PERMANENT COURT OF ARBITRATION

IRON RHINE CASE
BELGIUM *v.* THE NETHERLANDS

REJOINDER

OF

THE KINGDOM OF THE NETHERLANDS

JUNE 2004

REJOINDER OF THE KINGDOM OF THE NETHERLANDS
IN THE IRON RHINE CASE
BETWEEN BELGIUM AND THE NETHERLANDS
SUBMITTED TO THE PERMANENT COURT OF ARBITRATION

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Contents

Chapter 1: Introduction

1. On 30 March 2004, the Netherlands received Belgium's Reply concerning the Iron Rhine case. The present document, in accordance with Article 11, paragraph 4, of the Rules of Procedure for the Arbitration regarding the "IJzeren Rijn" between the Kingdom of the Netherlands and the Kingdom of Belgium, contains the Netherlands' rejoinder.

2. Chapter 2 includes a number of points which the Netherlands, having studied the Memorial and Reply, regards as essential background information for the Tribunal's decision. Chapter 3, entitled "The Dutch right to territorial sovereignty", contains the response to Belgium's answer to the first of the questions subject to arbitration. Chapter 4 gives a more detailed analysis of Article XII of the Separation Treaty. The subject of Chapter 5 is the Dutch right to territorial sovereignty as it relates to Belgium's right of transit.

3. A list of errata in the Counter-Memorial has been annexed to this Counter-Memorial, along with a new List of Exhibits. In the opinion of the Netherlands, the inaccuracies which were found to be present in the Counter-Memorial do not affect the substance of the arguments presented and could not conceivably have stood in the way of clarity. The Netherlands tenders its apologies to the Tribunal for any inconvenience this situation may have caused.

Chapter 2: Key points

4. The Netherlands concludes from the Reply that Belgium's position is that it should be allowed to use the Iron Rhine in its current form immediately and with at least 43 trains, while the Netherlands should bear all the costs of any restoration, adaptation and modernisation and may not create any obstacles. This means, *inter alia*, that the Netherlands, in its capacity as the territorial state, would only be able to apply its legislation partially if at all.

5. In this context, Belgium repeatedly points out, by referring to the *travaux préparatoires*, that the Separation Treaty should be applied and interpreted against the background of the allocation of Limburg to the Netherlands and that the right of transit was granted in order to provide Belgium with a direct link from Antwerp to Germany along the shortest route.

6. To clarify the historical situation outlined by Belgium and, in particular, the renunciation of sovereignty it mentions in paragraphs 20, 106, 115, and 126 of the Reply, it should be noted that the allocation of Limburg on the right bank of the Maas to the Netherlands was connected to the cession to Belgium of part of the territory of Luxembourg by William I, who in addition to being King of the Netherlands was also Grand Duke of Luxembourg. Until the French Revolution, moreover, the towns of Maastricht and Sittard belonged to the Republic of the United Provinces, as well as various enclaves on both the left and right banks of the Maas. In 1839, the Maas came to form the relevant part of the border between the Netherlands and Belgium.
Exhibit 1 shows that much of Limburg belonged to the Republic of the United Provinces and that King William I had to cede a very large part of Luxembourg to Belgium.[1]

7. In the opinion of the Netherlands, the manner in which Belgium has handled its right of transit stands in stark contrast to the great importance that it attaches to it as appears from the Reply. The fact is that since World War I Belgium has made little – and since 1991 no – use of its right of transit through Limburg, that is to say, for the purpose for which the right was granted in 1839.

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[1] Exhibit 1. BONT, A.L. DE, *Kleine Geschiedkundige Atlas*, negende druk, P.J. Noordhoff N.V., 1957, Groningen. Page 1 of this Exhibit shows the territory of the Republic of the United Provinces and the Dutch enclaves on both banks of the Maas. Pages 2 and 3 show the territory of the Kingdom of the Netherlands and the Grand Duchy of Luxembourg before and after the separation.

8. Furthermore, in its claim that the right of transit was granted in exchange for the cession of part of Limburg, Belgium disregards the fact that this right was granted under the conditions described in Article XII of the Separation Treaty. The passage in Article XII that is considered most essential by the Netherlands states that whatever is provided therein ("*le tout*") will be realised "*sans préjudice des droits de souveraineté exclusifs sur le territoire qui traversait la route ou le canal en question*". This passage (which is not discussed by Belgium) means, in the opinion of the Netherlands, that the Netherlands retains its territorial sovereignty over the Iron Rhine. It is discussed in detail in the Counter-Memorial.

9. The next chapter of the Rejoinder, which is in part a response to Belgium's answer to Question 1, deals chiefly with the Dutch right to territorial sovereignty. In this context, attention is devoted not only to the retention of this right by the Netherlands, but also to the legal implications of this right in the light of Belgium's desire to reactivate the Iron Rhine.

10. In this context, the Netherlands considers it important to point out that the passage "*sans préjudice des droits de souveraineté exclusifs sur le territoire qui traversait la route ou le canal en question*" only serves to confirm that which would apply in any case. Even if the drafters of the Separation Treaty had not laid down explicitly in so many words in Article XII that the Netherlands retained its territorial sovereignty, Dutch territorial sovereignty would still apply in the absence of restrictions providing otherwise, also given the practice in the application of Article XII, in which Dutch law has consistently been applied. Moreover, Belgium explicitly recognises that there is no regime of extra-territoriality and it is unthinkable that *not one* national legal system would apply to the Iron Rhine.

11. Finally, the Netherlands notes that, despite claims to the contrary by Belgium, it has no interest of its own in the reactivation of the Iron Rhine, which is only being carried out in order to comply with Belgium's right of transit. All the measures that need to be taken for the purpose of reactivation, as well as all the related costs, including those related to the loop around Roermond and the tunnel in the Meinweg, are a consequence of this reactivation. In spite of this, the Netherlands has offered to pay a share of the costs.

Chapter 3: The Dutch right to territorial sovereignty

12. In this chapter, the Netherlands broadly follows Belgium's line of reasoning in its answer to Question 1. This means that, first of all, section A considers several issues of international law raised by Belgium. Section B concerns paragraphs 28 to 71 of the Reply, in which Belgium comments on the extent to which the Netherlands has complied with the right of transit so far.[2]

A. Issues of international law raised by Belgium

13. In the opinion of the Netherlands, the following three issues deserve attention:
(a) a further explanation of the Netherlands' position that territorial sovereignty can only be limited on the basis of international law;
(b) the Netherlands' response to Belgium's general exposition concerning the principles of good faith and reasonableness; and
(c) the restrictive interpretation of treaty provisions concerning territorial sovereignty.

14. First and foremost, the Netherlands contends that the applicability of the principle of *pacta sunt servanda* to both parties in the case at hand requires no further discussion.

(a) Territorial sovereignty limited on the basis of international law

15. In paragraph 19 of the Reply, Belgium argues that "*territorial sovereignty must be fully respected in so far as it is not limited by international law*".[3] In the process, Belgium refers to the judgments of the Permanent Court of International Justice in the *Free Zones of Upper Savoy and the District of Gex* and *Interpretation of the Statute of the Memel Territory* cases, which are quoted in paragraph 3.2 of the Counter-Memorial, only to go on to argue that they are "*unhelpful to answer the questions presently submitted to the Tribunal*".[4]

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2 In the answer to *Question* 1 and elsewhere, Belgium frequently quotes and parphrases the Counter-Memorial. It goes without saying that, in case of inconsistencies, the Counter-Memorial prevails.

3 Reply, p. 17.

4 *Free Zones of Upper Savoy and the District of Gex* case (PCIJ, Series A/B, No. 46 (1929), pp. 164, 166) and the *Interpretation of the Statute of the Memel Territory* case, Judgment of 11 August 1932 (PCIJ, Series A/B, No. 49, pp. 313-314). See Counter-Memorial, para. 3.2 (p. 36).

16. In paragraph 21, Belgium also quotes the passage from the *Lotus* case that ends with the statement that "*[r]estrictions upon the independence of states cannot … be presumed*".[5] Belgium then selects a few passages from legal writings concerning this case, the most salient parts of which state that "*if restrictions upon the independence of states cannot be presumed, neither […] can the absence of restrictions*" and that the relevant passage from the *Lotus* case "*did not give expression to freedom*".

17. In so far as Belgium thereby implies that the Netherlands is supposedly ignoring the limitation of its right to territorial sovereignty set by international law, the Netherlands would observe that it acknowledges the infringement of its right of territorial sovereignty by Belgium's right of transit.

18. As Belgium shares the Dutch view that the right of transit is not based on a rule of general international law[6], and since neither the EC Decisions and Directives referred to by Belgium[7] nor the Statute on the International Regime of Railways[8] contain a right of transit like the one in Article XII of the Separation Treaty, the latter constitutes the only basis for this right.

19. In paragraph 3.3 of the Counter-Memorial, the Netherlands analyses the possible implications of the limitation of its territorial sovereignty on the basis of Article XII of the Separation Treaty carefully and in detail. This analysis leads to the conclusion that the Netherlands retains the right to exercise its territorial sovereignty and, more specifically, that "*the Netherlands retains the right to exercise in full its legislative, executive and judicial authority in respect of the reactivation of the Iron Rhine, unless expressly provided otherwise*

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5 With regard to the right to territorial sovereignty, in addition to the *Free Zones of Upper Savoy and the District of Gex* and *Interpretation of the Statute of the Memel Territory* cases, as well as the *Island of Palmas* case, which is mentioned in para. 3.3.5.1 of the Counter-Memorial (p. 44), see also, for example, the *Corfu Channel* case (ICJ Reports 1949, p. 4 at p. 35): "Between independent States, respect for territorial sovereignty is an essential foundation of international relations".

6 Reply, para. 25.

7 The EC Decisions and Directives referred to by Belgium do not provide EU member states with a right of transit like the one in Article XII of the Separation Treaty across the territory of other EU member states.

8 Statute annexed to the Convention on the International Regime of Railways (Geneva, 9 December 1923), Additional Exhibit (Reply) No. 6. In para. 27 of the Reply (p. 25), Belgium cites this Statute as a basis for its right of transit. In this paragraph, it quotes eight words from the Preamble of the Statute. In para. 118, Belgium also states that the Statute obliges the Netherlands '*to make the Iron Rhine in a good state and prone to facilitating trade*'. After searching for the source of these claims, which Belgium does not provide, the Netherlands concludes that this Statute does not contain a right '*to make [a railway] in a good state and prone to facilitating trade*', let alone a right of transit like the one in Article XII of the Separation Treaty.

in the Separation Treaty of 1839 or in other applicable international agreements, which is, however, not the case in this matter."

20. In chapter 5, the Netherlands examines the relationship between the Dutch right to territorial sovereignty and Belgium's right of transit in greater detail.

(b) The principles of good faith and reasonableness

21. In paragraph 16 of the Reply, Belgium refers to the Netherlands' inference from the *Border and Transborder Armed Actions* case (*ICJ Reports* 1988, pp. 105-106, para. 94) that the principles of good faith and reasonableness do not constitute independent sources of international law. The relevant passage from the Counter-Memorial on the principle of good faith reads in full:

> "The Netherlands infers from this that the principle of good faith does not constitute an independent source of international law and that it is applied only in the interpretation and execution of obligations under international law relevant in a given case, in other words *Article XII of the Separation Treaty in this case*." [9] (emphasis added)

22. In the opinion of the Netherlands, there is no difference between this conclusion and Belgium's view that, in addition to the interpretation and fulfilment of obligations, the principle of good faith also applies to the "*exercise of rights under international law*", in this case the Netherlands' right of territorial sovereignty.

