

The Iron Rhine Arbitration Case: On the Right Legal Track?

Analysis of the Award and of its Relation to the Law of the European Community

Ineke van Bladel*

1. INTRODUCTION

The Iron Rhine is a railway linking the port of Antwerp to the Rhine basin in Germany across Dutch territory. Belgium acquired the right of transit over Dutch territory in a treaty from 1839 and requested a reactivation of the railway in 1998. As they failed to come to an understanding in negotiations, the Netherlands and Belgium decided to submit the case to arbitration. In 2003 they set up an Arbitral Tribunal under the auspices of the Permanent Court of Arbitration in The Hague. The Tribunal rendered its Award on 24 May 2005.¹

Section 2 of this paper describes the Iron Rhine case. It focuses on the history of the Iron Rhine (section 2.1) and the negotiations between the Netherlands and Belgium (section 2.2), followed by an exposition on the arbitration procedure (section 2.3), a description of the views of the Parties (section 2.4) and an analysis of the Award (section 2.5).

Section 3 contains some observations on the jurisdiction of the Iron Rhine Tribunal in respect to the law of the European Community. Section 3.1 contains a discussion of the Award and Section 3.2 a conclusion.

* Ineke van Bladel is Legal Counsel at the International Law Division of the Dutch Ministry of Foreign Affairs. The author acted as co-agent in the Iron Rhine case. The opinions expressed by the author in this paper are solely the author's and do not necessarily represent those of the Government of the Netherlands. This article was previously published in the *Hague Yearbook of International Law / Annuaire de La Haye de Droit International*, Volume 18 (2005), p. 3-22.

¹ The Award as well as the Rules of Procedure, the Memorial of Belgium, the Counter-Memorial of the Netherlands, the Reply of Belgium and the Rejoinder of the Netherlands are available at <http://www.pca-cpa.org>.

2. THE IRON RHINE CASE

2.1. THE HISTORY OF THE IRON RHINE

At the Congress of Vienna of 1815, Great Britain, Prussia, Austria and Russia decided to unite the region known before the Napoleonic era as the Austrian Netherlands and the former principality of Liège with the former Republic of the United Provinces to form the Kingdom of the Netherlands. The union failed. On 25 August 1830 the population of Brussels rose in revolt against what it considered the dominance of the north and on 17 October 1830 the four Powers and France announced the convention of what became known as the London Conference. The aim of the Conference was to maintain stability and peace in Europe by orchestrating the separation of the Netherlands and Belgium. On 19 April 1839, the Netherlands and Belgium concluded the Treaty between the Kingdom of the Netherlands and the Kingdom of Belgium relative to the Separation of their Respective Territories (the Treaty of Separation).² Article XII of this Treaty allows for an extension on Dutch territory of a new road to be constructed or a new canal to be dug on Belgian territory. In 1873 the Netherlands and Belgium implemented Article XII and entered into a treaty which permitted the construction of a railway line – instead of a road or canal – and which specified the present route of what became to be known as the “IJzeren Rijn” (Iron Rhine).³ On Dutch territory it runs through the municipalities of Budel, Weert and Roermond. The railway was completed in 1879.

Until 1897 the concession for the exploration and maintenance of the Iron Rhine was in Belgian hands. In that year, the Netherlands and Belgium concluded the Railway Convention, in which the Netherlands purchased the land and other immovable property of the Iron Rhine. The Netherlands rendered a concession for the maintenance and exploitation of the Iron Rhine to a Dutch railway company.⁴

The Iron Rhine was used intensively between 1879 and 1914. After World War I, however, international use declined sharply, as Belgium had access to an alternative route, the Hasselt-Montzen-Aken line. The use of the railway in the twentieth century varied, but it never exceeded more than nine trains per day. On 31 May 1991 Belgium terminated the use of the Iron Rhine track for international traffic.

At present, only part of the Dutch section of the Iron Rhine is in use. The section between Weert and Roermond coincides since 1913 with the rail link between Eindhoven and Maastricht and is used intensively for passenger and freight transport.⁵ The use to the west of Weert is minimal and the section of the

² Consolidated Treaty Series (CTS), 1838-1839, Vol. 88, p. 427.

³ 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 13 January 1873 (CTS, 1872-1873, Vol. 145, p. 447).

⁴ Railways Convention between Belgium and the Netherlands of 23 April 1897 (CTS, 1896-1897, Vol. 184, p. 374).

⁵ Counter-Memorial, paras 2.5.4 and 2.6.

line between Roermond and the German border is not in use at all. In 1994 the border crossing with Germany was closed and in 1996 the Netherlands removed some level crossing installations and safety installations on this section for security reasons.

