

IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL
CONSTITUTED IN ACCORDANCE WITH ARTICLE 5 OF
THE ARBITRATION AGREEMENT BETWEEN THE GOVERNMENT OF SUDAN
AND THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY
ON DELIMITING ABYEI AREA

-and-

THE PERMANENT COURT OF ARBITRATION OPTIONAL RULES
FOR ARBITRATING DISPUTES BETWEEN TWO PARTIES

OF WHICH ONLY ONE IS A STATE

Peace Palace, The Hague

Procedural Hearing

Monday, 24th November 2008

Before:

PROFESSOR PIERRE-MARIE DUPUY

JUDGE AWN AL-KHASAWNEH

PROFESSOR DR GERHARD HAFNER

JUDGE STEPHEN M SCHWEBEL

PROFESSOR W MICHAEL REISMAN

BETWEEN:

THE GOVERNMENT OF SUDAN

and

THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY

PROFESSOR JAMES CRAWFORD SC appeared on behalf of the Government of Sudan.

GARY BORN and WENDY MILES, of Wilmer Cutler Pickering Hale & Dorr LLP, PROFESSOR PAUL R WILLIAMS and VANESSA JIMÉNEZ, of Public International Law & Policy Group, and DR LUKA BIONG DENG, HON. DENG AROP KUOL, KUOL DUEIM KUOL, MATHEW OTUROMOI MARTINSON appeared on behalf of the SPLM/A.

REGISTRY: JUDITH LEVINE, Registrar and legal counsel, and ALOYSIUS LLAMZON, legal counsel, appeared for the Permanent Court of Arbitration.

Transcript produced by Trevor McGowan

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<p>09:30 1 Monday, 24th November 2008 2 (9.48 am) 3 THE CHAIRMAN: Good morning, ladies and gentlemen. This 4 is the first procedural meeting in the arbitration 5 under the Arbitration Agreement between the Government 6 of Sudan and The Sudan People's Liberation 7 Movement/Army on delimiting Abyei Area. 8 I am Pierre-Marie Dupuy, chairman of the Tribunal. 9 I am very honoured to serve in this capacity on this 10 important and challenging arbitration, and to serve with 11 such an eminent and experienced Tribunal. 12 I welcome my distinguished colleagues on the 13 Arbitral Tribunal. To my left, Judge Awn Al-Khasawneh 14 and Professor Gerhard Hafner; to my right, 15 Judge Stephen Schwebel and Professor Michael Reisman. 16 Also present are the representatives of the PCA with 17 the parties, and Ms Judith Levine, legal counsel, and 18 Aloysius Llamzon, legal counsel. 19 I welcome you, the representatives of the parties, 20 for coming to The Hague today with such horrible 21 weather. Perhaps before getting into today's agenda you 22 could introduce yourself for the record of the Tribunal. 23 PROFESSOR CRAWFORD: Sir, this won't take long on my side. 24 The agent, Dirdeiry Ahmed, apologises for not being 25 able to be here. He's having to travel to Europe in</p> <p style="text-align: center;">Page 1</p>	<p>09:51 1 SPLM/SPLA. 2 MR MARTINSON: Mathew Oturomoi Martinson, SPLM/SPLA. 3 THE CHAIRMAN: Thank you very much. 4 Then we turn to our agenda. The first agenda 5 item is the signature of the draft terms of appointment 6 which were circulated to the parties on November 13th. 7 I understand that the parties have communicated to 8 the PCA their approval of the draft terms of 9 appointment. Suggestion was made to insert reference to 10 Article 8.6 of the Arbitration Agreement, which has been 11 done. You will see that at paragraph 15 of the terms of 12 appointment, we can comment on that also when dealing 13 with publicity later, which is a further point in our 14 agenda. 15 A suggestion was made by the SPLM/A to insert 16 reference to Article 8.6 of the Arbitration Agreement, 17 which has been done, and that's basically what I just 18 said. I think once again that it is better to speak 19 again about that in connection with point 15. 20 So should I understand that such an insertion is 21 acceptable to the representatives of the Sudan? 22 PROFESSOR CRAWFORD: Yes, sir. 23 MR BORN: It of course is also acceptable to the Sudan 24 People's Liberation Movement/Army. We may have two 25 other categories of suggestions for the Tribunal to</p> <p style="text-align: center;">Page 3</p>
<p>09:50 1 conjunction with work on the arbitration, so it just 2 wasn't possible today. 3 My name is James Crawford, and I represent the 4 Government of Sudan with, I can assure you, numbers of 5 others. 6 THE CHAIRMAN: Thank you very much. 7 MR BORN: Thank you, Mr President. I am Gary Born, 8 I represent the Sudan People's Liberation 9 Movement/Army. I am accompanied by some of the 10 numbers, and I think, given the number of them, I will 11 let them each introduce themselves. Thank you. 12 MS MILES: Wendy Miles, partner at WilmerHale, with 13 Gary Born. 14 DR DENG: Thank you, Mr President, for being here. My 15 name is Luka Biong Deng for the Sudan People's 16 Liberation Movement/Army. 17 PROFESSOR WILLIAMS: Good morning. Paul Williams, the 18 executive director of the Public International Law 19 & Policy Group, and co-counsel. 20 MS JIMÉNEZ: Vanessa Jiménez, attorney with the Public 21 International Law & Policy Group, and also co-counsel 22 for the SPLM/A. 23 MR KUOL: Kuol Dueim Kuol, Sudan People's Liberation 24 Movement / Sudan People's Liberation Army. 25 THE HONOURABLE MR KUOL: Honourable Deng Arop Kuol,</p> <p style="text-align: center;">Page 2</p>	<p>09:54 1 consider. 2 THE CHAIRMAN: Would you like us to examine that right 3 now? 4 MR BORN: If now is a good time we would be pleased to. 5 THE CHAIRMAN: Then please do. 6 MR BORN: And apologies for the somewhat last-minute 7 nature of the suggestions. 8 They come in two categories. The first is in 9 Article 2.3, which is in the Tribunal's draft recitation 10 of the dispute. There in the second line, for the 11 purpose of tracking more precisely the language of 12 Article 2 of the Arbitration Agreement which is referred 13 to later in the page, we would suggest adding the words 14 "experts of the" just before "Abyei Boundaries 15 Commission". So that the sentence would instead begin: 16 "According to the parties, a dispute has arisen 17 between them regarding whether or not the experts of the 18 Abyei Boundaries Commission ...", and so forth. 19 We would also then as a consequential change 20 suggest, in the next line down, changing "its" to 21 "their". 22 This, if you look in subparagraph (a), which is 23 quoted in 2.6 at the bottom of the page, simply tracks 24 the language of the Arbitration Agreement, and the 25 thought on our side was that it would be better simply</p> <p style="text-align: center;">Page 4</p>

09:55 1 to follow what the parties had already agreed in the
2 Arbitration Agreement, recognising, of course, that in
3 a sense the Arbitration Agreement stands for what it is
4 already, and the language that is here doesn't affect
5 that.
6 THE CHAIRMAN: May I ask Professor Crawford to react to
7 this proposal.
8 PROFESSOR CRAWFORD: Sir, I wasn't given notice of these
9 changes. I'm not the signatory to the terms of
10 appointment, the agent is, and arrangements have been
11 made for him to sign them, as it were, in escrow, so
12 that they could be completed today.
13 It might be helpful for me to know what the
14 remaining changes proposed by the other party are, and
15 then perhaps I could respond to them all.
16 THE CHAIRMAN: Could you circulate a copy of the changes
17 that you propose?
18 MR BORN: We certainly could. Should I give it to
19 Professor Crawford?
20 THE CHAIRMAN: Yes, please.
21 MR BORN: The only other changes --
22 THE CHAIRMAN: And could you give the Tribunal as well
23 a copy.
24 MR BORN: It would mean giving up the copy that
25 Professor Crawford has, but I'm happy to.

