

**PERMANENT COURT OF ARBITRATION**

**IRON RHINE CASE  
(BELGIUM v. THE NETHERLANDS)**

**REPLY OF THE KINGDOM OF BELGIUM**

**INTRODUCTION**

1. Belgium's Reply to the Counter-Memorial of the Netherlands will deal with issues of fact as well as of law. However, factual elements will not be presented under a separate section, but will be addressed where appropriate in the context of Belgium's answers to the three Questions submitted to the Arbitral Tribunal.

Before answering the Netherlands' Counter-Memorial, Belgium will address the issue of jurisdiction, already mentioned in its Memorial.

2. In the present Reply, the Exhibits accompanying Belgium's Memorial will be referred to, as before in the Memorial, as "Exhibit". Additional exhibits joined with the present reply, will be referred to as "Add. Exhibit". Exhibits of the Netherlands will be referred to as "Exhibit of the Netherlands".

## JURISDICTION

3. As already indicated in Belgium's Memorial<sup>1</sup>, account must be taken in answering the questions submitted to the Tribunal, of Article 292 of the EC Treaty, pursuant to which "*Member States undertake not to submit a dispute concerning the interpretation or application of this treaty to any method of settlement other than those provided therein*".

4. In this respect, it may be noted that, in the *MOX Plant case* between Ireland and the United Kingdom, the European Commission has filed proceedings against Ireland for the alleged violation of European Community law.

In the *Mox Plant case*, the arbitral tribunal established under Annex VII to the Law of the Sea Convention decided to suspend further proceedings in the light of concerns about its jurisdiction to hear and decide the case. Amongst other things, the United Kingdom had objected to the Tribunal's jurisdiction based on the position of the Parties under the law of the European Communities. Noting that the European Commission had indicated that it "*is examining the question whether to institute proceedings under Article 226 of the EC Treaty*", the Tribunal concluded that "*there remain substantial doubts whether the jurisdiction of the Tribunal can be firmly established in respect of all or any claims in the dispute*".<sup>2</sup>

The Commission eventually instituted proceedings against Ireland and stated that Ireland, by instituting dispute settlement proceedings against the United Kingdom, violates the exclusive jurisdiction of the Court of Justice with respect to the interpretation and application of the UN Convention on the Law of Sea (UNCLOS) and with respect to the interpretation and application of other provisions of Community law<sup>3</sup>.

As far as the Law of the Sea Convention is concerned (a mixed agreement concluded on behalf of the Community and by almost all Member States of the EU<sup>4</sup>) the Commission esteems that the provisions of the Convention invoked by Ireland fall under the competence of

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<sup>1</sup> Memorial of Belgium, para. 50.

<sup>2</sup> Order N° 3, Suspension of proceedings on jurisdiction and merits and request for further provisional measures, *The MOX Plant case, Ireland/ United Kingdom*, para. 25. Exhibit No J10.

<sup>3</sup> Application of the Commission of the European Communities against Ireland, 24 October 2003, JURM (2003) 10039, p. 21. Add. Exhibit No 1.

<sup>4</sup> *Loc. cit.*, para 59.

the Community. For this reason, the Commission esteems, their interpretation and application as between Member States falls under the exclusive jurisdiction of the Court of Justice under Article 292 EC<sup>5</sup>.

Concerning the provisions of Community law, the Commission points out that the statement of claims of Ireland provides that “*the arbitral tribunal will also be asked to take into account, as appropriate, the provisions of ( ...) European Community laws*” and that “*Ireland considers that the provisions of UNCLOS fall to be construed by reference to other international rules which are binding upon Ireland and the United Kingdom, including (...) Directive 85/337/EEC and Directives 80/836/EURATOM and 96/29/EURATOM*”<sup>6</sup>. The Commission adds that, throughout the subsequent pleadings of Ireland, numerous references to various instruments of Community law can be found<sup>7</sup>.

On this basis, the Commission considers that “*such a submission of instruments of Community law to the interpretation and application of a non-Community tribunal is a violation of Article 292 EC*”<sup>8</sup>. Whilst Ireland objects that it has not called upon the Arbitral Tribunal to apply the provisions of Community law, but rather refers to article 293 of UNCLOS requiring the Tribunal to consider the provisions of some non UNCLOS instruments as an aid to the interpretation of the UNCLOS obligations, the Commission objects that, pursuant to Article 293 of UNCLOS, “*a court or tribunal having jurisdiction under this Section shall apply this Convention and other rules of international law not incompatible with this Convention*”, so that, the Commission argues, it cannot accept Ireland’s explanation because Article 293 is a provision which specifies the law to be applied by the Tribunal<sup>9</sup>.

The Commission also notes that the United Kingdom in its submissions objected to Ireland’s invoking Community law before the Arbitral Tribunal, and that it stems from the transcripts of the hearings that Members of the Tribunal understood Ireland’s position as asking the Tribunal to decide that the United Kingdom had violated European Community law<sup>10</sup>.

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<sup>5</sup> *Ibidem.*

<sup>6</sup> *Loc. cit.*, para. 96.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Loc. cit.*, para. 97.

<sup>9</sup> *Loc. cit.*, para. 98-100.

<sup>10</sup> *Loc. cit.*, para. 101.

To end with, the Commission refers to the duty of cooperation derived from Article 10 EC with respect to mixed agreements<sup>11</sup>

5. As far as the present case is concerned, this position of the Commission leads to the following remarks.

First, both Belgium in its Memorial and the Netherlands in its Counter-Memorial, have referred to European Community law.

This, however, is not a sufficient reason to conclude that Article 292 is violated. Where in the *Mox Plant* case, the Commission notes that: “*throughout the subsequent pleadings of Ireland, numerous references to various instruments of Community law can be found*”, this cannot be meant to say that mentioning European Community law would per se be contrary to Article 292. Suffice it to say that indicate European Community law before the Arbitral Tribunal is indispensable for providing the Tribunal with the necessary elements to respect the exclusive competences of the Community Institutions.

Further, it may be noted that, unlike the United Kingdom in the *Mox Plant* case, the Netherlands has not objected to Belgium’s referring to Community law in its Memorial. Also, neither party to the present case submits nor argues that the other party violates Community law.

6. Yet, rather than building on those differences, Belgium will hereinafter take a cautious stance on the issue of jurisdiction in the drafting of its submissions. For the main part, the issue is indeed resolved by the fact that, as already indicated in Belgium’s Memorial, issues where Community law comes into play in the present cases really boil down to the apportionment of costs, which is not a matter of Community law.

If ever the Arbitral Tribunal were to hold, nevertheless, that one or more of Belgium’s submissions are outside the Tribunal’s jurisdiction, then, Belgium respectfully requests the Tribunal to take account of the need for this case to be decided upon without delay – witness notably the issue of temporary driving already mentioned in Belgium’s Memorial, and

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<sup>11</sup> *Loc. cit.*, para. 104 ff.

therefore, not to postpone its judgment as to issues which are within the Tribunal's jurisdiction.

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## QUESTION N° 1

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

7. In its Memorial, Belgium has shown that Question No. 1 includes the issue of whether Dutch legislation and decision-making does, or does not apply, to the Iron Rhine, but also the question of possible modalities of application, *i.e.*, how the Netherlands should use their regulatory powers with respect to the Iron Rhine. In its Counter-Memorial the Netherlands does not take a stance on this point, which therefore does not need to be further developed by Belgium in its Reply.

8. In its Memorial, Belgium argued that the rules and principles of international law that limit Dutch jurisdiction include the principle *pacta sunt servanda*, the principles of reasonableness and good faith, and the obligation for States to harmonize the performance of their international obligations.

Applying these rules and principles to the case at hand, Belgium first highlighted limitations to Dutch jurisdiction flowing from the fact that Article XII of the Separation Treaty accords Belgium a right to construct or to have constructed “*a new road .. or canal*” on Dutch territory “*according to the same plan*” as on Belgian territory, “*at the expense of Belgium*” and “*without any expense for the Netherlands*”, as well as a right to use that route provided that it “*only serve[s] as commercial communication*” and that the height and mode of collection of toll rights shall be agreed upon between the Netherlands and Belgium (Memorial of Belgium, p. 73-74, para. 55).

Turning to good faith and reasonableness in the application of the Iron Rhine’s conventional regime and, more specifically, in the exercise of Dutch jurisdiction in relation to the reactivation of the railway, Belgium distinguished between temporary use of the Iron Rhine as it was contemplated in the Memorandum of Agreement of 28 March 2000, and the long-term use of the historical route of the Iron Rhine (Memorial of Belgium, p. 74 ff.).

With respect to temporary use, Belgium argued that it flows from the Environmental Impact Assessment of May 2001 that the use of the historical route, during a five-years period, by fifteen trains per natural day (both directions summed up) including at limited speed in evening hours and at night, would not cause irreversible damage and therefore, does not violate any international obligation incumbent on the Netherlands with respect to environmental protection. The Netherlands' preventing the use of the historical route under the same conditions would therefore violate the principles of *pacta sunt servanda*, reasonableness and good faith.

With respect to long-term use, Belgium concentrated on the most expensive measures requested by the Netherlands, more specifically the Meinweg tunnel and protection devices (referred to in the Memorial as an embankment) in the Weerter- and Budelerbergen. Belgium argued that such measures were decided by the Netherlands by its own free will, on a discretionary basis, rather than pursuant to an international (EC) obligation in the sense that these measures would be the only possible means for the Netherlands to comply with its international obligations in the field. Belgium then argued that reactivating the Iron Rhine is a matter of respecting Belgium's conventional rights, but also of taking positive action towards sustainable development through the modal shift, and of implementing the TENS Trans-European Network. In these circumstances, and in view of the fact that Belgium reserved its rights with respect to reactivation, it would be contrary to international law to make the long-term use of the Iron Rhine conditional upon the construction of highly expensive environmental protection devices *and* on the financing of such craftworks by Belgium.

**9.** As the Netherlands addressed the factual and legal issues of the dispute as a whole without specifying the Question to which each of its arguments relates, Belgium considers it appropriate to identify the arguments in the Netherlands' Counter-Memorial which, in Belgium's view, relate to Question No. 1.

As to the applicable rules and principles of international law, the Netherlands essentially argue that:

- Belgium's right to the use, the restoration, the adaptation and the modernization of the Iron Rhine is not based on a general rule of international law and more specifically,

that 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 (Counter-Memorial, p. 35-36, para. 3.1).

- The right of transit must be construed restrictively (*loc. cit.*, p. 36-38, para. 3.2).
  
- The principle of good faith does not constitute an independent source of international law (*loc. cit.*, p. 60, para. 3.3.11) and neither does the principle of reasonableness constitute a general, independent source of international law. Yet, the Netherlands point out, the Tribunal is not requested to decide the dispute *ex aequo et bono* (*loc. cit.*, p. 62, para. 3.3.11.5).

With respect to more specific arguments brought in Belgium's Memorial, the Netherlands' position may be summarized as follows:

- Article XII of the Separation Treaty, in granting Belgium a right of passage "*sans préjudice des droits de souveraineté exclusifs sur le territoire que traverserait la route ou le canal en question*", refers to territorial sovereignty "*which confers the exclusive right to exercise legislative, judicial and executive power within an area*" which in the Netherlands' opinion implies that it retained exclusive sovereignty over the territory concerned "*and the realisation of the project*" (Counter-Memorial, p. 44, para. 3.3.5.1 and 3.3.5.2). According to the Netherlands, this interpretation is supported by the *travaux préparatoires* of the Separation Treaty confirming Dutch sovereignty, and by a treaty of 13 November 1874 between the Netherlands and Germany, regulating the connection to the Dutch-German border of a railway from Antwerp to Gladbach, which provides that Dutch legislative obligations incumbent on railway companies shall apply to the part of this railway line which is located on Dutch territory, from which the Netherlands concludes that "*unless otherwise provided in the relevant Agreement, the national legislation remains in force*" (Counter-Memorial, p. 45, para. 3.3.5.3). The Netherlands further refers to a statement made in the Dutch House of Representatives confirming the applicability of Dutch legislation to the part of the Iron Rhine located in Dutch territory, adding that "*ce n'est que par une loi spéciale qu'elle pourrait en être dispensée*" (Counter-Memorial, p. 46). It also mentions that when in 1873 a member of Belgian Parliament argued that the Government had 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”, the Belgian Government stated that *‘pour ne point soumettre ce chemin à toute la législation de principe établie en Hollande, il fallait ... être souverain sur le territoire’* (Counter-Memorial at p. 47). The Netherlands further argues that, so it says, Belgium recognizes that the current criteria apply to the technical requirements (the so-called functionality requirements) and therefore recognizes 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 (Counter-Memorial, p. 48, para. 3.3.5.4).

- In reply to Belgium’s position that the Netherlands, in creating wildlife protection areas in the parts of its territory passed through by the Iron Rhine, neglected the reservations Belgium made with respect to the future use of the Iron Rhine, the Netherlands argues that these Belgian steps *“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 .. was made to the Netherlands”* (Counter-Memorial, p. 42, para. 3.3.4.1). Elsewhere in its Counter-Memorial, the Netherlands states that *« Belgium’s conduct between November 1986 and June 1998 was .. unclear and ambivalent”*, that *« 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 »* and that Belgium would appear to believe that *‘the Netherlands .. should have been more attentive to the way in which Belgium handled its right of transit than Belgium did itself’* (Counter-Memorial, p. 13-14, para. 2.7.2).
- The Netherlands further argues that *‘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*". The Netherlands specifies that it *"has itself decided on the basis of the Flora and Fauna Act .. and the ecological values which it protects, that the construction of a tunnel is necessary"* to protect the ecological values in the Meinweg *"because it considers it to be the only way to adequately protect those values"* (Counter-Memorial, p. 49). In this context, the Netherlands also refers to other instances where tunnels have been built to protect ecological features from the impacts of transport infrastructure (p. 50). The Netherlands further contests that it could have taken compensatory measures or could have excluded the Iron Rhine from the area protected by the Birds and Habitats Directives (p. 51).

- According to the Netherlands, Belgium's argument that reactivating the Iron Rhine should contribute to an environment-friendly modal shift from road to rail and inter-modal transports, is contradicted by a Dutch study of the year 2000 indicating that diesel trains are (or will be in the years to come) less environment-friendly than modern diesel trucks (Counter-Memorial, p. 16-17, para. 2.9.2).
- The Netherlands argues that its interpretation of Article XII of the Separation Treaty is an interpretation in good faith, and that this interpretation forms the basis of its proposals relating to the reactivation of the Iron Rhine. It has actively participated in preparatory works and their financing, including on temporary arrangements, and offered during negotiations to pay 25 percent of reactivation costs (Counter-Memorial, p. 60-62). Finally, the Netherlands esteems that it has acted in accordance with reasonableness, *"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 .. with local authorities, environmental groups and local communities"* (Counter-Memorial, p. 60-63).

**10.** Belgium's Reply first analyses the Netherlands' position as concerns the applicable rules and principles of international law (A). Then, Belgium will revert to the application of these rules and principles to the case at hand, in that they limit Dutch legislative and decision-making power. In this respect, a number of general issues will first be addressed (B), and then, the application of the same principles to the reactivation of the Iron Rhine as it is currently envisaged, will be analysed (C).

## A. Relevant Rules and Principles of International Law

11. Belgium has shown in its Memorial that the relevant rules and principles of international law which limit Dutch jurisdiction include the principle *pacta sunt servanda*, the principles of reasonableness and good faith, and the obligation for States to harmonize the performance of their international obligations<sup>1</sup>.

As already indicated, the Netherlands makes a number of points relating to the rules and principles of international law, which are relevant to the present case. According to the Netherlands:

- The principle of good faith does not constitute an independent source of international law and neither does the principle of reasonableness constitute a general, independent source of international law<sup>2</sup>.
- Restrictions on its territorial sovereignty deriving from the conventional regime of the Iron Rhine must be construed restrictively and more specifically the right of transit is to be construed restrictively<sup>3</sup>.
- The right to the use, restoration, adaptation and modernization of the Iron Rhine is not based on a rule of general international law. More specifically, there is no agreement other than Article XII of the Separation Treaty obliging the Netherlands to permit Belgium to use, restore, etc. the Iron Rhine<sup>4</sup>.

In replying to the Netherlands' Counter-Memorial, Belgium will first show that Dutch jurisdiction with respect to the use, restoration, adaptation and modernization of the Iron Rhine on Dutch territory is limited by the international obligations of the Netherlands, notably the principle *pacta sunt servanda*, and the principles of reasonableness and good faith (1). As in its Counter-Memorial, the Netherlands does not take a stance on the obligation for States to harmonize the performance of their international obligations, this will not be further developed in the Belgium's Reply. Rather, Belgium will show that the Netherlands' position

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<sup>1</sup> Memorial of Belgium, p. 72-77, par. 55-58.

<sup>2</sup> Counter-Memorial of the Netherlands, p. 60, para. 3.3.11 and p. 62, para. 3.3.11.5.

<sup>3</sup> *Loc. cit.*, p. 36-37, par. 3.2.

<sup>4</sup> *Loc. cit.*, p. 35-36.

as regards restrictive interpretation has no legal basis and could not, at any rate, apply in the specific case under review (2). Finally, Belgium will show that rights relating to the use, restoration, adaptation and modernisation of the Iron Rhine on Dutch territory are not exclusively governed by the specific Iron Rhine conventional regime (3).

1. *Pacta sunt servanda* and the principles of good faith and reasonableness

**12.** A State enjoys sovereignty on its own territory within the limits of what is permitted under international law. International law notably requires that a State perform its conventional obligations. According to Article 26 of the 1969 Vienna Convention on the Law of Treaties, the *pacta sunt servanda* principle implies that: “*Every treaty in force is binding upon the parties to it and must be applied by them in good faith*”.

The rule *pacta sunt servanda* is a formal imperative. «*Sunt servanda* » commands to execute the pactum, irrespective of existing domestic legislation. Article 27 of the Vienna Convention specifies in this respect that: “*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. (...)*”.

**13.** The principle of good faith as well as the principle of reasonableness clarify the way treaties must be executed. Sir Gerald Fitzmaurice, in his Fourth Report to the International Law Commission formulated these two aspects of the principle *pacta sunt servanda* as follows :

“*2. A treaty must be executed in good faith and so as to produce reasonable and equitable effects with regard to a correct interpretation of its terms.*”<sup>5</sup>

International judicial decisions frequently apply the principles of good faith and reasonableness. Recently, the International Court of Justice ruled in the *Case concerning the Gabčíkovo-Nagymaros Project* that:

“*Article 26 combines two elements, which are of equal importance. It provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". This latter element, in the Court's view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which*

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<sup>5</sup> *ILC Yearb.*, 1959, vol.II, p. 42. Add. Exhibit 2.

*should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.”*<sup>6</sup>

**14.** Quoting from the International Court’s ruling in the case concerning *Border and Transborder Armed Actions* that “good faith is not in itself a source of obligation where none would otherwise exist”<sup>7</sup>, the Netherlands states, as already indicated, that good faith only applies in the interpretation and execution of obligations under international law in a given case and that, nor the good faith principle, neither the principle of reasonableness are independent sources of obligation<sup>8</sup>.

This argument on the part of the Netherlands may have been inspired by the fact that in identifying the relevant rules and principles of international law in its Memorial, Belgium distinguished between *pacta sunt servanda* and the performance of treaty obligations in good faith, on the one hand<sup>9</sup>, and the principles of reasonableness and good faith as they govern the exercise of jurisdiction under international law<sup>10</sup>, on the other hand. The Netherlands’ position may, in Belgium’s view, be understood as accepting the existence of the former, but not of the latter of these rules and principles relied upon by Belgium.

This position is unfounded for several reasons.

**15.** First, as already indicated, the principles of good faith and of reasonableness apply in the execution of a conventional regime. Article 26 of the Vienna Convention on the Law of Treaties makes it clear that performance in good faith does not merely relate to obligations, but to the treaty as such and as a whole: it is the “*treaty*” which must be applied in good faith. The application of this principle, not only for conventional obligations, but equally in the exercise of rights, was also established by the International Court of Justice<sup>11</sup>. Therefore, the statement of the Netherlands that the principle of good faith applies only in the execution of

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<sup>6</sup> I.C.J., *Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgement of 25 September 1997, *ICJ Reports*, 1997, § 142. Add. Exhibit No J 1.

<sup>7</sup> I.C.J., *Case concerning border and transborder actions, (Nicaragua/ Honduras)*, Judgement of 20 December 1988, *ICJ Reports*, 1988, § 94. Add. Exhibit No J 2.

<sup>8</sup> *Loc. cit.*, p. 60 and 62, par. 3.3.11.1. and 3.3.11.5.

<sup>9</sup> Memorial of Belgium, p. 72, para. 55.

<sup>10</sup> *Loc. cit.*, p. 74, para. 56.

<sup>11</sup> See i.e.: I.C.J., *Case concerning rights of nationals of the United States of America in Morocco (France v. United States of America)*, Judgment, *I.C.J. Reports* 1952, page 212. Exhibit No. J3.

obligations under international law, if it is meant to say that the principle does not apply in the exercise of rights, has no legal basis.

This is equally true when the exercise of national jurisdiction is at stake. Article 27 of the Vienna Convention on the Law of Treaties makes it clear that a State may not invoke its internal law to justify its failure to perform a treaty. In case of contrariety of a treaty to which a State has consented with its internal order, it is the State's responsibility to take the necessary legislative measures<sup>12</sup>. There is therefore not a single reason to operate a distinction between the obligation to execute a treaty in good faith and in a reasonable manner, and the obligation for a State to respect these very same precepts in the exercise of its internal normative powers. In the latter case, the exercise of national powers is equally conditioned by international law, and the exercise in good faith and reasonableness is nothing but the performance of said international obligation. As a consequence, the position of the Netherlands that *"in principle the Netherlands has full sovereignty as regards the Belgian rights to the use, the restoration, the adaptation and the modernisation of the Iron Rhine"* and that *"the Netherlands is therefore entitled to apply the legislation currently in force in the Netherlands to the reactivation of the Iron Rhine"*<sup>13</sup>, is unfounded as such. As the territorially sovereign State, The Netherlands is under the international obligation to exercise its jurisdiction in good faith and in a reasonable manner. In the words of the International Court:

*"A discretion certainly does not authorize (...) an arbitrary or capricious exercise of the power »*<sup>14</sup>.

What is more, the Netherlands' position that it has *"full sovereignty as regards the Belgian rights"* is a negation of Belgium's rights and of international law itself.

Further, if the just-mentioned International Court's statement applies to discretionary acts, it applies *a fortiori*, to other rules whose objectives are defined more restrictively.

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<sup>12</sup> P.C.I.J., *The Greco-Bulgarian « Communities »*, 31 July 1930, Series B, N° 17, p. 32; P.C.I.J., *Exchange of Greek and Turkish populations*, 21 February 1925, Series B, N° 10, p. 20; C.P.I.J., *Treatment of polish nationals and other persons of polish origin of speech in the Danzig territory*, 4 February 1932, , Series A/B, n° 44, p. 24. Add. Exhibit No J 4, J 5 and J 6.

<sup>13</sup> Counter-Memorial of the Netherlands, p. 48, para. 3.3.5.5.

<sup>14</sup> I.C.J., *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal (Yakimetz)*, *Advisory Opinion*, of 27 May 1987, *I.C.J. Reports*, 1987, p. 45. Add. Exhibit No. J 7.

16. It may be added that the International Court's ruling in the *Border and Transborder Armed Actions* case is exactly that good faith is not in itself a source of obligation "where none would otherwise exist". This does not amount to a dispensation from verifying whether an obligation does exist in a given field.

In this context, reference may be made to the numerous judicial rulings quoted in Belgium's Memorial, according to which States are under the international obligation to exercise their jurisdiction in accordance with the principle of reasonableness and good faith<sup>15</sup>. As far as the exercise of jurisdiction is concerned, an obligation therefore does exist.

It is also of relevance to note that the obligation for States to act in good faith and in a reasonable manner especially applies in fields where co-operation is needed. For instance, in the Case concerning the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the International Court, while affirming the possibility for the WHO to withdraw from Egypt where it had its seat, ruled that:

*"(...) les obligations réciproques imposent à la partie qui souhaite le transfert de donner à l'autre un préavis raisonnable pour mettre fin à la situation actuelle du bureau d'Alexandrie (...). En l'espèce l'OMS se trouve confrontée au souhait de 19 membres de l'organisation régionale de la Méditerranée orientale qui demandent le transfert du Bureau de cette organisation dans un autre pays. Si l'Assemblée mondiale de la santé approuve cette recommandation, l'Organisation devra suivre une ligne de conduite raisonnable (...)"*<sup>16</sup>

Likewise, in the *Case concerning the Military and Paramilitary Activities in and against Nicaragua* the Court held:

*"...the right of immediate termination of a declaration with indefinite duration is far from established. It appears from the requirement of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of the validity. Since Nicaragua has in fact not manifested any intention to withdraw its own declaration, the question of what reasonable period of notice would*

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<sup>15</sup> Memorial of Belgium, p. 74-76, para. 56-57.

<sup>16</sup> I.C.J., *Interpretation of Agreement of 25 March 1951 between the WHO and Egypt*, Advisory opinion, ICJ Reports, 1980, p. 96 and 111.

*be legally required does not need to be further examined: it need only to be observed that from 6 to 9 April would not amount to a 'reasonable time'.*"<sup>17</sup>

**17.** One should therefore not make too sharp a distinction between the conventional regime, on the one hand, and limits to the exercise of jurisdiction under general international law, on the other hand. The reasonableness of the exercise of jurisdiction in a given context may be co-determined by treaty rights and obligations. Conversely, it stems from the customary rule codified in Article 31, §3 c) of the Vienna Convention on the Law of Treaties that in interpreting a treaty, there shall be taken account of any relevant rules of international law applicable in the relations between the parties. Rules of international law relating to jurisdiction are undoubtedly among the ones that are relevant in interpreting the power of the Netherlands to regulate the use, maintenance, etc. of the Iron Rhine pursuant to Article XII of the Separation Treaty.

**18.** In conclusion, the Netherlands' contradicting Belgium's Memorial on the basis that the principles of good faith and reasonableness do not constitute independent sources of international law, is unfounded. The principles of good faith and reasonableness govern the application of treaties – and therefore, of treaty rights and obligations alike – as well as the exercise of jurisdiction under general international law. In the present case, the application of the treaties forming the Iron Rhine's conventional regime, on the one hand, and the exercise of Dutch jurisdiction with respect to the Iron Rhine, are inextricably interwoven.

## 2. Principles relating to the interpretation of treaties

**19.** Belgium will now address the principles governing the interpretation of the 1839 Separation Treaty. The Netherlands argues that treaty provisions limiting the territorial sovereignty of the Netherlands are to be construed restrictively. Again, this position of the Netherlands is unfounded.

It is of course undisputable that, as the Netherlands recall in paraphrasing the Permanent Court of International Justice in the case concerning the *Free Zones of Upper Savoy and the*

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<sup>17</sup> I.C.J., *Case concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgement of 26 November 1984, ICJ Reports 1984, p. 420, para. 63. Add. Exhibit No J 8.



*District of Gex*, territorial sovereignty must be fully respected in so far as it is not limited by international law<sup>18</sup>. That, however, leaves the question unanswered of how and to what extent international law does limit territorial sovereignty.

In that respect, Belgium submits that rulings from the Permanent Court of International Justice to the effect that specific statutes apply only “*within the limits so fixed and expressly specified*”, that “*in the absence of provisions to the contrary in the Convention .. the rights ensuing from .. sovereignty .. must apply*” or that “*in case of doubt a limitation of sovereignty must be construed restrictively*”<sup>19</sup>, are unhelpful to answer the questions presently submitted to the Arbitral Tribunal, misinterpreted by the Netherlands or inapplicable to the Iron Rhine’s conventional regime.

**20.** First, irrespective of its intrinsic value, the ‘presumption of sovereignty’ does not fit with the specific circumstances in which Article XII was drafted and the rights of transit etc. accorded to Belgium. In that respect, it is useful to quote the Netherlands’ justification for applying the Permanent Court’s rulings in the present case, which is as follows:

*“.. 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.”*<sup>20</sup>

It stems from the first sentences of this quote (and it will be shown in more detail later on), that the rights of Article XII were accorded to Belgium in compensation for the fact that districts of the Duchy of Limburg were allocated to the Netherlands, which deprived Belgium of a direct transit to Germany over its own territory. That is a situation, if ever there were one, where the ‘*presumption of sovereignty*’ would not operate. The presumption, if any, would

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<sup>18</sup> Counter-Memorial of the Netherlands, p. 36, para. 3.2.

<sup>19</sup> Counter-Memorial of the Netherlands, p. 37, para. 3.2.

<sup>20</sup> Counter-Memorial of the Netherlands, p. 36, para. 3.2.

indeed be based on the fact that the State in whose favour it operates accepted limitations to its sovereignty as it pre-existed these limitations. Yet, in the present case, Belgium made concessions as regards sovereignty even more so than the Netherlands did. The right of passage was accorded to Belgium, not in derogation to Dutch sovereignty, but as a partial compensation for the Netherlands' gaining sovereignty over the territories concerned, or in other words: in consideration for Belgium's renouncing its sovereignty claims. In these circumstances, the presumption, if any in international law, should not operate in favour of the Netherlands: by granting Belgium the right to have a new road prolonged in the Duchy of Limburg, the Netherlands did not limit their pre-existing sovereign rights. To the contrary, the Netherlands acquired sovereignty on districts over Limburg on which they had no rights before, in consideration of the right of passage.

The 1839 Separation Treaty is therefore a most striking illustration of the soundness of Sir Hersch Lauterpacht's objection to the principle of restrictive interpretation, that:

*"it does not take into account the benefits which the party bound by the commitment has reaped in consideration of its undertaking."*<sup>21</sup>

**21.** More fundamentally, there is no 'presumption of sovereignty' in international law. Legal writings on the *Lotus* case<sup>22</sup>, the benchmark case in the field which the Netherlands does not mention, have pointed to the fact that *Lotus* does not provide an adequate basis for the said presumption. In *Lotus*, the Permanent Court held:

*"International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these coexisting independent communities or with a view to the achievement of common aims. Restrictions upon the independence of states cannot therefore be presumed."*<sup>23</sup>

It is the last phrase of this quote, which has been interpreted as consecrating a 'presumption of sovereignty'. Yet, as J.L. Brierly pointed out when the judgment was rendered, if restrictions

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<sup>21</sup> H. Lauterpacht, "Restrictive interpretation and the principle of effectiveness in the interpretation of treaties", *B.Y.I.L.*, 1949, p. 48. Add. Exhibit No W1.

<sup>22</sup> J.L. Brierly, "The *Lotus* Case", *L.Q.R.*, vol. 44, 1928, p. 155-156. Add. Exhibit No W 2. Adde: O. Spiermann, « *Lotus* and the double structure of international legal argument », in *International law, the International Court of justice and Nuclear Weapons*, ed. by L. Boisson de Chazournes and Ph. Sands, Cambridge University Press, 1999, p. 137. Add. Exhibit No. W3.

<sup>23</sup> C.P.I.J., *The Lotus case*, Series A, No. 10 (1927), p. 18. Add. Exhibit No. J 9.

upon the independence of states cannot be presumed, “neither, it may be said, can the absence of restrictions; for we are not entitled to deduce the law applicable to a specific state of facts from the mere fact of sovereignty or independence”<sup>24</sup>. More recently, it has been indicated that while Turkey had said “*in dubio pro libertate*”, the Court presented the Turkish position “*purged of any hint of a presumption*” to mean only that what is not forbidden by international law, is authorized, that a presumption or burden of proof as to the content of international law fits badly with the fact that the Court had “*not confined itself to a consideration of the arguments put forward*” and, perhaps most importantly, that “*the Lotus statement did not give expression to a presumption of freedom. Literally, it rejected a presumption against freedom. The general principle which was clearly expressed in the judgment was a residual principle*”<sup>25</sup> holding that what is not forbidden is authorized.

