

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

**Award in the Arbitration regarding the Iron Rhine (“Ijzeren Rijn”) Railway
between the Kingdom of Belgium and the Kingdom of the Netherlands, decision
of 24 May 2005 - Interpretation of the Award of the Arbitral Tribunal, decision
of 20 September 2005**

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INTERPRETATION OF THE AWARD OF THE ARBITRAL TRIBUNAL, DECISION OF 20 SEPTEMBER 2005

INTERPRÉTATION DE LA SENTENCE DU TRIBUNAL ARBITRAL, DÉCISION DU 20 SEPTEMBRE 2005

Interpretation–authoritative interpretation by the Tribunal of its own Award–interpretation in the light of its own intention at the time of rendering the Award–interpretation not responding to the various observations and comments of the Parties.

Obligation to repair–obligation understood as a financial rather than a construction obligation–obligation to bring back the railway to the levels of equipment maintained during its light regular use–significant upgrading costs implied by the future intensive use not covered–current safety standards required to be taken into account.

Temporary use of the railway–applicability of the findings of the Award to any use of the railway, including its temporary use.

Allocation of costs–no change resulting from the modification of financial estimates after the Award.

Interprétation–interprétation officielle par le Tribunal de sa propre sentence–interprétation à la lumière de sa propre intention lors de l'exposé de la sentence–interprétation ne répondant pas aux diverses observations et commentaires des Parties.

Obligation de rénover–obligation comprise comme une obligation financière plutôt que matérielle–obligation de remettre la voie ferrée au niveau d'équipement maintenu pendant son utilisation régulière limitée–exclusion des coûts liés à la mise à niveau impliquée par la future utilisation intensive–obligation de prendre en compte les standards de sécurité actuels.

Utilisation temporaire de la voie ferrée–application des conclusions de la sentence à tout usage de la voie, y compris son utilisation temporaire.

Répartition des coûts–aucun changement résultant d'une modification des estimations financières postérieurement à la sentence.

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INTERPRETATION OF THE AWARD OF THE ARBITRAL TRIBUNAL

1. On 25 July 2005, Belgium, pursuant to Article 23(1) of the Rules of Procedure for the Arbitration Regarding the Iron Rhine (“IJzeren Rijn”) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, requested an Interpretation of the Award rendered by the Arbitral Tribunal on 24 May 2005.

2. The application of Belgium comprised three Requests, which were each accompanied by explanations and contentions, and by Exhibits.

3. By letter dated 25 July 2005, the Netherlands was invited to comment on Belgium's Requests. Comments of the Netherlands on each of the Belgian Requests for Interpretation of the Award were received by the Tribunal on 15 August 2005.

4. The Tribunal has examined carefully the contentions of each of the Parties. At the same time, it notes that it is for the Tribunal to interpret how the Award is to be understood, in the light of its own intentions at the time of rendering the Award. The ensuing paragraphs thus do not respond to the various observations and comments of the Parties but rather constitute an authoritative interpretation by the Tribunal of its own Award under Article 23(1) of the Rules of Procedure.

5. First Request:

Should the Award be interpreted as meaning that the Netherlands is under the obligation to bring at its own expenses the Iron Rhine railway back to a level allowing for a use of the Iron Rhine comparable to the one that prevailed during the regular albeit light use of the line prior to discontinuation of such use in 1991?

6. The Tribunal responds as follows.

7. At paragraph 76, the Award states: “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.”

8. At paragraph 89, the Tribunal found that the Netherlands law which provides for the maintenance of railways by reference to the level of traffic occurring at a particular time did not violate Belgium's rights under Article XII of the 1839 Treaty of Separation. The Tribunal observed that “[t]his 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.”

9. In the chapter of the Award on the allocation of costs (paragraph 225), the Tribunal recalled 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.”

10. While this finding is not repeated in the Tribunal’s Replies to the specific Questions put to it, at paragraphs 238-244 of the Award, the finding was a necessary step to the formulation of those Replies.

11. The Tribunal first observes that the reference to the Netherlands’ obligation to restore the line to its 1991 condition is to be understood as a reference to financial obligations (rather than construction obligations) incumbent upon the Netherlands as regards outstanding maintenance in the event of a reactivation of the line. That is clear from the reference to cost allocation in each of the paragraphs of the Award cited above.

