

## COMMENTS ON THE CONTRIBUTION OF :

JACQUES, T., *La pratique belge  
et le droit de la mer :  
la protection de l'environnement marin* (\*)

BY

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Because of time constraints, I would like to make just a few personal remarks concerning the environmental provisions of the 1982 United Nations Convention on the Law of the Sea. If T. Jacques started to look at the issue from his position as scientist at the Ministry of Public Health and Environment in order to come subsequently to the 1982 Convention, I would like, as an internationalist, to reverse this order of ideas. Starting from the 1982 Convention and its special significance in this particular field, I will then try to frame present day Belgian state practice in this global context.

### THE 1982 CONVENTION

As quite correctly remarked by T. Jacques, the originality of the 1982 Convention in this respect may not pass unnoticed. Indeed, if one compares this convention with its predecessors, i.e. the four Geneva conventions on the law of the sea of 1958, the conclusion must be reached that the provisions concerning the protection and preservation of the marine environment were completely overhauled. Leaving apart those totally novel elements of the 1982 Convention, such as the exclusive economic zone and deep sea-bed, and maybe also the provisions on the settlement of disputes, Part XII (Protection and Preservation of the Marine Environment) of the 1982 Convention is probably the area where the changes were most fundamental.

One could even add that the importance of the environmental provisions of this 1982 Convention transcends the strict framework of the law of the

(\*) English translation by the author of the original intervention which was made in Dutch.

sea as such. Or as the convention was recently labeled by an article in the American Journal of International Law

« the strongest comprehensive environmental treaty now in existence or likely to emerge for quite some time. » (1).

The colloquium which was held last week at the *Université Libre de Bruxelles*, entitled « l'actualité du droit de l'environnement » seems to confirm this submission.

A renewed interest in these articles relating to the protection and the preservation of the environment, now that the 1982 Convention has entered into force, seems to be justified. One should not forget that consensus around these particular articles of the 1982 Convention arose at a rather early stage of the negotiations during the third United Nations Conference on the Law of the Sea, which started in 1973. The crux of it was already to be found in the Informal Single Negotiating Text of May 1975. The accident in front of the coast of Brittany, France, with the *Amoco Cadiz* in 1978 slowed down the general progress in this field somewhat. This occurrence urged France to ask for a re-examination of this part in order to provide greater jurisdiction to the coastal state. Nevertheless one can safely submit that the ultimate consensus on this part of the convention was reached in 1979.

At the time of the signature in 1982, the content of this Part XII appeared to be an equitable compromise, which even gained support from environmentalists. A growing public awareness, as witnessed by the swift developments concerning the Antarctic minerals regime or, more generally, the United Nations Conference on Environment and Development at Rio de Janeiro in 1992, placed the « equitable compromise » of 1982 back on the old drawing board. Several specialists in this area recently came to the conclusion that a new equilibrium had to be found between the interests of the flag states and coastal states in this respect. What may have been a fair balance during the late 1970s and early 1980s, in other words, does not necessarily remain so during the 1990s. The result is that the content of Part XII, at a moment when this convention finally entered into force 12 years after its signature, appears to be subject to change. As will be remembered from the intervention by J.-P. Lévy this morning, this is a salient feature characteristic of several parts of this 1982 Convention.

About 15 years separate the codification of these rules from entry into force. This period was characterized by the fact that it was rather doubtful whether the 1982 Convention would ever become operative as an international treaty of a universal character, generally agreed upon. State practice in such a period is of special interest since, having to choose between *de lege*

(1) STEVENSON, J. & OXMAN, B., « The Future of the United Nations Convention on the Law of the Sea », 88 *American Journal of International Law*, p. 488, 496 (1994).

*lata* and *de lege ferenda*, it appears to reflect the attitude of states more accurately than during a period when states already try to implement treaty provisions which are expected to enter into force soon afterward.

Because it appears reasonable at present to assume that the 1982 Convention will soon receive the general support it had originally hoped for, a renewed interest in Part XII seems to be more than justified. First of all, a careful study of the general and often rather ambiguous terminology, logical result of the consensus rule which governed the negotiations at UNCLOS III, is to be undertaken. Secondly, a profound analysis of the 15-year interim period is at hand in order to assess its influence on the 1982 compromise formula as enshrined in the convention. The topical interest of these questions was recently underlined by the International Law Association's initiative to create a special Committee on Coastal State Jurisdiction Relating to Marine Pollution which subject these above-mentioned provisions during the coming years to a detailed study.

These few basic remarks may suffice to illustrate the importance of Part XII of the 1982 Convention as well as of the accompanying state practice.

#### BELGIAN STATE PRACTICE

This brings us to the second part of our intervention, namely the Belgian state practice. Once again, I can only confirm the thoughts expressed by T. Jacques when he stated that the relevant juridical framework in Belgium remains of a rudimentary nature and that the many international obligations subscribed by Belgium in this respect, are implemented on a pragmatism rather than on a juridical basis on the internal level. Improvisation appears more than once to play a key element. It should be noted that the word «improvisation» is used here not necessarily with the negative connotation usually attached to it, but rather in the sense of having to create something where nothing has really been planned in advance.