More recently, in its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court abstained from deducing from the absence of a clear rule authorizing or prohibiting the threat or use of nuclear weapons, that such a use is authorized under international law, holding that “*in view of the present state of international law viewed as a whole, (...), and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a state in an extreme circumstance of self-defence, in which its very survival would be a stake.*”<sup>26</sup>.

Yet, if there is no presumption of sovereignty, neither is there any basis for a restrictive interpretation, “*in case of doubt*”, of limitations of sovereignty.

**22.** What is more, as outlined by Christian Tomuschat and Sir Hersch Lauterpacht, even when judicial decisions referred to the principle, it was almost if not entirely without practical impact<sup>27</sup>. The Permanent Court, after recognizing the principle refused to apply it in individual cases on the grounds that the treaty was clear or that restrictive interpretation must

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<sup>24</sup> J.L. Brierly, *op.cit.*, p. 155-156. Add. Exhibit No. W2.

<sup>25</sup> O. Spierman, *op.cit.*, p. 141-142. Add. Exhibit No. W3.

<sup>26</sup> I.C.J., *The legality of the Threat or Use of Nuclear Weapons, Advisory opinion of 8 July 1996, I.C.J. Reports, 1996, § 97.* Add. Exhibit No. J 10.

<sup>27</sup> H. Lauterpacht, “Restrictive interpretation and the principle of effectiveness in the interpretation of treaties”, *B.Y.I.L.*, 1949, p. 461 ff.; C. Tomuschat, “International Law: Ensuring the survival of mankind on the eve of a new century”, *R.C.A.D.I.*, 1999, v. 281, p. 171. Add. Exhibit N ° W 1 and No W 4.

be resorted to only if all other methods of interpretation have failed<sup>28</sup>. In the case of the *Territorial Jurisdiction of the International Commission of the River Oder*, the Permanent Court dealt with the argument of the restrictive interpretation as follows:

*“(..) This argument, though sound in itself, must be employed only with the greatest caution. To rely upon it it is not sufficient that the purely grammatical analysis of a text should not lead to definitive results; there are many other methods of interpretation, in particular reference is properly had to the principles underlying the matters to which the text refers; it will be only when, in spite of all pertinent considerations, the intention of the Parties still remains doubtful, that that interpretation should be adopted which is most favourable to the freedom of States”<sup>29</sup>.*

If at that time the restrictive interpretation was not applied *in practice*, but was recognised as a principle by international courts, it has, since then, been rejected by the drafters of the Vienna Convention on the Law of Treaties<sup>30</sup>, on which the Netherlands itself relies in its Counter-Memorial<sup>31</sup>. Article 31 of the Vienna Convention enumerating the principles of interpretation, does not mention the principle of restrictive interpretation. What it does state, is that:

*“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”.*

If a treaty has to be interpreted in good faith and in the light of its object and purpose, one wonders how it could simultaneously be interpreted in a restrictive way.

Analysing the work of the International Law Commission, Christian Tomuschat reaches the conclusion that:

*“This outcome of the deliberation (of the International Law Commission) may be assessed as more than just an accidental event. It demonstrates that the sovereign State today is not anymore the core value of international community. It has become clear that conditions of peace and security in international society require a collective effort on part of all States so that restrictions to sovereignty pertain to the normal picture of international relations and cannot be termed as unusual exception”<sup>32</sup>.*

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<sup>28</sup> *Ibidem*. In the same sense: *Oppenheim's International Law*, 9<sup>th</sup> edition, edited by Sir Robert Jennings and Sir Arthur Watts, Longman, 1992, vol. 1, p. 1275 ff., esp. 1278. Add. Exhibit No W5.

<sup>29</sup> C.P.J.I., *Case concerning the Territorial Jurisdiction of the International Commission of the River Oder*, Series A, No 23, p. 26. Add. Exhibit No J 11.

<sup>30</sup> C. Tomuschat, *op. cit.*, p. 171. Add. Exhibit N° W4.

<sup>31</sup> Counter-Memorial of the Netherlands, p. 38, para. 3.3.1.

<sup>32</sup> C. Tomuschat, *op.cit.*, p. 171. Add. Exhibit N° W4.

Before the adoption of the Convention of Vienna Convention on the Law of Treaties, Lord McNair already stated that:

*“In general sovereignty plays no part in the interpretation of treaties. There, is however, one point at which there is, or has been some contact the so-called rule of restrictive interpretation. This is not the place for a full examination of the rule. It’s believed to be now of declining importance and the time may be not far distant when it will disappear from the books. It dates from an age in which treaties were interpreted not by legal tribunals, and not even much by lawyers, but by statesmen and diplomats”<sup>33</sup>.*

True, in the *Nuclear Tests Case*, the International Court of Justice stated that when a State takes up legal obligations by way of unilateral declaration, ‘*à restrictive interpretation is called for*’<sup>34</sup>. Yet, the Court again did not make any specific application of this principle. What is more, as Tomuschat indicates, ‘*this pronouncement however does not prove that the ICJ still clings to the traditional doctrine. (...) Only exceptionally can States be bound by unilateral declarations (...). Great caution is required to sustain such conclusion. Normally States assume legal obligation on the base of reciprocity. A treaty as a bilateral instrument, embodying an undertaking of give and take, cannot be compared with a unilateral declaration (...)*’.<sup>35</sup> It cannot therefore be deduced from this *obiter dictum* of the Court that the principle of restrictive interpretation applies to treaties. Quite to the contrary, the specificity of treaties excludes such a principle. As Sir Hersch Lauterpacht stated:

*“It has been shown that the principle in dubio mitius, in so far as it implies an interpretation unfavourable to the recipient of benefits under the contract and one which is less onerous to the party burdened with an obligation, is not a general principle of law. Moreover, quite independently of the fact that its merits do not seem to be as apparent as is generally assumed, it is a principle which is open to the objection that it does not take into account the benefits which the party bound by the commitment has reaped in consideration of its undertaking.”<sup>36</sup>*

As already indicated, this is of particular relevance with respect to the 1839 Separation Treaty.

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<sup>33</sup> L. McNair, *The Law of Treaties*, Oxford, Clarendon Press, 1961, p. 765. Add. Exhibit No W 6.

<sup>34</sup> I.C.J., *Nuclear Tests Case (Australia v. France)*, Judgment of 20 December 1974, *ICJ Reports* 1974, p. 267, para. 44. Add. Exhibit No J 12.

<sup>35</sup> C. Tomuschat, *op.cit.*, p. 171-172. Add. Exhibit No W4.

<sup>36</sup> H. Lauterpacht, “Restrictive interpretation and the principle of effectiveness in the interpretation of treaties”, *B.Y.I.L.*, 1949, p. 48. Add. Exhibit No W1.

23. Finally, the Dutch Government itself has pleaded against a restrictive interpretation of its obligations deriving from Article IX of the Separation Treaty of 1839, and in favour of an interpretation and application of its obligation taking into account nowadays requirements for maritime transport. Article IX of the Separation Treaty of 1839 provides that both Governments commit themselves to preserve the navigability of the Scheldt, each of them for its part of the river. The Dutch Government sustained before its highest Court, the *Hoge Raad*, that Article IX of the Separation Treaty of 1839 must be interpreted in a reasonable manner taking into account nowadays needs, which notably implied that the Netherlands are under obligation to maintain the navigability of the river not only inside their territorial waters but also in the run-up routes to the Western Scheldt. According to the Dutch Government:

*“(…) the Court [which rendered the judgment against which appeal was filed in the Hoge Raad] negated, that a reasonable interpretation of the abovementioned treaty and notably of Art. 9 of the Treaty – which in its Dutch text stipulates that both governments undertake each for its part of the river to preserve the navigable entrances to the sea of the Scheldt and of its estuaries and to place the necessary buoys and floats there – entails that both concerned States are obliged in relation to the increased draught and size of the ships to not only preserve and/or maintain the “navigable entrances to the sea” located within their territorial waters and to clear out hindering or dangerous wrecks but also to follow this line of conduct with regard to the run-up routes to the Western Scheldt located outside their territorial waters, since the above described care exclusively for the good navigability of the Western Scheldt itself and the channels and run-up routes located in the territorial sea in relation to the increased draught and size of the boats would not have a good sense anymore if the Belgian and Dutch States would not care for the run-up routes in the high seas.”<sup>37</sup>.*

The Court did not address this specific issue, and it is therefore the Dutch Government’s position that counts. One does not see why, for the Dutch Government, its obligations deriving from the Separation Treaty of 1839 must in one case be interpreted restrictively,

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<sup>37</sup> Hoge Raad, *Gaasterdijk/Zuidpool*, 26 May 1978, *Schip en Schade*, 1978, N°63, p. 186, 5<sup>th</sup> pt (a). Emphasis added. Add. Exhibit N° 3. Authentic text: “Aldus heeft het Hof miskend, dat een redelijke interpretatie van het vorenbedoelde verdrag en met name art. 9 van het Verdrag - dat in zijn Nederlandse tekst bepaalt dat de beide Regeringen zich verbinden ieder voor haar gedeelte der rivier om de bevaarbare zeegaten van de Schelde en van hare monden te behouden en daar de nodige tonnen en boeien te plaatsen - meebrengt dat de beide betrokken Staten i.v.m. de toegenomen diepgang en omvang van de schepen verplicht zijn om niet slechts de binnen hun territoriale wateren gelegen “bevaarbare zeegaten” te behouden en/of te onderhouden en daarin zich bevindende voor de scheepvaart hinderlijke of gevaarlijke wrakken op te ruimen doch deze gedragslijn ook te volgen m.b.t. de buiten hun territoriale wateren gelegen aanlooproutes naar de Westerschelde, daar vorenomschreven zorg uitsluitend voor de goede bevaarbaarheid van de Westerschelde zelf en de in de territoriale zee gelegen vaargeulen en aanlooproutes i.v.m. de toegenomen diepgang en omvang van de schepen geen goede zin meer zou hebben indien de Belgische en Nederlandse Staat aan de aanlooproutes in volle zee geen zorg zouden besteden.”

while in another case they have to be interpreted and applied so as to warrant the useful effect of their undertaking, given the present-day requirements of transport.

**24.** In conclusion, therefore, the restrictive interpretation of international obligations finds no basis in international law. Even if it did, it could not possibly apply to Article XII of the 1839 Separation Treaty, which accorded rights to Belgium on Dutch territory, in compensation for the fact that districts of Limburg which had never before belonged to the Netherlands were allocated to them, depriving Belgium of a short and direct transit to Germany over its own territory.

3. Rights relating to the use, restoration, adaptation and modernization of the Iron Rhine do not exclusively derive from the Iron Rhine's conventional regime.

**25.** According to the Netherlands, the right to the use, restoration, adaptation and modernization of the Iron Rhine is not based on a rule of general international law. More specifically, there is no agreement other than Article XII of the Separation Treaty obliging the Netherlands to permit Belgium to use, restore, etc. the Iron Rhine (Counter-Memorial of the Netherlands, p. 35-36).

Belgium agrees with the Netherlands where it highlights the *sui generis* nature of Belgium's rights on the Iron Rhine, which finds its basis in the 1839 Separation Treaty and in the subsequent bilateral treaties entered into between Belgium and the Netherlands. The right of transit Belgium is claiming is a conventional right. The same is true of Belgium's other rights deriving from Article XII of the Separation Treaty and, more generally, from the Iron Rhine's conventional regime, which will be addressed below.

For completeness' sake, it should however be added that, contrary to what the Netherlands states, this does not imply that "*other than Article XII of the Separation Treaty, there is no agreement obliging the Netherlands to permit Belgium to use, restore, etc. the Iron Rhine*". The use, restoration, etc. of railway lines is presently governed also by European Community law, and by the Statute on the regime of international railways of 9 December 1923.

26. For the Tribunal's information the common transport policy in the European Community is becoming more and more integrated. The creation of international railway lines is part of the trans-European transports network referred to in Articles 154 to 156 of the Treaty establishing the European Community, which the Community institutions must promote to help achieving the progressive establishing of the internal market (Articles 154 and 14) and the overall harmonious development of the Community by strengthening its economic and social cohesion (Articles 154 and 158)<sup>38</sup>.

Directive No. 2001/16 of the European Parliament and of the Council of 19 March 2001 on the interoperability of the trans-European conventional rail system, aim to ensure the interoperability between railways networks and systems by assuring notably the compatibility between the technical characteristics of the infrastructure<sup>39</sup>. Decision No. 1692/96/EC of the European Parliament and of the Council, of 23 July 1996, on Community guidelines for the development of the trans-European transport network, provides that the trans-European network shall be established gradually by 2010 in accordance with the outline plans indicated on the maps in Annex I and/or the specifications in Annex II<sup>40</sup>. In Annex I, the Iron Rhine was defined as a "conventional line"<sup>41</sup> and the High Level Group, in its Report dated 27 June 2003, identified the Iron Rhine as a *'priority project to start before 2010'* to which *"the countries concerned gave their firm commitment to begin work on all the sections of each one of these projects at the latest in 2010 so that to make them operational at the latest in 2020"*.

Directive 1991/440/EEC on the development of the Community's railways as amended by Directive 2001/12/EC of the European Parliament and of the Council<sup>42</sup>, grants railway undertakings and international groupings of such undertakings a right of access to the railway network of a Member State for the purpose of international transports, providing in Article 10.3 that *"whatever the mode of operation, railway undertakings within the scope of Article 2 (being, in essence, railway undertakings established or to be established in a Member*

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<sup>38</sup> Treaty establishing the European Community (consolidated version, 2002), *O.J.* C325/1 ff. Exhibit No. 50.

<sup>39</sup> Directive No. 2001/16 of the European Parliament and of the Council of 19 March 2001 on the interoperability of the trans-European conventional rail system, *O.J.* L110, 20 April 2001, p. 1. Exhibit No. 40.

<sup>40</sup> Decision No. 1692/96/EC of the European Parliament and of the Council, of 23 July 1996, on Community guidelines for the development of the trans-European transport network *O.J.* L228, 9 September 1996, p. 1 ff. Exhibit No. 51.

<sup>41</sup> *Ibidem.*

<sup>42</sup> Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive No. 91/440/EEC on the development of Community Railways, *O.J.* L75, 15 March 2001, p. 1. Exhibit No. 56.



*State*<sup>43</sup>), shall be granted, on equitable conditions, the access that they are seeking to the Trans-European Rail Freight Network defined in Article 10 (a) and in Annex I after 15 March 2008, to the entire rail network, for the purpose of operating international freight services”. The maps in Annex I of Directive No 2001/12/EC identify the Iron Rhine as part of the Trans-European Rail Freight Network<sup>44</sup>.

As the second railway package – relating notably to the extension of access rights to infrastructure, and interoperability, as well as to the establishment of a European railway Agency – was agreed on by the European Parliament and the Council on 16<sup>th</sup> March 2004, and will, according to a press release of the Commission of 17 March 2004, be confirmed by both institutions in the following weeks, the common transport policy will in a close future, become even more integrated<sup>45</sup>. Further, in order notably to “achieve an infrastructure network capable of meeting growing needs”, the European Parliament and the Council held, on 10 March 2004, informal contacts to amend Directive 1692/96/EC of 23 July 1996 on Community guidelines for the development of the trans-European transport network<sup>46</sup>.

27. Apart from European Community law, one should also mention the Statute on the regime of international railways signed at Geneva, the 9 December 1923, to which Belgium, Germany, and the Netherlands are parties<sup>47</sup>. The objective of this Statute is to establish between the networks of the Parties, “*les communications appropriées aux besoins du trafic international*”<sup>48</sup>.

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<sup>43</sup> See article 2 as amended by Directive 2001/12/EC, article 1.

<sup>44</sup> Exhibit No. 56.

<sup>45</sup> European Commission, Boosting European Rail Transport: Commission welcomes the agreement on the full opening of rail freights market, 17 March 2004. Add. Exhibit N° 4.

<sup>46</sup> Council of the European Union, Draft decision amending 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, 11 March 2004. Add. Exhibit No 5.

<sup>47</sup> Convention of the International Regime of Railways, signed at Geneva the 9 December 1923, *L.N.T.S.*, 1926, N°1129 and entered into force 23 March 1926. The Convention was ratified by Belgium the 16<sup>th</sup> May 1927, by Germany the 5<sup>th</sup> December 1927 and by the Netherlands the 22<sup>nd</sup> February 1928. Add. Exhibit No 6 and No 7.

<sup>48</sup> *Loc.cit.*, Art. 1er, para 1.

## **B. International law as applied to the present case: General Issues**

**28.** It has been shown in Belgium's Memorial that the Iron Rhine does not benefit from a regime of extra-territoriality. However, the Netherlands' regulatory powers are limited by its obligations under international law.

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

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

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

*The two parties would lay down, by a common agreement, the height and mode of collection of toll rights that would be levied on that same road or canal."*<sup>49</sup>

**29.** This provision enunciates the following obligations for the Netherlands.

*First*, the Netherlands shall, if Belgium constructs a "new road .. or canal" as described in Article 12, allow for the prolongation of this road or canal "according to the same plan" (see also Question No. 2). Dutch regulatory powers are limited accordingly. It is beyond doubt that the Netherlands' rights are limited by Article XII granting Belgium the right to have the route

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<sup>49</sup> Unofficial translation. Exhibit No. 3.

prolonged “*according to the same plan*”. The exercise of Dutch jurisdiction with respect to the use, the restoration, the adaptation and the modernization of the Iron Rhine, will not *necessarily* be affected by the “*plans*” aspect in Article XII, however, as domestic law may not be relied upon to curtail international rights and obligations, the Netherlands could not rely on their jurisdiction so as to curtail Belgium’s conventional right to have the route prolonged according to the same plan as on Belgian territory.

*Second*, it flows from Article XII, that Belgium is entitled to have a new road in Belgium prolonged on Dutch territory according to the same plan as on Belgian territory, without the Netherlands’ agreement as to the plan (see also Question No. 2). Dutch jurisdiction with respect to the use, the restoration, the adaptation and the modernization of the Iron Rhine is limited accordingly.

*Third*, if, in this hypothesis, the Netherlands takes the option to perform the works by itself, such works can only be at the expense of Belgium, if they have been agreed upon by both Governments. Conversely, if the Netherlands chooses to have these works performed by Belgium, no agreement is necessary as to the works (see also Question No. 2). Dutch jurisdiction with respect to the use, the restoration, the adaptation and the modernization of the Iron Rhine is limited accordingly.

*Fourth*, without prejudice to European law, the Netherlands have the obligation to allow for the use of the Iron Rhine route provided that it “*only serve[s] as commercial communication*” and to take all the measures necessary to permit this use (See also Question No. 3). Dutch jurisdiction with respect to the use, the restoration, the adaptation and the modernization of the Iron Rhine is limited accordingly.

*Fifth*, the height and mode of collection of toll rights shall be determined by a common agreement between the Netherlands and Belgium. Such agreement must be taken in conformity with international law and European law. Dutch jurisdiction with respect to the use, the restoration, the adaptation and the modernization of the Iron Rhine is limited accordingly.

*Sixth*, no re-routings deviating from the historical route shall be decided upon by the Netherlands without the agreement of Belgium.

C. **International law as applied to the reactivation of the Iron Rhine currently envisaged**

30. Belgium will now address a number of issues specifically related to the reactivation of the Iron Rhine as it is presently envisaged.

In that respect, it may be recalled that the parties have contemplated a temporary reactivation for 15 trains per day, on the one hand, and a long-term reactivation making the Iron Rhine suitable for 36 trains a day in 2010 and 43 trains in 2020. In the Memorandum of Agreement of 28 March 2000 it was envisaged to take a “dual decision”, meaning that a decision was to be taken, within a specified time limit, at the same time on temporary and long-term use.

Therefore, Belgium will address the legal status of the Memorandum of Agreement of 28 March 2000 (1) before addressing international law limits to Dutch jurisdiction with respect to temporary driving (2) and then, to long-term driving (3).

1. **The Memorandum of Agreement of 28 March 2000**

31. Belgium has shown in its Memorial that the Memorandum of Agreement of 28 March 2000 does not provide a basis for laying international obligations upon Belgium because, irrespective of its legal nature, the Memorandum had lapsed by reason of the fact that the decisions contemplated therein were not taken within the specified time limit. In reply, the Netherlands limits itself to noting in its Counter-Memorial that Belgium “*is not willing to meet the costs of temporary use .. despite the arrangement to this effect in the MoU*”<sup>50</sup>. However, the arbitral procedure is not about gauging the parties’ willingness, but about determining their rights and obligations. In this context, Belgium confirms its position, for two distinct reasons. On the one hand, the Memorandum intrinsically did not create rights and obligations under international law; it was a non-binding, political text. On the other hand, the Memorandum has lapsed.

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<sup>50</sup> Counter-Memorial of the Netherlands, p. 34.

32. First, the Memorandum is not “governed by international law” within the meaning of Article 2, §1, of the Vienna Convention on the Law of Treaties, which means that it does not create obligations under international law<sup>51</sup>.

When, in the *Aegean Sea Continental Shelf* case, the International Court of Justice was called upon to determine whether a joint communiqué of the Greek and Turkish Prime Ministers was capable of founding its jurisdiction, the Court held that “whether the Brussels Communiqué of 31 May 1975 does or does not constitute such an agreement essentially depends on the nature of the act”<sup>52</sup> and that “in determining what was indeed the nature of the act or transaction ..., the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up”<sup>53</sup>. Having analysed the Brussels Communiqué and the circumstances of its adoption, the Court ruled that it did not furnish a valid basis for establishing the Court’s jurisdiction<sup>54</sup>. Later on, in the *Qatar v. Bahrain* case, the International Court had to decide whether it could found its jurisdiction on letters exchanged between the Ministers of Foreign Affairs of Qatar and Bahrain in December 1987, and on minutes of a meeting between same Ministers of December 1990. As concerns the 1987 letters, the Court noted that: “the parties agree that the exchanges of letters of December 1987 constitute an international agreement with binding force in their mutual relations”<sup>55</sup>. This agreement stated notably that “all the disputed matters shall be referred to the International Court of Justice (...)” and that a committee shall be formed “for the purpose of approaching the International Court of Justice, and satisfying the necessary requirements to have the dispute submitted to the Court in accordance with its regulations and instructions so that a final ruling, binding upon both parties, be issued”<sup>56</sup>. The parties, however, did not agree on the nature of the Minutes of the meeting in December 1990, signed by the Ministers of Foreign Affairs of Bahrain, Qatar and of Saudi Arabia which had provided its good offices in this dispute. The Minutes stated that: “the following was agreed: (1) to reaffirm what was agreed previously between the two parties; (2) to continue the good offices of .. King Fahd .. till May of the next year 1991. After the end of this period, the parties may submit the matter to the International Court of Justice in accordance with the Bahraini formula [i.e., a text transmitted by the Heir

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<sup>51</sup> Reports of the International Law Commission on its Eighteenth Session, 4 May - 19 July 1966, ILC Yearbook, 1966, vol. II, p. 205-206. Add. Exhibit No. 8.

<sup>52</sup> I.C.J., *Aegean Sea Continental Shelf*, 19 December 1978, I.C.J. Reports 1978, para. 96. Add. Exhibit No. J 13.

<sup>53</sup> *Ibidem*

<sup>54</sup> *Loc. cit.*, para. 107.

<sup>55</sup> I.C.J., *Case concerning maritime delimitation and territorial questions between Qatar and Bahrain*, 1<sup>st</sup> July 1994, I.C.J. Reports 1994, para. 22. Add. Exhibit No. J 14.

<sup>56</sup> *Loc. cit.*, para. 17.

Apparent of Bahrain, when on a visit to Qatar, to the Heir Apparent of Qatar], *which has been accepted by Qatar, and the proceedings arising therefrom ..*<sup>57</sup>. In this respect, the Court ruled that the Minutes “*enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement*”<sup>58</sup> and it did “*not find it necessary to consider what might have been the intentions of the Foreign Minister of Bahrain or, for that matter, those of the Foreign Minister of Qatar*”<sup>59</sup>. The Court added that there was nothing “*in the material before the Court which would justify deducing from any disregard by Qatar of its constitutional rules relating to the conclusion of treaties that it did not intend to conclude, and did not consider that it had concluded, an instrument of that kind; nor could any such intention, even if shown to exist, prevail over the actual terms of the instrument in question*”<sup>60</sup>.

It stems from these decisions that the question of whether a given text has legally binding force under international law, depends on its wording as well as on the circumstances in which it was drawn up. In the present case, these elements lead to the conclusion that the Memorandum of Agreement of 28 March 2000 is a text of a mere political nature deprived of legally binding force.

Indeed, having provided that the decisions on the temporary use and the definitive track will be taken simultaneously, the Memorandum further stipulates that “*these agreements will be laid down in treaty*”, and that “*until the choice is made for the definitive track, Belgium reserves all rights, which flow from the Separation Treaty of 1839 and the Belgian-Dutch Iron Rhine Treaty of 1873*”<sup>61</sup>. This makes it fully clear that the Memorandum itself is not a treaty, and that it does not affect Belgium’s rights under the 1839 Separation Treaty and the 1873 Iron Rhine Treaty, which would otherwise have been curtailed by the Memorandum.

To this it may be added that, unlike the Minutes in the *Qatar v. Bahrain* case, which were signed by the Ministers of Foreign Affairs, the signatories of the Memorandum were both

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<sup>57</sup> *Loc. cit.*, para. 19. The text of the Minutes was in Arabic and the English translations supplied by the parties differed on certain points. Those differences do not need to be clarified as they are irrelevant to the present matter.

<sup>58</sup> *Loc. cit.*, para. 25.

<sup>59</sup> *Loc. cit.*, para. 27.

<sup>60</sup> *Loc. cit.*, para. 29.

<sup>61</sup> Memorandum of Understanding van 28 maart 2000 tussen Minister Durant en Minister Netelenbos over de Ijzeren Rijn (Memorandum of understanding of 28 March 2000 between the Belgian Minister of Transports and the Dutch Minister of Transports concerning the Iron Rhine). Exhibit No. 82.

Ministers of Transports, who are not considered as representing their State in virtue of their functions and without having to produce full powers.

Further, the Memorandum was signed but not ratified, either by Belgium or by the Netherlands. Pursuant to Article 12 of the Vienna Convention, signature expresses consent to be bound when “(a) the treaty provides that signature shall have that effect; (b) it is otherwise established that the negotiating States were agreed that signature should have that effect; or (c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation”. The Memorandum is silent as to the effect of the signature, the signatories made no declaration in that respect, and neither of them produced full powers.

In conclusion, therefore, in signing the Memorandum of Agreement of 28 March 2000 the Belgian and Dutch Ministers of Transports did not express their States’ consent to be bound under international law, and neither was such consent expressed afterwards.

**33.** Second, as already indicated in Belgium’s Memorial<sup>62</sup>, the Memorandum provided that a decision on the temporary and long term use of the Iron Rhine was to be taken, “ultimately mid 2001”. In this context, Belgium would bear the limited costs of temporary reactivation so as to speed up the revitalisation of the Iron Rhine. Belgium’s position as to financing was conditional upon the modalities and time-schedule enunciated in the Memorandum. The paramount importance of these deadlines and their linkage with Belgium’s undertakings was highlighted in a letter of the Belgian and Flemish Prime Ministers to Prime Minister Kok of the Netherlands, which reads as follows:

*"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*

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<sup>62</sup> Memorial of Belgium, para. 93.

*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’.*”<sup>63</sup>

As the condition of reactivating the Iron Rhine for the end of 2001 has not been met, Belgium’s undertaking to finance costs of temporary reactivation has equally lapsed. This is again confirmed by paragraph 8 of the Memorandum, which provides that:

*“Until the choice is made for the definitive track, Belgium reserves all rights, which flow from the Separation Treaty of 1839 and the Belgian-Dutch Iron Rhine Treaty of 1873.”*<sup>64</sup>

**34.** In conclusion, the Memorandum of Agreement does not impose any international obligation upon Belgium for two distinct reasons. First, it is a mere political text not governed by international law. Second, the Memorandum, whether political or legal, has lapsed by reason of the fact that the modalities and time-schedule provided for temporary and long-term driving have not been met.

## 2. Temporary Use

**35.** As already indicated, the reactivation of the Iron Rhine as it is presently contemplated comprises “temporary driving”, which refers to the use which may be made of the historical route of the Iron Rhine awaiting long-term driving.

As already indicated in Belgium’s Memorial<sup>65</sup> it flows from the Environmental Impact Assessment of May 2001 that the use of the historical route, during a five-years period, by fifteen trains per natural day (both directions summed up) including at limited speed in evening hours and at night, would not cause any irreversible damage. Under these conditions,

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<sup>63</sup> Letter of the Belgian Prime Minister Verhofstadt and the Flemish Prime Minister Dewael to Prime Minister Kok, Exhibit of the Netherlands No. 27.

<sup>64</sup> Memorandum of Understanding of 28 maart 2000 tussen Minister Durant en Minister Netelenbos over de IJzeren Rijn (Memorandum of understanding of 28 March 2000 between the Belgian Minister of Transports and the Dutch Minister of Transports concerning the Iron Rhine). Exhibit No. 82. *Authentic text: “Totdat de keuze is gemaakt voor het definitieve tracé, behoudt België zich alle rechten voor, die voortvloeien uit het Scheidingsverdrag van 1839 en het Belgisch-Nederlands IJzeren Rijn-Verdrag van 1873”.*

<sup>65</sup> Memorial of Belgium, para. 35.



the Netherlands would, under the Memorandum of Understanding of 28 March 2000, allow for such a temporary use.

Also, while the Netherlands has partly dismantled the supra-structure of the Iron Rhine making it unfit for *immediate* use in the strict sense of the word, such measures can easily be reversed, witness the fact that the historical track of the Iron Rhine on Dutch territory is mentioned in the *Network Statement 2003* of the Dutch Railinfrabeheer, RailNed and Railverkeersleiding<sup>66</sup>. The *Network Statement* lists Dutch railway lines available for use by railway undertakings, further to Directive 2001/14/EC on the allocation of railway infrastructure capacity<sup>67</sup>. Paragraph 2.1 of this document provides that it “*covers the infrastructure of the national railways in the Netherlands managed by Railinfrabeheer and open to public transports. This network is ... indicated on the general map in annex I*”<sup>68</sup>. Annex 1, in turn, clearly includes the historical route of the Iron Rhine in its entirety, from the Belgian-Dutch border to the Dutch-German border. For completeness’ sake, it may be added that the Iron Rhine is *not* part of the tracks listed in Annex 8 as subject to traffic or transports limitations.

In these circumstances, there is no basis for the Netherlands on which to prevent Belgium’s exercising its right of passage over the Iron Rhine, which the Netherlands does not contest. In the circumstances just-mentioned, the Netherlands’ preventing the temporary use of the historical route would therefore violate the principles of *pacta sunt servanda*, reasonableness and good faith.

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

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<sup>66</sup> Railinfrabeheer, Railned and Railverkeersleiding, Netverklaring 2003, annex I. Exhibit No. 52.

<sup>67</sup> *Loc. cit.*, para. 1.3. For certainty’s sake, it may be added that, where the same paragraph presents the Netverklaring as a “trial edition”, this must be due to the fact that the text dates back to 29 November 2001 (see p. 1) and has thus remained unchanged until 2003. Directive 2001/14/EC provides in Article 28 that the Member States shall comply with its provisions by 15 March 2003 (Exhibit No. 53).

<sup>68</sup> Railinfrabeheer, Railned and Railverkeersleiding, Netverklaring 2003, p. 7, para. 2.1. Exhibit No. 52.

- When Belgium makes a demand for provisional driving on the historical route of the Iron Rhine, by 15 trains per natural day (both directions summed up), including at limited speed in evening hours and at night, for a period of 5 years at least, the Netherlands shall immediately accept that demand, and immediately take all decisions necessary to effectively allow for such driving within the shortest time materially feasible, which shall not be more than one month.

### 3. Long Term Use

**37.** As to long-term use, it has been pointed out in Belgium's Memorial that the financing of measures required by the Netherlands as a condition for reactivating the Iron Rhine, lies at the heart of the present case.

