PERMANENT COURT OF ARBITRATION

IRON RHINE CASE
(BELGIUM v. THE NETHERLANDS)

COUNTER-MEMORIAL
OF THE KINGDOM OF THE NETHERLANDS

JANUARY 2004

Table of Contents

Chapter 1: Introduction

Having received Belgium's Memorial on the Iron Rhine case on 1 October 2003, the Netherlands hereby presents its response in accordance with Article 11, paragraph 2 of the Rules of Procedure for the Arbitration regarding the "IJzeren Rijn" between the Kingdom of the Netherlands and the Kingdom of Belgium.

Besides this introduction, this Counter-Memorial contains three chapters. Chapter 2 deals with the factual background to the case. Paragraphs 2.1 to 2.4 give a brief outline of the history of the Iron Rhine in the nineteenth century. Paragraphs 2.5 to 2.11 address a number of essential points concerning the recent past. Paragraph 2.12 sets out the Memorandum of Understanding which contains the working arrangements concerning the Iron Rhine established by the Dutch and Belgian transport ministers in March 2000, while paragraph 2.13 deals with its implementation. Paragraph 2.14 summarises a number of points from chapter 2. Chapter 3 deals with the legal aspects of the case. In paragraphs 3.1 and 3.2, Belgium's right to the use, the restoration, the adaptation and the modernisation of the Iron Rhine is set against the background of international law. Paragraph 3.3 discusses the most relevant passages of Article XII of the Treaty between the Netherlands and Belgium relative to the Separation of their Respective Territories, with reference to Article 31 of the Vienna Convention on the Law of Treaties. The answers to the questions put to the Tribunal are the subject of Chapter 4.[1]

Chapter 2 refers to Annexes A and B, which consider certain issues in more detail and which form an integral part of the Counter-Memorial. Annexe A briefly summarises the relevant legislation relating to nature and the environment and assesses the ecological issues relating to the Weerter- en Budelerbergen and the Meinweg, the two areas crossed by the Iron Rhine which are protected under this legislation. Annexe B gives an estimate of how much the work required to reactivate the Iron Rhine would cost.

Reference is made in the Counter-Memorial to the annexes to the Belgian Memorial. The latter are referred to as Exhibit B, while the annexes added by the Netherlands are referred to as Exhibit N. The following documents have been submitted in a separate folder:

- *Samenvatting Trajectnota/MER IJzeren Rijn* (Iron Rhine Route Assessment/EIS)

[1] See Exhibit N No. 1

- *Zusammenfassung Trassennotiz/UVP Eiseren Rhein* (Iron Rhine Route Assessment/EIS)
- a map of the Iron Rhine.

In addition, a separate album has been submitted containing a selection of photographs of the Iron Rhine and a number of animal species found in its vicinity (“Photographs of the Iron Rhine over the years”).

Chapter 2: Factual Background

2.1. The union, the separation and the London Conference

2.1.1 At the Congress of Vienna of 1815, Great Britain, Prussia, Austria and Russia decided to unite the region known before the Napoleonic era as the “Austrian Netherlands”, as well as the former Principality of Liège, with the former Republic of the United Provinces to form the Kingdom of the Netherlands. The son of the last stadholder of the House of Orange became King William I. The union was a key issue on the Congress’s agenda. Great Britain, in particular, which regarded the Kingdom of the Netherlands as a barrier to French expansionism, attached great importance to it.

2.1.2 Although the northern and southern parts of the Kingdom flourished economically during the fifteen years of its existence, the union failed. Too many differences existed between the liberal Catholic south and the Protestant north, which was sympathetic to the House of Orange and the autocratic character and opinions of King William I.
On 25 August 1830, shortly after the July Revolution in Paris brought the “citizen king” Louis Phillipe to power, the population of Brussels rose in revolt. A States General was formed, which, on 13 September 1830, decided in favour of the separation of north and south, with 55 votes in favour and 43 against. These developments were welcomed in France, which was nevertheless unable to annex Belgium due to domestic problems. Instead, in an attempt to prevent the other Great Powers of the period (Great Britain, Austria, Prussia and Russia) from granting military assistance to William I, France spoke out in support of the principle of non-intervention. William I requested assistance on 5 October 1830, but it was not forthcoming. In their response of 17 October 1830, however, the four Powers and France announced the rapid convention of what became known as the London Conference. The British foreign secretary, Lord Palmerston, was the Conference’s main spokesman.

2.2 The Separation Treaty

2.2.1 The London Conference held its first meeting on 4 November 1830 and concluded its activities on 19 April 1839.
The Conference’s aim was to maintain stability and peace in Europe by orchestrating the separation of the Netherlands and Belgium. In January 1831 the Conference presented the so-called *bases de séparation*, the conditions for the separation of the Netherlands and

Belgium. The Netherlands agreed to the terms of the Conference, but Belgium did not. The first draft treaty dates from 26 June 1831. This draft, the so-called Eighteen Articles, was accepted by Belgium, but not by the Netherlands. On 14 October 1831, the Conference presented a second draft treaty, the Twenty-Four Articles, to the Netherlands and Belgium. In a note to the Dutch king, the Conference guaranteed both states "des avantages réciproques, de bonnes frontières, un état de possession territoriale sans disput, une liberté de commerce mutuellement bienfesante".[2]

2.2 2 The Twenty-Four Articles were reproduced, with some changes, in the Treaty between the Kingdom of the Netherlands and the Kingdom of Belgium relative to the Separation of their Respective Territories (the Separation Treaty). On the same day, the Netherlands and Belgium both signed treaties with the five Great Powers to guarantee the observance of their rights under the bilateral Separation Treaty (the so-called Guarantee Treaties).[3]

The Separation Treaty contains provisions determining the territory and borders of the Netherlands and Belgium (Articles I, II and VI). Articles II and V concern the cession by William I of part of the Grand Duchy of Luxembourg, which was connected to the Kingdom of the Netherlands in a personal union because William I was also the Grand Duke of this member of the German Federation. In return for ceding part of Luxembourg, William I was granted the Duchy of Limburg (Articles III and IV). Article VII concerns the continued neutrality of Belgium and Article XIV states that Antwerp "continuera d'être uniquement un port de commerce". [4] Article XIII distributes existing debts between the Netherlands and Belgium. Article XII concerns, together with Article IX (on the Scheldt and the Maas), Article X (on the use of cross-border canals) and Article XI (on passage through Maastricht and the Dutch town of Sittard) Belgian transit rights within Dutch territory.[5]

2.2.3 The text of Article XII of the Separation Treaty was copied verbatim from the Twenty-Four Articles. It reads as follows:

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2 Note from the Conference to the Plenipotentiaries of His Majesty the King of the Netherlands. Recueil des pièces diplomatiques relatives aux affaires de la Hollande et de la Belgique en 1831 et 1832. Tome II. A la Haye, chez A.D. Schinkel, imprimeur, et se débite à la Haye et Amsterdam, Chez les Frères Van Cleef – 1832 ; (Collection of Diplomatic Documents concerning the Affairs of the Netherlands and Belgium in 1831 and 1832, Volume II, printed by A.D. Schinkel (The Hague) and sold by Van Cleef Brothers (The Hague and Amsterdam), 1832, p. 93.) Exhibit N No. 2. Unofficial translation: "reciprocal advantages, strong borders, a state of undisputed territorial possession and a mutually beneficial freedom of commerce".

3 Treaty between the Netherlands and Belgium relative to the Separation of their respective territories. Treaty between Austria, France, Great Britain, Prussia, Russia and the Netherlands and the Treaty between Austria, France, Great Britain, Prussia, Russia and Belgium. Exhibit N No. 3.

4 Unofficial translation: "will continually serve only as a commercial port"

5 The remaining provisions concern details and/or are probably no longer relevant.

> "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 pourrait 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, 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]

William I refused to sign the Separation Treaty till 10 March 1838. The London Conference reconvened on 11 March 1838. The Separation Treaty and the two Guarantee Treaties were eventually concluded on 19 April 1839.

2.3. The 1839-1897 period

2.3.1 On 5 November 1842, the Netherlands and Belgium concluded the so-called Boundary Treaty[7], in which the Netherlands, with reference to Article XII of the Separation Treaty,

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6 Unofficial translation: "If a new road were to be constructed or a new canal dug in Belgium, connecting with the Maas opposite the Dutch canton of Sittard, Belgium would be at liberty to ask Holland to agree that the said road or waterway, in accordance with the plan, should be extended, entirely at Belgium's expense and for Belgium's account, through the canton of Sittard to the border of Germany, a request which Holland would not refuse. This road or canal, the sole purpose of which would be to maintain trade relations, would be constructed, depending on the choice made by Holland, either by engineers and workmen whom Belgium would be authorised to employ in the canton of Sittard, or by engineers and workmen supplied by Holland, who, at Belgium's expense, would execute the works decided upon, at no charge to Holland and without prejudice to its exclusive sovereign rights to the territory to be crossed by the said road or canal.
The two parties should jointly set the duties and tolls to be levied on the said road or canal and determine how they are to be levied."

7 Boundary Treaty between Belgium and the Netherlands, signed at The Hague, 5 November 1842. Exhibit N No. 4. Article 3 reads: "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'art. 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 nécessaires, et ce de la même manière qu si le Gouvernement Belge procédait par lui-même aux travaux d'exécution et d'exploitation de la route ou du canal. Unofficial translation: "The Belgian Government shall be entitled to substitute, under its guarantee towards the Government of the Netherlands, a concessionary company, to the righs 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 shall be grounds for

gave Belgium permission to grant a concession for the construction of a road or canal through the Dutch canton of Sittard.

At that time, the Netherlands refused to accept the understanding between Belgium and the Great Powers and permit the construction of a railway line – instead of a road or canal – that furthermore would also pass through the Netherlands much further to the north than provided for by Article XII of the Separation Treaty. Belgium requested this change in the agreed route because a railway line through the canton of Sittard would only offer a small advantage over the Antwerp-Hasselt-Maastricht-Aken line, which was opened in 1843.[8]

2.3.2 In August 1868, the Netherlands agreed to Belgium's request to amend Article XII of the Separation Treaty. A year earlier, on 9 November 1867, the two countries had concluded the Agreement to regulate the connection of railways on the territory of the two States concerning the cross-border construction of railway lines between Neuzen and St. Nicolaas, Sluiskil and Gent, Eindhoven and Hasselt and Tilburg and Turnhout.[9]
On 13 January 1873 Belgium and the Netherlands entered into the Treaty relative to the Payment of the Belgian Debt, the Abolition of the Surtax on Dutch Spirits, and the Passing of a Railway Line from Antwerp to Germany across Limburg (the Iron Rhine Treaty).[10] The Iron Rhine Treaty implements Article XII of the Separation Treaty and Article III of the Boundary Treaty. It also constitutes an amendment of Article XII, as it permits the construction of a railway line – instead of a road or canal - along a different route than the one agreed under Article XII of the Separation Treaty.

2.3.3 On 13 November 1874, the Netherlands and Germany concluded the Agreement to regulate the connection to the Dutch-German border of a railway from Antwerp to Gladbach,

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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 proceeed by itself to the execution and exploitation works of the road or the canal.)

8 The Netherlands also refused to interpret the passage of Article XII reading: "Dans le cas, où *il aurait été* construit en Belgique une nouvelle route, ou creusé un nouveau canal …" in such a way that a planned Belgian railway line would qualify for extension within Dutch territory.

9 Overeenkomst tusschen Nederland en België tot regeling der aansluiting van spoorwegen op het grondgebied van beide Rijken, 's-Gravenhage, 9 November 1867. Exhibit N No. 5.

10 Tractaat op 13 Januarij 1873 te Brussel gesloten: 1. tot kapitalisatie der bij lid 1 van art. 63 van het tractaat van 5 November 1842 bedoelde rente van f 400.000; 2. tot wijziging van art. 3 der overeenkomst van 12 Mei betreffende het Nederlandsch gedistilleerd; en 3e tot regeling van den aanleg van een spoorweg door Limburg. Exhibit N No. 6.

in which both countries declared their willingness to grant a concession for the construction of such a line within their territories and to expedite its construction.[11]
In light of its necessity for establishing a connection between Antwerp and Germany, as well as the interest that existed in Belgium for constructing the Iron Rhine, the Belgian authorities of the period must have been aware of the existence of this Agreement.

2.3.4 The Iron Rhine was completed in 1879.

2. 4. The period after 1897

Many railway lines in Europe were constructed and operated by private companies during the nineteenth century. Around 1900, a large number of countries had policies aimed at nationalising those railway lines.[12] It was thus that Belgium asked the Netherlands for its cooperation in this area.

On 23 April 1897, the Netherlands and Belgium concluded the Railways Agreement[13], in which the Netherlands granted Belgium permission to purchase the concessions for four cross-border railway lines located within Dutch territory from *Grand Central*. The Netherlands then purchased the land and other immovable property belonging to these railway lines from Belgium and granted a concession to the *Maatschappij tot Exploitatie van Staatsspoorwegen* (Company for the Exploitation of State Railways). This concession related to all the railway lines in the Netherlands that were owned by the state at that time.

The *Maatschappij tot Exploitatie van Staatsspoorwegen* was a private company. It was provided by statute that, on 1 January 1938, the infrastructure of the railways constructed and owned by the State would pass into the ownership of the newly established company N.V. Nederlandse Spoorwegen (NS), which also became the operator.

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[11] Overeenkomst tot regeling der aansluiting aan de Nederlandsch-Duitsche grens van eenen spoorweg van Antwerpen naar Gladbach, Berlin, 13 November 1874. Exhibit N No. 7. In the case of the Netherlands, the concession was granted to the Compagnie du Nord de la Belgique.

[12] See paragraph 15 of the Memorial, where Belgium notes that it also made arrangements related to this issue with Prussia and France.

[13] Overeenkomst betreffende de overneming van de Nederlandsche gedeelten van eenige in Nederland gelegen spoorwegen, benevens het daarbij behoorend slotprotocol, 23 april 1897. Railways Agreement between the Netherlands and Belgium, signed at Brussels, 23 April 1897. Exhibit N No. 8. In addition to the Iron Rhine, the Railways Agreement also applies to the Tilburg-Turnhout, Hasselt-Aken and Hasselt-Eindhoven lines. The Turnhout-Tilburg line was still used by a steam train (for tourist purposes) in 1981, but is no longer in use. The Hasselt-Maastricht line has not been used since 1990, but has not been

The Dutch Railways Act (*Spoorwegwet*) does not impose any obligation on the operator to bring a railway into a useable condition and keep it in that condition for a potential user. Nor is there any provision requiring maintenance; instead, proper maintenance is expected to take place commensurate with the level of traffic.

dismantled. The Hasselt-Eindhoven line has not been used since 1973 and was dismantled a few years thereafter.

2.5 Use of the Iron Rhine

2.5.1 The Iron Rhine was used intensively between 1879 and 1914. After World War I, however, international use declined sharply, as Belgium had access to an alternative route, the Hasselt-Montzen-Aken line (the Montzen line), which was constructed by Germany in 1917. Eight international freight trains still used the Iron Rhine in 1920, and nine still did so in 1921. In the remaining years until World War II, however, freight trains rarely traversed the entire line. The Montzen line was attractive to Belgium, as it involved crossing only one border. In addition, freight revenues are divided between railway companies on a per kilometre basis, and the route via Montzen, being 49 kilometers longer, brought de NMBS (Belgian Railways) a larger part of the revenue.

2.5.2 Germany made intensive use of the Iron Rhine during World War II. The Dutch section of the line was destroyed at the end of the war. It was subsequently repaired by the Allied Powers but only provisionally, as their aim was not to build a lasting network but to create as much transport capacity as they could in the shortest possible time.

2.5.3 After World War II, freight traffic resumed on a modest scale. Belgium showed little interest in the Iron Rhine and continued to use the Montzen line. Incidentally, the Iron Rhine was used fairly intensively for transporting British and American soldiers to army bases in Germany after 1945, but from the 1960s onwards they were transported by air and road.

In the 1950s, part of the Dutch section of the Iron Rhine was used primarily to transport coal from the mines in South Limburg to the west of the Netherlands.

2.5.4 From 1977 to 1991, the Iron Rhine was used for the transport of road trailers, otherwise known as *huckepack* ("piggyback") transport. Trains with this kind of load could not use the Montzen line due to height restriction. However, once the bottleneck on the Montzen line – the tunnel at Gemmenich – had been dealt with, *huckepack* transport was also transferred to this line, on the basis of an agreement between the NMBS and Deutsche Bahn.[14] The *huckepack* train made its last journey on 31 May 1991. After that, the

[14] Prognos Report, Exhibit B No. S2, p. 6. The Montzen line is entirely double track and, with the exception of a 7-kilometre section by the Belgian/German border, is entirely electrified. The NMBS is currently carrying out major repairs on an approximately 80-year-old viaduct in the Voerstreek, involving an investment of ca. €25 million. The speed attainable on that section of track could rise from 20 to 60 km per hour after these modernisation works are completed. The electrification of the remaining 7 kilometres is scheduled for 2005. In the opinion of the Netherlands, as a result of these measures, the Montzen line will

Iron Rhine was no longer used for international freight traffic between Antwerp and Germany.[15]

In 1996, the level crossing installations on the section of the line between Roermond and Vlodrop were removed. The removal of warning crosses and safety installations, such as flashing signals and automatic level crossing barriers that had fallen into disuse has its basis in Dutch legislation on railways. This policy is persued to prevent road-users from becoming accustomed to level crossings that are no longer in use, so that they would create a risk that they would not expect trains even at crossings that are in use.
The cost of restoring the railway line to its 1991 condition is in no way comparable to the cost of carrying out Belgium's wishes regarding the future scenario for the Iron Rhine.

2.6 Current state of the Iron Rhine

2.6.1 The Dutch section of the Iron Rhine is currently used as follows:

Every twenty-four hours, from Mondays to Fridays, one train runs in both directions from the Belgian border to the zinc factory in Budel to deliver zinc ore.

Per twenty-four hours, from Mondays to Fridays, one train carrying chemicals runs from Budel to Weert (in both directions) during the daytime.

Since 1913, the section of the line between Weert and Roermond has coincided with the rail link between Eindhoven and Maastricht and is used intensively for passenger and freight transport.

