

PERMANENT COURT OF ARBITRATION

IRON RHINE CASE (BELGIUM v. THE NETHERLANDS)

MEMORIAL OF THE KINGDOM OF BELGIUM

INTRODUCTION

1. The Arbitral Tribunal is set up under the Exchange of Letters between Belgium and the Netherlands of 22 and 23 July 2003. The relevant parts of the authentic Dutch version read as follows:

“(..) Het Koninkrijk België en het Koninkrijk der Nederlanden zijn overeengekomen het geschil in verband met de reactivering van de IJzeren Rijn middels de volgende gezamenlijke vraagstelling ter bindende beslissing aan een door hen in te stellen arbitrage-tribunaal onder auspiciën van het Permanente Hof van Arbitrage te Den Haag voor te leggen.

“België en Nederland zijn het erover eens dat België recht heeft op het gebruik, het herstel, de aanpassing en de modernisering van het Nederlandse gedeelte van het historische tracé van de IJzeren Rijn en dit ten gunste van alle Belgische en andere spoorwegondernemingen die voldoen aan de regels voor de toegang tot de markt.

Met het oog op de toekomstige investeringen voor de IJzeren Rijn besluiten beide Partijen om de volgende vragen voor te leggen aan een Arbitrage-tribunaal onder auspiciën van het Permanente Hof van Arbitrage te Den Haag:

- 1. In hoeverre is de Nederlandse regelgeving en daarop gebaseerde beslissingsbevoegdheid met betrekking tot het gebruik, het herstel, de aanpassing en de modernisering van spoorwegen op Nederlands grondgebied op gelijke wijze van toepassing op het gebruik, het herstel, de aanpassing en de modernisering van het historische tracé van de IJzeren Rijn op Nederlands grondgebied?*
- 2. In hoeverre heeft België het recht om met het oog op het gebruik, het herstel, de aanpassing en de modernisering van het historische tracé van de IJzeren Rijn op Nederlands grondgebied werken uit te voeren of te laten uitvoeren en om daarop betrekking hebbende plannen, kenmerken en procedures volgens Belgische regelgeving en daarop gebaseerde beslissingsbevoegdheid te bepalen? Moet een onderscheid worden gemaakt tussen de eisen, normen, plannen, kenmerken en procedures in verband met enerzijds de functionaliteit van de spoorinfrastructuur op zich en anderzijds de ruimtelijke ordening en inpassing van de spoorinfrastructuur, en zo ja, wat zijn daarvan de consequenties? Kan Nederland de bouw van tunnels, holle dijken, omleidingen, en dergelijke, evenals de desbetreffende voorgestelde bouw- en veiligheidsnormen eenzijdig opleggen?*

3. *In hoeverre dienen, in het licht van het antwoord op de voorgaande vragen, de kostenposten en de financiële risico's die voortvloeien uit het gebruik, het herstel, de aanpassing en de modernisering van het historische tracé van de IJzeren Rijn op Nederlands grondgebied door België dan wel door Nederland te worden gedragen? Is België ertoe gehouden om meer investeringen te financieren dan wat nodig is voor de functionaliteit van het historische tracé van de spoorlijn?*

Het Arbitragetribunaal wordt verzocht zijn uitspraak te doen op basis van het internationale recht, met inbegrip zonodig van het Europees recht, zulks evenwel met inachtneming van de verplichting die Partijen hebben op grond van artikel 292 EG-Verdrag.”

Het Koninkrijk België en het Koninkrijk der Nederlanden zijn overeengekomen gezamenlijk de procedureregels van de arbitrage op te stellen met als uitgangspunt de “Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between two States”. Deze procedureregels worden opgelegd in een gezamenlijk document.

Het Koninkrijk België en het Koninkrijk der Nederlanden zijn overeengekomen zo spoedig mogelijk uitvoering te geven aan de uitspraak van het Arbitragetribunaal door een besluit te nemen over het definitieve tracé, alsmede over een tijdelijke beperkte heringebruikneming van het historisch tracé. (..)¹

For the Arbitral Tribunal’s convenience, the Netherlands and Belgium have drafted the following translation in English:

“(.) The Kingdom of Belgium and the Kingdom of the Netherlands have agreed to submit the dispute concerning the reactivation of the Iron Rhine to an arbitral tribunal they are to set up under the auspices of the Permanent Court of Arbitration in The Hague, by requesting a binding decision on the following jointly formulated statement of questions.

“Belgium and the Netherlands agree that Belgium has the right to use, restore, adapt and modernise the Dutch section of the historical route of the Iron Rhine, for the benefit of all Belgian and other rail operators that comply with the rules for access to the market.

With a view to the future investments in the Iron Rhine the two Parties have decided to submit the following questions to an arbitral tribunal under the auspices of the Permanent Court of Arbitration in The Hague:

1. *To what extent is Dutch legislation and the decision-making power based thereon in respect of the use, restoration, adaptation and modernisation of railway lines on Dutch territory applicable, in the same way, to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory?*

¹ Exhibit No. 1. The Dutch version has been published by the Netherlands in the *Tractatenblad*, 2003, No. 138.

2. *To what extent does Belgium have the right to perform or commission work with a view to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, and to establish plans, specifications and procedures related to it according to Belgian law and the decision-making power based thereon? Should a distinction be drawn between the requirements, standards, plans, specifications and procedures related to, on the one hand, the functionality of the rail infrastructure in itself, and, on the other hand, the land use planning and the integration of the rail infrastructure, and, if so, what are the implications of this? Can the Netherlands unilaterally impose the building of underground and above-ground tunnels, diversions and the like, as well as the proposed associated construction and safety standards?*
3. *In the light of the answers to the previous questions, to what extent should the cost items and financial risks associated with the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory be borne by Belgium or by the Netherlands? Is Belgium obliged to fund investments over and above those that are necessary for the functionality of the historical route of the railway line?*

The Arbitral Tribunal is requested to render its decision on the basis of international law, including European law if necessary, while taking into account the Parties' obligations under article 292 of the EC Treaty."

The Kingdom of Belgium and the Kingdom of the Netherlands have agreed to jointly draw up the rules of procedure for the arbitration on the basis of "the "Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States". These rules of procedure will be laid down in a joint document.

The Kingdom of Belgium and the Kingdom of the Netherlands have agreed to execute the Arbitral Tribunal's decision as soon as possible by taking a decision on the definitive route, and on the temporarily and restricted re-use of the historical route. (..)"²

It should be noted from the outset that the English translation differs, on some points which will be reverted to below, from the Dutch text. It may, however, be noted from the outset that the sentence preceding the questions, according to which, in the English text, "*Belgium and the Netherlands agree that Belgium has the right to use, restore, adapt and modernise the Dutch section*" does not reflect the Dutch version, which in reality provides that "*Belgium and the Netherlands agree that Belgium has the right to the use, the restoration, the adaptation and the modernisation of the Dutch section*" of the historical route of the Iron Rhine.

² Exhibit No. 2.

2. As provided in the Arbitral Agreement, Belgium and the Netherlands subsequently agreed on the Arbitral Tribunal's Rules of Procedure.

3. In Part I of its Memorial, Belgium will analyse the factual and legal background of the present case. This includes an analysis of the Iron Rhine's conventional regime (A), followed by a study of the issues at stake and of events that eventually led Belgium and the Netherlands to conclude the Arbitral Agreement (B). Part II of the Memorial addresses the three questions submitted to the Arbitral Tribunal.

Relevant parts of exhibits in French or Dutch have been quoted in the Memorial in, or accompanied with, unofficial translations into English.

I. FACTUAL AND LEGAL BACKGROUND

A. THE IRON RHINE AND ITS CONVENTIONAL REGIME

4. The Iron Rhine is a railway linking the port of Antwerp, Belgium, to the Rhine basin in Germany, through the Netherlands, more specifically the Dutch province of Limburg. It has a length of 162 km in total, of which ca. 96 kilometres in Belgium, 48 kilometres in the Netherlands and 18 in Germany. In Belgium, the line runs from Antwerp via Lier, Herentals, Geel, Mol, Lommel, Neerpelt on to Hamont. It then crosses the Belgian/Dutch border, and continues through the south of the Netherlands via Budel, Weert and Roermond to cross the Dutch/German border near Herkenbosch. The line then continues in Germany via Dalheim on to Rheydt (part of Mönchengladbach) where the line joins the German railway network to Duisburg³. Following map is taken from a study made with the funding of the European Commission, Belgium, the Netherlands and Germany, which was finalized in May 2001⁴.



³ See Prognos, *The Iron Rhine Railway Link between Antwerp and the Rhine-Ruhr Area*, final report, May 1991, notably p. 4-6. Exhibit No. S2; Arcadis, *Comparative Cross-Border Study on the Iron Rhine*, p. 11. Exhibit No S3.

The Iron Rhine and its conventional regime originate in the separation of Belgium from the Netherlands in the 19th century. Their coming into being was closely related with the settlement of territorial issues, which remained outstanding after Belgium had gained independence. The various treaties which have governed the status of Iron Rhine over time are analysed here after.

1. The Separation Treaty of 19 April 1839: Freedom of Communications and Commerce as part of the Settlement of Territorial Issues

5. In the Treaty relative to the Separation of their Respective Territories, signed at London on 19 April 1839 (hereafter referred to as the “Separation Treaty”), Belgium and the Netherlands agreed on the settlement of territorial issues as well as on various other matters such as freedom of communications and the apportionment of State debts⁵.

The settlement of territorial disputes included the attribution to the Netherlands of both banks of the Western Scheldt toward the North Sea, as well as of the province of Limburg, north of the river Meuse (Maas). In exchange, Belgium was accorded a number of guarantees with respect to freedom of commerce and communications, notably in favour of the port of Antwerp. These included provisions with respect to means of communication with Germany, which are at the basis of the Iron Rhine’s conventional regime.

6. Article 12 of the Separation Treaty conferred Belgium the right to construct or to have constructed new means of communication with Germany over Dutch territory. It provides as follows:

“Art. 12. Dans le cas où il aurait été construit en Belgique une nouvelle route, ou creusé un nouveau canal, qui aboutirait à la Meuse vis-à-vis le canton hollandais de Sittard, alors il serait loisible à la Belgique de demander à la Hollande, qui ne s’y refuserait pas dans cette supposition, que la dite route ou le dit canal fussent prolongés d’après le même plan, entièrement aux frais et dépens de la Belgique, par le canton de Sittard, jusqu’aux frontières de l’Allemagne. Cette route ou ce canal, qui ne pourraient servir que de communication commerciale, seraient construits, au choix de

⁴ *Ibid.*

⁵ Treaty between Belgium and the Netherlands relative to the Separation of their Respective Territories, signed at London, 19 April 1839, *C.T.S.*, vol. 88 (1838-1839), p. 427 ff. Exhibit No 3.

la Hollande, soit par des ingénieurs et ouvriers que la Belgique obtiendrait l'autorisation d'employer à cet effet dans le canton de Sittard, soit par des ingénieurs et ouvriers que la Hollande fournirait, et qui exécuteraient, aux frais de la Belgique, les travaux convenus, le tout sans charge aucune pour la Hollande, et sans préjudice des droits de souveraineté exclusifs sur le territoire que traverserait la route ou le canal en question.

Les deux parties fixeraient, d'un commun accord, le montant et le mode de perception des droits et péages qui seraient prélevés sur cette même route ou canal.”⁶

Article 11 of the Separation Treaty governed the status of existing means of communication between Belgium and Germany, over Dutch territory. It notably provided that the use of such roads, leading to Germany via Maastricht and Sittard, would be subject only to the payment of moderate toll rights for the financing of maintenance, prone to facilitating trade. Article 15 *i.a.* provided that public or private utility works, such as canals, roads and others of similar nature, which were built in whole or in part at the expense of the Netherlands, would belong, with the advantages and the liabilities attached to them, to the country where they are situated.

7. The provisions of this bilateral treaty were also referred to in two treaties entered into by Austria, France, Great Britain, Prussia and Russia, with the Netherlands, on the one hand, and with Belgium, on the other⁷. Article 1 of the Treaty with Belgium (and Article 2 of the Treaty with the Netherlands, using an analogous formula) stated:

“S.M. le Roi des Français, S.M. l'Empereur d'Autriche, [etc.] déclarent que les Articles ci annexés et formant la teneur du traité conclu en ce jour entre S.M. le Roi des Belges et S.M. le Roi des Pays-Bas, Grand-Duc de Luxembourg, sont considérés comme ayant la même force et valeur que s'ils étaient textuellement insérés dans le

⁶ Exhibit No. 3. Unofficial translation : "Art. 12. In case a new road would have been constructed in Belgium, or a new canal dug, which would lead to the Maas opposite the Dutch district of Sittard, then Belgium would be at liberty to ask The Netherlands, which in that hypothesis would not refuse it, that the said road or the said canal be prolonged according to the same plan, entirely at the cost and expense of Belgium, through the district of Sittard, up to the borders of Germany. This road or this canal, which could only serve as commercial communication, would be built, at the choice of The Netherlands, either by engineers and workers, which Belgium would obtain the authorisation to employ, or by engineers and workers which The Netherlands would supply, and which would execute, at the expense of Belgium, the agreed works, all of which without any expense for The Netherlands, and without prejudice to the exclusive rights of sovereignty over the territory the road or canal at issue would cross.

The two parties would lay down, by a common agreement, the height and mode of collection of toll rights that would be levied on that same road or canal.”

⁷ Treaty between Austria, France, Great Britain, Prussia and Russia, and the Netherlands, signed at London, 19 April 1839, *C.T.S.*, 1838-1839, vol. 88, p. 412 ff. Treaty between Austria, France, Great Britain, Prussia and Russia, and Belgium, signed at London, 19 April 1839, *C.T.S.*, 1838-1839, vol. 88, p. 421 ff. Exhibits Nos. 4 and 5.

présent Acte, et qu'ils se trouvent ainsi placés sous la garantie de Leursdites Majestés."⁸

This guarantee notwithstanding, the effective exercise of the rights granted to Belgium as part of the territorial settlement faced a number of obstacles, which were eventually dealt with in the Boundary Treaty of 5 November 1842.

2. The Boundary Treaty of 5 November 1842: Eliminating Obstacles to the Exercise of Belgium's Rights under the Separation Treaty

8. On 5 November 1842, Belgium and The Netherlands entered into a Boundary Treaty⁹. According to its preamble, the purpose of the signatories of the Boundary Treaty was to settle a number of issues, which were not sufficiently determined in the Separation Treaty of 1839¹⁰.

Article III of the Treaty elaborated on Article 12 of the Separation Treaty, by stipulating that Belgium could have the road or canal toward Germany constructed by an agent (*concessionnaire*). The second paragraph of same Article aimed at guaranteeing the effective exercise of that right, by regulating the issue of expropriations on Dutch territory:

“Le Gouvernement belge pourra substituer, sous sa garantie envers le Gouvernement des Pays-Bas, une compagnie concessionnaire, aux droits résultant en sa faveur des termes de l'article XII du Traité du 19 avril, 1839, à l'effet de construire le canal ou la route mentionnée dans cet Article.

Dans le cas d'application de la présente disposition, il y aura lieu à expropriation, suivant la législation des Pays-Bas, pour cause d'utilité publique, des terrains

⁸ Unofficial translation: “H.M. the King of the French, H.M. the Emperor of Austria, [etc.] declare that the articles annexed herewith and which constitute the contents of the treaty entered into today between H.M. the King of the Belgians and H.M. the King of the Netherlands, Grand Duke of Luxembourg, are considered as having the same force and value as if they were included textually in the present Act, and that they are therefore placed under the guarantee of Their Majesties aforementioned.”

⁹ Boundary Treaty between Belgium and the Netherlands, signed at The Hague, 5 November 1842, C.T.S., vol. 94 (1842-1843), p. 37 ff. Exhibit No. 6.

¹⁰ “Sa Majesté le Roi des Belges et Sa Majesté le Roi des Pays-Bas, Grand-Duc de Luxembourg, ayant reconnu qu'au degré où en sont arrivés les travaux des Commissions instituées à la suite du Traité du 19 avril, 1839, il est devenu nécessaire, pour aplanir toute difficulté, d'arrêter, par l'intervention directe des 2 Gouvernements, certains points qui ne sont pas suffisamment déterminés audit Traité .. ». Unofficial translation: “His Majesty the King of the Belgians and His Majesty the King of The Netherlands, Grand Duke of Luxembourg, having recognised that at the stage reached in the proceedings of the Commissions instituted following the Treaty of 19 April, 1839, it has become necessary, in order to level any difficulty, to decide, through the direct intervention of the two Governments, upon certain points which are not sufficiently determined in the said Treaty..”

nécessaires, et ce de la même manière que si le Gouvernement belge procédait par lui-même aux travaux d'exécution et d'exploitation de la route ou du canal."¹¹

Pursuant to Article LXIII of the Treaty, a sum of 400,000 florins, being the price paid by Belgium in return for the freedoms of commerce and navigation accorded by the 1839 Separation Treaty, was allocated as a guarantee for the performance by the Netherlands of their treaty obligations.

9. It appears from correspondence between Belgian ministries that on 8 October 1862, the *Société du chemin de fer du Nord de la Belgique* made a request to the Netherlands for the purpose of obtaining the concession envisaged in the Boundary Treaty¹². The request was supported by Belgium¹³. On 31 May 1863, the Belgian parliament voted a law authorizing the government to grant a railway concession from Antwerp to the Dutch border¹⁴. On 29 September 1869, the concession on Belgian territory was granted on a provisional basis¹⁵. However, it proved necessary to extend the temporal application of the Royal Decree adopted for such purpose, due to delays in the negotiations with the Netherlands¹⁶.

10. The Netherlands indeed continued to create obstacles to the performance of the Separation and Boundary Treaties. In a letter of 24 July 1863 to the Belgian ambassador in The Hague, the Dutch Minister of Foreign Affairs indicated that the granting of a railway concession could not be considered by the Netherlands until the competing Dutch lines to Germany had reached a further stage of advancement:

¹¹Unofficial translation: "*The Belgian government will be entitled to substitute, under its guarantee towards the Government of The Netherlands, a concessionary company, to the rights resulting in its favour from the terms of article XII of the Treaty of 19 April, 1839, to the end of building the canal or the road mentioned in that Article. In the case of the application of the present provision, there will be grounds for expropriation, following the legislation of The Netherlands, by reason of public utility, of the necessary land, and this in the same manner as if the Belgian Government would proceed by itself to the execution and exploitation works of the road or the canal.*"

¹² Letter of the Belgian Minister of Public Works to the Belgian Minister of Foreign Affairs, dated 6 June 1863. Exhibit No. 7.

¹³ *Ibid.*; Letter of the Dutch Ministry of Foreign Affairs to the Belgian Ambassador at The Hague, dated 24 July 1863. Exhibit No. 8. Letter of the Belgian Ambassador at The Hague to the Dutch Minister of Foreign Affairs, dated 5 December 1863. Exhibit No. 9.

¹⁴ Loi relative à la concession de divers chemins de fer (Act concerning the granting of several railway concessions), 31 May 1863, *Moniteur belge*, 1863, p. 2634-2635. Exhibit No. 10.

¹⁵ Royal Decree of 29 September 1869, Concession d'un chemin de fer d'Anvers vers Gladbach (Concession of a railway from Antwerp towards Gladbach), *Moniteur belge*, 14 October 1869, p. 3853-3855. Exhibit No. 11.

¹⁶ Royal Decree of 13 January 1872, Chemin de fer d'Anvers vers Gladbach – prorogation de délai (Railway from Antwerp towards Gladbach – extension of time limit), *Moniteur belge*, 16 February 1872, p. 400. Exhibit No. 12.

*“Ayant communiqué au Ministre de l’Intérieur votre office du 24 juin dernier ..., j’ai l’honneur de porter à votre connaissance, que mon collègue pense qu’avant de pouvoir prendre en considération sérieuse la demande de la Société des chemins de fer du Nord de la Belgique pour obtenir la concession de la partie d’un chemin de fer d’Anvers à Dusseldorf à construire sur le territoire des Pays-Bas et indépendamment des intérêts de la défense militaire, qui s’opposent à la concession demandée, le ralliement du chemin de fer de l’Etat Zélando-Limbourgeois aux routes ferrées allemandes devra être plus avancé et assuré qu’il ne l’est actuellement.”*¹⁷

The Netherlands also argued that the Separation Treaty did not include their consent to the prolonging of a route in project, as opposed to the prolonging of a route already constructed on Belgian territory. In a letter of 7 March 1864 of the Netherlands to the Belgian ambassador, it was stated:

*“... l’article [12] part de la supposition qu’une route soit déjà construite en Belgique, mais jusqu’ici cette route n’existe qu’en projet.”*¹⁸

The Netherlands further objected to the construction of a bridge over the river Meuse, as indicated in a letter of 29 September 1864 to the Belgian *chargé d’affaires a.i.*:

*“... je dois ajouter que le gouvernement néerlandais ne saurait admettre que la faculté de construire un pont sur la Meuse est tacitement comprise dans les stipulations de l’article 12.”*¹⁹

Belgium objected to each and any of these arguments²⁰. However, as stated by a Dutch author, *“The Dutch government was not interested in the shortest nor in the most promising railway line; it was interested in ... having no railway at all. While they could not refuse to perform the treaty, they sought to hinder its performance by all possible means.”*²¹.

¹⁷ Letter of 24 July 1863 of the Dutch Minister of Foreign Affairs to the Belgian ambassador at The Hague. Exhibit No. 8. Unofficial translation: *“Having communicated your letter of 24 June last to the Minister of Internal Affairs, I have the honour of informing you that my colleague esteems that, before we can seriously consider the request of the Société des chemins de fer du Nord de la Belgique to be granted the concession of part of a railway line from Antwerp to Dusseldorf, to be constructed on Dutch territory, and irrespective of the interests of military defense which oppose the concession requested, the linking of the railway line of the Zeeland-Limburg State to the German railways should have reached a further stage of advancement and be assured better than it is at present.”*

¹⁸ Letter of the Dutch Government to the Belgian ambassador at The Hague, dated 7 March 1864. Exhibit No. 13. Unofficial translation: *“Article [12] starts from the assumption that a route has already been constructed in Belgium, but until now, the route only exists as a project.”*

¹⁹ Letter of 29 September 1864 of the Dutch Government to the Belgian *chargé d’affaires a.i.* Exhibit No. 14. Unofficial translation: *« I have to add that the Dutch government cannot accept that the possibility of building a bridge over the Meuse is tacitly comprised in the provisions of Article 12.”*

²⁰ Letter of the Belgian Ambassador at the Hague to the Dutch Minister of Foreign Affairs, dated 5 December 1863. Exhibit No. 9.

²¹ M. Hartgerink-Koomans, “De corridor door Limburg”, *Bijdragen voor de geschiedenis der Nederlanden*, vol. XIX, 1964-65, p. 217-225 quote at p. 220. Exhibit No. 28. Unofficial translation. Authentic text: *“Maar het ging*

By letter of 12 August 1868, the Netherlands finally accepted the Belgian demands for the granting of a railway concession and the construction of a bridge over the Meuse²². In a statement before the Dutch Parliament on the occasion of the approval of the Iron Rhine Treaty of 1873, which shall be discussed hereafter, the Dutch Government again confirmed that their position had been inspired by their wish to promote the Dutch, competing railway lines:

*“This [Belgium’s request to build a railway line] derogated from the treaty of 1839, and although the Dutch Government did not refuse to agree with such demand, they esteemed that the time had not yet come to satisfy the wishes of the Belgian Government. In 1863 they were informed that the concession requested could not seriously be considered before the link of our Zeeuwsch-Limburschen Staatsspoorweg [State-owned railway line] with Germany had progressed and was assured.
This situation remained in force until the year 1868.”*²³

3. The “Iron Rhine” Treaty of 13 January 1873: The Birth of the Railway Line

11. For economic reasons, Belgium had also requested a modification of the original track as described in the Separation Treaty of 1839. The Netherlands made the acceptance of such modification subject to a number of conditions, notably the abolition of the surtax on Dutch spirits, a further modification of the original track so as to have the railway pass through the Dutch commune of Weert, and the abolition of the financial guarantee of 400,000 florins which the Netherlands had provided pursuant to the 1842 Boundary Treaty.

de nederlandse regering niet om de kortste lijn of om de meest-belovende lijn, het ging haar om géén lijn. Kon zij de uitvoering van het tractaat niet weigeren, op alle manieren trachtte ze die te belemmeren.”

²² Letter of 12 August 1868 of the Dutch Government to the Belgian Ambassador at The Hague. Exhibit No. 15. Authentic text: “...le Gouvernement des Pays-Bas, en considération des bonnes et cordiales relations qui unissent actuellement les Gouvernements Néerlandais et Belge, ne fait aucune difficulté d’admettre en principe la prolongation sur le territoire Néerlandais d’un chemin de fer Belge vers l’Allemagne, et la Construction d’un pont sur la Meuse. ». Unofficial translation: « .. the Dutch government makes no difficulty in accepting, as a matter of principle, the prolonging of a Belgian railway line over Dutch territory toward Germany, and the construction of a bridge over the Meuse.”

²³ Ontwerp van wet tot goedkeuring van sommige bepalingen van het tractaat op 13 januari 1873 tussen Nederland en België gesloten – Memorie van toelichting (Bill for the approval of some provisions of the treaty of 13 January 1873 between the Netherlands and Belgium - Explanatory Statement), Tweede Kamer, *Bijblad van de Nederlandsche Staatscourant*, no. 110, session 1872-1873, quote at page 2. Exhibit No. 17. Authentic text: “Dit [België’s verzoek om een spoorweg aan te leggen] nu was eene afwijking van het tractaat van 1839, en hoewel de Nederlandsche Regering niet weigerde daarin toe te stemmen, meende zij evenwel dat het oogenblik nog niet gekomen was om aan het verlangen der Belgische Regering te kunnen voldoen. Haar werd dienvolgens in 1863 te kennen gegeven dat de gevraagde concessie niet in ernstige overweging komen kon alvorens de verbinding van onzen Zeeuwsch-Limburschen Staatsspoorweg met Duitschland meer gevorderd en verzekerd zijn zoude. Deze toestand bleef voortduren tot het jaar 1868.”

On 13 January 1873, Belgium and the Netherlands thus entered into a Convention relative to the Payment of the Belgian Debt, the Abolition of the Surtax on Netherlands Spirits, and the Passing of a Railway Line from Antwerp to Germany across Limburg (hereafter: the “*Iron Rhine Treaty*”)²⁴.

12. In Article IV of the Treaty, the Netherlands recognized the *Compagnie du Nord de la Belgique* as the concessionary of the railway line on Dutch territory. The line was to be constructed and exploited by the former company or by the *Grand Central Belge*, without any charge for the Netherlands and without prejudice to their rights of sovereignty over the territory passed through. Paragraphs 1 to 3 provided to that effect:

“La Compagnie du Nord de la Belgique, concessionnaire de la partie Belge du chemin de fer d’Anvers à Gladbach, est déclarée et reconnue, par le Gouvernement des Pays-Bas, concessionnaire de la section de cette même ligne qui est située sur le territoire du Duché de Limbourg.

Cette section sera construite et exploitée par la Compagnie du Nord de la Belgique ou par le Grand Central Belge, sans charge aucune pour le Gouvernement des Pays-Bas, et sans préjudice de ses droits de souveraineté sur le territoire traversé.

*L’exploitation ne pourra en être cédée sans le consentement du Gouvernement des Pays-Bas.”*²⁵

Paragraphs 5 and 6 of same Article regulated the hypothesis of a common exploitation of the bridge over the Meuse as well as of the station of Roermond:

“ Dans le cas où le pont sur la Meuse et une partie de la susdite section seraient assignés pour service commun avec d’autres entreprises de chemins de fer, le Gouvernement des Pays-Bas se réserve la faculté de prescrire les conditions qu’il jugera nécessaires et équitables, tant pour l’exécution du service commun et l’installation des voies et travaux que pour la répartition des frais de construction et d’exploitation entre la société et ces entreprises.

²⁴ Convention between Belgium and the Netherlands relative to the Payment of the Belgian Debt, the Abolition of the Surtax on Netherlands Spirits, and the Passing of a Railway Line from Antwerp to Germany across Limburg, signed at Brussels, 13 January 1873, C.T.S., vol. 145 (1872-1873), p. 447-451. Exhibit No. 16.

²⁵ Exhibit No. 16. Unofficial translation: “*The Compagnie du Nord de la Belgique, concessionary of the Belgian part of the railway from Antwerp to Gladbach, is declared and recognised, by the Government of The Netherlands, concessionary of the section of this same line which is situated on the territory of the Duchy of Limburg.*

This section will be constructed and exploited by the Compagnie du Nord de la Belgique or by the Grand Central Belge, without any charge whatsoever for the Government of The Netherlands, and without prejudice to its sovereignty rights over the crossed territory.

The exploitation shall not be assigned without the consent of the Government of The Netherlands.”

La station de Ruremonde pourra être reconnue commune à la société exploitant la ligne d'Anvers à la frontière de Prusse, moyennant les conditions d'usage."²⁶

Paragraph 7 provided for the concessionary's right to expropriate buildings and land necessary for the establishment of the railway line, its stations and dependencies:

*"La Compagnie du Nord de la Belgique aura le droit d'exproprier, en se conformant aux lois qui régissent l'expropriation, les immeubles et terrains nécessaires à l'établissement du chemin de fer, de ses stations et dépendances."*²⁷

With respect to the latter provision, the Explanatory Statement made for the purpose of parliamentary approval in the Netherlands noted (unofficial translation):

*"The approval of this provision will provide the Belgian Government with a guarantee for the performance of the agreed provision relating to the railway through Limburg. This will indeed imply that, upon ratification of the treaty, the statement that an expropriation is required in the public interest, may not be refused anymore. To that extent, the treaty anticipates on the expropriation law to be adopted at a later stage, in which the main points determining the direction and the townships to be crossed by the railway, will be identified."*²⁸

13. In Article IV, Paragraph 4 of the Treaty, the track was described as follows:

"La ligne entrera sur le territoire du Duché de Limbourg en passant au sud de Hamont (Belgique) ; elle se dirigera vers Weert, passera au sud de cette localité ainsi que de Haelen, franchira la Meuse sur un pont fixe dans la partie droite en amont du coude de Buggenum, entre les bornes 83 et 84, rejoindra la ligne de Maestricht à Venlo au nord de la station de Ruremonde, suivra une partie de cette ligne et s'en

²⁶ Exhibit No. 16. Unofficial translation: "In case the bridge on the Maas and part of the abovementioned section would be assigned for common service with other railway undertakings, the Government of The Netherlands reserves the right to prescribe the conditions which they will deem necessary and equitable, both for the execution of the common service and the installation of the tracks and works, and for the repartition of the construction and exploitation costs between the corporation and these undertakings.

The station of Roermond may be recognized as common to the corporation exploiting the line from Antwerp to the Prussian border, on the usual conditions."

²⁷ Exhibit No. 16. Unofficial translation: "The Compagnie du Nord de la Belgique will have the right to expropriate, in conformity with the laws which regulate expropriation, the buildings and land necessary to the establishment of the railway line, of its stations and dependencies."

²⁸ Ontwerp van wet ..., op. cit., p. 2. Exhibit No. 17. Authentic text: "In de goedkeuring dier bepaling zal de Belgische Regering een waarborg vinden van uitvoering van het overeengekomen beding omtrent den spoorweg door Limburg. Daarin toch zal liggen opgesloten dat na de ratificatie van het tractaat de verklaring dat het algemeen nut de onteigening vordert niet meer zal kunnen worden geweigerd. In zoover loopt het tractaat dus vooruit op de later in te dienen onteigeningswet, waarbij de hoofdpunten ter bepaling van de rigting en de gemeenten door welke de weg zal loopen, zullen worden aangewezen."

détachera au sud de la dite station pour aller rejoindre la frontière de Prusse dans la direction à régler avec le Gouvernement de l'Empire Allemand."²⁹

The railway contemplated would not, therefore, pass through Sittard, as provided under Article XII of the Separation Treaty. The Netherlands feared that, in these circumstances, Belgium might, at a later date, argue that it was also entitled to the way described in the 1839 Separation Treaty³⁰. Therefore, when exchanging their instruments of ratification, the Belgian and Dutch representatives declared:

*".. les Soussignés croient utile de rappeler que, d'après les déclarations des deux Gouvernements aux Chambres législatives, la concession de l'établissement d'un chemin de fer d'Anvers à Gladbach par le Duché du Limbourg, en passant à Ruremonde, comme elle est stipulée par le Traité du 13 Janvier, 1873, constitue l'exécution pleine et entière de l'article XII du Traité du 19 Avril, 1839."*³¹

14. The railway, to be known as the "Iron Rhine", was exploited as from 1879. On Belgian and Dutch territory, exploitation was in the hands of the Belgian private railway company *Grand Central Belge*.

²⁹ Exhibit No. 17. Unofficial translation: "The line will enter the territory of the Duchy of Limburg passing south of Hamont (Belgium) ; it will head towards Weert, pass south of this locality as well as of Haelen, cross the Maas on a fixed bridge in the right part upstream of the elbow of Buggenum, between the milestones 83 and 84, join the line from Maastricht to Venlo north of the station of Roermond, follow a part of this line and part from it south of the said station to join the border of Prussia in the direction to be agreed upon with the Government of the German Empire."

³⁰ Rapport de la section centrale de la deuxième chambre des Etats généraux des Pays-Bas (traduction) (report of the central section of the second Chambre of the Dutch Parliament), N° 172, Annex No. 4, p. 36-37. Exhibit No. 18.