The works required for this purpose do not curtail Belgium's rights *per se*, provided that measures are taken to ensure the uninterrupted use of the railway during and notwithstanding these works, so that (1) temporary driving is followed directly by long-term use and (2) neither of these 'regimes' is affected by construction works.

However, the Netherlands' requiring such works does amount to an unreasonable exercise of their rights, when it is combined with the further requirement that the works be financed by Belgium, and not by the Netherlands. To that extent, the issue presently discussed is related to Question No. 3. Under Question No. 3, Belgium notably submits that, pursuant to the Iron Rhine's conventional regime, all the costs and financial risks associated with the use, reparation, adaptation and modernization of the railway line shall be borne by the Netherlands. However, the Netherlands in its Counter-Memorial sustains that Belgium should bear all costs on Dutch territory pursuant to the Iron Rhine's conventional regime. Therefore, it will be demonstrated hereafter that, irrespective of specific conventional obligations which are dealt with under Question No. 3, several measures required by the Netherlands as a condition for the long-term reactivation as it is presently envisaged, would, if they were to be financed by Belgium, amount to a violation of Belgium's rights under international law.

Belgium will hereafter, first, give an overview of measures which appear to be required by the Netherlands for the long-term reactivation presently envisaged (a). It will then show why such

requirements would be in violation of Belgium's rights under international law, if they were subject to the further requirement that the measures be financed by Belgium and not by the Netherlands. In this context, Belgium will address the unlawfulness of laying with Belgium, the costs related to tracks which are in present or future use for Dutch railway transports (b), the costs of measures required to meet objectives over and above Dutch legislative requirements (c) the costs of building a loop around Roermond (d) and the costs of a tunnel in the Meinweg and similar nature protection devices (e).

*(a) Measures required by the Netherlands for the long-term reactivation presently envisaged*

**38.** The overview hereinafter of measures required by the Netherlands for the reactivation of the Iron Rhine as it is presently envisaged, is based on the draft bill on the Iron Rhine, *IJzeren Rijn – Concept ontwerp-tracébesluit*<sup>69</sup>, which was finalised by the Dutch infrastructure manager ProRail in July 2003. Reference will also be made to the estimation of costs, which was transmitted to the Belgian Railways in the course of the present procedure<sup>70</sup>.

Belgium's referring to these documents in its Reply is meant to give an overview of measures required by the Netherlands for the long-term reactivation, and does not imply any acceptance by Belgium of the contents of these documents.

**39.** The *Concept ontwerp-tracébesluit* subdivides the Iron Rhine on Dutch territory into four tracks, as identified on the map at page 21 of the document<sup>71</sup>. Section 3 of the *Concept* gives an overall description of the four tracks. A more detailed description and a list of measures to be taken is given in Sections 4 to 7 of the document.

**40.** For a proper understanding of the *Concept*'s extracts hereafter, it should be noted from the outset that Section 3 starts with indicating that “*the norm setting for noise abatement measures and safety measures depends on whether or not the use of an existing rail track is involved for the Iron Rhine. When use is made of an existing track, the intensity of railway*

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<sup>69</sup> IJzeren Rijn, Concept ontwerp-tracébesluit, July 2003, ProRail, Add. Exhibit No 9.

<sup>70</sup> Counter-Memorial of the Netherlands, Annex B.

<sup>71</sup> IJzeren Rijn, Concept ontwerp-tracébesluit, op. cit., Add. Exhibit No.9.

traffic on that track may equally be determining for the norm setting”<sup>72</sup>. Section 3 then describes the four tracks, A to D, as follows.

Track A covers the towns of Cranendonck and Weert, and lies on the existing, historical track of the Iron Rhine between the Belgian border near Budel and the eastern limit of Weert. The *Concept* makes a further distinction between two parts of Track A. The first part is located between the Belgian-Dutch border and the junction with the railway line Eindhoven-Weert, and is also referred to as A1. It is described as follows:

*“The railway line is and remains single track between the Belgian-Dutch border and the junction with the railway line Eindhoven-Weert. This railway is not electrified. Currently, the line is used by two freight trains per 24 hours, the two directions combined. Reactivating the Iron Rhine involves an intensification of the railway traffic up to 45 freight trains per 24 hours, both directions combined.*

*As far as norm setting is concerned, one starts from an existing situation. For security on crossings use is made of the national average collision risk. The collision risk on the track must not go beyond the national average as a consequence of reactivation.”*<sup>73</sup>

The second part of Track A is located east of the junction with the railway line Eindhoven-Weert, and is also referred to as A2. It is described as follows (emphasis added):

*“East of the junction the existing railway is and remains double track and electrified. Currently the line is used by 104 trains per 24 hours, the two directions combined, 92 of which are passenger trains. This concerns both freight and passenger trains. In 2020, the 43 “Iron Rhine” trains will be added thereto. Including the autonomous development of railway transports, the line will then be used according to the prognosis by 199 trains per 24 hours, the two directions combined, 152 of which are passenger trains. The norm setting is also based on an existing situation. With respect to collision risks, this means that application is made of the stand-still principle. The incident risk will thus remain below the national average.”*<sup>74</sup>

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<sup>72</sup> Loc. cit., p. 22. Add. Exhibit No. 9. Authentic Text: “De normstelling is voor de te treffen geluidsmaatregelen en maatregelen inzake veiligheid afhankelijk van het al dan niet gebruik maken van een bestaande spoorlijn voor de IJzeren Rijn. Wanneer gebruik gemaakt wordt van een bestaand tracé, is de intensiteit van het treinverkeer op dat tracé soms ook bepalend voor de normstelling”

<sup>73</sup> Loc. cit. p. 22, para. 3.2.1. Add. Exhibit No. 9. Authentic text: “De spoorlijn is en blijft tussen de Belgisch-Nederlandse grens en de aansluiting op de spoorlijn Eindhoven-Weert enkelsporig. Deze spoorlijn is niet geëlektrificeerd. Thans rijden hier twee goederentreinen per etmaal in beide richtingen samen. Reactivering van de IJzeren Rijn betekent een intensivering van het treinverkeer tot 45 goederentreinen per etmaal in beide richtingen tesamen. Met betrekking tot de normstelling geldt dat sprake is van een bestaande situatie. Voor de veiligheid op overwegen wordt de landelijk gemiddelde ongevalskans gehanteerd. Als gevolg van reactivering van de IJzeren Rijn mag de ongevalskans op het tracé niet groter zijn dan het landelijk gemiddelde ”

<sup>74</sup> Loc. cit., p. 22, para. 3.2.1. Authentic Text : « Ten oosten van de aansluiting is en blijft de bestaande spoorlijn dubbelsporig en geëlektrificeerd. Nu rijden hier 104 treinen per etmaal in beide richtingen samen, waarvan 92 reizigerstreinen. Dat betreft zowel goederen – als reizigerstreinen. In 2020 worden hier de 43 IJzeren Rijn

Track B covers the communes of Nederweert, Heythuysen and Haelen, and is described as follows (emphasis added):

*“This part of the railway lies on the track, which already exists and is in use, between Weert and the eastern accesses to the bridges over the Maas near Roermond. The track is, like track A2, part of the railway line leading from Eindhoven via Weert to Roermond. Track B is and remains double track and electrified. The track is used by 92 trains per 24 hours in both directions combined. This concerns both freight and passenger trains.*

*The norm setting is the same as for track A2, which is intensification of the existing train traffic up to 199 trains per 24 hours in both directions combined.”<sup>75</sup>*

Track C covers the communes of Roermond and Swalmen:

*“For this track a new railway will be realised, which joins eastern of the Maas river near Roermond. The track consists of a loop north and east of Roermond. Near Herkenbosch it joins the part of the historic track which is out of use and which leads from the station of Roermond to the German border near Vlodrop. The new railway will insofar as possible be bound up with the National Road 73. The railway is single track and not electrified. The norm setting for this part of the track is based on the fact that a new situation is created locally.”<sup>76</sup>*

Track D crosses the commune of Roerdalen where the nature protection area De Meinweg is located:

*“This part of the track lies on the historical track, which is out of use since 1991. Track D lies between the Asenrayerweg and the German-Dutch border near Vlodrop. The track lies in the nature area De Meinweg. For the purpose of reactivation of the Iron Rhine, the track in De Meinweg will be built in part in a tunnel and in part in an*

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*treinen aan toegevoegd. Inclusief de autonome ontwikkeling van het spoorvervoer rijden hier volgens de prognose dan 199 treinen per etmaal in beide richtingen samen, waarvan 152 reizigerstreinen. De normstelling is hier eveneens gebaseerd op een bestaande situatie. Met betrekking tot de overwegveiligheid betekent dit dat op dit gedeelte het ‘stand-still’ beginsel gehanteerd wordt. Daarmee blijft de ongevalskans onder het landelijk gemiddelde.”*

<sup>75</sup> *Loc. cit., p.22, para. 3.2.2. Authentic text: “Dit tracédeel ligt op het reeds bestaande en in gebruik zijnde tracé tussen Weert en de oostelijke oprit van de maasbruggen bij Roermond. Dit tracé is, net als tracédeel A2, onderdeel van de spoorlijn van Eindhoven via Weert naar Roermond. Tracédeel B is en blijft dubbelsporig en geëlektrificeerd. Over deze spoorlijn rijden 92 treinen per etmaal in beide richtingen samen. Dat betreft zowel goederen- als reizigerstreinen. De normstelling is dezelfde als bij tracédeel A2, dat wil zeggen intensivering van reeds bestaand treinverkeer tot 199 treinen per etmaal in beide richtingen samen”.*

<sup>76</sup> *Loc. cit., p. 23, para. 3.2.3. Authentic text: « Voor dit tracé wordt een nieuwe spoorlijn gerealiseerd, die aansluit ten oosten van de Maasbrug bij Roermond. Het tracédeel ligt in een boog ten noorden en oosten van Roermond. Nabij Herkenbosch wordt aangesloten op het in onbruik geraakte historisch tracé dat van het station van Roermond naar de Duitse grens bij Vlodrop loopt. De nieuwe spoorlijn is zoveel als mogelijk gebundeld met Rijksweg 73. De spoorlijn is enkelsporig en niet geëlektrificeerd. De normstelling voor dit tracédeel is gebaseerd op het gegeven dat een nieuwe situatie ter plekke ontstaat».*

*embankment. This track is currently out of use. The norm setting for track D is based on the creation of a new situation as a consequence of the reactivation of the Iron Rhine.”<sup>77</sup>*

**41.** The *Concept* further indicates in Section 3 that: “*the norm setting flows from applicable laws and regulations, or has been declared applicable in the context of the tracébesluit IJzeren Rijn to be adopted*”<sup>78</sup>. As concerns the integration of the infrastructure, which encompasses noise, vibrations, external security, air pollution, ecology, landscape protection, soil protection, archaeology, etc.<sup>79</sup>, it is stated that the “*starting points flow from the legislation and regulations, or have been applied by reason of a careful integration of the Iron Rhine track, which is considered necessary, although no legal provisions exist that make such a measures obligatory*”<sup>80</sup>.

More specifically, the *Concept* indicates that as concerns noise pollution, Dutch legislation provides for a possibility to dispense from the taking of measures for the protection of houses and other noise-sensitive buildings, up to a maximum noise level, which is not the case on any part of the Iron Rhine:

*“The maximal exemption level is 73 dB(A) (sic). This situation does not present itself on the Iron Rhine.”<sup>81</sup>*

A further account of Dutch regulatory norms is given in the following extract (the maximum exemption value mentioned here is of 70 dB(A), not 73dB(A) as in the above quote):

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<sup>77</sup> *Loc. cit.*, p. 23, para. 3.2.4. Authentic text : « *Dit tracédeel ligt ter plaatse van het historisch tracé, dat sinds 1991 in onbruik is geraakt. Tracédeel D ligt tussen de Asenrayerweg en de Duits – Nederlandse grens bij Vlodrop. Het tracé ligt in het natuurgebied De Meinweg. Ten behoeve van reactivering van de IJzeren Rijn wordt het tracé in De Meinweg deels in een tunnel, deels in een holle dijk aangelegd. Op dit tracé vindt thans geen treinverkeer plaats. De normstelling voor tracédeel D is gebaseerd op het ontstaan van een nieuwe situatie als gevolg van reactivering van de IJzeren Rijn* ».

<sup>78</sup> *Loc. cit.*, p. 21, para. 3.2. Authentic text : « *De normstelling vloeit voort uit wet – en regelgeving, of is in het kader van het te nemen tracébesluit IJzeren Rijn van toepassing verklaard* ».

<sup>79</sup> *Loc. cit.*, p. 32-46.

<sup>80</sup> *Loc. cit.*, p. 32, para. 3.4. Authentic text: “*Deze uitgangspunten vloeien voort uit wet - en regelgeving, of zijn gehanteerd omwille van een noodzakelijk geachte zorgvuldige inpassing van het tracé van de IJzeren Rijn, hoewel er geen wettelijk voorschrift is dat het treffen van zodanige maatregelen verplicht stelt*”.

<sup>81</sup> *Loc. cit.*, p. 33, para. 3.4.1. Authentic text: “*De maximale ontheffingswaarde bedraagt 73 dB (A). Deze situatie komt langs de IJzeren Rijn niet voor*”.

“Table 3-2 Limiting values for the construction of a national railway

<i>Destinations sensitive to noise</i>	<i>Preferred limit value</i>	<i>Max. exoneration value</i>
<i>Housings</i>	57 dB(A)	70 dB(A) (sic)
<i>Schools, hospitals, convalescent homes and other health care buildings</i>	55 dB(A)	70 dB(A) (sic)
<i>Caravan grounds</i>	57 dB(A)	65 dB(A)
<i>Other grounds sensitive to noise</i>	57 dB(A)	68 dB(A)
<i>Destinations insensitive to noise</i>	<i>Preferred value</i>	<i>Max. exoneration value</i>
<i>Camping’s, leisure housings, hotels</i>	57 dB(A) * **	65 dB(A) * **
<i>Enterprises and offices (day value)</i>	65 dB(A)	not applicable.

*For the destinations insensitive to noise no legal preferred limiting value or maximal exoneration values apply formally. The values indicated in table 3-2 must be considered as target values, also on the basis of the case law.*

*Camping’s, leisure parks and hotels are considered as housings on the basis of this case law. For enterprises and offices the changing noise situation must be included in the balancing of interests.”<sup>82</sup>*

The Concept further states:

*“Measures at the source may be executed on the equipment, the railway infrastructure or a combination of both. Since there is no sufficient legislation in national and international context concerning the equipment to be set in to impose measures at the source to the equipment, these are not taken into consideration as measures at the source. However in the Memorandum of Understanding of 29 March 2001 it is agreed upon that Belgium shall stimulate the setting in of silent locomotives for the Iron Rhine, such as the Belgian ‘Class 77’ or acoustically equivalent [5].*

*The reduction of the sound emissions of the equipment can also be realised by diminishing the speed of freight trains. In relation to the necessary capacity and functionality of the railway, speed limitation is not part of the package of sound-reducing measures at the source.*

*For track to be built anew or to be replaced, the most noiseless superstructure that is released by the manager of the railways in the Netherlands is applied, i.e.: concrete crossbeams in a bed of ballast from chippings and track without joints.”<sup>83</sup>*

<sup>82</sup> Loc. cit., p. 34. Authentic text: “ Voor niet-geluidgevoelige bestemmingen gelden formeel geen wettelijke voorkeursgrenswaarden of maximale ontheffingswaarden. De in table 3-2 aangegeven waraden moeten worden gezien als streefwaarden, mede op basis van jurisprudentie. Campings, recreatieparken en hotels worden op basis van jurisprudentie beschouwd als woningen. Voor bedrijven en kantoren geldt dat de veranderende geluidssituatie in de belangenafweging moet worden betrokken”

<sup>83</sup> Loc. cit., p. 34. Authentic text: “Bronmaatregelen kunnen getroffen worden aan het materieel, de spoorinfrastructuur of een combinatie van beide. Omdat er over het in te zetten materieel onvoldoende wetgeving in nationaal en international verband is om bronmaatregelen aan het materieel af te dwingen, zijn deze niet als bronmaatregel in de beschouwing genomen. Wel is het Memorandum of Understanding van 29 maart 2001 afgesproken dat België zal stimuleren dat voor de IJzeren Rijn stille locomotieven worden ingezet, zoals de Belgische ‘klasse 77’ of akoestisch gelijkwaardig. Reductie van de geluidemissies van het materieel kan ook

The Concept then explains that, “when source and abatement measures notwithstanding, the preferential value of 57 dB(A) is still exceeded, a higher value is applied, being the value effectively calculated, with a maximal level equal to the maximal exemption value”<sup>84</sup>. It appears from specific measures envisaged in Sections 4 and following, that expropriation is only warranted when the maximal exemption value is exceeded<sup>85</sup>. It also appears from Sections 4 and following, giving a detailed overview of measures envisaged on each specific track, that, rather than providing outright for exemptions up to the maximum noise level, the *Concept* provides for measures so as to reach the “preference limit” of 57 dB (A). A higher limit is only provided for when abatement measures prove insufficient to reach the preferential limit, which occurs in a comparatively limited number of cases<sup>86</sup>.

The *Concept* also states that, “in silence zones, application has been made of the stand-still principle for traffic noise from existing roads, where an adaptation of the road within the meaning of the *Wet Geluidshinder* (Noise Pollution Law) is at stake. For the *Leudal* and the *Meinweg*, a preferential value equivalent to 40 dB(A) at day, shall be applied in the faze of utilisation”<sup>87</sup>.

**42.** In the following sections, it will be shown that applicable international law precludes the Netherlands from laying with Belgium the costs related to tracks which are in present or

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*worden gerealiseerd door de snelheid van de goederentreinen te verminderen. In verband met de benodigde capaciteit en functionaliteit van de spoorbaan maakt snelheidsbeperking geen deel uit van het pakket geluidbeperkende bronmaatregelen. Voor nieuw te bouwen of te vervangen spoor wordt de meest geluidarme bovenbouw toegepast die is vrijgegeven door de beheerder van spoorlijnen in Nederland, te weten: betonnen dwarsliggers in een ballastbed van steenslag en voegloos spoor”*

<sup>84</sup> *Loc. cit.*, p. 35. Authentic text: “(..) na het treffen van bron- en overdrachtsmaatregelen, de voorkeurgrenswaarde van 57 dB (A) nog steeds wordt overschreven, wordt in het tracébesluit een hogere waarde vastgesteld, zijnde de berekende waarde groter dan 57 dB(A) met als plafond de maximale ontheffingswaarde”.

<sup>85</sup> E.g., *loc. cit.*, p. 53 under graph 4-6.

<sup>86</sup> In Cranendonck, 128 habitations require noise abatement measures to reach the 57 dB(A) level, whilst a higher limit is provided for 38 habitations and one house would be expropriated (*loc. cit.*, p. 51-53). In Weert, 2.400 habitations require noise abatement to reach the 57 dB(A) level. A higher limit is set for 577 habitations. 7 houses would be expropriated (*loc. cit.*, p. 53-76). In Nederweert, 20 habitations require noise abatement to reach the 57 dB(A) level, while a higher limit is set for 15 houses (*loc. cit.*, p. 86-87). In Heythuysen, 307 habitations require noise abatement to reach the 57 dB(A) level, while a higher limit is set for 149 houses and 7 are expropriated (*loc. cit.*, p. 87-90). In Haelen, 388 habitations require noise abatement measures to reach the 57 dB(a) level, whilst a higher limit is provided for 149 habitations and 5 houses would be expropriated (*loc. cit.*, p. 91-95). In Roermond, 135 habitations require noise abatement measures to reach the 57 dB(a) level, whilst a higher limit is provided for 120 habitations (*loc. cit.*, p. 110-113). In Roerdalen, 10 habitations require noise abatement measures to reach the 57 dB(a) level, whilst a higher limit is provided for 4 habitations (*loc. cit.*, p. 121).

<sup>87</sup> *Loc. cit.*, p. 37.



future use for Dutch railway transports (hereafter: b); laying with Belgium the costs of measures required to meet objectives beyond Dutch legislative requirements (hereafter: c); laying with Belgium the costs of building a new track to circumvent Roermond (hereafter: d); and laying with Belgium the costs of financing a tunnel under the Meinweg and similar protection measures for nature and recreation (hereafter: e).

***(b) Tracks which are in present or future use for Dutch railway transports***

**43.** It flows from the above description that an important part of the Iron Rhine is in (often intensive) use by the Dutch railways: while the A1-track of about 8 kilometres is used only by two trains a day, the A2-track representing the remaining 9 kilometres of the A track<sup>88</sup> is in use by 104 trains a day. The B track, totalling 14 kilometres<sup>89</sup>, is used with the same intensity. The C track as envisaged in the *Concept* will be a new track to circumvent Roermond, but this does not prevent part of this track to be in use.

It further appears from the above description that, in order to determine measures to be taken in the context of reactivation of the Iron Rhine (including expropriation, safety measures, noise protection devices...) the *Concept* takes account of the situation which will prevail by reason of the *combination* of trains presently using the tracks (notably for internal Dutch purposes), the 43 additional “Iron Rhine” trains forecasted by 2020, and further additional trains resulting from the autonomous development of railway transport.

**44.** The fact that measures are decided upon in view of the situation which will prevail after the addition of Iron Rhine and other trains is reasonable enough *per se*. It does not matter for local communities, or children travelling by bike across the railway, whether they are being disturbed or endangered by Dutch regional passengers’ traffic or by “Iron Rhine” trains. It is equally reasonable to take account of the fact that the additional trains forecasted, will bring total transports up to a level where specific measures are considered to be required.

Another question, however, is whether (irrespective of specific conventional obligations which are dealt with under Question No. 3) it is consonant with good faith and reasonableness

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<sup>88</sup> See the map and information, op. cit., p. 47.

<sup>89</sup> *Loc. cit.*, p. 80.

to lay all the costs of such measures with Belgium, and if not, what these principles require in these circumstances.

**45.** The approach laying all the costs with Belgium, would stem from the idea that it is Belgium's request for reactivation and the additional trains resulting from it, which brings the total number of trains up to a level where measures are required. That, however, is not an adequate starting point.

The *Concept* indicates that, on tracks A2 and B, the line is currently in use by 104 trains per day. Adding the 43 Iron Rhine trains as well as further trains resulting from the autonomous development of railway transports, the total number would be of 199 trains in 2020, 152 of which are passenger trains (and therefore not Iron Rhine trains). This means that, irrespective of the 43 Iron Rhine trains, an autonomous development of  $(199-43-104 =) 52$  trains is expected by 2020. In other words, *the forecasted autonomous development outweighs the development of traffic due to Iron Rhine trains*. Accordingly, there is no evidence that the addition of 43 "Iron Rhine" trains would itself suffice to reach the levels requiring measures to be taken. That level might as well be reached by the mere "autonomous development" not imputable to the Iron Rhine trains. There is therefore no basis for laying all the costs with Belgium.

Even on the assumption that the 43 additional Iron Rhine trains would suffice to reach the level at which measures are required, this would still not provide a reasonable basis for imputing all the costs of such measures with Belgium. Given the fact that tracks A2 and B are currently in use by 104 trains per day, it would still be indisputable that the 43 trains *alone*, *i.e.*, without *any* other train, would not trigger the measures required. The trigger would therefore result from existing Dutch trains and new (Iron Rhine) trains *combined*.

In these circumstances, laying all the costs with Belgium would amount to charging Belgium for the *use* of the Iron Rhine<sup>90</sup>. Yet, as explained under Question No. 3<sup>91</sup>, Belgium has been accorded a right to use the Iron Rhine, in consideration for territorial concessions, and free of any other charge. The only retribution for the use of the Iron Rhine on Dutch territory flows

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<sup>90</sup> What is more, it would amount to charging Belgium for a use of the Iron Rhine, which, in view of the ongoing liberalisation of railway transports in the European Community, will not necessarily be performed by the Belgian Railways.

<sup>91</sup> *Infra*, para. 105.

from the charges the Netherlands is entitled to levy from the users of the line, within the limits set forth in Article XII of the 1839 Separation Treaty. This also means that, if the costs here discussed were to be borne by Belgium, the Netherlands could be paid *twice* for the use of the railway: first, by Belgium's financing the measures, and second, by the users of the railway paying charges to the infrastructure manager in accordance with Article XII.

Further, Belgium would thus finance measures which – irrespectively of the general interest involved in reactivating the Iron Rhine<sup>92</sup> – primarily benefit the Netherlands: by 2020, non-Iron Rhine trains will account for approximately three quarters of the traffic on the A2 and B tracks. Yet, even if Belgium were under the obligation to pay for the reactivation of the line pursuant to the Iron Rhine's conventional regime (which, as explained under Question No. 3, is not the case), this obligation would be limited to the financing of measures required for the exercise of Belgium's rights on the Iron Rhine. There would still be no international legal basis on which the Netherlands could require Belgium to finance measures that are required because of the local use made of the Iron Rhine on Dutch territory.

Requiring Belgium to pay for such measures would also be unreasonable and contrary to the principle of good faith. In this context, it may be noted that the Iron Rhine crosses German territory over 69 kilometres up to Duisburg. Yet, only 19 kilometres have been included in the international study<sup>93</sup>, the remaining 50 kilometres being part of the German railway network, which is in average use. Germany thus appears to have considered it reasonable not to include parts of the line currently in use, in the international project.

**46.** The same may be said, *mutatis mutandis*, of Track C in Roermond and Swalmen. As already indicated, the *Concept* provides for the construction of a loop circumventing the town of Roermond. However, this does not mean that the current track up to Roermond is out of use. Track B is described in the *Concept* as “*part of the railway line from Eindhoven via Weert to Roermond*”<sup>94</sup>, and it may therefore be assumed (unless the Netherlands presents evidence to the contrary) that the 92 trains currently using track B also use track C, at least up to Roermond. According to Belgium's information, an important number of trains, including freight trains, passes through Roermond, notably continuing in the direction of Maastricht.

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<sup>92</sup> *Infra*, para. 60.

<sup>93</sup> Arcadis, *Comparative Cross-Border Study on the Iron Rhine*, p. 19. Exhibit No. S3.

<sup>94</sup> *Loc. cit.*, p. 22, para. 3.2.2.

Further, as the *Concept* forecasts an intensification of traffic on track B up to 199 trains per day in 2020 (which is 156 not including the 43 Iron Rhine trains), one may also assume a similar increase in traffic to Roermond.

To this it may be added that the *Concept* also provides for measures to be taken in Roermond with respect to “road traffic noise”<sup>95</sup>. Belgium ignores how this measure happens to be mentioned in relation to the Iron Rhine project, but submits that it would go against the principle of reasonableness if the Netherlands were to require that Belgium finances measures for the abatement of road traffic noise.

**47.** On these bases, and without prejudice to Belgium’s position under Question No. 3, it may be concluded with respect to this specific situation:

- In primary order, that the costs and financial risks associated with measures required with respect to parts A2, B and C of the track as identified in the *Concept*, shall be borne in whole by the Netherlands.
- In subsidiary order, that the costs and financial risks associated with such measures shall be borne by the Netherlands at the least in proportion to its forecasted use of the railway line by 2020, which is (199-43=) 156 out of 199, or 77,889 percent and by Belgium in a proportion of maximum 22,111 percent, under the further proviso that the Netherlands may not charge to Belgium costs which are charged on the users of the line in accordance with the applicable international and European Community rules, nor costs unrelated to the reactivation which includes, but is not limited to, costs for the abatement of road traffic noise.

***(c) Measures required to meet objectives beyond Dutch legislative requirements***

**48.** As indicated here above, the *Concept* also provides for a large number of measures, notably in the field of noise abatement, with a view to reaching the *preferential* noise level of 56 dB(A) for houses and other noise-sensitive buildings. This means that the *Concept* does

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<sup>95</sup> *Loc. cit.*, p. 113-114.

not make a general and outright application of the maximal exemption level, up to which a higher noise level is authorized and no expropriation is required by law (if, at all, it is required by law above that level). The exemption is only granted where noise abatement measures prove insufficient to reach preferential values.

In abstract terms, a policy favouring noise abatement measures so as to meet preferential values is not unreasonable. However, it is another question whether, when the Iron Rhine and its conventional regime are at stake, the Netherlands may pursue such a policy at the detriment of Belgium.

**49.** Dutch law allows for an exemption up to 70 dB(A) (or 73 dB(A))<sup>96</sup>. Up to that level, no expropriation is required. This testifies to the fact that there is no objection to submitting habitations to such a noise level – even though there may be a “*preference*” for a lower level.

Also, the Dutch *Wet Geluidhinder* (Noise Act) to which the *Concept* refers as the basis for the measures contemplated<sup>97</sup>, provides in Article 106 d, paragraph 4, which is part of Chapter VII on “*Zones near railways, trams and undergrounds*”, that exemption up to the maximal value may be granted in a series of cases (emphasis added):

*“Our Ministers may only apply paragraphs 2 and 3 [providing for the maximal limits] in those cases where the application of measures aimed at reducing the expected noise impact on the front of the habitations concerned, [...] down to the value applicable pursuant to paragraph 1 are insufficiently efficacious, or where it faces predominant objections as regards town planning, transports, landscape or financing”<sup>98</sup>*

Thus, while the *Concept* only makes application of the first hypothesis contemplated in Article 106d, §4, which is to grant an exemption when abatement measures prove

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<sup>96</sup> *Supra*, para. 41 and *Concept*, *op. cit.*, p. 33, para. 3.4.1.

<sup>97</sup> *Loc. cit.*, p. 32, para. 3.4.1.

<sup>98</sup> Dutch Noise Act (*Wet Geluidhinder*), art. 106, d, par. 4. Add. Exhibit No.10 Authentic text: “Onze Ministers kunnen slechts toepassing geven aan het tweede of derde lid in die gevallen waarin toepassing van maatregelen, gericht op het terugbrengen van de verwachte geluidsbelasting van de gevel van de betrokken woningen (...) tot de ingevolge het eerste lid geldende waarde, onvoldoende doeltreffend zal zijn, dan wel overwegende bezwaren ontmoet van stedenbouwkundige, verkeerskundige, landschappelijke of financiële aard”. The words omitted from the quote hereabove are: “by reason of the country railway or by reason of a road or rail to be placed on the track of that country railway” – authentic Dutch text: “*vanwege de landelijke railweg of vanwege binnen het trace van die landelijke railweg aan te leggen wegen of spoorwegen*”.

insufficiently efficacious, the Act allows for exemptions also in other hypotheses, all of which relate to a predominant general interest, including from a financial perspective<sup>99</sup>.

In referring to this provision, Belgium does not request that application be made of the Act, which is not opposable to Belgium to the extent that it is contrary to international law (although Belgium does not understand why the Concept only envisages to apply the first hypothesis of Article 106, §4, to the Iron Rhine). Belgium refers to the Act as evidence for the fact that, in the Netherlands' own view, allowing for a noise level up to 70 (or 73) dB(A) without abatement measures is justified where the general interest is at stake.

**50.** It flows from the above that it would be contrary to the principle of good faith and the principle of reasonableness to submit the reactivation of the Iron Rhine to the taking of noise abatement measures as contemplated in the Concept which are not necessary so as to reach the maximal exemption limit of 70 dB(A) (or 73dB(A)), if such abatement measures are to be financed by Belgium or in any other way render the exercise of Belgium's rights on the Iron Rhine more difficult. In the words of the Arbitral Tribunal in the *North-Atlantic Coast fisheries case*, quoted in Belgium's Memorial, this would amount to an unnecessary interference<sup>100</sup>.

**(d) *The loop around Roermond***

**51.** The *Concept* also requires a new track to be built so as to circumvent Roermond<sup>101</sup>.

In that respect, it may suffice to note that Belgium has the right to the use of the historical track of the Iron Rhine, witness the fact that, when in the 19<sup>th</sup> Century, Belgium requested a modification of the track contemplated in the 1839 Separation Treaty and the Netherlands in turn requested a further modification so as to have the railway pass through Weert, a treaty

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<sup>99</sup> To this it may be added that, when Dutch economic activities are at stake, i.e., for "enterprises and offices", the *Concept* indicates that no maximal exemption value applies and further, that "*the changing noise situation must be included in the balancing of interests.*" (*Loc. cit.*, p. 34). Although this relates to the economic activity in buildings subject to railway noise, and not to the economic activity of railway transports, it nevertheless testifies to the fact that environmental and economic objectives must be balanced against each other.

