

2003

The Binding Dilemma: From Bakassi to Badme - Making States Comply with Territorial Decisions of International Judicial Bodies

Nejib Jibril

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [International Law Commons](#)

Recommended Citation

Jibril, Nejib. "The Binding Dilemma: From Bakassi to Badme - Making States Comply with Territorial Decisions of International Judicial Bodies." American University International Law Review 19, no. 3 (2003): 633-677.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University International Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

THE BINDING DILEMMA: FROM BAKASSI TO BADME – MAKING STATES COMPLY WITH TERRITORIAL DECISIONS OF INTERNATIONAL JUDICIAL BODIES

NEJIB JIBRIL*

INTRODUCTION	634
I. BACKGROUND	638
A. THE ETHIO-ERITREAN AND NIGERIA-CAMEROON BORDER DISPUTES AND THEIR SUBMISSION TO THE RESPECTIVE COURTS	638
1. <i>The Ethio-Eritrean War and the Algiers Peace Agreement</i>	638
2. <i>Nigeria and Cameroon's Border Dispute and ICJ Compulsory Jurisdiction</i>	641
B. DIFFERENCE IN FORUM – COURTS OF ARBITRATION AND THE INTERNATIONAL COURT OF JUSTICE	644
1. <i>Similarities and Differences Between the ICJ and the EEBC</i>	644
2. <i>The EEBC's Decision Concerning the Ethiopia-Eritrean Dispute and its Rationale</i>	646
3. <i>The Basis for the ICJ's Ruling on the Nigeria-Cameroon Dispute</i>	648
II. ANALYSIS	650
A. WEAKNESSES IN INTERNATIONAL JUDICIAL BODIES' ABILITY TO TRULY BIND COUNTRIES TO THEIR DECISIONS	650
1. <i>Problems with Jurisdiction</i>	650

* J.D. Candidate, 2005, American University, Washington College of Law. I would like to express my thanks to my parents who provided me with the necessary education, love, and courage to pursue my academic interests. Thanks also to my amazing and inspiring big sister and my two wonderful brothers. Finally, I would like to give a shout out to all my friends (including, but not limited to, my redhead colleagues) and the entire ILR staff.

2. <i>Claims of Injustice and Unfairness Emanating from the Lack of Power to Make Decisions Ex Aequo et Bono and from the Doctrine of Uti Possidetis</i>	652
3. <i>Lack of Specificity in Arbitration Agreements</i>	655
4. <i>Lack of Strong Consequences for Failing to Comply with Decisions</i>	659
B. WHY DECISIONS OF ARBITRATION COURTS UNDER THE PCA ARE MORE BINDING THAN TERRITORIAL DECISIONS OF THE ICJ AND THE ETHIO-ERITREAN DISPUTE AS AN EXCEPTION	662
III. RECOMMENDATIONS	668
A. THE INTERNATIONAL COMMUNITY SHOULD PUSH COUNTRIES TO SUBMIT CONTENTIOUS TERRITORIAL DISPUTES TO ARBITRATION COURTS RATHER THAN FACING ICJ JURISDICTION	668
B. PARTIES CREATING ARBITRATION AGREEMENTS SHOULD CLARIFY AND INCORPORATE CRITICAL RULES OF PROCEDURE IN THE ARBITRATION AGREEMENT ITSELF	670
C. PARTIES SHOULD INCLUDE STRONGER ENFORCEMENT CLAUSES IN ARBITRATION AGREEMENTS	672
CONCLUSION	675

INTRODUCTION

Boundary disputes are often bitter, contentious, and can boil over into armed conflict.¹ This is especially the case in Africa where, at the Berlin Conference of 1884-1885, colonial powers carved out boundaries without regard for inhabitants and local geography.² Fear

1. See Jan Paulsson, *Boundary Disputes into the Twenty-First Century: Why, How... and Who?* 95 AM. SOC'Y INT'L L. PROCEEDINGS 122, 122 (2001) (observing the tensions that exist between states with boundary disputes).

2. See P. Mweti Munya, *The International Court of Justice and Peaceful Settlement of African Disputes: Problems, Challenges, and Prospects*, 7 J. INT'L L. & PRACTICE 159, 165 (1998) (noting that the Conference created countries without consideration for preexisting geographic, ethnic, or cultural affinities); see also Keith Somerville, *Border Dispute an African Colonial Legacy*, BBC, Oct. 10, 2002 (remarking that lack of precision and scant documentation between colonial powers has led to numerous border conflicts in post-colonial Africa), <http://news.bbc.co.uk/2/hi/africa/2316645.stm> (last visited Jan. 14, 2004). See generally Ronald Robinson, *The Conference in Berlin and the Future in Africa, 1884-1885*, in BISMARCK, EUROPE AND AFRICA: THE BERLIN CONFERENCE 1884-1885 AND THE ONSET OF PARTITION OF AFRICA, 1, 30-32 (Stig Forster et al. eds.,

of ethnic fragmentation in post-colonial Africa led countries to sign the 1964 Organization of African Unity ("OAU") Cairo Declaration on Border Disputes Among African States.³

In spite of the Cairo Declaration, African countries continue to call upon international judicial bodies to mediate present day border disputes.⁴ Although some African countries have consented to border rulings by international judicial bodies,⁵ other African countries have refused to comply with unfavorable rulings.⁶ Most recently, Nigeria greeted the International Court of Justice's ("ICJ" or "Court") ruling that the Bakassi Peninsula belonged to Cameroon with anger and contempt, and has yet to turn the Bakassi Peninsula over to Cameroon.⁷ Similarly, Ethiopia expressed its disappointment at a ruling by the Eritrea-Ethiopia Boundary Commission ("EEBC") over

1988) (describing the events and repercussions of the Berlin Conference, where European powers and the United States met to divide Africa amongst themselves).

3. See *Resolutions Adopted by the First Ordinary Session of the Assembly of Heads of State and Government Held in Cairo, UAR, From 17 to 21 July 1964: Border Disputes Among African States*, OAU Doc. AHG/Res. 16(I) (1964) [hereinafter Cairo Declaration] (committing African states to respect the borders existing on their achievement of national independence), http://www.africa-union.org/official_documents/Heads%20of%20State%20Summits/hog/bHoGAssembly1964.pdf. (last visited Jan. 14, 2004); see also Makau Wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113, 1162-64 (1995) (noting that African countries adopted the Cairo Declaration in order to avoid the fragmentation of countries on the basis of ethnicity).

4. See Munya, *supra* note 2, at 173-183 (arguing that factors such as the end of the Cold War, structural changes in the ICJ, and a change in judicial attitude has led more African countries to bring disputes before the ICJ). These changes have led the ICJ to decide more African border disputes by relying on the assumption that colonial boundaries already in existence should be preserved to decrease potential future conflicts. *Id.* at 215-218. The ICJ has already faced these issues in cases between Burkina Faso and Mali, Libya and Chad, Botswana and Namibia, and between Nigeria and Cameroon. *Id.*

5. See *id.* at 220-21 (discussing two cases in which African countries complied with decisions by the ICJ on territorial issues).

6. See Martin Plaut, *Nigeria Opens Legal Can of Worms*, BBC, Oct. 24, 2002 (discussing legal repercussions of Nigeria's rejection of an ICJ ruling as potentially challenging the U.N.), at <http://news.bbc.co.uk/2/hi/africa/23569231933451.stm> (last visited Jan. 14, 2004).

7. See *id.* (reporting on Nigeria's rejection of the decision by the ICJ).

its border dispute with Eritrea.⁸ Ethiopia's protest against the EEBC decision has forced the EEBC to indefinitely postpone the demarcation of the Ethio-Eritrean border.⁹ The demarcation was originally scheduled in May 2003 and then postponed to October 2003.¹⁰

These two cases expose the weaknesses in international judicial bodies' ability to compel countries to submit to their binding and final decisions.¹¹ In both cases, a dispute over a symbolic strip of land along an ill-defined border sparked armed conflict.¹² Moreover, a substantial number of the people living in the disputed land consider themselves nationals of the country that obtained the unfavorable ruling.¹³ However, the two cases proceeded in different

8. See Damian Zane, *Ethiopia Regrets Badme Ruling*, BBC, Apr. 3, 2003 (noting that while the Ethiopian government expressed disappointment at the ruling, but did not openly reject it), at <http://news.bbc.co.uk/2/hi/africa/2914559.stm> (last visited Jan. 14, 2004).

9. See *Eritrea-Ethiopia: Border Demarcation Again Postponed*, IRIN NEWS.ORG, Oct. 24, 2003 (explaining that the U.N. Mission in Ethiopia and Eritrea has postponed the demarcation and not provided a new date for the demarcation), at http://www.irinnews.org/report.asp?ReportID=37429&SelectRegion=Horn_of_Africa&SelectCountry=ERITREA-ETHIOPIA (last visited Jan. 14, 2004).

10. *Id.*

11. See discussion *infra* Part II.A (identifying weaknesses that enable countries to disregard supposedly binding and final decisions).

12. Compare Nita Bhalla, *Badme: Village in No Man's Land*, BBC, Apr. 22, 2002 (explaining how the Ethio-Eritrean border war began in a fight over Badme), at <http://news.bbc.co.uk/2/hi/africa/1943527.stm> (last visited Aug. 10, 2003), with Gilbert M. Khadiagala, *Reflections on the Ethiopia-Eritrea Border Conflict*, 23 FLETCHER F. WORLD AFF. 39, 42-43 (1999) (arguing that ideological and personality conflicts between the leaders of Ethiopia and Eritrea and different approaches to political management, economic relations, and nation-building led to the border war).

13. See Omer Songwe, *Nigerians in Fear in Bakassi*, BBC, Nov. 1, 2002 (reporting that the majority of people living in the disputed Bakassi, a peninsula in the southern border between Nigeria and Cameroon, are Nigerian fishermen), at <http://news.bbc.co.uk/2/hi/africa/2387993.stm> (last visited Jan. 14, 2004); see also Bhalla, *supra* note 12 (observing that most of the 5,000 residents of Badme say they are from Ethiopia). Badme is a small town in the northwestern border of Ethiopia and Eritrea. *Id.*

forums: the ICJ heard Cameroon's case against Nigeria,¹⁴ and an arbitration court, the EEBC, adjudicated Ethiopia's dispute with Eritrea.¹⁵

This comment analyzes the differences between the ICJ and the EEBC, and points out weaknesses in the ICJ's and EEBC's ability to bind countries to their decisions.¹⁶ Part I provides the background for the border disputes and explains how these cases appeared before their respective international bodies.¹⁷ Part I also stresses the similarities and differences between the ICJ and EEBC, and briefly summarizes the rationale of each court.¹⁸ Examining these rulings in light of Ethiopia's and Nigeria's objections, Part II points out why countries refuse to comply with such decisions.¹⁹ Part II also argues

14. See Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.), 2002 I.C.J. 94 (Oct. 10) (ruling on the border between Nigeria and Cameroon), http://212.153.43.18/icjwww/idoctet/icn/icnjudgment/icn_ijudgment_20021010.PDF (last visited Jan. 14, 2004).

15. See Eritrea-Ethiopia Boundary Commission: Decision Regarding Delimitation of the Border Between the State of Eritrea and the Federal Democratic Republic of Ethiopia (Eri. v. Eth.), 41 I.L.M. 1057, (Apr. 13, 2002) [hereinafter Eritrea-Ethiopia Boundary Commission] (laying out the court's decision on the boundary between Ethiopia and Eritrea), <http://www.un.org/NewsLinks/eebcarbitration/EEBC-Decision.pdf> (last visited Jan. 15, 2004). The EEBC was created under auspices of the Permanent Court of Arbitration ("PCA"). See Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Eth.-Eri, Dec. 12, 2000, 40 I.L.M. 260 art. 4(11) [hereinafter Algiers Agreement] (basing the EEBC's rules on the 1992 Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States), <http://www.pca-cpa.org/ENGLISH/RPC/E-E%20Agreement.html> (last visited Jan. 21, 2004).

16. See discussion *infra* Part II (discussing weaknesses that limit international courts' ability to bind parties).

17. See *infra* Part I.A.1 (explaining background of the Eritrea-Ethiopia border dispute and how the case came before the EEBC); see also *infra* Part I.A.2 (providing background to the Nigeria-Cameroon border dispute and how the case came before the ICJ).

18. See *infra* Part I.B.1 (summarizing comparing the similarities and differences between the ICJ and P.C.A., and exploring the common problem in the courts' inability to enforce binding decisions); see also *infra* Part I.B.2-3 (recounting the rational and holding of the EEBC and the ICJ).

19. See *infra* Part III.A.1-3 (arguing that lack of jurisdiction, claims of bias and unfairness, and weak enforcement mechanisms weaken international courts' ability to bind states to territorial decisions).

that parties are more likely to adhere to a decision from a court under the Permanent Court of Arbitration ("PCA") than the ICJ.²⁰ This section predicts that Ethiopia will not comply with the EEBC's border verdict, with respect to Badme, because its agreement with Eritrea, creating the EEBC, lacked qualities that make arbitration courts more binding.²¹ Part III recommends measures judicial bodies and mediators should take in the future to make territorial decisions more binding.²² This comment concludes that involvement and pressure from the international community, rather than reliance on the goodwill of disputing countries, is the key to creating arbitration agreements that bind countries to a judicial territorial decision.²³

I. BACKGROUND

A. THE ETHIO-ERITREAN AND NIGERIA-CAMEROON BORDER DISPUTES AND THEIR SUBMISSION TO THE RESPECTIVE COURTS

1. *The Ethio-Eritrean War and the Algiers Peace Agreement*

The area of what is now Eritrea came into existence in 1890, when the Italians made their first colonial conquest in the Horn of Africa

20. See *infra* Part II.B (maintaining that decisions of arbitration courts more readily bind the parties because the parties are more involved in the court's decision-making process and therefore have little justification for opposing court's rules, procedure, composition, and mandate).