(c) Restrictive interpretation of treaty provisions on the right of territorial sovereignty

23. In paragraph 3.2 of the Counter-Memorial, the Netherlands argues, *inter alia*, that "*treaty provisions limiting territorial sovereignty … are to be construed restrictively*". In this connection, the Netherlands quotes a passage from the *Wimbledon* case, which states, in brief, that a treaty provision that limits territorial sovereignty must be interpreted restrictively "*in case of doubt*".

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[9] Counter-Memorial, para. 3.3.11.1 (p. 60). On the principle of reasonableness, see Counter-Memorial, para. 3.3.11.5 (p. 62).

24. The Netherlands is of the opinion that, to the extent that the Separation Treaty and other treaties concerning the Iron Rhine give rise to limitations on the Dutch right to territorial sovereignty, there can be no doubt about the interpretation of these limitations, which means that, in the opinion of the Netherlands, there is no call for the restrictive interpretation referred to in the *Wimbledon* case.

B. Comments on Belgium's observations concerning the exercise by the Netherlands of its territorial sovereignty

25. The following sections discuss (a) so-called temporary use, (b) the Network Statement, (c) Belgium's demand for uninterrupted use of the Iron Rhine and (d) long-term use.

(a) Temporary use

26. The Netherlands agrees that the signatories of the Memorandum of Understanding (MoU) of March 2000 did not intend to create a legally binding agreement.

27. The MoU formed the basis for the Transport Infrastructure (Planning Procedures) Act/EIA. In accordance with the MoU, the Netherlands completed the Route Assessment/EIS in a relatively short amount of time and, in anticipation of the "dual decision", also continued the procedure set out in the Transport Infrastructure (Planning Procedures) Act on an informal basis, in order to prevent delays. This cost approximately €19 million.[10]

28. The next section (1) discusses the passage on temporary use in the MoU. In the following section (2), the Netherlands argues that Belgium is not entitled to temporary use as defined in the MoU.

(1) The definition of temporary use in the MoU[11]

29. The MoU originally envisaged two phases of temporary use:

> "If, when decisions are taken on the temporary and definitive route in mid 2001 at the latest, the EIA-study concludes that a temporary, limited use will not cause

[10] Counter-Memorial, para. 2.12.3.1 (p. 22 *et seq.*) and para. 3.3.11.3 (p. 60 *et seq.*)
[11] Counter-Memorial, para. 2.12.1 (p. 20 *et seq.*)

> irreversible environmental damage, then, *from the end of 2001 onwards* a few trains a day will be allowed to use the whole historic route at limited speed between 7 AM and 7 PM. Under these same conditions of timely decision-making and of absence of irreversible environmental damage, trains could, *from the end of 2002 onwards*, also use temporarily at limited speed the whole historic route in evening hours and at night, up to a maximum of fifteen per 24-hour period (combined total in both directions)." (emphasis added)

30. However, following an informal feasibility study based on one train per day in each direction, the Netherlands and Belgium decided to omit the first phase.[12] In the opinion of the Netherlands, the first phase can be equated with the restoration of the line to its pre-1991 condition.[13]

31. Finally, with reference to the above-cited passage, the Netherlands notes that temporary use by fifteen trains per 24-hour period did not imply that the line could only be used at limited speed during the evening and at night, as argued by Belgium. A speed limit would also have applied during the daytime.

(2) Belgium is not entitled to temporary use by fifteen trains per day

32. The Netherlands finds it surprising that, although the "dual decision" has not been adopted and the MoU that formed the basis for temporary use based on such a decision is no longer in force, Belgium argues that the Netherlands must take all the necessary decisions within one month to allow temporary use by at least fifteen trains per day for a period of 5 years at least. Belgium's description of the conditions under which such temporary use could take place, namely, "*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*", in paragraph 35 of the Reply, omits the most important condition, namely, that the decision concerning temporary use had been made contingent on the decision concerning long-term use (the "dual decision"), because otherwise there would be no guarantee that this use would be temporary.[14]

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[12] See Exhibit No. 2 to the Rejoinder. Verslag van de vergadering van de technische werkgroep "IJzeren Rijn" gehouden te Brussel op 12 januari 2001. (Minutes of meeting in Brussels on 12 January 2001 of the Iron Rhine technical working group.) p. 6.

[13] Counter-Memorial, footnote 66 (p. 32).

[14] Reply, paras. 35 and 36, (p. 32 *et seq.*); Counter-Memorial, para. 2.12.4 (p. 24 *et seq.*); para. 2.13.4 (p. 31).

33. In order to accommodate Belgium's wishes, the Netherlands agreed to temporary use as defined in the MoU subject to the "dual decision", despite the fact that it thereby ran the risk of being held to account by the European Commission for a breach of the Habitats Directive.

34. The Environmental Impact Assessment concerning this temporary use was based, *inter alia*, on a report by the "Alterra Research Institute for the Green World", which contained an 'appropriate assessment', within the meaning of Article 6 (3) of the Habitats Directive, concerning the Meinweg. The report's conclusion concerning temporary use by fifteen trains per day reads as follows:

> "Strictly speaking, the temporary reactivation of the historic route would be in breach of the assessment criteria of the Habitats Directive regarding amphibians. However, if the temporary nature of the reactivation (which is expected to last about five years) is taken into consideration and the adverse impacts are mitigated as much as possible, this *will not result in irreversible damage* to the Meinweg."[15]

35. The adverse impacts identified by Alterra would only be acceptable if there was a guarantee that, after five years of temporary use, measures (linked to long-term use) would be taken to eliminate these impacts, so that the situation could restore itself. Only then would it be possible to prevent potential proceedings before a national court from resulting in the nullification of the decision (a Planning Procedure Order) in favour of temporary use, and only then would it be possible to refute any objections voiced by the European Commission.[16]

36. The Alterra Report also states that the adverse impacts would have to be mitigated as much as possible in order to prevent irreversible damage to the Meinweg. Such mitigating

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[15] See Exhibit No. 3. to the Rejoinder. Beoordeling *ecologische effecten reactivering 'IJzeren Rijn' op het gebied van de Meinweg*; Alterra, Research Instituut voor de Groene Ruimte, Wageningen, 2000. (Unofficial translation: *Assessment of the ecological effects of the reactivation of the 'Iron Rhine' concerning the Meinweg*; "Alterra, Research Institute for the Green World", Wageningen, 2000. Samenvatting (Summary). Authentic text: "De tijdelijke *reactivering* van het historisch tracé is voor amfibieën, strikt formeel gezien, in strijd met de toetsingscriteria van de habitatrichtlijn. Wanneer echter de tijdelijke aard van de reactivering in beschouwing wordt genomen (hier is een periode van circa 5 jaar verondersteld) en negatieve effecten zoveel mogelijk worden gemitigeerd, zal dit *geen onomkeerbare aantasting* van de Meinweg tot gevolg hebben."

[16] Counter-Memorial, para. 2.13.4 (p. 31).

measures were not contemplated and costs are not included in the cost estimate for temporary use.[17]

37. The preparations for temporary use by 15 trains per 24-hour period were suspended in November 2001, since the dual decision was not forthcoming. Safety equipment designed to make temporary use possible had already been purchased, at Belgium's expense. At the request of the NMBS on 3 July 2003, it was offered for sale.[18]

38. The Netherlands takes the position that, in the absence of a "dual decision", Belgium is not entitled to temporary use as defined in the MoU.

(b) The Network Statement

39. In paragraphs 35 and 92 of the Reply, Belgium implies that, after what it refers to as the "dismantling" has been reversed, the Network Statement 2003 would permit the Iron Rhine to be used first by 15 and then by 43 trains.[19]

40. The Network Statement 2003 was drawn up in October 2001 as a trial document, in anticipation of the entry into force of Directive 2001/14/EC. The intention is to publish a Network Statement 2005 in the near future. A preliminary version of this Network Statement was presented to the interested parties for consultation on 12 March 2004.

41. The above-mentioned Directive obliges the rail infrastructure manager to list *all* the railway lines for which it is responsible in the Network Statement.[20] The Iron Rhine was managed by the operating organisations (*taakorganisaties*) Railinfrabeheer, Railverkeersleiding and Railned[21], which means that the Iron Rhine had to be listed in the Network Statement 2003.

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17 Annexe B to the Counter-Memorial, p. 5.

18 See Reply, para. 130 (pp. 117-8)

19 Reply, pp. 33 and 87. Exhibit 52 to the Memorial. Para. 2.5.4 of the Counter-Memorial (pp. 9-10) cites the reason for the removal of the warning crosses and safety installations in 1996 on the section of the line between Roermond and Vlodrop, which has not been in use since 1991. Incidentally, the Network Statement also lists other sections of railway line that are currently not in use but are still part of the railway network, such as the Boxtel-Veghel line.

20 According to Article 2 (i) of Directive 2001/14/EC (Exhibit 53 to the Memorial), "network" means "the *entire* railway infrastructure owned and/or managed by an infrastructure manager" (emphasis added).

21 ProRail replaced these organisations as infrastructure manager.

42. The Netherlands notes that the allocation of railway infrastructure capacity in the Network Statement depends on the transport supply and that transport companies can apply for allocations. Capacity is not allocated solely on the basis of Belgium's right op transit.

43. Directive 2001/14/EC does not oblige the manager of a railway line that appears in the Network Statement to realise the capacity desired by a potential user on that line. The Model Access Agreement of 1997, which is Annexe 14 to the Network Statement, defines "*capacity*" as "*the space that can be allocated on the infrastructure of the national railway network, defined according to time, place and use*". The mention of the Iron Rhine in the Network Statement therefore does not mean that any railway company can present ProRail with a demand to operate 15 or 43 trains on the Iron Rhine.

44. The preamble to the Network Statement 2003 also states that the operating organisations must manage the railway lines "*within the framework established by the government in its capacity as a legislator and as the principal of the operating organisations*". Paragraph 2.5 of the Statement provides that the use of the infrastructure is limited, among other things, by regulations imposed on the operating organisations by the government.

45. Annexe 8 to the Network Statement, mentioned by Belgium in paragraph 35 of the Reply, relates to the *categorical* exclusion of sections of track due to transport-related restrictions**.** [22] In many other parts of the network, however, other restrictions pertain, in the form of limits or ceilings. However, these restrictions are not exhaustively listed in the Network Statement. Annexes 3 (axle load limits and load limits per unit of length) and 5 (sectional speed limits), for instance, divide the Dutch railway network into various categories, while always allowing for local variations in these limits.

(c) Belgium's demand for uninterrupted use

46. In paragraph 37, Belgium argues that it has a right to "*uninterrupted use of the railway during and notwithstanding […] works, so that (1) temporary driving is followed directly by long-term use and (2) neither of these "regimes" is affected by construction works"*. This would mean that the Netherlands would not be able to carry out the works that it considers necessary for the protection of humans and the environment, or that it would have

to construct a temporary additional track, for example in the Meinweg, in order to permit continuous use of the Iron Rhine during the construction of the tunnel, with all the harm it entails for the ecological values that are meant to be protected.