In 1994, on the section of the line between Roermond and the Dutch-German border, a few trains still ran as far as Herkenbosch. The border crossing with Germany was closed in 1994.[16] Until that time, the Iron Rhine was still open to through traffic, but was not used for this purpose.

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be able to handle major growth in transport levels and – because that transport will soon make use exclusively of electric locomotives – to do so more efficiently and with less environmental impact than rail transport over the Iron Rhine, which even after modernisation will be partly single track and non-electrified.

[15] An overview of transport movements since 1920, compiled by ProRail (formerly Railinfrastructuur), appears in Exhibit N No. 9.

[16] See the letter dated 13 August 1992 from Deutsche Bundesbahn to the NS, stating: "dass der Grensübergang Vlodrop – Dalheim inzwischen geschlossen wurde; ein Aufnahme im LIF entfällt deshalb." (Unofficial translation: "that the Vlodrop-Dalheim border crossing is now closed; it will therefore no longer be included on the LIF" (Liste internationale des frontières; Algemeines Verzeichnis der Grenzübergänge und der im internationalen Eisenbahngüterverkehr geltenden Beschränkungen) Exhibit N. No. 10.

2.6.2 The Iron Rhine's current super-structure (sleepers and rails) in the three countries is not suited to heavy through freight traffic. Forty-six per cent of the Dutch section of the line consists of just one track, and various sections are subject to speed and axle load limits that restrict capacity. The line is not electrified over its entire length, which means that through traffic can only be achieved by means of diesel traction or by repeatedly switching locomotives. The sections that are electrified all use different overhead wire voltages.[17]

2.6.3 Speed limits on the Dutch section of the line vary from 40 km per hour (on the sections between Budel and Weert and Rheydt and Güterbahnhof) to 130-140 km per hour (for passengers' trains only, on the heavily used section between Weert and Roermond). Before its closure in 1991, the speed limit on the section between Roermond and Dalheim was 80 km per hour.

2.6.4 The Iron Rhine crosses three areas with a protected status, namely the Weerter- en Budelerbergen, the Leudal and the Meinweg. These areas had not only been selected or designated as special protection areas under the Birds Directive and/or Habitats Directive at the start of the procedure set out in the Transport Infrastructure (Planning Procedures) Act, which is discussed in 2.12 below, they are also protected areas under national legislation on nature and the environment.

2.7 "Belgium's first steps towards revitalisation"

2.7.1 In section B.2 of the Memorial, Belgium notes that prior to 31 May 1991, the day on which international use of the Iron Rhine was terminated, it had already taken steps towards "the revitalisation and improvement of the Iron Rhine". This is a reference to statements in November 1986 and February 1987, and subsequently in December 1991 and April 1993, which are commented on below.

2.7.1.1 At a meeting of the Subcommission on Railway Transports of the Commission for Transport of the Benelux Economic Union on 13 November 1986, the Belgian delegation was asked about the country's future plans regarding the Iron Rhine as it was envisaged to create a park in an area in the Dutch/German border region passed through by the Iron Rhine.[18] In response, the delegation merely noted that there was interest in Antwerp for

[17] Source: Tractebel Report, Exhibit B No. S1, pp. 1-5 and 44-50.

[18] The minutes of this meeting indicate, that the suggestion to do so did not originate with the Dutch delegation, but with the secretary of the Subcommittee, who is a member of the Secretariat of the Benelux. Exhibit B No. 58

refurbishing the section of the line between Antwerp and Weert, which is not located within the Dutch/ German border region.

2.7.1.2 The letter of 23 February 1987 from Belgium's Minister De Croo of Transport to the Netherlands' Minister Smit-Kroes of Transport, Public Works and Water Management, concerned a request for the cooperation of the Nederlandse Spoorwegen in the performance of a cost-benefit analysis regarding the Iron Rhine, as there was interest for this "in *certain* Belgian circles".[19] Minister De Croo also noted that, in his opinion, the creation of a nature reserve between Roermond and Herkenbosch[20] would violate Article XII of the Separation Treaty. He ended his letter by stating that "it is beyond doubt that Belgium will hold firm to its right of free transport through the Iron Rhine".
In her response of 26 October 1987 Minister Smit-Kroes did not address the relationship between the Iron Rhine and the designation of an area in the vicinity of the railway line as a nature reserve. Minister De Croo and his successors did not raise the issue again. As a matter of fact, the Netherlands does not contest the "right of free transport" (right of transit) to which Minister De Croo referred.

2.7.1.3 On 11 December 1991, in the same year that Belgium terminated its already limited international rail traffic via the Iron Rhine, the Belgian delegation gave an account of the so-called Prognos Report at a meeting of the above-mentioned Subcommission on Railway Transports.[21] The delegation noted that the "possible reactivation of the Iron Rhine must remain guaranteed in the light of an increase of transport in the future", despite the fact that STAR 21 made no provision for investment in this area. According to the Prognos Report, STAR 21 (Spoor Toekomst = Avenir du Rail) covers planned investments for twenty years, starting from 1989.[22]
On 20 April 1993, the Belgian delegation reiterated that "future reactivation must be safeguarded", at the same time removing the Iron Rhine from the Subcommission's agenda.

2.7.1.4 Around the same time, Belgium asked the European Commission to fund a second feasibility study into the modernisation of the Iron Rhine. The Commission approved the

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19 This is the correct English translation of "in *sommige* Belgische middens".
20 The nature reserve in question is located not between Roermond and Herkenbosch, but between Herkenbosch and the German border.
21 Prognos Report. Exhibit B No. S2.
22 Prognos Report, p. 12; Appendix 1.

funding in July 1994. The study was eventually initiated two and a half years later, after Belgium provided, in Article 9 of the Treaty concerning the construction of a railway connection for high-speed trains between Rotterdam and Antwerp between the Kingdom of the Netherlands and the Kingdom of Belgium of 21 December 1996[23], that a feasibility study into the reactivation of the Iron Rhine would be carried out. This study, known as the Tractebel Report, was eventually completed in January-February 1997. One and a half years later, on 12 June 1998, the Belgian prime minister informed the Dutch prime minister that he attached great importance to the swift realisation of the Iron Rhine.

2.7.2 A key characteristic of the above-mentioned statements is that they all focus on maintaining the right of transit, which is not contested by the Netherlands. Furthermore, in the opinion of the Netherlands, Belgium's conduct between November 1986 and June 1998 was also unclear and ambivalent. The Belgian Government itself did not have a clear vision of the future of the Iron Rhine, as evidenced by the Belgian delegation's statements in the Benelux-Subcommission on Railway Transports. Although a desire was expressed to guarantee future use, it was simultaneously stated that no new investment was planned in the framework of STAR 21 and that the Iron Rhine could be removed from the Sub-commission's agenda. The inconsistency of Belgium's position is also apparent from the fact that Belgium twice ordered a feasibility study that it was subsequently in no hurry to carry out. As recently as 21 December 1996, Belgium laid down *in a treaty* that it wished to study the feasibility of reactivating the Iron Rhine. It has officially approached the competent Dutch minister on only one occasion, in 1986. Diplomatic notes, which the Netherlands considers the appropriate means for addressing undesirable behaviour by other States, are entirely lacking, as are explicit objections from any source to the now contested dismantling of the Iron Rhine and the designation of some of the areas it passes through as protected areas.

The opinion of Antwerp lawyer Van Hooydonk is very interesting in this context. In November 1998, he wrote:

> The modernisation of the Iron Rhine has been a top priority of the port community of Antwerp for many years. The key political problem is obviously that part of the

[23] Verdrag tussen het Koninkrijk der Nederlanden en het Koninkrijk België betreffende de aanleg van een spoorverbinding voor hogesnelheidstreinen tussen Rotterdam en Antwerpen; Brussel, 21 december 1996. (Treaty concerning the construction of a railway connection for high-speed trains between Rotterdam and Antwerp). Artikel 9. Exhibit N No. 11. Memorial, paragraph 28.

> line is located within Dutch territory and that the Dutch government consequently has to be involved in its refurbishment. *The reactivation and modernisation of the Iron Rhine was only recently identified as a priority on the political agenda of Flanders and Belgium*. (emphasis added) [24]

At present, Belgium seems to believe that the Netherlands, a territorially sovereign state that has to strike a balance among numerous interests of its own against a complex political, social and legal backdrop, should have been *more* attentive to the way in which Belgium handled its right of transit than Belgium did itself.

2.8 The Tractebel Report

2.8.1 The Tractebel Report[25], which was prepared under the auspices of the Ministry of the Flemish Regio deserves consideration, because it formed the basis for the decisions of the Belgian government to request the Netherlands to reactivate the Iron Rhine.[26] The Tractebel Report concludes that:

> "… 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 …".[27]

The Report also states that "the present route was carefully studied from an environmental point of view".[28] In fact, this is an exagerated representation of the contents of the report.

2.8.1.1 The Report discusses the so-called modal shift from road freight to rail freight, which will be discussed in 2.9 below. In the Tractebel Report (p. 90), reference is made to German, Austrian and Swiss reports on modal shift from 1993-1994. The Tractebel researchers argue without any further explanation that they "have reason to believe [that] the specific cost

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[24] E. van Hooydonk, Het Internationale Statuut van de IJzeren Rijn (The International Statute of the Iron Rhine); Tijdschrift Vervoer & Recht, November 1998, p. 111. Exhibit N No. 12. Authentic text: "De modernisering van de IJzeren Rijn staat al jaren op de verlanglijst van de Antwerpse havengemeenschap. Het grote politieke knelpunt is uiteraard dat de lijn gedeeltelijk op het Nederlandse territorium ligt, en dat de Nederlandse overheid bijgevolg bij de aanpassingswerken moet worden betrokken. Pas recent werd het dossier van de reactivering en modernisering van de IJzeren Rijn als een prioriteit op de Vlaamse en Belgische politieke agenda geplaatst."

[25] Exhibit B No. S1.

[26] The results of the Tractebel Report were, without any further investigation, incorporated into the international study drawn up for the implementation of the March 2000 Memorandum of Understanding. In paragraph 21 of its Memorial, Belgium cites parts of this international study that were taken word for word from the Tractebel Report. In effect, thus Belgium cites the Tractebel Report.

[27] Tractebel Report, p. 94

[28] Tractebel Report, p. 94

factors applied … would be fully applicable in the context of the Iron Rhine". They do not focus on the effects of reactivating the Iron Rhine.

2.8.1.2 The Tractebel Report also devotes attention to the effects of noise, but notes that a full noise analysis is lacking[29], stating that this "would require detailed data".[30]

2.8.1.3 It is also apparent that the rapporteurs were aware of the problems a resumption of rail traffic through the Meinweg would involve. On page 65 of the Report, they describe the area in question as "a region of high natural interest".

2.8.2 The Netherlands concludes that the rapporteurs conducted no research of their own into the effects of modal shift and into the noise effects associated with the reactivation of the Iron Rhine. At the same time, the Report recognises the consequences of the reactivation of the Iron Rhine for areas requiring special conservation measures. This makes it all the more remarkable that the Report devotes no attention to these issues in its conclusion, which state that "the Iron Rhine could be put into operation on a short term and at low expenses" "(i.e. between BEF 1.3 and 3.4 billion)".[31]

2.9 Modal Shift

2.9 In the discussion of the Birds and Habitats Directives and elsewhere in its Memorial, Belgium persistently refers to the advantages of replacing road freight with rail freight (i.e. "modal shift" in transport).

2.9.1 On this issue, the Netherlands would first note that Belgium does not at any point state what the specific consequences of reactivating the Iron Rhine, in terms of emissions, would be, let alone describe why reactivation would have a positive impact on the environment and nature in the Weerter- en Budelerbergen and the Meinweg. On the subject of the implementation of Article 6 of the Habitats Directive, the European Commission says:

> "The notion of what is significant needs to be interpreted objectively. At the same time, the significance of effects should be determined in relation to the *specific*

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29 Tractebel Report, pp. 64, 92.

30 Tractebel Report, Annex 5-2, p. 138 *et seq.* The International Study compares the historic route of the Iron Rhine and the Montzen line in a number of areas, in order to provide "a first overview on where the main problems can be expected". It also refers to the "*severe Netherlands legislation*" in this area.

31 Tractebel Report, pp. 94 and 95. The Report does state on p. 92 that "some allowance has been made for rail noise effects in the contingency amounts included in the investment costs which could be used for noise screens". However, it is not clear how these "*contingency amounts*" have been calculated.

> *features and environmental conditions of the protected site concerned by the plan or project, taking particular account of the site's conservation objectives.*"[32] (emphasis added)

2.9.2 Moreover, lorries are becoming ever "cleaner" and as a result the relative benefits, in terms of emissions, of rail freight over road freight are becoming ever smaller. The Netherlands commissioned a committee of experts to produce a report on this topic. This report, entitled *On track for environmental benefits? A synthesis of studies of the environmental effects of rail freight (February 2000)*, had as its aim:

> "to contain an integrative and transparent overview of existing research into the environmental effects of rail transport, making the principles, assumptions and parameters of each study mutually comparable. The publication of the report is intended to lead to a more transparent discussion of the environmental aspects of rail freight."[33]

The summary of this report includes the following passage:

> "In 2010, emissions resulting from rail freight will, in a favourable case ("classic" bulk transport: 60 km per hour, electric locomotives, no prior or subsequent transport), amount to 20 to 40 per cent, in the case of CO_2, and 10 to 25 per cent, in the case of NO_x, of those of the competing road traffic. *However, in an unfavourable case (intermodal transport of containers or swap bodies, 100 km per hour, diesel-electric locomotives, with prior or subsequent transport at a level of 20 per cent) emissions from rail freight are 0 to 20 per cent more in the case of CO_2, and 1 to 5 times more in the case of NO_x, than those of the competing road transport.*" (emphasis added)

This led to changes in Dutch policy on modal shift in transport. In a letter to the House of Representatives of the States General, the Minister of Transport, Public Works and Water Management and the Minister of Housing, Spatial Planning and the Environment expressed this as follows:

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[32] *Managing NATURA 2000 Sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC*. European Communities, 2000; Exhibit N No. 13, p. 34. Given this statement by the European Commission, particularly the italicised portion, it is somewhat surprising to note that the Environment Directorate-General of the European Commission wrote the following on 19 September 2001: "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 environmental benefit that may result from shifting more transport capacity to freight railways in the framework of the current 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)." Letter of the Directorate-General Environment, European Commission dated 19 september 2001, signed by Mr. Nicholas Hanley, Head of Unit, to officials of the Netherlands, Belgium and Germany. Exhibit N No. 14.

[33] Letter DGG/SR/00/000700-fvh of 11 April 2000, including as an enclosure the report *On track for environmental benefits? A synthesis of studies of the environmental effects of rail freight (February 2000).* Exhibit N No. 15.

> "[The report shows] that the performance of rail transport, with regard to CO_2 and NO_x emissions, is fair to very good in diverse scenarios in comparison to road transport and inland shipping. However, other scenarios are conceivable in which rail transport in fact performs more poorly on these parameters than either of the other two modes of transport considered. The crucial factors are the extent to which diesel-electric propulsion is used instead of electric propulsion, as well as the vehicles' speed (in relation to the form of propulsion). *On the basis of the report one can conclude that, from the perspective of emissions, the use of diesel-electric propulsion in rail transport should be discouraged*." (emphasis added)

The Dutch government thus does not subscribe to the broadly formulated view, expressed in Belgium's Memorial, that rail transport should be promoted "from the perspective of modal shift". Furthermore, Belgium has requested that the Iron Rhine be made suitable for diesel-electric locomotives with a maximum desired speed of 100 km per hour; it has not requested electrification of the line. Under such conditions of use, the claim that freight transport over the Iron Rhine will produce a lower level of emissions than road freight is questionable to say the least. It remains to be noted that, despite the Netherlands' policy of discouraging diesel-electric propulsion, it has not set any conditions for Belgium in this area in respect of the reactivation of the Iron Rhine.

2.9.3 In part B.1 of the Memorial, paragraphs 20 and 22 in particular, Belgium refers to trans-European networks. On 23 July 1996, Decision No. 1692/96/EC of the European Parliament and the Council on Community guidelines for the development of the trans-European transport network laid down the first Community guidelines for the development of the Trans-European Transport Networks (TEN-T) programme.[34] The guidelines apply to roads, railways, airports and ports. The Iron Rhine is included on the map of European TEN links. This classification signifies that the EU attaches importance to the link in question and that any improvements to the link will in principle be eligible for limited EU co-financing (10 per cent of the investment at most). Other than that, it has no specific meaning or effect. There were originally 14 projects that received priority and hence were eligible for EU co-financing and soft loans from the European Investment Bank. On 5 December 2003, an additional list of priority projects eligible for EU co-financing was adopted. This list includes the Iron Rhine.

Article 8, paragraph 1 of Decision 1692/96/EC includes the following provision:

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[34] 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; *Official Journal L 228, 09/09/1996 P. 0001 – 0104.* Exhibit N No. 16

> "When projects are developed and carried out, environmental protection must be taken into account by the Member States through execution of environmental impact assessments of projects of common interest which are to be implemented, pursuant to Directive 85/337/EEC and *through the application of Directive 92/43/EEC*." (emphasis added)

In the opinion of the Netherlands, the relationship between Decision 1692/96/EC and the Habitats Directive (92/43/EEC)[35] requires no further explanation, in view of Article 8, paragraph 1 of the said Decision.

2.10 Belgium's request to reactivate the Iron Rhine

On the basis of the Tractebel Report, the Belgian government, decided to ask the Netherlands to reactivate the Iron Rhine.[36]
On 10 July 1998, the Dutch Prime Minister, Kok, responded as follows to the request of the Belgian Prime Minister, Dehaene, in this regard[37]:

> I have read your letter of 19 June 1998 with much interest. We are aware of the great importance Belgium attaches to the swift realisation of the Iron Rhine along the historic route. Regardless of the aspects of international-law issues, the Netherlands will participate in the consultations in a neighbourly spirit, as it has stated on many occasions. It speaks for itself that reactivating the historical line – or any other line – within Dutch territory is subject to Dutch environmental legislation and EC legislation on the conservation of natural habitats (Habitats Directive).[38]

2.11 The establishment of the future scenario for the Iron Rhine

In a meeting of the Tripartite official steering group on 5 March 1999, Belgium and Germany initially fixed the number of trains for 2020 at 36 per working day (combined total for both

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35 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora. Exhibit N No. 17.