The Iron Rhine track crosses two areas with a protected status. The Weerter en Budeler Bergen is a special protection area under the Birds Directive and the Meinweg is a special protection area under both the Birds and Habitats Directives of the European Community. Both areas are also protected under Dutch national legislation on nature and environment. In February 1987 the Belgian Minister of Transport wrote to his Dutch counterpart that the Dutch plan to create a nature park to the east of Roermond would limit the exploitation of the Iron Rhine track and that Belgium would “hold firm to its right of free transport through the Iron Rhine”.⁶

On 10 July 1998, the Belgian Government asked the Netherlands to reactivate the Iron Rhine. The Netherlands acknowledged the Belgian right of transit across Dutch territory, while stating that the reactivation would be subject to Dutch environmental legislation and EC legislation on the conservation of natural habitats.⁷

2.2. THE NEGOTIATIONS BETWEEN THE NETHERLANDS AND BELGIUM

At the time of Belgian’s request, informal contacts had already led to the establishment of several committees and working groups in which Dutch, Belgian and German officials participated. In the course of the discussions, Belgium proposed to modernize the track so as to achieve a capacity of 43 freight trains each 24 hours in 2020. On 9 December 1999 the Transport Ministers of the three countries approved this scenario.⁸

While Belgium wished to put the historic route back into use, the environmental legislation of the Netherlands requested a study of alternative and perhaps more environmentally-friendly routes. The Netherlands appealed to Belgium to allow such an investigation, not only because Dutch laws prescribed it, but also because the situation had changed since 1879, the more so in view of the minimal use during the twentieth century and the termination of international traffic in 1991. Belgium was reluctant to deviate from its right to use the route described in the 1873 Iron Rhine Treaty – nowadays called “the historic route” – and to accept the applicability of Dutch environmental law.

In March 2000, the Netherlands and Belgium reached a compromise, which they laid down in a Memorandum of Understanding.⁹ The Netherlands promised to prepare an environmental impact assessment within a relatively short time. This would not only cover the historic and other possible routes for the future use by 43 trains, but also whether a temporary and limited use of the historic track would be possible without irreversible environmental damage in the Meinweg

⁶ Memorial, para 24.

⁷ Memorial, para 24; Counter-Memorial, para 2.10.

⁸ Counter-Memorial, para 2.11.

⁹ Award, para 154.

area. Belgium would pay for the works necessary to realize this temporary use. The decisions on the temporary use and the long-term use would be taken simultaneously. This so-called dual decision ensured that the temporary solution would not become permanent.

On the basis of a Route Assessment Environmental Impact Study it was decided in 2001 that a reactivation of the Iron Rhine along the historic route would be the best option, provided that measures were taken to mitigate the adverse impacts of the reactivation on the environment and nature.¹⁰ These measures included a diversion around the city of Roermond and a tunnel under the Meinweg. The diversion was welcomed by Belgium as it offered certain advantages, but the tunnel met with objections.

The Environmental Impact Study demonstrated that a limited use of the historic track for a period of five years would not cause irreversible damage to the nature and environment in the Meinweg.¹¹

At that time, the costs of the reactivation were estimated at between 500 and 600 million euro. At a tripartite ministerial meeting in September 2001 the Netherlands offered to pay 25 % of these costs, *i.e.* 140 million euro. This amount was to cover the following cost items (up to 100 million euro) which, according to the Netherlands, should not or not entirely accrue to Belgium:

- a) the costs for restoring the railway “as if standard maintenance of the line had continued since 1991” (about 21 million euro);
- b) the participation in the costs for noise barriers to be placed along the Weert-Roermond section, which was in use intensively for Dutch traffic (estimated at 19 million euro); and
- c) the excess costs of around 60 million euro for the diversion around Roermond.¹²

The remaining 40 million euro was offered without earmarking.

Belgium was prepared to pay 100 million euro.¹³ This amount more or less coincided with the costs of the measures necessary to reactivate the Iron Rhine track from a functional point of view and virtually excluded payment for environmental measures.

Apart from the fact that it depended on the dual decision, the temporary use of the Iron Rhine gave rise to the problem that it was to take place on the definitive route, where major infrastructural work needed to be carried out.¹⁴ This meant that any use would have to be suspended. For this reason, and because it encountered substantial opposition to temporary use in the region, the Netherlands offered to pay an additional 40 million euro, if Belgium would waive temporary use. The

¹⁰ Counter-Memorial, para 2.13.1. The Route Assessment/Environmental Impact Study (Trajectnota/MER) is the second of six stages in the Transport Infrastructure (Planning Procedures) Act (*Tracéwet*). It is preceded by the Notification of Intent (*Starnotitie*) and followed by the Official Position (*Standpuntbepaling*).

¹¹ Counter-Memorial, para. 2.13.3.

¹² Counter-Memorial, para. 2.13.5.1, n. 66.

¹³ Memorial, para. 48.

¹⁴ Counter-Memorial, para. 2.12.4.

Netherlands also offered the use of other railway tracks on its territory to Belgium, either until the definitive reactivation would be completed or – if temporary use materialized – when that use of the track had to be suspended. Belgium, on its side, stressed the importance of its temporary use of the track from a political point of view.¹⁵

The parties were unable to reach an agreement on the allocation of the costs, the tunnel, which cost about 150 million euro, being the major obstacle. The Netherlands nevertheless continued its national procedure on an informal basis and prepared a Preliminary Study, which detailed the works to be done on the Iron Rhine in order to allow a use of 43 trains per 24 hours in 2020. This study also showed, incidentally, that the costs could be reduced to about 500 million euro.¹⁶ The negotiations stalled in 2002. In December of that year, the Belgian Prime Minister asked his Dutch counterpart to agree to arbitration.