<sup>100</sup> Permanent Court of Arbitration, *North-Atlantic Coast fisheries case*, award of 7 September 1910, *R.I.A.A.*, Volume XI, page 173 ff., at 189. Exhibit No J6.

<sup>101</sup> *Supra*, para. 43.

was considered necessary for that purpose. The modification was agreed upon in the 1873 Iron Rhine Treaty (See also Question No.2).<sup>102</sup>

Without prejudice to Belgium's position under Question No. 3, there is, therefore, no legal basis for the Netherlands to require that the loop around Roermond be financed by Belgium.

*(e) The tunnel under the Meinweg and other nature protection measures including compensatory measures*

**52.** Until present, the Netherlands have made the (long-term) use of the historical route of the Iron Rhine subject to conditions relating to environmental protection, including the building of a tunnel under the Meinweg park and of nature protection devices, notably in the Weerter- and Budelerbergen park, as well as compensatory measures in other parts of the track<sup>103</sup>.

**53.** In this context, it may be recalled that, according to the *Concept*, the track crosses the nature area Weerter- and Budelerbergen in part A1 of the track<sup>104</sup>, which is presently used by only two trains per day and for which no additional use, other than by Iron Rhine trains, is forecasted<sup>105</sup>. The *Concept* mentions that the Weerter- and Budelerbergen are notably classified under the Birds Directive. Noise abatement devices, compensation measures, wildlife passages and ecoducts would be provided for. While originally an embankment was foreseen, it appeared later on that no such craftwork was required to protect the nature values in the area<sup>106</sup>. Further, the Netherlands indicates in its Counter-Memorial 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 .. Instead, the Weerterbos and the Ringelsveen and Kruispeel, areas not within the sphere of influence of the Iron Rhine, were included”*<sup>107</sup>.

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<sup>102</sup> See Memorial of Belgium, p. 11.

<sup>103</sup> See i.a. Annex B to the Counter-Memorial of the Netherlands.

<sup>104</sup> *Loc. cit.*, p. 47, para. 4.1.

<sup>105</sup> See above, para. 25.

<sup>106</sup> Ijzere Rijn, Concept ontwerp-tracébesluit., op. cit, p. 77-78, para. 4.7.

<sup>107</sup> Counter-Memorial of the Netherlands, p. 28, para. 2.13.1.3.

Track B as demarcated in the *Concept*, which is presently in intensive use by the Dutch railways, borders the Leudal, which is identified in the *Concept* as a Habitat area and a silence zone<sup>108</sup>. For the purpose of protecting the Leudal as a silence zone, the *Concept* requires the building of “*a noise abatement wall .. of 1 metre high*”, which at some places will be of “*3 to 4 metres by reason of habitations near to the track*”<sup>109</sup>. The same measure is mentioned for the purpose of mitigation noise in the context of the Leudal’s future status under the Habitats Directive. It is added that for “*the future Heythuysenweg [“weg” meaning “road”] .. noise will be mitigated by using noise-reducing asphalt*”<sup>110</sup>. Again, it is stated in the Netherlands’ Counter-Memorial that, when the Dutch Government on 18 February 2003 presented its definitive list of areas to be designated as Habitat Directive areas, “*the demarcation of the Leudal was changed*” so that “*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*”<sup>111</sup>.

As far as track C is concerned, the *Concept* makes no mention of specific nature or wildlife protection areas crossed over.

As to track D, the *Concept* mentions that most of the track, totalling 7,8 kilometres, runs across the Meinweg area<sup>112</sup>, which is a recreational area, which benefits from different nature protection statuses under national law, is subject to the Birds Directive and has further been designated for protection under the Habitats Directive<sup>113</sup>. In that area, it is required that a tunnel of approximately 6,5 kilometres be built<sup>114</sup>.

It thus appears that the EC protection statuses of areas crossed by the Iron Rhine have been changed over time by the Netherlands.

**54.** It may be added that criteria for classification under the Birds Directive are as follows: the A-class refers to species in danger of extinction; the B-class, to species vulnerable to

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<sup>108</sup> Ijzeren Rijn, *Concept ontwerp-tracébesluit.*, op. cit., p. 80, para. 5.1.

<sup>109</sup> *Concept*, op. cit., p. 95, para. 5.5.

<sup>110</sup> *Loc. cit.*, p. 96, para. 5.7.

<sup>111</sup> Counter-Memorial of the Netherlands, p. 27, para. 2.13.1.3.

<sup>112</sup> Ijzeren Rijn, *Concept ontwerp-tracébesluit.*, op. cit., p. 117, para. 7.1.

<sup>113</sup> *Loc. cit.*, p. 122, para. 7.7.

<sup>114</sup> *Loc. cit.*, p. 121, para. 7.4 (« *between km. 95,3 and km. 101,8*”).



specific change in their habitat; the C-class, to species considered rare, and the D-class, to other species<sup>115</sup>. Inside each category, sub-classifications are made. For the C-category, sub-classifications go from C1 to C7. Criterion C7, headed “*Other ornithological criteria*”, the official comment on which provides that “*application of this criterion is confined to designated SPAs, and to sites which have been selected as SPAs in the framework of a national inventory which has been used by government agencies as such (although not necessarily officially accepted). This criterion should be applied only to a minority of exceptional cases where it would be inadvisable to exclude the sites concerned from the IBA inventory*”<sup>116</sup>. C7 is, in other words, a “catch all” criterion which may be relied upon when the specific criteria C1 to C6 do not allow for a designation under the Birds Directive. This does not, of course, amount to saying that the criterion should not be relied upon. Belgium, in fact, has made far more designations under this exceptional C7 criterion than the Netherlands did. The Netherlands have only made two such designations, one of which is in the Meinweg<sup>117</sup>.

While the Weerter- and Budelerbergen is classified under criterion C6<sup>118</sup>, only very limited measures were required in the *Concept*. For the Meinweg classified under criterion C7 and which is also a recreational area<sup>119</sup>, it is required that a tunnel be built.

In this context, reference may further be made to the three other tunnels mentioned in the Netherlands’ Counter-Memorial<sup>120</sup>:

- The Netherlands first mentions the tunnel under the Pannerdensch Canal, in the context of its Betuwe-route project, which is “*to spare the Rijnstrangengebied and De Gelderse Poort .. protected under the Birds Directive*”<sup>121</sup>. Yet, apart from the fact that a craftwork was required at any rate to cross the canal, it should be observed that, according to a publication from the Dutch Ministry of Transports, the Dutch authorities originally envisaged to build a bridge, and that the tunnel was decided upon only following protests of the local population: “*.. adaptations to the VTB have*

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<sup>115</sup> Council Directive No 79/409/EEC of 2 April 1979 on conservation of wild birds, O.J. L 103, 25 April 1979, Article 4. Exhibit No 69.

<sup>116</sup> Important Birds Areas in Europe. Priority sites for conservation, Birds Conservation Series No. 8, p. 18-19. Add. Exhibit No 11.

<sup>117</sup> *Loc. cit.*, p. 505.

<sup>118</sup> *Loc. cit.*, p. 504-505.

<sup>119</sup> Railinfrabeheer, Trajectnota/MER, overzichtskaart Ijzeren Rijn. Structurele oplossing. Add. Exhibit No 12 and Counter-Memorial of the Netherlands, Exhibit N° 24.

<sup>120</sup> Counter-Memorial of the Netherlands, p. 50.

<sup>121</sup> *Ibid.*

been proposed. (...) This concerns the crossing of the Pannerdensch Canal, where inhabitants of the neighbourhood Boerenhoek reacted strongly against the construction of a bridge”<sup>122</sup>. This is sufficient to conclude that the tunnel was not a matter of scientific necessity from a perspective of nature protection. To this it may be added that, according to the 6<sup>th</sup> Betuweroute Progress Report, “there will be relocation of the habitat of the crested salamander, which is on the European list of endangered species. At the end of 1998 six pools were excavated about 200 meters south of the existing habitat. (...) In spring 1999 the larvae and eggs of the water-dwelling salamander can be transferred; the adults – which are reluctant to be caught – will then go along of their own accord. After this, their original habitat will be free for the preparatory soil survey and in 2000 the construction of the tunnel”<sup>123</sup>. The crested salamander is also one of the protected species in the Meinweg area<sup>124</sup>.

- The Netherlands’ Counter-Memorial further mentions the tunnel for the HST-line under the *Groene Hart van Holland*. Again, according to official publications of the Netherlands, this tunnel was built so as to minimize the ecological consequences “and to warrant the speed of traveling”<sup>125</sup>, which seems indeed appropriate for a high-speed line. This second aspect does not, of course, do away with the first, ecological one. Yet, it is sufficient again to deprive this tunnel of any relevance for the purpose of establishing the normality of tunnels for the exclusive purpose of nature protection.
- To end with, as concerns the tunnel under the Drontermeer, which is to be built for the Hanze Line, the internet site of the Dutch Ministry of Transport mentions that the tunnel is to be constructed “in the interests of nature and water recreation”<sup>126</sup>. In this context, it is relevant to recall that the Meinweg is equally a recreation zone as much as a nature protection area<sup>127</sup>.

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<sup>122</sup> Sporen naar een nationaal project: de Betuweroute, October 1998, p. 28. Authentic text: “Er zijn inmiddels de nodige aanpassingen ten opzichte van het VTB voorgesteld. .. Het gaat om de kruising met het Pannerdensch Kanaal, waar bewoners van de buurtschap Boerenhoek sterk gereageerd hebben tegen de aanleg van een brug”. Add. Exhibit No. 13.

<sup>123</sup> Betuweroute Progress Report 6. Add. Exhibit N° 14.

<sup>124</sup> *Ibid.*

<sup>125</sup> [http://www.hslzuid.nl/JSindex.html?noh/trace/Boortunnel\\_Groene\\_Hart\\_1138470.html](http://www.hslzuid.nl/JSindex.html?noh/trace/Boortunnel_Groene_Hart_1138470.html) Add. Exhibit No. 15

<sup>126</sup> <http://www.minvenw.nl/cend/dco/home/data/international/gb/eng0901.html> Add. Exhibit No. 16.

<sup>127</sup> Railinfrabeheer, Trajectnota/MER, overzichtskaart Ijzeren Rijn. Structurele oplossing. Add. Exhibit No 12.

55. Further discretion appears to exist when, as already indicated, it is stated in the *Concept* that, as to the integration of the infrastructure, the starting points flow from the legislation and regulations, ‘*or have been applied by reason of a careful integration of the Iron Rhine track, which is considered necessary, although no legal provisions exist that make such a measures obligatory*’<sup>128</sup>. This is notably the case as concerns noise levels declared applicable in so-called “silence zones”. The *Concept* states that “*for the Leudal and the Meinweg, a preferential value equivalent to 40 dB(A) at day, shall be applied in the faze of utilisation*”<sup>129</sup>. The graph in the *Concept* reproduced here above confirms that this standard has no legal basis<sup>130</sup>. As already indicated in Belgium’s Memorial<sup>131</sup>, in a meeting of the Flemish-Dutch administrative working group on 26 July 1999, the Dutch delegate confirmed that the noise level of 40 dBA was not a compulsory norm but an objective pursued<sup>132</sup>.

56. Also, the Netherlands argues in its Counter-Memorial that in view of its exclusive territorial sovereignty it is not necessary for environmental measures to be based on or justified by the Birds and Habitats Directives. In this context, the Netherlands specifies that it “*has itself decided on the basis of the Flora and Fauna Act .. and the ecological values which it protects, that the construction of a tunnel is necessary*” to protect the ecological values in the Meinweg “*because it considers it to be the only way to adequately protect those values*”<sup>133</sup>.

All of this confirms the position expressed in Belgium’s Memorial, that the classifying of the Meinweg and other areas, and measures related to it, were decided by the Netherlands by its own free will, on a discretionary basis, rather than pursuant to an international (EC) obligation in the sense that these measures would have been the only possible means for the Netherlands to comply with its international obligations in the field<sup>134</sup>.

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<sup>128</sup> IJzeren Rijn, Concept ontwerp-tracébesluit., *op. cit.*, p. 32, para. 3.4. Authentic text: “*(...) of zijn gehanteerd omwille van een noodzakelijk geachte zorgvuldige inpassing van het tracé van de IJzeren Rijn, hoewel er geen wettelijk voorschrift is dat het treffen van zodanige maatregelen verplicht stelt*”

<sup>129</sup> *Loc. cit.*, p. 37. Authentic text: “*Voor het Leudal en de Meinweg wordt in de gebruiksfase een voorkeurswaarde van een equivalent geluidsniveau van 40 dB(a) dagwaarde aangehouden*”.

<sup>130</sup> *Supra*, par. ...

<sup>131</sup> Memorial of Belgium, p. 41.

<sup>132</sup> Vlaams-Nederlandse ambtelijke werkgroep spoorvervoer, ontwerp-verslag van de vergadering dd. 26 juli 1999 (Flemish-Dutch Administration Working Group - Draft Report of the meeting of 12 October 1999), AWS (99) PV-03, p. 3. Exhibit No. 75. For approval, see the report of 12 October 1999, Exhibit No. 76.

<sup>133</sup> Counter-Memorial of the Netherlands, p. 49.

<sup>134</sup> Memorial of Belgium, para. 68.

Belgium stated in its Memorial that the measures relating to the Meinweg (as those relating to other Birds Directive or Habitats Directive areas) should not be treated differently in the context of the present dispute, than any other measure required by the Netherlands in the exercise of its jurisdiction. This point has now been confirmed by the just mentioned statement in the Netherlands' Counter-Memorial.

57. This discretion should be seen in combination with the cost of the measures required by the Netherlands.

As already indicated in Belgium's Memorial<sup>135</sup>, in 1999, the tunnel under the Meinweg was estimated by the Netherlands at 559 millions ECU (which equals EUR 559 millions) while other costs for reactivating the historic track in the Netherlands were estimated at 55 millions ECU (EUR 55 millions).

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

In June 2002, the Netherlands communicated a new cost estimation, for the so-called "A3+ variant" including a tunnel in the Meinweg, an embankment in the Weerter- and Budelerbergen reduced to single track, and a by-pass at Roermond. The Netherlands' estimation of the Meinweg tunnel was at EUR 151,7 millions ex VAT, its estimation of the embankment in the Weerter- en Budelerbergen at EUR 58,8 millions ex VAT<sup>136</sup>. Various other measures, including noise abatement devices, nature compensation, and 'minimum measures for nature and recreation' were required in addition thereto<sup>137</sup>. The A3+ variant on Dutch territory was estimated in total at EUR 514,3 millions. Costs related to functionality on Dutch territory, *not* including the rerouting at Roermond, were estimated at EUR 98,1 millions.

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<sup>135</sup> Memorial of Belgium, p. 81.

<sup>136</sup> V&W – DGG / Railinfrabeheer, "Opbouw investeringskosten modernisering Nederlands gedeelte IJzeren Rijn", 20 June 2002, p. 2, point 6. Exhibit No. 95

<sup>137</sup> *Ibid.*, points 4 and 5.

Now, after plenty of measures contemplated, including to the detriment of Belgium's transport interests, for the purpose of reducing the costs of the Meinweg tunnel, the updated cost estimation provided to Belgium in the course of the proceedings<sup>138</sup>, still speaks for itself. The Meinweg tunnel is estimated at EUR 144,3 million (at March 2001 price levels) on a total amount of EUR 380,2 millions without the Roermond diversion, and a total of 440,5 millions including the Roermond diversion<sup>139</sup>. As the diversion's costs could not possibly accrue to Belgium, the Meinweg tunnel thus accounts for thirty-eight percent (38%) of the total costs of reactivating the Iron Rhine on Dutch territory.

On top of that, the latest estimation further provides for compensatory conservation measures of a total amount of 19,4 millions without the Roermond diversion, and of EUR 32,9 millions with the Roermond diversion<sup>140</sup>.

The prohibitive nature of these costs is fully borne out by a comparison with costs related to the parts of the Iron Rhine on Belgian and German territory. In Germany, the costs of reactivation have been considered to be minor and Germany has therefore decided not to request financing by the European Community in the TEN programme<sup>141</sup>. In Belgium, the reactivation costs EUR 16,6 millions (at 2004 price levels) for 97 kilometres, which is EUR 0,174 millions per kilometre<sup>142</sup>. By contrast, in the Netherlands, costs of reactivation amount to EUR 412,5 millions (at 2004 price levels without the Roermond diversion) for 48 kilometres, which equals EUR 8,5 millions per kilometre.

**58.** The above suffices to conclude that, in designating several areas on the historical track of the Iron Rhine as nature protection and recreational zones, and in requiring the building of various craftworks as a condition for the reactivation of the Iron Rhine in these areas, the Netherlands has acted in the exercise of discretionary power and would violate the principles of good faith and reasonableness in making the long-term use of the Iron Rhine conditional upon the financing of these measures by Belgium.

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<sup>138</sup> Annex B to the Counter-Memorial of the Netherlands.

<sup>139</sup> *Loc. cit.*, p. 4.

<sup>140</sup> *Ibid.*

<sup>141</sup> Service Public Fédéral Mobilité et transports, note au président du Comité de direction. Objet: Réunion du 3 février avec Monsieur Van Maanen, Secrétaire general du Rijkswaterstaat aux Pays-Bas, pt 4. Add. Exhibit No 17.

<sup>142</sup> *Loc. cit.*, pt 5.

59. This is the more so, if one places the above mentioned facts in the context of Belgium's conventional rights on the Iron Rhine, as well as of the express reservations Belgium made with respect to future use when the international use of the line was interrupted, including as concerns Dutch plans to accord special wildlife protection statuses to areas crossed through by the railway<sup>143</sup>.

In this respect, the Netherlands argues in its Counter-Memorial that the Belgian steps towards reactivation *“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 .. was made to the Netherlands”*<sup>144</sup>. The Netherlands further argues that *“Belgium's conduct between November 1986 and June 1998 was .. unclear and ambivalent”*, that *“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”* and that Belgium would appear to believe that *“the Netherlands .. should have been more attentive to the way in which Belgium handled its right of transit than Belgium did itself”*<sup>145</sup>. Belgium disagrees.

First, the Netherlands is incorrect in stating that: *“objections to Dutch specific measures date from after June 1998”*. As indicated in Belgium's Memorial, the Belgian Minister of Transports De Croo wrote to the Dutch Minister of Transports on 23 February 1987, stating notably:

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

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

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<sup>143</sup> Memorial of Belgium, p. 38.

<sup>144</sup> Counter-Memorial of the Netherlands, p. 42, para. 3.3.4.1.

<sup>145</sup> Counter-Memorial of the Netherlands, p. 13-14, para. 2.7.2.

*In the above context, it is beyond doubt that Belgium will hold firm to its right of free transport through the Iron Rhine.”*<sup>146</sup>

As already mentioned in Belgium’s Memorial, this was followed, notably, by another express reservation in a meeting of the Commission for Transports, Sub-Commission for Railway Transports, of the Benelux Economic Union, on 11 December 1991, where the Belgian representative Mr. L. Stockman declared that the reactivation of the Iron Rhine should be safeguarded, in view of a future increase in traffic, and notwithstanding the fact that the investment plan STAR 21 of the Belgian railways NMBS/SNCB, did not at that time provide for any investments in this railway line<sup>147</sup>. A similar statement was made in a meeting of the Sub-Commission for Railway Transports on 20 April 1993<sup>148</sup>.

In view of this, there is no basis for the Netherlands’ argument that Belgian steps were “*aimed at securing the right of transit (which is not disputed by the Netherlands)*”. Minister De Croo made the very clear point that he would consider the creation of a natural park envisaged by the Netherlands in violation of the Iron Rhine’s conventional regime to the extent that it would limit the exploitation of the line. The Minister added in the very same letter that he considered it “*necessary that an in-depth cost-benefits analysis be made*” with respect to reactivating the Iron Rhine<sup>149</sup>. It cannot seriously be sustained that Minister De Croo reserved Belgium’s conventional rights irrespective of the financial aspects of reactivation.

It is equally irrelevant that Belgium announced that no investment was anticipated for the time being, and that it commissioned two feasibility studies “*which could equally well have led to the conclusion that no reactivation should take place*”. As to the absence of Belgian investments, it may be recalled that the historical track on Belgian territory is currently in use and in a good state, so that financing is in fact limited to normal repair and renovation measures. Further and foremost, what counts is that Belgium enjoys rights under Article XII of the Separation Treaty, and that the Netherlands had been informed of the possibility that Belgium would decide to reactivate the Iron Rhine, albeit in the long run. Being so informed,

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<sup>146</sup> Letter of the Belgian Minister of Transports to the Dutch Minister of Transports and Waterstaat, dated 23 February 1987. Exhibit No. 59.

<sup>147</sup> Benelux Economic Union, Commission for Transports, Sub-Commission “Railway Transports”, Brussels, 9.1.1992, VE/TF (91) PV 1, Report of the meeting held in Luxemburg on 11 December 1991, p. 4. Emphasis added. Exhibit No. 63.

<sup>148</sup> Benelux Economic Union, Commission for Transports, Sub-Commission “Railway Transports”, Brussels, 26 April 1993, VE/TF (93) PV 1, Report of the meeting held at The Hague on 20 April 1993, p. 3. Exhibit No. 64.

<sup>149</sup> *Ibid.*

the Netherlands took measures, which severely burdened this reactivation *if* it was to take place. What is more, the feasibility studies of course included a cost-benefits analysis, and the Netherlands could not possibly ignore that, in taking nature protection measures, which would require highly expensive craftworks if the Iron Rhine was to be reactivated, they were taking measures at the heart of the cost-benefit analysis.

This is not, therefore, a matter of Belgium expecting the Netherlands to be more attentive to the way in which Belgium handled its right of transit than Belgium did itself. Belgium officially envisaged the possibility of reactivating the Iron Rhine, and the Netherlands, having been so informed, did not adequately take account of Belgium's rights on the Iron Rhine nor of the *possibility* of reactivation in the use they made of their discretionary power.

In brief, therefore, the reservations made by Belgium as to its conventional rights on the Iron Rhine, and the Netherlands' neglecting these reservations, confirm that the Netherlands' requirement for a tunnel in the Meinweg and other protection devices, as well as for compensatory measures, combined with the further requirement that these be financed by Belgium, is contrary to the principles of good faith and of reasonableness. Pursuant to these principles, all costs and risks associated with these measures shall be borne by the Netherlands.

**60.** This conclusion is the more warranted in view of the fact that, as already indicated in Belgium's Memorial, reactivating the Iron Rhine is not only a matter of Belgium's conventional rights. It is also a matter of the interests of the Netherlands, as well as of general interest.

As far as the Netherlands' specific interests are concerned, it has been indicated that an important part of the Iron Rhine is currently in intensive use by the Dutch Railways and that further autonomous development is expected<sup>150</sup>. There is also a specific Dutch interest for the reactivation of the Iron Rhine currently envisaged. In April 1992, the Dutch Railways *Nederlandse Spoorwegen* published a '*Projectnota Betuweroute*', which was a first cost-benefit analysis of the Betuwe-route project linking the port of Rotterdam to Germany. In Part A of this study, under the heading "*The Betuwe Route in International Perspective – A*

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<sup>150</sup> *Supra*, para.45.



*Strategic Underpinning*”, the Iron Rhine was mentioned by the Dutch railways as an alternative to the Betuwe-route. It was stated that:

*“from a European perspective, the Iron Rhine .. probably is a meaningful alternative. Moreover, this would probably render other infrastructure investments in the Netherlands superfluous. This would however imply a (relative) weakening of the position of Rotterdam (..) What is more, there are no agreed upon plans in Belgium for this project”*<sup>151</sup>.

There is no need to underscore the unsoundness of the last point. The real point is indeed that, if the Iron Rhine would be reactivated whereas the Betuwe-route would *not* be built, this might weaken the position of the port of Rotterdam as compared to its main competitor, the port of Antwerp. However, this does not alter the Netherlands’ interest in the Iron Rhine if, as it is now the case, the Betuwe-route also comes into being. In a press release of 5 May 2000 by the Dutch Ministry of Transport, it was stated that: *“the Dutch government attaches great importance to this freight line, which could also be used for Dutch transport”*<sup>152</sup> and the *“Vijfde Nota Landsdeel Zuid”*, an official policy statement on the economic development of the southern part of the Netherlands, states under the heading *“Infrastructure”*:

*“For freight railway transports, a maximum use will be made of the Betuwe-route and of the Iron Rhine.”*<sup>153</sup>

**61.** In the same line of reasoning, reactivating the Iron Rhine is also a matter of taking positive action towards sustainable development through the modal shift, favored by international organizations including the European Community to meet objectives of the Climate Change Convention and its Kyoto Protocol. It is equally a priority project to implement the TENS Trans-European Network, in the general interest including that of the Netherlands.

In this respect, the Netherlands now argues in its Counter-Memorial that Belgium’s argument that reactivating the Iron Rhine should contribute to an environment-friendly modal shift from road to rail and inter-modal transports, is contradicted by a Dutch study of the year 2000

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<sup>151</sup> De Betuweroute in international perspectief- A Strategische onderbouwing, Nederlandse spoorwegen, p. 30. Add. Exhibit No. 18. Authentic text: *“De Ijzeren Rijn (...) is vanuit Europees perspectief gezien wellicht een zinnig alternatief. Bovendien worden andere infrastructuur investeringen in rail in Nederland wellicht overbodig. Het houdt echter wel in een (relative) verzwakking van de positie van Rotterdam”*.

<sup>152</sup> Add. Exhibit No. 19

<sup>153</sup> Vijfde Nota Landsdeel Zuid, November 2001, p. 2. Add. Exhibit No.20.

indicating that diesel trains are less environment-friendly than modern diesel trucks<sup>154</sup>. Belgium again disagrees.

While the Netherlands in its Counter-Memorial refers to a study performed by CE Delft in February 2000 with the title *“On track for environmental benefits”*<sup>155</sup>, it fails to mention a further study on the same subject performed by the same CE Delft, in 2003, and which provide for quite a different view on the issue.

This further study, which was ordered by a Dutch governmental agency, the National Institute for Public Health and Environment, was published in March 2003 under the title *“To shift or not to shift, that’s the question”*<sup>156</sup>. The summary of this study reads as follows:

- “The main conclusions of this specific comparison and for freight in general are:*
- *In 2010, long-distance road transport will outperform non-bulk intermodal water and diesel-powered rail transport with respect to air pollution. Differences in CO<sub>2</sub>-emissions between modes are relatively small in this segment. Which mode scores best depends on the specific case. Road transport generally scores several dozen per cent worse than rail and sea, but a little better than inland shipping.*
  - *The picture is more favourable for rail and water transport when bulk transport and/or the year 2000 are considered. Crucial factors for rail and water appear to be type of traction (electrical power is far ‘cleaner’ than diesel), environmental performance of diesel engines (currently lagging behind road transport), logistical efficiency and vessel size.*
  - *More generally, the differences in environmental performance between transport modes in homogeneous and competing freight markets are smaller than the differences between the average emissions of the modes in question. This is because the relatively cleanest sub-segment of road transport – long-distance transport with relatively new, well-filled and large trucks – is precisely the segment that competes with rail and water transport.*
  - *The CO<sub>2</sub>-emissions per tonne kilometre of freighter aircraft are extremely high compared with all other modes: from over ten times higher than the worst of all other non-bulk freight modes, up to sixty times higher than the best of these modes.”*<sup>157</sup>

The first sentence stating that *“in 2010, long-distance road transport will outperform non-bulk inter-modal water and diesel-powered rail transport with respect to air pollution”* might create the impression that road transport performs better than diesel-powered rail transport. However, this is contradicted by the further sentence that *“road transport generally scores*

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<sup>154</sup> Counter-Memorial of the Netherlands, p. 16-17, para. 2.9.2.

<sup>155</sup> *Ibid.* and Exhibit of the Netherlands No. 15.

<sup>156</sup> CE- DELFT, “To shift or not to shift, that’s the question”, Report, March 2003. Add. Exhibit No.21. For the Institute’s status, see Add. Exhibit No. 25.

<sup>157</sup> *Loc. cit.*, Add. Exhibit No.21, p. 3 and same text on p. 58.

*several dozen per cent worse than rail and sea, but a little better than inland shipping*". It thus appears that the first sentence does not reflect a comparison between trucks and diesel locomotives, but a comparison between trucks, on the one hand, and diesel locomotives and inland vessels *combined*, on the other. If, in that specific perspective, trucks perform better, it is inland shipping, which is the culprit.

This finds confirmation in Figure 1 of the study<sup>158</sup>, which is a graph of CO<sub>2</sub>, PM<sub>10</sub> and NO<sub>x</sub>-emissions per ton kilometer of inter-modal non-bulk freight transport by road, rail and water. It appears from this graph that diesel freight trains perform better than trucks for CO<sub>2</sub> emissions and No<sub>x</sub>-emissions, but worse than trucks for PM<sub>10</sub> emissions. By contrast, inland vessels perform significantly worse than trucks in all respects. The Iron Rhine is not about combining inland shipping and rail transports. It is mainly about combining rail and sea, and therefore, which the just-mentioned study by CE Delft considers less polluting than road transports.

Further, European studies point out that there is a strong relationship between specific fuel consumption factors for diesel trains and their gross vehicle weight<sup>159</sup>. Taking into account that on the Iron Rhine 2.070 tons of cargo may be transported by one locomotive from Belgium to Germany and that one may assume that it would lead to an average load factor of ca. 1.600 tons per train<sup>160</sup>, the emissions factor of the Iron Rhine will be significantly lower than the average and will consequently be even more environmentally friendly than the diesel freight trains average.

To this it may be added that this situation is expected further to improve to the advantage of railway transports, as the European Community is about to enact emission norms for diesel locomotives.

In sum, therefore, recent studies and facts contradict the Netherlands' position that diesel-power freight railway transport is more polluting than road transports. This is consonant with

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<sup>158</sup> *Loc. cit.*, p. 4.

<sup>159</sup> Development of a database system for the Calculation of indicators of environmental pressure caused by Transport, Transport and Environment Database system, TRENDS, Detailed Report 3: railway Module, by technical University of Denmark, October 2002. Add. Exhibit No. 22.

<sup>160</sup> Arcadis, *op. cit.*, p. 33. Exhibit No. S3.

the international instruments already mentioned, which promote the modal shift without making a distinction between electric and diesel-powered freight trains.

While combating air pollution is of general interest to humanity, it is also in the individual interest of the Netherlands, as the road transports between Antwerp and the Ruhr mainly passes over Dutch territory. More specifically, it appears from the map at page 5 of Belgium's Memorial that these transports may use:

- The E34-A67 leading from Antwerp to Duisburg, over Turnhout and Eindhoven. This highway has 75 kilometers of length on Dutch territory, and is the best alternative to the railway which equally leads to Duisburg<sup>161</sup>.
- The E314 (identified as E313) linking Antwerp to Aachen over Hasselt and Maasmechelen, which has 26 kilometers of length on Dutch territory<sup>162</sup>.

The E314 is used every 24 hours by approximately 2.769 Belgian and German trucks traveling between Antwerp and Germany. The E34 is used in the same conditions by 3.395 trucks<sup>163</sup>. As a consequence, the modal shift from road to rail over the Iron Rhine could significantly reduce air pollution on Dutch territory. This is the more so as air pollution is significantly increased by bottlenecks, which could equally be reduced by the modal shift. Also, road transport has severe social consequences in terms of traffic incidents, etc., which the modal shift should contribute to limit<sup>164</sup>. For example, the number of incidents is of 100 for freight transports by low-duty vehicles, of 6,8 for high-duty vehicles and of zero for trains<sup>165</sup>.

In brief, therefore, the general interests at stake in the reactivation of the Iron Rhine and more importantly, the Netherlands' individual interests in this regard, again confirm the unreasonableness of requiring that the measures presently discussed be financed by Belgium.