36 Memorial, paragraph 28, p. 38.

37 At that time, informal contacts had already led to the establishment of the Tripartite official Iron Rhine Steering Group, which met on 29 June 1998. At the meeting, the Dutch delegation stated that it could not approve the reactivation costs cited in the feasibility study and that the Report made no allowance for the costs that would result from essential environmental measures. Exhibit N No. 18.

38 Letter of the Dutch Prime Minister Wim Kok to the Belgian Prime Minister Jean-Luc Dehaene of 10 July 1998. Exhibit N No. 19. Authentic text: "Uw brief van 19 juni 1998 heb ik met veel belangstelling gelezen. Wij zijn zeer doordrongen van het grote belang dat België hecht aan een spoedige realisatie van de IJzeren Rijn langs het historisch tracé. Ook los van de volkenrechtelijke aspecten zal Nederland, zoals reeds meermalen tot uitdrukking gebracht, in goed nabuurschap het overleg voeren. Vanzelfsprekend is het reactiveren van het historisch tracé – net zoals elk ander tracé – op het Nederlandse grondgebied onderworpen aan de in Nederland geldende milieuwetgeving en de EU-regelgeving met betrekking tot beschermde natuurgebieden (Habitat-richtlijn)."

directions). In a meeting of the Iron Rhine technical working group on 25 October 1999, at the request of the Belgian chairman of the working group, the railway companies B-Cargo, DB-Cargo and NS-Cargo again discussed the transport forecasts and the technical specifications with which the railway would have to comply from a commercial perspective.[39] At this meeting, the railway companies proposed to fix the number of trains at 43 trains (combined total for both directions per working day).[40] With regard to the technical specifications, it was proposed that the trains could be up to 700 metres in length, carry loads of up to 22.5 tonnes per axle and 8 tonnes per metre and travel at speeds of up to 100 km/h. On 18 November 1999, the Iron Rhine technical working group decided to recommend to the Tripartite official steering group that it approve these forecasts. On 1 December 1999, the steering group decided to place the new forecasts on the agenda for the meeting of members of government of 9 December 1999. On this date, the relevant members of government of the Netherlands, Belgium and Germany approved the forecast, which was taken as authoritative throughout the rest of the procedure.[41]

The proposed number of freight trains per 24-hour period, namely 43, is many times more than have ever travelled over the Iron Rhine in the past. Since 1920, in most years only 1 or 2 per 24-hour period have done so, and never more than 9 per 24-hour period

2.12 The Memorandum of Understanding of March 2000

2.12. The full text of the MoU appears below (in paragraph 2.12.1), to facilitate a comprehensive assessment of the reciprocal working arrangements. The paragraphs of the MoU have been numbered for easy reference. Paragraph 2.12.2 explains the basis of the arrangement that an environmental impact statement (EIS) would be drawn up in the Netherlands. Paragraph 2.12.3 then describes the procedure set out in the Transport Infrastructure (Planning Procedures) Act, including the EIS, as well as the current status of the procedure regarding the Iron Rhine. Paragraph 2.12.4 contains a description of the outcome of the stage of the procedure – the Route Assessment/EIS – which has been formally completed.

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[39] In 1999, NS-Cargo was an independent commercial organisation, B-Cargo was (and remains) a subsidiary of the state-owned NMBS (Belgian Railways) and DB-Cargo was a subsidiary company of the state-owned Deutsche Bahn (German Railways).

[40] Minutes of the meeting on 25 October 1999 of the Iron Rhine Technical Working Group. Exhibit N No. 20.

[41] Minutes of the meeting on 1 December 1999 of the Tripartite official steering group. Exhibit N No. 21.

The above-mentioned paragraphs refer to a number of Annexes that form an integral part of the Counter-Memorial.

2.12.1 The unofficial translation of the Memorandum of Understanding of March 2000 reads as follows[42]:

> ***Memorandum of Understanding***
> *between Minister Durant and Minister Netelenbos concerning the Iron Rhine (in accordance with the arrangement between the ministers of 29 February 2000)*
>
> (1) Belgium and the Netherlands emphasise the importance of being able to swiftly transport freight by rail from the Belgian and Dutch ports to the hinterland and back again in an ever-expanding internal market. Access to the infrastructure that is available for this purpose will be open to all railway companies.
> (2) Both countries will closely cooperate with Germany on an international study of the positive and negative consequences of the reactivation of the Iron Rhine and of the possible alternative routes. This study will assess the situation "as if there were no border". The results of this study must be available in March 2001, so that at that time the international decision-making can take place.
> (3) Given the relationship between the international study and the Dutch EIA, the Netherlands will do its utmost to have the results of the EIA for the part of the Iron Rhine that is located on Dutch territory, ready in March 2001. In the EIA the following will be investigated:
>
> For the short term the possibility temporary, limited reactivation of the complete historic route, this temporary reactivation being applicable until the definitive route is being put to use.
>
> For the definitive solution all relevant routes shall be studied; possibilities for the transportation of passengers will also be examined.
>
> (4) The Netherlands and Belgium will propose to Germany that they discuss the progress of the EIA regularly on a trilateral basis. The Netherlands will invite Belgium to designate an official to monitor the day-to-day progress of the EIA.
> (5) The decisions on temporary use and the definitieve route will be taken simultaneously.
> (6) If, when decisions are taken on the temporary and definitive route in mid 2001 at the latest, the EIA-study concludes that a temporary, limited use will not cause irreversible environmental damage, then, from the end of 2001 onwards a few trains a day will be allowed to use the whole historic route 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 the end of 2002 onwards, also use temporarily at limited speed the whole historic route in evening hours and at night, up to a maximum of fifteen per 24-hour period (combined total in both directions). The possible loss of ecological value will be compensated for. [43]
> (7) If it is decided that the definitive route shall be another route than that passing through the Meinweg (as the Netherlands assumes, but not Belgium), this route 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 arrangements will be laid down in a Treaty.

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42 Exhibit N No 22

43 The condition that the route be used "at limited speed" applies during the day as well.

(8) Until the definitive route has been selected, Belgium reserves all its rights under the Separation Treaty of 1839 and the Dutch-Belgian Iron Rhine Treaty of 1873.
(9) The costs for the temporary use of the historic route will be met by Belgium.
(10) If the Belgian railways company (NMBS) so wishes, it may undertake these works either by itself or by a third party, always taking account of the European public procurement rules and of the Dutch legal requirement that such works are undertaken by a contractor who is recognized in the Netherlands. This contractor could be Belgian.
(11) For the construction of the definitive route the Netherlands is willing to bear part of the costs related thereto. Further arrangements will be made in this respect after the definitive route has been chosen.

2.12.2 Prior to the conclusion of the MoU, the Netherlands made an inventory of Dutch legislation that would be relevant to the reactivation of the Iron Rhine. This inventory revealed that the Railway Noise Abatement Decree (*Besluit Geluidshinder Spoorwegen*)[44] applied to various sections of the route, which meant that the government would have to liaise with twelve municipalities in relation to the potential noise nuisance resulting from reactivation. In addition, with regard to the section of the line between Roermond and the border, which passes through the Meinweg, the government was required to draw up an EIS and issue a Planning Procedure Order (*Tracébesluit*) on the basis, respectively, of the Environmental Impact Assessment (EIA) Decree (*Besluit Milieueffectrapportage*) and the Transport Infrastructure (Planning Procedures) Act (*Tracéwet*). [45] Furthermore, Article 6(3) of the Habitats Directive required an "appropriate assessment" of the implications for the three Bird and/or Habitats Directive areas that, according to the information available at that time, traversed by the Iron Rhine, namely, the Weerter- en Budelerbergen, the Leudal and the Meinweg.[46]

As the above-mentioned procedures would have offered a whole host of options for lodging objections and applications for judicial review, which could have led to substantial delays, the Netherlands proposed to Belgium that the entire line be submitted to the procedure set out in the Transport Infrastructure (Planning Procedures) Act. This procedure incorporates reviews of compliance with *all* the relevant specific legislation, which in this case includes the Railways Act (*Spoorwegwet*), the Railway Noise Abatement Decree and other legislation for the protection of humans and the environment. The procedure also includes an EIA. Only

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44 On the basis of the Railway Noise Abatement Decree, requirements can be imposed on the nature, composition or method of construction and the alteration of a railway line. Alteration refers, among other things, to a significant increase in the number of trains and/or the speed of transit. Certain measures are required in such cases. The railway management company must present these measures to the municipalities concerned. Construction or adaptation can only commence after a final decision has been reached.

45 The adoption of a plan for a new railway line or the reactivation of an existing railway line that passes for a distance of at least five kilometres through a buffer zone or a sensitive area delimited in a zoning plan or a regional plan requires the preparation of an EIS.

46 In the Netherlands, the EIA procedure is used to comply with the "appropriate assessment" requirement under Article 6(3) of the Habitats Directive.

the final Planning Procedure Order is to be open to appeal (before the Administrative Jurisdiction Division (*Afdeling Bestuursrechtspraak*) of the Council of State (*Raad van State*)). Belgium agreed to the proposal.

2.12.3 Paragraph 2.12.3.1 briefly describes the stages of the procedure set out in the Transport Infrastructure (Planning Procedures) Act. This is followed by a description of the current state of affairs regarding the reactivation of the Iron Rhine (in paragraph 2.12.3.2).

2.12.3.1 The Transport Infrastructure (Planning Procedures) Act/EIA procedure consists of the following six stages:

1. A *Notification of Intent* (*Startnotitie*) marks the formal beginning of the procedure. It specifies the plans of the initiator,[47] what alternatives to the planned activity will be examined and the potential consequences for the environment of each alternative.
2. The results of the study of the alternatives and their consequences are recorded in the *Route Assessment/EIS* (*Trajectnota/MER*), taking into consideration the results of public input regarding the Notification of Intent. The purpose of the Route Assessment/EIS is to describe the anticipated consequences for the environment, so that the environment receives proper attention in the decision-making concerning the planned activity.
3. On the basis of the Route Assessment/EIS, and with due regard to the results of public input and the advisory report of the independent Committee for Environmental Impact Assessment established pursuant to statute, the competent authorities[48] select a preferred option, which is published in an *Official Position* (*Standpuntbepaling*).
4. The preferred alternative is worked out in detail (this involves specification of the position of the railway line that is accurate to within one meter) and the result is recorded in a *Draft Planning Procedure Order* (*Ontwerp-Tracébesluit*), which is published.
5. After public input on the Draft Planning Procedure Order, the competent ministers adopt a *Planning Procedure Order* (*Tracébesluit*), which forms the basis for issuing building permits, expropriation procedures and the like. A Planning Procedure Order is open to judicial review, which can lead to the annulment of all or part of the Order.

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47 Directorate-General for Public Works and Water Management, Limburg and North Brabant Departments, and ProRail (formerly Railinfrabeher).

48 The Minister of Transport, Public Works and Water Management and the Minister of Housing, Spatial Planning and the Environment.

6. Once the Planning Procedure Order has become final and conclusive, the construction stage of the project can begin.

As the procedure progresses, the studies conducted on the basis of the procedure become more specific. The Route Assessment/EIS for the Iron Rhine (stage 2) thus consists of a relatively broad assessment of a *number* of routes, while the study in preparation for the draft Planning Procedure Order (stage 4) focuses on the preferred option published in the Official Position (stage 3). The more detailed the study, the more thoroughly the adverse effects of measures and the possibilities for mitigating them can be determined. The increasing level of detail may also have implications for the calculation of costs.

2.12.3.2 The Notification of Intent was completed in November 1999. In accordance with the arrangements in the MoU, the Netherlands completed the Route Assessment/EIS, which takes two or three years to prepare on average, within one year, at the same time the international study was completed, in May 2001. The Dutch authorities were unable to issue an Official Position, because agreement could not be reached with Belgium regarding the costs of the preferred option. As far as possible, however, the Dutch Minister Netelenbos of Transport, Public Works and Water Management continued the procedure *on an informal basis* in order to prevent delays. On 27 June 2002, she wrote as follows to her Belgian counterpart, Minister Durant:

> "During the tripartite ministerial meeting on the Iron Rhine of 21 September 2001, we agreed that the official negotiations between the Belgian and Dutch delegations should continue. This has happened. The negotiation process has deepened both parties' insights, but has so far not produced any concrete result that can be presented to you and me.
>
> In September 2001, the work required in the Netherlands with a view to putting the Iron Rhine back into use was proceeding entirely according to the schedule on which we jointly agreed in our MoU of spring 2000. At that time, in order to ensure that the Dutch part of the project would not be delayed as a result of the negotiation process, I issued an order to continue the necessary procedures and work in the Netherlands as far as possible. In this context, the following steps were taken:
>
> 1. In November 2001, in accordance with the Dutch Transport Infrastructure (Planning Procedures) Act, I submitted a preliminary document containing the Official Position on the Dutch section of the Iron Rhine to the Dutch government. The government approved my proposal, but the document cannot be formally adopted and published until the tripartite MoU on the Iron Rhine has been signed.

> 2. On the basis of the government's approval of the preliminary Official Position, I subsequently instructed Railinfrabeheer [(the Dutch railway infrastructure management company)] and the Directorate-General for Public Works and Water Management (*Rijkswaterstaat*) to start developing detailed plans in the form of a preliminary version of a Draft Planning Procedure Order.
>
> 3. In this context, consultations are being held with municipalities and other institutions. In May and June 2002, public consultation meetings were held for people living close to the line. During five meetings, a few hundred people participated in discussions concerning the development of detailed plans.
>
> As a result of this expeditious approach, we have so far succeeded – despite the continuation of the negotiations between Belgium and the Netherlands – in keeping to the original schedule, which is geared towards the adoption of the Draft Iron Rhine Planning Procedure Order by the Minister of Transport, Public Works and Water Management and the Minister of Housing, Spatial Planning and the Environment by the end of 2002.
>
> In accordance with the statutory rules (the Transport Infrastructure (Planning Procedures) Act), however, the Draft Planning Procedure Order cannot be adopted until the Official Position has been published."[49]

The preliminary version of the Draft Iron Rhine Planning Procedure Order was completed in July 2003.[50] The Draft Planning Procedure Order was not adopted. The Route Assessment/EIS is thus the last *formal* step taken in the procedure set out in the Transport Infrastructure (Planning Procedures) Act and hence is discussed in paragraph 2.12.4.

2.12.4 The Route Assessment/EIS comprises more than 500 pages, excluding annexes. In addition to Dutch, the official summary has been published in German. An unofficial English translation was made for the benefit of the Tribunal.[51]

The purpose of the Route Assessment/EIS is to describe the anticipated consequences for the environment. In accordance with the arrangement in the MoU, it considers a number of alternatives. This was necessary due to various statutory regulations, including those arising from the Habitats Directive. The Route Assessment/EIS examines options A0, A1, A2 and A3 via Roermond and options D1, D2 and D3 via Venlo.[52]

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49 Letter from the Dutch minister Tineke Netelenbos to the Belgian minister Isabelle Durant of 27 June 2002. Exhibit N No. 23.

50 On 5 September 2003 it was sent to the NMBS in connection with the company's assistance during its preparation.

51 Samenvatting Trajectnota/MER IJzeren Rijn. Exhibit N No. 24 (separate). Zusammenfassung Trassennotiz/UVP Eiserner Rhein. Exhibit N No. 25 (separate). Summary Route Assessment/EIS. Exhibit N No. 26.

52 The consideration of options A1 and D2 also included variants of these options (Summary, Chapter 4).

In accordance with the MoU, the Route Assessment/EIS includes, in addition to an assessment concerning the selection of the definitive route, an assessment concerning "temporary use" as specified in paragraph 6 of the MoU.

With regard to temporary use, the Route Assessment/EIS observed that the only option consisted of using the historic line. The assessment concerning temporary use indicated that, during a period of five years, no irreversible damage would result if the historic line were used by fifteen trains per day in accordance with the conditions laid down in the MoU. Temporary use was therefore permissible from an environmental perspective.[53]

With regard to the selection of the definitive route, it may very briefly be noted that the Route Assessment/EIS evaluated ten aspects of the above-mentioned seven alternatives: noise; vibration; major hazard; air; soil and water; ecosystems; landscape, cultural heritage and archaeology; recreation; agriculture; and quality of life and the lived environment. The alternatives were evaluated in terms of their adverse impact in these areas, and the results were quantified and expressed as scores. These scores were then considered from three perspectives: a neutral perspective, a lived-environment perspective and a wildlife and countryside perspective. As required by Dutch environmental law, the Route Assessment/EIS also contains a description of the most environmentally friendly option.[54]

2.13. The implementation of the MoU

The following sections discuss five aspects of the MoU, namely, the selection of the definitive route (2.13.1), the diversion around Roermond (2.13.2), the "dual decision" (2.13.3), the risk of legal action (2.13.4) and the costs associated with temporary use and the chosen route (2.13.5).

2.13.1 It was decided that the best option would be to reactivate the Iron Rhine along the historic route. This decision took account of the international study conducted on the basis of the MoU, the purpose of which was to provide an overall picture of the reactivation of the Iron Rhine in the Netherlands, Belgium and Germany. The three countries then determined the form the Iron Rhine would take within their own territories, in accordance with their national legislative requirements.

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53 Summary, Chapter 2.
54 Summary, Chapter 5.

2.13.1.1 The Route Assessment/EIS determined that the historic route, with modifications including a tunnel in the Meinweg and a diversion around Roermond, would be the most environmentally friendly option. A comparison of the conclusions of the Route Assessment/EIS and the international study in relation to ecological issues reveals that both studies came to similar conclusions on noise nuisance, fragmentation and land take.[55] In particular, it was clear that the tunnel in the Meinweg would significantly or completely mitigate these adverse impacts.[56] However, the international study drew a different conclusion with regard to the impact of the construction of a tunnel in the Meinweg on groundwater levels and even concluded, despite identifying uncertainties in this area, that this potential adverse impact would cancel out the mitigation of noise nuisance, fragmentation and land take.[57] On the basis of the findings regarding groundwater levels in the international study, further research was conducted, which concluded that a change in

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55 In paragraph 36 of the Memorial, Belgium notes that the international study concluded that the historic track without a tunnel under the Meinweg was the most favourable alternative. However, in contrast to the Route Assessment/EIS, the main purpose of which is to ensure that environmental factors receive equal attention in the decision-making process, the international study includes an *integral impact assessment* that also considers such factors as transport time and residual capacity. The conclusions of the two studies cannot be compared without bearing this in mind.