2.3. THE IRON RHINE ARBITRATION

On 22/23 July 2003 the Netherlands and Belgium concluded a treaty (the Arbitration Agreement) which was provisionally applied from 23 July 2003 and entered into force on 1 July 2005. The Netherlands appointed as arbitrators Professor Alfred H.A. Soons and International Court of Justice Judge Peter Tomka. Belgium appointed Professor Guy Schrans and International Court of Justice Judge Bruno Simma and the four arbitrators nominated Judge (now President) Rosalyn Higgins of the International Court of Justice as President of the Arbitral Tribunal.¹⁷

In the Arbitration Agreement the Netherlands and Belgium acknowledged that Belgium had the right to the use, the restoration, the adaptation and the modernization of the Iron Rhine railway.¹⁸ The following questions were put to the Tribunal:

1. To what extent is Dutch legislation and the decision-making power based thereon in respect of the use, restoration, adaptation and modernization of lines on Dutch territory applicable, in the same way, to the use, restoration, adaptation and modernization 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 modernization of

¹⁵ Memorial, para. 48.

¹⁶ Counter-Memorial, para. 2.13.5.1. This Preliminary Study is officially known as the preliminary Draft Planning Procedure Order (concept Ontwerp-Tracébesluit) and forms the fourth stage in the Transport Infrastructure (Planning Procedures) Act. On completion of this fourth stage, a Planning Procedure Order (Tracébesluit) would be adopted, which would be open for judicial review and, when final and conclusive, would be executed.

¹⁷ Professor Johan G. Lammers, Legal Adviser of the Ministry of Foreign Affairs of the Kingdom of the Netherlands and Mr. Jan Devadder, Director-General of the Department of Legal Affairs, Federal Public Service Foreign Affairs, Foreign Trade and Development Co-operation of the Kingdom of Belgium acted as Agents.

¹⁸ Series of the Kingdom of the Netherlands, 2003, No 138.

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 aboveground 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 modernization 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?

In essence, these questions boil down to a request to determine whether, and to what extent, Dutch legislation, and in particular environmental legislation, is applicable to the reactivation, as well as a request to allocate the costs of the reactivation.

The Arbitration Agreement required the Arbitral Tribunal to decide 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.¹⁹

The Rules of Procedure contained a timetable for the pleadings and envisaged for the Tribunal to render its Award on 29 September 2004. Unfortunately, the parliamentary approval of the Arbitration Agreement in the Netherlands took more time than expected. The Tribunal rendered its Award on 24 May 2005, before the Arbitration Treaty entered into force and based its jurisdiction on a provisionally applied *compromis*. However, the Award was rendered only after the Dutch parliamentary procedure had been completed and the Tribunal had made sure that all constitutional requirements in both States had been fulfilled.²⁰ On 25 July 2005 Belgium requested an Interpretation of the Award and on the same day the Netherlands was invited to comment on the Belgian Request. It did so on 15 August 2005. On 20 September 2005 the Tribunal rendered its Interpretation of the Award.²¹

¹⁹ The text of Article 292 reads: "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".

²⁰ Award, para. 12.

²¹ Available at <http://www.pca-cpa.org>.

2.4. THE VIEWS OF THE PARTIES

The Treaty of Separation plays an essential role in the decision of the Tribunal and Article XII of this Treaty forms a key provision. This is the translation of the authentic French text of this provision, as provided by the Tribunal:

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 would 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.”²² (emphasis added)

The Netherlands and Belgium differed in opinion on the interpretation of several passages of Article XII of the Treaty of Separation. By far the most important terms were that “a new road” or “a new canal” on Belgian territory would “be extended” on Dutch territory. They were crucial for the decision whether, and to what extent, Article XII would be applicable to the reactivation of the Iron Rhine.²³

Belgium was of the opinion that its present request for reactivation was not a request for “a new road, canal or track to be extended”, as the track was prolonged on Dutch territory in 1879 and still existed at the present; Article XII thus dealt only with the *construction* of the Iron Rhine.²⁴ Belgium also referred to the fact that the Netherlands maintained the Iron Rhine during the twentieth century and that it had concluded an agreement on maintenance and renovation with the Dutch company holding the concession to explore the Iron Rhine on Dutch territory.²⁵ Therefore the Netherlands had the responsibility to maintain and renovate the track of the Iron Rhine in light of what Belgium considered commercially viable.²⁶ This actually amounted to an obligation for the Netherlands to keep the track of the Iron Rhine in such a way that through traffic from Antwerp to Germany would be possible at any time.

In its Reply Belgium also demanded the immediate use of the historic route of the Iron Rhine at full capacity and on a long term basis.²⁷ If the Netherlands would be permitted to take measures to accommodate for such use, it would have

²² Award, para 32.

²³ Award, para. 74 *et seq.*

²⁴ Reply, para. 104.

²⁵ Reply, para. 117.

²⁶ Reply, para. 122.