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09:58 1 can --
2 PROFESSOR CRAWFORD: It would be helpful with the
3 remaining changes could be read into the record now.
4 THE CHAIRMAN: Yes.
5 MR BORN: The other changes which will be on the marked
6 copy that the PCA distributes involve Articles 6 and
7 7; Article 6.3.2 refers to the costs of things other
8 than the hearings rooms being borne by the parties.
9 That formulation is then repeated in Article 7.1, 7.2
10 and 7.3.
11 Our suggestion in each of those instances is that
12 rather than referring to the parties there be
13 a reference to the Presidency of the Republic of Sudan
14 as per Article 11.1 of the Arbitration Agreement.
15 THE CHAIRMAN: Here again I would like to get a copy
16 circulated to the other party and to the Tribunal.
17 PROFESSOR CRAWFORD: Sir, in relation to 7.1, it's true
18 that it is the presidency, but the presidency in this
19 respect is acting on behalf of both parties. In any
20 event, I agree that you that we need to see the actual
21 language.
22 THE CHAIRMAN: No further comments?
23 PROFESSOR CRAWFORD: Not for the moment. Until I've seen
24 the language it's difficult to comment, I have had no
25 notice of this.

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09:57 1 The other changes all relate to the description of
2 who is responsible for the costs, and again the effort
3 is made to track more precisely the Arbitration
4 Agreement.
5 I certainly hope, and I certainly think, on our
6 side, that these are not changes that are anything but
7 of a ministerial character. I too received late notice
8 of them, and I apologise for any inconvenience that this
9 might cause to either Professor Crawford or the
10 Tribunal, but I do think that they are truly in the
11 nature of housekeeping.
12 PROFESSOR CRAWFORD: Sir, I've made arrangements to
13 contact the agent if necessary during this morning.
14 So what I suggest is that we put on the record the
15 changes that are sought and that we then adjourn this
16 item so that I can get clarification.
17 It's obviously an important question. I agree with
18 Mr Born that the dominant instrument is the agreement to
19 arbitrate, but it's desirable that the terms of
20 appointment be consistent with the agreement to
21 arbitrate, and we are certainly not in principle opposed
22 to any move that makes them consistent, but I would need
23 to get approval.
24 THE CHAIRMAN: Alright. So if necessary we will be able
25 to suspend also this morning's session so that you

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10:00 1 What I can say is that prima facie the changes, with
2 the possible exception of 6.1, don't seem to create a
3 problem but I would need to see them in writing.
4 MR BORN: That's entirely understandable. I would very
5 much hope that these are in the nature of housekeeping
6 changes and they can be worked out, but until
7 Professor Crawford sees them he obviously can't
8 respond.
9 THE CHAIRMAN: Alright, thank you.
10 So before getting copies of the changes, the first
11 suggestion you made, and if necessary suspending the
12 hearing for a few minutes so that Professor Crawford can
13 get in touch with the agent, we should go on and look to
14 the further points of the draft agenda. Then we move to
15 schedule of proceedings, which is the second item.
16 We appreciate the parties' desire for a speedy
17 resolution of this dispute, and each of us from the
18 Tribunal were aware of the timeframe for resolution of
19 this dispute when we accepted our appointments and
20 committed to serve. In particular we note the terms of
21 Article 4.3 of the agreement which provides, and
22 I quote:
23 "... the Tribunal shall endeavour to complete the
24 arbitration proceedings including the issuance of the
25 final award within a period of six months from the date

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<p>10:02 1 of the commencement of arbitration proceedings subject 2 to three months extension." 3 We further note the relatively tight deadlines set 4 for these steps in the arbitration set out in Article 8 5 of the Arbitration Agreement, and we note that 6 Article 8.7 provides some scope for flexibility in the 7 schedule in so far as it sets out: 8 "... notwithstanding Article 4.3, the Tribunal shall 9 be empowered to extend for good cause the periods 10 established for the arbitration proceedings on its own 11 motion or at the request of either party. The total 12 cumulative extension of the periods granted by the 13 Tribunal at the request of either party may not exceed 14 thirty days for each party." 15 Finally we note that Article 9.1 provides: 16 "Subject to Article 8.7 of this agreement, the final 17 award should be rendered by the Tribunal within 18 a maximum of 90 days from the closure of submissions." 19 Now, there is here a point of clarification that the 20 Tribunal would like to confirm with the parties today. 21 Article 2 of the Arbitration Agreement sets the Tribunal 22 two tasks; the first task is to determine whether the 23 Abyei Boundaries Commission exceeded its mandate. The 24 second task, which will be reached only if the answer to 25 the first question is a positive one, is to proceed to</p> <p style="text-align: center;">Page 9</p>	<p>10:07 1 that will certainly be the case with us. 2 In any event, the Tribunal will find it difficult to 3 understand the issues of excess of mandate unless it 4 understands something about the issues of substance. So 5 it would be impractical to bifurcate in any event. 6 THE CHAIRMAN: Alright, thank you. And I turn to Mr Born. 7 MR BORN: Our understanding is precisely the same as the 8 Tribunal's. The reference to consecutively, I think, 9 refers only to the obvious fact that in so far as the 10 Tribunal decides that there was no excess of mandate, 11 there's no need to spend further time on the later 12 question in the case. 13 THE CHAIRMAN: Alright, so we take note of this 14 interpretation of the terms of the agreement, which of 15 course confronts everyone in this room to a very heavy 16 and difficult task. I'm sure we are all conscious of 17 that. 18 Moving on to the nuts and bolts of the schedule 19 itself, shall we start with the written pleadings and 20 then move to the oral pleadings? 21 PROFESSOR CRAWFORD: Sir, if I may make a suggestion. On 22 matters of scheduling the parties would be able to 23 agree, and the Tribunal I think within limits would be 24 able to agree as well, to a slightly more relaxed 25 scheduling. At present I'm confronted with the</p> <p style="text-align: center;">Page 11</p>
<p>10:05 1 delimit the boundaries of the area of the nine 2 Ngok Dinka chiefdoms, transferred to Kordofan in 1905. 3 Article 8.2 provides that the arbitration 4 proceedings shall consist of two phases, one for written 5 pleadings, and the other for oral pleadings. The 6 parties intend the issues articulated in Article 2 to be 7 considered and pleaded consecutively. 8 Article 8.3(i) notes that the memorial shall cover 9 all issues of dispute. 10 It is our current understanding, based on the terms 11 of the agreement, that there will be just one set of 12 written proceedings and one set of oral proceedings, and 13 the intention is to deal with both issues together. The 14 reference to consecutive treatment of the issues does 15 not imply that the proceeding should be bifurcated. The 16 timeframe also does not appear to allow for bifurcation. 17 Is our understanding correct that all issues will be 18 dealt with in one hit? I turn to the representative of 19 the Government of Sudan. 20 PROFESSOR CRAWFORD: Sir, that's our understanding as 21 well. The word "consecutively" has caused me some 22 puzzlement in the context of the agreement as a whole, 23 but it's quite obvious from the timetable, and from 24 all other circumstances, that it's intended that each 25 memorial deal with all of the issues in dispute, and</p> <p style="text-align: center;">Page 10</p>	<p>10:08 1 problem of cancelling my Christmas holiday because of 2 the schedule of pleadings. I think the sensible thing 3 to do would be to fix the oral hearing first, and then 4 we can work out within the flexibility allowed what 5 would be an appropriate point for the submission of 6 the written pleadings. 7 I should say I have had some discussion with 8 Mr Born, and we both agree that we will submit our 9 memorials within the week, and the reference in the 10 Arbitration Agreement is to the week, not the day, in 11 question. We can come back to the precise day in that 12 week. 13 We both intend to submit the memorial on time, but 14 given that the next period of four weeks includes 15 a holiday period, I'm afraid it's inhuman, degrading 16 treatment and punishment to require a large 17 counter-memorial in that period, and we will be arguing 18 very strenuously for an extension in relation to the 19 counter-memorial. A short reply is quite a good idea, 20 because that could be focused, but the 21 counter-memorial -- both parties need to see how the 22 case is pleaded by the other, and I'm afraid this 23 agreement was drawn up by someone who has never had 24 responsibility for producing pleadings before. 25 MR BORN: Just briefly, Mr Chairman, the agreement was</p> <p style="text-align: center;">Page 12</p>

