

BELGIUM EXTENDS ITS TERRITORIAL SEA UP TO 12 NAUTICAL MILES

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Recently Belgium extended its territorial sea (1) up to 12 nautical miles. The government bill, already approved by the House of Representatives, passed the Senate just before the latter entered into its summer recess (2).

The object of this paper is to take a closer look at the Belgian position on this matter. First a brief description will be given of the changed international setting relating to the exact extent of the territorial sea. In the structure so described, the Belgian attitude will be filled in throughout the different phases. Next, the situation will be looked at from a municipal point of view, discerning the different steps in the tortuous road by which Belgium finally managed to reach this position. Before reaching conclusions, a succinct description will be attempted of similar Dutch, French and British legislation on this topic, i.e. countries which share a maritime boundary with Belgium, making it possible to place the new Belgian enactment in its proper perspective.

I. INTERNATIONAL SETTING

The exact breadth of the territorial sea is one of those issues of international law which lingered on for a long time without receiving a clear-cut

(1) The present article will prefer the term territorial sea and avoid the term territorial waters, except with respect to the preparation of the 1930 Codification Conference of the League of Nations, where it was widely used. In international law the term territorial sea gained the upper hand over territorial waters, although some countries today still adhere to the latter concept. The Soviet Union for instance consistently uses the following expression in its municipal legislation: « territorial waters [territorial sea] ». As far as Belgium is concerned, a lot of confusion existed with respect to the exact meaning of the term territorial waters during the first half of the 20th century, in internal legislation as well as in the works of publicists. For a good overview see note of GANSHOF VAN DER MEERSCH, under Cour de cassation, 23 November 1963, *Pasicrisie*, I, pp. 375, 378-379 (1963). At present the notion territorial sea is generally accepted.

(2) Loi fixant la largeur de la mer territoriale belge. This law passed the House of Representatives on 15 January and the Senate on 18 July 1987 (*Moniteur belge* du 22 octobre 1987). The text can be found in appendix.

answer. At first a consensus appeared to emerge around a 3-mile limit, but later this gradually shifted towards the 12-mile limit (3). The United Nations, as well as its predecessor the League of Nations, thought at several occasions this topic to be ripe for codification. At the end of the 1920's the 3-mile limit was believed to be at its strongest. The principle, while not infrequently attacked in theory, was supreme in practice (4). The time, therefore, seemed right to attempt to reach an international agreement on the question of territorial waters. The Assembly of the League of Nations acted accordingly by convening an international codification conference, which included this topic in its agenda (5). National views on this matter proved to be so widely divergent, that when the Conference came to an end, no formal voting was attempted. The Final Act of the Conference was a very hollow statement, stripped of all articles on which no agreement could be reached. The breadth of the territorial sea consequently formed no part of it (6).

In 1958 a first conference on the law of the sea took place under the auspices of the United Nations (7). Four conventions resulted out of this effort, but once again, no solution could be found with respect to the breadth of the territorial sea (8). Together with fisheries, the breadth of the territorial sea caused the General Assembly to convene a second conference two years later (9). At this Conference Canada and the United States introduced a joint compromise proposal based on the so-called six and six formula : A territorial sea of 6 miles combined with an exclusive fishing zone extending from the outer limit of the territorial sea to a maximum distance of 12 miles (10). In the Committee of the Whole this proposal was adopted (11). In plenary, however, where according to the rules of procedure

(3) For a good overview, see S. SWARZTRAUBER, *The Three-Mile Limit of Territorial Seas*, Annapolis, Naval Institute Press, 316 p. (1972).

(4) T. BARY, *The Three-Mile Limit*, 22 *Am. J. Int'l L.*, 503, 503 (1928).

(5) Resolution adopted by the Assembly of the League of Nations on 27 September 1927, reprinted in I S. ROSENNE, *League of Nations Committee of Experts for the Progressive Codification of International Law 1925-1928*, p. xciii (1972). The Conference took place in The Hague from 13 March until 13 April 1930.

(6) League of Nations Doc. 228.M.115.1930.V (*L.N. Pub. N° 1930.V.7*), reprinted in *Actes de la conférence pour la codification du droit international*, Vol. I, p. 139, 165.

(7) Hereinafter cited as UNCLOS I. Held in Geneva from 24 February until 27 April 1958.

(8) The only indication given was Art. 24 [2] of the Convention on the Territorial Sea and the Contiguous Zone (hereinafter cited as 1958 Convention) done at Geneva on 29 April 1958, 516 United Nations Treaty Series (hereinafter cited as UNTS) 205, which reads : « The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured ». Entered into force on 10 September 1964.

(9) Hereinafter cited as UNCLOS II. Held in Geneva from 17 March until 26 April 1960.

(10) Canadian-U.S. proposal, U.N. Doc. A/CONF.19/C.1/L.10 (8 April 1960), Conférence des Nations Unies pour le droit de la mer, Documents officiels (hereinafter cited as UNCLOS [fr] II), p. 183 (1960) and A/CONF.19/L.11 (22 April 1960), UNCLOS [fr] II, pp. 186-187 (1960).

(11) 43 in favour, 33 against, 12 abstentions, Comptes rendus analytiques de la vingt-huitième séance (13 avril 1960), UNCLOS [fr] II, pp. 161, 162 (1960).

a two-thirds majority was required (12), this compromise failed by just one vote (13).

Ever since the failure of these two Conferences (1958-1960) more and more states enacted legislation extending their territorial seas up to 12 nautical miles. At the beginning of 1960 only 30 % of all territorial sea claims established a 12 nautical mile zone (14). According to the last report of the Secretary-General this figure reached the cape of 100 (15), meaning that today about 75 % of the total territorial sea claims adhere to the 12-mile rule. Although this figure does not reflect the differences which actually exist between coastal states (as there are the length of coastlines or the impact on law of the sea matters), it gives at least an impression of the evolving general tendency.

A third conference of the United Nations convened for this purpose (16) reflects this evolution. The outcome of that Conference was written down in the United Nations Convention on the Law of the Sea, Art. 3 of which reads : « Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from the baselines determined in accordance with this Convention » (17).

II. POSITION OF BELGIUM

The preliminary work of the 1930 Hague Conference was entrusted to a Committee of Experts and later on to a Preparatory Committee. In the Committee of Experts, which consisted of 16 internationally renowned jurists, Belgium was represented by Professor C. De Visscher. The report of Mr. Schücking, rapporteur on the question of territorial waters who labeled the extent of the territorial sea as the most difficult problem (18), proposed

(12) Rules of Procedure adopted by the Conference (A/CONF.19/7), rules 35 and 49, UNCLOS [fr] II, pp. xxvii, xxix-xxx and xxxi (1960).

(13) 54 in favour, 28 against, 5 abstentions. Comptes rendus analytiques de la treizième séance plénière (26 avril 1960), UNCLOS [fr] II, pp. 29, 32 (1960). A second vote on the question, requested by the United States, did not alter the situation : 50 in favour, 29 against, 8 abstentions. *Ibid.*, p. 33.

(14) R. SMITH, *Exclusive Economic Zone Claims*, Dordrecht, Martinus Nijhoff, p. 7 (1986).

(15) United Nations, *Law of the Sea : Report of the Secretary General*, U.N. Doc. A/41/742 (28 October 1986), p. 6.

(16) Hereinafter cited as UNCLOS III. Held in different places between 1973 and 1982.

(17) Opened for signature on 10 December 1982, reprinted in United Nations, *The Law of the Sea : United Nations Convention on the Law of the Sea* (U.N. Pub. Sales n° E.83.V.5). Hereinafter cited as 1982 Convention. This Convention, according to its Art. 308 [1], will enter into force 12 months after 60 states have ratified it or acceded to it. As of March 1987, 31 states and one entity ratified this Convention. See *Law of the Sea Bulletin*, Special Number (March 1987), p. 1.

(18) Mémoire présenté par M. SCHÜCKING, Questionnaire n° 2, in Rapport au Conseil de la Société des Nations sur les questions qui paraissent avoir obtenu le degré de maturité suffisant pour un règlement international (Questionnaires n° 1 à 7 (hereinafter cited as Report), League of Nations Doc. C.196.M.70.1927.V (L.N. Pub. No. 1927.V.1), pp. 29, 33.

a 6-mile limit (19). This figure was however reduced to 3 in the draft convention submitted to the different governments for comment (20). It is interesting to note that Belgium did not reply to the questionnaire on territorial waters in time for it to be included in the Final Report of the Committee of Experts (21). When a Preparatory Committee was appointed early 1929 to prepare the preliminary documents for the Conference itself, the letter transmitted by the Belgian government of 19 December 1928 was incorporated in volume II of the bases of discussion, entitled « Territorial Waters ». In here Belgium made reference to a series of municipal enactments and international conventions concluded by it which all asserted different kinds of jurisdiction in a belt of 3 nautical miles in front of the Belgian coast. In theory, none of them fixed the breadth of the territorial sea as such and, therefore, Belgium could allow itself to close this topic with an open-ended formula : These enactments and conventions « ne préjugent en aucune façon de l'étendue que la Belgique pourrait revendiquer pour ses eaux territoriales, conformément à des principes internationaux nouveaux substitués à l'ancienne et désuète doctrine étendant ces eaux à la portée maxima des pièces d'artillerie » (22). During the Conference itself, however, members were asked to state the position of their respective governments right to the point and Mr. de Ruelle said for Belgium : « La Belgique accepte la zone de trois milles marins avec zone contiguë » (23). The reason why Belgium acted so reluctantly was most probably expressed by Mr. Rolin, during that same Conference, when he stated : « ... le problème n'est pas soluble par la méthode de codification » (24).

UNCLOS I was prepared by the International Law Commission of the United Nations. No Belgian national formed part of this body, but on several occasions the national points of view were requested from the different governments on this subject. In 1956 the Belgian government transmitted a circumstantial report to the International Law Commission. With respect to the breadth of the territorial sea the note proposed a

(19) *Ibid.*, p. 58.

(20) *Ibid.*, p. 72. See also notes on this draft article p. 74.

(21) It replied to 8 out of the 11 questionnaires sent to governments. See Réponses des gouvernements aux questionnaires, in Report, *supra* note 18, pp. 140-142 and Réponses des gouvernements aux questionnaires, in Deuxième rapport au Conseil de la Société des Nations, sur les questions qui paraissent avoir obtenu le degré de maturité suffisant pour un règlement international (Questionnaires nos 8 à 11), League of Nations Doc. A.15.1928.V (L.N. Pub. No. 1928.V.4), pp. 61-62.

(22) Lettre du 19 décembre 1928, reprinted in « Bases de discussion établies par le comité préparatoire à l'intention de la conférence », Volume II : Eaux territoriales, League of Nations Doc. C.74.M.39.1929.V (L.N. Pub. n° 1929.V.2), pp. 119-121. See especially p. 120.

(23) Procès-verbaux de la treizième séance de la deuxième commission (3 avril 1930), *Actes de la conférence pour la codification du droit international*, Vol. III, League of Nations Doc. C.315 (b).M.145(b).1930.V, p. 123, 123 (1930).

(24) Procès-verbaux de la quinzième séance (7 avril 1930), *Actes de la conférence pour la codification du droit international*, Vol. III, League of Nations Doc. C.315(b).M.145(b).1930.V, pp. 150, 151 (1930).

regime were states could claim a territorial sea up to an absolute maximum of 12 miles. All claims, however, reaching beyond 3 miles would need to be recognized on the basis of an international agreement (25). During the work of the First Committee at UNCLOS I Mr. Muûls, the Belgian representative, reiterated that Belgium had always adhered to a 3-mile limit and that it saw no good reason to change its attitude (26). It should be kept in mind that during UNCLOS I the 3-mile limit was in fact never put to a vote. Even the United Nations whose main objective was the preservation of the 3-mile limit (27) came pretty soon to the conclusion that such a position was unrealistic, especially after a United Kingdom proposal, which stated that the limit should not extend beyond 6 miles, with the proviso that this should not affect existing rights of passage for aircraft and vessels in the outer 3 miles (28), was withdrawn in the First Committee (29). Also Belgium mitigated its initial stand and during the work of this Committee Belgium voted in favour (30) of a (rejected) American draft, designed to establish a six and six formula as explained above. In the outer 6 miles states would be allowed to continue their fishing activities if they had fished in that region during the last five years (31). An identical draft was initiated by the United States in plenary (32). Although Belgium voted in favour, the proposal was rejected (33).