²⁷ Reply, paras. 36, 70.

to pay the costs. In case Belgium had to bear any costs of the reactivation, these could only result from international obligations (including EC law) and such costs were to be minimal.²⁸

With regard to the interpretation of Article XII, the Netherlands argued that the request to reactivate the railway was new, as considerable adaptation and modernization was necessary to achieve the use desired by Belgium and that, therefore, Article XII was applicable in its entirety. The Netherlands claimed that Belgium, in view of the text of Article XII,²⁹ would have to bear the costs of the reactivation and it contended, referring to the passage “without prejudice to the exclusive rights to exercise its sovereignty in the territory which would be crossed by the road or canal in question” in Article XII, that the measures it imposed on the reactivation constituted the legitimate exercise of its legislative, judicial and executive power in relation to persons and objects in its territory.³⁰ The Netherlands also argued in the Counter-Memorial that restrictions on its sovereignty would have to be construed restrictively, but it did not pursue this in the Rejoinder.³¹

A second passage of Article XII which was the object of rather lengthy disputes between the Parties was “to be extended according to the same plan”. On the basis of this phrase Belgium claimed the exclusive right to decide on the works to be done on Dutch territory in order to prepare the track for the use by 43 trains in 2020.³² The Netherlands contended that these words referred to the conditions permitting unrestricted physical cross-border transit.³³

2.5. ANALYSIS OF THE AWARD

The Tribunal interpreted Article XII of the 1839 Treaty of Separation by applying Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (Vienna Convention),³⁴ stating that the Netherlands and Belgium both are Parties to this Convention and referring to cases before the International Court of Justice in which these provisions had been applied to treaties concluded before the entering into force of the Vienna Convention.³⁵

With regard to Article 31 it noted that its clauses are not hierarchical, but that there is no doubt that the starting point for treaty interpretation is the ordinary meaning to be given to the terms of a treaty, taking them in context, and having regard also to the object and purpose of the treaty.³⁶ In the opinion of the Tribunal, the extracts of the diplomatic negotiations leading up to the conclusion of the

²⁸ Reply, para. 124.

²⁹ The relevant passages of Article X11 are “the said road, or the said canal [would] be extended [...] entirely at the cost and expense of Belgium” and “engineers and workers [...] would execute the agreed works at the expense of Belgium, all without any burden to Holland.”

³⁰ Rejoinder, paras 147, 150.

³¹ Rejoinder, para. 24; Award, para. 55.

³² Reply, para. 70.

³³ Rejoinder, para. 126.

³⁴ UNTS, 1155, p. 332.

³⁵ Award, para. 45.

³⁶ Award, para. 47.

1839 Treaty of Separation provided by the Parties do not serve the purpose of illuminating a common understanding as to the meaning of the various provisions of Article XII, so that they cannot be considered as *travaux préparatoires* on which it may safely rely as a supplementary means of interpretation under Article 32 of the Vienna Convention.³⁷

In respect of the words “in accordance with the same plan” the Tribunal noted that the plan:

insofar as it relates to continuity at the border, is a matter for Belgium. ... 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, included, inter alia, all safety elements of the whole work and safety conditions under which the work is carried out.³⁸

Just like Belgium, the Tribunal adopted the ordinary meaning of the words “a new road or a new canal to be extended” and emphasized that Article XII in relation to the 1873 Iron Rhine Treaty referred to the *construction* of a railway.³⁹ It rejected, however, Belgium’s broad interpretation of the words “maintenance and renovation” stating that these words do not cover “the significant upgrading costs now involved in Belgium’s request”.⁴⁰

According to the Tribunal, 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” and that of Article XII was “to provide for transport links from Belgium to Germany”. The object of Article XII “was not for a fixed duration and its purpose was ‘commercial communication’”.⁴¹ From these objects and purposes it necessarily followed, in the view of the Tribunal,

even in the absence of specific wording, that such works ... 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 modernization requested by Belgium.⁴²

The Tribunal then applied the principle of effectiveness, stating that this has “relevance in relation to the object and purpose of a treaty” but “does not entitle a tribunal to revise a treaty”.⁴³ The recourse to the principle of effectiveness needs some elaboration, as a motivation for employing this principle seems to be absent in the Award. However, in the 2003 Arbitration Agreement the Netherlands and Belgium agreed that Belgium not only had the right to the use and the restoration of the iron Rhine railway, but also to its adaptation and modernization. That the Iron Rhine railway forms a commercial connection between Antwerp and

³⁷ Award, para. 48.

³⁸ Award, para. 67.

³⁹ Award, para. 84.

⁴⁰ Award, para. 76.

⁴¹ Award, para. 83.

⁴² Award, para. 83.

⁴³ Award, para 49.

