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## Scheldt River

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## A. History of Navigation on the River Scheldt

### 1. A Shared Navigation Channel

1 The Scheldt is an international river which rises in north-western France and flows through Belgium and the Netherlands to the North Sea (International Watercourses). The Scheldt **estuary** is shared between the Belgian region of Flanders and the Netherlands. Since the separation of Belgium from the Netherlands in 1839 the navigation channel to the Belgian port of Antwerp has been shared between Belgium and the Netherlands. The freedom of navigation on the river Scheldt and the maintenance and improvement of the navigation channel have long been important international legal issues (Navigation, Freedom of).

### 2. Blockade of the Scheldt

2 During the war between Spain and the northern Netherlands, the Spanish King Philip II and the Duke of Parma tried to recapture the Netherlands. The blockade of the river Scheldt in 1585, which was a crucial part of their strategy, caused a severe economic recession in Antwerp. After a Peace Treaty was concluded in 1648—the Treaty of Münster—the northern Netherlands were separated from Spain (Westphalia, Peace of [1648]; History of International Law, Ancient Times to 1648; History of International Law, 1648 to 1815). To the disillusionment of Antwerp, the Republic of the Netherlands managed to continue the blockade for more than a century, which contributed greatly to the economic prosperity of the northern Netherlands in the 17th century. Only after the French had occupied the Netherlands in 1795 was the Blockade discontinued.

3 Following the Peace Treaty of 1814, the Final Act of the Vienna Congress of 1815 (Vienna Congress [1815]) contained important regulations and principles on the freedom of navigation on rivers and canals. The northern and southern Netherlands were united and because of the freedom of navigation on the river Scheldt, the Antwerp economy started to flourish.

### 3. The Separation Treaty of 1839

4 In 1830 a provisional Belgian government declared the independence of Belgium, and the Dutch King William I responded with a new blockade of the river Scheldt. France and England decided to intervene, to discontinue the Dutch blockade of the Scheldt, and to separate the northern and southern Netherlands. The Separation Treaty of 1839 contains important provisions for freedom of navigation on the river Scheldt (Treaties of Friendship, Commerce and Navigation). Art. 9 Separation Treaty contains the Statute of the Western Scheldt ('Scheldt Statute'). This statute applies Arts 108 to 117 Final Act of the Vienna Congress to all rivers that form or cross the border between Belgium and the Netherlands. These articles deal with the freedom of navigation, and the obligation of the States to carry out the necessary works for safeguarding the navigability of the river.

## B. The Scheldt Statute and Dutch Territorial Sovereignty

### 1. The Interpretation of 'Travaux Nécessaires'

5 Ever since the conclusion of the Separation Treaty in 1839, the interpretation of the Scheldt Statute has been the most important legal Scheldt issue between Belgium and the Netherlands, and the interpretation of the Scheldt Statute continues to be an issue in present day negotiations over the river Scheldt. The Belgian and Dutch governments have always interpreted the statute differently. The core of this international legal conflict concerns the interpretation of the words 'travaux nécessaires' in the first part of Art. 113 Final Act of the Vienna Congress stating '[c]haque état riverain se chargera de l'entretien des chemins de halage qui passent par son territoire, et des travaux nécessaires pour la même étendue dans le lit de la rivière, pour ne faire éprouver aucun obstacle à la navigation' ('each state on the river will undertake the maintenance of the tow paths on its territory as well as the necessary works on the riverbed so as to prevent any obstruction of navigation'; translation by the editor). Basically, the Dutch interpretation is that the Netherlands

have to co-operate on the maintenance of the navigation channel, which is to say an obligation to maintain the navigation channel as it was in 1839. The Belgian interpretation is that the Dutch have to co-operate unconditionally on both the maintenance and the improvement of the navigation channel so as to adjust the navigation channel to the demands of modern shipping.

## **2. Attempts to Revise the Scheldt Statute**

**6** After World War I, Belgium and the Netherlands negotiated a treaty which had to settle various territorial issues, which would enable the construction of various new canals connecting Antwerp to the Rhine River, and which contained crucial amendments to the Scheldt Statute. (History of International Law, 1815 to World War I; History of International Law, World War I to World War II). The treaty of 1925 reflected the Belgian interpretation of the Scheldt Statute. The First Chamber of the Dutch Parliament, however, did not want to accept the proposed package deal, and the Belgian interpretation of the Scheldt Statute in particular. It therefore refused to ratify the treaty, and sent the Dutch Minister of Foreign Affairs, Van Karnebeek, away.

## **3. Dredging Permits**

**7** In the meantime the Belgian government had received the first permits for carrying out maintenance dredging works on Dutch territory in 1906. The Dutch used these permits to stress their sovereignty over the Western Scheldt and as a vehicle for formulating various conditions to the maintenance dredging works.

# **C. New Scheldt Treaties**

## **1. Construction and Improvement of Canals**

**8** In 1960 Belgium and the Netherlands concluded a treaty on the improvement of the canal from Ghent to Terneuzen. In addition to an agreement on various infrastructure works, this treaty contains the first Belgian-Dutch agreement on the issue of pollution prevention in the Scheldt **estuary**. In 1963 the countries concluded a treaty on the connection between the Scheldt and the Rhine, which connects the port of Antwerp to the Rhine River. Among other things, this treaty states that the Dutch loss of fresh water which is caused by the use of locks and sluices in this canal, has to be compensated somewhere along the Belgian-Dutch border.

