

**IN THE ARBITRATION**

**REGARDING THE IRON RHINE (“IJZEREN RIJN”) RAILWAY**

**BETWEEN:**

**THE KINGDOM OF BELGIUM**

**- AND -**

**THE KINGDOM OF THE NETHERLANDS**

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**AWARD OF THE ARBITRAL TRIBUNAL**

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**The Arbitral Tribunal:**

Judge Rosalyn Higgins, President

Professor Guy Schrans

Judge Bruno Simma

Professor Alfred H.A. Soons

Judge Peter Tomka

The Hague, 24 May 2005

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## CHAPTER I – PROCEDURAL HISTORY, BACKGROUND, AND SUBMISSIONS OF THE PARTIES

### A. Procedural History

1. This Award is rendered pursuant to an Arbitration Agreement (“Arbitration Agreement”) between the Kingdom of Belgium (“Belgium”) and the Kingdom of the Netherlands (“the Netherlands”) (“the Parties”). Its terms were agreed through an exchange of diplomatic notes dated 22 and 23 July 2003, which provided that the Arbitration Agreement would be provisionally applied pending completion of the constitutional formalities in both countries.
2. Under the Arbitration Agreement, the Parties agreed “to submit [their] dispute concerning the reactivation of the Iron Rhine to an arbitral tribunal they are to set up under the auspices of the Permanent Court of Arbitration in The Hague” and “to execute the Arbitral Tribunal’s decision as soon as possible.”
3. The Arbitration Agreement further posed specific Questions for the Arbitral Tribunal as follows:
  1. To what extent is Dutch legislation and the decision-making power based thereon in respect of the use, restoration, adaptation and modernisation of railway lines on Dutch territory applicable, in the same way, to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory?
  2. To what extent does Belgium have the right to perform or commission work with a view to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, and to establish plans, specifications and procedures related to it according to Belgian law and the decision-making power based thereon? Should a distinction be drawn between the requirements, standards, plans, specifications and procedures related to, on the one hand, the functionality of the rail infrastructure in itself, and, on the other hand, the land use planning and the integration of the rail infrastructure, and, if so, what are the implications of this? Can the Netherlands unilaterally impose the building of underground and above-ground tunnels, diversions and the like, as well as the proposed associated construction and safety standards?
  3. In the light of the answers to the previous questions, to what extent should the cost items and financial risks associated with the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on

Dutch territory be borne by Belgium or by the Netherlands? Is Belgium obliged to fund investments over and above those that are necessary for the functionality of the historical route of the railway line?

4. In the Arbitration Agreement, the Parties requested that the Arbitral Tribunal “render its decision on the basis of international law, including European law if necessary, while taking into account the Parties’ obligations under article 292 of the EC Treaty.”
5. In accordance with the Arbitration Agreement, the Parties subsequently agreed upon Rules of Procedure for the arbitration (“Rules of Procedure”),<sup>1</sup> which were based on the “Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States.”
6. In conformity with Article 5, paragraph 1 of the Rules of Procedure, Belgium appointed as arbitrators Professor Guy Schrans and Judge Bruno Simma, and the Netherlands appointed Professor Alfred H.A. Soons and Judge Peter Tomka. The four arbitrators met on 22 September 2003, and, pursuant to Article 5, paragraph 2 of the Rules of Procedure, appointed Judge Rosalyn Higgins as President of the Arbitral Tribunal (“Tribunal”).
7. Consistent with the Arbitration Agreement and the designation of the Permanent Court of Arbitration (“PCA”) as Registry under Article 1, paragraph 3 of the Rules of Procedure, the Secretary-General of the PCA appointed Ms. Anne Joyce, Deputy General Counsel, to serve as Registrar to the Tribunal.
8. By letters dated 3 September 2003 and 9 September 2003, respectively, the Netherlands and Belgium each designated their Agents. The Agent appointed by the Netherlands was Professor Johan G. Lammers, and the Agent appointed by Belgium was Mr. Jan Devadder.
9. The Tribunal held a meeting with the Agents on 29 September 2003. At the meeting, the Tribunal and the Agents reached certain understandings regarding implementation of the Rules of Procedure and discussed other practical matters relating to the arbitration

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<sup>1</sup> The Rules of Procedure, as well as other documents related to the arbitration, are available at <http://www.pca-cpa.org>.

proceedings. The Rules of Procedure provide for the possibility of oral proceedings only in the event of a specific request of a Party (Article 13). However, it was agreed that should the Tribunal wish to seek additional information from the Parties following receipt of the written pleadings, the Tribunal would notify the Parties and consult with them as to whether such information would best be obtained through further written pleadings or through an oral proceeding. It was further agreed that, in the event of a hearing or an additional round of written pleadings, the time limits for issuance of the Award would commence following the date of the last submission or the closure of hearings, as the case may be.

10. The Parties filed their written pleadings in accordance with the timetable set forth in the Rules of Procedure. The pleadings consisted of Belgium's Memorial filed on 1 October 2003 ("BM"), the Netherlands' Counter-Memorial filed on 30 January 2004 ("NCM"), Belgium's Reply filed on 30 March 2004 ("BR"), and the Netherlands' Rejoinder filed on 1 June 2004 ("NR").
11. No request for an oral hearing was made by either Party or sought by the Tribunal.
12. In June 2004, it came to the attention of the Tribunal that approval of the Arbitration Agreement by the Netherlands Parliament was taking longer than anticipated, and that ratification was unlikely prior to the date envisaged under Article 18 of the Rules of Procedure (29 September 2004) for rendering the Tribunal's Award. In light of these developments, the Tribunal decided that it would not render the Award before completion by both Parties of their respective constitutional procedures required for the entry into force of the Arbitration Agreement. On 6 and 13 July 2004, the Tribunal received from Belgium copies of the relevant documents indicating that the constitutional procedures required in Belgium for the entry into force of the Arbitration Agreement had been completed. On 20 May 2005, the Tribunal was notified by the Netherlands that the constitutional procedures required in the Netherlands for entry into force of the Arbitration Agreement had been completed and copies of the relevant documents were provided. On 20 May 2005, the Parties informed the Tribunal that, although the Arbitration Agreement, on its terms, would not enter into force until 1 July 2005, the necessary ratification procedures in each country and the mutual notification thereof had been completed. They both wished to request that the Tribunal render its

Award “as soon as possible prior to its formal entry into force.” The Tribunal acceded to the Parties’ request, and the Award has been rendered accordingly.

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13. Neither Party has challenged the jurisdiction of the Tribunal to decide the dispute. Nevertheless, Belgium, in a section of its Reply with the heading “Jurisdiction,” cites the requirement under Article 292 of the Treaty Establishing the European Community (1997 Official Journal of the European Communities (“O.J.”) (C 340) 3) (“EC Treaty”) pursuant to which “Member States undertake not to submit a dispute concerning the interpretation or application of this treaty to any method of settlement other than those provided therein,” and states that, although both Belgium and the Netherlands had referred to EC law in their pleadings, such references do not constitute sufficient reason to conclude that Article 292 had been violated (BR, pp. 2, 4, paras. 3, 5).
14. In support of its view, Belgium distinguishes the ongoing *MOX Plant* case,<sup>2</sup> wherein Ireland has brought a dispute with the United Kingdom before an arbitral tribunal established pursuant to Annex VII to the United Nations Convention on the Law of the Sea (which proceedings that tribunal suspended), and the Commission of the European Communities (“European Commission”) has instituted proceedings against Ireland before the Court of Justice of the European Communities (“European Court of Justice”) for an alleged violation of Article 292 of the EC Treaty. Belgium states that, unlike the United Kingdom in the *MOX Plant* case, the Netherlands had not objected to Belgium’s references to EC law in its Memorial. Belgium further argues that neither Party was contending that the other had violated EC law. Moreover, Belgium states, “issues where Community law comes into play in the present cases [sic] really boil down to the apportionment of costs, which is not a matter of Community law” (BR, p. 4, para. 6).
15. The Parties elaborated further on their view of applicable law and its relationship to EC law in a letter addressed to the Secretary-General of the European Commission, which was dated 26 August 2003, a copy being sent to the PCA. In the letter, the Parties stated:

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<sup>2</sup> For a description of the case and other related information, see <http://www.pca-cpa.org/ENGLISH/RPC/#Ireland v. United Kingdom> (“MOX Plant Case”).

For both parties the core of the dispute relates to the interpretation of the bilateral Separation Treaty of 1839 and the interpretation of the obligations laid down in this treaty, i.e., questions of international law.

The letter concluded:

Should the eventuality of an application or interpretation of community law arise in the course of the procedure, the Kingdom of Belgium and the Kingdom of the Netherlands commit themselves to take all necessary measures in order to comply with all the obligations resting with them under the EC Treaty, and in particular Article 292 thereof.

## **B. Background**

16. The Iron Rhine, or “*IJzeren Rijn*” as it is known in Dutch, is a railway linking the port of Antwerp, Belgium, to the Rhine basin in Germany, via the Netherlands provinces of Noord-Brabant and Limburg.<sup>3</sup> The Iron Rhine has its origins in the negotiations surrounding the separation of Belgium from the Netherlands in the 1830s, and in particular in the Treaty between Belgium and the Netherlands relative to the Separation of their Respective Territories (“1839 Treaty of Separation”) (Consolidated Treaty Series (“C.T.S.”), 1838–1839, Vol. 88, p. 427).
17. Among other matters treated in the 1839 Treaty of Separation was the question of a communication link between Antwerp and Germany. In this connection, Article XII of the 1839 Treaty of Separation provides as follows:

*Dans le cas où il aurait été construit en Belgique une nouvelle route, ou creusé un nouveau canal, qui aboutirait à la Meuse vis-à-vis le canton hollandais de Sittard, alors il serait loisible à la Belgique de demander à la Hollande, qui ne s’y refuserait pas dans cette supposition, que la dite route ou le dit canal fussent prolongés d’après le même plan, entièrement aux frais et dépens de la Belgique, par le canton de Sittard, jusqu’aux frontières de l’Allemagne.<sup>[4]</sup> Cette route ou ce canal, qui ne pourraient servir que de communication commerciale, seraient construits, au choix de la Hollande, soit par des ingénieurs et ouvriers que la Belgique obtiendrait l’autorisation d’employer à cet effet dans le canton de Sittard, soit par des ingénieurs et ouvriers que la Hollande fournirait, et qui exécuteraient,*

<sup>3</sup> For a map of the Iron Rhine railway provided jointly by the Parties, see Annex.

<sup>4</sup> The Tribunal notes that Article XII speaks of “*l’Allemagne*” even though in 1839 Germany did not exist as a state under international law, but as a mere confederation (“*Deutscher Bund*”). The new road or canal envisaged in the Treaty would thus have reached the borders of Prussia. At the time of the conclusion of the Iron Rhine Treaty in 1873 (see paragraph 18), Prussia and other German states had been united in the German Empire.

*aux frais de la Belgique, les travaux convenus, le tout sans charge aucune pour la Hollande, et sans préjudice de ses droits de souveraineté exclusifs sur le territoire que traverserait la route ou le canal en question. Les deux parties fixeraient, d'un commun accord, le montant et le mode de perception des droits et péages qui seraient prélevés sur cette même route ou canal.*<sup>5</sup>

18. The transit right conferred on Belgium by Article XII of the 1839 Treaty of Separation was further specified through treaties concluded in the nineteenth century, culminating in the Convention between Belgium and the Netherlands relative to the Payment of the Belgian Debt, the Abolition of the Surtax on Netherlands Spirits, and the Passing of a Railway Line from Antwerp to Germany across Limburg of 1873 (“Iron Rhine Treaty”) (C.T.S., 1872–1873, Vol. 145, p. 447), pursuant to which the Iron Rhine railway was constructed across Netherlands territory. It was completed in 1879.
  
19. From 1879 until World War I, the Iron Rhine railway was used continuously. During this period, the legal status of the Iron Rhine railway remained essentially unchanged with one exception – namely, ownership of the track was transferred from the Belgian concessionaire “*Grand Central Belge*” to the Government of Belgium, and thence to the Government of the Netherlands pursuant to the Railway Convention between Belgium and the Netherlands of 23 April 1897 (“1897 Railway Convention”) (C.T.S., 1896–1897, Vol. 184, p. 374). Use of the line then varied in intensity during the period 1914–1991. It is common ground that all commercial transit traffic was halted during World War I. Belgium states that thereafter “twelve international freight trains a day travelled in both directions between Antwerp and the Ruhr area, between Rotterdam and the Ruhr area” (BM, p. 22, para. 18); whereas the Netherlands specifies the line was little used, with eight freight trains per 24-hour period passing in 1920, nine in 1921, and since 1922, only 1 or 2 per 24-hour period (and only rarely over the entire track) (NCM, p. 19, para. 2.11; NR, p. 29, paras. 115–117). The Netherlands explains this by referring to the access had by Belgium to the then recently constructed Hasselt-Montzen-Aken line and its economic advantages. Both agree that during World War II, the Iron Rhine track was destroyed and it was necessary to rebuild it. For a period thereafter it was used for military transportation. During the ensuing forty years only

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<sup>5</sup> See paragraph 32 below for the Tribunal’s translation of Article XII. The text of the 1839 Treaty of Separation provided by the Netherlands to the Tribunal uses, in the French and English versions, Roman numerals; the text provided by Belgium uses Roman numerals in the English version and Arabic numerals in the French version. The Tribunal will use Roman numerals when referring to the 1839 Treaty of Separation.

light use was made of the line. Since 1991, the Iron Rhine railway has not been used for through traffic between Belgium and Germany, although use of certain sections of the line in the Netherlands has continued (which use is not in issue between the Parties).

20. During the 1990s, a number of legal steps were taken by the Government of the Netherlands with respect to designation of nature reserves in the provinces of Noord-Brabant and Limburg, some of which lie across the route of the Iron Rhine railway. In 1987 and during the 1990s (thus beginning even prior to the cessation of through traffic in 1991), there were a number of communications, both oral and written, between government officials of Belgium and the Netherlands concerning possible reactivation of the Iron Rhine railway.
21. Formal inter-governmental discussions on the issue of use, restoration, adaptation and modernisation of the Iron Rhine railway were initiated by the Prime Minister of Belgium on 12 June 1998. (Hereinafter, the term “reactivation” will be used to denote the just-mentioned various activities.) These discussions led to the adoption, on 28 March 2000, of a Memorandum of Understanding (“March 2000 MoU”) between the two Governments, which, among other things, provided for completion of certain environmental impact studies of the reactivation, as well as a timetable for phasing in renewed use of the line.
22. The environmental impact studies envisaged by the March 2000 MoU were completed in May 2001. However, further implementation of the March 2000 MoU, particularly with respect to the plans for so-called “temporary use” of the Iron Rhine railway, foundered on disagreements between the Parties concerning conditions to be attached to such use and allocation of costs necessary for making the line suitable for long-term use as requested by Belgium. The Parties have further disagreed as to whether this temporary use can occur in the absence of agreement on long-term use. Discussion between the Parties then turned to the possibility of submitting their dispute to arbitration and led to the Arbitration Agreement concluded between the Parties in July 2003.
23. In general, Belgium argues that the exercise of jurisdiction by the Netherlands over the Iron Rhine railway is limited by the Netherlands’ obligations under international law

and in particular the obligations of good faith and reasonableness. As applied to the transit right granted under the 1839 Treaty of Separation, Belgium argues, the Netherlands is obliged at a minimum to allow immediate – albeit modest – “temporary” use of the historic track and, for the long term, a major reactivation of the track. Exercise of its rights, Belgium asserts, must not be rendered “unreasonably difficult” by, among other things, the various “highly expensive” environmental protection measures the Netherlands seeks to impose in relation to any such reactivation.

24. Belgium also argues that, alternatively, and if such measures are nonetheless to be imposed, the Netherlands must ensure that Belgium’s use of the Iron Rhine railway is not adversely affected by the resulting construction works, and bear the costs and financial risks. In support of this view, Belgium emphasizes that its obligations to bear costs under Article XII relate to the *construction* of the road or canal, and not to the exercise of Belgium’s right of passage (BR, p. 98, para. 104). Belgium also looks to the language of Article XI of the 1839 Treaty of Separation – including the term “*entretien*,” which appears therein – and argues further that the Netherlands has a responsibility to maintain the track of the Iron Rhine railway “in a good state and prone to facilitating trade.” The question of what constitutes “a good state and prone to facilitating trade,” Belgium asserts, must be viewed in light of current circumstances and what is considered commercially viable (BR, p. 113, para. 122). If the Tribunal determines that Belgium should bear any of the costs, such costs should, in Belgium’s view, be limited to those needed to meet only minimum requirements consistent with Netherlands legislation, for example with respect to noise abatement. Moreover, if Belgium is to bear the costs of measures resulting from other international obligations (such as EC law), the Netherlands must require only the least costly and/or onerous options available to meet these obligations.
25. In general, the Netherlands, for its part, argues that while it does not contest Belgium’s right of transit across Netherlands territory, that right is circumscribed by the requirements set forth in Article XII of the 1839 Treaty of Separation, and that, as a limitation of Netherlands territorial sovereignty, the transit right must be interpreted restrictively. The Netherlands cites in particular the reservation of its sovereignty in Article XII and the requirements that Belgium bear the costs of the “*travaux*” envisaged under that article. Environmental measures and other requirements putatively imposed

by the Netherlands on reactivation of the Iron Rhine railway, the Netherlands maintains, constitute the legitimate exercise of its sovereignty under Article XII, leaving Belgium's obligation to pay the costs of complying with the Netherlands' requirements intact. Further, nothing in Article XI of the 1839 Treaty of Separation, the 1897 Railway Convention, or subsequent practice of the Parties, the Netherlands asserts, leads to a different conclusion (NCM, p. 57, paras. 3.3.8.2–3.3.8.4; NR, pp. 33–35, paras. 133–139). Belgium employs too broad a definition of the term “*entretien*,” the Netherlands argues, and it cannot be stretched to cover the costs associated with reactivation (NR, p. 33, para. 135).

## C. Final Submissions of the Parties

### 1. Belgium

26. The final submissions of Belgium, made in the Reply, were as follows:

#### ON QUESTION NO. 1

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

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

- No re-routings deviating from the historical route shall be decided upon by the Netherlands without the agreement of Belgium.
- The Netherlands is under the obligation to exercise its legislative and decision-making power in good faith and in a reasonable manner, and so as not to deprive Belgium's rights to have the Iron Rhine prolonged on Dutch territory according to the same plan as on Belgian territory to use the historical route of the Iron Rhine, of their substance, and so as not to render the exercise of these rights unreasonably difficult. The Netherlands shall take all necessary measures so as to allow for such a use.
- If the Netherlands has several possibilities of complying with an international obligation, one of which allows it to comply with its obligation towards Belgium as concerns the Iron Rhine, while the others does or did not, the Netherlands are under the obligation to take the possibility which makes it possible for it to comply with both obligations.
- If the Netherlands has conflicting obligations as concerns the reactivation of the Iron Rhine, it shall reduce the effect of such a conflict by taking measures, which are the least onerous for Belgium.
- Without prejudice to Belgium's right to an immediate use of the historical route of the Iron Rhine at full capacity and on a long-term basis, when Belgium makes a demand for provisional driving on the historical route of the Iron Rhine, by 15 trains per natural day (both directions summed up), including at limited speed in evening hours and at night, for a period of 5 years at least, the Netherlands shall immediately accept that demand, and immediately take all decisions necessary to effectively allow for such driving within the shortest time materially feasible, which shall not be more than one month.
- The Netherlands shall take all necessary measures so as to prevent any interruption of the use of the Iron Rhine between "temporary driving" and "long-term" driving, and to effectively allow for the latter within the shortest time feasible.
- Without prejudice to Belgium's position under Question No. 3, the measures foreseen in ProRail's "*IJzeren Rijn Concept Ontwerp-tracébesluit versie 1.4*" of July 2003 with respect to parts A2, B and C of the track as identified therein, may not be required as a prior condition to Belgium's exercise of its rights on the Iron Rhine, unless such measures do not render the exercise of Belgium's right to the use of the Iron Rhine unreasonably difficult and:
  - o In primary order, unless the costs and financial risks associated with these measures shall be borne in whole by the Netherlands.
  - o In subsidiary order, unless the costs and financial risks associated with such measures be borne by the Netherlands at the least in proportion to its forecasted use of the railway line by 2020, which is at least 77,889 percent, and by Belgium in a proportion of maximum 22,111 percent, under the further proviso that the Netherlands may not charge to Belgium costs which are charged on the users of the line in accordance with Article XII of the 1839 Separation Treaty and European Community rules, nor charge to Belgium costs unrelated to the reactivation, which includes, but is not limited to, costs for the abatement of road traffic noise.

- Without prejudice to Belgium's position under Question No. 3, the measures foreseen in ProRail's "*IJzeren Rijn Concept Ontwerp-tracébesluit versie 1.4*" of July 2003 with respect to noise abatement which are not necessary so as to reach the maximal exemption limit of 70 dB(A) or 73 dB(A) provided by law, unless if such measures do not render the exercise of Belgium's right to the use of the Iron Rhine unreasonably difficult, and unless if the costs and financial risks associated with such abatement measures are borne in whole by the Netherlands.
- Without prejudice to Question No. 3, the Netherlands may not require the building of a tunnel in the Meinweg area nor other wildlife and nature protection measures including compensatory measures in areas passed through by the historical route of the Iron Rhine, unless if such requirement does not render the exercise of Belgium's right to the use of the Iron Rhine unreasonably difficult and if the costs and financial risks associated with these measures are borne in whole by the Netherlands.
- In subsidiary order to the last submission, if the Tribunal esteems that the former point is outside its jurisdiction, the Netherlands may not require the building of a tunnel in the Meinweg area nor other wildlife and nature protection measures including compensatory measures in areas passed through by the historical route of the Iron Rhine, unless if such requirement does not render the exercise of Belgium's right to the use of the Iron Rhine unreasonably difficult and if the costs and financial risks associated with these measures are borne in whole by the Netherlands, save to the extent that the Netherlands had no other possibilities to meet its obligations under EC law, and to the extent that the measures required are the least costly for allowing the Netherlands to meet its EC obligations.

