

The *Iron Rhine* Case – A Treaty’s Journey from Peace to Sustainable Development

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Abstract

This article reviews the *Iron Rhine* case before an arbitral tribunal established under the rules of the Permanent Court of Arbitration. It inquires how an old peace treaty is interpreted to resolve a current dispute with the help of the principle of sustainable development. Three points of law are critically assessed. Firstly, the way in which the tribunal establishes its jurisdiction vis-à-vis the ECJ. Secondly, how it determined the applicability of the treaty of separation. And finally, in which way it employed the principle of sustainable development. The article concludes by reflecting on the way in which judgments and awards should be understood and discussed by legal scientists.

I. Departure – The Facts

Thinking about peace and sustainable development, one tends to think about mutual relations and preferences like it is often referred to in the relation of peace and justice: are those principles complementary or exclusive, necessary prerequisites or alternatives in international cooperation: And, or, neither ... nor, either ... or, and so forth? The notion of peace seems to be as

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old as humanity.¹ Since the beginning of human thought the problem of peace has been the maybe most fundamental problem of humanity.² The term sustainable development is rather recent. Not by accident both notions play a very prominent role in the field of international cooperation. Where peace is threatened or even breached, international cooperation is often needed to restore or keep the peace. On the other hand, international cooperation has often the aim to develop and further societies. In doing so, many environmental and societal issues have to be taken care of to make the development lasting and sustainable. Like in the case of peace and justice, peace and sustainable development could be construed as mutually exclusive as well as reinforcing each other. The *Iron Rhine* case,³ adjudicated by a tribunal under the rules of the Permanent Court of Arbitration, is a very interesting case to illuminate how those concepts interrelate.

The Treaty of Separation of 1839⁴ resulted from a dispute between the then “newly independent” Kingdom of Belgium and the United Kingdom of the Netherlands, which was a fragile state at that time. At the Conference of Vienna of 1815 it was tried to establish the United Kingdom of the Netherlands by merging the Austrian Netherlands with the former Republic of the United Provinces but the state building process failed and independence was declared on 4.10.1830. In the same year, the five permanent powers of the time recognised the Kingdom of Belgium at their conference in London while the King of the Netherlands did not accept the secession until 1839, when the said Treaty of Separation was concluded. Amongst other provisions the United Kingdom of Belgium was granted a right to passage through the territory of the United Kingdom of the Netherlands to link the port of Antwerp to German territory in Art. XII.⁵ It took the parties until

¹ And as the notion of war, one tends to say.

² See E. Beiser, Friede, in: J. Ritter: Historisches Wörterbuch der Philosophie, Vol. II, 1976, 1114.

³ Award in the Arbitration regarding the *Iron Rhine* (“Ijzeren Rijn”) Railway (the Kingdom of Belgium and the Kingdom of the Netherlands), decision of 24.5.2005, RIAA XXVII, 35 et seq.

⁴ Consolidated Treaty Series (“C.T.S.”), 1838-1839, Vol. 88, 427.

⁵ Art. XII reads in the translation rendered in *Iron Rhine* (note 3), 18, para. 32: “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

1873 to agree on the Iron Rhine Treaty⁶ which sets out how to proceed. By that time, the approach of 1839 to build a “road or canal” was really outdated as trains were now state of the art. As human thinking captures the unknown in known terms, *Ludolf Campenhausen*, a German democrat and nationalist, found the metaphor Iron Rhine for the railway track that now preformed the function of rivers and canals.⁷ The track was well used until the Second World War. After, the track was only rarely used and traffic across borders stopped completely after 1991. While reserving is contractual right in the interim period, Belgium made concrete efforts to use the track again in 1998. By that time the Netherlands had implemented several environmental measures that caused the need to adapt the old route if the railway link was to be modernised as Belgium asked for. Those measures contained inter alia noise barriers, a partial deepening of the track and a tunnel of 6.5km and a rerouting of the historic track. As a dispute arose that could not be resolved by other means, the parties referred the dispute to an arbitral tribunal and asked whether the Netherlands were entitled to implement these environmental measures and who had to bear the costs.

The tribunal confirmed Belgium’s right to transit⁸ as well as the right of the Netherlands to implement environmental measures on its territory,⁹ and held that the route could not be altered without the consent of Belgium.¹⁰ In relation to the costs, the tribunal held that this question could be resolved by the Treaty of Separation and that the costs were incumbent on Belgium, while the Netherlands had to contribute if quantifiable advantages were derived from the modernisation. The tribunal went on to apply this logic to certain parts of the railway tracks as far as possible and left it for the parties to negotiate the exact allocation of costs.

II. Journey

One element that makes the case at hand most interesting is the amount of time that elapsed between the conclusion of the treaty and the settlement

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.”

⁶ C.T.S., 1872-1873, Vol. 145, 447.

⁷ *L. von Campenhausen*, *Zur Eisenbahn von Köln nach Antwerpen* 1833, 7.

⁸ *Iron Rhine* (note 3), 115, para. 220.

⁹ *Iron Rhine* (note 3), 111, para. 205.