56 With regard to the noise-affected areas in the Meinweg, the international study states (pp. 107 and 131):
"The tunnel in alternatives A0 and A3 induces a decrease of around 10% of total noise-affected area, when compared to alternative A0 and A3 without tunnel. This tunnel can be considered an effective mitigating measure for noise abatement. … If in the "Meinweg" a tunnel is build [sic], the "Meinweg" will not be affected by noise. The total increase of noise-affected Bird and Habitat Directive areas in alternative A0 with tunnel is 1135 ha".
With regard to fragmentation and land take in Birds and Habitats Directive areas, the international study concludes (p. 127):
"Infrastructure may further fragment Bird and Habitats Directive areas and national status areas and may disrupt necessary migration between functional areas and between populations. Fragmentation is less serious if new railway track combines with existing or future infrastructure. Therefore new fragmentation and the increase of existing fragmentation are determined. New fragmentation considers fragmentation of nature areas by new track. *The increase of existing fragmentation considers fragmentation caused* by track doubling, by a combination of new track with existing or future infrastructure and *by reactivation of track. The last mentioned is considered, because at the moment the non-used track causes no to very little fragmentation. Reactivation of track will therefore cause an increase of fragmentation.*" (emphasis added).
It also states (p. 129):
"If a tunnel will be built, temporary land take takes place in a part of the "Meinweg" in the Netherlands (wood area), that has been appointed as a Bird Directive area and as a other-status area, because of its ecological values …. If its is assumed that after the construction ecological values can develop again above the tunnel, there will be no permanent loss of space as a consequence of the construction of the tunnel. Land take caused by a tunnel is therefore not considered."

57 See paragraph 36 of the Memorial, in particular the following quote from the international study (p. 124):
"The construction of the 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.*" (emphasis added).

groundwater levels of less than 10 cm would not have an adverse impact on groundwater-dependent vegetation in the Meinweg area.

2.13.1.2 The measures for protecting nature and the environment on the basis of the Route Assessment/EIS are a consequence of the designation of the Weerter- en Budelerbergen, the Leudal and the Meinweg as special conservation areas under the Birds and/or Habitats Directives, as well as of the protection these areas derive from general Dutch environmental legislation. Annexe A, Part 1, briefly describes this legislation. Part 2 of this Annexe contains a description of the ecological factors of the Weerter- en Budelerbergen and the Meinweg, based on the first draft of a study by Transport Consultants and Engineers (TCE) concerning the ecological values of the protected areas. Also borrowed from this study is a detailed assessment by TCE of the consequences of the reactivation of the Iron Rhine for the ecosystems in the areas concerned and how these consequences are to be mitigated. TCE conducted its study in the context of the preparation of the preliminary version of the Draft Planning Procedure Order.[58]

2.13.1.3 Since the preparation of the Route Assessment/EIS, a number of developments have occurred in relation to the Leudal and the Weerter- en Budelerbergen. These developments are described below.

Until mid-February 2003, the precise demarcation of the Habitats Directive areas was not known, and the areas were only temporarily so registered. On 18 February 2003, the Ministry of Agriculture, Nature Management and Fisheries presented a definitive list of areas to be designated as Habitats Directive areas, including the proposed boundaries. As the demarcation of the Leudal was changed, the Iron Rhine no longer lies directly on the boundary of this area. This means that the area is beyond the influence of effects as a consequence of the reactivation of the Iron Rhine, so that the Leudal need no longer be taken into account on the basis of the Habitats Directive.[59]

With regard to the Weerter- en Budelerbergen, it is important to devote attention to two successive changes of plan that led to the adoption of environmental measures differing

[58] See paragraph 2.12.3.1.

[59] In connection with its status as a designated noise-sensitive area *(stiltegebied)*, noise abatement screens will be erected in the Leudal.

from those considered necessary on the basis of the Route Assessment/EIS and thus to a reduction of the projected costs.

On the basis of the Route Assessment/EIS, the plan was to cover the entire line in order to protect the ecological values of the Weerter- en Budelerbergen. In its search for ways to reduce costs, the Netherlands presented Belgium with a proposal to limit the covered section of the line to a single track, so that it would be narrower and therefore less costly. This single-track section was only possible if the adjoining section of the line within Belgian territory consisted of a double track. As indicated in paragraph 45 of the Memorial, the NMBS (Belgian Railways) agreed to this.

During the detailed development of the plans for covering the line in the Weerter- en Budelerbergen, it was subsequently concluded that the various ecological values requiring protection would on balance experience more harm than good as a result of covering the line. In the autumn of 2002, a decision was therefore made to abandon the plan to cover the entire section of the line in the Weerter- en Budelerbergen and to construct noise barriers, wildlife bridges and wildlife passages instead. The above was discussed in detail with the NMBS, which cooperated in the development of the plans, and was also communicated to Belgium during a high-level meeting on 11 April 2003. Nevertheless, Belgium continues to refer to the covering of the line in the Memorial.

Aside from the above, it is important to note that the plans to designate the Weerter- en Budelerbergen as a Habitats Directive area have now been changed. The Weerter- en Budelerbergen was no longer included on the basis of the February 2003 list of areas to be registered for special protection under the Habitats Directive. Instead, the Weerterbos and the Ringselveen and Kruispeel, areas not within the sphere of influence of the Iron Rhine, were included. The proposed list was accepted by the European Commission in July 2003.[60] As a consequence, the Weerter- en Budelerbergen need no longer be assessed as a Habitats Directive area.

2.13.2 In various places[61], Belgium's Memorial states that the Netherlands cannot unilaterally impose the diversion around Roermond on Belgium, as it forms a deviation from the Iron Rhine Treaty. This is not the case. Following preparations at official level, during

[60] Source: http://www.minlnv.nl/natura2000.
[61] Paragraphs 67, 76 (point 5) and 83 of the Memorial.

which Belgium did not express any objections to the diversion, the Dutch Minister of Transport, Public Works and Water Management indicated, during the tripartite ministerial meeting (between the Netherlands, Belgium and Germany) on 21 September 2001[62], that she wished to create a diversion around Roermond. The Netherlands was willing to meet the additional costs of the diversion and bear the risk that it would run over budget. There was never any question of a unilateral imposition of the diversion, but only, in the framework of the consultations concerning the form that the Iron Rhine will take after reactivation, of a Dutch proposal that was not unwelcome to Belgium. The advantages of the diversion around Roermond (running alongside a motorway that passes around the town) over the historic route (which runs straight through a residential area) are clear. Among other things:

1. the adverse impact on the lived environment will be smaller;
2. it will be easier to expand the capacity of the diversion in the future;
3. the rail traffic on the diversion will be less likely to be affected by any future legal restrictions on the transport of dangerous substances in close proximity to residential developments (general legislation of this type is currently being drafted in the Netherlands in relation to transport on the Dutch rail network); and
4. interested parties will probably have less cause to seek judicial review of the Planning Procedure Order that finally lays down the route if the latter goes *around* rather than *through* Roermond.

2.13.3 The arrangement in the MoU to the effect that the decisions on temporary use and the definitive route would be taken simultaneously (the “dual decision”) was vital as it was meant to ensure that the temporary solution would not become permanent. However, following the completion of the Route Assessment/EIS, the dual decision failed to materialise, mainly because agreement could not be reached on the division of costs related to the definitive route. The fact that the definitive solution would require the construction of a certain amount of infrastructure on the historic line made uninterrupted temporary use difficult if not impossible. Belgium objected to this, without offering a meaningful solution to the problem.

Belgium subsequently made several attempts to disconnect the decisions on temporary use and the definitive route, as is evident from p. 78 *et seq.* of the Memorial and the quotation in paragraph 48 of the Memorial, which states that temporary use is “a political necessity”. This

[62] Memorial, footnote 162 (p. 52).

happened despite the above-mentioned arrangement in the MoU and the confirmation by Belgian and Flemish government officials that a "dual decision" would be taken. In a letter to Prime Minister Kok of the Netherlands, the Belgian and Flemish prime ministers stated as follows:[63]

> As you are aware, the Memorandum of Understanding concerning the Iron Rhine, which was concluded on 29 March 2000 by Minister Durant and Minister Netelenbos, provides that the international study concerning the optimal route will be available in March 2001 and that the Netherlands will do its utmost to present the results of the Dutch environmental impact assessment by March 2001, as well as that *the decisions on temporary use and the definitive route will be taken simultaneously*, at the latest by mid-2001. The historic line would in that case be reactivated for temporary use by the end of 2001.
>
> We are pleased to note that Minister Netelenbos informed the House of Representatives of the States General in a letter of 26 January 2001 that the Dutch Route Assessment/EIS will be published in spring 2001. *The letter states that the dual decision will be taken "shortly after the summer"*; elsewhere in the letter reference is made to September 2001. In this context, we wish to recall the agreements in the Memorandum of Understanding and the reference to "mid-2001 at the latest". (emphasis added)

At a meeting on 5 April 2001, the Dutch and Belgian transport ministers and the German state secretary for transport established:

> that the "dual decision" would indeed take place as described in the Belgian-Dutch MoU;
> that the EIS and the international study had both experienced limited delays and would be completed in May 2001 instead of March 2001; and
> that the Tripartite Steering Group would be responsible for the preparation of the final decision-making process and matters related to funding.[64]

Both in the above-mentioned letter and at the meeting on 5 April 2001, Belgian government officials placed emphasis on Dutch compliance with the MoU, in particular with regard to the time within which the Route Assessment/EIS had to be completed, so that it would be possible to adopt the dual decision. The Netherlands completed the Route Assessment/EIS within the allotted time. In addition, despite the lack of a dual decision, the Dutch Minister of Transport, Public Works and Water Management decided to continue the procedure outlined in the Transport Infrastructure (Planning Procedures) Act on an informal basis, so that the

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63 Unofficial translation. The letter was not dated and was received by Prime Minister Kok on 9 March 2001. Exhibit N No. 27.

64 Unofficial translation. Exhibit B No. 87.

Netherlands would be able to complete the procedure as soon as the negotiations produced a dual decision.

2.13.4 It is worth noting that the selection of the most environmentally friendly option not only achieves the primary objective, namely, to protect nature and the environment in accordance with Dutch legislation, but also reduces the risk of judicial review of the Planning Procedure Order concerning the reactivation of the Iron Rhine. In addition, even if an application for judicial review were lodged, it is less likely that it would be followed by a Dutch court decision that would delay or prevent reactivation. As a result of the implementation of the Birds and Habitats Directives, there is also less of a risk that actions will be brought before or by EC institutions.

The decision regarding temporary use could also become the subject of legal action. The understanding that a "dual decision" would be aimed at ensures that the route will be organised entirely in long-term conformity with the current requirements within a relatively short time. The Netherlands believes that a decision concerning temporary use during the period preceding the establishment of this long-term situation will have a better chance of withstanding judicial review if a univocal and credible decision on the endpoint of the temporary-use stage has been taken. The aim of the understanding on the dual decision is thus to provide the best possible guarantee of Belgium's option to make temporary use of the line.

2.13.5 As mentioned above (in paragraph 2.12.3.1), the further the procedure outlined in the Transport Infrastructure (Planning Procedures) Act advances, the easier it becomes to estimate costs. This applies in particular to costs related to the definitive route, which are discussed in paragraph 2.13.5.1. Paragraph 2.13.5.2 discusses the costs related to temporary use. Annexe B contains a detailed overview of current estimates for the definitive route and temporary use.

2.13.5.1 The first estimate of the costs related to the definitive route, which was based on a rough assessment of the required measures in the Route Assessment/EIS, dates from October 2001.[65] At March 2001 price levels, the costs of the works on the Dutch part of the

[65] The cost analysis that appears in paragraph 32 of the Memorial, which is also referred to elsewhere in the Memorial and indicates that the tunnel in the Meinweg would cost well over €500 million, was part of a draft report of March 1999 that was never finalised.

Iron Rhine were estimated at €547.8 million. At the tripartite ministerial meeting of 21 September 2001 the Netherlands offered to pay 25 per cent of these costs, i.e. € 140 million, as a one-off contribution.[66] Belgium would have had to pay the remaining € 407 million and bear the risk that the costs might turn out higher or lower. However, Belgium wanted to pay €100 million towards the reactivation of the Iron Rhine, which represented not even 20 per cent of the total costs, and felt that the Netherlands should bear the risks of overspending or underspending.

In June 2002, a further elaboration of the plans and the estimate of the costs caused the estimate to be adjusted to €514.3 million (at March 2001 price levels).[67] An important difference in relation to the earlier estimate was that the costs to cover the line in the Weerter- en Budelerbergen were to be reduced, at the proposal of the Netherlands, by turning the relevant section of the line in the Netherlands into a single track, while a double track was planned on the Belgian side of the border.[68]

In the framework of the Draft Planning Procedure Order, the cost estimate of June 2002 was also adjusted recently to the version of 8 January 2004 (see Annexe B). In autumn 2002, more detailled information showed, that it would no longer be necessary to build a covering in the Weerter en Budeler Bergen. Cost reductions have also proved possible in relation to the Meinweg tunnel and the diversion around Roermond. In contrast, estimates for the purchase of immovable property appear to have been too low. The total estimate currently stands at €478 million (at March 2004 price levels).

2.13.5.2 In paragraph 44 of Belgium's Memorial, it summarises the four reasons that – according to the consulting agency KPMG – there are differences between the Netherlands' and Belgium's estimates of the costs of the works on the Iron Rhine to be carried out in the Netherlands. The fourth reason is characterised in the Memorial as a "difference in

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66 The Netherlands made this offer in order to demonstrate its good neighbourliness and because it could be said that certain cost items should not accrue entirely to Belgium. The items in question were:
(1) the costs of restoring of the railway line between Roermond and Dalheim, which has not been in use by international trains since 1991, to its 1991 condition ("as if standard maintenance of the railway line had continued since 1991"), the current estimate of these costs being €21 million (at March 2004 price levels), without preceding temporary use of the track.;
(2) the cost of part of the noise barriers to be placed along the Weert-Roermond section, which, while they are a consequence of reactivation, are not directly linked to the Iron Rhine trains (see annexe B, section 1, table, third row);
(3) the excess cost of the Roermond diversion (see 2.13.2 and annexe B, section 1, table, last row).

67 See Memorial, paragraph 66, p. 81.

68 See Memorial, paragraph 45, p. 58.

calculation methods", but this is an inaccurate description. In fact, what is at issue is the fundamentally different ways in which the Netherlands and Belgium deal with uncertainties existing at the time of estimation, such as the fact that not all the details of the plans had yet been filled in and all sorts of unforeseen costs. The Netherlands' approach to such uncertainties is based on years of practical experience in the Dutch construction market, and as a result adds an additional margin to the basic estimated cost items. According to KPMG, Belgium's approach (to the same facts) would yield estimated costs 15 to 20 per cent lower. This difference does not reflect any difference in the *actual costs*, but a difference in the approach to risk (or the financial valuation of risks).

2.13.5.3 The MoU stipulates that Belgium will meet the costs of temporary use. However, the Memorial indicates that Belgium no longer intends to honour its original commitment in this regard. As noted above, temporary use gives rise to problems, as it is meant to take place on the definitive route, where major infrastructural work needs to be carried out. As a result, temporary use would have to be suspended again for a certain period.[69] For this reason, and because the Netherlands is encountering substantial opposition to temporary use from the province of Limburg, the municipality of Roermond, the environmental lobby and people that live close to the line[70], which were accustomed to low-level use of the Iron Rhine for many decades (in the last fifteen years, not one international train has passed), the Netherlands has offered to provide an additional contribution of €40 million.[71] Furthermore, as evident from the cost analysis in Annexe B (section 2) Belgium will save approximately €12 million (at March 2001 levels) if there is no temporary use.[72]

2.14. Summary

Following the Belgian prime minister's request of June 1998 to reactivate the Iron Rhine, Dutch officials conducted intensive negotiations with Belgian and Flemish officials, which resulted in the signing of a Memorandum of Understanding in March 2000.

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69 The Netherlands offered Belgium to use the routes Antwerp-Roosendaal-Breda-Eindhoven-Venlo; Budel-Weert-Eindhoven-Venlo en Budel-Weert-Roermond-Venlo for temporary use.

70 As showed by the annexed articles from the Dutch and German press. Exhibit N No. 28.

71 In paragraphs 48 and 65 of the Memorial, Belgium claims that the Netherlands made its €40 million contribution contingent on three conditions. This claim is based on the "Memo" of the meeting held at Roosendaal between Belgium and the Netherlands on 11 October 2001, which provides a false impression. The "Memo" is an internally produced Belgian document that is not in the possession of the Netherlands.

72 The total cost of temporary use comes to €36.3 million. Facilities to the amount of €12.2 cannot be used for the definitive route.

The Netherlands complied with the arrangements in the MoU and completed the Route Assessment/EIS, which normally takes two or three years to prepare, in May 2001, within one year's time. The scenario established by Belgium for the Iron Rhine, with 43 trains per 24-hour period (combined total for both directions), served as the basis of the Route Assessment/EIS.

Pursuant to the MoU, temporary use cannot be allowed unless a decision on the definitive route is adopted at the same time.

The Netherlands was unable to reach agreement with Belgium on the division of costs related to the definitive route, because the latter is not willing to meet the costs of the environmental measures that are necessary in order to reactivate the Iron Rhine. In addition, the two countries did not reach an understanding about how to apportion the risk of running over or under budget. In the Memorial, Belgium further states that it is not willing to meet the costs of temporary use either, despite the arrangement to this effect in the MoU.

