COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

CASE OF KLEYN AND OTHERS v. THE NETHERLANDS

(Applications nos. 39343/98, 39651/98, 43147/98 and 46664/99)

JUDGMENT

STRASBOURG

6 May 2003

In the case of Kleyn and Others v. the Netherlands,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr G. RESS,
Sir Nicolas BRATZA,
Mr L. CAFLISCH,
Mrs V. STRÁŽNICKÁ,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs N. VAJIĆ,
Mr J. HEDIGAN,
Mrs W. THOMASSEN,
Mrs M. TSATSA-NIKOLOVSKA,
Mr A.B. BAKA,
Mr K. TRAJA,
Mr M. UGREKHELIDZE,
Mr V. ZAGREBELSKY,

and also of Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 27 November 2002 and 9 April 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in four applications (nos. 39343/98, 39651/98, 43147/98 and 46664/99) against the Kingdom of the Netherlands lodged between 8 July 1997 and 16 March 1998 with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by twenty-three Netherlands nationals, Mr A.A. Kleyn, Mr A. van Helden, Mrs C.H. van Helden-Schimmel, Mr A. Hougee, Mrs O.L. Hougee-van Frankfoort, Mr C.M. van Burk, Ms C.J.P. Kleijn, Ms P.M. Kleijn, Ms C.J. Kleijn, Mr M.A.J.E. Raymakers, Mrs P.W.N. Raymakers-Spreeuwenberg, Mr A.J.Th. Berndsen, Mrs B.A.G. Berndsen-Wezendonk, Mr P. Bunschoten, Mr W.F. van Duyn, Mr C.J. Hanhart, Mr J.H. Kardol, Mr C. de Kreij, Mr G.J. van Lent, Mrs G. van Lent-de Kroon, Mr S.J.B.A. Pompen, Ms C.M.M. Wennekes and Mr M. Witvliet, and by twelve companies, Mettler Toledo B.V., Van Helden Reclame-Artikelen B.V., Grasshopper Reclame, M.C. Gerritse B.V., Texshop B.V.,

Restaurant De Betuwe B.V., Maasglas B.V., Kuwait Petroleum (Nederland) B.V., Sterk Technisch Adviesbureau B.V., Kleijn Financierings- en Leasemaatschappij B.V., Exploitatiemaatschappij De Zeiving B.V. and Maatschap Takel- en Bergingsbedrijf Hanhart ("the applicants").

2. The applicants in applications nos. 39343/98, 39651/98 and 43147/98 were represented by Mr K.F. Leenhouts, a lawyer practising in Tiel. The applicants in application no. 46664/99 were initially represented by the Vereniging Landelijk Overleg Betuweroute (Association for Nationwide Consultation on the *Betuweroute*), which subsequently delegated its representation of these applicants to Mr Leenhouts. The Netherlands Government ("the Government") were represented by their Agent, Mr R.A.A. Böcker, of the Netherlands Ministry of Foreign Affairs.

3. The applicants alleged that, from an objective point of view, the Administrative Jurisdiction Division of the Netherlands Council of State (*Raad van State*) could not be regarded as an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention in that the Council of State combined both advisory and judicial functions. They also raised further complaints under Article 6 § 1 and Article 8 of the Convention and Article 1 of Protocol No. 1.

4. The applications were transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The applications were allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. On 3 May 2001 this Chamber decided to join the applications, to give notice of the complaint of the lack of objective independence and impartiality of the Administrative Jurisdiction Division of the Council of State to the Government (Rule 54 § 2 (b)) and to declare inadmissible the remainder of the applications.

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1). On 2 July 2002 a Chamber of that Section, composed of Mr J.-P. Costa, Mr A.B. Baka, Mr Gaukur Jörundsson, Mr K. Jungwiert, Mr V. Butkevych, Mrs W. Thomassen and Mr M. Ugrekhelidze, judges, and Mrs S. Dollé, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

7. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

8. The applicants and the Government each filed written observations on the admissibility and merits. In addition, third-party comments were received from the Italian and French Governments, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 61 § 3). The applicants replied to those comments (Rule 61 § 5).

9. A hearing on admissibility and the merits took place in public in the Human Rights Building, Strasbourg, on 27 November 2002 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr	R.A.A. BÖCKER, Ministry of Foreign Affairs,	*Agent*,
Mr	E. DAALDER, Deputy State Advocate,	*Counsel*,
Ms	B. DREXHAGE, Ministry of the Interior and Kingdom Relations,	
Ms	L. LING KET ON, Ministry of Justice,	
Ms	W. WARMERDAM, Ministry of Transport,	*Advisers*;

(b) *for the applicants*

Mr	K.F. LEENHOUTS,	
Mr	T. BARKHUYSEN,	*Counsel*,
Ms	C. FENIJN,	*Adviser*.

The applicants Mr van Duyn and Mr Raymakers also attended the hearing.

10. The President of the Court gave the applicants' representatives leave to use the Dutch language (Rule 34 § 3). The Court heard addresses by Mr Böcker and Mr Daalder, and by Mr Leenhouts and Mr Barkhuysen.

11. Under the provisions of Article 29 § 3 of the Convention and Rule 54A § 3, the Court decided to examine the merits of the applications at the same time as their admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicants

Application no. 39343/98

12. Mr A.A. Kleyn was born in 1941 and lives in Asperen. He is a managing director of the limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) Kleijn Financierings- en Leasemaatschappij B.V. and of the limited liability company Exploitatiemaatschappij De Zeiving B.V. He is also part-owner of the restaurant "De Goudreinet".

Application no. 39651/98

13. Mettler Toledo B.V. is a limited liability company. Its premises are located in Tiel.

Van Helden Reclame-Artikelen B.V. is a limited liability company. Its premises are located in Tiel. Its managing directors, Mr A. van Helden and Mrs C.H. van Helden-Schimmel, who were both born in 1946, live next to the company's business premises.

Grasshopper Reclame is a registered partnership (*vennootschap onder firma*) established under Netherlands law. Its premises are located in Tiel. Its managing directors, Mr A. Hougee and Mrs O.L. Hougee-van Frankfoort, who were born in 1947 and 1948 respectively, live above the company's business premises.

M.C. Gerritse B.V. is a limited liability company. Its premises are located in Tiel.

Texshop B.V. is a limited liability company. Its premises are located in Tiel.

Restaurant De Betuwe B.V. is a limited liability company. It operates a restaurant in Tiel.

Maasglas B.V. is a limited liability company. Its premises are located in Tiel.

Mr C.M. van Burk, who was born in 1953, operates a petrol station on the A15 motorway, near Meteren.

Kuwait Petroleum (Nederland) B.V. is a limited liability company established in Rotterdam. It owns the petrol station operated by Mr van Burk.

Sterk Technisch Adviesbureau B.V. is a limited liability company. Its premises are located in Spijk.

Kleijn Financierings- en Leasemaatschappij B.V. and Exploitatiemaatschappij De Zeiving B.V. are both limited liability companies and – together with Ms C.J.P. Kleijn, Ms P.M. Kleijn and Ms C.J. Kleijn, who were born in 1936, 1970 and 1978 respectively – are joint owners of a number of plots of land along the A15 motorway and part-owners of the restaurant "De Goudreinet" that is located on one of the plots.

Application no. 43147/98

14. Mr M.A.J.E. Raymakers and Mrs P.W.N. Raymakers-Spreeuwenberg, who were born in 1956 and 1959 respectively, live in Kerk-Avezaath.

Application no. 46664/99

15. Mr A.J.Th. Berndsen and Mrs B.A.G. Berndsen-Wezendonk were born in 1950 and 1952 respectively and live in Groessen.

Mr P. Bunschoten was born in 1955 and lives in Herveld.

Mr W.F. van Duyn was born in 1962 and lives in IJzendoorn.

Mr C.J. Hanhart was born in 1938 and lives in Tiel.

Mr J.H. Kardol was born in 1938 and lives in Meteren.

Mr C. de Kreij was born in 1948 and lives in Giessenburg.

Mr G.J. van Lent was born in 1944 and lives in Ochten.

Mrs G. van Lent-de Kroon was born in 1910 and lives in Echteld.

Mr S.J.B.A. Pompen was born in 1963 and lives in Tiel.

Takel- en Bergingsbedrijf Hanhart is a partnership (*maatschap*) of which Mr C.J. Hanhart and Mr S.J.B.A. Pompen are the partners. Its premises are located in Tiel.

Ms C.M.M. Wennekes was born in 1949 and lives in Herveld.

Mr M. Witvliet was born in 1944 and lives in Kesteren.

B. Factual background

16. The territory of the Netherlands includes the estuaries of the Rhine, Maas and Schelde, all of which flow into the North Sea at or near the town of Rotterdam. These rivers have long been used for the transport of merchandise to and from a large part of the north-western and central European hinterland, and in particular the vast industrial area situated along the River Ruhr in Germany. Over the centuries this geographical situation has allowed the Netherlands to become one of Europe's major transport

hubs, with Rotterdam harbour and Schiphol Airport, near Amsterdam, developing into important transit points for goods.

17. In recent years worldwide economic growth, the opening of the borders between the European Union countries and the opening up to foreign trade of central and east European countries have led to an increase in the quantity of merchandise transported through the Netherlands and, consequently, in the volume of traffic.

18. Since the 1980s the volume of transport by inland waterways, rail and pipelines has largely remained stable. It is essentially road transport which has absorbed the increase. This is due to various factors, such as the greater availability and convenience of roads as compared to railways and waterways and the increased tendency of industry to have raw and unfinished materials delivered as and when needed instead of keeping stocks.

19. In the early 1990s the government decided on a policy of maintaining and further improving the competitiveness of Rotterdam harbour as Europe's main entry and exit port, as compared to its major rivals, Hamburg, Antwerp, Le Havre, Marseilles and London. At the same time it was considered important to prevent, and if possible reduce, congestion of the roads and damage to the environment.

C. The Transport Infrastructure Planning Bill (*Tracéwet*) and the advisory opinions of the Council of State (*Raad van State*)

20. On 1 July 1991, in accordance with section 15 of the Council of State Act (*Wet op de Raad van State*) and upon a proposal of the Minister for Transport and Communications (*Verkeer en Waterstaat*) and the Minister for Housing, Planning and Environment Management (*Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer*), the Queen transmitted the Transport Infrastructure Planning Bill (*Tracéwet*) to the Council of State for an advisory opinion.

21. The Transport Infrastructure Planning Bill was intended to provide a legislative framework for the supra-regional planning of new major transport infrastructure (roads, railways, canals) and major modifications to existing transport infrastructure with a view to simplifying procedures for securing the cooperation of the provincial, regional and local authorities whose territories might be affected. An additional effect was intended to be the concentration of legal remedies in such a way that only one single appeal could be lodged with the Council of State against a decision of central government and all related decisions of subordinate authorities, obviating the need for a plurality of appeals before both the ordinary courts and the Council of State against decisions and plans of local authorities.

22. The Council of State transmitted its advisory opinion to the government on 9 December 1991. Its opening paragraph reads:

"The Council of State fully acknowledges the problems that the signatories to the Transport Infrastructure Planning Bill wish to resolve. It often concerns large, technically complex and expensive infrastructure projects. These must not only be balanced against diverse and weighty interests relating to traffic and transport, road safety, town and country planning and the environment, but in addition it is desirable to have the widest possible public support for these projects. The current decision-making procedure – entailing a non-statutory routing determination following which final decisions are only made in accordance with the town and country planning procedure, against which an appeal may be lodged with a judge – can take much time. Furthermore, where a number of provincial and municipal bodies are involved, the decision-making process is diffused over several regional and local zoning plans. The Council of State therefore shares the government's concern about the outlined problems. It will examine hereafter whether, in its opinion, the proposals made will in practice sufficiently resolve the problems and whether the concomitant disadvantages are acceptable."

23. In its opinion the Council of State noted, among other things, the absence of any binding time-limits for the administrative authorities. It expressed doubts as to whether the procedure under the new bill, if enacted, would be any shorter than the aggregate of separate procedures necessary hitherto. It also considered that the new bill created uncertainty at the lower levels of government (the provinces, the regional surface waterboards (*waterschappen*) and the municipalities) by bypassing the planning structures of those lower bodies; in addition, insufficient weight was given to the justifiable interests of individuals. It found that the considerable limitation of legal protection constituted an important objection to the new bill.

24. Point 8 of the advisory opinion reads:

"Having reached the end of the examination of the legal protection in the framework of this bill, from which it can be seen that the Council of State has serious objections to the removal of a routing determination [*tracévaststelling*] from general town and country planning considerations, it nevertheless wishes to point out that, when the Council of State leaves aside here the problem dealt with under point 2 (length of the decision-making process under the bill), those serious objections would be less weighty if the bill only related to routing determinations of such exceptional (supra-)national importance that it must be clear to anyone that in the case in question the provincial, regional and local interests should yield to them. In that case, the routing plans [*tracés*] referred to in section 24b should be explicitly mentioned in the bill. It would be preferable to reconsider the bill in this sense."

25. The Council of State made a number of suggestions for improving the drafting of the bill before it was transmitted to Parliament. Its final conclusion reads:

"The Council of State advises you not to send this bill to the Lower House of the States General until the above observations have been taken into account."