<p>10:09 1 drawn up, in fact, by the parties, and at the end of 2 the day all of us in this room, as the Chairman 3 pointed out, knew what we were getting into when we 4 signed up for it. 5 It is a difficult and ambitious timetable that is 6 set forth in the Arbitration Agreement. It is difficult 7 and ambitious, though not for frivolous reasons or for 8 reasons of lack of attention to the demands on counsel; 9 rather it is ambitious because of the exigences of the 10 situation. This determination is central to a larger 11 peace process, it is essential that it proceed on the 12 basis that the parties agreed in the Arbitration 13 Agreement, and which, as Professor Crawford rightly put 14 it, we all signed up to. 15 We therefore do not think it is appropriate, as one 16 might do in a commercial arbitration or some other 17 arbitration, to fix a convenient hearing date and work 18 backward from that. Rather what we all have here is 19 a timetable fixed in the Arbitration Agreement to which 20 our mandate is to comply. 21 We therefore intend to proceed with submission of 22 the memorial pursuant to the terms of the Arbitration 23 Agreement in the week of the 15th. I think 24 Professor Crawford's suggestion about identifying the 25 exact day, whether it's the 15th or the 17th, if that's</p> <p style="text-align: center;">Page 13</p>	<p>10:13 1 days, in our case, should relate to the 2 counter-memorial, because that is the period of time, 3 having regard to the date when it falls, where more time 4 will inevitably be required. 5 I should say, since Mr Born has mentioned the dates, 6 that although I haven't had the opportunity to consult 7 with co-counsel in relation to this period, we will 8 comply with the first period of April dates, even if 9 that means changing our counsel. And I would not ever 10 want it to be thought from what has been said, and 11 I thought we were talking about merely procedural steps, 12 that the Government of Sudan is not committed to the 13 expeditious resolution of this issue. That was implicit 14 in what I said, that we have prepared, and with 15 considerable difficulty, a memorial which will be filed 16 in the week of 15th December. 17 So all I'm suggesting is that the period of 30 days 18 be allowed for the counter-memorial as the agreement 19 provides. 20 THE CHAIRMAN: Thank you. 21 Perhaps I can ask Ms Levine to give notice of the 22 dates that have been proposed for the oral hearings, and 23 then we will move back to the dates for the completion 24 of the written phase. 25 THE REGISTRAR: The dates on which all members of the</p> <p style="text-align: center;">Page 15</p>
<p>10:11 1 more convenient for the Government of Sudan, makes 2 perfect sense and we should do that. 3 We do not see either justification or need, frankly, 4 to move the date for the reply memorial. Will we have 5 to work hard over Christmas? Yes. But that is 6 something we knew that we were getting into when we 7 signed up for this case. 8 I should just be another moment, I hope. The 9 Tribunal has indicated some dates on which it is 10 available for hearings. Those dates also no doubt will 11 cause some difficulties for counsel, yet again we all 12 knew we were getting into this when we signed up. 13 I believe that the second set of dates, the April 14 dates, and the first half of the April dates, could be 15 doable on our side. Professor Crawford has told me that 16 they are doable on his side. If that is the case then 17 there should be no difficulty proceeding with the 18 timetable that is contained in the Arbitration 19 Agreement, and we see no reason or justification to 20 deviate from that. 21 PROFESSOR CRAWFORD: Sir, the Arbitration Agreement allows 22 the parties to have an extra 30 days in relation to a 23 period of exigency, and if Mr Born wants to stick to 24 the letter of the agreement then so do we. 25 Our very strong submission is that that period of 30</p> <p style="text-align: center;">Page 14</p>	<p>10:14 1 Tribunal would be available for oral hearings in 2 The Hague would be, in the first place, Saturday April 3 18th 2009, Sunday April 19th 2009, Monday April 4 20th 2009, Tuesday April 21st 199, Wednesday April 5 22nd 2009, and Thursday April 23rd 2009. 6 The Tribunal, if necessary, would also be able on 7 Thursday April 30th 2009, Friday May 1st 2009, and 8 Saturday May 2nd 2009, if necessary. 9 PROFESSOR CRAWFORD: Mr President, it may help the 10 Tribunal, while Mr Born and I are still speaking to 11 each other, if I recall two points on which we did, I 12 believe, reach agreement. He will confirm. The first 13 is that in the oral proceeding the Government of Sudan 14 would go first, and the second is that we envisage 15 that a period of approximately six days would be 16 sufficient for the hearing. 17 THE CHAIRMAN: I thank you. 18 MR BORN: We certainly did agree that the Government of 19 Sudan would go first. We agreed that the hearing 20 would not take longer than six days. I don't think we 21 addressed the question of whether all six days would 22 be required. 23 THE CHAIRMAN: Alright, I thank you. So should 24 I understand that prima facie the dates which have 25 been indicated so far for the oral pleadings, starting</p> <p style="text-align: center;">Page 16</p>