## **ON QUESTION NO. 2**

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

- Belgium's present request for reactivation does not amount to a request for a "*new road or canal*" within the meaning of Article XII of the Separation Treaty with the consequence that the Netherlands does not have the option provided by Article 12 of the 1839 Separation Treaty to require that Belgium performs work on Dutch territory.
- Works on Dutch territory performed by the Netherlands shall be agreed upon between Belgium and the Netherlands. As the present request of Belgium to reactivate the Iron Rhine is not a request to have the Iron Rhine prolonged on Dutch territory according to the same plan as on Belgian territory, such limitation is not at stake at present. The same is true of Belgium's right to benefit from a treatment not less favourable than that accorded to other operators with respect to other railways on Dutch territory, as concerns the freedom to establish plans, specifications and procedures.

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

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

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

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

The 'pacta sunt servanda' principle, and its corollaries the principles of good faith and of reasonableness, also applies in the hypothesis that the Netherlands wishes to build underground and above-ground tunnels on the Iron Rhine on Dutch territory at its own expenses, and not at the expenses of Belgium. As a consequence, the Netherlands may not, notably, decide to build a tunnel at their expenses, if such a

construction infringes in an unreasonable manner on the right to passage of Belgium conferred to it by Article XII of the Separation Treaty.

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

### **ON QUESTION NO. 3**

#### In primary order:

- That, in application of the Iron Rhine's conventional regime, Belgium shall bear the costs and financial risks associated with the Iron Rhine on Dutch territory, only to the extent that Belgium requests that a new route on Belgian territory be prolonged on Dutch territory according to the same plan, and, if the Netherlands would then take the option of having the route constructed by engineers and workers which the Netherlands would employ, to the further condition that the works be agreed upon.
- That Belgium's present request for the reactivation of the Iron Rhine does not amount to a request that a new route on Belgian territory be prolonged on Dutch territory according to the same plan, with the consequence that Belgium is not under the obligation to bear the costs and financial risks associated with this reactivation.
- That, in application of the Iron Rhine's conventional regime, the Netherlands shall be responsible for all cost items and financial risks associated with the restoration, adaptation and modernization of the historical route of the Iron Rhine on Dutch territory, so as to make it in a good state and prone to facilitating trade.
- That the reactivation of the Iron Rhine as it is presently envisaged does not exceed what is necessary for the line to be in a good state and prone to facilitating trade, with the consequence that the Netherlands shall be responsible for all costs and financial risks associated with the envisaged restoration, adaptation and modernization.

#### In subsidiary order:

- That all costs items and financial risks related to restoration of the historical route, caused by the Netherlands' dismantling part of the infrastructure of the historical track, making it unfit for use or failing to provide maintenance, shall be borne by the Netherlands.
- That the Netherlands shall be responsible for all costs and financial risks associated with (a) of measures related to tracks which are in present or future use for Dutch railway transports, (b) of measures required to meet objectives over and above Dutch legislative requirements, (c) of building a loop around Roermond, and (d) of building a tunnel in the Meinweg and similar nature protection devices and compensatory measures, within the limits set under Question No. 1.

## **2. Netherlands**

27. The final submissions of the Netherlands, made in the Rejoinder, were as follows:

### **ON QUESTION NO. 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 NO. 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 NO. 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.

## CHAPTER II – LEGAL BASIS AND SCOPE OF BELGIUM’S TRANSIT RIGHT

### A. The Applicable Legal Provisions

28. The Arbitral Tribunal has been asked to render an Award, answering Questions jointly put to it by the Parties, “on the basis of international law, including European law if necessary, while taking into account the Parties’ obligations under Article 292 of the EC Treaty.”
29. Various treaties have a relevance to this dispute and have been brought to the Tribunal’s attention by the Parties. In addition, the Parties have each invoked various rules and principles of international law.
30. As noted above (*see* paragraph 16), a key treaty relevant to this dispute is the 1839 Treaty of Separation. By this treaty, Belgium and the Netherlands settled the allocation of territory, and also dealt with various other matters. This was achieved after prolonged diplomatic multilateral negotiations, which had begun in 1830, in which other Powers were involved (“the Conference of London”).
31. The 1839 Treaty of Separation determined the territory of Belgium and the Netherlands and specified their borders (Articles I, II and VI). Articles II and V deal with the cession by Willem I of part of the Grand Duchy of Luxembourg. Articles III and IV attribute part of Limburg to the Netherlands. Article VII affirms the continued neutrality of Belgium. Article XIII distributes debts between the two countries. Various transit rights are guaranteed to Belgium by virtue of Articles IX, X, XI and XII. It is Article XII which has been most at issue in the pleadings of the Parties in the present arbitration.
32. The Treaty was concluded in Dutch and in French. There is no dispute between the Parties about such small distinctions as exist in the two languages. The Parties have used the French text (Martens, *Nouveau Recueil des Traités*, Vol. XVI, p. 773) in their pleadings. They have each provided for the benefit of the Tribunal a translation in English of the particular articles. These translations differ from each other in several

respects. For this and other technical reasons the Tribunal has prepared its own translation of Article XII, which is as follows:

In the case that in Belgium a new road would have been built or a new canal dug, which would lead to the Maas facing the Dutch canton of Sittard, then Belgium would be at liberty to ask Holland, which in that hypothesis would not refuse it, that the said road, or the said canal be extended in accordance with the same plan, entirely at the cost and expense of Belgium, through the canton of Sittard, up to the borders of Germany. This road or canal, which could be used only for commercial communication, would be constructed, at the choice of Holland, either by engineers and workers whom Belgium would obtain authorization to employ for this purpose in the canton of Sittard, or by engineers and workers whom Holland would supply, and who would execute the agreed works at the expense of Belgium, all without any burden to Holland, and without prejudice to the exclusive rights of sovereignty over the territory which would be crossed by the road or canal in question.

The two Parties would set, by common agreement, the amount and the method of collection of the duties and tolls which would be levied on the said road or canal.

The French text of which this is a translation is reproduced above (*see* paragraph 17).

33. On the very same day as the 1839 Treaty of Separation was concluded, two further treaties were concluded at the Conference of London, one being a treaty by Belgium with Austria, France, Great Britain, Prussia, and Russia, and the other being a treaty by the Netherlands with the same parties (C.T.S., 1838–1839, Vol. 88, p. 411 ff). These treaties each referred to the provisions of the 1839 Treaty of Separation (the articles of which were annexed thereto), and provided that they “*sont considérés comme ayant la même force et valeur que s'ils étaient textuellement insérés dans le présent Acte, et qu'ils se trouvent ainsi placés sous la garantie de Leursdites Majestés.*”
34. It was thus clear from the outset that the provisions of the 1839 Treaty of Separation, including Article XII thereof, were of more than bilateral interest. That has remained the case until today. In the current era there is a certain interest of the EC in the railway that was in due course to be established by reference, *inter alia*, to Article XII of the 1839 Treaty of Separation. That interest, and the legal implications for this arbitration, are further examined below (*see* paragraphs 145 and 146).
35. Article XII of the 1839 Treaty of Separation referred to a road which might have been built or a canal which might have been dug. In 1842, the Boundary Treaty between

Belgium and the Netherlands was concluded in The Hague (C.T.S., 1842–1843, Vol. 94, p. 37 ff). Its purpose, as stated in the preamble, was to clarify a number of issues arising from the 1839 Treaty of Separation. In particular, Article III made clear that the road or canal across the Netherlands referred to in Article XII of the 1839 Treaty of Separation could be constructed by a concessionnaire. (In 1869, Belgium provided for such a concession for a railway (BM, p. 9, para. 9).) The second paragraph of Article III of the Boundary Treaty envisaged the possibility of expropriation by the Netherlands, on the basis of its legislation and for a public utility purpose, of the necessary land for the project that had been envisaged under Article XII. There was immediately added to Article III of the Boundary Treaty the phrase “*et ce de la même manière que si le Gouvernement Belge procédait par lui-même aux travaux d’exécution et d’exploitation de la route ou du canal,*” thus maintaining the careful balance between the Parties that had been struck in Article XII of the 1839 Treaty of Separation.

36. In the event, the Boundary Treaty did not resolve all the outstanding difficulties between the Netherlands and Belgium. The Parties were in dispute about whether, for purposes of the extension envisaged in Article XII of the 1839 Treaty of Separation, the road or canal would have had to have been built or merely planned. This problem has since been resolved, as is explained below (*see* paragraph 62). The Parties were also in dispute as to whether Article XII of the 1839 Treaty of Separation envisaged a railway line extension, in contradistinction to the extension of a road or canal. That Belgium could extend a railway line was eventually agreed to by the Netherlands in a letter dated 12 August 1868 (BM, Exhibit No. 15, Letter of the Dutch Government to the Belgian Ambassador at The Hague, dated 12 August 1868).
37. In 1873, Belgium and the Netherlands entered into a further treaty, the Iron Rhine Treaty. Under Article IV of that treaty the Netherlands acknowledges the *Compagnie du Nord de la Belgique* as the concessionnaire of the railway line on Netherlands territory. It was also agreed that the Antwerp-Gladbach section would be built by either that company or by the *Grand Central Belge*, on conditions echoing the requirements of Article XII of the 1839 Treaty of Separation, namely “*sans charge aucune pour le Gouvernement des Pays-Bas, et sans préjudice de ses droits de souveraineté sur le territoire traversé.*” Agreement was also reached on matters relating to the bridge that in 1873 the Netherlands had agreed would be built over the Maas, near Roermond.

38. Importantly, in the context of this arbitration, a modification to the original route as specified in the 1839 Treaty of Separation was also agreed in the Iron Rhine Treaty: it would now not pass through Sittard after all. Article IV, paragraph 4<sup>6</sup> provides as follows (in the Tribunal’s English translation):

The line will enter the territory of the Duchy of Limburg passing to the south of Hamont (Belgium); it will head towards Weert, pass to the south of that locality as well as of Haelen, traverse the Maas on a fixed bridge in the right part upstream of the bend at Buggenum, between the markers 83 and 84, rejoin the Maastricht line to Venlo north of the station of Roermond, follow part of this line, leave it south of that station to go to reach the Prussian frontier in a direction to be agreed upon with the Government of the German Empire.

39. The Parties thus varied the provision in Article XII of the 1839 Treaty of Separation whereby the road or canal was intended to pass through Sittard. To make clear that this amendment did not amount to an additional line to the one envisaged in 1839, the Belgian and Netherlands representatives jointly confirmed, in a document appended to the treaty at the moment of ratification, that as provided in the statements of the two Governments to their legislative chambers,

*la concession de l'établissement d'un chemin de fer d'Anvers à Gladbach par le Duché de Limbourg, en passant à Ruremonde, comme elle est stipulée par le Traité du 13 janvier, 1873, constitue l'exécution pleine et entière de l'article XII du Traité du 19 avril, 1839 [C.T.S., 1872–1873, Vol. 145, p. 447].*

There was no suggestion voiced during these ratification procedures that the “*exécution pleine*” was to be understood as meaning that the right of transit had expired or that Belgian rights in relation to what today is termed the “historic route” had lapsed. Rather, the intention was to show an agreed amendment to the location of the track that had originally been designated at Sittard; Belgium’s right of transit would henceforth be along a track that now incorporates the variation agreed in Article IV, paragraph 4 of the Iron Rhine Treaty (the “historic track”). The agreed statement made clear that this was a final decision, in the sense that no future claim made by Belgium for a canal, road, or railway through Sittard would be entertained.

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<sup>6</sup> The Netherlands uses Arabic numerals in the Dutch text provided to the Tribunal and Belgium uses Roman numerals in referring to the French text of the Iron Rhine Treaty. The Tribunal will use Roman numerals.

40. To affirm the continued existence of an “historic route” and Belgian rights in relation thereto, does not, of course, answer the question as to whether Belgium’s current requests do amount to a *further* “new track”; or whether, if not, Article XII has any role to play. These questions, of great importance for this arbitration, are distinct, and will be addressed by the Tribunal below (*see* paragraphs 74 ff).
41. The Iron Rhine railway, on the revised route stipulated in Article IV, paragraph 4 of the Iron Rhine Treaty, came into use from 1879, the concessionnaire on both Belgian and Netherlands territory being, in the event, the *Grand Central Belge*.
42. At the end of the nineteenth century, railway lines on Belgian territory were nationalised by that Government. The Netherlands purchased the railway interests of *Grand Central Belge* on its own territory, under an arrangement whereby Belgium was allowed in the first place to buy from *Grand Central Belge* the concession “[d’]Anvers à la frontière Prussienne vers Gladbach,” and then sell it on to the Netherlands (the 1897 Railway Convention). A further arrangement was made between the Netherlands Government and the *Maatschappij tot Exploitatie van Staatsspoorwegen* (“*Maatschappij tot Exploitatie*”) to run the railway lines on Netherlands territory which had been passed by the 1897 Railway Convention to the Netherlands. This further arrangement of 1897, which contained detailed financial provisions to apply as between the *Maatschappij tot Exploitatie* and the Government, was annexed to the Netherlands legislation of 2 April 1898, applying the 1897 Railway Convention (BM, Exhibit No. 25, Agreement between the State of the Netherlands and the *Maatschappij tot Exploitatie*, 29 October 1897, annexed to the Act of 2 April 1898 approving the Railway Convention of 23 April 1897). It stipulated, *inter alia*, that the provisions of an earlier agreement between the Netherlands Government and the *Maatschappij tot Exploitatie* as regards maintenance, would apply to the recent transfers.
43. As has been explained above (*see* paragraphs 16–22), there has arisen, against the background of a certain long pattern and level of use of the Iron Rhine railway, and the Belgian interest in reactivation as initiated and developed between 1987 and 2003, a dispute between Belgium and the Netherlands as to their legal rights and obligations in respect of the Iron Rhine railway, entailing Belgian proposals and Netherlands counter-proposals. It will be necessary for the Tribunal both to interpret some

provisions of the above-mentioned treaties and to comment upon the legal significance of certain terms.

**B. The Principles of Interpretation to be Applied by the Tribunal**

44. It is clear that, in order to respond to the Questions put to it by the Parties, the Tribunal must interpret various provisions in the governing instruments, as well as apply the relevant rules of international law.
  
45. Belgium and the Netherlands are both parties to the Vienna Convention on the Law of Treaties of 23 May 1969 (“Vienna Convention”) (United Nations Treaty Series (“U.N.T.S.”), Vol. 1155, p. 331). It is precisely because some terms in that Convention reflected customary law, and some were new, that Article 4 provided generally for non-retroactivity of the Convention, but “without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention.” It is now well established that the provisions on interpretation of treaties contained in Articles 31 and 32 of the Convention reflect pre-existing customary international law, and thus may be (unless there are particular indications to the contrary) applied to treaties concluded before the entering into force of the Vienna Convention in 1980. The International Court of Justice has applied customary rules of interpretation, now reflected in Articles 31 and 32 of the Vienna Convention, to a treaty concluded in 1955 (*Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, *I.C.J. Reports 1994*, p. 6 at pp. 21–22, para. 41); and to a treaty concluded in 1890, bearing on rights of States that even on the day of the Judgment were still not parties to the Vienna Convention (*Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, *I.C.J. Reports 1999 (II)*, p. 1045 at p. 1059, para. 18). In the *Sovereignty over Pulau Ligitan and Pulau Sipadan* case, the Court noted that Indonesia was not a party to the Vienna Convention, but nevertheless applied the rules as formulated in Articles 31 and 32 of that Convention to a treaty concluded in 1891. Indonesia did not dispute that the rules codified in these articles were applicable (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, *I.C.J. Reports 2002*, p. 625 at pp. 645–646, paras. 37–38). There is no case after the adoption of the Vienna Convention in 1969 in which the International Court of Justice or any other leading tribunal has failed so to act.

46. These articles provide as follows:

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

47. Although the clauses contained within Article 31 are not hierarchical, there is no doubt that the starting point for interpretation is the ordinary meaning to be given to the terms, taking them in context, and having regard also to the object and purpose of the treaty. The Tribunal will pay particular attention to these factors in carrying out its tasks of interpretation, along with the other principles of interpretation as appropriate. Its elaboration on the application of the various principles of interpretation will be made in the paragraphs dealing with the various phrases contained within Article XII of the 1839 Treaty of Separation whose meaning is disputed.

48. At the same time, it is convenient for the Tribunal to make certain more general observations at the outset. Although the Parties have provided it with extracts from the prolonged diplomatic negotiations leading up to the conclusion of the 1839 Treaty of

Separation, these do not, in the view of the Tribunal, have the character of *travaux préparatoires* on which it may safely rely as a supplementary means of interpretation under Article 32 of the Vienna Convention. These extracts may show the desire or understanding of one or other of the Parties at particular moments in the extended negotiations, but do not serve the purpose of illuminating a common understanding as to the meaning of the various provisions of Article XII. This observation is relevant, in particular, to the question of whether the right of transit afforded to Belgium is to be read as a *quid pro quo* for the agreement that subsequent to the separation, the territory that now constitutes the Netherlands province of Limburg should be part of the Netherlands (the view of Belgium); or whether the obtaining of Limburg by the Netherlands was a *quid pro quo* for the obtaining by Belgium of a part of Luxembourg (the view of the Netherlands). In the absence of *travaux préparatoires* reflecting a common understanding, the answer cannot be certain, but the Tribunal is of the view that there were very many elements in play (and not one or other of these alone) that contributed to the balance struck in the text of Article XII. At the same time, the Tribunal will remain mindful of the circumstances of the conclusion of each of the applicable treaties, as required in Article 32 of the Vienna Convention. The Tribunal notes also that good faith is both a specific element in Article 31, paragraph 1 of the Vienna Convention and a general principle of international law that relates to the conduct of parties *vis-à-vis* each other.

49. The Tribunal further observes that there exist other well-established principles relevant to the process of interpretation. Of particular importance is the principle of effectiveness: *ut res magis valeat quam pereat*. The relevance of effectiveness is in relation to the object and purpose of a treaty; at the same time this does not entitle a Tribunal to revise a treaty.
50. The Netherlands has placed emphasis on the fact that a right of transit by one country across the territory of another can only arise as a matter of specific agreement. This proposition of law is undoubtedly correct and is not challenged by Belgium. The Netherlands further contends that the transit right as such is to be construed restrictively, citing various cases in support. This latter proposition *is* challenged by Belgium.

51. In the *Case of Free Zones of Upper Savoy and the District of Gex* (P.C.I.J., Series A/B, No. 46 (1932) at p. 166) the Permanent Court of International Justice (“Permanent Court”) said, of the stated rights in the case, France’s “sovereignty . . . is to be respected in so far as it is not limited by her international obligations, and . . . by her obligations under the treaties . . .” and that “no restriction exceeding these ensuing from those instruments can be imposed on France without her consent.” In the *Interpretation of the Statute of the Memel Territory* case (P.C.I.J., Series A/B, No. 49 (1932) at pp. 313–314) the Permanent Court stated that in the absence of provisions in the treaty providing for the autonomy of Memel, “the rights ensuing from the sovereignty of Lithuania must apply.” Nor can it be doubted in the present case that, beyond what rights of Belgium are provided for in Article XII of the 1839 Treaty of Separation, Netherlands sovereignty remains intact.
52. It is true that in both the *Free Zones* case and in *Case of the S.S. Wimbledon* (P.C.I.J. Series A, No. 1 (1923) at p. 24) the Permanent Court said that in case of doubt about a limitation on sovereignty that limitation is to be interpreted restrictively. In the latter case, the Permanent Court did caution, however, that it would nonetheless “feel obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted.”
53. The doctrine of restrictive interpretation never had a hierarchical supremacy, but was a technique to ensure a proper balance of the distribution of rights within a treaty system. The principle of restrictive interpretation, whereby treaties are to be interpreted in favour of state sovereignty in case of doubt, is not in fact mentioned in the provisions of the Vienna Convention. The object and purpose of a treaty, taken together with the intentions of the parties, are the prevailing elements for interpretation. Indeed, it has also been noted in the literature that a too rigorous application of the principle of restrictive interpretation might be inconsistent with the primary purpose of the treaty (see Jennings and Watts, *Oppenheim’s International Law*, 9<sup>th</sup> Edition (1992), at p. 1279). Restrictive interpretation thus has particularly little role to play in certain categories of treaties – such as, for example, human rights treaties. Indeed, some authors note that the principle has not been relied upon in any recent jurisprudence of international courts and tribunals and that its contemporary relevance is to be doubted

(Bernhardt “Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights,” 42 *German Yearbook of International Law* (1999), p. 11, at p. 14).

54. The Award in the *Lac Lanoux Arbitration* (24 *International Law Reports* (1957), p. 101) remains to this day a very useful guide to the present type of inevitable tension between rights on one’s own territory given under a treaty, and reservations as to sovereignty. The relevant clause in the treaty provision for the utilization of the waters of Lac Lanoux referred to territorial sovereignty “except for the modifications agreed upon between the two Governments” (p. 120). Article XII of the 1839 Treaty of Separation has the converse structure, whereby the rights of Belgium are specified and the general reservation as to sovereignty then follows. In the view of the Tribunal, this makes no difference – each is a balancing of special rights granted by a state to another on its own territory, and a general affirmation of territorial sovereignty. As the *Lac Lanoux* tribunal held,

[i]t has been contended before the Tribunal that these modifications should be strictly construed because they are in derogation of sovereignty. The Tribunal could not recognize such an absolute rule of construction. Territorial sovereignty plays the part of a presumption. It must bend before all international obligations, whatever their origin, but only before such obligations [*Ibid.*].