During UNCLOS I in other words, Belgium had showed its willingness to compromise (34). At the same time, however, Belgium made it crystal clear that the 3-mile limit remained unimpaired and unaffected by any of the proposals made during that Conference. Or to use the words of Mr.

(25) *Observations du Gouvernement belge sur le projet d'articles provisoires relatifs au régime de la haute mer et le projet d'articles relatifs au régime de la mer territoriale adoptés par la Commission du droit international à sa septième session en 1955 (9 janvier 1956)*, U.N. Doc. A/CN.4/99, reprinted in (1966) 2 *Annuaire de la Commission du droit international* pp. 37, 39. Belgium also submitted a report relating to the delimitation of the territorial sea. See *infra* note 166.

(26) *Comptes rendus analytiques de la dix-septième séance (19 avril 1958)*, 3 UNCLOS [fr] I, pp. 55, 57 (1958).

(27) W. HEARN, *The Law of the Sea, the 1958 Geneva Convention*, *JAG Journal*, pp. 3, 29 (March-April 1960). Also the opening statement of the American delegation leaves no room for doubt on this questions. See *Comptes rendus analytiques de la dixième séance (11 mars 1958)*, 3 UNCLOS [fr] I, pp. 28, 28-30 (1958).

(28) Revised proposal of the United Kingdom of Great Britain and Northern Ireland, U.N. Doc. A/CONF.13/C.1/L.134 (1 April 1958), 3 UNCLOS [fr] I, p. 271, 271 (1958).

(29) *Comptes rendus analytiques de la cinquante-sixième séance (19 avril 1958)*, 3 UNCLOS [fr] I, p. 193, 197 (1958).

(30) *Comptes rendus analytiques de la cinquante-septième séance (19 avril 1958)*, 3 UNCLOS [fr] I, pp. 197, 199 (1958).

(31) U.S.A. proposal, U.N. Doc. A/CONF.13/C.1/L.159/Rev. 2 (19 April 1958), 3 UNCLOS [fr] I, p. 277, 277 (1958).

(32) U.S.A. proposal, U.N. Doc. A/CONF.13/L.29 (24 April 1958), 2 UNCLOS [fr] I, pp. 142-143 (1958).

(33) *Comptes rendus analytiques de la quatorzième séance plénière (25 avril 1958)*, 2 UNCLOS [fr] I, pp. 41, 46 (1958).

(34) Note, *Le droit de la mer à la Conférence de Genève*, 12 *Chronique de Politique Etrangère*, pp. 1, 34 (1959).

Muîls : « Si toutefois l'on ne peut aboutir à un compromis, le Gouvernement belge considérera que la règle des trois milles reste inchangée » (35). Of the four conventions ensuing out of these deliberations Belgium signed not a single one at that time. The major reason was to be found exactly in the absence of precise figures delimiting the different zones, with the emphasis of course on the territorial sea and the baleful influence this could have on the Belgian fishery industry which traditionally relied on the high seas for its resources (36).

The international setting during the inter-conference period started to deteriorate even further when looked upon from a Belgian point of view. The initial United States draft submitted to UNCLOS II was once more based on the six and six formula, but the rights foreign states had in the fishery zone were more restricted. Fishing activities of foreign states could not exceed the level of recent years and would also be restricted to recently fished areas and species of fish (37). The final Canadian-United States proposal (38) went even further by providing for a phasing-out period of 10 years, after which these foreign fishing activities would no longer be tolerated. The Belgian delegation found itself consequently in a very difficult position. The Conference had turned a deaf ear to the plea of Mr. Nisot at the beginning of the Conference to attribute special attention to the peculiar position of Belgium (39). The latter could have been inclined, be it with great sacrifice, to accept the original United States draft. It could not, however, agree to the terms of the joint Canadian-United States proposal, which would simply result in the annihilation of the Belgian fishery industry (40). Belgium as a consequence, did not vote in favour but abstained when this proposal was put to a vote (41). Mr. van der Essen explained this not totally negative vote by the fact that the Canadian-United States proposal was the most moderated of all those submitted. At the same time he stressed that the Belgian abstention did not embody a Belgian endeavour to enlarge the territorial sea to more than 6 miles (42). In plenary, where the voting margin was expected to be rather narrow (43),

(35) Comptes rendus analytiques de la cinquante-neuvième séance (21 avril 1958), 3 UNCLOS [fr] I, pp. 202, 203 (1958).

(36) Question n° 29 of Mr. Dehousse, Lilar and Rolin of 6 March 1963 addressed to the Minister of Foreign Affairs, *Bulletin of Questions and Answers*, Senate, 1962-1963, n° 20, 2 April 1963, pp. 504-505.

(37) United States proposal, U.N. Doc. A/CONF.19/C.1/L.3 (23 March 1960), UNCLOS [fr] II, pp. 180-181 (1960).

(38) Proposal of 22 April 1960, see *supra* note 10 and accompanying text.

(39) Comptes rendus analytiques de la dix-huitième séance (6 avril 1960), UNCLOS [fr] II, pp. 113, 114 (1960).

(40) Comptes rendus analytiques de la vingt-huitième séance de la Commission plénière (13 avril 1960), UNCLOS [fr] II, pp. 161, 164 (1960).

(41) Comptes rendus analytiques de la vingt-huitième séance de la Commission plénière (13 avril 1960), UNCLOS [fr] II, pp. 161, 162 (1960).

(42) *Ibid.*, p. 164.

(43) See *supra* note 13 and accompanying text.

Belgium even voted in favour of this proposal (44) simply because it did not want to bear the responsibility for its failure (45). As in 1958, the last words of the Belgian representative on this question emphasized that the initial position of Belgium remained unaltered by this vote (46).

The end of UNCLOS II with its failure to reach an agreement on this topic, also heralded a period of unilateral extensions beyond the 3-mile limit, either in the form of a territorial sea (47) or fishery zone (48). The latter found its first conventional approval in the London Convention of 1964 (49). Once again, it was the six and six formula which formed the basis of this Convention. In a zone up to 6 nautical miles the coastal state had exclusive fishing rights. In a belt located between 6 and 12 nautical miles attention had to be paid to other contracting states with historic rights in that zone. No phasing-out period was provided for, but catches should not exceed their former levels. Such a regime was certainly not to the advantage of Belgium, but being the best possible international compromise to be obtained, the explanatory memorandum accompanying the Belgian bill to approve this Convention stated : « ... la politique la plus réaliste commandait d'accepter la négociation et de s'efforcer au cours de celle-ci de défendre au mieux les intérêts des pêcheurs belges » (50).

Although the London Fisheries Convention did not touch upon the problem of the extent of the territorial sea *stricto sensu*, it did have its impact on the latter, and, more particularly, as will be seen, on the Belgian position towards the 1958 Convention. Indeed, the Belgian government was mostly concerned with the necessity of its fishermen to fish in front of the coast of other countries. This certainly did not mean the coast of all the other coastal states, but rather of those coasts usually fished by Belgian nationals. Therefore, the fear that coastal states would unilaterally extend their territorial seas related mostly to other European states. Or to use the words of Mr. Rolin, uttered during the 1930 Codification Conference :

(44) See *supra* note 13.

(45) « La Belgique ... avait presque tout à perdre à se rallier à la proposition en question, mais elle n'a pas voulu prendre la responsabilité de faire échouer ce qui lui semblait être la dernière chance d'accord. Elle était prête à consentir des sacrifices très lourds pour que soit établie une règle de droit international ». See *comptes rendus de la quatorzième séance plénière* (26 avril 1960), UNCLOS [fr] II, p. 34, 34 (1960).

(46) « Le compromis proposé n'ayant pas recueilli la majorité requise, le Gouvernement belge ne se considère pas comme lié par le vote qu'il a émis ». *Ibid.*

(47) See *supra* notes 14 and 15 and accompanying text.

(48) For a chronological table and analysis, see S. ODA, *International Law of the Resources of the Sea*, Alphen aan den Rijn, Sijthoff & Noordhoff, pp. 17-23 (1979).

(49) M. FITZMAURICE-LACHS, *The Legal Regime of the Baltic Sea Fisheries*, 29 *Neth. Int'l L. Rev.* pp. 174, 201-202 (1982). For a description of this Convention see Y. VAN DER MENSBRUGGHE & B. DE SCHUTTER, *Les zones de pêche exclusives et la convention de Londres du 9 mars 1964*, in *La Belgique et le droit de la mer*, Actes du Colloque conjoint du 21 et 22 avril 1967, Bruxelles, Editions de l'Institut de Sociologie de l'Université Libre de Bruxelles, pp. 63-94 (1969).

(50) *Documents of the House of Representatives of 30 December 1964*, n° 926/1 (1964-1965), pp. 1-4.

« J'avoue qu'en ce qui concerne la Belgique, le tracé des côtes territoriales dans les trois quarts du monde nous est assez indifférent ... » (51). Since the London Convention, in other words, adequately alleviated this particular concern in the eyes of the Belgian government (52) the latter acceded to the 1958 Convention on 6 January 1972, i.e. just in time before UNCLOS III started its work.

Typical of UNCLOS III was certainly the lack of a single preparatory text on which the Conference could fall back as a working document (53). During the general debate in 1974 Mr. van der Essen outlined the Belgian position. Inspired by the international practice of states more and more extending their territorial seas, Belgium expressed its readiness to agree to an extension of the limit to 12 nautical miles (54). It also co-sponsored together with other geographically disadvantaged states, a draft on the territorial sea in that direction : « Each State shall have the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles ... » (55). If one compares this article with Art. 3 of the 1982 Convention (56) it becomes clear that the content remained unchanged.

(51) Procès-verbaux de la quinzième séance (7 avril 1930), *supra* note 23, p. 151.

(52) Parliamentary Annals, Senate, 1966-1967, n° 63, 29 June 1967, pp. 1746, 1747. It did not alleviate the Belgian concerns regarding the Convention on the Continental Shelf. Belgium never adhered to this Convention, not so much because of its own continental shelf but mainly because of the possible abuse third countries could make of this imperfect legal construction. See Y. VAN DER MENSBRUGGE, « La mer et les communautés européennes », 5, *Revue Belge de Droit International*, pp. 87, 128 (1969).

(53) Contrary to the 1930 Hague Codification Conference as well as to UNCLOS I, the preparatory work of this Conference had not been entrusted to an expert body of jurists, of limited size, but instead to a broad political body. See on this topic for example J.-P. LEVY, *La Conférence des Nations Unies sur le droit de la mer*, Paris, Pédone, pp. 33 and 43 (1983) and T. KOH & S. JAYAKUMAR, *Negotiating Process of the Third United Nations Conference on the Law of the Sea*, in 1 *United Nations Convention on the Law of the Sea 1982: A Commentary* (M. Nordquist, ed.), Dordrecht, Martinus Nijhoff, pp. 29, 29-31 and 45-46 (1985). During this preliminary work Belgium only hinted obliquely at the extent of the territorial sea. Already in 1971 a document on the limits and status of an international zone, a maximum territorial sea of 12 nautical miles was put forward, be it between parentheses. See draft articles of Austria, Belgium, Hungary, Nepal, Netherlands and Singapore (19 August 1971), Art. I (A), U.N. Doc. A/AC.138/55, reprinted in Rapport du comité des utilisations pacifiques du fond des mers et des océans au-delà des limites de la juridiction nationale, Assemblée générale, *Documents officiels*, Supp. n° 21 (A/8421), pp. 193, 193 (1971). Belgium also co-sponsored a draft on resource jurisdiction of coastal states beyond the territorial sea, in which the exact breadth of the territorial sea was left open. See draft articles of Afghanistan, Austria, Belgium, Bolivia, Nepal and Singapore (16 July 1973), Art. 1 (1), U.N. Doc. A/AC.138/SC.II/L.39, reprinted in Rapport du comité des utilisations pacifiques du fond des mers et des océans au-delà des limites de la juridiction nationale, Vol. 3, Assemblée générale, *Documents officiels*, Supp. n° 21 (A/9021), p. 100, 100 (1973).