21. See *id.* (arguing that every step in the process of creating the EEBC, from the creation of the agreement, to the selection of the judges, to the EEBC's interpretation of the agreement's provisions, drew complaints from Ethiopia). This section also compares Ethiopia's situation with that of Nigeria, and explains why Ethiopia is likely to follow Nigeria's lead in refusing to respect the tribunal's ruling. *Id.*

22. See *infra* Part III (recommending that parties should litigate territorial disputes in arbitration courts, that the arbitration agreement should include a strong enforcement clause, and that both the agreement creating the arbitration court and the decision of the court should avoid any ambiguity that may tint the parties' expectations).

23. See *infra* text accompanying notes 237-246 (concluding that the two case studies illustrate why courts should not simply rely on states' goodwill, but should take precautionary measures to make their decisions more binding).

and occupied the territory north of Ethiopia.²⁴ Ethiopia evaded colonial occupation by defeating the Italians in the 1896 Battle of Adowa.²⁵ After Italy's defeat, Ethiopia and Italy negotiated and signed a series of agreements in 1900, 1902, and 1908 with regard to the Ethiopian border with Eritrea.²⁶ However, in 1935, Italy again invaded Ethiopia and occupied it for four years before the British freed both Ethiopia and Eritrea from Italian occupation at the end of World War II.²⁷

In 1952, the United Nations ("U.N.") gave Eritrea to Ethiopia as a protectorate, and Ethiopia added Eritrea as a province in 1962.²⁸ Ethiopia's annexation of Eritrea set off a long and bloody civil war that finally ended after a group of insurgent forces in Ethiopia united with Eritrean insurgency factions and overcame the government of the Ethiopian dictator Mengistu Hailemariam in 1991.²⁹ The new Ethiopian government allowed Eritreans to determine whether to remain a part of Ethiopia through a referendum in 1993, and the two

24. See PAUL HENZE, *ERITREA'S WAR: CONFRONTATION, INTERNATIONAL RESPONSE, OUTCOME, PROSPECTS* 231-33 (2001) (explaining the history of Eritrea's emergence as a state). The author notes that Eritrea came into existence as a "geographic and political entity" after the Italians named their new conquered territory *Colonia Eritrea*, the Red Sea Colony. *Id.* at 233.

25. See Derege Demissie, Note, *Self-Determination Including Secession vs. The Territorial Integrity of Nation-States: A Prima Facie Case for Secession*, 20 SUFFOLK TRANSNAT'L L. REV. 165, 180 (1996) (recounting the history of Ethiopia's battle with Italy); see also Minasse Haile, *Legality of Secessions: the Case of Eritrea*, 8 EMORY INT'L L. REV. 479, 482-84 (1994) (describing how Italy retained possession of Eritrea despite Ethiopia's defeat of Italy at the Battle of Adowa).

26. See Eritrea-Ethiopia Boundary Commission, *supra* note 15, para. 2.7 (cataloguing the series of agreements between Ethiopia and Italy).

27. See *id.* para. 2.8 (summarizing agreements between Ethiopia and Italy).

28. See MALCOLM N. SHAW, *TITLE TO TERRITORY IN AFRICA* 117-119, 212 (1986) (providing a detailed account into the U.N. Commission that recommended the unification of Eritrea and Ethiopia and the resulting annexation of Eritrea by Ethiopia in 1962). The Commission cited three reasons for its action including: the sentiments of inhabitants of Eritrea, the interests of peace in East Africa, and rights of claims of Ethiopia including Ethiopia's need for access to the sea. *Id.* at 118.

29. See Bereket Habte Selassie, *Self-Determination in Principle and Practice: the Ethiopian-Eritrean Experience*, 29 COLUM. HUM. RTS. L. REV. 91, 104-11 (1997) (discussing different resistance groups within Ethiopia that fought for more self-determination and eventually overthrew the Ethiopian dictator in 1991).

countries separated amicably when 99.8% of Eritreans voted instead for independence.³⁰

However, relations between Ethiopia and Eritrea soon turned sour as a result of disagreements concerning differing economic and political directions.³¹ The extent of this bitterness shocked the world when Eritrea moved its troops to claim Badme, an Ethiopian-held town in the border between Ethiopia and Eritrea, and a full-scale war on three fronts erupted between the two former allies.³² Concerted efforts by the international community, including the United States and the OAU, finally resulted in a peace accord on December 12, 2000.³³

In the Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Ethiopia ("Algiers Agreement"), Ethiopia and Eritrea created a court of arbitration, the EEBC, and agreed to let the EEBC settle their dispute.³⁴ The Algiers Agreement also stated that the Commission would consist of five members with a mandate to delimit and demarcate the colonial treaty border based on pertinent colonial

30. See Eritrea-Ethiopia Boundary Commission, *supra* note 15, para. 2.11 (explaining that in April 1993, over ninety-nine percent of voters in Eritrea favored independence and that the United Nations Special Representative announced the referendum process was free and fair).

31. See Khadiagala, *supra* note 12, at 39-43 (explaining the background to the fighting and citing sources of bitter relations between the two countries even before the border war erupted). Specifically, the article points out that differences in economic and political policies, Ethiopia's refusal to permit Eritrea to use its own currency to conduct trade between the two countries that led to the worsening of relations between Ethiopia and Eritrea. *Id.* at 43.

32. See *Border a Geographer's Nightmare*, BBC, May 12, 2001 (detailing how a squabble over a small town grew into a full-scale war), at <http://news.bbc.co.uk/2/hi/africa/396571.stm> (last visited Jan. 21, 2004); see also Jane Perlez, *U.S. Did Little to Deter Buildup as Ethiopia and Eritrea Prepared for War*, N.Y. TIMES, May 22, 2000, at A9 (revealing that each country spent more than one billion dollars each on weapons during the war).

33. See *Eritreans and Ethiopians Sign Treaty to End Their Border War*, N.Y. TIMES, Dec. 13, 2002, at A12 (reporting that the treaty, drafted by the OAU, creates commissions to demarcate the 600-mile border, to exchange prisoners and displaced people, and to hear war damage claims).

34. See generally *Algiers Agreement*, *supra* note 15 (reaffirming the cessation of hostilities between Ethiopia and Eritrea and detailing the contents of the Algiers Agreement).

treaties and applicable international law.³⁵ Moreover, it specified that the EEBC would not have the power to make decisions *ex aequo et bono* – according to what is just and proper.³⁶ The Algiers Agreement also stated that the Commission would base its rules of procedure on the 1992 Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States.³⁷ Another key provision stated that decisions and rulings of the EEBC would be final and binding, and that both countries would respect the decision.³⁸

2. Nigeria and Cameroon's Border Dispute and ICJ Compulsory Jurisdiction

Whereas Ethiopia fought the control of a single European power, the territory disputed by present-day Nigeria and Cameroon was controlled by three colonial powers: Germany, France, and Great Britain ("Britain").³⁹ While in control, these countries entered into a series of agreements dividing the territory amongst themselves.⁴⁰ Two sets of agreements are relevant to the Bakassi

35. See *id.* art. 1.2.11 (specifying the law the court would use to decide the case).

36. See *id.* art. 4.2 (denying the EEBC the power to consider the equitable doctrine, *ex aequo et bono*, in its decision).

37. See *id.* art. 4.11 (explaining that the Commission's rules of procedure shall be based upon the Optional Rules); see also Permanent Court of Arbitration, *Optional Rules for Arbitrating Disputes Between Two States* (Oct. 20, 1992) [hereinafter *Optional Rules*] (setting out the optional rules of procedure for interstate dispute settlement), at <http://www.pca-cpa.org/ENGLISH/BD/2stateeng.htm> (last visited Jan. 21, 2004).

38. See Algiers Agreement, *supra* note 15, art. 4.15 (confirming that both parties agreed that the EEBC's decision would be binding).

39. See Land and Maritime Boundary Case, *supra* note 14, para. 33 (explaining that agreements between Germany, France, and Great Britain at the end of the nineteenth and the beginning of the in the late-nineteenth and early-twentieth centuries defined the boundaries of what are now Cameroon and Nigeria). Britain primarily colonized Nigeria while Germany colonized Cameroon. *Id.* para. 30.

40. See *id.* para. 33 (observing that France and Great Britain signed the Franco-British Convention of 1906 and the Franco-British Protocol of 1910 to delimit possessions to the east of the Niger). Britain and Germany supplemented the Anglo-German Agreement Respecting Boundaries in Africa signed November 15, 1893 with the Agreement of March 19, 1906, and redefined it by the Agreements of March 11, 1913 and April 12, 1913. *Id.* Likewise, France and Germany signed

dispute: (1) an agreement between Britain and the Kings and Chiefs of Old Calabar,⁴¹ and (2) an agreement between Britain and Germany.⁴²

After World War I, however, Britain and France split Germany's territory in West Africa into British Cameroon and French Cameroon.⁴³ Britain further divided British Cameroon into Northern and Southern Cameroon for administrative purposes.⁴⁴ Nigeria and French Cameroon gained independence in 1960.⁴⁵ The following year, British Northern Cameroon voted to become a part of Nigeria while Southern Cameroon opted to become a part of French Cameroon.⁴⁶

While Nigeria and Cameroon, as members of the OAU, agreed to maintain colonial boundaries, they could not reach an agreement on the demarcation of their border due to the vagueness of colonial era treaties and the resulting exchange of territory between the three

agreements on March 15, 1894, April 9, 1908, and April 18, 1908, defining the boundaries between French Congo and Cameroon. *Id.*

41. See Asisi Asobie, *Conflict between Nigeria and Bakassi: Political Context and Contending Principles*, VANGUARD ONLINE EDITION, June 6, 2003 (relaying that the people of the main settlements in the Bakassi peninsula owed allegiance to the Obong of Calabar and that, through the 1884 treaty, Bakassi became a British protectorate), *at* <http://news.biafranigeriaworld.com/archive/2003/jun/06/0071.html> (last visited Jan. 21, 2004). Britain incorporated the Bakassi with the rest of Nigeria in 1914. *Id.*

42. See Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.), 2002 I.C.J. 94, para. 37 (Oct. 10) (noting that the March 11, 1913 and April 12, 1913 agreements between Germany and Nigeria placed the Bakassi in German territory), http://212.153.43.18/icjwww/idoctet/icn/icnjudgment/icn_ijudgment_20021010.PDF (last visited Jan. 14, 2004).

43. See *id.* para. 34 (explaining that the Treaty of Versailles apportioned German-held territory between France and Britain). France and Britain signed separate agreements, in 1919, 1929, and 1930 to delimit their portions. *Id.*

44. See *id.* para. 35 (describing the 1946 Order in Council Providing for the Administration of the Nigeria Protectorate and Cameroon).

45. See *id.* (noting that French Cameroon gained independence on January 1, 1960, and that Nigeria gained independence on October 1, 1960).

46. See *id.* (detailing the British Government organized separate plebiscites in Northern and Southern Cameroon in accordance with United Nations directives).

colonial powers.⁴⁷ Although the two countries attempted to reach bilateral border agreements,⁴⁸ border clashes nearly ignited a war between the two sides over the Bakassi in 1981, and then again, in 1993 and 1994.⁴⁹ On March 19, 1994, Cameroon claimed the Bakassi and filed proceedings against Nigeria with the ICJ.⁵⁰ Cameroon later amended its claim, asking the Court to settle its entire territorial and maritime boundary with Nigeria.⁵¹ Nigeria objected to the jurisdiction of the Court and the admissibility of the case, but the ICJ rejected this argument,⁵² finding jurisdiction to decide the case under Article 36 of the ICJ statute.⁵³

47. See Somerville, *supra* note 2 (commenting on the increasing number of African conflicts caused by vague and poorly defined maps and colonial agreements).

48. See *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria*, 2002 I.C.J. 94, para. 36 (discussing the Yaundé Declaration used to carry out the demarcation of borders in stages and the Lake Chad Basin Commission).

49. See Asobie, *supra* note 41 (describing the buildup of military conflict, between Nigeria and Cameroon, over the Bakassi).

50. See *Concerning the Land and Maritime Boundary between Cameroon and Nigeria*, 2002 I.C.J. at para. 1 (describing Cameroon's claim).

51. See *id.* paras. 3-5 (communicating that Cameroon asked that the Court amend its original claim and settle the entire issue of the border between the two countries). Nigeria did not object to the amendment. *Id.* para. 5.

52. See *Case Concerning Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.)*, 1998 I.C.J. 275, 300 (June 11, 1998) (Preliminary Objections) (holding that the ICJ has jurisdiction to judge the case on its merits and that Cameroon had no obligation to continue negotiations with Nigeria before filing its complaint to the ICJ), available at 1998 WL 1148893.

53. See *Statute of the International Court of Justice*, art. 36, para. 2 (stating instances when the ICJ would have compulsory jurisdiction to decide a case on its merits), http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm#CHAPTER_II (last visited Jan. 13, 2004). In the event of jurisdictional dispute, the ICJ has the ability to determine whether it has jurisdiction. *Id.* art. 36, para.6.

B. DIFFERENCE IN FORUM – COURTS OF ARBITRATION AND THE INTERNATIONAL COURT OF JUSTICE

1. Similarities and Differences Between the ICJ and the EEBC

The ICJ, formed in 1946, functions as the judicial organ of the United Nations.⁵⁴ Its mandate is to settle international disputes and to give advisory opinions.⁵⁵ In 1899, global leaders created the PCA to provide an alternative international mechanism for settling inter-state disputes.⁵⁶ The EEBC was formed under the auspices of the PCA.⁵⁷

Since the EEBC is a court of arbitration, two parties can come before it only after mutual agreement.⁵⁸ Each party may choose the judges arbitrating the disagreement,⁵⁹ the law and procedure that the court will use, and the scope of the court's mandate.⁶⁰ A court of

54. See Int'l Court of Justice, *General Information - The Court at a Glance* [hereinafter *General Information*], (explaining the Court's relationship to the United Nations), at <http://www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html> (last visited Jan. 13, 2004).

55. See *id.* (explaining that the ICJ can give advisory opinions to authorized international bodies and agencies).

56. See Permanent Court of Arbitration, *General Information*, (describing the creation of the PCA at the first Hague Conference in 1899), at <http://www.pca-cpa.org/ENGLISH/GI/#History> (last visited Jan. 13, 2004); see also Bette E. Shifman, *The Revitalization of the Permanent Court of Arbitration*, 23 INT'L J. LEGAL INFO. 284, 285 (1995) (providing background on the origins of the PCA).