47. The Netherlands refers to its offer to pay an additional €40 million towards the structural reactivation if Belgium would abandon its desire for temporary use.[23] In addition, the Netherlands offered Belgium the opportunity, either for the time being or if temporary use were to take place and would have to be interrupted for construction work, to make use of the Antwerp-Roosendaal-Breda-Eindhoven-Venlo, Budel-Weert-Eindhoven-Venlo or Budel-Weert-Roermond-Venlo routes.[24]

48. Assuming that Belgium has good reason to see its desire to operate 43 trains per day on the historic route realised, the Netherlands believes that, in the interests of good faith and reasonableness in the exercise of its right of transit, Belgium should have accepted the Dutch offer of temporary alternative routes from Antwerp to Germany. Belgium's refusal to do so is possibly connected to the political necessity of making temporary use of the Iron Rhine, which it refers to in paragraph 48 of the Memorial.

(d) Long-term use

49. Following some introductory remarks (1), the Netherlands discusses the legal basis of the measures required for reactivation (2) and the regimes for the prevention of noise nuisance that are relevant to reactivation (3). The loop around Roermond is discussed under (4). The tunnel in the Meinweg and other environmental protection issues are the subject of section (5), and this is followed by a list of main findings in section (6). In order to avoid repetition, the Dutch argument does not entirely follow the Reply.

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22 Annexe 8 only covers three – short – sections of track. In all three cases, the restrictions concern the transport of hazardous substances and, in one case, the exclusive access of traffic to a particular destination.

23 Counter-Memorial, para. 2.13.5.3 (p. 33).

24 Counter-Memorial, footnote 69, (p. 33).

(1) Introductory remarks

50. The following sections discuss (i) the legal context of the preliminary version of the Draft Planning Procedure Order, (ii) the factual data underlying the preliminary version of the Order en (iii) the financial background for the reactivation.

(i) The legal context of the preliminary version of the Draft Planning Procedure Order

51. In paragraph 38 *et seq.*, Belgium analyses the preliminary version of the Draft Planning Procedure Order, which was prepared in the framework of stage 4 of the procedure set out in the Transport Infrastructure (Planning Procedures) Act/EIA, which is described in paragraph 2.12.3.1 of the Counter-Memorial. As is evident from paragraph 2.12.3.2, the Dutch Minister of Transport, Public Works and Water Management continued the procedure set out in the Transport Infrastructure (Planning Procedures) Act/EIA on an *informal* basis, in anticipation of the "dual decision", in order to prevent delays.[25] The Minister then halted the procedure, to spare the Netherlands further expense, in accordance with the wishes expressed by the Dutch cabinet during the meeting at which it decided to agree to Belgium's request to take the issue to arbitration. To prevent any loss of investment, however, it was agreed that ProRail could finish preparing the preliminary version of the Draft Planning Procedure Order, which by then was already well under way.

52. The preliminary version of the Draft Planning Procedure Order was sent to the NMBS, which had cooperated in its preparation, as a matter of courtesy, and not with the intention that it would be included in the arbitration case. It was not prepared with a view to being analysed by Belgian lawyers, as they are unable to place its contents in the context of Dutch domestic law.

53. Obviously, the preliminary version is not legally binding. It was not discussed with the relevant ministries[26], the provinces of North Brabant and Limburg or the municipalities

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[25] Counter-Memorial, p. 22 *et seq.*

[26] In addition to the Ministry of Transport, Public Works and Water Management, the Ministry of Agriculture, Nature and Food Quality, and the Ministry of Housing, Spatial Planning and the Environment.

concerned and the interested parties have not had an opportunity to comment, as is required by the Transport Infrastructure (Planning Procedures) Act/EIA.

(ii) The factual data underlying the preliminary version of the Draft Planning Procedure Order

54. The Dutch Transport Infrastructure (Planning Procedures) Act/EIA, in so far as completed, focused on reactivating the Iron Rhine in such a way that it could be used by 43 trains (combined total for both directions per working day) in 2020. This number was agreed by the state-owned railway companies B-Cargo and DB-Cargo and the privately-owned railway company NS-Cargo in the Iron Rhine technical working group in October 1999. There were subsequently no negotiations concerning this number, between either civil servants or the relevant members of government.[27] In other words, Belgium's desire to operate 43 trains on the Iron Rhine in 2020 was indicative for the Dutch procedure, while the results of the Transport Infrastructure (Planning Procedures) Act/EIA, in so far as completed, played a key role in the consultations between the Netherlands and Belgium.

(iii) The financial background of the reactivation

55. In paragraph 37 of the Reply, Belgium argues that the Netherlands has taken a number of measures "*as a condition for the long-term reactivation as it is presently envisaged,*" which, "*if they were to be financed by Belgium, amount to a violation of Belgium's rights under international law*". In this context, it is appropriate to provide a brief overview of the cost estimates and the proposed Dutch and Belgian contributions to the costs of reactivation.

56. First, the Netherlands would emphasise that the cost estimates are based on the prevailing arrangements for similar projects.

57. As stated in paragraph 2.13.5 of the Counter-Memorial, the Transport Infrastructure (Planning Procedures) Act/EIA produces ever more detailed data, which means that cost estimates are increasingly specific.[28] Paragraph 2.13.5 also indicates what important

[27] Exhibits Nos. 20 and 21 to the Counter-Memorial.
[28] Counter-Memorial, p. 31; Annexe B to the Counter-Memorial.

changes in the measures necessary for reactivating the Iron Rhine led to a reduction in the estimates.

58. The first cost estimate of €547.8 million dates from October 2001 and was based on the Route Assessment/EIS. [29] This was followed in June 2002 by a cost estimate of €514.3 million. During the drafting of the preliminary version of the Draft Planning Procedure Order, it emerged that the cost estimate could be reduced again, namely, to €440.5 million or €478 million at March 2004 prices.[30] The Netherlands is aware that the last estimate did not play a part in Belgium's decision to initiate arbitration proceedings.

59. The reduction of the cost estimates became possible as a result of specific efforts on the part of the Netherlands in this regard. The measures to reduce the estimated costs were the result of consultations with the NMBS and were only determined after explicit agreement of the NMBS was obtained.

60. In October 2001, the Netherlands offered to pay 25% (€140 million) of the then estimated costs. Only part of this sum had a specific destination: approximately €60 million was earmarked for the additional cost of the loop around Roermond, in comparison with that of reactivating the relevant section of the historic route, and approximately €19 million for the cost of noise abatement facilities that would be necessitated by the reactivation of the Iron Rhine, but which Belgium was not required to finance.[31]

61. Belgium has never offered to contribute more than €100 million to the costs of reactivation.

62. In paragraph 43 *et seq.*, Belgium comments on a number of measures from the preliminary version of the Draft Planning Procedure Order. In the process, it hardly mentions the financial contribution of the Netherlands. In sections (2) to (6), the Netherlands discusses Belgium's comments. However, the Netherlands also draws attention to the fact that, while it has no interest of its own in the reactivation of the Iron Rhine, it is contributing generously to

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[29] In para. 57 of the Reply, Belgium indicates that the cost of constructing a tunnel in the Meinweg initially amounted to ECU 559 million. This concerned a double-track bored tunnel, while the cost estimates since 2001 concern a single-track tunnel, partially constructed above-ground. See Counter-Memorial, footnote 65, p. 31, as well as Annexe A to the Counter-Memorial, para. 2.2, p. 21 *et seq*.

[30] All prices in this section are expressed at March 2001 levels, unless indicated otherwise.-

the financing of the measures needed to prepare the railway line for use by 43 trains per 24-hour period, as desired by Belgium.

63. In the opinion of the Netherlands, Belgium's attempts to calculate in detail how the financial contributions should be divided between the Netherlands and Belgium on the basis of the preliminary version of the Draft Planning Procedure Order should be seen against this background.

64. In this context, Belgium also argues that "*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*". However, the costs of the "measures" to which Belgium refers relate to investments needed to prepare the Iron Rhine, which has seen little or no international traffic since 1917, for the use desired by Belgium. Moreover, on the basis of EC law, the Netherlands is entitled to charge users a user fee for the purpose of maintaining the line.

65. The Netherlands also offered to raise its offer from €140 million to €180 million if Belgium waived temporary use, which means that, based on the estimate of June 2002, Belgium's costs would have come to €334.3 million.

(2) The legal basis of the measures required for reactivation

66. In the section of the Reply entitled "*Measures required to meet objectives beyond legislative requirements*" and in paragraph 55 of the Reply, Belgium quotes the preliminary version of the Draft Planning Procedure Order as follows:

> "[T]he norm setting flows from applicable laws and regulations, *or* [the norm setting] *has been declared applicable in the context of the Tracébesluit IJzeren Rijn to be adopted*."
>
> "[T]he 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 … measures obligatory*". [32]

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[31] See para. 80 of this Rejoinder; also, Counter-Memorial, footnote 66 (p. 32) and Annexe B, p. 5 and p. 4 (third row).

[32] Reply, pp. 35, 51.

67. The Netherlands submits that the vast majority of the measures required to reactivate the Iron Rhine derive directly from sector-specific legislation, such as the Transport Infrastructure (Planning Procedures) Act and noise abatement legislation.

68. The Administrative Jurisdiction Division of the Council of State, which is the competent court in relation to the Planning Procedure Order, not only examines the Order for compatibility with sector-specific law, but also examines the way in which the authorities take account of the interests of citizens for compatibility with the norms for government action, the so-called *general principles of sound administration*.

69. These principles are part of current Dutch law. They can influence the interpretation and application of statutory provisions and the implementation of policy and can also serve as administrative policy in cases where a statutory regulation leaves a certain amount of freedom or is entirely lacking. The most relevant general principles of sound administration in the case at hand are codified in Sections 3.2 and 3.4 of the General Administrative Law Act (*Algemene wet bestuursrecht*), which read:

> "When preparing an order [*besluit*] an administrative authority shall gather the necessary information concerning the relevant facts and the interests to be weighed."
>
> "The administrative authority shall weigh the interests directly involved in so far as no limitation on this duty derives from a statutory regulation or the nature of the power being exercised."[33]

70. The examination of the procedure set out in the Transport Infrastructure (Planning Procedures) Act for compatibility with the general principles of sound administration often concerns very specific local situations or specific interests of individual citizens. Thus, for example, the Administrative Jurisdiction Division of the Council of State quashed two sections of the Planning Procedure Order concerning the Betuwe railway line, because the government agency concerned had not taken sufficient account of the interests of, respectively, a riding academy located close to the Betuwe railway line, where internationally ranked dressage horses were stabled, and a company that manufactured weighing

[33] Authentic text: " Bij de voorbereiding van een besluit vergaart het bestuursorgaan de nodige kennis omtrent relevante feiten en de af te wegen belangen" " Het bestuursorgaan weegt de rechtstreeks bij het besluit betrokken belangen af, voor zover niet uit een wettelijk voorschrift of uit de aard van de uit te oefenen bevoegdheid een beperking voortvloeit".

equipment and performed calibrations. Both companies complained about the expected consequences of vibrations, an area in which the Netherlands does not possess specific legislation. In an appeal against the construction of the Southern High-Speed Line, the Administrative Jurisdiction Division set aside a decision because insufficient account had been taken of the access to a nearby catering establishment.

71. The passages from the preliminary version of the Draft Planning Procedure Order quoted by Belgium thus do not relate to measures without a legal basis, as suggested in the Reply.