³¹ Exhibit No. 16, at p. 450. Unofficial translation: ".. the Undersigned consider it useful to recall that, according to the declarations of the two Governments to the legislative Chambers, the concession of the establishment of a railway from Antwerp to Gladbach through the Duchy of Limburg, passing at Roermond, as it is stipulated by the Treaty of 13 January, 1873, constitutes the full and complete execution of article XII of the Treaty of 19 April, 1839."

4. The Railway Convention of 23 April 1897: The Transfer of Property Rights to the Netherlands

15. In the last decade of the 19th century, the Belgian Government sought to nationalise railway lines on Belgian territory³². On 10 February 1897, the Belgian Government thus purchased the whole of *Grand Central Belge*'s railway net, including rolling stock, instruments, machines, etc.³³. As part of the *Grand Central Belge*'s railway net was located outside Belgium, this operation required that agreements be concluded with the foreign countries concerned, namely France, the Netherlands and Prussia. The Netherlands accepted to purchase *Grand Central Belge*'s railways located on its territory.

For that purpose, Belgium and the Netherlands entered into a Railway Convention on 23 April 1897³⁴, which provided for such transfer in two stages. Pursuant to Article I of the treaty, the Dutch Government consented to the Belgian Government's buying a number of railway concessions located on Dutch territory, among which the concession relating to the Iron Rhine:

“Art. I. Le Gouvernement Néerlandais consent à ce que le Gouvernement Belge rachète la concession des lignes de chemin de fer suivantes pour autant qu’elles soient situées sur le territoire des Pays-Bas : (..)

*(b.) D’Anvers à la frontière Prussienne vers Gladbach ; (..)”*³⁵

At a second stage, these concessions were to be sold to the Dutch Government, as provided in Articles II, III and IV. Pursuant to the latter provision, the sale would be considered effective on 1 January 1897, irrespective of whether the railways were in fact transferred to the Netherlands at that point in time:

³² Projet de loi relatif au rachat de diverses concessions de chemin de fer ... - Exposé des motifs (Act concerning the repurchase of several railway concessions – explanatory statement, *Ann. Parl.*, 11 May 1897. Exhibit No. 19.

³³ Loi relative au rachat de diverses concessions de chemin de fer ... (Act concerning the repurchase of several railway concessions ...), 16 April 1897, *Moniteur belge.*, 23 April 1898, p. 1589 ff. Exhibit No. 20.

³⁴ Railway Convention between Belgium and the Netherlands, signed at Brussels, 23 April 1897, *C.T.S.*, vol. 184 (1896-1897), p. 374-381. Exhibit No. 21.

³⁵ Exhibit No. 21. Unofficial translation: "Art. I. The Dutch Government agrees with the Belgian Government redeeming the concession of the following railway lines as far as they are located on the territory of The Netherlands : .. (b) From Antwerp to the Prussian border towards Gladbach ; .."

“ II. Le Gouvernement belge s’engage à céder au Gouvernement Néerlandais, dans un délai de quatre mois après l’échange des ratifications de la présente Convention, les parties des lignes mentionnées ci-dessus situées sur le territoire des Pays-Bas.

Cette cession comporte le chemin de fer et ses dépendances immobilières par nature ou par destination avec tous les terrains à leur usage, même ceux non portés aux plans approuvés par le Gouvernement Néerlandais pour l’établissement des lignes, à moins qu’il ne s’agisse d’excédents non utilisés pour l’exploitation ; ne sont pas compris dans la cession :

- 1. Le matériel de traction, le matériel de transport, le mobilier (...)* ;
- 2. Les approvisionnements, marchandises, et objets en fabrication ou en magasin.*

III. Quelle que soit la date de la remise effective au Gouvernement Néerlandais des parties de lignes visées dans l’article I, la cession sera considérée comme conclue et effectuée à la date du 1^{er} Janvier, 1897, pour les lignes désignées sub (a), (b), et (c) à cet Article, et au 1^{er} Janvier, 1896, pour la ligne désignée sub (d).

*IV. Le Gouvernement Néerlandais s’engage à payer au Gouvernement Belge le prix de rachat des parties Néerlandaises des lignes désignées sub (a), (b), et (c) à l’Article I ci-dessus, dans le délai de deux ans après que ce prix aura été déterminé de commun accord, cette participation du premier de ces Gouvernements ne pouvant d’ailleurs pas dépasser 13,000,00 fr. (...)*³⁶

The agreement on price calculation referred to in Article IV was reached on the day of signature of the Convention, and laid down in the “Final Protocol” as well as in the Annex thereto. Article I of the Protocol provided that the price to be paid in accordance with Article IV would be calculated, notably, on the basis of the gross profits of the Grand Central Belge and net profits³⁷. As concerns gross profits, the annex to the Protocol provided for further calculation methods, being, in essence, revenues from passenger transports, luggage and goods, in proportion to the part of the railway located on Dutch territory³⁸. As concerns the calculation of net profits, the Protocol made use of figures relating to both the Grand Central Belge and the Maatschappij tot Exploitatie van Staatsspoorwegen which was to take over the

³⁶ Exhibit No. 21. Unofficial translation: *“II. The Belgian Government pledges to assign to the Dutch Government, within a period of four months after the exchange of the ratifications of the present Convention, the parts of the lines mentioned here above situated on the territory of The Netherlands. This cession encompasses the railway and its dependencies which are immovable by nature or by incorporation with all the land at their use, even those not mentioned on the plans approved by the Dutch Government for the establishment of the lines, unless they are surpluses not used for the exploitation; are not included in the cession; 1. Traction equipment, transport equipment, furniture (...)* ; 2. *The supplies, commodities, and items in manufacture or in stock.*

III. Whichever be the date of the actual remittance to the Dutch government of the parts of the lines meant in article I, the cession will be considered as concluded and accomplished at the date of 1 January, 1897, for the lines designated sub (a), (b), and (c) at that Article, and on 1 January, 1896, for the line designated sub (d).

IV. The Dutch Government pledges to pay to the Belgian government the price of the redemption of the Dutch part of the lines designated sub (a), (b), and (c) at Article I, here above, within a period of two years after that price will have been determined by common agreement (...), (...)”

³⁷ *Loc. cit.*, p. 377 ff.

³⁸ *Loc. cit.*, p. 380 ff.

exploitation of the railways³⁹, so as to take account of the fact that the exploitation costs of the Maatschappij were higher than those of the Grand Central⁴⁰.

When the Convention was submitted to the Parliament of the Netherlands for approval, the Dutch Government argued in favour of the treaty on the ground that “*if the State of the Netherlands can obtain, for an equitable price, the ownership of railways located on its territory, which are either owned or exploited by a foreign company, it is generally recommendable to negotiate on such taking-over*”⁴¹, and further, that “*as concerns the railway Antwerp-Glabach, which is of paramount importance for transports to the port of Antwerp, account should be taken of the importance of bringing this line in the hands of the Maatschappij tot Exploitatie van Staatsspoorwegen, because this would more adequately guarantee that Dutch interests involved in the exploitation of these lines, shall not be disregarded*”⁴². The Government then added that it had equally obtained that Belgium take over the exploitation of a line on Belgian territory, which was in the hands of the Dutch Luik-Limburgsche Spoorwegmaatschappij and which showed a recurrent deficit⁴³. The Statement then explained in detail why the method of calculation of the transfer price, on the basis of present and future expected profitability, guaranteed that the price to pay would be of a limited amount, and concluded:

³⁹ *Loc. cit.*, p. 377 ff.

⁴⁰ See: Goedkeuring van de overeenkomst tusschen Nederland en België op 23 april 1897 te Brussel gesloten ..., Memorie van Toelichting (Approval of the agreement between the Netherlands and Belgium entered into in Brussels by the Netherlands and Belgium on 23 April 1897 – Explanatory Statement), session 1897-1898, 104, p. 5. Exhibit No. 22: “*Uitgaande van de stelling, dat de [Maatschappij] ... behoorde te worden belast met de exploitatie van deze lijnen, is het dezerzijds rationeel geoordeeld den coefficient der exploitatiekosten van de Nederlandse gedeelten van den Grand Central Belge te stellen op een cijfer gelijkstaande aan dat der exploitatiekosten van de Exploitatie-maatschappij over de laatste jaren. Deze coëfficiënt bedroeg 64,462 pct. Van de bruto opbrengst en was dus beduidend hooger dan die van den Grand Central Belge, die in de laatste jaren ongeveer 53 pct. Van de bruto opbrengst aan uitgaven van exploitatie besteedde*”. Unofficial translation: “*Taking as a starting point that the [Maatschappij] ... was to be entrusted with the exploitation of these lines, it was considered rational to fix the coefficient of the exploitation costs of the Dutch parts of the Grand Central Belge, at a level equal to that of the exploitation costs of the Maatschappij over the last few years. This coefficient amounts to 64,462 pct of the gross income and is, therefore, significantly higher than that of the Grand Central Belge, which, in the last few years, has spent approximately 53 pct. of its gross revenues for expenses for exploitation.*”

⁴¹ Exhibit No. 22, p. 1. Unofficial translation from the authentic Dutch text: “*Wanneer de Nederlandsche Staat voor billijken prijs den eigendom kan verkrijgen van op zijn grondgebied gelegen spoorwegen, die hetzij aan buitenlandsche maatschappijen toebehooren, hetzij bij eene buitenlandsche maatschappij in exploitatie zijn, verdient het in het algemeen aanbeveling over den aankoop te onderhandelen.* »

⁴² *Op. cit.*, p. 2. Unofficial translation from the authentic Dutch text: “*Ten aanzien van den spoorweg Antwerpen-Glabach, die van zeer groot gewicht is voor het verkeer naar de haven van Antwerpen, geldt de overweging dat het van belang is dezen te brengen in handen van de Maatschappij tot Exploitatie van Staatsspoorwegen, omdat hierdoor meer waarborg verkregen wordt, dat de Nederlandsche belangen, die bij de exploitatie dezer lijnen betrokken zijn, niet uit het oog zullen worden verloren.*”

⁴³ *Op. cit.*, p. 2-3.

“While it results from the above that the price to be paid by the Netherlands is very limited in regard of the benefits which shall probably accrue, a comparison between the price and the costs incurred for the construction of the lines to be taken over, which include two high bridges over the Maas, leads to the same conclusion. Indeed, the Netherlands shall pay a maximum amount of 13,000,000 francs, whereas the costs incurred for the construction and innovation have amounted to a surplus of 2,500,000, i.e., 15,527,815 francs.”⁴⁴

In subsequent debates, it was added that taking over the lines would afford the possibility of improving exploitation⁴⁵. Further, it was argued that approving the Railway Convention would grant the Netherlands the possibility:

“...of building a direct line between Tilburg and Budel, which would shorten the link between Germany and the Dutch ports by approximately 20 to 25 kilometres. This would probably make it possible for the Netherlands to come ahead with respect to pricing, in particular as concerns merchandises. This idea deserved the more attention on the part of the Government, as, so it seems, Belgium considers building a direct line from Liège to Aachen so as to obtain a shorter linkage between Cologne and Antwerp”⁴⁶

In sum, it appears from the above, first, that the sale was to take place according to commercial conditions taking account of present and expected future profitability, and second, that the Netherlands also sought to gain control over the railway lines of the Grand Central Belge on its territory in view of its national economic policy as concerns Dutch ports, on the one hand, and the port of Antwerp, on the other.

Other issues regulated by the Railway Convention included the passing through of Belgian enclaves on Dutch territory. With respect to the Tilburg-Turnhout route (which is not part of the Iron Rhine mentioned in Article I *sub* b), Article VII also regulated the railway's passing

⁴⁴ *Op. cit.*, p. 3. Unofficial translation from the authentic Dutch text: “Blijkt dus uit een en ander, dat de door Nederland te betalen koopprijs zeer matig is in verband met de vermoedelijke opbrengst daarvan, eene vergelijking van den koopprijs met de aanlegkosten van de over te nemen lijnen, waarin zich twee hooge bruggen over de Maas bevinden, leidt tot hetzelfde resultaat. Immers wordt van Nederland een maximum gevorderd van frs. 13 000 000, terwijl de kosten van aanleg en vernieuwing frs. 2 500 000 meer, namelijk frs. 15 527 815, hebben bedragen.”

⁴⁵ Goedkeuring van de overeenkomst ..., voorloopig verslag (provisional report), No. 7, p. 2. [Exhibit](#) No. 23.

⁴⁶ Eerste Kamer der Staten-Generaal, eindverslag der Commissie van Rapporteurs ... (Final Report of the Commission of Rapporteurs), session 1897-1898, No. 69, p. 3, para. 4. [Exhibit](#) No. 24. Unofficial translation from the authentic Dutch text: “...daarin de aanleiding kan worden gevonden tot het aanleggen van eene rechtstreeksche verbindingslijn van Tilburg naar Budel, waardoor eene kortere verbinding van 20 à 25 kilometer verkregen zou worden tusschen Duitschland en de Nederlandsche havens. Daardoor ware wellicht een voorsprong verkrijgbaar op de vrachtprijzen, vooral van goederen. Dit denkbeeld wenschte men met te meer aandrang aan de Regeering te onderwerpen, omdat, naar het schijnt, men in België denkt over het bouwen eener rechtstreeksche lijn van Luik naar Aken tot verkrijging eener kortere verbinding tusschen Keulen en Antwerpen..”

through Belgian enclaves in Dutch territory. While reserving Belgian rights of sovereignty over the enclaves, the Article provided for Dutch control over the exploitation of the railway, as well as for the application of Dutch railway regulations:

“ VII. Sans préjudice des droits de souveraineté appartenant au Gouvernement Belge sur les parcelles de son territoire enclavées dans le territoire des Pays-Bas, le contrôle supérieur sur l'exploitation des tronçons de chemins de fer situés sur ces parcelles et faisant partie de la ligne de Turnhout à Tilbourg ... est, en général, dévolu au Gouvernement Néerlandais (..).

Le Gouvernement belge approuve qu'à partir de la même date cette exploitation se fasse par l'administration qui exploitera les sections Néerlandaises, à la condition que le Gouvernement des Pays-Bas lui paye une redevance annuelle de 2,000 fr. pour l'exploitation de ces tronçons ; (..).

*Le Gouvernement belge consent aussi à ce que les horaires et les tarifs se rapportant à ces tronçons soient approuvés et arrêtés par le Gouvernement Néerlandais.”*⁴⁷

Article IX of the Convention finally provided for the international exploitation of the railways concerned to be settled through future arrangements:

*“Les deux Gouvernements régleront par des arrangements ultérieurs tout ce qui intéressera l'exploitation internationale des chemins de fer rachetés.”*⁴⁸

16. The Belgian Government is presently not aware of any subsequent agreement entered into on the express basis of Article IX of the Railway Convention and with respect to the Iron Rhine as a whole.

There is no evidence of any investment made, or costs paid, by Belgium with respect to the railway infrastructure on Dutch territory after the Railway Convention of 1897. It appears that, having obtained the ownership of the railway on their territory, the Netherlands also took charge of maintenance as from that date. This is confirmed by the agreement entered into

⁴⁷ Exhibit No. 21. Unofficial translation: "VII. Without prejudice to the sovereignty rights belonging to the Belgian Government on the parcels of its territory enclaved in the territory of The Netherlands, the superior control on the exploitation of the railway sections situated on these parcels and which are part of the line from Turnhout to Tilburg ..., generally falls to the Dutch Government(..) The Belgian Government approves that from the same date onwards this exploitation be carried out by the administration which will exploit the Dutch sections, on the condition that the Government of The Netherlands pay them an annual fee of 2.000 fr. for the exploitation of these sections ; (..)The Belgian Government agrees to the timetables and tariffs relating to these sections being approved and decided upon by the Dutch government."

⁴⁸ Exhibit No. 21. Unofficial translation : "IX. The two Governments will settle through later agreements everything relating to the international exploitation of the redeemed railways."

between the Netherlands and the Dutch railway company *Maatschappij tot Exploitatie van Staatsspoorwegen* with respect to the exploitation of the railways formerly owned by the *Grand Central Belge* and which were transferred to the Netherlands by the 1897 Railway Convention⁴⁹. Article 1 of this agreement provided that the *Maatschappij* should pay an annual sum to the State of the Netherlands in return of the use of the Dutch parts of a number of railways, including the Iron Rhine⁵⁰. Article 1, paragraph 2, provided that the annual sum would be reduced if the price which the Netherlands should pay to Belgium in application of the Iron Rhine Treaty, did not reach the ceiling of 13,000,000 francs provided for in Article IV of the Railway Convention. Article 2 further provided that, in case of a reduction of the annual sum, the *Maatschappij* would pay to the State a percentage of costs incurred by reason of reparations and renovations performed by the State. It is unnecessary for present purposes to inquire into the rationale underlying this scheme. The relevant fact is that it results from this agreement that the State of the Netherlands was in charge of maintenance and renovations (unofficial translation):

*“... the Maatschappij shall pay to the State ...an annual sum of an amount of three percent of the sum spent by the State by reason of reparations and renovations made to the parts of the railways mentioned in Article 1, as contemplated in Article 8 of the agreement of 21 January 1890, approved by law of 22 July 1890 ...”*⁵¹

The explanatory statement of the first mentioned agreement explained that (unofficial translation):

*“Under Article 8 of the agreement of 21 January 1890, the State has the obligation to provide, on its own account, for a sufficient level of maintenance of the railways to be taken over by the Exploitatie-maatschappij.”*⁵²

⁴⁹ Overeenkomst tussen den Staat der Nederlanden en de Maatschappij tot Exploitatie van Staatsspoorwegen (Agreement between the State of the Netherlands and the Maatschappij tot Exploitatie ...), 29 October 1897, annexed to the Act of 2 April 1898 approving the Railway Convention, *Staatsblad van het koninkrijk der Nederlanden*, No 81, p. 14-19. Exhibit No.25.

⁵⁰ *Op. cit.*, p. 14-15. Authentic text: “*De Maatschappij verbindt zich om voor het gebruik van de Nederlandsche gedeelten van de spoorwegen : (...) van Antwerpen naar de Pruissische grens in de richting van Gladbach, (...) aan den Staat te betalen eene jaarlijksche uitkering ...* ». Unofficial translation: “*The Maatschappij undertakes to pay, in return of the use of the Dutch parts of the railways: (...) from Antwerp to the Prussian border toward Gladbach, (...)An annual fee ...*”

⁵¹ *Op. cit.*, p. 15, emphasis added. Authentic text: “*In het geval, voorzien bij het tweede lid van het vorig artikel, zal de Maatschappij, boven en behalve de jaarlijksche uitkering in dat lid bedoeld, aan den Staat betalen eene jaarlijksche uitkeering tot een bedrag van drie ten honderd van de som door den Staat besteed wegens aan de spoorweggedeelten, in art. 1 genoemd, verrichte herstellingen en vernieuwingen, als bedoeld bij artikel 8 der overeenkomst van 21 januari 1890, goedgekeurd bij wet van 22 juli 1890 ...*”

⁵² Explanatory Statement, p. 13, Exhibit No. 22, p. 12-13. Authentic text : “*Artikel 8 der overeenkomst dd. 21 januari 1890 legt aan den Staat de verplichting op de spoorwegen, welke door de Exploitatie-maatschappij moeten worden overgenomen, voor zijne rekening in een voldoende staat van onderhoud te brengen.”*

Article 8 of the agreement of 21 January 1890 reads as follows (unofficial translation):

(..)" *"If they are to be exploited by the Maatschappij pursuant to Article 2, railways coming in the possession of the State through expropriation or otherwise, shall, if necessary, be brought at a sufficient level of maintenance during the first year of such exploitation, either by the State or, if the Minister of Waterstaat, Commerce and Industry so decides, by the Maatschappij on the State's account.*

Before the Maatschappij is accorded the exploitation, the existing level of maintenance of such railways, including all that is provided under Article 2, 3rd phrase, shall be verified by a Commission of three arbitrators appointed pursuant to Article 48, who shall also determine the repair or renovations required to bring all items in a state of maintenance, the average of which corresponds with the level of maintenance of the other railway lines exploited by the Maatschappij. (..)"⁵³

It is clear, therefore, that, having become the owner of the Iron Rhine on Dutch territory, the Netherlands also took charge of reparations and renovations on that railway line.

In the same context, it may be mentioned that, on 31 March 1898, a convention was entered into between the administration of the Belgian State railways and the corporation exploiting the Dutch State railways, "*réglant le service sur les sections frontières des lignes de Liège à Maestricht, de Hasselt à Maestricht, de Hasselt à Eindhoven, d'Anvers à Ruremonde et de Turnhout à Tilbourg*"⁵⁴. The reference to "*frontier sections*" notwithstanding, this agreement also governed a number of issues unrelated to boundary areas. In that it covered the railway line between Antwerp and Roermond, it notably applied to the part of the Iron Rhine situated

⁵³ Agreement of 21 January 1890 between the Dutch Government and the Maatschappij tot Exploitatie van Staatsspoorwegen, annexed to the Act of 22 July 1890, p. 7 ff., quote at page 12, emphasis added. Exhibit No. 26. Unofficial translation of the authentic Dutch text: "*Spoorwegen, waarover de Staat door naasting of op andere wijze de beschikking verkrijgt, voorzoover zij door de Maatschappij volgens Art. 2 ter exploitatie moeten worden overgenomen, worden, zoo noodig, in het eerste jaar der exploitatie door den Staat of, indien de Minister van Waterstaat, Handel en Nijverheid dit bepaalt, door de Maatschappij voor rekening van den Staat in voldoende toestand van onderhoud gebracht. De toestand van onderhoud, waarin die spoorwegen met al hetgeen daaronder volgens Art. 2, derde zinsnede, te verstaan is, zich bevinden, zal voordat de Maatschappij die ter exploitatie verkrijgt, onderzocht worden door eene commissie van drie, overeenkomstig Art. 48, te benoemen scheidsmannen, die tevens zullen bepalen, welke herstellingen of vernieuwingen noodig zijn om een en ander in een toestand van onderhoud te brengen, gemiddeld overeenkomende met dien van de overige spoorwegen in exploitatie bij de Maatschappij* "

De kosten van dat onderzoeken zijn voor rekening van den Staat."

⁵⁴ Convention réglant le service sur les sections frontières des lignes de ... Anvers à Ruremonde ... (Agreement regulating the operation on the frontier sections of the lines of ... Antwerp to Roermond ...), 31 March 1898, reprinted in: Belgian Ministry of Railways, Post and Telegraphy, *Recueil administratif*, 1906, p.646 ff. Exhibit No. 27.

between these two towns. While the agreement did not regulate the specific issue of investments with respect to that track, the general principle underlying the agreement was, that each party was to be responsible for operations on its own territory.

This is without prejudice to specific arrangements relating to technical cooperation in the border area. It may thus be noted that the mechanism operating passages Nos. 50 and 51 in Hamont is located on Dutch territory, but is fed with electricity coming from Belgian territory, while maintenance is performed by the Belgian Railways. No documents are available to the Belgian Government relating to this specific situation.

5. The Iron Rhine after World War I

17. Before World War I, the Iron Rhine in its entirety was transformed to double track⁵⁵. According to the abovementioned study performed by Arcadis, on which the following overview draws, the existence of the line helped to establish industries in the Netherlands at Budel and in Belgium at Overpelt, Lommel and Balen⁵⁶.

18. As a result of Dutch neutrality in World War I, all transit traffic via the Netherlands was brought to an end. After World War I, twelve international freight trains a day traveled in both directions between Antwerp and the Ruhr area, between Rotterdam and the Ruhr area. The Iron Rhine was also used for regional passenger trains. During World War II, the German army made use of the Iron Rhine before destroying it in 1944. At the end of the war and thereafter, the route was rebuilt as double-track and electrified. Yet, the Iron Rhine gradually fell into disuse. Double-track sections on Dutch territory were reduced to single-track and local passenger service on the Belgian railway between Mol and Hamont was replaced by a bus service. International freight trains ran between Roermond and Dalheim until 1970. Between 1970 and 1991, the entire length of the line was used on a modest scale to transport car parts for General Motors between Antwerp and Bochum. A so-called ‘Hückepack’ shuttle service ran between the Belgian port of Zeebrugge via Antwerp to Neuss (near Düsseldorf) until 1991.

⁵⁵ Railinfrabeheer and Directoraat-Generaal Rijkswaterstaat, *Trajectnota/MER IJzeren Rijn, Hoofdrapport deel A: Hoofdlijnen*, p. 12. Exhibit No. S4 B.

⁵⁶ Arcadis, *Comparative Cross-Border Study on the Iron Rhine*, p. 17. Exhibit No. S3.

While the Iron Rhine as a whole has fallen in disuse since 1991, parts of the line are still used. The section between Mol and Neerpelt is used by passenger trains. The section between Antwerp and Budel is used by five to ten trains a week to transport zinc ore to the zinc industries near Budel. The section between Budel and Weert is occasionally used by freight trains to and from the zinc industries. The section between Weert and Roermond is used for passenger transport as part of the intercity connection between Amsterdam and Maastricht and for freight traffic. The section Herkenbosch-Dalheim is not in use since 1991 and the Roermond-Herkenbosch section is not in use since 1994. The German section from Dalheim via Rheydt-Mönchengladbach and further on to Duisburg is in use for passenger and freight traffic⁵⁷.

In brief, since 1991, the Iron Rhine has not been used as a whole, for the purpose of connecting Antwerp to Germany, although this did not bring to an end the line's use for local purposes⁵⁸. However, as will be seen hereafter, as from 1986 and in the subsequent years, Belgium expressly reserved its rights with respect to a future international use of the Iron Rhine toward Germany, which is bound to become of increasing importance for ecological as well as social and economic reasons.

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⁵⁷ Arcadis, *op. cit.*, p. 17-18.

⁵⁸ *Cfr.* Railinfrabeheer and Directoraat-Generaal Rijkswaterstaat, *op. cit.*, p. 12.

B. THE STAKES AND RISE OF THE PRESENT DISPUTE

1. International Interests in Revitalising the Iron Rhine

19. The reactivation of the Iron Rhine is not only a matter of Belgian economic interests, but also of a sustainable development policy in the environmental and social fields.

The need to shift from road and air to more sustainable modes of transport such as railways and shipping has been recognized by several international intergovernmental bodies, such as the United Nations Economic Commission for Europe⁵⁹ and the European Conference of Ministers of Transport⁶⁰. It is a primary means to reduce green gas emissions, which, in turn, is an important means to implement the Climate Change Convention⁶¹ and its Kyoto Protocol⁶², which aim at combating global warming by stabilizing the concentration of greenhouse gas in the atmosphere at a level that would prevent dangerous man-made interference with the climate system⁶³. The Convention, as well as the Kyoto Protocol setting legally binding emissions targets for developed countries for the present decade, have been ratified by the European Community and its Member States⁶⁴.

20. In the European Union, emissions from transport are the second largest single source of greenhouse gas emissions accounting for about 21 % of total greenhouse gas emissions in 2000⁶⁵. Furthermore, in the European Union emissions from transport have increased rapidly. Between 1990 and 2000, CO₂ emissions increased by 18 %. According to the European

⁵⁹ United Nations Economic Commission for Europe, Regional Conference on Transport and the Environment, "Programme of joint Action", 27 November 1997, ECE/RCTE/CONF./3/FINAL. Exhibit No. 31. It appears from this document that the 1997 Conference on Transport and the Environment "*acknowledged that transport activities and transport sector development must be pursued within the framework of sustainable development*" (p. 2, para. 1). Accordingly, the Conference recommended taking measures at the international and national level to establish "*a shift of road and short haul air traffic to rail and inland water as well as to coastal and maritime shipping*" (*loc. cit.*, p. 8, section III (a)).

⁶⁰ Council of Ministers, "Resolution on the Development of Railways", Bucharest, 6th June 2002, CEMT/CM(2002)2/FINAL, p. 8. Exhibit No. 32.

⁶¹ United Nations Framework Convention on Climate Change, Rio de Janeiro, 9 May 1992, *I.L.M.*, 1992, vol. 31, p. 849 ff. (Entered into force 21 March 1994). Exhibit No. 33.

⁶² Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, *I.L.M.*, 1998, vol. 37, p. 32 ff. Exhibit No. 34.

⁶³ *Ibidem*, Article 2.

⁶⁴ The European Community ratified the Framework Convention by Decision of the Council No. 94/69/EC of 15 December 1993, *O.J.* L33, 07.02.1994, and the Kyoto Protocol by Decision of the Council No. 2002/358/EC of 25 April 2002, *O.J.* L130, 15.05.2002, p. 1. Exhibits Nos. 35 and 36.

⁶⁵ European Commission, «Second European Climate Change Programme, can we meet our Kyoto Targets?», April 2003, p. 22. Exhibit No. 37.

Union Commission:

*“The main reason for the strong growth of CO2 emissions from transport is the increase in road transport volumes and - associated with this - rising road fuel consumption.”*⁶⁶

The Commission’s White Paper of 12 September 2001, “*European Transport Policy for 2010: time to decide*”, stresses that this situation is bound to aggravate if no measures are taken:

*“According to the latest estimates, if nothing is done to reverse the traffic growth trend, CO2 emissions from transport can be expected to increase by around 50% to reach 1 113 billion tonnes in 2010, compared with the 739 million tonnes recorded in 1990. Once again, road transport is the main culprit since it alone accounts for 84% of the CO2 emissions attributable to transport.”*⁶⁷

In order to meet the requirements of the Kyoto Protocol, the European Commission has proposed several measures to shift the balance between modes of transport, in particular from road and aviation to the more environmentally friendly modes of rail and waterway transport. Such measures include the revitalisation of railways, improving the quality of port services and instituting a Program for inter-modal freight transport⁶⁸. In Directive 2001/16 of the European Parliament and of the Council of 19 March 2001 on the interoperability of the trans-European conventional rail system, the predominant role of railways in this respect is underlined as follows:

*“By signing the Protocol adopted in Kyoto on 17 December 1997, the European Union has undertaken to reduce his gas emissions. These objectives require an adjustment to the balance between the various modes of transport, and consequently an increase in the competitiveness of rail transport.”*⁶⁹

⁶⁶ *Ibidem*.

⁶⁷ European Commission White paper, “European Transport Policy for 2010: time to decide”, 12 September 2001, COM(2001)370/final, p. 7-13. Exhibit No. 38.

⁶⁸ European Commission, “Second European Climate Change Programme, can we meet our Kyoto Targets?”, April 2003, p. 65. Exhibit No. 37. European Commission White paper, “European Transport Policy for 2010: time to decide”, 12 September 2001, COM(2001)370/final, p. 7-13. Exhibit No. 38; Commission of the European Community, “Third communication from the European Community under the UN Framework Convention on Climate Change”, 30 November 2001, p. 92 and 168. Exhibit No. 39.

⁶⁹ Directive No. 2001/16 of the European Parliament and of the Council of 19 March 2001 on the interoperability of the trans-European conventional rail system *O.J.L110*, 20 April 2001, p. 1. Exhibit No. 40. Adde: European Commission White paper, “European Transport Policy for 2010: time to decide”, *op. cit.*, p. 13, where the Commission stresses that: “*Rail transport is literally the strategic sector, on which the success of the efforts to shift the Balance will depend, particularly in the case of goods*”. Exhibit No. 38.

The United Nations and the European Community also recognize the “*linking up [of] the modes of transport*”, notably “*linking up sea, inland waterways and rail*”, as an important policy for reducing greenhouse gas emissions⁷⁰.

Apart from the European Union, several countries have also opted for a modal shift from road to rail in order to meet the Kyoto Protocol requirements⁷¹. This is the case of Austria⁷², Belgium⁷³, Germany⁷⁴, Japan⁷⁵, Spain⁷⁶, Switzerland⁷⁷, and Great Britain⁷⁸. In Switzerland, where the alpine environment is the object of specific protective measures, the modal shift from road to rail has been made the object, in 1994, of a constitutional provision⁷⁹. The Netherlands also recognize the need of a modal shift from road to less polluting means of transport:

*“Pilot projects for freight transport by rail are being undertaken in the Mainport Schiphol, as a start to the project 'Intermodal Freightport Schiphol'. The airports Schiphol, Frankfurt and Paris/Charles de Gaulle have entered into a co-operation aimed at launching a rail product onto the market in the short term, which provides for transport of airfreight between the mainports. Research into (...) modal shift (...) is becoming a more pressing issue. The Dutch government has adopted the plan of approach “Transport in Balance”. The policy objectives of Transport in Balance are Reinforcement of the competitive position of sustainable transport, particularly rail, inland shipping and short sea by infrastructure initiatives.”*⁸⁰

⁷⁰ United Nations Economic Commission for Europe, Regional Conference on Transport and the Environment, “Programme of joint Action”, *op. cit.* Exhibit No. 31; Regulation No. 1382/2003 of the European Parliament and of the Council on granting of Community financial assistance to improve the environmental performance of the freight transport system (“Marco Polo Programme”), *O.J.* L196, 02 August 2003, p. 1. Exhibit No. 41; Commission of the European Community, “Third communication from the European Community under the UN Framework Convention on Climate Change”, 30 November 2001, p. 92 and 168. Exhibit No. 39. European Commission White paper, “European Transport Policy for 2010: time to decide”, *op. cit.*, p.41-42. Exhibit No. 38.

⁷¹ United Nations, Secretariat of the Framework Convention on Climate Change, “Good Practices in Policies and measures among parties included in Annex I to The Convention. Policies and measures reported by Parties included in Annex I to the Convention in their third national communications”, 28 May 2003, FCCC/WEB/2003/1, p. 7. Exhibit No. 42.

⁷² *Ibidem*, p. 7.

⁷³ *Ibidem*, p. 11.

⁷⁴ *Ibidem*, p. 50.

⁷⁵ *Ibidem*, p. 65.

⁷⁶ *Ibidem*, p. 96.