(54) Summary Records of the 39th Plenary Meeting (12 July 1974), 1 Third United Nations Conference on the Law of the Sea, Official Records (hereinafter cited as UNCLOS [e] III), p. 166, 167 (1975).

(55) Draft articles of Austria, Belgium, Bolivia, Botswana, Burundi, Byelorussian Soviet Socialist Republic, Czechoslovakia, Finland, Federal Republic of Germany, Hungary, Laos, Lesotho, Luxembourg, Mali, Mongolia, Netherlands, Paraguay, Singapore, Swaziland, Sweden, Uganda, Upper Volta and Zambia (31 July 1974), 3 UNCLOS [e] III, p. 212, 212 (1975). A draft on fisheries sponsored by Belgium a few days later took once more a territorial sea of 12 miles as

At the eleventh hour Belgium signed this Convention (57). In a declaration made upon signature of the Convention the Belgian government showed its full endorsement of the principle enshrined in Art. 3 : « The limitation of the breadth of the territorial sea, as established by article 3 of the Convention, confirms and codifies a widely observed customary practice which it is incumbent on every State to respect, as it is the only one admitted by international law : the Government of the Kingdom of Belgium will not therefore recognize, as territorial sea, waters which are, or may be, claimed to be such beyond 12 nautical miles measured from baselines determined by the riparian State in accordance with the Convention » (58).

This brief history will provide the reader with a sufficient background to understand more accurately the Belgian legislative action in this respect.

III. BELGIAN MUNICIPAL LEGISLATION

A) 3-miles

The 3-mile limit, consistently claimed by the Belgian government, is not that easily encountered in its municipal legislation. Instead, different zones were claimed for different purposes over the years (59) : A custom zone was for instance established in 1832 (60) ; fishing was prohibited within a belt of 3 miles, measured from the low-water line in 1891 (61) ; a neutrality zone of the same distance was proclaimed in 1939 (62). The enactment generally referred to when documenting the Belgian 3-mile territorial sea claim (63), moreover, only talked about *coastal* waters, when in fact meaning

basis. See draft articles of Belgium, Denmark, France, Germany (Federal Republic of), Ireland, Italy, Luxembourg and Netherlands (5 and 28 August 1974), Art. 4 and note 17, 3 UNCTOS [e] III, p. 217, 217 (1975). The other proposals sponsored or co-sponsored by Belgium during the initial phase of UNCTOS III (see A. VAN DER ESSEN, « La Belgique et le droit de la mer », 10 *Revue Belge de Droit International*, pp. 102, 114-118 [1975]) did make no reference to the breadth of the territorial sea.

(56) See *supra* note 17 and accompanying text.

(57) The Convention was opened for signature on 10 December 1982. The closing date for signature was 9 December 1984. Belgium signed on 5 December 1984.

(58) English translation from the original French version, reprinted in United Nations, *The Law of the Sea : Status of the United Nations Convention on the Law of the Sea*, (U.N. Pub. Sales n° E.85.V.5) pp. 7, 8-9 (1985).

(59) For a more exhaustive coverage, see the letter Belgium sent to the Preparatory Committee of the 1930 Hague Codification Conference : Lettre du 19 décembre 1928, *supra* note 22, p. 120.

(60) Loi du 7 juin 1832 qui établit un rayon unique de douane, Art. 1, *Bulletin Officiel*, n° XLV (443), pp. 542-544. *Pasinomie* (Sér. 3, Tom. 2) 1931-1932, pp. 356-357. For further references see M. VAN GOETHEM, *The Status of the Territorial Sea* (in Dutch), Brugge, Die Keure, p. 27 note 1 (1963).

(61) Loi du 19 août 1891 relative à la pêche maritime dans les eaux territoriales, Art. 1, *Moniteur belge* du 29 août 1891. *Pasinomie* (Sér. 4, Tom. 26) 1891, pp. 356-357.

(62) Déclaration de neutralité de la Belgique, Art. 1, *Moniteur belge* du 3 septembre 1939 (2^e édition). *Pasinomie* (Sér. 6, Tom. 6) 1939, pp. 469-471.

(63) See for instance the list annexed to the official records of UNCTOS II, UNCTOS [fr] II, p. 170, 170 (1960). Reference is made to the enactment of 1929. See *infra* note 64.

the territorial sea (64). Later reforms of this enactment remedied this shortcoming (65). It should nonetheless be noted that until the new law enters into force, the breadth of the Belgian territorial sea has always been regulated by royal decree, and not by law. In a note sent to the Secretary-General of the United Nations of 7 December 1979, the Belgian government explicitly stated that Belgium never adopted a law to fix the breadth of its territorial sea at 3 miles. Instead it referred to customary law and the 1958 Convention, to which Belgium is a party (66).

B) 12-miles.

The changing international setting, as outlined above, as well as the gradual acquiescence of the Belgian government in the fact that the 3-mile rule tended to fall into oblivion, were certainly major instigating factors for Belgium to reconsider the problem of the extent of its territorial sea. Others complete the picture.

Special attention in this respect should also be paid to the problem of pollution. It is a well known fact that the North Sea — and the Belgian coast does certainly not form an exception to the general rule — belongs to the worst polluted sea areas in the world (67). This could have a very detrimental effect on the tourist industry, which for the Belgian coast amounts up to 25 million tourist nights a year (68). Also its influence on the ecosystem in the region (69), and thus also of the local fishery stocks is not to be underestimated (70).

The major marine sources (i.e. which find their origin in the coastal waters) of pollution normally enumerated in this respect are shipping on the one hand and hydrocarbon extraction on the other. The latter can be neglected when applied to Belgian coastal waters. This must be considered as one of the (few) positive spin-offs of the absence of any promising hydrocarbon deposits in the Belgian continental shelf region (71). The dense

(64) Arrêté royal du 22 janvier 1929 portant règlement de police de la navigation dans les eaux du littoral belge et de ses ports, Arts. 1-2, *Moniteur belge* du 22 février 1929. *Pasinomie* (Sér. 5, Tom. 20) 1929, pp. 8-12. See also *supra* note 1.

(65) A lot of modifications of this royal decree took place over the years, the last one being the Arrêté royal du 4 août 1981, portant règlement de police et de navigation pour la mer territoriale belge, les ports et les plages du littoral belge, Arts. 1-2, *Moniteur belge* du 1 septembre 1981; errat. *Moniteur* du 27 octobre 1981. *Pasinomie* (Sér. 7) 1981, pp. 1349-1361.

(66) Reprinted in 2 *Law of the Sea Bulletin* (December 1983) p. 7 (1983).

(67) A. Couper, ed., *Atlas of the Oceans*, London, Times Books Ltd., pp. 172-173 (1983).

(68) N. VANHOVE, *Tourism at the Belgian Coast* (in Dutch with English summary), 5 *Water* (n° 31, November-December 1986), p. 20, 23.

(69) C. HEMP, « The Ecology of the North Sea », (in Dutch with English summary), 5 *Water* (n° 31, November-December 1986), p. 13, 14. This author states that parts of Belgian coastal waters belong to the poorest of the world with respect to macrobenthic biomass and diversity.

(70) P. HOVAERT, *The Fishery on the Belgian Continental Shelf* (in Dutch with English summary), 5 *Water* (n° 31, November-December 1986), p. 18, 19.

(71) This due to the structure of the Belgian continental shelf. See S. HENRIET, *The Pre-Quaternary Basement of the Belgian Continental Shelf* (in Dutch with English summary), 5 *Water* (n° 31, November-December 1986), pp. 10-11.

traffic in the neighbouring waters, on the other hand, plays a primordial role in the evaluation of methods capable of reducing oil pollution in front of the Belgian coast. The proximity of the Straits of Dover, which constitutes the busiest strait used for international navigation in the world today (72), has to be stressed in this respect. The coastal waters facing the Belgian coast are cut through by different navigational channels (See map). First we have the Noord Hinder South IMO approved traffic separation scheme which runs for about 85 % on the Belgian side if a theoretical median line were to be drawn between Belgium and the United Kingdom. This route runs almost parallel to the coast in a north-easterly direction, where it joins the Noord Hinder Junction Precautionary Area. Secondly there is the main entrance to the river Scheldt through the IMO approved traffic separation scheme of West Hinder. This West Hinder-Vlissingen route starts south of the West Hinder Bank. From there it runs in an easterly direction in front of the Belgian coast avoiding the Akkeart Bank and passing north of the Wandelaar and the Bol van Heist by means of the Scheur (73). This route finally leaves Belgian coastal waters in front of the Zwin (74). Furthermore, there are the entrance routes to the ports of Nieuwpoort, Ostend and Zeebrugge.

Under the 3-mile rule only part of these entrance routes to the coastal ports and a negligible stretch of the West Hinder-Vlissingen route, did form part of the Belgian territorial sea. If, however, Belgium would proclaim a 12-mile territorial sea, about 75 % of the West Hinder-Vlissingen route in front of its coast would be comprised by the Belgian territorial sea. It should be stressed that the latter would not entail any additional coast for the Belgian government as far as buoyage is concerned (75). Belgium might actually be better off with an extended territorial sea for it often proved difficult in practice to recover the expenses made to repair buoys when ships came into collision with them outside that zone.

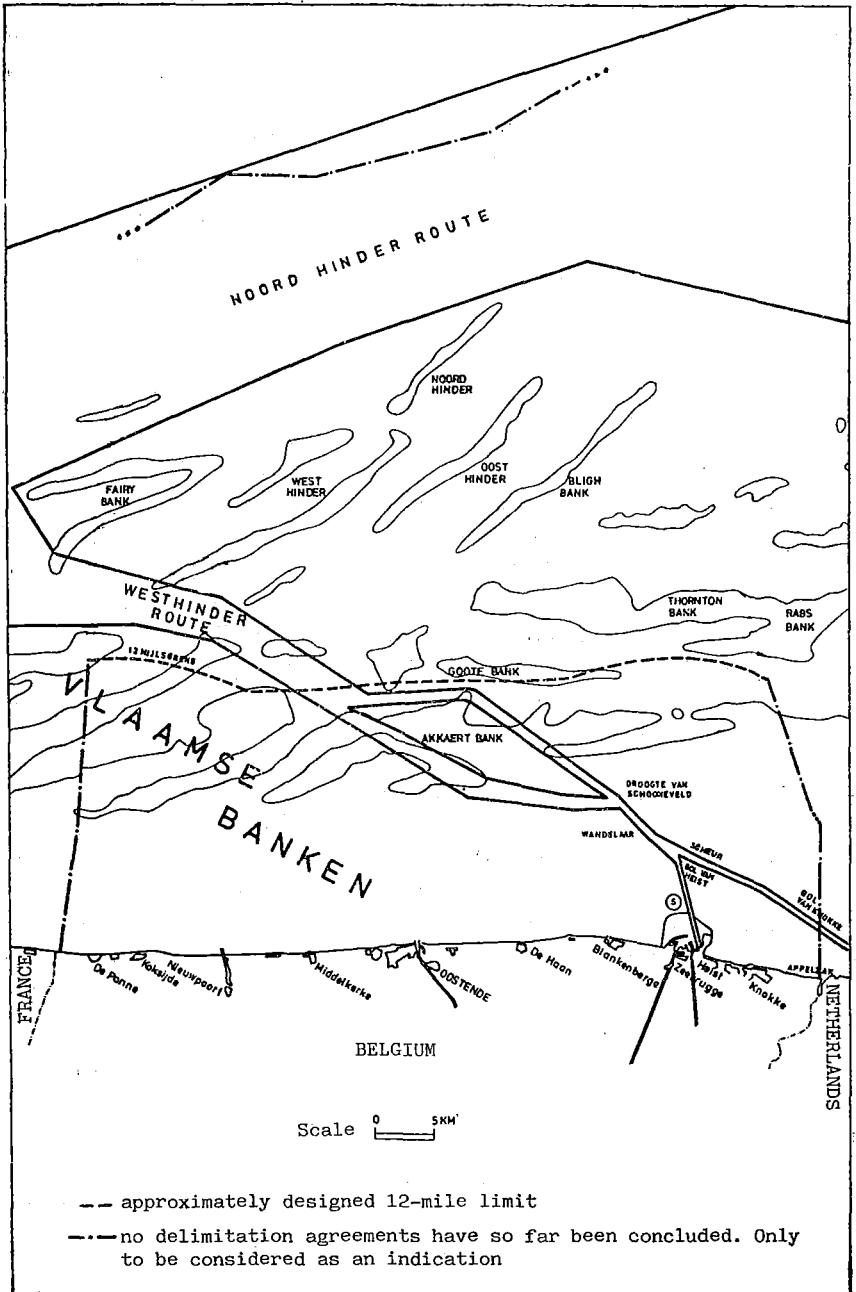
The inclusion of areas of intensive navigation within the territorial sea of a state in order to obtain the necessary legislative and enforcement powers to cope with environmental pollution or threat of such pollution, is a