The *Lac Lanoux* tribunal observed that in the application of this observation “the question is therefore to determine the obligations of the French Government in this case . . . .” (*Ibid.*).

55. In precisely that same way, the sovereignty reserved to the Netherlands under Article XII of the 1839 Treaty of Separation cannot be understood save by first determining Belgium’s rights, and the Netherlands’ obligations in relation thereto. This is to be done not by invocation of the principle of restrictive interpretation, but rather by examining – using the normal rules of interpretation identified in Articles 31 and 32 of the Vienna Convention – exactly what rights have been afforded to Belgium. All else falls within the Netherlands’ sovereignty. And indeed, the correctness of this methodology seems in the final analysis to be recognized by the Netherlands (NR, p. 7, para. 24).

56. Put differently, the Netherlands may exercise its rights of sovereignty in relation to the territory over which the Iron Rhine railway passes, unless this would conflict with the treaty rights granted to Belgium, or rights that Belgium may hold under general international law, or constraints imposed by EC law.
57. Finally, the Tribunal wishes to draw attention to a matter which in its view is of great importance in this case: the problem of intertemporality in the interpretation of treaty provisions. This idea will have considerable relevance in the ensuing interpretation of certain phrases contained in Article XII of the 1839 Treaty of Separation.
58. It is to be recalled that Article 31, paragraph 3, subparagraph (c) of the Vienna Convention on the Law of Treaties makes reference to “any relevant rules of international law applicable in the relations between the parties.” For this reason – as well as for reasons relating to its own jurisdiction – the Tribunal has examined any provisions of European law that might be considered of possible relevance in this case (*see* Chapter III below). Provisions of general international law are also applicable to the relations between the Parties, and thus should be taken into account in interpreting Article XII of the 1839 Treaty of Separation and Article IV of the Iron Rhine Treaty. Further, international environmental law has relevance to the relations between the Parties. There is considerable debate as to what, within the field of environmental law, constitutes “rules” or “principles”; what is “soft law”; and which environmental treaty law or principles have contributed to the development of customary international law. Without entering further into those controversies, the Tribunal notes that in all of these categories “environment” is broadly referred to as including air, water, land, flora and fauna, natural ecosystems and sites, human health and safety, and climate. The emerging principles, whatever their current status, make reference to conservation, management, notions of prevention and of sustainable development, and protection for future generations.
59. Since the Stockholm Conference on the Environment in 1972 there has been a marked development of international law relating to the protection of the environment. Today, both international and EC law require the integration of appropriate environmental measures in the design and implementation of economic development activities. Principle 4 of the Rio Declaration on Environment and Development, adopted in 1992

(31 I.L.M. p. 874, at p. 877), which reflects this trend, provides that “environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.” Importantly, these emerging principles now integrate environmental protection into the development process. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm (*see* paragraph 222). This duty, in the opinion of the Tribunal, has now become a principle of general international law. This principle applies not only in autonomous activities but also in activities undertaken in implementation of specific treaties between the Parties. The Tribunal would recall the observation of the International Court of Justice in the *Gabčíkovo-Nagymaros* case that “[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development” (*Gabčíkovo-Nagymaros (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7 at p. 78, para. 140). And in that context the Court further clarified that “new norms have to be taken into consideration, and . . . new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past” (*Ibid.*). In the view of the Tribunal this dictum applies equally to the Iron Rhine railway.

60. The mere invocation of such matters does not, of course, provide the answers in this arbitration to what may or may not be done, where, by whom and at whose costs. However, the Tribunal notes that, as regards the Questions put to it, neither Party denies that environmental norms are relevant to the relations between the Parties. To that extent, they may be relevant to the interpretation of those treaties in which the answers to the Questions may primarily be sought.
61. The Tribunal now turns to the application of the principles of interpretation to the relevant treaty provisions.

**C. The Interpretation of Disputed Elements in Article XII of the 1839 Treaty of Separation**

**1. “Would have been built”**

62. As early as 1864, differences had arisen over the meaning of “would have been built” – differences which did not disappear with the agreement in 1873 to replace the references in the 1839 Treaty of Separation to “road” and “canal” with “railway.” The Netherlands informed Belgium in 1864 that what had been agreed to in the 1839 Treaty of Separation was the extension of a route that had already been built in Belgium and not the extension to a route whose status was still that of a project (BM, Exhibit No. 13, Letter of the Dutch Government to the Belgian Ambassador at The Hague, dated 7 March 1864). In 1868, an extension to a projected route was agreed to “*en principe*,” for the sake of “*des bonnes et cordiales relations*” (BM, Exhibit No. 15, Letter of the Dutch Government to the Belgian Ambassador at The Hague, dated 12 August 1868). The legal issues regarding “would have been built/*aurait été construit*” remained unresolved, but no longer of importance. Article IV of the Iron Rhine Treaty of 1873 provided that the *Compagnie du Nord de la Belgique*, which was the concessionnaire of the Antwerp to Gladbach railway line would become concessionnaire “*de cette même ligne qui est située sur le territoire du Duché de Limbourg*.” Notwithstanding the present tense, that sector was yet to be built. But Article IV provided that the Netherlands section “will be constructed and exploited” either by the *Compagnie du Nord de la Belgique* or by the *Grand Central Belge*.

**2. “That the said road, or the said canal be extended in accordance with the same plan”**

63. The dispute between the Parties as to the meaning of the term “plan” is easy to comprehend. In the opinion of the Netherlands, the word “plan” refers to the works that physically allow cross-border transit to be possible – for a railway to be “extended” from Belgium into and across the Netherlands (NR, p. 31, para. 126). Belgium, invoking the “plain meaning” of that term, and also the meaning to be given to the term in the context of construction projects, insists that “plan” is to be understood as relating to the proposals for and descriptions of the project in its entirety.

64. The Parties are also in dispute as to the rights arising for each of them consequent upon these different views of “the same plan.” The Netherlands’ position is straightforward: It believes the Belgian request constitutes a demand for a “new railway,” which is therefore to be extended “in accordance with the same plan.” The reservation of “exclusive rights of sovereignty over the territory which would be crossed” means, in the view of the Netherlands, that “the same plan” cannot entail specifications for the entire project. It can at most be a reference to trans-border functionality. The “same plan” refers to the physical continuity that the Netherlands is obliged to undertake, but not more. The Netherlands finds its view supported by the reference in Article XII to the execution of “the agreed works” – this term affirming that a plan for the line as a whole cannot therefore be unilaterally imposed by Belgium. The Netherlands also contends that Article V of the Iron Rhine Treaty, taken with Article 3 of the 1867 Convention between Belgium and the Netherlands (*pour le jonction de quatre chemins de fer*) (Convention Between Belgium and the Netherlands for the Junction of Railways, The Hague, 9 November 1967, C.T.S. 1866–1867, Vol. 135, p. 467), suggest that agreement is needed upon “the plan.”
65. Belgium finds these last provisions irrelevant. Belgium contends that no request is being made for a railway to be extended under Article XII; but it regards the developments and upgrading of the railway as also subject to the “same plan” provisions in Article XII. As the “same plan” refers to the plan that Belgium alone was entitled to make for Belgian territory, it cannot be subject to negotiations for its application on Netherlands territory. The unilateral determination of the plan is, in the eyes of Belgium, also 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” (BR, p. 77, para. 77). Acknowledging that the Netherlands is entitled to exercise jurisdiction within its own territory (the example of establishment of crossings is given), Belgium argues that it may not do so in a manner that denies Belgian rights recognized under international law. It differentiates, however, its claimed entitlement unilaterally to establish the plan when *it* is to perform the work, from the provision when the Netherlands would opt to perform the work. In the former hypothesis agreement may be desirable, but is not in Belgium’s view legally necessary; Belgium accepts that in the

latter hypothesis the agreement of the Netherlands to the works is legally necessary (BR, p. 82, para. 81).

66. The Tribunal finds that the functionality of continuation of the line in Belgium through the Netherlands is to be in accordance with track specifications, the dimensions and character of which may indeed have found their origin in Belgian decision-making. But, whether as regards extension or reactivation, the overall plan for the line is subject to mutual agreement. The ensuing works are “agreed works.” Naturally, agreement shall not be withheld by the Netherlands, were that to amount to a denial of Belgium’s transit right. The Tribunal sees nothing in Article XII of the 1839 Treaty of Separation or in the Iron Rhine Treaty which draws a distinction in this regard between works which may be done legally by Belgium or works which the Netherlands will cause to be done. It cannot accept the contentions of Belgium on this point.
  
67. The phrase “according to the same plan” is to be read as to give an interpretation that reconciles Belgium’s specific rights and the Netherlands’ reservation of sovereignty. Although the term “plan” is commonly understood in the construction industry, and in some dictionary references, as comprising the depiction of the entire venture, various provisions in Article XII suggest that this is not the meaning to be accorded in this case. In particular, the reference to “agreed works” and the reservation of Netherlands’ sovereignty suggest otherwise. The reservation of Netherlands’ sovereignty ensures for it that, apart from the elements specified in terms in favour of Belgium, no further limitations of sovereignty are to be implied. But at the same time, the reservation of sovereignty cannot serve the converse purpose of detracting from the rights given to Belgium under Article XII. Applying these observations, the Tribunal notes that the plan referred to in the phrase “according to the same plan,” insofar as it relates to continuity at the border, is a matter for Belgium. That follows from the fact that under Article XII a Belgian line will have been built, and it may or may not be the subject of a later request for extension. Beyond that, specifications for use of the entirety of the line are to be jointly agreed. Matters reserved to the sovereignty of the Netherlands, on which it has the right of decision-making, includes, *inter alia*, all safety elements of the whole work and safety conditions under which the work is carried out.

3. **“The said road, or the said canal [would] be extended . . . entirely at the cost and expense of Belgium . . .”**  
**“Engineers and workers . . . would execute the agreed works at the expense of Belgium, all without any burden to Holland . . .”**
68. The Tribunal first observes that the introduction of the adjective “agreed” before the noun “works” clearly suggests, as a matter of ordinary meaning, that both Parties envisaged that although the Netherlands would not refuse a request for a railway to be extended across its territory, the works therefore would be a matter for them both. In this way the reserved sovereign rights of the Netherlands and the entitlement of transit of Belgium could be reconciled.
69. Beyond that, it is clear that the works for a railway to be extended from Belgium up to the borders of Germany were to be paid for by Belgium alone.
70. The dispute that arises is as to whether the specific request of Belgium for the upgrading and restoration of the line beyond its previous capacity is “an extension” within the meaning of Article XII (a question discussed by the Tribunal in paragraphs 82–84 below); and, more particularly, whether the costs and expenses to be incurred by Belgium should include the costs and expenses incurred should the works ultimately agreed upon entail the environmental protection measures required by Netherlands law. Belgium denies such a duty, on the ground that these measures are not measures necessitated by the physical extension of the line – they are measures unilaterally undertaken by the Netherlands in the exercise of its sovereignty. Belgium further claims that it should have been consulted before the various areas were declared protected nature reserves. It observes that the Netherlands has affirmed (NR, p. 23, para. 93) that these specific measures are not as such required of it under EC law. Further, Belgium asserts that the proposed measures for noise protection, in particular tunnelling, are not the least costly available to mitigate any environmental harm.
71. The Netherlands asserts that it has the sovereign right to assess the appropriate means to protect the environment to EC and its own domestic standards; that it has sought to identify objectively, through expert reports, those means; and that the measures would

not otherwise have been necessary save for Belgium's request for a restoration and significant upgrading of the capacity of the Iron Rhine railway.

72. There is merit in both arguments. The Tribunal finds it necessary, in order to answer this matter, first to ascertain whether the project is one which would attract the cost-allocation provisions of Article XII, and second, if so, to see if the costs and expenses of the measures envisaged by the Netherlands are integral to the extension of the Iron Rhine line.
73. The Tribunal will later return to these questions.

#### **4. A "new road" or a "new canal" to "be extended"?**

74. The Belgian request for reactivation is both immediate and over the longer term. It is understood that Belgium wishes to achieve by 2020 use in both directions by 43 trains of 700 metres length per day, able to travel at 100 kilometres per hour. The work needed for this is, in the Netherlands' view, so substantial that it "amounts . . . to a request within the meaning of Article XII for the extension of a railway on Belgian territory on Netherlands territory. This railway is *new* to the extent that considerable adaptation and modernization is necessary in many ways in order to achieve the desired use." (NCM, para. 3.3.4.5). For the Netherlands, therefore, the Article XII provisions on the costs (beyond restoration to the 1991 level of maintenance, which costs it will bear) apply. This new work is, as regards functionality, to be "entirely at the cost and expense of Belgium" and "without any burden to the Netherlands." Belgium, by contrast, asserts that its request for reactivation is not a demand for "extension" – "[t]he Iron Rhine was prolonged on Netherlands territory in the 1870's and still exists at present." To that extent, in Belgium's view its current claims are outside of Article XII of the 1839 Treaty of Separation.
75. The question thus arises as to whether the Belgian request is a request for a new road or canal or railway line to be extended across the Netherlands within the meaning of Article XII; or whether it is a request for the adaptation of a transit right already in existence under Article XII. The Tribunal is called upon to state whether or not the costs of the reactivation are to be borne by Belgium. In this context it notes that the positions

taken by the Parties are not wholly identical to what they were each prepared to contemplate during negotiations, before resort to arbitration. Belgium assimilates its request to the maintenance of an existing line, such costs to be borne by the Netherlands. It invokes Article XI of the 1839 Treaty of Separation to that end. The Netherlands assimilates Belgium's request to one for a new railway line, with the costs all to be borne by Belgium. In any event, neither Party wholly excludes the relevance of Article XII. Each of these possibilities is not without its difficulties.

76. The Tribunal observes that Article XII of the 1839 Treaty of Separation addresses neither the question of maintenance nor of “adaptation and modernization” (the description jointly agreed in the Questions put to the Tribunal by the Parties). The former has been resolved by a Netherlands practice assuming physical and financial responsibility for maintenance (no doubt perceived by it as an element of its territorial sovereignty) and is accepted by both Parties. Neither Article XII nor the detailed financial arrangements, elaborated in the 1897 Railway Convention, made specific reference to maintenance costs of the lines on Netherlands territory (including the Iron Rhine railway) and now owned by the Netherlands. Article IX of the 1897 Railway Convention spoke of future agreements for the “*exploitation internationale des chemins de fer rachetés*,” but never seems to have been applied to maintenance. And the related agreement between the Netherlands and the *Maatschappij tot Exploitatie* (which Netherlands company was henceforth to exploit the Iron Rhine railway on Netherlands territory) clearly presupposes Netherlands Government responsibility for repairs and renovations (BM, Exhibit No. 25, Agreement between the State of the Netherlands and the *Maatschappij tot Exploitatie*, 29 October 1897, annexed to the Act of 2 April 1898 approving the Railway Convention of 23 April 1897, Articles 2 and 8). The Explanatory Statement associated with the Netherlands’ ratification of the 1897 Railway Convention observes that “the State has the obligation to provide, on its own account, a sufficient level of maintenance for the railways to be taken over by the Exploitatie-Maatschappij” (BM, Exhibit No. 22, Approval of the agreement between the Netherlands and Belgium signed at Brussels on 23 April 1897 – Explanatory Statement, pp. 12–13). At the same time, this does not necessarily lead to the conclusion that “renovation” to meet standards needed for previously unanticipated levels of activity under the current Belgian request is thereby part of the maintenance and renovation obligation assumed by the Netherlands at the end of the nineteenth century. In the view of the Tribunal, the

Netherlands (as it accepts) is under an obligation to bring the Iron Rhine railway back to the levels maintained during the regular (albeit light) use of the line prior to discontinuation of such use in 1991; but these maintenance and repair obligations do not cover the significant upgrading costs now involved in Belgium's request. Whether these are for Belgium's account under Article XII of the 1839 Treaty of Separation depends on further questions.

77. The question of significant adaptation and modernisation is a more complex, and as yet uncharted, problem. The application of international law principles of treaty interpretation may assist in its resolution.
78. The provision that Belgium will bear all the costs and expenses of the "new road" or "new canal" (railway) is clear, as a matter of "plain meaning." But in deciding what is or is not a "new road" or "new canal" (railway), or rather a reactivation of an existing one, and the related questions of whether, and the extent to which, Article XII is applicable, other principles of interpretation must be borne in mind.
79. Article 31, paragraph 3, subparagraph (c) of the Vienna Convention also requires there to be taken into account "any relevant rules of international law applicable in the relations between the parties." The intertemporal rule would seem to be one such "relevant rule." By this, regard should be had in interpreting Article XII to juridical facts as they stood in 1839. In particular, it is certainly the case that, in 1839, it was envisaged that the costs for any extension of a new road or canal that Belgium might ask for would be limited and relatively modest. The great advances that were later to be made in electrification, track design and specification, freight stock, and so forth – and the concomitant costs – could not have been foreseen by the Parties. At the same time, this rule does not require the Tribunal to be oblivious either to later facts that bear on the effective application of the treaty, nor indeed to all later legal developments. It has long been established that the understanding of conceptual or generic terms in a treaty may be seen as "an essentially relative question; it depends upon the development of international relations" (*Nationality Decrees Issued in Tunis and Morocco*, P.C.I.J. Series B, No. 4 (1923), p. 24). Some terms are "not static, but were by definition evolutionary . . . . The parties to the Covenant must consequently be deemed to have accepted them as such" (*Namibia (SW Africa) Advisory Opinion*, I.C.J. Reports 1971,

p. 16 at p. 31). Where a term can be classified as generic “the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time” (*Aegean Sea Continental Shelf (Greece/Turkey), Judgment, I.C.J. Reports 1978*, p. 3 at p. 32, para. 77). A similar finding was made by the WTO Appellate Body when it had to interpret the term “natural resources” in Article XX, paragraph (g) of the WTO Agreement (*United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R*, 12 October 1998, para. 130).

80. In the present case it is not a conceptual or generic term that is in issue, but rather new technical developments relating to the operation and capacity of the railway. But here, too, it seems that an evolutive interpretation, which would ensure an application of the treaty that would be effective in terms of its object and purpose, will be preferred to a strict application of the intertemporal rule. Thus in the *Gabčíkovo-Nagymaros* case, the International Court was prepared to accept, in interpreting a treaty that predated certain recent norms of environmental law, that “the Treaty is not static, and is open to adapt to emerging norms of international law” (*I.C.J. Reports 1997*, p. 7 at pp. 67–68, para. 112). The Netherlands District Court of Rotterdam was faced with the question of whether a provision that referred to telegraph cables could be interpreted as to include telephone cables, even though these had not yet been developed at the time that the 1884 Convention on the Protection of Submarine Cables was concluded. The Court thought that it was “reasonable” to include the later telephone cables in the interpretation of what was protected under the Convention (*The Netherlands (PTT) and the Post Office (London) v. Ned Lloyd*, 74 *International Law Reports*, p. 212).
81. Finally, the Tribunal notes a general support among the leading writers today for evolutive interpretation of treaties. The editors of the 9<sup>th</sup> Edition of *Oppenheim* agree that, notwithstanding the intertemporal rule, “in some respects the interpretation of a treaty’s provisions cannot be divorced from developments in the law subsequent to its adoption . . . the concepts embodied in a treaty may be not static but evolutionary . . . .” (Jennings and Watts, *Oppenheim’s International Law*, Vol. 1, p. 1282). See further Jiménez de Aréchaga “International Law in the Past Third of a Century,” 159 *Recueil des Cours* (1978-1), at p. 49). Rudolf Bernhardt explains it thus: “The object and purpose of a treaty plays . . . a central role in treaty interpretation. This reference to

object and purpose can be understood as entry into a certain dynamism. If it is the purpose of a treaty to create longer lasting and solid relations between the parties . . . , it is hardly compatible with this purpose to eliminate new developments in the process of treaty interpretation” (42 *German Yearbook of International Law* (1999) at pp. 16–17).

82. The Iron Rhine Treaty was not intended as a treaty of limited or fixed duration. The Parties probably did not think beyond an “extension” of a Belgian railway across the Netherlands, to take place at one moment of time. Indeed, the statements made by the Parties when ratifying the Iron Rhine Treaty, in which, *inter alia*, Article XII of the 1839 Treaty of Separation had been amended, provided that this “constitutes the full and complete execution of Article XII of the Treaty of 19 April, 1839.” However, the Tribunal believes that it would be incompatible with the object and purpose of the earlier treaty to read those declarations as stating that further work and requests were to be regarded as *en dehors* Article XII. The declarations are to be understood as referring rather to the amended routing of the Iron Rhine track that they had agreed.
83. The object and purpose of the 1839 Treaty of Separation was to resolve the many difficult problems complicating a stable separation of Belgium and the Netherlands: that of Article XII was to provide for transport links from Belgium to Germany, across a route designated by the 1842 Boundary Treaty. This object was not for a fixed duration and its purpose was “commercial communication.” It necessarily follows, even in the absence of specific wording, that such works, going beyond restoration to previous functionality, as might from time to time be necessary or desirable for contemporary commerciality, would remain a concomitant of the right of transit that Belgium would be able to request. That being so, the entirety of Article XII, with its careful balance of the rights and obligations of the Parties, remains in principle applicable to the adaptation and modernisation requested by Belgium.
84. Further, it is reasonable to interpret Article XII as envisaging future work occurring – beyond necessary maintenance – on the line. No separate provisions for the allocation of such future costs and rights over the line and the territory which it traversed were provided for in Article XII. However, an interpretation compatible with the principle of effectiveness leads the Tribunal to determine the continued applicability of Article XII of the 1839 Treaty of Separation to upgrading and improvements (save for the path of

the route, which remains governed by the amendments of the Iron Rhine Treaty). Applying this dynamic and evolutive approach to a treaty that was meant to guarantee a right of commercial transit through time, the Tribunal concludes that a request for a reactivation of a line long dormant, with a freight capacity and the means to achieve that considerably surpassing what had existed before for nearly 130 years, is still not to be regarded as a request for a “new line.” At the same time, the conditions attaching to this request (that is, for a revival of and considerable upgrading and modernisation of an existing “extension”) remain governed by the provisions of Article XII of the 1839 Treaty of Separation. It must be acknowledged that the wording as drafted was directed to the construction of a new road, canal or track, rather than a periodic upgrading inherent in a right of commercial transit. It may therefore be necessary to read into Article XII, so far as the allocation of contemporary costs for upgrading is concerned, the provisions of international law as they apply today (*see* paragraph 59). The Tribunal will have regard to the concept of reasonableness in the light of all the circumstances and to the fairness and balance embodied in Article XII.