10:16 1 on April 18th, would be convenient for both sides?
 2 PROFESSOR CRAWFORD: Yes, sir.
 3 MR BORN: On my side we can do the first six dates at some
 4 difficulty, that means the dates from the 18th through
 5 the 23rd. It will potentially involve my resignation
 6 as an arbitrator in another case, which I need to
 7 confirm with the parties. I would not do that
 8 lightly. I would need to listen to the reactions of
 9 the presiding arbitrator and the co-arbitrator as well
 10 as counsel for the parties. This case, though, has
 11 special characteristics that I think justify an
 12 exceptional step of that nature, and if this is the
 13 only date we can do I will take it.
 14 I am unable to do the remaining four dates which
 15 were mentioned. I am sitting in another case there
 16 where, owing to its peculiarities, it would be untenable
 17 for me to resign.
 18 PROFESSOR CRAWFORD: Sir, I think we're talking about the
 19 first six dates and I think we have agreement on the
 20 first six dates.
 21 THE CHAIRMAN: I thank you, and I ask the registrar to
 22 take note of this agreement.
 23 So if we turn back now to the issue of the written
 24 pleadings, I suggest that we examine the draft timeline,
 25 the estimated timeline which has been prepared by the

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10:22 1 the last day in the week of 26th January, for the
 2 submission of the counter-memorial, at least for the
 3 submission of our counter-memorial.
 4 But I assume the agreement means that if we use our
 5 days, the days are inured to the benefit of the other
 6 side as well. Again, we're happy with that. We think
 7 the Tribunal will be assisted by having considered
 8 counter-memorials which are responsible for the cases
 9 put forward in the memorial.
 10 THE CHAIRMAN: Should I ask Ms Levine to indicate what
 11 would be the further changes in the timeline if, on
 12 hypothesis, we take the suggestion made by the
 13 Government of Sudan?
 14 THE REGISTRAR: Were the counter-memorials to be filed on
 15 Friday February 27th, I believe that the rejoinders 15
 16 days later would be due on March 14th, which is
 17 a Saturday.
 18 PROFESSOR CRAWFORD: We are content with that, sir, and it
 19 gives the Tribunal a month between the submission of
 20 the memorial and the beginning of the oral phase to
 21 absorb the rejoinders. So it seems, within the
 22 context of a not very -- well, let me put it
 23 positively, a very compressed timetable, it seems
 24 a reasonable balance.
 25 MR BORN: If I may just briefly speak to that.

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10:18 1 registrar. We already understand that the parties will
 2 be able to provide the Tribunal with the memorial on
 3 15th December.
 4 PROFESSOR CRAWFORD: Sir, the agreement says the week of
 5 15th December, and I'm afraid when one is working to
 6 these timetables, days matter. I was going to suggest
 7 18th December in that week, certainly later than in
 8 that week, 18th or 19th, which would still be
 9 consistent with the agreement.
 10 MR BORN: If the 18th suits Professor Crawford it suits me
 11 as well.
 12 PROFESSOR CRAWFORD: I'm grateful.
 13 MR BORN: I want to make sure he keeps speaking to me.
 14 THE CHAIRMAN: I thank the two parties for this agreement.
 15 In principle, the parties should submit
 16 a simultaneous counter-memorial at the end of January,
 17 and the date which had been indicated so far is Monday
 18 26th, January. But we heard the observation made by
 19 Professor Crawford, and I would be grateful if --
 20 PROFESSOR CRAWFORD: Sir, it involves our using a
 21 substantial part of the 30 days provided for in the
 22 agreement for each party within which we can seek an
 23 extension. I'm very happy to spend those days in the
 24 circumstances, and I would suggest 27th February, the
 25 Friday, which is three weeks from 30th January, being

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10:23 1 Professor Crawford is of course right that we should
 2 pay attention to the letter of the Arbitration
 3 Agreement. It provides, in contrast to perhaps the
 4 usual procedural discretion that the Tribunal might
 5 enjoy, that the timetables fixed by the parties shall
 6 only be extended for good cause.
 7 The parties knew quite well where Christmas lay when
 8 they fixed this timetable. Good cause, I would suggest,
 9 is not either Professor Crawford or, with the greatest
 10 of respect to my wife, our holidays. What is important
 11 is the parties and what they have chosen. There are
 12 pressing security issues in the region, there is the
 13 overall conduct of the peace agreements, and most
 14 importantly, even if the Tribunal were minded to grant
 15 Professor Crawford some of the time he requests, his
 16 spending, if you will, his entire 30 days now leaves no
 17 further time for extensions on his side.
 18 I would suggest for those reasons that there's
 19 neither good cause to extend based simply on the
 20 Christmas vacations; rather, what was intended by good
 21 cause was if a party tried its best, tried in accordance
 22 with the timetable that had been fixed, and saw that it
 23 just couldn't make it, that the Tribunal would have
 24 an exceptional discretion for good cause.
 25 If we had logistical issues, there were problems of

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10:24 1 transportation or communication in the remote area of
2 Abyei, there was an illness on the team or something of
3 that sort, the Tribunal then could make a special
4 dispensation. That does not encompass, and with the
5 greatest of respect again to Professor Crawford and his
6 family's holidays, that does not encompass simply
7 rejigging the timetable now based on a holiday that has
8 been there for the last 20 centuries.

9 I would suggest in those circumstances that the
10 Tribunal not grant any additional time, and in so far as
11 it does, does not permit Professor Crawford to spend
12 what he regards as his entire budget now, because he may
13 well need to use time in the future because of things
14 that he can't, in contrast to Christmas, foresee just
15 now.

16 PROFESSOR CRAWFORD: Sir, first of all the Tribunal's
17 discretion is not as limited as Mr Born says. You
18 have a discretion to extend for each party, and I am
19 arguing that you should exercise it now in relation to
20 the counter-memorial. We're not using the whole of
21 our budget because the last date on which the
22 counter-memorial could have been submitted was the
23 Friday of the week in question, and we've used 21 days
24 out of 30.

25 In any event, if I have to commit the whole 30 days

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10:27 1 will save time.
2 THE CHAIRMAN: I agree with both suggestions.
3 (10.27 am)
4 (A short break)
5 (11.19 am)
6 THE CHAIRMAN: We should first consider the modifications
7 which have been proposed by the SPLM/A. Could you
8 please, Professor Crawford, tell us ...
9 PROFESSOR CRAWFORD: Sir, I was able to discuss them with
10 the agent and we are happy with them. We accept them.
11 They make the terms of appointment consistent with the
12 agreement so there's no difficulty.

13 THE CHAIRMAN: Thank you very much. This is also the view
14 of the Tribunal.

15 Ms Levine, can you then tell us, because we made
16 a slight modification.

17 THE REGISTRAR: In addition to the changes proposed and
18 agreed, a slight modification was made to
19 paragraph 4.5, which had included December 15 as the
20 date for exchange of memorials, and now reads:

21 "In accordance with Article 8.3(i) of the
22 Arbitration Agreement, the parties agree to
23 simultaneously submit memorials covering all issues of
24 dispute in form and content by December 18th 2008".

25 MR BORN: That makes perfect sense.

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10:26 1 to the counter-memorial I do so for the very good reason
2 that neither party knows with clarity the case that will
3 be put forward by the other. It is obvious now that it
4 will be beneficial to the Tribunal in this difficult
5 case for the counter-memorial to be properly considered,
6 and for the other party to have a short opportunity, and
7 it will be a short opportunity, to respond to anything
8 that is said in the counter-memorial. In those
9 circumstances, I request the Tribunal -- I'm perfectly
10 happy to cancel my own personal holiday now, not that
11 I have very many, if it will make Mr Born happy. That's
12 not the point. The point is that during this period --
13 I mentioned a holiday, in fact it is a period of time in
14 which I will be working but working in another place.
15 We request that the Tribunal grant the extension now to
16 us in relation to the date which has been mentioned.
17 Thank you, sir.