26. In their reply of 28 January 1992 the Minister for Transport and Communications and the Minister for Housing, Planning and Environment Management noted – as regards the doubts expressed by the Council of State as to whether the new procedure would be appreciably shorter than the

former one – among other things that it might take a very long time to obtain the cooperation of the local authorities. It was also stated that the local authorities were involved in all stages of the procedure, being informed and consulted as the need arose; if it was necessary to compel their cooperation, this was done at the final stage, that of the routing decision. Legal protection of the justified interests of individuals was sufficiently guaranteed in the form of a single appeal, on legal grounds, against a routing decision.

27. As to the remarks made under point 8 of the advisory opinion of the Council of State, the ministerial response reads as follows:

> "With the approval of the Council of Ministers (decision of 24 January 1992), we decided to include in the bill a separate regulation for large projects of national importance. In line with this, the transitory arrangement referred to in section 24b will be concentrated on the high-speed railway and the '*Betuweroute*' [railway]. The original section 24b was included exclusively in view of these projects and can now be dropped, as a provision will be devoted to these projects. Since, with the inclusion of the special procedure for large projects and the above-indicated transitional arrangement, the bill will be further amended, we find it desirable to consult the Council of State on this. The amendments to the bill will therefore be submitted for advice to the Council of State in the form of a ministerial memorandum of amendments."

28. The Minister for Transport and Communications made a number of changes to the bill in the light of the Council of State's criticism. The amendments were submitted to the Council of State for advice on 6 February 1992.

29. In its advisory opinion of 8 May 1992, the Council of State considered, *inter alia*:

> "... it desirable to indicate in section 24g that the notions 'high-speed railway' and '*Betuweroute*' railway relate to specific [railway] connections between specifically named places."

30. The ministerial reply of 19 May 1992 to this recommendation states:

> "This advice has been followed. It is now indicated in section 24g that the high-speed railway relates to the Amsterdam-Rotterdam-Belgian border route, and the '*Betuweroute*' [railway] to the Rotterdam-Zevenaar route."

31. The government then submitted the bill to the Lower House (*Tweede Kamer*) of Parliament, together with the Council of State's advisory opinion and the ministers' comments. The Transport Infrastructure Planning Act eventually entered into force on 1 January 1994. It contains no specific mention of the high-speed railway or the *Betuweroute* railway, but does provide for a special procedure for projects of national importance.

D. The planning process of the *Betuweroute* railway

1. The preparatory stages

32. An existing railway through the Betuwe region (the area circumscribed by the rivers Rhine, Lek and Waal) – known as the "Betuwe line" (*Betuwelijn*) – links the city of Rotterdam to the town of Elst. It was, and still is, mainly used for passenger traffic and is operated at a loss. As early as 1985 a government committee suggested converting it for use solely for the transport of goods, extending it as far as the town of Zevenaar and connecting it to the German railway system. A study commissioned by the Netherlands Railways (*Nederlandse Spoorwegen* – "the NS") and published in 1991 concluded that the environmental impact would be unacceptable and that the capacity of such a railway line would be insufficient.

33. This led the government to reject that idea. Instead, the government decided to investigate the possibility of building a new railway through the Betuwe, to be known as the "*Betuweroute*", along the A15 motorway. The NS was required to prepare an environmental impact report (*milieu-effectrapportage*).

2. Outline Planning Decision – Part 1

34. On 16 April 1992 the Minister for Transport and Communications and the Minister for Housing, Planning and Environment Management together presented the first draft of the outline planning decision (*Planologische Kernbeslissing*) within the meaning of section 2a of the Town and Country Planning Act (*Wet op de Ruimtelijke Ordening*), which later became known as "Outline Planning Decision – Part 1". The environmental impact report prepared by the NS was appended to this document. Pursuant to the then applicable section 2a of the Town and Country Planning Act, it was laid open for public inspection, notice of its publication being given through the Netherlands Government Gazette (*Staatscourant*) and the media. Anyone interested could then make his or her views known. The time-limit for doing so was 27 July 1992. More than 1,800 reactions were received.

35. On 31 August 1992 the Netherlands Minister for Transport and Communications signed an agreement with his German counterpart, the Federal Minister for Transport, for increased cooperation in the matter of cross-border railway communication. The agreement provided – subject to the conclusion of procedures prescribed by national law – for, *inter alia*, the building of a new railway from Rotterdam to the German border via Zevenaar. There were to be two border crossings, one at Oldenzaal/Bad Bentheim and the other at Venlo/Kaldenkirchen. The agreement also

provided for corresponding measures to be taken on the German side and for a time frame.

3. Outline Planning Decision – Part 2

36. On 18 April 1993 the government published a document entitled "*Reacties op de Ontwerp Planologische Kernbeslissing Betuweroute*" (Reactions to the *Betuweroute* Outline Planning Decision). It contained an overview of the reactions to Outline Planning Decision – Part 1 sent in by individuals and the results of further consultations and discussions with local government bodies, that is provinces, municipalities and regional surface waterboards. Advice obtained from the Netherlands-German Planning Board (*Nederlands-Duitse Commissie voor de Ruimtelijke Ordening*), the Environmental Impact Reports Board (*Commissie milieu-effectrapportage*), the Planning Advisory Board (*Raad van Advies voor de Ruimtelijke Ordening*) and the Traffic Infrastructure Consultation Body (*Overlegorgaan Verkeersinfrastructuur*) was also included in this document, which became known as Outline Planning Decision – Part 2.

4. Outline Planning Decision – Parts 3 and 3A

37. On 18 May 1993 the government published their views on the *Betuweroute* project and transmitted it to the Lower House of Parliament for approval. This document became known as Outline Planning Decision – Part 3. After deliberations, the Lower House of Parliament sent Outline Planning Decision – Part 3 back to the government with its comments.

38. The government made certain modifications. The resulting document, which became known as Outline Planning Decision – Part 3A, was submitted to the Lower House of Parliament on 14 December 1993 for approval.

5. Outline Planning Decision – Part 4

39. Outline Planning Decision – Part 3A was approved by the Lower House of Parliament on 22 December 1993 and, on 12 April 1994, by the Upper House (*Eerste Kamer*) of Parliament. It became known thereafter as Outline Planning Decision – Part 4 and came into force after its publication in the Netherlands Government Gazette on 27 May 1994.

40. Outline Planning Decision – Part 4 contained an explanatory memorandum setting out the need for the *Betuweroute*, as perceived by the government, and giving reasons for the choices made. It was stated that Rotterdam, the Netherlands' main port, and Schiphol Airport, now served most of the European continent and that the increase in the volume of transport could not be absorbed by inland waterway traffic alone. Moreover, much of the European hinterland could not be reached by water. Road traffic could not be the only alternative, as it was relatively expensive,

uneconomical over long distances and environmentally unfriendly. Furthermore, in much of eastern Europe the railway infrastructure was better developed and in a better state of repair than the roads.

41. Other European countries, including Germany, France and the Alpine countries, were investing heavily in railways in order to relieve the roads. Germany had undertaken to connect its railway system to the *Betuweroute*, and would give effect to this undertaking as soon as the decision to build the *Betuweroute* was taken. The transport policies developed by the European Economic Community also provided for the development of new railways.

42. The explanatory memorandum contained summaries of studies – additional to that undertaken by the NS in 1991 – that had been commissioned by the government, namely a study on the macro-economic and social effects by Knight Wendling and a micro-economic analysis by McKinsey. Both studies concluded that the *Betuweroute* would be profitable. They were scrutinised by the Central Planning Office (*Centraal Planbureau*). The results of this appraisal were also rendered in summary form. The government considered that although the conclusions of the Central Planning Office were rather more guarded, they too indicated that the project was viable.

43. Other alternatives were taken into consideration. These included increasing the capacity of an existing railway running from Rotterdam through the southern province of North Brabant to Venlo and from there into Germany (the "*Brabantroute*"), used mainly for passenger traffic, and making it more suitable for the transport of goods. This alternative was rejected on the ground that it would require building two extra tracks. Moreover, the urban density along the Brabant route being three to four times as high as that along the projected *Betuweroute*, this would cause severe and unacceptable problems.

44. Alternatives not involving railways, which had been suggested after Outline Planning Decision – Part 1 had been laid open for public inspection, were discarded in view of the need to connect to the existing railway infrastructure in the rest of Europe. The importance of inland navigation was nonetheless recognised, and it was stated that in both the Netherlands and Germany inland port facilities were undergoing further development.

45. Alternative methods of constructing the railway had been suggested in the wake of Outline Planning Decision – Part 1. Many of those who had stated their views on the matter had expressed a preference for an underground tunnel or for open tracks sunk below ground level. These were considered, but rejected as the cost would be prohibitive. A traditional construction was chosen consisting of rail tracks resting on a sand base and located mostly at ground level, a raised or lowered track being envisaged only for locations where such was called for by considerations of safety or

environmental impact. Similarly, conventional rather than innovative technology was chosen.

46. Outline Planning Decision – Part 4 provided for a twin-track railway. Its location was fixed as far as possible within a horizontal band of 100 m. Within this band limited adjustment to local conditions would be possible, it being understood that any additional features such as drainage ditches or other traffic infrastructure might have to be located outside it. The actual route was set out in sketch plans, with reasons being given for the choices made and for the rejection of alternatives.

47. Consideration was given to possible harmful effects. Thus, although under the legislation in force (Article 7 of the Railway Noise Ordinance – *Besluit geluidhinder spoorwegen*) the maximum permissible noise level was 60 decibel ampere (dBA) on the outside walls of residential buildings, a "preferential noise level" of 57 dBA would be applied in anticipation of stricter standards which were expected to come into force in 2000. Where it appeared in practice that this could not be achieved, noise levels would be reduced by means of screens. Exceptionally, noise levels of up to 70 dBA might be tolerated at specific locations, but even there they were not to exceed 37 dBA inside residential buildings with the windows closed and ventilation apertures open. Although there might be an accumulation of noise from the A15 motorway and the *Betuweroute* railway, it was considered that the railway would contribute less noise than the louder motorway traffic, so that it would be possible, by screening and other measures, to reduce the combined noise levels to 60 dBA.

48. Some 150 residential buildings were found to be located within 50 m of the projected railway track. It was estimated that approximately one quarter of these were so close to the projected track that noise levels would compel the termination of their residential function. Studies had also been conducted regarding the vibration likely to be caused and the standards to be applied on this point. Further studies would be undertaken with a view to taking constructive measures aimed at reducing vibration levels.

49. The danger that might be result from the operation of the *Betuweroute* railway was also considered, although not in detail. It was intended to build the railway so that the "individual risk" would be no greater than 10-6 near residential areas. The "group risks" would be kept "as low as reasonably achievable". Specific measures would be set out in the routing decision.

50. There had been an audit of the costs of the project as proposed by the government, which, as was estimated at 1993 cost levels, would amount to a total of 7,138,000,000 Netherlands guilders (NLG). Of this sum a portion of NLG 1,975,000,000 would be paid out of the State budget. The remaining NLG 5,163,000,000 would be raised from other sources, such as the financial markets, windfall profits from the sale of natural gas and funds supplied by the EEC. The total figure included a sum of NLG 750,000,000

occasioned by changes imposed by the Lower House of Parliament and NLG 375,000,000 required to meet objections and special requests made by individuals and local authorities.

51. A new government took office on 22 August 1994, which in pursuance of agreements reached between the coalition parties reconsidered the *Betuweroute* plan in its entirety. After obtaining the views of a parliamentary committee (the "Hermans Committee"), the new government decided that the plan should go ahead. Its views were made public in a letter sent by the Minister for Transport and Communications and the Minister for Housing, Planning and Environment Management to the Lower House of Parliament on 21 April 1995. On 29 June 1995 the Lower House of Parliament endorsed the government's views.

6. The Betuweroute *Routing Decision (*Tracébesluit*)*

52. In accordance with the procedure for projects of national importance under the Transport Infrastructure Planning Act which had come into force on 1 January 1994, a preliminary draft of the routing decision – containing the determination of the exact routing of the planned railway – was laid open for public inspection in June 1994, together with an addition to the environmental impact report and a survey of expected noise levels. Some 5,500 reactions were received from individuals, non-governmental organisations and local-government bodies. These led to modifications, which were incorporated into the draft routing decision.

53. The draft routing decision was published on 4 March 1996 and laid open for public inspection until 29 April 1996. More than 600 reactions were received from individuals and local-government bodies. Changes were considered, and eventually incorporated into the final routing decision, in so far as they did not affect the projected route, did not require additional expenditure and did not affect the interests of other parties. Changes made included, for certain locations, noise-reduction measures in addition to those foreseen in Outline Planning Decision – Part 4.

54. The routing decision was finalised on 26 November 1996 by the Minister for Transport and Communications in agreement with the Minister for Housing, Planning and Environment Management. It covered most of the projected track of the new *Betuweroute* railway, with the exception of a number of locations – not concerned by the present case – for which further planning was required.

55. The routing decision comprises twenty-four Articles, creating a legal framework for the measures required, and a set of detailed maps with explanations. In its published form it is accompanied by an extensive explanatory part setting out the outline of the choices made.