**5. “Without prejudice to the exclusive rights of sovereignty over the territory which would be crossed by the road or the canal in question.”**

85. Applying that element in Article 31, paragraph 1 of the Vienna Convention, whereby a treaty is to be interpreted in accordance with the ordinary meaning to be given to the terms, it might be thought that the phrase “without prejudice” suggests that any intrusion at all into Netherlands’ sovereignty, beyond the acceptance of an extension of a new railway across Limburg, is contrary to Article XII. However, Article 31, paragraph 1 requires that that “ordinary meaning” be read not only in good faith, but also in context and in the light of the object and purpose of the treaty.
86. The Parties have in their pleadings contested whether good faith constitutes a distinct source of international law. Belgium alludes to an absence of good faith in a series of both acts and omissions of the Netherlands, whereas the Netherlands alludes to an abuse of rights in connection with various demands being made by Belgium as regards the reactivation of the Iron Rhine railway. The Tribunal finds rather that there have been important different perceptions by the Parties as to the scope of their respective rights and obligations under international law, and under Article XII of the 1839 Treaty of

Separation in particular, and that it is these different perceptions that have occasioned the ancillary contentions of absence of good faith and abuse of rights. The task of the Tribunal is to clarify the rights and obligations held by each, and then to be able to answer the Questions the Parties have jointly put to it.

87. As for the injunction in Article 31, paragraph 1 of the Vienna Convention that a term be read “in context” for its correct interpretation, the Tribunal notes that the relevant context of the phrase “without prejudice to the exclusive rights of sovereignty” is its location in a paragraph which also includes rights given to Belgium. The Netherlands has necessarily already derogated from its territorial sovereignty in allowing a railway to be built, at the request of another state, over its territory. The sovereignty reserved is over the territory over which the track runs. The Netherlands has forfeited no more sovereignty than that which is necessary for the track to be built and to operate to allow a commercial connection from Belgium to Germany across Limburg. It thus retains the police power throughout that area, the power to establish health and safety standards for work being done on the track, and the power to establish environmental standards in that area.
88. In this context, the Tribunal has noted that Netherlands law provides for maintenance of railways not at a fixed level, but rather in relation to the level of traffic occurring at a particular time. With the passing of the Iron Rhine track into disuse after 1991, only minimum upkeep occurred. In 1996, the level crossings on the Roermond-Vlodrop section on the line were removed. Also in accordance with Netherlands legislation, so too, more generally, were flashing signals removed. It has been explained to the Tribunal that “[t]his policy is pursued to prevent road-users from becoming accustomed to level crossings that are no longer in use, so that they would create a risk that they would not expect trains even at crossings that are in use” (NCM, p. 10, para 2.5.4).
89. The Tribunal finds this policy, and the lowering of the maintenance levels thereunder, not to violate Belgium’s rights under Article XII of the 1839 Treaty of Separation, and thus to fall within the reservation of Netherlands’ sovereignty in that provision. This is the more so as the Netherlands fully accepts its obligation to restore, at its own expense, the maintenance and safety features of the line to the 1991 condition upon a Belgian demand for reactivation.

90. It may thus be said that only if retained sovereignty would be exercised in such a manner that it is inconsistent with Belgium's right to have a railway extended across Limburg, or in violation of other international obligations, would the Netherlands be acting other than in conformity with Article XII. The Tribunal examines below (*see* paragraphs 202–206) whether this is the case.
91. Article 31, paragraph 1 of the Vienna Convention also requires the terms of a treaty to be interpreted “in the light of its object and purpose.” It may be queried as to whether any great illumination will follow in this case from the application of this very important principle, because the object and purpose of the 1839 Treaty of Separation was so broad – namely the separation of Belgium and the Netherlands on terms that could satisfy the participants in the Conference of London. It is clear that a Belgian claim to what is now the Netherlands province of Limburg was forfeited and at the same time the commercial proximity that Belgium would otherwise have had to Germany was retained by the road and canal prolongation provisions. In this way (among others) was the overall object and purpose of the 1839 Treaty to be achieved. What may certainly be said is that this object and purpose requires the careful balancing of the rights allowed to each party in Article XII.
92. There requires also to be addressed the question of whether the clause reserving Netherlands sovereignty did or did not require consultation with Belgium before designating any territory over which the historic route runs as a nature reserve.
93. Belgium has not denied the Netherlands' sovereign right to designate reserved nature areas; but it has implied (BM, p. 42, para. 31) that the right of transit which it holds under the 1839 Treaty of Separation and the Iron Rhine treaty was such that the Netherlands should have consulted it before designating the Meinweg as such an area (*see* paragraph 189). Belgium furthermore points to Article 9 of the Treaty of 21 December 1996 concerning the construction of a railway connection for high-speed trains between Rotterdam and Antwerp, which makes reference to the Iron Rhine railway:

The cases concerning the extension of the No. 11 freight line to the railway line between Goes and Bergen-op-Zoom and the opening up of the port of Antwerp through the so-called “IJzeren Rijn” [“Iron Rhine”] to Germany shall be judged on their own merits, after close consultation and as befits good neighbours. In the first case, efforts shall be made to decide on a route before 1 January 2000. In the second case, the Netherlands shall actively participate in the feasibility study, also in connection with the development of alternative routes near Roermond and the border between the Netherlands and Germany. Depending on the results of that study, the Parties shall jointly hold consultations with the competent authorities of the Federal Republic of Germany [2054 U.N.T.S. p. 293 (1999)].

94. On 12 June 1998, the Prime Minister of Belgium made clear to the Prime Minister of the Netherlands the preference of Belgium for the historic route of the Iron Rhine railway, claiming “a right of public international law on this historic track.” Diversions were either too long or could “only be realised in the long run” (BM, Exhibit No. 67, Letter of Belgian Prime Minister Dehaene to Dutch Minister-President Kok of the Netherlands, dated 12 June 1998). Under the seventh and eighth paragraphs of the March 2000 MoU (*see also* paragraph 155 of this Award), it was provided as follows:

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

Until the definitive route has been selected, Belgium reserves all its rights under the Separation Treaty of 1839 and the Dutch-Belgian Iron Rhine Treaty of 1873.<sup>7</sup>

95. The Tribunal notes that the Netherlands has on several occasions acknowledged Belgium’s right of transit under international law (BM, p. 46, para. 34). This right of transit was not, *per se*, affected by the designation of the Meinweg as a nature reserve: the relationship between Belgium’s right of transit and the Netherlands’ rights of sovereignty remained in balance as intended under Article XII. Had the Netherlands at the time of the designation of the Meinweg supposed that Belgium would soon propose a major reactivation programme, it might have been desirable on the basis of “good neighbourliness” to consult with it before the designation. The measures relating to the Meinweg were taken in 1994, after the Belgian communication of 1987. However, against the background of minimal use – and a recent period of non-use – of the line by Belgium, and only periodic reservations of its transit right, it was not unreasonable for

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<sup>7</sup> The Netherlands and Belgium offer slightly different English translations of these provisions (BM, para. 34; NCM, para. 2.12.1). The Tribunal here uses the Netherlands’ version.

the Netherlands to assume that that situation would possibly continue into the foreseeable future. In any event, as the designation of the Meinweg did not in theory constitute a limitation of the right of transit, there was no legal obligation for the Netherlands to have consulted Belgium. If later, the designation of the Meinweg as a nature reserve would have implications for any unforeseen demands for reactivation at a level previously unknown, that is a different matter, and one which clearly requires resolution initially by consultations between the Parties. On this particular point, therefore, the Tribunal finds the Netherlands' contention to be preferred.

96. That being said, the legitimate exercise of the Netherlands' sovereign right to designate the Meinweg as a nature reserve, in the particular circumstances described above, is not necessarily without financial consequences so far as the exercise by Belgium of its right of transit is concerned.

## CHAPTER III – THE ROLE OF EUROPEAN LAW IN THE PRESENT ARBITRATION

### A. Obligations Arising under Article 292 of the EC Treaty

97. The Arbitration Agreement between the Parties requests the Tribunal “to render its decision on the basis of international law, *including European law if necessary, while taking into account the Parties’ obligations under article 292 of the EC Treaty*” (emphasis added).
98. The Tribunal has already (*see* paragraph 15 above) referred to the letter sent by the Parties to the European Commission on 26 August 2003, in which they stated their common position that, although the core of the present dispute related to questions not of EC law but international law, they would, if necessary, take all measures required to comply with their obligations under EC law, in particular under Article 292 of the EC Treaty.
99. According to Article 292 of the EC Treaty, “Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided therein” (*see* paragraph 13 above).
100. This provision is to be seen in connection with Articles 227 and 239 of the EC Treaty. Pursuant to Article 227, a Member State that considers that another Member State has failed to fulfil an obligation under the EC Treaty may bring the matter before the European Court of Justice, while Article 239 provides the means for Member States of the EC in any dispute which relates to the subject matter of the Treaty, to submit this dispute to the European Court of Justice on the basis of a special agreement.
101. The combined effect of the EC Treaty articles thus referred to (together with Article 234 on preliminary rulings, on which *see* paragraph 102 below) is to establish the exclusive competence of the European Court of Justice “to ensure that in the interpretation and application of this Treaty the law is observed” (Article 220 of the EC Treaty). Hence, within the EC legal system, following a division of competences among the courts of

EC Member States and the European Court of Justice, only the European Court of Justice ultimately has the power to decide authoritatively questions of the interpretation or application of EC law. If Member States submit to a “non-EC” tribunal a legal dispute that requires that tribunal to interpret or apply provisions of EC law, proceedings may be instituted against them by the Commission for violation of Article 292 of the EC Treaty.<sup>8</sup>

102. With regard to the obligation to refer questions of EC law to authoritative adjudication by the European Court of Justice, the EC Treaty expressly addresses the domestic courts of Member States in Article 234. Pursuant to this article, a national court faced with the interpretation of EC law may, and in certain cases shall,<sup>9</sup> request the Court to give a preliminary ruling “if it considers that a decision on the question [of the interpretation of EC law] is necessary to enable it to give judgment.” According to the settled jurisprudence of the European Court of Justice (*see, e.g., Case C-373/95 Maso, Gazzetta et al. v. Istituto Nazionale della Previdenza Sociale (INPS)*, Judgment of 10 July 1997, para. 26),

it is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the particular facts of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court.

The Court has further held that “[a] request from a national court may be rejected only if it is quite obvious that the interpretation of Community law . . . sought bears no relation to the actual nature of the case or to the subject-matter of the main action” (*Case C-186/90 Durighello v. Istituto Nazionale della Previdenza Sociale (INPS)*, Judgment of 28 November 1991, para. 9).

103. In rendering its Award, the Tribunal has carefully considered these elements. The Tribunal is of the view that, with regard to the determination of the limits drawn to its jurisdiction by the reference to Article 292 of the EC Treaty in the Arbitral Agreement, it finds itself in a position analogous to that of a domestic court within the EC, described

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<sup>8</sup> *Cf.* Application of the European Commission to the European Court of Justice against Ireland in the *Mox Plant* case (BR, Exhibit No. 1, pp. 1 ff).

<sup>9</sup> The distinction between a national court having a right of referral or a duty to do so is irrelevant in the present context, as are other issues of the application of Article 234.

in the preceding paragraphs. In other words, if the Tribunal arrived at the conclusion that it could not decide the case brought before it without engaging in the interpretation of rules of EC law which constitute neither *actes clairs* nor *actes éclairés*, the Parties' obligations under Article 292 would be triggered in the sense that the relevant questions of EC law would need to be submitted to the European Court of Justice (in the present instance not *qua* Article 234 but presumably by means of Article 239 of the EC Treaty).

104. As to the necessity *vel non* of the Tribunal having to decide issues of EC law in order to enable it to render its Award, the criteria elaborated in the application of Article 234 of the EC Treaty by national courts and the European Court of Justice will also apply by analogy. In this regard, not all mention of EC law brings with it the duty to refer. The European Court of Justice clarified this matter in *Case 283/81, Srl CILFIT and Lanificio di Gavardo SpA v. Ministero della Sanità* [1982] ECR 3415 (“*CILFIT* case”) by stating that domestic courts or tribunals faced with the interpretation of EC law and obliged to submit this question to the Court of Justice in accordance with Article 234 of the EC Treaty,

have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment. Accordingly, those courts or tribunals are not obliged to refer to the Court of Justice a question concerning the interpretation of Community law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case.

. . . If, however, those courts or tribunals consider that recourse to Community law is necessary to enable them to decide a case, Article 177 [now 234] imposes an obligation on them to refer to the Court of Justice any question of interpretation which may arise [*CILFIT* case at 3429, paras 10–11].

105. From the perspective of a domestic court, the same point was explained with characteristic lucidity by Lord Denning in the case of *H.P. Bulmer Ltd. v. J. Bollinger SA*, [1974] 2 C.M.L.R. 91, [1974] 2 All E.R. 1226. As he emphasised,

*The point must be conclusive.*

The [domestic] court has to consider whether ‘a decision of the question is *necessary* to enable it to give *judgment*.’ That means judgment in the very case which is before the court. The judge must have got to the stage when he says to himself: ‘This clause of the Treaty is capable of two or more meanings. If it means *this*, I give judgment for the plaintiff. If it means *that*, I give judgment for the defendant.’ In short, the point must be such that, whichever way the point is decided, it is conclusive of the case. Nothing more remains but to give judgment. . .

106. It is on the basis thus described that the Tribunal will consider the issues of EC law put forward by the Parties. In their submissions the Parties refer repeatedly to provisions of secondary EC law in two areas, namely that of trans-European rail networks and that of protection of the environment (*see* paragraphs 121–137 below). Further, Article 10 of the EC Treaty is referred to by Belgium. At the same time Belgium states that this is not determinative. The Tribunal will now decide whether these references have the effect that the dispute that has arisen between the Parties requires the “interpretation” of EC law in the sense of conclusiveness, or relevance, described immediately above.

### **B. Issues Concerning Trans-European Networks**

107. As both Parties note, the Iron Rhine railway has been earmarked as a priority project within the system of “trans-European networks” (“TEN”) provided for in Articles 154–156 of the EC Treaty. Although the Parties do not appear actually to be in dispute concerning the “interpretation or application” of the relevant provisions of EC law (and thus it seems that in this regard a “dispute” within the meaning of Article 292 of the EC Treaty has not arisen at all), a brief review of the provisions of the EC Treaty on the TEN system and of the relevant secondary EC law, as well as of the respective arguments of the Parties, is necessary.

108. According to Article 154 of the EC Treaty, the EC “shall contribute to the establishment and development of the TEN system in the areas of transport, telecommunications and energy infrastructures” (paragraph 1). Action by the EC “shall aim at promoting the interconnection and interoperability” of national networks as well as access to them (paragraph 2).

109. In order to achieve these aims, Article 155 provides for the establishment of “a series of guidelines covering the objectives, priorities and broad lines of measures envisaged in the sphere of trans-European networks.” These guidelines shall identify projects of common interest. Article 155 further calls for EC measures to ensure the interoperability of the networks, authorizes EC support for projects of common interest identified in the framework of TEN guidelines, and mentions the possibility of contributing through the EC Cohesion Fund to the financing of specific projects in the

- area of transport infrastructure (paragraph 1). Article 155 then stipulates a duty of EC Member States to coordinate among themselves national policies that may have a significant impact on the achievement of the TEN objectives (paragraph 2).
110. Article 156 contains procedural provisions to the effect that the guidelines and other measures referred to in Article 155, paragraph 1 shall be adopted by the Council by way of the co-decision procedure established by Article 251, with the proviso, however, that guidelines and projects of common interest that relate to the territory of a Member State shall require the approval of the Member State concerned.
111. The program set out in Articles 154 and 155 has been implemented by various instruments of EC legislation, foremost among them Decision No. 1692/96/EC of 23 July 1996 (“Decision No. 1692/96”) (1996 O.J. (L 228) 1) of the European Parliament and of the Council relating to Community guidelines for the development of the trans-European transport network. The purpose of Decision No. 1692/96 is to lay down the guidelines referred to in the title as “a general reference framework intended to encourage the Member States and, where appropriate, the Community in carrying out projects of common interest” (Article 1, paragraph 2). Section 3 of Decision No. 1692/96 is devoted to the development of a trans-European rail network, comprising both high-speed and conventional lines. It has been concretised by a number of further legislative acts of a more technical nature. Concerning the costs of developing TEN projects, Article 155 of the EC Treaty has been implemented by Council Regulation (EC) No. 2236/95 of 18 September 1995 (1995 O.J. (L 228) 1), as substantially amended by Regulation (EC) No. 807/2004 of the European Parliament and of the Council of 21 April 2004 (2004 O.J. (L 143) 46), in which the rules for the granting of Community financial aid – generally up to a ceiling of 10% of total investment cost – to the TEN system, are laid down.
112. Annex II of Decision No. 884/2004/EC of the European Parliament and of the Council of 29 April 2004 (2004 O.J. (L 167) 1), amending Decision No. 1692/96, lists the “priority projects on which work is due to start before 2010,” including (as part of project No. 24) the “‘Iron Rhine’ Rheidt-Antwerpen, cross-border section.”

113. It is to this set of EC legislation, as far as it is devoted to the development of a trans-European railway network, that the Parties refer in their pleadings, albeit arriving at different conclusions and employing different degrees of emphasis.
114. Belgium takes the view that the reactivation of the Iron Rhine railway is governed not only by Article XII of the 1839 Treaty of Separation but also by EC law (BR, p. 23, para. 25), namely the TEN system just described as well as EC environmental law to which the Tribunal will turn later (*see* paragraphs 121–137 below). More specifically, regarding the trans-European railway network, Belgium points to the “high European value added” through the inclusion of the Iron Rhine railway among the TEN priority projects on all sections of which work is to begin at the latest in 2010 so that they can be made operational at the latest in 2020 (BM, p. 29, para. 22). Belgium views the upgrading of the Iron Rhine railway also as a significant step towards the realization of the policy of so-called “modal shift” from road to rail transportation advocated by the EC and thus towards sustainable development. The need for this modal shift, Belgium argues, will help reduce greenhouse gas emissions and is recognized and supported in various EC official documents, as well as in statements of the Netherlands Government itself (BM, p. 26, para. 20). Belgium further refers to its position expressed in a joint note of the Belgian, Netherlands and German administrations of 20 August 2001, in which the three countries listed their respective viewpoints with regard to the repartition of costs for the definitive track of the Iron Rhine. According to the view of Belgium, the obligations flowing from Decision No. 1692/96 “comprise that each Member State involved has the responsibility of realising the required infrastructure on its territory . . . and bears the burden of financing the works on its own territory” (BM, p. 64, para. 47).<sup>10</sup> However, the Tribunal notes that in its Reply, in the last instance in which it refers to the set of EC rules on the TEN system, Belgium states that it

does not . . . rely on these provisions for the purpose of interpreting the conventional regime of the Iron Rhine in the light of Community law or otherwise. It only seeks to draw the Tribunal’s attention to the existence of European Community rules in the field presently discussed for jurisdictional purposes [BR, p. 112, para. 119].

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<sup>10</sup> The fact that the TEN decisions relevant to the upgrading of the Iron Rhine railway were adopted with the approval of the Netherlands, appears to indicate that the Netherlands did not consider that it would have to finance the development of the Iron Rhine within the TEN system on Dutch territory in its entirety.

115. With this concluding assessment, the Belgian view on the relevance of the TEN system in EC law for the present case appears essentially to reconcile itself with that of the Netherlands. Thus, regarding Belgium's arguments in support of reactivation of the Iron Rhine railway arising from its inclusion as a priority project in the TEN system, the Netherlands states:

This classification signifies that the EU attaches importance to the link in question and that any improvements to the link will in principle be eligible for limited EU co-financing (10 percent of the investment at most). Other than that, it has no specific meaning or effect [NCM, p. 17, para. 2.9.3].

116. In addition, the Netherlands cites Article 8 of Decision No. 1692/96 pursuant to which TEN projects must take environmental protection into account. With respect to the environmental advantages cited by Belgium of modal shift (*see also* paragraph 114 above) the Netherlands maintains that the extent of the benefits from modal shift is controversial, and that, in any event, "the Netherlands does not pursue an active modal shift policy" (NR, p. 25, para. 105). Moreover, the Netherlands argues, Belgium has not stated what the specific consequences of reactivation of the Iron Rhine railway, in terms of emissions, would be for the areas in need of environmental protection along the route of the Iron Rhine railway (NCM, p. 15, para. 2.9.1).