⁷⁷ *Ibidem*, p. 105.

⁷⁸ *Ibidem*, p. 109.

⁷⁹ European Conference of Ministers of Transport, «National Policies towards shifting freight from road to rail », January 2003, p. 5. Exhibit No. 43.

⁸⁰ EUTP, «Member States Report, The Netherlands», available on the EUTP website (consulted in July 2003) http://www.eutp.org/en/research/member_state_reports/. Exhibit No. 44.

In this context, the Netherlands have decided to construct a conventional double track rail link of 160 km from Rotterdam to the German border, mainly for freight transport between Rotterdam and the European hinterland (known as the Betuwe Line). An average of 160 trains a day is expected to cross the Dutch German border, carrying around 37 millions tons of freight. The whole line, which benefits from a financial contribution of the European Union for its construction, is expected to be operational by 2006⁸¹. Besides the Betuwe line, the Netherlands have also drafted an action plan to improve rail freight on the Rotterdam-Milan line⁸² and have launched Pilot projects for freight transport by rail in the Mainport Schiphol, as a first step in the project 'Intermodal Freightport Schiphol'⁸³.

21. The importance of the Iron Rhine from the perspective of the modal shift is acknowledged by the Netherlands⁸⁴, and has been underscored in the international study performed by Arcadis⁸⁵. Revitalising the Iron Rhine also fits in a policy of linking up environment-friendly modes of transport:

“The Port of Antwerp is from an economic viewpoint largely dependent on its connections with the hinterland. In Antwerp the railways have always played an important role. Different lines, which are connected to the hinterland by lines in north, south and eastward directions intersect the harbour area and docklands. From Antwerp freight is transported in all directions by short sea, inland shipping, rail and road. The main lines are oriented towards the east (Germany, Scandinavia, Eastern Europe and Austria) and the south (France, Switzerland, Italy, Luxembourg and Spain)”⁸⁶.

In this context, the Inter Ferry Boats Company has been awarded financial assistance for a project relating to the Iron Rhine under the European Union Programme for Pilot Action for Combined Transport⁸⁷. According to article 1 of the Council Regulation of 1 October 1998

⁸¹ European Commission, “Trans-European transport networks. Ten-T priority Projects”, September 2002. Exhibit No. 45.

⁸² Dutch Ministry of Transport, Public Works and Water Management, Press Release 02 May 2002, available on the website of the Ministry (consulted in August 2003): <http://www.minvenw.nl/cend/dco/home/data/international/gb/eng0502.html#RubBB>. Exhibit No. 46.

⁸³ EUTP, “Member States Report, The Netherlands”, available on the EUTP website (consulted in July 2003) http://www.eutp.org/en/research/member_state_reports/. Exhibit No. 44.

⁸⁴ Verslag van het overleg tussen de Belgische, Nederlandse en Duitse Ministers van Vervoer over de Reactivering van de IJzeren Rijn, gehouden te Brussel op 29 maart 1999 (Report of the discussions between the Belgian, Dutch and German Ministers of Transport on the Reactivation of the Iron Rhine ..), p. 2. Exhibit No. 47.

⁸⁵ Arcadis, *op. cit.*, pages 21 and 31. Exhibit No. S3.

⁸⁶ *Loc. cit.*, p. 21.

⁸⁷ European Commission, “PACT : Contracts concluded in the 2001 Selection Procedure”, available on the Website of the European Commission at the following address (consulted in August 2003): http://europa.eu.int/comm/transport/marcopolo/pact/legal_en.htm. Exhibit No. 48.

“concerning the granting of Community financial assistance for actions of an innovative nature to promote combined transport”, the main goal of this initiative is to grant Community financial assistance to: “innovative projects which contribute to the increased use of combined transport and encourage the transfer of traffic from roads to more environment-friendly modes of transport”⁸⁸.

In this context, reactivating the Iron Rhine is a matter of urgency. As underscored in the Arcadis study of 2001, traffic congestion around Antwerp and in the Ruhr area are about to reach alarming levels:

“Around Antwerp, the problem concerning congestion became apparent in the mid 1990’s. In the period 1991-1996 the number of congestion-hours tripled. Taking into account the expansion of the port of Antwerp and the economic developments in the region, the congestion problems around Antwerp will increase as well. (..) Current congestion problems exist in Nordrhein-Westphalen as well. (..) The current congestion-problems are likely to intensify in the period up to 2010 as underlined in the 2003-2007 anti-congestion programme published by the Federal Government. (..) The current (and future) congestion problems are putting a lot of pressure on the physical accessibility of Antwerp and the Ruhr area.

The economic costs, in terms of additional costs, resulting from lost time and lack of reliability with respect to delivery times is increasing to such an extent that alternative forms of transport, such as rail and water, might become essential. In the light of the predicted increase in road congestion around Antwerp and in the Ruhr area, the development of practical alternatives to road transports is a matter of urgency.”⁸⁹

22. At the European level, the creation of international railway lines is also promoted as part of the trans-European transports network referred to in Articles 154 to 156 of the Treaty establishing the European Community, which the Community institutions must promote to help achieve the progressive establishing of the internal market (Articles 154 and 14) and the overall harmonious development of the Community by strengthening its economic and social cohesion (Articles 154 and 158)⁹⁰.

⁸⁸ Council Regulation No. 2196/98 of 1 October 1998 concerning the granting of community financial assistance for action of an innovative nature to promote combined transport, *O.J* L277, 14 October 1998, p. 1-4. Exhibit No. 49.

⁸⁹ Arcadis, *Comparative cross-border study on the Iron Rhine*, *op. cit.*, p. 30-31. Exhibit No. S3.

⁹⁰ Treaty establishing the European Community (consolidated version, 2002), *O.J.* C325/1 ff. Exhibit No. 50.

Decision No. 1692/96/EC of the European Parliament and of the Council, of 23 July 1996, on Community guidelines for the development of the trans-European transport network, provides in Article 2, Paragraph 1, that:

“the trans-European network shall be established gradually by 2010 by integrating land, sea and air transport infrastructure networks throughout the Community in accordance with the outline plans indicated on the maps in Annex I and/or the specifications in Annex II”⁹¹.

In Annex I, Section 3.1 (Belgium), Section 3.3 (Germany) and Section 3.10 (Netherlands), maps were included identifying the Iron Rhine as a “conventional line”, the part on Dutch territory being, however, identified as a “planned conventional line”⁹². The reason why the Belgian and Dutch parts of the Iron Rhine are thus accorded a different status remains unclear, the more because the “Netverklaring 2003” drafted by the Dutch Railinfrabeheer, Railned and Railverkeersleiding, which lists Dutch railway lines available for use by railway undertakings, includes the Dutch part of the Iron Rhine⁹³.

In this context, the High Level Group, in its Report dated 27 June 2003, identified the Iron Rhine as a “*priority project to start before 2010 (List 1)*”:

“18. On the basis of the proposals submitted by the Member States, the acceding countries and the Commission, the Group identified a series of projects having a very high European value added. The countries concerned gave their firm commitment to begin work on all the sections of each one of these projects at the latest in 2010 so that to make them operational at the latest in 2020. (..)

21. The inclusion in this list of certain projects is accompanied by conditions to be fulfilled before a certain date. The Group considers that if these conditions are not met after a while, it will be advisable to transfer the projects concerned to List 2 (longer-term priority projects). (..)

23. These priority projects, and the corresponding sections, are indicated below (date of completion of sections between brackets). (..)

⁹¹ Decision No. 1692/96/EC of the European Parliament and of the Council, of 23 July 1996, on Community guidelines for the development of the trans-European transport network *O.J.* L228, 9 September 1996, p. 1 ff. Exhibit No. 51.

⁹² *Ibidem*.

⁹³ Railinfrabeheer, Railned and Railverkeersleiding, Netverklaring 2003, 29 November 2001, annex I. Exhibit No. 52. This document has been drafted on the basis of the principles laid down in Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, *O.J.* L 75/29 of 15 March 2001. Exhibit No. 53.

9. “Mixed railway line Lyon/Genova – Basel – Duisburg – Rotterdam/Antwerp”:

- Lyon-Mulhouse-Müllheim (2018) (..)
- Genova-Milano/Novara-Basel-Karlsruhe (2015)
- Frankfurt-Mannheim (2012)
- Duisburg-Emmerich (2009)
- “Iron Rhine” Rheidt-Antwerp (2010).”⁹⁴

Another European Community initiative relates to the trans-European Rail Freight Network, identified in Directive No. 91/440/EEC⁹⁵, as amended by Directive No. 2001/12/EC of 26 February 2001⁹⁶. Article 10.3 of Directive No. 91/440/EEC, as amended, provides that “whatever the mode of operation, railway undertakings within the scope of Article 2 (being, in essence, railway undertakings established or to be established in a Member State⁹⁷), shall be granted, on equitable conditions, the access that they are seeking to the Trans-European Rail Freight Network defined in Article 10 (a) and in Annex I after 15 March 2008, to the entire rail network, for the purpose of operating international freight services”. The maps in Annex I of Directive No 2001/12/EC identify the Iron Rhine as part of the Trans-European Rail Freight Network⁹⁸.

23. From an economic and social perspective, the reactivation of the Iron Rhine will be profitable, not only to Belgium and the port of Antwerp, but also to the Netherlands and Germany. In the past, the creation of the Iron Rhine has – irrespective of profits and employment opportunities engendered by the transport activity as such – contributed to the development of the port of Antwerp and of industries in Budel, the Netherlands. Currently, according to the abovementioned Arcadis study of May 2001, the reactivation of the Iron Rhine could be profitable for the port of Antwerp and for industrial areas in Holland and in Germany:

“Apart from economic benefits on a (inter)national scale, regional benefits of a reactivation of the Iron Rhine are anticipated. On the basis of a survey carried out in Noord-Brabant and Dutch Limburg in 1999, it can be stated that the Iron Rhine could have a major positive impact on the regions that are crossed by the route. The Iron

⁹⁴ High Level Group on the trans-European transport network, “Report”, 27 June 2003, p. 32-35. Exhibit No. 54.

⁹⁵ Council Directive No. 91/440/EEC on the Development of the Community Railways, *O.J.L237*, 24 August 1991, p. 25. Exhibit No. 55.

⁹⁶ Directive No. 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive No. 91/440/EEC on the Development of the Community Railways, *O.J.L75*, 15 March 2001, p. 1 ff. Exhibit No. 56.

⁹⁷ See article 2 as amended by Directive 2001/12/EC, article 1.

⁹⁸ Exhibit No. 56.

Rhine does provide some interesting opportunities to open up Belgian Limburg, including the region around Genk, to Germany via the railways. This however, requires the reconstruction of the Neerpelt-Hasselt line (line nr 18). In the Netherlands, the regions around Born and Venlo, could profit from the reactivation of the Iron Rhine. These areas might open up to (inter)national freight transport by rail. Previously unopened zones in Germany (Wegberg-Wildenrath and Krefeld) could benefit as well (...). [The reactivation of the Iron Rhine] offers opportunities for Roermond and Mönchengladbach because of the existing industries in the vicinity of the railway (...). The upgrading of the section Dalheim-Rheydt (...) may clearly improve the conditions for companies to establish themselves at the former military airfield near Wegberg-Winldenrath, which will be rebuilt into a large industrial area (...). The track doubling between Dalheim-Rheidt by rail will enhance the potentials of this new industrial area both in the directions Antwerp and Duisburg.”⁹⁹

EVO, a Dutch professional organisation in the logistics and transport sector, has manifested its interest in a speedy reactivation of the Iron Rhine, notably because “*this would improve potentials for the Dutch transports sector in the South-East of the country to carry goods by rail, at a continental and inter-continental level, via the port of Antwerp*”¹⁰⁰.

Besides the freight transport and its positive effects for industries and employment, the upgrading of railways connections on the historic track of the Iron Rhine has also positive effects for passenger transport, especially in the Netherlands:

“Upgrading the section Neerpelt / Budel-Weert may offer new possibilities for a passenger connection between Neerpelt / Budel and Weert (...). The (re-)establishment of a railway connection between Roermond and Dalheim and track doubling of the connection Dalheim-Rheydt provides possibilities for regional passenger transport on the line Roermond-Dalheim-Rheydt-Mönchengladbach. Because of the track doubling, the capacity for extra (regional) trains is improved.”¹⁰¹

In sum, therefore, the reactivation of the Iron Rhine is of major international interest, in that it will contribute to sustainable development in each of its ecological, economic and social pillars.

⁹⁹ Arcadis, *op.cit.*, p. 22 and 101. Exhibit No. S3.

¹⁰⁰ EVO, Letter of 13 November 1998 to Dutch Prime Minister Wim Kok, p. 1. Exhibit No. 57.

¹⁰¹ Arcadis, *op.cit.*, p. 103. Exhibit No. S3.

2. Belgium's First Steps Towards Revitalisation

24. The revitalisation and improvement of the Iron Rhine was already discussed between Belgium and the Netherlands, before its international use was interrupted in 1991. In 1986, the Dutch delegate in the Benelux Commission for Transports, Mr. Van den Berg, indicated that Dutch authorities envisaged to create a national park in an area passed through by the railway and inquired about its future use. The Belgian representative, Mr. Stockman, replied that Antwerp circles contemplated contacting the Dutch and German authorities with respect to a more active use of the railway. The Dutch representative then suggested that Belgium should inform the Dutch Government thereof and, if necessary, refer to the 1839 Separation Treaty (unofficial translation):

“The Dutch Ministry announces the existence of plans to create a national park in the Dutch-German frontier area. The Iron Rhine is located in the surroundings of this park. In view of the park creation procedure, it is desirable to gain better insight in the importance which will be accorded to the railway line in the future, notably in view of possible repercussions on the park classification.

Mr. STOCKMAN announces that, after consultations with Antwerp circles, one intends to contact the Dutch and German authorities so as to determine (how) whether the Iron Rhine could be used more actively. An improvement of the existing infrastructure up to Weert is being thought of. He would appreciate that NS [Dutch Railways] and NMBS [Belgian Railways] would study in common whether an improvement up to Weert for diesel traction is (economically/financially) feasible. (..)

Mr. Van den Berg suggests to verify whether the classification as a national park is compatible with the provisions of the Separation Treaty of 19 April 1839.

The Belgian delegation is requested to place the possible reactivation of the line on the agenda through correspondence with the Ministry of Transports and Waterstaat and, if desirable, to refer in that letter to the Separation Treaty.”¹⁰²

¹⁰² Benelux Economic Union, Commission for Transports, Sub-Commission Railway Transports, report of the meeting held in Luxemburg on 13 November 1986, VE/TF(86) PV2 of 5 December 1986, at p. 5. Exhibit No. 58. Authentic text: “Van de kant van het Nederlands Ministerie wordt meegedeeld dat er plannen bestaan voor de instelling van een nationaal park in het Duits-Nederlandse grensgebied. De IJzeren Rijn ligt in de buurt van dit park. Met het oog op de parkinrichtingsprocedure is het wenselijk nader inzicht te krijgen in het belang dat in de toekomst gehecht wordt aan deze spoorlijn, mede gelet eventuele repercussies i.v.m. de parkclassificatie. De heer STOCKMAN deelt mee dat na overleg met Antwerpse kringen het voornemen bestaat om contact te leggen met de Nederlandse en Duitse autoriteiten ten einde na te gaan (hoe) of de IJzeren Rijn actiever gebruikt kan worden. Men denkt daarbij aan verbetering van de bestaande infrastructuur tot aan Weert. Graag zou hij zien dat de NS en NMBS samen zouden bestuderen of een verbetering tot aan Weert voor dieseltractie (economisch/financieel) haalbaar is. (...)”

De heer van den BERG suggereert na te gaan of een dergelijke parkclassering strookt met de bepalingen van het Scheidingsverdrag van 19 april 1839. Aan de Belgische delegatie wordt verzocht de eventuele reactivering van

As suggested by the Dutch delegation, the Belgian Minister of Transports, Mr. Herman De Croo, then wrote a letter to his Dutch counterpart, Mrs. Smit-Kroes:

I have the honour of asking your attention for the transboundary railway Antwerp-Roermond-Mönchen-Gladbach, also called the Iron Rhine.

In Belgian circles, there is strong interest for a modern direct railway link between Antwerp and the Ruhr area, with the consequence that I consider it necessary that an in-depth cost-benefits analysis be made of such a linkage.

The NMBS has been instructed to study this issue. However, such a study could not be finalised failing the cooperation of the NS and DB.

I would be highly appreciative if you could request the NS to cooperate in this study with the NMBS.

The possible realisation of the project would require a decision by the respective ministers of transports on the investments required for that purpose.

I would therefore appreciate your informing me whether you would be willing to take such investments into consideration and whether you would possibly agree with a financing of the project in the context of the EEC. As a line which crosses two internal frontiers of the community, the project would appear to qualify for such financing.

To conclude, I refer to plans existing in the Netherlands, to create a natural park between Roermond and Erkenbosch alongside the Iron Rhine, which would limit the railway exploitation on that line.

In my view, such a limitation would go against the rights accorded to Belgium by Article 12 of the Treaty of London of 19 April 1839 between Belgium and the Netherlands, which was executed through the Treaty of 13 January 1873 regulating the passage of the railway Antwerp-Gladbach through the territory of Limburg.

In the above context, it is beyond doubt that Belgium will hold firm to its right of free transport through the Iron Rhine.”¹⁰³

de lijn via briefwisseling met het Ministerie van Verkeer en Waterstaat aan de orde te stellen en indien wenselijk in dit schrijven te verwijzen naar het Scheidingsverdrag.”

¹⁰³ Letter of the Belgian Minister of Transports to the Dutch Minister of Transports and Waterstaat, dated 23 February 1987. Exhibit No. 59. Authentic text: “Ik ben zo vrij, nogmaals uw aandacht te vragen voor de grensoverschrijdende spoorverbinding Antwerpen-Roermond-Mönchen-Gladbach, die de IJzeren Rijn wordt genoemd. In sommige Belgische middelen leeft sterk de idee van een moderne rechtstreekse spoorverbinding tussen Antwerpen en het Ruhr-gebied, zodat ik een grondig onderzoek over de baten en de kosten van zo een verbinding wenselijk acht. De N.M.B.S. kreeg opdracht, deze zaak te bestuderen, maar vanzelfsprekend kan de studie niet worden voltooid zonder de medewerking van de N.S. en de D.B. U zou mij daarom zeer verplichten, indien U de N.S. wilde verzoeken, voor deze studie met de N.M.B.S. samen te werken. De eventuele realisatie van het project zou een beslissing van de respectieve verkeersministers over de daartoe noodzakelijke investeringen vereisen. Ik had dan ook graag vernomen of U bereid bent, dergelijke investeringen te overwegen en of U eventueel akkoord zou gaan met een financiering van het project in het raam van de EEG. Als verbinding die twee binnengrenzen van de gemeenschap overschrijdt, lijkt het project daarvoor in aanmerking te kunnen komen. Als besluit verwijs ik naar plannen die in Nederland bestaan, om tussen Roermond en Erkenbosch langs de IJzeren Rijn een natuurgebied af te bakenen, waardoor de spoorexploitatie op die verbinding zou

In parallel, the Belgian Minister of Transports also invited the German Minister of Transports to request the German Railways to cooperate with the Belgian Railways in the study contemplated¹⁰⁴. The Dutch Minister of Transports informed Belgium that the Dutch railways would participate in the study, although they did not give high priority to the project. She also considered it premature to take a decision on investments before the study was finalised¹⁰⁵. The German Minister did not manifest, at the time, a particular interest for the project and suggested that the issue be settled through the Belgian and German Railways¹⁰⁶.

25. In October 1990, the Directorate-General for Transport of the European Commission awarded a contract to the European Centre for Applied Economic Research PROGNOS to make a study on the possibility of rehabilitating the Iron Rhine and look at possible alternatives. The study was finalised in May 1991¹⁰⁷. The study revealed the merits of the Iron Rhine, and strongly insisted on the need to preserve the existing route and ensure its future availability for rail transports, so as to be able to revive it around 2000, when very substantial increases in international goods traffic by rail were forecast. Its main conclusions were as follows:

“(1) The .. Iron Rhine, is the shortest, easiest and therefore potentially the cheapest direct rail connection from Antwerp to the Rhine-Ruhr area. However, for a variety of historical reasons, almost half the line is now single track and more than half is not electrified. Partly because of these technical shortcomings, but even more because of the divergent operational planning and priorities of the three national railway companies involved, both goods and passenger services on the Iron Rhine are currently being reduced and even abandoned.

(2) The really important international function of the Iron Rhine lies in goods transport; both current and potential passenger services are essentially local.

worden beperkt. Mijns inziens zou een dergelijke beperking ingaan tegen de rechten die aan België zijn verleend bij artikel 12 van het Verdrag van Londen van 19 april 1839 tussen België en Nederland, dat uitvoering gekregen heeft met het Verdrag van 13 januari 1873 tot regeling van de doorgang van de spoorweg Antwerpen-Gladbach over het grondgebied van Limburg. In de bovengeschetste context lijkt het geen twijfel dat België zal vasthouden aan zijn recht op vrije doorvoer via de IJzeren Rijn.”

¹⁰⁴ Letter of the Belgian Minister of Transports to the German Minister of Transports, dated 9 November 1987. Exhibit No. 60.

¹⁰⁵ Letter of the Dutch Minister of Transports to the Belgian Minister of Transports, dated 26 October 1987, Exhibit No. 61.

¹⁰⁶ Letter of the German Minister of Transports to the Belgian Minister of Transports, dated 24 April 1987, Exhibit No. 62.

¹⁰⁷ Prognos, *The Iron Rhine Railway Link Between Antwerp and the Rhine-Ruhr Area – Final Report*, May 1991. As concerns the financing by the EC, see p. 1. Exhibit No. S2.

(3) Full double tracking and electrification would cost 120 – 130 mio ECU; modernisation for double tracking and diesel service about 30 – 80 mio ECU. None of the three railway companies concerned envisages any such investment in their future planning, which concentrates on major axes and calls for very substantial capacity increases both in passenger services, including the high speed network, and goods traffic. Allowing for nuances within these organisations, their attitude towards the Iron Rhine, apparently backed by Governments who may have to provide the funds for rail infrastructure, ranges from hostile to irrelevant. The interest, from a macroeconomic European viewpoint, of minimising the allocation of resources to the transport of goods between Antwerp and destinations East has not been considered by any of the 3 networks. In that light suggestions for reviving the line are at present countered by the question whether the European Community would back a project not put forward by any of the Member States concerned.

(...)

(7) To safeguard the future and be able to revive the Iron Rhine at a date closer to the year 2000, when very substantial increases in international goods traffic by rail are forecast, it is strongly recommended to preserve the current route and ensure its future availability for rail transport. Costs and benefits of upgrading the Iron Rhine and alternative ways of providing extra capacity can then be judged on their own merits, especially in the light of the permanent topographical advantages of the Iron Rhine vis-à-vis the Montzen-Aachen route. (...)”¹⁰⁸

26. In a meeting of the Commission for Transports, Sub-Commission for Railway Transports, of the Benelux Economic Union, on 11 December 1991, the Belgian representative Mr. L. Stockman again made an express reservation to the effect that the reactivation of the Iron Rhine should be safeguarded, in view of a future increase in traffic, and notwithstanding the fact that the investment plan STAR 21 of the Belgian railways NMBS/SNCB, did not at that time provide for any investments in this railway line. The report of this meeting provides as follows (unofficial translation):

“d. Iron Rhine.

Prognos has completed a study concerning this connection. On 14 February 1992 further consultation is foreseen with the concerned railway companies.

Mr. STOCKMAN observes that the Prognos-study goes into one direction, that the number of cross border points in the network must remain limited, but that on the other hand the possible reactivation of the Iron Rhine must remain guaranteed in the light of an increase of transport in the future.

¹⁰⁸ *Loc. cit.*, at p. 33 ff.

In STAR 2, no investments are foreseen for this connection.”¹⁰⁹

A similar statement was made in a meeting of the Sub-Commission for Railway Transports on 20 April 1993:

“Iron Rhine (VE/TF (93)3.

In view of the current transports expectations and investment priorities, it is decided not to place this project on the next agenda.

Mr. STOCKMAN informs that Belgium does not envisage a modernisation in the short term. However, a future reactivation must be safeguarded.”¹¹⁰

27. This was not only a matter of reserving a hypothetical future use of the railway, but reflected a genuine and active interest on Belgium’s part, in the Iron Rhine’s present-day potentials. In spring 1993, Belgium made a demand to the European Commission for the granting of financial aid pursuant to Regulation EEC No. 1738/93, for the purpose of financing a cost-benefit analysis of a high-speed expansion of the Iron Rhine. Such aid was granted by Commission Decision of 26 July 1994¹¹¹. The study as described in the annex of this Decision was to include an analysis of the impact of a high-speed expansion of the Iron Rhine on the modal shift¹¹², which, as mentioned here above, is one of the main issues of present-day transport policies from an economic as well as an ecological perspective.

¹⁰⁹ Benelux Economic Union, Commission for Transports, Sub-Commission “Railway Transports”, Brussels, 9.1.1992, VE/TF (91) PV 1, Report of the meeting held in Luxemburg on 11 December 1991, p. 4. Emphasis added. Exhibit No. 63. Authentic text: “*d. IJzeren Rijn. Prognos heeft een studie naar deze verbinding afgerond. Op 14 februari 1992 is nader overleg voorzien met de betrokken spoorwegmaatschappijen. De Heer STOCKMAN merkt op dat de Prognos-studie in een richting gaat, dat het aantal grensoverschijdingspunten in het net beperkt dient te blijven, maar dat anderzijds de eventuele reactivering van de IJzeren Rijn gevrijwaard dient te blijven in het licht van een toename van het vervoer in de toekomst. In STAR 21 zijn geen investeringen voor deze verbinding voorzien.*”

¹¹⁰ Benelux Economic Union, Commission for Transports, Sub-Commission “Railway Transports”, Brussels, 26 April 1993, VE/TF (93) PV 1, Report of the meeting held at The Hague on 20 April 1993, p. 3. Exhibit No. 64. Authentic text: “*IJzeren Rijn (VE/TF (93) 3) Gelet op de huidige vervoersverwachtingen en de investeringsprioriteiten wordt besloten dit project niet op de volgende agenda op te nemen. De Heer STOCKMAN deelt mee dat België geen modernisering op korte termijn voorziet. Wel wenst men een toekomstige reactivering te vrijwaren.*”

¹¹¹ Beschikking van de Commissie van de Europese Gemeenschappen van 26 juli 1994 inzake de toekenning van financiële bijstand voor de uitvoering van de projecten vermeld in Bijlage I (Decision of the Commission of the European Communities of 26 July 1994 concerning the granting of financial assistance for the performance of the projects mentioned in Annex I), C(94) 1982 def/2.. Exhibit No. 65.

¹¹² *Loc. cit.*, p. 4. Authentic text: “*PROJECT TITEL: Verkeersstudie naar de kosten-baten van een hoge snelheids uitbreiding van de IJzeren Rijn. BESCHRIJVING: Het project behoort tot het Transeuropees netwerk voor gecombineerd vervoer. Het project houdt verbeteringswerken in voor de treinverbinding Antwerpen-München-Gladbach (sic) (Ruhrgebied). Deze beschikking slaat enkel op de verkeersstudie. BESCHRIJVING VAN DE STUDIE: Onderzoek naar huidige vervoersstromen en prognoses; impact op de modale verschuiving met verschillende kwaliteitsniveaus; impact op de capaciteit; kosten-baten evaluatie. LIGGING: Lijn Antwerpen-Mol-Neerpelt/Weert/Roermond/München-Gladbach (IJzeren Rijn)*”.

The said study was entrusted to the Ministry of the Flemish Region, which, in turn, ordered a study of the transport potential of the Iron Rhine, which was started in January 1996. The Final Report, which was delivered in January 1997, concluded as follows:

“(..) There is a good economic case for putting the Iron Rhine back into operation as soon as possible. Moreover, the Iron Rhine could be put into operation on a short term and at low expenses.

Prospects for a substantial shift of road traffic to rail will materialise once the second access to Antwerpen-Noord comes into service which is planned for 2005. If the Iron Rhine is then in operation, it will be able to handle about 40 % of the rail traffic from the Belgian ports to Germany and beyond.

A further argument in its favour is that at present all such rail traffic must rely on a single line (Montzen) with all the attendant risks of such an operation in case of a breakdown or accident.

In looking at the alternative ways of restoring the Iron Rhine, the comparison of the various cases suggests strongly that the minimum investment alternative which does not try to anticipate future growth in traffic at too early a date would be the most profitable avenue. (..)

Summing up, it may be concluded that the economics for rehabilitating the Iron Rhine are generally positive. It should not be forgotten that the proposed investment (1300 million BEF for restoration to 3400 million BEF for double tracking) is also very modest, especially compared to other projects (..).

The results from the macro-economic evaluation reinforce this conclusion by showing that many of the benefits, which could be brought by about the Iron Rhine clearly lie in its contribution to the environment and the reduction in ever growing road congestion, especially in the Antwerpen area. (..)”¹¹³.

28. In the meantime, on 21 December 1996, Belgium and the Netherlands had entered into a Treaty concerning the construction of a railway connection for high-speed trains between Rotterdam and Antwerp. Article 9 of this Treaty relates to other railway projects between Belgium and the Netherlands, and notably to the Iron Rhine. It provides as follows:

“The cases concerning the extension of the No. 11 freight line to the railway line between Goes and Bergen-op-Zoom and the opening up of the port of Antwerp through the so-called “IJzeren Rijn” [“Iron Rhine”] to Germany shall be judged on their own merits, after close consultation and as befits good neighbours. In the first case, efforts shall be made to decide on a route before 1 January 2000. In the second case, the Netherlands shall actively participate in the feasibility study, also in

¹¹³ Ministry of the Flemish Region / Tractebel Development n.v. / Technum n.v. / Prognos AG, *Study of the Transport Potential of the Iron Rhine, Final Report*, January 1997. Exhibit No. S1, quote at pages 94-95

*connection with the development of alternative routes near Roermond and the border between the Netherlands and Germany. Depending on the results of that study, the Parties shall jointly hold consultations with the competent authorities of the Federal Republic of Germany.”*¹¹⁴

On June 12, 1998, Belgian Prime Minister Dehaene again drew the attention of Minister-President Kok of the Netherlands, on the importance of the Iron Rhine and on the comparative advantages of the historic track (unofficial translation):

*“I accord great importance to a rapid realisation of the Iron Rhine. Therewith, the preference is given to the currently existing historic track. This historic track is the flattest, the shortest and the most economical. Furthermore, Belgium can claim a right of public international law on this historic track. Alternative connections (the Brabant-route, the diversion via Venlo) are either a too long roundabout route or necessitate the installation of new lines which can only be realised in the long run.”*¹¹⁵

3. Dutch Environment Protection Measures

29. Although Belgium expressly reserved its rights on the future reactivation of the Iron Rhine, the Netherlands, by Ministerial Decree of 20 May 1994¹¹⁶, identified the “Meinweg”, an area in the province of Limburg of about 1.600 hectares, which is passed through by the Iron Rhine’s historic track, as a “*special protection area*” within the meaning of Article 4.1 of Directive 79/409/EEC of the Council of 2 April 1979, the so-called “Birds Directive”.

¹¹⁴ Treaty of 21 December 1996 between the Kingdom of Belgium and the Kingdom of The Netherlands concerning the construction of a railway junction for high speed trains between Rotterdam and Antwerp, *U.N.T.S.*, No. 35512, vol. 2054 (1999), p. 293 ff. Exhibit No. 66. Quote hereabove from the translation published in the United Nations Treaty Series. Authentic Dutch text: “*De dossiers betreffende de doortrekking van Goederenlijn 11 naar de spoorlijn tussen Goes en Bergen-op-Zoom en de ontsluiting van de Antwerpse haven via de zogenaamde “IJzeren Rijn” naar Duitsland zullen op hun eigen merites en in goed overleg en nabuurschap worden beoordeeld. In het eerste dossier wordt ernaar gestreefd om vóór 1 januari 2000 een tracékeuze te maken. In het tweede dossier zal Nederland actief meewerken aan de haalbaarheidsstudie, ook in verband met de ontwikkeling van tracévarianten ter hoogte van Roermond en de Nederlands-Duitse grens. Afhankelijk van de resultaten van dit onderzoek zullen de Partijen desgevallend gezamenlijk in overleg treden met de bevoegde instanties in de Bondsrepubliek Duitsland.*”

¹¹⁵ Letter of the Belgian Prime Minister Dehaene to Dutch Minister-President Kok dated 12 June 1998. Exhibit No. 67. Authentic text: “*Ik hecht groot belang aan een spoedige realisatie van de IJzeren Rijn. Daarbij wordt de voorkeur gegeven aan het thans bestaande historisch tracé. Dit historisch tracé is het vlakste, het kortste en het meest economische. Daarenboven kan België aanspraak maken op een volkenrechtelijk recht op dit historisch tracé. Alternatieve verbindingen (de Brabantroute, de omleiding via Venlo) zijn ofwel een te grote omweg of vereisen de aanleg van nieuwe lijnen die slechts op lange termijn te realiseren zijn.*”

¹¹⁶ Ministerial Decree of 20 May 1994 (Aanwijzingen als speciale beschermingszone in de zin van de richtlijn 79/409/EEG – designation of special protection areas within the meaning of Directive 79/409/EEC), *Staatscourant*, No. 103. Exhibit No. 68.