(72) See for an elaborated study on the subject L. CUYVERS, *The Strait of Dover*, Dordrecht, Martinus Nijhoff, 142 p. (1986). It should be noted that the author defined the Straits of Dover for the purpose of his study rather broadly. The Belgian coast and neighbouring waters do form part of it.

(73) A second route south of the Wandelaar and the Bol van Heist through the Wielingen was not so long ago introduced as an amendment to the traffic separation scheme at West Hinder. The International Maritime Organization approved the amendment, but on further consideration, mainly due to high buoyage costs, the Belgian government never implemented this scheme. The last change implemented by Belgium concerns the West Hinder area itself. See *Notices to Mariners* (in Dutch) of 13 March 1986 (n° 6/66) pp. 1-3 and annex.

(74) See chart *Noordzee Vlaamse Banken*, Hydrografische Dienst der Kust, published by the Ministry of Public Works, Brussels, February 1987.

(75) A technical agreement actually in force between Belgium, France, the Netherlands and the United Kingdom divides the ocean between these countries in this respect.



Source : P. DE WOLF, « The Network 'Vlaamse Banken' » (in Dutch), 5 *Water* (n° 31, November-December 1986), pp. 60, 62. Adapted.

well-known practice. A good example is the German Bight where the Federal Republic of Germany, while generally claiming a 3-mile territorial sea, especially extended its territorial limits in order to be better equipped to ensure the safety of navigation in that region (76). Indeed, international law proved to be insufficient to tackle the problem of maritime casualties which occurred outside the territorial sea of a coastal state. If such an incident happened within the territorial sea, no problem arose for the coastal state because of its sovereign powers there (77). However, on the high seas, where the old customary principle of freedom reigned, exceptions were only tolerated if provided by either customary or treaty law. Under customary law, the much debated principle of self-help was at times invoked, based on the old ruling of the United States Supreme Court (1804) in the case *Church v Hubbard* (78). But this ruling being rather vague, its application was difficult (79). As far as treaty law is concerned, prior to 1969, Art. 24 of the 1958 Convention on the High Seas (80), which covered pollution prevention on the high seas, referred to existing treaty provisions for further guidance. The only major treaty on the subject, the 1954 London OILPOL Convention (81), bestowed the flag state with exclusive control of ships on the high seas. This whole system, however, proved to be deficient, and in 1969 a special international convention on the subject was elaborated: the Intervention Convention (82). This Convention worked out a system where coastal states were allowed to take protective measures beyond their territorial seas under certain circumstances. Since it only applied to pollution by oil it was supplemented later on by the so-called Protocol of 1973, which broadened its field of application to other polluting substances as well (83). Where the 1969 Intervention Convention binds

(76) J. KOKOIT & L. GÜNDLING, « Die Erweiterung der deutschen Küstengewässer in der Nordsee », 45 *Zeitschrift für ausländisches, öffentliches Recht und Völkerrecht*, pp. 675-693 (1985). See also R. LAGONI, « The Federal Republic of Germany and the United Nations Convention on the Law of the Sea », 2 *Int'l. J. Estuarine & Coastal L.*, pp. 86-91 (1987).

(77) R. M'GONIGLE & M. ZACHER, *Pollution, Politics and International Law*, Berkeley, University of California Press, p. 147 (1979).

(78) U.S. Supreme Court, 6 U.S. (2 Cranch) 187, 2 L.Ed. 249 (1804).

(79) D. ABCASSIS, *The Law and Practice Relating to Oil Pollution From Ships*, London, Butterworths, p. 87 (1978).

(80) Art. 24 of this Convention (done at Geneva on 29 April 1958, 450 UNTS 82, entered into force on 30 September 1962) reads: « Every State shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil, taking account of existing treaty provisions on the subject ».

(81) International Convention for the Prevention of Pollution of the Sea by Oil, done at London on 12 May 1954, 327 UNTS 3. Entered into force on 26 July 1958.

(82) International Convention Relating to Intervention on the High Seas in the Case of Oil Pollution Casualties, done at Brussels on 29 November 1969, 970 UNTS 211. Entered into force on 6 May 1975.

(83) Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances Other than Oil, done at London on 2 November 1973, United Nations Legislative Series, U.N. Doc. ST/LEG/SER.B/18, pp. 457-517. Entered into force on 30 March 1983. This Protocol in fact constitutes a separate treaty for countries can be bound by it without being a party to the 1969 Intervention Convention.

50 states at present, the Protocol is only applicable between 21 states (84). The powers entrusted to the coastal states by these conventions are moreover much more limited in scope than the sovereign powers attributed to a coastal state in its territorial sea.

As if to exemplify this point to the Belgian government, a collision occurred on 25 August 1984 between a French Ro : Ro cargo ship *Mont Louis* and the German ferry *Olau Britannia* some 10 miles north of Ostend. An environmental disaster could be avoided, but the case is also illustrative of another area in which the coastal state lacks competence : the salvage of wrecks. In this case the Belgian government paid well over 300 million BF for the salvage of the wreck and has actually little hope to recover the expenses made (85). A lot has been written on this subject, but it is generally admitted that if Belgium had claimed a 12-mile territorial sea before the collision occurred, it would have found itself in a much better position than it actually holds (86). Its royal decree of 4 August 1981 as a matter of fact explicitly obliges the owners of sunken ships to remove their wrecks out of Belgian internal waters or its territorial sea (87).

Another factor which certainly stimulated Belgium to join the 12 nautical mile club was the example set by its continental neighbours. France extended its territorial sea up to 12 miles in 1971 (88) and the Netherlands more recently in 1985 (89). Since bilateral delimitation agreements concerning the territorial sea still have to be concluded on both sides, it might prove to be a more practical method to bring the extent of these waters up to the same limit first, before starting negotiations on delimitation. The explanatory memorandum attached to the bill extending the territorial sea up

(84) Information obtained from the Belgian Ministry of Foreign Affairs, Treaty-section (3 July 1987). Corresponds with figures stated in the magazine of the International Maritime Organization « IMO News », n° 1, p. 2 (1987).

(85) The judicial proceedings are still lingering on. The only hope for the Belgian government remains the fact that the *Mont Louis* will not be found seaworthy for transport of the kind of cargo it did. See in that direction N. GASKELL, « Lessons of the *Mont Louis*. Part One : Prevention of Hybrid Accidents », 1 *Int'l J. Estuarine & Coastal L.*, pp. 116, 123-124 (1986).

(86) E. FRANCKX, « Juridical Aspects of the *Mont-Louis* Collision », (in Dutch with English summary), 5 *Water* (n° 31, November-December 1986), pp. 60, 61 ; R. PLANCHER, « Si la Belgique doit payer, c'est de notre faute (*Mont Louis*) », *Lloyd Anversois* du 15 octobre 1984 and « Le projet de la loi sur la mer territoriale belge déposé », *Lloyd Anversois* du 18 novembre 1986 ; G. STARKLE, « Les épaves de navires en haute mer et le droit international. Le cas du 'Mont-Louis' », 18 *Revue Belge de Droit International*, pp. 496, 526-527 (1984-1985/1) ; Y. VAN DER MENSBRUGGHE, « L'affaire du *Mont-Louis*, une cargaison dangereuse, une épave gênante », 15 *Annuaire Français de Droit International*, pp. 853, 863 (1984). This author stresses the fact that the extension of the territorial sea is a first step but that the final solution of the problem is to be found on the international plane ; J. VANHOEFF, « The Case of the 'Mont-Louis' for the Association of Insurance Jurists » (in Dutch), *Maritiem Recht en Verzekeringen*, 10-11 February 1985, pp. 1, 3. The author seems to imply that the signing of the 1982 Convention suffices to extend the Belgian territorial waters up to 12 nautical miles, *quod non*.

(87) See *supra* note 65, Art. 22 (4-5).

(88) Loi n° 71-1060 du 24 décembre 1971, *Journal Officiel* du 30 décembre 1971, p. 12899.

(89) Wet van 9 januari 1985, houdende vaststelling van de grenzen van de territoriale zee van Nederland, *Staatsblad* 1985, n° 129.

to 12 nautical miles, introduced by the Belgian government to the House of Representatives on 21 October 1986, as well as the oral statements made by the Minister of Foreign Affairs before the competent commissions of the House and Senate, only referred to the international setting when elucidating the underlying motives (90).

Although the pithy original draft, as worked out by the government, contained only three articles, it underwent significant changes before being promulgated by the Executive Branch. First of all it was sent to the Conseil d'Etat, which pointed out that reference to the baseline from which the breadth of the territorial sea is to be measured, should be included in the bill. Secondly, the article stating that the lateral delimitation was to be arrived at through bilateral agreements, lacked legal force in the eyes of the Conseil d'Etat. Art. 3 finally, which read : « La législation belge s'applique à la mer territoriale », was thought to create the impression that the Belgian legislation would have to be applied *in toto* in that zone. It belonged however to the prerogatives of the legislator to determine which rules would apply in that zone (91).

Taking into account these observations, the government bill was redrafted and submitted to the House of Representatives in the following form :

Article 1^{er}

La largeur de la mer territoriale de la Belgique est portée à douze milles marins, soit vingt-deux mille deux cent vingt-quatre mètres, mesurée à partir de la laisse de basse mer de la côte, ou des hauts fonds découvrants à marée basse pour autant qu'ils se trouvent à moins de douze milles marins de cette laisse de basse mer, ou des extrémités des installations portuaires permanentes dépassant ladite laisse de basse mer, comme il est indiqué sur les cartes marines officielles belges à grande échelle.

Art. 2

Les accords que le Roi conclut aux fins de déterminer les limites latérales de la mer territoriale de la Belgique avec celles de la France, d'une part, et des Pays-Bas, d'autre part, sortiront leur plein et entier effet.

Art. 3

Toute référence dans la législation ou réglementation belge à la mer territoriale de la Belgique s'entend dans le sens d'une mer territoriale dont la largeur est conforme à celle fixée par la présente loi (92).