56. A series of tests had been carried out from which it appeared that goods trains made rather more noise than had initially been estimated. It was stated that a reduction of noise levels was expected from modifications

to the rolling stock (reduction at source). However, in case these should not be sufficient, screens would be erected where necessary regardless of the expected reductions at source. Further reductions were expected from the use of modern concrete sleepers instead of the conventional wooden ones on which the initial noise level assessments had been based. Finally, if the noise levels still turned out to be too high in practice, other measures would be considered, such as further modifications to rolling stock, avoiding operations at night and lowering maximum speeds. The standards to be applied, including those with regard to the accumulation of noise caused by the new railway and the A15 motorway, were those set out in Outline Planning Decision – Part 4. Stricter standards would be applied in the vicinity of sensitive locations such as hospitals and schools and certain designated rural areas (*stiltegebieden* – "silent areas"). The residential function of buildings where the noise levels would be excessive would have to be terminated. A detailed report setting out the noise levels for each municipality was appended to the routing decision.

57. Compensating measures for the preservation of the environment and the existing landscape were to include, among other things, the provision of culverts (to enable wildlife and cattle to cross underneath the railway) and of appropriate vegetation. Special measures were also envisaged for the protection of any known archaeological sites.

58. Consideration was also given to special measures required by the nature of the subsoil, which provided less support in the western part of the country than in the east; hence the need for additional supporting shoulders in certain areas. The need, at some locations, for cleaning polluted soil was noted.

59. Indications were given of how noise reduction screens, bridges and viaducts were to be built, and of how the railway would be sunk below ground level where this was unavoidable, an important objective being to limit the railway's visual and environmental impact while maintaining its visual unity and continuity. Where the *Betuweroute* crossed existing traffic infrastructure – roads, existing railways, cycle paths – safety was the main consideration. Changes to existing ditches and waterways were unavoidable. Construction details of the electrical installations would, however, depend on the final decision on the electrical system to be used, which would be taken at a later date.

E. Appeals against Outline Planning Decision – Part 3A and the *Betuweroute* Routing Decision

1. Appeals against Outline Planning Decision – Part 3A

60. A total of 173 appeals against Outline Planning Decision – Part 3A were lodged with the Administrative Jurisdiction Division (*Afdeling*

Bestuursrechtspraak) of the Council of State, many jointly by a plurality of appellants. With the exception of the applicants Mr and Mrs Raymakers (no. 43147/98), who only raised objections of a general nature to Outline Planning Decision – Part 3A, all applicants in the present case submitted specific complaints about the proposed route of the railway in so far as their respective interests would be affected.

61. The bench of the Administrative Jurisdiction Division dealing with the appeals was composed of three ordinary councillors (*Staatsraden*) of the Council of State, namely Mr J. de Vries (President), Mr R. Cleton and Mr R.H. Lauwaars (members). Mr de Vries had been appointed Ordinary Councillor in 1982. Mr Cleton and Mr Lauwaars had been appointed ordinary councillors in 1992 and 1994 respectively.

62. On 31 January 1997, after sixteen hearings held between July and September 1996, the Administrative Jurisdiction Division delivered its decision. It rejected all the complaints of a general nature.

63. As to the specific complaints, it noted that Outline Planning Decision – Part 3A was not yet final as regards the definitive route of the railway. It therefore limited the scope of its review, for each separate location, to the question whether the government could reasonably have set the band as it had and, if so, whether it could reasonably have considered that an acceptable route was possible within the band specified or that, in view of possible measures to be taken, the interests of the affected appellants had been adequately taken into account. It reserved its opinion on the definitive location of the railway, which was to be the subject of the routing decision.

64. One group of general complaints addressed, *inter alia*, the assessment made by the government of the need for a new railway. These were rejected with reference to government policy aimed at maintaining and strengthening the position of the Netherlands as a European hub for transport and distribution. The Administrative Jurisdiction Division concluded that the government's assessment of the need to construct the railway did not appear incorrect or unreasonable.

65. Another group of general complaints challenged the government's estimates of the railway's macro-economic effects and its profitability and the financial calculations underlying the government's plans. These were rejected on the ground that the said estimates did not appear incorrect or unreasonable in view of the expert reports which the government had commissioned.

66. A further group of general complaints challenged the government's failure to choose the most environmentally friendly alternative. The Administrative Jurisdiction Division held that the government could reasonably have come to the decision – having weighed alternatives and decided to give priority to human interests – to choose the most cost-effective solution and to use only proven technology. Where specific

problems were alleged to arise, these would be dealt with separately. General complaints concerning expected noise and vibration levels, risk assessments, deprivation of property and the likelihood of damage were rejected as being either unfounded on the facts or premature given that these problems would be addressed for specific locations in the routing decision.

67. Specific complaints of twenty-two appellants were accepted as being well-founded, which led to parts of Outline Planning Decision – Part 3A (and therefore Outline Planning Decision – Part 4) being annulled. None of those twenty-two appellants are applicants in the present case.

68. As regards the specific complaints which were rejected, the Administrative Jurisdiction Division held either that it could not be established in advance of the routing decision that the railway could not be located within the band in such a way as to meet the objections, or that the appellants' objections could not be met in another way, for instance by relocating business premises or offering financial compensation.

69. The decision ran to 292 pages, to which maps were appended indicating locations in respect of which parts of Outline Planning Decision – Part 3A were annulled.

2. The appeals against the Betuweroute *Routing Decision*

70. In total 147 appeals were lodged with the Administrative Jurisdiction Division against the *Betuweroute* Routing Decision. Many of these appeals were introduced by a plurality of appellants, including the applicants in the present case. As was the case in the appeals against Outline Planning Decision – Part 3A, a large number of appellants made complaints of a general nature dealing with such matters as the procedure followed. Some challenged the government's refusal to consider modifications of the routing decision unless the objections put forward were of a very serious nature. Others questioned the need or desirability for building the railway at all or objected to the procedure for assessing expected noise levels.

71. The composition of the bench of the Administrative Jurisdiction Division dealing with the appeals against the routing decision was the same as the bench that had determined the appeals against Outline Planning Decision – Part 3A (see paragraph 61 above). It commenced its examination of the appeals on 18 November 1997.

72. In the course of a public hearing held on 2 December 1997, Mr and Mrs Raymakers challenged the entire membership of the Administrative Jurisdiction Division and, in the alternative, all the councillors of that Division with the exception of the extraordinary councillors (*Staatsraden in buitengewone dienst*), and in the further alternative, the councillors sitting on the case, on the ground of lack of impartiality. They argued that, since the Plenary Council of State (*Volle Raad*) was involved in advising the government on proposed legislation, it was inconsistent with Article 6 of the

Convention that members of that body should subsequently decide in a judicial capacity on the application of legislation once it had been adopted.

73. A hearing on this challenge was held on 9 December 1997 before a special Chamber of three members of the Administrative Jurisdiction Division who were not involved in hearing the appeal, that is Mr E. Korthals Altes (President), Mr A.G. van Galen and Mr C. de Gooyer (members), all of whom were extraordinary councillors of the Council of State.

74. Mr and Mrs Raymakers cited the European Court's judgment of 28 September 1995 in *Procola v. Luxembourg* (Series A no. 326). They noted similarities between the organisation and functioning of the Netherlands Council of State and the Luxembourg *Conseil d'Etat* and quoted several comments published in the legal press by learned authors.

75. Given that the Council of State's advice on the introduction of the Transport Infrastructure Planning Act had been worded "in generally positive terms" and therefore conflicted with these applicants' own interest in maintaining the status quo, they considered that that advice had been contrary to their own position in their appeal. The Administrative Jurisdiction Division was therefore not an "impartial tribunal". These applicants therefore asked the special Chamber to rule that the Administrative Jurisdiction Division should decline to make any decision in the case.

76. On 10 December 1997 the special Chamber of the Administrative Jurisdiction Division gave its decision. It held that, under section 8(15) of the General Administrative Law Act (*Algemene Wet Bestuursrecht*), a challenge could only be directed against judges who were dealing with the case of the party concerned. As to the challenge of the entire membership of the Administrative Jurisdiction Division, it was pointed out that if the Administrative Law Act had provided otherwise, no member of such a tribunal would in fact be in a position to entertain the challenge. Consequently, in so far as the applicants' challenge was directed against members of the Administrative Jurisdiction Division who were not involved in hearing the applicants' appeal, it was inadmissible. The challenge directed against the members who were so involved was rejected in the following terms:

> "The Division considers that under section 8(15) of the General Administrative Law Act each of the members who decide a case can be removed from it [*gewraakt*] on the application of a party on the grounds of facts or circumstances by which judicial impartiality might be impaired. The Division deduces therefrom that only a lack of impartiality on the part of a judge can lead to his removal from a case. Neither the wording nor the drafting history of that provision offers support for the contention that a lack of independence of the tribunal to which a judge belongs can constitute grounds for that judge's removal from a case. For this reason alone the appellants' submissions at the hearing cannot lead to their application being granted.

> As to the appellants' reliance on *Procola*, the Division considers that the appeal lodged by the appellants with the Division does not raise questions on which the Council of State has, in advisory opinions on the legislation that is at issue in this appeal, expressed itself in a way contrary to the position taken by the appellants in their appeal. There is therefore no reason to fear that the members of the Council of State who are charged with deciding the appeal will consider themselves bound by any position adopted by the Council of State in the relevant advisory opinions."

77. The hearing on the merits was resumed on 25 February 1998 and, on 28 May 1998, the Administrative Jurisdiction Division delivered its decision, which ran to 354 pages.

78. General complaints relating to the refusal of the government to consider modifications to the routing decision unless the objections put forward were of a very serious nature were dismissed on the ground that this was not unreasonable *per se*; it was more appropriate to consider the objections in question individually. General complaints relating to the necessity or desirability of building the railway at all – including complaints about the environmental impact report – were also dismissed. These had already been considered as part of the appeals against Outline Planning Decision – Part 3A. The question was no longer whether the building of the *Betuweroute* was acceptable, but only whether, in coming to the routing decision, the government could reasonably have decided as it had.

79. The complaint made by several appellants that the routing decision was taken before the appeals against the outline planning decision had been determined was rejected by the Administrative Jurisdiction Division. It held that, under section 24(5) of the Transport Infrastructure Planning Act, the period for lodging an appeal against decisions taken in an outline planning decision and against the routing decision based thereon started to run simultaneously and that, therefore, it was normal that a routing decision was already taken before the outline planning decision had become final. It further considered that it did not follow from the Transport Infrastructure Planning Act that where, like in the present case, a separate appeal lay against an outline planning decision, no routing decision could be taken before the outline planning decision had become final. The mere fact that the time-limits for appealing started to run independently did not, according to the Administrative Jurisdiction Division, alter the tenor of section 24(5) of the Transport Infrastructure Planning Act that no final outline planning decision was required for a routing decision to be taken on the basis of that decision.

80. As to noise levels, the various complaints were to be considered individually. General complaints concerning the determination of acceptable noise levels could not be entertained. Reasonable standards had been set by law, and actual noise would be monitored once the railway was in use. The safety studies were not held to have been insufficient. It was noted that there had been an additional study made in respect of areas where the concentration of the population, and therefore the group risk, was greatest.

Moreover, the government had specified additional safety measures for these areas in its statement of defence, as well as specific ways of operating the railway so as to minimise the dangers attending the transport of dangerous goods. As to the individual risk, the routing decision provided that new development which would increase it within 30 m from the centre line of the track would be prevented; this made it unlikely that the individual risk would be increased further away from the track. Other objections relating to safety considerations would be dealt with on an individual basis.

81. As to vibration levels, the Administrative Jurisdiction Division held that the government could not be found to have acted unreasonably by basing its assessments on an industrial standard (DIN 4150) rather than a different standard suggested by certain appellants. Nor was the assessment of the likely nuisance caused by vibration unreasonable *per se*. Moreover, the government had undertaken to provide active monitoring (that is, to measure vibration levels of its own motion) in all residential buildings located within 50 m of the railway once it was in use, and passive monitoring (that is, to measure vibration levels after complaints were received) in residential buildings located 50 to 100 m from the railway. The government would then deal with unacceptable nuisance on a case-by-case basis. Specific problems raised by appellants would be dealt with individually.

82. With regard to general complaints about the arrangements for compensating damage, the Administrative Jurisdiction Division referred generally to the relevant provisions of the routing decision. It further noted that legal remedies were available against any specific decisions taken in this regard. It could therefore not yet be assumed at this stage that acceptable arrangements in respect of damage were not possible.

83. As to the appeal lodged by Mettler Toledo B.V. (no. 39651/98), whose extremely accurate device for calibrating scales was stated to be particularly sensitive to vibration, the Administrative Jurisdiction Division noted that studies were still ongoing as to whether the vibration likely to be caused by the railway would unduly interfere with that company's business. That being so, Mettler Toledo B.V.'s claims could not be dismissed as unfounded; to that extent, the appeal was allowed.

84. Sterk Technisch Adviesbureau B.V. (no. 39651/98), whose premises would have to be relocated, complained that no sufficient clarity had been provided as to whether a new location of equivalent quality would be made available. The Administrative Jurisdiction Division held this complaint to be well-founded. This made it unnecessary to go into other specific complaints made by this applicant.