72. Belgium's comments on the preliminary version of the Draft Planning Procedure Order relate primarily to noise abatement measures. The above will therefore be applicable to what has been stated in this section, but may also apply to other areas.

(3) Noise abatement regimes relevant to the reactivation of the Iron Rhine

73. Two distinct regimes are relevant in this context. The following sections discuss the regime for dwellings and similar objects (i) and Belgium's criticism that it has to pay for Dutch rail traffic on certain sections of the track (ii). This is followed by an explanation of the noise abatement regime for silent areas (iii).

(i) The noise abatement regime for dwellings and similar objects

74. With regard to the noise abatement regime for dwellings and similar objects, Belgium quotes Section 106 (d)(4) the Noise Abatement Act in paragraph 49.[34] This occurs in the context of Belgium's contention that the preliminary version of the Draft Planning Procedure Order *"does 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 (…) . The exemption is only granted where noise abatement measures prove insufficient to reach preferential values".*

[34] In fact, Section 106 (d) of the Noise Abatement Act discusses measures in a general sense. When the preferential value (57 dB(A)) is exceeded, measures are applied in the following order: (1) measures at the source (e.g. using quieter infrastructure and/or quieter trains), (2) measures related to the transfer of noise (e.g. noise barriers) and (3) measures at the point of impact (i.e. façade insulation).

75. Paragraphs 48 and 50 of the Reply indicate that Belgium understands the Dutch position, but that it believes that the residents along the Iron Rhine should be subject to a less favourable regime, as a result of Belgium's right of transit, or that the Netherlands should cover the difference in cost between the "normal" application of the relevant statutory regime and an application that has less favourable consequences for the interested parties.

76. In paragraph 49, Belgium also points out that the Netherlands only makes use of the exemption available under Section 106(d)(4) of the Noise Abatement Act if the measures are "insufficiently efficacious", and not in the case of other "objections", especially objections of a financial nature.

77. In this context, the Netherlands notes that a set of barrier criteria (*schermcriterium*) is employed to determine the location, length and height of noise barriers for the purpose of Planning Procedure Orders. In every situation where the noise impact exceeds the preferential value, these criteria make it possible to determine in an unequivocal and objective manner, by means of a cost-benefit analysis, whether a noise barrier will be effective. The criteria cover both acoustic and financial factors. As soon as the noise nuisance exceeds the maximum exoneration value of 70 or 73 dB(A), the relevant dwellings lose their residential function.[35]

78. The Netherlands sees no reason in the case at hand to deviate from the Noise Abatement Act and the barrier criteria, to the disadvantage of the interested parties or to cover the difference in cost between the "normal" application of the Act and the criteria and the deviation from them proposed by Belgium.

(ii) Belgium's alleged payment for Dutch rail traffic

79. Belgium argues that it is being made to pay for noise barriers on tracks "*which are in present or future use for Dutch railway transports*".

80. The increase in rail traffic on the busy section of the line between Weert and Roermond by 43 trains per 24-hour period means that legally permissible noise levels will be exceeded there. Because an increase in Dutch rail traffic is also anticipated, the Netherlands

[35] The maximum permitted noise impact of a modified railway line is 73 dB(A); the maximum permitted noise impact of a new railway line is 70 dB(A).

stated from the beginning of the negotiations that it would bear a share of the cost of the necessary noise abatement measures. In the table of costs that appears in Annexe B of the Counter-Memorial, these costs are referred to as costs for "*noise barriers (near dwellings) not specifically for the Iron Rhine*".[36] Footnote 66 in the Counter-Memorial indicates that they are part of the Dutch contribution to the reactivation of the Iron Rhine.[37]

(iii) The noise abatement regime in silent areas

81. It is not correct, as Belgium argues in paragraph 55, that the absence of the preferential value of 40 dB(A) for silent areas in the graph quoted by Belgium on p. 39 of the Reply implies that this value has no legal basis. The regime for silent areas is separate from the one for dwellings and similar objects.

82. The term silent area derives from section 4(9) of the Environmental Management Act (*Wet milieubeheer*). On the basis of this provision, provinces are required to adopt a Provincial Environmental Policy Plan every four years, in which they identify areas that require special protection to preserve the environment or certain aspects thereof (such as quiet). A silent area is an area where the noise nuisance should be so low that the sounds that occur there naturally are hardly disturbed, if at all (stand still principle). The preferential noise value in silent areas can vary from province to province. Both the province of North Brabant and the province of Limburg employ a value of 40 dB(A) during the daytime in their Environmental Policy Plans.

83. Belgium's comments concerning the target value in silent areas focus, *inter alia*, on the tunnel in the Meinweg. In the process, Belgium creates the impression that the 40 dB(A) norm that applies to maintaining the status quo in the Meinweg as a silent area is the decisive factor.

84. The fact that a tunnel is required in the Meinweg for reasons connected to environmental protection, regardless of the preferential value of 40 dB(A) that needs to be

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[36] Counter-Memorial, Annexe B, p. 4.

[37] The partition of the Iron Rhine in the preliminary version of the Draft Planning Procedure Order deviates from the partition of the line employed in Annexe B to the Counter-Memorial. In the preliminary version of the Draft Planning Procedure Order, the partition is based on the location of the borders of municipalities. Annexe B to the Counter-Memorial is based on the functional differences of the line.

maintained for this area to be a silent area, can be demonstrated by reference to Annexe A to the Counter-Memorial, which establishes objectively what measures are necessary to prevent adverse impacts on the area on the basis of ecological criteria. The authors of the report in Annexe A conclude that noise barriers would be sufficient, in relation to the status of the Meinweg as a Birds Directive and Habitats Directive area. However, with regard to the preservation of its status as a silent area and the application of the Flora and Fauna Act, noise barriers would not be an adequate measure for preventing adverse impacts resulting from an increase in noise levels. Furthermore, noise barriers create fragmentation.[38]

(4) The loop around Roermond

85. It appears that Belgium has not understood paragraphs 2.13.2 and 3.3.10.1 of the Counter-Memorial correctly. In summary, for the benefit of the Tribunal, these paragraphs explain that the Netherlands never considered constructing a loop around Roermond unilaterally, in breach of the Iron Rhine Treaty.[39] However, this loop has certain benefits, which were also recognised by Belgium during the negotiations. Furthermore, the Netherlands is willing to assume the additional costs of the loop as well as the associated risks.

(5) The tunnel in the Meinweg and other environmental protection issues

86. This section includes comments (i) on Belgium's arguments concerning the tunnels mentioned by the Netherlands in the Counter-Memorial, (ii) on the designation of the Meinweg as a Birds Directive and Habitats Directive area and (iii) on Belgium's discussion of the so-called *modal shift*.

87. Prior to this, some comments are appropriate concerning the "*express reservations Belgium made with respect to future use when the international use of the line was interrupted*" in 1986, 1987, 1991 and 1993.[40]

88. Although his letter of 23 February 1987 refers to the creation of a national park, Minister De Croo of Transport saw no reason to take further action on this matter, even after

[38] Counter-Memorial, Annexe A , para. 2.2 (p. 21 *et seq.*).
[39] Counter-Memorial, para. 2.13.2 (p. 28) .
[40] Reply, para. 59 (p. 54 *et seq.*).

the reply from Minister Smit-Kroes of Transport, Public Works and Water Management eight months later.[41] The planned in-depth cost analysis was conducted three years later, in 1990. Moreover, both this analysis and the second feasibility study, the Tractebel Report, took no account of environmental protection measures in the cost estimates, even though Belgium was aware that the Iron Rhine crosses protected areas.[42]

89. The Netherlands stands by its position, as expressed in paragraph 2.7 of the Counter-Memorial.

(i) Tunnels

90. With the description of the three Dutch tunnels that are currently under construction in paragraph 3.3.5.6.A of the Counter-Memorial, the Netherlands aims to do no more and no less than to illustrate that such works are also being carried out as part of the construction of other railway lines in the Netherlands. All three cases involve tunnels that are primarily intended for the protection of ecological values, although the circumstances differ in each case.

91. The Netherlands did not intend to use these examples to demonstrate "*abstract normality*" or *"proportionality*", let alone to create the impression that these tunnels resulted from "*an international regime similar to that of the Iron Rhine*" or that the Dutch "*competent authorities always require tunnels to be built in wildlife protection areas*".[43]

92. The Netherlands will therefore refrain from discussing this issue any further, except to note that the construction of tunnels in order to protect the environment is not unusual in Belgium either, as is apparent from the construction of the above-ground tunnel beside the Peerdsbos, which is described in paragraph 3.3.5.6.A of the Counter-Memorial, but which Belgium ignores in its Reply.[44]

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41 Exhibits Nos. 59 and 61 to the Memorial.
42 Prognos Report (1991) Exhibit S2 to the Memorial; Tractebel Report (1997), Exhibit S1 to the Memorial. Counter-Memorial, para. 2.8 (p.14) and footnote 31 (p. 15).
43 Reply, para. 54 (p. 49 *et seq*.) and para. 62 (p. 61).
44 Counter-Memorial, p. 48 *et seq*.

(ii) Designation of the Meinweg as a Habitats Directive area

93. As also evident from paragraph 84 of this Rejoinder, the environmental protection measures in the Meinweg derive from different statutory regimes. Annexe A to the Counter-Memorial demonstrates that the application of the Birds and Habitats Directives is not a decisive factor for the construction of a tunnel in the Meinweg.[45]

94. Nevertheless, the Netherlands will discuss Belgium's observations concerning the designation of the Meinweg as a Habitats Directive area.

95. In paragraph 67, Belgium argues that the Netherlands was not obliged to designate the areas traversed by the Iron Rhine as special Birds Directives and Habitats Directives areas, as the obligation to designate such areas derives from a directive, and directives grant member states a certain amount of freedom with regard to their implementation.

96. With regard to the designation areas of conservation under the Birds and Habitats Directives, however, this freedom is limited. In its judgment in the *Santoña Marshes* case, the European Court of Justice stated as follows with regard to areas of conservation under the Birds Directive:

> "In choosing the territories which are most suitable for classification as special protection areas pursuant to Article 4(1) of Directive 79/409 on the conservation of wild birds, member States have a certain discretion which is limited by the fact that the classification of those areas is subject to certain ornithological criteria determined by the directive, such as the presence of birds listed in Annex 1 to the directive on the one hand, and the designation of a habitat as a wetland area on the other."[46]

97. This judgment is generally considered as applying equally to the designation of areas of conservation under the Habitats Directive. Ecological criteria should determine this designation. If a member state does not register or designate areas that conform to the criteria described in the Directives, the Commission can initiate proceedings against that member state before the European Court of Justice.

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[45] Counter-Memorial, Annexe A, para. 2.2 (p. 21 *et seq.*).

98. In paragraph 67 of the Reply, Belgium points out that the Netherlands, after provisionally registering the Weerter en Budeler Bergen and the Leudal with the European Commission, changed this provisional registration in February 2003.

99. This change was the result of a critical discussion with the European Commission in June 2002.[47] The Commission's two main points of criticism were the lack of ecological data and the fact that the Netherlands employed a 250 ha lower limit when selecting the areas. This criticism led to a new selection on the basis of new environmental research. It involved the selection of the five most important examples of each natural habitat type and habitat of species for which the Netherlands is responsible.[48] Subsequently, the selection was examined to determine whether it achieved the percentage of cover and was adjusted where necessary.[49]

100. The Meinweg was registered as one of the five most important examples of *European dry heaths* and five other habitat types[50], as well as one of the five most important areas for the brook lamprey and also one other species (the great crested newt).