117. The Tribunal concurs with the Netherlands' assessment of the – very limited – relevance of the TEN system for the case at hand. The Belgian view according to which the reactivation of the Iron Rhine railway is governed not only by the 1839 Treaty of Separation but also by EC law (and in particular EC secondary law on the TEN system) is in principle correct. However, nowhere does Belgium argue that the inclusion of the Iron Rhine railway in the TEN system of the Community results in any rights in its favour going beyond the right of transit claimed by it on the basis of Article XII of the 1839 Treaty of Separation. Rather, the purpose of Belgium's reliance on the EC law constituting the legal basis for the trans-European rail network seems to be merely that of emphasizing the general desirability of an upgraded Iron Rhine railway from the perspective of fostering both EC transport policy and the modal shift from road transport to railways. As far as the specific issues are concerned on which Belgium and the Netherlands are actually in dispute, the development of the Iron Rhine railway within the TEN system in EC law thus provides no more than a background in policy

and in law in front of which the Tribunal has to interpret Article XII of the 1839 Treaty of Separation. In this regard, what is relevant in the specific context of the present case is of a purely programmatic nature. The inclusion of the Iron Rhine railway in the EC list of priority projects in the sphere of trans-European transport networks is a situation the existence of which the Tribunal acknowledges but from which there flow no legal consequences at issue in the present arbitration.

118. While the Netherlands may have a different view on the modal shift policy to which Belgium subscribes, it does not contest Belgium's transit right derived (exclusively, in its view) from Article XII of the 1839 Treaty of Separation, even with the sense given to Article XII in Belgium's pleadings. However, the Netherlands subjects the exercise of this right to what it considers to be measures of environmental protection, adequate under EC law and required under its own law on Netherlands territory, affected by the reactivation of the Iron Rhine railway. Such claims, however, do not generate any conflict with the TEN system which expressly bows to environmental requirements by stating in Article 8, paragraph 1 of Decision No. 1692/96:

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

(The Tribunal will turn shortly to the Directives mentioned; *see* paragraph 123 below).

119. In summary of this point, the fact of the inclusion of the Iron Rhine railway in the EC list of priority projects in the sphere of the trans-European rail network does not give rise to the necessity for the Tribunal to engage in the interpretation of EC (*i.e.* TEN) law in the sense set out above (*see* paragraphs 99–105), because this inclusion has not created any rights, or obligations, for the Parties that go beyond what Article XII of the 1839 Treaty of Separation already provides. Thus, the points of EC law put forward by the Parties are not conclusive for the task of the Tribunal.
120. Even had it been the case that EC law on the TEN system afforded a right to Belgium for a renovated and modernised Iron Rhine railway, this would not be determinative of the Tribunal's decision. It is sufficient for the task of the Tribunal that this right derives

from Article XII of the 1839 Treaty of Separation, a point on which both Parties are agreed. As a result, to use the terms of Article 234 of the EC Treaty, in the context of the TEN system it is not necessary for the Tribunal to decide on any question of interpretation of EC law. Thus, the obligation under Article 292 of the EC Treaty does not come into play.

### **C. Issues Concerning EC Environmental Legislation**

121. The legal consequences for the reactivation of the Iron Rhine railway, particularly with respect to the allocation of the costs involved, resulting from the subjection of certain areas along the historic route to the regime, *inter alia*, of Council Directive No. 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (1992 O.J. (L 206) 7) (“Habitats Directive”) have also been discussed by the Parties. From the viewpoint of Article 292 of the EC Treaty the question thus faced by the Tribunal is the same as that posed with regard to the law of the trans-European rail network: does the Tribunal have to engage in the interpretation of the Habitats Directive in order to enable it to decide the issue of the reactivation of the Iron Rhine railway and the costs involved?
122. In order to answer this question, the Tribunal will proceed as it did in the case of the TEN issue. It will first briefly sketch the legal regime of the Habitats Directive. Following this, it will set out the arguments of the Parties with respect to this Directive, before deciding about the relevance, from the point of view of their being determinative, of the EC law issues for its own decision.
123. The Tribunal notes that in their pleadings the Parties refer not only to the Habitats Directive but also to an earlier act of EC legislation in a more narrow field, namely Council Directive No. 79/409/EEC of 2 April 1979 on conservation of wild birds (1979 O.J. (L 103) 1) (“Birds Directive”). However, as was made clear by its Preamble and Article 7, the Habitats Directive superseded the regime established 13 years earlier by the Birds Directive for the purposes of the present case. Consequently, the Tribunal finds it unnecessary to treat the Birds Directive separately; its findings as to the question of the conclusive nature of the Habitats Directive *vel non* also apply to the earlier EC legislation.

124. The Habitats Directive finds its legal basis in Articles 174 and 175 of the EC Treaty which spell out the EC policy of environmental protection and which were originally introduced by the Single European Act of 1986 (1987 O.J. (L 169) 1). While Article 174 decrees the objective and basic principles of EC environmental policy, Article 175 regulates decision- and law-making in this area. More recently, the Treaty of Amsterdam (1997 O.J. (C 340) 1) amended the EC Treaty to include a new Article 6, which integrates EC environmental considerations into the definition and implementation of all EC policies and activities.
125. The EC Treaty provisions thus mentioned are supplemented by Article 176, according to which, and subject to certain conditions, protective measures adopted pursuant to Article 175 “shall not prevent any Member State from maintaining or introducing more stringent protective measures.”
126. The Habitats Directive aims at reconciling the maintenance of biodiversity with sustainable development by developing a coherent European ecological network (“Natura 2000”). This is to be effected by the designation of special areas of conservation, as “sites of Community importance,” in accordance with a specified timetable. Sites eligible for such designation are proposed by the EC Member States (Article 4). In exceptional cases, and after consultation with the Member State concerned, the European Commission may propose to the Council the selection of additional sites. The areas thus chosen are subjected to an elaborate conservation regime securing a high level of protection (*cf.* Article 174, paragraph 2, subparagraph 1 of the EC Treaty), the maintenance of which is to be monitored by the European Commission.
127. The provisions of the Habitats Directive most frequently relied on by the Parties are paragraphs 2–4 of Article 6, which read as follows:
2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.
4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

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

128. The second EC law aspect of the present case thus turns on the fact that the Netherlands has designated the Meinweg area, through which the historic track of the Iron Rhine railway runs, as a special area of conservation according to the Habitats Directive, besides identifying it as a national park and as a "Silent Area" under its domestic legislation (*see* paragraph 189 below). The Netherlands had in 1994 also identified the Meinweg as a special protection area in accordance with the Birds Directive mentioned above in paragraph 123, but, as already mentioned, the provisions of the Birds Directive that are pertinent in the present dispute were amended, and for all practical purposes superseded, by the Habitats Directive.

129. As to the Parties' arguments developing the issues of EC environmental law thus described, Belgium's position regarding the submission of the Meinweg to the regime of the Habitats Directive *per se* is not wholly clear. However, Belgium does claim that the Netherlands should have done (and should still do) more to harmonise the obligations arising for it under EC law on the one hand and Article XII of the 1839 Treaty of Separation on the other (BR, pp. 64–65, para. 67). According to Belgium, this harmonisation would be feasible because the Netherlands has a certain margin of discretion with respect to the scope of the designation of the Meinweg and the

consequences flowing therefrom. For instance, Belgium claims, the Netherlands should, for the Meinweg, have followed the approach taken by the European Court of Justice in the so-called *Poitevin Marsh* case (C-96/98 *Commission v. French Republic*, Judgment of 25 November 1999), in which a strip of land was exempted from a designated conservation area in France for the development of a motorway (BM, pp. 85 ff, paras. 70 ff; BR, pp. 65–66, para. 68). Belgium further argues that the Netherlands retained some discretion in determining the type of protection required under EC law. In particular, the Netherlands could have considered the possibility of compensatory measures under Article 6, paragraph 4 of the Habitats Directive, pursuant to which such measures are to be adopted in the designated areas if a project, although conflicting with the conservation regime established in accordance with the Habitats Directive, must nevertheless be carried out for “imperative reasons of overriding public interest” (BM, p. 87, para. 72). In any event, Belgium is not convinced that the environmental measures envisaged by the Netherlands in the area designated in accordance with the Habitats Directive, and in particular the building of a tunnel under the Meinweg, are the least costly and onerous options that could have been chosen consistent with the Netherlands’ obligations under EC law. In Belgium’s view, even if the extremely costly measures envisaged by the Netherlands to protect the environment of the Meinweg would have been the only means at the disposal of the Netherlands to meet its obligations under EC law, this would, according to EC law, still not imply that such measures would have to be financed by Belgium (BM, p. 88, para. 75). In any case, Belgium insists, a tunnel under the Meinweg cannot be the only possible solution for the Netherlands to meet environmental obligations (BM, p. 87, para. 73; BR, pp. 61–62, para. 62).

130. Belgium further refers to a discussion in July of 2001 that took place between the Netherlands, Belgium, and Germany with the European Commission, as a result of which the European Commission stated that the benchmark conservation value according to the Habitat Directive was to be based on the environmental situation prevailing in 1994; that is, at a time when, according to the European Commission, the Meinweg area was still crossed by railway traffic<sup>11</sup> (the respective benchmark according to the earlier Birds Directive was to be the situation in 1981) (BM, pp. 52–56,

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<sup>11</sup> The Tribunal notes that the Parties agree that as far as trans-border traffic between Belgium and Germany, crossing Limburg, was concerned, use of the Iron Rhine railway ceased after 1991.

paras. 39–42). Belgium also reminds the Tribunal that in the Commission’s 2001 opinion the modal shift from road to train transportation to which the Iron Rhine railway will contribute might eventually imply beneficial consequences of primary importance for the environment in the sense of Article 6 of the Habitats Directive (BM, pp. 54–56, para. 42).

131. At other points in its pleadings, however, Belgium itself detracts from the import of the Habitats Directive for the case at hand by referring to (without in any way disputing) Netherlands statements (*see* paragraphs 132–136 below) as confirming that the designation of the Meinweg and the measures flowing from it were decided by the Netherlands by its own free will, rather than pursuant to obligations under EC law in the sense that these measures would have been the only possible means for the Netherlands to comply with obligations under the Habitats Directive). Thus, according to the observations of Belgium, the environmental requirements decreed by the Netherlands are acknowledged as made necessary not by EC law but by the Netherlands’ domestic norms governing the status of nature protection zones, which the Netherlands decided to create in the areas crossed by the historic route of the Iron Rhine railway (BM, p. 87, para. 73; BR, p. 51, para. 56). Further, it is not suggested by Belgium that these Netherlands measures are inconsistent with the Netherlands’ obligations under EC law.
132. An analysis of the Netherlands’ pleadings concerning the relevance of the Habitats Directive for the case at hand indeed confirms that Belgium has read these arguments correctly.
133. On the one hand, the Netherlands is ready to discuss the arguments put forward by Belgium on the impact of the Habitats Directive on the measures it took concerning the natural environment surrounding the route of the Iron Rhine railway. It thus disputes the Belgian contention as to the degree of discretion left to it regarding the choice of the Meinweg as a conservation area; rather, according to the Netherlands, the designations made according to the Directive(s)<sup>12</sup> are to be determined by ecological criteria which leave little freedom to Member States (NR, p. 23, paras. 95–97) and were made pursuant to consultations with the European Commission.

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<sup>12</sup> The Meinweg was first identified as a special protection area according to the Birds Directive before, more recently, being subjected to the regime of the Habitats Directive; *cf.* BM, pp. 38–40, para. 29.

134. Further, the Netherlands denies the applicability of the *Poitevin Marsh* jurisprudence to the Iron Rhine railway (NR, pp. 24–25, para. 102). It distinguishes the facts of this case from the situation at hand and argues that an analogous approach to the Iron Rhine railway would be inappropriate and would not be accepted in Netherlands courts or by the European Commission.
135. So far as the relevant measures consequent upon designation are concerned, Belgium argues that compensatory measures could have been taken according to Article 6, paragraph 4 of the Habitats Directive. However, in the Netherlands’ view, such measures may be taken only if and to the extent that a significant negative impact on the environment cannot be mitigated, and alternative solutions cannot be found (NCM, p. 51, para. 3.3.5.6). The Netherlands regards the building of a tunnel under the Meinweg as precisely such a mitigating measure, so that as a consequence, the necessity of taking compensatory steps within the meaning of Article 6, paragraph 4 of the Habitats Directive does not arise. The Netherlands argues further that it would be doubtful whether its national courts or the European Court of Justice would accept the obligation on the Netherlands deriving from Belgium’s transit right as providing an “imperative reason of overriding public interests” within the meaning of Article 6, paragraph 4 (NCM, p. 51, para. 3.3.5.6). In any case, the Netherlands argues, the designation of the Meinweg area as a protected zone under the Directive(s)<sup>13</sup> took place in accordance with EC case law and objective criteria (NR, p. 26, para. 107).
136. What is ultimately more significant in the present context, however, is the Netherlands’ repeated and unequivocal assertion that while it has taken EC law fully into account,

it is not necessary – in view of the legislative power based on the Netherlands’ exclusive territorial sovereignty – for the measures required by Dutch legislation for the protection of nature and the environment to be based on or justified by the Birds and Habitats Directives, in any event in so far as such measures are not contrary to EU law [NCM, p. 49, para. 3.3.5.6].

Thus, the Netherlands’ decisions as to the appropriate environmental protection measures to take in the context of the reactivation of the Iron Rhine railway, were taken

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<sup>13</sup> See preceding note.

by reference to Netherlands environmental law and administrative procedures, albeit in a way consistent with the relevant EC Directives.

The Netherlands continues:

The Netherlands is *not* saying: ‘The European Commission is telling us we must construct a tunnel in the Meinweg, because that is an automatic consequence of the Habitats Directives [*sic*].’

The Netherlands has *itself* decided on the basis of the Flora and Fauna Act (Flora en Faunawet) and the ecological values which it protects, that the construction of a tunnel is necessary in order to protect the ecological values in the Meinweg because it considers it to be the only way to adequately protect those values [NCM, p. 49, para. 3.3.5.6].

Finally, the Netherlands refers to the principle embodied in Article 176 of the EC Treaty, according to which EC Member States have the right to impose more stringent environmental framework conditions and conservation measures than what is required by EC Directives. In sum, for the Netherlands, the application of these Directives “is not a decisive factor for the construction of a tunnel in the Meinweg” (NR, p. 23, para. 93). Rather, what is decisive is Netherlands environmental law; provided always that it is in conformity with EC law. According to the Netherlands, it is fully entitled to take these measures, not only under EC law but also by virtue of Article XII of the 1839 Treaty of Separation, due to the reservation of sovereignty embodied therein. In the Netherlands’ view it thus necessarily follows that it is for Belgium to bear the costs involved.

137. It is precisely this issue upon which the Tribunal has later to pronounce. But the Tribunal will first have to decide whether it must interpret the Habitats Directive in order to render its Award. Applying the test enunciated at paragraphs 102–105 above, the Tribunal has examined whether it would arrive at different conclusions on the application of Article XII to the Meinweg tunnel project and its costs if the Habitats Directive did not exist. The Tribunal answers this question in the negative, as its decision would be the same on the basis of Article XII and of Netherlands environmental legislation alone. Hence, the questions of EC law debated by the Parties are not determinative, or conclusive for the Tribunal; it is not necessary for the Tribunal to interpret the Habitats Directive in order to render its Award. Therefore, as in the case

of the TEN, the questions of EC law involved in the case do not trigger any obligations under Article 292 of the EC Treaty.

**D. Article 10 of the EC Treaty**

138. Pursuant to Article 10 of the EC Treaty,

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

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

139. Belgium refers to this basic tenet of EC law by arguing that pursuant to Article 10 it does find itself under an obligation to facilitate the application of the environmental rules of EC law discussed above and, to that end, assist the Netherlands which is bound to apply these rules on its territory (BM, p. 90, para. 75). In Belgium's view, however, its duty arising under Article 10 could never go as far as obliging it to finance EC implementation measures on Netherlands territory. Belgium then points to various aspects of the position it has taken over the years with regard to the modernisation of the Iron Rhine railway, which it wants to be understood as acts of assistance to the Netherlands in complying with Article 10.

140. The Netherlands' pleadings, on their part, nowhere contest this point. Thus, there exists no dispute between the Parties concerning Article 10.

141. The Tribunal therefore finds that the question of obligations arising under Article 10 in the context of the dispute about the Iron Rhine railway does not have to be decided by the Tribunal; it is not determinative or conclusive in the sense of bringing Article 292 of the EC Treaty into play.

## **CHAPTER IV – THE BELGIAN REQUEST FOR REACTIVATION AND THE MEMORANDUM OF UNDERSTANDING OF MARCH 2000**

142. On 28 March 2000 the Belgian and the Netherlands Ministers of Transport signed a Memorandum of Understanding concerning the Iron Rhine railway “in accordance with the arrangement between the Ministers of 29 February 2000” (“March 2000 MoU”). The main aspects of this instrument were confirmed in a trilateral meeting of the Belgian and Netherlands Ministers of Transport and the German Secretary of State for Transport held on 5 April 2001 (BM, Exhibit No. 86, Report of the discussions between the Belgian and Dutch Ministers and the German Secretary of State for Transport on the reactivation of the Iron Rhine, held in Luxembourg on 5 April 2001). Normally, a Memorandum of Understanding is “an instrument concluded between states which is not legally binding” (A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press (2000), p. 26, at p. 31). A key factor in distinguishing a “non-legally binding instrument” from a treaty is the intention of the parties. To ascertain this intention, the Tribunal will, first, review the circumstances that preceded the signature of the March 2000 MoU. It will then set out the content and determine the legal significance of this particular instrument. Finally, it will summarize the circumstances that followed the signature of the March 2000 MoU, and that ultimately led to the present arbitration between the Parties.

### **A. Circumstances Preceding the Signature of the Memorandum of Understanding**

143. As noted in paragraph 19 above, use of the Iron Rhine railway line varied in intensity during the period 1914–1991. It is common ground between the Parties that there was no further transit use of the Iron Rhine railway between Belgium and Germany after 31 May 1991 (BM, p. 23, para. 18; NCM, pp. 9–10, para. 2.5.4).

144. Of interest for the present arbitration is the fact that even before May 1991, various Belgian officials had affirmed Belgium’s interest in the future use of the Iron Rhine railway (BM, pp. 32–38, paras. 24–28). The most striking expression of that interest is the letter of 23 February 1987 which the Belgian Minister of Transport addressed to his colleague the Minister of Transport of the Netherlands (original Dutch text in BM, Exhibit No. 59, Letter of the Belgian Minister of Transport to the Dutch Minister of

Transport and Waterstaat, dated 23 February 1987; unofficial translation in BM, p. 33, para. 24). This letter already refers to the forthcoming difficulties of reconciling the future use of the Iron Rhine railway with the protection of the environment. The Tribunal now reproduces that translation of certain passages of the Belgian Minister's letter:

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

In Belgian circles,<sup>[14]</sup> there is strong interest for a modern direct railway link between Antwerp and the Ruhr area, with the consequence that I consider it necessary that an in-depth cost-benefits analysis be made of such a linkage.

The NMBS [Belgian railways] has been instructed to study this issue. However such a study could not be finalised without the cooperation of the NS [Dutch railways] and DB [German railways].<sup>[15]</sup>

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

[ . . . ]

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

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

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

In her response of 26 October 1987 the Netherlands Minister of Transport did not address the relationship between the Iron Rhine railway and the designation of an area in the vicinity of the railway line as a nature reserve, but simply acknowledged Belgium's right of transit.

145. In May 1991 an economic study commissioned by the European Commission was published. This study recommended that the existing route of the Iron Rhine railway be preserved, and concluded that "the economics for rehabilitating the Iron Rhine are generally positive" (BM, Exhibit No. S2, Prognos, *The Iron Rhine Railway Link between Antwerp and the Rhine-Ruhr Area*, Final Report, May 1991). This study was

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<sup>14</sup> The Tribunal notes that the Netherlands, in its Counter-Memorial, states that the correct English translation of "in sommige Belgische middelen" is "in certain Belgian circles" (see NCM, p. 12, para. 2.7.1.2. and note 19). The Tribunal interprets this phrase to mean "in some Belgian circles."

<sup>15</sup> See also the Belgian Minister of Transport's letter of 9 November 1987 to his German colleague: BM, Exhibit No. 60, Letter of the Belgian Minister of Transport to the German Minister of Transport, dated 9 November 1987.

discussed at the meeting of the Benelux Economic Union, Commission for Transport, on 11 December 1991, during which the Belgian representative stated that “the possible reactivation of the Iron Rhine must remain guaranteed in the light of an increase of transport in the future” (BM, Exhibit No. 63, Benelux Economic Union, Commission for Transport, Sub-Commission “Railway Transports,” Report of the meeting held in Luxembourg on 11 December 1991). A similar statement was made at the meeting of the Benelux Economic Union, Commission for Transport on 20 April 1993 (BM, Exhibit No. 64, Benelux Economic Union, Commission for Transport, Sub-Commission “Railway Transport,” Report of the meeting held at The Hague on 20 April 1993).

146. In 1994 the European Commission approved a Belgian request to fund a feasibility study into the modernisation of the Iron Rhine railway. Such a study was subsequently provided for in Article 9 of the Treaty concerning the construction of a railway connection for high-speed trains between Rotterdam and Antwerp in 1996. The study (the Tractebel Report) was commenced in December 1996 and concluded in January-February 1997.

147. On 12 June 1998 the Prime Minister of Belgium wrote to his colleague, the Prime Minister of the Netherlands, as follows (BM, Exhibit No. 67, Letter of Belgian Prime Minister Dehaene to Dutch Minister-President Kok of the Netherlands, dated 12 June 1998, unofficial translation: BM, p. 38, para. 28):

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

148. Whether any legal consequences flow from discontinuation in 1991 may now be addressed.

149. In the view of the Netherlands, this history evidenced an inconsistent position on the part of Belgium regarding the reactivation of the Iron Rhine railway.