57. See Algiers Agreement, *supra* note 15, art. 4(11) (basing the EEBC's rules on the 1992 Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States).

58. See generally Carla S. Copeland, *The Use of Arbitration to Settle Territorial Disputes*, 67 FORDHAM L. REV. 3073, 3074-3076 (1999) (summarizing the qualities of arbitration courts).

59. See Eritrea-Ethiopia Boundary Commission, *supra* note 15, para. 1.2 (noting that under the Algiers Agreement, Ethiopia and Eritrea each get to appoint two judges and the Secretary General of the United Nations appoints the fifth judge).

60. See Shifman, *supra* note 56, at 286-290 (summarizing innovations in the PCA, such as its flexibility, modernizing procedural rules, and establishing a better fund to pay for cases, that has made it more attractive to parties in dispute).

arbitration, like the EEBC, may also hold hearings and deliberations privately.⁶¹

In contrast, the rules of the ICJ are more rigid.⁶² The United Nations appoints judges to serve on the court for a certain term.⁶³ Furthermore, hearings and deliberations of the ICJ are open to the public.⁶⁴ The ICJ also has limited enforcement mechanisms.⁶⁵ However, unlike a court of arbitration, the ICJ may have compulsory jurisdiction in certain cases,⁶⁶ as was the case in *Cameroon v. Nigeria*.⁶⁷

In spite of these differences, the courts relied on similar laws to reach their decisions on the Ethiopia and Eritrea border and the Nigeria and Cameroon border.⁶⁸ The fact that both Ethiopia and Eritrea, like Nigeria and Cameroon, were party to the Cairo Declaration restricted the applicable law that the EEBC could use to

61. See Copeland, *supra* note 58, at 3073 (noting that one advantage of arbitration is the ability to proceed in secret).

62. See *id.* (highlighting that the ICJ's rigid structure makes it less preferable to parties than arbitration).

63. See General Information, *supra* note 54 (indicating that fifteen judges, voted in by the United Nations, make up the ICJ). However, if the Court does not include a judge from the same country as a party to a case, that country may appoint a person to sit as a judge ad hoc for the purpose of the case. *Id.*

64. Cf. Copeland, *supra* note 58, at 3073 (pointing out that unlike the ICJ, hearings of courts of arbitration may be held in private or secrecy).

65. See Susan W. Tiefenbrun, *The Role of World Court in Settling International Disputes: A Recent Assessment*, 20 LOY. L.A. INT'L & COMP. L. REV. 1, 24 (1997) (arguing that the structure of international adjudication in the ICJ reinforces the failure of States to comply with the court's judgments).

66. See Bernard H. Oxman, *ICJ Compulsory Jurisdiction – Effective Date of Optional Clause Declarations – Existence of a Dispute – Effect of Absent Third Party – Diplomatic Negotiation as a Precondition for Recourse to ICJ – Effect of Negotiation Requirements of Law of the Sea Convention Where Jurisdiction is Based on Optional Clause*, 92 AM. J. INT'L L. 751, 752-54 (1998) (explaining the ICJ's rationale for permitting Cameroon to use the optional clause under Article 36, paragraph 2 of the statute of the ICJ to gain compulsory jurisdiction over Nigeria).

67. See *supra* notes 52-53 and accompanying text (illustrating how Article 36 can provide the ICJ with compulsory jurisdiction).

68. See *supra* notes 35-40 and accompanying text (noting that both the ICJ and the EEBC used applicable international law, colonial treaties, and the 1964 Cairo Declaration to settle the dispute).

reach its decision.⁶⁹ Moreover, both the EEBC and the ICJ made their decisions without considering the equitable doctrine of *ex aequo et bono*,⁷⁰ which permits a court to base its decision on what is just and proper.⁷¹

2. The EEBC's Decision Concerning the Ethiopia-Eritrean Dispute and its Rationale

Lacking the mandate to decide the case *ex aequo et bono*, the Boundary Commission used the principle of *uti possidetis*,⁷² the principle of adherence to boundaries existing immediately upon independence, and applicable international law to reach its decision.⁷³ As a result, the EEBC focused on the 1900, 1902, and 1908 treaties between Ethiopia and Italy.⁷⁴ The Commission interpreted these treaties in accordance with their plain meaning and in light of their context and objective.⁷⁵ The Commission also applied the doctrine of contemporaneity.⁷⁶ In addition, the Commission took

69. See Eritrea-Ethiopia Boundary Commission, *supra* note 15, para. 1.2 (setting out the laws and principles the EEBC used as a basis for its decision).

70. See Land and Maritime Boundary Case, *supra* note 14 (making no mention of using *ex aequo et bono* to decide the case). But see *Statute of the International Court of Justice*, *supra* note 53, art. 38, para. 2 (permitting the Court to use *ex aequo et bono* if the parties agree).

71. See Russell Gabriel & Professor Louis B. Sohn, *Equity in International Law*, 82 AM. SOC'Y INT'L L. PROC. 277, 278 (1988) (explaining that *ex aequo et bono* is an international law and equity term meaning that the court should decide the case according to what is just and proper).

72. See generally Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590, 591 (1996) (explaining that *uti possidetis* is a doctrine that provides that newly independent states essentially inherit the colonial administrative borders that they receive at the time of independence).

73. See Eritrea-Ethiopia Boundary Commission, *supra* note 15, para. 3.1-3.2 (conveying the source of law for the EEBC's determinations).

74. See *id.* para. 3.3 (noting that the Algiers Agreement specified the significance of these three treaties).

75. See *id.* para. 3.4 (explaining that the Commission read the treaties to determine what the signing parties actually intended or their "common will").

76. See *id.* para. 3.5 (conveying that the doctrine of contemporaneity means that a treaty should be interpreted under the circumstances and background prevailing when parties signed on to it and accounting for changes in names and expressions).

into account subsequent conduct such as prescription and acquiescence.⁷⁷ Evidence of prescription and acquiescence included maps, activity on disputed territory showing the exercise of authority (effectivités), diplomatic and similar exchanges, and admissions before the EEBC.⁷⁸ However, since the Algiers Agreement specifically stated that the parties reaffirm the principle of respect for the borders existing at independence, the EEBC took the conduct of the parties into account only after the independence of Eritrea on April 27, 1993.⁷⁹

The Commission used these principles to determine the border sector by sector.⁸⁰ Specifically, the Commission interpreted the 1902 Treaty to determine the path of the western border, near where Badme is located.⁸¹ However, differences in the Italian and Amharic versions of the Treaty in reference to a river complicated the Commission's interpretation of the 1902 Treaty.⁸² Analyzing supporting evidence, the EEBC accepted Eritrea's contention that the river named "Mateeb" in the Amharic version of the Treaty was actually present-day Sittona and not Maiteb as Ethiopia contended.⁸³

77. See *id.* para. 3.14 (concluding that the Commission's mandate to use relevant principles of international law includes the use of any rules of customary international law pertaining to the case). The EEBC cited the reasoning from a decision of the International Court of Justice in Kasikili/Sedudu Island (Botswana/Namibia) in which the Court also took into consideration rules of customary international law and reached the same conclusion. *Id.*

78. See Eritrea-Ethiopia Boundary Commission, *supra* note 15, ch. 3.16 (listing examples of what the Commission considered evidence of subsequent relevant conduct).

79. See Algiers Agreement, *supra* note 15, art. 4.1 (providing that the parties would adhere to the principle of respect for the borders existing at independence).

80. See Eritrea-Ethiopia Boundary Commission, *supra* note 15, para. 3.3, (determining that the parties agreed that the 1900 Treaty covers the central sector, the 1902 Treaty covers the western sector, and the 1908 Treaty deals with the eastern sector).

81. See *id.* (organizing the EEBC's boundary ruling by sector according to the relevant treaty).

82. See *id.* paras. 5.13-5.15 (pointing out that 1902 Treaty delineated a boundary created by the point in the Setit River where the boundary follows another river towards the confluence of the Mareb and Mai Ambessa).

83. See *id.* paras. 5.82-5.90 (indicating that the river could not be Maiteb because the treaty explicitly intended to transfer the Cunama tribe to Eritrea). The

Moreover, the EEBC rejected Ethiopia's evidence of subsequent conduct demonstrating that it had exercised sovereignty over the disputed land.⁸⁴ Significantly, the Commission's decision did not identify the town of Badme on any of the maps of its decision.⁸⁵

3. *The Basis for the ICJ's Ruling on the Nigeria-Cameroon Dispute*

Like the EEBC, the ICJ relied on treaties and international law to determine the boundary between Nigeria and Cameroon.⁸⁶ In particular, on the matter of the Bakassi Peninsula, the Court rejected Nigeria's argument that Britain had no right to cede the Bakassi to Germany in the Agreement of March 11, 1913, where the King and Chief of Old Calabar previously signed a treaty with Britain on September 10, 1884.⁸⁷ The Court pointed out that the 1884 Treaty did not establish an international protectorate.⁸⁸ The Court also noted the

EEBC also discussed evidence showing that Ethiopia recognized Italy's possession of land including the Cunama tribe. *Id.* paras. 5.44-5.81.

84. *See id.* paras. 5.94-5.96 (finding evidence that Ethiopia submitted of policing activity in Badme Wereda from 1972-1973 and other items dating from 1991-1994 insufficient to consist of administration clear enough in location and scope to displace Eritrea's title).

85. *See Controversy Over Horn Border Ruling*, BBC, Apr. 17, 2002 (highlighting that the EEBC's map of its boundary decision did not identify which country was awarded possession of Badme, causing confusion and leading both sides to claim possession of the town), *at* <http://news.bbc.co.uk/2/hi/africa/1930613.stm> (last visited Jan. 20, 2004).

86. *See Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.)*, 2002 I.C.J. 94, para. 31 (Oct. 10) (remarking that the dispute falls within historical framework and the treaties, diplomatic exchanges, administrative instruments, maps, and various documents by colonial powers), http://212.153.43.18/icjwww/idocket/icn/icnjudgment/icn_ijudgment_20021010.PDF (last visited Jan. 14, 2004).

87. *See id.* paras. 201-09 (discussing Nigeria's argument that Britain did not have sovereignty over the Bakassi and could not, therefore, cede it to a third party). Nigeria also argued that the international principle of *nemo dat quod non habet* imposes a duty to protect the protectorate from external powers, not an ability to cede the protectorate. *Id.*

88. *See id.* paras. 206-07 (explaining that Britain's choice of a protectorate treaty did not incur an obligation to protect territory and to not turn it over to other states).

lack of evidence that the Kings and Chiefs of Old Calabar protested the transfer of the Bakassi to Germany.⁸⁹

Moreover, the Court decided in favor of Cameroon's argument that Nigeria's vote in favor of General Assembly Resolution 1608(XV) was a sign of Nigeria's acceptance that the Bakassi belonged to Cameroon.⁹⁰ In addition, the Court highlighted evidence that Nigeria accepted, in 1970 and again in 1975, that Cameroon maintained sovereignty over the Bakassi.⁹¹ Finally, the Court rejected Nigeria's claim of title on the basis of historical consolidation and acquiescence.⁹² In contrast to the approach used by the Eritrea-Ethiopia Border Commission, the Court stated that where there is a conflict between title and effectivités, the Court would give preference to title.⁹³ Consequently, the Court held that Cameroon retained sovereignty over the Bakassi.⁹⁴

89. See *id.* para. 208 (noting an absence of evidence of protest or action by the Chiefs to transfer the Bakassi to Nigeria when Nigeria gained its independence in 1960). Thus, the Court did not have to rule on either side's arguments about whether it could separately analyze the 1913 Treaty and declare parts of it invalid. See *id.* para. 217.

90. See *id.* paras. 210-15 (agreeing that the map attached to the plebiscite showed that the Bakassi Peninsula formed part of Cameroon and that Nigeria failed to protest).

91. See *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria*, *supra* note 14, para. 214 (pointing out that documents such as the Yaoundé Declaration of August 14, 1970 demonstrate Nigeria's acquiescence).

92. See *id.* paras. 218-24 (denying Nigeria's claim that large Nigerian settlements in Bakassi gave rise to Nigerian ownership of the Bakassi). The Court mentioned that civil war in Nigeria in the 1960s accounted for the large number of Nigerian population in Bakassi, and noted evidence that Cameroon engaged in activities on the Bakassi such as granting hydrocarbon licenses over the peninsula and protesting Nigerian presence for the most part. *Id.*

93. See *id.* para. 223 (affirming the principle that title yields a stronger legal claim than effectivité from the ICJ's decision in *Frontier Dispute (Burkina Faso v. Republic of Mali)* decided in 1986).

94. See *id.* para. 225 (summing up Cameroon's greater claim to the Bakassi).

II. ANALYSIS

A. WEAKNESSES IN INTERNATIONAL JUDICIAL BODIES' ABILITY TO TRULY BIND COUNTRIES TO THEIR DECISIONS

1. Problems with Jurisdiction

A key issue that states raise to prevent being bound by a decision of an international court is lack of jurisdiction.⁹⁵ Territorial decisions are no exception.⁹⁶ Not surprisingly, Nigeria quickly objected to the ICJ's jurisdiction in *Cameroon v. Nigeria*.⁹⁷ Similarly, once certain that the EEBC had assigned Badme to Eritrea, Ethiopia protested that the EEBC exceeded its jurisdiction.⁹⁸

The ICJ is especially prone to attacks of lack of jurisdiction.⁹⁹ The ICJ rules find jurisdiction before the ICJ when a state acquiesces to the case brought before the court.¹⁰⁰ When the ICJ awarded the

95. See, e.g., Munya, *supra* note 2, at 162 (noting that "no state can be required to recognize the jurisdiction of the Court," and that "states may revoke the jurisdiction at any time or even refuse to appear before the Court").

96. See Gary L. Scott & Craig L. Carr, *The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause*, 81 AM. J. INT'L L. 57, 63-64 (1987) (stressing Thailand's objection to ICJ jurisdiction in the Case concerning the June 15, 1962 Temple of Preah Vihear Case between Cambodia and Thailand that concerned territorial land). Thailand refused to turn the disputed land over even after the court went against it. *Id.* The article also notes that France and China have revoked their acceptance of the optional clause. *Id.* at 57.

