the memorial, counter-memorial and replies; costs of legal research; and costs incurred in connection with oral proceedings.

Other African States have also received assistance from the Fund. For example, on 4 June 2004, Benin and Niger were awarded U.S. \$ 350,000 each in respect of the settlement of their boundary dispute before the Court.<sup>50</sup>

As in the case of arbitration, aside from financial assistance, States facing difficulties with legal costs may consider approaching law firms or relevant international organisations for *pro bono* legal support.

## The Enforcement of Judgments of the Court

As stated above, judgments of the Court in contentious cases are binding on the parties to the case, meaning that parties to a given case have an obligation under international law to comply with them. This obligation is set out in Article 94 of the UN Charter. As a result, there is a strong political incentive for parties to comply with the Court's judgments. Indeed, in the clear majority of cases, parties do comply.

In the event of non-compliance with the Court's judgment by a party to a case, the UN Charter provides that the other State party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment. In reality, however, this procedure is used infrequently. Instead, the non-complying State is likely to face considerable diplomatic pressure from neighbouring States and from the international community, which may encourage it to fall in line.

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<sup>50</sup> UN Press Release of 4 June 2004, SG / 2087, L / 3070.

## Annex II: Arbitration

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### Length of Arbitral Proceedings

The length of the arbitral proceedings – like all other procedural aspects of the arbitral process – can be measured by the willingness of the parties to cooperate with and consent to arbitration.

Most inter-State boundary arbitrations tend to take about one-and-a-half to two years from the signature of an arbitration agreement to reach a conclusion. Some, however, have notably taken less time; the Abyei Arbitration between the Government of Sudan and the Sudan People's Liberation Movement, for example, was completed within just eight months of the tribunal's first procedural meeting.<sup>51</sup>

In considering an appropriate timeframe for arbitration, parties should *inter alia* consider the factual and legal complexity of the dispute between them. The parties will need to prepare submissions in which they set out the tribunal evidence for the positions that they take. The collection of evidence for such submissions and legal research will likely require a lot of time. Furthermore, once the parties' submissions have been made, the tribunal must have sufficient time to analyse everything with which it has been presented and come to a reasoned solution.

In order to ensure that a tribunal is not unduly pressured by time in coming to its decision, parties will often provide for some flexibility regarding the arbitral schedule. For example, the arbitration agreement between Ethiopia and Eritrea in 2000 in relation to the two States' border dispute provided for an aspirational deadline for the decision of the Commission within six months from the date of the Commission's first

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<sup>51</sup> The tribunal's first procedural meeting was held on 24 November 2008 and the award in the case was issued on 22 June 2009 (see, The Government of Sudan // The Sudan People's Liberation Movement (Abyei Arbitration), Final Award, 22 June 2009).

meeting.<sup>52</sup> The agreement also indicated, however, that the deadline could be extended at the Commission's discretion.<sup>53</sup> Ultimately, the arbitration took just over a year.<sup>54</sup>

## The Cost of Proceedings

The fact that arbitration can be a relatively quick means of resolving international boundary disputes can also help to limit the parties' costs: the parties' legal advisers have only a limited timeframe in which to work and this can serve to restrict legal fees. In addition, since the parties are free to choose how the tribunal will conduct the arbitral process, they can ensure that certain case management costs – related, for example, to the production of written submissions – are minimised.

Arbitration is not, however, necessarily cheaper than systems of dispute resolution that take more time (such as proceedings before the International Court of Justice). Unlike the judges of the ICJ, arbitrators are paid by the parties to hear their dispute. The parties must also cover any costs related to the administration of the arbitral process.

In the context of international boundary disputes, arbitrator fees are set between the arbitrators and parties directly. Parties typically have little bargaining power, however, since the number of people qualified to adjudicate land and maritime boundary disputes is limited and they are often in high demand.

In order to ensure predictability in relation to administrative fees (and, indeed, for greater efficiency), parties may consider appointing an administrative authority to run the proceedings. The Permanent Court of Arbitration, for example, acts as an administrative authority and charges for its services in accordance with an established schedule of fees.

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<sup>52</sup> Article 4(12) of the Agreement of 12 December 2000 between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia.

<sup>53</sup> *Ibid.*

<sup>54</sup> The Boundary Commission first met in The Hague on 25 March 2001. It issued its Decision in the case on 13 April 2002 (Decision on the Delimitation of the Border between Eritrea and Ethiopia).

At the end of the arbitral process, unless the parties have agreed otherwise, the arbitrators will determine how the costs of the arbitration will be apportioned. In State-to-State arbitration cases the practice is usually that each party should bear its own costs and the costs of the proceedings should be split evenly, whether or not the claimant or the respondent prevails.

## Financial Assistance

For States concerned about the costs associated with submitting a dispute to arbitration, financial assistance is potentially available. In October 1994, the Permanent Court of Arbitration (PCA) established a fund to aid developing countries with part of the costs associated with PCA-administered arbitrations. In order to qualify for funding, a State must:

- a. be a signatory to either the 1899 or 1907 Hague Conventions;
- b. have concluded an agreement to refer a dispute (or disputes) to arbitration to be administered by the PCA; and
- c. at the time of the application, be listed on the Development Assistance Committee List of Aid Recipients regularly prepared by the Organisation for Economic Co-operation and Development.

A request for funding should be submitted to the Secretary-General of the PCA and must be accompanied by an undertaking by the relevant State to submit an audited Statement of Account on the expenditures made with the funds received. A board of independent trustees will decide on the request.

Aside from financial assistance, States facing difficulties with legal costs may consider approaching law firms or relevant international organisations *pro bono* (for free) legal support.