18 THE CHAIRMAN: The Tribunal will adjourn for
19 a few minutes.

20 PROFESSOR CRAWFORD: Sir, if --

21 MR BORN: Would it be convenient for the Tribunal if the
22 parties went elsewhere?

23 PROFESSOR CRAWFORD: If it would be possible for the
24 amendments to be circulated, I can take the
25 opportunity to get approval of the changes, so that

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11:20 1 PROFESSOR CRAWFORD: Sir, for the record I would say, and
2 this is again what I understand to be the result of
3 a discussion with Mr Born, that by "submit" we mean
4 submit to the PCA here at 5 o'clock on that day.
5 MR BORN: We will do our best for 5 o'clock. It certainly
6 means that day, and to the PCA.
7 PROFESSOR CRAWFORD: I see Mr Born wants flexibility after
8 all!

9 MR BORN: Within the day.

10 THE REGISTRAR: Mr Chairman, we would be ready to
11 circulate the terms of appointment for signature now,
12 or we can wait until the next adjournment.

13 THE CHAIRMAN: I think you can do that now in order to
14 save time.

15 THE REGISTRAR: And we already have the signature for the
16 agent of the Government of Sudan, and I understand,
17 Professor Crawford, you are now authorised for that to
18 be used in the final version.

19 PROFESSOR CRAWFORD: Yes, I am. (Pause)

20 THE CHAIRMAN: Now we turn to the issue of dates for
21 delivery of the different written pleadings.

22 In view of the consideration advanced by both sides,
23 the Tribunal believes that it would be convenient to
24 grant an additional time, considering in particular the
25 crucial importance of the counter-memorial. Due to the

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<p>11:22 1 fact that delivery of memorials is simultaneous, it 2 appears to the Tribunal that the counter-memorial will 3 constitute a very important piece of the pleading, but 4 we are also aware of the timeframe and of the overall 5 context, so the Tribunal decides to grant an additional 6 time not of 31 days, but of a shorter length. 7 I would be grateful if Ms Levine could give us the 8 reading of the new dates which have been established. 9 THE REGISTRAR: In accordance with the instruction of the 10 Tribunal, as agreed the date for the exchange of 11 memorials, in accordance with Article 8.3(i) of the 12 agreement, will be Thursday December 18th 2008. 13 The revised date for submission of counter-memorials 14 in accordance with Article 8.3(ii) would be Friday 15 February 13th 2009. 16 The date for submission of rejoinders in accordance 17 with Article 8.3(iii) would be Saturday February 18 28th 2009. 19 By Monday March 16th 2009, in accordance with 20 Article 8.3(iv), other written pleadings that the 21 Tribunal deems necessary to be requested will be 22 requested. 23 PROFESSOR CRAWFORD: Sorry, what was that date? 24 THE REGISTRAR: That was Monday March 16th 2009. And the 25 Tribunal has also decided that the date of Friday</p> <p style="text-align: center;">Page 25</p>	<p>11:27 1 On our side, having simultaneous transcription, 2 so-called LiveNote, and facilities for audio visual, 3 whether PowerPoint or something of that sort, would be 4 desirable. I suspect there will not need to be 5 interpreters, counsel can speak slowly, and in so far as 6 interpreters are required, I think counsel can 7 communicate with each other and arrange on satisfactory 8 individuals. 9 PROFESSOR CRAWFORD: I agree with all of that. 10 THE CHAIRMAN: I thank you. So we are left with point 5, 11 publicity. There are here a couple of points of 12 clarification that the Tribunal would like to seek 13 from the parties. With respect to implementation of 14 Article 8.6, Article 8.6 provides: 15 "The oral pleading(s) of the Tribunal shall be open 16 to the media. A portion of a hearing may only be closed 17 at the discretion of the Tribunal for security reasons. 18 The parties authorise the PCA to issue periodic press 19 releases regarding the progress of the arbitration 20 proceedings and to make publicly available on its 21 website the final award as well as party submissions." 22 Now the first question: for the publication of 23 submission on the website, can this occur immediately 24 after the filing, or should the PCA hold off until the 25 end of the proceedings? We would like the hear the</p> <p style="text-align: center;">Page 27</p>
<p>11:25 1 March 20th 2009 will be the date for notification, in 2 accordance with Article 8.4 of the agreement, of those 3 experts and witnesses intended to be presented. 4 The dates that I have just read and the deadlines 5 I have just read would be by close of business Hague 6 time 5 pm. 7 THE CHAIRMAN: And you will send to the parties a written 8 copy of the different dates? 9 THE REGISTRAR: That's correct. The PCA will distribute 10 a letter confirming those dates subsequent to today's 11 meeting. 12 THE CHAIRMAN: I thank you. 13 Now I think we can move directly to point 4(b), 14 which deals with technical requirements in the framework 15 of oral pleadings, and we would like to hear the parties 16 on that issue, and in particular the parties should 17 liaise with the PCA closer to the date of the hearings 18 regarding the technical requirements for the oral 19 pleadings. 20 There is the issue of interpreters, the equipment, 21 court reporting. Any comment? 22 MR BORN: I suspect this is something that the parties can 23 work out between themselves. I suspect there will not 24 need to be unusually complicated technical equipment, 25 although Professor Crawford can speak for himself.</p> <p style="text-align: center;">Page 26</p>	<p>11:29 1 parties on that. Professor Crawford. 2 PROFESSOR CRAWFORD: Sir, this is not a matter on which 3 I have specific instructions. It is clear from the 4 Arbitration Agreement that this is not a private or 5 confidential arbitration. I think, if the pleadings 6 were to be made public instantaneously upon deposit -- 7 although I certainly haven't had experience of that 8 happening, and I'd be interested in Mr Born's view 9 about it -- we don't have any a priori view. 10 THE CHAIRMAN: Thank you. Mr Born? 11 MR BORN: It may be also that Professor Crawford would 12 like to consult with his agent on his side, we 13 certainly would have no objection to him taking the 14 time to do that. On our side, I think past experience 15 has been that the PCA has put things up relatively 16 quickly on their website. Prima facie we don't see 17 a reason to treat pleadings differently. However, if 18 there are objections from the government we can 19 certainly consider those. 20 PROFESSOR CRAWFORD: Sir, I wasn't making an objection. 21 When I do make an objection you will know it. 22 The pleadings will be given to you in hard copy 23 form. Because of the nature of illustrations and maps 24 and so on it may not be possible to give you electronic 25 versions of the pleadings at the same time. We would</p> <p style="text-align: center;">Page 28</p>