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<sup>161</sup> This is also why, contrary to what the Netherlands sustains, the Montzen line is not a real alternative to the Iron Rhine. See Arcadis, *op. cit.*, p. 33. *Exhibit* No. S3.

<sup>162</sup> Memorial of Belgium, p. 5. The map refers to the E-314 as the E-313.

<sup>163</sup> Add. Exhibit No. 31.

<sup>164</sup> Infrac, (Consulting Group for Policy Analysis and Implementation), External Costs of Transports (summary), p. 5-6. Add. Exhibit No.23.

<sup>165</sup> *Ibid.*

62. For completeness' sake, it may be added that the Netherlands' referring – in terms of abstract normality – to other instances where tunnels have been built to protect ecological features from the impacts of transport infrastructure<sup>166</sup>, does not affect Belgium's conclusion which is notably in terms of proportionality.

Reasonableness includes both normality and proportionality. In the *Gulf of St. Lawrence case* between Canada and France, already mentioned in the Memorial of Belgium<sup>167</sup>, the Arbitral Tribunal held that the exercise of regulatory power is always limited by the rule of reasonableness. It held then that “ *this rule orders the State to proportion its behaviour to the objective legally pursued by taking duly into account the rights and liberties granted to another State* ”<sup>168</sup>. A number of cases have indicated that the principle of reasonableness also calls for an equilibrium between the respective rights of the parties concerned<sup>169</sup>.

As the International Court of Justice underscores, what is reasonable depends on the circumstances of any given case<sup>170</sup>. As a consequence, what is normal in general or abstract terms, may still be disproportionate, and therefore unreasonable, in the circumstances. Central to these circumstances are, of course, Belgium's international rights under the Iron Rhine's conventional regime, yet, none of the other tunnels mentioned in the Netherlands' Counter-Memorial involves an international regime similar to that of the Iron Rhine.

Further, the Netherlands' argument in terms of normality is neither here nor there.

The point the Netherlands seeks to make could not possibly be that competent authorities *always* require tunnels to be built in wildlife protection areas or, for that matter, in Birds Directive or Habitats Directive sites. The Netherlands did not give an exhaustive overview of such craftworks in all the European Birds and Habitats Directive sites. The Iron Rhine crosses another area protected under national and EC law in the Weerter- and Budelerbergen, on

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<sup>166</sup> Counter-Memorial of the Netherlands, p. 50.

<sup>167</sup> Memorial of Belgium, para. 56.

<sup>168</sup> *Affaire concernant le filetage à l'intérieur du Golfe du St. Laurent entre le Canada et la France*, arbitral award of 17 July 1986, R.I.A.A., Vol. IXI, page 258, § 54. Authentic text : “ *Cette règle commande à l'Etat de proportionner son comportement au but légalement poursuivi en tenant compte des droits et des libertés concédés à un autre Etat* ». Exhibit No J 8.

<sup>169</sup> *Affaire concernant le filetage à l'intérieur du Golfe du St. Laurent entre le Canada et la France*, *op. cit.*, § 28 ; WTO, *United-states-import prohibition of certain shrimp and shrimp products*, Report of the Appellate Body, WT/DS58/AB/R of 12 October 1998, § 1.5.8. Exhibit No J 8 and 11. Memorial of Belgium, para. 57.

<sup>170</sup> I.C.J., Case of the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion of 20 December 1980, *Rec.* 80. p. 96.

Dutch territory, and no tunnel is presently required in these areas<sup>171</sup>. Therefore, the tunnel under the Meinweg is not normal in that such a craftwork would always be required in areas enjoying a similar protection status. Neither is it normal in the sense that such requirement would apply in the majority of such areas. The unsoundness of the Netherlands' argument is the more evident when one has a look at the three tunnels mentioned in the Netherlands' Counter-Memorial<sup>172</sup>, which have been analyzed here above.

The tunnel in the Meinweg area, then, would not be a matter of normality but of adequacy, *i.e.*, of its appropriateness to reach a specific result in view of the specific characteristics of the Meinweg. This is quite distinct from, if not the opposite of normality, and the other tunnels mentioned by the Netherlands do not in any way contribute to establish the adequacy or the appropriateness of the Meinweg tunnel.

Neither should the Netherlands seek to establish the appropriateness or adequacy of the Meinweg tunnel. On the assumption that granting a specific protection and recreational status to the Meinweg rendered the building of the tunnel necessary, then, the unreasonableness of the Netherlands' exercise of jurisdiction lies, in the circumstances mentioned above, in their granting such a status to the Meinweg combined with their requiring that the craftworks made necessary by this status be financed by Belgium.

**63.** In conclusion, requiring the building of a tunnel in the Meinweg area and various wildlife and nature protection measures including compensatory measures in the Meinweg and other areas passed through by the Iron Rhine, *and* requiring further that such measures be financed by Belgium would be incompatible with the principles of good faith and reasonableness. The principles of good faith and reasonableness require that those measures, if taken, be financed in whole by the Netherlands. This applies even on the assumption that the Netherlands has no other means to comply with its EC obligations than to take these measures.

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<sup>171</sup> Counter-Memorial of the Netherlands, p. 11, pt 2.6.4. and Annex A, p. 5; IJzeren Rijn, Concept ontwerp-tracébesluit, July 2003, ProRail, p. 77 Add. Exhibit No. 9.

<sup>172</sup> Counter-Memorial of the Netherlands, p. 50.

*(f) The formulation of Belgium's submission*

64. Belgium's submission under Question No. 1 (B) is, as already indicated, subsidiary in the sense that if the Tribunal decides that according to Belgium's submission under Question No. 3 (A), all costs relating to the present request of reactivation are to be borne by the Netherlands, there is no need for the Tribunal to examine Question No. 1 (B). However, if the Tribunal decides otherwise, Belgium's submission under Question No. 1 (B) calls, in view of the Tribunal's jurisdiction, for a brief explanation as regards European Community Law, and more specifically as concerns the so-called "Birds Directive"<sup>173</sup> and the so-called "Habitats Directive"<sup>174</sup>.

65. In its Memorial Belgium has shown that, under international law, when a State has several possibilities of complying with an international obligation, one of which allows the State to comply with another international obligation, while the other does not, the State shall be bound to take the possibility that allows for a harmonisation of both obligations<sup>175</sup>. In the application of this international obligation, Belgium concludes that if the Netherlands had, or has, several possibilities of complying with an international obligation, one of which allows it to comply with its obligation towards Belgium as concerns the Iron Rhine, while the others does not, the Netherlands shall take the possibility which makes it possible for it to comply with both obligations<sup>176</sup>.

Further, it flows from the same principle, as well as from the obligation to execute treaties in good faith and in a reasonable manner, and from the principle that a State may not weigh down in an unreasonable manner the performance of obligations which another State owes to it, already mentioned in Belgium's Memorial under Question No. 3<sup>177</sup>, that, to the extent that a State faces conflicting obligations, it must seek to reduce the effect of such a conflict, notably by adopting the course of conduct which is the least onerous for the other State concerned.

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<sup>173</sup> Council Directive No. 79/409/EEC of 2 April 1979 on conservation of wild birds, O.J. L103, 25 April 1979, p. 1. Exhibit No. 69.

<sup>174</sup> Council Directive No. 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, O.J.L206, 22 July 1992, p. 7ff. Exhibit No. 70.

<sup>175</sup> Memorial of Belgium, p. 76 ff., para. 58.

<sup>176</sup> *Loc. cit.*, p. 77 ff., spec. para. 59.

<sup>177</sup> *Loc. cit.*, p. 109-110, para. 98.

These are both submissions as to principles of international law, on a matter not governed by European Community law.

**66.** Consequently, in order for the Netherlands to be able to invoke their European obligations flowing from the Birds and/or Habitats Directives so as to oblige Belgium to pay the measures pertaining to them, the Netherlands must (in the hypothesis here discussed) have had no other means to execute their European Community obligations, having regard to Belgium's rights concerning the Iron Rhine.

The Netherlands has not argued in its Memorial that such was the case, and Belgium has plenty of reasons to believe that it was not.

In order to throw some light on the scope of Belgium's submission under Question No. 1 B, drafted with a view to avoiding, even if this is purely hypothetical, to infringe the exclusive competence of the European Community, Belgium will summarize, hereafter, the reasons for which the Netherlands had the possibility of harmonising their European Community obligations with their obligations towards Belgium relating to the Iron Rhine.

**67.** *First*, in order for the Netherlands to be able to invoke their European obligations against Belgium, they should first of all have had no other choice than the one of designating the zones crossed by the Iron Rhine as protected be it as bird zone or as habitat zone.

Yet, under Community law this issue is governed by a directive, which means that the Member States are bound as to the result to be achieved, but are left free as to the form and methods to achieve the said objectives. Article 249 § 3 of the EC Treaty specifies in this regard that : *"A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods"*<sup>178</sup>.

As indicated in the Counter-Memorial of the Netherlands, the latter made use in February 2003 of this freedom to choose form and methods, for two sites crossed by the Iron Rhine. It is stated in the Netherlands' Memorial that: *"the plans to designate the Weerter and Budelberger area as a Habitat Directive has now been changed. The Weerter and*

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<sup>178</sup> Add. Exhibit N° 24.



*Budelberger area was no longer included on the basis of February 2003 list of areas to be registered for special protection under the Habitats directive. Instead the Weerterbos and the Ringselveen and Kruispel, 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*<sup>179</sup>. The same decision was taken by the Netherlands for the Leudal area crossing the Iron Rhine<sup>180</sup>, but not for the Meinweg area.

This leaves the question of the European status of Weerter- and Budelerbergen, which was designated as a protected areas under the Birds directive, open. However, in the light of the Netherlands' obligation of the Netherlands to harmonize its international obligations, the issue is not to know whether because of the protected status of a zone, environmental measures are required, but to know if at the moment of the designation, the Netherlands had no other possibility to perform its European Community obligation than to designate as a protected area a zone crossed by the Iron Rhine. This is determining for to the question of the costs, not only for the Meinweg, but also for Weerter and Budelerbergen. It appears from the last estimation of the costs provided by the Netherlands during the present procedure, that they intend to impose upon Belgium the burden of the costs relating to the compensatory measures in Budel-Weert and Weert-Roermond, places in the Leudal and Weerter and Budelberger areas that are crossed by the Iron Rhine<sup>181</sup>. Yet, if the Netherlands had the possibility, at the time of designation, to opt for other areas than those passed through by the Iron Rhine, the costs of measures presently required should be borne by the Netherlands.

**68.** *Second*, even if assuming that one of the areas crossed by the Iron Rhine were of such an ecological importance that the Netherlands did not have other possibilities to execute their European Community obligations than to designate that area to the exclusion of any other area (*quod non*), it would still be necessary, in order for the Netherlands to be able to invoke Community law, that they would not have had the possibility, at the time of their decision to designate the concerned area as protected, to apply the case law of the Court of Justice of the European Communities in the case C-96/98 *Commission v. France* relating to the Poitevin Marsh.

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<sup>179</sup> Counter Memorial of the Netherlands, p. 28, para. 2.13.1.3.

<sup>180</sup> *Loc. cit.*, p. 27, para. 2.13.1.3.

<sup>181</sup> Annex B. of the Counter-Memorial of the Netherlands, p.

The European Court of Justice, in this judgement, declared it permissible for a State to subtract a strip of land from a protected area, in this case a strip for the construction of a planned motorway<sup>182</sup>, and rejected the complaint of the Commission alleging that the subtraction of the strip in the protected area would not only result in a reduction of its surface area, but would also disturb birds in the region by reasons of works and the isolation of the remainder of the area, cut off by the motorway<sup>183</sup>.

In its Counter-Memorial, the Netherlands argues in this regard that: ‘*Member States are bound under Article 6(2) of the Habitats Directive to make a permanent assessment of the existing condition of a special protection area as a consequence not only within the special protection area but also of external influences*’<sup>184</sup>. However, if a Member State must make an assessment not only for projects inside a protected area under Community law, but also for projects to be performed outside the protected zone, and has, in principle, the obligation to take adequate measures if the project significantly disturbs the species protected, the result of the impact assessment for a project inside a protected area could be different from those of a project outside this protected area.

In the present case, it may be recalled that scientific studies have found that, taking existing levels of nuisance as a starting point, and on the basis of a noise limit determined in the absence of legal norms, train traffic on the Iron Rhine in relevant areas would have *detrimental* effects for the environment. In combination with the fragmentation of the protected site caused by the railway, a *significant* effect could be expected<sup>185</sup>. Yet, if a strip of land is subtracted, no fragmentation occurs, there are two distinct zones.

**69.** To end with, on the assumption that the Netherlands had or have no other possibility than designating an area crossed by the Iron Rhine as protected area under Community law, or on the assumption that, the Netherlands having subtracted the strip, independent impact assessment demonstrates that the Iron Rhine project will entail significant damage for the species or the area protected under Community law, the Netherlands will still have, according to their obligation under international law to harmonize their obligations and to execute their

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<sup>182</sup> Memorial of Belgium, p. 85-86, para. 70-71 and Exhibit No J16.

<sup>183</sup> *Ibidem*.

<sup>184</sup> Counter-Memorial of the Netherlands, p. 51-52, para. 3.3.5.6 C.

<sup>185</sup> Memorial of Belgium, p. 82-83, para. 67.

obligation in good faith and in a reasonable manner, the obligation to limit the cost to be borne by Belgium.

Consequently, the amount to be paid by Belgium in such an hypothesis will be limited to the measure which, while enabling the Netherlands to execute their European Community obligations, will appear to be the least expensive. If for instance, in order to allow protected species to cross the line, the Netherlands has the choice between the building of a tunnel or the creation of fauna passage, the costs to be borne by Belgium are limited to the least costly measure, in our example, the costs of the fauna passage.

**70.** In view of this, Belgium will hereafter also request the Tribunal, first, to decide on the two principles mentioned above, to wit that:

- When a State has several possibilities of complying with an international obligation, one of which allows the State to comply with another international obligation, while the other does not, the State shall be bound to take the possibility that allows for a harmonisation of both obligations. Therefore, if the Netherlands had, or has, several possibilities of complying with an international obligation, one of which allows it to comply with its obligation towards Belgium as concerns the Iron Rhine, while the others does not, the Netherlands shall take the possibility which makes it possible for it to comply with both obligations.
- To the extent that a State faces conflicting obligations, and that one party to a treaty owes obligations to perform investments or payments, the amount of which depends of the behaviour of the other party, the latter must seek to reduce the effect of such a conflict, notably by adopting the course of conduct which is the least onerous for the other State concerned. Therefore, if the Netherlands had, or has, conflicting obligations as concerns the reactivation of the Iron Rhine, it shall reduce the effect of such a conflict by taking measures, which are the least onerous for Belgium.

Second, Belgium will make a subsidiary submission for the hypothesis that the Tribunal esteems that it is outside its jurisdiction to decide that the Netherlands may not require the building of a tunnel in the Meinweg area, etc., unless if the costs and financial risks associated with these measures are borne in whole by the Netherlands. According to this subsidiary

submission, the Netherlands may not make such a requirements, *safe to the extent that the Netherlands had no other possibilities to meet its obligations under EC law, and to the extent that the measures required are the least costly allowing the Netherlands to meet its EC obligations.*

#### **D. Conclusions**

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

- The Netherlands shall, if Belgium decides to construct a *‘new road or canal’* on Belgian territory, as described in Article XII of the Separation Treaty of 19 April 1839, allow for the prolongation of this road or canal on Dutch territory *“according to the same plan”* as on Belgian territory, without the Netherlands’ agreement as to the plan.
- If, in the hypothesis just-mentioned, the Netherlands takes the option to perform the works by itself, such works can only be at the expense of Belgium if they have been agreed upon by both Governments. Conversely, if the Netherlands chooses to have these works performed by Belgium, no agreement is necessary as to the works. In the latter hypothesis, Belgium has the right to benefit from a treatment not less favourable than the one accorded to other operators in this respect.
- Without prejudice to European law, the Netherlands have the obligation to allow for the use of the Iron Rhine route provided that it *“only serve[s] as commercial communication”* and to take all the measures necessary to permit this use.
- The height and mode of collection of toll rights shall be determined by a common agreement between the Netherlands and Belgium. Such agreement must be taken in conformity with international law and European law.

- No re-routings deviating from the historical route shall be decided upon by the Netherlands without the agreement of Belgium.
- The Netherlands is under the obligation to exercise its legislative and decision-making power in good faith and in a reasonable manner, and so as not to deprive Belgium's rights to have the Iron Rhine prolonged on Dutch territory according to the same plan as on Belgian territory to use the historical route of the Iron Rhine, of their substance, and so as not to render the exercise of these rights unreasonably difficult. The Netherlands shall take all necessary measures so as to allow for such a use.
- If the Netherlands has several possibilities of complying with an international obligation, one of which allows it to comply with its obligation towards Belgium as concerns the Iron Rhine, while the others does or did not, the Netherlands are under the obligation to take the possibility which makes it possible for it to comply with both obligations.
- If the Netherlands has conflicting obligations as concerns the reactivation of the Iron Rhine, it shall reduce the effect of such a conflict by taking measures, which are the least onerous for Belgium.
- Without prejudice to Belgium's right to an immediate use of the historical route of the Iron Rhine at full capacity and on a long-term basis, when Belgium makes a demand for provisional driving on the historical route of the Iron Rhine, by 15 trains per natural day (both directions summed up), including at limited speed in evening hours and at night, for a period of 5 years at least, the Netherlands shall immediately accept that demand, and immediately take all decisions necessary to effectively allow for such driving within the shortest time materially feasible, which shall not be more than one month.
- The Netherlands shall take all necessary measures so as to prevent any interruption of the use of the Iron Rhine between "temporary driving" and "long-term" driving, and to effectively allow for the latter within the shortest time feasible.

- Without prejudice to Belgium's position under Question No. 3, the measures foreseen in ProRail's "*IJzeren Rijn Concept Ontwerp-tracébesluit versie 1.4*" of July 2003 with respect to parts A2, B and C of the track as identified therein, may not be required as a prior condition to Belgium's exercise of its rights on the Iron Rhine, unless such measures do not render the exercise of Belgium's right to the use of the Iron Rhine unreasonably difficult and:
  - o In primary order, unless the costs and financial risks associated with these measures shall be borne in whole by the Netherlands.
  - o In subsidiary order, unless the costs and financial risks associated with such measures be borne by the Netherlands at the least in proportion to its forecasted use of the railway line by 2020, which is at least 77,889 percent, and by Belgium in a proportion of maximum 22,111 percent, under the further proviso that the Netherlands may not charge to Belgium costs which are charged on the users of the line in accordance with Article XII of the 1839 Separation Treaty and European Community rules, nor charge to Belgium costs unrelated to the reactivation, which includes, but is not limited to, costs for the abatement of road traffic noise.
- Without prejudice to Belgium's position under Question No. 3, the measures foreseen in ProRail's "*IJzeren Rijn Concept Ontwerp-tracébesluit versie 1.4*" of July 2003 with respect to noise abatement which are not necessary so as to reach the maximal exemption limit of 70 dB(A) or 73dB(A) provided by law, unless if such measures do not render the exercise of Belgium's right to the use of the Iron Rhine unreasonably difficult, and unless if the costs and financial risks associated with such abatement measures are borne in whole by the Netherlands.
- Without prejudice to Question No. 3, the Netherlands may not require the building of a tunnel in the Meinweg area nor other wildlife and nature protection measures including compensatory measures in areas passed through by the historical route of the Iron Rhine, unless if such requirement does not render the exercise of Belgium's right to the use of the Iron Rhine unreasonably difficult and if the costs and financial risks associated with these measures are borne in whole by the Netherlands.

- In subsidiary order to the last submission, if the Tribunal esteems that the former point is outside its jurisdiction, the Netherlands may not require the building of a tunnel in the Meinweg area nor other wildlife and nature protection measures including compensatory measures in areas passed through by the historical route of the Iron Rhine, unless if such requirement does not render the exercise of Belgium's right to the use of the Iron Rhine unreasonably difficult and if the costs and financial risks associated with these measures are borne in whole by the Netherlands, safe to the extent that the Netherlands had no other possibilities to meet its obligations under EC law, and to the extent that the measures required are the least costly for allowing the Netherlands to meet its EC obligations.

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## QUESTION NO. 2

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

71. In its Memorial, Belgium took the position that Question No. 2 as a whole relates to the hypothesis in its first phrase, that Belgium performs or commissions work with a view to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, it being understood, however, that other aspects which would be covered by Question No. 2 in a broader interpretation, are governed by the rules and principles identified in answer to Question No. 1.

In its Counter-Memorial, the Netherlands does not take a stand as to Belgium's interpretation of the scope of Question No. 2. However, it would appear from its submissions on Question No. 2 (Counter-Memorial, p. 65) that the Netherlands interprets the Question in a broader way than Belgium did, as covering both the hypothesis that Belgium constructs or commissions work on Dutch territory, and the hypothesis that Belgium does not construct or commission work on Dutch territory.

In answering the Netherlands' Counter-Memorial, Belgium is bound for the sake of convenience to widen the scope of Question No. 2 as compared to the position it took in its Memorial. As already indicated in the Memorial, there is no objection thereto, as it is beyond doubt, and it is uncontested, that the issues which remained outside the scope of Question No. 2 in the narrow interpretation, are within the scope of the Arbitral Agreement as a whole and would, in Belgium's view, be governed by the rules and principles set out in answer to Question No. 1.



72. In answer to Question No. 2, Belgium has shown in its Memorial first, that it does not have the right to perform or commission work with a view to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, unless (1) Belgium exercises its right under Article XII of the Separation Treaty to have a new road or canal in Belgium prolonged on Dutch territory according to the same plan as in Belgium, and (2) the Netherlands takes the option to have the works performed by Belgium. The current request of Belgium to reactivate the Iron Rhine is not a request to have a new road or canal in Belgium prolonged according to the same plan on Dutch territory. Therefore, the Netherlands does not have the option provided by Article XII of the 1839 Separation Treaty to require that Belgium perform work on Dutch territory.

Second, it has been shown in Belgium's Memorial that, as the Iron Rhine does not benefit from a regime of extra-territoriality, Belgium does not in principle have the right to establish plans, specifications and procedures for such works "*according to Belgian law and the decision-making power based thereon*". However, Dutch regulatory powers are limited by Article XII of the Iron Rhine Treaty which gives Belgium the right to have a new road or canal on Belgian territory prolonged on Dutch territory "*according to the same plan*", and by the limits to Dutch jurisdiction outlined under Question No. 1. Again, as the present request of Belgium to reactivate the Iron Rhine is not a request to have a '*road or canal*' prolonged on Dutch territory according to the same plan as on Belgian territory, the first of these limitations is not presently at stake. The same is true of Belgium's right to benefit, as concerns the freedom to establish plans, specifications and procedures, from a treatment not less favourable than that accorded to other operators in the Netherlands. However, Dutch regulatory powers to establish plans, specifications and procedures with a view to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory are limited by the principles of international law identified under Question No. 1.

Third, Belgium has argued in its Memorial that the distinction between the requirements, standards, plans, specifications and procedures related to, on the one hand, "*the functionality of the railway infrastructure in itself*", and, on the other hand, "*the land use planning and the integration of the rail infrastructure*", is, as such, irrelevant as concerns the extent to which Belgium has the right to perform or commission work on Dutch territory. It is equally irrelevant, as such, with respect to the extent to which Belgium has the right to establish plans,

specifications and procedures related to it according to Belgian law and the decision-making power based thereon.

Fourth, the right of the Netherlands to *“unilaterally impose the building of underground and above-ground tunnels, as well as the proposed associated construction and safety standards”*, is limited by the abovementioned rights of Belgium in case it requests that the new road or canal on Belgian territory be prolonged on Dutch territory according to the same plan, which is not the case at present. It is further limited by the principles identified under Question No. 1. Diversions and the like may not unilaterally be imposed by the Netherlands, in that they require the consent of Belgium.

73. In its Counter-Memorial, the Netherlands submits, first, that Belgium does not have the right to perform or commission work on Dutch territory and to establish plans, specifications and procedures related to it according to Belgian law and the decision-making power based thereon. More specifically, and although this is not reflected in its submissions, the Netherlands argues 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”* (Counter-Memorial, p. 54, § 3.3.6.1). It may be noted that this proposition comprises two aspects:

- First, the Netherlands esteems that the *“plan”* should be agreed upon between Belgium and the Netherlands.
- Second, the Netherlands esteems that in using the words *“d’après le même plan”* it was the intention of the Parties to the Separation Treaty merely to permit *“physical cross-border use”*.

Then, the Netherlands argues that Belgium is requesting more than a restoration of the 1991 situation, and that *“the Belgian request for reactivation of the Iron Rhine, which is described in the jointly formulated statement of questions to the Arbitral Tribunal as the right to the use, the restoration, the adaptation and the modernization of the Iron Rhine amounts, in the opinion of the Netherlands, to a request within the meaning of Article XII [of the Separation Treaty] for the extension of a railway on Belgian territory on Dutch territory. This railway is new to the extent that considerable adaptation and modernization is necessary in many ways*

*in order to achieve the desired use*” (Counter-Memorial of the Netherlands, at p. 43, pars. 3.3.4.4. and 3.3.4.5).

The Netherlands further submits that no distinction may be drawn according to whether the functionality of the railway is involved or, instead, the land use planning and the integration of the rail infrastructure. It finally submits that the Netherlands may unilaterally impose the building of tunnels, etc., as long as these are not contrary to applicable rules of international law (Counter-Memorial, p. 65).

**74.** In addressing the Netherlands’ position, Belgium will hereinafter follow, as in its Memorial, the structure guided by the three sub-questions of Question No. 2. Belgium’s submissions with respect to this Question will then be formulated in a fourth section.

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

**75.** The meaning of the terms “*d’après le même plan*” in Article XII of the 1839 Separation Treaty is at the heart of this sub-section of Question No. 2. Belgium will therefore answer the Netherlands’ position that the “*plan*” should be agreed upon between Belgium and the Netherlands (1) and further, that the words “*d’après le même plan*” merely ensure “*physical cross-border use*” (2), before determining in more detail the scope of Belgium’s right to have the Iron Rhine prolonged on Dutch territory according to the same plan as on Belgian territory (3).

Then, Belgium will show that there is no legal basis for the Netherlands’ assertion that the reactivation as presently envisaged amounts to “*a new road*” to the extent that considerable adaptation and modernization are necessary (4) and will draw the conclusion from this section (5).

1. The “plan” within the meaning of Article XII of the 1839 Separation Treaty shall be determined by Belgium without the agreement of the Netherlands

76. As already indicated, the Netherlands argues that the plan of the new route, which Belgium would seek to have prolonged on Dutch territory, should be agreed upon by the Netherlands (Counter-Memorial, p. 54, § 3.3.6.1). This is, however, contradicted by the very terms of Article XII of the 1839 Separation Treaty.

77. Article XII of the Separation Treaty of 1839, in its relevant part, reads as follows:

*“Dans le cas où il aurait été construit en Belgique une nouvelle route (...), alors il serait loisible à la Belgique de demander à la Hollande, qui ne s’y refuserait pas dans cette supposition, que la dite route ou le dit canal fussent prolongés d’après le même plan, entièrement aux frais et dépens de la Belgique (...). Cette route (...) qui ne pourraient servir que de communication commerciale, seraient construits au choix de la Hollande, soit par des ingénieurs et ouvriers que la Belgique obtiendrait l’autorisation d’employer à cet effet dans le canton de Sittard, soit par des ouvriers et ingénieurs que la Hollande fournirait, et qui exécuteraient, aux frais de la Belgique les travaux convenus (...).”<sup>1</sup>*

This article expressly grants Belgium the right to have a new road in Belgium prolonged on Dutch territory “according to the same plan” as on Belgian territory. Having the road in Belgium prolonged in the Netherlands “according to the same plan” is therefore a right of Belgium under Article XII.

What is more, the words “same plan” refer to the plans of the new road to be constructed in Belgium. The plan on Belgian territory is to be decided upon by Belgium only. As a consequence, the Netherlands, who have no right to decide on the plan of the road on Belgian territory, neither have the right to decide on the plan on Dutch territory.

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<sup>1</sup> Exhibit No 3. Unofficial translation: “In case a new road would have been constructed in Belgium (...) then Belgium would be at liberty to ask the Netherlands, which in this hypothesis will not refuse it, that the said road or canal be prolonged according to the same plan, entirely at the expenses of Belgium (...). This road (...) which could only serve as commercial communication will be built, at the choice of Netherlands, either by engineers and workers, which Belgium would obtain the authorisation to employ, or by engineers and workers the Netherlands would supply, and which would execute, at the expense of Belgium, the agreed works (...)”.

This is further confirmed by the fact that pursuant to Article XII, the road or canal would be built, at the choice of the Netherlands, “*either by engineers or workers, which Belgium would obtain the authorisation to employ, or by engineers and workers which the Netherlands would supply, and which would execute, at the expense of Belgium, the agreed works ...*”<sup>2</sup>. An agreement between Belgium and the Netherlands was required in one specific hypothesis, which is where the Netherlands would chose to perform the works by itself at the expense of Belgium. In that case, and in that case only, agreement was required, and that agreement related to the “*works*” to be performed and not to the “*plan*” of the route. The fact that Article XII expressly provides for an agreement to be reached in that specific hypothesis confirms that no agreement was required with respect to the “*plan*”.

Also, Belgium’s right to determine the plan on Dutch territory through its decision on the plan of the route in Belgium, is a logical corollary of the fact that pursuant to Article XII of the Treaty, the costs of building the new route in the Netherlands were to be borne by Belgium.

The Netherlands’ contrary view is the more surprising if one recalls that it was the Netherlands’ position in the 19<sup>th</sup> Century<sup>3</sup>, and the Netherlands recalls this position in its Counter-Memorial<sup>4</sup>, that, for Belgium to exercise its right under Article XII, a new road should first *have been* constructed on Belgian territory, with the consequence that a route *in project* on Belgian territory would not trigger the exercise of Belgium’s right under Article XII. Yet, it would be manifestly absurd and unreasonable to allow the Netherlands, first, to require that Belgium construct a road on its territory, and then, to hold that the route cannot be prolonged in the Netherlands according to the same plan, with the consequence that Belgium would have to dismantle the route already built in Belgium.

**78.** It follows from the above that the Netherlands’ view according to which the plan of the route on Dutch territory should be agreed upon between Belgium and the Netherlands, is contradicted by very wording of Article XII. That is the end of the matter. As the International Court of Justice has ruled several times, “*interpretation must be based above all upon the text*

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<sup>2</sup> Exhibit No 3.

<sup>3</sup> Memorial of Belgium, p. 10, par. 10 and Exhibit No 13.

<sup>4</sup> Counter-Memorial of the Netherlands, p. 6, footnote 8.

of the treaty”<sup>5</sup>. In the case concerning the *Arbitral Award of 31 July 1989*, the International Court of Justice ruled that:

*“the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then, only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words. (Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950, p. 8).”<sup>6</sup>*

**79.** The Netherlands, however, seek to rely on provisions in two other treaties, notably Article 3 of the Convention between Belgium and the Netherlands *«pour la jonction de quatre chemins de fer»*, signed at the Hague on 9 November 1867<sup>7</sup> and Article 5 of the Iron Rhine Treaty of 1873<sup>8</sup>. It is unclear whether the Netherlands invokes these treaties in support of its argument that the plan should be agreed upon, or for the purpose of defining the meaning of the word plan, or both. For completeness’ sake, Belgium will show that neither of these treaties allows for the conclusion that the plan should be agreed upon.