(90) Exposé des motifs concernant le projet de loi fixant la largeur de la mer territoriale belge (hereinafter cited as Exposé des motifs), *Documents of the House of Representatives* of 21 October 1986, n° 635/1 (1986-1987), p. 1; Exposé introductif du Ministre des Relations extérieures (hereinafter cited as Exposé Chambre), *Documents of the House of Representatives* of 17 December 1986, n° 635/2 (1986-1987), pp. 1-2; Exposé du Ministre des Relations extérieures (hereinafter cited as Exposé Sénat), *Documents of the Senate* of 2 June 1987, n° 451/2 (1986-1987), pp. 1-2.

(91) Avis du Conseil d'Etat, *Documents of the House of Representatives* of 21 October 1986, n° 635/1 (1986-1987), pp. 3-4.

(92) Projet de loi, *Documents of the House of Representatives* of 21 October 1986, n° 653/1 (1986-1987), p. 5.

The Foreign Affairs Commission of the House of Representatives discussed the draft on 17 December and approved the government bill by unanimity with the exception of Art. 2 which was deleted altogether. The latter was thought to impair the constitutional prerogatives of the legislator for it would allow the executive branch to fix the territorial boundaries of Belgium all by itself and not by law as required by the Constitution (93). The soundness of this legal reasoning will be scrutinized later on (94). In this form the bill passed the House of Representatives, where no further discussion took place (95), as well as the competent Commission of the Senate (96) and the Senate's plenary (97).

IV. COMPARISON WITH FRANCE, THE NETHERLANDS, THE UNITED KINGDOM

Before drawing conclusions, it may be useful at this point to refer briefly to the legislation of countries possessing a joint maritime boundary with Belgium, namely France, the Netherlands and the United Kingdom.

A) *France*

The French law of 1971 consists of five short articles (98). It first brings the limit of the territorial sea up to 12 nautical miles, defines the baseline and states that the French sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil (99). The provisions concerning delimitation between states with adjacent and opposite coasts relies on the median line as guiding principle (100). The law also provides for the possibility of establishing a transit regime for shipping if the extension would preclude a stretch of high seas, necessary for navigation (101). This enact-

(93) Rapport fait au nom de la Commission des Relations Extérieures par M. Van Wambeke (hereinafter cited as Rapport Van Wambeke), *Documents of the House of Representatives* of 17 December 1986, n° 635/2 (1986-1987), p. 2.

(94) See *infra* notes 124-139 and accompanying text.

(95) *Parliamentary Annals, House of Representatives*, 1986-1987, n° 19, 14 January 1987, pp. 579-580. The final voting took place the day afterwards in one and the same breath with four other unrelated bills. Out of the 172 members present, 171 voted in favour, with one abstention. *Parliamentary Annals, House of Representatives*, 1986-1987, n° 20, 15 January 1987, pp. 625, 637-638.

(96) Adopted by unanimity. See Rapport fait au nom de la Commission des Relations Extérieures par M. Laverge (hereinafter cited as Rapport Laverge), *Documents of the Senate* of 2 June 1987, n° 451/2 (1986-1987), p. 6.

(97) *Parliamentary Annals, Senate*, 1986-1987, n° 107, 13 July 1987, p. 2806. For the final voting see *Parliamentary Annals, Senate*, 1986-1987, n° 115, 18 July 1987, pp. 3054-3055. Out of 150 members present, 141 voted in favour and 9 abstained.

(98) See *supra* note 88. For short comments and text, see also 17 *Annuaire Français de Droit International*, p. 1073 (1971) and 76 *Revue Générale de Droit International Public*, pp. 192-195 (1972). See also J.-P. QUENEUDEC, *Chronique du droit de la mer*, 17 *Annuaire Français de Droit International*, pp. 759-770 (1971).

(99) Art. 1.

(100) Art. 2.

(101) Art. 3.

ment honors the existing fishing agreements in that zone (102) and applies to the French over-seas territories as well (103).

B) *The Netherlands*

The « Wet grenzen Nederlandse territoriale zee » of 1985 (104) comprises nine articles of which five relate to amendments of prior legislative enactments. The article extending the territorial sea up to 12 miles and defining the baseline resembles Art. 1 of the Belgian law, but does not mention permanent harbour works (105). It adds to the latter a definition of the low-water line. A system of baselines is also established to distinguish between Dutch internal waters and its territorial sea (106). According to this law, lateral delimitation is to be arrived at by agreement with neighbouring countries (107). A special clause was inserted with respect to the Ems estuary (108). A final article determines the date on which the law will enter into force as well as its exact title (109).

C) *The United Kingdom*

The United Kingdom started the process of extending its territorial sea up to 12 nautical miles not so long ago. Due to recent parliamentary elections a number of bills, including the one on the territorial sea, which were waiting for parliamentary debate, were adopted as a package deal just before Parliament was dissolved.

The Royal Assent was notified to the House of Lords on May 15, day of the latter's adjournment *sine die* (110). According to Art. 4 (2) an Order in Council of 21 July 1987 brought this Territorial Sea Act of 1987 into force on 1 October 1987 (111). It consists of four elaborated articles, with two schedules in annex : One enumerating the amendments to be made to

(102) Art. 4.

(103) Art. 5.

(104) See *supra* note 89. For a short description see 17 *Netherlands Y.B. Int'l L.*, pp. 244-245 (1986).

(105) Art. 1.

(106) Art. 2.

(107) Art. 3.

(108) Art. 3 (2). See in this respect the Explanatory Memorandum to this Bill of 29 October 1982, *Annex to the Proceedings of the Second Chamber, 1982/1983 - 17.654, n° 3*, pp. 9-10.

(109) Article 9. This law entered into force on 1 June 1985.

(110) See *House of Lords Hansard*, Vol. 487, 14 May 1987, column 821. Although amendments were made during the committee stage (see *ibid.*, Vol. 484, 19 February 1987, columns 1212-1221) as well as during the report stage (see *ibid.*, Vol. 485, 2 March 1987, columns 442-449), they were all withdrawn. The Act as it appeared in Halsbury's Statute Service (Issue 16, 49 Water pp. 35-41) is consequently identical to the bill introduced to the House of Lords and ordered to be printed on 15 January 1987 (London, St. Stephen's Parliamentary Press, 6 p. (1987)).

(111) Territorial Sea Act 1987 (Commencement) Order 1987, SI 1987/1270 as mentioned by the monthly review August 1987 of Halsbury's Law (Vol. 20, para 160). This entry into force went not that smooth as *inter alia* experienced by Belgian fishermen, since changes were also made to the location of the charted limits around Seven Stones, Wolf Rock, Goodwin Sands, Kentish Knook, Haisborough Sand and Ball Rock.

prior enactments and a second one concerning the repeals. Art. 1 states the principle of a 12-mile territorial sea, to be established by Order in Council but also allows for derogations in the same manner. It provides that the baselines shall be established by Order in Council and gives effect to those already in force. A section similar to Art. 2 of the Belgian law is to be found, as well as a definition of the term nautical mile. Art. 2 preserves the operation of any local Acts on the present limits of existing jurisdiction of any harbour or port health authority, which do not require automatic extension. With respect to coal and petroleum exploration and exploitation some provisions remain unaffected, i.e. in a belt located between 3 and 12 miles this specific legislation will remain applicable. Art. 3 provides for amendments and repeals in existing legislation and has to be read together with Schedules 1 and 2, as mentioned before. Art. 4, finally, gives the short title, makes the Act applicable to Northern Ireland and includes the possibility, by Order in Council, to extend its provisions to the Channel Islands and the Isle of Man.

V. CONCLUSIONS

Based on the general international setting, on the position of Belgium on the internal and international level throughout the years as well as on the legislative action of the countries surrounding the Belgian coastal waters, the following conclusions can be arrived at with respect to the Belgian law fixing the breadth of the territorial sea at 12 nautical miles. For the sake of clarity, a distinction will be made between the purpose of this enactment, its timeliness, its form and finally its content.

A) *Purpose*

The explanatory memorandum attached to the government bill when it was introduced to the House of Representatives, as well as the oral statements made by the Minister of Foreign Affairs before the competent commissions of the House and the Senate only referred to the changing general trend in state practice inclined to set the limit of the territorial sea at 12 miles. It is, however, submitted that the extended pollution prevention and monitoring powers with respect to shipping, bestowed upon the Belgian government in a belt of coastal waters between 3 and 12 miles, was not a negligible factor in this respect (112).

It did form part of the French explanatory memorandum (113) and not without reason. After the grounding of the fully loaded oil tanker *Torrey Canyon* on 18 March 1967 about 7 miles northeast of the Scilly Isles, and the

(112) See *supra* notes 67-87 and accompanying text.

(113) *Journal Officiel*, Doc. Ass. Nat. 1^{re} session, 1971-1972, n° 2020. See also 2 E. LANGAVANT, *Droit de la mer : le droit des communications maritimes*, Paris, Cujas, p. 42 (1981) and J.-P. QUENEDEEC, *supra* note 98, p. 765.

ensuing oil pollution which also affected the French coast substantially, the French government could only note the problem encountered by the British government when trying to take swift action against a Liberian tanker, located outside the British territorial sea but polluting its shores and those of France on a scale never experienced before (114). Also in the Netherlands this double argument (oil pollution prevention — monitoring of vessels) played a primordial role in revising the traditionally supported 3-mile rule (115). The same arguments are finally encountered when analyzing the British changing attitude in this respect (116).

Taking into account the dense traffic in the West Hinder-Vlissingen route (117) and also the recent inauguration on 12 October of the port of Zeebrugge for regular commercial deliveries by the LNG carrier Methania, this new Belgian legislation not only brings Belgium in line with most other countries, but it gives the Belgian government adequate tools to cope with the intensive shipping in front of its coast. Since an extension of rights normally also implies an increase of obligations, the Belgian government will find itself confronted with some extra duties to be carried out in this respect.

Following the same line of reasoning, the introduction of an economic zone in front of the Belgian coast would be most advantageous. In such a zone the 1982 Convention delegates *inter alia* certain pollution prevention powers, previously belonging to the flag state, to the coastal state. It would in fact enable Belgium to monitor the Noord Hinder South traffic separation scheme more closely and effectively (118).

(114) When the ship finally broke up under heavy seas, the Royal Air Force even bombed the ship in an attempt to burn up any remaining oil. This incident resulted in the intervention Convention. See *supra* note 82.

(115) See the preamble of the 1985 law, *supra* note 78. See also H. DE JONG, « Extension of the Territorial Sea of the Kingdom of the Netherlands », 30 *Netherlands Int'l L. Rev.*, p. 129, 137 (1983) as well as the Explanatory Memorandum, *supra* note 108, p. 6, which elaborated these reasons in greater detail following the advisory opinion of the Dutch Conseil d'Etat. See *Annex to the Proceedings of the Second Chamber*, 1982-1983 — 17.664 B, p. 1.

(116) Introduction on behalf of the government by Baroness Young in the House of Lords (see *House of Lords Hansard*, Vol. 484, 5 February 1987, columns 381, 381-382). See also speeches made by Lord Nathan (*ibid.*, columns 389, 390-391) and Lord Campbell of Croy (*ibid.*, column 391, 393). See also A. COUPER, « The Marine Boundaries of the United Kingdom and the Law of the Sea », 151 *The Geographical Journal*, n° 2, p. 228, 235 (1985) and J. CABLE, « Closing the British Seas », 11 *Marine Policy*, p. 90, 98 (1987).

(117) From July 1975 until January 1980 the Dutch North Sea Directorate of Rijkswaterstaat conducted research with respect to the traffic flow of vessels in the North Sea, called « North Sea traffic analysis by visual identification ». Useful information can also be derived from this study relating to the traffic density in front of the Belgian coast. According to this aerial observation project the West Hinder-Vlissingen route had a calculated traffic flow of 50 ships per day. See North Sea Directorate, *A Bird's Eye View of the Shipping Traffic on the North Sea (Rijkswaterstaat Communications*, n° 33/1982), Part I, The Hague, Government Printing Office, p. 52 (1982). See also annex 8 in Part II.