97. See Land and Maritime Boundary Case, *supra* note 14, paras. 9, 12 (describing the procedural history of the case and Nigeria's objection to ICJ jurisdiction).

98. See Eritrea-Ethiopia Boundary Commission, Decision Regarding the Request for Interpretation, Correction and Consultation Submitted by the Federal Democratic Republic of Ethiopia on 13 May 2002 (addressing Ethiopia's objection that the EEBC exceeded its jurisdiction), <http://pca-cpa.org/PDF/EEBC/Decision24June2002.pdf> (last visited Jan. 21, 2004).

99. See Scott & Craig, *supra* note 96, at 58 (observing that most states prefer not to accept a situation that might make them unwilling defendants before an international court).

100. See *Statute of the International Court of Justice*, *supra* note 53, art. 36, para. 2 (spelling out the different forms of acquiescence). For instance, compulsory jurisdiction applies to questions concerning international law and disputes relating

Bakassi to Cameroon, however, Nigeria called attention to the fact that it had objected to the jurisdiction of the Court and had never agreed to be bound by the Court's decision.¹⁰¹ Likewise, the United States, Thailand, and France are examples of countries that rejected ICJ compulsory jurisdiction in the past.¹⁰²

Questions of jurisdiction usually are less of an issue in arbitration courts because the arbitration agreement spells out the arbitration court's powers.¹⁰³ Because arbitration courts are formed only with the consent of both parties, states objecting to the jurisdiction of arbitration courts, like the EEBC, have a weak case for objecting to the court's jurisdiction unless the agreement leaves the question of jurisdiction very vague.¹⁰⁴ Similarly, as Ethiopia had already agreed to submit to the jurisdiction of the EEBC, it could only object to the scope of the EEBC's decision.¹⁰⁵ As a result, Ethiopia has placed more emphasis on the decision being "wrong and unjust."¹⁰⁶

to treaty interpretation. *Id.* Furthermore, the country must be a signatory of Article 36. *Id.* art. 36.5.

101. See *Obasanjo Denies Bakassi Promise*, BBC, Oct. 25, 2002 (reporting that the Nigerian President stated that Nigeria was not bound to respect the ICJ ruling), <http://news.bbc.co.uk/2/hi/africa/2361693.stm> (last visited Jan. 20, 2004).

102. See *supra* notes 95-96 (examining countries who have objected to ICJ compulsory jurisdiction after originally signing the optional clause).

103. See Copeland, *supra* note 58, at 3099 (mentioning that if the arbitration court's powers are ill-defined, the party can actually claim its decision is null).

104. See *id.* at 3099-3100 (citing the Dayton Accords as an example where the parties could challenge the award as a nullity because the agreement did not sufficiently define the arbitration court's jurisdiction or place limitations on its powers). The author points out that if the court clearly exceeds the scope of its jurisdiction, the parties may challenge the award as a nullity, a doctrine unique to arbitration decisions. *Id.* at 3076.

105. See Eritrea-Ethiopia Boundary Commission: Determinations, Nov. 7, 2002, paras. 4-10 [hereinafter *Determinations*] (addressing concerns with jurisdiction and scope of powers of the EEBC), <http://pca-cpa.org/PDF/EEBC/Determinations071102.pdf> (last visited Jan. 19, 2004).

106. See *Border Ruling "Wrong and Unjust", Meles Says*, UN OCHA IRIN, May 27, 2003 [hereinafter *Border Ruling Wrong*] (quoting Ethiopian Prime Minister Meles' statements that the EEBC decision was wrong and unjust and it would be unfair to expect Ethiopia to comply with it), <http://www.reliefweb.int/w/rwb.nsf/f303799b16d2074285256830007fb33f/b343e066395d2569c1256d330050b28d?OpenDocument> (last visited Jan. 19, 2004).

2. Claims of Injustice and Unfairness Emanating from the Lack of Power to Make Decisions Ex Aequo et Bono and from the Doctrine of Uti Possidetis

Another justification countries provide for not being bound by international territorial decisions is that the decision is unfair and unjust.¹⁰⁷ Two sources for this inherent unfairness in international territorial decisions are courts' lack of power to make decisions that apply the doctrine of *ex aequo et bono*¹⁰⁸ and the principle of *uti possidetis*.¹⁰⁹

Denying courts the ability to decide a case *ex aequo et bono* is a precaution intended to ensure that a court decides the issue purely on the basis of the law.¹¹⁰ Theoretically, this minimizes the court's bias and leaves less discretion to the court.¹¹¹ In reality, however, the absence of considerations of overall fairness often leads to bitterness and a sense of injustice.¹¹² For instance, although Ethiopia requested the EEBC to strictly adhere to principles of law and to avoid

107. See Copeland, *supra* note 58, at 3100 (suggesting that controversy concerning jurisdiction also often undermine parties' faith that the court would issue a fair and unbiased decision).

108. See Gabriel & Sohn, *supra* note 71, at 280 (distinguishing between *ex aequo et bono* and equity at law). The authors argue that *ex aequo et bono* is a power that only the Court may exercise, if it has that power. *Id.* In contrast, equity is a principle of law that parties may invoke at will. *Id.*

109. See Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590, 591 (1996) (asserting that *uti possidetis*, in many cases, sacrifices injustice and unfairness for the sake of maintaining the status quo). The article also argues that that *uti possidetis* in fact leads to greater instability in newly created states. *Id.*

110. See Gabriel & Sohn, *supra* note 71, at 279-80 (discussing consequences of using *ex aequo et bono* to settle border disputes). Cases where international bodies use *ex aequo et bono* without mandate can lead to states refusing to comply with decisions. *Id.* at 280.

111. See *id.* at 281 (discussing an arbitration case between the United States and Mexico where the parties specifically asked the court to decide in the favor of one country or the other, but *ex aequo et bono* resulted in a ruling neither side wanted).

112. See Thomas M. Franck & Dennis M. Sughrue, *The International Role of Equity-As-Fairness*, 81 GEO. L.J. 563, 572-76 (1993) (contending that equity has come to represent a set of principles designed to supplement the law and ensure fairness between parties, especially in areas of scarce resources).

compromise, Ethiopia later objected that the EEBC ruling was “unjust.”¹¹³

Arbitration courts that use the rules and procedures of the PCA are created by agreements that include a clause denying courts the ability to decide a case *ex aequo et bono*.¹¹⁴ Yet, although both Ethiopia and Eritrea agreed to limit the EEBC’s power to decide the case according to what is just and proper, after the EEBC issued its decision, Ethiopia asked it to reconsider certain aspects of its decision on the basis of fairness and justice.¹¹⁵

The Statue of the ICJ, however, allows parties to mutually consent to the ICJ’s consideration of cases *ex aequo et bono*.¹¹⁶ In *Cameroon v. Nigeria*, the ICJ held that elements of unfairness and injustice were not substantial enough to justify awarding the Bakassi to Nigeria.¹¹⁷ Nigeria, however, challenged the fairness of the decision.¹¹⁸

113. *Compare Ethiopian Foreign Minister Lobbies Border Commission*, AGENCE FRANCE-PRESSE, Dec. 20, 2001 (quoting statements from the Ethiopian Foreign Minister asking the arbitration commission to make its decision purely on the basis of law and not on equitable considerations), <http://www.reliefweb.int/w/rwb.nsf/f303799b16d2074285256830007fb33f/587e844508984572c1256b280063db50?OpenDocument> (last visited Jan. 19, 2004), with *Border Ruling Wrong*, *supra* note 106 (quoting Ethiopian Prime Minister Meles’ statements that it would not be fair to expect Ethiopia to accept a decision that is wrong and unjust).

114. *See Optional Rules*, *supra* note 37, art. 33.2 (stating that parties may give the arbitration court power to decide a case *ex aequo et bono*).

115. *See Eritrea-Ethiopia Boundary Commission: Decision Regarding the “Request for Interpretation, Correction, and Consultation” Submitted by the Federal Democratic Republic of Ethiopia on 13 May 2002 (June 24 2002) para. 15 [hereinafter Interpretation, Correction and Consultation]* (describing Ethiopia’s certain issues from the decision that Ethiopia asked the EEBC to reconsider), <http://pca-cpa.org/PDF/EEBC/Decision24June2002.pdf> (last visited Jan 19, 2004). The EEBC found Ethiopia’s submission inadmissible and responded by asking Ethiopia to revise its request with specific reference to applicable considerations of international law. *Id.* paras. 17-18.

116. *See Gabriel & Sohn*, *supra* note 71, at 278 (pointing out that Article 38 (1) requires both parties to empower the ICJ before it can decide the case *ex aequo et bono*). *But see* Franck & Sughrue, *supra* note 112, at 570 (claiming that the ICJ has ever decided a case *ex aequo et bono*).

117. *See Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.)*, 2002 I.C.J. 94, paras. 218-19 (Oct. 10) (rejecting Nigeria’s equity arguments that Bakassi had a majority Nigerian presence and thus,

The doctrine of *uti possidetis* heightens this sense of unfairness.¹¹⁹ In Africa, *uti possidetis*, where countries respect boundaries as they were at the time of independence, results in states abiding by boundaries created by colonial powers.¹²⁰ While *uti possidetis* may prevent the fragmentation of states, it also perpetuates the status quo and colonial hierarchy.¹²¹ This contributes to a sense of injustice and paranoia that the destiny of African countries is still controlled by colonial powers.¹²²

The Nigerian government expressed its distrust of the influence of past colonial powers on the outcome of the ICJ's decision.¹²³ It accused British, German, and French court officials at the ICJ of bias, stating that, "[as] citizens of the colonial powers whose action had come under scrutiny, [they] have acted as judges in their own cause and thereby rendered their judgment virtually null and void."¹²⁴

belonged to Nigeria), http://212.153.43.18/icjwww/idocket/icn/icnjudgment/icn_ijudgment_20021010.PDF (last visited Jan. 14, 2004) (rejecting Nigeria's equity arguments that Bakassi had a majority Nigerian presence and thus, belonged to Nigeria)

118. See Plaut, *supra* note 6 (quoting the statement of the Nigerian cabinet that the ruling was a legal position contrary to all known laws and conventions).

119. See Ratner, *supra* note 109, at 591 (maintaining that *uti possidetis* creates injustice by leaving large populations both unsatisfied with their status in new states). But see TIYANJANA MALUWA, INTERNATIONAL LAW IN POST-COLONIAL AFRICA 76 (Kluwer Law International ed. 1999) (arguing that *uti possidetis* was not imposed on Africa but is one of few modern international law principles that the collective vision of African countries helped to fashion).

120. See Mutua, *supra* note 3, at 1114 (arguing that continued application of *uti possidetis* has not freed African people from the colonial legacy).

121. See *id.* at 1144-45 (arguing that African leaders agreed to maintain colonial boundaries in part because of the post-colonial ruling elite's desire to maintain status quo).

122. See *id.* at 1143-50 (suggesting that lack of moral considerations for decisions based on *uti possidetis* doomed them for failure). Mutua discusses ethnic conflict in countries such as Somalia, Ethiopia, the Democratic Republic of Congo, and Kenya, and predicts more ethnic conflict until the international community recognizes a better means of creating new nation states. *Id.*

123. See Plaut, *supra* note 6 (reporting that Nigeria quickly dismissed the ICJ ruling after hearing the Court's decision).

124. *Id.*; see also Fred L. Morrison, *The Future of International Adjudication*, 75 MINN. L. REV. 827, 841-43 (1991) (studying voting practices and the composition of judges in the ICJ). He finds that judge selection is very regional

In contrast, Ethiopia's participation in selecting the law that the EEBC would apply and the judges who would apply it, limited Ethiopia's ability to protest the influence of Western powers.¹²⁵ Instead, Ethiopia focused on lamenting the unfairness of the decision and urging the EEBC to reconsider its decision.¹²⁶ In both the case of Ethiopia and Nigeria, the EEBC and ICJ respectively ignored such complaints, stated that their decisions were final and binding, and refused to accept additional evidence or reconsider their decision.¹²⁷

3. Lack of Specificity in Arbitration Agreements

Vagueness and a lack of specificity in agreements are other sources of weakness in courts' ability to bind states to territorial decisions.¹²⁸ This applies to both: (1) vagueness in the colonial agreements and treaties courts must interpret to reach their decisions;¹²⁹ and (2) agreements between the disputing parties to create and be bound to the decision of an arbitration court.¹³⁰

and that judges' desire for re-election might influence them to remain consistent to political line thinking of the relevant regional electorate block. *Id.*

125. See Algiers Agreement, *supra* note 15, arts. 5.2-5.3 (outlining the authority of the parties to jointly appoint the arbiters and president of the Commission).

126. See *Eritrean Badme Ruling Upheld*, BBC, Mar. 31, 2003 (noting that Ethiopia appealed maintaining that the Commission promised that the demarcations could be refined), <http://news.bbc.co.uk/1/hi/world/africa/2903229.stm> (last visited January 26, 2004).

127. See Interpretation, Correction and Consultation, *supra* note 115, paras. 16-18 (explaining that a request for interpretation of a decision may only be invoked where a specific statement of the decision must be clarified in order for the parties to properly apply it and does not include the possibility of appeal).

128. See Copeland, *supra* note 58, at 3100 (remarking that the Dayton Accord's ambiguity concerning the actual issue actually before the Brcko arbitration tribunal undermined the parties' confidence in the tribunal's ability to render a fair decision). The Dayton Accord created an arbitral panel to resolve control over the Brcko area. *Id.* at 3090.

129. See, e.g., Sommerville, *supra* note 2 (maintaining that vagueness and lack of precision in border agreements between colonial powers has led to irreconcilable differences between African countries).

130. See, e.g., Copeland, *supra* note 58, at 3099-3100 (examining the Dayton Accord's vagueness in order to demonstrate problems with the ability of arbitration to bind parties when the arbitration agreement poorly defines their powers).