<p>11:30 1 certainly not have any difficulty about the hard copy of 2 the pleadings being made available to the media 3 et cetera upon deposit. If Mr Born is happy with that 4 I think we are happy with it. 5 We would have to have some discussion about the 6 modalities of making electronic copies available and how 7 much longer that would take, because obviously the whole 8 process of production is quite a complicated one. We 9 are obviously putting in a map atlas, and to prepare 10 that in an electronic form may take some further time. 11 MR BORN: If the Government of Sudan has no objections to 12 the materials going onto the website as soon as 13 technically feasible then I think we have agreement. 14 Obviously there will need to be technical discussions 15 but I'm not sure that need detain us today. 16 THE CHAIRMAN: Of course, the Tribunal insists that the 17 electronic version be completed before the work of the 18 Tribunal as it's very useful. 19 Now I come to the second point of clarification. As 20 I read just before, the oral pleading shall be open to 21 the media. Does it imply also that the proceedings are 22 open to members of the public generally? 23 PROFESSOR CRAWFORD: Sir, if the parties had wanted to 24 make the oral proceedings open to members of the 25 public they would have said so. I think the</p> <p style="text-align: center;">Page 29</p>	<p>11:33 1 and does not address specifically the question of the 2 public, although it goes on to say that the hearings 3 shall only be closed for security reasons. 4 The Sudan People's Liberation Movement/Army submits 5 that the better view of that provision, both in terms of 6 the parties' intentions and the overall objectives of 7 this process, is to permit those members of the public, 8 and particularly the interested and affected group on 9 the side of the Sudan People's Liberation Movement/Army, 10 to attend. It would not object to attending with 11 appropriate security arrangements, which might include 12 viewing from another room. 13 But I think we should all not lose sight of the fact 14 that this arbitration concerns a land that a specific 15 people claims is theirs, and has been decided to be 16 theirs, and should they wish to attend and see this 17 process, huge benefits would be served by that. 18 Those same people have a deep concern that the lack 19 of public attention in the past has led us to where we 20 are today, and they therefore wish there to be maximal 21 transparency, maximal public attention to this, and 22 hence the provisions already in the agreement. 23 I think it therefore sensible, indeed fundamentally 24 important, that the public see this themselves, not just 25 through the filter of the media or the press, but be</p> <p style="text-align: center;">Page 31</p>
<p>11:32 1 significance is to be attached to the actual language 2 which says "open to the media", and that would imply 3 some form of media accreditation. 4 The hearing is going to take place in a very 5 compressed timetable, and I envisage that, although we 6 haven't discussed the day-by-day timetable, I envisage 7 that most or all of the time available will be taken up 8 with the hearings. So it's important that the hearings 9 are conducted in an orderly way without delay. 10 Our strong preference would be for the hearings to 11 be open to accredited members of the media, and for the 12 hearings, the live note -- and I agree with Mr Born that 13 we need a live note -- to be immediately made available 14 electronically. But we would have some difficulty about 15 the hearings being conducted in a room to which members 16 of the public generally had access. There would be 17 security concerns, risk of interruption and so on. It 18 would be possible, and it has been done, for there to be 19 a separate room in which people can watch the 20 proceedings being televised. That would be less 21 problematic from our point of view. 22 THE CHAIRMAN: Thank you. Mr Born? 23 MR BORN: A couple of thoughts for the Sudan People's 24 Liberation Movement/Army. Firstly, the Arbitration 25 Agreement provides that the media shall be admitted</p> <p style="text-align: center;">Page 30</p>	<p>11:35 1 able to say that they saw you and us deliberate upon 2 this matter. 3 PROFESSOR CRAWFORD: Sir, this arbitration is being held 4 because it is not the case, according to the 5 Government of Sudan, that there is only one people 6 involved, but several. And the arbitration is 7 certainly not being conducted on the footing that 8 there is no difficulty in that regard. 9 Mr Born said he would be happy with a separate room 10 in the Peace Palace being available for viewing, and 11 subject to normal security arrangements in the 12 Peace Palace we would be happy with that as well. But 13 we think the orderly conduct of the proceedings 14 themselves would be better if attendance to the 15 proceedings was limited to accredited members of the 16 media. 17 THE CHAIRMAN: Alright, I thank both parties, and the 18 Tribunal will consider the issue in coordination with 19 the PCA in order to define the best ways to organise 20 the hearings. We do consider that there is 21 an agreement among the two sides, particularly for the 22 use of a special room for the public. 23 MR BORN: Just to be clear, Mr Chairman, although there is 24 an agreement on that, our position remains that if 25 appropriate security measures could be taken also to</p> <p style="text-align: center;">Page 32</p>

<p>11:37 1 ensure expeditious seating and the like, it would be 2 appropriate and just for members of the public to be 3 able to watch in person. It might be a limited 4 number, but this is a matter which affects the people 5 as well as counsel. 6 THE CHAIRMAN: Yes. Once again, I think this is a point 7 to be considered with the PCA so that we can examine 8 these eventual possibilities. 9 Yes, it is true that there are still some issues 10 which have not been considered so far and which are of 11 interest for the organisation of the written pleadings. 12 The first deals with evidence, documents, witness 13 statements, expert reports, maps, which of course are of 14 particular importance from a material point of view for 15 the clarification of the positions of the two sides -- 16 The agreement appears to be silent on this, and we 17 would be happy to have your clarifications on that 18 point. 19 PROFESSOR CRAWFORD: Sir, we were envisaging the 20 submission of a memorial which would contain some 21 maps, but a separate map annex. Obviously the 22 submission will be accompanied by a certificate of the 23 agent as to the authenticity of the maps. 24 To the extent that there are witness statements, the 25 witness statements should be attested in the normal way,</p> <p style="text-align: center;">Page 33</p>	<p>11:40 1 certainly do, to submit witness statements, in so far 2 as they are to be provided, documentary evidence, 3 expert reports and maps, together with the memorial. 4 That's certainly, as I say, our intention as opposed 5 to submitting them at some other time. 6 We agree entirely that with regard to modern 7 technology, be it CDs or something else, that can be 8 submitted slight thereafter. There may be technical 9 issues in terms of transferring it to the appropriate 10 medium, I'm certainly not the person that can master 11 those technical issues, but I would expect that they 12 would be surmountable in the days, perhaps week, 13 following hard copy submission. 14 THE CHAIRMAN: Alright. I take it that there is 15 an agreement among the parties on that issue. 16 MR BORN: Just noticing one point that I failed to 17 address. We certainly do not object to extracts, if 18 you will, of books, the front page and the relevant 19 material. I think it would be helpful if relevant 20 material were defined, obviously it's within both 21 parties' discretion, but were defined with an effort 22 to provide both the other party and the Tribunal with 23 not just the particular sentence that one thinks is 24 ideally suited, but rather the immediately surrounding 25 context.</p> <p style="text-align: center;">Page 35</p>
<p>11:39 1 as would be done for ICJ proceedings. There is a great 2 volume of documentary material, including quite a lot of 3 published documentary material; as the Tribunal will 4 discover, the proceedings of the administration of the 5 Condominium were largely published by Her Majesty's 6 Stationery Office, and it would produce a huge volume of 7 annexes if all this material was submitted. 8 What we were proposing to do was to submit only the 9 front sheet and the relevant page from which a quotation 10 comes. But in many cases there exist electronic 11 versions of these documents, and we would propose, 12 possibly not on the day of submission but within as 13 short a time thereafter as is technically possible, 14 giving you a CD. 15 For example, there is a 1995 handbook of the Sudan 16 in two volumes which is available on the internet, and 17 we would give you a copy of that in electronic form. 18 Unfortunately it's not available in hard copy anymore 19 except in selected libraries, so we can't give you the 20 whole thing, but we will give you with the memorial the 21 relevant pages we quote, and then subsequently give you 22 electronic versions of the documents to the extent that 23 they are available, which is a surprising extent. 24 THE CHAIRMAN: I thank you. Mr Born. 25 MR BORN: I take it that the Sudan intends, as we</p> <p style="text-align: center;">Page 34</p>	<p>11:42 1 We also suggest that both parties be responsible for 2 providing the translation, in so far as the original 3 language of the document is not the English language, of 4 that selected excerpt, meaning not just the particular 5 sentence that one wishes to draw attention to but rather 6 the immediately surrounding context. 7 THE CHAIRMAN: Which means that you would produce the 8 original text together with a translation. 9 MR BORN: Precisely. 10 THE CHAIRMAN: I thank you. 11 PROFESSOR REISMAN: Do I understand then that the 12 documents will be submitted with the memorials in 13 accordance with 8.3(i), and that the counter-memorials 14 will not be including documents? 15 My second question is with respect to the production 16 of witnesses, I presume that every witness produced will 17 have already submitted a witness statement? 18 PROFESSOR CRAWFORD: Sir, if I can respond to those 19 questions. On the first, I don't take the 20 non-reference to documents in relation to the 21 counter-memorial as meaning that one is precluded from 22 submitting new documents in the counter-memorial, 23 although it's too early to tell. We would certainly 24 envisage doing so, and I would be very surprised if 25 Mr Born had a different view.</p> <p style="text-align: center;">Page 36</p>