85. With regard to a complaint submitted jointly by Mr A.A. Kleyn (no. 39343/98) and Kleijn Financierings- en Leasemaatschappij B.V., Exploitatiemaatschappij De Zeiving B.V., Ms C.J.P. Kleijn, Ms P.M. Kleijn

and Ms C.J. Kleijn (no. 39651/98) in respect of the restaurant "De Goudreinet" which they owned and the flat inhabited by Mr A.A. Kleyn, the Administrative Jurisdiction Division found that no investigation had been undertaken as to whether it would be possible for these to continue in use. To that extent the complaint was therefore well-founded. The remainder of their appeal was dismissed.

86. As regards the appeal lodged by Mr M. Witvliet (no. 46664/99), the Administrative Jurisdiction Division rejected the objections to a possible expropriation, holding that such objections could be raised in the specific procedure set out in the Expropriation Act (*Onteigeningswet*). As to his complaint about nuisance from noise in a particular area, it was held that this element had been insufficiently examined. To that extent, his appeal was well-founded. The remainder was rejected.

87. The Administrative Jurisdiction Division rejected the appeals lodged by the other individual applicants and applicant companies.

88. In so far as the appeals were considered well-founded, the Administrative Jurisdiction Division annulled the routing decision and made an award in respect of costs.

F. Subsequent developments

1. The 1998 routing decisions

89. In a letter to the Lower House of Parliament of 13 July 1998 the Minister for Transport and Communications, writing also on behalf of the Minister for Housing, Planning and Environment Management, observed that the decision of the Administrative Jurisdiction Division left 95% of the routing decision intact. It was therefore not necessary either to undertake a radical review of the project or to interrupt the building work. It was expected that the *Betuweroute* railway would be operational by 2005.

90. In so far as minor parts of the routing decision had been annulled, the reason therefor had merely been that insufficient information had been obtained as to whether the interests of the appellants could be safeguarded. In so far as relevant to the present case, the minister expected that in all but one or two cases changes to the original routing decision would prove unnecessary.

91. New partial routing decisions were taken in the course of 1998. An appeal lodged by Mettler Toledo B.V. was declared inadmissible by the Administrative Jurisdiction Division on 16 April 1999. The appeal lodged by Sterk Technisch Adviesbureau B.V. was dismissed by the Administrative Jurisdiction Division on 25 October 1999. The appeals lodged by Kleijn Financierings- en Leasemaatschappij B.V., Exploitatiemaatschappij De Zeiving B.V., Ms C.J.P. Kleijn, Ms P.M. Kleijn, Ms C.J. Kleijn and Mr A.A. Kleyn were dismissed by the Administrative Jurisdiction Division

on 25 July 2000. Mr Witvliet apparently did not lodge an appeal against any of the 1998 routing decisions.

2. The Betuweroute *Note*

92. In response to suggestions made in the media to reconsider the *Betuweroute* project, the Minister for Transport and Communications sent a note (*Notitie Betuweroute*) to the Lower House of Parliament on 6 November 1998. In this note the minister restated the considerations which had led to the decision of 1995 to allow the project to go ahead. She also expressed the view that no new information had become available since the reconsideration of 1995 which would tend to undermine earlier assumptions as to the viability and desirability of the project. On the contrary, developments had been such as to endorse these.

3. Revision proceedings before the Administrative Jurisdiction Division

93. On 13 April 1999 the Stichting Duurzame Mobiliteit (Durable Mobility Foundation) – one of the appellants against the routing decision but not one of the applicants in the present case – lodged a request for revision (*herziening*) of the decisions of 31 January 1997 and 28 May 1998 with the Administrative Jurisdiction Division. This appellant argued that the government had either been insufficiently aware of certain relevant factual information at the time when it finalised Outline Planning Decision – Part 3A or had failed to consider this information.

94. In a decision of 9 March 2000 the Administrative Jurisdiction Division refused to revise its decisions. It found that the information in question was not of such a nature as to justify reopening the proceedings.

4. The report of the Chamber of Audit

95. From August 1999 until February 2000 the Chamber of Audit (*Algemene Rekenkamer*) undertook a study of the *Betuweroute* decision-making process. It published its report on 22 June 2000 under the title "*Beleidsinformatie Betuweroute*" (*Betuweroute* Policy Information).

96. The purpose of the report was to provide guidance for the quality and use of information relied on by the government to ground future policy decisions relating to large infrastructure projects. The central questions were whether the quality of the information relied on in taking *Betuweroute* policy decisions was assured and whether this information had been used in a responsible way in the preparation of the decision-making process. Developments subsequent to the reconsideration of 1995 were taken into account.

97. The Chamber of Audit found that in the initial stages an adequate analysis of the problems to be solved had not been made. The decision-

making process had related one-sidedly to the solution chosen, namely the construction of the *Betuweroute* railway, it having been decided at the outset that that was beneficial for the national economy and the environment; an expert analysis of the information on which the outline planning decision was based had not been sought.

98. Predictions concerning the expected volume of transport through the Netherlands were considered imprecise and unreliable. The predictions eventually relied on appeared overly optimistic; also, in some cases, it was not clear on what considerations the preference for particular predictions over others was based. Uncertainty remained, *inter alia*, as to the capacity of the German railway system to absorb the increased volume of goods traffic. The increasing competitiveness of inland navigation had not been considered, nor had the slow progress in some European countries (for example, Belgium and France) of the liberalisation of rail transport. Nor had account been taken of the possible effects of levies on road transport as against the passing on of the costs of railway infrastructure to shippers, the latter possibility being envisaged in a policy proposal of the European Commission.

99. Alternatives to the *Betuweroute* had not been sufficiently explored. The Chamber of Audit criticised the way in which the use of the existing railway infrastructure in the Netherlands and waterborne inland and coastal transport had been considered in isolation rather than in combination. A thorough analysis of the possibilities of optimising existing east-west transport, including existing railway infrastructure, was lacking. Possible future developments in inland waterway traffic, which already accounted for a greater volume of transport than Netherlands railways, had not been looked into.

100. The assumed environmental benefit had also been misstated. The information concerning the environmental impact of alternatives to the *Betuweroute* railway had been inadequate and had been used in a selective way. Attention had been focused on the immediate reduction of energy use and noxious emissions without taking into account technical developments such as the increased use of cleaner and more economical engines in alternative transport; insufficient information had been provided concerning such matters as nuisance levels, external safety or soil and groundwater pollution attending alternative choices.

101. A positive feature of the process, given especially the public discussion which had arisen, was that the project had been reconsidered in its entirety in 1995 and that the arguments in favour had been presented anew in 1998 (the *Betuweroute* Note – see paragraph 92 above). However, the information available at those times and the way in which it had been used was open to criticism.

102. The draft of the report was transmitted in its entirety to the government. The Minister for Transport and Communications, in a reaction

submitted also on behalf of the Minister for Housing, Planning and Environment Management, expressed broad agreement with the report although some of the individual findings were contested. The conclusions of the Chamber of Audit were accepted for future reference.

103. Parts of the draft report were transmitted to the NS Railway Infrastructure Division and to Railned, the Netherlands government entity which operated the railway system. The Railway Infrastructure Division disagreed with certain findings of the Chamber of Audit with regard to environmental impact estimates. Railned called into question some of the findings of the Chamber of Audit with regard to the predicted increase in the volume of rail transport.

104. The full report, including the reactions, was transmitted to the Lower House of Parliament (parliamentary year 1999-2000, 27 195, nos. 1-2).

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Outline planning decisions

105. Section 2a of the Town and Country Planning Act empowers the Minister for Housing, Planning and Environment Management together with the other ministers concerned in each case to prepare plans, known as outline planning decisions, for particular aspects of national planning policy (section 2a(1)). At the relevant time (that is before 1 January 1994) the draft for such a plan was required to be laid open for public inspection for a period of between one and three months, an announcement being made beforehand in the Netherlands Government Gazette and the local media. Anyone minded to do so could submit their views for a period of one month after the end of the inspection period (section 2a(2)). The draft was transmitted to the Lower House of Parliament for information at the time of its being laid open for public inspection (section 2a(5)).

106. The ministers were required to consult the authorities of the provinces, regional surface waterboards, municipalities and any other public-law entities, as appropriate, about the draft (section 2a(3)). The advice of the Planning Advisory Board had to be sought (section 2a(4)).

107. The ministers were then required to transmit the outline planning decision – which by this time no longer had the status of a draft – to the Lower House for approval. The plan had to be accompanied by a general statement setting out the way in which any views submitted by interested parties, the results of consultations with lower government bodies and the advice of the Planning Advisory Board had been taken into account (section 2a(6)).

108. The Lower House was entitled to send the outline planning decision back to the ministers concerned for modification before deciding whether or not to approve it. Thereafter it could withhold its approval of all or part of the plan (section 2a(7)).

109. The Lower House then transmitted the outline planning decision, as approved by it, to the Upper House of Parliament. The latter House could decide to approve it or not, but could not amend it (section 2a(8)). If approved by the Upper House, the outline planning decision came into force (section 2a(7)). Once it was in force, the outline planning decision was published in the Official Bulletin and the local media (section 2a(9)).

110. Although there is no specific provision for any appeal to an administrative tribunal against an outline planning decision, the Administrative Jurisdiction Division of the Council of State held in its decision of 31 January 1997 – that is the decision on the appeals against the outline planning decision in the present case (see paragraphs 62-69 above) – that the decisive moment for lodging an appeal was when the ministers resubmitted the outline planning decision to the Lower House of Parliament after the latter had given them the opportunity to modify it (that is, for the purposes of the present case, Outline Planning Decision – Part 3A).

111. Since 1 January 1994 it is provided that, in so far as an outline planning decision contains policy decisions about major projects of national importance, all further planning relating to such projects is subject to the limitations set out in these policy decisions (section 39).

B. The Transport Infrastructure Planning Act

112. The Transport Infrastructure Planning Act, as in force since 1 January 1994, requires the Minister for Transport and Communications to consult the local and regional authorities whose territories may be affected and, in the case of a railway project, the prospective exploiter of the railway before drawing up a draft routing decision (section 6). This draft is then transmitted to them, after which they have the opportunity to comment (sections 11(1), 12(1) and (2), and section 13).

113. The minister then draws up a final routing decision and may if necessary require the local and regional authorities to modify their own local and zoning plans (section 15(1)-(3)). The routing decision is transmitted to Parliament with an explanatory statement (section 16(1)). Non-binding time-limits are set for the various stages of the procedure.

114. Anyone with an interest may lodge an appeal against the routing decision with the Administrative Jurisdiction Division of the Council of State (section 15(4)).

115. Chapter V of the Transport Infrastructure Planning Act contains special provisions governing the procedure relating to major projects of national importance. This procedure is to be followed if an outline planning

decision is in force (section 21). In such cases the outline planning decision is to form the basis of, and be transformed into, a draft routing decision (section 22). If changes to the draft routing decision appear necessary in view of observations received from interested parties or local-government bodies, then these changes are to remain within the limits drawn by the outline planning decision (section 23(1)).

116. The Minister for Transport and Communications, together with the Minister for Housing, Planning and Environment Management, then draws up a final routing decision and may, if necessary, require the local and regional authorities to modify their own local and zoning plans (section 24(1)-(3)).

117. Anyone with an interest may appeal against the final routing decision to the Administrative Jurisdiction Division of the Council of State (section 24(4)). No separate appeal lies against the outline planning decision if it is followed within one year from its entry into force by a final routing decision (section 24(5)).

C. Historical overview of the Council of State and its Divisions

118. The Council of State was established by Emperor Charles V in 1531 in order to assist and advise his sister, Mary of Hungary, whom he had appointed regent (*landvoogdes*) of the Low Countries to rule on his behalf.

119. Following the Low Countries' secession from Spain in 1581 and in the course of the subsequent establishment of the independent Republic of the Seven United Netherlands Provinces, which was formalised in 1648 by the Treaty of Westphalia, the Council of State developed into a body that, together with the Stadtholder (*Stadhouder*), was charged with daily government. The control over their governance was exercised by the representatives of the United Provinces sitting in the States General (*Staten-Generaal*).

120. The Council of State was abolished in 1795, when France occupied the Republic. Napoleon transformed the Republic into the Kingdom of Holland in 1806 and, in 1810, incorporated it into the French Empire. In 1805 the Council of State had been reinstated as an advisory body to the Grand Pensionary (*Raadpensionaris*), who was appointed by the legislative body to head the then executive. The Council of State exercised this function until 1810. The Kingdom of the Netherlands regained independence in 1813. According to the 1815 Netherlands Constitution (*Grondwet*), the monarch had an obligation to consult the Council of State before legislative acts and measures of internal administration were enacted. The monarch was further free to consult the Council of State on other matters.

121. A further function of the Council of State was introduced in 1861, namely that of hearing administrative disputes in which an appeal had been

lodged with the Crown (*Kroonberoep*) and advising the Crown, consisting of the inviolable monarch and the responsible minister or ministers, on the ruling to be given by the Crown on the appeal. The Crown was free to depart from this advice. For the exercise of this function, the Administrative Litigation Division of the Council of State (*Afdeling voor Geschillen van Bestuur van de Raad van State*) was created.

122. On 1 July 1976 the Act on Administrative Jurisdiction as to Decisions of the Administration (*Wet administrative rechtspraak overheidsbeschikkingen* – "the AROB Act") came into force, which provided for an administrative appeal procedure in statutorily defined categories of administrative disputes not eligible for an appeal to the Crown. The final decision on such disputes was to be taken by a newly established Division of the Council of State, that is the Judicial Division of the Council of State (*Afdeling Rechtspraak van de Raad van State*).