Vagueness in colonial agreements is especially relevant in African territorial disputes.¹³¹ Such vagueness gives great discretion and powers of interpretation to the courts and can be a source for claims accusing judges of bias and favoritism by the party receiving an unfavorable decision.¹³² This concern is often asserted in disputes before the ICJ where the disputing parties are unable to pick the judges.¹³³ For example, Nigeria accused ICJ judges of favoritism and western bias after they awarded the Bakassi to Cameroon.¹³⁴

In addition, another source of conflict is vagueness in the actual arbitration agreement between the parties.¹³⁵ This is true in cases where an arbitration agreement defines the mandate and the rules of procedure for the arbitration court too broadly.¹³⁶ General and unspecific provisions trigger conflict over the scope of a court's power.¹³⁷

131. See Munya, *supra* note 2, at 164-89 (citing several African cases before the ICJ, such as the *Guinea Bissau v. Senegal Case* of July 1989, which arose because of ambiguity in colonial agreements and the colonial experience).

132. See Plaut, *supra* note 6 (reporting the statement of the Nigerian cabinet accusing the ICJ judges of bias and labeling their decision as "virtually null and void").

133. See *id.* (quoting statements made by the Nigerian cabinet after the ICJ issued its border ruling in *Cameroon v. Nigeria*). The statements accused the judges of acting as citizens of the colonial powers and argued that they had based their ruling on legal positions "contrary to that go against all known laws and conventions." *Id.*

134. See Madu Onuorah et al., *Bakassi: I'm Ready to Dialogue, Anytime, Anywhere, Says Obasanjo*, THE GUARDIAN (London), Oct. 30, 2002 (reporting the Nigeria Labour Congress' statements that Britain acted arrogantly and paternalistically and influenced the ICJ judges' decision), <http://news.biafranigeriaworld.com/archive/ngguardian/2002/oct/30/article06.html> (last visited Jan. 14, 2004). The article also reports that Britain denied any involvement in ICJ decisions. *Id.*

135. See Copeland, *supra* note 58, at 3100 (emphasizing that ambiguity in the Brcko arbitration agreement causes conflict over the tribunals powers and purpose).

136. See *id.* at 3076 (warning that if an arbitration agreement does not clearly define the court's powers, a party can challenge an arbitration decision in which it thinks the court exceeds its powers).

137. See *id.* at 3099-3101 (examining the Dayton Accords as a flawed agreement that lacked precision in defining the powers of the arbitration court).

For instance, the Algiers Agreement simply stated that the EEBC's decision was final and binding.¹³⁸ While case law generally recognizes that final and binding decisions are not subject to appeal or review, Ethiopia argued that the EEBC could reconsider its decision.¹³⁹ The Algiers Agreement provides that the EEBC shall determine its procedure based on the PCA's Optional Rules for Arbitrating Disputes Between Two States; Articles 35 and 36 of these rules discuss the procedure for the reinterpretation and correction of awards in decisions.¹⁴⁰ However, the EEBC refused to reconsider its decision, clarifying that the Articles did not permit the EEBC to make substantive amendments to a decision, nor did they permit one party to reargue their case.¹⁴¹ Following its conclusion, the EEBC also issued its demarcation directions, maintaining that it had no authority to vary the boundary line from its original assessment, even if the demarcation ran through and divides a town or village.¹⁴²

138. See Algiers Agreement, *supra* note 15, art. 4.14 (providing that each party shall respect the EEBC's decision and the territorial integrity of the other party).

139. See Eritrea-Ethiopia Boundary Commission, *supra* note 15, paras. 1-15 (summing up Ethiopia's appeal for reconsideration to the EEBC after the EEBC issued its decision).

140. See *Optional Rules*, *supra* note 37, arts. 35-36 (explaining the procedure through which states can ask the arbitration court to reinterpret and correct its decisions).

141. See Eritrea-Ethiopia Boundary Commission, *supra* note 15, paras. 16-17 (clarifying that states may request interpretation or corrections in case of confusion or blatant errors, but they may not ask for another result); see also *Eritrean Badme Ruling Upheld*, BBC, Mar. 31, 2003 (quoting the EEBC's ruling that it cannot permit Ethiopia to unilaterally insist on adjustments to parts of the border decision that it finds disadvantageous), at <http://news.bbc.co.uk/2/hi/africa/2903229.stm> (last visited Jan. 14, 2004). The EEBC reiterated that the process of interpretation does not involve appealing decisions or relitigating matters already settled by the Court. Eritrea-Ethiopia Boundary Commission, *supra* note 15, paras. 16-17.

142. See Determinations, *supra* note 105, para. 4 (citing Article 14.A from the EEBC's demarcation directions in which the EEBC made clear that it had no authority to vary the boundary from its original decision even if it meant that the decision would separate towns and cities), <http://pca-cpa.org/PDF/EEBC/Determinations071102.pdf> (last visited Jan. 14, 2004).

Ethiopia reacted negatively to the EEBC's rulings.¹⁴³ Ethiopian officials claimed that Ethiopia would never have approved of the arbitration agreement had it known of the lack of flexibility in the demarcation process.¹⁴⁴ Ethiopia's basis for questioning the EEBC's decision was that the Algiers Agreement itself did not specify the appeals process and the demarcation directions, nor did it detail the instances where the EEBC could reconsider its decision.¹⁴⁵

The ICJ's decision in *Nigeria v. Cameroon* saw similar problems because of the lack of concreteness in Nigeria's agreement with the United Nations to respect the ICJ's ruling.¹⁴⁶ This uncertainty, which existed even before the ICJ issued its decision, contributed to the ease with which Nigeria later rejected the decision.¹⁴⁷ Since the parties never recorded Nigeria's commitment in writing, Nigeria later denied ever having entered into an agreement to comply with the ICJ's decision.¹⁴⁸

143. See, e.g., Zane, *supra* note 8 (observing Ethiopia's disappointment and regret concerning the boundary decision).

144. *Eritrea-Ethiopia: Border Ruling "Dangerous," Says Tigray President*, IRIN, Aug. 6, 2003 (quoting the statement of the President of the regional Ethiopian state of Tigray, who administered Badme as part of Tigray before the war), <http://eri24.com/news3469.htm> (last visited Jan. 14, 2004). The President argued that Ethiopia initially approved of the boundary ruling only because it believed that it could make border adjustments during the demarcation process. *Id.*

145. See Algiers Agreement, *supra* note 15 (lacking a provision adequately clarifying the appeals process and the issue of interpretation).

146. See *Nigerian Deal on Disputed Peninsula*, BBC, Sept. 6, 2002 (discussing statement from the U.N. that secret talks between the Presidents of Cameroon and Nigeria led to both countries pledging to respect the impending ICJ decision), <http://news.bbc.co.uk/2/hi/africa/2241155.stm> (last visited Jan. 14, 2004).

147. See *Obasanjo Denies Bakassi Promise*, *supra* note 101 (reporting that in spite of pressure from Britain, the Nigerian President denied ever pledging to respect the ICJ's decision).

148. But see *Nigeria "Does Not Reject" Bakassi Ruling*, BBC, Nov. 13, 2002 (citing the Nigerian foreign minister's statement that Nigeria did not reject the ruling, but simply highlighted its shortcomings and pitfalls), [at http://news.bbc.co.uk/1/hi/world/africa/2468303.stm](http://news.bbc.co.uk/1/hi/world/africa/2468303.stm) (last visited Jan. 14, 2004).

4. Lack of Strong Consequences for Failing to Comply with Decisions

Finally, a lack of strong consequences for violating the ruling of an international court permits countries to disregard unfavorable decisions.¹⁴⁹ In the case of the ICJ, Article 94 of the U.N. Charter explains the repercussions for failing to abide by an ICJ decision.¹⁵⁰ However, the lack of explicit language in Article 94¹⁵¹ combined with the Security Council's hesitance to get involved in territorial disputes often leads to inaction.¹⁵²

As a regional hegemon¹⁵³ that enjoys good relations with Permanent Security Council members, Nigeria could be assured that the Security Council would not take measures to force it to comply with the ruling.¹⁵⁴ This situation facilitated Nigeria's decision to

149. See John C. Guilds, III., "If It Quacks Like A Duck": Comparing ICJ Chamber to International Arbitration for a Mechanism of Enforcement, 16 MD. J. INT'L L. & TRADE 43, 69-71 (1992) (pointing to the Iran-U.S. case as an example of where a strong and detailed enforcement mechanism led to a binding decision).

150. See U.N. CHARTER art. 94 (setting out how the UN will enforce ICJ decisions), <http://www.un.org/aboutun/charter/chapt14.htm>. (last visited Jan. 14, 2004).

151. See *id.* (warning that a party may protest to the Security Council if another party refuses to comply). Article 94 only states that the Security Council may make recommendations or take measures to enforce the decision. *Id.*

152. See Ibrahim J. Gassama, *World Order In the Post-Cold War Era: The Relevance and Role of the United Nations After Fifty Years*, 20 BROOK. J. INT'L L. 255, 266-68 (1994) (observing that enforcement of ICJ rulings by the Security Council is purely discretionary and that the U.N. machinery is slow to intervene militarily). But see Lilly R. Sucharipa-Behrmann & Thomas M. Franck, *Preventive Measures*, 30 N.Y.U. J. INT'L L. & POL. 485, 502-03 (1998) (examining the diplomatic "carrots and sticks" the U.N. has at its disposal to prevent conflicts between states). Specifically, it discusses the options available to U.N. sister organizations, such as the World Bank and IMF. *Id.*

153. See Binaifer Nowrojee, *Joining Forces: United Nations and Regional Peacekeeping—Lessons from Liberia*, 8 HARV. HUM. RTS. J. 129, 140-42 (1995) (discussing Nigeria's leadership in molding Economic Community of West African States (ECOWAS) as a regional peace enforcing authority by emphasizing Nigeria's role in ECOWAS' military intervention in Liberia in 1995).

154. See Vera Gowlland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 INT'L & COMP L.Q. 55, 71 (1994) (discussing how the Security Council is clearly a political organ and how political considerations motivate decisions of Security Council members). The article also identifies the potential for the Security Council's abuse of power. *Id.* at 73-74.

reject the ruling and deny ever agreeing to be bound by it.¹⁵⁵ In fact, instead of binding Nigeria to the decision, the United Nations pushed Nigeria and Cameroon back to bilateral mediation.¹⁵⁶ Nigeria has since backed away from its strong rejection of the ICJ ruling.¹⁵⁷ As a result of the talks and mediation, Nigeria and Cameroon agreed to implement parts of the border ruling and have exchanged villages along their north-eastern border.¹⁵⁸ However, Nigeria and Cameroon have yet to reach an agreement concerning the Bakassi.¹⁵⁹

In contrast, decisions of arbitration courts may be more binding.¹⁶⁰ Parties create arbitration courts with an enforcement clause that details the consequences of disregarding a decision.¹⁶¹ Unfortunately, in the case of the EEBC, Articles 4.14 and 4.15 of the Algiers Agreement do not contain a strong enforcement clause.¹⁶² These

155. See *Obasanjo Denies Bakassi Promise*, *supra* note 101 (reporting that Nigerian President Obasanjo said that he would never agree to respect a judgment without knowing which way it would go).

156. See *Mission to Go to Bakassi*, BBC, Dec. 3, 2002 (reporting that U.N. Secretary-General Kofi Annan created a commission consisting of presidents of both countries to discuss the border dispute), <http://news.bbc.co.uk/2/hi/africa/2533881.stm> (last visited Jan. 18, 2004).

157. See *Nigeria 'Does Not Reject' Bakassi Ruling*, BBC, Nov. 13, 2002 (stating that although Nigeria had appeared to reject the ICJ ruling, the Nigerian Minister of State for Foreign Affairs denied that Nigeria had rejected the ruling), <http://news.bbc.co.uk/1/hi/world/africa/2468303.stm> (last visited Jan. 19, 2004).

158. See *Bilkisu Labarn Ohyoma, Nigeria Gives Village to Cameroon*, BBC, Dec. 9, 2003 (reporting that Nigeria/Cameroon Mixed Border Commission facilitated an agreement that led Cameroon and Nigeria to swap villages consistent with the ICJ ruling), <http://news.bbc.co.uk/2/hi/africa/3303781.stm> (last visited Jan. 18, 2004).

159. See *id.* (explaining that Nigeria and Cameroon have not reached an agreement on the Bakassi). Because of disagreement on the Bakassi, the two sides agreed to deal with the border dispute sector by sector. *Nigeria Stalls on Bakassi*, BBC, Aug. 7, 2003, <http://news.bbc.co.uk/2/hi/africa/3131809.stm> (last visited Jan. 18, 2004).

160. See *Guilds*, *supra* note 149, at 43-44 (suggesting that the ability to choose enforcement mechanisms is an attribute of an arbitration court that makes its decisions more binding).

161. See, e.g., *Algiers Agreement*, *supra* note 15, art. 4, paras. 15-16 (declaring that the EEBC's decision is binding and calling for the United Nations to facilitate resolution of problems).

162. See *id.* (failing to include negative consequences for not complying with the EEBC's ruling).

articles simply state that both countries agree to respect the decision and that the United Nations facilitate the resolution of problems that result from the transfer of territory.¹⁶³ There is no mention of diplomatic consequences or punitive measures for failing to comply with the decision. Moreover, while several guarantors, including the United States, the U.N. Secretary-General, Nigeria, Algeria, and the European Union, witnessed the signing of the Algiers Agreement, there were no provisions in the Algiers Agreement specifying what measures the guarantors must take against the party that refuses to abide by the boundary decision.¹⁶⁴

As a result of these weak enforcement mechanisms, both Nigeria and Ethiopia were able to reject the outcome of the decisions.¹⁶⁵ After the EEBC refused to reconsider its demarcation directions, Ethiopia stated that the EEBC decision concerning Badme and parts of the Central Sector were “totally illegal, unjust, and irresponsible.”¹⁶⁶ Although agreements that create arbitration courts can include tough enforcement clauses, the lack of such a clause in this case bolstered Ethiopia’s argument that they were not bound by the EEBC’s decision.¹⁶⁷

163. See *id.* (setting out steps for the U.N. involvement to encourage both parties to comply with the EEBC’s decision). Paragraph 16 asks the United Nations to facilitate problems that arise due to the transfer of territory, but does not empower the United Nations to take measures to ensure the parties’ compliance with the decision. *Id.*

164. Cf. Jonah Fisher, *Eritrea Acts Over Border Row*, BBC, Nov. 20, 2003 (expressing Eritrea’s frustration that none of the guarantors have taken concrete steps to force Ethiopia to comply with the ruling), at <http://news.bbc.co.uk/1/hi/world/africa/3224790.stm> (last visited Jan. 18, 2004).