Chapter 3: Legal Aspects

3.1 The right to the use, the restoration, the adaptation and the modernisation of the Iron Rhine not based on a general rule of public international law

3.1. The Netherlands takes the view that there is no general rule of public international law obliging States to limit their territorial sovereignty by guaranteeing freedom of transit or permitting the construction or operation of railway lines for the benefit of foreign states.[73] In *RailwayTraffic between Lithuania and Poland,* Advisory Opinion of 15 October 1931: PCIJ Series A./B. No. 42, p. 114, Lithuania asserted that the Landwarów-Kaisiadorys railway sector would be reopened only when other problems between Lithuania and Poland had been resolved. The Permanent Court of International Justice held as follows:

> "It is however to be observed that the question whether Lithuania is or is not entitled to exercise reprisals, *inter alia,* by keeping the Landwarów-Kaisiadorys railway sector out of use, only arises if it is shown that *the international engagements in force oblige Lithuania to open this sector for traffic*." (emphasis added)

The Permanent Court of International Justice went on to examine three "engagements". It concluded that the Resolution of the Council of the League of Nations of 10 December 1927, merely required Lithuania and Poland to negotiate and that the Convention of Paris of 8 May 1924, concerning Memel, did oblige Lithuania to facilitate free transit by rail, but only on routes "in use convenient for international traffic" – a requirement which the Landwarów-Kaisiadorys railway sector did not fulfil. In assessing the position in relation to Article 23(e) of the Covenant of the League of Nations, the Permanent Court of International Justice held (p. 119):

> "… it is impossible to deduce from the *general rule* contained in Article 23 (*e*) of the Covenant an obligation for Lithuania to open the Landwarów-Kaisiadorys railway

[73] See Gerfried Mutz, Railway Transport, International Regulation, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Volume IV, (2000), p. 14: "There is no general rule of public international law obliging States to limit their territorial sovereignty by guaranteeing freedom of transit or constructing or operating railway lines (see *Railway Traffic between Lithuania and Poland (Advisory Opinion)*), but a great deal of international railway transport is regulated by the multitude of international treaties in force." Exhibit N No.29.

sector for international traffic, or for part of such traffic ; *such obligation could only result from a special agreement*." (emphasis added).[74]

Other than Article XII of the Separation Treaty, there is no agreement obliging the Netherlands to permit Belgium to use, restore, adapt and modernise the Iron Rhine. If the validity of Article XII were to be denied, there would therefore be no basis in international law for the right to the use, the restoration, the adaptation and the modernisation of the Iron Rhine and the Netherlands would not be obliged under international law to recognise this right.

3.2 Right of transit based on special agreement and to be construed restrictively

3.2. Chapter 2 shows that one of the objects and purposes of the Separation Treaty was to determine the boundaries between the Netherlands and Belgium. More specifically, the Netherlands and Belgium agreed to incorporate Article XII in the Separation Treaty in order to give Belgium the possibility of direct transit to Germany through the Duchy of Limburg, which had been allocated to the Netherlands (now the province of Limburg). In the opinion of the Netherlands, the relationship between the provisions regulating the territory and boundaries of the two countries on the one hand and the right described in Article XII on the other means that Belgium has a right of transit which limits to a certain degree Dutch territorial sovereignty. It is also established case law that the extent of this limitation is determined by international law and that the territorial sovereignty must be fully respected in so far as it is not limited by international law. In the *Case of the Free Zones of Upper Savoy and the District of Gex (Series A./B.,* No. 46 (p. 164, p. 166)) the Permanent Court of International Justice held:

> "If the Court, in settling the questions involved by the execution of Article 435, paragraph 2, of the Treaty of Versailles, must respect Switzerland's right to the zones, it must also respect the sovereignty of France over the zones ; *this sovereignty is complete in so far as it has not been limited by the provisions of the treaties of 1815 and 1816 and by the instruments supplementary to these treaties."* (emphasis added)
>
> "It follows from the principle *that the sovereignty of France is to be respected in so far as it is not limited by her international obligations* that no restriction exceeding those

[74] Article 23 of the Covenant of the League of Nations reads: "Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League: … (e) will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League. …"

ensuing from these instruments can be imposed on France without her consent." (emphasis added)

The Permanent Court of International Justice also ruled in *Interpretation of the Statute of the Memel Territory, Judgment of August 11th, 1932, Series A./B*., no. 49, pp. 313-314 that:

> "Whilst Lithuania was to enjoy full sovereignty over the ceded territory, subject to the limitations imposed on its exercise, *the autonomy of Memel was only to operate within the limits so fixed and expressly specified."*
>
> *"* The Court holds that Memel's autonomy *only exists within the limits fixed by the Statute and that, in the absence of provisions to the contrary in the Convention or its annexes, the rights ensuing from the sovereignty of Lithuania must apply.* "[75] (emphasis added)

In the *Case of the S.S. Wimbledon (August 17th, 1923; Series A, No. 1 (1923))*, p. 24 the Permanent Court of International Justice also ruled on the interpretation of a treaty provision limiting territorial sovereignty:

> "Whether the German Government is bound by virtue of a servitude or by virtue of a contractual obligation undertaken towards the Powers entitled to benefit by the terms of the Treaty of Versailles, to allow free access to the Kiel Canal in time of war as in time of peace to the vessels of all nations, the fact remains that Germany has to submit to an important limitation of the exercise of the sovereign rights which no one disputes that she possesses over the Kiel Canal. *This fact constitutes a sufficient reason for the restrictive interpretation, in case of doubt, of the clause which produces such a limitation*. But the Court feels obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted."(emphasis added)

Also relevant is the following passage from the *Case of the Free Zones of Upper Savoy and the District of Gex* to which reference has already been made (p. 167):

> "In this connection, the Court observes that no such limitation necessarily ensues from the old provisions relating to the free zones ; that *in case of doubt a limitation of sovereignty must be construed restrictively* ;" (emphasis added)

The Netherlands henceforth concludes that restrictions on its territorial sovereignty involving a right of Belgium to the use, the restoration, the adaptation and the modernisation of the Iron Rhine through its territory could only result from a special agreement such as the

[75] Reference is made to the Convention of Paris of 8 May 1924 between the British Empire, France, Italy and Japan on the one hand and Lithuania on the other hand. The Statute was annexed to this Convention.

Separation Treaty and the Iron Rhine Treaty and that treaty provisions limiting the territorial sovereignty of the Netherlands are be construed restrictively.

3.3 Analysis of Article XII of the Separation Treaty

3.3.1 In the opinion of the Netherlands, Article XII of the Separation Treaty should be interpreted by reference to the general rule of interpretation contained in Article 31 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1967; hereinafter referred to as the Vienna Convention). In *Kasikili/Sedudu Island (Botswana/Namibia), Judgment 13 December 1999 (I.C.J. Reports 1999, p. 1045),* para. 18 the International Court of Justice ruled as follows on this provision:

> "As regards the interpretation of that Treaty[76], the Court notes that neither Botswana nor Namibia are parties to the Vienna Convention on the Law of Treaties of 23 May 1969, but that both of them consider that Article 31 of the Vienna Convention is applicable inasmuch as it reflects customary international law. *The Court itself has already had occasion in the past to hold that customary international law found expression in Article 31 of the Vienna Convention* (see *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994,* p. 21, para 41; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 812, para. 23). Article 4 of the Convention, which provides that it "applies only to treaties which are concluded by States after the entry into force of the … Convention with regard to such States" *does not, therefore, prevent the Court from interpreting the 1890 Treaty in accordance with the rules reflected in Article 31 of the Convention."* (emphasis added)

3.3.2 Article 31 of the Vienna Convention reads:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which established the

[76] The Anglo-German Agreement of 1 July 1890.

agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

3.3.2.1 Article 31 provides that a number of aspects should be taken into account when applying the rule that the terms of a treaty should be interpreted in good faith in accordance with their ordinary meaning. The Netherlands believes that the following matters in particular should be considered in the interpretation of Article XII of the Separation Treaty.

(a) Under Article 31, paragraph 2, the context for the purpose of the interpretation of a treaty comprises, *inter alia*, its preamble and annexes. The Separation Treaty has neither a preamble nor annexes.

In keeping with Article 31, paragraph 2, the context also includes agreements and instruments related to the treaty and concluded or accepted by the Netherlands and Belgium in connection with the conclusion of the Separation Treaty. With the exception of the two substantively identical Guarantee Treaties, the one between the Great Powers and the Netherlands and the other between the Great Powers and Belgium, there are no such agreements or instruments.

(b) As explained in paragraph 2.2 of this Counter-Memorial, the determination of the territories and boundaries of the Netherlands and Belgium was the main object and purpose of the Separation Treaty.

(c) Under Article 31, paragraph 3(a), account must be taken of any subsequent agreement between the Parties regarding the interpretation of the Separation Treaty or the application of its provisions. In the opinion of the Netherlands, these include, in so far as relevant, the Boundaries Treaty of 1842 and the Iron Rhine Treaty of 1873.

(d) In accordance with Article 31, paragraph 3(b) of the Vienna Convention, subsequent practice plays an important role in the interpretation of Article XII, which has now been in existence for more than 150 years. In the *Kasikili/Sedudu Island case* cited above, the International Court of Justice held as follows on the subject of the subsequent practice of the parties in the application of a treaty (para. 50):

> *"Indeed, in the past, when called upon to interpret the provisions of a treaty, the Court has itself frequently examined the subsequent practice of the parties in the application of that treaty* (see, for example, *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949,* p. 25; *Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960*, pp. 206-207; *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, pp. 33-35; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, pp. 157, 160-161 and 172-175; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 408-413, paras. 36-47; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 34-37, paras. 66-71; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 75, para. 19)."

(e) As regards the application of Article 31, paragraph 2(c), of the Vienna Convention, reference should be made to the Dutch view, explained in paragraph 3.2 of this chapter, that the scope of the right of transit in Article XII is determined by international law and that the terms of this provision should be interpreted restrictively.

(f) As will be seen below, the Netherlands is of the opinion that Belgium's interpretation of certain points is not consistent with Article 31, paragraph 4, of the Vienna Convention.

3.3.3 Article XII of the Separation Treaty reads as follows:

> "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 pourrait 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, 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."[77]

[77] Separation Treaty, Exhibit N No. 3. (Unofficial translation: "If a new road were to be constructed or a new canal dug in Belgium, connecting with the Maas opposite the Dutch canton of Sittard, Belgium would be at liberty to ask Holland to agree that the said road or waterway, in accordance with the plan, should be extended, entirely at Belgium's expense and for Belgium's account, through the canton of Sittard to the border of Germany, a request which Holland would not refuse. This road or

The following elements of Article XII are discussed below:

the passage ”dans le cas, où il aurait été construit en Belgique une nouvelle route, ou creusé un nouveau canal, 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” (paragraph 3.3.4);

the Dutch reservation of exclusive sovereignty in the application of Article XII (”sans préjudice des droits de souveraineté exclusifs sur le territoire que traverserait la route ou le canal en question”) (paragraph 3.3.5);

the interpretation of the words ”d’après le même plan” (paragraph 3.3.6);

the interpretation of the words ”travaux convenus” (paragraph 3.3.7)

the passages indicating that in the application of Article XII all the costs are to be borne by Belgium: ”entièrement aux frais et dépens de la Belgique” and ”et qui exécuteraient aux frais de la Belgique”) (paragraph 3.3.8);

the Dutch option to decide whether the Iron Rhine should be built by Dutch or Belgian engineers and workers (”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”) (paragraph 3.3.9).

The amendment of Article XII of the Separation Treaty agreed in the Iron Rhine Treaty is also considered (paragraph 3.3.10). Paragraph 3.3.11 contains a discussion of the principle of good faith and paragraph 3.3.12 a summary by way of conclusion.

3.3.4 The passage “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” indicates that the Netherlands is under a binding obligation to accede to a Belgian request for the extension of a new road or canal across Dutch territory. (As the Tribunal is aware, the Iron Rhine Treaty of 1873 provided instead for a railway line and the words “road or canal” (“route ou canal”) in Article XII should therefore be read as “railway line”.)

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canal, the sole purpose of which would be to maintain trade relations, would be constructed, depending on the choice made by Holland, either by engineers and workmen whom Belgium would be authorised to employ in the canton of Sittard, or by engineers and workmen supplied by Holland, who, at Belgium’s expense, would execute the works decided upon, at no charge to Holland and without prejudice to its exclusive sovereign rights to the territory to be crossed by the said road or canal.

3.3.4.1 Paragraph 2.6 describes the use made by Belgium of the right of transit provided for in Article XII. In brief, Belgium made very little use of the Iron Rhine for international rail transport during the greater part of the twentieth century. Moreover, Belgium terminated this traffic completely on 31 May 1991. Belgium has referred to steps towards reactivation that were taken at the moment of termination, but they were aimed at securing the right of transit (which is not disputed by the Netherlands) and were accompanied by the announcement that no investment was anticipated for the time being. Belgium also considered it necessary to commission two feasibility studies, which could, of course, equally well have led to the conclusion that no reactivation should take place. Moreover, objections to specific Dutch measures date from after June 1998, when the request for reactivation of the Iron Rhine was made to the Netherlands.

Belgium is now asking for the reactivation of the Iron Rhine and wishes to achieve a capacity of 43 freight trains each 24 hours (combined total for both directions) in 2020, which should be allowed to have a length of 700 metres and to travel at 100 kph.[78] The reactivation required for this capacity would have technical consequences for the line (functionality). In addition, current Dutch legislation requires protection of the residential and living environment in the areas traversed by an Iron Rhine which must be restored, adapted and modernised in such a way as to carry 43 trains each 24 hours.

3.3.4.2 In view of the above, the Netherlands does not share the Belgian view, as expounded in paragraph 79 of the Memorial, that the Iron Rhine should be reactivated on its historic route *in its current state*.

Paragraph 2.4 of this Counter-Memorial explains that the Iron Rhine has been maintained in the same way as all railways in the Netherlands, namely on the basis of the use made of the railway. As submitted above, this use was minimal. Paragraph 2.5 explains why security systems on the Roermond-Dalheim section, which had been in disuse since 1991, were removed.

Belgium completely disregards the fact that it is impossible for the capacity desired by it to be achieved on the historic route of the Iron Rhine in its present state, in view of the requirements of functionality and of ecology and the environment.

The two parties should jointly set the duties and tolls to be levied on the said road or canal and determine how they are to be levied.)

[78] See paragraph 2.11.

3.3.4.3 The Belgian position, namely that its request does not involve an extension of a railway within the meaning of Article XII, also means that although the right of transit is claimed, the conditions on which this right of transit can be exercised in accordance with Article XII and the obligations entailed by Article XII in relation to the realisation of that right are not recognised by Belgium. The Netherlands would draw attention to the following quotation from the Separate Opinion of Judge Ajibola in *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, 3 February 1994*, p. 72*)*:

> "In final analysis, execution in good faith is essential to the protection of the "considerations" mutually granted by and between the parties in a treaty, to use a term from the Law of Contracts in Common Law. "Good faith" implies that all parties to a treaty must comply with and perform all their obligations. They may not pick and choose which obligations they would comply with and which they would refuse to perform, ignore or disregard. Treaties like any agreement may contain obligations "beneficial" or "detrimental" to a particular party or parties, nevertheless, all the obligations, whether executory or not, must be performed."

3.3.4.4 Belgium is requesting more than *restoration* of the 1991 situation, when it itself stopped the international rail traffic on the Iron Rhine. It is, after all, requesting such *adaptation* and *modernisation* of the railway that the historic route of the Iron Rhine can be used for 43 trains every 24 hours. Such use of the Iron Rhine would, however, far exceed the capacity of the Iron Rhine in its present state (even if the situation existing before what is termed, by Belgium, the dismantling were to be restored), not only in a technical sense but also as regards the nuisance caused to adjoining residential areas and the harm to nature and the environment. Moreover, Belgium is claiming the right of transit, but is not prepared to respect the conditions and obligations inextricably linked to this right.

3.3.4.5 The Belgian request for reactivation of the Iron Rhine, which is described in the jointly formulated statement of questions submitted to the Arbitral Tribunal as the right to the use, the restoration, the adaptation and the modernisation the Iron Rhine amounts, in the opinion of the Netherlands, to a request within the meaning of Article XII for the extension of a railway on Belgian territory on Dutch territory. This railway is *new* to the extent that considerable adaptation and modernisation is necessary in many ways in order to achieve the desired use.

3.3.5 The passage “sans préjudice des droits de souveraineté exclusifs sur le territoire que traverserait la route ou le canal en question“ forms an essential element of Article XII.

3.3.5.1 It can be inferred from the words “sur le territoire que traverserait la route ou le canal en question” that this concerns *territorial sovereignty.* Under international law, this confers the exclusive right to exercise legislative, judicial and executive power within an area. In the *Island of Palmas Case, The Hague, April, 1928 (RIAA, Vol. 2. pp. 829*, 838/839), Max Huber stated as follows:

> “Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.”
>
> “This demonstration [of territorial sovereignty] consists in the actual display of State activities, such as belongs only to the territorial sovereign.”

3.3.5.2 The wording of the passage “sans préjudice des droits de souveraineté exclusifs sur le territoire qui traverserait la route ou le canal en question“, when interpreted in accordance with its ordinary meaning and viewed in the context of the Separation Treaty and in the light of the object and purpose of this Treaty as described in paragraph 3.3.3, leaves no doubt whatever, in the opinion of the Netherlands, that although Belgium acquired the right at the time to build a road or canal through the canton of Sittard, the Netherlands retained its exclusive sovereignty over the territory concerned and the realisation of the project.[79]

3.3.5.3 This interpretation can be supported in various ways.

A. First of all, the Dutch view is confirmed in the *travaux préparatoires*[80], namely in the following words of Lord Palmerston, who was the spokesman of the Londen Conference:

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[79] The rather stilted phrase “sur le territoire que traverserait la route ou le canal en question” was used because it was not yet known when the Separation Treaty was concluded whether Limburg would form part of the Kingdom of the Netherlands or would belong to the German Federation as the Duchy of Limburg. It was ultimately decided that Limburg should belong to both countries.