The explanatory note annexed to the Ministerial decision indicated:

“The area is passed through by the railway Roermond-Mönchengladbach. The railway (single track and not electrified) is used exclusively for transports of goods and military transports. The present use is quite extensive; the noise hindrance for the environment is therefore very limited.”¹¹⁷

Pursuant to Article 4.1 of Directive 79/409/EEC¹¹⁸ *“the species mentioned in annex 1 shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in the area of distribution”, and “member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species ..”*. According to article 4.2, *“member states shall take similar measures for regularly occurring migratory species not listed in Annex I”*.

Article 4.4, as it was originally drafted, provided that *“in respect of the protection areas referred to in paragraphs 1 and 2 .. [of same article], member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this article. Outside these protection areas, member States shall also strive to avoid pollution or deterioration of habitats”*. Directive 92/43/EEC of the Council of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, the so-called *“Habitats Directive”¹¹⁹*, has amended this provision by providing that any obligations arising under the first sentence of Article 4.4 shall, in June 1994, be replaced by obligations arising under Article 6.2, 3 and 4 of the Habitats Directive.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives. In the light

¹¹⁷ *Loc. cit.*, p. 4. Authentic text: *“Het gebied wordt doorsneden door de spoorlijn Roermond-Mönchengladbach. De spoorbaan (enkelbaans en niet geëlectriceerd) wordt uitsluitend gebruikt voor goederenvervoer en militair verkeer. Het huidig gebruik is vrij extensief; de geluidsbelasting van de omgeving is derhalve zeer gering.”*

¹¹⁸ Council Directive No. 79/409/EEC of 2 April 1979 on conservation of wild birds, *O.J. L103*, 25 April 1979, p. 1. Exhibit No. 69.

¹¹⁹ Council Directive No. 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, *O.J.L206*, 22 July 1992, p. 7ff. Exhibit No. 70.

of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.”

In the years 1994-1995, the Netherlands also identified the “Meinweg” area as a national park¹²⁰ and as a “silence zone”¹²¹ under their domestic legislation.

In July 1997, the Netherlands apparently made part of the Iron Rhine unfit for use by dismantling part of the infrastructure (not including the rails).

30. The impact of the status of the “Meinweg” on the reactivation of the Iron Rhine was also discussed in a meeting of the Dutch-Flemish administrative working group on 15 December 1998. The Flemish representative, Mr. Desmyter, indicated that, “*apart from studying alternative tracks, one should also consider modifying the status of the Meinweg*”¹²². The Dutch delegate indicated that the new environmental status of the “Meinweg” area created a number of obstacles to reactivation. He expressed the Netherlands’ position as follows :

¹²⁰ Dutch regulation identifying the “Meinweg” as national park, 1 June 1995, *Staatscourant*, 1995, No. 107. Regeling aanwijzing nationaal park De Meinweg, *Staatscourant*, 1995, No. 107, 1. Article 6 of this regulation determines the composition of the consultative body, which comprises a representative of the Dutch State Railways. Exhibit No. 71.

¹²¹ Nota stiltegebieden van de Provinciale Staten van Limburg vastgesteld in hun vergadering van 18 februari 1994, referred to in the letter of 7 April 1994 of the "Gedeputeerde Staten van Limburg" to the "Colleges van Burgemeester en Wethouders". Exhibit No. 72.

¹²² Vlaams-Nederlandse ambtelijke werkgroep spoorvervoer, ontwerp-verslag van de vergadering d.d. 15 december 1998 te Brussel (Flemish-Dutch Administration Working Group - Draft Report of the meeting held in Brussels on 15 December 1998), AWS (98) PV-04, p. C. Exhibit No. 73. Authentic text: “*Desmyter geeft aan dat naast mogelijke tracés ook de consequenties van een herziening van de huidige status van het Meinweggebied moet bekeken worden*”. The Draft report was approved during the next meeting: Exhibit No. 74.

“According to Van Hout, the Landsadvocaat [State’s advocate] states that for the reactivation of the Iron Rhine an EIA-procedure is necessary. Precisely because the railway line was taken out of use in 1991 and because Belgium announced in December 1991 during the Benelux-consultation on railway transportation that the track was not included anymore in the ten-year program of the NMBS (+PROGNOST-study), there was no party anymore in The Netherlands in 1993 that came up for the interests of the railway line on the occasion of the determination of the structuurschema Groene Ruimte [structural scheme Green Space].

The decision concerning the silence zone already dates from 11.02.1994. Given the habitat directive it will be necessary for a reactivation to demonstrate that a project with imperative reasons of overriding public interest is at stake. Furthermore, it will be necessary to study the alternative tracks with respect to their impact on environment and nature.

Be it as it may, some sort of EIA-reporting procedure is necessary. According to Mr. Van Hout it should be possible – once agreement is reached on how to reach a decision on the definitive track (cfr. EIA-reporting) – to consider a limited reactivation of the existing line in the meanwhile.”¹²³

At the next meeting held on 5 March 1999, the Flemish expert Mr. Serruys stated that *“the maximum noise level of 40 dB(A) advocated by the Netherlands [led] to a maximum capacity [of railway traffic] which was inoperative: 1 train per week or 0,5 train a day”*. Further, *“measures required to respect the 40 dBA norm were overly expensive and impossible to take from a regulatory viewpoint (administrative authorization)”* and *“the 40 dB (A) norm was laid down nowhere”¹²⁴*. At the following meeting on 26 July 1999, the Dutch delegate confirmed that a noise level of 40 dBA was not a compulsory norm but an objective pursued¹²⁵.

¹²³ Loc. cit., Exhibit No. 73. Authentic text: *“Volgens Van Hout stelt de landsadvocaat dat voor de reactivering van de IJzeren Rijn een MER-procedure noodzakelijk is. Precies omdat de spoorlijn in 1991 buiten gebruik is gesteld en België in december 1991 tijdens het Benelux-overleg inzake spoorvervoer meldde dat het tracé niet meer op het tienjarenprogramma van de NMBS voorkwam (+PROGNOST-studie), was er in 1993 in Nederland geen partij meer die opkwam voor het belang van de spoorlijn naar aanleiding van de vaststelling van het structuurschema Groene Ruimte. De beslissing over het stiltegebied dateert reeds van 11.02.1994. Gelet op de habitat-richtlijn zal voor een reactivering moeten worden aangetoond dat het hier om een project met een groot openbaar belang gaat. Verder zullen de alternatieve tracés moeten onderzocht worden op hun impact op milieu en natuur. Hoe dan ook is een soort MER-rapportage procedure noodzakelijk. Volgens de heer van Hout zou – wanneer men zich akkoord heeft verklaard over de wijze van aanpak om te komen tot een definitieve tracé-keuze (cfr. MER-rapportage) – in afwachting een beperkte reactivering van de bestaande lijn kunnen overwogen worden.”*

¹²⁴ Vlaams-Nederlandse ambtelijke werkgroep spoorvervoer, ontwerp-verslag van de vergadering d.d. 5 maart 1999 te Brussel (Draft Report of the meeting held in Brussels on 5 March 1999), AWS (99) PV-01, p. 2. Exhibit No. 74. Authentic text: *“De geluidsvoorwaarde 40 dB(A) leidt tot een max. capaciteit van onbruikbare grootte: 1 trein/week of 0,5 trein/dag. Maatregelen om 40 dBA te halen zijn overmatig duur en reglementair onmogelijk (vergunningsplicht). De 40 dBA-norm staat nergens vast”*. This draft report was approved in the meeting on 26 July 1999: Exhibit No. 75.

¹²⁵ Vlaams-Nederlandse ambtelijke werkgroep spoorvervoer, ontwerp-verslag van de vergadering dd. 26 juli 1999 (Flemish-Dutch Administration Working Group - Draft Report of the meeting of 12 October 1999), AWS (99) PV-03, p. 3. For approval, see the report of 12 October 1999, Exhibit No. 76.

31. Although it was both parties' position that the granting of environmental statuses created obstacles to the reactivation of the Iron Rhine, and continuing negotiations on reactivation notwithstanding, the Netherlands steadily proceeded with creating further such sites along the historic track of the Iron Rhine, and, apparently, omitted to exclude from the protected sites the strip of land reserved for the Iron Rhine. According to Belgium's information, the Dutch Government in 1998-1999 proposed the « Meinweg » area as a Site of Community Importance under the Habitats Directive, but no final decision on the list of Dutch sites has been taken as yet. On 24 March 2000, the Netherlands further identified the "Weerter- en Budelerbergen" area, which is also passed through by the historic track, as a special protection area under the Birds Directive¹²⁶.

Belgium was never consulted on any of these environmental protection measures taken by the Netherlands. A study of the effects of a reactivation of the Iron Rhine on Birds Directive and Habitat Directive areas passed through by the track on Belgian territory, concluded that significant negative effects were unlikely to occur, and that the integrity of the areas would not be affected¹²⁷.

4. Alternative tracks, Mitigating and Compensating Measures, and Temporary Use of the Historic Track

32. Early 1999, governmental departments of Belgium, the Netherlands and Germany made a comparative cost-benefit analysis of the historic track with and without tunnel (A) as well as a number of alternatives thereto¹²⁸. The costs related to the reactivation of the historic track and the alternatives appeared to depend to a very large extent on whether a tunnel should be built under the Meinweg area so as to prevent noise pollution. The historic track without a tunnel was estimated to 89,9 millions ECU, the same track with a tunnel between 684, 9 and 434,9 millions ECU. Other alternatives varied from 184 to 1484 millions ECU¹²⁹:

¹²⁶ Ministerial Decree of 24 March 2000, *Staatscourant*, 31 March 2000, No. 65, 16. Exhibit No. 77.

¹²⁷ Lisee, *Intensivering goederenverkeer IJzeren Rijn – ecologische effecten op het Vogelrichtlijngebied nr. 21 en Habitatrichtlijngebied nr. 32 te Neerpelt en Hamont-Achel*, Final version, August 2002, p.85. Exhibit No. S5.

¹²⁸ Ontwerp van rapport "IJzeren Rijn" voor de Ministers van Vervoer van België, Nederland en Duitsland, opgemaakt door de ambtelijke stuurgroep. VE/IJz. Rijn (98) 9, 8ste herz., versie 05.03.99. Exhibit No. 78.

¹²⁹ *Loc. cit.*, p. 13.

“2.4 Comparison of the alternatives with cost estimation

<i>Track</i>	<i>Length up to Duisburg (km)</i>	<i>Length up to Rheydt (km)</i>	<i>Belgium</i>	<i>Netherlands</i>	<i>Germany</i>	<i>Total</i>
<i>A</i>	<i>212</i>	<i>163</i>	<i>29</i>	<i>55 + 595 (NL) to 345 (B) [note 3]</i>	<i>5,9</i>	<i>89,9 + 595 (NL) 345 (B)</i>
<i>A1</i>	<i>214</i>	<i>165</i>	<i>29</i>	<i>73</i>	<i>240</i>	<i>342</i>
<i>A2</i>	<i>215</i>	<i>166</i>	<i>29</i>	<i>135 [note 4]</i>	<i>50</i>	<i>214</i>
<i>B</i>	<i>211</i>	<i>190</i>	<i>29</i>	<i>100</i>	<i>65</i>	<i>194</i>
<i>C</i>	<i>199</i>	<i>178</i>	<i>29</i>	<i>250</i>	<i>65</i>	<i>344</i>
<i>D</i>	<i>229</i>	<i>208</i>	<i>29</i>	<i>90</i>	<i>65</i>	<i>184</i>
<i>F</i>	<i>218</i>	<i>197</i>	<i>182</i>	<i>280</i>	<i>65</i>	<i>527</i>
<i>G</i>	<i>225</i>	<i>204</i>	<i>0</i>	<i>390</i>	<i>65</i>	<i>455</i>
<i>H</i>	<i>263</i>	<i>312</i>	<i>0</i>	<i>480</i>	<i>0 to 1000</i>	<i>480 to 1480</i>

Footnote 3: This relates to the tunnel of 6,5 km. under the Meinweg area, not including the additional environmental measures in Roermond. The Netherlands estimate that this tunnel will cost 595 million ECU, while Belgium’s estimation is 345 ECU (for a double track drilled tunnel, which from a technical viewpoint is the most expensive solution).

Footnote 4: This does not include the additional environmental measures in Roermond.”

With respect to the length of procedures to be followed, the report concluded as follows¹³⁰:

“3.4 Summary of the procedures

<i>Track</i>	<i>Belgium</i>	<i>Netherlands</i>	<i>Germany</i>
<i>A</i>	<i>6 months</i>	<i>Probably 5 years</i>	<i>1 year (modernisation) min. 5 years (complete construction)</i>
<i>A1</i>	<i>6 months</i>	<i>Minimum 7 years</i>	<i>Minimum 5 years</i>
<i>A2</i>	<i>6 months</i>	<i>Minimum 7 years</i>	<i>Minimum 5 years</i>
<i>B</i>	<i>6 months</i>	<i>5 years</i>	<i>Minimum 5 years</i>
<i>C</i>	<i>6 months</i>	<i>Minimum 7 years</i>	<i>Minimum 5 years</i>
<i>D</i>	<i>6 months</i>	<i>5 years</i>	<i>Minimum 5 years</i>
<i>F</i>	<i>5 years</i>	<i>Minimum 7 years</i>	<i>Minimum 5 years</i>
<i>G</i>	<i>3 years</i>	<i>3 years</i>	<i>Minimum 5 years</i>
<i>H</i>	<i>3 years</i>	<i>3 years</i>	<i>Minimum 5 years</i>

¹³⁰ *Loc. cit.*, p. 18.

33. During a ministerial meeting of 29 March 1999, the Belgian and German ministers manifested their wish to proceed with the reactivation of the Iron Rhine as soon as possible, indicating also their preference for the historic track. The Dutch representative, however, while acknowledging the importance of the project in the context of a modal shift policy, urged that further study was required, notably in view of the environmental status of the Meinweg area¹³¹. The Minister of Transports of the Netherlands, Mrs. Netelenbos, confirmed this viewpoint by letters of 13 April and 3 May 1999 to the President of the Permanent Commission on Transports of the Dutch Parliament (Tweede Kamer)¹³².

34. In order to take a final decision on the reactivation of the Iron Rhine for the end of the first semester of 2001 at the latest, Belgian Minister Durant and Dutch Minister Netelenbos signed a Memorandum of Understanding on the Iron Rhine on 28 March 2000¹³³.

Having underscored “*the importance that in the constantly developing internal market, goods can be transported quickly by rail via the Belgian and Dutch harbours from and to the Hinterland*” and that “*access to the infrastructure available thereto, shall be free for all railway undertakings*”¹³⁴, the Memorandum sought to schedule the additional studies requested by the Netherlands. Paragraphs 2 to 4 provided as follows (unofficial translation):

“Both countries shall closely cooperate with Germany in an international study of the positive and negative consequences of the reactivation of the Iron Rhine and of the possible alternative tracks. This study considers the situation “as if there were no border”. The results of this study must be available in March 2001, so that at that moment the international decision-making can take place.

Given the relationship between the international study and the Dutch EIA, the Netherlands will make their utmost effort to have the results of the EIA for the part of the Iron Rhine that lays on Dutch territory, ready in March 2001. In the EIA the following will be investigated:

¹³¹ Verslag van het overleg tussen de Belgische, Nederlands en Duitse Ministers van Vervoer over de reactivering van de IJzeren Rijn, gehouden te Brussel op 29 maart 1999 (Report of the meeting between the Belgian, Dutch and German Ministers of Transports on the reactivation of the Iron Rhine, held in Brussels on 29 March 1999), VE/Ijz. Rijn./M PV 1 2e herz., 19 May 1999. Exhibit No. 79.

¹³² Letters of 13 April 1999 and of 3 May 1999 of the Dutch Minister of Transports of the Netherlands to the President of the Permanent Commission on Transports of the Tweede Kamer. Exhibits Nos. 80 and 81.

¹³³ Memorandum of Understanding van 28 maart 2000 tussen Minister Durant en Minister Netelenbos over de IJzeren Rijn (Memorandum of understanding of 28 March 2000 between the Belgian Minister of Transports and the Dutch Minister of Transports concerning the Iron Rhine). Exhibit No. 82.

¹³⁴ *Loc. cit.*, para. 1.

- *For the short term the possible temporary, limited reactivation of the complete historic track, this temporary reactivation being applicable until the definitive track is being put into use.*
- *For the final solution all relevant tracks shall be studied; possibilities for the transportation of passengers will also be examined.*

*The Netherlands and Belgium will propose Germany to discuss trilaterally the progress of the EIA study on a regular basis. The Netherlands invites Belgium to designate a civil servant who can follow the progress of the EIA study from day to day.”*¹³⁵

With respect to the temporary use of the railway line, pending its adaptation, paragraphs 5 and 6 stated (unofficial translation):

“The decisions on the temporary use and the definitive track will be taken simultaneously.

*If, when decisions are taken on the temporary and definitive track ultimately mid 2001, the EIA-study concludes that a temporary, limited use will not cause irreversible environmental damage, then, from end 2001 onwards a few trains a day will be allowed to use the whole historic track at limited speed between 7 AM and 7 PM. Under these same conditions of timely decision-making and of absence of irreversible environmental damage, trains could, from end 2002 onwards, also use temporarily the whole historic track at limited speed in evening hours and at night, up to a maximum of fifteen per natural day (both directions summed up). The possible loss of nature value will be compensated.”*¹³⁶

¹³⁵ Exhibit No. 82. Authentic text: «Beide landen zullen nauw met Duitsland samenwerken in een internationale studie naar positieve en negatieve gevolgen van reactivering van de IJzeren Rijn en van mogelijke alternatieve tracé's. Deze studie beoordeelt de situatie “alsof er geen grens is”. De resultaten van deze studie dienen in maart 2001 ter beschikking te zijn, zodat op dat ogenblik internationale besluitvorming kan plaatsvinden. Gelet op de samenhang tussen de internationale studie en de Nederlandse MER zal Nederland zich tot het uiterste inspannen om in maart 2001 het resultaat van de MER voor het deel van de IJzeren Rijn, dat op Nederlands grondgebied ligt, op tafel te hebben. In die MER zullen worden onderzocht:

. voor de korte termijn de eventuele tijdelijke, beperkte heringebruikneming van het volledige historische tracé; deze tijdelijke heringebruikname geldt tot het definitieve tracé in gebruik wordt genomen.
. voor de definitieve oplossing worden alle relevante tracé's bestudeerd; hierbij zullen ook de mogelijkheden voor reizigersvervoer worden bezien.

Nederland and België zullen Duitsland voorstellen de voortgang van de MER studie regelmatig trilateraal te bespreken. Nederland nodigt België uit een ambtenaar aan te wijzen, die de voortgang van de MER-studie van dag tot dag kan volgen”.

¹³⁶ Exhibit No. 82. Authentic text: “De beslissingen over het tijdelijk gebruik en het definitieve tracé zullen gelijktijd worden genomen. Bij besluitvorming over het tijdelijke en definitieve tracé uiterlijk medio 2001 zullen, indien de MER_studie uitwijst dat een tijdelijk, beperkt gebruik geen onherstelbare milieuschade zal veroorzaken vanaf eind 2001 enkele treinen per dag met beperkte snelheid tussen 07.00 en 19.00 uur van het gehele historische tracé gebruik kunnen maken. Onder dezelfde voorwaarden van tijdige besluitvorming en van uitblijven van onherstelbare milieuschade zouden vanaf eind 2002 ook in de avonden en 's nachts treinen tijdelijk met beperkte snelheid gebruik kunnen maken van het gehele tracé tot een maximum van 15 per etmaal (beide richtingen opgeteld). Het eventuele verlies aan natuurwaarde zal worden gecompenseerd”

Paragraphs 7 and 8 of the Memorandum referred to the Separation Treaty of 1839 and the Iron Rhine Treaty of 1873 (unofficial translation):

“If it is decided that the definitive track shall be another track than that passing through the Meinweg (which The Netherlands assumes, but not Belgium), this track will be considered the complete fulfilment of the obligations under public international law arising from the Separation Treaty of 1839 and the Belgian-Dutch Iron Rhine Treaty of 1873. These agreements will be laid down in a Treaty.

Until the choice is made for the definitive track, Belgium reserves all rights, which flow from the Separation Treaty of 1839 and the Belgian-Dutch Iron Rhine Treaty of 1873.”¹³⁷

Later on, in a letter of 7 January 2000 to the Commission of Transports of Dutch parliament¹³⁸, and subsequently on 18 December 2001¹³⁹ and on 29 January 2002¹⁴⁰, Mrs. Netelenbos the Dutch Minister of Transports Mrs. Netelenbos declared and reiterated before the Dutch Parliament, that Belgium enjoyed a “right of passage” under international law, which the Netherlands should respect.

Other aspects of the Memorandum were confirmed trilaterally in a meeting between Dutch, Belgian and German Ministers of Transports on 5 April 2001. It was notably confirmed that decisions on temporary and long-term driving would be taken simultaneously, and further,

¹³⁷ Exhibit No. 82. Authentic text: *“Indien beslist wordt dat het definitieve tracé een ander tracé is dan dat door de Meinweg (waar Nederland van uit gaan, maar België niet), zal dit tracé worden beschouwd als volledige invulling van de volkenrechtelijke verplichtingen uit het Scheidingsverdrag van 1839 en het Belgisch-Nederlands IJzeren Rijn-Verdrag van 1873. Deze afspraken zullen in een Verdrag worden vastgelegd. Totdat de keuze is gemaakt voor het definitieve tracé, behoudt België zich alle rechten voor, die voortvloeien uit het Scheidingsverdrag van 1839 en het Belgisch-Nederlands IJzeren Rijn-Verdrag van 1873”.*

¹³⁸ Letter of the Dutch Minister of Transports to the Chairperson of the Permanent Commission on Transports, Tweede Kamer, 7 January 2000, ref. DGG/SR/99008667. Exhibit No. 83. Authentic text: *“Uit artikel 12 van het Verdrag blijkt dat België “recht van doortocht” heeft via Nederlands grondgebied en dat de aanleg dient te geschieden voor rekening van België.”* Unofficial translation: *“It appears from Article 12 of the Treaty that Belgium has a “right of passage” through Dutch territory and that the construction shall take place at the expense of Belgium.”*

¹³⁹ Handelingen, Tweede Kamer, 2001-2002, 18 December 2001, nr. 37, 2746-2748 (question time). Exhibit No. 84.. Authentic text: *“Het Scheidingsverdrag met België is nooit herzien, ook niet op het punt van het recht van overpad, zoals België dat indertijd heeft afgesproken. België kan een beroep doen op het Scheidingsverdrag.”.* Unofficial translation: *“The Separation Treaty with Belgium has never been revised, not even as regards the right of passage, as it was agreed upon by Belgium years ago. Belgium is entitled to rely on the Separation Treaty.”*

¹⁴⁰ Letter of the Dutch Minister of Transports to the Chairperson of the Tweede Kamer, 29 January 2002, ref. DGG/TR/02/000114-fvh. Exhibit No. 85. Authentic text: *“Op grond van die verdragen heeft België recht op de aanleg en het gebruik van de bedoelde verbinding tussen België en Duitsland via Nederland. Nederland dient deze volkenrechtelijke verplichting te respecteren en na te leven.”.* Unofficial translation: *“On the basis of these Treaties Belgium is entitled to the construction and the use of the said connection between Belgium and Germany via The Netherlands. The Netherlands must respect and comply with this obligation of public international law.”*

*“The Netherlands covenants that, if a positive decision is taken with respect to temporary driving (in the Dutch procedure, ultimately in November 2001), 15 trains a day will drive on the historical route in September 2002 at the latest.”*¹⁴¹

35. In May 2001, the Environmental Impact Assessment “Trajectnota / MER IJzeren Rijn” was delivered by Railinfrabeheer, the Dutch public service in charge of railway infrastructure, and the Directorate-General Rijkswaterstaat (Ministry of Transport)¹⁴². The study’s conclusions related to a provisional use for a five years period starting in 2002, as well as to a definitive solution as from 2008/2010.

With respect to provisional use, the study concluded that using the historic track was the only alternative and that, on the assumption that the track be used by 15 trains per day, no irreversible damage would be caused during the five-years period contemplated¹⁴³.

With respect to the structural (long-term) solution, seven alternatives were envisaged, which included the use, in whole or in part, of the historic track (alternatives A) as well as alternatives via Venlo (alternatives D)¹⁴⁴. The study evaluated these alternatives from a number of different perspectives: first, on the assumption that all environmental themes are of equal importance; second, on the assumption that human environment, *i.e.*, effects in urban areas have the greatest importance; and third, on the assumption that nature and landscape, *i.e.*, effects in rural areas, should be accorded predominant weight¹⁴⁵.

On the first, so-called “neutral” assumption, the A alternatives were considered preferable, in particular alternatives A1 and A1.n, both leaving the historic track West of Roermond. On the second assumption, according greater weight to human environment, the alternatives A1, A1.n and A3 (passing North of Roermond) obtained the best score. On the third assumption,

¹⁴¹ Verslag van het overleg tussen de Belgische en Nederlandse Ministers en de Duitse Staatssecretaris van Vervoer over de reactivering van de IJzeren Rijn, gehouden te Luxemburg op 5 april 2001 (report of the discussions between the Belgian and Dutch Ministers and the German Secretary of State for Transport on the reactivation of the Iron Rhine, held in Luxemburg on 5 April 2001), VE/Ijz.Rijn/M (2001) PV1, p. 2. Exhibit No. 86. Authentic text: “Nederland engageert zich dat, bij positief besluit inzake het tijdelijk rijden (in de Nederlandse procedure uiterlijk november 2001), 15 treinen per dag over het historisch tracé zullen rijden tegen ten laatste september 2002.”

¹⁴² Railinfrabeheer and Directorate-General Rijkswaterstaat, *Trajectnota / MER IJzeren Rijn*, Exhibit No. S4 A/B.

¹⁴³ *Op. cit.*, “Samenvatting” (summary), p. 8. Exhibit No. S4 A.

¹⁴⁴ *Loc. cit.*, p. 12-14.

¹⁴⁵ *Loc. cit.*, p. 16.

according predominant weight to nature and landscape, alternative A0 (the entire historic track) was considered best.

On these bases, the Report also identified the “Most Environment-Friendly Alternative” as being alternative A0, *i.e.*, the entire historic track, combined with a series of mitigating measures, notably the covering over of the railway in the Weerter- and Budelerbergen, an earth embankment in the “Leudal” and a tunnel through the Meinweg area. Such measures would prevent any effect in Birds Directive and Habitats Directive areas¹⁴⁶. Failing such measures, the study indicated that priority habitats would be affected in a significant way¹⁴⁷.

Further, the study concluded that, from a technical and economic viewpoint, the A alternatives via Roermond, *i.e.* the original track and its variants, were most attractive for prospective transporters, while the B alternatives via Venlo were more favourable from the perspective of regional economic development, notably in that the construction of new lines would temporarily engender an increase in local employment¹⁴⁸.

This study, however, only considered Dutch territory and provided only limited information to form a sound basis for an international decision on the reactivation of the Iron Rhine¹⁴⁹.

36. The “international study” referred to in paragraph 2 of the Memorandum of Understanding – being the comparative cross-border study performed by Arcadis and funded by the European Commission and by the Belgian, Dutch and German ministries of transport – was also delivered in May 2001¹⁵⁰.

This comprehensive study first analysed the necessity for reactivating the Iron Rhine, identified a number of alternatives to the historic track, and then proceeded with an integral impact assessment as concerns transport time, residual capacity, reliability, positive side effects of freight transport and on passenger transport, noise, vibrations, risk assessment, ground water, flora and fauna, landscape and cultural heritage, agriculture, recreation,

¹⁴⁶ *Loc. cit.*, p. 17.

¹⁴⁷ *Op. cit.*, *Hoofdrapport deel A: Hoofdlijnen*, p. 58. Exhibit No. S4 B.

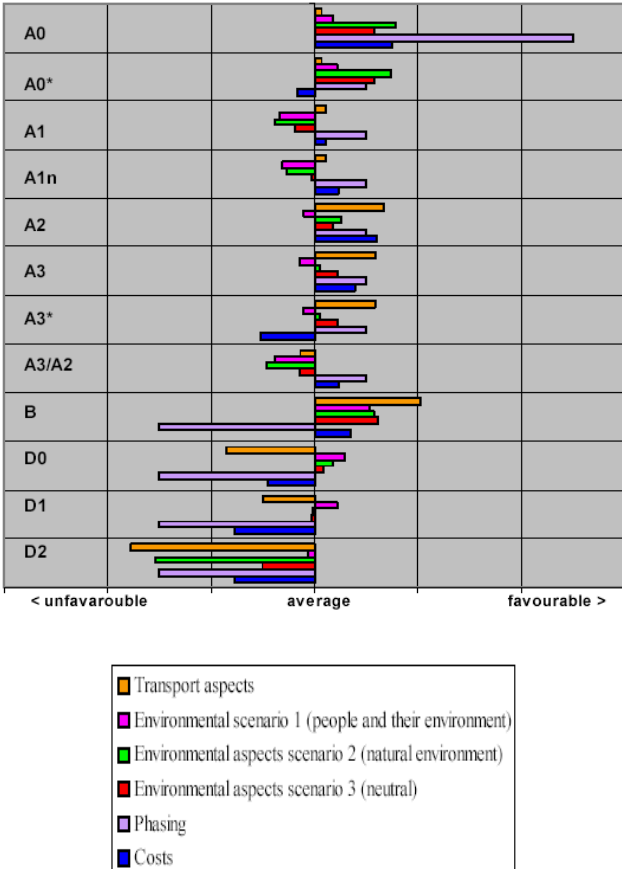
¹⁴⁸ *Op. cit.*, *Samenvatting*, p. 17. Exhibit S4 A.

¹⁴⁹ Arcadis, *op. cit.*, p. 14. Exhibit No. S3.

¹⁵⁰ Arcadis, *op. cit.* Exhibit No. S3.

physical planning, social aspects, costs and phasing possibilities. It then analysed mitigating and compensating measures, before making an overall comparative assessment.

The study concluded that the historic track *without* a tunnel under the Meinweg area was the most favourable alternative. Figure 8.3-1, which is reproduced hereafter, presented the more and less favourable alternatives per theme (transport aspects, several environmental scenarios, phasing and costs), A0 being the entire historic track without a tunnel, A0* same track with a tunnel¹⁵¹:



With respect to the historic track and the question of whether a tunnel should be built, the study commented as follows:

“More favourable alternatives

Alternatives A0 without and with tunnel, A2, A3 without and with tunnel and B are considered relatively more favourable in comparison to the other alternatives. The

¹⁵¹ *Op. cit.*, p. 234.

more favourable alternatives are characterised by the fact that they use existing track to the largest extent. Using existing track results in relatively low costs and limited land take, thus limiting environmental impacts.

Alternative A0 without tunnel

This alternative, passing through Roermond and Mönchengladbach, is the only alternative that is favourable on all 6 themes. Land take within this alternative is limited, because of the use of existing track, which results in limited impacts on aspects as groundwater, nature, landscape and agriculture. Where negative impacts are expected, adequate mitigating and compensating measures are envisaged. Alternative A0 has the best phasing possibilities. The track is already at its future position and only minor measures have to be taken. The building time is very short and it is possible to build parts of the new infrastructure in a later stage, if required by increasing number of trains. Because of the extensive use of existing track, the costs of this alternative are relatively low.”¹⁵²

Leaving aside the overall assessment, the above overview also indicated that track A with a tunnel under the Meinweg area, did not offer significant advantages, if any, as compared to the same route without a tunnel. As concerns the tunnel, the Report noted advantages related to noise reduction and avoidance of fragmentation of the Birds and Habitats Directive areas¹⁵³, but also pointed at a number of negative effects. A potential detrimental effect on ground water protection, which was, however, to be compensated by the closing of the pumping station “Herkenbosch” in 2003:

“Alternatives A0 and A3 with tunnel

A tunnel built through the ‘Meinweg’ causes an ‘underground land take’ of 1.8 ha in the ‘Herkenbosch’ groundwater protection area. As the pumping station ‘Herkenbosch’ will be closed in 2003, the groundwater protection area will not be affected by the construction of the tunnel.”¹⁵⁴

With respect to areas with apparent groundwater levels, the Report noted that “*the excavation of a tunnel in the ‘Meinweg’ permanently affects two of these areas*”¹⁵⁵, and further:

“The construction of a tunnel will probably have influence on the hydrological system. The exact influence must be determined in a more detailed study. On the short term a brown coal extraction site will be opened east of the ‘Meinweg’. ... The impacts of the reactivation of the Iron Rhine could well be negligible compared to the impacts of the brown coal extraction. Further research would be necessary to ascertain this.”¹⁵⁶

¹⁵² *Op. cit.*, p. 235.

¹⁵³ *Op. cit.*, p. 127.

¹⁵⁴ *Op. cit.*, p. 121.

¹⁵⁵ *Op. cit.*, p. 123.

¹⁵⁶ *Op. cit.*, p. 124.

37. The results of the Dutch MER Trajectstudie and the international study by Arcadis were further discussed trilaterally, which gave rise to a note of 20 August 2001 by the competent Belgian, Dutch and German administrations¹⁵⁷. The note analysed the underlying reasons of differing conclusions in the Dutch and the international studies. It notably indicated that, if the track (alternative A1/A1n) passing north of Roermond and the Meinweg was considered very favourable in the Dutch study while it was regarded as rather unfavourable in the international study, this was due to the fact that this track avoided a number of problems for human environment and nature on Dutch territory, but had important negative consequences for Germany¹⁵⁸. With respect to the tunnel under the Meinweg area, it was noted that, whereas the Dutch study accorded great benefits to the construction of an embankment, the effects of which on groundwater would be negligible, the international study, conversely, taking the same type of tunnel as a starting point, esteemed that, due notably to effects on groundwater, the mitigating effects of such tunnel would be negligible¹⁵⁹.