Germany has never been in dispute between the two States. Thus it is clear that the present-day views of the parties encompass “contemporary commerciality” - the 1839 object and purpose of Article XII construed by the Tribunal - so that there is no reason for either party to object to “a dynamic and evolutive approach to a treaty that was meant to guarantee a right of commercial transit through time”.⁴⁴

While the aims of the Treaty of Separation and Article XII and the present-day interest of the parties in the effectiveness of Article XII resulted in an evolutive approach to the interpretation of Article X11, neither the ordinary meaning of the words “a new road or a new canal to be extended” nor the fact that Article X11 deals with construction only, were discarded. This is illustrated by the following statement of the Tribunal on the allocation of the costs of the adaptation and modernization:

[A]lthough 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?⁴⁵

The Tribunal decided that neither the Netherlands nor Belgium is to bear the costs of adaptation and modernization alone. These costs, including those for environmental measures, are in principle for Belgium. The Netherlands, however, has an obligation to pay for the cost items estimated at 100 million euro referred to above, for which it already offered to pay for during the negotiations, as well as for any particular quantifiable advantages it derives from the reactivation on the part of the route which it uses extensively. Moreover, the costs for the tunnel in the Meinweg are to be shared by the Netherlands and Belgium on an equal basis. This, according to the Tribunal, was “attributable to the past conduct of both of the Parties”. By this the Tribunal meant that the Netherlands, when establishing the nature reserve in the Meinweg, ignored the Belgian right of transit, even though Belgium in February 1987 drew attention to this right, whereas Belgium terminated its use of the track in 1991 and did not inform the Netherlands in a timely fashion of a request for reactivation.⁴⁶

On the basis of the Award both Parties will have to pay more than they anticipated.

Departing from the rough estimate in December 2002 of the total costs of the long term reactivation at 500 million euro, the Netherlands will have to pay 100 million euro for the three cost items mentioned in section 2.2, as well as 75 million towards the costs of the tunnel in the Meinweg. This adds up to 175 million euro, which is more than the 140 million the Netherlands offered to pay during the negotiations.⁴⁷ Belgium will have to pay 325 million euro as opposed to the 100

⁴⁴ Award, para. 84.

⁴⁵ Award, para. 219.

⁴⁶ Award, para. 243.

⁴⁷ The Netherlands offered 80 million euro, if Belgium would waive the temporary use of the Iron

million euro it was prepared to contribute. An uncertain factor in the division of the costs between the parties are those for particular quantifiable advantages which the Netherlands has to bear and for which no reliable estimate can be given. The Tribunal advised the Parties to set up a committee of independent experts to engage in the task of determining the costs of the reactivation.⁴⁸

With regard to the Netherlands' right on territorial sovereignty the Tribunal observed that:

[T]he 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.⁴⁹

The *dictum* on this issue stated, that the legislation of the Netherlands was applicable to the reactivation of the Iron Rhine as long as it did not amount to a denial of Belgium's right of transit or rendered the exercise by Belgium of its right of transit unreasonably difficult.⁵⁰ The Tribunal also decided that the measures detailed in the Preliminary Study with regard to the reactivation of the track for the use by 43 trains in 2020 could not be regarded as amounting to a denial of Belgium's right of transit or render the exercise of the right unreasonably difficult.⁵¹

Thus the principle of reasonableness will play a central role in the execution of the Award. Few problems are to be expected where it concerns the long-term reactivation, as the Tribunal carefully explained the rights and obligations of the Parties in this respect.

The Tribunal was not requested to decide on the issue of the temporary use of the Iron Rhine track by Belgium. In its Request for an Interpretation of the yard, Belgium asked the following question:

[S]hould the finding that the Netherlands' requirement may not amount to a denial of Belgium's right of transit nor render unreasonably difficult the exercise by Belgium of its right of transit (§§ 239(c) and 241(e)) be interpreted as applying to the issue of temporary use of the Iron Rhine,⁵²

Paragraphs 239(c) and 241(e) of the Award refer to the decision of the Tribunal that the application of Dutch legislation may not amount to a denial of the right of transit or render the exercise of the right unreasonably difficult. The Netherlands, in its reaction to the Belgian Request, confirmed that it followed from the award that *any* use of the Iron Rhine would be subject to these paragraphs. This was also the view of the Tribunal, which, in line with this observation remarked that:

Rhine Track.

⁴⁸ Award, para. 235. At the time of the completion of this paper, discussions on the institution of this committee were underway.

⁴⁹ Award, para. 87.

⁵⁰ Award, para. 239.

⁵¹ Award, para. 205.

⁵² Interpretation of the Award, para. 14.

[T]he Award may not be interpreted as meaning that Belgium had no right to temporary use. Nor is the Award to be interpreted as containing any pronouncement by the Tribunal upon the circumstances in which any such right may be exercised.⁵³

So, the Parties are more or less left to their own devices where it concerns the reasonableness or unreasonableness of temporary use of the Iron Rhine track by Belgium. Matters to be discussed in this respect are the financing of such use, the time during which it would be permitted and the measures necessary from a functional and environmental point of view.

As explained above, the temporary use was part of the compromise in the March 2000 MoU. According to Belgium this MoU lapsed “by reason of the fact that the decisions contemplated therein were not taken within the specified limited time”.⁵⁴ Nevertheless, the Tribunal observed, that:

[P]rinciples 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.⁵⁵

It goes without saying that this suggestion of the Tribunal should be seen against the background of the Award and that the Parties should take into account that the circumstances in March 2000 differ from the present situation. After all, the Tribunal stated that the measures imposed by the Netherlands with regard to the preparation of the track for the long-term use do not render the exercise of the right of transit by Belgium unreasonably difficult. Therefore, there is a fair case to be made that Belgium, if temporary use would materialize, would have to end any temporary use to allow for the works to be done to prepare the track for use by the 43 trains in 2020 requested by Belgium.