[80] Article 32(2) of the Convention on the Law of Treaties: “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”

> "Ces districts donnaient à la Belgique des points de contact avec la Prusse, entre Maestricht et Mook, et par conséquent les moyens d'établir avec l'Allemagne les communications les plus courtes qu'elle puisse avoir une route commerciale à ses propres frais dans le canton de Sittard, qui n'avait jamais encore appartenu à la Hollande, *faculté subordonnée néanmoins à diverses conditions, et à la réserve pleine et entière de la souveraineté de Sa Majesté le Roi des Pays-Bas.*" [81]

In addition, Article 10 of the Agreement to regulate the connection to the Dutch-German border of a railway from Antwerp to Gladbach concluded between the Netherlands and Germany (13 November 1874) reads as follows:

> "Pour le reste:
> a. les obligations, que les lois de l'Empire Allemand ou du Royaume de Prusse imposent et que les lois qui pourront être établies plus tard, soit pour l'Empire Allemand, soit pour la Prusse, imposeront aux sociétés de chemins de fer, seront maintenues et mises en vigueur pour la partie de ce chemin de fer qui est située sur le territoire Allemand;
> *b. les obligations, que les lois du Royaume des Pays-Bas imposent et que les lois, qui pourront être établies plus tard pour les Pays-Bas, imposeront aux sociétés de chemins de fer, seront maintenues et mises en vigueur pour la partie de ce chemin de fer qui est située sur le territoire Néerlandais*." (emphasis added)[82]

It is evident from this passage that, unless provided otherwise in the relevant Agreement, the national legislation remains in force. Moreover, it would hardly have been logical for the Netherlands to stipulate the application of Dutch law in a treaty with Germany if this had not been possible with regard to the route of the Iron Rhine on Dutch territory under the Separation Treaty and the Iron Rhine Treaty with Belgium. Needless to say, the Netherlands could not have stipulated in a treaty with Germany that (current and future) Dutch laws would apply, if it had agreed in treaties with Belgium on the same subject-matter that the power to impose laws in keeping with Dutch sovereignty would be limited in this respect.

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[81] Mémoire destiné à servir de réponse à celui de messieurs les plénipotentiaires des Pays-Bas en date du 14 décembre 1831. Memorandum answering the plenipotentiaries of the Netherlands dated 14 December 1831. Recueil des pièces diplomatiques relatives aux affaires de la Hollande et de la Belgique en 1831 et 1832. Tome II. A la Haye, chez A.D. Schinkel, imprimeur, et se débite à la Haye et Amsterdam, Chez les Frères Van Cleef – 1832 ; p. 189. Exhibit N No. 30. (Unofficial translation: "These districts gave Belgium points of contact with Prussia, between Maastricht and Mook, and in consequence the means of establishing the shortest possible lines of communication with Germany that would enable it to have a commercial route at its own expense in the canton of Sittard, which had never yet belonged to Holland, *an option that is subject nonetheless to various conditions and to the full and complete reservation of the sovereignty of His Majesty the King of the Netherlands.*" (emphasis added))

[82] Unofficial translation: "In other respects:
a. the obligations imposed by the laws of the German Empire or of the Kingdom of Prussia on the railway companies and those that will be imposed on them by laws made later either for the German Empire or for Prussia shall be observed and applied for that part of the railway which is situated on German territory;
b. *the obligations imposed by the laws of the Kingdom of the Netherlands on the railway companies and*

B. In the parliamentary proceedings in connection with the Iron Rhine Treaty, the House of Representatives of the Dutch Parliament expressed the fear that Article 5 of the Treaty, which reads as follows:

> "Le cahier des charges du 4 Novembre, 1864, imposé à la Compagnie du Nord de la Belgique pour la section Néerlandaise de la ligne de Turnhout à Tilbourg, sera, dans ses conditions générales, appliqué à la partie Néerlandaise du chemin de fer d'Anvers à Gladbach; toutefois, le maximum des inclinaisons pourra être porté à 10 par 10,000."[83]

insufficiently guaranteed that the Belgian *Compagnie du Nord* would observe Dutch law. The House of Representatives addressed the Government as follows:

> "Pour la bonne exécution de la loi précitée de 1859, il est nécessaire que, lorsqu'une société étrangère obtient la concession d'une ligne de chemins de fer sur notre territoire, on lui impose l'obligation de faire représenter convenablement dans le pays l'administration de ce chemin de fer.
> *C'est alors seulement que les ordres que les autorités auraient à donner à cette société peuvent régulièrement leur être communiqués, et que les amendes qui seraient encourues peuvent être encaissées sans difficulté.*" (emphasis added)

The Government of the Netherlands replied as follows:

> "Le deuxième point … a rapport l'art. 5 du traité. *Les soussignés désirent faire remarquer à ce sujet, que les dispositions légales existantes ou à établir sur l'emploi des chemins seront applicables à la partie de la ligne Anvers-Gladbach à établir sur le territoire néerlandais. Ce n'est que par une loi spéciale qu'elle pourrait en être dispensée.* Au surplus, il y sera pourvu par les conditions générales indiquées par l'art. 5, et l'on y comprendra aussi la condition que le concessionnaire élise domicile à la Haye et qu'il se fasse représenter auprès du Gouvernement néerlandais par un ou plusieurs Néerlandais domiciliés dans les Pays-Bas, comme ses fondés de pouvoirs." (emphasis added) [84]

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those that will be imposed on them by laws made later shall be observed and applied for that part of the railway which is situated on Dutch territory."(emphasis added). Exhibit N No.7.

83 Iron Rhine Treaty, Exhibit N No. 6. (Unofficial translation: "The *cahier des charges* of 4 November 1864, imposed on the Compagnie du Nord de la Belgique for the Dutch section of the line from Turnhout to Tilburg, shall be applied in its standard conditions to the Dutch part of the railway from Antwerp to Gladbach; nonetheless, the maximum of the gradients could be raised to 10 per 10,000.)

84 Rapport de la section centrale de la deuxième chambre des états généraux des Pays-Bas – traduction (Report of the central section of the Second Chambre of the Dutch Parliament, No. 172, Annex No. 4); pp. 38, 41, 42; Exhibit N No. 31.
(Unofficial translation: "To ensure the correct implementation of the aforesaid law of 1859, it is necessary for a foreign company that obtains the concession for a railway line on our territory to be subjected to an obligation to arrange that the administration is suitably represented in the country of that railway line. *It is only in this way that any orders issued by the authorities can be duly communicated to this company and that any fines which may be outstanding can be collected without difficulty.*" "The second point … relates to Article 5 of the Treaty. *The undersigned wish to observe on this subject that the existing or future legal*

The italicised passage is self-explanatory. The *Compagnie du Nord de la Belgique* moreover chose The Hague as its address for service.

C. Nor was there any doubt in the debate on the Iron Rhine Treaty in the Belgian *Chambre des Représentants* that the Dutch legislation was applicable to the construction and operation of the Iron Rhine. One of the members of parliament accused the Belgian Government of having provided insufficient instruments to compel the Netherlands to levy reasonable tariffs and not to create obstacles to the construction and operation of the Iron Rhine. In his reply, the Minister of Finance Monsieur Malou, who defended the Iron Rhine Treaty in the *Chambre des Représentants*, stated:

> "Mais, messieurs, encore une fois et pour arriver à ceci, pour ne point soumettre ce chemin à toute la législation de principe établie en Hollande, il fallait réclamer beaucoup plus que vous ne le dites; il fallait pas dire: Nous avons le droit de passer, d'établir un chemin de fer à travers le duché de Limbourg; il fallait dire: nous devons être souverain sur le territoire où il s'agit d'établir un chemin de fer. Il fallait conquérir le Limbourg; il fallait, comme quelqu'un me l'a dit un jour, le trouer à coups de canon pour y passer."
>
> …
> "Quant à ces points, nous avons en réalité, en vertu de notre souveraineté, comme le Royaume des Pays-Bas en vertu de la sienne, nous avons dans la législation les mêmes droits et les mêmes dispositions qui sont établies dans les Pays-Bas[85] et je pense que si quelqu'un avait la prétention de faire sur le territoire belge un chemin de fer international qui fût en dehors de la législation, de la surveillance de l'autorité et des droits nécessaires qu'elle s'est toujours réservés, s'il pouvait se trouver un ministre qui signât une pareille convention, il ne se trouverait pas un seul membre des Chambres pour la ratifier.
> Dans une négociation, lorsque l'on veut aboutir, on ne doit pas proposer ce que, dans une position analogue, on n'accepterait pas.'"[86]

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provisions on the use of routes will be applicable to the section of the Antwerp-Gladbach line to be built on Dutch territory. Only by a special law could an exemption be granted. Moreover, it will be provided for by the general conditions referred to in Article 5, which are also deemed to include the condition that the party holding the concession should choose to have its address for service in The Hague and arrange to be represented before the Government of the Netherlands by one or more Dutch nationals domiciled in the Netherlands, as its authorised representatives." (emphasis added.). Exhibit B No. 18.

85 The report of the debate in the *Chambre des Représentants* shows that the Dutch and Belgian Railway Acts contained identical provisions, because the Belgian legislation served as a model for the Dutch.

86 Chambre des Représentants, - Séance du 30 mai 1873, p. 1236. Exhibit N No. 32.
(Unofficial translation: "But, gentlemen, once again, to achieve this and to avoid subjecting this railway line to all the primary legislation introduced in the Netherlands, it would have been necessary to claim much more than you are saying: it would have been necessary to say *not* "We have the right to pass, to build a railway line across the Duchy of Limburg" *but* "We must become sovereign in the territory where the line must be built". It would have been necessary to conquer Limburg; and, as someone once said to me, to use the artillery to force a passage." ... "As regards these points, by virtue of our sovereignty, like the Kingdom of the Netherlands by virtue of its sovereignty, we have in reality in our legislation the same rights and the

3.3.5.4 Belgium recognises that the current criteria apply to the technical requirements (the so-called functionality requirements) that are necessary for the use, the restoration, the adaptation and the modernisation of the Iron Rhine.[87] However, it also believes that the present requirements resulting from the legislation to protect the residential and lived environment should not affect Belgium as regards the granting of its request for reactivation. Belgium therefore recognises that the present Dutch legislation is applicable, but limits this recognition to what is termed "the functionality", without providing what the Netherlands considers to be sound reasons.

In the opinion of the Netherlands, the present Belgian request for realisation of the right of transit entails that the conditions on which this right is granted and the obligations inextricably linked with this right should also be complied with fully in accordance with the present legislation. Belgium cannot argue that only some of its obligations resulting from Article XII are subject to the current criteria and claim, when this suits it, that the remainder are governed by criteria that were applicable to it in the past.

3.3.5.5 On the basis of the above, the Netherlands concludes that the passage "sans préjudice des droits de souveraineté exclusifs sur le territoire que traverserait la route ou le canal en question" confirms that, in principle, the Netherlands has full sovereignty as regards the Belgian right to the use, the restoration, the adaptation and the modernisation of the Iron Rhine. The Netherlands is therefore entitled to apply the legislation currently in force in the Netherlands to the reactivation of the Iron Rhine, including the legislation for the protection of the residential and lived environment. Naturally, exclusive territorial sovereignty also means that the Dutch courts may assess the relevant legislation and the decisions based on it in accordance with the procedural and substantive law of the Netherlands.

3.3.5.6 Some specific aspects of the Belgian Memorial require further discussion.

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same provisions as those that have been created in the Netherlands, and I think that if someone wished to build an international railway line on Belgian territory which would fall outside the legislation, outside the control of the authority and the necessary rights which it has always reserved, and always assuming that a government minister could be found to sign such a convention, it would be impossible to find a single member of parliament to ratify it. If one wishes to succeed in negotiations, one should not propose that which one would not accept oneself in an analogous position.".

87 Paragraph 81 Memorial.

A. In the opinion of the Netherlands, it is not necessary – in view of the legislative power based on the Netherlands' exclusive territorial sovereignty – for the measures required by Dutch legislation for the protection of nature and the environment to be based on or justified by the Birds and Habitats Directives, in any event in so far as such measures are not contrary to EU law.

In the Memorial, statements by the Dutch Minister of Transport, Public Works and Water Management are often quoted selectively, giving an inaccurate impression of the Netherlands' opinions about the protection of Birds Directive and Habitats Directive areas. The Netherlands is *not* saying: "The European Commission is telling us we must construct a tunnel in the Meinweg, because that is an automatic consequence of the Habitats Directives". The Netherlands has *itself* decided on the basis of the Flora and Fauna Act (Flora en Faunawet) and the ecological values which it protects, that the construction of a tunnel is necessary in order to protect the ecological values in the Meinweg because it considers it to be the only way to adequately protect those values.

The letter from the Head of the Nature and Biodiversity Unit of the Environment Directorate-General of the European Commission, Nicholas Hanley, of 19 September 2001 contains the following passage:

> "*Member States have the right to impose more stringent environmental framework conditions and conservation measures than what is requested by the 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." (emphasis added)

Belgium concludes from this passage that:

> ".. the Commission esteemed that the Netherlands unduly relied on European Community law so as to present the re-activation of the Iron Rhine."

It goes without saying that any such conclusion is not warranted by this passage. It can hardly be supposed that Mr. Hanley is insinuating that the Netherlands is guilty of such conduct.

Examples can be given of other projects in the Netherlands where application of the Transport Infrastructure (Planning Procedures) Act has resulted in a decision to build a tunnel to protect ecological features.[88] The following list is not exhaustive:

in the Betuwe Route lies a railway tunnel of approximately 2 km in length under the Pannerdensch Canal in order to spare the Rijnstrangengebied and De Gelderse Poort. This tunnel, the structural work of which has been completed, is intended to protect the river water meadows, old branches of the Rhine, wetlands and natterjack toads; De Gelderse Poort is protected under the Birds Directive;

in the High Speed Line lies a railway tunnel of approximately 8.5 km in length, the structural work of which has been completed, under the *Groene Hart van Holland*, a region of pastureland which has *not* been designated or registered as an area for protection under the Birds or Habitats Directives;

in the Hanze Line lies a railway tunnel of approximately 0.8 km in length which is to be built under the Drontermeer, for which the preparations are now under way; the main aim of the tunnel is to protect birds on the Drontermeer, a lake between the Veluwe national park and the Flevopolder. The Drontermeer is protected under the Birds Directive.[89]

various "ecoducts" (vegetated overpasses allowing wildlife to cross) are located above the existing highways A1 and A50 where they cross the Veluwe, which has been selected/designated as a protected area under the Birds and Habitats Directives.

It should be noted that provision is made in Belgium too for the construction of tunnels to protect ecological features. An example is the above-ground railway tunnel in the High Speed Line between Antwerp and Rotterdam beside the Peerdsbos. The tunnel has a length of approximately 3.2 km. The structural work has been completed. Its purpose is to protect ecological features in an area that has not been designated or registered as a special protection area under the Birds or Habitats Directive.[90]

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88 Not all of the areas concerned are protected by the Birds and/or Habitats Directives

89 Information about these tunnels can be found at: http://www.betuweroute.nl; http://www.hslzuid.nl; http://www.minlnv.nl); and http://www.b-rail.be/press/N/nieuws/hsl_nl.

90 See the information brochure entitled "Aanleg hsl Antwerp-Dutch border". Exhibit N No. 33. The brochure contains the following passage (unofficial translation): "The high speed line between Antwerp and the Dutch border will be situated to the west of the E19 motorway. The high speed line runs next to the E19 along the entire length of the Peerdsbos wood. By the end of 2005 rail traffic on this section will travel through a tubular structure. Between Kleine Bareel and Elshoutbaan in Schoten the High Speed Line will be encapsulated in a tube that is open on the side of the E19. The preparatory work started in the autumn of 2000. To avoid the possibility of trees falling across the high speed line, it will be roofed over by means of a tubular structure. *In this way the width of the strip of land taken for the railway line at the edge of the wood can be minimised and, once the tube is finished, the area can be replanted. In addition, the tube will*

B. Belgium claims in paragraph 72 of its Memorial that the Netherlands has not opted for compensatory measures, as referred to in Article 6, paragraph 4 of the Habitats Directive. However, the Habitats Directive does not provide for compensatory measures until a number of steps have been taken. On the basis of Article 6, paragraph 3, if appropriate assessment of a plan or project shows that it would have a significant negative impact, the impact may be *mitigated*. The mitigating measures planned for the reactivation of the Iron Rhine (e.g. the underground or above-ground tunnel in the Meinweg) would prevent the significant effects in question from taking place.
When a significant effect cannot be or is not mitigated, Article 6, paragraph 4 applies. This means that, first of all, alternative solutions must be considered. It may be assumed that routes other than the historic route would, at the very least, become a focus of attention in court proceedings. If for any reason whatsoever no route other than the historic route were selected, imperative reasons of overriding public interest would have to be demonstrated. In the case of the Iron Rhine it is unclear whether a Dutch national court, the European Commission or the Court of Justice of the European Communities, should the occasion arise, would accept that such interests exist. Moreover, Article 6(4) stipulates that compensatory measures must be taken and case law of the Court of Justice of the European Communities prescribes that these measures must be taken *before* the execution of a plan or project.[91] The costs of the necessary compensatory measures – if it were possible to take such measures –[92] would accrue to Belgium.

C. Belgium also contends that the Netherlands could have excluded the Iron Rhine from the designation or registration of the Meinweg as an area protected by the Birds and Habitats Directives and refers in that connection to the *Poitevin Marsh* case.[93] The Netherlands, however, wishes to recall that the judgment in the *Poitevin Marsh* case also forms the basis of the established case law of the Court of Justice of the European Communities, namely that the Member States are bound under Article 6(2) of the Habitats Directive to make a

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serve as a noise barrier, reducing the noise of the motorway by ten decibels where it passes the Peerdsbos. This will greatly reduce noise nuisance in the wood and thus enhance its recreational value." (emphasis added).

91 See *Managing NATURA 2000 Sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC*. European Communities, 2000; Exhibit N No. 13.

92 The Route Assessment/EIS shows that compensatory measures for the increase in rail traffic in the Meinweg would inevitably have a negative impact on the wooded area adjacent to the Meinweg. Under the Forestry Act (*Boswet*), however, it would then be necessary to compensate for that negative impact as well.