A further Dutch report of 6 September 2001, reviewing the abovementioned Dutch EIA of May 2001, confirmed that the Dutch EIA did not sufficiently take account of the effect of a tunnel on the hydrological system. It also noted that no account had been taken of the fact that the existing dike, which was to be removed for the purpose of constructing a tunnel, was an important habitat for species protected under the Habitats Directive. This, however, could be taken into account when determining construction methods and the seasons during which the works should take place¹⁶⁰. With respect to the Habitats and Birds Directives requirements, the report criticized the fact that protective measures required *outside* the special protection areas had not been studied, but again, opined that this could be done at a later stage¹⁶¹.

38. During an informal meeting of the Belgian, Dutch and German Ministers of Transports on 21 September 2001, it was confirmed that a global decision would be taken as

¹⁵⁷ Gezamenlijke nota t.b.v. eerste ministerieel overleg inzake de IJzeren Rijn, opgesteld door de Ambtelijke Stuurgroep in beperkte samenstelling (Common note in view of the first ministerial discussions on the Iron Rhine, drafted by the administrative steering group with restricted membership), 20 August 2001, VE/Ijz. Rijn/restr. (2001) 4 def. Exhibit No. 87.

¹⁵⁸ *Op. cit.*, p. 4, para. 1.1.

¹⁵⁹ *Op. cit.*, p. 4, para. 3.

¹⁶⁰ Toetsingsadvies over het milieueffectrapport Goederenspoor Antwerpen – Ruhrgebied: IJzeren Rijn (Review advice on the EIA goods railway Antwerp-Ruhr area: Iron Rhine), 6 September 2001, p. 3-5. Exhibit No. 88.

¹⁶¹ *Op. cit.*, p. 8-9.

provided in the Memorandum of Understanding (double decision on definitive track, temporary driving and repartition of costs). The Ministers insisted on the importance of executing the works as soon as possible with a minimal hindrance to temporary traffic¹⁶²

5. The European Commission's position

39. On 5 July 2001, the three countries concerned met with the Directorate-General Environment of the European Commission. Items discussed during this meeting led to a provisional¹⁶³ and then a final¹⁶⁴ statement by the Directorate General Environment. The quotes hereafter are from the final version, with the few diverging sentences in the provisional version added and identified as such.

40. The first question related to Article 6, §3 of the Habitats Directive, which provides that *“any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives”*¹⁶⁵. The question asked was, whether such appropriate assessment should be based on the present-day situation of the area concerned, or on the situation, which prevailed at the prior date, when the area was designated as a Natura 2000 site within the framework of the Habitats or Birds Directive¹⁶⁶. In that respect, the Commission answered:

“- It is understood that this question is asked because at the time of the SPA [special protection area, under the Birds Directive] designation of “De Meinweg” (1994), there were still trains running through the area and this was duly mentioned in the designation forms, whereas in 1998, when the same site was designated as a pSCI, there was no more rail traffic. This situation could lead to difficulties for the

¹⁶² Memo van het informeel overleg tussen de Belgische, Nederlandse en Duitse ministers van vervoer over de reactivering van de IJzeren Rijn, gehouden te Den Haag op 21 september 2001 (Memo of the informal discussions between the Belgian, Dutch and German ministers of transports on the reactivation of the Iron Rhine, held at the Hague on 21 September 2001), VE/Ijz.Rijn (2001) PV2 of 24 September 2001. Exhibit No. 89.

¹⁶³ Iron Rhine Railway Project, Meeting at DG ENV on 5 July 2001 (provisional version) annexed to Gezamenlijke nota t.b.v. eerste verkennend ministerieel overleg inzake de IJzeren Rijn, *op. cit.* Exhibit No. 87.

¹⁶⁴ Letter from the European Commission to the Belgian, Dutch and German Ministries of Transports, dated 19 September 2001. Exhibit No. 90.

¹⁶⁵ Council Directive No. 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, *O.J.* L206, 22 July 1992. Exhibit No. 70.

¹⁶⁶ Exhibit No. 90.

determination of the impact of train traffic on the state of conservation of this particular site.

- In our opinion the reference situation to be considered is the following:

Concerning the SPA, the reference situation should be the state of conservation of the area in 1981, which was the original deadline for the SPA designations according to the Birds Directive 79/409. As prescribed by art. 4/4 of the Birds Directive and ensuing Case Law (C-355/90 – “Santona judgment”), measures should have been taken by NL to avoid pollution or deterioration of habitats or any disturbances affecting birds between 1981 and the moment of designation in 1994. From the designation data, it can be expected that the site still qualified with SPA criteria in 1994 and thus there should have been no significant deterioration since 1981, given that regular train traffic had existed for more than 100 years until 1991.

Concerning the pSCI [site of Community importance, under the Habitats Directive], the same reasoning applies. Our opinion is that Member States should not allow deterioration of sites meeting the scientific criteria for designation during the 1st phase of the procedure set out in annex III of the HD, even when not yet designated as such, as this would prejudice the objectives of the directive. This implies that we can reasonably assume that the existence of train traffic prior to the designation deadline in 1998 (until 1994) did not have affected the state of conservation of habitats and species for which the area would qualify as a future pSCI. As no information was made available about other activities that may have been detrimental to the conservation objectives of the site, it seems improbable that the pSCI’s conservation values only developed during the relatively short timespan between complete stop of railway traffic in 1994 and designation in 1998.”¹⁶⁷

The Commission thus esteemed that the conservation value of the area, which is to be protected pursuant to European Community law, was the one, which prevailed in 1981 as far as the Birds Directive were concerned, and that of 1994 as concerns the Habitats Directive. At both these dates, the Meinweg area was still crossed by railway traffic, so that restoring that traffic would be in full conformity with the Birds and Habitats Directives. It may be noted that this finding in favour of Belgium, did not take account of the possibility recognized in the European Court’s judgment of 25 November 1999 in *Commission v. France*, that the Netherlands, at the moment of notification, wrongly omitted to subtract the strip of the Iron Rhine track from the site to be protected, so that it could still be excluded from the protected zone without this being considered a reduction in the surface area of the site¹⁶⁸.

¹⁶⁷ *Loc. cit.*, p. 2. Exhibit No. 90.

¹⁶⁸ ECJ, *Commission v. France*, Case No. C-96/98, E.C.R., 1999-I, p. 8531 ff. Exhibit No. J 15.

41. The second question asked to the Commission related to the mandatory contents of the lists of priority habitats and priority species, which Member States should submit to the Commission for decision:

“2. Does the fact that a priority habitat (even over a very small surface) exists or that a priority species occurs (even in very small numbers) in a designated pSCI oblige Member States to list it in the Natura 2000 forms? In other words: is it mandatory that all priority habitats or spp. present on a given site occur in the forms that are transmitted to the EC?”

The Commission answered:

“- Our interpretation of the relevant dispositions of the HD is that, if a proposed site hosts a priority habitat or species, this has to be mentioned in the Natura 2000 data form. Section 3 of the Natura 2000 form requires that for each of the habitat and species listed in annexes I and II of the HD, an evaluation of the interest is made in accordance with the criteria of annex III of the directive.

- To this has to be added that the mentioning of occurrence of priority habitats by third parties (such as in consultants’ reports or notifications from other non official sources), needs to be verified and endorsed by competent Member States authorities (and eventually followed by transmission of additional designation data to DG Environment) before it can be taken into account by EC services”¹⁶⁹

42. The third question was, whether the Commission could give an indication for the timeframe within which it expects to be able to answer a request for an opinion of the Commission, as mentioned in art. 6, § 4, of the Habitats Directive¹⁷⁰, which provides as follows:

“4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.”¹⁷¹

¹⁶⁹ *Loc. cit.*, p. 2. Exhibit No. 90.

¹⁷⁰ *Loc. cit.*, p. 3. Exhibit No. 90.

¹⁷¹ *Ibid.*

The Commission answered that, although no binding rules are given by the Habitats Directive on this point, they had practised an indicative three months delay for answering such requests¹⁷². They added:

“We would like to stress, however, that this applies only in the case of presence of a priority habitat or species and existence of other imperative reasons of overriding public interest than those mentioned in art. 6/4§2 HD.”¹⁷³

The Commission then made following additional remarks:

“- It is our opinion that an increase in noise level caused by passing trains would not appear to be regarded as producing a significant effect (as far as conservation objectives based on the HD are concerned) on a forest habitat when its territorial integrity is not affected. For the specific case of impact on wildlife, this would need to be considered in relation to the species for which the site has been proposed on a case by case basis. (comp. provisional version : ‘As far as wildlife is concerned, we hold the view that its resilience to traffic noise has been amply demonstrated’).

- We feel that the assessments of the IR project’s impacts which were put at our disposition have only marginally touched the issue of potential general environmental benefit that may result from shifting more transport capacity to freight railways in the framework of current EU transport policy. Such a shift in transport mode may allow for growth of more environmentally friendly ways of transport and might eventually imply “beneficial consequences of primary importance for the environment” (art. 6/4 HD) (comp. provisional version: ‘We believe that the assessments of the IR project carried out hitherto could give more importance to environmental benefits resulting from the shift in transport mode (sic) proposes’.)”¹⁷⁴

The Commission then made following general remarks:

“- The above considerations only apply to the proposal to reopen the existing railway line and to restore traffic to a level that has existed before. All interventions going beyond the original traffic capacity such as upgrading, raising of the transport capacity, installing a second track etc. should be considered separate projects and have to be assessed specifically.

- On one hand, it should be bore in mind that Natura 2000 is not to be considered as a collection of strict nature reserves where no other activities than conservation related ones are allowed. Neither the Birds Directive nor the Habitats Directive can be interpreted in such a way because the basic philosophy of Natura 2000 is to allow sustainable use of natural resources go hand in hand with the conservation of nature. On the other hand, Member States have the right to impose more stringent

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

*environmental framework conditions and conservation measures than what is requested by Community Directives, e.g. when integrating existing nature reserves in Natura 2000. They should not, however fall back on EC nature protection directives to justify measures that go beyond their contents.”*¹⁷⁵

In sum, it would appear that the Commission esteemed that the Netherlands unduly relied on European Community law so as to prevent the re-activation of the Iron Rhine, thereby also neglecting environmental benefits resulting from the modal shift.

The Commission, it should be added, then made a reservation to the effect that “*only the European Court of Justice has a mandate to produce legally binding interpretations of Community directives*” and that if the Member States concerned “*want to obtain a binding statement about certain aspects of community legislation, this can be obtained by requesting a pre-judiciary opinion from the Court*”¹⁷⁶.

Later on, the Dutch Minister of Transport, Mrs. Netelenbos, declared in Parliament:

“.. the Commission has informed me that in their view, even the construction of two embankments on the track of the Iron Rhine is unnecessary. We have asked Belgium to do so, because the train would then, more or less, pass underground in the Meinweg area and alongside Veghel and Budel. According to the Commission, the Habitat Directive does not play any role in this matter, because the TENS-networks are of greater importance. My question to the Commission, therefore, hasn't helped me at all”..¹⁷⁷

The minister also wished “*to discourage the local authorities to take action with the Commission, because the result [was] predictable*”¹⁷⁸.

43. On 6 February 2002, a European Parliament member asked the Commission, notably, whether it is “*necessary to build a tunnel under the nature reserve near Roermond, pursuant*

¹⁷⁵ *Ibid.*

¹⁷⁶ *Loc. cit.*, p. 4.

¹⁷⁷ Tweede Kamer, Verslag van een notaoverleg, vastgesteld 17 december 2001 (Report of a note discussion, adopted on 17 December 2001), p. 44. Authentic text: “*.. de Commissie heeft mij laten weten dat volgens haar zelfs de aanleg van twee holle dijken in het tracé van de IJzeren Rijn niet nodig is. Wij hebben België hierom gevraagd, omdat de trein dan min of meer onder de grond door het Meinweggebied en langs Veghel en Budel zou rijden. De habitatrictlijn spelt volgens de Commissie daarbij geen rol, omdat het belang van de TENS-netwerken groter is. Mijn vraag aan de Commissie heeft mij dus in het geheel niet geholpen. Exhibit No. 91.*

¹⁷⁸ *Loc. cit.*, p. 45. Authentic text: “*Ik wil de gemeenten ontmoedigen om actie te ondernemen bij de Commissie, omdat de uitkomst na deze uitspraak voorspelbaar is*”.

to the European Habitats and Birds Directives”. On 22 March 2002, Mrs. Wallström, speaking on behalf of the Commission, declared:

*“The nature protection Directives (...) do not give a mandate to the Commission to take decisions, in the framework of mitigation or compensation measures related to the effects of infrastructure projects, about the necessity to build tunnels under any of the sites designated as part of the Natura 2000 network or belonging to Member States’ own national nature reserves.”*¹⁷⁹

In answer to another parliamentary question concerning a complaint procedure against the Netherlands and two complaint procedures against Germany relating to the reactivation of the Iron Rhine, Mrs. Wallström, speaking on behalf of the Commission, declared on 17 October 2002:

“As far as the Commission is aware, no final decision by the national authorities has yet been taken as to the re-opening of the Iron Rhine.

*The Commission closed the complaint case against the Netherlands as the re-opening of the Iron Rhine, to the extent that it had been practised until 1994, did not infringe upon the Birds and Habitats Directives. An international assessment of the project has shown that the re-opening of the existing line would be the most environmentally friendly and the most economical option. In addition, it is improbable that restoring railway traffic would significantly affect the area’s conservation values. The sites “Meinweg” and “Weerter en Budelerbergen”, that will possibly be affected by the re-opening of the Iron Rhine, have been designated as special protection areas under the Birds Directive and notified as proposed sites of Community importance under the Habitats Directive. At the time of the respective designation and notification, however, the railway had already been operational for more than 100 years in the area. (..)”*¹⁸⁰

¹⁷⁹ Declaration of Mrs Wallström on behalf of the Commission on 22 March 2002, *O.J.* C 172 E, 18 July 2002, p. 163. Exhibit No. 92.

¹⁸⁰ Declaration of Mrs Wallström on behalf of the Commission on 17 October 2002, *O.J.* C92E, 17 April 2003, p. 181-182. Exhibit No. 93.

6. Calculation and Repartition of Costs

44. Dutch and Belgian railway administrations also continued studying the costs involved in reactivating the Iron Rhine.

As already indicated above, a first estimation of costs had been made early 1999. The historic track without a tunnel was estimated to 89,9 millions ECU, the same track with a tunnel between 684, 9 and 434,9 millions ECU¹⁸¹.

When cost estimations made at the request of the Dutch Railinfrabeheer were reviewed by the Belgian TUCRail, it appeared that costs as estimated by TUCRail were 64 percent lower for the Weerter- en Budelerbergen tunnel, 49 percent lower for the Meinweg tunnel, and 37 percent lower for the by-pass at Roermond¹⁸². Dutch and Belgian authorities then requested KPMG to inquire into the reasons of such differences. KPMG identified four reasons for this. First, unit prices for different types of concrete constructions differed, the Dutch prices being twice as high as the Belgian prices¹⁸³. Second, KPMG pointed at differing views on technical requirements, due to the fact that the Dutch study took more accurate account of the societal and normative context prevailing in the Netherlands¹⁸⁴. Third and fourth, there were a number of differences in calculation methods. Corrections made by KPMG notwithstanding, differences between Belgian and Dutch estimations remained very significant¹⁸⁵.

45. In order to limit costs involved in some of the environmental protection measures envisaged on Dutch territory, notably the covering over of the railway in the Weerter- en Budelerbergen area, it was envisaged to limit the line between the Belgian border and Weert to single track, which would not give rise to capacity problems provided that part of the existing line be transformed into double track on the Belgian side of the border¹⁸⁶.

¹⁸¹ See above, para. 32 and *Exhibit* No. 78.

¹⁸² KPMG, *Vergelijking Kostenraming IJzeren Rijn – samenvatting* (Comparative costestimation Iron Rhine – summary), 12 February 2002, p. 2. *Exhibit* No. 94.

¹⁸³ *Ibid.*

¹⁸⁴ *Op. cit.*, p. 3.

¹⁸⁵ *Op. cit.*, p. 3-4.

¹⁸⁶ *Verkeer- en Waterstaat / Railinfrabeheer, Opbouw investeringskosten – modernisering Nederlands gedeelte IJzeren Rijn* (Investments costs – modernisation of the Dutch part of the Iron Rhine), 20 June 2002, p. 1. *Exhibit* No. 95.

46. Repartition of costs, however, proved as much an issue. In the report prepared by the Belgian, Dutch and German authorities early 1999, the respective viewpoints were described as follows. The Netherlands esteemed (unofficial translation):

“The Netherlands are of the opinion that with respect to the repartition of costs between the countries, one should take the repartition of benefits (from a business economics and a socio-economic viewpoint) as a starting point. This may lead to contributions by some countries to investments which are to be made in other countries. This also occurred in the past (the original Iron Rhine, the deepening and maintenance of the Western Scheldt, the Scheldt-Rhine connection, the canal Ghent-Terneuzen, the radar chain “Western Scheldt” and the HST-South”¹⁸⁷

The Belgian viewpoint was as follows (unofficial translation):

“Belgium esteems that each country should bear investments in infrastructure on its own territory, including all investments required as a consequence of environmental protection measures.”¹⁸⁸

The report concluded (unofficial translation):

“Germany and Belgium accept the principle that each country must bear the investments of infrastructure on its own territory (including environmental investments).

For the Netherlands, this could engender problems as priorities are identified, inter alia, on the basis of the profitability of the investment. The Netherlands are of the opinion that the starting point for the sharing of burdens between the countries should be the repartition of benefits (from a business economics and a socio-economic viewpoint).” “Duitsland en België onderschrijven het principe dat elk land de infrastructuurinvesteringen op zijn grondgebied moeten dragen (inclusief de milieu-investeringen).¹⁸⁹

¹⁸⁷ *Loc. cit.*, p. 24. Authentic text: “Nederland is van oordeel dat uitgangspunt voor de verdeling van de lasten tussen de landen de verdeling van de baten (bedrijfseconomisch en sociaal-economisch) moet zijn. Dit kan leiden tot bijdragen van landen aan investeringen in een ander land. Dit is in het verleden ook gebeurd (de originele IJzeren Rijn, de verdieping en het onderhoud van de Westerschelde, de Schelde-Rijn verbinding, het kanaal Gent-Terneuzen, de walradarketen ‘Westerschelde’ en de HSL-Zuid).”

¹⁸⁸ *Loc. cit.*, p. 25. Authentic text: “België is van oordeel dat elk land de infrastructuurinvesteringen op zijn grondgebied moet dragen met inbegrip van alle investeringen die nodig zijn ingevolge milieubeschermingmaatregelen.”

¹⁸⁹ *Loc. cit.*, p. 25. Authentic text: “Duitsland en België onderschrijven het principe dat elk land de infrastructuurinvesteringen op zijn grondgebied moeten dragen (inclusief de milieu-investeringen). Voor Nederland kan dit een probleem betekenen omdat de prioriteitstelling gebeurt op basis van ondermeer de rentabiliteit van de investering. Nederland is van oordeel dat uitgangspunt voor de verdeling van de lasten tussen de landen de verdeling van de baten (bedrijfseconomisch en sociaal-economisch) moet zijn.”

In the meeting of Belgian, Dutch and German ministers of transport on 9 December 1999, the allocation of costs was discussed again. It was stated (unofficial translation):

“As concerns the repartition of costs for the limited reactivation, Belgium and Germany take the territoriality principle as a basis. The Netherlands, to the contrary, state that on the basis of the Separation Treaty of 1839 which accords Belgium the right of passage, Belgium should also bear the costs on Dutch territory. The Dutch minister declares that she is unable to provide for budgetary means before 2010.”¹⁹⁰

Later on, the Memorandum of Understanding of 28 March 2000 contemplated the repartition of costs for the temporary reactivation and for the works required for a long-term solution, respectively. Paragraphs 9 and 10 provided (unofficial translation):

“The costs for the temporary reactivation of the historic track shall be borne by Belgium. (...) For the construction of the definitive track The Netherlands are willing to bear part of the costs related thereto. Further agreements will be made in this respect after the definitive track has been chosen.”¹⁹¹

47. In the note of 20 August 2001 by the Belgian, Dutch and German administrations reflecting on the results of the Dutch MER Trajectstudie, the international study by Arcadis and the European Commission’s position¹⁹², the participating States again expressed their viewpoints with respect to the repartition of costs for the definitive track, covering both one-time investment and yearly management and maintenance costs – it being understood that the costs of a temporary use of the historic track would be born by Belgium as provided in the Memorandum of Understanding of 28 March 2000.

¹⁹⁰ Verslag van het overleg tussen de Belgische en Nederlandse Ministers en de Duitse Staatssecretaris van Vervoer over de reactivering van de IJzeren Rijn, gehouden te Brussel op 9 December 1999 (Report of the meeting between Belgian and Dutch Ministers and the German Secretary of State for Transports on the reactivation of the Iron Rhine, held in Brussels on 9 December 1999), VE/Ijz. Rijn/M (99) PV 3. Exhibit No. 96. Authentic text: *“Met betrekking tot de kostenverdeling voor de beperkte heringebruikname gaan België en Duitsland uit van het territorialiteitsprincipe. Nederland daarentegen stelt dat op grond van het Scheidingsverdrag van 1839 dat België het recht van doortocht verleent, België ook de kosten op Nederlands grondgebied zou moeten dragen. De Nederlandse minister beweert geen budgettaire voorzieningen te kunnen inschakelen vóór 2010.”*

¹⁹¹ Exhibit No. 82. Authentic text: *“De kosten voor de tijdelijke reactivering van het historisch tracé komen voor rekening van België.(..).Voor de aanleg van het definitieve tracé is Nederland bereid een deel van de daarmee gepaard gaande kosten voor haar rekening te nemen. Hierover zullen nadere afspraken worden gemaakt na de definitieve tracékeuze.”*

¹⁹² Gezamenlijke nota t.b.v. eerste ministerieel overleg inzake de IJzeren Rijn, opgesteld door de Ambtelijke Stuurgroep in beperkte samenstelling, 20 August 2001, VE/Ijz. Rijn/restr. (2001) 4 def. Exhibit No. 87.

The Dutch position was as follows:

“The Netherlands make a distinction between, on the one hand, the reasoning with respect to repartition of costs and, on the other hand, the appreciation of alternative tracks for the purpose of determining the definitive track. For example: the fact that the Netherlands herein after chooses for A0-with-tunnel in the context of repartition of costs does not preclude that A3-with-tunnel be chosen when it comes to making a substantive judgment on alternative tracks (see point 4 hereafter).”¹⁹³

The Netherlands then formulated following background principles:

“A. By Article XII of the Separation Treaty of 1839, Belgium was granted the right of passage through the Netherlands. The railway track, which is now known as the historic track, was laid down in the so-called Iron Rhine treaty of 1873. Both treaties provided that the realization of the linkage was “entirely at the cost and expense of Belgium”. This means that the linkage on Belgian and Dutch territory should be paid by Belgium. For the part on German territory, no similar arrangement exists; it appears to us that the financing of that part is an issue between Belgium and Germany.

B. The said treaties further provide that the works shall be performed “without any expense for The Netherlands, and without prejudice to the exclusive rights of sovereignty over the territory the road or canal at issue would cross”. This means that the construction in the Netherlands shall be made in accordance with rules prevailing in the Netherlands. The said provisions of the abovementioned treaties are presently of integral application.

C. The Iron Rhine primarily is a Belgian railway link, which is reactivated at the demand of Belgium so as to be used for Belgian interests; the project does not seek to serve Dutch interests.

D. The Dutch input in the Iron Rhine project is primarily that we wish to comply with our international obligations.”¹⁹⁴

¹⁹³ Exhibit No. 87, p. 21. Authentic text: “Nederland maakt een onderscheid in enerzijds de betoogtrant om te komen tot een visie op de kostenverdeling en anderzijds de beoordeling van de tracé-alternatieven om te komen tot een tracékeuze. Bijvoorbeeld : dat Nederland hieronder in het kader van de kostenverdeling kiest voor A0-met-tunnel sluit niet uit dat bij de inhoudelijke beoordeling van de tracé-alternatieven kan besloten worden voor A3-met-tunnel (zie punt 4 hieronder).”

¹⁹⁴ Ibid. Authentic text: “A. In artikel XII van het Scheidingsverdrag van 1839 verkreeg België het recht van doortocht door Nederland. Het spoorwegtracé dat nu bekend staat als het historisch tracé werd neergelegd in het zgn. IJzeren Rijn-verdrag van 1873. In beide Verdragen staat dat de realisatie van de verbinding, ‘geheel en al op kosten en voor rekening van België’ komt. Dat betekent dat de verbinding op Belgisch en op Nederlands grondgebied door België betaald wordt. Voor het gedeelte op Duits grondgebied is iets dergelijks niet geregeld ; de financiering hiervan lijkt ons een zaak tussen België en Duitsland.

B. De genoemde Verdragen bepalen voorts dat de werken worden aangelegd ‘zonder eenig bezwaar voor Holland en zonder benadeeling der uitsluitende regten van souvereiniteit op het grondgebied, hetwelk de bedoelde weg of kanaal zoude doorsnijden’. Dit betekent dat de aanleg in Nederland geschiedt volgens in Nederland geldende regels. De betreffende bepalingen uit de genoemde Verdragen zijn ook anno nu onverkort van kracht.

C. De IJzeren Rijn is primair een Belgische spoorverbinding, die op Belgisch verzoek wordt gereactiveerd om gebruikt te worden voor Belgische belangen ; het project is niet opgezet om Nederlandse belangen te dienen.

D. De Nederlandse insteek inzake het project IJzeren Rijn is primair dat wij onze volkenrechtelijke verplichtingen willen nakomen.”

On the basis of these principles, the Netherlands then formulated their position as follows:

- “1. As what is involved is the re-use of an existing railway link, the use of which was interrupted some time ago, the rules which applied at the time the railway link was built still apply. Therefore: on Dutch territory, all costs shall be borne by Belgium (see background principle A) and works shall be performed pursuant to the rules applicable in the Netherlands (see background principle B).*
- 2. It is reasonable that the Belgian contribution shall be limited to costs of the cheapest alternative, which complies with rules applicable in the Netherlands: this shall be referred to hereafter as the “BASIS-alternative”.*
- 3. On the basis of information contained in the Trajectnota/MER, it can be seen that: the BASIS-alternative is the A0-alternative, the restored existing railway link with acoustic screens etc., and with a tunnel under the Meinweg area.*
- 4. The Netherlands could itself decide in favour of another, more expensive alternative, for example alternative A3. That alternative also includes a tunnel under the Meinweg, but also a loop line east of Roermond, which would limit the negative effects of the reactivation for the inhabitants of Roermond. The additional costs as compared with the BASIS-alternative shall then be borne by the Netherlands.”¹⁹⁵*

Belgium, in return, expressed following starting points:

- “1. The Iron Rhine is a project of international (European) interest and its reactivation is in conformity with a policy of sustainable mobility which is fostered by the European Union and its Member States. The main objective hereof is to increase the part of railways in the meeting of mobility demands. From that perspective, an important part of the expected increase in mobility demands should be met by the railways, which should consequently witness an increase of their market share, as compared to roads transport. Because of this European interest, the Iron Rhine has been inserted in the Trans-European networks as defined in the European decision 1692/96/EC of 23 April 1996. More recently, said linkage has also been made part of Annex I to European Directive 2001/12/EC of 26 February 2001, which defines the European freight railway network and which includes the Iron Rhine.*

¹⁹⁵ *Loc. cit.*, p. 21-22. Authentic text: “1. Omdat het gaat om de her-ingebruikneming van een al bestaande spoorverbinding, waarvan het gebruik enige tijd geleden is gestaakt, gelden nog steeds de regels die golden bij de aanleg van deze spoorverbinding.

Dus : op Nederlands grondgebied komen alle kosten ten laste van België (zie achtergrondpunt A), en wordt gewerkt conform de in Nederland geldende regels (zie achtergrondpunt B).

2. Het is redelijk dat de Belgische bijdrage beperkt blijft tot de kosten van het goedkoopste alternatief dat voldoet aan de in Nederland geldende regels : dit noemen we hier verder het ‘BASIS-alternatief’.

3. Op grond van de informatie die in de Trajectnota/MER is opgenomen kan vastgesteld worden : het BASIS-alternatief is het A0-alternatief, de opgeknapte bestaande spoorverbinding met geluidschermen e.d., en met een tunnel onder het Meinweggebied.

4. Nederland zou zélf tot een ander, kostbaarder alternatief kunnen besluiten, bijvoorbeeld alternatief A3. Dat alternatief omvat óók een tunnel onder de Meinweg, maar tevens een omleiding ten oosten van Roermond, waardoor de negatieve effecten van de reactivering voor de bewoners van Roermond worden beperkt. De meerkosten van dit alternatief t.o.v. het BASIS-alternatief zal Nederland dan zelf moeten betalen.”

2. *Historically, the Iron Rhine is part of the Separation Treaty of 1839 and the Iron Rhine Treaty of 1873 according Belgium the right of passage over Dutch territory, while laying the burden of financing the linkage on Belgium. At the time, said linkage was realised in accordance with the stated conditions, with the consequence that Belgium should be considered having fulfilled its obligations in that respect.*

3. *In the nineties, the Iron Rhine linkage was gradually dismantled as a consequence of prior decisions unilaterally taken by the Netherlands and notwithstanding Belgian reservations, communicated through the appropriate channels (Benelux Commission for Transports, Sub-commission “Railway Transports” – meetings of 11 December 1991 in Luxemburg and of 20 April 1993 in The Hague). This dismantling continued until the end of the nineties although Belgium, at that time, had already clearly expressed its interest in a reopening of the line. As a consequence of this dismantling, the Belgian right of passage has been prejudiced.*

4. *The Meinweg area and the Weerter- en Budelerbergen have become nature areas with a European status to which the European Birds and Habitats Directives, as implemented by the Netherlands, apply. Apart from that, several areas have received a national status as protected natural areas. All these areas are passed through by the Iron Rhine. At the moment of designation or notification of these areas, neither the Belgian authorities nor the [Belgian Railways] NMBS were consulted, notwithstanding the implications of such designation or notification for a more intensive use of this railway line.”¹⁹⁶*

¹⁹⁶ *Loc. cit.*, p. 22 ff. Authentic text: “1. De IJzeren Rijn is een project van internationaal (Europees) belang en zijn reactivering is in overeenstemming met een politiek van duurzame mobiliteit die door de Europese Unie en de onderscheiden lidstaten wordt voorgestaan. Hoofddoel hierbij is het verhogen van het aandeel van de spoorwegen in de opvang van de mobiliteitsbehoeften. In die zin zou een groot gedeelte van de verwachte toename van het goederenvervoer door de spoorwegen moeten ingevuld worden, die aldus hun marktaandeel t.o.v. het wegtransport moeten zien stijgen.

Omwille van dit Europees belang werd de IJzeren Rijn opgenomen in de Trans-Europese netwerken zoals gedefinieerd in de Europese beschikking van 1692/96/EG van 23 april 1996. Genoemde verbinding werd meer recentelijk eveneens opgenomen in de bijlage 1 van de Europese Richtlijn 2001/12/EG van 26 februari 2001, waarin het Europees spoorwegnet voor goederenvervoer wordt gedefinieerd en waar de IJzeren Rijn verbinding deel van uitmaakt.

2. *De IJzeren Rijn kadert historisch in het Scheidingsverdrag van 1839 en het IJzeren Rijnverdrag van 1873 die aan België het recht tot doorgang over Nederlands grondgebied verleenden, maar de financiering van de verbinding ten laste van België legden.*

Bewuste verbinding werd indertijd onder de gestelde voorwaarden verwezenlijkt waardoor mag beschouwd worden dat België zijn verplichtingen terzake nagekomen heeft.

3. *In de loop van de jaren '90 werd de IJzeren Rijn-verbinding geleidelijk ontmanteld ingevolge eerder door Nederland eenzijdig genomen beslissingen en niettegenstaande het Belgische voorbehoud, via de geëigende kanalen aangetekend (Benelux-Commissie voor het Verkeer : Subcommissie “Vervoer over de Spoorwegen” – vergaderingen van 11 december 1991 te Luxemburg en 20 april 1993 in Den Haag).*

Deze ontmanteling is blijven doorgaan op het einde van de negentiger jaren hoewel België toen reeds duidelijk te kennen had gegeven interesse te tonen voor de heropening van de verbinding. Als gevolg van deze ontmanteling is het Belgische recht op doorgang geschaad.

4. *Het Meinweggebied en de Weerter- en Budelerbergen werden natuurgebieden met Europees statuut waarop de Europese Vogel- en Habitatrictlijnen, zoals door Nederland geïmplementeerd, van toepassing zijn. Daarnaast hebben verschillende gebieden een nationale status van beschermende natuurzone gekregen. Al deze gebieden worden door de IJzeren Rijn doorkruist. Bij de aanduiding of aanmelding van deze gebieden werd de Belgische overheid noch de NMBS geraadpleegd, niettegenstaande de implicaties van deze aanduiding of aanmelding voor een intensiever gebruik van deze spoorlijn.”*

On these bases, Belgian authorities formulated their position as follows:

“On the basis of the abovementioned starting points, it can be stated that, on the one hand, Belgium has complied with its financial obligations deriving from the nineteenth century treaties and, on the other hand, that, in a present-day European context, the Iron Rhine linkage is part of the Trans-European network for freight railway transport.

In these circumstances, Belgium esteems that the Member States concerned may reasonably be expected to make serious efforts to realise the said line as soon as possible and that these States effectively comply with their obligations flowing from the European Decision (i.a. No. 1692/96/EC of 23 April 1996) and with the undertakings entered into through the adoption of said Decision.