3. SOME OBSERVATIONS ON THE JURISDICTION IN THE IRON RHINE CASE IN RESPECT OF THE LAW OF THE EUROPEAN COMMUNITY

3.1. THE AWARD

When discussing Article 31(3)(c) of the Vienna Convention, which states that, when interpreting a treaty, “any relevant rules of international law applicable in the relations between the Parties” should be taken into account, the Tribunal asserted that it would examine provisions of European law for reasons relating to its jurisdiction. It should be brought to mind that the Arbitration Agreement requested 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.

⁵³ Interpretation of the Award, para. 18.

⁵⁴ Reply, para. 31.

⁵⁵ Award, para. 157.

It cannot be denied that issues concerning European law played a role in the Iron Rhine case. This gives rise to the question whether the Iron Rhine Tribunal encroached upon the jurisdiction of the European Court of Justice (ECJ). This question attracted even more attention when, during the Iron Rhine arbitration procedure, the European Commission filed proceedings against Ireland in the so-called *MOX Plant case*, stating that Ireland had violated the exclusive jurisdiction of the ECJ by summoning the United Kingdom before an Arbitral Tribunal established under the UN Convention on the Law of the Sea (UNCLOS),⁵⁶ which is a mixed agreement concluded on behalf of the European Community by almost all EU Member States.⁵⁷ The Commission was of the opinion that the provisions of UNCLOS invoked by Ireland fell under the competence of the Community and should be brought before the ECJ.⁵⁸ At that time, the Arbitral Tribunal set up under UNCLOS already suspended its proceedings as it was concerned about its jurisdiction to decide the case.⁵⁹

Before turning to a short exposition on the positions of the parties in the Iron Rhine case and the decisions of the Tribunal in this respect, it should be explained that the Netherlands and Belgium, during their negotiations on the Arbitration Agreement, realized that they had a problem on their hands. They agreed that the core of their dispute related to questions of general international law and that a procedure on the basis of Article 239 of the EC Treaty, which provides EU Member States with the means to submit disputes relating to the subject matter of the Treaty to the ECJ, did not seem the obvious way of dealing with the matter. Thus, in July 2003 representatives of the Netherlands and Belgium asked for the advice of the office of the legal advisor of the European Commission. This resulted in a joint letter of 26 August 2003 to the European Commission, in which the parties committed themselves, “should the eventuality of an application or interpretation of community law arise in the course of the procedure”, “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”. The Tribunal received a copy of this letter and consequently had an instrument at its disposal to obtain the view of the EU institutions, if need be.⁶⁰

The Tribunal made no use of this instrument. It acknowledged that it was in a position to use Article 234 of the EC Treaty and thus to request a preliminary ruling of the ECJ, as this is reserved to domestic courts.⁶¹ However, in the view of the Tribunal, it found itself in a position analogous to a domestic court and therefore applied the so-called CILFIT criteria,⁶² which meant, in words of the Tribunal,

⁵⁶ UNTS, 1833, p. 3.

⁵⁷ Permanent Court of Arbitration: Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the UN Convention on the Law of the Sea for the Dispute Concerning the MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea (*Ireland v. United Kingdom*), <http://www.pca-cpa.org>. See also Reply, paras. 3-6.

⁵⁸ *Commission v. Ireland* (Case C-459/03) lodged on 30 October 2003.

⁵⁹ *MOX Plant case*, Order No. 3, 24 June 2003.

⁶⁰ Award, paras. 15 and 98.

⁶¹ Award, para. 102.

⁶² Case 283/81, *Srl CIL FIT and Lanificio di Gavardo SpA v. Ministero della Sanità*, [1982] ECR

that it would determine “whether the references to EC law have the effect that the dispute that has arisen between the Parties requires an ‘interpretation’ of EC law in the sense of conclusiveness, or relevance ...”.⁶³

The Tribunal then elaborated on the three issues of EC law presented by the Parties, *i.e.* the law on the trans-European networks (TEN), EC environmental law and Article 10 of the EC Treaty, the so-called loyalty clause.

Articles 154, 155 and 156 of the EC Treaty refer to the establishment of a trans-European network in the areas of transport, telecommunication and energy infrastructure and provide for guidelines identifying projects of common interest to be supported through the EC Cohesion Fund. Decision 1692/96/EC refers to the trans-European transport network and encourages Member States to carry out projects of common interest.⁶⁴ Section 3 of this Decision is devoted to a trans-European rail network. The Decision is concretized by several Regulations, such as Regulation (EC) No. 807/2004 which lays down the rules for the granting of Community financial aid - up to a ceiling of 10 % of the investment costs.⁶⁵

In the framework of the TEN the reactivation of the Iron Rhine project is listed as a priority project on which the work is due to start before 2010.⁶⁶ Belgium stressed this listing and also the advantages, from the view of sustainable development, of rail transportation as opposed to transportation by road (“modal shift”). Moreover, in its Memorial Belgium stated that Decision 1692/96/EC contained the obligation for the Netherlands to finance the Iron Rhine project on its territory. However, it abandoned this position in its Reply, stating that, with regard to cost issues, it did not rely on provisions of EC law.⁶⁷