123. In order to give effect to the Court's judgment of 23 October 1985 in *Benthem v. the Netherlands* (Series A no. 97), in which it was found that the Crown could not be regarded as a tribunal within the meaning of Article 6 § 1 of the Convention, the Interim Act on Crown Appeals (*Tijdelijke Wet Kroongeschillen*) was passed on 18 June 1987. It entered into force on 1 January 1988 and was to remain in force for five years. Under the provisions of this Act, the Administrative Litigation Division of the Council of State was to determine all disputes which formerly were to be decided by the Crown. The function of the Judicial Division of the Council of State was not affected by this Act.

124. On 1 January 1994 the General Administrative Law Act (*Algemene Wet Bestuursrecht*), laying down new uniform rules of administrative procedure, entered into force. On the same date the Interim Act on Crown Appeals and the AROB Act were repealed. The functions of both the Administrative Litigation Division and the Judicial Division, which thereby became defunct, were vested in a new division of the Council of State, the Administrative Jurisdiction Division (*Afdeling bestuursrechtspraak*).

D. General features and functions of the Council of State

1. Membership of the Council of State

125. The Council of State is presided over by the monarch and consists of a vice-president and up to 28 ordinary councillors (*Staatsraden*) (section 1 of the Council of State Act (*Wet op de Raad van State*)) and 55 extraordinary councillors (*Staatsraden in buitengewone dienst*) (section 4, as worded since 1 April 2001; prior to this date the maximum number of extraordinary councillors was 25). At present, the Council of State is composed of 27 ordinary councillors and 27 extraordinary councillors.

126. All councillors are appointed by royal decree (*Koninklijk Besluit*) following nomination by the Minister of the Interior and Kingdom Relations in agreement with the Minister for Justice. Appointments are for life, the age of retirement being 70 (sections 3 and 4). Extraordinary councillors submit proposals for the number of hours they wish to work, and their number is subsequently determined for five-year periods by royal decree.

127. Any candidate for membership of the Council of State is required to be a Netherlands national and to be at least 35 years old (section 5). In the appointment of ordinary councillors, care is taken to ensure that the composition of the Plenary Council of State (*Volle Raad*), which solely consists of ordinary councillors, reflects political and social opinion in the proportions represented in the Houses of Parliament (*Staten-Generaal*). However, membership of a political party is not a formal or material criterion.

128. Ordinary councillors are appointed primarily on the basis of their knowledge and experience, whether in a specific field or in relation to public administration and administrative law in general. They are mainly selected from the circle of politicians, governors, high-level civil servants, judges and academics. Extraordinary councillors are mainly selected from the judiciary on the strength of their specific judicial knowledge and experience.

129. Section 7(1) of the Council of State Act sets out the posts, offices and professional activities that are incompatible with being vice-president of the Council of State and with being an ordinary councillor. These categories are extended in section 7(2) of this Act with regard to the extraordinary councillors. This provision reads:

> "The vice-president, ordinary councillors and extraordinary councillors shall not hold any post the exercise of which is undesirable with a view to the proper discharge of their office, the preservation of their impartiality and independence, or the confidence therein."

130. Pursuant to section 7(3), the vice-president renders public any other positions held by members of the Council of State. This information is published in the Netherlands Government Gazette and posted on the Council of State's official website.

2. Advisory function of the Council of State concerning draft legislation

131. As required by Article 73 of the Constitution, before the government submits to Parliament a bill for adoption, draft delegated legislation or a proposal to approve or denounce a treaty, it must seek the advisory opinion of the Council of State (section 15 of the Council of State Act).

132. In cases where proposed legislation does not originate from the government but from one or more members of the Lower House of

Parliament, the Lower House will seek the advisory opinion of the Council of State (Article 15a).

133. For the purposes of delivering advisory opinions, the ordinary councillors are divided into five Sections, grouped by ministries. A bill is first scrutinised by officials, who set out their findings in a memorandum. The bill and this memorandum are subsequently transmitted to a rapporteur, who prepares a draft advisory opinion. This draft is then discussed in the Section concerned. It will subsequently be submitted to the Plenary Council of State for examination and adoption.

134. The Council of State examines draft legislation and explanatory memoranda in the light of a large number of criteria bearing on policy, points of law and technical legislative requirements. These criteria include compatibility with human rights conventions, European law, the Constitution, the Charter for the Kingdom of the Netherlands (*Statuut voor het Koninkrijk der Nederlanden*), general legislation and unwritten legal principles, as well as existing law and general regulations on the structure, formulation and presentation of bills and explanatory memoranda. It further examines the anticipated effectiveness, efficiency, feasibility and enforceability of the proposed regulations, the degree of compliance to be expected, as well as the internal consistency of the legislation, the legal certainty it provides and the quality of legal protection.

135. The Plenary Council of State, which is composed solely of the ordinary councillors, adopts the advisory opinions of the Council of State. The extraordinary councillors are not involved in the advisory function of the Council of State. It is further standing practice that the meetings of the Plenary Council of State are not attended by the extraordinary councillors.

3. Judicial function of the Administrative Jurisdiction Division

136. The Administrative Jurisdiction Division of the Council of State is entrusted with adjudicating administrative disputes, including applications for provisional relief, where the law so provides (section 26 of the Council of State Act). Its cases are heard in accordance with the provisions of the General Administrative Law Act and the relevant provisions of the Council of State Act.

137. The Administrative Jurisdiction Division consists of all the ordinary councillors of the Council of State (not its vice-president) and all the extraordinary councillors. They all hold this position for life until their retirement at the age of 70. Among them a president of the Division is appointed by royal decree, also for life.

138. The president manages the work of the Administrative Jurisdiction Division and decides on the composition of its four Chambers. The first Chamber deals with cases involving town and country planning, the second Chamber with environment cases, the third Chamber with general appeals and the fourth Chamber with appeals in cases concerning aliens. The first

two Chambers administer justice at first and sole instance, whereas the third and fourth Chambers hear appeals against judgments given by lower administrative courts. Cases before the Administrative Jurisdiction Division are dealt with by either a three-judge bench or a single judge.

139. With a view to guaranteeing the impartial administration of justice, the Administrative Jurisdiction Division has adopted certain principles, namely that a member who has been involved in an application for provisional relief will not be involved in hearing the proceedings on the merits; if an appeal is dealt with in simplified proceedings (that is without an oral hearing), any objection (*verzet*) will not be heard by the member who gave the original judgment, and every member must be alert to any conflict of interest and, in case of any reasonable doubts, either withdraw from a case or acquiesce in a challenge to his or her impartiality.

140. Partly to facilitate this, and well in advance of hearings, members of the Administrative Jurisdiction Division assigned to a particular case are sent copies of the principal documents in the case, together with a list of parties involved and their legal counsel. In this way, each member can verify whether there are reasons for withdrawing from the case on grounds of, for instance, a previous position, kinship or any other relation between a member of the Administrative Jurisdiction Division and a party or legal representative.

E. Combination of the advisory and judicial functions

141. From the above description it follows that some members of the Administrative Jurisdiction Division combine the judicial function with the advisory function, namely the ordinary councillors of the Council of State, while the extraordinary councillors perform only a judicial function within the Council of State.

F. Effect given to *Procola v. Luxembourg* (judgment of 28 September 1995)

142. In a memorandum appended to a letter dated 12 February 1998 to the Chairman of the Lower House, the Minister for Justice and the Minister of the Interior informed the Lower House that, in view of *Procola* (Series A no. 326) and given the fact that there was not yet *communis opinio* about its precise scope and its possible consequences for the Netherlands, the Council of State had adopted a provisional practice in anticipation of further clarification by the European Court of Human Rights in its future case-law (Lower House parliamentary documents 1997-98, 25 425, no. 3).

143. The dual function of the Council of State was subsequently debated at length in Parliament, which accepted the position taken by the government.

144. In parliamentary budget discussions held in 2000, the government confirmed its above position. In reply to a question put in the Lower House on the advisory and judicial functions of the Council of State in relation to the independence of the administration of justice, the government stated that, after *Procola*, the Council of State had adapted its internal working methods and that, referring to the contents of the Minister for Justice's letter of 12 February 1998, these adaptations were of such a nature that so-called "*Procola* risks" were as good as excluded and that in this light the independent administration of justice was guaranteed (Lower House parliamentary documents 2000-01, 27 400 II, no. 3).

145. The practice adopted by the Council of State was further set out in the Annual Report 2000 of the Council of State. The relevant section reads as follows:

> "Since it is as yet unclear how the European Court of Human Rights will decide on the combination of functions within the Netherlands Council of State and the effect thereof on objective independence and impartiality, or what criteria the European Court of Human Rights will apply in this respect and what boundaries will be drawn, the Administrative Jurisdiction Division has for the time being chosen criteria and determined boundaries itself. Also, the Council of State and its Administrative Jurisdiction Division consider it important that justice is also seen to be done. The procedure opted for in this connection, and about which the Ministers for Justice and of the Interior have already made announcements to the Lower House (Lower House parliamentary documents 1997-98, 25 425, no. 3), amounts to the following:
>
> If in an appeal which has been lodged in time with the Administrative Jurisdiction Division, the lawfulness is disputed of a legal provision which has previously been applied in the case or of another regulation concerning an aspect – for example incompatibility with European law – in respect of which the Council of State has in the past explicitly expressed an opinion in its advice on the proposed provision, and if a party has voiced doubts as to the independence and impartiality of the bench dealing with the appeal, the composition of this bench will be changed so as to ensure that only members who have not participated in the advice sit on this bench. For this are in any event eligible the extraordinary councillors, who are not involved in the advisory function, and those ordinary councillors appointed after the giving of the advice and those ordinary councillors in respect of whom it is objectively certain that they have not participated in the adoption of the advice in the Plenary Council of State. In such a situation, this will – thanks to this way of proceeding in the Division – therefore prevent appellants as far as possible from relying on *Procola* in a challenge or otherwise."

G. Challenge of members of the Administrative Jurisdiction Division

146. Members of the Administrative Jurisdiction Division to whom a case has been assigned may be challenged by any of the parties on the grounds of facts or circumstances which may affect their judicial impartiality (section 8(15) of the General Administrative Law Act taken together with section 36 of the Council of State Act).

147. The challenge will be examined as soon as possible by a Chamber composed of three members of the Council of State, which shall not include the councillor(s) challenged. The challenging party and the councillor(s) challenged are offered the opportunity to be heard. A reasoned decision shall be given as soon as possible, against which no appeal lies (section 8(18) of the General Administrative Law Act taken together with section 36 of the Council of State Act).

148. In the case-law developed by the Administrative Jurisdiction Division in relation to challenges based on the Council of State's combined advisory and judicial functions in the light of Article 6 of the Convention, decisive importance is attached to the question whether or not the challenged councillor was involved in advising on the disputed legislation and whether the substance of the appeal concerns a point that was explicitly addressed in the advisory opinion given by the Council of State.

149. The Administrative Jurisdiction Division initially took as one of its criteria the degree to which members of the bench hearing the appeal had contributed to the advisory opinion. This criterion was dropped in later case-law, as this information is not accessible to the general public and therefore the parties. The key questions remain whether the challenged member of the bench belonged to the Plenary Council of State at the time when the advisory opinion was given and whether any position was adopted in the advisory opinion that is opposed by the party that has lodged the challenge. Only in cases where these questions can be answered in the affirmative is it accepted that a party has justified grounds to fear that the councillor concerned is biased in respect of the subject of the dispute (see Administrative Jurisdiction Division, case no. E10.95.0026/W, judgment of 9 October 1997, and case no. EO1.96.0532/W, judgment of 10 December 1997, *Jurisprudentie Bestuursrecht* 1998/28).

150. The rejection of a challenge does not however preclude the possibility that members of the bench concerned subsequently decide to withdraw from the case in view of the substance of the appeal (see Administrative Jurisdiction Division, case no. E03.96.0765/1, *Jurisprudentie Bestuursrecht* 2001/72).

151. Since *Procola* was published, it has been relied on in ten challenges lodged before the Administrative Jurisdiction Division. All of these challenges have been rejected, either because members assigned to the appeal were not involved in the previous advisory opinions on the statutory provisions concerned, or because the points of law put to the Administrative Jurisdiction Division by the party having lodged the challenge were so remote from the previous advisory opinion that the fear of bias was found to be unjustified.

152. In an appeal in cassation lodged with the Supreme Court (*Hoge Raad*) against a judgment of 29 March 1999 of the Arnhem Regional Court (*Arrondissementsrechtbank*) in expropriation proceedings in connection

with the construction of the *Betuweroute* railway, the appellant argued that the Regional Court, by confining itself to referring to the administrative procedures already pursued before the Administrative Jurisdiction Division, had neglected to rule on the legality and necessity of the expropriation and, in particular, that the Regional Court had failed to investigate technical alternatives such as tunnelling, which would make expropriation unnecessary. In this connection, referring to the Court's judgment in *Procola* (cited above), he argued that the Council of State's "structural impartiality" was in doubt and that it followed from this that he was entitled to have these issues reviewed by the ordinary courts.