101. The Iron Rhine was therefore not a factor in either the decision to change the registration of the Weerter- en Budeler Bergen and the Leudal or the decision to register the Meinweg as a Habitats Directive area.[51]

102. In paragraph 68 of the Reply, Belgium refers again to the *Poitevin Marsh* case *(*Commission v. France) and infers from it that the Netherlands should have at least

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46 See No. 4 to the Rejoinder. Judgment of the European Court of Justice of 2 August 1991. Commission of the European Communities *v.* Kingdom of Spain. Case C-355/90. *European Court reports 1993 Page I-04221*.

47 The so-called Atlantic Biogeographic Seminar in Zandvoort. Areas registered under the Habitats Directive by Belgium were also scrutinised.

48 In the case of priority habitats or priority species, ten areas were selected.

49 The percentage of cover refers to the national cover of the combined surface area of the selected (or registered) natural habitats and habitats of species, as a percentage of the national surface area of the natural habitat type or of the national population of the species. If an area qualifies for registration as more than one natural habitat type or as the habitat of more than one species, the surface area in question is included in the calculation of the percentage of cover.

50 Namely, natural dystrophic lakes and ponds, Northern Atlantic wet heaths with *Erica tertralix*; depressions on peat substrates of the *Rhynchosporion*; old acidophilous oak woods with *Quercus robor* on sandy plains; and the priority natural habitat known as Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior* (*Alno-Padion*, *Alnion incanae*, *Salicion albae).*

51 The Leudal is still a Habitats Directive area but the boundaries have been changed. The Ringselveen and Kruisveen areas are the core of the Weerter- en Budeler Bergen. The Weerter en Budeler Bergen still has the status of a Birds Directive area.

excluded a strip of land including the Iron Rhine when it designated the Meinweg as an area of conservation. In paragraph 3.3.5.6.C of the Counter-Memorial, the Netherlands has already explained that this is impossible on the basis of case law of the European Court of Justice.[52]

103. In substantive terms, Belgium's suggestion that two Birds Directive and Habitats Directive areas be designated in the Meinweg on either side of the Iron Rhine, so that "*no fragmentation occurs*", does not differ from the Belgian idea discussed in the previous paragraph. In the opinion of the Netherlands, there is no doubt that the Dutch courts and the European Commission would see through such a trick immediately.

(iii) Modal shift

104. In paragraph 61 of the Reply, Belgium refers to a study concerning modal shift that, in contrast to a study referred to by the Netherlands in its Counter-Memorial, indicates that lorries are less environmentally friendly than diesel trains.[53]

105. It is clear from the passages on modal shift in the Memorial, the Counter-Memorial and the Reply, as well as from the experience of experts consulted on this issue, that studies concerning modal shift appear regularly and frequently present different results. In the Counter-Memorial, the Netherlands refers to a specific study, because it is one of the reasons why the Netherlands does not pursue an active modal shift policy in order to realise a shift from road transport to rail transport and/or inland waterway transport. In the vision of the Netherlands, modal shift policy thus cannot play a part in decisions concerning infrastructural investments in railway lines.

106. With reference to paragraph 2.9.1 of the Counter-Memorial, the Netherlands reiterates that Belgium fails to explain why a tunnel should not be constructed in the Meinweg because of the possible environmental advantages resulting from modal shift and, by extension, why the costs of environmental protection measures in the Meinweg and

[52] Counter-Memorial, p. 51. Exhibits Nos. 34 and 35 to the Counter-Memorial.
[53] Counter-Memorial, para. 2.9 *et seq.* (p. 15).

elsewhere resulting from the reactivation of the Iron Rhine should be borne by the Netherlands.[54]

(6) Main findings

107. The most important conclusions to be drawn from this Chapter are:

The measures in the preliminary version of the Draft Planning Procedure Order serve to implement general Dutch law. In implementing this law, government action is guided by the general principles of sound administration, which are part of current Dutch law. To avoid causing disadvantage to interested parties, these principles are, if necessary, applied independently.

In so far as the costs of the reactivation should be covered by the Netherlands, these costs are included in the €140 million that the Netherlands has offered as a contribution to the costs of reactivating the Iron Rhine.

The designation of the environmentally significant Meinweg area as a Birds and Habitats Directives area took place in accordance with EC case law and on the basis of objective criteria.

On the basis of ecological criteria, it has been argued objectively (in Annexe A to the Counter-Memorial) why a tunnel needs to be constructed in the Meinweg in order to protect the environment.

Reference to the active *modal shift* policy cannot cancel or restrict the measures for the protection of humans and the environment that are required for the reactivation of the Iron Rhine.

[54] Counter-Memorial, p. 15 *et seq*. Moreover, Belgium raises the issue of modal shift policy in the context of sustainable development, which is also one of the objectives of the Birds and Habitats Directives.

Chapter 4: Article XII of the Separation Treaty revisited

108. In this chapter, the Netherlands once again discusses certain passages from Article XII of the Separation Treaty, in response to their interpretation by Belgium. The following passages are discussed:

(a) "*Dans le cas, où il aurait été construit en Belgique une nouvelle route, ou creusé un nouveau canal, qui aboutirait à la Meuse vis-à-vis le canton Hollandais de Sittard, alors il serait loisible à la Belgique de demander à la Hollande, qui ne s'y refuserait pas dans cette supposition que la dite route, ou le dit canal fussent prolongés*";

(b) "*que la dite route, ou le dit canal fussent prolongés d'après le même plan*";

(c) *"Cette route ou ce canal … seraient construits, au choix de la Hollande, soit par des ingénieurs et ouvriers que la Belgique obtiendrait l'autorisation d'employer à cette effet dans le canton de Sittard, soit par des ingénieurs et ouvriers que la Hollande fournirait, et qui exécuteraient aux frais de la Belgique, le travaux convenus*";

(d) "*qui ne pourrait servir que de communication commerciale*";

(e) "*entièrement aux frais et dépens de la Belgique*" / "*le tout sans charge aucune pour la Hollande*".

The main findings appear in section (f).

(a) "*Dans le cas, où il aurait été construit en Belgique une nouvelle route, ou creusé un nouveau canal, qui aboutirait à la Meuse vis-à-vis le canton Hollandais de Sittard, alors il serait loisible à la Belgique de demander à la Hollande, qui ne s'y refuserait pas dans cette supposition que la dite route, ou le dit canal fussent prolongés …*"

109. As in the Memorial, Belgium argues in the Reply that the request to reactivate the Iron Rhine does not involve a request for a "new *road within the meaning of Article XII of the Separation Treaty*", thereby creating a situation in which it enjoys a right but does not wish to fulfil the associated obligations.[55]

[55] Reply, paras 90-94 (p. 86 *et seq*.) Reply. The Netherlands believes that the word "nouveau" should be seen in relation to the provisions of the Separation Treaty that precede Article XII. Article X concerns the use by Dutch and Belgian nationals of *existing* canals within the territory of both countries and Article XI the use of *existing* roads through Maastricht and Sittard. They contain conditions for the use of these canals and roads, while Article XII determined what conditions needed to be met with regard to a road or a canal that did not exist in 1839.

110. The Netherlands maintains its position, which is that Article XII of the Separation Treaty applies to the construction of the infrastructure necessary to ensure that the Iron Rhine, which for a large part of the twentieth century was used for through traffic by one or two trains per 24-hour period and, since 31 May 1991, has not been used for through traffic at all, is restored, adapted and modernised in such a way that it can be used by 43 trains per 24-hour period.[56]

111. This is also an appropriate context for discussing Belgium's contention in paragraph 121 *et seq.* of the Reply that "*the reactivation of the Iron Rhine as it is presently envisaged does not exceed what is necessary for the line to be in good state and prone to facilitating trade*".

112. The Netherlands notes that, during the negotiations and in the Memorial, Belgium consistently took the position that Dutch legislation was applicable to what it referred to as "functionality" but not to measures necessary for the protection of humans and the environment. It appears from paragraph 71 of the Reply that Belgium has abandoned this distinction.[57]

113. Instead, Belgium now takes the position that the current legislation, not only regarding the protection of humans and the environment, but also concerning "functionality", is *entirely* inapplicable, in so far as Belgium must pay the costs arising from its application. This is the conclusion that must be drawn from Belgium's assertion that the historic line in its current state can be used by at least 43 trains per 24-hour period.

114. In support of its opinion, Belgium refers to the fact that the Iron Rhine was used "intensively" in the past and that the line was once double-tracked and electrified along its entire length. Belgium argues that, if the line needs to be restored, adapted or modernised so that it can be used by 43 trains per 24-hour period, the Netherlands must bear the cost of this.

115. It is useful to summarise the history of the Iron Rhine. From 1879 to 1914, the line was used intensively by Belgium, the Netherlands and Germany. It is unclear what should be

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[56] Counter-Memorial, para. 3.3.4.5 (p. 43).

understood by “intensively” then, in relation to the present. In Exhibit No. 9 to the Counter-Memorial, ProRail describes the use of the Iron Rhine as a through route from 1920 onwards This overview can be summarised as follows:

Number of international freight trains per direction and total per 24-hour period

Timetable	1920	1921	1925	1927	1930	1934-35	1938	1939-40	1947	1951-54	1954-57	1960	1964	1965-66	1970-71	1975-76	1980-81	1984-85	1986-91
B → G	4	4	1	1	1	0	0	0	1	0	1	1	1	1	3	0	1	1	1
G → B	4	5	0	0	0	0	0	0	1	0	1	1	1	1	3	0	1	1	1
Total	8	9	1	1	1	0	0	0	2	0	2	2	2	2	6	0	2	2	2

116. In the 1930s, the second track was removed in Belgium, the Netherlands and Germany. After being destroyed during World War II, the Iron Rhine was rebuilt by the Allied Powers as a double-tracked line in 1945, but not for the purpose of establishing a lasting connection. Thus, for example, the sleepers were made of pinewood, which is entirely unsuited to this purpose. A single-tracked Iron Rhine was sufficient for post-World War II traffic. As noted by Belgium in paragraph 127 of the Reply, the Iron Rhine was used for military transports from 1948 until the mid-1960s. Even during the peak periods of military use in 1948 and 1959, when respectively 1,570 and 2,025 military trains *per year* were used on the Iron Rhine, this only amounted to a maximum of six trains per 24-hour period.

117. At any rate, since 1920, the Iron Rhine - which has never been electrified along its entire length and still is not - has never been used for through international traffic by more than nine trains per 24-hour period.

118. It surprises the Netherlands that Belgium ignores the extremely limited use of the Iron Rhine from 1917 onwards and the termination of through traffic in 1991, and that it believes that it can disregard current regulations, not only of a technical and environmental nature, but more generally as regards the legal protection of interested parties.

[57] Reply, para. 71 (p. 73); also para. 95 (p. 89); Counter-Memorial, para. 3.3.5.4 (p. 48); Memorial, para. 81 (p. 96).

119. The Netherlands believes that the Iron Rhine, a railway line that can rightly be described as "historic" in more ways than one, cannot handle 43 trains per 24-hour period in its current condition.