93 Judgment of the Court, (Fifth Chamber), 25 November 1999. Commission of the European Communities v French Republic; Case-96/98. *European Court reports 1999 Page I-08531*. Exhibit N No. 34.

permanent assessment of the existing condition of a special protection area as a consequence not only of activities *within* the special protection area *but also of external influences*.[94] These may not result in a deterioration of the natural habitat or a disturbance of the species for which the area has been designated, in so far as such disturbance could be significant. As far as this aspect is concerned, France was held liable in *Poitevin Marsh* for its failure to fulfil its obligations under Article 4(4) of the Birds Directive.[95] The marshes designated as special protection area had fallen dry as a result of a systematic drainage and intensive embankment works, partly due to the agricultural policy pursued in areas outside the land designated as special protection area. As a result, the bird population in these areas had greatly diminished.[96]

The Belgian submission that the Netherlands *could* have excluded a strip of land when designating and registering the Meinweg as an area covered by the Birds and Habitats Directives on the basis of the *Poitevin Marsh* case is therefore entirely without merit. Even then, the Netherlands would have been obliged to mitigate the significant adverse consequences of the reactivation of the Iron Rhine.[97]

3.3.6 Article XII of the Separation Treaty states that a request for extension of a railway line should take place "d'après le même plan".

3.3.6.1 In the opinion of the Netherlands, it was the intention of the Parties to the Separation Treaty in using these words to ensure that cross-border use would be possible in the case of extension of a Belgian road, canal or railway. In the 19th century it was customary in treaties in which States agreed to construct a cross-border canal or railway to include a provision that would permit *physical* cross-border use. On this point, the Belgian legal academic Van Hooydonk says:

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94 This provision reads: "Member States shall take appropriate steps to avoid, in special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbances 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."

95 It is generally assumed that this judgment is also applicable to Article 6(3) and (4) of the Habitats Directive.

96 Paragraph 39 *et seq.*

97 See also Case C-44/95 *Regina v Secretary of State for the Environment, ex parte: Royal Society for the Protection of Birds* (Lappel Bank). *European Court reports 1996 Page I-03805*. Paragraph 7: "Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats." Exhibit N No. 35.

> "… on the hypothesis that Belgium could have used Art. 12 of the Separation Treaty to build a ship canal, the Netherlands could not have undermined the right of transit by allowing only the construction of a much narrower or shallower canal on its territory;"[98]

As an example of such a provision, reference may be made to the text of Article 3 of the Agreement between the Netherlands and Belgium of 9 November 1867 to regulate the connection of railways on the territory of the two States[99] (including the Turnhout-Tilburg line):

> "Chacun des deux Gouvernements arrêtera et approuvera les projets relatifs à la construction sur son territoire des chemins de fer dont il s'agit.
> Ils auront soin néanmoins que cette construction ait lieu de manière à ce que les locomotives, les voitures et les wagons des deux pays puissent circuler sans aucune difficulté sur tout le parcours de ces chemins de fer.
> La largeur de la voie entre les bords intérieurs des rails sera d'un mètre quatre cent trente cinq millimètres (1.435 m.).
> Les tampons des locomotives et des wagons seront établis de telle manière, qu'il y ait concordance avec les dimensions adoptées sur les chemins de fer en exploitation dans les deux pays."[100]

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98 E. van Hooydonk, Het Internationale Statuut van de IJzeren Rijn (The International Statute of the Iron Rhine); Tijdschrift Vervoer & Recht, November 1998, p. 111 *et seq*, p. 125 Exhibit N No. 12. (Authentic text: "… in de hypothese dat België van art. 12 Scheidingsverdrag gebruik had gemaakt om een scheepvaartkanaal aan te leggen, had Nederland het doortochtrecht niet kunnen uithollen door op eigen grondgebied slechts de bouw van een veel smaller of ondieper kanaal toe te laten;" .

99 Overeenkomst tussen Nederland en België van 9 november 1867 tot regeling der aansluiting van spoorwegen op het grondgebied der beide Rijken. Exhibit N No. 5.

100 Unofficial translation: "Each Government shall adopt and approve the designs for the building of the railways in question on its territory. They shall, however, ensure that the railways are built in such a way that the locomotives, carriages and wagons of the two countries can travel the entire length of the railways without difficulty. The gauge of the track between the top edges of the rails shall be fourteen hundred and thirty-five millimetres (1,435 m).The dimensions of the buffers of the locomotives and wagons used on the railways run in the two countries shall coincide."
Other examples are:
- Overeenkomst tusschen Nederland en Pruissen, van den 18den Julij 1851, tot aaneensluiting van de in beide Staten bestaande IJzerbanen (Agreement between the Netherlands and Prussia of 18 July 1851 for the connection of the railways in the two States). Exhibit N No. 36. Article 2: "… Comme l'intention est de faire passer les moyens de transport d'un chemin de fer à l'autre, les hautes parties contractantes veilleront à ce que la construction de la route et des moyens de transport soit exécutée autant que possible d'après les mêmes principes… " (Unofficial translation: "Since it is intended to use the rolling stock of the one railway on the track of the other, the High Contracting Parties shall ensure that the track and the rolling stock are built as far as possible in accordance with the same principles.")
- Overeenkomst tusschen Nederland en Pruissen op den 28sten November 1867 te Berlijn gesloten wegens de aansluiting van den spoorweg van Venlo naar Osnabrück (Agreement concluded between the Netherlands and Prussia in Berlin on 28 November 1867 for the connection of the railway line from Venlo to Osnabrück). Exhibit N No. 37. Article 1, paragraph 2: "Ce chemin de fer sera raccordé à Venlo aux chemins de fer de l'État Neerlandais et sur le territoire Prussien aux chemins de fer existants, dont il traversera une station, ainsi qu'à la ligne projetée d'Osnabrück à Hambourg, de manière que les locomotives, les voitures et les wagons des deux pays puissent circuler sans entraves sur les différentes lignes." (Unofficial translation: "The railway will connect in Venlo with the Dutch State Railways and on Prussian territory with the existing railway lines, where it will intersect a station, and will connect with the

The Netherlands is therefore of the opinion that the expression “d’après le même plan” means that there should be agreement between the Netherlands and Belgium about aspects that allow *physical* cross-border rail traffic.

3.3.6.2 When the Separation Treaty was drawn up, it was not possible to include special provisions of the kind contained in Article 3 of the Treaty between the Netherlands and Germany to which reference is made above. At that time, it was not even known, whether a road or a canal would be built.

These special provisions were included in the Iron Rhine Treaty. Article 5 of this Treaty confirms the Dutch position described in the previous paragraph[101]. This provision refers to the Turnhout-Tilburg railway, the specifications of which were regulated in the Agreement between the Netherlands and Belgium of 9 November 1867 to regulate the connection of railways on the territory of the two States, as referred to in paragraph 3.3.6.1. It is evident from Article 3 of this Agreement, as cited above, that the Netherlands and Belgium would each adopt the designs for the building of the railways referred to in the Agreement, but should also ensure that, through the arrangement of a number of special aspects, the trains in the two countries can travel “sans aucune difficulté sur tout le parcours de ces chemins de fer” (the entire length of the railways without difficulty).

3.3.6.3 In the opinion of the Netherlands, an Iron Rhine adapted and modified in keeping with the Belgian requirements should make rail traffic from Belgium to Germany via the Netherlands *physically* possible. Each State should itself take whatever measures it considers necessary for the purposes of safety and for the protection of people and the environment.

3.3.6.4 Belgium, however, submits in paragraph 79 that Dutch jurisdiction is limited as regards the adoption of plans, specifications and procedures:

> “… Article 12 of the 1839 Separation Treaty grants Belgium the right, if it so requests, to have a ‘route or canal’ on Belgian territory extended on Dutch territory “*according to the same plan*”. *Dutch jurisdiction as concerns the establishment of plans, specifications and procedures is limited accordingly.*”

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railway line designed to link Osnabrück and Hamburg in such a way that the locomotives, carriages and wagons of the two countries can be used without impediment on the different lines.”).

[101] Iron Rhine Treaty; Exhibit N No. 6; see paragraph 3.3.5.3 sub B.

By plans, specifications and procedures Belgium is clearly referring to the passage in Question No. 2 submitted for arbitration, namely "plans, specifications and procedures related to Belgian law and the decision-making power based thereon". Belgium is therefore implying that the application of plans, specifications and procedures *related to Dutch law* should be limited. However, such an interpretation is not consistent with the context of Article XII, in particular with the passage "sans préjudice des droits de souveraineté exclusifs". For further explanation, reference should again be made to Article 5 of the Iron Rhine Treaty.[102] The *cahier des charges* drawn up for the building of the Turnhout-Tilburg railway line and imposed on the Compagnie du Nord de la Belgique for the building of the Iron Rhine in Article 5 of the Iron Rhine Treaty cannot have been based on the idea that the Dutch "plans, specifications and procedures" would be limited because a Belgian "plan" would be applicable (let alone Belgian "plans, specifications and (legal) procedures"). After all, the building of the Turnhout-Tilburg railway line was *not* based on a right of transit, as contained in the Separation Treaty for the Iron Rhine.

3.3.6.5 Finally, it should be noted that Belgium takes the word "plan" to mean "plans, specifications and procedures", without providing any explanation. Article 31(4) of the Vienna Convention states that a term shall be given a special meaning only if it is established that the parties *so intended.* Of importance in this connection are the judgments of the International Court of Justice and its predecessor to the effect that the burden of proof rests on a party to a dispute who alleges that a term has a special meaning. In the case of *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, *p. 12*, para. 116 the International Court of Justice held, for example, that:

> "This wider meaning, it [Morocco] indicates, was the one with which the term was used in Moroccan documents and treaties. Spain, on the other hand, maintains that no evidence has been adduced to demonstrate the use of the term Wad Noun with that special meaning, that there is no trace of it in the cartography of the period and that the testimony of travellers and explorers is conclusive as to the geographical separation of the Wad Noun country from the Sakiet El Hamra. *It is for Morocco to demonstrate convincingly the use of the term with that special meaning* (cf. *Legal Status of Eastern Greenland, P.C.I.J., Series A/B, No. 53,* p. 49) and this demonstration, in the view of the Court, is lacking. (emphasis added)

3.3.6.6 The Netherlands is of the opinion that the ordinary meaning of the words "d'après le même plan", when read in the light of the text of Article XII, and in particular the words "sans

préjudice des droits de souveraineté exclusifs sur le territoire que traverserait la route ou le canal en question", must be that the purpose of the extension of a railway should be to make cross-border traffic *physically* possible. This also corresponds with the subsequent practice about which agreement existed between the parties in accordance with Article 5 of the Iron Rhine Treaty.

3.3.7 In paragraph 80 of its Memorial, Belgium submits, in reference to the words "travaux convenus" in Article XII, that the Netherlands and Belgium should reach agreement on the adaptation and modernisation of the Iron Rhine. Although the Netherlands by no means takes the position that such agreement is unnecessary, this does not mean that the rights which the Netherlands derives from Article XII of the Separation Treaty can be set aside. The Dutch position in this matter is therefore that the agreement with Belgium about the works that must be carried out for the reactivation of the Iron Rhine must be in keeping with what is stated in the present analysis of Article XII, in particular as regards Dutch territorial sovereignty, the interpretation of the words "d'après le même plan" and the passages about the costs.

3.3.8 Article XII of the Separation Treaty contains two passages about the costs, namely: "entièrement aux frais et dépens de la Belgique", and "qui exécuteraient aux frais de la Belgique".

3.3.8.1 According to the normal meaning of these words and given the context of Article XII and in particular the words "et sans préjudice des droits de souveraineté exclusifs sur le territoire que traverserait la route ou le canal en question", these passages leave no doubt, in the opinion of the Netherlands, that the costs referred to in Article XII should be borne in full by Belgium.

3.3.8.2 Paragraph 2.3 of this Counter-Memorial explains that the Iron Rhine has been maintained in the same way as all railways in the Netherlands, namely on the basis of the use made of the railway.[103] However, this does not mean that there is an obligation to grant

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[102] Iron Rhine Treaty; Exhibit N No. 6; see paragraph 3.3.5.3. sub B.

[103] With the exception of the section of track between Weert and Roermond, where the Iron Rhine follows the same route as the main line connecting Eindhoven, Weert, Roermond and Maastricht, the last investment in the Iron Rhine (partly in the interests of the Netherlands) was made around 1907 when the Iron Rhine was made double track (also in Belgium and Germany). This double track was taken up again in 1937/1938,

every request to build, adapt or modernise a railway.[104] The normal position is that where a request is made for adaptation and modernisation of a railway on Dutch territory which is comparable to the adaptation and modernisation desired by Belgium in respect of the Iron Rhine, the Netherlands can refuse this.

The Netherlands should, however, meet the present Belgian request for reactivation in view of its obligation under international law pursuant to Article XII of the Separation Treaty, despite the fact that the Netherlands itself has no need for and no interest whatever in this reactivation. Article XII also provides that Belgium must bear the full costs incurred in connection with its request for adaptation and modernisation of the existing infrastructure, which is at present not suitable for the international use desired by Belgium, i.e. 43 trains per 24-hour period travelling at an average speed of 100 kph.[105]

3.3.8.3 Belgium believes that the Railways Agreement of 1897 can be interpreted as meaning that the costs of adapting and modernising the Iron Rhine should be borne by the Netherlands. However, the object and purpose of the Railways Agreement was merely to transfer title to the land and other immovable property of four cross-border railway lines, including the Iron Rhine, to the Netherlands.

3.3.8.4 Belgium also invokes the Agreement between the State of the Netherlands and the State Railway Operating Company (*Maatschappij tot Exploitatie van de Staatsspoorwegen*), in particular the provisions in which the State undertakes to pay for the repair and renovation of State railways. It goes without saying that this purely domestic agreement does not create any obligations owed by the Netherlands to Belgium.

3.3.8.5 The reactivation of the Iron Rhine as now requested by Belgium constitutes, in the opinion of the Netherlands, implementation of the right of transit in Article XII of the Separation Treaty on the conditions of Article XII. The passages “entièrement aux frais et

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without, incidentally, any objection from Belgium. It should be noted for the record that the provisional repair of the Iron Rhine in 1945 was paid for by the Allies.

104 See also paragraph 3.1, where the Netherlands shows that general international law does not include such a right.

105 As regards the “territoriality principle”, which Belgium has mentioned as the basis for payment by the Netherlands of the costs of the reactivation, it should be noted that during the negotiations Belgium has never explained, despite requests to this effect, on what concrete provision of international or European law

dépens de la Belgique" and "qui exécuteraient aux frais de la Belgique" mean that the costs of reactivation of the Iron Rhine must be borne by Belgium.

On this point Van Hooydonk, the legal academic from Antwerp, says:

> "It can therefore be inferred from the applicable treaties that the Netherlands can in no way oppose modernisation of the existing Iron Rhine on its territory if Belgium decides to modernise the connection with Germany. It should, however, be observed in this connection that, by the same token, *the costs of modernisation must be borne by Belgium; this is also provided in the Separation Treaty.*" (emphasis added) [106]

3.3.9 The following passage in Article XII of the Separation Treaty regarding the choice of Dutch or Belgian engineers and workers to do the work is relevant to Question No. 2[107]: "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".

It appears to the Netherlands that the ordinary meaning to be given to the passage in question is that it is up to the Netherlands to choose whether the works for the reactivation of the Iron Rhine should be carried out by Dutch or Belgian personnel.[108]

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this "principle" is based. See for example the quotation from the Note of 20 August 2001 by the Belgian, Dutch and German administrations in paragraph 47 of the Memorial (p. 64).

106 E. van Hooydonk, Het Internationale Statuut van de IJzeren Rijn (The International Statute of the Iron Rhine); Tijdschrift Vervoer & Recht, November 1998, p. 111 *et seq*, p. 126. Exhibit N No.12. Authentic text: "Uit de geldende verdragen is dus het besluit te trekken, dat Nederland zich geenszins kan verzetten tegen een modernisering van de bestaande IJzeren Rijn op Nederlands grondgebied, indien België tot modernisering van de verbinding tot Duitsland besluit. Hierbij moet wel worden opgemerkt dat, in dezelfde zienswijze, de kosten van de modernisering voor rekening van België zijn; dit is ook in het Scheidingsverdrag bepaald.".

107 "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 historic route of the Iron Rhine on Dutch territory, …".

108 It is striking that in 1831 Belgium in vain proposed to the London Conference that the relevant passage should be replaced : "… l'idée d'abandonner le choix des ingénieurs et des ouvriers à la Hollande, est tout-à-fait inexécutable dans un pays où ces sortes d'entreprises se font par des sociétés particulières qui, obtenant du gouvernement une concession à cet effet, procèdent dans leurs travaux avec cette prudence et cette économie, qui dépendent en grande partie des hommes qu'on emploie.) (unofficial translation : "… the idea of leaving the choice of the engineers and workers to Holland is altogether impractical in a country where enterprises of this kind are carried out by private companies which, after obtaining a government concession to this effect, proceed with their work with a degree of prudence and economy largely dependent on the men whom they employ."); Letter of the plenipotentiary of the King of the Belgians to the plenipotentiaries of Austria, France, Great Britain, Prusia and Russia, 12 November 1831. Recueil des pièces diplomatiques relatives aux affaires de la Hollande et de la Belgique en 1831 et 1832. Tome II. À la Haye, chex A.D. Schinkel, imprimeur, et se débite à la Haye et Amsterdam, Chez Les Frères Van Cleef – 1832 ; p. 129, p. 132 ; (Collection of Diplomatic Documents concerning the Affairs of the Netherlands and

3.3.10 As the Tribunal is aware, it was agreed in the Iron Rhine Treaty that the road or canal referred to in Article XII would not be built through the canton of Sittard, and that a railway line would instead be built along the route described in Article 4 of the Iron Rhine Treaty. The relevant part of Article 4 of the Iron Rhine Treaty reads:

> "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 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. "

3.3.10.1 The Netherlands realises that its proposal for a diversion around Roermond represents a deviation from the route described in Article 4. Paragraph 2.13.2 describes the mutual benefits of the proposed diversion. Moreover, the Netherlands has offered to pay the extra costs of the diversion over and above those of refurbishing the historic route through the city of Roermond. As circumstances have changed drastically in the last 130 years, it seems to the Netherlands that Belgium can hardly object on substantive grounds to the Dutch proposal during future negotiations.[109]

In Belgium too account is taken of the interests of residential areas. This is evident from a press release issued by Dirk van Mechelen, Flemish Minister, of 23 June 2000, regarding the second rail access to the port of Antwerp, which contains the following passages:

Belgium in 1831 and 1832, Volume II, printed by A.D. Schinkel (The Hague) and sold by Van Cleef Brothers (The Hague and Amsterdam), 1832) Exhibit-N No. 38.