153. In its judgment of 16 February 2000, the Supreme Court rejected these arguments. It agreed with the Regional Court that issues such as the necessity of building the railway at all and the choice of technical and routing alternatives were matters to be dealt with in administrative proceedings under the Town and Country Planning Act and the Transport Infrastructure Planning Act and not in expropriation proceedings. As to the appellant's point concerning the impartiality of the Council of State, the Supreme Court held as follows:

> "3.2. [The appellant] has submitted before the Regional Court – in so far as still relevant – in objection to the expropriation:
>
> ...
>
> (b) As the Council of State (as a whole, therefore including the Administrative Jurisdiction Division) has been involved in the enactment of the Transport Infrastructure Planning Act and in this respect, as an advisory organ, has issued a generally positive advice, the Council of State cannot be regarded as a structurally impartial tribunal within the meaning of Article 6 of the Convention;
>
> ...
>
> 3.4.5.1. In Part Ib of the cassation plea, which concerns the objection set out in 3.2 under (b) and with reference to the judgment of the European Court ... in *Procola v. Luxembourg*, the argument is repeated that was unsuccessfully raised before the Regional Court, namely that the royal decree must be reviewed in its entirety as doubts may arise as to the structural impartiality of the Council of State as a judicial body where members of the Council of State have subsequently advised about the Transport Infrastructure Planning Act and administer justice on a decision that has been taken on the basis of this Act.
>
> 3.4.5.2. However, the argument overlooks the point that the mere fact that advice was heard from the Council of State, in accordance with the statutory provisions concerned, about the bill that eventually led to the Transport Infrastructure Planning Act does not warrant the conclusion that fears as to the impartiality of the Administrative Jurisdiction Division of the Council of State, which had to judicially determine objections against the routing decision, are objectively justified. Part Ib of the cassation plea must therefore be dismissed."

THE LAW

I. ADMISSIBILITY OF THE APPLICATIONS

154. The Government submitted that, with the exception of Mr and Mrs Raymakers, the applicants had not challenged the Administrative Jurisdiction Division or appealed to the civil courts on the ground that the administrative proceedings at issue did not offer sufficient guarantees of a fair procedure. According to the Government, both remedies were effective and capable of redressing the alleged violation of the Convention. The Government argued that none of the applicants, apart from Mr and Mrs Raymakers, had therefore exhausted domestic remedies as required by Article 35 § 1 of the Convention.

155. The applicants submitted that, although they had misgivings about the impartiality of the Administrative Jurisdiction Division, which some of them did in fact express in their appeal submissions, they had not lodged a formal challenge like Mr and Mrs Raymakers, fearing that this might have adverse consequences. They further pointed out that there were no substantial differences between the appeal lodged by Mr and Mrs Raymakers and those lodged by the other applicants. As to the remedy before the civil courts referred to by the Government, the applicants indicated that, according to the case-law of the civil courts as illustrated by the Supreme Court's judgment of 16 February 2000 (see paragraph 153 above), the Administrative Jurisdiction Division is regarded as complying with the requirements of impartiality under Article 6 § 1 of the Convention.

156. The Court reiterates the relevant principles as to exhaustion of domestic remedies as set out in, *inter alia*, the Court's judgment of 28 July 1999 in *Selmouni v. France* ([GC], no. 25803/94, §§ 74-77, ECHR 1999-V). The purpose of Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court. The obligation to exhaust domestic remedies is, however, limited to making use of those remedies which are likely to be effective and available in that their existence is sufficiently certain and they are capable of redressing directly the alleged violation of the Convention. An applicant cannot be regarded as having failed to exhaust domestic remedies if he or she can show, by providing relevant domestic case-law or any other suitable evidence, that an available remedy which he or she has not used was bound to fail.

157. The Court can agree with the Government that, where it is alleged that a tribunal does not meet the requirements of independence or impartiality under Article 6 § 1 of the Convention, a challenge can be regarded as an effective remedy under Netherlands law for the purposes of Article 35 § 1.

158. In the present case, however, the challenge of Mr and Mrs Raymakers – based on the same grounds as now submitted by all applicants to the Court – was dismissed. The Court fails to see that a further challenge by the other applicants, who were parties in the same set of proceedings as Mr and Mrs Raymakers, could have resulted in a different decision. The Court therefore accepts that, in the particular circumstances of the present case, the other applicants were not required to avail themselves of that remedy because it would have been bound to fail.

159. As regards the civil remedy advanced by the Government, it is true that the Court has previously held this remedy to be an effective one where an administrative appeal procedure is considered to offer insufficient guarantees as to a fair procedure (see *Oerlemans v. the Netherlands*, judgment of 27 November 1991, Series A no. 219, pp. 21-22, §§ 50-57). However, in that case the applicant's administrative appeal had been heard by the Crown (see paragraphs 121 and 123 above) after the Court had concluded in *Benthem v. the Netherlands* (judgment of 23 October 1985, Series A no. 97) that the Crown could not be regarded as a tribunal within the meaning of Article 6 § 1 of the Convention.

160. In their brief remarks about the remedy before the civil courts, the Government have not cited any domestic case-law in which a civil court agreed to hear an administrative appeal on the ground that, in view of the Court's judgment of 28 September 1995 in *Procola v. Luxembourg* (Series A no. 326), the Administrative Jurisdiction Division afforded insufficient guarantees as to independence and impartiality. The Supreme Court's case-law referred to by the applicants in fact indicates that this argument was rejected by the Supreme Court. The Court considers that the applicants have sufficiently established that in the present case this remedy too could not be regarded as offering any reasonable prospect of success.

161. In these circumstances, the applications cannot be rejected for failure to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention.

162. The Court considers that the applicants' complaint that, from an objective point of view, the Administrative Jurisdiction Division cannot be regarded as an independent and impartial tribunal within the meaning of Article 6 of the Convention raises questions of law which are sufficiently serious that their determination should depend on an examination of the merits. No other grounds for declaring it inadmissible have been established. The remaining part of the applications is therefore declared admissible. In accordance with its decision to apply Article 29 § 3 of the Convention (see paragraph 11 above), the Court will immediately consider the merits of the applicants' complaint.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

163. The applicants complained that the Administrative Jurisdiction Division of the Council of State was not independent and impartial, in that the Council of State exercises both advisory and judicial functions. They alleged a violation of Article 6 § 1 of the Convention, which provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ..."

A. Applicability of Article 6

164. The applicability of Article 6 § 1 of the Convention was not in dispute between the parties and the Court sees no reason not to find that the proceedings at issue fall within the scope of this provision.

B. Compliance with Article 6

1. Submissions before the Court

(a) The applicants

165. The applicants submitted that, in the light of the Court's judgments in *Procola* (cited above) and *McGonnell v. the United Kingdom* (no. 28488/95, ECHR 2000-II), the Administrative Jurisdiction Division cannot be regarded as an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention. In *Procola*, the Court indicated that, by reason of the combination of different functions within the Luxembourg *Conseil d'Etat*, this "institution's structural impartiality" could be put in doubt. The applicants further submitted that the perception of appellants had to be regarded as decisive where it concerned a tribunal's objective impartiality. Any doubts by appellants – based on reasonable and objectively justified grounds – as to the impartiality of a tribunal had to be dispelled.

166. The applicants considered that in this respect no distinction could be made between, on the one hand, a simultaneous exercise of different functions by one person and, on the other, an institutionalised simultaneous exercise of different structural tasks. To draw such a distinction would, from an appellant's perspective, be artificial. The practical implementation of a norm based on such a distinction was likely to be inadequate and to offer an appellant insufficient guarantees and opportunities for control.

167. It would follow that, in appeals to the Administrative Jurisdiction Division, an investigation would have to be carried out in each case as to which statutory provisions were at issue when the Council of State advised

on the relevant provisions, which councillors were then members of the Plenary Council of State, and what the content of the advice was. Apart from the risk of mistakes in such investigations, it was also incumbent on an appellant – who under administrative law was considered entitled to litigate without professional legal assistance – to verify whether such a possible combination of tasks existed. Appellants were often unable themselves to obtain a timely answer on the question how the Plenary Council of State was composed when an advice was given. Furthermore, in most cases appellants only became aware of the definite composition of the bench of the Administrative Jurisdiction Division shortly before the hearing of their case.

168. The applicants further submitted that the Council of State, in its advisory capacity, could not be compared to an independent and impartial judicial authority, in that it was a politically composed body having close ties with the government and the legislator. In this respect the applicants referred to section 22 of the Council of State Act, providing for a general possibility of consultation between the Council of State and the minister concerned, and submitted that no similar provision could be found in regulations on the status of the judiciary.

169. When considering the conditions for appointment as ordinary councillor – which are considerably less strict than for judges of the ordinary courts –, the appointment procedure itself and the role of the Council of State in the Netherlands legal order, it was, from the perspective of appellants, obvious that the Council of State had to be regarded as a part of the legislature and the executive. It was also clear that, in the exercise of its advisory functions, the Council of State dealt not only with questions of lawfulness but also with political and policy considerations.

170. As no distinction was made between the persons involved in the exercise of the Council of State's advisory functions and those involved in the exercise of its judicial functions, the applicants considered that institutionalised simultaneous exercise of both the advisory and the judicial functions of the Council of State was incompatible with the requirement of objective impartiality under Article 6 § 1 of the Convention.

171. The applicants further submitted that the advisory opinions given by the Council of State on the Transport Infrastructure Planning Bill did in fact serve as a prelude to future adjudication of appeals lodged against the *Betuweroute* routing decision. In its advisory opinion it dealt intensively with the issues going to problems of the legislation applicable to the decision-making process in relation to the planning of the *Betuweroute* railway. In this context the Council of State suggested the enactment of a special regulation for large-scale projects of (supra-)national importance such as the – expressly mentioned – *Betuweroute* railway, in order to allow a fast and efficient construction thereof, bypassing the normal legal-protection proceedings and the powers of local and regional public

authorities. To this end the Council of State even suggested that, by way of transitory arrangements, the Transport Infrastructure Planning Act be rendered applicable to the decision-making process already underway in respect of the planning of the *Betuweroute* railway. This considerably restricted the opportunities for, as well as the scope of, judicial control, which was limited to some main aspects of the decision-making process. In its second advice the Council of State further advised that the envisaged routing of the *Betuweroute* railway be mentioned expressly in the Transport Infrastructure Planning Act.

172. From the perspective of appellants it could not therefore be maintained that the Administrative Jurisdiction Division of the Council of State was an independent and impartial tribunal. From their perspective it appeared that both the political and judicial decisions on the construction of the railway had eventually been taken by the same kind of institution.

173. In this context the applicants further referred to the fact that the bench of the Administrative Jurisdiction Division that heard their appeals had been composed of three ordinary councillors. In the applicants' opinion, this gave rise to an objectively justified impression that these members considered themselves bound by the advisory opinions given previously by the Council of State on the Transport Infrastructure Planning Bill in which, in addition, the President of the bench concerned had participated.

174. This impression was confirmed by the reserved manner in which the Administrative Jurisdiction Division had examined the challenged decisions on the construction of the *Betuweroute* railway. It had relied upon favourable expert opinions, without giving adequate reasons for attaching less value to opposing expert opinions submitted by the appellants. It could be concluded from this that the Council of State, in the exercise of its judicial functions in the instant case, had allowed itself to be too influenced by policy considerations, that is the desirability of a speedy construction of the *Betuweroute* railway, a point of view which had been subscribed to in the Council of State's advisory opinions.

175. The applicants further argued that the policy adopted by the Council of State for preventing so-called "*Procola* risks" was inadequate and ineffective, in that this policy was formulated with insufficient precision and, further, had not been laid down in a regulation accessible to the general public. Furthermore, the Council of State did not indicate in concrete cases whether this policy had in fact been applied. At the material time the applicants could only deduce the existence of this policy from a memorandum sent by the Minister for Justice and the Minister of the Interior to the Lower House, after the decision on the appeals against the outline planning decision had already been taken. It was further only in the Annual Report 2000 of the Council of State, which was published in 2001, that an attempt was made to describe the "*Procola* policy" applied by the Council of State. The applicants were of the opinion that, given the

importance of the impartiality of the judiciary in a State respecting the rule of law, it could not be considered sufficient to refer merely to communications addressed to Parliament or to a chapter in an annual report. These kinds of guarantees for judicial impartiality should be laid down in a statutory regulation which was accessible to the general public.

176. The applicants submitted lastly that it was also incompatible with Article 6 § 1 of the Convention that the Council of State, according to the description of its *Procola* policy in its Annual Report 2000, only examined whether there was a *Procola* risk when an appellant "had advanced doubts as to the independence and impartiality of the bench dealing with the appeal". It could be inferred that the Council of State only examined this issue seriously after having been requested to do so. Given the Contracting States' positive obligation under Article 6 § 1 of the Convention to organise their judicial systems in such a way that their courts were capable of meeting each of its requirements, including that of judicial impartiality, such a system could not be seen otherwise than as being incompatible with this provision.

(b) The Government

177. According to the Government, the decision to construct the *Betuweroute* railway was taken after obtaining the consent of Parliament and after considering all the relevant interests. Construction projects like the one at issue in the present case were regulated by the Transport Infrastructure Planning Act and involved two stages, namely the taking of an outline planning decision containing the broad principles and the subsequent taking of a routing decision. The Government stressed that the Council of State had no advisory function whatsoever in the process leading to an outline planning decision or a routing decision and that an appeal against both types of decision lay to the Administrative Jurisdiction Division.