(b) "*que la dite route, ou le dit canal fussent prolongés d'après le même plan*"

120. In paragraph 76 *et seq.* of the Reply, Belgium argues that it has the right to determine unilaterally what the word "plan" within the meaning of Article XII implies.[58]

121. For the sake of completeness, the Netherlands reiterates that the words "*d'après le même plan*" should be seen against the background of the passage "*sans préjudice des droits de souveraineté exclusifs sur le territoire que traversait la route ou le canal en question*".[59] In the opinion of the Netherlands, this alone already implies that it is not appropriate for Belgium to determine a "plan" unilaterally.

122. Belgium further points out that this (alleged) unilateral determination 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*", thereby forgetting that the condition that Belgium would bear the costs of reactivating the Iron Rhine was included separately in Article XII and also that the passages concerning these costs should be understood in the context of Dutch territorial sovereignty.[60]

123. In paragraphs 79 and 80 Belgium argues that "*[t]he Netherlands … seek to rely on provisions in two other treaties, notably Article 3 of the Convention between Belgium and the Netherlands "pour la fonction de quatre chemins de fer", signed at [T]he Hague on 9 November 1867 and Article 5 of the Iron Rhine treaty of 1873*" and that the Netherlands pursues "*an analogical application of (Article 3 of) the 1867 Convention to the Iron Rhine*".[61]

124. First of all, the Netherlands would observe that the Iron Rhine Treaty was concluded in order to amend and implement Article XII of the Separation Treaty, and that the relevance of this Treaty is therefore beyond dispute. In addition, the Netherlands does not seek to rely on (Article 3 of) the Convention of 1867 and does not apply this provision by analogy.

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58 Reply, p 76 *et seq.*
59 Counter-Memorial, para. 3.3.6 (p.52 *et seq.*)
60 Reply, para. 77 (pp. 76, 77).

125. Article 5 of the Iron Rhine Treaty simply states that the same *cahier des charges* used for the construction of the cross-border railway line between Tilburg and Turnhout, a railway line which was *not* constructed on the basis of a right of transit like the one contained in Article XII of the Separation Treaty, will be used for the construction of the Iron Rhine. Even if the "plan" for the Tilburg-Turnhout line had been determined unilaterally by Belgium – *quod non* – *both* parties in any case agreed on the plan for the Iron Rhine, namely in Article 5 of the Iron Rhine Treaty.

126. The Netherlands maintains that two countries digging a cross-border canal or constructing a cross-border road or railway line (or in this case reactivating a railway line) should be in agreement to such an extent concerning the works on their respective territories that "*physical cross-border traffIc*" is possible. To clarify, by "*physical cross-border traffic*", the Netherlands means that the technical characteristics of the infrastructure in both countries should be compatible to the extent that traffic is not obstructed at the border.

127. In response to Belgium's apparent belief that, even if it had not decided unilaterally in 1873 how the Iron Rhine should be constructed on Dutch territory, the Netherlands should demonstrate that Belgium *currently* has no right to determine the route of the Iron Rhine unilaterally, the Netherlands refers to its right of territorial sovereignty.[62] The Netherlands would also point out that now, as then, states have no right to decide on the construction of railways on the territory of other states.

(c) "*Cette route ou ce canal ... seraient construits, au choix de la Hollande, soit par des ingénieurs et ouvriers que la Belgique obtiendrait l'autorisation d'employer à cette effet dans le canton de Sittard, soit par des ingénieurs et ouvriers que la Hollande fournirait, et qui exécuteraient aux frais de la Belgique, les travaux convenus*"

128. In paragraph 77 of the Reply, Belgium argues that this passage indicates that the Netherlands could choose whether the Netherlands or Belgium would recruit the engineers and workmen to construct the road or the canal. Only if the Netherlands *"would choose to perform (the works) by itself at the expense of Belgium*" would *agreement* be required. In the case that Belgium would perform the works, agreement would not be required and

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61 Reply, para. 79 (pp.78 en 79); see also para. 80 (p. 80).

62 Reply, para. 80 (and 81)

construction would take place "i*n function of the plan on Belgian territory without agreement of the Netherlands but in conformity with Dutch legislation within the limits set out under Question 1*".[63]

129. First and foremost, the Netherlands notes that, even *if* the choice of recruitment were to make a difference in relation to an agreement that had to be reached, this choice in any case lies with the Netherlands, which means that it would be able to determine the desired outcome.[64]

130. Moreover, engineers and workmen employed by Belgium could only start working if the Netherlands granted them "*authorisation*" to do so. This authorisation was undoubtedly only granted after the Netherlands had achieved the desired agreement.

(d) "*qui ne pourrait servir que de communication commerciale*"

131. In its submissions and elsewhere in both the Memorial and the Reply, Belgium argues that the Iron Rhine may only be used for commercial purposes. It is not clear why Belgium considers it important that this condition still applies today. The Netherlands notes that this condition can be explained by the political situation in Europe in 1839 and the hostile relations that existed between the Netherlands and Belgium at that time. Since then, the Iron Rhine has been used for purposes other than commercial ones, *e.g.* for the transport of military materiel after both world wars and for the transport of soldiers from round about 1948 until the 1960s. In the opinion of the Netherlands, this condition has therefore lost all significance.

(e) "*entièrement aux frais et dépens de la Belgique" and "le tout sans charge aucune pour la Hollande*"

132. Section (1) contests that the Netherlands taxes the right of transit *as such*. This is followed by a discussion of (2) Belgium's broad interpretation of the word '*entretien*', (3) the connection made by Belgium between the Railways Agreement and the maintenance of the Iron Rhine and (4) the application of Article XI of the Separation Treaty to the reactivation of the Iron Rhine. A conclusion appears in section (5).

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[63] Reply, p. 77; see also para. 94 (p. 89).

(1) The alleged taxation of the right of transit

133. In paragraphs 104-108, Belgium argues that "*the costs and financial risks of reactivating the Iron Rhin*" are regarded by the Netherlands as "*a corollary of Belgium's right of transit*".[65] Belgium further points out that Article XII concerns the "construction" of a road or canal, and in doing so quotes paragraph 3.3.4.4 of the Counter-Memorial.[66] However, paragraph 3.3.4.4 does not concern costs. In this paragraph, the Netherlands argues that, by taking the position that its request to reactivate the Iron Rhine is not a request in the sense of Article XII, Belgium is evading its obligations under Article XII. One of these is Belgium's obligation to bear the costs of reactivation, as the Netherlands explains in paragraph 3.3.8 *et seq.* of the Counter-Memorial.

134. The Netherlands agrees with Belgium that the costs of reactivating the Iron Rhine are not related to the right of transit *as such*. These costs actually relate to construction, in this case the construction of the infrastructural facilities that are necessary from a technical point of view, and in connection with the consequences for humans and the environment, in order to realise Belgium's desire to operate 43 trains per 24-hour period on the Iron Rhine in 2020.

(2) Belgium's broad interpretation of the word '*entretien*'

135. In paragraph 118 of the Reply, Belgium employs a broad definition of the word '*entretien*'. While Belgium refers to dictionaries in other cases, it is noteworthy that it does not do so here. The Netherlands contends that '*entretien*', which is defined in *Petit Robert* as "*soins, réparations, dépenses qu'exige le maintien (de qqch.) en bon état*" is concerned with the *preservation* of a particular state of affairs.[67] The definition certainly does not encompass the notions of "adaptation" and "modernisation", which imply change and which Belgium accordingly defines in paragraph 51 of the Memorial as: "*[making] fit or suitable by changing or adjusting, the [adjusting] to new or changed circumstances*" and "*[bringing up to date in style design and methods*". Belgium concludes in paragraph 51 of the Memorial that "*both*

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64 At present, subject to EC law.
65 Reply, p. 98 *et seq.*
66 Counter-Memorial, p. 43 *et seq.*
67 Exhibit No. 5 to the Rejoinder. Le Petit Robert, Dictionnaire alphabétique et analogique de la langue française, 1989; pp. 661-662.

adaptation and modernisation therefore imply a modification *and, in principle, an* improvement of characteristics*.*"(emphasis added)[68]

136. The Netherlands believes that the normal definition of '*entretien*' should be employed in the case at hand and notes that it was responsible for the maintenance of the Iron Rhine *in this sense* in the past. This maintenance - against the payment of a user fee - was geared to the use of the line. Even the sections of the line that are currently not in use because Belgium terminated through traffic on the Iron Rhine in 1991 are maintained, be it only in so far as necessary as to enable the resumption of traffic at 1991 level *from a technical point of view.* In accordance with international custom, the Netherlands will also be responsible for maintaining the Iron Rhine if it is reactivated. To cover the costs of this maintenance, the users (*i.e.* rail transport companies) will be charged a user fee in accordance with the relevant EC legislation.

(3) Railways Agreement

137. In view of what has been stated in the previous paragraphs, the Netherlands restricts itself to the following with regard to Belgium's argument concerning the alleged Dutch obligations deriving from the Railways Agreement of 1897 in paragraph 116 *et seq*. of the Reply.

138. The object and purpose of the Railways Agreement consisted – in the view of Belgium, too – of the transfer of ownership of the land and other immovable property not only of the Iron Rhine, incidentally, but also of three other cross-border railway lines. As Belgium itself notes, the Railways Agreement does not contain any provisions on maintenance. In the *Rights of US Nationals in Morocco* case (*Judgment of 27 August 1952, ICJ Rep.* 1952, p. 176), the International Court of Justice, after defining the object and purpose of the Madrid Convention, which was relevant to the case, stated:

> "In these circumstances, the Court cannot adopt a construction by implication of the provisions of the Madrid Convention *which would go beyond the scope of its declared purposes and objects.* Further, *this contention would involve radical changes and additions to the provisions of the Convention*. The Court, in its Opinion – Interpretation of Peace Treaties (Second Phase) (*I.C.J.*

[68] Memorial, p. 70

Reports 1950, p. 229) – stated: "It is the duty of the Court to interpret the Treaties, not to revise them"." (emphasis added)

139. Belgium's interpretation of the Railways Agreement *goes – far – beyond the scope* of this Agreement.

(4) The application of Article XI of the Separation Treaty to the reactivation of the Iron Rhine

140. In paragraph 110 *et seq.*, Belgium argues that the Netherlands is responsible "*for restoring, adapting, and modernising the Iron Rhine on Dutch territory so as to make it in a good state and prone to facilitating trade*".[69] Belgium borrows the phrase "*a good state and prone to facilitating trade*" from Article XI of the Separation Treaty, which lays down the right of transit on roads in Maastricht and Sittard.

141. The passage from Article XI invoked by Belgium reads:

> "L'usage des routes qui … ne sera assujetti *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."[70]

This passage does not contain a Dutch obligation to maintain the relevant roads "in good state and prone to facilitating trade", as Belgium argues in paragraph 114, but *does establish the Netherlands' right to levy moderate tolls*, which were used to maintain the roads in question in such a manner that the transit trade did not encounter any obstacles on them and that they were maintained, in return for the payment of these tolls, "*en bon état et propres à faciliter ce commerce*".