More concretely, these obligations comprise that each Member State involved has the responsibility of realising the required infrastructure on its territory, with the year 2010 as a deadline, and bears the burden of financing the works on its own territory.

This territoriality principle (each country finances the investments to be made on its own territory) is the most frequently applied in this kind of projects of an international ambit.

On 9 December 1999, in the tripartite meeting on the Iron Rhine line, both the Belgian Minister for Mobility and Transport and the German Secretary of State for Transport took that position.

In the past, Belgium consistently abided by this principle, notably for the construction of the HST-project and for the construction of the European speedway system, knowing that this infrastructure benefits a great deal to users who do not live in Belgium.

Studies have indeed revealed that only 20 percent of the trans-boundary travellers on the HST-link Brussels-Amsterdam are of Belgian nationality.

Apart from that, such national financing is justified by the fact that an important part of the costs are caused by national decisions, i.a. as a consequence of the unilateral decision by the Netherlands to dismantle the railway line or the creation of protected natural zones. Costs, which are a consequence of such decisions could hardly be apportioned to parties who bear no responsibility in this respect.”¹⁹⁷

¹⁹⁷ Loc. cit., p. 23. Authentic text: “Steunend op voornoemde uitgangspunten kan worden gesteld dat enerzijds België zijn financiële verplichtingen vervat in de 19^{de} eeuwse verdragen nagekomen heeft en dat anderzijds de IJzeren Rijn-verbinding in een hedendaagse Europese context deel uitmaakt van het Trans-Europees netwerk voor goederenvervoer over het spoor.

In die omstandigheden meent België dat van de betrokken lidstaten redelijkerwijs mag verwacht worden dat zij ernstige inspanningen leveren om zo spoedig mogelijk bewuste verbinding te realiseren en dat deze staten hun verplichtingen die voortvloeien uit de Europese beschikking (o.a. nr. 1692/96/EG van 23 april 1996) en de verbintenissen, aangegaan door het aanvaarden van deze beschikking, daadwerkelijk nakomen.

Deze verplichtingen betekenen meer concreet dat elke betrokken lidstaat instaat voor de verwezenlijking van de nodige infrastructuurvoorzieningen op zijn grondgebied met het jaar 2010 als tijdshorizon en hierbij zelf de financiering van de werken op eigen grondgebied ten laste neemt.

Bij de uitwerking van projecten met een internationale draagwijdte is dit territorialiteitsprincipe (elk land financiert de investeringen die op zijn grondgebied te verwezenlijken zijn) de meest gangbare benadering.

Germany notably declared:

“.. in principle, preference is given to the reactivation and development of existing tracks rather than building new tracks.

This starting point should also apply to the German part of the Iron Rhine, whereby the German regulations regarding expansion and protection requirements should be complied with. Germany takes as a starting point that the variant which is considered for execution is compatible with these starting points and requires no higher investments.

The investments required for temporary use will be borne by Germany. As concerns the definitive track, the total profitability of the German part should be demonstrated. Financing through public finances is possible only if the profits outweigh the costs. Evidence thereof should be provided in the context of ongoing activities for the revision of the Bundesverkehrswegeplan of 1992. The profitability will probably be most easy to demonstrate for Alternative A0.”¹⁹⁸

In sum, for Belgium and Germany, each State should bear costs on its own territory. On the contrary, after having argued that costs should be allocated on the basis of a cost-benefits analysis, the Netherlands relied on the treaties of 1839 and 1873 so as to shift all costs related to works on Dutch territory, to Belgium.

Op 9 december 1999 hebben zowel de Belgische Minister van Mobiliteit en Vervoer als de Duitse Staatssecretaris voor Verkeer zich tijdens de tripartiete bijeenkomst over de IJzeren Rijn-verbinding reeds in genoemde zin uitgesproken.

In het verleden heeft België trouwens steeds consequent dit principe nageleefd o.a. bij de uitbouw van het HST-project of bij de aanleg van het Europees autosnelwegsysteem, wel wetend dat deze infrastructuur in belangrijke mate ten goede komt aan gebruikers die niet in België wonen.

Uit studies is immers gebleken dat van de grensoverschrijdende reizigers op de HST-verbinding Brussel-Amsterdam ongeveer 20% de Belgische nationaliteit bezitten.

Daarnaast zijn deze nationale financieringen te rechtvaardigen door het feit dat een belangrijk gedeelte van de kosten veroorzaakt zijn door nationale beslissingen o.a. in gevolge de eenzijdig door Nederland besliste ontmanteling van de spoorverbinding of de inrichting van beschermde natuurgebieden. De kosten die een gevolg zijn van dergelijke beslissingen kunnen bezwaarlijk ten laste komen van partijen die er geen verantwoordelijkheid in dragen.”

¹⁹⁸ *Loc. cit.*, p. 24. Authentic text: “Daarbij geeft men principieel de voorkeur aan het reactiveren en uitbouwen van bestaande tracés boven het aanleggen van nieuwe.

Dit uitgangspunt zou ook voor het Duitse gedeelte van de IJzeren Rijn moeten gelden, waarbij de Duitse uitbreidingsvoorschriften en beschermingscriteria in acht genomen moeten worden. Duitsland gaat ervan uit dat de voor uitvoering in aanmerking komende variant de toepassing van deze uitgangspunten mogelijk maakt en geen hogere investeringen vergt.

De voor de tijdelijke inbedrijfstelling nodige investeringen worden door Duitsland gedragen. Wat het definitieve tracé betreft, moet voor het Duitse deeltraject de totale rentabiliteit worden aangetoond. Financiering middels overheidsmiddelen is enkel dan mogelijk, wanneer de baten de kosten overstijgen. De bewijsvoering dient plaats te vinden in het kader van de aan de gang zijnde werkzaamheden met het oog op de herziening van het Bundesverkehrswegeplan van 1992. De rentabiliteit valt wellicht het gemakkelijkste te onderbouwen bij alternatief A0.”

48. During a meeting on 11 October 2001, the Belgian delegation indicated that, “*in the light of the Separation Treaty and the Iron Rhine Treaty, Belgium is willing to bare the “functional” costs for definitive driving, including investments for temporary driving. This amounts to EUR 83, 8 millions*”¹⁹⁹. Belgium also noted that the estimations had accrued enormously during the preceding months²⁰⁰.

The Netherlands, in turn, stated that their basic offer amounted to EUR 140 millions, but that they

“could raise this offer up to EUR 183,1 millions (this amount corresponding to the additional cost of the embankment in the Weerter- en Budelerbergen and the tunnel in the Meinweg area), on the condition that:

1. *Belgium renounces temporary driving*
2. *No sanction is provided for in the MOU in case the works are not finalised in time (scheduled for 1 July 2002)*
3. *The risks of the basic estimation are borne by Belgium.*”²⁰¹

The Belgian delegation replied that they were not mandated to renounce temporary driving and should stick to agreements reached in the MOU. However, “*on the assumption that Belgium would consider renouncing temporary driving, definitive driving should be possible much earlier than in July 2009*”²⁰², which the Netherlands considered unfeasible.

When the Belgian delegation indicated that it could raise its contribution to EUR 100 millions, which would imply a contribution to the environmental costs, the Netherlands reacted that the Belgian contribution should (significantly) exceed 50 percent of the total amount of EUR 547,8 millions, *i.e.* amount to more than EUR 273,9 millions²⁰³.

¹⁹⁹ Memo van de vergadering gehouden te Roosendaal op 11 oktober 2001 tussen België en Nederland (Memo of the meeting held at Roosendaal between Belgium and the Netherlands on 11 October 2001), p. 1. Exhibit No. 97. Unofficial translation. Authentic text: “*Gelet op het Scheidingsverdrag en IJzeren Rijn-verdrag, is België bereid om, inclusief de investering voor tijdelijk rijden, de “functionele” kosten voor definitief rijden ten laste te nemen. Dit komt overeen met een bedrag van 83,8 miljoen*”.

²⁰⁰ *Ibid.* Authentic text: “*België merkt op dat de ramingen de laatste maanden enorm zijn gestegen*”.

²⁰¹ *Loc. cit.*, p. 1-2. Unofficial translation. Authentic text: “*Het basisbod van Nederland ligt op 140 miljoen. Nederland zou dit bod kunnen verhogen tot 183,1 miljoen (dit bedrag komt overeen met de meerkost van de holle dijk WBB en de tunnel Meinweggebied), mits: 1. België afziet van tijdelijk rijden. 2. Er geen boeteclausule wordt opgenomen in het MvO indien de werken niet op tijd klaar zijn (voorzien 1 juli 2009) 3. De risico’s van de basisraming liggen bij België*”.

²⁰² *Loc. cit.*, p. 2. Authentic text : « *Indien België eventueel zou overwegen om het tijdelijk rijden te schrappen, dan moet definitief rijden mogelijk zijn op een tijdstip dat beduidend vroeger ligt dan juli 2009*”.

²⁰³ *Ibid.* Authentic text: “*België kan haar bod van 83,3 miljoen e eventueel verhogen tot 100 miljoen (=gedeeltelijke tussenkomst in de milieukosten)” ... “Nederland reageert dat de Belgische bijdrage (beduidend) hoger zal moeten liggen dan 50% van de basisraming (dus beduidend [hoger dan] 273,9 miljoen*”.

In a further meeting on 6 November 2001, Belgium's position was as follows:

- “1. Belgium wants to realise the Iron Rhine project.
2. Belgium is willing to participate in the investment costs on Dutch territory for a determined fix amount (not for the risks).
3. Concretely, Belgium is willing to finance the costs of the functionality of the railway (EUR 75 millions). Belgium is also willing to make a substantial contribution to environmental measures in the Netherlands, but not for the tunnel. (..)
4. Belgium wishes to drive temporarily, in conformity with the MOU of February 2000 (this is a political necessity).”²⁰⁴

On 9 July 2002, a meeting at The Hague of the “Belgian-Dutch Follow-Up Commission” concluded that no final agreement could be reached on the repartition of financial risks nor on the estimation of total costs, and that the sum of the Dutch offer (140 millions increased up to 180 millions if Belgium renounced temporary driving) and the Belgian offer (100 millions) was quite insufficient to cover the most advantageous estimation. Technical discussions on how to limit the costs were therefore of no avail, and the situation should be taken up at a ministerial level²⁰⁵.

49. In the meantime, Belgium experienced increasing difficulties in understanding the Dutch Government's position.

On 10 December 2001, Mrs Netelenbos declared in Parliament, that “*we must avoid that one drives temporarily over the historic track*”²⁰⁶. On 18 December 2001, the Minister stated in Parliament (unofficial translation):

“I now bet on the financing. (..) One finds that what we ask is too costly. I am of another opinion, but I wait quietly. This may last long, but I see how the process goes. In the meanwhile I am working on the EIA-track-procedure in the upbeat towards a

²⁰⁴ Memo van de vergadering gehouden te Roosendaal tussen België en Nederland op 6 November 2001 (Memo of the meeting held at Roosendaal between Belgium and the Netherlands on 6 November 2001), p. 1. Exhibit No. 98. Authentic text: “*België wenst het IJzeren Rijn project te realiseren. 2. België is bereid om tussen te komen in de investeringskosten op Nederlands grondgebied, voor een bepaalde vaste som (dus niet de risico's). 3. Concreet is België bereid om de kosten voor de functionaliteit van het spoor te financieren (eur 75 miljoen). België is tevens bereid om een substantiële bijdrage te doen voor milieumaatregelen in het Meinweggebied, maar niet voor de tunnel (..). 4. België wenst tijdelijk te rijden, conform het MoU van februari 2000 (dit is politiek noodzakelijk)*”.

²⁰⁵ Memo over de conclusies van de Belgisch-Nederlandse opvolgingscommissie IJzeren Rijn – Den Haag, 9 juli 2002 (Memo concerning the conclusions of Belgian-Dutch follow-up commission Iron Rhine – The Hague, 9 July 2002), p. 3. Exhibit No. 99.

²⁰⁶ Declaration in Parliament of Mrs Netelenbos, *Handelingen*, 2001-2002, Tweede Kamer, 10 December 2001 (report adopted on 17 December), nr. 23, p.45. Exhibit No. 91. Authentic text: “*dat wij moeten vermijden dat er tijdelijk over het traject wordt gereden.*”

*further international elaboration. (...) .. it is sensible to consider what the formal procedure is, but it is also good to see what we do in the meanwhile to prevent that one has to drive temporarily over the historic track.”*²⁰⁷

On 29 January 2002, the Minister informed the Chairman of the Tweede Kamer that she had “*decided in November 2001 to interrupt preparations for the possible temporary driving on the historic track, awaiting agreement to be reached with Belgium and Germany*”²⁰⁸.

Having reached the conclusion that the reactivation of the Iron Rhine could not be properly realised on the sole basis of negotiations, Belgium then considered to have a number of issues resolved through arbitration.

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²⁰⁷ Declaration in Parliament of Mrs Netelenbos, *Handelingen*, 2001-2002, Tweede Kamer, 18 December 2001, nr. 37, p. 2748. Exhibit No. 100. Authentic text: “*Ik zet mijn kaarten nu op de financiering. (...) Men vindt wat wij vragen te kostbaar. Ik heb een andere mening, maar ik wacht rustig af. Dit kan lang duren, maar ik zie wel hoe het proces verloopt. Ondertussen ben ik bezig met de tracé-MER-procedure in de opmaat naar een verdere internationale uitwerking. (...) .. het is verstandig om te bezien wat de formele procedure is, maar het is ook goed om te zien wat wij ondertussen doen om te voorkomen dat tijdelijk over het historisch tracé moet worden gereden*”.

²⁰⁸ Letter of the Dutch Minister of Transport to the President of the Tweede Kamer, dated 29 January 2002, p. 4. Exhibit No. 101. Authentic text: “*Overigens heb ik in november 2001 besloten om de voorbereidingen van het eventueel tijdelijk rijden over het historisch tracé van de IJzeren Rijn op te schorten, in afwachting van de met België en Duitsland te bereiken overeenstemming*”.

II. QUESTIONS SUBMITTED TO THE ARBITRAL TRIBUNAL

50. The questions submitted for decision to the Arbitral Tribunal will be answered hereafter in the order, in which they have been formulated in the Arbitral Agreement reproduced in the introduction to this Memorial. Where appropriate, cross-references will be made.

In answering the questions, full account has been taken of Article 292 of the EC Treaty, pursuant to which “*Member States undertake not to submit a dispute concerning the interpretation or application of this treaty to any method of settlement other than those provided therein*”²⁰⁹. It is submitted that Belgium’s submissions as they are formulated hereinafter, taking account of specific circumstances of the case, do not infringe on Article 292.

51. The questions draw on a number of concepts, notably the “*use*”, the “*restoration*”, the “*adaptation*”, and the “*modernisation*” of the track. The ordinary meaning of these terms may be clarified as follows.

The “*use*” of the railway may, in principle, refer to the operation of rolling stock on the railway as well as the operation of the infrastructure (the railway itself). It is submitted that the costs and financial risks flowing from transport activities shall, in principle, be borne by the railway operators concerned, and that this is not subject to dispute between Belgium and the Netherlands. The only aspect of “*use*” to be considered is, therefore, that of costs and risks flowing from the operation of the railway infrastructure, notably including maintenance, which is “*the work of keeping a building, machinery, etc. in a state of good repair*”²¹⁰. “*Restoration*” is “*a putting or bringing back into a former, normal, or unimpaired state or condition*”²¹¹, and is synonymous for “*repair*”²¹². Maintenance and restoration thus have in common that they aim at safeguarding or bringing back existing characteristics.

²⁰⁹ Exhibit No. 50. See also Exhibit No. J.10.

²¹⁰ Webster’s New World Dictionary, 3rd. college edition, Prentice Hall, 1994, p. 815-816.

²¹¹ *Op. cit.*, p. 1144.

²¹² *Op. cit.*, p. 1137.

“*Adaptation*” is the “[making] *fit or suitable by changing or adjusting*”, the “[adjusting] *to new or changed circumstances*”²¹³ while “*modernisation*” is the “[bringing] *up to date in style, design, methods, etc.*”²¹⁴. Both adaptation and modernisation therefore imply a modification and, in principle, an improvement of characteristics.

²¹³ *Op. cit.*, p. 15.

²¹⁴ *Op. cit.*, p. 871.

QUESTION N° 1

To what extent is Dutch legislation and the decision-making power based thereon in respect of the use, restoration, adaptation and modernisation of railway lines on Dutch territory applicable, in the same way, to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory?

52. Question No. 1 is “*to what extent*” Dutch legislation and the decision-making power based thereon in respect of the use, restoration, adaptation and modernisation of railway lines on Dutch territory, is applicable “*in the same way*” to same activities relating to the historical route of the Iron Rhine on Dutch territory.

The question includes the issue of whether Dutch legislation and decision-making does, or does not apply, to the Iron Rhine. However, the words “*in the same way*” underscore that the question is also about possible modalities of application, *i.e.*, how the Netherlands should use their regulatory powers with respect to the Iron Rhine.

Indeed, it flows from the description of the Iron Rhine’s conventional regime here above, and it is uncontested, that the historical track of the Iron Rhine does not benefit from a regime of extra-territoriality. As a consequence, without prejudice to Question No. 2 hereafter, Dutch legislation and decision-making power apply to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, within the limits set forth by international law. Pursuant to international law, Dutch legislation and decisions are not opposable to Belgium, to the extent that they render impossible or unreasonably difficult the exercise of Belgium’s rights, or in any other way violate Belgium’s rights relating to the use, repair, adaptation and modernisation of the historic track of the Iron Rhine. However, Dutch regulations which are not opposable to Belgium must be replaced by others, which are in conformity with international law standards. If, for example, Dutch safety norms were unreasonable and in violation of Belgium’s rights, the effective exercise of Belgium’s rights would require that such norms be replaced by others, as no railway operator could function in a legal vacuum as concerns safety norms. The Netherlands’ obligation to exercise its regulatory power for that purpose, determines the extent to which Dutch legislation and decision-making power based thereon in respect of the use, restoration, adaptation and modernisation of railway lines on Dutch territory, is applicable, in the same way, to the use,

restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory.

53. Hereafter, Belgium will first give an overview of the rules and principles which limit Dutch jurisdiction in accordance with international law (A), and then apply some of these rules and principles to the main issues at stake with respect to the reactivation of the Iron Rhine presently envisaged (B).

A. Relevant rules and principles of international law

54. The rights of the Netherlands with respect to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory are limited by its international obligations, notably the principle *pacta sunt servanda*, the principle of reasonableness and good faith, and the obligation for a State to harmonise the performance of its international obligations.

1. *Pacta sunt servanda*

55. According to the principle *pacta sunt servanda*, every treaty in force is binding upon the parties to it and must be performed by them in good faith.

In application thereof, the regulatory powers of the Netherlands are limited by its international obligations. To the extent that international law imposes obligations on the Netherlands with respect to international transports, *e.g.*, with respect to security norms or inter-operability of international railways, such obligations limit the right of the Netherlands to legislate and use its decision-making power based thereon with respect to the use, the restoration, the adaptation and the modernisation of the Iron Rhine.

Among such limitations to the regulatory powers of the Netherlands, are those enshrined in Article 12 of the 1839 Separation Treaty, which provides as follows:

*"Art. 12. In case a new road would have been constructed in Belgium, or a new canal dug, which would lead to the Maas opposite the Dutch district of Sittard, then Belgium would be at liberty to ask The Netherlands, which in that hypothesis would not refuse it, that the said road or the said canal be prolonged according to the same plan, entirely at the cost and expense of Belgium, through the district of Sittard, up to the borders of Germany. This road or this canal, which could only serve as commercial communication, would be built, at the choice of The Netherlands, either by engineers and workers, which Belgium would obtain the authorisation to employ, or by engineers and workers which The Netherlands would supply, and which would execute, at the expense of Belgium, the agreed works, all of which without any expense for The Netherlands, and without prejudice to the exclusive rights of sovereignty over the territory the road or canal at issue would cross. The two parties would lay down, by a common agreement, the height and mode of collection of toll rights that would be levied on that same road or canal."*²¹⁵

This provision enunciates following obligations for the Netherlands.

First, the Netherlands shall, if Belgium constructs a “*new road .. or canal*” as described in Article 12, allow for the prolongation of this road or canal “*according to the same plan*”. This was concretised later on in the Iron Rhine Treaty of 1873 (see also Questions No. 2 and 3).

Second, if Belgium makes use of this right, the route or canal shall be constructed “*at the expense of Belgium*” and “*without any expense for the Netherlands*”. Concomitantly, Dutch regulatory powers shall be limited by the requirement under Article 12, that the “*works*” shall be “*agreed*” upon between Belgium and the Netherlands (See Questions Nos. 2 and 3).

Third, the Netherlands shall have the obligation to allow for the use of such route provided that it “*only serve[s] as commercial communication*”.

Fourth, the height and mode of collection of toll rights shall be determined by a common agreement between the Netherlands and Belgium (This provision is to the same effect as Article IX of the Railway Convention of 1897 which provides more generally that Belgium

²¹⁵ Unofficial translation. Exhibit No. 3.

and the Netherlands shall settle through later agreements everything relating to the international exploitation of the redeemed railways)²¹⁶.

2. *The principles of reasonableness and good faith*

56. Under international law, state jurisdiction must be exercised in good faith and in accordance with the principle of reasonableness. In the *Gulf of St. Lawrence case* between Canada and France, the Arbitral Tribunal held (unofficial translation):

*“Like the exercise of any power, the exercise of regulatory power is always limited by the rule of reasonableness, to which the International Court of Justice referred in the Barcelona Traction Case.”*²¹⁷

Pursuant to this general principle, when the exercise of a treaty right is subject to the territorial jurisdiction of the obligated State, such jurisdiction must be exercised in good faith and in a reasonable manner.

In the *North-Atlantic Coast fisheries case*, the Arbitral Tribunal found that the United Kingdom had accorded United States citizens the right to fish along British coasts, and further, that the United Kingdom had the right to regulate fisheries in the areas concerned. The Tribunal then ruled that the exercise of this right by Great Britain was limited by the treaty, in that regulations should be made *bona fide* and in a reasonable manner, without discriminating between United States and United Kingdom nationals:

*“Regulations which are (1) appropriate or necessary for the protection and preservation of such fisheries, or (2) desirable or necessary on grounds of public order and morals without unnecessarily interfering with the fishery itself, and in both cases equitable and fair as between local and American fishermen, and not so framed as to give unfairly an advantage to the former over the latter class, are not inconsistent with the obligation to execute the Treaty in good faith, and are therefore reasonable and not in violation of the Treaty”.*²¹⁸

²¹⁶ Exhibit No. 21 and para. 15.

²¹⁷ *Affaire concernant le filetage à l'intérieur du Golfe du St. Laurent entre le Canada et la France*, arbitral award of 17 July 1986, R.I.A.A. Vol. XIX, page 258, § 54. Exhibit No. J8. Authentic text: “A l’instar de l’exercice de toute compétence quelconque, l’exercice d’une compétence réglementaire est toujours lié par la règle du raisonnable, invoquée par la Cour internationale de Justice dans l’affaire de la Barcelona Traction.”

²¹⁸ Permanent Court of Arbitration, *North-Atlantic Coast fisheries case*, award of 7 September 1910, R.I.A.A., Volume XI, page 173 ff., at 189. Exhibit No J6.

Likewise, in the *case concerning rights of nationals of the United States of America in Morocco*, France as the protecting power of Morocco, and the United States disagreed on the interpretation of Article 95 of the General Act of Algeiras with respect to customs valuations. Having stated the principle that “*the power of making the valuation rests with the Customs Authorities*”, the International Court added that “*it is a power which must be exercised reasonably and in good faith*”.²¹⁹

The principle of reasonableness is also reflected, with a varying terminology, in numerous conventional regimes, including in international trade law. Article XX of the General Agreement on Tariffs and Trade safeguards the rights of Members to adopt or enforce measures, *i.a.*, “*necessary to protect human, animal or plant life or health*” or “*relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption*” (paras. b) and g)), subject to the requirement that such measures are not applied in a manner “*which would constitute a means of arbitrary or unjustifiable discrimination*” between countries where the same conditions prevail or a disguised restriction on international trade. In *United States – Import prohibition of certain shrimp and shrimp products*, the WTO Appellate Body ruled that:

*“The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of abus de droit, prohibits the abusive exercise of a state’s rights and enjoins that whenever the assertion of a right “impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably”. An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting.”*²²⁰

57. In a number of cases, it has been indicated that the principle calls for an equilibrium between the respective rights of the parties concerned. In the *Gulf of St. Lawrence* case, the Tribunal held:

²¹⁹ I.C.J., *Case concerning rights of nationals of the United States of America in Morocco (France v. United States of America)*, judgment, I.C.J. R. reports 1952, page 212. Exhibit No. J3.

²²⁰ WTO, *United States-import prohibition of certain shrimp and shrimp products*, Report of the Appellate Body, WT/DS58/AB/R of 12 October 1998, § 1.5.8. Exhibit No. J11.

“(…) un arrangement de voisinage du type de celui énoncé à l’article 4 de l’accord consacre au profit des Parties contractantes la reconnaissance de droits appelés à s’exercer concurremment dans un même secteur géographique et réclame de ce fait, de la part des titulaires de ces droits, mesure et modération dans leur mise en oeuvre et coopération dans le règlement des contestations relatives à cette mise en oeuvre. Il en est ainsi en l’espèce où le droit de “continuer à pêcher”, consacré au profit des navires visés à l’article 4, B, doit s’harmoniser avec le droit du Canada d’appliquer ses règlements relatifs à la pêche aux bateaux français opérants à l’intérieur du Golfe du Saint-Laurent.

*Le Tribunal attache une particulière importance à cette observation [entres autres] parce qu’il est convaincu que l’avenir des relations réciproques des Parties dans la zone du Golfe est conditionné par la manière raisonnable dont elles useront de leur droits respectifs (…)”.*²²¹

Likewise, in *United States – Import prohibition of certain shrimp and shrimp products*, the WTO Appellate Body declared:

*“The task of interpreting and applying the chapeau [of Article XX] is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (...), so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement.”*²²²

3. The obligation to harmonise the performance of international obligations

58. To the extent that a State has several possibilities of complying with an international obligation, one of which allows the State to comply with another international obligation, while the other does not, the State shall be bound to take the possibility, which allows for a harmonisation of both obligations. The European Court of Justice rules to that effect that:

*“when an international agreement allows, but does not require a member state to adopt a measure which appears to be contrary to community law, the member state must refrain from adopting such measure.”*²²³

²²¹ *Affaire concernant le filetage à l’intérieur du Golfe du St. Laurent entre le Canada et la France*, arbitral award of 17 July 1986, *R.I.A.A.* Vol. XIX, page 225 ff. at 242, § 28. Exhibit No. J8.

²²² *Loc. cit.*, para. 159.

²²³ E.C.J., *The Queen, ex parte Centro-com Srl v. HM Treasury and Bank of England*, judgment of 14th January 1997, case C-124/95, *E.C.R.* 1997, page I-00081 ff., at para. 60, referring to case C-324/93 *Evans Medical and Macfarlan Smith*, *E.C.R.* 1995, 1-563, para. 32. Exhibit No. J15.

The State taking implementing measures bears the burden of proving that it has no alternative means of complying with its international obligations. Thus, when Argentina sought to justify rates applicable to import transactions under Article XX of GATT, on the ground that “*the revenue raised from the various mechanisms .. is used to comply with certain quarterly deficit commitments Argentina has made vis-à-vis the International Monetary Fund (IMF)*” and that “*a reduction of the rate currently applicable to imports would jeopardise Argentina’s meeting those deficit targets*”²²⁴, the WTO Panel ruled:

*“Lastly, we turn to Argentina’s assertion that no changes to the current pre-payment mechanisms are possible, as this could preclude Argentina from meeting its deficit commitments to the IMF. In support of this assertion, Argentina has referred us to an Economic Policy Memorandum and a Technical Memorandum, which Argentina says are part of an agreement with the IMF. However, in neither Memorandum is there a statement to the effect that Argentina is under an obligation to impose a discriminatory tax burden on importers. Nor do we see a requirement in those Memoranda which would bar Argentina from compensating importers for the discrimination suffered. Furthermore, Argentina has in any event not presented argument and evidence sufficient for us to find that it would be impossible for Argentina to meet its deficit targets if it were to compensate importers for the additional interest lost or paid. It should also be recalled in this context that Argentina has not invoked Article XX (d) on the basis that RG 3431 and RG 3543 are necessary to secure compliance with the IVA Law and IG law. For these reasons, we do not consider that, in the present case, Argentina’s commitments to the IMF provide a justification for not compensating importers.”*²²⁵

B. Dutch Legislation and Decision-Making Power

59. In application of the above, the Netherlands is under the obligation to exercise its legislative and decision-making power in good faith and in a reasonable manner, and so as not to deprive Belgium’s right to the use, repair, adaptation and modernisation of the historical route of the Iron Rhine of its substance, or render its exercise unreasonably difficult.

Further, if the Netherlands has several possibilities of complying with an international obligation, one of which allows it to comply with its obligations towards Belgium as concerns

²²⁴ WTO, *Argentina – Measures Affecting the Export of Bovine Hides and Finished Leather*, Report of the Panel, 19 December 2000, para. 11.317. Exhibit No. J12. No appeal has been filed in this case.

²²⁵ *Loc. cit.*, para. 11.328.

the Iron Rhine, while the other does not, the Netherlands shall take the possibility, which makes it possible for it to comply with both obligations.

60. In the present circumstances, *i.e.*, as concerns the reactivation of the Iron Rhine presently contemplated, these principles notably come into play in two respects. First, as concerns a temporary and limited use of the historical track of the Iron Rhine. Second, as concerns requirements for the long-term use of the historical track at full capacity.

1. Temporary Use

61. When the international use of the Iron Rhine as a whole was interrupted in 1991, Belgium made express reservations with respect to its future reactivation. As from 1993, initiatives were taken in that respect, and the Netherlands were associated thereto²²⁶. Yet, the Netherlands took measures to make the historical route unfit for use, partly dismantling the infrastructure and created several nature protection zones across the same route. In the Memorandum of Agreement of 28 March 2000, it was then agreed that an environmental impact assessment (hereafter also: EIA) would be performed by the Netherlands for March 2001, to investigate *i.a.* “*for the short term the possible temporary, limited reactivation of the complete historic track, this temporary reactivation being applicable until the definitive track is being put into use*”. The Memorandum further provided:

“The decisions on the temporary use and the definitive track will be taken simultaneously.

If, when decisions are taken on the temporary and definitive track ultimately mid 2001, the EIA-study concludes that a temporary, limited use will not cause irreversible environmental damage, then, from end 2001 onwards a few trains a day will be allowed to use the whole historic track at limited speed between 7 AM and 7 PM. Under these same conditions of timely decision-making and of absence of irreversible environmental damage, trains could, from end 2002 onwards, also use temporarily the whole historic track at limited speed in evening hours and at night, up to a maximum of fifteen per natural day (both directions summed up). The possible loss of nature value will be compensated.”²²⁷

²²⁶ See above, para. 24 ff.

²²⁷ See above, para. 34 and Exhibit No. 82.

The EIA, which was finalised in May 2001, concluded that using the historical route was the only possibility as concerns temporary driving and that, on the assumption that the track be used by 15 trains per day, no irreversible damage would be caused during the five-years period contemplated²²⁸.

62. In view of the above, it is indisputable that the use of the historical route, during a five-years period, by fifteen trains per natural day (both directions summed up) including at limited speed in evening hours and at night, does not violate any international obligation incumbent on the Netherlands, notably with respect to environmental protection. It is equally indisputable that the Netherlands' preventing the use of the historical route under the same abovementioned conditions, would violate the principles of *pacta sunt servanda*, reasonableness and good faith.

Yet, this notwithstanding, temporary driving did not start as scheduled, neither in its limited version as from the end of 2001, nor in its more extended version as from the end of 2002. During the same period, the Dutch Minister of Transports declared in Parliament that she sought entirely to avoid temporary driving and that she had interrupted works for such purpose²²⁹.

63. Therefore, without prejudice to Belgium's right to an immediate use of the historical route of the Iron Rhine at full capacity and on a long-term basis, it is Belgium's position that Dutch legislation and the decision-making power based thereon in respect of the use, restoration, adaptation and modernisation of railway lines on Dutch territory do not apply in the same way to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, in that:

- When Belgium makes a demand for provisional driving on the historical route of the Iron Rhine, by 15 trains per natural day (both directions summed up), including at limited speed in evening hours and at night, for a period of 5 years at least, the Netherlands shall immediately accept that demand, and immediately take all decisions necessary to effectively allow for such driving within the shortest time materially feasible.

²²⁸ See above, para. 35 and Exhibit No. S 4A.

²²⁹ See above, para. 49 and Exhibit No. 101.

2. *The long-term use of the historical route*

64. Until present, the Netherlands have made the (long-term) use of the historical route of the Iron Rhine subject to conditions relating to environmental protection, notably the building of a tunnel under the Meinweg park and of an embankment or other nature protection devices in the Weerter- and Budelerbergen park, and further, on the rerouting around the city of Roermond, all of which should be paid by Belgium and not by the Netherlands.

65. Before addressing this issue, two preliminary remarks should be made.

First, Belgium submits, under Question No. 3 of the Arbitral Agreement, that, pursuant to the Iron Rhine's conventional regime as it evolved over time, it is for the Netherlands to bear costs and risks with respect to the maintenance, adaptation and modernisation of the historic route on Dutch territory – which includes the craftworks in the Meinweg and Weerter- en Budelerbergen. Belgium's present argument under Question No.1 is without prejudice to its position under Question No. 3.