178. In administrative appeal proceedings the Administrative Jurisdiction Division examined solely the lawfulness of an administrative decision. The policy on which a decision was based and policy considerations that had played a role in the decision were not examined on their merits. Given the division of powers between the executive and the judiciary, there was no room for a more comprehensive review than an examination of the lawfulness of a challenged decision. Where the Administrative Jurisdiction Division concluded that a decision was unlawful, it quashed the decision and referred the case back to the competent administrative authority for a new decision with due regard to the considerations stated by the Administrative Jurisdiction Division. It did not give a fresh decision of its own.

179. The applicants' complaint was based solely on the fact that the bench of the Administrative Jurisdiction Division that dealt with their

appeals against the routing decision had been composed of three ordinary councillors who were also members of the Plenary Council of State, which had issued an advisory opinion on the Transport Infrastructure Planning Bill. In the Government's view, by adopting this position, the applicants had misconstrued the link between the Transport Infrastructure Planning Act – and hence the Council of State's advice on it – and the determination of their appeals against the routing decision.

180. The proceedings in respect of the applicants' appeals had not involved any matter on which the Council of State had given an advisory opinion and they could not, therefore, have any grounds for fearing that the three judges had felt bound by an opinion previously given, since there had simply been no such opinion in respect of the routing decision.

181. The challenge lodged by Mr and Mrs Raymakers had been determined by three extraordinary councillors, who had never been involved in the exercise of the Council of State's advisory functions. Two of the three ordinary councillors who determined the applicants' appeals against the routing decision had not yet joined the Council of State when this body exercised its advisory functions in respect of the Transport Infrastructure Planning Bill, and the advice given by the Council of State on this bill had not discussed or even touched upon the questions which the Administrative Jurisdiction Division had been called upon to determine in the applicants' appeals against the routing decision. This was supported by the applicants' failure to identify elements of the Council of State's advisory opinion on the Transport Infrastructure Planning Bill which would cast doubt on the Administrative Jurisdiction Division's impartiality in hearing the applicants' appeals. The Government therefore failed to see in what manner any member of the bench of the Administrative Jurisdiction Division that dealt with the applicants' case could have felt bound by a previous position taken by the Council of State.

182. Although the ordinary councillors sat in the Plenary Council of State as well as the Administrative Jurisdiction Division, the Government considered that there was no general incompatibility between delivering advisory opinions to the executive and exercising a judicial function. It was only in very rare cases that an advisory opinion on draft legislation and a specific ruling by the Administrative Jurisdiction Division in which the finalised legislation was applied related to "the same case" or amounted to "the same decision".

183. According to the Government, it was clear from the Court's judgments in *Procola* and *McGonnell* (both cited above) that the key question was whether and how the same judge was directly involved in drafting regulations on which he or she was subsequently called upon to rule in a judicial capacity. The Government were therefore of the opinion that the mere fact that advisory and judicial functions were combined within a single body did not in itself vitiate the independence and impartiality of

that body. The Government considered that the measures taken by the Administrative Jurisdiction Division in response to *Procola* constituted sufficient safeguards for securing its objective impartiality.

(c) Third-party interventions

(i) The Italian Government

184. The Italian Government submitted that for the purposes of assessing judicial impartiality, a distinction had to be drawn between an abstract assessment of a provision, such as an advisory opinion, and an evaluation of the application of a provision in a specific case. In their view, a judgment, evaluation or examination of a law did not prevent further judgments or evaluations of that same law. It was incompatible with the requirements of impartiality for a judge to assess specific facts twice, but not for an abstract provision to be assessed by the same judge in different individual cases.

(ii) The French Government

185. The French Government drew attention to the fact that the French legislation on the operation of the French *Conseil d'Etat* and the status of its members were based on the principle of a simultaneous exercise of advisory and judicial functions by the same body. The French *Conseil d'Etat* was divided into five Administrative Divisions (*sections administratives*): interior, finance, public works, social, and report and research, which were responsible for giving advisory opinions to the government, and one Judicial Division (*section du contentieux*) responsible for hearing administrative disputes.

186. The primary function of the Administrative Divisions was to ensure the lawfulness of legislation submitted to them. Their legal advice to the government aimed to prevent illegalities which judicial authorities would only be able to remedy later, once the administrative decision had been made and sometimes already applied. The existence of a body able to analyse an administrative decision or rule and provide legal advice before it was enacted, and hence improve its quality, also guaranteed greater stability of the rule of law. If administrative decisions were better protected against legal errors, they were less likely to be set aside by the judicial authorities and therefore more stable.

187. The inherent advantage of a simultaneous exercise of both advisory and judicial functions was that it was easier for the members of Administrative Divisions who were also members of the Judicial Division to identify illegalities, which meant that the quality of the advisory opinions was guaranteed. It was impossible to separate the judicial function of the *Conseil d'Etat* from its advisory responsibilities. The adviser to the

government relied on case-law and the judge took into account the adviser's opinion. This resulted in the best possible guarantee of legal certainty.

188. Nevertheless, the simultaneous assignment of *Conseil d'Etat* members to an Administrative Division and the benches of the Judicial Division was not without limits, in that the requirement of impartiality took precedence over this principle of dual assignment. The *Conseil d'Etat* observed the rule that any judge who had either assisted, in the course of duties performed outside the *Conseil d'Etat*, in drafting an administrative decision which was then challenged before the Judicial Division, or had even dealt with the decision in the past as a reporting judge (*rapporteur*) to an Administrative Division, had to withdraw from the case.

189. The French Government considered that the fact that the same point of law was submitted successively to the *Conseil d'Etat* in its advisory capacity and its judicial capacity did not as such constitute a ground, given its independence in both capacities, for an objective doubt in the mind of an appellant that could undermine the impartiality of the Judicial Division. The impartiality of a body where advisory and judicial responsibilities coexisted did not pose a problem where an advisory opinion concerned merely a point of law. Where it concerned a question of fact, the assessment of the question whether an appellant could have objectively justified fears of bias depended on the merits of each case.

2. The Court's assessment

190. As is well established in the Court's case-law, in order to establish whether a tribunal can be considered "independent" for the purposes of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence.

191. As to the question of "impartiality" for the purposes of Article 6 § 1, there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect. Under the objective test, it must be determined whether, quite apart from the judges' personal conduct, there are ascertainable facts which may raise doubts as to their impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to proceedings (see *Morris v. the United Kingdom*, no. 38784/97, § 58, ECHR 2002-I).

192. The concepts of independence and objective impartiality are closely linked and the Court will accordingly consider both issues together as they relate to the present case (see *Findlay v. the United Kingdom*, judgment of

25 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 281, § 73).

193. Although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court's case-law (see *Stafford v. the United Kingdom* [GC], no. 46295/99, § 78, ECHR 2002-IV), neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction. The question is always whether, in a given case, the requirements of the Convention are met. The present case does not, therefore, require the application of any particular doctrine of constitutional law to the position of the Netherlands Council of State. The Court is faced solely with the question whether, in the circumstances of the case, the Administrative Jurisdiction Division had the requisite "appearance" of independence, or the requisite "objective" impartiality (see *McGonnell*, cited above, § 51).

194. In deciding whether in a given case there is a legitimate reason to fear that these requirements are not met, the standpoint of a party is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see, *mutatis mutandis*, *Hauschildt v. Denmark*, judgment of 24 May 1989, Series A no. 154, p. 21, § 48).

195. Having regard to the manner and conditions of appointment of the Netherlands Council of State's members and their terms of office, and in the absence of any indication of a lack of sufficient and adequate safeguards against possible extraneous pressure, the Court has found nothing in the applicant's submissions that could substantiate their concerns as to the independence of the Council of State and its members, the more so as this particular issue was not addressed in the challenge proceedings brought by Mr and Mrs Raymakers.

Neither is there any indication in the present case that any member of the bench of the Administrative Jurisdiction Division was subjectively prejudiced or biased when hearing the applicants' appeals against the routing decision. In particular, it has not been alleged by the applicants that the participation of the President of the bench in the advisory opinion on the Transport Infrastructure Planning Bill gave rise to actual bias on his part.

196. Nevertheless, as illustrated in *Procola*(cited above), the consecutive exercise of advisory and judicial functions within one body may, in certain circumstances, raise an issue under Article 6 § 1 of the Convention as regards the impartiality of the body seen from the objective viewpoint. In this context the Court reiterates that it is crucial for tribunals to inspire trust and confidence (see paragraph 191 above).

197. The Government have brought to the Court's attention the internal measures taken by the Council of State with a view to giving effect to *Procola* in the Netherlands (see paragraphs 142-45 above). According to the

description of these measures which is to be found in the Annual Report 2000 of the Council of State, the composition of the bench will only be scrutinised if doubts are expressed by a party; the criterion then applied is that if the appeal goes to a matter explicitly addressed in a previous advisory opinion, the composition will be changed so as to exclude any judges who participated in that opinion.

198. The Court is not as confident as the government was in its statement during the parliamentary budget discussions in 2000 that these arrangements are such as to ensure that in all appeals coming before it the Administrative Jurisdiction Division constitutes an "impartial tribunal" for the purposes of Article 6 § 1 of the Convention. It is not, however, the task of the Court to rule in the abstract on the compatibility of the Netherlands system in this respect with the Convention. The issue before the Court is whether, as regards the appeals brought by the present applicants, it was compatible with the requirement of the "objective" impartiality of a tribunal under Article 6 § 1 that the Council of State's institutional structure had allowed certain of its ordinary councillors to exercise both advisory and judicial functions.

199. In the present case the Plenary Council of State advised on the Transport Infrastructure Planning Bill, which laid down draft procedural rules for the decision-making process for the supra-regional planning of new major transport infrastructure. The applicants' appeals, however, were directed against the routing decision, which is a decision taken on the basis of the procedure provided for in the Transport Infrastructure Planning Act. Earlier appeals against the outline planning decision are not at issue as they were based on a different legal framework.

200. The Court is of the opinion that, unlike the situation examined by it in *Procola* and *McGonnell*, both cited above, the advisory opinions given on the Transport Infrastructure Planning Bill and the subsequent proceedings on the appeals brought against the routing decision cannot be regarded as involving "the same case" or "the same decision".

201. Although the planning of the *Betuweroute* railway was referred to in the advice given by the Council of State to the government on the Transport Infrastructure Planning Bill, these references cannot reasonably be interpreted as expressing any views on, or amounting to a preliminary determination of, any issues subsequently decided by the responsible ministers in the routing decision at issue. The passages containing the references to the *Betuweroute* railway in the Council of State's advice were concerned with removing perceived ambiguities in sections 24b and 24g of the Transport Infrastructure Planning Bill. These provisions were intended to apply to two major construction projects already under consideration at the relevant time, of which the *Betuweroute* railway was one. The Court cannot agree with the applicants that, by suggesting to the government to indicate in the bill the names of the places where the *Betuweroute* railway

was to start and end, the Council of State determined, expressed any views on or in any way prejudged the exact routing of that railway.

202. In these circumstances, the Court is of the opinion that the applicants' fears as to a lack of independence and impartiality of the Administrative Jurisdiction Division, due to the composition of the bench that heard their appeals, cannot be regarded as being objectively justified. Consequently, there has been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the remainder of each application admissible;

2. *Holds* by twelve votes to five that there has been no violation of Article 6 § 1 of the Convention;

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 6 May 2003.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr Ress;

(b) dissenting opinion of Mrs Thomassen joined by Mr Zagrebelsky;

(c) dissenting opinion of Mrs Tsatsa-Nikolovska joined by Mrs Strážnická and Mr Ugrekhelidze.

L.W.
P.J.M.

CONCURRING OPINION OF JUDGE RESS

I agree with the outcome of this case but in my view the reasoning of the Court needs some clarification.

It is true, as the Court has stressed in paragraph 198 of the judgment, that the issue before it is whether, as regards the appeals brought by the present applicants, it was compatible with the requirement of objective impartiality of a tribunal that the Council of State's institutional structure allowed certain of its ordinary councillors to exercise both advisory and judicial functions. But more precisely the issue is what was the subject matter of the relevant proceedings. In this connection, the Court refers in paragraph 200 to the fact that the advisory opinion given on the Transport Infrastructure Planning Bill and the subsequent proceedings on the appeals brought against the routing decisions cannot be regarded as involving the *same* case or the *same* decision. If this is the criterion then the question has to be answered: when are decisions "the same" or when is a case "the same"?

In my view that can only be so where their subject matter is identical – that is, to put it negatively, not different. The subject matter of different sets of proceedings is the same if the facts of the case are (more or less) the same and if the legal questions addressed in the proceedings on the basis of these facts are identical. One could also, as a third element, refer to the parties to the proceedings and ask the question whether they are different or the same.