(118) In front of the Belgian coast, the North Hinder South traffic separation scheme averages 105 ships per day. *Ibid.* Belgium would for instance certainly have to grade up its surveillance capability with respect to its part of the North Sea as far as environmental matters are concerned. At present land-sea surveillance is unknown, air-sea surveillance non-existent

B) *Timeliness*

Of its continental neighbours, Belgium was the last country to follow suit by enlarging its territorial sea up to 12 nautical miles (119). When looking back on the general attitude of the Belgian government towards internationally agreed rules concerning the law of the sea, one is left with the impression that the law of the sea formed for a long time a low-key issue for the Belgian government (120). Lately, however, some changes seem to have occurred within the Ministry of Foreign Affairs (121). At present Belgium appears to be more determined to elaborate, and consequently adhere to, a coherent maritime policy (122) of which the extension of the territorial sea constitutes a first tangible step.

C) *Form*

As mentioned before, the breadth of the Belgian territorial sea had always been regulated by royal decree. Accordingly, it would have been sufficient for the government simply to repeal the old royal decree and to replace it with a new one. The government nevertheless thought it appropriate to introduce the new maritime boundary by law. In the memorandum of understanding, as well as by means of the oral statements made by the Minister of Foreign Affairs before the competent commissions of the House and the Senate, two reasons were forwarded in this respect: Firstly, a law seemed preferable for it gave the enactment a more solemn character. Secondly, the example set by France and the Netherlands incited the Belgian government to act accordingly (123).

and sea-sea surveillance irregular. See T. IJLSTRA, « Enforcement of International Environmental Instruments in the North Sea: The Missing Link », in *The Status of the North Sea Environment, Reasons for Concern* (Peet, G., ed.), Proceedings of the Second North Sea Seminar held in Rotterdam, 1-3 October 1986, Amsterdam, Stichting Werkgroep Noordzee, p. 289, 293 (1986).

(119) Or to use the words of an article commenting on the Dutch extension of its territorial sea in 1985, which appeared in the Belgian press: « Voilà donc notre pays — comme souvent en ce qui concerne les choses de la mer — en retard sur ses voisins ». See R. PLANCHAR, « L'extension des eaux territoriales belges », *Lloyd Anverso* du 27 décembre 1985.

(120) F. VOLCKAERT, « Formulation of National Marine Policy: The Case of Belgium », *10 Marine Policy*, pp. 90, 90 and 100 (1986). This author states that a rigid and centralized governmental policy has never been developed and that Belgium never paid a lot of attention to the oceans. Some justification for this attitude can certainly be found in the hardly enviable geographical position of Belgium when it comes to marine matters. See A. VAN DER ESSEN, *supra* note 55, pp. 104-105.

(121) About the declaration made by Belgium when signing the 1982 Convention, one commentator writes: « C'est avec conviction que nous approuvons les termes de cette déclaration qui annonce un vent nouveau, soufflant dans la bonne direction, au plus haut niveau de la diplomatie ». See R. PLANCHAR, « Droit de la mer: la Belgique a signé la convention des Nations Unies », *Echo de la Bourse* du 11 décembre 1984.

(122) A permanent coordination between the different Ministries was established and the government even consults at regular intervals with professors of international law of the different Belgian universities. See Rapport Laverge, *supra* note 96, p. 5. A special working group has moreover been established to study the specific delimitation problems with respect to the Belgian continental shelf. Statement of the Minister of Foreign Affairs, see *Parliamentary Annals, Senate*, 1986-1987, n° 12, 27 November 1986, p. 300, 300.

(123) See Exposé des motifs, Exposé Chambre and Exposé Sénat, *supra* note 90, pp. 1-2, 2 and 2 respectively.

These arguments are certainly not totally convincing, but the question remains whether a sound reasoning could be forwarded based on Belgian judicial decisions and opinions of authors. An underlying question, namely whether the territorial sea had to be equated with the state's territory, did not receive a clear cut answer until 1976. For a long time the opinion prevailed that the territorial sea did form part of a state's territory. Belgium, for instance, stated *expressis verbis* in an amendment to the respective bases of discussion during the 1930 Codification Conference: « ... le territoire d'un Etat s'étend à une zone baignant ses côtes ... » (124). This was totally in accordance with the statement made by Mr. Rolin during the Conference itself (125). A note under a judgement of the Belgian Cour de Cassation in 1962 by the avocat général browsed through this issue for the court of appeal had labeled the territorial sea as « étant une étroite dépendance du domaine terrestre ». Mr. Ganshof van der Meersch came to the conclusion that a certain shift of emphasis had occurred and carefully suggested that the latter had probably inspired the court to use this more balanced terminology (126). The Cour de Cassation sustained this point of view (127). A main reference manual on Belgian constitutional law nevertheless stated in 1975: « The national territory also comprises the internal waters (streams, rivers, lakes) and the coastal sea » (128). Consequently, since the « coastal sea » formed part of the state's territory, the Belgian Constitution would have prohibited the government of settling the matter by royal decree (129).

On 27 April 1976 the Conseil d'Etat called a definitive halt to this interpretation by rendering its opinion in the case « V.Z.W. Koninklijk Belgisch Yachting Verbond t/ Provincie West-Vlaanderen », implying that the territorial sea does not form part of the state's territory (130). The reform

(124) Belgique. Amendement à la base de discussion n° 1, distribué aux membres de la Commission le 18 mars 1930, reprinted in Actes de la conférence pour la codification du droit international, Vol. III, Annexe II, *League of Nations Doc. C.315(b).M.145(b).1930.V* (L.N. Pub. n° 1930.V.16), p. 182, 182 (1930).

(125) Reprinted in *ibid.*, p. 26. Mr. Rolin said: « Ce à quoi nous tendons, c'est à l'assimilation complète, en principe, de la mer territoriale avec le territoire ... je pense qu'il serait peut-être bon d'affirmer cette correspondance entre la mer territoriale et le territoire et de dire que ... la mer territoriale fait partie du territoire ».

(126) Note by GANSHOF VAN DER MEERSCH, *supra* note 1, pp. 377-378. A comment on the said judgement agreed with this interpretation. See note of F. RIGAUX under Cour de Cassation, 23 novembre 1963, 17 *Revue Critique de Jurisprudence Belge*, pp. 227, 230-231 (1963).

(127) Cour de Cassation, 23 novembre 1963, *Pasicrisie*, I, p. 374, 380 (1963).

(128) English translation by the author of A. MAST, *Outline of Belgian Constitutional Law* (in Dutch), Gent, Story-Scientia, p. 55 (5th ed., 1975).

(129) Art. 3 of the Constitution states: « Les limites de l'Etat, des provinces et des communes ne peuvent être changées ou rectifiées qu'en vertu d'une loi ».

(130) Verzameling der arresten van de Raad van State, pp. 426-433 (1976). The coastal province of West Flanders had levied a tax on pleasure yachts sailing the territorial waters. According to the Conseil d'Etat only the central government was competent to levy such a tax, but had not done so *in casu*. The underlying legal reasoning immediately invited criticism, although the practical outcome was generally agreed with: Y. LÉJEUNE, « La mer territoriale fait-elle partie du territoire de la province? », *Administration Publique*, I, pp. 332-345 (1976-1977). See also J. VERHOEVEN, 14 *Revue Belge de Droit International*, pp. 734-735 (1978-1979)

of the Belgian state, which started soon afterwards, presented the Conseil d'Etat with more than one opportunity to restate and even refine its opinion on the matter (131). The territorial sea still does not form part of the Belgian territory, but the central government has power to delegate some of its powers to other entities (132).

This proved to be a workable solution for the ongoing state reform, but leaves the question here at hand, namely whether it is obligatory that the extension of the territorial sea be established by law, unresolved. Today, one can read in a revised edition of the above cited reference work on Belgian constitutional law : « The national territory comprises the land territory and the inland waters (streams, rivers, lakes). Nowadays it is generally admitted that the territorial sea does not belong to the actual territory of the state, but that the sovereignty of the state extends over the territorial sea » (133). If the territorial sea does not belong to the territory of the state, title I of the Belgian Constitution does not apply (134). Nor does its Art. 3, which requires a law for changing Belgian state boundaries.

It does seem awkward, however, in contemporary Belgian constitutional law that the government would be entitled, as it sees fit, to add a surface of say roughly 1000 km² to the Belgian territory, over which this country exercises sovereign rights, without the approval of Parliament. The same observations apply to the lateral delimitation of these water expanses, where the government could possibly cede certain areas to which Belgium is entitled by virtue of international law (135). This feeling also prevailed in

reiterating the same arguments and E. SOMERS, « The Division of Powers in Maritime Areas », 17 *Revue Belge de Droit International*, p. 323, 329 and footnote 21 (1983/1).

(131) For a good overview see Y. VAN DER MENSBRUGGHE, « Scope of the Patent Regulation at Sea », (in Dutch), 45 *Rechtskundig Weekblad*, columns 1713, 1720-1726 (1981-1982). The main issue at stake could be resumed as follows : If the territorial sea was to be considered as forming part of the territory, provincial legislation would mainly be applicable. If these waters were on the contrary labeled as extra-territorial, they would fall under the competence of the central government.

(132) *Ibid.*, column 1725. Although the Government promised at that time to do so urgently (Note of the Government on the territorial sea and the continental shelf. *Documents of the House of Representatives*, n° 627/12 [1979-1980]), no bill was introduced so far to Parliament aiming at the decentralization of these powers. See *Bulletin of Questions and Answers*, Senate, 1986-1987, n° 8, 2 December 1986, pp. 469-470. Question n° 6 by Mr. Didden of 12 November 1986.

(133) A. MAST & J. DUJARDIN, *Outline of the Belgian Constitutional Law* (in Dutch), p. 75 (8th rev. ed., 1985).

(134) Y. VAN DER MENSBRUGGHE, *supra* note 131, column 1725. Consequently Art. 68 too, which looks upon the problem from the point of view of the Executive Branch and stipulates that no cessation, exchange or addition of territory can take place except by law, is not applicable.

(135) Bilateral negotiations concerning maritime boundary delimitations are not always conducted on the sole basis of the internationally applicable legal rules on the subject. Extraneous factors may be brought into play which are totally irrelevant in this respect. A good example can be found in the Agreements Concerning Fishery and the Continental Shelf between Iceland and Norway (see J. EVENSEN, « La délimitation du plateau continental entre la Norvège et l'Islande dans le secteur de Jan Mayen », 27 *Annuaire Français de Droit International*,

the Foreign Affairs Commission of the House of Representatives, when the latter deleted the provision which would have enabled the government to arrange the lateral delimitation, which only forms a subtle part of the total area over which Belgium will acquire sovereign rights, at its discretion. Although Mr. Baert and Mr. Defraigne (Chairman) both based their argument on the Constitution, which seems to be unjustified in the present state of affairs as explained above, the government reconciled itself to the argument of the Commission (136). During the debate in the Senate, the Minister of Foreign Affairs himself further confused the matter by stating that the extension of the territorial sea « peut être assimilée à une extension du territoire national » (137).

It is, therefore, submitted that legal arguments in this particular case were dictated rather by a particular situation, thought to be desirable, than vice versa ! The opinion of Mr. Lejeune, expressed when criticizing the legal reasoning of the 1976 judgement of the Conseil d'Etat proves *ex post facto* to have been the only legal construction capable of tackling the different problems encountered over the years in the desired manner. According to this author the territorial sea does form part of the territory of a coastal state. But since this dispute was only settled on the international plane during the beginning of the 20th century, the drafters of the Belgian constitution could most certainly not have intended to include this part of the territory within the Province of West Flanders (138). In principle the central government is competent, but the latter can at its discretion delegate some of its powers, while remaining responsible on the international level (139). This construction would have resolved in the desired manner first the case submitted to the Conseil d'Etat in 1976 (the provincial powers of West Flanders are limited by its territory, which does not include the territorial sea) secondly the state reform (the territorial sea does not belong to West Flanders, for only the central government, unless it decides otherwise, is competent in this respect) and thirdly the necessity to enlarge the territorial sea by law and not by royal decree (for the territorial sea does form part of the Belgian territory : Arts. 3 and 68 of the Constitution are applicable).