Second, in a meeting on 11 October 2001, the Netherlands declared that its "basic offer" with respect to financial contributions amounted to EUR 140 millions, but that it could increase this offer up to EUR 183,1 millions, corresponding to the additional cost of the embankment in the Weerter- and Budelerbergen area and the tunnel in the Meinweg area²³⁰, provided that: (1) Belgium renounces using the historic track temporarily; (2) no sanction is provided for in case the works are not terminated on time (scheduled, in the Netherlands' proposal, for 1 July 2009) and (3) risks related to the basic estimation of the costs are borne by Belgium²³¹.

Such proposal, however, is manifestly unreasonable in that it requires Belgium to renounce its right to use the historic track on a temporary basis, and, at the same time, deprives Belgium of any guarantee that the works to be performed for the purpose of long-term use will be finalised at a given date (it was not even guaranteed that the works would be finished on 1 July 2009, although, as Belgium indicated at the meeting, if it were, *arguendo*, to renounce

²³⁰ The estimations forming the basis of this offer were reviewed later on (see Exhibit No. 95). However, this is immaterial for the issue discussed here above.

²³¹ Memo van de vergadering gehouden te Roosendaal op 11 oktober 2001, p. 1-2. Exhibit No. 97.

temporary driving, long-term driving should be assured well before 1 July 2009²³²). There is no reason, therefore, further to analyse this offer which does not, in reality, depart from the Netherlands' main position: the (long-term) use of the historical route is conditional on the building of craftworks amongst which the Meinweg tunnel and the Weerter- en Budelerbergen embankment; the building of such craftworks is, in turn, conditional on their being financed by Belgium and not by the Netherlands.

66. The issue of repartition of costs related to nature protection measures required by the Netherlands, is of paramount importance, witness the fact that it has been the main, if not the sole object of negotiations and disagreement for the last few years. Costs related to the craftworks required in the Meinweg and the Budeler- en Weerterbergen are, indeed, prohibitive.

In 1999, the tunnel under the Meinweg was estimated by the Netherlands at 559 millions ECU (which equals EUR 559 millions)²³³ while other costs for reactivating the historic track in the Netherlands were estimated at 55 millions ECU (EUR 55 millions)²³⁴.

Thereafter, efforts were made to reduce costs, notably by reducing to single-track. On the other hand, as already indicated, the Netherlands in 2001 proposed to increase its "basic offer" of EUR 140 millions to EUR 183,1 millions, corresponding to the additional cost of the embankment in the Weerter- and Budelerbergen area and the tunnel in the Meinweg area²³⁵, provided, *i.a.*, that Belgium would bear the risks associated with the estimation.

In June 2002, the Netherlands communicated a new cost estimation, for the so-called "A3+ variant" including a tunnel in the Meinweg, an embankment in the Weerter- and Budelerbergen reduced to single track, and a by-pass at Roermond. The by-pass at Roermond would increase functionality costs in the Roermond-Meinweg area, from EUR 3,5 millions up to EUR 132,3 millions ex VAT. The Netherlands' estimation of the Meinweg tunnel was at EUR 151,7 millions ex VAT, its estimation of the embankment in the Weerter- en

²³² *Loc. cit.*, p. 2.

²³³ See above, para. 27 and Exhibit No. 78, ontwerp van rapport "IJzeren Rijn" voor de ministers van vervoer van België, Nederland en Duitsland, opgemaakt door de ambtelijke stuurgroep... versie 05.03.99.

²³⁴ *Ibid.*

²³⁵ The estimations forming the basis of this offer were reviewed lateron (see Exhibit No. 95). However, this is immaterial for the issue discussed here above.

Budelerbergen at EUR 58,8 millions ex VAT²³⁶. Various other measures, including noise abatement devices, nature compensation, and ‘minimum measures for nature and recreation’ were required in addition thereto²³⁷. The A3+ variant on Dutch territory was estimated in total at EUR 514,3 millions. Costs related to functionality on Dutch territory, *not* including the rerouting at Roermond, were estimated at EUR 98,1 millions.

Belgium esteems that these various environmental measures are too costly, both as compared to the functionality costs for the reactivation of the whole line (89,9 millions EUR as estimated in 1999) and in view of the profitability of the line.

67. It appears from the above overview that the most expensive measures may be divided in two categories: The rerouting at Roermond, on the one hand, and the Meinweg tunnel and the Weerter- en Budelerbergen embankment, on the other.

The rerouting at Roermond requires a modification of the historical route of the Iron Rhine. The historical route, however, was agreed upon by treaty between Belgium and the Netherlands. The Netherlands may not, therefore, unilaterally decide on such a rerouting (see, *mutatis mutandis*, Question No. 2).

As concerns wildlife protection, a distinction should be made according to whether the measures are discretionary, or whether they are the only possible means for the Netherlands to comply with their international obligations in this field. Indeed, notwithstanding reservations voiced by Belgium since 1986²³⁸, the Netherlands has, on the one hand, granted areas passed through by the historical route of the Iron Rhine, special protective statuses in accordance with its national law (Stiltegebied (silence area), National Park)²³⁹. On the other hand, at the international level, the Netherlands has designated such zones as special protection areas pursuant to the EC Birds Directive and has recently, according to Belgian information, proposed the Meinweg as a Site of Community Importance pursuant to the EC Habitats Directive. However, no final decision has as yet been taken in that respect²⁴⁰. It may be recalled that scientific studies have found that, taking existing levels of nuisance as a starting

²³⁶ V&W – DGG / Railinfrabeheer, “Opbouw investeringskosten modernisering Nederlands gedeelte IJzeren Rijn”, 20 June 2002, p. 2, point 6. Exhibit No. 95

²³⁷ *Ibid.*, points 4 and 5.

²³⁸ Para 24 ff. and Exhibit No 59.

²³⁹ Para 29.

²⁴⁰ Para. 31.

point, and on the basis of a noise limit determined in the absence of legal norms, train traffic in relevant areas would have detrimental effects for the environment. In combination with the fragmentation caused by the railway, a significant effect could be expected.

68. It follows from Part I of Belgium's Memorial, that all the various wildlife and nature protection measures taken by the Netherlands must be considered taken by its own will – either because the Netherlands does not rely on any international legal basis, or because the Netherlands did not face the situation where it had no other means of complying with its international obligations, than to take such a measure.

True, the Netherlands' position originally was that the European Community basis of the protective measures taken, engendered an (additional) obstacle to reactivating the historical route of the Iron Rhine. On 15 December 1998, the Dutch delegate in the Dutch-Flemish administrative working group indicated that the Habitats directive created a number of obstacles to reactivation in the Meinweg area²⁴¹.

However, when the European Commission was consulted in 2001, they expressed a different viewpoint, which casts serious doubts as to the necessity of building a tunnel in the Meinweg. As concerns the Birds Directive, the Commission esteemed, in brief, that the very fact that the Netherlands designated the Meinweg only in 1994, while they should have protected the area since the entry into force of the Birds Directive in 1981, argued against the viewpoint that regular train traffic, as it occurred between 1981 and 1994 and for more than 100 years before, could cause a significant deterioration of the site's environmental values²⁴². The Commission applied same reasoning as concerns the Habitats directive²⁴³, and further insisted on the fact that:

*“.. an increasing noise level caused by passing trains would not appear to be regarded as producing a significant effect (as far as conservation objectives based on the habitats directive are concerned) on a forest habitat when its territorial integrity is not affected.”*²⁴⁴

²⁴¹ Vlaams-Nederlandse ambtelijke werkgroep spoorvervoer, ontwerp-verslag van de vergadering d.d. 15 december 1998 te Brussel (Draft Report of the meeting held in Brussels on 15 December 1998), AWS (98) PV-04, p. C. Exhibit No. 73.

²⁴² Exhibit No. 90, p. 2.

²⁴³ *Ibidem.*

²⁴⁴ *Loc. cit.*, p. 3.

With respect to wildlife, the Commission in its first opinion indicated that it held the view “that ... [wild life’s] resilience to traffic noise has been amply demonstrated.”²⁴⁵, before nuancing this statement in its later opinion of 5 July 2001, where it held that “this would need to be considered in relation to the species for which the site has been proposed on a case by case basis”²⁴⁶.

The Commission concluded that:

*“on one hand, it should be born in mind that Natura 2000 is not to be considered as a collection of strict nature reserves where no other activities than conservation related ones are allowed. Neither the birds directive nor the habitats directive can be interpreted in such a way because the basic philosophy of Natura 2000 is to allow sustainable use of natural resources go hand in hand with the conservation of nature. On the other hand, member states have the right to impose more stringent environmental framework conditions and conservation measures than what is requested by Community directives ... they should not, however, fall back on EC nature protection directives to justify measures that go beyond their contents”*²⁴⁷.

This finding may be placed in parallel with the fact that, although the historical route of the Iron Rhine also crosses special protection areas under the Birds and Habitats Directives in Belgium, the Lisec study has concluded that the reactivation of the track was unlikely to engender any significant effect²⁴⁸.

69. In December 2001, the Dutch Minister of Transports declared in Parliament:

*“.. the Commission has informed me that in their view, even the construction of two embankments on the track of the Iron Rhine is unnecessary. We have asked Belgium to do so, because the train would then, more or less, pass underground in the Meinweg area and alongside Veghel and Budel. According to the Commission, the Habitat Directive does not play any role in this matter, because the TENS-networks are of greater importance. My question to the Commission, therefore, hasn’t helped me at all”*²⁴⁹.

²⁴⁵ Exhibit No. 87, annexe, p. 2.

²⁴⁶ Exhibit No.90, p. 3.

²⁴⁷ Exhibit No. 90, p. 3.

²⁴⁸ Supra, para. 31 and Exhibit No. S5.

²⁴⁹ Tweede Kamer, Verslag van een notaoverleg, vastgesteld 17 december 2001 (Report of a note discussion, adopted on 17 December 2001), p. 44. Authentic text: “.. de Commissie heeft mij laten weten dat volgens haar zelfs de aanleg van twee holle dijken in het tracé van de IJzeren Rijn niet nodig is. Wij hebben België hierom gevraagd, omdat de trein dan min of meer onder de grond door het Meinweggebied en langs Veghel en Budel zou rijden. De habitatrichtlijn spelt volgens de Commissie daarbij geen rol, omdat het belang van de TENS-netwerken groter is. Mijn vraag aan de Commissie heeft mij dus in het geheel niet geholpen. Exhibit No. 91.

The Minister also wished “to discourage the local authorities to take action with the Commission, because the result [was] predictable”²⁵⁰.

70. Further, the Netherlands has not sought to harmonize its obligations towards Belgium and under the Habitats and Birds Directives, by applying the European Court of Justice jurisprudence in case C-96/98 *Commission v. France* relating to the Poitevin Marsh. In this case, the Commission filed proceedings against France because it had declassified, in April 1994, a corridor of 300 metres in width, in a zone of the Poitevin Marsh. The Commission esteemed that, in doing so, France had violated its Community obligations. According to the Commission, the declassification of the zone in question not only resulted in a reduction in its surface area, but would also disturb birds in the region by reason of the completion of works and the isolation of the remainder of the area, cut off by the motorway²⁵¹. The Court first held that, for a complaint of infringement of Article 4(4) of the Birds Directive by reason of the declassification, through a reduction in size, of a portion of an area which has been classified as a special protection area to be upheld, it is necessary, in any event, for the area in question to have been part of the classified area²⁵². Thereupon, the Court noted that the project of constructing a roadway through the Poitevin Marsh had been made the object of domestic administrative decisions in October 1993, before the French Government designated the Poitevin Marsh as a special protection area in November 1993²⁵³. The Court then concluded as follows:

“in those circumstances, it is evident, as the French government submits, that the strip of land earmarked for construction of the motorway was mistakenly referred to as forming part of the Marais Poitevin Intérieur SPA at the time when that SPA was notified to the Commission and that the declaration by the Minister for the Environment in his letter of 19 April 1994 to the Prefect of the Pays de Loire Region, to the effect that “the land acquired for the motorway ... must ... be regarded as being excluded from the SPA”, did not involve a reduction in the surface area of the SPA classified but simply the rectification of an error in the particulars forwarded to the Commission.

56. It follows that the complaint alleging infringement of article 4(4) of the Birds directive by reason of the declassification of part of the Marais Poitevin Intérieur SPA through a reduction in its surface area must be rejected”²⁵⁴.

²⁵⁰ *Loc. cit.*, p. 45.

²⁵¹ E.C.J., case C-96/98, *Commission v. French Republic*, Judgement of 25 November 1999, *E.C.R.* 1999, page I-08531, at para. 48. Exhibit No. J16.

²⁵² *Loc. cit.*, at para. 53.

²⁵³ *Loc. cit.*, at para. 54.

²⁵⁴ *Loc. cit.*, para.55-56.

Same reasoning would apply to the Meinweg area, as well as to the other Habitats or Birds Directives areas identified by the Netherlands in the zones crossed by the historic track of the Iron Rhine. When, in 1994, the Netherlands first designated the Meinweg area under the Birds Directive²⁵⁵, Belgium still enjoyed its rights under the several bilateral treaties, as it still does at present. Moreover, as from 1993, Belgium expressly reserved its rights with respect to a future reactivation of the historic track. The Netherlands pursued its designations under the Birds and Habitats Directives in subsequent years, when negotiations with respect to reactivation were well underway and the Netherlands had already taken, or participated in, a wide number of studies, including environmental impact assessments, in that respect²⁵⁶. If the Netherlands is of the opinion that the Iron Rhine may not be reactivated in a zone designated under the Habitats and/or Birds Directives, it could and should have subtracted the strip of the Iron Rhine track from the sites to be protected, so as to prevent any conflict occurring between its obligations towards Belgium with respect to the Iron Rhine, and its European Community obligations under the Habitats and Birds Directives.

71. The obligation of the Netherlands to take this initiative for the purpose of avoiding a conflict between its obligations towards Belgium and its European Community obligations under the Habitats and Birds Directives, is the more cogent, given that reactivating the Iron Rhine is not only a matter of safeguarding Belgium's conventional rights, but also of taking positive action towards sustainable development, notably through the elimination of green house gasses by a modal shift from road traffic to the more environmental friendly railway traffic and inter-modal transports, which, in turn, is a recognized measure to attain the objectives of the United Nations Framework Convention on Climate Change and its Kyoto Protocol²⁵⁷. What is more, reactivating the Iron Rhine is part of the TENS Trans-European Network, fostered by the United Nations Economic Commission for Europe, as well as by the EC Treaty in order to achieve the internal market and the harmonious development of the Community by strengthening its economic and social cohesion²⁵⁸.

²⁵⁵ See Exhibit No. 68

²⁵⁶ See above, para. 24 ff. and 29 ff.

²⁵⁷ See above, para. 19 ff.

²⁵⁸ See above, para. 22 and EC Treaty, Articles 14, 154, 156 and 158. Exhibit No. 50.

72. To this it may be added that neither has the Netherlands opted for taking - potentially less costly - compensatory measures pursuant to article 6.4 of the Habitats Directive, which is equally applicable to Special Protection Areas under the Birds Directive:

“If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest”²⁵⁹.

The possibility of using this means to safeguard a harmonious coexistence of Belgium’s conventional rights on the Iron Rhine and European Community obligations under the Habitats and Birds Directives warranted the more careful consideration, as, in its opinion of 19 September 2001, the Commission indicated :

“we feel that the assessments of the [Iron Rhine] project’s impacts which were put at our disposition have only marginally touched the issue of potential general environmental benefit that may result from shifting more transport capacity to freight railways in the framework of current EU transport policy. Such a shift in transport mode may allow for growth of more environmentally friendly ways of transports and might eventually imply “beneficial consequences of primary importance for the environment (8.6/4 [habitats directive])”²⁶⁰.

73. In sum, it appears from the above that – unless the Netherlands provides evidence to the contrary - the building of a tunnel under the Meinweg and of an embankment in the Weerter- en Budelerbergen, is not the only possible means for the Netherlands to comply with its obligations under the Birds and Habitats Directives.

These requirements are, therefore, formulated by the Netherlands by its own will. At best, they are made “necessary” by domestic norms governing the status of nature protection zones, which the Netherlands decided to create in the areas crossed by the historical route of the Iron

²⁵⁹ Exhibit No 70.

²⁶⁰ Exhibit No. 90, p. 3.

Rhine, even though Belgium had expressly reserved its rights with respect to a reactivation of the route.

74. In these circumstances, the Netherlands violates (or would violate) the abovementioned rules and principles of international law, by making the long-term use of the historical route of the Iron Rhine conditional upon the construction of a tunnel under the Meinweg and an embankment or other nature protection device in the Weerter- and Budelerbergen *and* on the financing of such highly expensive craftworks by Belgium.

This does not amount to saying, that the Netherlands' requiring a tunnel under the Meinweg and nature protection devices in the Weerter- en Budelerbergen, is *per se* incompatible with reasonableness and good faith. However, reasonableness and good faith require that these craftworks are wholly financed by the Netherlands itself, and further, that such construction does not delay the exercise of Belgium's right to use the historical route of the Iron Rhine.

This is the more so in view of the fact that Belgium, for its part, has sought to accommodate the exercise of its conventional rights with the exercise by the Netherlands of its regulatory power. Belgium accepted that detailed studies be performed over a number of years with respect to alternative tracks that might be more favourable to the interests of the Netherlands; such studies, however, proved to be in favour of reactivating the historic track. Belgium also abstained, pending these studies, from claiming the immediate and unconditional exercise of its right to use the historical track to its maximum capacity. Third, Belgium did not, as a matter of principle, oppose to the building of a tunnel under the Meinweg area as requested by the Netherlands, even though, irrespective of the costs involved, such measure would delay the use of the historic track at full capacity and engender problems as concerns the temporary use of the track pending the construction of the tunnel.

75. If, for argument's sake, the Netherlands had no means at its disposal to meet its obligations under the EC Birds and Habitats Directives, other than including the historical route of the Iron Rhine in protected areas pursuant to these Directives and subsequently requiring a tunnel under the Meinweg and environmental protection devices in the Weerter-en Budelerbergen, the Netherlands would still violate the principles of good faith and reasonableness in making the construction of these devices subject to the further condition that they be financed by Belgium. That is not a matter of Community law.

Belgium, admittedly, has an obligation with respect to the fulfilment of obligations under the EC Birds and Habitats Directives, including where measures to be taken on Dutch territory are at stake. This obligation flows from Article 10 (formerly Article 5) of the EC Treaty, which provides as follows:

“Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.”

The impact on Article 10 (then Article 5) on the obligations of a Member State who entered into treaty with another Member State prior to the entry into force of the EEC Treaty, has been clarified by the European Court of Justice in *Matteuci*²⁶¹. Belgium had entered into a bilateral treaty with Germany under which nationals of both parties were eligible for scholarships. Miss Matteuci, who was an Italian national, claimed the right to a scholarship on the basis of Regulation No. 1612/68, providing that a worker who is a national of a Member State is entitled, in the territory of the other Member States, to all social advantages in the same way as national workers. Having found that the scholarship fell within the purview of the Regulation, the Court rejected Belgium’s argument that, even if it were to propose Miss Matteuci for such a scholarship, Germany would be bound by the provisions of the bilateral agreement, under which only nationals of the two countries are eligible for scholarships, which was not Miss Matteuci’s case²⁶². The Court rejected this view, withholding Italy’s position that “another Member State may not prevent the host Member State from fulfilling the obligations imposed on it by Community law”²⁶³. The Court stated:

“Article 5 [now Article 10] of the Treaty provides that the Member States must take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty. If, therefore, the application of a provision of Community law is liable to be impeded by a measure adopted pursuant to the implementation of a bilateral agreement, even where the agreement falls outside the field of application of the Treaty, every Member State is under a duty to facilitate the

²⁶¹ *Annunziata Matteuci v. Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium*, Case 235/87, judgment of 27 September 1988, E.C.R. 1988 p. 05589 ff. Exhibit No. J.14.

²⁶² *Loc. cit.*, para. 17.

²⁶³ *Loc. cit.*, para. 18-19.

application of the provision and, to that end, to assist every other Member State which is under an obligation under Community law."²⁶⁴

Belgium's obligation to "*facilitate the application*" of EC Birds and Habitats Directives and "*to that end, to assist*" the Netherlands "*which is under an obligation under Community law*" to apply these Directives on Dutch territory, could not possibly amount to an obligation for Belgium to fulfil EC obligations on Dutch territory in lieu of the territorial sovereign. It could not, therefore, oblige Belgium to finance EC implementation measures on Dutch territory.

Belgium has assisted the Netherlands, in full compliance with the standards of Article 10, by accepting the performance of detailed studies over a number of years with respect to alternative tracks, and by abstaining, pending these studies, from claiming the immediate and unconditional exercise of its right to use the historic track to its maximum capacity. Belgium has also assisted the Netherlands by not opposing, as a matter of principle, to such measures as the construction of a tunnel in the Meinweg and of environment protection devices in the Weerter- en Budelerbergen, even though, irrespective of the costs involved, such measures delay the use of the historic track at full capacity and engender problems as concerns the temporary use of the track pending the construction of the tunnel.

C. Conclusion

76. On the basis of the above, Belgium submits that Dutch legislation and the decision-making power based thereon in respect of the use, restoration, adaptation and modernisation of railway lines on Dutch territory do not apply in the same way to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, in that:

- The Netherlands shall, if Belgium decides to modify the plan of the historical route of the Iron Rhine on Belgian territory, allow for the prolongation of the historical route on Dutch territory "*according to the same plan*".

²⁶⁴ *Loc. cit.*, para. 19.

- If Belgium makes use its right to have the historical route of the Iron Rhine on Belgian territory prolonged on Dutch territory according to the same plan as on Belgian territory, the route shall be constructed “*at the expense of Belgium*” and “*without any expense for the Netherlands*”. Concomitantly, Dutch regulatory powers shall be limited by the requirement under Article 12 of the 1839 Separation Treaty that the “*works*” shall be “*agreed*” upon between Belgium and the Netherlands.
- The Netherlands shall have the obligation to allow for the use of such route provided that it “*only serve[s] as commercial communication*”.
- Belgium and the Netherlands shall determine by agreement everything relating to the international exploitation of the railway, in particular the height and mode of collection of toll rights.
- No re-routings deviating from the historical route shall be decided upon by the Netherlands without the agreement of Belgium.
- The Netherlands is under the obligation to exercise its legislative and decision-making power in good faith and in a reasonable manner, and so as not to deprive Belgium’s rights to have the Iron Rhine prolonged on Dutch territory according to the same plan as on Belgian territory to use the historical route of the Iron Rhine, of their substance, and so as not to render the exercise of these rights unreasonably difficult.
- Without prejudice to Belgium’s right to an immediate use of the historical route of the Iron Rhine at full capacity and on a long-term basis, when Belgium makes a demand for provisional driving on the historical route of the Iron Rhine, by 15 trains per natural day (both directions summed up), including at limited speed in evening hours and at night, for a period of 5 years at least, the Netherlands shall immediately accept that demand, and immediately take all decisions necessary to effectively allow for such driving within the shortest time materially feasible.
- The Netherlands may not make the long-term use of the historical route of the Iron Rhine conditional upon the construction of a tunnel under the Meinweg and nature protection devices in the Weerter- and Budelerbergen, unless such works are financed

by the Netherlands and the construction does not delay the exercise of Belgium's right to use the historical route of the Iron Rhine.

*

QUESTION NO. 2

To what extent does Belgium have the right to perform or commission work with a view to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, and to establish plans, specifications and procedures related to it according to Belgian law and the decision-making power based thereon? Should a distinction be drawn between the requirements, standards, plans, specifications and procedures related to, on the one hand, the functionality of the rail infrastructure in itself, and, on the other hand, the land use planning and the integration of the rail infrastructure, and, if so, what are the implications of this? Can the Netherlands unilaterally impose the building of underground and above-ground tunnels, diversions and the like, as well as the proposed associated construction and safety standards?

77. The first sentence of Question No. 2 is composed of two phrases. First, it is asked to what extent Belgium has the right to perform or commission work with a view to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory. Second, it is asked to what extent Belgium has the right to establish plans, specifications and procedures “*related to it*” according to Belgian law and the decision-making power based thereon. *Prima facie*, the words “*related to it*” might refer to the preceding terms, *i.e.*, “*the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory*”. In that hypothesis, the first phrase would be composed of two, unrelated questions. However, the words “*related to it*” could also refer to “*work*” performed or commissioned by Belgium, as envisaged in the first phrase. In this hypothesis, the question of to what extent Belgium has the right to establish plans, etc., should only be contemplated to the extent that Belgium has the right to perform or commission works on Dutch territory.

The original Dutch text of the Arbitral Agreement makes it clear that the second, narrower interpretation should be withheld. The syntax being different, the words (“*daarop betrekking hebbende plannen*” (“*plans .. relating to it*”) in the Dutch version immediately follow the words “*werken uit te voeren of te laten uitvoeren*” (“*perform or commission works*”). Also, withholding the more narrow interpretation contributes to delimiting Questions Nos. 1 and 2. Therefore, the second phrase relating to plans being established by Belgium according to Belgian law, shall be limited hereafter to the hypothesis where Belgium performs or

commissions work. It is, however, understood that the remaining issue (in the broad interpretation suggested above) is governed by the principles set out under Question No. 1.

It may likewise be asked whether the second and third sentences of Question No. 2, relate to the specific hypothesis where Belgium performs or commissions work on Dutch territory, or whether they have a larger scope. The Dutch version is of no avail in this respect. However, in Belgium's view, it stems from Question No. 2 as a whole, that both the second and third sentences seek to specify the first sentence. Therefore, Belgium shall limit itself, under Question No. 2, to addressing these issues as they arise in the hypothesis where Belgium performs or commissions work on Dutch territory.

- A. To what extent does Belgium have the right to perform or commission work with a view to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, and to establish plans, specifications and procedures related to it according to Belgian law and the decision-making power based thereon?

78. The Separation Treaty of 1839 provided in Article 12:

*“Art. 12. Dans le cas où il aurait été construit en Belgique une nouvelle route, ou creusé un nouveau canal (..), alors il serait loisible à la Belgique de demander à la Hollande, qui ne s’y refuserait pas dans cette supposition, que la dite route ou le dit canal fussent prolongés d’après le même plan, entièrement aux frais et dépens de la Belgique (..). Cette route ou ce canal, qui ne pourraient servir que de communication commerciale, seraient construits, au choix de la Hollande, soit par des ingénieurs et ouvriers que la Belgique obtiendrait l’autorisation d’employer à cet effet dans le canton de Sittard, soit par des ingénieurs et ouvriers que la Hollande fournirait, et qui exécuteraient, aux frais de la Belgique, les travaux convenus, le tout sans charge aucune pour la Hollande (..).”*²⁶⁵

This provision granted Belgium the right to request from the Netherlands that a route or canal on Belgian territory be prolonged on Dutch territory according to the same plan. If Belgium exercised that right, the Netherlands would have the option of having the works performed, either by personnel, which Belgium would obtain the authorisation to employ, or by personnel supplied by the Netherlands. Belgium's right to perform or commission works on Dutch

²⁶⁵ Unofficial translation : "Art. 12. In case a new road would have been constructed in Belgium, or a new canal dug, (..), then Belgium would be at liberty to ask The Netherlands, which in that hypothesis would not refuse it, that the said road or the said canal be prolonged according to the same plan, entirely at the cost and expense of Belgium (..). This road or this canal, which could only serve as commercial communication, would be built, at the choice of The Netherlands, either by engineers and workers, which Belgium would obtain the authorisation to employ, or by engineers and workers which The Netherlands would supply, and which would execute, at the expense of Belgium, the agreed works, all of which without any expense for The Netherlands (..)." Exhibit No. 3.

territory was therefore subject to two conditions: First, that such works aimed at “*prolonging*” a Belgian route on Dutch territory “*according to the same plan*”; and second, that the Netherlands took the option of having that prolongation built by Belgium.

79. Belgium’s request for reactivation of the Iron Rhine is not a demand for the “*prolongation*” of a route, canal or railway “*according to the same plan as on Belgian territory*”. The Iron Rhine was prolonged on Dutch territory in the 1870’s and still exists at present – witness also the fact that it is offered for use in the “Netverklaring 2003” of Railinfrabeheer, Railned and Railverkeersleiding²⁶⁶. The plans of the Iron Rhine on Belgian territory have not been modified since its international use was interrupted in the 1990’s. Belgium is not, therefore, submitting a new “*plan*”, which could arguably re-activate the Netherlands’ option under the Separation Treaty of 1839. To the extent that the railway is not available for immediate use because of a lack of maintenance or because of the dismantling of part of the infrastructure by the Netherlands, the Netherlands could not rely on that situation so as to claim that it may now exercise its right of option under the Separation Treaty (“*nullus commodum capere de sua injuria propria*”: see Question No. 3).

Conversely, if Belgium were to request the prolongation of the historical track as a high-speed line, which would require a new or additional rail with different characteristics, this would arguably amount to a prolongation according to a new plan, which could trigger the Netherlands’ right to exercise the option referred to in Article 12 of the Separation Treaty.

80. As concerns the extent to which Belgium has the right to establish plans, specifications and procedures according to Belgian law and the decision-making power based thereon, it has been indicated under Question No. 1 that the Iron Rhine does not benefit from a regime of extra-territoriality. This would equally be true, as a matter of principle, if works were performed or commissioned by Belgium. To this extent, plans, specifications and procedures shall not be established “*according to Belgian law and the decision-making power based thereon*”. However, Dutch regulatory powers regarding plans, specifications and procedures are limited as follows.

First, article 12 of the 1839 Separation Treaty grants Belgium the right, if it so requests, to have a ‘route or canal’ on Belgian territory prolonged on Dutch territory “*according to the*

²⁶⁶ Exhibit No. 53. Annex I.

same plan". Dutch jurisdiction as concerns the establishment of plans, specifications and procedures is limited accordingly. At present, this hypothesis is not at stake, as Belgium has not made a request for prolongation.

Second, in case Belgium requests for a prolongation pursuant to the above, Article 12 of the Separation Treaty further requires that Belgium and the Netherlands "*agree*" on the "*works*" to be performed on Dutch territory.

The above is without prejudice to limits on Dutch jurisdiction as outlined under Question No. 1 above. Also, Dutch jurisdiction on plans, specification and procedures related to works on the Iron Rhine, is without prejudice to Belgium's right, when it performs works on Dutch territory, to benefit from a treatment not less favourable than that accorded to other operators with respect to other railways on Dutch territory, as concerns the freedom to establish plans, specifications and procedures.

B. Should a distinction be drawn between the requirements, standards, plans, specifications and procedures related to, on the one hand, the functionality of the rail infrastructure in itself, and, on the other hand, the land use planning and the integration of the rail infrastructure, and, if so, what are the implications of this?

81. The distinction envisaged in the Arbitral Agreement is between the requirements, standards, plans, specifications and procedures related to, on the one hand, "*the functionality of the railway infrastructure in itself*", and, on the other hand, "*the land use planning and the integration of the rail infrastructure*".

The "*functionality*" criterion seeks to distinguish between costs and investments for the purpose of warranting the operation of the railway from a mere transports perspective, and others, which aim at reconciling transports requirements with other objectives, notably land use planning and the protection of the environment²⁶⁷. The practical scope of this distinction is, to some extent, clarified by documents drafted in the negotiations between Belgium and

²⁶⁷ "*Functionality*" is not defined in the Webster Dictionary. "*Functional*" means "*1. of or relating to a function or functions. 2. a) performing or able to perform a function. b) intended to be useful*" (*Op. cit.*, p. 546).

the Netherlands, which classify costs and risks according to the ‘functionality’ criterion²⁶⁸. It would appear that the criterion reflects a starting point in negotiations that each State should pay for what it gets. Belgium, obtaining passage, would pay for functionality. The Netherlands, obtaining wildlife protection, etc., would pay for measures related thereto.

In that perspective, the distinction between “*functionality*” and “*other*” is, as such, irrelevant as regards the extent to which Belgium has the right to perform or commission work on Dutch territory. It is equally irrelevant, as such, as regards the extent to which Belgium has the right to establish plans, specifications and procedures related to it according to Belgian law and the decision-making power based thereon.

As to the relevance of the “functionality” criterion with respect to repartition of costs and risks, it will be shown under Question No. 3 that Belgium shall bear no costs nor financial risks associated with the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, irrespective of whether such costs are related to the functionality of the railway line.

C. Can the Netherlands unilaterally impose the building of underground and above-ground tunnels, diversions and the like, as well as the proposed associated construction and safety standards?

82. The building of underground and aboveground tunnels, as well as the proposed associated construction and safety standards, may be required to the extent that such requirements are in conformity with the principles identified under Question No. 1 above.

More specifically, the power of the Netherlands to “*unilaterally impose*” such requirements is limited:

- First, by Article 12 of the 1839 Separation Treaty, in the hypothesis where Belgium requests for a prolongation of the track on Dutch territory according to the same plan as on Belgian territory, and the Netherlands take the option of having the works

²⁶⁸ See Exhibit No. 95, notably p. 2.

performed by Belgium. In such a hypothesis – which does not materialise at present – Belgium and the Netherlands must agree on works to be performed.

- Second, by the obligation to cooperate and the principles of reasonableness and good faith, on the basis of which the Netherlands are under the obligation to inform and to consult in good faith with Belgium as concerns such requirements.