¹⁰ *Iron Rhine* (note 3), 119, para. 232.

of the dispute. Therefore, this article seeks to track the journey the tribunal made from a time when the parties had just ended a war of secession to a time of good neighbourhood under the umbrella of the European Union. The aim of this article is not only to explain *what* the tribunal held but *how* it arrived at its conclusions. The present study will, therefore, focus on three major issues of the award in the context of the possible other outcomes, which are:

- The jurisdiction of the tribunal in the face of European law;
- The applicability of the treaty to the modernisation of the railway link;
- The role the principle of sustainable development played for the resolution of the dispute.

1. Between Inadmissibility and Proliferation

The jurisdiction of the tribunal resulted from an ad hoc agreement between Belgium and the Netherlands. While one would imagine that this was a secure source of jurisdiction, the exchange of notes contained a clause stating that the

“... Arbitral Tribunal is requested to render its decision on the basis of international law, including European law if necessary, while taking into account the Parties’ obligation under article 292 of the EC Treaty¹¹ [article 344 Treaty on the Functioning of the European Union (TFEU)].”

The parties to the dispute had raised several questions of European law. Belgium relied on provisions regulating the Trans-European Networks as well as article 10 of the EC Treaty [which was changed and adapted in article 4(3) of the Treaty of the European Union].

The Netherlands designated certain areas as environmentally protected and relied inter alia on the Habitat Directive¹² as well as on article 175 of the EC Treaty [article 192 TFEU]. Article 292 of the EC Treaty [article 344 TFEU] provides that “Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein”. So there were two possible extreme stances the tribunal could take. The first was that the crite-

¹¹ See the agreement between the parties as expressed in the note of the Kingdom of Belgium, 22.7.2003, A.71.92/3110, 2; and the reply from the Ministry of Foreign Affairs of the Kingdom of the Netherlands, 23.7.2003, DJZ/VE-646/03, 3, all obtainable at <http://www.pca-cpa.org>.

¹² Council Directive, 92/43/EEC, 21.5.1992, 1992 O.J. (L 206), 7.

ria of article 292 of the EC Treaty [article 344 TFEU] were applicable which would result in the inadmissibility of the case before the tribunal. This would have contradicted the express wishes of the parties to submit the dispute to the arbitral tribunal. The second was that the tribunal could apply European law without any qualification. This would have furthered a trend in international law that is referred to as multiplication or proliferation¹³ of courts and tribunals in international law, which forms part of the wider debate on fragmentation. This refers to situations in which courts and tribunals apply the same legal norms to possibly the same dispute, with the effect that they might interpret the very same provision differently¹⁴ or even that the very same case is decided differently.¹⁵

The tribunal firstly determined the law in the abstract. It focused on the text of the EC Treaty to determine the meaning of article 292 of the EC Treaty [344 TFEU], which prohibits Member States of the EU to submit a dispute concerning the interpretation or application of the EU-Treaties to any method of settlement other than those provided for in the EU-Treaties. European law provides for the jurisdiction of the ECJ in article 239 of the EC Treaty [273 TFEU].¹⁶ The tribunal took this provision into account but also deemed article 234 of the EC Treaty [267 TFEU] to be relevant for the interpretation. It found itself in a position “analogous to that of a domestic court within the EC”.¹⁷ The tribunal stated that it was willing to halt the proceedings if a situation arose in which a national court would have to re-

¹³ Among many contributions see especially the special issue, *The Proliferation of International Tribunals: Piecing together the Puzzle*, *Journal of International Law and Politics* 31 (1999), with various accounts on the matter; *K. Oellers-Frahm: Multiplication of International Courts and Tribunals and Conflicting Jurisdiction, Problems and Possible Solutions*, *Max Planck UNYB* 5 (2001), 67 et seq.; *J. Alvarez, The New Dispute Settlers: (Half) Truths and Consequences*, *Tex. Int’l L. J.* 38 (2003), 405 et seq.

¹⁴ The most famous example is the requirement for the attribution of personal conduct to a state. The ICJ laid out the “effective control” test in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1984, paras. 105 et seq. The ICTY found that only “overall control” was necessary in *Tadić*, ICTY, IT-94-1, Trial Chamber, Opinion and Judgement, 7.5.1997, 117 et seq., paras. 588 et seq. The ICJ, nevertheless, adhered to its test in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Report 1991, 15 et seq., obtainable at <http://www.icj-cij.org>.

¹⁵ So for example the different legal assessment of the same facts by two investment arbitral tribunals in *Lauder v. The Czech Republic*, Final Award, 3.9.2001 and *CME Czech Republic BV v. The Czech Republic*, Partial Award, 13.9.2001.

¹⁶ One can, of course, only speculate why the parties did not submit the case to the ECJ. If the ECJ acts as an arbitral tribunal the parties cannot alter its composition or its procedure which might be in part an explanation why the parties preferred to submit the dispute to an arbitral tribunal.