165. See *supra* notes 7-8 and accompanying text (explaining Nigeria’s and Ethiopia’s reactions to the ICJ and the EEBC decisions respectively).

166. See Letter from Meles Zenawi, Prime Minister, Federal Democratic Republic of Ethiopia, to UN Security Council (Sept. 27, 2003) (protesting the EEBC’s decision concerning Badme), http://ethiomeia.com/press/meles_un_letter_091903.html (last visited Jan. 18, 2004). Prime Minister Meles asked the U.N. Security Council to create an alternate mechanism to settle contested parts of the decision. *Id.*

167. But cf. Vienna Convention on the Law of Treaties, Apr. 4, 1970, arts. 1-72, 1155 U.N.T.S. 331, 332-58 (1969) (setting out when state parties to treaties may lawfully withdraw from a treaty), <http://www.UN.org/law/ilc/texts/treaties.htm> (last visited Jan. 18, 2004). The Convention defines treaties as any agreement in written form and governed by international law. *Id.* art. 2.1. Article 51 of the

B. WHY DECISIONS OF ARBITRATION COURTS UNDER THE PCA ARE MORE BINDING THAN TERRITORIAL DECISIONS OF THE ICJ AND THE ETHIO-ERITREAN DISPUTE AS AN EXCEPTION

Decisions of arbitration courts are often more binding than those of the ICJ.¹⁶⁸ The primary reason for this is that countries are more invested in the decision of an arbitration court.¹⁶⁹ Two disputing parties choose the powers of the court, select the arbitrators, the law the arbitrators would use, and how and who would enforce the arbitration court's judgment.¹⁷⁰

On the surface, therefore, the fact that the Eritrea-Ethiopia border dispute took place in a court of arbitration rather than in the ICJ suggests that Ethiopia is likely to comply with the EEBC's decision.¹⁷¹ Ethiopia and Eritrea determined the law the court would use, they chose the judges, they defined the court's mandate and procedure, and they agreed that the decision would be final and binding.¹⁷²

Convention permits parties to void treaties entered into through coercion and Article 53 voids treaties that conflict with a peremptory norm of general international law. *Id.* However, a fundamental change of circumstances may not serve as grounds for the termination of a treaty if the treaty establishes a boundary. *Id.* art. 62.2(a).

168. *Cf.* Guilds, *supra* note 149, at 43-44 (indicating that ICJ chambers are restructuring themselves to resemble arbitration courts in an effort to be more binding).

169. *See id.* at 43 (identifying three basic concepts often attributed to international arbitration that makes them more readily enforceable: parties' ability to choose the panel, parties' power to decide on the applicable law, and the parties' power to determine rules and procedure).

170. *See supra* notes 63-65 and accompanying text (describing attributes of arbitration courts).

171. *See supra* notes 168-169 and accompanying text (suggesting that countries who vest their efforts in creating a court and determining the rules of the court are more likely to comply with the decision of the court than if they had no control over the court and its decision-making process). *But see Ethiopian Opposition Wants Referendum On Disputed Border*, AGENCE FRANCE-PRESSE, Dec. 31, 2001 (reporting that five Ethiopian opposition political parties joined to call for a referendum before the EEBC decision could become binding), at <http://www.reliefweb.int/w/rwb.nsf/f303799b16d2074285256830007fb33f/ffaa3633415ce8a8c1256b33004af20f?OpenDocument> (last visited Jan. 19, 2004).

172. *See Algiers Agreement*, *supra* note 15, art. 4 (determining the rules of arbitration).

However, Ethiopia voiced objections and reservations through each step of the arbitration process from the creation of the Algiers Agreement, to the selection of the arbitrators for the court, and the arbitration court's application of the law from the Algiers Agreement.¹⁷³ Although Ethiopia and Eritrea generally agreed to submit their case to arbitration in June of 2000,¹⁷⁴ it took six months of diplomatic pressure and mediation before Ethiopia agreed to provisions of an arbitration agreement.¹⁷⁵

Immediately after Ethiopia and Eritrea signed the Algiers Agreement, Ethiopia objected to the demarcations of U.N. deployment being inconsistent with the agreement and to perceived Eritrean violations of the agreement.¹⁷⁶ During the arbiter selection

173. See *infra* notes 174-176 and accompanying text (highlighting evidence that Ethiopia was reluctant to settle its border dispute with Eritrea through arbitration).

174. See *Ethiopia, Eritrea Sign Peace Deal to End Border War*, REUTERS, June 18, 2000 (explaining that Ethiopia and Eritrea agreed to a ceasefire and the deployment of peacekeepers), <http://www.reliefweb.int/w/rwb.nsf/f303799b16d2074285256830007fb33f/7f36edfa99ac6269c12569030031e05b?OpenDocument> (last visited Jan. 19, 2004); see also *Africa: Briefing by US Envoy to the U.N. Richard Holbrooke on Africa*, IRIN, June 30, 2000 (commenting that Ethiopia was reluctant to commit to a ceasefire because it was winning and wanted revenge on Eritrea for starting the war), <http://www.reliefweb.int/w/rwb.nsf/f303799b16d2074285256830007fb33f/ee838fddfa01722b8525690e00738c63?OpenDocument> (last visited Jan. 19, 2004). Holbrooke credited strong diplomatic efforts from the United States and the U.N. for the ceasefire. *Id.*

175. See Paul Ejime, *Ethiopia-Eritrea Conflict: Making Algiers Peace Accord Work*, PAN AFRICAN NEWS AGENCY, Dec. 17, 2000 (reflecting on the long path to the Algiers Agreement), <http://www.reliefweb.int/w/rwb.nsf/f303799b16d2074285256830007fb33f/f53fab770e8a15fec12569b90043250e?OpenDocument> (last visited Jan. 19, 2004). As a testimony to the diplomatic pressure exerted on both sides to reach an agreement, leaders including the U.S. Secretary of State Madeleine Albright, the U.N. Secretary General Kofi Annan, the OAU Secretary General Salim Ahmed Salim, President Olusegun Obasanjo of Nigeria, and Algerian President Bouteflika witnessed the signing of the Algiers Agreement. *Id.*

176. See Martin Plaut, *Wranglings Over Horn Peace Deal*, BBC, Jan. 2, 2001 (explaining differences between Ethiopia and Eritrea's understanding of troop redeployment along their border), at <http://news.bbc.co.uk/2/hi/africa/1097923.stm> (last visited Jan. 19, 2004). The Algiers Agreement stated that Ethiopia shall submit redeployment plans for its troops and stipulated that a twenty-five kilometers-wide buffer zone would be established along the border from these redeployment points. *Id.* Eritrea insisted that redeployment should be negotiated and not unilaterally determined by Ethiopia. *Id.*

process, Ethiopia strenuously objected to Eritrea's choice of Mr. Jan Paulsson as one of the arbitrators on the EEBC.¹⁷⁷ Eritrea eventually had to choose a new arbitrator to replace Mr. Paulsson.¹⁷⁸ Ethiopia's patience with the EEBC finally came to an end when the EEBC rejected Ethiopia's request for reconsideration of the original arbitration,¹⁷⁹ ruling that the EEBC ruling did not have the ability to alter its decision without Eritrea's consent.¹⁸⁰

Thus, Ethiopia found itself in the same dilemma as Nigeria.¹⁸¹ Diplomatic pressures from the United States and the United Nations

177. See Eritrea-Ethiopia Boundary Commission, *supra* note 15, at 1064, para. 1.6 (noting that Ethiopia lodged a challenge to Eritrea's selection of Mr. Paulsson as an arbitrator); see also Copeland, *supra* note 58, at 3075 (explaining that the selection of arbitrators is often a contentious part of the arbitration process).

178. See Eritrea-Ethiopia Boundary Commission, *supra* note 15, paras. 1.10-1.14 (explaining that since the arbitration agreement did not specify how the EEBC would resolve a party's challenge of an arbitrator, the EEBC had to create its own procedure). The EEBC decided that the unchallenged arbitrators would vote to decide whether Eritrea should select a new arbitrator. *Id.* Following the arbitrators' failure to reach a decision, Mr. Paulsson voluntarily stepped down and Eritrea appointed a new judge in his place. *Id.* para. 1.14.

179. See Eritrea-Ethiopia Boundary Commission, *Observations*, paras. 1-13 (Mar. 21, 2003) (conveying the reasons why the EEBC refused to vary its original decision), <http://www.pca-cpa.org/PDF/Obs.EEBC.pdf> (last visited Jan. 18, 2004). For instance, the Algiers agreement specifically stated that the decision was final, made clear that the EEBC did not have the power to make its decision *ex aequo et bono*, and called on the United Nations to resolve problems ensuing from the boundary decision. *Id.* para. 9.

180. See *Interview with Prime Minister Meles Zenawi*, IRIN, Oct. 29, 2003 (quoting the Ethiopian Prime Minister's statement that Ethiopia had originally approved of the April 2002 decision because it had assumed that the EEBC's map coordinates for the decision "could be adjusted by checking the facts on the ground"), <http://www.irinnews.org/print.asp?ReportID=37524> (last visited Jan. 18, 2004); see also *Border Ruling Wrong*, *supra* note 106 (reporting Ethiopian Prime Minister Meles' statements that it would not be fair to expect Ethiopia to accept a decision that is wrong and unjust). But see *Eritrean Badme Ruling Upheld*, BBC, Mar. 31, 2003 (referring to statements from Eritrea's Information Minister Ali Abdu Ahmed praising the EEBC's decision), [at http://news.bbc.co.uk/2/hi/africa/2903229.stm](http://news.bbc.co.uk/2/hi/africa/2903229.stm) (last visited Jan. 18, 2004). The Minister remarked that no party is allowed to change the ruling of the EEBC. *Id.*

181. See *The Horn in Peril: Ethiopia Must Accept Arbitration Verdict, However Painful*, FINANCIAL TIMES, June 17, 2003, at 14 (comparing Ethiopia's decision on whether or not to comply with the EEBC decision to Nigeria's decision on whether to concede its claim to the Bakassi). The article states that if Ethiopia does not

forced Ethiopia into an arbitration agreement,¹⁸² just as diplomatic pressures from the United Nations had compelled Nigeria to submit to ICJ jurisdiction.¹⁸³ Additionally, both Nigeria and Ethiopia were in stronger positions before the judicial rulings with substantially larger populations, resources, and military might than their neighbors in dispute.¹⁸⁴ In the end, both countries were unlikely to comply with their respective court's decisions (with respect to Badme or the Bakassi).¹⁸⁵ As a result, when Nigeria first decided to reject the ICJ decision, it did so without facing any severe consequences. Ethiopia was probably emboldened to act in a similar manner.¹⁸⁶

respect the arbitration decision, other countries with superior forces that obtain unfavorable decisions will follow suit. *Id.*

182. See Abdelmalek Touati, *Ethiopia and Eritrea Sign Peace Agreement*, REUTERS, Dec. 12, 2000 (stressing the diplomatic efforts that led to the Algiers Agreement), <http://www.reliefweb.int/w/rwb.nsf/f303799b16d2074285256830007fb33f/81fbca049bdcf885c12569b30060d23b?OpenDocument> (last visited Jan. 18, 2004). In particular, the article quotes statements by Secretary of State Madeline Albright and United States special envoy Anthony Lake expressing the United States' commitment to peace between Ethiopia and Eritrea. *Id.*

183. See *Nigerian Deal on Disputed Peninsula*, *supra* note 146 (citing a U.N. statement that after U.N.-brokered talks between the Presidents of the two countries, Cameroon and Nigeria had reached an agreement to respect the decision of the ICJ).

184. See Ian Fisher, *Ethiopia Wins Border War Against Eritrea*, N.Y. TIMES, Mar. 1, 1999, at A10 (describing a turning point in the border war when Ethiopia launched a fierce World War I-style offensive, recaptured territory Ethiopia controlled before the war and entered parts of Eritrea). After the defeat, Eritrea agreed to a peace deal. *Id.*

185. See *Ethiopia Says Border Decision "Most Dangerous,"* REUTERS, July 4, 2003 (reporting that the Ethiopian President, in his report to the Ethiopian Parliament, criticized the border decision as being a threat to regional security), <http://www.reliefweb.int/w/rwb.nsf/6686f45896f15dbc852567ae00530132/ae656786090d28c8c1256d590066740d?OpenDocument> (last visited Jan. 18, 2004). However, the President reiterated that Ethiopia is committed to resolving the dispute through peaceful means. *Id.*; see also *Nigeria Stalls on Bakassi*, BBC, Aug. 7, 2003 (reporting that while Nigeria agreed to comply with certain aspects of the ICJ ruling, it would not turn over the Bakassi for at least three years), <http://news.bbc.co.uk/2/hi/africa/3131809.stm> (last visited Jan. 18, 2004). Nigeria ignored Cameroon's demand that Nigeria withdraw its troops from the Bakassi. *Id.*

186. Compare Nita Bhalla, *Ethiopia Hails "Victory" Ruling*, BBC, Apr. 18, 2002 (commenting on Ethiopia's initial reaction to the border ruling in April 2002; Ethiopian officials believed that the ruling had awarded Badme to Ethiopia), with *Border Ruling Wrong*, *supra* note 106 (conveying Ethiopia's reaction, after Nigeria

Still, Ethiopia's compliance with the EEBC decision might have been more likely if the Algiers Agreement had incorporated stronger enforcement mechanisms.¹⁸⁷ Both Ethiopia and Eritrea depend strongly on foreign aid and financing from the International Monetary Fund ("IMF") and the World Bank.¹⁸⁸ If the Algiers Agreement made World Bank financing contingent upon compliance with the ruling, Ethiopia's political figures would probably be less vocal in opposing the EEBC ruling.¹⁸⁹ However, lacking such consequences, Ethiopia, like Nigeria, will likely refuse to turn Badme over when the process of demarcation begins.¹⁹⁰

Instead, Ethiopia has followed Nigeria's lead in trying to obtain a more favorable outcome by renegotiating with the opposing country.¹⁹¹ Just as Nigeria is holding bilateral talks with Cameroon

had already rebuffed its ICJ ruling in October 2002, to the EEBC ruling rejecting Ethiopia's appeal). See generally Ethiopian Embassy, *Ethiopia's Response to H.R. 2760*, at 2 n.4 (Sept. 3, 2003) (claiming that it is not uncommon for countries to object to certain aspects of international decisions, citing *Nigeria v. Cameroon* and *Nicaragua v. United States*), <http://www.ethiopianembassy.org/ResponseHR2760.pdf> (last visited Jan. 18, 2004).