## **2. The Belgian-Dutch Draft Water Agreements of 1975**

**9** In 1967 the Belgian government demanded that the Dutch government start negotiations on two other infrastructure projects which were aimed at improving maritime access to the port of Antwerp: the construction of a new canal connecting the harbours on the left bank of the Scheldt river to the Western Scheldt—the Baalhoek Canal—and a canal which would cut off a sharp bend in the Western Scheldt—the Bath Canal. Both canals are partly situated on Dutch territory. The Dutch linked these issues to the old issue of water distribution in the river Meuse (Meuse, Diversion of Water Case [Netherlands v Belgium]), and the issues of Scheldt and Meuse water pollution, issues in which the Dutch had an important interest. In 1975 Belgium and the Netherlands were able to reach agreement on a series of treaties dealing with all the aforementioned issues. Because of internal Belgian disagreement between the regions of Wallonia and Flanders, however, these treaties were never signed. The main reason for this was that the Walloon region did not perceive an interest in any of the proposed treaties, and used the Belgian federalization process, which had given the Belgian regions new competencies in the field of water management, to block approval of these treaties.

## **3. The Water Agreements of 1994**

**10** In 1984 the Belgian government changed its plans. For various reasons, it no longer aimed at digging new canals, but wanted to improve the navigation channel in the Western Scheldt, which entails the dredging of several bars in the navigation channel. Formally, the Belgian government was of the opinion that the Dutch would have to co-operate on the necessary dredging works

unconditionally, which is a direct consequence of their interpretation of the Scheldt Statute. The Dutch, however, linked the issue of the deepening programme to the issues of the water division in the river Meuse and the Meuse and Scheldt water pollution. It was not until 1995 that both countries were able to settle these issues simultaneously. Important developments which had made possible a breakthrough in the Belgian-Dutch negotiations on these water conventions were the conclusion of the United Nations Economic Commission for Europe ('UNECE') Convention on the Protection and Use of Transboundary Watercourses and International Lakes, and the third stage of the Belgian State reforms. Because the UNECE Convention fostered the river basin approach, as from 1992 France, as an the upstream basin State, was involved in the negotiations over the water quality of the rivers Scheldt and Meuse. Secondly, as a result of the third stage of the Belgian State reforms in 1992, the Belgian regions had received treaty-making competencies, and the Netherlands and France were then able to conclude treaties with the Belgian regions without interference from the federal State of Belgium (see also Federal States).

**11** In 1994 France, the Netherlands, and the Belgian regions of Brussels, Wallonia and Flanders signed agreements concerning the protection of the Scheldt and Meuse rivers (Environment, International Protection). These agreements aim at improving the water quality of both rivers, and form the legal basis for the International Commissions for the Protection of the Scheldt and Meuse—later the International Scheldt and Meuse Commissions. In 1995 Flanders and the Netherlands signed agreements on the deepening of the navigation channel in the Western Scheldt and the division of Meuse water. For strategic political reasons, these treaties were all linked to each other (for more information on these linkages see Meijerink).

**12** In 2002 the contracting parties to the agreement on the protection of the Scheldt signed a new Scheldt agreement which contains various amendments to the agreement of 1994. The main objective of the 2002 agreement is to implement Council Directive (EC) 2000/60 establishing a framework for Community action in the field of water policy; which was adopted in 2000.

**13** In 2005 Flanders and the Netherlands reached agreement on a series of new agreements on the management of the Scheldt **estuary**, one of which would make possible a further deepening of the navigation channel.

## **D. Present-Day International Legal Issues**

### **1. The Scheldt Statute and European Directives**

**14** Clearly, the improvement and maintenance of the navigation channel in the Western Scheldt continue to be important international issues between Flanders and the Netherlands. Both parties do still interpret differently the Scheldt Statute of 1839, and the Dutch do not want to co-operate on any deepening programme without signing a new international agreement. The Netherlands frequently uses its position to get Flanders to co-operate on other issues in which the Dutch have an interest. Lawyers continue to disagree on the issue as well. Samkalden and Berger, after discussing various possibilities of interpreting the Scheldt Statute, conclude that there is no international legal obligation for the Netherlands to co-operate in the improvement of the navigation channel unconditionally. Moreover, they argue that new international obligations, such as Council Directive (EEC) 79/409 on the Conservation of Wild Birds and Council Directive (EEC) 92/43/on the Conservation of Natural Habitats and of Wild Flora have made it more difficult for the Flemish region to claim the right to carry out dredging works in the Western Scheldt.

### **2. The Scheldt Statute and the Estoppel Principle**

**15** Suy and Wellens, however, draw a very different conclusion. They argue that the Dutch have an international legal obligation to co-operate in any deepening programme Belgium or Flanders deem necessary. They base their interpretation of the Scheldt Statute mainly on the estoppel principle. In the Final Act of the Vienna Congress, they argue, the principle of the freedom of navigation is applied to the Rhine and Scheldt rivers simultaneously. Since then, the Dutch have initiated various works to improve the navigability of the river Rhine, and have co-operated on any

such requests made by other Rhine basin States. In that context, Suy and Wellens argue, we may expect the Dutch to co-operate in the improvement of the navigation channel in the Scheldt as well.

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