¹⁷ *Iron Rhine* (note 3), 80, para. 103.

fer the case to the ECJ.¹⁸ This referral would not happen in analogy to article 234 of the EC Treaty [267 TFEU]. Being in an analogous situation does not mean to apply an analogy. The tribunal stated that the two parties would have to refer the case according to article 239 of the EC Treaty [273 TFEU].¹⁹ The tribunal went on to apply its construction of the EC-Treaty to the EC-Instruments the parties had referred to and found no reason that would necessitate a referral to the ECJ. The way the tribunal established and defended its jurisdiction was subject to critique. Some argued that an arbitral tribunal could not be considered as a court within the meaning of article 234 of the EC Treaty [267 TFEU].²⁰ A close reading, however, shows that the tribunal did not apply this provision in analogy but only relied on the requirements for guidance in its alternative construction. At no stage did the tribunal say that it would rely on article 234 of the EC Treaty [267 TFEU].²¹ Another point of critique was that the tribunal misapplied the criteria set out by the ECJ as it did in fact decide material questions concerning the interpretation of the Habitat Directive.²²

There is, however, a much more general argument against the construction of the tribunal. It employed a circular argumentation as “the conclusion that article 292 was irrelevant because EC law was not conclusive required in itself an interpretation of EC law by the tribunal”.²³ Had the tribunal really intended to refer questions of European law, that were in need of interpretation, to the ECJ, it would have had to begin with article 292 of the EC Treaty [344 TFEU]. According to the wording of article 292 of the EC Treaty [344 TFEU] European law forbids international courts and tribunals not only to interpret but also to apply European law. As it can be seen from article 234 of the EC Treaty [267 TFEU], European law sharply distinguishes between application and interpretation.²⁴ Under this provision, the courts of the Member States are empowered and sometimes even obliged to refer question of interpretation of European law to the ECJ.

¹⁸ ECJ Case C-283/81 ECR 1982, I-3415 margin numbers 12-20 – *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*.

¹⁹ The tribunal said that “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*) [emphasis added]”, *Iron Rhine* (note 3), 80, para. 103.

²⁰ N. Lavranos, *Regulating Competing Jurisdictions Among International Courts and Tribunals*, ZaöRV 68 (2008), 586; Y. Shany, *Regulating Jurisdictional Relations between National and International Courts*, 2007, 108 fn. 383.

²¹ *Iron Rhine* (note 3), 80, para. 103.

²² N. Lavranos, *The MOX Plant and IJzeren Rijn Disputes: Which Court Is the Supreme Arbiter?*, LJIL 19 (2006), 240 et seq.

²³ Y. Shany (note 20), 114.

²⁴ See only P. Craig/G. de Búrca, *EU Law, Text, Cases and Materials*, 4th ed. 2007, 494.

Nevertheless, the application of European law remains within their competence. By drawing this distinction European law seeks to achieve uniform interpretation and legal certainty through the abstract interpretation of the ECJ as well as effective enforcement through the application of the law to the facts of the case by the courts of the Member States.²⁵ If one contrasts the relationship between the ECJ and the Member States’ courts with that of the ECJ and international courts and tribunals it can be seen that while national courts are obliged to apply European law, article 292 of the EC Treaty [344 TFEU] entails a prohibition for Member States to submit their disputes concerning European law to international courts and tribunals other than the ECJ. This raises at least two serious doubts in relation to the construction of the tribunal in the *Iron Rhine* case. One could interpret article 292 of the EC Treaty [344 TFEU] rather narrowly, in the sense that a dispute is only concerning the application or interpretation when a specific question of European law is in dispute between the parties. But it can also be argued that the Member States must not refer a dispute to an international court or tribunal when a provision of European law applies to the dispute. Between these two extreme positions, there are more possible interpretations. The point the present author wants to stress here is that if the tribunal really intended to refer questions of interpretation, it would have had to refer the question of interpretation of article 292 of the EC Treaty [344 TFEU] to the ECJ. Secondly, as article 234 of the EC Treaty [267 TFEU] shows, it could be doubted whether national and international courts are in an analogous situation as the treaties oblige national courts and prohibit international courts to apply European law in general. As the tribunal expressly relied on that argument, it should have been confirmed by the ECJ as well.

Jurisdiction is a sensitive issue for courts and tribunals. Like for states, it means competence, influence and power. When it comes to the question of jurisdiction, a tribunal is not only a neutral and objective third party but also a *iudex in sua re*. It decides about its own competence and possibly about the effectiveness of the treaty to be applied. Comparing the approach of the tribunal to other cases, it can be seen that the provisions of jurisdiction are different and can be used in different ways by the competent interpreter. The ECJ has taken a very harsh view on the matter, finding that it had exclusive jurisdiction concerning the application and interpretation of

²⁵ See C. Gaitanides, Article 234, in: H. von der Groeben/J. Schwarze (eds.), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft*, 2003, para. 3.