187. See *supra* notes 162-164 and accompanying text (discussing the lack of specific consequences for noncompliance with the EEBC's decision).

188. See World Bank, *Ethiopia at a Glance*, at 2 (revealing Ethiopia's external debt and resource flows), http://www.worldbank.org/data/countrydata/aag/eth_aag.pdf (last visited Jan. 19, 2004). In 2001, Ethiopia made \$441 million from exports but borrowed \$419 million from the World Bank. *Id.*; see also World Bank, *Eritrea at a Glance*, at 2 (illustrating figures for Eritrea's revenues and borrowing), http://www.worldbank.org/data/countrydata/aag/eri_aag.pdf (last visited Jan. 19, 2004). Eritrea earned twenty million dollars from exports, but obtained seventy-seven million dollars in aid from the World Bank that same year. *Id.*

189. See Carol Lancaster, *Redesigning Foreign Aid*, FOREIGN AFFAIRS, Sept./Oct. 2000, at 80 (arguing that the World Bank can effectively serve as the primary channel for U.S. aid in order to preserve international peace and security).

190. See *Eritrea-Ethiopia: "We Don't Want Another Cyprus," Says U.N.*, IRIN, July 31, 2003 (expressing fear that unless Eritrea and Ethiopia establish communication and diplomatic relations, U.N. peacekeepers will be forced to monitor the security zone just like peacekeepers in Cyprus), <http://www.reliefweb.int/w/rwb.nsf/6686f45896f15dbc852567ae00530132/55d98c44d7067d91c1256d74004f402d?OpenDocument> (last visited Jan. 18, 2004).

191. See *Border Ruling Wrong*, *supra* note 106 (quoting the Ethiopian Prime Minister's statement that Ethiopia will attempt to improve the current impasse with Eritrea through peaceful means).

under the mediation of the United States,¹⁹² Ethiopia criticized the EEBC¹⁹³ and asked the U.N. Security Council for an alternative mechanism to settle its border dispute with Eritrea.¹⁹⁴ Ethiopia also offered to permit demarcation to proceed in uncontested areas, as determined by the EEBC, in the Eastern Sector and parts of the Central Sector.¹⁹⁵ Although the U.N. Security Council originally resisted Ethiopia's call for a new body to decide on contested areas of the border,¹⁹⁶ U.N. Secretary-General Kofi Annan recently appointed Lloyd Axworthy to serve as a special U.N. envoy to mediate between Ethiopia and Eritrea.¹⁹⁷ However, unlike Cameroon, Eritrea has resisted any efforts at mediation,¹⁹⁸ and rejected Lloyd Axworthy's appointment.¹⁹⁹

192. See *Cameroon-Nigeria Talks Inch Forward*, BBC, Nov. 15, 2002 (describing the difficult and slow progress Nigeria and Cameroon were making during their U.N.-mediated talks), at <http://news.bbc.co.uk/2/hi/africa/2482347.stm> (last visited Jan. 18, 2004).

193. See Zenawi, *supra* note 166 (protesting that the EEBC decision concerning Badme was "illegal, unjust, and irresponsible"); see also Ethiopian Permanent Mission to the U.N., *Letter of H.E. Mr. Seyoum Mesfin, Foreign Minister of the Federal Democratic Republic of Ethiopia, to H.E. Mr. Kofi A. Annan, Secretary-General of the United Nations* (protesting inconsistencies in the EEBC decision and stating that the EEBC has ceased to be a neutral body), at http://www.un.int/ethiopia/eth03_pgs/mfa_1021_3.htm (last visited Jan. 18, 2004).

194. See Zenawi, *supra* note 166 (suggesting that the alternative mechanism be composed of the guarantors and witnesses of the Algiers Agreement, and representatives of the two parties).

195. See *id.* (suggesting that the demarcation begin without waiting for the establishment of the alternative mechanism).

196. See *U.N. Tells Ethiopia to Implement Border Ruling*, IRIN, Oct. 3, 2003 (reporting that the U.N. Security Council reminded Ethiopia of its obligations under the Algiers Agreement and called on Ethiopia to cooperate fully with the EEBC), <http://www.reliefweb.int/w/rwb.nsf/f303799b16d2074285256830007fb33f/c20e858aabf880a1c1256db40051b44c?OpenDocument> (last visited Jan. 18, 2004).

197. See *UN Special Envoy Appointed to Help Stalled Process*, IRIN, Dec. 29, 2003 (discussing the appointment of Axworthy to settle the deadlock between the two countries), <http://www.reliefweb.int/w/rwb.nsf/6686f45896f15dbc852567ae00530132/4423de9d2e1b122c49256e0c000d15ed?OpenDocument> (last visited Jan. 18, 2004).

198. See *Eritrea Urges World to Help Resolve Its Crisis With Ethiopia*, AGENCE FRANCE-PRESSE, Dec. 17, 2003 (referring to Eritrean Foreign Minister Ali Abdella's statement that Eritrea refuses to talk with Ethiopia as long as Ethiopia continues to reject the EEBC decision),

III. RECOMMENDATIONS

A. THE INTERNATIONAL COMMUNITY SHOULD PUSH COUNTRIES TO SUBMIT CONTENTIOUS TERRITORIAL DISPUTES TO ARBITRATION COURTS RATHER THAN FACING ICJ JURISDICTION

Courts of arbitration possess a number of advantages over the ICJ as a more binding forum for territorial disputes.²⁰⁰ Thus, in situations where disputing parties are unable to resolve their dispute peacefully and bilaterally and the parties have a great deal of animosity towards each other, courts of arbitration are preferable to the ICJ as forums for dispute resolution.²⁰¹ This is especially true for territorial disputes which embody sensitive issues of political and nationalistic concern.²⁰² Countries that do not receive a favorable territorial ruling are likely to resist the ruling unless they have personally invested in and committed themselves to the decision, and unless they will face severe consequences for defying the court's ruling.²⁰³

<http://www.reliefweb.int/w/rwb.nsf/6686f45896f15dbc852567ae00530132/42c737a34cf9a61149256e00001e356d?OpenDocument> (last visited Jan. 18, 2004).

199. *See Eritrea Rejects U.N. Mediator On Border Dispute With Ethiopia*, AGENCE-FRANCE PRESSE, Jan. 2, 2004 (quoting the Eritrean Presidential Head of Staff's statement that the concept of a special envoy is not acceptable to Eritrea because it is an alternative dispute resolution mechanism to demarcate the border), <http://www.reliefweb.int/w/rwb.nsf/6686f45896f15dbc852567ae00530132/92add1c2e3d71bc9c1256e0f004ef29a?OpenDocument> (last visited Jan. 18, 2004).

200. *See supra* notes 168-170 and accompanying text (highlighting why arbitration creates a more binding structure than the ICJ, including that parties have more of an investment in the decision, and are more involved in the process).

201. *See* Copeland, *supra* note 58, at 3107 (arguing that states often see arbitration as a preferable means of judicial settlement for sensitive territory disputes, because it provides many of the benefits of a permanent court but more flexible procedures).

202. *But see id.* at 3107-08 (advising against the practice of compelling countries involved in contentious border disputes to submit to arbitration). Copeland cites the Brcko arbitration, created by the Dayton Accords, as an example of a failed settlement attempt. *Id.* at 3098-3103. The international community forced the Federation and the Republika, the two constituent elements of the single state of Bosnia and Hercegovina, into arbitration following the Dayton accords. *Id.* at 3088.

203. *See* Ian Brownlie & Surya Prakash Sinha, *The Peaceful Settlement of International Disputes in Practice*, 7 PACE INT'L L. REV. 257, 267 (1995) (observing that governments that agree to terms of arbitration are not likely to

Consequently, in volatile border disputes, the international community should push parties to create and submit their dispute to courts of arbitration rather than the ICJ.²⁰⁴ While many recognize the ICJ as the world's highest court, built-in constraints make it less able to change itself.²⁰⁵ Additionally, bureaucratic checks make it less able to adapt itself. For example, a majority of the United Nations' member states, and then the Security Council, would have to approve any change to the U.N. Charter that proposed more severe consequences for failure to comply with an ICJ ruling.²⁰⁶ Given that some Security Council members are suspicious of any encroachment of the ICJ on state sovereignty, such a change is unlikely to occur.²⁰⁷ Moreover, the lack of strict adherence to precedent can lead to conflicting ICJ decisions, giving a country extra ammunition to contest a decision.²⁰⁸ It is for these reasons that the international community should push parties involved in volatile border disputes to submit their dispute to courts of arbitration, rather than to the ICJ.²⁰⁹

subsequently attack the decision of the court of arbitration they themselves designed to resolve a conflict).

204. See Copeland, *supra* note 58, at 3103-06 (arguing that judicial settlement through arbitration is the most feasible type of settlement of contentious issues as long as outside forces do not dictate terms of the arbitration agreement).

205. See Munya, *supra* note 2, at 160-62 (discussing the structural challenges that have led countries to criticize the ICJ's ability to adjudicate contentious disputes).

206. See U.N. CHARTER art. 108 (providing that amendments to the U.N. Charter can only take effect if two-thirds of the General Assembly and all permanent members of the Security Council approve them).

207. See Kurt Taylor Gaubatz & Matthew MacArthur, *How International is "International" Law*, 22 MICH. J. INT'L L. 239, 241 (2001) (suggesting that the Western world enjoys a monopoly over legal practice that influence of international legal principles and constrains the effectiveness of international law).

208. See H. Vern Clemons, Comment, *The Ethos of the International Court of Justice is Dependent Upon the Statutory Authority Attributed to Its Rhetoric: A Metadiscourse*, 20 FORDHAM INT'L L.J. 1479, 1506-10 (1997) (arguing that the ICJ must recognize precedent and implement the doctrine of stare decisis in order to gain international credibility and establish a stable international judicial order).

209. See Copeland, *supra* note 58, at 3104-07 (arguing that judicial settlement through arbitration is the most feasible type of settlement of contentious issues as long as the parties themselves, and not outside forces, dictate the terms of the arbitration agreement).

While the ICJ is not perfect, neither are arbitration courts.²¹⁰ As Ethiopia's reaction to the EEBC decision demonstrates, weak enforcement clauses and broad rules and procedures can make states reluctant to comply with a court of arbitration's rulings.²¹¹ Therefore, the international community should be vigilant in promoting arbitration agreements that reinforce courts' ability to bind the parties to rulings.²¹² The United Nations, regional international organizations, and their wealthier members host, mediate, and finance the creation of agreements to establish arbitration courts and commissions. These groups must stress to disputing states that the arbitration agreement must not contain ambiguous clauses and weak enforcement clauses.²¹³

B. PARTIES CREATING ARBITRATION AGREEMENTS SHOULD CLARIFY AND INCORPORATE CRITICAL RULES OF PROCEDURE IN THE ARBITRATION AGREEMENT ITSELF

Articles in an arbitration agreement that are too general can corrode parties' perception of the validity of a court's ruling.²¹⁴ Thus, the arbitration agreement should specify critical rules of procedure.²¹⁵ In particular, in a contentious border dispute, the arbitration agreement should spell out the provisions relating to the appeals

210. See *id.* at 3098-3100 (singling out the failure of the Breko arbitration, and explaining that it failed primarily because control of the disputed territory remained the subject of a continuing political dispute at the time the parties submitted to arbitration).

211. See *supra* Part II.A.1-3 (illustrating weaknesses in the Algiers Agreement that facilitated Ethiopia's lack of compliance with the EEBC decision).

212. See *Optional Rules*, *supra* note 37, arts. 31-32 (providing that the arbitration court's determinations regarding rules and procedures are, in the absence of a majority of arbitrators, subject to revision by the arbitration tribunal and stating that "[t]he award shall be . . . final and binding on the parties.").

213. See *Africa: Briefing By U.S. Envoy to the U.N. Richard Holbrooke*, *supra* note 174 (explaining that the United States and Japan bear the brunt of the expense of maintaining peace between Ethiopia and Eritrea).

214. See *supra* Part II.A.3 (positing that a lack of specificity in arbitration agreements can weaken an arbitration court's ability to bind the parties to its decisions).

215. See *supra* notes 135-137 and accompanying text (providing evidence that general provisions that leave too much discretion to the arbitration court can lead to conflict between the parties):

process and the court's power to reconsider its prior decision.²¹⁶ For instance, the Algiers Agreement should have been more precise about the appeals process, and should have clarified those limited circumstances in which the EEBC could reinterpret its decisions.²¹⁷

Moreover, the EEBC should have issued its demarcation directions before it reached a decision.²¹⁸ Since both sides shared an incentive to guarantee the finality and binding capacity of the EEBC ruling before the EEBC issued its decision, it is likely that Ethiopia would not have objected to that portion of the demarcation directions that stated that the boundary could not be varied to account for current inhabitants and existing towns and cities.²¹⁹ Thus, if the EEBC issued its Demarcation Direction before it issued its border decision, Ethiopia would have had less justification to protest.²²⁰

One can argue that requiring specificity makes it less likely that countries would agree on an arbitration agreement.²²¹ However, countries' desire to ensure that their opponent complies with the court's decision counters their reluctance to submit to binding

216. See Copeland, *supra* note 58, at 3099-3102 (suggesting that vague and general provisions allow courts of arbitration to disregard legal, factual, and equitable arguments in favor of political considerations, leading to accusations of bias and bringing the court's neutrality into question).

217. See Algiers Agreement, *supra* note 15 (failing to include a provision governing the appeals process).

218. See Determinations, *supra* note 105, at pmbl. (revealing that, in its Demarcation Directions of July 21, the EEBC determined that it would not vary the boundary line in order to prevent towns and cities from being separated). Ethiopia objected to this provision of the Demarcation Direction. *Id.* para. 3.