In reaction to the Belgian view the Netherlands explained that, in its opinion, the TEN system had very little relevance for the case at hand. It submitted that it supported the Belgian initiative to put the Iron Rhine on the TEN list of priority projects, so as to be able to obtain financial support of the EC.⁶⁸ Moreover, it pointed out that the effect of modal shift was controversial and that Belgium did not explain why the alleged advantages of modal shift should prevent it from taking measures to protect the environment in special conservation areas, especially since Article 8 of Decision No. 1692/96/EC stated that TEN projects must take environmental protection, and in particular the Birds and Habitats Directives, into account.⁶⁹

The Tribunal shared the Dutch opinion on the limited relevance of the TEN System and concluded that the inclusion of the Iron Rhine railway in the TEN

3415.

⁶³ Award, paras 103-106.

⁶⁴ Decision No. 1692/96/EC of 23 July 1996 (OJEC 1996 L 228, P. 1) of the European Parliament and of the Council relating to Community guidelines for the development of the trans-European transport network.

⁶⁵ Regulation (EC) No. 807/2004 of the European Parliament and of the Council of 21 April 2004 (OJEC 2004 L 143, p. 46).

⁶⁶ Regulation (EC) No. 884/2004 of the European Parliament and of the Council of 29 April 2004 (OJEC 2004 L. 167, p. 1), Annex II.

⁶⁷ Memorial, paras. 20 and 22; Reply, paras. 61, 119.

⁶⁸ Counter-Memorial, para. 2.9.3.

⁶⁹ Counter-Memorial, paras. 2.9. and 2.9.3.

list of priority projects “does not give rise to the necessity for the Tribunal to engage in the interpretation of EC (*i.e.* TEN) law, ... because this inclusion has not created any rights, or obligations, for the parties beyond what Article XII of the 1839 Treaty of Separation already provides”.⁷⁰

The references by Belgium to EC environmental protection law focused on the designation by the Netherlands of the Meinweg as a special area of conservation according to the Birds and Habitats Directives. Belgium asserted that the Netherlands could have avoided designating the Meinweg or that a strip of land (The Iron Rhine track) could have been exempted from this designation. Furthermore, it objected to the way in which the Netherlands applied Article 6 of the Habitats Directive.⁷¹

The Netherlands objected to these Belgian contentions. In addition, it submitted that a report prepared by independent experts showed that the contested tunnel in the Meinweg was not required by its regulations implementing the Birds Habitats Directives, but that it ensued from its Flora and Fauna Act which, as a matter of fact, is applicable nation-wide and not only to protected areas, as well as from the status of the Meinweg as a national park and as a “silent area”. It also referred to Article 176 of the EC Treaty, which allows Member States to introduce more stringent measures to protect the environment than the EC Treaty and EC secondary law require.⁷²

In the end, the fact that the tunnel in the Meinweg emanated from Dutch national law and not, directly or indirectly, from EC law, prevented a request from the Tribunal to the parties to present, at least this aspect of the case, to one of the EC institutions. The Tribunal stated, that it was not necessary to interpret The Habitats Directive in order to render its Award.⁷³

With regard to Article 10 of the EC Treaty Belgium stated that this provision did not oblige it to pay for measures on Dutch territory.⁷⁴ The Netherlands refrained from a reaction, having made abundantly clear that Article XII was the only basis for the right of transit and thus for the relevant rights and obligations. The Tribunal decided that the question of obligations arising under Article 10 was “not determinative or conclusive in the sense of bringing Article 292 of the EC Treaty into play” and that it was not necessary for the Tribunal to interpret the EC law referred to in order to render its Award.⁷⁵

3.2. CONCLUSION

Although the Tribunal concluded that the issues at stake did not require an interpretation of EC law, in reality the Tribunal *did* interpret and apply EC law, as it decided that it was in a position analogous to a domestic court and then proceeded to apply the CILFIT criteria.

⁷⁰ Award, paras. 117-120.

⁷¹ Memorial, paras. 31 and 72; Reply, paras. 67, 68.

⁷² Counter-Memorial, para. 3.3.5.6.A.

⁷³ Award, para. 137.

⁷⁴ Memorial, para. 75.

⁷⁵ Award, paras. 138-141.

On 18 January 2006, Advocate General Poiares Maduro of the ECJ delivered his Opinion on the *MOX Plant* case. It is interesting to see how this Opinion relates to the Iron Rhine case.⁷⁶

Even though EC law plays a role in both cases, there are significant differences between the *MOX Plant* and Iron Rhine case.

To start with, the Netherlands and Belgium, in contrast to Ireland, took steps to obtain the view of the European Commission and provided the Arbitral Tribunal with an instrument to obtain the necessary decisions from the EC institutions. In paragraph 58 of his Opinion, the Advocate General agrees with the contention of the European Commission that Ireland should have consulted with the competent Community institutions before initiating dispute settlements. This was precisely what the Netherlands and Belgium did.