150. Be that as it may, it is the view of the Tribunal that the Netherlands knew that it was possible that, notwithstanding what had happened before, a formal demand for reactivation at a significantly higher level of use might be forthcoming in the foreseeable future. And Belgium had reserved its right of “free transit” – which right the Netherlands has always acknowledged and continues to acknowledge.
151. The Tribunal observes that the reaction of the Netherlands to these developments has consistently been based on two principles: (i) the Netherlands does not contest Belgium’s right of transit with respect to the Iron Rhine railway; and (ii) pursuant to the Netherlands’ sovereignty over its territory, any reactivation of the Iron Rhine railway must comply with Netherlands legislation, in particular legislation concerning the protection of the environment. This is clear from, *inter alia*, the answer of 10 July 1998 of the Prime Minister of the Netherlands to the letter of the Prime Minister of Belgium cited above:

[T]he Netherlands will participate in the consultations in a neighbourly spirit, as it has stated on many occasions. It speaks for itself that reactivating the historical line – or any other line – within Dutch territory is subject to Dutch environmental legislation and EC legislation on the conservation of natural habitats (Habitats Directive) [NCM, Exhibit No. 19, Letter of 10 July 1998 from the Dutch Prime Minister Wim Kok to the Belgian Prime Minister Jean-Luc Dehaene].

152. In the same period the Netherlands made an inventory of its national legislation relevant to the reactivation of the Iron Rhine railway (*see* NCM, p. 21, para. 2.12.2). On the basis of this inventory Belgium agreed with the proposal of the Netherlands to submit the entire railway line to the procedure set out in the Netherlands Transport Infrastructure (Planning Procedures) Act. In addition, the Meinweg area was designated by the Netherlands on 20 May 1994 as a “special protection area” within the meaning of the Birds Directive, later superseded by the Habitats Directive. In the years 1994–1995 the Netherlands also identified the Meinweg area as a national park and as a “Silent Area” under its domestic legislation (*see* discussion below at paragraph 189).
153. It soon became evident that the reactivation of the Iron Rhine railway under the prevailing environmental legislation of the Netherlands would give rise to substantial infrastructure costs (including the envisaged tunnel in the Meinweg area). At a meeting of the Netherlands and Belgian Ministers of Transport and the German Secretary of

State for Transport, held in Brussels on 9 December 1999, no overall agreement could be reached on the allocation of the costs between the countries concerned. While it was agreed that the costs for the temporary reactivation of the historic track would be borne by Belgium, no agreement appeared possible on the allocation of costs for a definitive solution. Belgium and Germany based their view on the territoriality principle: each country must bear the investments in infrastructure on its own territory. The Netherlands relied on Article XII of the 1839 Treaty of Separation to contend that such costs on Netherlands territory should be borne by Belgium (BM, Exhibit No. 96, Report of the meeting between Belgian and Dutch Ministers and the German Secretary of State for Transport on the reactivation of the Iron Rhine, held in Brussels on 9 December 1999).

## **B. The Contents and Legal Significance of the Memorandum of Understanding**

154. The text of the Memorandum of Understanding of 28 March 2000 between Minister Durant and Minister Netelenbos concerning the Iron Rhine reads as follows:<sup>16</sup>

Belgium and the Netherlands emphasise the importance of being able to swiftly transport freight by rail from the Belgian and Dutch ports to the hinterland, and back again, in an ever-expanding internal market. Access to the infrastructure that is available for this purpose will be open to all railway companies.

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

Given the relationship between the international study and the Dutch EIA,<sup>[17]</sup> the Netherlands will do its utmost to have the results of the EIA for the part of the Iron Rhine that is located on Dutch territory, ready in March 2001. In the EIA the following will be investigated:

- For the short term the possible<sup>[18]</sup> temporary, limited reactivation of the complete historic route, this temporary reactivation being applicable until the definitive route is being put to use.
- For the definitive solution all relevant routes shall be studied; possibilities for the transportation of passengers will also be examined.

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<sup>16</sup> For the authentic Dutch text of the March 2000 MoU, see BM, Exhibit No. 82 and NCM, Exhibit No. 22. Unofficial English translations of selected paragraphs are in BM, pp. 44–47, para. 34 and NCM, pp. 20–21, para. 2.12.1. Except as noted below, the Netherlands’ translation is reproduced here.

<sup>17</sup> EIA = Environmental Impact Assessment.

<sup>18</sup> The Tribunal here has used the word “possible” (from Belgium’s translation) rather than “possibility,” which appears in the Netherlands’ version.

The Netherlands and Belgium will propose to Germany that they discuss the progress of the EIA regularly on a trilateral basis. The Netherlands will invite Belgium to designate an official to monitor the day-to-day progress of the EIA.

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

If, when decisions are taken on the temporary and definitive route in mid 2001 at the latest, the EIA-study concludes that a temporary, limited use will not cause irreversible environmental damage, then, from the end of 2001 onwards a few trains a day will be allowed to use the whole historic route at limited speed between 7 AM and 7 PM. Under these same conditions of timely decision-making and of absence of irreversible environmental damage, trains could, from the end of 2002 onwards, also use temporarily at limited speed the whole historic route in evening hours and at night, up to a maximum of fifteen per 24-hour period (combined total in both directions). The possible loss of ecological value will be compensated for.

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

Until the definitive route has been selected, Belgium reserves all its rights under the Separation Treaty of 1839 and the Dutch-Belgian Iron Rhine Treaty of 1873.

The costs for the temporary use of the historic route will be met by Belgium.

If the Belgian railways company (NMBS) so wishes, it may undertake these works either by itself or by a third party, always taking account of the European public procurement rules and of the Dutch legal requirement that such works are undertaken by a contractor who is recognized in The Netherlands. This contractor could be Belgian.<sup>[19]</sup>

For the construction of the definitive route The Netherlands is willing to bear part of the costs related thereto. Further arrangements will be made in this respect after the definitive route has been chosen.

155. The Tribunal observes that the intentions contained in the March 2000 MoU can be summarized as follows.

- (1) An “international study” is to be carried out (jointly with Germany) on the consequences of the reactivation of the Iron Rhine railway and of possible alternative routes. The results of this study must be available in March 2001.

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<sup>19</sup> The translation of this paragraph is that prepared by the Tribunal (neither Party having offered a translation).

- (2) The Netherlands “will do its utmost” to have ready, also in March 2001, the results of its Environmental Impact Assessment (“EIA”) procedure for the part of the Iron Rhine railway that is located on Netherlands territory. The EIA procedure will include an investigation of both the temporary use of the Iron Rhine railway and the relevant routes for a definitive solution.
- (3) The decisions on the temporary use and on the definitive route are to be taken simultaneously (“dual decision”), in mid-2001 at the latest. The decision concerning temporary use has been made contingent on the decision concerning long-term use, because otherwise there would be no guarantee that this use would be temporary.
- (4) During the negotiations between the Parties, several meanings have been advanced for the notion of “temporary use” of the Iron Rhine railway. Under the MoU, temporary use is a “limited reactivation of the complete historic route” until the definitive route is being put to use. (If the definitive route coincides with the historic route, it may be expected that upgrading the historic route will have negative consequences for the temporary use of the route.) The MoU does not address this issue, but its terms perhaps suggest likely agreement on a definitive use that does not wholly follow the historic route. The temporary use is to be allowed if, at the time the Parties take the dual decision, the EIA procedure concludes that a temporary limited use will not cause irreversible environmental damage. If so, 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. From the end of 2002 onwards, trains could, under the same conditions, use the whole historic route at limited speed in the evening hours and at night, up to a maximum of 15 trains per 24-hour period (combined total in both directions). The costs for the temporary use of the historic route would be borne by Belgium.
- (5) For the definitive solution, all relevant routes will be examined. Until the definitive route has been selected, Belgium will reserve all its rights under the 1839 Treaty of Separation and the Iron Rhine Treaty of 1873. If it is decided that the definitive route will be another route than that passing through the Meinweg, this other route will be considered the complete implementation of Article XII of

the 1839 Treaty of Separation and of the Iron Rhine Treaty of 1873, and the relevant arrangements will be laid down in a treaty. The Netherlands would be willing to bear part of the costs relating to the construction costs of the definitive route.

156. The Parties agree that, as a matter of international law, the March 2000 MoU is not a binding instrument (BR, p. 29, para. 32; NR, p. 7, para. 26). At the same time, it was clearly not regarded as being without legal relevance. The Parties have in fact given effect to a number of provisions of the March 2000 MoU (*see* paragraph 159 below). Further, Belgium has spoken of it as “lapsing” when the date envisaged therein for the dual decision – “mid 2001 at the latest” – was not met. Belgium concludes that, as a consequence, “Belgium’s undertaking to finance costs of temporary activation has equally lapsed.”
157. The Tribunal notes that, in the arguments that the Parties advance in respect of certain of the Questions put to the Tribunal, the March 2000 MoU is equally not treated as legally irrelevant. Principles of good faith and reasonableness lead to the conclusion that the principles and procedures laid down in the March 2000 MoU remain to be interpreted and implemented in good faith and will provide useful guidelines to what the Parties have been prepared to consider as compatible with their rights under Article XII of the 1839 Treaty of Separation and the Iron Rhine Treaty. The respective allocation of costs for temporary use will depend not upon any undertakings given in the March 2000 MoU, but on other legal considerations (including what the Parties have thought reasonable during their negotiations in connection with the March 2000 MoU). The putative definitive route will – insofar as it may entail a short deviation from the historic route – require agreement; and the March 2000 MoU suggests that such an option was not *per se* considered as unreasonable by the Parties.
158. The Tribunal also finds it of continuing relevance that it was envisaged that the short term and definitive decisions were to be taken simultaneously. Just as Belgium cannot be said to have agreed to the financing of the temporary solution in the absence of agreement on a definitive solution, so the Netherlands cannot be held to have agreed to put the short term solution envisaged immediately into effect, without agreement on the definitive solution having been reached. Further, while at no time did Belgium’s right of

transit lapse, the long period of minimal use or absence of use, coupled with the technical complexities entailed in reactivation of the Iron Rhine railway, suggests that provision for Belgium's desired short term use may not reasonably be expected in the immediate future. The Netherlands has made clear it would prefer no temporary use, but it has also stated that any temporary use could not continue for more than five years (NCM p. 25, para. 2.12.4; NR p. 9, para. 35).

### **C. Acts Taken Subsequent to the Adoption of the Memorandum of Understanding**

159. The international study referred to in the March 2000 MoU was delivered in May 2001 (BM, Exhibit No. S3, Arcadis, *Comparative Cross-Border Study on the Iron Rhine*, Final Report, 14 May 2001). In the same month the results of the Netherlands' EIA procedure, referred to as the "Route Assessment/Environmental Impact Statement" ("EIS"), was delivered (BM, Exhibit No. S4, *Railinfrabeheer/Directoraat-Generaal Rijkswaterstaat, Trajectnota/MER*). Both the international study and the Netherlands Route Assessment/EIS involved detailed examinations of various options for the routes of a reactivated Iron Rhine railway, all starting at the historic entry point into the Netherlands at the border with Belgium. One series of options involved routes through Venlo; the other series of options involved routes through or near Roermond. The routes through or near Roermond included the historic track, with several variations. All options, with their required works, were evaluated on the basis of comprehensive criteria that included costs and environmental effects. Both studies concluded that the preferred option would be the historic route. The Route Assessment/EIS determined that the "most environmentally friendly" option would be the historic route, with modifications including a tunnel in the Meinweg and a diversion around Roermond. On 21 September 2001, the Belgian, Netherlands and German Ministers of Transport decided that an overall decision would be taken, including the dual decision as to the temporary and long term use (*see* paragraph 155, subparagraph 4 above) and a decision on the allocation of costs (BM, Exhibit No. 89, Memo of the informal discussions between the Belgian, Dutch and German Ministers of Transport on the reactivation of the Iron Rhine, held at The Hague on 21 September 2001). During the same period, the three countries concerned met with the Directorate General Environment of the European Commission, which meeting led to a provisional and a final statement of the Commission concerning questions of interpretation of the Habitats Directive. When it

appeared that the reactivation of the Iron Rhine railway could not be properly realised on the sole basis of negotiations, the Parties agreed to have a number of issues resolved through arbitration.

## CHAPTER V – THE MEASURES ENVISAGED BY THE NETHERLANDS IN THE LIGHT OF ARTICLE XII OF THE 1839 TREATY OF SEPARATION

### A. Introduction

160. The Tribunal has concluded above (*see* paragraph 56) that, as a consequence of the reservation of sovereignty in Article XII of the 1839 Treaty of Separation, the Netherlands may exercise its rights of sovereignty in relation to the territory over which the Iron Rhine railway passes, unless this would conflict with the treaty rights granted to Belgium, or rights that Belgium may hold under general international law, or constraints imposed by EC law.
161. The question of constraints posed by EC law is discussed separately, in Chapter III above and paragraph 206 below.
162. In the view of Belgium, the limitations flowing from Article XII entail that the Netherlands is under the obligation to exercise its legislative and decision-making power in good faith and in a reasonable manner and so as not to deprive Belgium's transit right of its substance or to render the exercise of the right unreasonably difficult (BR, p. 69, para. 70). The Netherlands does not contest these limitations, but contends that its actions fully comply with these requirements.
163. In the view of the Tribunal, the first and obvious limitation flowing from Article XII is that the entitlement of the Netherlands to apply its national legislation to the reactivation of the Iron Rhine may not amount to a denial of the right of transit by Belgium over the historic route. The second limitation flows from the generally accepted principles of good faith and reasonableness: any measures to be prescribed by the Netherlands on the basis of its national legislation for the reactivation of the Iron Rhine railway may not render unreasonably difficult the exercise of Belgium's transit right.
164. In this context, the Tribunal notes that Belgium takes the position that the works envisaged by the Netherlands as necessary for the reactivation of the Iron Rhine "do not curtail Belgium's rights *per se*, provided that measures are taken to ensure the

uninterrupted use of the railway during and notwithstanding these works, so that (1) temporary driving is followed directly by long-term use [*see* paragraph 155, subparagraphs 3 and 4 above] and (2) neither of these ‘regimes’ is affected by construction works” (BR, p. 34, para. 37).

165. Belgium submits that the requirement of the Netherlands for such works is not *per se* an unreasonable exercise of the Netherlands’ rights. However, when this requirement is combined with the further insistence that the works be financed by Belgium, and not by the Netherlands, it does, according to Belgium, become such an unreasonable exercise. Thus, Belgium considers that its transit right could be denied through the imposition of financial obligations (BR, p. 34, para. 37). The measures to be prescribed for the reactivation of the Iron Rhine railway, and the allocation of costs therefor, are closely intertwined issues. The former is addressed in this chapter and the latter is addressed in Chapter VI.

166. In the present chapter the Tribunal will examine the measures envisaged by the Netherlands for the reactivation of the Iron Rhine railway in the light of their compatibility with the treaty obligations of the Netherlands. For this purpose it is first necessary to devote some attention to the Netherlands legislation which forms the basis for the envisaged measures.

#### **B. The Applicable Legislation and Decision-making Procedures of the Netherlands**

167. In its pleadings the Netherlands has made a distinction between two categories of legislation that are applicable to the reactivation of the Iron Rhine railway: so-called “sector-specific” legislation; and general rules of administrative law. The Netherlands has only provided fragmentary information on the content of its national legislation, and Belgium has only commented on specific elements. Nevertheless the Tribunal deems it useful to provide an overview of the information provided by the Parties.

## 1. Sector-specific legislation

168. Various Netherlands acts and decrees apply to the reactivation of the Iron Rhine railway. Of particular importance are those dealing with technical and safety issues, such as the technical specifications for the track and railroad crossings, and those dealing with environmental issues (land-use planning, health and soil protection, and nature preservation). The technical and safety issues are mainly covered by the Railways Act (*Spoorwegwet*). The dispute between the Parties about the consequences of the implementation of Netherlands legislation focuses in particular on the environmental legislation. The legislation considered most relevant by the Parties in their pleadings includes the following.
169. The Noise Abatement Act (*Wet Geluidhinder*) lays down the allowable noise level standards to be applied with respect to various categories of buildings and activities. Where dwellings and similar structures are affected, a distinction is made between maximum exemption levels and so-called “preferential levels” of noise. The maximum permitted noise impact of a modified railway is 73 dB(A); for a new railway it is 70 dB(A). The preferential level is 57 dB(A). Section 106, paragraph (d), subparagraph (4) of the Act prescribes the measures to be taken when the preferential level is exceeded. Measures are to be taken 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 (*e.g.*, façade insulation). Where such measures are insufficient to ensure that the noise will not exceed the preferential level an exemption can be granted under certain conditions. When the noise nuisance is allowed to exceed the maximum exemption level, the relevant dwellings lose their residential function (which may result in compensated expropriation) (BR, pp. 44–46, paras. 48–50; NR, pp. 18–19, paras. 74–77).
170. The Railway Noise Abatement Decree (*Besluit Geluidhinder Spoorwegen*) provides the basis for imposing requirements (for the purpose of abating noise caused by the use of railways)

on the nature, composition or method of construction and the alteration of a railway line. Alteration refers, among other things, to a significant increase in the number

of trains and/or the speed of transit. Certain measures are required in such cases. The railway management company must present these measures to the municipalities concerned. Construction or adaptation can only commence after a final decision has been reached [NCM, p. 21, n. 44].

171. The Flora and Fauna Act (*Flora en Fauna Wet*) protects plant and animal species. It entails

a ban on the destruction or disruption of the species it protects, as well as of their nests, reproduction, resting and living environments. The stipulations of the bans in the Flora and Fauna Act do not feature the term ‘significant.’ As a consequence, *any* disruption and/or destruction occurring as a result of the laying of the route represents a violation of the ban stipulations. For the varieties suffering such effects due to the construction of the route, the implementation of a project can only be undertaken if an exemption is obtained on the basis of article 75 of the Flora and Fauna Act [NCM, Annex A, p. 1].

172. The Environmental Management Act (*Wet Milieubeheer*): as explained in paragraph 82 of the Netherlands’ Rejoinder, Section 4, paragraph 9 of this Act requires provinces

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.

173. The Environmental Impact Assessment (“EIA”) Decree (*Besluit Milieueffect-rapportage*) requires the preparation of an EIS for the adoption of a plan for a new railway or the reactivation of an existing railway line that passes for a distance of at least five kilometres through a buffer zone or a sensitive area delimited in a zoning plan or a regional plan (NCM, p. 21, n. 45).

174. The Netherlands also implements international guidelines adopted in 1969 with respect to the establishment of national parks, within the framework of the International Union for Nature Conservation and the Conservation of Natural Resources (“IUCN”). A National Park is defined as

a consecutive area of at least 1000 hectares consisting of natural land, water and/or woodland, with special landscape features and plant and animal life. The area offers good possibilities for recreational use. In a National Park, nature

conservation and nature development are intensified, nature and environmental education is heavily encouraged and forms of nature-oriented recreation and research are promoted [NCM, Annex A, p. 2].

175. At the provincial level also a number of regulations and policies implementing national legislation are relevant. In addition to the Provincial Environmental Policy Plan required by the Environmental Management Act already mentioned in paragraph 172, provinces can designate areas as part of their “Ecological Main Structure” (Limburg) or “Green Main Structure” (Noord-Brabant). These consist of core areas, nature development areas and linking zones for the conservation of which basic protection applies. In addition, areas can be designated for their landscape values under the Provincial Development Plan for the province of Limburg (NCM, Annex A, pp. 1–2).
176. Finally, at the provincial level the Provincial Environmental Regulation for Limburg provides for the possibility of designation as “Silent Area.” This provincial regulation includes a general protection stipulation for environmental protection areas, including “Silent Areas” (Article 5.4) which reads as follows:

Any party carrying out actions in an environmental protection area, who knows or could reasonably have suspected that through those actions in that area the special importance on the basis of which the area is designated a protected area will be or could be damaged, is required to take all measures which can reasonably be demanded with a view to preventing such damage or, if such damage occurs, as far as possible to limit that damage and as far as possible to limit and to reverse the consequences of the actions.

In the Provincial Environmental Regulations, no quantitative noise standards are laid down for “Silent Areas.” However, the Provincial Environment Plan for Limburg specifies that the Province of Limburg has set a maximum value of 40 dB(A) for noise, and that the Province intends to include this value in the Provincial Environmental Regulation (NCM, Annex A, p. 3).

## **2. General rules of administrative law**

177. In the application of sector-specific legislation the Netherlands Government is also required to comply with the general norms for governmental action, in particular the general principles of sound administration as codified in the General Administrative Law Act (*Algemene Wet Bestuursrecht*). The Netherlands refers in particular to the “general principles of sound administration” codified in sections 3.2 and 3.4 of the General Administrative Law Act, which read as follows:

When preparing an order 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 [NR, p.17, para. 69].

According to the Netherlands, these principles 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 Netherlands explains that such principles will be applied in any judicial review proceedings (NR, p. 17, paras. 69–70).

## **3. The Transport Infrastructure (Planning Procedures) Act**

178. In principle, each sector-specific law has its own decision-making procedures (including judicial review) to be followed for the implementation of its substantive provisions. In case of significant transport infrastructure projects a separate law applies, replacing the sector-specific decision-making procedures: the Transport Infrastructure (Planning Procedures) Act (*Tracéwet*) (NCM, p. 21, para. 2.12.2). This procedure incorporates reviews of compliance with all the relevant specific legislation and includes an EIA. Only the final Planning Procedure Order issued under this procedure will be open to judicial review. The Netherlands explains that the Transport Infrastructure (Planning Procedures) Act must be applied to the reactivation of the part of the Iron Rhine between Roermond and the German border (NCM, p. 21, para 2.12.2). The Netherlands, with the agreement of Belgium, has chosen to apply the Act for the purpose of the reactivation of the Iron Rhine railway in its entirety.