83. Diversions “*and the like*” may not unilaterally be imposed by the Netherlands. They require a new agreement between Belgium and The Netherlands. Suffice it to recall that article XII of the Separation Treaty of 1839 determined the localisation of the “*route or canal*” contemplated in that it would pass through the district of Sittard²⁶⁹. When Belgium requested a modification of the route originally contemplated (and the Netherlands, in return, requested that the route would pass through the Dutch commune of Weert), a new treaty was considered necessary for that purpose, which led to the Iron Rhine Treaty of 1873²⁷⁰. The historical route of the Iron Rhine cannot, therefore, be modified without Belgium’s consent.

D. Conclusions

84. On the basis of the above, Belgium submits in answer to Question No. 2 that:

- Belgium does not have the right to perform or commission work with a view to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, unless Belgium requests that the Iron Rhine on Belgian territory be prolonged on Dutch territory according to a new plan, and the Netherlands takes the option of having that prolongation according to the new plan built by Belgium in accordance with article 12 of the Separation Treaty of 19 April 1839. The current request of Belgium to reactivate the Iron Rhine is not a claim to have the Iron Rhine prolonged on Dutch territory, with the consequence that the Netherlands does not have the option provided by Article 12 of the 1839 Separation Treaty to require that Belgium performs work on Dutch territory.

²⁶⁹ Exhibit No. 3.

²⁷⁰ See above, para 10 and para 13 and Exhibit No. 16.

- Belgium does not have, in principle, the right to establish plans, specifications and procedures for such works according to Belgian law and the decision-making power based thereon. However, Dutch regulatory powers are, according to the 1839 Separation Treaty, limited by the right of Belgium to have the 'route or canal' prolonged on Dutch territory according to the same plan as on Belgian territory and by the requirement that, apart from the plan, works on Dutch territory be agreed upon by both Governments. As the present request of Belgium to reactivate the Iron Rhine is not a request to have the Iron Rhine prolonged on Dutch territory according to the same plan as on Belgian territory, such limitation is not at stake at present. The same is true of Belgium's right to benefit from a treatment not less favourable than that accorded to other operators with respect to other railways on Dutch territory, as concerns the freedom to establish plans, specifications and procedures.

However, Dutch regulatory powers to establish plans, specifications and procedures remains limited by the general principles of international law, including *pacta sunt servanda* and the principles of reasonableness and good faith.

- The distinction between the requirements, standards, plans, specifications and procedures related to, on the one hand, the functionality of the railway infrastructure in itself, and, on the other hand, the land use planning and the integration of the rail infrastructure, is, as such irrelevant as concerns the extent to which Belgium has the right to perform or commission work on Dutch territory. It is equally irrelevant as such with respect to the extent to which Belgium has the right to establish plans, specifications and procedures related to it according to Belgian law and the decision-making power based thereon.
- The right of the Netherlands to unilaterally require the building of underground and above-ground tunnels, as well as the proposed associated construction and safety standards, is limited by the abovementioned rights of Belgium in case it requests that the railway on Belgian territory be prolonged on Dutch territory according to the same plan, which is not the case at present. It is further limited by the obligations of the Netherlands to cooperate with Belgium as well as by the principle of good faith. Diversions and the like may not unilaterally be imposed by the Netherlands, in that they require the consent of Belgium.

QUESTION NO. 3

In the light of the answers to the previous questions, to what extent should the cost items and financial risks associated with the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory be borne by Belgium or by the Netherlands? Is Belgium obliged to fund investments over and above those that are necessary for the functionality of the historical route of the railway line?

85. The first sentence of Question No. 3 draws on a number of concepts, notably the “*use*”, the “*restoration*”, the “*adaptation*”, and the “*modernisation*” of the track, which have already been defined above²⁷¹. In brief, “*use*” is a synonymous for “*repair*”. Maintenance and restoration have in common that they aim at safeguarding or bringing back existing characteristics. “*Adaptation*” and “*modernisation*” imply a modification and, in principle, an improvement of characteristics.

The second sentence of Question No. 3 refers to the concept of “*functionality of the historical route*”, which embodies two distinct elements. First, in that it refers to the functionality “*of the historical route*”, the second sentence raises the question of whether Belgium should pay (additional) costs generated by the possible construction, use, etc., of alternative routes, other than the historical track. Second, as concerns the historical route, the “*functionality*” criterion seeks to distinguish between costs and investments for the purpose of warranting the operation of the railway from a mere transports perspective, and others, which aim at reconciling transports requirements with other objectives, notably land use planning and the protection of the environment. As already indicated under Question No. 2, the practical scope of this distinction is, to some extent, clarified by documents drafted in the negotiations between Belgium and the Netherlands, which classify costs and risks according to the ‘functionality’ criterion²⁷².

²⁷¹ See para. 51.

²⁷² See Exhibit No. 95, notably p. 2.

86. In Belgium’s view, the law applicable to the present dispute does not (directly) rely on any of these notions. Therefore, Belgium shall first set forth its position with respect to costs and investments by reference to existing legal criteria, before transposing the conclusions thus reached using the concepts of Question No. 3.

It is shown hereafter that, first, in application of the Iron Rhine’s conventional regime and without prejudice to the hypothesis where Belgium were to decide to modify the plans of the railway on its territory (*e.g.*, by building a HST-line) and were to request the Netherlands to have the line prolonged according to the same plan on Dutch territory, all cost items and financial risks associated with the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, shall be borne by the Netherlands and not by Belgium (hereafter: A).

Second, and in subsidiary order, all cost items and financial risks associated with the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, which are caused by a violation by the Netherlands of their international obligations towards Belgium shall be borne by the Netherlands and not by Belgium (hereafter: B).

A. In application of the Iron Rhine’s conventional regime, all cost items and financial risks associated with the use, restoration, adaptation and modernisation of the railway infrastructure of the historical route of the Iron Rhine on Dutch territory shall be borne by the Netherlands.

87. Article XII of the Separation Treaty of 1839 provided that the prolongation on Dutch territory of the road or canal linking Belgium to Germany through the district of Sittard would be constructed “*entirely at the cost and expense of Belgium*” and “*without any expense for the Netherlands*”.²⁷³ The road or canal could be constructed either by Belgium or by the Netherlands, at the choice of the Netherlands. The Treaty did not expressly provide, however, whose property the road or canal would be in any of these cases.

²⁷³ See para. 6 and Exhibit No. 3.

Later on, Article III of the Boundary Treaty of 1842 elaborated on Article XII of the Separation Treaty by stipulating that Belgium could have the road or canal constructed by a concessionary. It notably provided that “... *there will be grounds for expropriation, following the legislation of the Netherlands, by reason of public utility, ... in the same manner as if the Belgian Government would proceed by itself to the execution and exploitation works ...*”²⁷⁴. In that it provides for a right to expropriate, this provision makes it clear, first, that Belgium or its concessionary would become the owner of the railway infrastructure. Second, in that it refers to the “*execution and exploitation works*”, the Article testifies to the fact that, under Article XII of the 1839 Treaty, the construction of the route or canal by Belgium or its agent would entail same party’s also ensuring the exploitation of the route or canal.

When the 1873 Iron Rhine Treaty was entered into, the Netherlands recognized the *Compagnie du Nord de la Belgique* as a concessionary of the railway line on its territory, which was to be constructed and exploited by the *Compagnie du Nord de la Belgique* or the *Grand Central Belge*. Article IV of the 1873 Treaty provided to that effect that:

"The Compagnie du Nord de la Belgique, concessionary of the Belgian part of the railway from Antwerp to Gladbach, is declared and recognised, by the Government of The Netherlands, concessionary of the section of this same line which is situated on the territory of the Duchy of Limburg.

This section will be constructed and exploited by the Compagnie du Nord de la Belgique or by the Grand Central Belge, without any charge whatsoever for the Government of The Netherlands, and without prejudice to its sovereignty rights over the crossed territory.

*The exploitation shall not be assigned without the consent of the Government of The Netherlands.”*²⁷⁵

²⁷⁴ See para. 8 and Exhibit No. 6. Unofficial translation. Authentic text: « .. *il y aura lieu à expropriation... de la même manière que si le gouvernement belge procédait par lui-même aux travaux d'exécution et d'exploitation...* ».

²⁷⁵ See para. 12 and Exhibit No. 16. Unofficial translation. Authentic text: “*La Compagnie du Nord de la Belgique, concessionnaire de la partie Belge du chemin de fer d'Anvers à Gladbach, est déclarée et reconnue, par le Gouvernement des Pays-Bas, concessionnaire de la section de cette même ligne qui est située sur le territoire du Duché de Limbourg. Cette section sera construite et exploitée par la Compagnie du Nord de la Belgique ou par le Grand Central Belge, sans charge aucune pour le Gouvernement des Pays-Bas, et sans préjudice de ses droits de souveraineté sur le territoire traversé. L'exploitation ne pourra en être cédée sans le consentement du Gouvernement des Pays-Bas*”.

These texts, in sum, regarded the Iron Rhine as a commercial project whereby return on investments for the construction of the railway, would be generated by its exploitation. The Belgian railway company *Grand Central Belge* constructed the line and exploited it as from 1879, which proved very profitable²⁷⁶.

88. In 1897, Belgium sought to nationalise railway lines on Belgian territory. As part of the railway net of the *Grand Central Belge* was located on Dutch territory, the Belgian and Dutch Governments entered into a Railway Convention, which provided for the transfer to the Netherlands of the Grand Central railways located on its territory, in two stages. First, the Dutch Government consented to the Belgian Government buying the railway net of the *Grand Central Belge* located on Dutch territory, including the Iron Rhine, and second, the Belgian Government sold it to the Netherlands, which thus obtained ownership of the railway and of “its dependencies which are immovable by nature or by incorporation with all the land at their use”²⁷⁷.

The price to be paid by the Netherlands in return for this sale was to be calculated on the basis of criteria laid down in the Protocol annexed to the Railway Convention of 23 April 1897, and in the annex to the Protocol, with the proviso that the price should not exceed 13 million francs. With respect to the railways referred to in Article IV of the Convention, which included the Iron Rhine, such criteria were, in essence, the gross profits of the *Grand Central belge*, calculated in accordance with the annex to the Protocol, and the net profits, which took account of figures relating to both the *Grand Central Belge* and the *Maatschappij tot Exploitatie van Staatsspoorwegen* which was to take over exploitation of the railways²⁷⁸. The price was, therefore, mainly if not exclusively determined on the basis of present and expected future profitability²⁷⁹.

As, on the one hand, the Iron Rhine was prolonged on Dutch territory in the 1870’s pursuant to Article XII of the Separation Treaty of 1839, and, on the other hand, the Netherlands obtained ownership of the Iron Rhine on its territory in return for a price calculated on the basis of profitability and concomitantly benefited from future profits, they became solely responsible for reparations and innovations to the railway track. This is wholly consonant

²⁷⁶ See para. 12 and 14.

²⁷⁷ See para. 15 and Exhibit No. 21.

²⁷⁸ See article I of the Protocol and article I of the Annex thereto.

²⁷⁹ *Ibidem* and para. 15.

with the fact that, unlike the 1839 Treaty of Separation or the 1873 Iron Rhine Treaty, the Railway Convention did not contain any provision with respect to the financing of works to be performed in the future with respect to the Iron Rhine.

89. The fact that after the 1897 Treaty, expenses related to the use, the restoration, the adaptation and the modernisation of the historical route of the Iron Rhine on Dutch territory were (as they still are) to be born by the Netherlands is confirmed by the concession accorded by the Netherlands to the Dutch railway company *Maatschappij tot Exploitatie van Staatsspoorwegen* just after the sale²⁸⁰. The agreement entered into between the Netherlands and the *Maatschappij tot Exploitatie van Staatsspoorwegen* provided in Article 2 that, on a number of conditions, the *Maatschappij* should pay to the Netherlands “*an annual sum of an amount of three percent of the sum spent by the States by reason of repairs and renovations made to the parts of the railways mentioned in Article 1*”²⁸¹. This provision referred to Article 8 of the agreement of 21 January 1890 according to which the State of the Netherlands was obliged to provide on its own account for a sufficient level of “*maintenance*” of the railways to be taken over by the *Maatschappij*, such “*maintenance*” being defined as including “*herstellingen*” (repair) and “*vernieuwingen*” (renovations)²⁸².

The fact that, as indicated in the agreement between the Dutch Government and the *Maatschappij*, the Netherlands could recover part of investments and costs of maintenance, repair and renovations from the *Maatschappij*, confirms that same costs and investments could not be recovered from Belgium.

90. Furthermore, Belgium is not aware of any investment made by Belgium after 1897 with respect to the part of the Iron Rhine on Dutch territory, including with respect to the expansion of parts of the Iron Rhine to double track in the time-span between the sale and World War I, and its electrification after World War II.

91. It flows from the above that, as from 1897, the Netherlands became responsible for the cost items and financial risks associated with the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory.

²⁸⁰ See para. 16 and Exhibits No. 25 and No 24.

²⁸¹ Para. 16 and Exhibit No. 25.

²⁸² See para. 16 and Exhibit No. 26.

Costs and risks resting with the owner of the infrastructure include, first, all costs and risks associated with the functionality of the railway, as defined here above. They further include all costs and risks generated by Dutch regulatory requirements, *i.e.*, costs and risks the proximate cause of which lies in the fact that the owner of the railway is subject to Dutch territorial jurisdiction. This notably, but not exclusively, applies to costs and financial risks associated with all measures of environmental protection and land management. It includes, but is in no way limited to, the possible construction of a tunnel under the Meinweg and of an embankment or other noise abatement devices in the Weerter- and Budelerbergen.

92. Belgium's position does not imply that each and any cost and financial risk associated with the Iron Rhine necessarily rests with the Netherlands. If, for example, Belgium were to decide to modify the plans of the railway on its territory (*e.g.*, by building a HST-line) and were to request the Netherlands to have the line prolonged according to the same plan on Dutch territory, the Netherlands could arguably claim under Article XII of the 1839 Separation Treaty that such works on Dutch territory be financed by Belgium (another question being whether Belgium should, in such a case, be accorded the benefits accruing from the exploitation of the railway).

93. The above is unaffected by the fact that, as negotiations on reactivating the Iron Rhine went along, it was provided in the Memorandum of Understanding of 28 March 2000, that *"the costs for the temporary reactivation shall be borne by Belgium"*²⁸³.

According to same Memorandum, a decision on the temporary and long term use of the Iron Rhine was to be taken, *"ultimately mid 2001"*, so that if the Environmental Impact Assessment *"concludes that a temporary, limited use will not cause irreversible environmental damage, then, from end 2001 onwards a few trains a day will be allowed to use the whole historic track at limited speed between 7 AM and 7 PM. Under these same conditions of timely decision-making and of absence of irreversible damage, trains could, from end 2002 onwards, also use temporarily the whole track at limited speed in evening hours and at night, up to a maximum of fifteen per natural day (both directions summed up)"*.

²⁸³ Memorandum of Agreement, para. 9. Exhibit No. 82.

In this context, Belgium accepted to bear the limited costs of temporary reactivation so as to speed up the revitalisation of the Iron Rhine.

Irrespective of whether the Memorandum of Understanding has legally binding force, Belgium's position as concerns financing of temporary driving was conditional upon the modalities and time-schedule of temporary driving as provided for in the Memorandum. As indicated above, although the environmental impact assessment concluded that temporary driving would cause no irreversible environmental damage, decisions required for such purpose were not taken within the prescribed time limit. As the condition of reactivating the Iron Rhine for the end of 2001 has not been met, Belgium's (whether political or legal) undertaking to finance such reactivation has equally lapsed.

94. In conclusion, therefore, in application of the Iron Rhine's conventional regime and without prejudice to the hypothesis where Belgium would decide to modify the plans of the Iron Rhine on Belgian territory and would request the Netherlands to have the Iron Rhine prolonged on Dutch territory according to the same plan, which is not the case for the reactivation referred to in the Arbitral Agreement, all cost items and financial risks associated with the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, shall be borne by the Netherlands.

In application of this rule, and without prejudice to the hypothesis where Belgium were to decide to modify the plans of the Iron Rhine on Belgian territory:

- The Netherlands shall bear all costs and risks related to the functionality of the railway on Dutch territory, as well as all costs and risks generated by Dutch regulatory requirements, notably but not exclusively in the field of environmental protection and land management on Dutch territory, which includes but is not limited to the possible construction of a tunnel under the Meinweg and of an embankment or other noise abatement devices in the Weerter- and Budelerbergen.
- Belgium is under no obligation to bear any cost items or financial risks associated with the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, irrespective of whether such costs and/or financial risks are

generated by investments necessary for the functionality of the historical route of the railway line.

B. In subsidiary order, all cost items and financial risks associated with the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, which are caused by a violation by the Netherlands of their international obligations towards Belgium shall be borne by the Netherlands and not by Belgium.

95. If the Tribunal were to reject Belgium's submission here above that, according to the Iron Rhine's conventional regime, all costs and financial risks related to the use, the restoration, the adaptation and the modernisation of the Iron Rhine, shall be borne by the Netherlands, then, Belgium would still have no obligation to bear costs and financial risks caused by a violation, by the Netherlands, of its international obligations towards Belgium. This is a mere consequence of the obligation to make reparation for the prejudice caused by a violation of international law²⁸⁴, as well as an application of the principle that no one shall benefit from its illegal acts (*nullus commodum capere de sua injuria propria*). The latter principle, which is consecrated in literature²⁸⁵, finds expression in various conventional regimes as well as in decisions of courts and tribunals.

In the 1969 Vienna Convention on the Law of Treaties, several provisions enunciating grounds for invalidity, termination or suspension of treaties, preclude the possibility for a State to rely on such grounds if their occurrence results from a violation of that State's international obligations (Articles 60, 61 and 62). In the *Gabcikovo-Nagymaros case*, the International Court rejected Hungary's plea that its obligations towards Czechoslovakia had terminated as a consequence of the latter's illegal act, on the basis that "*Hungary, by its own conduct, had prejudiced its right to terminate the Treaty*"²⁸⁶. Pursuant to the same principle, the law of state responsibility precludes a State from invoking *force majeure*, the state of

²⁸⁴ See i.a. P.C.I.J., *Case concerning the factory at Chorzow*, Judgment of 13th September 1928, *Series A*, No. 17, p. 29. Exhibit No J 2.

²⁸⁵ See i.a., B. Cheng, *General Principles of Law as applied by International Courts and Tribunals*, London, Stevens and Sons Ltd., 1953, p. 149 ff.; R. Kolb, *La bonne foi en droit international public*, Paris, P.U.F., 2000, p. 487-499. Exhibits No W 1 and No. W 5.

²⁸⁶ I.C.J., *Case concerning the Gabcikovo-Nagymaros Project*, Judgment of 25 September 1997, *I.C.J. Reports*, 1997, §110. Exhibit No J 5.

necessity or distress as a circumstance precluding wrongfulness, when such circumstance is due to its own fact²⁸⁷. Again, on the basis of the same principle, a State may not rely on the local remedies rule, if the failure to exhaust such remedies is due to the same State's action or omission²⁸⁸. In *Tippets, Abbett, Mac Carthy, Stratton v. Iran*, the Iran-United States Claims Tribunal applied the principle *Nullus commodum capere de sua injuria propria* for the purpose of calculating reparation due in case of expropriation:

*“If payments for work on the TIA project have been wrongfully withheld by an Agency of the Government of the Islamic Republic of Iran and if for the lack of such payments the Tribunal did not include such moneys in the dissolution value of TAMS-AFFA, then the Respondent Agency would profit of its own wrongs. Conversely if TAMS-AFFA wrongfully failed to pay tax and social security obligation and if the Tribunal did not deduct such obligations then TAMS-AFFA would profit of its own wrongs. It's a well recognized principle in many municipal systems and in international law that no one should be allowed to reap advantages from their own wrong, 'Nullus commodum capere de sua injuria propria'”*²⁸⁹.

In application of these principles, costs and financial risks caused by violations by the Netherlands of their international obligations towards Belgium, shall not be borne by Belgium but by the Netherlands. Following obligations of the Netherlands are, notably, of relevance in this respect.

96. *First*, as demonstrated under Question No. 1, the Netherlands, in its capacity as territorial sovereign and owner of the Iron Rhine railway infrastructure on its territory, has, in violation of Belgium's right to use the historical route of the Iron Rhine in accordance with the Separation Treaty of 19 April 1839, and in violation of the principle of due diligence, rendered impossible the use of the railway by dismantling part of its infrastructure and making it unfit for use, by failing to provide for maintenance and by deciding to interrupt works aimed at restoring the historical route so as to make it fit for temporary use.

²⁸⁷ Article 23, 24 and 25 of the “Resolution on Responsibility of States for internationally wrongful acts”, Resolution adopted by the General Assembly [on the report of the Sixth Committee (A/56/589 and Corr.1)], 28 January 2002, A/RES/56/83.

²⁸⁸ Georg Schwarzenberger, *A Manual of International Law*, 4th ed., London, Stevens and Sons Ltd., 1960, p. 166. Exhibit No. W 6. See also: PCIJ, *Jurisdiction of the Courts of Danzig*, Advisory Opinion of 3rd March 1928, *Series B*, No. 15, p. 27. Exhibit No. J1.

²⁸⁹ Iran-United States Claims Tribunal, *Tippets, Abbett, Mc Carthy, Stratton v. Tams-Affa a.o. (Case No.7)*, Award n° 141-7-2 of 22 June 1984, *Iran-U.S. C.T.R.*, vol. 6, p. 227-228. Exhibit No. J 7.

As a consequence, the costs and financial risks related to restoration of the historical route, which would not have been required had the Netherlands not violated their obligations in the way just-mentioned, shall be borne by the Netherlands.

97. *Second*, it has been shown under Question No. 1 above that the Netherlands is under the international obligation to exercise its jurisdiction in a reasonable manner and in good faith.

In that context, it has been shown that the Netherlands may not make the long-term use of the historical route of the Iron Rhine subject to the construction of a tunnel under the Meinweg and an environmental protection device in the Weerter- en Budelerbergen, and on the further condition that such craftworks be financed by Belgium. If, therefore, the Netherlands requires such craftworks to be built, such requirements are not opposable to Belgium and costs related to them shall, consequently, not be borne by Belgium.

98. This financial consequence of Belgium's conclusions under Question No. 1 is the more warranted, in view of the fact that, pursuant to fundamental principle of good faith²⁹⁰, a State may not weigh down in an unreasonable manner, the performance of obligations which another State owes to it.

This principle finds application in the law of state responsibility, where the victim State is under the obligation to mitigate the damage caused by another State's wrongful act. As Philippe Kahn points out, this principle which may seem paradoxical at first glance, is in reality inherent in the principle of good faith:

*“This obligation (to mitigate the damage) is, at first glance, paradoxical. Indeed, the contract provides for obligations incumbent on each of the parties. If one of them does not properly perform its obligations, it is surprising that the other party, which suffers the inadequate performance, is obliged also to protect his debtor. Yet, this is a undisputed principle which is derived from the principle of good faith.”*²⁹¹

²⁹⁰ I.C.J., *Nuclear Tests Case (Australia v. France)*, Judgment of 20 December 1974, *I.C.J.Reports*, 1974 , p. 268, § 46. Exhibit No J 4.

²⁹¹ Ph. Kahn, “Les principes généraux du droit devant les arbitres du commerce international”, *J.D.I.*, 1989, p. 322. Unofficial translation. Authentic text : “*Cette obligation (de minimiser le dommage) est, au premier abord, paradoxale. En effet, le contrat prévoit des obligations à la charge de chacune des parties. Si l'une exécute mal ses obligations, il est étonnant que l'on impose à l'autre, celle qui supporte la mauvaise exécution, d'assumer en plus la sauvegarde de son débiteur. C'est pourtant un principe constant que l'on rattache à la bonne foi (...)*”. Exhibit No W4.

The existence of this general principle of international law has been recognized in numerous international decisions, notably by the International Centre for the Settlement of Investment Disputes²⁹² and the United Nations Compensation Commission²⁹³, and is approved of in literature²⁹⁴. It is also consecrated in article 77 of the United Nations Convention for the international Sales of Goods²⁹⁵, as well as in Article 39 of the Resolution on the Responsibility of States for Internationally Wrongful Acts²⁹⁶.

Likewise, where one party to a treaty owes an obligation to perform investments or payments, the amount of which depends on the behaviour of the other party, good faith prevents the latter from unreasonably weighing down the burdens, which performance entails for the former. This is the more obvious, if one considers that the *prima facie* paradox mentioned by Philippe Kahn as concerns the obligation of the victim State to protect its wrongdoer, does not come into play where the performance of primary (treaty) obligations is at stake.

99. Accordingly, if the Netherlands had the possibility to avoid costs and financial risks related to the construction of environmental protection devices in application of the Birds and Habitats Directives, they were under the obligation to do so, to the extent that such costs and risks are to be borne by Belgium. The European Court's jurisprudence relating to the Poitevin Marsh²⁹⁷, already mentioned under Question No. 1, is *prima facie* evidence for the fact that the Netherlands had the possibility to avoid the Birds and Habitats Directives' having an incidence on costs and financial risks related to the use, restoration, adaptation or modernisation of the historical route of the Iron Rhine, by taking out the strip of the Iron Rhine from the protected areas, either when making the designations or notifications, or at a later date. Unless this evidence be rebutted by the Netherlands, it should, therefore, be concluded that the Netherlands shall bear all costs and financial risks related to the use,

²⁹² International Center for Settlement of Investment Disputes, *Middle East Cement Shipping and Handling Co. S.A v. Arab Republic of Egypt*, Award of 12 April 2002, Arb/99/6, §167 ; International Center for Settlement of Investment Disputes, *Amco Asia et autres v. République of Indonésia*, Sentence of 31 May 1990, as summarized and interpreted by E. Gaillard, "CIRDI. Chronique des sentences arbitrales", *J.D.I.*, 1991, p. 172 ff., esp. p. 178 and p. 187. See also: I.C.J., *Case concerning the Gabcikovo-Nagyymaros Project*, *loc.cit.*, § 80. Exhibits No J 9 and W 2.

²⁹³ United Nations Compensation Commission, *Well Blowout Control Claim*, Report and Recommendations of 15 November 1996, UN Doc. S/AC.26/1996/5 reprinted in *I.L.R.*, vol. 109, p. 480 ff., esp. p. 502-503. Exhibit No J 12.

²⁹⁴ See e.g. D. Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility", *A.J.I.L.*, 2002, vol. 96, p. 846; Ph. Kahn, «Les principes généraux du droit devant les arbitres du commerce international», *J.D.I.*, 1979, p. 321-322. Exhibits No W 7 and NoW 4.

²⁹⁵ Exhibit No 57bis.

²⁹⁶ Exhibit No 57ter.

²⁹⁷ Exhibit No. J.15 and *supra*, para 70.

restoration, adaptation or modernisation of the historical route of the Iron Rhine to the extent that such costs and risks are caused by the applicability of the Birds Directive or the Habitats Directive in the area crossed by the historical route on Dutch territory.

C. Conclusion

100. On the basis of the above, Belgium submits in answer to Question No. 3 that:

1. In primary order

- In application of the Iron Rhine's conventional regime, all cost items and financial risks associated with the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, shall be borne by the Netherlands, unless Belgium would decide to modify the plans of the Iron Rhine on Belgian territory and would request the Netherlands to have the Iron Rhine prolonged on Dutch territory according to the same plan, which is not the case as concerns the contemplated reactivation mentioned in the Arbitral Agreement.

2. In subsidiary order

- All costs items and financial risks related to restoration of the historical route, caused by the Netherlands' dismantling part of the infrastructure of the historical track, making it unfit for use or failing to provide maintenance, shall be borne by the Netherlands.
- The Netherlands shall bear all costs and financial risks related to the use, restoration, adaptation and modernisation of the historical track, which are caused by the creation of silence zones, natural parks or other domestic environmental statuses, or by the applicability of the Birds and Habitats Directives in the area crossed by the historical route.

FINAL SUBMISSIONS OF THE KINGDOM OF BELGIUM

In the light of the foregoing arguments, the Kingdom of Belgium respectfully requests the Arbitral Tribunal to decide:

ON QUESTION No. 1

That Dutch legislation and the decision-making power based thereon in respect of the use, restoration, adaptation and modernisation of railway lines on Dutch territory do not apply in the same way to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, in that:

- The Netherlands shall, if Belgium decides to modify the plan of the historical route of the Iron Rhine on Belgian territory, allow for the prolongation of the historical route on Dutch territory “*according to the same plan*”.
- If Belgium makes use its right to have the historical route of the Iron Rhine on Belgian territory prolonged on Dutch territory according to the same plan as on Belgian territory, the route shall be constructed “*at the expense of Belgium*” and “*without any expense for the Netherlands*”. Concomitantly, Dutch regulatory powers shall be limited by the requirement under Article 12 of the 1839 Separation Treaty that the “*works*” shall be “*agreed*” upon between Belgium and the Netherlands.
- The Netherlands shall have the obligation to allow for the use of such route provided that it “*only serve[s] as commercial communication*”.
- Belgium and the Netherlands shall determine by agreement everything relating to the international exploitation of the railway, in particular the height and mode of collection of toll rights.
- No re-routings deviating from the historical route shall be decided upon by the Netherlands without the agreement of Belgium.

- The Netherlands is under the obligation to exercise its legislative and decision-making power in good faith and in a reasonable manner, and so as not to deprive Belgium's rights to have the Iron Rhine prolonged on Dutch territory according to the same plan as on Belgian territory to use the historical route of the Iron Rhine, of their substance, and so as not to render the exercise of these rights unreasonably difficult.

- Without prejudice to Belgium's right to an immediate use of the historical route of the Iron Rhine at full capacity and on a long-term basis, the Netherlands shall, when Belgium makes a demand for provisional driving on the historical route of the Iron Rhine, by 15 trains per day and for a period of 5 years at least, immediately accept that demand immediately, and immediately take all decisions necessary to effectively allow for such driving within the shortest time materially feasible.

- Without prejudice to Belgium's right to an immediate use of the historical route of the Iron Rhine at full capacity and on a long-term basis, when Belgium makes a demand for provisional driving on the historical route of the Iron Rhine, by 15 trains per natural day (both directions summed up), including at limited speed in evening hours and at night, for a period of 5 years at least, the Netherlands shall immediately accept that demand, and immediately take all decisions necessary to effectively allow for such driving within the shortest time materially feasible.

- The Netherlands may not make the long-term use of the historical route of the Iron Rhine conditional upon the construction of a tunnel under the Meinweg and nature protection devices in the Weerter- and Budelerbergen, unless such works are financed by the Netherlands and the construction does not delay the exercise of Belgium's right to use the historical route of the Iron Rhine.

ON QUESTION No. 2

- Belgium does not have the right to perform or commission work with a view to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, unless Belgium requests that the Iron Rhine on Belgian territory be prolonged on Dutch territory according to a new plan, and the Netherlands takes the option of having that prolongation according to the new plan built by Belgium in accordance with article 12 of the Separation Treaty of 19 April 1839. The current request of Belgium to reactivate the Iron Rhine is not a claim to have the Iron Rhine prolonged on Dutch territory, with the consequence that the Netherlands does not have the option provided by Article 12 of the 1839 Separation Treaty to require that Belgium performs work on Dutch territory.

- Belgium does not have, in principle, the right to establish plans, specifications and procedures for such works according to Belgian law and the decision-making power based thereon. However, Dutch regulatory powers are, according to the 1839 Separation Treaty, limited by the right of Belgium to have the 'route or canal' prolonged on Dutch territory according to the same plan as on Belgian territory and by the requirement that, apart from the plan, works on Dutch territory be agreed upon by both Governments. As the present request of Belgium to reactivate the Iron Rhine is not a request to have the Iron Rhine prolonged on Dutch territory according to the same plan as on Belgian territory, such limitation is not at stake at present. The same is true of Belgium's right to benefit from a treatment not less favourable than that accorded to other operators with respect to other railways on Dutch territory, as concerns the freedom to establish plans, specifications and procedures.

However, Dutch regulatory powers to establish plans, specifications and procedures remains limited by the general principles of international law, including *pacta sunt servanda* and the principles of reasonableness and good faith.

- The distinction between the requirements, standards, plans, specifications and procedures related to, on the one hand, the functionality of the railway infrastructure in itself, and, on the other hand, the land use planning and the integration of the rail infrastructure is, as such, irrelevant as concerns the extent to which Belgium has the right to perform or commission work on Dutch territory. It is equally irrelevant, as such, with respect to the extent to which Belgium has the right to establish plans, specifications and procedures related to it according to Belgian law and the decision-making power based thereon.

- The right of the Netherlands to unilaterally require the building of underground and above-ground tunnels, as well as the proposed associated construction and safety standards, is limited by the abovementioned rights of Belgium in case it requests that the railway on Belgian territory be prolonged on Dutch territory according to the same plan, which is not the case at present. It is further limited by the obligations of the Netherlands to cooperate with Belgium as well as by the principle of good faith. Diversions and the like may not unilaterally be imposed by the Netherlands, in that they require the consent of Belgium.

ON QUESTION No. 3

In primary order:

- That, in application of the Iron Rhine's conventional regime and without prejudice to the hypothesis where Belgium would decide to modify the plans of the Iron Rhine on Belgian territory and would request the Netherlands to have the Iron Rhine prolonged on Dutch territory according to the same plan, which is not the case for the reactivation referred to in the Arbitral Agreement, all cost items and financial risks associated with the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, shall be borne by the Netherlands.

In subsidiary order:

- That all costs items and financial risks related to restoration of the historical route, caused by the Netherlands' dismantling part of the infrastructure of the historical track, making it unfit for use or failing to provide maintenance, shall be borne by the Netherlands.
- That the Netherlands shall bear all costs and financial risks related to the use, restoration, adaptation and modernisation of the historical track, which are caused by the creation of silence zones, natural parks or other domestic environmental statuses, or by the applicability of the Birds and Habitats Directives in the area crossed by the historical route.

* * *

1 October 2003

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