In the second place the Iron Rhine Tribunal dealt with a very specific and relatively isolated case in which it interpreted a bilateral treaty and not with the comprehensive multilateral system ensuing from UNCLOS. Nevertheless, if the following statement by the Advocate General will set the standard for the jurisdiction of the ECJ, the Iron Rhine Arbitration case may – in retrospect – have infringed on EC law. Explaining Article 292 EC Treaty, the Advocate General wrote:

After all, there is no threshold in the rules establishing the Court's jurisdictional monopoly. Whenever Community law is concerned, Member States must settle their differences within the Community.⁷⁷

However, this statement should probably be considered against the background of other passages of the Opinion and in particular:

[T]he Court's exclusive jurisdiction in disputes between Member States concerning Community law is a means of preserving the autonomy of the Community legal order. It serves to ensure that Member States do not incur legal obligations under public international law which may conflict with their obligations under Community law.⁷⁸

The questions thus are whether the Netherlands and Belgium endangered the autonomy of the Community legal order and whether they did incur legal obligations under public international law which may conflict with their obligations under Community law. There are several reasons for answering these questions in the negative.

In the first place, the European Commission did not, either before the Netherlands and Belgium decided to bring their case before an *ad hoc* Tribunal, or after the Award had been rendered, assume that EC law would be infringed. After all, the Commission has not filed proceedings against the Netherlands and Belgium so that, at least for the time being, it may safely be assumed that the Netherlands and Belgium met not only the criteria phrased by the Advocate, but

⁷⁶ Opinion of Advocate General Poiares Maduro delivered on 18 January 2006.

⁷⁷ Opinion, para. 14.

⁷⁸ Opinion, para. 10.

also the rule of Article 10(2) of the EC Treaty, that “Member States shall abstain from any measure which would jeopardize the attainment of the objectives of the treaty”.

The second reason is of a more substantial character. The *MOX Plant* case before the Arbitral Tribunal established under UNCLOS referred to above was preceded by procedures at the International Tribunal for the Law of the Sea (ITLOS) and at an *ad hoc* Tribunal set up under the OSPAR Convention.⁷⁹ These cases merit attention. ITLOS emphasized the separate and distinct nature of the regime of the EC Treaty, the OSPAR Convention and UNCLOS, stating that:

[E]ven if the OSPAR Convention, the EC Treaty and the Euratom Treaty contain rights and obligations similar to or identical with the rights or obligations set out in the [Law of the Sea] Convention, the rights and obligations under those agreements have a separate existence from those under the Convention;

[...] that the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*.⁸⁰

And the OSPAR Tribunal pointedly refused to apply EC law at all, as:

[E]ach of the OSPAR Convention and Directive 90/313 is an independent legal source that established a distinct legal regime and provided for different legal remedies.⁸¹

The ITLOS and the OSPAR Tribunal thus viewed the legal regimes under the UNCLOS and under the OSPAR Convention as self-contained, leaving open, *inter alia*, questions on the fragmentation of general public international law and the way to contain this, the legal hierarchy between general public international law and self-contained regimes and between self-contained regimes among themselves, in this case between the UNCLOS, OSPAR and EC regimes.⁸²

Such questions are beyond the scope of this paper. It suffices to point out that the Iron Rhine Arbitral Tribunal, by finding itself in a position analogous to a domestic court, automatically acknowledged the precedence of the ECJ on the issues at stake. Moreover, the equation of the Tribunal to a domestic court will not prevent a Dutch domestic court, if necessary, to request a preliminary ruling on these issues with regard to the final decision by the Netherlands on the reactivation of the railway.

⁷⁹ Convention for the Protection of the Marine Environment of the North-East Atlantic, 22 September 1992, ILM 1992, p. 1069. International Tribunal for the Law of the Sea: the *MOX Plant* case (Ireland v. United Kingdom) – Request for Provisional Measures Order (3 December 2001), <http://itlos.org>. Permanent Court of Arbitration: Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention: Ireland v. United Kingdom – Final Award (2 July 2003), in: 42 ILM 2003, <http://pca-cpa.org>.

⁸⁰ ITLOS Judgment, at paras. 50-52.

⁸¹ OSPAR Award, at para. 142.

⁸² See International Law Commission, Fifty-sixth session, Geneva, Report of the Study Group on fragmentation of international law ILC(LVI)/SG/FIL/CRD.1/Add.1, 4 May 2004 and ILC(LVI)/SG/FIL/CRD.3/Rev.1, 28 May 2004, at p. 9.

In conclusion it may be asserted that the Iron Rhine Arbitration Tribunal has found a solution for dispute settlement cases which concentrate on general international law but still touch upon EC law. Admittedly, this solution may be feasible for only very few cases where the jurisdiction of the ECJ concurs with one of the various international courts and tribunals. Time, and the forthcoming judgment of the ECJ will tell if the rather hard line set out by the Advocate General in the MOX Plant case will be followed, or if constructions such as the Netherlands and Belgium and the Iron Rhine Arbitral Tribunal adopted will be permitted.⁸³

⁸³ But see: N. Lavranos, *Concurrent Jurisdiction: European and International*, EELR 2005, p. 213 at p. 221.