<p>11:43 1 As to the witness statements, I agree entirely that 2 any witness who intends to give oral evidence must 3 previously have submitted a witness statement. 4 THE CHAIRMAN: Mr Born. 5 MR BORN: That certainly is the position of the Sudan 6 People's Liberation Movement/Army. I would be quite 7 surprised if there were not documents or additional 8 materials attached to the counter-memorial in just the 9 same way as they are attached to the memorial, and the 10 same arrangements that we discussed ought also to 11 apply to that. 12 THE CHAIRMAN: Alright. 13 PROFESSOR REISMAN: My question goes to whether the 14 counter-memorials will be introducing new material, so 15 that they will in effect be a second memorial, or 16 whether the documents in the counter-memorial will 17 essentially be responding to issues raised in the 18 memorial. 19 PROFESSOR CRAWFORD: Sir, it's crystal ball gazing at this 20 stage, but I'm not sure that it's going to be very 21 easy to draw a distinction between purely responsive 22 arguments and the development of arguments in the 23 memorial. I think in the nature of things the two 24 will run together. 25 But obviously the principal function of the</p> <p style="text-align: center;">Page 37</p>	<p>11:46 1 a counter-memorial without being counter-productive. 2 I would be happy with a strong injunction that all of 3 the materials should be produced as soon as possible. 4 THE CHAIRMAN: I thank you. Mr Born. 5 MR BORN: In principle, the Sudan People's Liberation 6 Movement/Army doesn't disagree with that. We would 7 point out, though, that in a sense we will be seeing 8 the case for an excess of mandate for the first time 9 when we receive the memorial, and therefore we will be 10 facing only one opportunity in the counter-memorial to 11 meet that case. 12 THE CHAIRMAN: Alright, we take note of this position. 13 I should briefly review the number of hard copies. 14 The understanding of the Tribunal is that of course each 15 member of the Tribunal will be provided with one, two 16 for the PCA, and eight for each party, would that be 17 convenient? 18 PROFESSOR CRAWFORD: Sir, if the pleadings are to be made 19 publicly accessible, it might be desirable for the PCA 20 to have more than the bare minimum. So I would 21 propose ten copies for the PCA, including of course 22 for the use of the Tribunal, and Mr Born and I have 23 also discussed this and I think we agreed on 24 a number of ten as between the parties. Once we know 25 what the number is there's no particular problem in</p> <p style="text-align: center;">Page 39</p>
<p>11:44 1 counter-memorial will be to respond by such arguments as 2 each party is advised to the arguments made by the other 3 in the memorial. 4 PROFESSOR REISMAN: In that case, if I understand counsel, 5 that means that we may also be presented with 6 documents in the rejoinder, because new documents will 7 have been presented in the counter-memorial to which 8 a rejoinder may be necessary. Is that the 9 understanding, Mr President? 10 THE CHAIRMAN: My tendency would be to say that at some 11 point the parties should restrain from producing too 12 many document which, after a certain threshold, can 13 become counter-productive. So perhaps we could 14 consider that at the level of rejoinders, the two 15 sides would not in principal produce new 16 documentation, but this is a question to be discussed. 17 PROFESSOR CRAWFORD: Sir, we would be happy with that as 18 a guideline, even as a strict guideline, so that you 19 would have to have good cause. 20 If the Tribunal were minded to do so, it could be 21 put in the form of a rule that without the permission of 22 the Tribunal, but there's very little time between the 23 two phases. 24 So I would be happy with the Tribunal's injunction, 25 and it's the function of the parties to produce</p> <p style="text-align: center;">Page 38</p>	<p>11:48 1 producing it. 2 MR BORN: I would be very much guided by the PCA's desires 3 on this, but my understanding would be that we would 4 then adjust the numbers that are in the agenda to five 5 for the Tribunal, five for the PCA and ten for each 6 party. 7 THE CHAIRMAN: Ms Levine? 8 THE REGISTRAR: Five hard copies to be made available to 9 the public would be sufficient for the PCA. The 10 provision in 8.6 provides for the PCA to make the 11 documents publicly available on its website, so that 12 would be the primary form of making the information 13 available, for example, diplomatic representatives in 14 The Hague who may wish to come and inspect in person. 15 The hard copies, if each party provides five copies 16 that should be sufficient. 17 THE CHAIRMAN: Alright, I thank you. 18 We have already touched upon the question of the 19 translation of documents not being in English, so 20 I think the question is solved. 21 I think then we come to the end of this agenda. Are 22 there any questions from the members of the Tribunal? 23 PROFESSOR REISMAN: Mr President, I hate to belabour the 24 point, but I am concerned about an orderly procedure. 25 One of the ways of refuting a document is by</p> <p style="text-align: center;">Page 40</p>

11:49 1 submitting a different document. If documents can be
2 submitted through the rejoinder period, a party will
3 have submitted documents that another party will not
4 have had an opportunity to challenge in a documentary
5 fashion, which is one of the reasons why in many
6 procedures it is assumed, without the permission of the
7 Tribunal, that the documentary record is closed after
8 the counter-memorial.

9 If documents can be submitted by a party in rebuttal
10 in the rejoinder in response to documents that were in
11 the counter-memorial, then we will have documents that
12 will not have been tested in an adversarial fashion by
13 the possible submission of other documents.

14 I appreciate there are special problems with
15 simultaneous exchange, but the Tribunal benefits from
16 adversarial testing of documents, and I just wonder, if
17 there are documentary submissions at the rejoinder
18 phase, whether that will be precluded. Thank you.

19 JUDGE SCHWEBEL: Mr President, an allied point is that
20 when it comes to the oral argument, counsel should not
21 refer to documents that are not in the record.