142. Article XII also contains a provision on the levying of tolls, which reads:

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[69] Reply, p. 103 *et seq.*

[70] Unofficial translation: "The use of these roads, which … will only be subject to *the payment of moderate tolls* for the maintenance of these roads, in such a manner that the transit trade will not encounter any obstacles on them and that, in return for the above-mentioned tolls, these roads will be maintained in a good state and prone to facilitating this trade." (emphasis added)

> "Les deux parties fixeraient d'un commun accord le montant et le mode de perception des droits et péages qui seraient prélevés sur cette même route."[71]

143. Article XII lacks all reference to Article XI and Article XI lacks all reference to Article XII. According to the established case law of the International Court of Justice, terms that do not appear in a treaty provision may not be read into it. In this context, reference can be made to *Admission of a State to the United Nations (Article 4 of the Charter)*, Advisory Opinion, ICJ Rep., 1948, p. 57 at p. 63:

> "If the authors of the Charter had meant to leave Members free to import into the application of this provision considerations extraneous to the conditions laid down therein, they would undoubtedly have adopted a different wording."

144. In the opinion of the Netherlands, it is not possible to argue, as a general rule, that one provision from a treaty can provide the context in which another provision should be interpreted. In the *Wimbledon* case, the Permanent Court of International Justice rejected an attempt to apply the provisions concerning the inland navigable waterways of Germany in Articles 321 to 327 of the Treaty of Versailles to the interpretation and application of Article 380 concerning the Kiel Canal. The Court argued:

> "The provisions relating to the Kiel Canal in the Treaty of Versailles are therefore self-contained; if they had to be supplemented and interpreted by the aid of those referring to the inland navigable waterways of Germany in the previous Sections of Part XII, they would lose their "raison d'être", such repetitions as are found in them would be superfluous and there would be every justification for surprise at the fact that, in certain cases, when the provisions of Articles 321 to 327 might be applicable to the canal, *the authors of the Treaty should have taken the trouble to repeat their terms or re-produce their substance.*" (emphasis added)[72]

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[71] Unofficial translation: "The two parties shall, by common accord, set the duties and tolls to be levied on the said road and determine how they are to be levied." The "*commun accord*" was established by means of a declaration accompanying the Iron Rhine Treaty. Exhibit No. 6 to the Rejoinder. In this context the Netherlands notes that, without explaining why, Belgium claims at various points in the Reply to want to conclude a treaty on toll levying with the Netherlands. The Netherlands does not see the connection between such a treaty and the questions that need to be arbitrated.

[72] *Case of the S.S. Wimbledon (August 17th, Series A, No. 1 (1923)*, at pp. 23 and 24.

(5) Conclusion

145. The Netherlands maintains its position that Belgium should bear the costs of reactivating the Iron Rhine.

(f) Main findings

146. In the opinion of the Netherlands, the Belgian request for reactivation of the Iron Rhine, *i.e.* the request for the use, the restoration, the adaptation and the modernisation of the Iron Rhine in such a way that it can carry 43 trains per 24-hour period (combined total for both directions) on the conditions specified by Belgium[73], is a request to grant the right of transit under Article XII of the Separation Treaty.

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

on the ground of its territorial sovereignty, the Netherlands retains the right, subject to limitations imposed by international law, to exercise in full its legislative, executive and judicial authority in respect of the reactivation of the Iron Rhine;

as to the right of Belgium to perform or commission work with a view to the use, the restoration, the adaptation and the modernisation of the Iron Rhine on Dutch territory, the Netherlands refers to the text of Article XII of the Separation Treaty, which specifically states "*Cette route …seraient construits,* aux choix de la Hollande*, soit par des ingénieurs et ouvriers, que la Belgique obtiendrait l'autorisation d'employer à cet effet dans le canton de Sittard, soit par des ingénieurs et ouvriers, que la Hollande fournirait …*";

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

the costs of reactivation should be borne by Belgium.

[73] As specified in para. 2.11 (p. 18) of the Counter-Memorial; also, see para. 55 of this Rejoinder.

Chapter 5: The Netherlands' right to territorial sovereignty and Belgium's right of transit

148. The Netherlands recognises Belgium's right of transit on the conditions specified in Article XII of the Separation Treaty, which forms the only basis for Belgium's right of transit in international law.

149. An analysis of Article XII and the related treaties has therefore played a key role in the Dutch and Belgian pleadings.

150. The most important passages in Article XII relate to the retention by the Netherlands of its right to territorial sovereignty and Belgium's obligation to pay the costs of the reactivation. The Netherlands wishes to emphasise that it exercises its right to territorial sovereignty, which encompasses the right to exercise legislative, judicial and executive power in relation to persons and objects within its own territory[74], without any adverse physical consequences within the territory of Belgium.

151. Belgium takes the position that, in its capacity as the territorial state, the Netherlands may in no way hinder the temporary or long-term use of its right of transit or delay the application of this right by demanding the construction of works in relation to the reactivation.[75] Since these works stem from the regulatory powers that are inherent in the Dutch right to territorial sovereignty, Belgium's position renders this right entirely illusory.

152. Belgium argues in primary order that the costs of reactivating the Iron Rhine are to be borne entirely by the Netherlands, "*so as to make the Iron Rhine on Dutch territory in good state and prone to facilitating trade*". This implies that the Netherlands is obliged to finance the infrastructure desired by Belgium within Dutch territory in an unlimited manner, which is unacceptable.

153. A second Belgian assertion regarding the costs of reactivation is based on a distinction between measures taken by the Netherlands "*by its own free will¸ on a discretionary basis [...], in the sense that these measures would have been the only possible*

[74] See Counter-Memorial, para. 3.3.5.1, and especially the quote from the *Island of Palmas* case.

means for the Netherlands to comply with its international obligations in the field"', on the one hand, and measures "*pursuant to an international (EC) obligation*", on the other.[76]

154. This amounts to an assertion that, when applying domestic legislation to the Iron Rhine that does not derive directly from an international obligation, the Netherlands should impose less stringent requirements on the protection of humans and the environment than it does in the case of other railway lines in the Netherlands. In the opinion of the Netherlands, this position is untenable, also because it is inspired by Belgium's opinion that it only needs to make a minimal financial contribution to the costs of realising its right of transit, which it neglected for over 80 years.

155. In the Reply, Belgium refers repeatedly to the principles of good faith and reasonableness. In the opinion of the Netherlands, these principles do not constitute independent sources of law and can therefore only be applied in relation to the interpretation and application of Article XII of the Separation Treaty.

156. When it comes to striking a balance, in the context of these principles, between the exercise by the Netherlands of its right to territorial sovereignty, on the one hand, and the exercise by Belgium of its right of transit through Dutch territory, on the other, the Netherlands concludes, on the basis of the analyses in the pleadings that led to the two countries' respective positions, that it is acting reasonably and in good faith with regard to the interpretation and application of Article XII of the Separation Treaty.

157. In this context, the Netherlands also refers to paragraph 3.3.11.3 *et seq*. of the Counter-Memorial, in which it examines the compatibility of its actions during the period in which the negotiations took place with the principles of good faith and reasonableness. The Netherlands notes that it will bear part of the costs of the reactivation, despite the fact that all the costs connected to the reactivation are a result of the reactivation itself.[77]

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[75] Belgium refers to this, *inter alia*, as 'creating obstacles'. See Reply, paras. 37 (p. 34), 98 (p. 92) and 100 (p. 95). See also Submission on Question 1, pp. 122-123.

[76] Reply, paras. 56 (p. 51) and 70 (pp. 67-68).

[77] In addition, the Netherlands notes that the competent ministers supported Belgium's interest in the reactivation of the Iron Rhine and that they have included the railway line in the infrastructural plans for the Netherlands. See para. 60 of the Reply, in which Belgium quotes from a press release of 5 May 2000 and the *Vijfde Nota Landsdeel Zuid.* Incidentally, this policy document never acquired official status.

158. In the opinion of the Netherlands, its financial contributions and its behaviour during the negotiations attest to a spirit of cooperation and the realisation of the right to harmonisation asserted by Belgium in relation to the exercise of the Dutch and Belgian rights.[78]

159. In the context of its references to the principles of good faith and reasonableness, Belgium uses terms such as "*arbitrariness*", "*normality*", "*proportionality*" and "*non-discrimination*", which appear to suggest that the Netherlands is actually guilty of an abuse of rights in the case at hand.[79]

160. According to some writers, the prohibition of the abuse of rights is in fact an application of the principles of reasonableness and, in particular, good faith. In the opinion of the Netherlands, two differences between the principle of the prohibition of the abuse of rights and the principle of good faith can be inferred from the literature on the prohibition of the abuse of rights.

161. First of all, the prohibition of the abuse of rights provides a *threshold* that, if crossed, gives rise to a breach of international law. Second, the prohibition of the abuse of rights has the benefit that, unlike in the case of bad faith, there is no need to presume intent when it is violated.[80]

162. The Netherlands is aware that the principle of the prohibition of the abuse of rights is not regarded as a generally recognised principle of general international law. There is also no generally accepted definition of the concept. However, it is possible to identify a common denominator, which may serve as the above-mentioned threshold, from case law and the definitions of the principle employed by writers.

163. In the *Certain German Interests in Polish Upper Silesia* case (also known as the *Chorzów Factory* case), the Permanent Court of International Justice ruled as follows on the abuse of rights:

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78 With regard to cooperation, see para. 16 of the Reply. With regard to harmonisation, see paras. 11 (p. 11), 65 (p. 63) and 70 (p. 67) of the Reply.

79 See, in particular, paras. 15 (p. 14) and 96 (p. 91) of the Reply.

80 The term *threshold* is borrowed from M. Byers, "Abuse of Rights, An Old Principle, A New Age", *McGill Law Journal*, Vol. 47 2002, pp. 390-431; at p. 411; Exhibit No. 7 to the Rejoinder.

> "It remains, however, to consider whether Poland can rely as against Germany on the contention that there has been a misuse of the right possessed by the latter to alienate property situated in the plebiscite area, before the transfer of its sovereignty.
> In the Court's opinion, such misuse has not taken place in the present case. *The act in question does not overstep the limits of the normal administration of public property and was not designed to procure for one of the interested Parties an illicit advantage and to deprive the other of an advantage to which he was entitled.*" (emphasis added) [81]

164. Alexander Kiss defines it in a more general sense:

> "L'abus peut être l'exercice arbitraire du droit, c'est à dire l'absence de motivation acceptable, alors que cet exercice porte préjudice à un autre État.
>
> Il peut aussi résulter d'actes dont les bénéfices pour l'état territorial sont négligeables lorsqu'ils sont comparés aux conséquences produites sur le territoire de l'autre État."[82]

165. In addition, Oppenheim states:

> "An abuse of rights occurs when a state avails itself of its right *in arbitrary manner* in such a way as to inflict upon another state an injury *which cannot be justified by a legitimate consideration of its own advantag*e."[83]

166. In the opinion of the Netherlands, it is therefore possible to speak of an abuse of rights when one state causes harm to another state through the arbitrary exercise of a right and/or when the advantages that this state enjoys as a result of the exercise of a right are either entirely absent or negligible in relation to the disadvantages experienced by the other state as a result of the exercise of the right.

167. As already stated, the measures needed to realise Belgium's wishes regarding the reactivation derive from Dutch law,[84] including the application of codified or uncodified

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81 *Certain German Interests in Polish Upper Silesia* case, Merits, Judgment, [PCIJ, Series A,] No. 7, pp. 37-38 (emphasis added).