When compared with the other pieces of legislation analyzed above, the Belgian law certainly excels in succinctness. Of the three short articles introduced by the government only two survived parliamentary scrutiny. The pro's and con's of such approach will be further elucidated in the next section concerning the content.

pp. 711-738 [1982]) where Norway proved to be willing to make substantial geographical concessions in order to accommodate its global security and foreign policy interests. See W. OSTRENG, *Norway in Northern Waters : Security and Resources Issues* (C. Archer & D. Scrivener, eds.), London, Croom Helm, pp. 155, 158-162 (1986).

(136) Rapport Van Wambeke, *supra* note 93, p. 2.

(137) Rapport Laverge, *supra* note 96, p. 5.

(138) Y. LEJEUNE, *supra* note 130, p. 341.

(139) *Ibid.*, p. 342.

D) *Content*

Of the four laws discussed, only the French one does not specify that the nautical mile, referred to in its articles, corresponds with the international nautical mile of 1852 meters. Since the latter constitutes a nowadays generally agreed upon standard, this should not be considered as a deficiency in the French text but rather as an aiming at perfection of the others.

More important is the reference to the low-water mark by the Belgian legislation (140). Similar provisions can be found in the enactments of France (141) and the Netherlands (142). The draft of the United Kingdom on the other hand, simply states that the baselines « shall for all purposes be those established by her Majesty by Order in Council » (143). But then again, the entire British draft is based on Orders in Council and, what is more, can be amended, extended or annihilated through the same procedure. Even the breadth of 12 nautical miles itself is subject to such an exception (144). Or as Baroness White remarked : « There is nothing in this Bill for which it is not also provided that it may be altered, removed, extended or changed, either by Order in Council or by a certificate. It is the most astonishing method of legislating » (145).

But even the reference to the same principle by the continental countries on this point, i.e. the low-water mark, does not result in a uniform method of determining the respective baselines, for the physical low-water mark may present itself in a wide variety of forms (146). The municipal enactments of Belgium (147) and the Netherlands (148) furthermore refer to the large-scale charts officially recognized by the coastal state (149). But this does not solve the problem for the fundamental option itself between the different low-water lines was left to the discretion of the coastal state, resulting in possible lack of accordance between neighbouring countries (150). Moreover, even if the same general standard is used by two or more countries, different results may be obtained (151).

(140) Art. 1.

(141) Art. 1 para. 2.

(142) Art. 1.

(143) Art. 1 (b).

(144) Art. 1 (2).

(145) Debate in the House of Lords (5 February 1987), *supra* note 116, column 394. See also column 396.

(146) I D. O'CONNELL, *The International Law of the Sea*, Oxford, Clarendon Press, pp. 173-174, where eight different methods are listed.

(147) Art. 1 *in fine*.

(148) Art. 1 (2).

(149) As provided by Art. 3 of the 1958 Convention, which binds Belgium and the Netherlands, and Art. 5 of the 1982 Convention, signed by both countries.

(150) I. AURROCOEHEA & J. PETHIOK, « The Coastline : Its Physical and Legal Definition », 1 *Int'l J. Estuarine & Coastal L.*, pp. 29, 35 (1986), who give an overview of the legislation of Western European countries concerning the low-water mark.

(151) See *infra* note 155 and accompanying text.

These complex issues have to be taken into account when discussing the relations Belgium has with its maritime neighbours. Since this proves to be a non negligible complicating factor when it comes to delimiting territorial sea boundaries, as will be seen *infra*, the position of the United Kingdom will not be commented upon (152).

Belgium adheres to the local mean lower low-water spring (153). For Ostend the internationally used tidal period of 18 2/3-year was used. For Nieuwpoort and Zeebrugge shorter periods were taken into consideration due to a lack of available data. About every ten years these figures are compared with newly obtained data and adjusted if necessary.

The French « Zéro des cartes » is based on the lowest astronomical tide, i.e. « the lowest levels which can be predicted to occur under average meteorological conditions and under any combination of astronomical conditions. These levels will not be reached every year » (154). It is clear that such a method will result in a low-water line which lies at a lower level than if a method were to be used, based on the actual measured daily low-waters. In practice this amounts to a difference of about 30 cm between French low-water line and the Belgian one.

The mean lower low-water spring, adhered to by Belgium, is also the standard according to which Dutch maritime charts are drawn. Strangely enough, however, this does not result in an identical low-water line (155). A mixed commission, working on the estuary of the Western Scheldt, recently ran into this kind of trouble. It appears that the differences encountered are mainly caused by the shorter reference period used by Dutch authorities. Also the fact that the Belgian spring tide is measured *around* spring tide, whereas Dutch computers are able to cope with a much more rigid definition of spring tide, contributes to the difference. The low-water line in the Netherlands lies about 20 cm higher than the one used in Belgium.

Art. 2 of the Belgian law states in general terms that all references made in Belgian legislation or regulations to the territorial sea, must from now on be understood as meaning a 12-mile territorial sea. It is the only piece of legislation of the four countries here under consideration, which does not provide *expressis verbis* for exceptions in this respect. The French law excludes existing fishing rights granted to foreign vessels either by international agreement or by municipal law (156). The laws of the Nether-

(152) The situation in the United Kingdom, where several norms are applied simultaneously is rather complicated. See I. AURROCOECHEA & J. PETHICK, *supra* note 150, pp. 38-39.

(153) Chart *Noordzee Vlaamse Banken*, *supra* note 74.

(154) D. O'CONNELL, *supra* note 146, p. 173.

(155) *Contra*, the opinion of the Minister of Foreign Affairs, Rapport Laverge, *supra* note 96, p. 4. As a matter of fact, since the Netherlands opted for the lower low-water spring in 1921, it has changed its definition of that concept three times. Three time periods must be distinguished if one takes the tide-tables as point of reference : 1921-1941, 1946-1986, 1987-.

(156) Art. 4.

lands (157) and the United Kingdom (158) are even more explicit in this respect, citing by name the enactments which have to be amended or which constitute a derogation of the general rule. Special attention in this respect should be attributed to the fact that both enactments leave unaffected the existing provisions relating to the extraction of coal, sand, gravel or petroleum in a belt from 3 to 12 nautical miles. As mentioned above, the Belgian continental shelf is not that rich in coal or petroleum, but concessions do exist with respect to sand and, to a lesser extent, gravel (159). A Royal decree of 16 May 1977 (160) restricts these activities to two well-defined areas of which the geographical co-ordinates are listed in annex to this decree (see map). It furthermore provides that the delimitation of these zones can only be altered under certain specified conditions (161). In 1981 a proposal was introduced to amend the 1977 decree exactly for that purpose (zone 3 on the map), but hitherto without concrete results (162). Consequently, exploitation is only allowed in zones 1 and 2, of which the former has so far been reserved for the public sector and zone 2 for the private sector. Zone 1, as will be noticed on the map, lies almost entirely outside the 12-mile limit. Of zone 2, on the contrary, only the northern part of the Oost Dyck (one of the three sandbanks located in that zone) remains outside the Belgian territorial sea. The Kwinte Bank, on the other hand,

(157) Arts. 4-8.

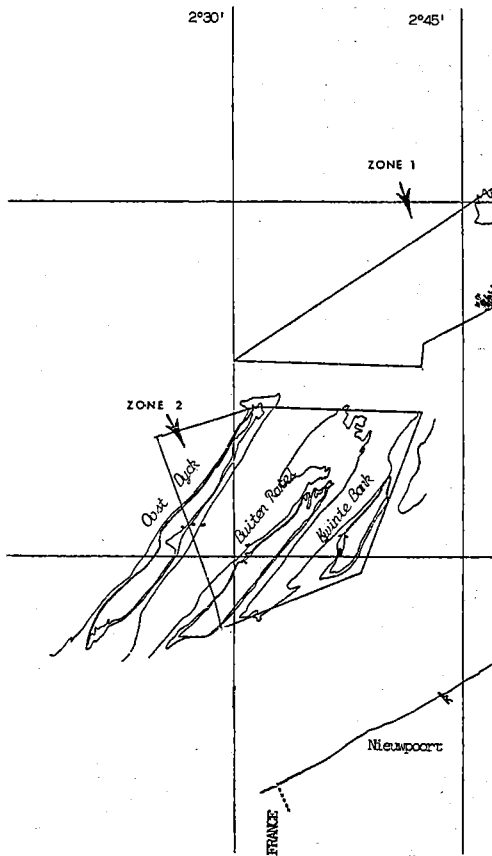
(158) Arts. 2 and 3, which have to be read together with schedules 1 and 2.

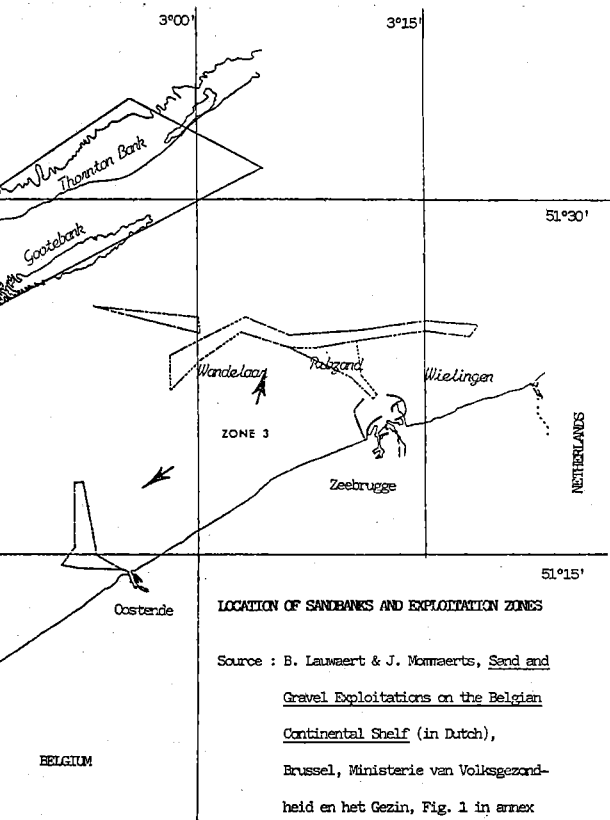
(159) For a list of Belgian legislation on this topic, see E. SOMERS, « The Legal Status of the Belgian Continental Shelf », (in Dutch with English summary), 6 *Water* (January-February 1987) p. 3, 6 and note 19. At present six private companies hold concessions: N.V. Alzagri and N.V. Nieuwpoortse Handelsmaatschappij both for a yearly quantity of 1,000,000 ton; N.V. D'Hoore and N.V. Zeeminerale both for 500,000 m³; Tijdelijke Vereniging N.V. De Cloedt, N.V. Dredging International, N.V. De Nul for 660,000 m³ and finally N.V. Satie for 300,000 m³ (status at 11 August 1987. Mimeographed document obtained from the Ministry of Economic Affairs, Department of Mining). A juridical problem exists with respect to N.V. Alzagri, the demand for renewal of which was lost during a change in government. A new demand was introduced by the company involved and a *modus vivendi* worked out by which N.V. Alzagri was allowed to continue exploitation. Even if a strict application of the rules were to suspend further exploitation, N.V. Alzagri could easily exploit together with N.V. Zeeminerale, company with which it has close ties, the part of the latter's concession. Indeed, it has to be kept in mind that the companies only exploit a small percentage of the amount actually requested. In 1984, for instance, one company exploited between 30 and 40 %, two between 10 and 20 % and four less than 10 % of the figure appearing in their concession. This has to be explained by the fact that all companies involved are competitors on the same market. Only one or two will be selected, but all want to make sure they have sufficient access just in case. See B. LAUWAERT & J. MOMMAERTS, *Sand and Gravel Exploitations on the Belgian Continental Shelf since 1976* (in Dutch), Brussel, Ministerie van Volksgezondheid en van het Gezin, pp. 8-9 and 23 (1986).