22 PROFESSOR CRAWFORD: To deal with the last point first,
23 that's obviously right, unless there is some
24 exceptional situation in which case permission of the
25 Tribunal would be required.

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11:53 1 there should, insofar as humanly possible, not be
2 references to documents which are so-called public if
3 they haven't been put before the Tribunal. Many
4 things can be found on the internet these days and
5 I assume that's public, and I really think that the
6 Tribunal would be best served by having a fixed
7 documentary record.

8 With regard to counter-memorials and rejoinders,
9 I am a bit concerned that we are engaged in crystal ball
10 gazing at this stage. Certainly documents need to be
11 tested by an adversarial procedure; on the other hand
12 the real question is where you draw the line. Does it
13 stop after counter-memorials or after rejoinders? In
14 either instance, if you stop it in a particular place
15 there will be no more adversarial testing of that. It
16 strikes me at least that more rather than less
17 adversarial testing is probably a good thing.

18 That said, if the Tribunal, in the interests of
19 clarity, wishes to draw a line after counter-memorials
20 and before rejoinders where, save for very clear and
21 exceptional circumstances, no further documents will be
22 permitted, so be it, we will then know what rules we are
23 playing by and we would not object to that.

24 THE CHAIRMAN: Alright, I thank you. I think we can keep
25 to this rule that the record should be closed with the

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11:51 1 There's a distinction of course between documents
2 which are in the public domain, such as could be cited
3 without notice in the International Court, and I would
4 assume that that's permissible in the way that one would
5 cite the normal range of authorities on a particular
6 subject.

7 But we are talking about documents particular to the
8 case, and I entirely agree that without the permission
9 of the Tribunal the record should be closed at some
10 point. As to what point, we would be content with
11 a stipulation that all documents of the sort that I've
12 just described will be submitted with the
13 counter-memorial, except with the permission of the
14 Tribunal.

15 I would put on the record in order to be helpful --
16 Mr Born doesn't always realise that I'm trying to be
17 helpful -- I would put on the record our acceptance that
18 if there was something new in our counter-memorial it
19 would be appropriate for the Tribunal to give
20 permission. But I agree very much with
21 Professor Reisman that in principle the record should be
22 closed at the counter-memorial stage if at all possible.

23 MR BORN: We certainly agree that there should not be
24 references to documents outside of the record that is
25 placed in front of the Tribunal. We also believe that

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11:54 1 counter-memorial except with the authorisation of the
2 Tribunal at the stage of the rejoinder, in order for
3 us, all of us, to be disciplined and remain with the
4 possibility of a reaction by both sides.

5 Would you like to draw other points?

6 THE REGISTRAR: Yes. Thank you, Mr President. One
7 further point of clarification with respect to
8 implementing Article 8.6, Article 8.6 refers to making
9 available on the PCA website the final award as well
10 as parties' submissions. It makes no references to
11 transcripts of proceedings or to procedural orders or
12 to the terms of appointment, and the PCA would like
13 some instruction with respect to those other types of
14 documents in the case, and whether we should make
15 those publicly available also.

16 MR BORN: I think from the Sudan People's Liberation
17 Movement/Army's perspective all materials should be
18 available.

19 PROFESSOR CRAWFORD: Sir, we agree with that.

20 THE CHAIRMAN: I thank you.

21 THE REGISTRAR: Thank you. I had some other comments on
22 the deposit arrangements if you have nothing further.

23 THE CHAIRMAN: Please.

24 THE REGISTRAR: As you are aware, the PCA is responsible
25 for the administration of this case and acting as

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11:56 1 registry, in accordance with the terms of appointment
2 signed today, and as provided by Article 41 of the
3 PCA Rules, a deposit has been requested in the amount
4 of €1 million.
5 The PCA notes the terms of Article 11 of the
6 Arbitration Agreement, which provides for the Presidency
7 of the Republic of Sudan to direct for the payment of
8 the cost of the arbitration from the unity fund,
9 regardless of the outcome of the arbitration, and
10 Article 11.2 of the agreement, which notes that the
11 Government of Sudan shall apply to the PCA Financial
12 Assistance Fund, and the parties may solicit additional
13 assistance from the international community.
14 Speaking with respect to the anticipated application
15 to the PCA's Financial Assistance Fund, the PCA received
16 in July, at the time of deposit of the agreement --
17 I believe it was July 11th -- a request from the
18 Government of Sudan in general terms for assistance from
19 the PCA Financial Assistance Fund. That fund was
20 established in 1994, at the initiative of the PCA's
21 member states; it is available to qualifying states who
22 are participating in arbitration proceedings before the
23 PCA, and in order to qualify a state must be a member
24 state, which Sudan is, and be on a list of developing
25 countries established by the OECD, which Sudan is

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11:59 1 We will confirm these amounts once the contributions
2 are finalised, and keep the parties abreast of any
3 developments with respect to that funding.
4 The usual timeline for requesting a deposit from
5 a state in matters such as this would be around 30 days,
6 and with that timeframe in mind, once we can confirm the
7 amount to be requested, that will be forwarded to the
8 Government of Sudan's agent, and both parties will be
9 kept abreast of those developments.
10 THE CHAIRMAN: Thank you very much. Would the
11 representative of the government like to react to this
12 information?
13 PROFESSOR CRAWFORD: I managed to take note of it, sir,
14 and I would be grateful if Ms Levine would keep me
15 personally informed about the process, because it's
16 obviously important that this be done with appropriate
17 expedition.
18 THE CHAIRMAN: I thank you. Mr Born?
19 MR BORN: The PCA's efforts are appreciated.
20 THE CHAIRMAN: Thank you. So I thank you very much for
21 your cooperation. I think that all the points on the
22 agenda have been discussed and agreed upon, so I thank
23 you very much, and we adjourn this meeting. Thank
24 you.
25 MR BORN: Thank you, Mr President.

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11:57 1 a member of.
2 The current balance of the Financial Assistance Fund
3 does not cover €1 million. There is however currently
4 available a couple of hundred thousand euros possibly
5 for use in this case, and we have been informed at the
6 end of last week, and given permission to tell the
7 parties, that the Government of Norway intends to make
8 a contribution of 2 million Norwegian kroner to the PCA
9 Financial Assistance Fund for the purposes of allocation
10 to this case, which is approximately equivalent to
11 €230,000.
12 The PCA anticipates that now that the deposit has
13 been established, and that the terms of appointment have
14 been signed, the Secretary General of the PCA will
15 forward on behalf of the Government of Sudan, which
16 represents a request on behalf of both parties to this
17 case, a request of financial assistance from the PCA
18 Financial Assistance Fund board of trustees.
19 The Secretary General anticipates that, should the
20 Norwegian funds come through as promised, there could be
21 an allocation in the vicinity of €400,000 from the PCA
22 Financial Assistance Fund, and therefore that the
23 Presidency of the Republic of Sudan ought to contribute
24 in the vicinity of €600,000 towards the deposit in this
25 case.

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12:01 1 PROFESSOR CRAWFORD: Thank you, Mr President, members of
2 the Tribunal, and thank you for accepting the heavy
3 charge of this arbitration, which is sui generis both
4 in its timetable as also its content.

(12.03 pm)

(The hearing concluded)

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