As far as the 1867 Convention is concerned, it stems from its title that this treaty shall apply to the *“junction of four railway tracks”*. These tracks are identified in Article 1 of the Convention which reads as follows:

*“Les deux gouvernements déclarent qu’ils ont chacun sur son territoire accordé la concession de chemin de fer :*

*1°) de Neuzen par Sluiskil, Axel et Hulst à Saint Nicolas ;*

*2°) de Sluiskil par Sas de Gand à Zelzaete à Gand ;*

*3°) de Eindhoven par Valkensnaard, Achel et le camp de Berverloo à Hasselt ;*

*4°) de Tilbourg par Barle-Nassau à Turnhout. ”<sup>9</sup>*

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<sup>5</sup> I.C.J., *Case concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment of 3 February 1994, I.C.J. Reports, 1994, p. 21-22, §41; *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment of 13 December 1999, ICJ Reports, 1999, §20; *LaGrand Case (Germany/United States of America)*, Judgment of 27 June 2001, ICJ Reports, 2001, §§ 99 ff. Add. Exhibit No J 15, J 16 and J 17.

<sup>6</sup> I.C.J., *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau/Senegal)*, Judgment of 12 November 1991, ICJ Reports, 1991, p. 70, § 48. Add. Exhibit No J 18.

<sup>7</sup> Agreement regulating the connection of railway lines within the territory of both Kingdoms, The Hague, November 9, 1867, Staatsblad, 1868, Exhibit of the Netherlands No 5 and Add. Exhibit No 26.

<sup>8</sup> Exhibit No 16.

<sup>9</sup> Agreement regulating the connection of railway lines within the territory of both Kingdoms, op. cit., Exhibit of the Netherlands No 5 and Add. Exhibit No 26.

The Iron Rhine is not part of the four railway tracks to which the 1867 Convention applies.

Further, there is no reason to pursue an analogical application of the 1867 Convention to the Iron Rhine. The rights under Article XII of the Separation Treaty are *sui generis*. They were accorded to Belgium in the specific context of territorial concessions and more precisely, as a partial compensation for the Netherlands' gaining sovereignty over districts of the province of Limburg which had never been in their possession before and the consequent loss for Belgium to have a short and uninterrupted communication with Germany on its own territory. In their response to the memorial of the Plenipotentiaries of the Netherlands, dated 14 December 1831, the London Conference stipulated under Articles XI and XII of the draft (emphasis added):

*“Ad. XI and XII. It has already been mentioned that the articles 1 and 2 of the annex A of the protocol of 27 January 1831, assigned to Belgium in Limburg, on the left bank and the right bank of the Maas, the districts which Holland did not possess in 1790. These districts gave Belgium contact points with Prussia, between Maestricht and Mook, and consequently the means to establish with Germany the shortest communications she might have. When for the reasons developed here above, the Conference offered Holland, all the districts which did not belong to it in 1790, on the right bank of the Maas, they would have thought committing an injustice if, by detaching these territories from Belgium, they would have deprived it of all the means of communication and of trade which they offered it with Germany. Hence, the possibility which was let to it to build a commercial road at its expense, in the canton of Sittard, which had never belonged to Holland so far, possibility nevertheless subject to several conditions, and to the full and entire sovereignty of his Majesty the King of the Netherlands. Hence also, the maintenance of the current road in that canton, and the moderate toll rights which must be levied there. Hence, eventually, the use of the road which crosses Maestricht, at the same conditions.”<sup>10</sup>*

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<sup>10</sup> Mémoire de la Conférence destiné à servir de réponse à celui de messieurs les plénipotentiaires des Pays-Bas, en date du 14 décembre 1831 (Memorial of the Conference meant to serve as a reply to the Memorial of Messrs the plenipotentiaries of the Netherlands, dated 14 December 1831), *Recueil de pièces diplomatiques relatives aux affaires de la Hollande et de la Belgique, en 1831 et 1832*, La Haye, A.D. Schinkel, 1832, t. II, p. 189-190. Add. Exhibit No 27. Authentic text (emphasis added): "Ad. XI et XII. Il a déjà été observé que les articles 1 et 2 de l'annexe A du protocole du 27 janvier 1831, assignaient à la Belgique dans le Limbourg, sur la rive gauche et la rive droite de la Meuse, les districts que la Hollande ne possédait pas en 1790. Ces districts donnaient à la Belgique des points de contact avec la Prusse, entre Maastricht et Mook, et par conséquent les moyens d'établir avec l'Allemagne les communications les plus courtes qu'elle puisse avoir. Quand la Conférence, par les motifs développés plus haut, offrit à la Hollande, tous les districts qui ne lui appartenaient pas en 1790, sur la rive droite de la Meuse, elle aurait cru commettre une injustice si, en détachant ces territoires de la Belgique, elle l'avait privée de tous les moyens de communication et de commerce qu'ils lui présentaient avec l'Allemagne. De là, la faculté qui lui a été laissée de construire 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. De là aussi, l'entretien de la route actuelle dans ce canton, et les droits de barrière modérés qui doivent y être perçus. De là enfin, l'usage de la route qui traverse Maestricht, aux mêmes conditions."

The Netherlands itself recognizes this specificity of the Iron Rhine as compared to other railway lines. Having invoked the 1867 Convention for the junction of four railway lines including the line between Tilburg and Turnhout, the Netherlands adds in its Counter-Memorial that “*After all, the building of the Turnhout-Tilbourg railway was not based on a right of transit, as contained in the Separation Treaty*”<sup>11</sup>.

In conclusion, therefore, the 1867 Convention referred to by the Netherlands in no way allows for the conclusion that the “plan” of the Iron Rhine on Dutch territory should be agreed upon between Belgium and the Netherlands.

**80.** The second treaty relied upon by the Netherlands as a basis for its thesis that the plan of the Iron Rhine must be agreed upon, is Article 5 of the Iron Rhine Treaty of 1873, which provides 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 1,000.”*<sup>12</sup>

The Netherlands in its Counter-Memorial would appear to rely on this provision to demonstrate that Article 3 of the abovementioned 1867 Convention applies to the Iron Rhine, and possibly also, as an autonomous basis for its thesis that the plans should be agreed upon<sup>13</sup>. Both these arguments are unfounded.

Article 5 of the Iron Rhine Treaty does not refer back to the 1867 Convention for the junction of four railways, but to general conditions imposed upon the *Compagnie du Nord de la Belgique* in 1864 for the Dutch section of the line Tilburg-Turnhout. The general conditions of 1864 could not possibly refer to the 1867 Convention, which was adopted later on. As a consequence, Article 5 of the 1873 Iron Rhine Treaty does not allow for the conclusion that Article 3 of the 1867 Convention applies to the Iron Rhine.

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<sup>11</sup> Counter-Memorial of the Netherlands, p. 55, par. 3.3.6.4.

<sup>12</sup> Exhibit No 16. Unofficial translation: “*The specifications of 4 November 1864, imposed to the Company of Northern Belgium for the Dutch section of the track from Turnhout to Tilburg, will be, in its general clauses, applied to the Dutch part of the railway from Antwerp to Gladbach; however, it will be allowed to raise the maximum of the slopes to 10 by 1,000.*”

<sup>13</sup> Counter-Memorial of the Netherlands, p. 54, par. 3.3.6.2.



Nor could it be argued that Article 5 of the Iron Rhine Treaty, either, reflects the fact that Belgium had no right to decide on the plan in accordance with Article XII of the Separation Treaty, or, put an end to that right if it existed before. Apart from the fact that the Netherlands do not demonstrate that Article 5 of the Iron Rhine Treaty or the 1864 “*cahier des charges*” relate to the “*plan*” of the Iron Rhine within the meaning of Article XII, both these interpretations are unfounded:

- The fact that the plan is, *arguendo*, laid down in the treaty does not allow for the conclusion that the plan was subject to the Netherlands’ agreement in application of previously existing international law or, in other words, that the treaty is declaratory of a right of the Netherlands under Article XII of the Separation Treaty. While the treaty provision might be grounded in the exercise by the Netherlands of a *right* to agree or to object, it might as well give expression to an *obligation* of the Netherlands to allow for construction on the basis of Belgium’s plan. In the latter case, the treaty would do nothing but giving expression to Belgium’s right under Article XII of the Separation Treaty to determine the plan without the Netherlands’ consent.
- Neither could Article 5 of the Iron Rhine Treaty be interpreted as putting an end to Belgium’s right to determine the plan or, in other words, as being constitutive of the Netherlands right to agree or to object to the plan. For that argument to succeed, it should be demonstrated that in negotiating the plan of the route to be built in 1873, if ever they did, the parties created a new obligation on behalf of Belgium to seek the Netherlands’ agreement *for each and any further exercise* of its right under Article XII. It should be demonstrated that Belgium, not only renounced the *exercise* of its right under Article XII in the specific case at hand, but that it renounced *its right* under Article XII. Such a renunciation cannot be presumed to exist, and there is no indication whatsoever, in the Iron Rhine Treaty or otherwise, as to its existence.

**81.** In conclusion, it follows from the above that, pursuant to the Iron Rhine’s conventional regime, Belgium is entitled to have a new road prolonged on Dutch territory according to the same plan as on Belgian territory if so request, without the Netherlands’ agreement as to the plan.

This, of course, does not amount to saying that an agreement as to the plan is not useful from a practical viewpoint, nor that Belgium should not inform and consult the Netherlands in application of the reasonableness and good faith.

If the Netherlands takes the option to perform the works by itself, such works can only be at the expense of Belgium if they have been agreed upon by both Governments. Conversely, if the Netherlands choose to have these works performed by Belgium, no agreement is necessary.

Dutch jurisdiction with respect to the establishment of plans, specifications and procedures is limited accordingly.

In this respect it should be noted that, contrary to what the Netherlands alleges, Belgium does not, in formulating this position, take *‘the word ‘plan’ to mean ‘plans, specifications and procedures’, without providing any explanation’*<sup>14</sup>. When Belgium stated in its Memorial<sup>15</sup>, as it still does at present, that *“article 12 of the Separation Treaty of 1839 grants Belgium the right, if it so requests, to have a ‘route’ or ‘canal’ on Belgian territory prolonged on Dutch territory according to the same plan”* and that *“Dutch jurisdiction as concerns the establishment of plans, specifications and procedures is limited accordingly”*, Belgium does not define the word ‘plan’, but draws the legal consequences of its right under Article XII so as to answer Question No. 2 of the Arbitral Agreement, which requests the Tribunal to decide to what extent Belgium has the right *“to establish plans, specifications and procedures related to it according to Belgian law ...”*.

2. The terms “according to the same plan” in Article XII of the 1839 Separation Treaty are not limited to ensuring to Belgium the physical trans-border use of the railway

**82.** The Netherlands second argument with respect to Question No. 2 of the Arbitral Agreement is that the terms *“according to the same plan”* in Article XII of the 1839

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<sup>14</sup> Counter-Memorial of the Netherlands, at p. 55, par. 3.3.6.5.

<sup>15</sup> Memorial of Belgium, p. 95-96, para. 80.

Separation Treaty merely ensure “*physical trans-border use*” of the railway. This interpretation is equally unfounded.

**83.** As already indicated, “*interpretation must be based above all upon the text of the Treaty*”<sup>16</sup> and “*if the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter*”<sup>17</sup>. Also, if, notwithstanding the apparent meaning of a term, it is open to a party to invoke a special meaning, the burden of proof of the special meaning will rest on that party<sup>18</sup>.

**84.** The word “*plan*” was defined, neither in the Separation Treaty nor in any subsequent agreement on the Iron Rhine. As a consequence, one must start from the ordinary meaning of the term. The ordinary meaning of the term ‘plan’ for a construction is a ‘*drawing showing the proportion and relation of parts*’<sup>19</sup> of the construction considered and more precisely the “*representation of a construction in horizontal projection*”<sup>20</sup> or “*a sketch representing on a flat surface the different parts of an edifice or of an appliance: drawing the plan of a house*”<sup>21</sup>. As for a house, the plan of a route thus consists of a representation of the construction with all its characteristics. For a railway track this includes for instance: the number of tracks, the length and the wide of the tracks, the gradients, the bends, etc.

**85.** In proposing a different interpretation of the word «*plan*», the Netherlands refers, neither to the ordinary meaning of the term in its context and taking into account the object and purpose of the treaty, nor to supplementary means of interpretation such as preparatory

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<sup>16</sup> I.C.J., *Case concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment of 3 February 1994, *I.C.J. Report*, 1994, pp. 21-22, §41; *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment of 13 December 1999, *ICJ Reports*, 1999, §20. Add. Exhibit No J15 and No J 16.

<sup>17</sup> I.C.J., *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment of 12 November 1991, *ICJ Reports*, 1991, § 48. Add. Exhibit No J 18.

<sup>18</sup> I.C.J., *Western Sahara*, Advisory opinion of 16 October 1975, *ICJ Reports* 1975, § 75; A. Aust, *Modern Treaty Law and Practice*, Cambridge, Cambridge University Press, 2000, p. 196; R. Jennings and A. Watts, (ed.), *Oppenheim’s International Law*, United Kingdom, Longman, 9th Edition, 1992, Vol. I (Parts 2 to 4), p. 1272. Add. Exhibit No J 19, W 7 and W 5.

<sup>19</sup> *The New International Webster’s Comprehensive Dictionary of the English Language*, Trident Press International, 1998 ed., p. 965. Adde: *Black’s Law Dictionary. Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern with Guide to Pronunciation*, St. Paul (Minn.), West Publishing Co., 6<sup>th</sup> Edition, 1990, p. 1150. Add. Exhibit No W 8 and W 9.

<sup>20</sup> P. Robert, *Dictionnaire alphabétique et analogique de la langue française*, Paris, P. Dupont, t. V, p. 240. Add. Exhibit No W 10. Authentic text: “représentation d’une construction en projection horizontale”.

<sup>21</sup> Cl. Augé (sous la direction de), *Nouveau Larousse Illustré. Dictionnaire universel encyclopédique*, Paris, Larousse, 1905, t. VI, p. 922. Add. Exhibit No W 11. Authentic text: “un tracé représentant sur une surface plane les différentes parties d’un édifice ou d’un appareil: tracer le plan d’une maison”.

works or other treaties using the same expression. The Netherlands limits itself to relying on one single legal writings and on three treaties, which are irrelevant to the issue.

Further, the legal essay quoted by the Netherlands<sup>22</sup> does not confirm the Dutch thesis, quite to the contrary. When Mr. Van Hooydonk writes that «...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 narrower or shallower canal »<sup>23</sup>, the author does not state that the Netherlands was entitled to digging a narrower canal than the one located in Belgium, provided that such canal allowed for the physical passage of the ships. His point is that the prolongation of the canal on Dutch territory must have the same breadth as the one in Belgium, which is in full conformity with the ordinary meaning of the word “*plan*”.

Likewise, if in considering the ordinary meaning to be given to the terms of a treaty, it could be appropriate to compare them with the terms generally or commonly used in other treaties<sup>24</sup>, in the present case none of the three treaties referred to by the Netherlands (Article 3 of the 1867 Convention between Belgium and the Netherlands on the junction of four railways, and two treaties entered into respectively in 1851 and 1867 between the Netherlands and Germany for the junction of certain railways) contain the word “*plan*”. In these circumstances, these treaties do not provide any useful information as regards the definition of this term.

What is more, in the restrictive interpretation suggested by the Netherlands, the terms “*according to the same plan*” would be devoid of any useful effect, as they would add nothing to the terms “*that the said road or canal be prolonged*” in Article XII of the Separation Treaty.

**86.** In conclusion, therefore, the Netherlands’ position that the words “*according to the same plan*” in Article XII of the 1839 Separation Treaty merely grant Belgium a right to “*physical trans-border crossing*” of Dutch territory – thus allowing the Netherlands, for example, to provide for a narrower route on its territory – is deprived of any legal basis. The

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<sup>22</sup> Counter-Memorial of the Netherlands, p. 52-53, § 3.3.6.1 and Exhibit of the Netherlands No 12.

<sup>23</sup> *Ibidem*.

<sup>24</sup> I.C.J., *Case concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment of 3 February 1994, I.C.J. Reports, 1994, p. 26-27, §§ 53-54; *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment of 13 December 1999, ICJ Reports, 1999, §§ 20 ff. Add. Exhibit No J15 and No J 16.

word “*plan*” must be interpreted on the basis of its ordinary meaning, according to which it refers to all the technical characteristics and particularities of the railway.

However, as explained hereafter, this does not amount to saying that Belgium is completely free in determining the characteristics and particularities of the railway on Dutch territory.

3. The scope of Belgium’s right to have the Iron Rhine prolonged on Dutch territory according to the same plan as on Belgian territory

**87.** The meaning of the word “*plan*” as identified above, and the fact that the prolongation of the Iron Rhine on Dutch territory is not subject to the Netherlands’ agreement as to the plan, does not amount to saying that Belgium enjoys an unfettered discretion in determining all the characteristics and particularities of the railway on Dutch territory. Such a conclusion is barred by two further elements in Article XII of the Separation Treaty.

**88.** First, the word “*plan*” is part of the broader phrase “*according to the same plan*”, which means: according to the same plan as on Belgian territory. The Separation Treaty, therefore, does not provide that Belgium shall be entitled freely to determine the plans of the railway on Dutch territory. It provides that Belgium shall be entitled to have a route on Belgian territory “*prolonged on Dutch territory*” according to “*the same plan*” as on Belgian territory. Belgium’s right to decide on the plan in the Netherlands is dependent upon the plans in Belgium and, more precisely, on whether the plans in Belgium determine the plans in the Netherlands.

There is an important limit inherent in this formulation of Article XII. The choice for a 1,435 metres gauge for the railway in Belgium does not determine the plan for a fish-and-chips shop at Maastricht railway station in the Netherlands. Neither does the plan on Belgian territory determine the need for crossings on Dutch territory. Conversely, for example, the choice for a double track in Belgium does determine the plan for a double track on Dutch territory, and so does the choice for an electrified railway in Belgium determine the plan for an electrified railway in the Netherlands.

**89.** Second, Belgium's right to determine the plan of the railway on Dutch territory does not subtract the drafting of the plan from Dutch jurisdiction within the limits set out under Question No. 1 here above. Belgium has the right to determine the plan on Dutch territory subject to applicable Dutch legislation which is in conformity with international law, much in a comparable way as an architect draws the plan of a house in accordance with applicable legislation.

4. Belgium's present request for reactivation does not amount to a request for a "new road" within the meaning of Article XII of the Separation Treaty

**90.** The Netherlands' argument, that the present demand for reactivation amounts to a "new road", is again based on an interpretation by the Netherlands of Article XII of the Separation Treaty, which is inconsistent with the wording of Article XII in more than one respect.

**91.** First, Article XII provides that "*In case a new road would have been constructed in Belgium .. then Belgium would be at liberty to ask the Netherlands, which in this hypothesis will not refuse it, that the said road or canal be prolonged ..*"<sup>25</sup>. In this hypothesis, Article XII grants Belgium the right of having this road prolonged 'according to the same plan' and obliges it to bear the expenses of this construction.

Presently, Belgium has not built a new road on its territory whose prolongation into Dutch territory it would request, nor does Belgium consider building such a new road. Moreover, the Netherlands does not maintain that Belgium would have built a new road on its own territory or considers building such a new road. As a consequence, the conditions laid down to trigger the right of Belgium to have the road prolonged according to the same plan and its obligation to pay are not met in the present circumstances.

**92.** Secondly, even when supposing, that Article XII of the Separation Treaty could in an extensive interpretation mean that Belgium has the right to have a road prolonged according to the same plan and the obligation to pay the costs incurred in the Netherlands when the

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<sup>25</sup> Exhibit No. 3. Authentic text: "*Dans le cas où il aurait été construit en Belgique une nouvelle route (...), 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 (...)*".

prolongation of a newly built road *in Belgium* is not at issue, it would still suppose, at least, that a new road would be built *in the Netherlands*.

However, given the ordinary meaning of the term “new”, which “*may denote novelty, or the condition of being previously unknown or of recent or fresh origin*”<sup>26</sup> or which means “*1. Of recent origin: having existed only a short time (...). 2. a) Not yet old: fresh: recent. b) Used for the first time: not second hand (...)*”<sup>27</sup>, the historical route of the Iron Rhine, which Belgium requests to be reactivated, is not a new road to be built on Dutch territory.

Although some technical interventions have made the infrastructure unfit for immediate use in some limited areas, the railway known as the “Iron Rhine” still exists and could be made operative subject to limited technical interventions. This is confirmed by the Network Statement for 2003 of the Dutch infrastructure manager which, as already indicated under Question No. 1, provides that it “*covers the infrastructure of the national railways in the Netherlands managed by Railinfrabeheer and open to public transports. This network is ... indicated on the general map in annex I*”<sup>28</sup>, which, in turn, clearly includes the historical route of the Iron Rhine in its entirety, from the Belgian-Dutch border to the Dutch-German border. This document is published on the basis of the directives concerning the liberalisation of the railways, obliging EC Member States to open the access to the ir transport networks and obliging the infrastructure manager to publish a network statement which “*shall set out the nature of the infrastructure which is available to railways undertakings*”<sup>29</sup> in order to “*ensure transparency and non discriminatory access to rail infrastructure for all railway undertakings*”<sup>30</sup>. If in the present circumstances, the construction of a new road in Holland was at issue, one does not see on what grounds the Iron Rhine would be mentioned in the Network Statement.

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<sup>26</sup> *Black's Law Dictionary. Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern with Guide to Pronunciation*, St. Paul (Minn.), West Publishing Co., 6<sup>th</sup> Edition, 1990, p. 1042. Add. Exhibit No W 9.

<sup>27</sup> *The Illustrated Heritage Dictionary and Information Book*, Boston, Houghton Mifflin Company, 1977. Add. Exhibit No W12.

<sup>28</sup> Railinfrabeheer, Railed and Railverkeersleiding, Netverklaring 2003, p. 7, para. 2.1. Exhibit No. 52.

<sup>29</sup> Art. 3, par. 2. of the Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, O.J. L75/29, 15 March 2001, p. 75. Exhibit No 53.

<sup>30</sup> *Ibidem*, Preamble.

In these circumstances, what is at stake is "*restoration*", "*adaptation*" or "*modernization*", all of which can only apply to an *existing* road<sup>31</sup>.

**93.** This is presumably why the Netherlands' position is not quite that Belgium is presently requesting a "*new*" road properly so called. Rather, the Netherlands argues that the Belgian request for reactivation "*amounts .. to a request within the meaning of Article XII*" because "*this railway is new to the extent that considerable adaptation and modernization is necessary in many ways in order to achieve the desired use*"<sup>32</sup>.

The Netherlands however does not explain why this interpretation of the term «*new*» should be withheld. Neither does the Netherlands demonstrate that Belgium has requested adaptations and modernizations, which could and should be qualified in law as "*considerable*".

Belgium submits that this position of the Netherlands is unfounded. More specifically, Belgium submits that if, in an extensive interpretation, works to be carried out to an existing road could, as the Netherlands claim, justify its description as "*new*" within the meaning of Article XII, the relevant criterion would not be that of the "*considerable*" nature of these works, which has no legal basis, but that of whether the modernisations and adaptations exceed what is required to ensure the good state of the track and its ability to favour trade between Belgium and Germany through the Iron Rhine. This is further developed under Question No 3, more directly concerned with this aspect of the question.

## 5. Conclusion

**94.** It has been shown above that, if Belgium requests a new route to be built on Dutch territory as the prolongation of a new route on Belgian territory, with the consequence that Belgium shall bear the costs of constructing this road in the Netherlands, Belgium shall be

<sup>31</sup> To this it might be added that, according to the Netherlands, "*the Belgian request for reactivation .. 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 modernization of the Iron Rhine*" (Netherlands' Memorial at p. 43, par. 3.3.4.5; see also p. 42, par. 3.3.4.1 describing Belgium's demand in the same terms). If this wording of the Arbitral Agreement described Belgium's present request for reactivation, this would confirm that such request is not for the "construction" of a "new", i.e. presently inexistent road. However, Belgium considers that the Arbitral Agreement includes, but is not limited to the reactivation as it is presently envisaged. The Tribunal is also requested to rule, on an abstract level, on Belgium's and The Netherlands rights and obligations with respect to the Iron Rhine.

<sup>32</sup> Counter-Memorial of the Netherlands at p. 43, par. 3.3.4.5.



entitled to have this route in the Netherlands built according to the same plan as on Belgian territory, which means that the plan on Dutch territory shall be determined by Belgium in function of the plan on Belgian territory, without the agreement of the Netherlands but in conformity with Dutch legislation within the limits set out under Question No. 1. On this assumption, the Netherlands pursuant to Article XII of the Separation Treaty has the option to perform the works by itself at the expense of Belgium, or to have the works performed by Belgium. If the Netherlands chooses to perform the works by itself, an agreement on the works to be performed by the workers and the engineers is required, but this agreement only relates to the ‘works’ to be performed in application of the plan and not to the ‘plan’ in itself.

Belgium’s current request to reactivate the Iron Rhine is not a request to have a new road built in Belgium prolonged on Dutch territory. Therefore, Belgium’s right to have a new road in Belgium prolonged according to the same plan on Dutch territory, is not at stake, and the Netherlands does not have the option provided by Article XII of the 1839 Separation Treaty to require that Belgium performs work on Dutch territory.

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

95. The distinction envisaged in the Arbitral Agreement is between the requirements, standards, plans, specifications and procedures related to, on the one hand, “*the functionality of the railway infrastructure in itself*”, and, on the other hand, “*the land use planning and the integration of the rail infrastructure*”. In its Memorial<sup>33</sup> Belgium has argued that this distinction is, as such, irrelevant as regards the extent to which Belgium has the right to perform or commission work on Dutch territory. It is equally irrelevant, as such, as regards the extent to which Belgium has the right to establish plans, specifications and procedures related to it according to Belgian law and the decision-making power based thereon.

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<sup>33</sup> Memorial of Belgium, p. 96-97, par. 81.

The Netherlands submits under Question No. 2, that “*no distinction may be drawn*” between the functionality of the railway and land use planning and integration of the infrastructure<sup>34</sup>. This submission goes beyond the question of whether Belgium has the right to perform or commission work in the Netherlands and whether it has the right to establish plans, etc. In that respect at least, the Netherlands holds a more radical view than Belgium.

Indeed, as already mentioned under Question No. 1, Dutch jurisdiction must be exercised in a reasonable manner, and what is reasonable depends on the specific circumstances of any given case. It cannot be ruled out that the said distinction would be a relevant one in that context, notably when it comes to determining the reasonableness of Dutch requirements for the building of infrastructure to be paid for by Belgium. Indeed, the distinction between “*functionality*” and “*land use planning and integration*” is not unrelated to issues of causation and to the question of who benefits from a given measure<sup>35</sup>.

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

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

**96.** It has been shown under section I above that:

- If Belgium requests that a new road built on Belgian territory be prolonged on Dutch territory, with the consequence that Belgium shall bear the costs of constructing this road in the Netherlands, Belgium shall be entitled to have this route in the Netherlands built according to the same plan as on Belgian territory, but in conformity with Dutch legislation within the limits set out under Question No. 1.

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<sup>34</sup> Counter-Memorial of the Netherlands, p. 65.

<sup>35</sup> See also Memorial of Belgium, p. 97, par. 81

- If, in that hypothesis, the Netherlands takes the option of performing the works by itself, an agreement on the works to be performed is required, but this agreement only relates to the ‘works’ to be performed in application of the plan and not to the ‘plan’ in itself.
- This hypothesis is not at stake as concerns the reactivation presently envisaged.

**97.** In application of these principles, the Netherlands may, if Belgium requests that a new road on Belgian territory be prolonged according to the same plan on Dutch territory, impose the building of underground and above-ground tunnels, as well as the associated safety standards according to their legislation within the limits set out under Question No. 1 and, if the Netherlands chooses to perform the works itself, under the further condition that these works are agreed upon between Belgium and the Netherlands.

Therefore, according to the limits set under Question No. 1, if the Netherlands can impose the building of underground and above-ground tunnels this decision must be taken in accordance with the ‘*pacta sunt servanda*’ rule, as reflected in Article 26 of the Vienna Convention on the Law of Treaties, which obliges the parties to a treaty to execute it in good faith and in a reasonable manner<sup>36</sup>. The Netherlands may not impose the construction of underground and above-ground tunnels at the expense of Belgium, if such a requirement is contrary to the principle of good faith and of reasonableness, the latter including notably the standards of normality and of proportionality, as well of non-arbitrariness and non-discrimination. There could hardly be any doubt, for example, that the Netherlands could not require the building of a tunnel paved with gold at the expense of Belgium. The relevance of the principles of good faith and reasonableness in the context here discussed is therefore beyond doubt.

It has been shown under Question No. 1 above, that this hypothesis indeed materialises with respect to measures required by the Netherlands in the context of the reactivation as it is presently envisaged.

Further, the Netherlands is under the obligation to inform and to consult in good faith with Belgium as concerns such requirements, in accordance with its obligation to cooperate and the principle of reasonableness and good faith.

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<sup>36</sup> I.C.J., *Case concerning the Gabcikovo-Nagymaros (Hungary/Slovakia)*, Judgement of 25 September 1997, ICJ Reports, 1997, § 142. Add. Exhibit No J1.

98. The ‘pacta sunt servanda’ principle, and its corollaries the principles of good faith and of reasonableness, also applies in the hypothesis that the Netherlands wishes to build underground and above-ground tunnels on the Iron Rhine on Dutch territory at its own expenses, and not at the expenses of Belgium. As a consequence, the Netherlands may not, notably, decide to build a tunnel at their expenses, if such a construction infringes in an unreasonable manner on the right to passage of Belgium conferred to it by Article XII of the Separation Treaty.

99. Diversions “and the like” may not unilaterally be imposed by the Netherlands. They require a new agreement between Belgium and the Netherlands. Suffice it to recall that article XII of the Separation Treaty of 1839 determined the localisation of the “route or canal” contemplated, in that it would pass through the district of Sittard<sup>37</sup>. When Belgium requested a modification of the route originally contemplated (and the Netherlands, in return, requested that the route would pass through the Dutch commune of Weert), a new treaty was considered necessary for that purpose, which led to the Iron Rhine Treaty of 1873<sup>38</sup>. The historical route of the Iron Rhine cannot, therefore, be modified without Belgium’s consent.

This position appears to be shared by the Netherlands, even if this is not fully reflected in its submissions. In its Counter-Memorial, the Netherlands, having recalled that the original Iron Rhine track was modified by Article IV of the Iron Rhine Treaty of 1873, states that it “realises that its proposal for a diversion represents a deviation of the route described in Article 4 (of the Iron Rhine Treaty of 1873)” and that “it seems to the Netherlands that Belgium can hardly object on substantive grounds to the Dutch proposal during future negotiations”<sup>39</sup>, thus implying that such diversions may not be imposed unilaterally. Further, the Netherlands’ submission is that “the Netherlands may unilaterally impose the building of .. tunnels, diversions and the like (...) as long as these are not contrary to international law”<sup>40</sup>.

Belgium submits that applicable international law precludes the unilateral imposition of diversions by the Netherlands.

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<sup>37</sup> Exhibit No. 3.

<sup>38</sup> See Memorial of Belgium, par. 10, 13 and 83, as well as Exhibit No. 16.

<sup>39</sup> Counter-Memorial of the Netherlands, p. 59, para. 3.3.10.1.

<sup>40</sup> *Loc. cit.*, p. 65.

#### **D. Conclusions**

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

- Belgium does not have the right to perform or commission work with a view to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, unless Belgium requests to have a new road on Belgian territory prolonged according to the same plan on Dutch territory, and the Netherlands takes the option of having that prolongation according to the new plan built by Belgium in accordance with Article XII of the Separation Treaty of 19 April 1839.
- Belgium has the right according to Article XII of the 1839 Separation Treaty to have a new road on Belgian territory prolonged on Dutch territory according to the same plan. This is subject to Dutch jurisdiction within the limits set forth under Question No. 1. The right of Belgium to establish plans, specifications and procedures for such works according to Belgian law and the decision-making power based thereon, is limited accordingly.
- The “plan” within the meaning of Article XII of the 1839 Separation Treaty shall be determined by Belgium without the agreement of the Netherlands, however, Belgium shall inform and consult the Netherlands in accordance with the principles of good faith and reasonableness, all of this without prejudice to European Community law.
- The word “plan” in Article XII of the Separation Treaty must be interpreted on the basis of its ordinary meaning, according to which it refers to all the technical characteristics and particularities of the railway.
- Belgium’s present request for reactivation does not amount to a request for a *‘new road or canal’* within the meaning of Article XII of the Separation Treaty with the consequence that the Netherlands does not have the option provided by Article 12 of the 1839 Separation Treaty to require that Belgium performs work on Dutch territory.