179. The decision-making procedure under the Transport Infrastructure (Planning Procedures) Act (including the EIA) consists of six stages which are described in the Netherlands' Counter-Memorial (p. 22, para. 2.12.3.1) as follows (footnotes omitted):

1. A *Notification of Intent (Startnotitie)* marks the formal beginning of the procedure. It specifies the plans of the initiator, what alternatives to the planned activity will be examined and the potential consequences for the environment of each alternative.

2. The results of the study of the alternatives and their consequences are recorded in the *Route Assessment/EIS (Trajectnota/MER)*, taking into consideration the results of public input regarding the Notification of Intent. The purpose of the Route Assessment/EIS is to describe the anticipated consequences for the environment, so that the environment receives proper attention in the decision-making concerning the planned activity.

3. On the basis of the Route Assessment/EIS, and with due regard to the results of public input and the advisory report of the independent Committee for Environmental Impact Assessment established pursuant to statute, the competent authorities select a preferred option, which is published in an *Official Position (Standpuntbepaling)*.

4. The preferred alternative is worked out in detail (this involves specification of the position of the railway line that is accurate to within one meter) and the result is recorded in a *Draft Planning Procedure Order (Ontwerp-Tracébesluit)*, which is published.

5. After public input on the Draft Planning Procedure Order, the competent ministers adopt a *Planning Procedure Order (Tracébesluit)*, which forms the basis for issuing building permits, expropriation procedures and the like. A Planning Procedure Order is open to judicial review, which can lead to the annulment of all or part of the Order.

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

180. Stage 1 (the Notification of Intent) was completed in November 1999. Stage 2 (the Route Assessment/EIS) was completed in May 2001. This document analysed and evaluated a series of options for the reactivation of the Iron Rhine railway. At the same time the international study (sponsored by the three Governments involved in the planning for the reactivation of the Iron Rhine railway, i.e. Belgium, Germany and the Netherlands) was completed (*see* paragraph 159 above). The Governments involved ultimately agreed on the preferred option of the historic track (with a diversion around Roermond).

181. Stage 3 of the decision-making procedure (the issuing of the Official Position) could not be completed because agreement could not be reached with Belgium in the negotiations regarding the costs and their allocation in relation to the preferred option. Stating that its

intention was to prevent delays in the execution of the project, the Netherlands Government decided to continue the procedure on an informal basis (NCM, p. 23, para. 2.12.3.2). The Government approved a preliminary Official Position in November 2001 (which has not been published) and on that basis a preliminary version of a Draft Planning Procedure Order (*IJzeren Rijn, Concept ontwerp-tracébesluit*) was finalised by the Netherlands infrastructure manager ProRail in July 2003. This preliminary version was informally communicated to the Belgian railway company NMBS, and was used by Belgium in the preparation of its Reply (which fact was objected to by the Netherlands (NR, p.13, para. 52)).

182. According to the Netherlands, the application of its legislation would result in a series of measures required for the long-term reactivation of the Iron Rhine railway as listed in the preliminary version of the Draft Planning Procedure Order. The Tribunal notes that this document has an informal and provisional status, as explained in paragraph 181 above. The Netherlands has observed that, in a formal sense, the measures proposed in this preliminary version cannot be regarded as the definitive ones which will have to be implemented. Even after the issuance of the definitive version of the Order there will still be the possibility of judicial review. Thus, there is still uncertainty about the exact measures to be prescribed for the reactivation of the Iron Rhine railway on Netherlands territory. However, since the arguments of the parties have specifically focused on the measures proposed in the preliminary version, the Tribunal will deal with them in more detail. The Tribunal notes that Belgium, in its Reply (p. 35, para. 38), states that, in referring to this document, Belgium does not imply any acceptance of the contents of the document.

**C. The Measures Envisaged in the Preliminary Version of the Draft Planning Procedure Order**

183. The Tribunal observes that the preliminary version of the Draft Planning Procedure Order is based on the assumption by the Netherlands that it is Belgium's desire to reactivate the Iron Rhine railway in such a way that it can be used by 43 trains (combined total for both directions per working day) in 2020 (NR, p. 14, para. 54). The Tribunal notes that Belgium, in its pleadings, has not contested this assumption.

184. The route of the Iron Rhine railway over Netherlands territory is divided into four track segments (A to D, from west to east). Section 3 of the preliminary version of the Draft Planning Procedure Order describes the track segments in the following way (BR, pp. 35–38, para. 40):

- (1) Track segment A covers the municipalities of Cranendonck and Weert, and lies on the existing, historic track of the Iron Rhine railway between the Belgian border near Budel and the eastern limit of Weert. The preliminary version of the Draft Planning Procedure Order makes a further distinction between two parts of Track segment A. The first part is located between the Belgian-Netherlands border and the junction with the railway line Eindhoven-Weert, and is also referred to as A1. This part crosses the nature area “Weerter- en Budelerbergen.” It is described as follows:

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

As far as norm setting is concerned, this is a matter of an existing situation. For security on crossings use is made of the national average collision risk. The collision risk on the track must not go beyond the national average as a consequence of reactivation.

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

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

- (2) Track segment B covers the municipalities of Nederweert, Heythuysen and Haelen. It passes next to the nature area “Leudal” and is described as follows:

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

The norm setting is the same as for track segment A2, which is intensification of the existing train traffic up to 199 trains per 24 hours in both directions combined.

- (3) Track segment C covers the municipalities of Roermond and Swalmen and is described as follows:

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

- (4) Track segment D covers the municipality of Roerdalen and is described as follows:

This part of the track lies on the historical track, which is out of use since 1991. Track D lies between the Asenrayerweg and the German-Dutch border near Vlodrop. The track lies in the nature area De Meinweg. For the purpose of reactivation of the Iron Rhine, the track in De Meinweg will be built in part in a tunnel and in part in an embankment. This track is currently out of use. The norm setting for track D is based on the creation of a new situation as a consequence of the reactivation of the Iron Rhine.

185. For these different track segments the preliminary version of the Draft Planning Procedure Order describes in detail all the measures to be taken for the long-term reactivation of the Iron Rhine railway. The main sources of disagreement between the Parties are the measures for noise abatement and nature protection. The Tribunal will next focus on these measures.

**1. Noise abatement measures for dwellings and similar objects**

186. For the entire track, significant measures are envisaged in order to protect the inhabitants of the areas close to the railway from the increasing noise levels to be produced by the projected future use of the Iron Rhine railway. These measures, required by the Noise Abatement Act, further envisage compensated expropriation of dwellings where noise abatement measures will be insufficient to stay below the maximum exemption level.

187. According to Belgium, the Netherlands does not apply the maximum exemption level that is provided for by the Noise Abatement Act but applies the stricter preferential level. Application of the maximum exemption level would result in less extensive measures to be required. On this issue, and returning also to the financial implications thereof, Belgium concludes that

it would be contrary to the principle of good faith and the principle of reasonableness to submit the reactivation of the Iron Rhine to the taking of noise abatement measures as contemplated in the Concept [the preliminary version of the Draft Planning Procedure Order] which are not necessary so as to reach the maximal exemption limit of 70 dB(A) (or 73 dB(A)), if such abatement measures are to be financed by Belgium or in any other way render the exercise of Belgium's rights on the Iron Rhine more difficult.

In Belgium's view, this would amount to an unnecessary interference with its right of transit (BR, p. 44–46, paras. 48–50).

188. The Netherlands agrees that the preliminary version of the Draft Planning Procedure Order applies the preferential level but argues that the noise abatement legislation, including the preferential level criteria, is applied in the same way as in other cases of railways, and sees no reason to deviate from the general policy to the disadvantage of the interested parties involved. In this context, the Netherlands additionally invokes the principles of sound administration on which the proposed measures are also based (NR, pp. 18–19, paras. 74–78).

## **2. Tunnel Meinweg**

189. The Meinweg is an area of approximately 1,600 hectares located adjacent to the eastern part of track segment D. On 18 February 1994 the Province of Limburg designated the area as a “Silent Area.” By Ministerial Decree of 20 May 1994 the Meinweg was designated as a special protection area under Article 4, paragraph 1 of the Birds Directive. On 1 June 1995 the area was designated a national park by the Minister of Agriculture, Nature Management and Fisheries. On 18 February 2003 the Netherlands Government included the Meinweg on the proposed list of specially protected areas under the Habitats Directive. This proposal was accepted by the European Commission in July 2003. Belgium states that it was not consulted before any of these designations. The Netherlands says there was no requirement for it to consult.
190. According to Belgium, the Netherlands had the obligation to prevent any designations not flowing from its obligations under the EC Directives that would result in the requirement to take additional measures for noise abatement and nature protection.
191. For the passage of the Iron Rhine railway through the historic track in the Meinweg area the preliminary version of the Draft Planning Procedure Order envisages the construction of a tunnel of 6.5 kilometres in length with an aqueduct, and an embankment.
192. According to the Netherlands, these measures are a consequence of the designation of the Meinweg as a national park and as a “Silent Area,” and not as a consequence of its designation under the EC Directives which would only require the building of noise barriers. EC law allows the Netherlands to apply stricter standards for environmental protection than those required by the relevant EC Directives. The designation of the area as a national park and “Silent Area” flow from the application of national legislation and policy, which the Netherlands has stated employ objective criteria. The measures envisaged are the result of careful studies and consideration of alternative options under the applicable decision-making procedures, including an EIA (NCM, p. 49, para. 3.3.5.6; NR, p. 23, paras. 93 ff).

193. Belgium does not in principle dispute that the Netherlands could make these designations, but disagrees as to the financial consequences for the Parties.

### **3. Weerter- en Budelerbergen**

194. The Weerter- en Budelerbergen are a nature area located in Track segment A1. This area was designated as a special protection area under the Birds Directive on 24 March 2000 (both Parties assert this, but Belgium's Exhibit 77 to its Memorial – The Netherlands, Ministerial Decree of 24 March 2000 – does not include this area), and as a “Silent Area” by the province of Limburg on 18 February 1994 (the same date as the Meinweg), and apparently also by the province of Noord-Brabant.

195. The preliminary version of the Draft Planning Procedure Order envisages a number of measures for the area of the Weerter- en Budelerbergen. These involve the building of noise barriers, a partial deepening of the track, and the building of an ecoduct. In addition, loss of habitat area is to be compensated for.

196. According to the Netherlands, these measures flow from the application of its national legislation and policy; they are a consequence of the designation by it of the area as a “Silent Area” and as a specially protected area under the Birds Directive.

197. That this is so is not contested by Belgium, but it disagrees as to the financial consequences for the Parties.

### **4. Loop around Roermond**

198. The proposed Track segment C involves a rerouting of the historic track of the Iron Rhine railway through the town of Roermond to a new track to the east and north of the town. This is the preferred option of the Netherlands Government for this part of the track. Although it would be possible to keep the historic track, under the current legislative requirements concerning safety and noise abatement, significant additional measures would be required for this purpose. Such measures would not be necessary in the case of a rerouted track staying beyond the town centre. Furthermore, in view of further developing norms on the safety of transport of dangerous goods, preventing the

passing through the town of Roermond of large numbers of freight trains in the future, is considered preferable by the Netherlands (NCM, pp. 28–29, para. 2.13.2).

199. Belgium insists that no rerouting deviating from the historic route may be decided upon by the Netherlands without the agreement of Belgium (BR, p. 69, para. 70).
200. The Netherlands essentially agrees with this position. Further, it is willing to pay the extra costs caused by the rerouting (NR, p. 21, para. 85).
201. The Tribunal concludes that the Parties concur that any decision by the Netherlands on the rerouting of the Iron Rhine railway would require the agreement of Belgium. It also notes that such agreement seems in principle to be forthcoming.

#### **D. Conclusions**

202. With respect to the measures envisaged by the Netherlands discussed above, Belgium argues that the Netherlands is under an obligation to apply its legislation in the way least unfavourable for Belgium; in not doing so the Netherlands would be acting contrary to the principles of reasonableness and good faith. Belgium regards some of the measures envisaged as an unnecessary interference with its transit right. They would constitute a breach by the Netherlands of its obligations towards Belgium (BR, pp. 32–33, 46, and 68–71, paras. 37, 50, and 70).
203. The Netherlands argues that it treats the reactivation of the Iron Rhine railway in the same way as other railways in the Netherlands. It accepts Belgium's right to reactivation, but it sees no reason why the Iron Rhine railway should be treated more favourably than regular Netherlands railways. In requiring the envisaged measures for the reactivation, the Netherlands claims that it is acting reasonably and in good faith. Its actions do not constitute an abuse of right, and are not arbitrary or discriminatory. In fact, it asserts that its legislative requirements are applied in the most favourable way for Belgium (NR, pp. 40–42, paras. 158–170).
204. In the view of the Tribunal, the obligations of the Netherlands under Article XII of the 1839 Treaty of Separation do not require it to apply its national legislation and policy

with respect to the reactivation of the Iron Rhine railway in a more favourable way than with respect to other railways in the Netherlands, unless such non-discriminatory application would amount to a denial of Belgium's transit right or render the exercise of that right unreasonably difficult.

205. The Tribunal concludes that the measures as such as presently envisaged by the Netherlands cannot be regarded as amounting to a denial of Belgium's transit right or render the exercise of the right unreasonably difficult. The related but distinct question as to whether the laying of the costs for any of these measures on Belgium would amount to a denial of Belgium's transit right or render the exercise of the right unreasonably difficult will be addressed by the Tribunal in Chapter VI.
206. Since the Netherlands insists that the envisaged measures flow exclusively from the application of its national legislation, and Belgium does not say otherwise, the Tribunal has not found it necessary to address any issue of constraints posed by EC law (*see* Chapter III above).

## CHAPTER VI – ALLOCATION OF COSTS

207. The Tribunal will now turn to the issue of the allocation of costs which forms the subject-matter of the third Question put jointly by the Parties to the Tribunal. It is formulated in the following terms:

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

208. The Tribunal notes that under the Arbitration Agreement it is requested to render its decision on the basis of international law, including European law if necessary. It is not authorized to decide these matters *ex aequo et bono*. The introductory words of the third Question clearly indicate that the Tribunal's decision on the cost allocation shall be rendered in the light of the Tribunal's answers to the two previous Questions. The ensuing consideration by the Tribunal of the question of costs is thus based upon the reasoning in the previous chapters.

209. The Tribunal observes that the 1839 Treaty of Separation does not refer to "financial risks." The Parties use that term in the Questions they jointly put to the Tribunal, without specifying the meaning they give to it, nor in their pleadings does either Party explain its understanding of the term. The Tribunal understands that in the context of infrastructure projects such term refers to the covering of financial costs over and above those budgeted for the project, due to different factors, such as higher than projected inflation, underestimation of the costs, unforeseen events, and increases in the costs of materials used and of labour costs. The Tribunal notes that, whatever position on the question of allocation of risks and costs, respectively, the Parties may have taken from time to time in negotiations, the Parties, in their pleadings, have not made any distinction between the costs of the reactivation and financial risks associated with it, nor have they suggested that the financial risks should be borne by a Party other than that which would bear the costs themselves. The Tribunal is of the view that the financial risks are not to be severed from the costs. Thus, the Party which bears the

costs will also have to bear the financial risks, and, when the Tribunal refers in this chapter to the costs, it should be understood as including the financial risks as well.

**A. Arguments of the Parties**

210. The Tribunal further notes that both Parties argue that the cost allocation falls within the ambit of the conventional regime for the Iron Rhine railway. They differ, however, in the identification of the relevant provisions and in their interpretation.

211. Article XII of the 1839 Treaty of Separation provides that the “agreed works” would be executed “at the expense of Belgium, all without any burden to Holland.”

212. Belgium, however, contends that its obligation to bear expenses as provided in Article XII related to the *construction* of a railway on Netherlands territory as a prolongation of a new railway on Belgian territory, but not to the exercise of Belgium’s right of transit (BR, p. 98, para. 104). Belgium refers to Article XI of the 1839 Treaty of Separation and what it terms the “*travaux préparatoires*” to support its contention that its obligation to bear expenses relates to the construction of a new railway prolonged on Netherlands territory, but not to the exercise of its right of passage (BR, pp. 99–100, para. 105). The exercise of the right of passage is, according to Belgium, subject only to moderate toll fees, to be paid by the users of the Iron Rhine railway, for the financing of its maintenance (BR, p. 99, para. 105).

213. Belgium, as a consequence of its view that its present request for reactivation does not amount to a request for a “new road” within the meaning of Article XII of the 1839 Treaty of Separation, maintains that it has no obligation to bear the costs and financial risks associated with the reactivation of the Iron Rhine. Belgium thus argues that in application of the conventional regime for the Iron Rhine all cost items and financial risks associated with the use, restoration, adaptation and modernisation of the historic route of the Iron Rhine railway on Netherlands territory shall be borne by the Netherlands and not by Belgium (BM, p. 101, para. 86; BR, pp. 103 ff and p. 127, paras. 110 ff and Submission on Question No. 3).

214. Belgium also contends that the Netherlands has rendered impossible the use of the railway by dismantling part of its infrastructure and making it unfit for use, by failing to provide for maintenance, and by deciding to interrupt works aimed at restoring the historic route to a standard necessary for temporary use. Thus, according to Belgium, the Netherlands violated Belgium's right to use the historic route of the Iron Rhine railway as well as the principle of due diligence. Belgium concludes that consequently the costs and financial risks related to the restoration of the historic route, which would not have arisen had the Netherlands not violated its obligations, shall be borne by the Netherlands (BM, p. 109, para. 96). Were the Tribunal to reject Belgium's submissions that all costs and financial risks shall be borne by the Netherlands, then Belgium contends, by way of a subsidiary argument ("in subsidiary order"), that it would still have no obligation to bear those costs and financial risks caused by the Netherlands' violation of its obligation towards Belgium. According to Belgium that would be a consequence of the obligation to make reparation for the prejudice caused by a violation of international law, as well as an application of the principle that no one shall benefit from his illegal acts (*nullus commodum capere de sua injuria propria*) (BM, p. 107, para. 95).
215. Belgium insists that all costs relating to reactivation, including environmental protection, are for the Netherlands. However, as a "subsidiary" argument, it maintains, with respect to the long-term use of the historic route of the Iron Rhine railway, that the Netherlands may not insist on Belgium paying for the following: (1) measures related to tracks in present or future use for Netherlands railway transport; (2) measures necessary to meet objectives over and above Netherlands legislative requirements; (3) a loop around Roermond; and (4) a tunnel in the Meinweg and similar nature protection structures and compensatory measures there and elsewhere along the route. Belgium concludes that, if the Netherlands imposes these requirements, the Netherlands will have the obligation to finance the measures necessary so as to ensure the exercise of Belgium's right of transit (BR, pp. 118–119, para. 131).
216. The Netherlands contends that Belgium is claiming the right of transit but is not prepared to respect the conditions and obligations inextricably linked to that right under Article XII of the 1839 Treaty of Separation (NCM, p. 43, para. 3.3.4.4).

217. The Netherlands further argues that the Belgian demand for reactivation of the Iron Rhine railway amounts to a request within the meaning of Article XII of the 1839 Treaty of Separation for the extension of a railway originating in Belgium into and over Netherlands territory. In the view of the Netherlands, this railway is new to the extent that a very considerable adaptation and modernisation is necessary in order to achieve the desired use (NCM, p. 43, para. 3.3.4.5). Consequently, the Netherlands, referring to Article XII, and in particular to the words “entirely at the cost and expense of Belgium” and “at the expense of Belgium, all without any burden to Holland, and without prejudice to the exclusive rights of sovereignty over the territory which would be crossed by the road or canal in question,” maintains that the costs referred to in Article XII should be borne in full by Belgium (NCM, p. 56, para. 3.3.8.1).
218. The Netherlands thus interprets Article XII of the 1839 Treaty of Separation as requiring Belgium to bear the full costs incurred in connection with its request for adaptation and modernisation of the existing infrastructure, which is at present not suitable for the use desired by Belgium (NCM, p. 57, para. 3.3.8.2).

#### **B. Consideration by the Tribunal**

219. That the Parties should advance these arguments is understandable. But each of their positions finds its origins in divergent readings of Article XII of the 1839 Treaty of Separation, neither of which can be sustained. The Tribunal has explained above (*see* paragraphs 82–84) that although Article XII was directed towards the construction of, and regime for, the Iron Rhine, the right of transit there provided for also covers the reactivation of the track and its use through time. The specific financial provisions of Article XII were formulated in respect of the construction of a new road, canal or track. The real questions, so far as allocation of costs is concerned, are the following: what elements of Article XII relating to costs are applicable to a reactivation that is not a construction of a new railway but is nonetheless within the ambit of Article XII? And what other elements within Article XII, interpreted in accordance with the legal principles explained in Chapter II above, may illuminate the allocation of costs for the reactivation that Belgium seeks and is entitled to?