European law in relation to international tribunals.²⁶ European law seems in that regard quite inflexible and apt to cause collisions. The Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) is quite similar in that regard, as it clearly attributes the decision about the admissibility of the dispute only to the OSPAR Arbitral Tribunal and does not take into account other judicial mechanisms.²⁷ It is no surprise that the OSPAR Arbitral Tribunal employed a similarly rigid approach and did not find it necessary to constrain its jurisdiction.²⁸ An interesting precedent of denying jurisdiction in favour of another tribunal was the *Mox-Plant* decision of a tribunal established according to the United Nations Convention on the Law of the Sea (UNCLOS), in which the tribunal stayed the proceedings so that the ECJ could decide.²⁹ Other than European law or the OSPAR Convention, UNCLOS provides that more judicial bodies are competent to apply and interpret the treaty.³⁰ Furthermore, article 282 of UNCLOS provides that other procedures agreed by the parties to a dispute should be applied in lieu of the procedures envisaged by UNCLOS. Therefore, UNCLOS seems to take into account other mechanisms for the settlement of disputes and it does seem consistent that the tribunal established under UNCLOS stayed the proceedings to wait for the decisions of the other judicial bodies. In contrast, the OSPAR-Tribunal and

²⁶ ECJ Case C-459/03 ECR 2006, I-4657 margin numbers 123 et seq. – *Commission of the European Communities v. Ireland*, see also S. Hindelang, *Der primärrechtliche Rahmen einer EU Investitionsschutzpolitik: Zulässigkeit und Grenzen von Investor-Staat-Schiedsverfahren aufgrund künftiger EU Abkommen*, WHI Paper 01/11 (2011), 10 et seq., obtainable at <http://www.whi-berlin.de>.

²⁷ See article 32(6)(c) of the OSPAR Convention.

²⁸ *Proceedings pursuant to the OSPAR Convention (Ireland and United Kingdom)*, decision of 2.7.2003, RIAA XXIII, 59 et seq., 100, para. 143. The tribunal did in fact say that the OSPAR convention entailed no constraints on the choice of dispute settlement. There seems to be a little more leeway than in European law if a wide interpretation of article 32(1) of the OSPAR Convention is employed. This rule envisages other mechanisms of dispute settlement as alternatives prior to an arbitral decision and, additionally, article 32(6)(a) of the OSPAR Convention obliges the tribunal to decide in accordance with international law, which could be interpreted as including European law. Taking into account that an arbitral tribunal has the competence to set its own rules of procedure according to article 32(6)(b) of the OSPAR Convention, it seems to be at least possible that the tribunal could try to avoid the multiplication of judicial proceedings.

²⁹ UNCLOS arbitral tribunal, *Mox Plant*, Suspension of Proceedings on Jurisdiction and Merits and Request for further Provisional Measures, Order No. 3 of 24.6.2003, 7 et seq., paras. 22 et seq., available at <http://www.pca-cpa.org>; In the provisional measures phase, the International Tribunal for the Law of the Sea has not declined prima facie jurisdiction, see *The MOX Plant Case (Ireland v. United Kingdom)* (Provisional Measures) ITLOS Case No. 10 (3.12.2001), paras. 41 et seq.

³⁰ See only article 287 UNCLOS.

the ECJ seemed to have acted according to the spirit of their treaty and asserted jurisdiction.

The tribunal deciding the *Iron Rhine* case proceeded in a similar fashion. It did what the compromise told it to do: rendering a decision while carefully avoiding to delve into European law. In this way the tribunal sought to find a middle course between proliferation and inadmissibility. It did so by employing a creative interpretation of the provisions of the EC Treaty, which is, as the present author has tried to show, not entirely consistent.

2. Between Inapplicability and Equity

As the tribunal found itself competent to determine the question, it was able to address the two major questions, namely, whether the Netherlands could implement those measures and who had to pay for them. Finding that it was within the competence of the Netherlands to protect the environment, it was unclear who had to pay for the adaptation and modernisation of the railway link to the new environmental standards. Article XII of the Treaty of Separation addressed the question how to build a new link. But was the treaty at all applicable to the situation as it only concerned the costs to build a new road and did not stipulate on who should disburse for the modernisation and adaptation of the link?

In deciding this question the tribunal found itself within a second dilemma: between non-liquet and equity. Had the tribunal thought that the modernisation and adaptation was not within the ambit of article XII, it could have pronounced a non-liquet, indicating that the situation was not regulated by international law and could not be resolved by legal means. This doctrine, which was advocated inter alia by *Julius Stone*,³¹ is taken up every once in a while by academics but has not been applied.³² The application of this doctrine would have been, however, contrary to the expectations of the parties whose memorials showed that they believed in a legal solution to the dispute. As the pertinent issues were at least not expressly addressed by the treaty, there was some room for the parties to differ on the legal answer to their dispute.

Article XII and its application are framed in a very binary fashion regarding the costs: either the modernisation can be considered as something like a

³¹ *J. Stone*, Non-Liquet and the Function of Law in the International Community, BYIL 35 (1959), 124.

³² *A. Pellet*, Article 38, in: A. Zimmermann/C. Tomuschat/K. Oellers-Frahm, *The Statute of the International Court of Justice – A Commentary*, 2006, 731 et seq., paras. 156 et seq.

new road or canal which meant that Belgium had to bear all the costs or modernisation is to be seen more as maintenance which would by implication through the subsequent practice of the parties be paid for by the Netherlands. The tribunal indeed decided that the treaty was applicable to the dispute which, therefore, had to be resolved under the treaty's provisions.