## Enforcement

The difficulty of enforcing awards is perhaps the greatest limitation of inter-State arbitration. Although arbitration will normally result in a binding decision, ensuring that the decision is implemented can be problematic. To the extent that the winning State has support within the international or its regional community, economic or diplomatic pressure may be brought to bear on the losing party. If such pressures are ignored, however, options available to the winning State to enforce the arbitral award are likely to be limited.

## **Annex III:**

### **Achievements of the AUBP**

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Since the launch of the Programme numerous advances have been recorded. A non-exhaustive list of activities undertaken in recent years is presented below.

#### **With regards to delimitation and demarcation**

- Provision of technical and financial assistance, covering, among others, requisite equipment and training, in various countries implementing the AUBP;
- Completion of the demarcation of the Burkina Faso / Mali border;
- Completion of the delimitation of the maritime boundaries between Comoros, Mozambique, the Seychelles and Tanzania;
- Support for reaffirmation exercises between Mozambique and Zambia;
- Support for reaffirmation exercises between Malawi and Zambia;
- Support for ongoing reaffirmation exercises between Mozambique and Tanzania and between Mozambique and Malawi;
- Signing of Delimitation, Demarcation and Boundary Treaty between Mali and Senegal;
- Support of launch of demarcation exercises of the border between Burkina Faso and Niger, in accordance with the ruling of the ICJ;
- Implementation of a Border Information System (AUBIS) – which is a database on African borders. The Commission subsequently received colonial archives from Germany, the United Kingdom, France, Portugal, Italy and Belgium, which have been integrated into AUBIS;
- Facilitation of meetings of the Joint Border Commission and the Joint Demarcation Committee between South Sudan and Sudan;
- Support for the drafting of the delimitation and demarcation treaties between Botswana and Namibia.

## With regards to cross-border cooperation

- Development and adoption of the AU Convention on Cross-Border Cooperation in Niamey, Niger, in 2012;
- Establishment of a cross-border health centre at the border between Burkina Faso and Mali;
- Establishment of a local management structure of cross-border cooperation between the border communities of Burkina Faso and Mali;
- Systematic articulation and sensitisation of the AUBP at the Regional Economic Communities (REC) and Member States levels through regional sensitisation workshops jointly organised with the REC;
- Support for the fight against the Ebola epidemic at the borders of Guinea-Senegal and Guinea-Mali.

## With regards to capacity building

- Publication of practical guidebooks on delimitation and demarcation of borders in Africa, the establishment of cross-border infrastructure projects, the establishment and the work of border commissions, the resolution of border disputes, as well as a collection containing all resolutions and declarations of the AU on African borders between 1963 and 2012. The document at hand, titled “Boundary Dispute Settlement: Guidebook of Procedures and Mechanisms for African Decision Makers” is the sixth publication of the AUBP;
- Launch of the new AUBP documentary film and two new textbooks during the 4th African Border Day;
- Organisation of regional training workshops aimed at staff in charge of border management.

## With regards to outreach and partners

- Institutionalisation of the seventh of June as the African Border Day in accordance with the Decision adopted by the 17th Ordinary Session of the Executive Council Doc.EX.CL/585(XVII), held in Kampala (Uganda) on 25 July, 2010. This day is celebrated each year and commemorates the adoption of the first Declaration on the AUBP;

- Ongoing partnership with the Federal Republic of Germany especially through the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, as well as the United Kingdom of Great Britain and Northern Ireland for the support of border delimitation and demarcation exercises;
- Writing and publication of an anthology on African borders, entitled *Borders in Africa: An Anthology of the Policy History*, in partnership with GIZ and Institute for Peace and Security Studies (IPSS).

## Annex IV: Overview of Procedures

	Negotia- tion	Media- tion	Good Offices	Inquiry	Concilia- tion	ICJ	Arbitra- tion
Is the out- come binding	✗*	✗*	✗*	✗***	✗***	✓	✓
Requires 3rd party	✗	✓	✓	✓	✓	✓	✓
Established procedure	✗	✗	✗	✓***	✓***	✓	✓***
Confidential- ity can be agreed?	✓	✓	✓	✓	✓	✗	✓
Relative expense	✗	✗	✗	✓ / ✗	✓ / ✗	✓	✓

\* Should a settlement agreement be achieved the terms of that agreement will be binding on the parties

\*\* Varies depending on the function and competence given to a particular inquiry/conciliation committee

\*\*\* Procedure can be varied by agreement of the parties

	ICJ	Arbitration
Binding decision	✓	✓
Parties have full control over proceedings	✗	✓
Parties appoint their own judges/arbitrators	✗	✓
Public proceedings	✓	✗
Possibility of third party intervention	✓	✗
Possibility of appeal	✗	✗
Cost of court/tribunal facilities to be paid for by the parties	✗	✓
Cost of judges/arbitrators to be paid for by the parties	✗	✓
Cost of legal counsel to be paid for by the parties	✓	✓
Financial assistance available to States	✓	✓
Relative ease of enforcement	✓	✗
Other dispute resolution mechanisms can be pursued at the same time	✓	✓
Possible to cease proceedings if a settlement is achieved	✓	✓



This fifth guide of the AUBP delivers a detailed description of the different methods of settling boundary disputes. It presents diverse options, ranging from international adjudication to mediation, and experiences accumulated by various African States.

In particular, it exposes the advantages and disadvantages of each option, in order to allow Member States to make an informed decision on how to solve a boundary dispute. This endeavor aims to support conflicting parties to find a peaceful and sustainable way to resolve their boundary disputes that often surface on the continent.

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African Union Commission

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# African Border Dispute Settlement: The User's Guide

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