219. See *Ethiopian Foreign Minister Lobbies Border Commission*, *supra* note 113 (quoting statements from the Ethiopian Foreign Minister in which he asked the arbitration commission to make its decision purely on the basis of law and not equitable measures). The Foreign Minister also argued that the EEBC should not base its decision on political considerations and compromise. *Id.*

220. See *id.* (suggesting that before the EEBC issued its decision, Ethiopia was confident that it would obtain a favorable ruling).

221. See Morrison, *supra* note 124, at 838 (intimating the difficulties associated with according both parties to the adjudication process the ability to choose their own specific terms). The author explains that the ease with which parties could block adjudication in the context of GATT dispute settlement compensated for these difficulties. *Id.*

arbitration.²²² Since both sides often believe they have the better case, the desire to bind the other party is likely to be of primary concern.²²³ In short, areas that may become sources of conflict later on should be worked out in the arbitration agreement early in the process so that neither party has an excuse for complaint after the arbitration court issues its decision.²²⁴

C. PARTIES SHOULD INCLUDE STRONGER ENFORCEMENT CLAUSES IN ARBITRATION AGREEMENTS

Stronger enforcement clauses would also tend to make states more likely to abide by the court's decisions.²²⁵ A clause threatening monetary damages or loss of institutional membership or voting rights in international organizations is one example.²²⁶ In addition, an enforcement clause can make membership in the IMF contingent upon compliance with the arbitration court's decision.²²⁷ Even if such

222. See Touati, *supra* note 182 (quoting statements from Ethiopia and Eritrea's leaders pledging to respect the Algiers Agreement and urging the other side to do the same).

223. See *Ethiopia: Official Condemns Any Refusal to Accept Border Ruling*, IRIN, Apr. 2, 2002 (expressing Ethiopia's belief in the superiority of its own position eleven days before the EEBC declared its decision), at http://www.irinnews.org/report.asp?ReportID=27046&SelectRegion=Horn_of_Africa&SelectCountry=ETHIOPIA (last visited Jan. 21, 2004). Ethiopia feared that Eritrea would refuse to abide by the EEBC ruling. *Id.*

224. See Copeland, *supra* note 58, at 3080 (crediting specific rules and procedures and well-defined issues for the success of the Rann of Kutch Arbitration concerning a border dispute between India and Pakistan).

225. See *supra* Part II.A.4 (pointing to the outcomes of the Nigeria-Cameroon case and the Ethiopia-Eritrea arbitration, both of which threatened only weak sanctions for non-compliance, in order to illustrate that the lack of a strong enforcement clause makes it easier for countries to refuse to comply with an arbitration decision).

226. See Andrea Kupfer Schneider, *Getting Along: the Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 MICH. J. INT'L L. 697, 721-23 (1999) (discussing the range of options, including the imposition of damages, that the WTO has in enforcing compliance with dispute settlement proceedings).

227. See *supra* note 188 (illustrating Ethiopia and Eritrea's dependence on World Bank aid and lending); see also World Bank, *General Information About Membership* (finding that since countries have to be members of the IMF in order to qualify for World Bank funding, developing countries feel great pressure to comply with decisions of arbitration courts when IMF membership is at stake), at

clauses are contingent on the approval of the IMF or World Bank, whose benefit is denied to non-complying parties,²²⁸ it will certainly make the country less reluctant to comply with a binding judgment.²²⁹ Moreover, the clause should also contain a provision denying future grants for funding the cost of litigation²³⁰ before the arbitration court from the mediating party to the non-complying party.²³¹ However, such a measure would only be effective for developing countries that are dependant on foreign aid.²³²

<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040908~menuPK:250996~pagePK:43912~piPK:44037~theSitePK:29708,00.html> (last visited Jan. 21, 2004).

228. See Articles of Agreement of the International Development Association, Jan. 26, 1960, art. V, sec. 6, 11 U.S.T. 2284, 2289, 439 U.N.T.S. 249, 255 (prohibiting officers of the Agency from considering political factors when deciding whether to fund projects in a certain country). The International Development Agency is the division of the World Bank responsible for funding projects in less developed countries. *Id.* art. I. However, the Articles of Agreement do not expressly define "political consideration." *Id.* art. V. In practice, World Bank executives distinguish between issues that predominately affect economic indicators and those that are primarily political in nature. See Professor Daniel Bradlow, Class Lecture at the Washington College of Law, International Finance and Development Law Class (Sept. 11, 2003). World Bank officers should only consider issues that substantially affect economic indicators when deciding on whether to finance a project. *Id.* One can argue, however, that the World Bank can consider the parties' refusal to comply with international judicial decisions as an economic factor because of the devastating economic consequences of the continuance of armed conflict. See Perlez, *supra* note 32 (estimating that Ethiopia and Eritrea spent more than one billion dollars on weapons, money that they could have spent on development).

229. See Sucharipa-Behrmann, *supra* note 152, at 502-503 (discussing diplomatic options available to the World Bank and IMF).

230. See *Progress Report of the Secretary-General on Ethiopia and Eritrea*, U.N. SCOR, at 4, U.N. Doc. S/2003/858 (2003) (estimating that logistic and administrative costs of the EEBC and border demarcation would cost \$14.5 million), <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N03/484/71/PDF/N0348471.pdf?OpenElement> (last visited Jan. 22, 2004).

231. See *Eritrea-Ethiopia: Congressmen Seek to Limit US Aid If Border Ruling Not Heeded*, IRIN, Aug. 12, 2003 (discussing four Congressmen's efforts to get Congress to pass a bill sponsored by Democrat Tom Lantos, entitled the Resolution of the Ethiopia-Eritrea Border Dispute Act of 2003, that would restrict development and military aid to Ethiopia and Eritrea until they resolve their border dispute), http://www.irinnews.org/report.asp?ReportID=35918&SelectRegion=Horn_of_Africa&SelectCountry=ERITREA-ETHIOPIA (last visited Jan. 19, 2004). The

One can argue that Ethiopia would not have complied with any decision that would have required it to relinquish Badme to Eritrea.²³³ But if a truly binding clause had imposed a severe penalty, such as the loss of Ethiopia's status as host to the Africa Union, Ethiopia likely would not have obstructed the EEBC's ruling.²³⁴ Again, while a strong enforcement clause may make some countries reluctant to agree to arbitration, other countries may be willing to insert such a clause to ensure that the court's decision truly binds the other party.²³⁵ The PCA should encourage the use of such clauses in its Optional Rules of Procedure for Arbitration Between Disputing States.²³⁶

Congressmen referred the bill to the International Relations Committee. *Id.* But see Ethiopian Embassy, *supra* note 186, at 4 (protesting that Ethiopia is fully cooperating with the EEBC and that states involved in arbitration have to request modifications when errors appear in the rulings).

232. See Nicholas P. Van Deven, *Taking One for the Team: Principle of Treaty Adherence as a Social Imperative for Preserving Globalization and International Legal Legitimacy as Upheld in Re World War II Era Japanese Forced Labor Litigation*, 46 ST. LOUIS U. L.J. 1091, 1117 n.172 (2002) (addressing arguments that the international legal system is flawed because superpowers escape sanctions for violating international law).

233. See Martin Plaut, *Tense Horn Awaits Border Decision*, BBC, Apr. 12, 2002 (reporting that although the national government of Ethiopia stated its willingness to commit to the upcoming decision, Ethiopian officials from the Tigray province, that claims Badme, were wary of any decision that would lead to the loss of Badme), at <http://news.bbc.co.uk/2/hi/africa/1923737.stm> (last visited Jan. 19, 2004).

234. See *Letter from Eritrea to the President of the U.N. Security Council*, U.N. SCOR, U.N. Doc. S/2003/305 (2003) (urging the Security Council to warn Ethiopia to comply with EEBC decision or face serious consequences), <http://www.reliefweb.int/w/rwb.nsf/0/69ed158618d63140c1256ced003ebc7c?OpenDocument> (last visited Jan. 22, 2004). Eritrea suggests that Ethiopia's non-compliance constitutes a breach of international peace and security that is subject to Chapter VII enforcement. *Id.*

235. See *supra* notes 219-220 and accompanying text (illustrating Ethiopia and Eritrea's original willingness to abide by the EEBC decision and fear that the other party would fail to comply).

236. See Shifman, *supra* note 56, at 286-89 (describing how the PCA has the ability to adopt and modernize its own rules and procedures).

CONCLUSION

In mediating volatile border disputes, the international community should refer the disputing countries to arbitration courts, under the PCA, rather than to the ICJ.²³⁷ There is a strong need, however, for the international community to be just as involved in encouraging compliance with decisions of international judicial bodies as they are mediating the creation of agreements.²³⁸ The guarantors of such agreements should also verify that such agreements are not ambiguous and have effective enforcement mechanisms.²³⁹ The government in power will be hesitant to comply with an unfavorable border decision and risk unifying opposition parties and losing its political support unless it faces strong enforcement measures and public consequences for noncompliance.²⁴⁰

Due to international pressure on Ethiopia and Eritrea to resume dialogue and to reach an amicable settlement, Eritrea will likely eventually agree to hold talks with Ethiopia.²⁴¹ As a result, like the

237. See *supra* Part III.A.1 (detailing the benefits of arbitration to judicial settlement in the ICJ for contentious border disputes).

238. See Ejime, *supra* note 175 (warning that the international community has a duty to continue to invest diplomatic, logistic and financial support to the peace process until Ethiopia and Eritrea reach an enduring and peaceful conclusion to their dispute).

239. See *supra* Part III (recommending that arbitration agreements specifically define contentious issues such as the appeals process and include more severe enforcement provisions to increase the likelihood of a country's compliance with a border decision).

240. See *Ethiopia: New Opposition Coalition Seeks "Renegotiation" of Border Ruling*, IRIN, Aug. 12, 2003 (reporting that fifteen Ethiopian political parties formed a coalition to contest the 2005 general elections under a central promise to renegotiate the EEBC border ruling), <http://www.reliefweb.int/w/rwb.nsf/s/3AB2E6F51BC811E5C1256D8000428655> (last visited Jan. 19, 2004).

241. See S.C. Res. 1507, U.N. SCOR, 4822nd mtg. at 2, U.N. Doc. S/RES/1507 (2003) (reaffirming the need for dialogue between Ethiopia and Eritrea and calling on both parties to normalize relations), <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N03/498/87/PDF/N0349887.pdf?OpenElement> (last visited Jan. 22, 2004); see also *Progress Report of the Secretary-General on Ethiopia and Eritrea*, U.N. SCOR, at 8, U.N. Doc. S/2003/1186 (2003) (expressing Secretary-General Kofi Annan's observation that "a crucial aspect of a well-functioning and mutually beneficial relationship between two neighboring states is an open channel of communication at all levels"), <http://ods-dds->

situation with Nigeria and Cameroon, demarcation of the border between Ethiopia and Eritrea will proceed sector by sector.²⁴² However, Badme and other disputed areas in the Central Sector will probably remain unresolved indefinitely.²⁴³ Such unresolved conflicts pose the risk of encouraging disputing countries to interfere in the other country's domestic politics.²⁴⁴ Moreover, it presents the possibility of the resumption of war.²⁴⁵ In short, arbitration agreements must be clear, unambiguous, and contain severe

ny.un.org/doc/UNDOC/GEN/N03/660/87/PDF/N0366087.pdf?OpenElement (last visited Jan. 22, 2004). Ethiopia has also adopted a pro-dialogue stance. *See African Union to Push for Lasting Peace Between Ethiopia, Eritrea*, AGENCE FRANCE-PRESSE, Dec. 16, 2003, www.reliefweb.int/w/rwb.nsf/6686f45896f15dbc852567ae00530132/9ffee58fadbb885ec1256dfe004fb119?OpenDocument (last visited Jan. 27, 2004).

242. *See* Letter from Meles Zenawi, *supra* note 166 (emphasizing Ethiopia's willingness to go ahead with border demarcation and territorial transfer for parts of the EEBC decision that it does not dispute).

243. *See Interview with Prime Minister Meles Zenawi*, *supra* note 180 (presenting Ethiopia's position that the EEBC decision to impart Badme to Eritrea was illegal and unjust); *see also Eritrea: Interview with Recalled AU Ambassador Salih Omer*, IRIN, Nov. 21, 2003 (insisting border decision is legitimate and that Badme is Eritrean territory), http://www.irinnews.org/report.asp?ReportID=38027&SelectRegion=Horn_of_Africa&SelectCountry=ERITREA (last visited Jan. 19, 2004). Ambassador Salih Omer explained that Eritrea had recalled him from the African Union to protest the African Union's failure to act against Ethiopia's non-compliance. *Id.*

244. *See Smarting Over Bakassi, Nigeria to Fund Cameroon "Dissidents" Paper*, AGENCE FRANCE-PRESSE, May 21, 2003 (citing the contents of a Cameroon bi-weekly newspaper, AURE PLUS, that accused the Nigerian government of political involvement in Cameroonian domestic affairs in order to maintain possession of Bakassi); *see also Eritrea 'Region's Trouble-Maker'*, BBC, Dec. 29, 2003 (confirming that Ethiopia, Sudan, and Yemen established a regional alliance to combat terrorism and accused Eritrea of interfering in domestic politics and contributing to regional instability), <http://news.bbc.co.uk/2/hi/world/africa/3353313.stm> (last visited Jan. 19, 2004).

245. *See supra* notes 173-175 (discussing that Eritrea and Ethiopia were reluctant to settle the border dispute). *But see Eritrea, Ethiopia Agree On Local Military Border Commissions: UN*, AGENCE FRANCE-PRESSE, Dec. 18, 2003 (reporting that senior military officials from Ethiopia and Eritrea met, under the mediation of the U.N. Mission in Eritrea-Ethiopia, and agreed to form a local military border commission to prevent border incidents from inciting major battles).

enforcement mechanisms to insure compliance and to avoid prolonged border disputes.²⁴⁶

246. See *supra* Part III (advocating explicit arbitration agreements that spell out severe consequences for parties who refuse to be bound by the border ruling).