It went on to resolve the dispute in two steps. Firstly, it set out the general rule how the costs should be allocated; secondly, it applied those rules as far as possible to the present dispute. This approach strongly resembles the approach of equity decisions, especially concerning the delimitation of continental shelves.³³ In the *North-Sea Continental Shelf* case, the International Court of Justice operated in a very similar fashion. In a first step, it held that the coastal state does have a right to the continental shelf as part of its sovereignty.³⁴ That meant that the dispute was within the realm of law and could be resolved in principle by legal means. As there was, however, no way to determine legally how far this right extends, the ICJ prescribed an equitable solution.³⁵ It set out certain standards it derived from the principle of equity to guide the parties' negotiation on the matter.

The tribunal deciding the *Iron Rhine* case proceeded similarly. It established a general rule that could be applied to some parts of the track and was a guide for the negotiation of the parties concerning the rest. It held that Belgium would in general have to bear all the costs, but the Netherlands would have to contribute if the measures paid for by Belgium would amount to quantifiable benefits. This would be the case if the measures would have been obligatory independent from the modernisation of the railway track. The tribunal applied this general rule on the basis of the facts as far as possible and left it for the parties to negotiate the details. So far, it seemed to be a solution *infra* or *praeter legem*. The most expensive and contentious environmental measure was a tunnel under the *Meinweg* area, which was designated as a nature reserve and a silent area by the Netherlands. The tribunal found that the general allocation of costs had to be reversed. Generally, they had to be borne by the Netherlands as the designation had happened with the knowledge that Belgium wanted to re-establish the railway link. But as Belgium had claimed this only in very abstract terms, the tribunal held that it had to contribute to the costs. In effect the costs had to be split. This is, of course, a just result, but it does not fit into the general rule on the allocation of costs previously established by the tri-

³³ See for example *North-Sea Continental Shelf (Federal Republic of Germany v. Netherlands)*, ICJ Reports 1969, 3 et seq.

³⁴ *North-Sea Continental Shelf* (note 33), 22, para. 19.

³⁵ *North-Sea Continental Shelf* (note 33), 46 et seq., paras. 83 et seq.

bunal.³⁶ It is not at all clear, how article XII of the Treaty of Separation could be the basis for this result. It is hard to see, why this specific result should not be seen as equity *contra legem* to which the parties, of course, had not consented. Although the tribunal stated that it was not deciding *ex aequo et bono*,³⁷ it seems to have transgressed the boundary of its previous interpretation. The argument that was employed by the tribunal to interpret the old peace treaty in this extensive manner was the “principle of sustainable development”.

3. Between the Concrete Case and General International Law

The notion of sustainable development in its legal sense, on which the tribunal relied to achieve a just balance, has a very close relationship to equity.³⁸ The tribunal had to justify why it used a modern concept to interpret a treaty from 1839. It argued that according to the inter-temporal rule “regard should be had in interpreting article XII to juridical facts as they stood in 1839”.³⁹ This general rule could be altered if the terms to be interpreted were of a generic nature. Relying on *Gabčíkovo-Nagymaros*, the tribunal found that emerging norms could prompt an evolutive interpretation as well.⁴⁰ One is tempted to question this construction and the reasons of the tribunal to rely on the principle of sustainable development for the interpretation of the treaty. But the logical step that precedes the claim that a treaty has to be interpreted differently because a new rule binding upon the parties has emerged is that this rule had indeed emerged. Only after establishing whether there is a principle of sustainable development and what it meant can one establish its repercussions on the interpretation of treaties. The emergence of the notion of sustainable development was labelled as the “most significant change” in international law.⁴¹ Yet, it has remained an ambiguous concept in many respects. “*Is it an objective, or a process, or a prin-*

³⁶ See C. Warbrick, Introduction: The “Iron Rhine” (“IJzren Rijn”) Arbitration (Belgium-Netherlands): Its Contribution to International Law, in: C. Warbrick/Permanent Court of Arbitration (eds.), *The Iron Rhine (IJzeren Rijn) arbitration (Belgium-Netherlands)*, Award of 2005, 2007, 35.

³⁷ *Iron Rhine* (note 3), 112, para. 208.

³⁸ D. Barstow Magraw/L. D. Hawke, Sustainable Development, in: D. Bodansky/J. Brunnee/E. Hey (eds.), *The Oxford Handbook of International Environmental Law*, 2007, 630.; S. A. Atapattu, *Emerging Principles of International Environmental Law*, 2006, 114.

³⁹ *Iron Rhine* (note 3), 72, para. 79.

⁴⁰ *Iron Rhine* (note 3), 73, para. 80.

⁴¹ V. P. Nanda/G. Pring, *International Environmental Law for the 21st Century*, 2003, 22.

ciple or all of those things?”, Philippe Sands asks.⁴² Nanda and Pring predict that “answering this question will be a major preoccupation of international law, lawmakers, and institutions deep into the 21st century”.⁴³ Looking at the general importance of the matter it is not surprising that Boyle remarks that “there will be no easy answer, whether international law requires that development ought to be sustainable”.⁴⁴ As sustainable development has played a role in the tribunal’s reasoning it should be examined carefully, in which way the tribunal answered the open questions just mentioned. Looking closer at the reasoning, it can be seen that the tribunal developed the notion of sustainable development with regard to its sources, its normative content and its form.