- Works on Dutch territory performed by the Netherlands shall be agreed upon between Belgium and the Netherlands. As the present request of Belgium to reactivate the Iron Rhine is not a request to have the Iron Rhine prolonged on Dutch territory according to the same plan as on Belgian territory, such limitation is not at stake at present. The same is true of Belgium's right to benefit from a treatment not less favourable than that accorded to other operators with respect to other railways on Dutch territory, as concerns the freedom to establish plans, specifications and procedures.

Further, Dutch regulatory powers to establish plans, specifications and procedures remains limited by the principles set out under Question No. 1.

- The distinction between the requirements, standards, plans, specifications and procedures related to, on the one hand, the functionality of the railway infrastructure in itself, and, on the other hand, the land use planning and the integration of the rail infrastructure, is irrelevant, as such, as concerns the extent to which Belgium has the right to perform or commission work on Dutch territory. The distinction is also irrelevant, as such, with respect to the extent to which Belgium has the right to establish plans, specifications and procedures related to it according to Belgian law and the decision-making power based thereon. This does not affect the relevance of the said distinction for determining the reasonableness of Dutch requirements for the building of infrastructure to be paid for by Belgium.
- The right of the Netherlands to unilaterally require the building of underground and above-ground tunnels, as well as the proposed associated construction and safety standards, is limited by the abovementioned rights of Belgium in case it requests that the railway on Belgian territory be prolonged on Dutch territory according to the same plan, which is not the case at present. It is further limited by the obligations of the Netherlands to cooperate with Belgium as well as by the principles stated under Question No. 1.

Therefore, the Netherlands may not impose the construction of underground and above-ground tunnels at the expense of Belgium, if such a requirement is contrary to the principles set under Question No. 1, which notably include notably the standards

of normality and of proportionality, as well of non-arbitrariness and non-discrimination.

The Netherlands is under the obligation to inform and to consult in good faith with Belgium as concerns such requirements, in accordance with its obligation to cooperate and the principle of reasonableness and good faith.

*The 'pacta sunt servanda' principle, and its corollaries the principles of good faith and of reasonableness, also applies in the hypothesis that the Netherlands wishes to build underground and above-ground tunnels on the Iron Rhine on Dutch territory at its own expenses, and not at the expenses of Belgium. As a consequence, the Netherlands may not, notably, decide to build a tunnel at their expenses, if such a construction infringes in an unreasonable manner on the right to passage of Belgium conferred to it by Article XII of the Separation Treaty.*

- Diversions and the like may not unilaterally be imposed by the Netherlands, in that they require the consent of Belgium.

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### QUESTION NO. 3

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

**101.** In answer to Question No. 3, Belgium has shown in its Memorial, first, that the Netherlands shall bear all the costs and risks associated with the use, the restoration, adaptation and modernization of the historical route of the Iron Rhine on Dutch territory in application of the Iron Rhine's conventional regime. Second, Belgium has shown that all cost items and financial risks which are caused by a violation by the Netherlands of their international obligations towards Belgium shall be borne by the Netherlands.

In response to Belgium's submission regarding the Iron Rhine's conventional regime, the Netherlands argue, first, that Belgium is under the obligation to bear said costs and risks as a corollary to its right of transit under Article XII of the Separation Treaty. Second, the Netherlands argues that Belgium's present request for reactivation amounts to a "new" road to the extent that considerable adaptation and modernization is required.

Further, in reply to Belgium's submission regarding the law of State responsibility, the Netherlands argue that the principle of good faith and the principle of reasonableness do not constitute independent sources of international law and that they may only apply in the interpretation and application of obligations under international law in a given case. As already indicated under Question No. 1, the Netherlands also contest the fact that they have acted in violation of the principles of good faith and reasonableness.

In addressing the Netherlands' position, Belgium will, hereinafter, follow the structure of its argument in its Memorial.



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

**102.** The Netherlands in its Counter-Memorial argues that Belgium shall bear the cost items and the financial risks associated with the use, restoration, adaptation and modernization of the historical route of the Iron Rhine on Dutch territory, essentially on two grounds:

- First, the Netherlands argues that “*although the right of transit is claimed, the conditions on which this right of transit can be exercised in accordance with Article XII [of the Separation Treaty] and the obligations entailed by Article XII in relation to the realization of that right are not recognized by Belgium*”, and that “*Belgium is claiming the right of transit but is not prepared to respect the conditions and obligations inextricably linked to this right*” (Memorial of the Netherlands at p. 43, pars. 3.3.4.3. and 3.3.4.4). In other words, it is the Netherlands’ position that Belgium’s obligation to bear the costs flows from the right of transit accorded to Belgium under Article XII of the Separation Treaty.
  
- Second, the Netherlands argues that Belgium is requesting more than a restoration of the 1991 situation, and that “*the Belgian request for reactivation of the Iron Rhine, which is described in the jointly formulated statement of questions to the Arbitral Tribunal as the right to the use, the restoration, the adaptation and the modernization of the Iron Rhine amounts, in the opinion of the Netherlands, to a request within the meaning of Article XII [of the Separation Treaty] for the extension of a railway on Belgian territory on Dutch territory. This railway is new to the extent that considerable adaptation and modernization is necessary in many ways in order to achieve the desired use*” (Memorial of the Netherlands at p. 43, pars. 3.3.4.4. and 3.3.4.5).

Both these arguments are unfounded. Belgium will first show that it is not under any obligation to bear costs and risks related to the restoration, adaptation and the modernization of the railway as a corollary of its right of passage (1), and that there is no legal basis for the Netherlands' assertion that the road as presently envisaged is "new" to the extent that considerable adaptation and modernization are necessary (2). Then, Belgium will argue in more detail that all costs and risks associated with the restoration, adaptation and modernization of the Iron Rhine so as to bring it in a good state and prone to facilitating trade between Antwerp and Germany shall be borne by the Netherlands (3). To end with, Belgium will address the issue of commutative justice which, as Belgium understands, is at the heart of the Netherlands' position (4).

1. Belgium is under no obligation to bear the costs and financial risks of reactivating the Iron Rhine as a corollary of its right of transit under Article XII of the Separation Treaty

**103.** The Netherlands' viewpoint that Belgium should bear the costs and financial risks of reactivating the Iron Rhine, as a corollary of its right of transit under Article XII of the Separation Treaty, is contradicted by the very wording of Article XII, by a contextual interpretation of the Article and finally, by the object and purpose of the 1839 Separation Treaty.

**104.** Article XII, in its relevant part, reads as follows:

*“Dans le cas où il aurait été construit en Belgique une nouvelle route (...), 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 (...)”<sup>1</sup>.*

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<sup>1</sup> Exhibit No 3. Unofficial translation: "In case a new road would have been constructed in Belgium (...) then Belgium would be at liberty to ask the Netherlands, which in this hypothesis will not refuse it, that the said road or canal be prolonged according to the same plan, entirely at the expenses of Belgium (...)"

Belgium's obligation to bear expenses as provided in Article XII thus relates to the *construction* of a road or canal on Dutch territory as a prolongation of a new road or canal on Belgian territory. It does not relate to the exercise of Belgium's right of passage.

**105.** The fact that Belgium's obligation to pay pursuant to Article XII does *not* relate to its right of transit over Dutch territory, is confirmed by a contextual reading of said Article, and more specifically by a combined reading of Articles XII and XI, which both relate to the right to passage granted to Belgium on Dutch territory in compensation of the loss of the possibility for Belgium, following the territorial settlement with the Netherlands, to have a short and direct communication with Germany over its own territory<sup>2</sup>.

The right of transit granted to Belgium by Article XI over existing roads on Dutch territory, across the town of Maastricht and the District of Sittard, is not dependent on any payment to be made by Belgium. It is subject only to the payment, by the users of these roads, of moderate toll rights for the financing of maintenance of these roads in a good state and prone to facilitating trade:

*“Les communications commerciales par la ville de Maestricht, et par celle de Sittard, resteront entièrement libres, et ne pourront être entravées sous aucun prétexte. L’usage des routes qui, en traversant ces deux villes, conduisent aux frontières de l’Allemagne, ne sera assujéti qu’au paiement de droits de barrière modérés pour l’entretien de ces routes, de telle sorte que le commerce de transit n’y puise éprouver aucun obstacle, et que, moyennant les droits ci-dessus mentionnés, ces routes soient entretenues en bon état et propres à faciliter ce commerce.”*<sup>3</sup>

The fact that Belgium does not have to pay for its right of transit is further confirmed by the fact that when, in September 1832, the Netherlands sought to “*subject the passage through the roads of Maastricht and of Sittard to transit rights and not only to toll rights*”<sup>4</sup>, the London

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<sup>2</sup> See *infra*, § 106.

<sup>3</sup> Exhibit No. 3. Unofficial Translation: “*The commercial communications through the city of Maestricht, and through the city of Sittard, will remain entirely free, and may not be hindered under any pretext. The use of the roads which, by crossing these two cities, lead to the borders of Germany, will only be subject to the payment of moderate toll rights for the maintenance of these roads, in such a way that the transit trade would not encounter any obstacle and that by means of the abovementioned rights, these roads would be maintained in a good state and prone to facilitating trade.*”

<sup>4</sup> Résumé des éclaircissements, donnés verbalement par le plénipotentiaire néerlandais, dans la Conférence du 26 septembre 1832 (Summary of the clarifications, given orally by the Dutch plenipotentiary, in the Conference of the 26<sup>th</sup> of September 1832), *Recueil de pièces diplomatiques relatives aux affaires de la Hollande et de la Belgique, en 1832*, La Haye, A.D. Schinkel, 1833, t. III, p. 217. Add. Exhibit No 28. Authentic text : “*assujétir le passage par les routes de Maestricht et de Sittard à des droits de transit, et non uniquement à des droits de barrière*”.

Conference rejected this request and the proposed amendment of Article XI drafted for this purpose by the Netherlands<sup>5</sup> on the grounds that:

*“It is maybe timely to remind here that the Canton of Sittard and several districts of Limburg were originally meant, since they were not part of Holland in 1790, to remain with Belgium. The Conference, which later, in order to facilitate the general agreement, insisted on the cession of these districts, had to take into account Belgium’s sacrifice, which these concessions imposed her, on important points, of the direct communications with Germany. It is in these views that the Conference considered equitable to stipulate the freedom of transit through the existing roads of Maestricht and of Sittard.”*<sup>6</sup>

The fact that Belgium’s right of transit pursuant to Article XI is not subject to payments to be made by Belgium, confirms the conclusion from the wording of Article XII, that Belgium’s obligation to bear expenses as provided in Article XII relates to the *construction* of a new road or canal prolonged on Dutch territory, but not to the exercise of Belgium’s right of passage.

**106.** The above conclusion is fully consistent with the object and purpose of the 1839 Separation Treaty. The rights under Article XII and more generally, the rights of transit over Dutch territory, were accorded to Belgium as part of the settlement of territorial issues, and more specifically, to partly compensate for Belgium’s renunciation to sovereignty over districts of the province of Limburg north of the river Meuse, and its consequent loss of a short and interrupted communication with Germany through its own territory. This ‘raison d’être’ of the rights conceded to Belgium by Article XI and XII of the Separation Treaty of

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<sup>5</sup> Réponses du plénipotentiaire de Sa Majesté le Roi des Pays-Bas, lues et communiquées en conférence le 26 septembre 1832 (Answers of the plenipotentiary of his Majesty the King of the Netherlands, read and communicated in conference on the 26<sup>th</sup> of September 1832), *Recueil de pièces diplomatiques relatives aux affaires de la Hollande et de la Belgique, en 1832*, La Haye, A.D. Schinkel, 1833, t. III, p. 217-218. Addé : Projets de traités, présentés par la Prusse, avec les modifications désirées par le Gouvernement des Pays-Bas (Treaty projects, presented by Prussia, with the modifications desired by the Government of the Netherlands), *Recueil de pièces diplomatiques relatives aux affaires de la Hollande et de la Belgique, en 1832*, La Haye, A.D. Schinkel, 1833, t. III, p. 270. Add. Exhibit No 28 and No 29.

<sup>6</sup> Observations faites par la Conférence sur les réponses, données par le plénipotentiaire néerlandais aux questions qui lui ont été adressées le 25 septembre 1832 (Observations made by the Conference on the answers, given by the Dutch plenipotentiary to the questions which were addressed to him on the 25<sup>th</sup> of September 1832), *Recueil de pièces diplomatiques relatives aux affaires de la Hollande et de la Belgique, en 1832*, La Haye, A.D. Schinkel, 1833, t. III, p. 217. Add. Exhibit No 28. Authentic text: “Il est peut-être à propos de rappeler ici que le canton de Sittard et différents districts du Limbourg étaient destinés originairement, comme n’ayant pas fait partie de la Hollande en 1790, à rester à la Belgique. La Conférence ayant plus tard, pour faciliter l’arrangement général, insisté sur la cession de ces districts, a dû tenir compte à la Belgique du sacrifice, que ces cessions lui imposaient, sur des points importants, des communications directes avec l’Allemagne. C’est dans ces vues que la Conférence a jugé équitable de stipuler la liberté de transit par les routes existantes de Maestricht et de Sittard.”

1839, was clearly pointed out by the London Conference in its answer to the Memorial of the Plenipotentiaries of the Netherlands of 14 December 1831:

*“Ad. XI and XII. It has already been mentioned that the articles 1 and 2 of the annex A of the protocol of 27 January 1831, assigned to Belgium in Limburg, on the left bank and the right bank of the Maas, the districts which Holland did not possess in 1790. These districts gave Belgium contact points with Prussia, between Maestricht and Mook, and consequently the means to establish with Germany the shortest communications she might have. When for the reasons developed here above, the Conference offered Holland, all the districts which did not belong to it in 1790, on the right bank of the Maas, they would have thought committing an injustice if, by detaching these territories from Belgium, they would have deprived it of all the means of communication and of trade which they offered it with Germany. Hence, the possibility which was let to it to build a commercial road at its expense, in the canton of Sittard, which had never belonged to Holland so far, possibility nevertheless subject to several conditions, and to the full and entire sovereignty of his Majesty the King of the Netherlands. Hence also, the maintenance of the current road in that canton, and the moderate toll rights which must be levied there. Hence, eventually, the use of the road which crosses Maestricht, at the same conditions.”<sup>7</sup>*

Article XII, as well as Article XI, were therefore not about conferring Belgium a right in historically foreign territory. There were rather about reserving to Belgium a minor part of its historical rights and advantages in the area, in the context of an overall settlement. There was no reason, therefore, for Belgium to be charged in the future for the exercise of its right of transit. The right had been granted in consideration for Belgium’s renouncing sovereignty over districts in the province of Limburg.

**107.** For the Tribunal’s information, it may be added that the right of access to the trans-European transports network in return for a fee in payment of the use made of the network, is

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<sup>7</sup> Mémoire de la Conférence destiné à servir de réponse à celui de messieurs les plénipotentiaires des Pays-Bas, en date du 14 décembre 1831 (Memorial of the Conference meant to serve as a reply to the Memorial of Messrs the plenipotentiaries of the Netherlands, dated 14 December 1831), *Recueil de pièces diplomatiques relatives aux affaires de la Hollande et de la Belgique, en 1831 et 1832*, La Haye, A.D. Schinkel, 1832, t. II, p. 189-190. Add. Exhibit No 27. Authentic text: "Ad. XI et XII. Il a déjà été observé que les articles 1 et 2 de l'annexe A du protocole du 27 janvier 1831, assignaient à la Belgique dans le Limbourg, sur la rive gauche et la rive droite de la Meuse, les districts que la Hollande ne possédait pas en 1790. Ces districts donnaient à la Belgique des points de contact avec la Prusse, entre Maastricht et Mook, et par conséquent les moyens d'établir avec l'Allemagne les communications les plus courtes qu'elle puisse avoir. Quand la Conférence, par les motifs développés plus haut, offrit à la Hollande, tous les districts qui ne lui appartenaient pas en 1790, sur la rive droite de la Meuse, elle aurait cru commettre une injustice si, en détachant ces territoires de la Belgique, elle l'avait privée de tous les moyens de communication et de commerce qu'ils lui présentaient avec l'Allemagne. De là, la faculté qui lui a été laissée de construire 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. De là aussi, l'entretien de la route actuelle dans ce canton, et les droits de barrière modérés qui doivent y être perçus. De là enfin, l'usage de la route qui traverse Maestricht, aux mêmes conditions."

presently recognized by European Community law. Article 10 of the Directive 1991/440/EEC on the development of the Community's railways as amended by Directive 2001/12/EC of the European Parliament and of the Council<sup>8</sup>, grants railway undertakings and international groupings of such undertakings a right of access to the railway network of a Member State for the purpose of international transports:

*“Section V. Access to Railway infrastructure.*

*1. International groupings shall be granted access and transit rights in the Member States of establishment of their constituent railway undertakings, as well as transit rights in other Member States, for international services between the Member States where the undertakings constituting the said groupings are established.*

*2. Railway undertakings within the scope of Article 2 shall be granted, on equitable conditions, access to the infrastructure in other Member States for the purpose of operating international combined transport goods services.*

*3. Whatever the mode of operation, railway undertakings within the scope of Article 2 shall be granted, on equitable conditions, the access that they are seeking to the Trans-European Rail Freight Network defined in Article 10(a) and in Annex I after 15 March 2008, to the entire rail network, for the purpose of operating international freight services.”*

**108.** In conclusion, there is no legal basis for the Netherlands' position that *“Belgium is claiming the right of transit but is not prepared to respect the conditions and obligations inextricably linked to this right”*<sup>9</sup>.

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<sup>8</sup> Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive No. 91/440/EEC on the development of Community Railways, O.J. L75, 15 March 2001, p. 1. This right of access will be extend in a short period of time, as a proposal of the Commission to amend Directive 91/440/EC was agreed by the European and the Council on 16 March 2004. This agreement will, according to a press released of the Commission, dated of 17 March 2004, be confirmed by both institutions in the following weeks. Exhibit No. 56 and Add. Exhibit No 30 and No 4.

<sup>9</sup> Counter-Memorial of the Netherlands at p. 43, § 3.3.4.4.

2. Belgium's present request for reactivation does not amount to a request for a "new road" within the meaning of Article XII of the Separation Treaty

**109.** The Netherlands' second argument is that Belgium should bear all costs and risks because its present demand for reactivation "*amounts .. to a request within the meaning of Article XII*" because "*this railway is new to the extent that considerable adaptation and modernization is necessary in many ways in order to achieve the desired use*"<sup>10</sup>.

It has been shown in detail under Question No. 2 that this position of the Netherlands is equally unfounded<sup>11</sup>.

It will be shown in the next section that if, in an extensive interpretation, works to be carried out to an existing road could, as the Netherlands sustain, justify its description as "*new*" within the meaning of Article XII, the relevant criterion would not be that of the "*considerable*" nature of these works, which has no legal basis, but that of knowing if the modernisations and adaptations exceed what is required to ensure the good state of the track and its ability to favour trade between Belgium and Germany through the Iron Rhine.

3. The Netherlands shall bear all costs items and financial risks associated with the use, restoration, adaptation and modernization of the Iron Rhine on Dutch territory so as to make it in a good state and prone to facilitating trade.

**110.** In this section, Belgium will show, first, that pursuant to the Iron Rhine's conventional regime, the Netherlands is under the obligation to bear all cost items and financial risks associated with the restoration, adaptation and modernization of the Iron Rhine on Dutch territory, so as to bring it in a good state and prone to facilitating trade (a). Second, Belgium will show that the restoration, adaptation and modernization required for the reactivation as presently envisaged does not exceed what is necessary to bring the railway in a good state and prone to facilitating trade. All cost items and financial risks associated with the reactivation presently envisaged shall therefore be borne by the Netherlands (b).

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<sup>10</sup> Memorial of the Netherlands at p. 43, par. 3.3.4.5.

<sup>11</sup> *Supra*, paras 73 ff.

*a. The Netherlands shall be responsible for restoring, adapting and modernizing the Iron Rhine on Dutch territory so as to make it in a good state and prone to facilitating trade*

**111.** The fact that the Netherlands have the responsibility to ensure the financing of the costs and the risks relating to the reactivation of the Iron Rhine flows from the conventional regime of the Iron Rhine. More specifically, this conclusion is borne out by the interpretation of Article XII of the Treaty within its context, taking into account the object and the purpose of the Separation Treaty and also, the treaties concluded subsequently concerning the Iron Rhine as well as the practice of the parties in the application of the treaties.

**112.** Article XII does not explicitly deal with the issue of the maintenance, adaptation and modernisation measures of the Iron Rhine. It states that Belgium will have the right to build or to have built a new road, stipulating that the costs of this construction, *i.e.*, of the initial installation of the track, will be incumbent upon Belgium.

It is not contested that Article XII as it is drafted contains, in an implicit but certain way, a transit right on the said road in favour of Belgium. The regulation – in one way or in another – of the maintenance, the adaptation and the modernisation of the track once built is, likewise, an indispensable element of the transit regime desired by the parties.

The issue is therefore to know whether the subsequent maintenance, adaptation and modernisation costs must be borne by Belgium or by the Netherlands. Independently of the subsequent practice of the parties, several elements plead right away in favour of the second branch of the alternative.

**113.** Even if Article XII does not explicitly deal with the issue of the maintenance, adaptation and modernisation measures of the Iron Rhine, this article was understood at the time of drafting as laying the charges of maintenance of the road, on Dutch territory, once constructed, with the Netherlands.



On 12 November 1831 the Belgian plenipotentiary informed the Conference of Belgium's fear that the Netherlands could levy charges and rights on a route constructed wholly at the expense of Belgium. Belgium argued that "*it would be contrary to the rules of equity, that the Netherlands could establish rights and tolls on a road built at the expense of Belgium*", and proposed to stipulate expressly in Article XII that the route or canal "*would only be subject to tolls for maintenance*"<sup>12</sup>. Now, if the Belgian representative sought to stipulate in Article XII that the road could be subjected only to toll rights in return for maintenance, and not for the construction, this is to be explained by the fact that Article XII, while conferring Belgium the right to construct a road, entrusted its maintenance to the Netherlands. If maintenance had not been entrusted to the Netherlands, it is not only the Netherlands' levying tolls for construction, but also its levying tolls for maintenance, which would have been regarded as inequitable.

It may be added that if the proposal of the Belgian plenipotentiary has not been withheld, this was not due to an objection of principle, but to the fact that the conference esteemed that the 24 Articles of the draft could not be modified any further<sup>13</sup>.

**114.** Second, Article XII must be interpreted in its context and, more in particular, in the light of Article XI which, for recall, states the following :

*"Les communications commerciales par la ville de Maestricht, et par celle de Sittard, resteront entièrement libres, et ne pourront être entravées sous aucun prétexte. L'usage des routes qui, en traversant ces deux villes, conduisent aux frontières de l'Allemagne, ne sera assujéti qu'au paiement de droits de barrière modérés pour l'entretien de ces routes, de telle sorte que le commerce de transit n'y puisse éprouver aucun obstacle, et que, moyennant les droits ci-dessus mentionnés, ces routes soient entretenues en bon état et propres à faciliter ce commerce"*<sup>14</sup>.

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<sup>12</sup> Note du plénipotentiaire de Sa Majesté le Roi des Belges à la Conférence sur les 24 articles, en date du 12 novembre 1831 (Note of the plenipotentiary of His Majesty the King of the Belgians at the Conference on the 24 Articles, dated 18 November 1831), *Recueil de pièces diplomatiques relatives aux affaires de la Hollande et de la Belgique, en 1831 et 1832*, La Haye, A.D. Schinkel, 1832, t. II, p. 132. Add. Exhibit No 31. Authentic text: "il serait contraire aux règles de l'équité, que la Hollande pût établir des droits et péages sur une route entièrement construite aux frais de la Belgique " and "ne serait assujéti qu'à des péages pour l'entretien".

<sup>13</sup> Réponse de la Conférence à la note du plénipotentiaire de Sa Majesté le Roi des Belges à la Conférence sur les 24 articles (Answer of the Conference to the note of the plenipotentiary of His Majesty the King of the Belgians to the Conference on the 24 Articles), *Recueil de pièces diplomatiques relatives aux affaires de la Hollande et de la Belgique, en 1831 et 1832*, La Haye, A.D. Schinkel, 1832, t. II, p. 134-135. Add. Exhibit No 31.

<sup>14</sup> Exhibit No. 3. Unofficial Translation: « The commercial communications through the city of Maestricht, and through the city of Sittard, will remain entirely free, and may not be hindered under any pretext. The use of the roads which, by crossing these two cities, lead to the borders of Germany, will only be subject to the payment of moderate toll rights for the maintenance of these roads, in such a way that the transit trade would not encounter any obstacle and that by means of the abovementioned rights, these roads would be maintained in a good state and prone to facilitating trade ».

This Article, which establishes Belgium's right of passage on the existing roads in the town of Maastricht and in Sittard, entrusts the Netherlands with the obligation to maintain these roads "in a good state and prone to facilitating trade"<sup>15</sup>. The costs of this maintenance would not be charged to Belgium. Article XI stipulates that this maintenance will be borne by the Netherlands, in return for the sole and unique possibility for the latter, to levy moderate toll rights that do not create any obstacle to trade.

Irrespective of whether Article XI applies to the Iron Rhine, once built, Article XI determines the standard applicable to the maintenance of roads that are the property of the Netherlands, for the purpose of the exercise of the right to passage granted to Belgium. Today, the two criteria of this standard are transposable to the Iron Rhine: its property has been transferred to the Netherlands, and it is not disputed that Belgium still enjoys a right to passage on the Iron Rhine. As a consequence, the right to passage of Article XII could not, for fear of ending up in a manifestly absurd and unreasonable result, be interpreted as conferring upon Belgium *less* rights than those granted to it by Article XI.

**115.** Next, it has already been mentioned here above that the rights of Article XII and more generally, the rights to passage in Dutch territory, have been granted to Belgium in the framework of the settlement of the territorial issues arising from the separation. Belgium renounced to sovereignty over districts in the province of Limburg, which did not belong historically to the Netherlands. A marked incision into Belgian territory, in comparison with the general orientation of the border, as well as the loss for Belgium of a short and uninterrupted communication with Germany through its own territory, resulted from it. What is at issue is therefore not a right to passage that the Netherlands would have granted *in vacuo*, and on a part of their territory which historically came under their sovereignty. It is a matter of a passage right recognized in the framework of territorial settlement, and with a view to mitigating the effects of the renunciation, by Belgium, to its territorial revendications on the crossed territory.

In such a context, one could not argue that the holder and beneficiary of the right to passage must in principle bear the whole of the costs pertaining to it. Even when supposing, that the existence of such a general principle could be established, its application would not at all be

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<sup>15</sup> Exhibit No. 3. Authentic Text: "en bon état et propre à faciliter ce commerce".

justified in the specific case at issue. To the contrary, the text of Article XII, the object and the purpose of the Separation Treaty and the historical context of Article XII confirm the cogency of the aforementioned interpretation of Article XII in the light of Article XI.

**116.** This interpretation was again confirmed by the treaties concluded subsequently concerning the Iron Rhine, *i.e.*, by the subsequent agreements between the parties regarding the interpretation of the treaty or the application of its provisions within the meaning of Article 31, §3 (a) of the Vienna Convention on the Law of Treaties.

In its memorial, Belgium already indicated that by virtue of Article IV of the 1873 Iron Rhine Treaty, the Netherlands recognized the *Compagnie du Nord de la Belgique* as the concessionary for the construction and exploitation of the railway line on Dutch territory<sup>16</sup>. Article IV, par. 2 provided that the Dutch section was to be “*constructed and exploited by the Compagnie .. without any charge whatsoever for the Government of the Netherlands ..*”. This concession therefore comprised two elements, construction on the one hand and exploitation on the other hand.

As far as construction was concerned, the concession was granted to the *Compagnie du Nord de la Belgique* under the guarantee of the Belgian Government. This was done further to Article III of the 1842 Boundary Treaty entitling Belgium to “*substitute, under its guarantee towards the Government of the Netherlands, a concessionary company, to the rights resulting in its favour from the terms of Article XII of the Treaty of 19 April, 1839, to the end of building the canal or road ..*”<sup>17</sup>. This was also a mere application of Article XII of the Separation Treaty providing that the route should be constructed “*at the expense of Belgium .. and without any expense for the Netherlands*”<sup>18</sup>.

Conversely, the exploitation was within the domain of the Netherlands and had to be run as a commercial project. This is made clear by the fact that the exploitation of the line was not under the guarantee of the Belgian Government and by the fact that Article IV of the Iron Rhine Treaty dispensed the Netherlands from bearing any expense.

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<sup>16</sup> Memorial of Belgium, par. 87 and Exhibit No. 16.

<sup>17</sup> Exhibit No. 6.

<sup>18</sup> Exhibit No. 3.

This was further confirmed in 1897 when Belgium was authorized by the Netherlands, in the context of the nationalisation of the Belgian railways, to buy the Iron Rhine on Dutch territory from the concessionary of the line and to transfer this property to the Netherlands. By this transfer, the Netherlands obtained ownership of the Iron Rhine on its territory in return for a price calculated on the basis of criteria laid down in the Protocol annexed to the Railway Convention of 1897, which price was in essence calculated on the basis of present and expected future profitability<sup>19</sup>.

Consequently, as it became the owner of the line, the Netherlands remained solely responsible for restorations, adaptations and modernizations to the railway track on Dutch territory. This is not merely a consequence of the reading of article XII of the Separation Treaty and of the commercial logic underlying the conventional regime as it evolved over time. It is also a necessary conclusion in view of the fact that the Railway Convention of 1897 does not provide for any obligation on behalf of Belgium to finance, nor to contribute to the financing of restorations, adaptations and modernizations of the Iron Rhine. On the assumption that the absence of a specific provision to that effect in the previous treaties could be interpreted as laying the financial burden of restorations, adaptations and modernizations with Belgium (*quod non*), such an interpretation could not possibly be maintained as concerns the Railway Convention of 1897 which transferred the property and exploitation of the Iron Rhine on Dutch territory to the Netherlands. Given the object and purpose of the Railway Convention, the absence of a specific provision to the effect that Belgium shall finance restorations, adaptations and modernizations, must lead to the conclusion that no such obligation exists. In view of its object and purpose, the silence of the Railway Convention speaks in the favour of Belgium.

**117.** The above is still further confirmed by following elements, which are part of the subsequent practice of the parties within the meaning of Article 31, §3 (b) of the Vienna Convention on the Law of Treaties.

As already indicated, Belgium is not aware of any investment made by Belgium after 1897 with respect to the part of the Iron Rhine on Dutch territory, including with respect to the expansion of parts of the Iron Rhine to double track in the time-span between the sale and

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<sup>19</sup> Memorial of Belgium, pars. 15 and 87, and Exhibit No 21.

World War I and its electrification after World War II<sup>20</sup>. The Netherlands in its Counter-Memorial refers to investments made on the Dutch part of the Iron Rhine in 1907, “*partly in the interest of the Netherlands*”<sup>21</sup>, which implies that same investments were also made in part in the interest of Belgium and of Germany.

Second, the agreement entered into between the Netherlands and the *Maatschappij tot Exploitatie van Staatsspoorwegen* with respect to the Iron Rhine provided that the State of the Netherlands could recover part of investments and costs of maintenance, repair and renovations from the *Maatschappij*<sup>22</sup>, which implies that same costs and investments were not to be recovered from Belgium. The fact that, as the Netherlands’ argue, this is a “*purely domestic agreement [which] does not create any obligations owed by the Netherlands to Belgium*”<sup>23</sup> does not prevent it from being part of subsequent practice within the meaning of Article 31 of the Vienna Convention, nor from providing evidence of the *fact* that costs made by the Netherlands with respect to the maintenance, repair and renovations of the Iron Rhine were not recovered from Belgium.