The decisive question is not whether an ordinary councillor has exercised both advisory and judicial functions, but whether the decisions taken by him or her, irrespective of whether in an advisory or a judicial capacity, relate to the same subject matter. In that connection, it is necessary to note, as the Court did in paragraph 201 of the judgment, that the advice given by the Council of State to the government on the Transport Infrastructure Planning Bill relates only to the consultation of local and regional authorities and the prospective exploiter of the railway before a draft routing decision is drawn up. The advice concerns the procedure leading to the outline planning decision which is to form the basis of, and be transformed into, a draft routing decision. It is an advisory opinion which concerns the general structure of this procedure, but not the precise routing decision, which is taken afterwards by the Minister for Transport and Communications together with the Minister for Housing, Planning and Environmental Management (the final routing decision) and which may affect the interests and property rights of individuals. There is a clear relation between the Transport Infrastructure Planning Act as a general rule and the concrete routing decision. The subject matter of these two sets of proceedings is as different as the distinction between general and individual or abstract and concrete normally is. The advice on the Transport Infrastructure Planning Bill concerns the procedures laid down therein and does not relate to the precise places which the *Betuweroute* railway will cross. These places of the

routing arrangements are not determined, not even by the proposal of the Council of State to the government to indicate the starting and ending points. Within the Transport Infrastructure Planning Bill quite a number of different routing decisions are possible. As everybody knows, the level of abstraction may be very different in different matters of legislation; it may become so near to concrete and the subject matter may become so narrowed that a formal distinction would have to be considered rather artificial in the light of appearances. Appearances do not just stop at these formal classifications. Therefore a closer look at the different subject matter of the decisions will always be necessary.

Here, since the subject matter of the decisions was clearly different, there is no appearance that those ordinary councillors who had given advice had already addressed, or made up their minds about, all the possible routing decisions. The facts of these two sets of proceedings were different, since the exact routing points were not known when the advice on the Transport Infrastructure Planning Bill was given. Secondly, the legal questions addressed were different because the advice only dealt with questions of procedure and participation and not the question of the necessity of the actual routing in the light of the applicants' rights and interests, unlike the decision on their appeals against the routing decision. And, thirdly, the parties were different, as the advice was given in proceedings between State organs whereas the examination of the legality of the actual routing involved private individuals, such as the applicants, with their specific rights, on the one hand and the ministers who had taken the *Betuweroute* Routing Decision on the other.

DISSENTING OPINION OF JUDGE THOMASSEN JOINED BY JUDGE ZAGREBELSKY

In *Procola v. Luxembourg* **(**judgment of 28 September 1995, Series A no. 326, p. 16, § 45) the Court stated: "The Court notes that four members of the *Conseil d'Etat* carried out both advisory and judicial functions in the same case. In the context of an institution such as Luxembourg's *Conseil d'Etat* the mere fact that certain persons successively performed these two types of function in respect of the same decisions is capable of casting doubt on the institution's structural impartiality."

The present case raises the question of the structural independence and impartiality of the Netherlands Council of State, whose ordinary councillors, as in the *Conseil d'Etat* of Luxembourg, combine both judicial and advisory functions (see paragraphs 125-41 of the judgment). The Constitution of the Netherlands requires the government, before submitting any bill to Parliament for adoption, to seek the advisory opinion of the Council of State. This advice is required to address different aspects of the proposed law, bearing not merely on technical legislative questions but also on the effectiveness and feasibility of the intended measures, as well as on the quality of the legal protection thereby provided (see paragraph 134 of the judgment). Advisory opinions are adopted by the Plenary Council of State, which is composed of the ordinary councillors. The ordinary councillors are at the same time members of the Administrative Jurisdiction Division of the Council of State and, as such, are entrusted with the function of adjudicating administrative disputes, including applications for interim relief, where the law so provides.

The present applicants lodged appeals against the *Betuweroute* Routing Decision (*Tracébesluit*) adopted by the government, the effect of which was to route the planned railway close to their homes or businesses. Their appeals were determined by a Chamber of the Administrative Jurisdiction Division of the Council of State, whose judges combined both advisory and judicial functions and whose president had been a member of the Plenary Council which had advised the government on the bill which became the Transport Infrastructure Planning Act (*Tracéwet*). The Act was designed to introduce a new legislative framework for large-scale transport projects of major national importance. It did so by, *inter alia*, simplifying procedures for securing the cooperation of provincial, regional and local authorities whose territories might be affected by the project and by restricting to a single appeal the legal remedies available to those objecting to decisions of national and local authorities. The Act would be directly applicable to the already ongoing decision-making process concerning the *Betuweroute*.

The central question raised is whether, in the circumstances of the present case, the combining of the advisory and judicial functions within the Council of State was capable of casting doubt on the institution's structural impartiality sufficiently to vitiate the impartiality of the Chamber of the Administrative Jurisdiction Division which determined the applicants' appeals.

As the Court correctly observes in its judgment (paragraph 196) and as is established by *Procola*, the consecutive exercise of advisory and judicial functions within a body may, in certain circumstances, raise an issue under Article 6 § 1 of the Convention as regards the impartiality of the body seen from an objective point of view. In deciding whether in any given case there exists a legitimate ground to fear that the requirements of independence and impartiality are not met, the standpoint of a party is important but not decisive. What is decisive is whether this fear can be objectively justified, that is, whether there are ascertainable facts which may raise doubts as to the impartiality of the tribunal in question. However, in making this assessment, the Court has repeatedly emphasised that appearances may be of a certain importance, what is at stake being the confidence which the courts in a democratic society must inspire in the public and above all in the parties to proceedings.

The question of appearances assumes particular importance, in my view, in a context where judicial functions and the structural function of advising the government are combined within the same body and where the structure of the body is such that its members can successively exercise both functions. While it is true that neither Article 6 nor any other provision of the Convention has been held by the Court to require States to comply with any theoretical constitutional concept of separation of powers, it is also true, as is noted in the judgment, that the notion of the separation of powers between the political organs of government and the judiciary has assumed a growing importance in the Court's case-law, most recently in *Stafford v. the United Kingdom* (cited at paragraph 193 of the present judgment).

Where, as here, there exists no clear separation of functions within the body concerned, particularly strict scrutiny of the objective impartiality of the tribunal is called for. This is all the more the case where, as in the Netherlands system, an appellant is not informed in advance of the composition of the Chamber of the Administrative Jurisdiction Division which is to determine his appeal or of the nature of the participation, if any, of its members in the advisory work of the Council of State.

The majority of the Court recognise in the judgment the potential problems posed in Convention terms by the structural arrangements within the Council of State. Indeed, the Court goes as far as to state that it does not share the confidence of the Government that even the changes made in the arrangements within the Council of State with a view to giving effect to *Procola* in the Netherlands would be such as to ensure that in all appeals

coming before it the Administrative Jurisdiction Division would satisfy the requirements of impartiality for the purposes of Article 6 of the Convention.

The majority of the Court nevertheless find that, in the particular circumstances of the present case, the applicants' doubts were not justified. In doing so, they distinguish the present case from both *Procola* (cited above) and *McGonnell v. the United Kingdom* (no. 28488/95, ECHR 2000-II) by holding that the advisory opinions given on the Transport Infrastructure Planning Bill and the subsequent proceedings on the appeals brought against the routing decision cannot be regarded as involving "the same case" or "the same decision". It appears to be the view of the majority that this would only have been the case if the Council of State in its advisory capacity could reasonably have been interpreted as expressing views, or making preliminary determinations, on issues subsequently decided by the responsible ministers in the relevant routing decision (see paragraph 201 of the judgment).

I cannot agree with this analysis, which appears to me to place too narrow an interpretation on the terms "same case" or "same decision". The terms themselves were first used in cases in which individual judges had been involved in the same legal proceedings at two different stages and in two different capacities (see, for example, *Piersack v. Belgium*, judgment of 1 October 1982, Series A no. 53, and *Hauschildt v. Denmark*, judgment of 24 May 1989, Series A no. 154). While, in such a context, the test of what constitutes the "same case" is straightforward, its application in circumstances such as the present, involving the structural independence and impartiality of the judicial members of the Council of State, is less clear. Having regard to the importance of the confidence which courts must inspire in the public, I consider that in such a case a broad rather than a strict legal approach should be taken to the question whether the proceedings on the appeals against the routing decision could reasonably be regarded as involving "the same case" as that on which the members of the Council of State had already advised.

As is clear from the summary of the facts, the construction of the *Betuweroute* was a highly controversial project which had been the subject of extensive debate at all stages. While the Council of State did not give any advice as to the precise routing of the railway, it indisputably played a role in the realisation of the *Betuweroute* project, to which explicit reference was made in the two advisory opinions given on the Transport Infrastructure Planning Bill. While the issues on which the Council of State, in its capacity as advisory body to the government, was required to advise and those which, in its judicial capacity, it had to decide were clearly not identical and while the links between the two may be said to be more remote than those which were examined by the Court in *Procola* and *McGonnell*, I consider that those links were sufficiently strong to regard the proceedings before the

Administrative Jurisdiction Division as relating to the same case and, thus, to give rise to doubts which were objectively justified.

For these reasons, I consider that there has been a violation of the applicants' rights under Article 6 of the Convention in the present case.

DISSENTING OPINION OF JUDGE TSATSA-NIKOLOVSKA JOINED BY JUDGES STRÁŽNICKÁ AND UGREKHELIDZE

1. I regret that I am unable to share the opinion of the majority that there has been no violation of Article 6 § 1 of the Convention in this case.

2. The requirement under Article 6 § 1 that tribunals must be independent and impartial is directly linked to the concept of separation of powers, which notion lies at the very heart of this case. Admittedly this principle has never been recognised explicitly as forming part of Article 6, and indeed Article 6 does not require Contracting States to adopt or endorse any particular constitutional theory (see *McGonnell v. the United Kingdom*, no. 28488/95, § 51, ECHR 2000-II). It is nonetheless inseparable from the notion of judicial independence. This can be illustrated with examples from the Court's case-law, such as *McGonnell* (cited above, § 55), *Stran Greek Refineries and Stratis Andreadis v. Greece* (judgment of 9 December 1994, Series A no. 301-B, p. 82, § 49), as regards independence from the legislature, and *T. v. the United Kingdom* ([GC], no. 24724/94, § 113, 16 December 1999), as regards independence from the executive.

3. The fact that advisory and judicial tasks are exercised within one State organ, such as the Netherlands Council of State, is in my opinion not necessarily incompatible with Article 6, in particular where, as in the Netherlands Council of State, the exercise of judicial tasks is entrusted to a separate division. However, where such an organisational structure nevertheless allows these two functions to be exercised by the same individuals in respect of one and the same law, it is conceivable and, in my opinion, quite understandable that parties to judicial proceedings before the Council of State should have serious misgivings as to the impartiality, from an objective perspective, of a bench composed of such persons.

4. As reiterated by the Court in the present case, "appearances" are in this respect of relevance as "what is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to proceedings" (see paragraph 191 of the judgment). This in my view applies all the more where, as in the present case, new legislation entails restrictions on the scope of judicial control by reducing the number of tribunals competent to hear appeals in a particular case to only one.

5. This does not of course imply that fears perceived by a party must be accepted as decisive. In this respect, it is standing case-law that the opinion of a party to proceedings is important but not decisive. The crucial test remains whether a party's doubts as to the impartiality can be regarded as objectively justified (see, as a recent authority, *Werner v. Poland*, no. 26760/95, § 39, 15 November 2001, with further references).

6. Since the complaint that the Administrative Jurisdiction Division cannot be regarded as an independent and impartial tribunal for the purposes

of Article 6 § 1 is directly based on the organisational structure of the Netherlands Council of State allowing dual assignments, I find it regrettable that the Court has only examined this complaint in light of the specific circumstances of the applicants' case without clearly making a finding as to the question whether, as a matter of principle, such a structure is compatible with the requirements for tribunals under Article 6.

7. In my opinion, the exercise of both advisory and judicial functions by the same persons is, as a matter of principle, incompatible with the requirements of Article 6 regardless of the question how remote or close the connection is between these functions. A strict and visible separation between the legislative and executive authorities on the one hand and the judicial authorities of the State on the other is indispensable for securing the independence and impartiality of judges and thus the confidence of the general public in its judicial system. Compromise in this area cannot but undermine this confidence.

8. The facts in the present case illustrate this. It is clear from the facts that the plans for the construction of the *Betuweroute* railway were contested as from the start and that the executive sought a way to simplify and shorten the planning procedures for this and other major transport infrastructure projects, which eventually resulted in the Transport Infrastructure Planning Act. In view of the explicit references to the *Betuweroute* railway in the two advisory opinions given by the ordinary councillors of the Netherlands Council of State on the Transport Infrastructure Planning Bill, it is obvious that the impact of this bill on the realisation of this project was taken into consideration by the ordinary councillors when they exercised the advisory functions of the Council of State.

9. When considering this element in conjunction with the circles from which ordinary councillors are mainly selected (see paragraph 128 of the judgment), I quite understand that the applicants in the present case, whose appeals were determined by a bench of the Administrative Jurisdiction Division entirely composed of ordinary councillors, had doubts as to the impartiality of this judicial body and consider that these doubts were objectively justified. Consequently, there has in my opinion been a violation of Article 6 § 1 of the Convention.

10. It would have been far preferable, and quite possible even within the present organisational structure of the Council of State, for the bench that dealt with these appeals to have been composed of extraordinary councillors. Had this been the case, there would have been no room for doubts as, unlike the ordinary councillors, the extraordinary councillors have only one function – namely, the administration of justice. An even better possibility to remove all doubts would of course be to incorporate administrative-law proceedings entirely in the regular judicial system by establishing either a separate administrative-law division at the level of the

Netherlands Supreme Court or a separate administrative judicial authority as a final appeal body.