Proper research by the author with respect to coastal state jurisdiction of Belgium relating to the maritime areas in front of its coast, revealed indeed that the Belgian legislator very often limited its action to a very brief (one article) law of approval, with the text of the international agreement attached to it as annex. The practical implementation is quite often reported *ad infinitum*. The most salient example of this practice is the so-called MARPOL 73/78 Convention (Convention for the Prevention of Pollution from Ships of 1973, with additional Protocol of 1978) which found its way into the *Moniteur belge* in 1984 by means of such a law of approval. As of today, this instrument remained a paper tiger in Belgium, for the simple reason that the concrete implementation of the conventional obligations never materialized. Not one single royal decree saw the daylight in

this particular domain. Not that no attempts were ever undertaken. The story even goes around that each and every time the government tries to tackle this particular problem, it has to resign and does not survive the operation. It is therefore satisfying to hear that a new legislative bill has been submitted in this respect. Not that I imply that the government should now render its resignation in the near future, but let us simply hope that this time the attempt will be successful. If that were the case, for the first time severe penalties would be provided for, comparable to what exists in the neighboring countries. It should nevertheless be noted that the bill concerns only a general law, meaning that details will later have to be filled in by the King. In other words, even if the bill becomes law, some time will lapse before comprehensive implementation of the MARPOL 73/78 Convention will be accomplished in Belgium.

This is a rather remarkable development, especially if one takes into consideration the fact that one of the subjects relating to the law of the sea which usually receives most attention during the parliamentary question-time, is exactly marine pollution. The government is, for instance, at regular intervals reminded of the absence of implementation of the MARPOL 73/78 Convention (2). From the answers provided by the government, one will understand that this lacuna has to be related to the recent state reform which urged the *Conseil d'État* to mothball a previous bill. Port reception facilities, to which an earlier bill made reference, it was argued, was no longer a federal competence.

It is with reference to the recent Belgian state reform and its influence on the protection and preservation of the marine environment that I would like to conclude this intervention. In addition to what has already been said by T. Jacques, a few new elements will be addressed with particular emphasis on the aspect of implementation. This choice can be justified by the fact that Belgium, as already mentioned, is very often a party to the relevant international conventions, while its internal legal order remains deficient. Two concrete examples will be highlighted in this respect.

That the regions must be involved in the protection and the preservation of the marine environment is beyond dispute since the most prominent source of marine pollution is to be found on land. The Constitution explicitly provides for the conclusion of so-called cooperation agreements in such instances. Again one has to observe that no such agreement has been concluded so far. It must be added that on 20 May 1989 a cooperation agreement concerning an increased protection of the North Sea against pollution was signed between the competent federal and regional authorities. This agreement, however, never entered into force because of problems of representation. Instead, a pragmatic solution was arrived at. Based on the

(2) See for instance *Questions et Réponses*, Chambre, 1992-93, 21 June 1993 (Question n° 651, Barbé).

provisions of this juridically non-binding document of 1989, an *ad hoc* Technical Committee North Sea was established in order to guide this cooperation. This Committee is entrusted with the compliance of the international obligations undertaken by Belgium. It works apparently fine in practice. And this is rather comforting, for the very peculiar construction of this cooperation, of which salient features are its non-binding character and vague formulations, makes it very doubtful whether a coherent policy could be formulated if the political will to cooperate would disappear.

Let me conclude by making reference to a second example which clearly illustrates the type of incongruity which characterizes certain aspects of this recent state reform with respect of the protection and preservation of the marine environment along the Belgian coast. It concerns the police duties of the maritime police, as briefly mentioned by T. Jacques.

As a result of the recent state reform the pilot and beaconing services to and from the ports, as well as the towing services became a regional competence (Law of 8 August 1988). This transfer of competence was given concrete content about a year later by means of a Special Law on the Financing of Communities and Regions (17 January 1989). This law stipulates that all movable and immovable property relating to these services which belonged to the federal authorities should be transferred free of charge to the Flemish Region. Early 1994 a Royal Decree is enacted which gives concrete substance to this provision (23 February 1994). This results in the transfer of about 40 ships. It is, however, most remarkable to note that certain of the ships enumerated in the latter Royal Decree are customs or police vessels, since the latter remained a federal competence. In reality, this transfer of ships already materialized in 1990 when an agreement was reached to transfer all seafaring personnel and material of the Flemish Region. The 1994 Royal Decree in fact only confirmed a practice firmly established many years ago.

The maritime police, indeed, remained a federal institution which still resorts under the Ministry of Communications and Infrastructure. This creates a rather awkward situation. In order to be able to fulfill its normal functions, the maritime police has nowadays to rent the vessels needed for this task, and which formerly belonged to the federal Ministry of Communications and Infrastructure, from the Flemish Region. It must be added that the vessels concerned are not really equipped to fulfill their mission because it will depend from meteorological conditions whether these vessels will be allowed to leave the coastline. Negotiations, started in 1988, finally resulted in 1990 in the signing of a contract concerning the renting of services between the federal Ministry of Communications and the Flemish Region. This contract, concluded for an indefinite period of time, allows the maritime police to use the ships in question for an amount of about 90 million Bfr. on a yearly basis. Also the situation on board such vessels is

remarkable, for the simple reason that the two agents of the maritime police, normally present, instruct the skipper who resorts under the Flemish region. This skipper, moreover, who does not have an official police duty himself, will determine the safety of navigation and, as a result, will decide whether certain assignments can be fulfilled or not. In practice this cooperation on board appears to work quite well. Once again, however, this rather complicated construction gives reason to believe that conflicts would be difficult to avoid if the parties, for one reason or another, were to implement the agreement to the letter at some future date.

Together with T. Jacques I would like to end my intervention with an urgent request addressed to the competent public bodies to start with the elaboration of an adequate legal framework which would be able to guide the cooperation between the different departments along juridically sound and safe paths.