[109] Iron Rhine Treaty, Exhibit N No. 6. Inoffical translation: "The line will enter the territory of the duchy of Limburg to the south of Hamont (Belgium). Heading towards Weert, it will pass south of both Weert and Haelen, and cross the Maas by a fixed bridge in the section above the Buggenum bend between border posts nos. 83 and 84. It will join the Maastricht-Venlo line north of Roermond station, follow the said line for a short distance and leave it south of Roermond station, reaching the Prussian border in a direction to be determined with the government of the German Empire.")
When signing the Iron Rhine Treaty, both Governments issued a Declaration to the effect that Belgium could not also ask the Netherlands to agree to the construction of a road or canal through the canton of Sittard. This Declaration reads: "… 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." See paragraph 13 of the Memorial.

> "The existing railway line 27A will be moved to the west at the point where it passes the 'Het Laar' residential area in order to protect the habitability of this area as far as possible."
>
> "In any event, the most easterly route will be chosen in order to spare both the wood and the adjacent residential centres as much as possible.**"**[110]

3.3.11 Belgium refers in paragraph 56 of the Memorial to the principle of good faith. In the *Border and Transborder Armed Actions* case*, ICJ Reports 1988*, pp. 105-106, para. 94, the International Court of Justice held as follows:

> "The principle of good faith is, as the Court has observed, 'one of the basic principles governing the creation and performance of legal obligations' (*Nuclear Tests, ICJ Reports 1974,* p. 268, para. 46; p. 473, para. 49); *it is not in itself a source of obligation where none would otherwise exist*." (emphasis added)

3.3.11.1 The Netherlands infers from this that the principle of good faith does not constitute an independent source of international law and that it is applied only in the interpretation and execution of obligations under international law relevant in a given case, in other words Article XII of the Separation Treaty in this case.

3.3.11.2 In the opinion of the Netherlands, the interpretation of Article XII of the Separation Treaty based on Article 31 of the Vienna Convention, which has been explained at length in the preceding analysis, is an interpretation in good faith of Article XII of the Separation Treaty.

3.3.11.3 This interpretation forms the basis of the execution of Article XII proposed by the Netherlands and formed the framework of the negotiations on the Belgian request for reactivation.

The Netherlands considers that it has taken part in the negotiations with Belgium on the reactivation of the Iron Rhine in good faith and has consistently sought ways of assisting

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[110] Persmededeling van Dirk van Mechelen, Vlaams minister van Economie, Ruimtelijke Ordening en Media, Brussels, 23 June 2000. Exhibit N No. 39. Authentic text: "Ter hoogte van de woonwijk "Het Laar" wordt de bestaande spoorlijn 27 A verplaatst naar het westen zodat de leefkwaliteit van de woonwijk kan gevrijwaard worden." … "Alleszins wordt gekozen voor het meest oostelijk tracé om zowel het bos als de naastgelegen woonkernen maximaal te sparen."

Belgium as much as possible in realising its right of transit. Its officials have taken part intensively in the various committees and working groups that have prepared the decisions on the Iron Rhine to be taken by the Dutch, Belgian and German transport ministers. In this process of preparation and decision-making, the Netherlands has also endeavoured, wherever possible taking account of the relevant Dutch legislation and the possibility of applications for judicial review of the decisions, to find a way of enabling Belgium's request to be granted as quickly as possible in accordance with its wishes.

As an illustration of the constructive approach taken by the Netherlands, reference may be made to the discussions on temporary arrangements. When it transpired that the statutory noise limits would be exceeded on a given part of the route if six of the fifteen permitted trains were to travel during the day, three in the evening and six at night, the Netherlands proposed that an 8/4/3 formula should be adopted for the 15 trains, thereby ensuring that the use remained within the statutory limits. Belgium accepted this proposal.

A much more important example of the lengths to which the Netherlands has gone to assist Belgium is its work on the Route Assessment/Environmental Impact Statement (EIS), which was completed in one year rather than the two or three years that would normally be required. Moreover, the Netherlands has hitherto incurred costs of approximately €19 million for research, public information, public consultation and procedural activities.

As a sign of good neighbourliness and despite its view that all costs of reactivating the Iron Rhine should be borne by Belgium, the Netherlands offered during the negotiations to pay 25% of the costs of the reactivation.

3.3.11.4 The Netherlands has incurred costs of €19 million and was prepared to make a financial contribution even though it is reactivating the Iron Rhine solely for the benefit of Belgium and, moreover, all the costs to be incurred on Dutch territory are a result of this reactivation.

Nonetheless, during the negotiations Belgium was prepared to pay only €100 million for the reactivation of the Iron Rhine to meet Belgian requirements and modern times and even stated in the Memorial that all costs, or in any event all costs "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 historic route", should be borne by the Netherlands. As is apparent from the quotation in the previous sentence, Belgium's refusal to bear the costs of the reactivation of the Iron Rhine results in part from its view that it should not have to bear the costs connected with Dutch environmental legislation. From the start of the discussions on the reactivation of the Iron Rhine the Netherlands has made clear that it recognises the right of transit on the basis of Article XII of the Separation Treaty subject to the conditions specified in this provision. It was also pointed out to Belgium from the outset that Dutch environmental law would be applicable.[111]

However, Belgium has consistently refused to discuss the passages about costs and the words "et sans préjudice des droits de souveraineté exclusifs sur le territoire que traverserait la route ou le canal en question". Even the Memorial contains no reference to these words, which are of such importance to the Netherlands.

In the opinion of the Netherlands, the Belgian refusal to discuss the conditions on which the right of transit under Article XII is recognised by the Netherlands is not in keeping with the requirements which may be made in this connection on the basis of the principle of good faith and good neighbourliness. This refusal was in sharp contrast to the willingness of the Netherlands (albeit without prejudice to the interpretation which the Netherlands gives to the conditions on which the right of transit is given to Belgium) to accede to Belgium's wishes and to accept part of the (financial) obligations which should, in the opinion of the Netherlands, be borne by Belgium.

3.3.11.5 In paragraph 56 of the Memorial, Belgium also invokes the "principle of reasonableness". According to the Netherlands, this is not a general, independent source of international law. Nor does Belgium explain why it alleges that the judgments and awards, as well as the rulings of the WTO Appellate Body on Article XX of the General Agreement on Tariffs and Trade, which it quotes in paragraph 56, are applicable to the present case. The contents of paragraph 56 of the Memorial suggest that Belgium would like the matter to be decided *ex aequo et bono* on the basis of this "principle". However, such a possibility is excluded under the Rules of Procedure.

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111 See the letter of the Dutch Prime Minister Wim Kok to the Belgian Prime Minister Jean-Luc Dehaene of 10 July 1998. Exhibit N No. 19.

In any event, the Netherlands considers that it has acted reasonably in the discussions on the reactivation of the Iron Rhine, certainly in comparison with the Belgian refusal to discuss the consequences of Dutch sovereignty and the lack of understanding shown by Belgium for the problems encountered by the Netherlands in the reactivation of the Iron Rhine with local authorities, environmental groups and local communities.

3.3.12 In the opinion of the Netherlands, the Belgian request for reactivation of the Iron Rhine, i.e. the request for the use, the restoration, the adaptation and the modernisation of the Iron Rhine in such a way that it can carry 43 trains per 24-hour period (combined total for both directions) on the conditions specified by Belgium, is a request to grant the right of transit under Article XII of the Separation Treaty.[112]

If Article XII is interpreted in good faith, the right of transit laid down in it is inextricably linked with the conditions on which it is granted under Article XII. In the opinion of the Netherlands, it follows from this interpretation that these conditions largely comprise the following essential elements.

On the ground of its territorial sovereignty, the Netherlands retains the right to exercise in full its legislative, executive and judicial authority in respect of the reactivation of the Iron Rhine, unless expressly provided otherwise in the Separation Treaty of 1839 or in other applicable international agreements, which is, however, not the case in this matter.

The costs of reactivation should be borne by Belgium.

Agreement should be reached between the Netherlands and Belgium about the works necessary for the reactivation desired by Belgium, subject to the conditions imposed in Article XII of the Separation Treaty on the realisation of the right of transit.

It is up to the Netherlands to decide whether the works necessary for the reactivation are to be carried out by Dutch or Belgian engineers and workers.

[112] In so far as amended in the Iron Rhine Treaty.

Chapter 4: Answers to the Questions

The questions submitted to the arbitral tribunal are presented below, followed by summaries of the most essential conclusions stemming from the preceding chapters.

QUESTION 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?

- The Netherlands submits that it has retained the right to exercise in full its legislative, executive and judicial authority in respect of the reactivation of the Iron Rhine, so that the Dutch legislation in force and the decision-making power based thereon in respect of the use, the restoration, the adaptation and the modernisation of railway lines on Dutch territory is applicable *mutatis mutandis* to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory.

- Other than Article XII of the Separation Treaty, there is no agreement obliging the Netherlands to permit Belgium the right to the use, the restoration, the adaptation and the modernisation of the Iron Rhine on Dutch territory.

- Article XII of the Separation Treaty forms a special agreement. It contains a restriction on the territorial sovereignty of the Netherlands involving the right of Belgium to the use, the restoration, the adaptation and the modernisation of the Iron Rhine. However, as a restriction of the territorial sovereignty of the Netherlands, Article XII of the Separation Treaty should be construed restrictively.

QUESTION 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?

- In view of the answer given to Question 1 the Netherlands submits that Belgium does not have the right to perform or commission work with a view to the use, the restoration, the adaptation and the 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;

- As to the right of Belgium to perform or commission work with a view to the use, the restoration, the adaptation and the modernisation of the Iron Rhine on Dutch territory, the Netherlands refers to the text of Article XII of the Separation Treaty, which specifically states "Cette route …seraient construits, aux 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 …";

- No distinction may 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;

- The Netherlands may unilaterally impose the building of underground and above-ground tunnels, diversions and the like, as well as the proposed associated construction and safety standards, as long as these are not contrary to applicable rules of international law.

QUESTION 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 Netherlands submits that in view of the passages of Article XII of the Separation Treaty reading “entièrement aux frais et dépens de la Belgique”, and “qui exécuteraient aux frais de la Belgique”, 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 subject to the requirements of Dutch legislation and decision-making power based thereon in respect of the functionality of the rail infrastructure and the protection of the residential and lived environment should be borne by Belgium.

LIST OF EXHIBITS

TO THE

COUNTER-MEMORIAL

1. Arbitral Agreement between the Kingdom of the Netherlands and the Kingdom of Belgium. Note LT/sr A.71.92/3110 of 22 July 2003 from the Embassy of the Kingdom of Belgium at The Hague; Note DJZ/VE-646/03 of 23 July 2003 from Ministry of Foreign Affairs of the Kingdom of the Netherlands. Including unofficial translation.

2. *Note from the Conference to the Plenipotentiaries of His Majesty the King of the Netherlands.* (Collection of Diplomatic documents concerning the Affairs of the Netherlands and Belgium in 1831 and 1832.)

3. Treaties between the Kingdom of the Netherlands and the Powers and between the Netherlands and Belgium relative to the Separation of their Respective Territories. (Tractaat tusschen Nederland en de Mogendheden en tusschen Nederland en België van 19 April 1839); Bulletin of Acts and Decrees (*Staatsblad*) 1839, 26.

4. Boundary Treaty between the Kingdom of the Netherlands and the Kingdom of Belgium, signed at The Hague, 5 November 1842. (Tractaat tusschen Nederland en België van 5 November 1842 ter uitvoering van het op den 19den April 1839 te Londen aangegaan traktaat); Bulletin of Acts and Decrees (*Staatsblad*) 1843, 3.

5. Agreement regulating the connection of railway lines within the territory of both Kingdoms, The Hague, November 9, 1867. (Overeenkomst tot regeling der aansluiting van spoorwegen op (het) grondgebied van beide Rijken). Bulletin of Acts and Decrees (*Staatsblad*) 1868, 9.

6. Treaty relative to the Payment of the Belgian Debt, the Abolition of the Surtax on Dutch Spirits, and the Passing of a Railway Line from Antwerp to Germany across Limburg; 13 January 1873. (Tractaat tusschen Nederland en België gesloten: 1e. tot kapitalisatie der bij lid 1 van art. 63 van het tractaat van 5 November 1842 bedoelde rente van f 400 000; 2e. tot wijziging van art. 3 der overeenkomst van 12 Mei 1863, betreffende het Nederlandsch gedistilleerd; en 3e. tot regeling van den aanleg van een spoorweg door Limburg). Bulletin of Acts and Decrees (*Staatsblad*) 1873, 65

7. Agreement between the Netherlands and Germany to regulate the connection on the Dutch-German border of a railway line from Antwerp to Gladbach, Berlin, November 13, 1874. (Overeenkomst tussen Nederland en Duitschland tot regeling der aansluiting aan de Nederlandsch-Duitsche grens van eenen spoorweg van Antwerpen naar Gladbach). Bulletin of Acts and Decrees (*Staatsblad*) 1875, 18.

8. Railways Agreement between the Netherlands and Belgium, signed at Brussels, 23 April 1897. (Overeenkomst betreffende overneming van de Nederlandsche gedeelten van eenige in Nederland gelegen spoorwegen, benevens het daarbij behorend slotprotocol met bijlage). Bulletin of Acts and Decrees (*Staatsblad*) 1898, 114

9. "Train Services on the Iron Rhine from 1920 onwards", an overview of transport movements, compiled by ProRail.

10. Letter of 13 August 1992 of the *Deutsche Bundesbahn* to the Nederlandse Spoorwegen.

11. Treaty concerning the construction of a railway connection for high-speed trains between Rotterdam and Antwerp, with Annex; Brussels, 21 December 1996. (Verdrag tussen het

Koninkrijk der Nederlanden en het Koninkrijk België betreffende de aanleg van een spoorverbinding voor hoge-snelheidstreinen tussen Rotterdam en Antwerpen, met Bijlage). Treaties Series (*Tractatenblad*) 1997, 22.

12. E. van Hooydonk: Het internationaal statuut van de IJzeren Rijn (The International Statute of the Iron Rhine); *Tijdschrift Vervoer en Recht*; November 1998

13. Managing Natura 2000 Sites. The provisions of Article 6 of the "Habitats Directive" 92/43/EEC. European Communities, 2000.

14. Letter from the Directorate-General Environment, European Commission dated 19 September 2001, signed by Mr. Nicholas Hanley, Head of Unit, to officials of the Netherlands, Belgium and Germany.

15. Letter from the Minister of Transport, Public Works and Water management dated 11 April 2000 to the Chairman of the House of Representatives.

16. Decision 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 network. *Official Journal l 228, 09/09/1996 P. 0001 0- 0104.*

17. Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora. *Official Journal L 206, 22/07/1992 P. 0007-0050.*

18. Draft-Minutes of meeting on 29 June 1998 of the Tripartite official Iron Rhine steering group.

19. Letter of 10 July 1998 from the Dutch Prime Minister Wim Kok to the Belgian Prime Minister Jean-Luc Dehaene.

20. Minutes of meeting in Antwerp on 25 October of the Iron Rhine technical working group.

21. Minutes of meeting in Brussels on 1 December 1999 of the Tripartite official steering group.

22. Memorandum of Understanding of March 2000 between minister Durant and minister Netelenbos on the Iron Rhine.

23. Letter of 27 June 2002 from minister Tineke Netelenbos to minister Isabelle Durant.

24. *Samenvatting Trajectnota/MER IJzeren Rijn* (separate).

25. *Zusammenfassung Trassennotiz/UVP Eiserner Rhein* (separate).

26. Summary Route Assesment/Environmental Impact Statement.

27. Letter of the Belgian Prime Minister Verhofstadt and the Flemish Prime Minister Dewael to Prime Minister Kok. (March 2001).

28. Articles from Dutch and German news papers.

29. Gerfried Mutz, Railway Transport, International Regulation, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Volume IV, (2000), p. 14.et seq.

30. *Mémoire destiné à servir de réponse à celui de messieurs les plénipotentiaires des Pays-Bas en date du 14 décembre 1831.* Collection of Diplomatic documents concerning the Affairs of the Netherlands and Belgium in 1831 and 1832.

31. Report of the central section of the Second Chamber of the Dutch Parliament – translation; No. 172, Annex No.4.

32. Report of the debate in the Chambre des Représentants of the Kingdom of Belgium; Séance 30 mei 1873, p. 1236.

33. Information brochure entitled “Aanleg hsl Antwerp- Dutch Border.

34. Judgment of the Court (Fifth Chamber) of 25 November 1999. Case C-96/98. *European Court reports 1999 Page I- 08531.*

35. Judgment of the Court of 11 July 1996. Case C-44/95. *European Court reports 1996 Page I-03805.*

36. Agreement between the Netherlands and Prussia of 18 July 1851 for the connection of the railways in the two States. (Overeenkomst tusschen Nederland en Pruissen tot aaneensluiting van de in beide Staten bestaande IJzerbanen) Bulletin of Acts and Decrees (*Staatsblad*), 1852, 54

37. Agreement concluded between the Netherlands and Prussia in Berlin on 28 November 1867 for the connection of the railway line from Venlo to Osnabrück. (Overeenkomst tussen Nederland en Pruissen wegens de aansluiting van den spoorweg van Venlo naar Osnabruck.) Bulletin of Acts and Decrees (*Staatsblad*), 1868, 17.

38. *Letter of the plenipotentiary of the King of the Belgians to the plenipotentiaries of Austria, France, Great Britain, Prussia and Russia, 12 November 1831.* Collection of Diplomatic documents concerning the Affairs of the Netherlands and Belgium in 1831 and 1832.

39. Persmededeling van Dirk van Mechelen, Vlaams minister van Economie, Ruimtelijke Ordening en Media.