12. If a decision is taken by the Parties to reactivate the Iron Rhine Railway and if the Parties have agreed on the modalities of its future use, the allocation of costs for its reactivation (as specified in the Award in the Reply to Question 3) shall include as an element the obligation of the Netherlands to bear that portion of the costs that represents the expenses that would have been incurred for outstanding maintenance of the track, including its safety features, to permit use comparable to the one that existed in 1991. The Tribunal recalled at paragraph 225 of its Award that the Netherlands had recognized that it would be “responsible for the maintenance of a reactivated line.”

13. The findings of the Tribunal cited above are to be understood as meaning that the financial obligations of the Netherlands (arising in the eventuality described in the preceding paragraph) would relate to safety standards (as an element of maintenance) as current Netherlands legislation would require and not as they may have been applicable in 1991.

14. Second Request:

Should the Award be interpreted as meaning that Belgium has no right to temporary use of the Iron Rhine line?

Should the finding that the Netherlands’ requirements 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, together with the Tribunal’s findings on the principles and procedures laid down in the March 2000 MoU, contained in paragraphs 157 and 158 of the Award?

15. Belgium in its Request states that “it is beyond doubt that the Tribunal decided not to uphold Belgium’s submission” regarding immediate provisional driving and that “[i]t is also beyond doubt that the Tribunal did not rule on issues regarding temporary use.” Belgium continues that: “However, this does not mean that the Award may be interpreted as meaning that

Belgium has no right to temporary use, nor that temporary use is not governed by principles contained in the Award, notably the principles of reasonableness and good faith referred to in paragraphs 239(c), 241 (e) and 157.” Belgium seeks an interpretation as to these matters.

16. The Netherlands has observed to the Tribunal “that it believes that the decision-making on any actual use of the Iron Rhine is reserved to the Parties.”

17. The Tribunal responds as follows.

18. The Award may not be interpreted as meaning that Belgium has 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.

19. At paragraph 237 of its Award, the Tribunal noted “that the financing of temporary use is not, in terms, among the formal Questions put to it.” Accordingly, the Replies to the Questions do not include any findings concerning allocation of costs for any temporary use.

20. The Tribunal has made no findings as to the legal validity or correct interpretation of the Memorandum of Understanding signed on 28 March 2000 by the Belgian and the Netherlands Ministers of Transport, these not being asked of it in the Questions put. The Tribunal has confined itself to stating that “the principles and procedures laid down in the March 2000 MoU... will prove 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” (Award, paragraph 157).

21. The Tribunal has found that the application of Dutch legislation and the decision-making powers based thereon 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. These findings, as others in the Award, are applicable to any use of the Iron Rhine.

22. Third Request:

Should the Tribunal’s ruling on the apportionment of costs in segment C if a loop around Roermond is agreed, be interpreted as laying with Belgium the costs of a reactivation of the historic route through Roermond, when such costs result from measures required by the Netherlands after the award had been rendered, over and above those included in the figures presented to the Tribunal, the Dutch legislation of general application remaining unchanged?

23. The Tribunal responds as follows.

24. The pleadings of the Parties and the Annexes thereto suggested that both Parties envisaged that any reactivation of the Iron Rhine would be likely to entail a deviation from the historic route by means of a loop around the town of Roermond. The Tribunal had before it no other scenario for segment C.

25. When it formulated its Replies to Question 3, at paragraph 244(d), and the principles there stated, the Tribunal did not suppose that the projected estimates for the contemplated works it had before it, provided by the Parties, would remain unchanged through time. At the same time, the Tribunal has made clear in its Award that the application of Dutch legislation and the decision-making powers based thereon 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.

26. The Tribunal's ruling on the apportionment of costs in segment C, if a loop around Roermond is agreed, is to be interpreted as applicable to the scenario before it and not to any other hypothetical alternative.

Done at the Peace Palace, The Hague, this 20th day of September 2005,

(Signed) Judge Rosalyn Higgins
President

(Signed) Professor Guy Schrans

(Signed) Judge Bruno Simma

(Signed) Professor Alfred H. A. Soons

(Signed) Judge Peter Tomka