220. The Tribunal finds itself in the presence of three points of departure for its analysis of these questions. The first is that, in matters other than those specifically provided for in relation to the construction of a new line, the Netherlands retains its rights of sovereignty. The second is that a major adaptation and modernisation of an existing railway must today include necessary environmental protection measures as an integral component of such a project. It has been shown in paragraphs 58 and 59 that rules of international law on protection of the environment are applicable law between the Parties in the interpretation of the conventional regime for the Iron Rhine railway. As a third point, the Tribunal will remain mindful that the financial burdens associated with the reactivation must not fall in such a way as effectively to prevent or render unreasonably difficult the exercise of Belgium's right of transit under Article XII of the 1839 Treaty of Separation. These elements, taken together, suggest that the costs are not to be borne solely by Belgium as if it were "a new road"; but neither are they to be borne solely by the Netherlands. The financial obligations of the Parties must therefore be subjected to careful balancing. Such balancing requires a variety of factors to be taken into account. That the Parties did not consider such a balancing unreasonable is demonstrated by their offers, during the negotiations, to contribute to the costs of the reactivation: the Netherlands offered, in October 2001, to pay 25% (€140 million) of the then estimated costs (NR, p. 15, para. 60), with an additional contribution of €40 million if Belgium waived temporary use of the line (NR, p. 16, para. 65), and Belgium was willing to contribute €100 million (BM, pp. 66–67, para. 48).
221. The Tribunal considers that Belgium is in principle entitled to exercise its right of transit in a way which corresponds to its current economic needs. At the same time, the concern of the Netherlands for its environment and the impact thereon of the intended, much more intensive, use of the railway line is to be viewed as legitimate. Such exercise of Belgium's right of transit and the Netherlands' legitimate environmental concerns are to be, as far as possible, reconciled. The Tribunal notes that such a reconciliation of rights echoes the balancing of interests reflected in Article XII of the 1839 Treaty of Separation. The Tribunal has found that the restoration and upgrading of the line as requested by Belgium falls to be analysed by reference of Article XII of the 1839 Treaty of Separation – not because it amounts to a "new line" (the Netherlands' view) but rather because the object and purpose of the Treaty suggests an interpretation that would include within the ambit of the balance there struck new needs and developments

relating to operation and capacity (*see* paragraph 84 above). As the Tribunal has already observed above (*see* paragraph 59), economic development is to be reconciled with the protection of the environment, and, in so doing, new norms have to be taken into consideration, including when activities begun in the past are now expanded and upgraded.

222. The use of the Iron Rhine railway started some 120 years ago and it is now envisaged and requested by Belgium at a substantially increased and intensified level. Such new use is susceptible of having an adverse impact on the environment and causing harm to it. Today, in international environmental law, a growing emphasis is being put on the duty of prevention. Much of international environmental law has been formulated by reference to the impact that activities in one territory may have on the territory of another. The International Court of Justice expressed the view that “[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment” (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 226 at pp. 241–242, para. 29).

223. Applying the principles of international environmental law, the Tribunal observes that it is faced, in the instant case, not with a situation of a transboundary effect of the economic activity in the territory of one state on the territory of another state, but with the effect of the exercise of a treaty-guaranteed right of one state in the territory of another state and a possible impact of such exercise on the territory of the latter state. The Tribunal is of the view that, by analogy, where a state exercises a right under international law within the territory of another state, considerations of environmental protection also apply. The exercise of Belgium’s right of transit, as it has formulated its request, thus may well necessitate measures by the Netherlands to protect the environment to which Belgium will have to contribute as an integral element of its request. The reactivation of the Iron Rhine railway cannot be viewed in isolation from the environmental protection measures necessitated by the intended use of the railway line. These measures are to be fully integrated into the project and its costs.

224. The Tribunal is not asked to, nor could it, determine which particular measures are to be taken. What the Tribunal is asked to do is to pronounce on the allocation of costs in respect of such measures as are to be specified. The Tribunal notes that it was the intention under the March 2000 MoU that these measures would be laid down in a treaty. The Tribunal will not specify in monetary terms the allocation of costs but will, on the basis of the law applicable to this issue, indicate relevant criteria and principles that the Parties should apply to this question.
225. The Tribunal starts by recalling that it is for the Netherlands at its expense to bring the Iron Rhine railway line back to the state in 1991 (*see* paragraphs 76 and 89 above). This is the case for the entire historic line. This conclusion is not dependent upon any violation by the Netherlands as regards maintenance of the line since the early 1990s. The Tribunal further recalls that the Netherlands recognizes that it will be responsible for the maintenance of a reactivated line (NR, p. 34, para. 136).
226. The Belgian obligation to fund the environmental element of the overall costs of the reactivation is integral to its exercise of its right of transit. At the same time, an interpretation, based on reasonableness, of the financial provisions of Article XII also requires that the Netherlands' use of parts of the line be acknowledged. On those parts of the line, both expenditures attributable to autonomous development, and benefits to the Netherlands may be envisaged. This has particular relevance where the line is so significantly adapted and modernised. On those parts of the line where both Iron Rhine trains and Netherlands trains will pass, Belgium will only be obliged to fund the expenditures associated with the measures attributable to the use of the line by Iron Rhine trains. The Netherlands will have to contribute to the total cost to the extent that those measures represent particular, quantifiable benefits to the Netherlands.
227. The application of these principles will depend upon the information given to the Tribunal as regards the particular segments of the line. These segments and their planned future use are described in paragraph 184 above. Relevant information was provided by the Parties, with no distinction being made by them between freight trains and passenger trains as far as the measures necessitated by their use is concerned.

228. Segment A is divided into two parts. The first part between the Belgian-Netherlands border and the junction with the railway line Eindhoven-Weert (referred to also as segment A1) (*see* paragraph 184 above) is currently used by just two trains per 24-hour period. These are local trains and are not to be viewed as trains being used in the exercise of the transit right of Belgium over the Iron Rhine. The costs of work needed for the reactivation (that is, the use, restoration, adaptation and modernisation, including necessary environmental protection measures) of this part of the track are, in the view of the Tribunal, due to the Belgian request to allow in the future up to 43 freight trains in addition per 24-hour period. Accordingly, the Tribunal concludes that the costs for the reactivation of this part of segment A are to be borne by Belgium.
229. The second part of segment A (also referred to as segment A2) (*see* paragraph 184 above) is located east of the junction with the railway line Eindhoven-Weert up to the municipality of Nederweert. Currently, the line is used by 104 trains per 24-hour period. It is envisaged in the preliminary version of the Draft Planning Procedure Order that in 2020 it will be used by 199 trains including the 43 Iron Rhine trains. It cannot be ruled out that the development of the Netherlands railway transport (“autonomous development”) envisaged for 2020 amounting to the addition of 52 trains to the current level of use by 104 trains per 24-hour period would also entail a certain expenditure. Therefore, in the view of the Tribunal, the costs for the reactivation of this segment A2 shall be apportioned between the Parties: the Belgian obligation to fund the costs associated with the reactivation is to be diminished by a financial factor that includes the costs which would otherwise have been required for the autonomous development had the Iron Rhine not been reactivated, so far as both track and environmental factors are concerned. The Tribunal here refers to and bases itself upon the envisaged autonomous development which the Netherlands has itself taken into account when preparing the preliminary version of the Draft Planning Procedure Order.
230. While the overall financial obligation remains that of Belgium, the Tribunal is further of the view that an element that may represent particular, quantifiable benefits to the Netherlands – resulting from, in particular, improved road traffic circulation, enhanced road safety, reduced noise, and potential beyond the currently anticipated development for additional use of the track by Netherlands trains – are also to be taken into account in the apportioning of costs between the Parties. In fact, during the trilateral negotiations

with Belgium and Germany in early 1999, the Netherlands advocated that the distribution of the benefits (both from the perspective of business economics and socio-economics) should be a point of departure for the distribution of the costs of the reactivation between the Parties (BM, Exhibit 78, Flemish-Dutch Administrative Steering Group, Draft Report “Iron Rhine” for the Ministers of Transport of Belgium, the Netherlands and Germany, p. 25).

231. Segment B (*see* paragraph 184 above) covers the line between the municipalities of Nederweert and Haelen. The current and the planned use of this segment is similar to the segment A2, save that the current use is 92 trains per 24-hour period, rather than 104 trains per 24-hour period (notwithstanding that by 2020 the comparable figure of 199 trains per 24-hour period is envisaged). The Tribunal is therefore of the view that the costs of the reactivation of the railway line shall also be apportioned between the Parties according to the principle set out in paragraphs 229 and 230 above.
  
232. Segment C (*see* paragraph 184 above) covers the municipalities of Swalmen and Roermond. From the material before it, the Tribunal understands that this segment will be used solely for the railway connection between Belgium and Germany (BR, Exhibit No. 10, as corrected, Preliminary Version 1.4 of the Draft Planning Procedure Order, p. 98, para. 6.1 ff). The track is envisaged as a loop north and east of Roermond proposed by the Netherlands which, during the negotiations, expressed its willingness to pay the extra costs for a such diversion around Roermond. The loop constitutes a deviation from the route agreed on in Article IV of the Iron Rhine Treaty. Such a deviation cannot be executed without the consent of Belgium, *i.e.*, it must be done by agreement, thus modifying the agreed historic route. Belgium is therefore entitled to request that the Netherlands undertake to bear the extra financial costs of such a deviation over and above those which would otherwise be involved had the historic route through Roermond been adapted and modernised. On the other hand, if the Netherlands is willing to bear these extra costs, Belgium cannot reasonably withhold its consent to a deviation. If a loop around Roermond is agreed, then the costs would be distributed between the Parties in the following manner: Belgium would be obliged to fund the amount which would have been required for the reactivation of the historic route in its current location, while the Netherlands would be obliged to bear costs incurred above that amount due to the relocation of the line to the north and east of Roermond.

233. Segment D (*see* paragraph 184 above) runs through the municipality of Roerdalen. It lies between the Asenrayerweg and the German-Netherlands border. The railway line in this segment has been out of use since 1991 and in the future, as the Tribunal understands, will be used solely for the connection between Belgium and Germany (BR, Exhibit No. 10, as corrected, Preliminary Version 1.4 of the Draft Planning Procedure Order, p. 117, para. 7.1 ff). The reactivation is required because of the Belgian request. Belgium will, for the reasons given above, have to bear the cost of the reactivation of the track.
234. Specifically, Belgium will have to bear costs for noise barriers to be built near dwellings and compensatory conservation measures in this segment. The Tribunal is aware that the major cost factor not only in this segment but in relation to the whole project of the reactivation of the Iron Rhine is attributable to the envisaged tunnel in the Meinweg. Belgium contended that the costs of various environmental measures, in particular of the tunnel in the Meinweg, were “too costly” (BM, p. 82, para. 66), “highly expensive” (BM, p. 88, para. 74), and even “prohibitive” (BM, p. 81, para. 66). The construction of such a tunnel is envisaged in light of the fact that the track lies in the Meinweg area designated as a national park by the Netherlands Minister of Agriculture, Nature Management and Fisheries on 1 June 1995 and as a “Silent Area” by the Province of Limburg. When the Netherlands took that decision it already knew that the historic route crossed that area and that Belgium, despite not exercising since 1991 its right of transit, had reserved its right to the use of the line in the future. The Tribunal is of the view that the Netherlands’ decision to declare the Meinweg a national park in an area over which Belgium was entitled under treaty to a right of transit, though a permitted act of Netherlands’ sovereignty, cannot remain without financial consequence for the Netherlands. On the other hand, the Belgian Government reserved its right only in abstract terms, and did not specify the parameters of its future use of the line before the decisions of the Netherlands were taken. The construction of the tunnel is required not only in view of the intensive use envisaged by Belgium, of which nevertheless the Netherlands was not fully informed in a timely fashion, but also arises out of the Netherlands’ decision to establish a national park in the area which was already crossed by the historic route. The Tribunal considers that both Parties contributed to the occurrence of the situation which now requires much more costly measures. The

Tribunal is therefore of the view that the costs for the tunnel in the Meinweg are to be apportioned equally between the Parties.

235. The Tribunal has in paragraphs 228–234 identified the principles of apportionment of costs in the various segments that it sees as flowing from Article XII of the 1839 Treaty of Separation, taking into account the applicable provisions of international law. The Tribunal has not been asked to calculate precisely the overall costs of reactivation, the costs of autonomous development, and the benefits of the reactivated Iron Rhine railway to the Netherlands. Moreover, it understands that the Draft Planning Procedure Order is of a preliminary character and its content may be subject to further changes. Nor is it the task of this Tribunal to investigate questions of considerable scientific complexity as to which measures will be sufficient to achieve compliance with the required levels of environmental protection. These issues are appropriately left to technical experts. To that effect, the Tribunal recommends that the Parties promptly, and in any case not later than 4 months from the date of this Award, put into effect the conditions necessary for a committee of independent experts to be set up within the same time frame, unless the Parties agree otherwise, to engage in the task of determining:

1. the costs of the reactivation of the Iron Rhine railway;
2. the costs of the autonomous development; and
3. the particular, quantifiable benefits to the Netherlands – in financial terms – of the reactivation resulting from, in particular, improved road traffic circulation, enhanced road safety, reduced noise and the potential beyond currently anticipated autonomous development for additional use of the track by Netherlands trains.

This committee of independent experts should conclude its findings as soon as possible, and in any case not later than 6 months from the date of its establishment.

The findings of this committee of independent experts are to be used by the Parties in determining their respective share for the costs and risks associated with the upgrading of the Iron Rhine railway in segments A2 and B. The Netherlands will have to contribute to the costs of and financial risks associated with the reactivation of the Iron Rhine in segments A2 and B in the amount which comprises the costs of the autonomous development (point 2 above) and the financial equivalent of the benefits for it (point 3), as determined by the committee of independent experts. Belgium will have

to bear all the remaining costs of and financial risks associated with the reactivation of the Iron Rhine in segments A2 and B.

236. The Tribunal thus concludes that the costs and financial risks associated with the long-term use of the Iron Rhine railway are to be borne by the Parties in the following way:
1. Belgium alone will be obliged to bear the costs and financial risks of the reactivation of segment A1 and segment D with the exception of the tunnel in the Meinweg;
  2. Belgium and the Netherlands will have to share the costs and financial risks of the reactivation of segments A2, B, C and the Meinweg tunnel in segment D in accordance with the formulas specified in paragraphs 229–231 (for segments A2 and B), 232 (for segment C) and 234 (for the Meinweg tunnel).
237. Within the Parties’ pleadings there was debate, not only about the separation of temporary use from agreement on long-term use, but also how long any temporary use might last, whether it could be interrupted by work for the long-term reactivation, and the financing of such temporary use. In the March 2000 MoU, the Parties had agreed that Belgium would pay the costs for such temporary use. However, Belgium has since claimed that this undertaking has lapsed, as no timely agreement has been reached on long-term use. The Tribunal notes that the financing of temporary use is not, in terms, among the formal Questions put to it. Nor has the Tribunal understood the Questions it is asked concerning the “use, restoration, adaptation and modernization of the historic route” as being related to the above issues regarding temporary use.

## CHAPTER VII – REPLIES OF THE TRIBUNAL TO THE QUESTIONS PUT BY THE PARTIES

### A. Question 1

238. The first specific Question for the Arbitral Tribunal posed in the Arbitration Agreement reads as follows:

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

239. The Tribunal responds as follows:

- (a) The Tribunal understands the phrase “in the same way” to refer to an application of Dutch legislation, and the decision-making power based thereon, in respect of the use, restoration, adaptation and modernisation of the historic route of the Iron Rhine as would be the case in respect of the use, restoration, adaptation and modernisation of any other railway on Dutch territory.<sup>20</sup>
- (b) Dutch legislation and the decision-making power based thereon in respect of the use, restoration, adaptation and modernisation of railway lines on Dutch territory are applicable in the same way to the use, restoration, adaptation and modernisation of the historic route of the Iron Rhine on Dutch territory to the extent specified in subparagraphs (c) and (d) following.
- (c) Such application of Dutch legislation and the decision-making power based thereon may not conflict with the treaty rights granted to Belgium, or the rights and obligations of the Parties under general international law, or constraints imposed by EU law (*see* paragraph 56). Thus, the application of Dutch legislation and of the decision-making power based thereon may not amount to a denial of Belgium’s right of transit (*see* paragraph 66), nor render unreasonably difficult the exercise by Belgium of its right of transit (*see* paragraph 163).

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<sup>20</sup> The Tribunal has used the formal adjective “Netherlands” throughout this Award, but in answering the Questions it has used the adjective “Dutch,” as this is the terminology there employed by the Parties.

- (d) The Tribunal further finds that:
- (i) Dutch legislation and the decision-making power based thereon may not be applied unilaterally to order a deviation from the historic route;
  - (ii) the application of such Dutch legislation and the decision-making power based thereon is not dependent upon whether the relevant works are to be performed by the Netherlands itself or by Belgium;
  - (iii) Dutch legislation and the decision-making power based thereon may not unilaterally fix the level and rate of toll collection; and
  - (iv) the measures resulting from the application of Dutch legislation and the decision-making power based thereon must allow for the reactivation of the Iron Rhine railway to be executed in accordance with “the same plan” (understood in the sense of functionality: *see* paragraph 67 above).

**B. Question 2**

240. The second specific Question for the Arbitral Tribunal posed in the Arbitration Agreement reads as follows:

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

241. The Tribunal responds as follows:

- (a) Belgium has the right to make a plan to establish track specifications relevant for the functionality of the continuation of the line through the Netherlands. The works consequential upon the requested use, restoration, adaptation and modernisation of the historic route of the Iron Rhine are to be “agreed works.” Belgium may not engage in works on Dutch territory that have not been agreed to. The Netherlands may not withhold its agreement to any proposal by Belgium should such withholding of agreement amount to a denial of Belgium’s transit

rights, or render unreasonably difficult the exercise by Belgium of its right of transit.

- (b) This is the case whether the Netherlands chooses itself to carry out the agreed works on its territory, or asks Belgium to do so.
- (c) The Tribunal observes, however, that the Netherlands may not unilaterally impose a diversion from the historic route.
- (d) The Netherlands was entitled to have designated areas along the historic route as protected areas as this did not *per se* constitute a limitation to Belgium's right of transit and the circumstances examined by the Tribunal do not suggest that there was a legal obligation to have consulted Belgium before doing so.
- (e) The Netherlands is in principle entitled unilaterally to impose the building of underground and above-ground tunnels "and the like." However, any such measures that it seeks to impose may not amount to a denial of Belgium's right of transit over the historic route, nor render unreasonably difficult the exercise by Belgium of its right of transit.

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**C. Question 3**

242. The third specific Question for the Arbitral Tribunal posed in the Arbitration Agreement reads as follows:

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

243. The Tribunal responds as follows, taking the second element of the Question first:

The Tribunal recalls that Belgian obligations other than those associated with functionality flow from the fact that the requested reactivation represents an economic development on the territory of the Netherlands, with which the prevention and minimalisation of environmental harm is to be integrated. The Tribunal has further found that the costs of environmental protection measures and other safety measures cannot be severed from the costs necessary for the functionality of the historic route.

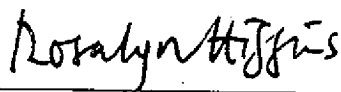
The costs and financial risks associated with the right of transit on which the use, restoration, adaptation and modernisation (“reactivation”) requested by Belgium is based are to reflect the balance between the Parties inherent in Article XII of the 1839 Treaty of Separation, interpreted by reference to the applicable principles of international law. Accordingly, Belgium’s obligations to fund investments are not limited to those necessary for the functionality of the historic route of the railway line.

244. The Tribunal further finds that the cost items and financial risks associated with the reactivation of the historic route of the Iron Rhine on Dutch territory are:

- (a) As to the sector between the Belgian-Netherlands border and the junction with the railway line Eindhoven-Weert (“segment A1”), to be borne by Belgium.
- (b) As to the sector located east of the junction with the railway line Eindhoven-Weert up to the municipality of Nederweert (“segment A2”), to be apportioned between the Parties as follows: Belgium has the obligation to bear the costs and financial risks associated with the reactivation, such obligation being diminished by a financial factor that represents the costs which would have been required for the autonomous development envisaged for Dutch railway transport by 2020, were the Iron Rhine not to be reactivated. This remaining obligation of Belgium is further to be diminished by a financial factor representing particular, quantifiable benefits to the Netherlands (other than as regards autonomous development) resulting from, in particular: improved road traffic circulation, enhanced road safety, reduced noise, and potential beyond the autonomous development plans.
- (c) As to the sector between the municipalities of Nederweert and Haelen (“segment B”), to be apportioned between the Parties as follows: Belgium has the obligation to bear the costs and financial risks associated with the reactivation, such obligation being diminished by a financial factor that represents the costs which would have been required for the autonomous development envisaged for Dutch railway transport by 2020, were the Iron Rhine not to be reactivated. This remaining obligation of Belgium is further to be diminished by a financial factor representing particular, quantifiable benefits to the Netherlands (other than as regards autonomous development) resulting from, in particular: improved road traffic circulation, enhanced road safety, reduced noise, and potential beyond the autonomous development plans.

- (d) As to the sector covering the municipalities of Swalmen and Roermond (“segment C”), to be apportioned between the Parties as follows: if a loop around Roermond is agreed, Belgium has the obligation to bear the costs and financial risks associated with the reactivation of the historic route had that reactivation been in the current location of the historic line; while the Netherlands has the obligation to bear the costs and risks over and above that sum due in respect of the relocated line agreed to the north and east of Roermond.
- (e) As to the sector running through the municipality of Roerdalen (“segment D”), to be apportioned between the Parties as follows: Belgium has the obligation to bear the costs and financial risks of reactivation of the railway line, which is to be used solely for the connection between Belgium and Germany, including the costs and financial risks associated with noise barriers to be built near dwellings and compensatory conservation measures in this segment. However, as regards any tunnel that may be built in the Meinweg area designated as a national park by the Netherlands Minister of Agriculture, Nature Management and Fisheries on 1 June 1995 and as a “Silent Area” by the Province of Limburg, the need for this being attributable to the past conduct of both of the Parties, they shall share the obligation to bear the costs and financial risks associated therewith in equal parts.

Done at the Peace Palace, The Hague, this 24<sup>th</sup> day of May 2005,




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Judge Rosalyn Higgins  
President




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Professor Guy Schrans



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Judge Bruno Simma



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Professor Alfred H.A. Soons



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Judge Peter Tomka

**THE IRON RHINE RAILWAY**