To ascertain a legal norm one firstly has to look for the source of the norm. Regarding sustainable development, there is an ongoing debate where this norm stems from.⁴⁵ This notion was used in very important soft-law instruments such as the Declarations of Stockholm,⁴⁶ Rio de Janeiro⁴⁷ and Johannesburg.⁴⁸ The term is mentioned in several treaties which do not elaborate on it.⁴⁹ For some it has achieved the status of customary international law.⁵⁰ Others see it as general principle.⁵¹ If one cannot allocate it to

⁴² P. Sands, *International Law in the Field of Sustainable Development*, BYIL 65 (1994), 305.

⁴³ V. P. Nanda/G. Pring, *International Environmental Law for the 21st Century*, 2003, 23; for this question and answer mode see C. Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law*, Legal Aspects of Sustainable Development, 2009, 186.

⁴⁴ A. E. Boyle/D. A. C. Freestone, Introduction, in: A. E. Boyle/D. A. C. Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges*, 2001, 16.

⁴⁵ For a general overview see U. Beyerlin, *Sustainable Development*, in: R. Wolfrum (ed.), *MPEPIL* online edition, www.mpepil.com, para. 15. as well as D. Barstow Magraw/L. D. Hawke (note 38), 622 et seq. The general problem is well described by D. M. Ong, *International Environmental Law’s “Customary” Dilemma: Betwixt General Principles and Treaty Rules*, *Irish Yearbook of International Law* 1 (2006), 4.

⁴⁶ UN Doc. A/CONF.48/14/Rev.1, 16.6.1972, although the term sustainable development was not used.

⁴⁷ UN Doc. A/CONF.151/26 (vol. I), 13.6.1992.

⁴⁸ UN Doc. A/RES/55/199, 20.12.2000.

⁴⁹ See N. Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning, and Status*, RdC 329 (2007), 217 et seq., especially 383 et seq.

⁵⁰ P. Sands, *International Courts and the Application of the Concept of “Sustainable Development”*, in: J. Hatchard/A. Perry-Kessaris/P. Slinn (eds.), *Law and Development: Facing Complexity in the 21st Century*, Essays in Honour of Peter Slinn, 2003, 254; *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* Separate Opinion Judge Weeramantry, ICJ Reports 1997, 95.

⁵¹ See for example C. Voigt (note 43), 160., *Dominicé* even suggests to have found a new source of international law where this principle stems from, see C. *Dominicé*, *The Iron Rhine*

one of the sources of international law it would seem logical to conclude that there cannot be a legal norm.⁵² There are however many, who deliberately remain tacit on this question.⁵³ The tribunal takes a similar stance:

“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.”⁵⁴

The rationale behind this might be not to hinder the evolution of the law of sustainable development⁵⁵ but to allow for the further crystallization of the principle. This way, a middle ground is sought, as *Simma*, in a different context, puts it very vividly,

“thereby avoiding siding with either the dwindling number of traditionalists who tenaciously cling to the *biblia pauperum* of Article 38 of the Statute of the International Court of Justice, or with radical obfuscationists steeped in the art of campaign-hardened advocacy of their preferred standards of international law, regardless of the degree of their acceptance by the community of states or even by different so-called civil societies”.⁵⁶

It is obvious, however, that there is a difference between academic writing and judicial decisions. While a writer can decide not to touch upon a question that seems unsuitable, a judge or arbitrator has to give reasons for his or her decision that states the law authoritatively on a certain point.⁵⁷ The parties can, indeed, allow a judicial body to apply a norm of law that is not yet in force. Tunisia and Libya referred a dispute to the ICJ by special

Arbitration and the Emergence of a Principle of General International Law, in: T. M. Ndiaye/R. Wolfrum/T. A. Mensah, *Law of the Sea, Environmental Law and Settlement of Disputes*, 2007, 1072.

⁵² See V. Lowe, *Sustainable Development and Unsustainable Arguments*, in: A. E. Boyle/D. A. C. Freestone (eds.) (note 44), 29 f. focussing also on the normative content.

⁵³ U. Beyerlin (note 45), 3, para. 15; N. Schrijver (note 49), 374.

⁵⁴ *Iron Rhine* (note 3), 66, para. 58.

⁵⁵ V. Barral, *La sentence du Rhin de fer, une nouvelle étape dans la prise en compte du droit de l’environnement par la justice internationale*, *RGDIP* 110 (2006), 653.

⁵⁶ B. Simma, *Introduction*, in: N. Schrijver/F. Weiss (eds.), *International Law and Sustainable Development: Principles and Practice, Developments in International Law*, 2004, vi.

⁵⁷ Critically on that point also C. Warbrick (note 36), 35; as well as M. Ong (note 45), 27.

agreement and stated that it could take into account “the new accepted trends in the Third Conference on the Law of the Sea”.⁵⁸ It is, of course, acceptable if a judicial body employs a very careful rhetoric to avoid hindering the evolution of a legal principle. But the tribunal goes beyond this.

“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.”