118. The obligation of the Netherlands to bear the cost items and financial risks associated with the restoration, adaptation and modernisation of the Iron Rhine on Dutch territory must be performed by them so as to ensure to Belgium the full exercise of its right of passage. The useful effect of the right to passage as a trade facility<sup>24</sup> supposes that the Dutch roads on which this right exerts, be *in a good state and prone to facilitating trade*. As already indicated, the Netherlands has recognized this principle with respect to the Western Scheldt<sup>25</sup>,

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<sup>20</sup> Memorial of Belgium, pars. 87 ff.

<sup>21</sup> Counter-Memorial of the Netherlands, p. 56, footnote 103.

<sup>22</sup> Memorial of Belgium, pars. 16 and 86, and Exhibit No. 26.

<sup>23</sup> Counter-Memorial of the Netherlands, p. 57, par. 3.3.8.4.

<sup>24</sup> The fact that the right of passage was conceived as a trade facility flows, not only from the wording of Articles XI et XII of the Separation Treaty, but also of the following extract from the documents of the London Conference, which sets ..... the ratio legis of Articles XI and XII : “*Quand la Conférence par les motifs développés plus haut offrit à la Hollande, tous les districts qui ne lui appartenaient pas en 1790, sur la rive droite de la Meuse, elle aurait cru commettre une injustice si, en détachant ces territoires de la Belgique, elle l’avait privée de tous les moyens de communication et de commerce qu’ils lui présentaient avec l’Allemagne*”, *Mémoire de la Conférence destiné à servir de réponse à celui de messieurs les plénipotentiaires des Pays-Bas, en date du 14 décembre 1831* (Memorial of the Conference meant to serve as a reply to the Memorial of Messrs the plenipotentiaries of the Netherlands, dated 14 December 1831), *Recueil de pièces diplomatiques relatives aux affaires de la Hollande et de la Belgique, en 1831 et 1832*, La Haye, A.D. Schinkel, 1832, t. II, p. 189-190. Add. Exhibit No 27. Unofficial translation: “*When for the reasons developed here above, the Conference offered Holland, all the districts which did not belong to it in 1790, on the right bank of the Maas, they would have thought committing an injustice if, by detaching these territories from Belgium, they would have deprived it of all the means of communication and of trade which they offered it with Germany.*”

<sup>25</sup> *Supra*, p.22.

and the 1923 Geneva Statute on the regime of international railways makes use of a similar criterion<sup>26</sup>. The Netherlands have therefore the obligation to prevent and eliminate the obstacles to the right to passage, taken into account its commercial purpose and the needs which flow from it at a given moment.

One thus understands that the Netherlands invokes *"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"*<sup>27</sup>. However, the increased use and the forecasts that are formulated and approved in this respect, to the contrary call for an upward revision of the works, so as to guarantee the ability of the Iron Rhine to ensure trade and thus, to safeguard the respect of Belgium's right of passage.

This is also confirmed by Article 11 of the Separation Treaty, by virtue of which the Netherlands pledged to maintain the existing roads *"in a good state and prone to facilitating this trade"*. In the same line of thought still, Article 8 of the agreement of 21 January 1890, according to which the State of the Netherlands was obliged to provide on its own account for a sufficient level of *"maintenance"* of the railways to be taken over by the *Maatschappij*, defined such *"maintenance"* as including *"herstellingen"* (repair) and *"vernieuwingen"* (renovations)<sup>28</sup>. This illustrates that maintenance is a functional notion that can include a retrospective aspect (repair) and a prospective one (adaptation and modernisation). If the maintenance of rails for a museum of railway transports essentially has a retrospective aspect, by contrast, the maintenance of a railway line with a view to its commercial use necessarily has a pronounced prospective aspect.

The Netherlands can therefore not invoke the fact that Belgium would ask more than the restoration of the Iron Rhine *"in its current state"*<sup>29</sup>, neither the fact that *"the costs 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 of the Iron Rhine"*<sup>30</sup>. The Netherlands are under the obligation to bear the costs and the financial risks of the adaptation and the modernisation of the Iron Rhine so as to ensure the continuous exercise of Belgium's

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<sup>26</sup> *Supra*, p. 25, para. 27.

<sup>27</sup> Counter-Memorial of the Netherlands, p. 56, par. 3.3.8.2

<sup>28</sup> See Memorial of Belgium, par. 16 and Exhibit No. 26.

<sup>29</sup> Counter-Memorial of the Netherlands, p. 42.

<sup>30</sup> Counter-Memorial of the Netherlands, pp. 10 and 43.

right to passage for commercial purposes, and this obligation is not limited in any manner by a *stand-still* in accordance with the state of the rail in 1991.

**119.** For the information of the Court as to its jurisdiction, a few words should be added on community law in the field.

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 foresees that *‘the trans-European transport network shall be established gradually by 2010 by integrating land, sea and air transport infrastructure networks throughout the Community in accordance with the outline plans indicated on the maps in Annex 1 and on the specification in Annex II’*, whose maps enclosed in Annex 1 comprise the Iron Rhine<sup>31</sup>. More precisely, the Directive 1991/440/EEC on the development of the Community’s railways, which falls within the framework of the liberalisation of railway transports by granting a right to access to Member States’ network for international transport, states in its Article 7, § 1 that *‘Member States shall take the necessary measures for the development of their national railway infrastructure taking into account, where necessary the general needs of the Community’* and in its Article 8, § 1 that *‘the manager of the infrastructure shall charge a fee for the use of the railway infrastructure for which he is responsible, payable by railway undertakings and international groupings using the infrastructure’*<sup>32</sup>.

Belgium does not, however, rely on these provisions, for the purpose of interpreting the conventional regime of the Iron Rhine in the light of community law or otherwise. It only seeks to draw the Tribunal’s attention to the existence of European Community rules in the field presently discussed for jurisdictional purposes.

**120.** In conclusion on the above, the interpretation of the Iron Rhine's conventional regime pursuant to the rules of customary law codified in Article 31 of the Vienna Convention on the

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<sup>31</sup> In Annex 1 of this directive maps were included identifying the Iron Rhine line in the three countries concerned (Memorial of Belgium, p. 29, par. 22 and Exhibit No. 52. Furthermore, the high level group in its report identified the Iron Rhine amongst a series of projects having a very high European value added to start before 2010, and noted that the countries concerned by these projects gave their firm commitment to begin work on all the sections at the latest in 2010 so that to make them operational at the latest in 2020 (Memorial of Belgium, p. 29, par. 22 and Exhibit No. 54).

<sup>32</sup> Directive 1991/440/EEC on the development of the Community’s railways, *O.J.* L237, 24 August 1991, p. 25, amended by Directive No 2001/12/EC of the European Parliament and of the Council of 26 February 2001, *O.J.* L75, 15 March 2001, p. 1. Exhibit No 55 and 56.

Law of Treaties leads to the univocal conclusion that the Netherlands shall be responsible for the financing of all cost items and financial risks associated with the restoration, adaptation and modernisation of the Iron Rhine on Dutch territory so as to bring and keep it in a good state and prone to facilitating trade between Belgium and Germany.

*b. The reactivation of the Iron Rhine as it is presently envisaged does not exceed what is necessary for the line to be in a good state and prone to facilitating trade. The costs and financial risks associated with the envisaged restoration, adaptation and modernization shall, therefore, be borne in whole by the Netherlands.*

**121.** As concerns the reactivation of the Iron Rhine as it is presently envisaged, it should first be noted that the application of the abovementioned rules and principles is not precluded by the Memorandum of Understanding of 28 March 2000 between the Belgian and Dutch Ministers of Transports<sup>33</sup>.

It has been shown under Question No. 1 that, first, the Memorandum of Understanding is a political agreement without binding force in international law, and second, that as the condition of reactivating the Iron Rhine for the end of 2001 has not been met, Belgium's undertaking to finance measures required for "provisional use" has equally lapsed.

**122.** It remains therefore to be shown that, in application of the Iron Rhine's conventional regime as interpreted above, the costs and financial risks of the reactivation as it is presently envisaged shall be borne by the Netherlands. This is indeed the case.

A road whose passage would not support 15 freight trains a day in the short term, 36 freight trains by 2010, and 43 freight trains by 2020 – which are the numbers of "Iron Rhine" trains foreseen at these points in time<sup>34</sup> – could not be assimilated to a road in a good state and prone to facilitating trade. Suffice it in this respect to remind that the number of 43 trains has been laid down on the basis of a projection concerning the demand of the sector in 2020. As the Netherlands reminds it in their Counter-Memorial :

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<sup>33</sup> Exhibit No. 82.

<sup>34</sup> Exhibit of the Netherlands No. 20 and 21.



*"In a meeting of the Iron Rhine technical working group on 25 October 1999 .. 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. At this meeting, the railway companies proposed to fix the number of trains at 43 trains (combined total for both directions per working day). 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 [9 December 1999], the relevant members of the government of the Netherlands, Belgium and Germany approved the forecast, which was taken as authoritative throughout the rest of the procedure"<sup>35</sup>.*

It is therefore an agreed fact that, from a commercial perspective, the Iron Rhine should be adapted to (at least) 43 trains per day in 2020. As a consequence, the Iron Rhine could not be regarded as *"in a good state and prone to facilitating trade"* if it were unable to carry that number of trains by 2020. By comparison the double track rail of 160 kilometres from Rotterdam to the German border, mainly for freight transport between Rotterdam and the European hinterland (known as the Betuwe Line) will, according to Belgium's information, carry an average of 160 trains a day.

**123.** In overabundance, it can be added that, before it was transferred to the Netherlands pursuant to the 1897 Railway Convention, as well as in subsequent years until 1914, the Iron Rhine was used in a way which the Netherlands themselves qualify as *"intensive"*<sup>36</sup>. Not only freight trains but also passenger trains were using it. Subsequently, the line was double track on the whole of its distance. After the Second World War, and taken into account the destructions she had been subject to on Dutch territory, the Iron Rhine was rebuilt in double track. Currently, on the 48 kilometres of the line in Dutch territory, around 24 kilometres are used intensively, by approximately 100 trains a day<sup>37</sup>, and are still double track, if not electrified<sup>38</sup>. The 24 other kilometres that are less or not at all used, are single track (it being understood that the bed is foreseen for a double track).

Now, the measures currently envisaged for the reactivation of the Iron Rhine do not comprise the reinstallation of a double track on of that section of 24 kilometres. Seen from this point of

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<sup>35</sup> Counter-Memorial of the Netherlands, at p. 19, par. 2.11 – emphasis added.

<sup>36</sup> Counter-Memorial of the Netherlands, p. 9, par. 2.5.1.

<sup>37</sup> Prorail, Concept Ontwerp-Tracebesluit. Ijzeren Rijn. Toelichting en bepalingen, July 2003, p. 22. Add. Exhibit No 9

<sup>38</sup> Arcadis, *Comparative Cross-Border Study on the Iron Rhine*, Final Report, 14 May 2001, p. 20. Exhibit No S.3.

view, the currently envisaged reactivation corresponds to criteria that are below those of the maintenance under its sole *retrospective* aspect.

**124.** In conclusion, therefore, the adaptations and modernizations presently envisaged amount to less than a restoration of the Iron Rhine in its previous conditions, *i.e.*, wholly double-track and electrified, and do not exceed what is necessary for the route to be “*in a good state and prone to facilitating trade*” at present and in the coming years. Pursuant to the Iron Rhine’s conventional regime, the costs and financial risks associated with such measures shall therefore be borne in whole by the Netherlands.

#### 4. On Commutative Justice

**125.** The Netherlands’ Counter-Memorial provides a detailed overview of the principles governing treaty interpretation laid down in the Vienna Convention on the Law of Treaties. However, the Counter-Memorial is far less explicit on how these principles warrant the Netherlands’ submission that all costs and financial risks should be borne by Belgium, and it has been shown here above that a systematic application of these principles univocally leads to the opposite conclusion, that the costs and risks should be borne by the Netherlands.

At the end of the day, the Netherlands’ claim is in fact for commutative justice. Belgium should accord retribution for the valuable it obtains from the Netherlands, or in other words, the Netherlands should not be deprived of their presumed valuables without retribution. Three observations should be made in that respect.

**126.** First, there is a strong sense of commutative justice *within* the Iron Rhine’s conventional regime. As already indicated, the transit regime was accorded to Belgium as part of the territorial settlement with the Netherlands, and more specifically as a partly compensation for Belgium’s renouncing sovereignty over districts in the province of Limburg. It is part of a broader framework of reciprocal rights and obligations. Also, it is the Dutch infrastructure manager, not Belgium, who will be entitled to levy charges for the use of the Iron Rhine.

127. Second, the Netherlands' call for commutative justice is further undermined by the fact that, in an interdependent world, everybody "reaps without sowing".

This was first highlighted in 1832 by the London Conference, which in its answer to the Memorial of the Netherlands relating to Belgium's right of passage, stated that : "*il resterait à considérer, d'ailleurs, si le commerce de transit n'offre pas des avantages réels aux pays qu'il parcourt, s'il n'en féconde pas les ressources, s'il n'en accroît pas les richesses*". The history of the Iron Rhine shows that this has indeed been the case. In the past the construction of the Iron Rhine has, irrespective of profits and employment opportunities engendered by the transport activities as such, contributed to the development of industries in the Netherlands, especially in Budel<sup>39</sup>. The Iron Rhine was used by the Netherlands not only for local freight and passenger transport, but also for military purposes essentially between 1948 and the 1960s (in 1948, 620 military passenger trains and 950 military freight trains used the Iron Rhine from the Netherlands to Dalheim in Germany and vice versa. In 1959 the number of military trains on this section amounted to 305 passenger trains and 1720 military freight trains. In 1966, the number of trains was 26 passenger trains for 680 military freight trains)<sup>40</sup>. More recent expressions of this Dutch interest in the Iron Rhine have been mentioned under Question No. 1<sup>41</sup>

More recently, this essential feature of interdependence was implicitly highlighted by Belgium when it formulated its position in the note of 20 August 2001 by the Belgian, Dutch and German administrations<sup>42</sup>. Arguing in favour of the "territoriality principle", Belgium recalled that it had consistently abided by this principle in the past, notably for the construction of the HST-project and for the construction of the European speedway system,

*".. knowing that this infrastructure benefits a great deal to users who do not live in Belgium. Studies have indeed revealed that only 20 percent of the trans-boundary travellers on the HST-link Brussels-Amsterdam are of Belgian nationality."*<sup>43</sup>

The "territoriality principle", then, is quite unrelated to the sovereignty issues, which are central in the Netherlands' Counter-Memorial. It is a principle giving practical expression to

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<sup>39</sup> Memorial of Belgium, p. 30, par. 23.

<sup>40</sup> Add. Exhibit No 32.

<sup>41</sup> *Supra*, p. 56, par. 60.

<sup>42</sup> Exhibit No 87.

<sup>43</sup> *Loc. cit.*

international solidarity or, perhaps, to national self-interest in the longer term on the basis that interdependence makes us all "*reap without sowing*" in some respect.

**128.** In conclusion, therefore, an approach in terms of commutative justice does not provide any basis for the Netherlands' submissions. Quite to the contrary, it further reinforces the soundness of Belgium's analysis of the Iron Rhine's conventional regime.

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

129. Belgium has shown in its Memorial that, if the Tribunal were to reject Belgium's submission here above that, according to the Iron Rhine's conventional regime, all costs and financial risks related to the use, the restoration, the adaptation and the modernisation of the Iron Rhine, shall be borne by the Netherlands, then, Belgium would still have no obligation to bear costs and financial risks caused by a violation, by the Netherlands, of its international obligations towards Belgium. This flows from the obligation to make reparation for the prejudice caused by a violation of international law, as well as an application of the principle that no one shall benefit from its illegal acts (*nullus commodum capere de sua injuria propria*)<sup>44</sup>.

In its Counter-Memorial, the Netherlands has not contested this principle.

130. In its Memorial, Belgium then argued that the Netherlands, in its capacity as territorial sovereign and owner of the Iron Rhine railway infrastructure on its territory, has, in violation of Belgium's right to use the historical route of the Iron Rhine in accordance with the Separation Treaty of 19 April 1839, and in violation of the principle of due diligence, rendered impossible the use of the railway by dismantling part of its infrastructure and making it unfit for use, by failing to provide for maintenance and by deciding to interrupt works aimed at restoring the historical route so as to make it fit for temporary use<sup>45</sup>.

In this respect, the Netherlands sustains that "*the Dutch Railway 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*"<sup>46</sup>. In this respect, it may suffice to note that, pursuant to Article 27 of the Vienna Convention specifies in this respect that: "*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. (...)*".

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<sup>44</sup> Memorial of Belgium, p. 107 ff.

<sup>45</sup> Memorial of Belgium, p. 108.

<sup>46</sup> Counter-Memorial of the Netherlands, p. 8.

The Netherlands also argues that if, “*in 1996, the level crossing installations on the section of the line between Roermond and Vlodrop were removed*”, this “*has its basis in Dutch legislation on railways. This policy is pursued to prevent road-users from becoming accustomed to level crossings that are no longer in use*”<sup>47</sup>. In that respect, the principle just-mentioned equally applies, but the question here is rather whether this should be seen as a reasonable exercise of Dutch jurisdiction in the circumstances, given the safety objectives pursued by Dutch legislation.

In this context, it is of relevance that, at the time the measures were taken, Belgium was already actively pursuing the reactivation of the historical route of the Iron Rhine. Equally of relevance is the fact that on 29 January 2002, the Dutch Minister of Transports informed the Chairman of the Tweede Kamer that she had “*decided in November 2001 to interrupt preparations for the possible temporary driving on the historic track, awaiting agreement to be reached with Belgium and Germany*”<sup>48</sup>.

Belgium therefore maintains its submission in this respect.

**131.** In its Memorial, Belgium further argued that requirements on the part of the Netherlands which are in violation of the principles and rules mentioned under Question No. 1 limiting the exercise of Dutch jurisdiction, are not opposable to Belgium and costs related to them shall, consequently, not be borne by Belgium.

Belgium’s position in this respect has been elaborated under Question No. 1, where the arguments of the Netherlands have also been addressed.

It has been concluded under Question No. 1 that the Netherlands may not, in the exercise of their jurisdiction, require that Belgium shall bear the costs (a) of measures related to tracks which are in present or future use for Dutch railway transports, (b) of measures required to meet objectives over and above Dutch legislative requirements, (c) of building a loop around

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<sup>47</sup> Counter-Memorial of the Netherlands, p. 10.

<sup>48</sup> Letter of the Dutch Minister of Transports to the President of the Tweede Kamer, dated 29 January 2002, p. 4. Exhibit No. 101. Authentic text: *Overigens heb ik in november 2001 besloten om de voorbereidingen van het eventueel tijdelijk rijden over het historisch tracé van de IJzeren Rijn op te schorten, in afwachting van de met België en Duitsland te bereiken overeenstemming*”.

Roermond, and (d) of building a tunnel in the Meinweg and similar nature protection devices and compensatory measures.

Therefore, such requirements shall not be opposable to Belgium. The costs of such measures, if taken, shall therefore be borne by the Netherlands in the performance of its obligation towards Belgium to allow for the use of the Iron Rhine.

While the unlawfulness of such requirements allows for the conclusion that they are not opposable to Belgium, the Netherlands' obligations towards Belgium as concerns the use of the Iron Rhine lead to the conclusion that, if the Netherlands imposes these requirements, it shall have the obligation to finance the measures required so as to warrant the exercise of Belgium's right of transit, which is uncontested.

### **C. Conclusion**

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

**In primary order:**

- That, in application of the Iron Rhine's conventional regime, Belgium shall bear the costs and financial risks associated with the Iron Rhine on Dutch territory, only to the extent that Belgium requests that a new route on Belgian territory be prolonged on Dutch territory according to the same plan, and, if the Netherlands would then take the option of having the route constructed by engineers and workers which the Netherlands would employ, to the further condition that the works be agreed upon.
- That Belgium's present request for the reactivation of the Iron Rhine does not amount to a request that a new route on Belgian territory be prolonged on Dutch territory according to the same plan, with the consequence that Belgium is not under the obligation to bear the costs and financial risks associated with this reactivation.
- That, in application of the Iron Rhine's conventional regime, the Netherlands shall be responsible for all cost items and financial risks associated with the restoration,

adaptation and modernization of the historical route of the Iron Rhine on Dutch territory, so as to make it in a good state and prone to facilitating trade.

- That the reactivation of the Iron Rhine as it is presently envisaged does not exceed what is necessary for the line to be in a good state and prone to facilitating trade, with the consequence that the Netherlands shall be responsible for all costs and financial risks associated with the envisaged restoration, adaptation and modernization.

In subsidiary order:

- That all costs items and financial risks related to restoration of the historical route, caused by the Netherlands' dismantling part of the infrastructure of the historical track, making it unfit for use or failing to provide maintenance, shall be borne by the Netherlands.
- That the Netherlands shall be responsible for all costs and financial risks associated with (a) of measures related to tracks which are in present or future use for Dutch railway transports, (b) of measures required to meet objectives over and above Dutch legislative requirements, (c) of building a loop around Roermond, and (d) of building a tunnel in the Meinweg and similar nature protection devices and compensatory measures, within the limits set under Question No. 1.



## SUBMISSIONS

On the basis of the above, Belgium respectfully requests the Tribunal to decide:

### ON QUESTION NO. 1

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

- The Netherlands shall, if Belgium decides to construct a *‘new road or canal’* on Belgian territory, as described in Article XII of the Separation Treaty of 19 April 1839, allow for the prolongation of this road or canal on Dutch territory *“according to the same plan”* as on Belgian territory, without the Netherlands’ agreement as to the plan.
- If, in the hypothesis just-mentioned, the Netherlands takes the option to perform the works by itself, such works can only be at the expense of Belgium if they have been agreed upon by both Governments. Conversely, if the Netherlands chooses to have these works performed by Belgium, no agreement is necessary as to the works. In the latter hypothesis, Belgium has the right to benefit from a treatment not less favourable than the one accorded to other operators in this respect.
- Without prejudice to European law, the Netherlands have the obligation to allow for the use of the Iron Rhine route provided that it *“only serve[s] as commercial communication”* and to take all the measures necessary to permit this use.
- The height and mode of collection of toll rights shall be determined by a common agreement between the Netherlands and Belgium. Such agreement must be taken in conformity with international law and European law.

- No re-routings deviating from the historical route shall be decided upon by the Netherlands without the agreement of Belgium.
- The Netherlands is under the obligation to exercise its legislative and decision-making power in good faith and in a reasonable manner, and so as not to deprive Belgium's rights to have the Iron Rhine prolonged on Dutch territory according to the same plan as on Belgian territory to use the historical route of the Iron Rhine, of their substance, and so as not to render the exercise of these rights unreasonably difficult. The Netherlands shall take all necessary measures so as to allow for such a use.
- If the Netherlands has several possibilities of complying with an international obligation, one of which allows it to comply with its obligation towards Belgium as concerns the Iron Rhine, while the others does or did not, the Netherlands are under the obligation to take the possibility which makes it possible for it to comply with both obligations.
- If the Netherlands has conflicting obligations as concerns the reactivation of the Iron Rhine, it shall reduce the effect of such a conflict by taking measures, which are the least onerous for Belgium.
- Without prejudice to Belgium's right to an immediate use of the historical route of the Iron Rhine at full capacity and on a long-term basis, when Belgium makes a demand for provisional driving on the historical route of the Iron Rhine, by 15 trains per natural day (both directions summed up), including at limited speed in evening hours and at night, for a period of 5 years at least, the Netherlands shall immediately accept that demand, and immediately take all decisions necessary to effectively allow for such driving within the shortest time materially feasible, which shall not be more than one month.
- The Netherlands shall take all necessary measures so as to prevent any interruption of the use of the Iron Rhine between "temporary driving" and "long-term" driving, and to effectively allow for the latter within the shortest time feasible.

- Without prejudice to Belgium's position under Question No. 3, the measures foreseen in ProRail's "*IJzeren Rijn Concept Ontwerp-tracébesluit versie 1.4*" of July 2003 with respect to parts A2, B and C of the track as identified therein, may not be required as a prior condition to Belgium's exercise of its rights on the Iron Rhine, unless such measures do not render the exercise of Belgium's right to the use of the Iron Rhine unreasonably difficult and:
  - o In primary order, unless the costs and financial risks associated with these measures shall be borne in whole by the Netherlands.
  - o In subsidiary order, unless the costs and financial risks associated with such measures be borne by the Netherlands at the least in proportion to its forecasted use of the railway line by 2020, which is at least 77,889 percent, and by Belgium in a proportion of maximum 22,111 percent, under the further proviso that the Netherlands may not charge to Belgium costs which are charged on the users of the line in accordance with Article XII of the 1839 Separation Treaty and European Community rules, nor charge to Belgium costs unrelated to the reactivation, which includes, but is not limited to, costs for the abatement of road traffic noise.
  
- Without prejudice to Belgium's position under Question No. 3, the measures foreseen in ProRail's "*IJzeren Rijn Concept Ontwerp-tracébesluit versie 1.4*" of July 2003 with respect to noise abatement which are not necessary so as to reach the maximal exemption limit of 70 dB(A) or 73dB(A) provided by law, unless if such measures do not render the exercise of Belgium's right to the use of the Iron Rhine unreasonably difficult, and unless if the costs and financial risks associated with such abatement measures are borne in whole by the Netherlands.
  
- Without prejudice to Question No. 3, the Netherlands may not require the building of a tunnel in the Meinweg area nor other wildlife and nature protection measures including compensatory measures in areas passed through by the historical route of the Iron Rhine, unless if such requirement does not render the exercise of Belgium's right to the use of the Iron Rhine unreasonably difficult and if the costs and financial risks associated with these measures are borne in whole by the Netherlands.

- In subsidiary order to the last submission, if the Tribunal esteems that the former point is outside its jurisdiction, the Netherlands may not require the building of a tunnel in the Meinweg area nor other wildlife and nature protection measures including compensatory measures in areas passed through by the historical route of the Iron Rhine, unless if such requirement does not render the exercise of Belgium's right to the use of the Iron Rhine unreasonably difficult and if the costs and financial risks associated with these measures are borne in whole by the Netherlands, save to the extent that the Netherlands had no other possibilities to meet its obligations under EC law, and to the extent that the measures required are the least costly for allowing the Netherlands to meet its EC obligations.

## **ON QUESTION NO. 2**

- Belgium does not have the right to perform or commission work with a view to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, unless Belgium requests to have a new road on Belgian territory prolonged according to the same plan on Dutch territory, and the Netherlands takes the option of having that prolongation according to the new plan built by Belgium in accordance with Article XII of the Separation Treaty of 19 April 1839.
- Belgium has the right according to Article XII of the 1839 Separation Treaty to have a new road on Belgian territory prolonged on Dutch territory according to the same plan. This is subject to Dutch jurisdiction within the limits set forth under Question No. 1. The right of Belgium to establish plans, specifications and procedures for such works according to Belgian law and the decision-making power based thereon, is limited accordingly.
- The "plan" within the meaning of Article XII of the 1839 Separation Treaty shall be determined by Belgium without the agreement of the Netherlands, however, Belgium shall inform and consult the Netherlands in accordance with the principles of good faith and reasonableness, all of this without prejudice to European Community law.

- The word “plan” in Article XII of the Separation Treaty must be interpreted on the basis of its ordinary meaning, according to which it refers to all the technical characteristics and particularities of the railway.
- Belgium’s present request for reactivation does not amount to a request for a “*new road or canal*” within the meaning of Article XII of the Separation Treaty with the consequence that the Netherlands does not have the option provided by Article 12 of the 1839 Separation Treaty to require that Belgium performs work on Dutch territory.
- Works on Dutch territory performed by the Netherlands shall be agreed upon between Belgium and the Netherlands. As the present request of Belgium to reactivate the Iron Rhine is not a request to have the Iron Rhine prolonged on Dutch territory according to the same plan as on Belgian territory, such limitation is not at stake at present. The same is true of Belgium’s right to benefit from a treatment not less favourable than that accorded to other operators with respect to other railways on Dutch territory, as concerns the freedom to establish plans, specifications and procedures.

Further, Dutch regulatory powers to establish plans, specifications and procedures remains limited by the principles set out under Question No. 1.

- The distinction between the requirements, standards, plans, specifications and procedures related to, on the one hand, the functionality of the railway infrastructure in itself, and, on the other hand, the land use planning and the integration of the rail infrastructure, is irrelevant, as such, as concerns the extent to which Belgium has the right to perform or commission work on Dutch territory. The distinction is also irrelevant, as such, with respect to the extent to which Belgium has the right to establish plans, specifications and procedures related to it according to Belgian law and the decision-making power based thereon. This does not affect the relevance of the said distinction for determining the reasonableness of Dutch requirements for the building of infrastructure to be paid for by Belgium.
- The right of the Netherlands to unilaterally require the building of underground and above-ground tunnels, as well as the proposed associated construction and safety standards, is limited by the abovementioned rights of Belgium in case it requests that

the railway on Belgian territory be prolonged on Dutch territory according to the same plan, which is not the case at present. It is further limited by the obligations of the Netherlands to cooperate with Belgium as well as by the principles stated under Question No. 1.

Therefore, the Netherlands may not impose the construction of underground and above-ground tunnels at the expense of Belgium, if such a requirement is contrary to the principles set under Question No. 1, which notably include the standards of normality and of proportionality, as well of non-arbitrariness and non-discrimination.

The Netherlands is under the obligation to inform and to consult in good faith with Belgium as concerns such requirements, in accordance with its obligation to cooperate and the principle of reasonableness and good faith.

The 'pacta sunt servanda' principle, and its corollaries the principles of good faith and of reasonableness, also applies in the hypothesis that the Netherlands wishes to build underground and above-ground tunnels on the Iron Rhine on Dutch territory at its own expenses, and not at the expenses of Belgium. As a consequence, the Netherlands may not, notably, decide to build a tunnel at their expenses, if such a construction infringes in an unreasonable manner on the right to passage of Belgium conferred to it by Article XII of the Separation Treaty.

- Diversions and the like may not unilaterally be imposed by the Netherlands, in that they require the consent of Belgium.

### ON QUESTION NO. 3

#### In primary order:

- That, in application of the Iron Rhine's conventional regime, Belgium shall bear the costs and financial risks associated with the Iron Rhine on Dutch territory, only to the extent that Belgium requests that a new route on Belgian territory be prolonged on Dutch territory according to the same plan, and, if the Netherlands would then take the option of having the route constructed by engineers and workers which the Netherlands would employ, to the further condition that the works be agreed upon.
- That Belgium's present request for the reactivation of the Iron Rhine does not amount to a request that a new route on Belgian territory be prolonged on Dutch territory according to the same plan, with the consequence that Belgium is not under the obligation to bear the costs and financial risks associated with this reactivation.
- That, in application of the Iron Rhine's conventional regime, the Netherlands shall be responsible for all cost items and financial risks associated with the restoration, adaptation and modernization of the historical route of the Iron Rhine on Dutch territory, so as to make it in a good state and prone to facilitating trade.
- That the reactivation of the Iron Rhine as it is presently envisaged does not exceed what is necessary for the line to be in a good state and prone to facilitating trade, with the consequence that the Netherlands shall be responsible for all costs and financial risks associated with the envisaged restoration, adaptation and modernization.

#### In subsidiary order:

- That all costs items and financial risks related to restoration of the historical route, caused by the Netherlands' dismantling part of the infrastructure of the historical track, making it unfit for use or failing to provide maintenance, shall be borne by the Netherlands.

- That the Netherlands shall be responsible for all costs and financial risks associated with (a) of measures related to tracks which are in present or future use for Dutch railway transports, (b) of measures required to meet objectives over and above Dutch legislative requirements, (c) of building a loop around Roermond, and (d) of building a tunnel in the Meinweg and similar nature protection devices and compensatory measures, within the limits set under Question No. 1.

\* \* \*

29 March 2004

Jan DEVADDER

Agent of the Kingdom of Belgium

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