(160) Arrêté royal du 16 mai 1977 portant des mesures de protection de la navigation, de la pêche maritime, de l'environnement et d'autres intérêts essentiels lors de l'exploration, et de l'exploitation des ressources minérales et autres ressources non vivantes du lit de la mer et du sous-sol dans la mer territoriale et sur le plateau continental, Art. 1, paras. 1 & 4 and annex, *Moniteur belge* du 21 juillet 1977. *Pasinomie* (Sér. 7) 1977, pp. 772-774.

(161) *Ibid.*, Section 1, Art. 1, para. 2.

(162) Personal communication from the Ministry of Economic Affairs, Department of Mining.





Source : B. Lauwaert & J. Mommaerts, Sand and

Gravel Exploitations on the Belgian
Continental Shelf (in Dutch),

Brussel, Ministerie van Volksgezond-
heid en het Gezin, Fig. 1 in annex

(1966). Adapted.

which makes up for about two thirds of the total volume of sand extracted in zone 2 (163), no longer forms part of the continental shelf *stricto sensu*. Since all concessions granted in this zone are at present based on the Belgian legislation on the continental shelf, some adjustments will have to be considered by the Belgian government.

Last but not least, the Belgian law does not give any clue as to the method to be implemented when delimiting the lateral boundary of the territorial sea. The French law points at the median line in this respect (164). The Dutch law, on the other hand, states that lateral delimitation will be arrived at by way of agreement with the countries involved (165). As far as Belgium is concerned, reference should be made once more to the declaration, made when signing the 1982 Convention. Here it was said that Belgium « regrets that the concept of equity, adopted for the delimitation of the continental shelf and the exclusive economic zone, was not applied again in the provision for delimiting the territorial sea » (166).

a. — *France*

This country never became party to the 1958 Convention. French municipal legislation, on the other hand, rewords the content of that Convention on this topic by forwarding the median line as method to be applied. Together with Belgium it signed the 1982 Convention, which did not alter the respective provision of the 1958 Convention. In theory, it would seem an easy task for cartographers to draw a line every point of which is equidistant from the nearest points on the baselines. Several complicating factors present themselves. First, as mentioned above, no common low-water line exists. Secondly, the maritime border area with France is characterized by the presence of low-water elevations, the low-water line on which may be used as baseline for measuring the breadth of the territorial sea (167). Condition for these low-tide elevations to be taken into account, however, is the fact that they must be surrounded by and above water at low tide. Depending on whether one uses the French « Zéro des cartes » or the Belgian standard, different baselines will present themselves, leading up to a different lateral boundary. Furthermore, the political option could be taken not to take these low-tide elevations into account when delimiting the lateral boundary. Finally, a system could also be adhered to where a mixed line is drawn based on the Belgian low-tide elevations measured from the Belgian low-water line and on French low-tide elevations from the French

(163) B. LAUWAERT & J. MOMMAERTS, *supra* note 159, pp. 7 and 23.

(164) Art. 2.

(165) Art. 3 (1).

(166) English translation from the original French text, see *supra* note 58, p. 7. See also an elaborated answer of the Belgian government on this topic to the International Law Commission enclosed in U.N. Doc. A/CN.4/71 and add. 1-2, reprinted in 2 *Y.B. Int'l L. Commission*, pp. 79, 80-82 (1953).

(167) See Art. 11 (1) of the 1958 Convention and Art. 13 (1) of the 1982 Convention.

low-water line (168). Although some of these proposed limits coincide, differences can be noticed when comparing these various lines, especially further out from the coast.

b. — *The Netherlands*

Similar technical problems as the ones just described occur with relation to the Belgian – Dutch delimitation of the territorial sea, while others have to be added (169). The Netherlands ratified the 1958 Convention about six years earlier than Belgium (170) and signed the 1982 Convention on the day the Convention was opened for signature (171).

First of all there is the cartographical problem of the low-water line, as discussed above. Secondly the ancient Wielingen dispute surfaces once again (172). Thirdly, there is the seaward extension of the port of Zeebrugge (173). Fourthly, special attention has to be paid to the fact that the Dutch law on the extension of the territorial sea uses a double set of baselines, which may lead to confusion. Indeed, this law makes a clear distinction between Art. 1, which defines the baselines from which the territorial sea is measured, and Art. 2, demarcating for purposes of the application of Dutch laws the boundary between internal waters and the territorial sea. The former has, in other words, an international character (174), the latter a merely municipal purview (175). It has been stressed in the explanatory memorandum attached to this law that Art. 2, defining the boundary between internal waters and the territorial sea, does not have any impact on the outer limit of the territorial sea as such (176). Closely connected with this fourth point are the closing line of the Scheldt estuary and the

(168) Since the French low-water line is 30 cm lower than the Belgian one, such method would be disadvantageous and unacceptable for Belgium, according to the opinion of the Minister of Foreign Affairs. See Rapport Laverge, *supra* note 96, p. 4.

(169) See also enumeration by the Minister of Foreign Affairs, Rapport Laverge, *supra* note 96, pp. 4-5. As mentioned above, the problem of the low-water level is ignored by the Minister of Foreign Affairs. See *supra* note 155.

(170) This country signed on 31 October 1958 and ratified on 18 February 1966.

(171) 10 December 1982.

(172) A joint workshop gathering Belgian and Dutch international lawyers around the theme: « The Scheldt and its problems in international law » (held in Brussels on 23 November 1984) showed that this problem, though dormant, still lingered on. See also Explanatory Memorandum, *supra* note 108, p. 10.

(173) It seems hardly conceivable that the Dutch government would object such extension. See Art. 8 of the 1958 Convention and Art. 11 of the 1982 Convention.

(174) Hereinafter cited as international baseline.

(175) Hereinafter cited as municipal baseline. The advisory opinion of the Dutch Conseil d'Etat already stated that it would be desirable to elucidate in the Explanatory Memorandum the relationship between this municipal boundary and Art. 5 of the 1958 Convention, i.e. the international baseline (see advisory opinion of the Dutch Conseil d'Etat, *supra* note 115, p. 1). The clarification on this point given by the Minister of Foreign Affairs implied that the municipal baseline was established according to the principles enshrined in the 1958 Convention, which may only lead to further confusion (see Further Report, *Annex to the Proceedings of the Second Chamber*, 1982/1983 – 17.654 C, p. 4).

low-tide elevation of Rassen, located some three kilometers west of the Dutch island Walcheren. Normally, according to the 1984 law, only the low-tide elevation of Rassen should be taken into account when fixing the international baseline of the territorial sea (177). A Dutch scientific article, however, commenting upon this law, referred to Art. 2 (2) (a), namely the closing line of the estuary of the Western Scheldt, when treating the delimitation with Belgium (178), which should normally be subjected to the provisions of Art. 1 only. In the explanatory memorandum, moreover, to an earlier Bill, regulating title to the territorial seabed, the following statement is to be found in the middle of a passage dealing with the international baseline : « For the West Scheldt, the Netherlands has always applied a bay regime which means that on the landward side of a straight line across the mouth ... the West Scheldt is regarded as forming part of internal waters » (179). Summing up, one can say that where negotiations with France, which are actually under way, may soon lead to a conclusion, discussions with the Dutch government may prove more difficult (180). The Dutch hope to reach an agreement with Belgium on the delimitation of the territorial sea in the near future (181), may well prove hard to materialize.

After many years of perseverant adherence to the 3-mile principle, mainly inspired by a desire to protect its fishery industry, Belgium finally yielded to the external pressure, as evidenced by a general trend in state practice, to set the limits of the territorial sea at 12 miles. The gradual international acceptance of exclusive fishery zones, later on supplemented or substituted by exclusive economic zones, as well as the introduction by the European Economic Community of a Common Fisheries Policy, all put the future of this fundamental argument, which for a long time determined the maritime policy of Belgium, at risk. Following these changes, the Belgian government recently re-evaluated its position on the breadth of the territorial sea and came to the conclusion that there existed in fact

(176) Explanatory Memorandum, *supra* note 108, p. 9. Here again a most peculiar phrase was added stating that the municipal baseline does not have any impact on the outer limit of the territorial sea « because the points of importance for that purpose are always located on the more seaward drawn low-water line or on the seaward edges of low-tide elevations ».

(177) Art. 1 (1). It is interesting to note that the low-tide elevation of Rassen was not taken into account by the Netherlands when fixing the boundary line between the outer limit of the territorial sea and the continental shelf in 1967. See Decree of 7 February 1967 executing Article 1, point two of the Continental Shelf Mining Law. Art. 1 (1).

(178) DE JONGE, *supra* note 115, p. 142. It is interesting to note that this author had stressed the clear distinction between Arts. 1 and 2 just a few pages before : « The boundaries between internal waters and the territorial sea do not affect the position of the outer limit of the territorial sea ... », (*Ibid.*, p. 141).

(179) Statement of 25 September 1979, *Annex, Proceedings of the Second Chamber, 1979-1980* - 15.819, n° 3, p. 4.

(180) Negotiations, as mentioned above, are still at the technical level. Diplomatic negotiations will be the next necessary step. See answer to question n° 18 of Mr. Didden of 27 January 1987, *Bulletin of Questions and Answers, Senate, 1986-1987*, n° 21, 3 March 1987, pp. 1333-1334.

(181) Explanatory Memorandum, *supra* note 108, p. 10.

more pro's than con's. Fisheries no longer playing a primordial role (182), the protection of the marine environment as well as the safety of shipping tilted the balance towards an extended territorial sea. The responsibilities accompanying this extension, on the other hand, as there are for example policing, maintaining order, keeping navigable channels clear, providing rescue services and certainly buoying and marking of wrecks, sandbanks and channels and so on (183), did not prove to be important enough to outweigh the advantages.

With this homework done, the Belgian government should not be tempted to rest on its laurels. Other, even more important issues will have to be confronted in the near future, of which the instauration of a possible exclusive economic zone and the delimitation of the maritime boundaries with its neighbours appear to be the most important ones for Belgium right now.

Appendix

Loi fixant la largeur de la mer territoriale belge ()*

Article 1^{er}

La largeur de la mer territoriale de la Belgique est portée à douze milles marins, soit vingt-deux mille deux cent vingt-quatre mètres, mesurée à partir de la laisse de basse mer de la côte, ou des hauts fonds découvrants à marée basse pour autant qu'ils se trouvent à moins de douze milles marins de cette laisse de basse mer, ou des extrémités des installations portuaires permanentes dépassant ladite laisse de basse mer, comme il est indiqué sur les cartes marines officielles belges à grande échelle.

Art. 2

Toute référence dans la législation ou réglementation belge à la mer territoriale de la Belgique s'entend dans le sens d'une mer territoriale dont la largeur est conforme à celle fixée par la présente loi.

(182) If one examines the amount of fish landings in Belgian ports for the time period 1939-1984, it becomes clear that the years 1946-1955 are to be considered as the top of a curve. Ever since that period a gradual decline in the amount of fish landings has to be noted. The value of these landings during the same reference period, on the other hand, has experienced a quasi steady growth. See *Statistical Yearbook of Belgium* (in Dutch), Nationaal Instituut voor de Statistiek, Ministerie van Buitenlandse Zaken, Vol. 105, p. 229 (1985). Even if the quay-side value is expressed in real terms, a general upward trend can be discerned over the years. See *The Belgian Sea Fishery : Catches and Returns* (in Dutch), Ministerie van Landbouw, Dienst voor de Zeevisserij, p. 25 (1985). In 1986 this figure even reached the cape of 700 million. See *ibid.*, 1986, issue, p. 25. X

(183) See *supra* note 75 and accompanying text.

(*) Passed the House of Representatives on 15 January 1987 and the Senate on 18 July 1987. Enters into the tenth day after its publication in the *Moniteur belge*, which occurred on 22 October 1987.