It is difficult to conceive how the tribunal can talk about sustainable development as an *emerging* principle and at the same time a duty that *has become* a principle of international law. The only explanation to this is that the critical moment had happened exactly between the lines of this award. Again, in this case it would have been even more necessary to inquire into the source of the principle as the source does not only determine the existence but also the content of the principle. To that date, the content of sustainable development was most famously defined by the World Commission on Environment and Development (*Brundtland Commission*) as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.⁵⁹ The fourth principle of the Rio Declaration stipulates that “environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it”. This definition entails sustainable development not as a direct obligation binding upon states, requiring a certain conduct. It is not an obligation of result but a meta-rule that serves as a guide for balancing processes and norm conflicts in which aspirations for development meet environmental concerns.⁶⁰ This meta-rule, of course, carries with it the principle of sustainability that represents the environmental concerns.⁶¹

The notion of sustainable development is frequently criticised for its vagueness.⁶² One should not forget that the vagueness with regard to the

⁵⁸ *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, ICJ Reports 1982, 18, 23.

⁵⁹ World Commission on Environment and Development, *Our Common Future*, 1987, 43, see also Rio Declaration (note 47), principle 3.

⁶⁰ *V. Lowe* (note 52), 31.

⁶¹ *N. Schrijver* (note 49), 374.

⁶² *A. E. Boyle/D. A. C. Freestone* (note 44), 13, *V. P. Nanda/G. Pring* (note 41), 23.

legal concept is not inherent in the concept but stems from the impossibility to achieve consent between the actors negotiating about the exact content. The tribunal found that the principle of sustainable development entailed a duty to prevent or at least mitigate serious harm to the environment.⁶³ This formulation is more specific than the previous definitions as it defines as the limit of development the term “serious harm to the environment”, which is itself subject to interpretation. Whether this is a rather small or a big step in the development of sustainable development depends on how “serious harm to the environment” will be interpreted.

The tribunal, however, varied not only the content but also the legal form and, therefore, the effect of the notion in international law. While some authors completely neglect the legal significance of the notion sustainable development,⁶⁴ the ICJ in *Gabčíkovo Nagymaros* termed it very neutral as a concept⁶⁵ whereas Judge *Weeramantry* referred to it as a “legal principle”.⁶⁶ The tribunal joined the dissenting opinion in that regard.⁶⁷ The tribunal did not explicate what this shift should mean in practice, but one can of course inquire into the practical effect of the principle in the award. It came into play when Belgium’s contractual right was balanced against the sovereignty of the Netherlands to implement environmental measures. Pronouncing upon the general allocation of costs, the tribunal found that environmental costs had to be part of the project and applied the prohibition of transboundary harm by analogy to allocate the costs to Belgium. The Treaty of 1839 clearly provided for the development of a railway train. Whenever it was not clear how to proceed with the modernisation and adaptation to achieve the development, the tribunal referred to forms of sustainability, such as the prohibition to cause transboundary harm, as guide for its decision.⁶⁸ What the tribunal has actually done is introducing a meta-rule that promotes environmental concerns. As a principle it does not create direct obligations for the parties but serves as a guide to questions of interpretation.

As the use as a principle is again unprecedented, it has become clear that the tribunal used sustainable development for its reasoning but also developed the notion of sustainable development in key aspects, namely the question of sources, its content and its form and effect. The fact that the tri-

⁶³ *Iron Rhine* (note 3), 66, para. 58.

⁶⁴ A. Cassese, *International Law*, 2005, 492.

⁶⁵ *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Reports 1997, 78, para. 140.

⁶⁶ *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* Separate Opinion Judge *Weeramantry*, see note 50, 88.

⁶⁷ *Iron Rhine* (note 3), 67, para. 59.

⁶⁸ *Iron Rhine* (note 3), 116, para. 223.

bunal did develop the notion of sustainable development in these respects is even more noteworthy if one looks at the actual result of this progressive development in the case at hand. When balancing the contractual right with the freedom to implement measures on the territory, the same results could have been achieved without relying on the principle of sustainable development. For the legality of the measures, the tribunal could have given way to the territorial sovereignty of the Netherlands, Belgium's general obligation to pay could have been extended to the modernisation of the railway line by a wide interpretation of the Treaty of Separation, and the contribution of the Netherlands in the case of quantifiable advantages could have been derived from general notions of equity.

Although the true nature of the dispute might be much more about the economic rivalry between the ports of Antwerp and Amsterdam and later Rotterdam,⁶⁹ the parties couched their arguments in environmental terms. So even though other principles such as the general notion of equity would have led to the same result, the construction of the tribunal responded directly to the arguments of the parties. Belgium emphasised the beneficial effects of its modal shift policy and the Netherlands highlighted their environmental measures. It is a little ironic that Belgium actually argued with the principle of sustainable development and thought that the modal shift to the train by developing the railway link would foster sustainability.⁷⁰ The tribunal rejected that claim and held that the development of the railway line is a danger to the environment in the first place⁷¹ so that the argument was actually used against its original author. One should not omit to mention that the parties chose arbitrators and not only highly regarded scholars in international law but also specialists of environmental law that were competent to pronounce upon the environmental aspects of the disputes. Although the case seems to be rather technical, the award contains some general statements that could affect the development of international law. The award has been cited frequently⁷² but with respect to sustainable devel-

⁶⁹ F. Wiltox, *The Iron Rhine Railway Link: A Chronicle of Dutch-Flemish Geopolitics Based on Contextual History*, *Journal of European Economic History* 35 (2006), 149 et seq.; A. Schrauwers, "Regenten" (Gentlemanly) Capitalism: Saint-Simonian Technocracy and the Emergence of the "Industrialist Great Club" in the Midnineteenth Century Netherlands, *Enterprise & Society* 11 (2010), 786 et seq.; R. Fremdling, *The Dutch Transportation System in the Nineteenth Century*, *de Economist* 148 (2000), 521 et seq.; S. Vanfraechem, *The Dutch "Iron Lady" versus the Belgian "Unknowing Man": The Water-Treaties between the Netherlands and Belgium, 1975-1995*, *The Northern Mariner/Le marin du nord* 15 (2005), 74.