82 Quoted by Byers, Exhibit No. 7 to the Rejoinder, at p. 409. Unofficial translation: "The abuse may take the form of the arbitrary exercise of a right, that is to say, the absence of an acceptable motivation, even though the exercise [of this right] causes harm to the other state. It may also result from acts whose advantages for the territorial state are negligible when they are compared to the consequences produced within the territory of the other state." (The words 'sur le territoire de l'autre Etat' attest to the fact that an abuse of rights is often raised in the context of actions within the territory of one state that have consequences within the territory of another state (e.g. environmental pollution or the use of transboundary waters).

83 Exhibit No. 8 to the Rejoinder.

84 Includng Dutch law implementing EC directives.

general principles of sound administration. In states governed by the rule of law, such as the Netherlands and Belgium, the primary goal of legislation is to provide citizens with guarantees against government intervention and create legal certainty. Furthermore, legislation with a general application, that is to say, which applies to all persons in a particular situation described in the relevant law, guarantees equality of treatment.

168. The specific interests at stake in connection with the reactivation of the Iron Rhine include, in addition to technical matters, the protection of humans and the environment. Judging by the examples that the Netherlands refers to in the Counter-Memorial, these interests are also recognised by Belgium.[85]

169. Like the basis on which the costs have been calculated, the Dutch legislation that applies to the reactivation of the Iron Rhine, such as the Transport Infrastructure (Planning Procedures) Act (*Tracéwet*) and the Flora and Fauna Act, is of a general nature. There is no question of any legislation specifically intended to cause harm to Belgium or frustrate its right of transit, which means that the Netherlands cannot be accused of arbitrary (or discriminatory) behaviour in this regard.[86]

170. In so far as Belgium seeks to accuse the Netherlands of *applying* its legislation to the reactivation of the Iron Rhine in an arbitrary or discriminatory manner, the preliminary version of the Draft Planning Procedure Order proves, in conjunction with Chapter 2, section B, of this Rejoinder, that this is not the case.

171. The Netherlands believes it has demonstrated that the compelling interests it is bound to guarantee, as the territorial state, with regard to the protection of humans and the environment more than outweigh the problems Belgium claims to be experiencing in the exercise of its right of transit.

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[85] Counter-Memorial, para. 3.3.5.6.A (p. 50) concerning the tunnel beside the Peerdsbos and para.. 3.3.10.1 (p. 59) concerning the protection of the habitability of the 'Het Laar' residential area.

[86] With regard to the term 'arbitrariness', the International Court of Justice ruled as follows in the *Elettronica Sicula SpA (ELSI)* case, Judgment, ICJ Reports 1989, p. 15 at. p. 76: 'Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the Asylum case, when it spoke of "arbitrary action" being "substituted for the rule of law" (*Asylum, Judgment, I.C.J. Reports 1950,* p. 284). It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.'

172. Based on the above, the Netherlands concludes that it is not in breach of international law in the exercise of its right to territorial sovereignty, that is to say, it is neither violating good faith or reasonableness in the interpretation and application of Article XII of the Separation Treaty, nor the principle of the prohibition of the abuse of rights, to the extent that that principle is generally recognised.

173. This means that, in the case at hand, there is no violation of Article 27 of the Vienna Convention, which states that "*[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty*", or of the principle that no one may benefit from his own illegal acts.[87]

174. Finally, the Netherlands wishes to draw attention to a specific issue, namely, the loop around Roermond. If Belgium were to cling to its right to a route laid down in 1873 in Article 4 of the Iron Rhine Treaty, despite the fact that it offers no advantage (quite the opposite) and causes the Netherlands substantial disadvantages in the exercise of its right to territorial sovereignty, this would almost constitute a textbook example of an abuse of rights.

[87] With regard to Article 27 of the Vienna Convention, see paras. 12 (p. 12) and 29 (p. 27) of the Reply. With regard to the principle that 'no one shall benefit from its illegal acts' (referred to by Belgium as *nullus commodum capere de sua injuria propria*), see para. 129 (p. 117) of the Reply.

SUBMISSIONS

On the basis of the above the Netherlands presents the following definitive answers, and respectfully requests the Tribunal to decide as follows:

ON QUESTION 1:

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

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

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

ON QUESTION 2

In view of the answer given to Question 1 the Netherlands submits that Belgium does not have the right to perform or commission work with a view to the use, the restoration, the adaptation and the modernisation of the historical route of the Iron Rhine on Dutch territory and to establish plans, specifications and procedures related to it according to Belgian law and the decision-making power based thereon.

As to the right of Belgium to perform or commission work with a view to the use, the restoration, the adaptation and the modernisation of the Iron Rhine on Dutch territory, the Netherlands refers to the text of Article XII of the Separation Treaty, which specifically states "*Cette route …seraient construits,* aux choix de la Hollande, *soit par des ingénieurs et ouvriers, que la Belgique obtiendrait l'autorisation d'employer à cet effet dans le canton de Sittard, soit par des ingénieurs et ouvriers, que la Hollande fournirait …*".

No distinction may be drawn between the requirements, standards, plans, specifications and procedures related to, on the one hand, the functionality of the rail infrastructure in itself, and, on the other hand, the land use planning and the integration of the rail infrastructure.

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

ON QUESTION 3

The Netherlands submits that in view of the passages of Article XII of the Separation Treaty reading "*entièrement aux frais et dépens de la Belgique*", and "*qui exécuteraient aux frais de la Belgique*", all cost items and financial risks associated with the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory subject to the requirements of Dutch legislation and decision-making power based thereon in respect of the functionality of the rail infrastructure and the protection of the residential and lived environment should be borne by Belgium.

1 June 2004 Johan G. Lammers
Agent of the Kingdom of the Netherlands

LIST OF EXHIBITS

1. BONT, A.L. DE, *Kleine Geschiedkundige Atlas*, negende druk, P.J. Noordhoff N.V., 1957, Groningen. Maps of the territory of the Netherlands from 1715-1795, 1815-1839 and from 1839 onwards.

2. Verslag van de vergadering van de technische werkgroep "IJzeren Rijn" gehouden te Brussel op 12 januari 2001. (Minutes of meeting in Brussels on 12 January 2001 of the Iron Rhine technical working group) (p. 6)

3. *Beoordeling ecologische effecten reactivering 'ÍJzeren Rijn' op het gebied van de Meinweg*; Alterra, Research Instituut voor de Groene Ruimte, Wageningen, 2000; (Unofficial translation: *Assessment of the ecological effects of the reactivation of the 'Iron Rhine' concerning the Meinweg*; Alterra, Research Institute for the Green World", Wageningen, 2000. Samenvatting (Summary).

4. Judgment of the European Court of Justice of 2 August 1991. Commission of the European Communities *v.* Kingdom of Spain. Case C-355/90. *European Court reports 1993 Page I-04221.*

5. Le Petit Robert, Dictionnaire alphabétique et analogique de la langue francaise, 1989; p. 661/662

6. Declaration Accompanying the Treaty Relative to the Payment of the Belgian Debt, the Abolition of the Surtax on Dutch Spirits and the Passing of a Railway Line from Antwerp to Germany across Limburg; 13 January 1873.

7. BYERS, MICHAEL, "Abuse of Rights: An Old Principle, A New Age", *McGill Law Journal*, Vol. 47 2002, pp. 390-431.

8. *Oppenheim's International Law,* ninth edition, edited by Sir Robert Jennings and Sir Arthur Watts, Longman, 1996, vol 1, pp. 407-410.

ERRATA IN THE COUNTER-MEMORIAL
AND
LIST OF EXHIBITS TO THE COUNTER-MEMORIAL

ERRATA
in the
COUNTER-MEMORIAL

Footnote 3 should read:
"Treaty between the Netherlands and Belgium relative to the Separation of their respective countries. Treaty between Austria … "

In paragraph 2.2.2, second line: the word 'the' should be deleted.

Paragraph 2.4, line 12/13
The second sentence should read: "It was provided by Statute that, on 1 January 1938, the infrastructure of the railways constructed and owned by the State …"

Paragraph 2.7.1.1, line 5
Footnote 18 follows the first sentence.

Paragraph 2.8.1.1
The second sentence should read: "In the Tractebel Report (p. 90), reference is made …"

Paragraph 2.9.3, line 9/10
The sentence "Priority was originally given to fourteen projects." should be deleted.

Paragraph 2.10
The quote should read: "I have read your letter of 19 June 1998 …"

Paragraph 2.11, last line
The words "2 per year" should be replaced by "2 per 24-hour period"

Paragraph 2.12
The heading should read: "The Memorandum of Understanding of March 2000"

Paragraph 2.12.1
The first sentence should read: "The unofficial translation of the Memorandum of Understanding of March 2000 reads as follows:"
The numbering of the paragraphs of the MoU is not correct.

Paragraph 2.12.3.2, quotation from the letter of 27 June 2002, fifth paragraph, second line
The word **"**five**"** should be deleted.

Footnote 56, lines 13/14/15/16 should read:
The increase of existing fragmentation considers fragmentation caused by track doubling, by a combination of a new track with existing or future infrastructure *and by reactivation of track. The last mentioned is considered, because at the moment the non-used track causes very little fragmentation.*

Paragraph 2.13.5.1, second paragraph, second line
"2003" should be replaced by "2001".

Paragraph 2.13.5.1
The last sentence should read: "The total estimate currently stands at € 478 million (at March 2004 price levels)."

At page 32, footnote 68 should be footnote 66.

Paragraph 2.13.5.3, last sentence
"€ 24 million" should be replaced with "€ 12 million".

Paragraph 2.14
The third paragraph should read: "Pursuant to the MoU, temporary use cannot be allowed unless a decision on the definitive route is adopted at the same time." The remainder of the sentence should be deleted.

Paragraph 3.2
The words "(emphasis added)" should follow the quote from the *Free Zones* case ending with "without her consent".

Paragraph 3.3.10
The first sentence should read: "As the Tribunal is aware, it was agreed in the Iron Rhine Treaty that …".

Footnote 108, last line
"Exhibit-N No. 39" should be "Exhibit N No. 38"**.**

Footnote 110, second line.
"Exhibit N No. 40" should be "Exhibit N No. 39".

A new List of Exhibits is added.

With regard to the **volumes of Exhibits,** it should be noted that the green page regarding Exhibit N No. 27 (letter from the Belgian Prime Minister Verhofstadt and the Flemish Prime Minister Dewael to Prime Minister Kok) was placed *after* Exhibit N No. 27 and the green page regarding Exhibit N No. 28 (Articles from the Dutch and German press) is missing.

LIST OF EXHIBITS
TO THE
COUNTER-MEMORIAL

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

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

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

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

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

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

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

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

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

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

11. Treaty concerning the construction of a railway connection for high-speed trains between Rotterdam and Antwerp, with Annex; Brussels, 21 December 1996. (Verdrag tussen het Koninkrijk der Nederlanden en het Koninkrijk België betreffende de aanleg van een spoorverbinding voor hoge-snelheidstreinen tussen Rotterdam en Antwerpen, met Bijlage). Treaties Series (*Tractatenblad*) 1997, 22.

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

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

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

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

16. Decision 1692/96/EC of the European Parliament and of the Council of 23 July 1996 on Community guidelines for the Development of the trans-European network. *Official Journal l 228, 09/09/1996 P. 0001 0- 0104.*

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

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

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

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

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

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

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

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

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

26. Summary Route Assesment/Environmental Impact Statement.

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

28. Articles from Dutch and German news papers.

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

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

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

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

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

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

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

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

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

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

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