⁷⁰ *Iron Rhine* (note 3), 83, para. 114.

⁷¹ *Iron Rhine* (note 3), 84, para. 117.

⁷² See for instance J. Crawford, *Continuity and Discontinuity in International Dispute Settlement: An Inaugural Lecture*, *Journal of International Dispute Settlement* 1 (2010), 21 fn.

oment a caveat has to be made. Under this heading, several issues are discussed that are of course not all addressed in the award. The tribunal focused on sustainability with regard to future generation, i. e. inter-generational equity.⁷³ Sustainability that concerns only the present generation, i. e. intra-generational equity, is not at issue here.⁷⁴ This dimension would apply the balance between countries that have developed in a rather unsustainable way and developing countries. This was, of course, not the problem between the Netherlands and Belgium, both developed countries. This means in turn that the award should not be seen as precedent for cases involving developing countries.

While the tribunal contended that it developed the principle of sustainable development to develop the applicable treaty law, it can equally be contended that the tribunal in fact used the case to develop the principle of sustainable development. An old treaty formed an ideal background to show that things have changed with regard to the environment and that assertion was apt to take the environmental protection even further. The tribunal took care of the concrete facts of the case but also of the development of international law in general. Like a two-sided sword cutting two Gordian knots, the award aimed to solve the dispute at hand and develop international law at the same time. The use of the principle of sustainable development was just like *Lowe* predicted in 2001:

“Whether the principle will reach further, time alone will tell. There is certainly scope for it. For example, a tribunal might one day assert, on the basis of the principle of sustainable development, a power to modify not only the application of primary norms of customary law but also treaty obligations. It might rewrite, rather than strike down, a bargain struck by the parties that is shown to lead to unsustainable development and serious environmental harm.”⁷⁵

III. Arrival – Dialectics or Dilemma

After the consideration of the major questions of law of this award, it can be said that the tribunal successfully contributed to the settlement of the

25; *B. Simma*, Universality of International Law from the Perspective of a Practitioner, EJIL 20 (2009), 286.

⁷³ See for example Rio Declaration (note 47), principles 3 and 4.

⁷⁴ See for example Rio Declaration (note 47), principles 5 and 6.

⁷⁵ *V. Lowe* (note 52), 36 f.

dispute.⁷⁶ It asserted its power to decide the dispute but carefully omitted to go beyond what European law allowed. It applied a treaty that was more than 160 years old in the light of new developments. It framed a dispute about economic competition in environmental terms and made use of the emerging principles of environmental law. But the analysis also showed that there seem to be open questions concerning the interpretation and construction of the tribunal. How could it state that it would refer open questions to the ECJ but omit to ask whether article 292 of the EC Treaty [344 TFEU] was a bar to its jurisdiction? How could it reverse its previous general finding concerning the allocation of costs in relation to the *Meinweg* tunnel without any legal explanation? How could it crystallize and develop the principle of sustainable development without inquiring into its sources? The choices the tribunal made, between inadmissibility and proliferation, between non-liquet and equity, between the concrete case and general international law, could be understood as choices in a dilemma in which the tribunal would either fail to resolve the dispute in a satisfactory manner or fail to offer a coherent construction of the law. But the choices could be also understood as dialectical aimed at accomplishing a solution that is as coherent as possible while at the same time contributing as much as possible to the resolution of the dispute. From this perspective, a judicial body is a “creative mirror”: Reflecting the law for the parties, objective and binding but also a bit blurred and bewitched. Like historians, for whom *Friedrich Meinecke* developed this metaphor, judges and arbitrators are “creative mirrors”, trying to reflect the law accurately and honestly as far as possible but remain permeated with their own creative individuality.⁷⁷

⁷⁶ It is currently upon the parties to implement the judgement and negotiate the open questions.

⁷⁷ *F. Meinecke*, *Schaffender Spiegel: Studien zur deutschen Geschichtsschreibung und Geschichtsauffassung*, 1948, 7. The original passage reads: “Der Historiker aber darf das Wort als Gleichnis für das Ziel seiner eigenen Arbeit anwenden. Sie soll das einst Gewesene nicht mechanisch, sondern schaffend spiegeln, Subjektives und Objektives in sich so verschmelzen, daß das dadurch gewonnene Geschichtsbild zugleich die Vergangenheit, soweit sie zu fassen ist, getreu und ehrlich wiedergibt und dabei doch ganz durchblutet bleibt von der schöpferischen Individualität des Forschers.“