

*Delenda est haec Carthago: The Ostend Company As A Problem Of European Great Power Politics (1722-1727)*¹

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Summary

The Ostend Company (1722-1731) is a symbol of present-day Belgium's strangling by European Great Power politics in the Ancien Régime, and more specifically of the limitations imposed on the Southern Netherlands by the Dutch Republic in 1648. The present contribution analyses the right of Emperor Charles VI to send out ships to the East Indies. Pamphlets by Abraham Westerveen and Jean Barbeyrac, argued for the exclusion of the Southern Netherlands based on the Treaty of Munster. Against this, Patrice de Neny and Jean du Mont invoked the peremptory character of the natural law-rules governing free trade. However, the Treaty of Commerce concluded between Charles VI and Philip V, King of Spain, on 1 May 1725, constituted a strong basis to refute the Dutch attacks. Yet, norm hierarchy between the balance of power inscribed in the Peace of Utrecht and secondary bilateral treaties between sovereigns dominated multilateral diplomacy after 1713 and prejudiced the "Belgian" East India trade.

Keywords

International Law, Legal History, International Relations

Introduction²

[Les Nations] *les plus prudentes cherchent à se procurer par des Traités, les secours & les avantages, que la Loi Naturelle leur assureroit, si les pernicieux conseils d'une fausse Politique ne la rendoient inefficace.*

Vattel, *Le Droit des Gens*³

Concerning the OSTEND COMPANY [...] DELENDA EST HAEC CARTHAGO
*The Importance of the Ostend-Company consider'd, 1726*⁴

In Belgian historiography, the Imperial East India Company created in Ostend (1722-1731) is often presented as an example of the sorry fate the Southern Netherlands had to suffer from the Dutch Revolt to the end of the French Revolutionary Wars⁵. Politically relegated to the status of but one of several

¹ Abbreviations used in this article : *CUD* (Corps Universel Diplomatique du Droit des Gens, see footnote 6) ; *NA* (National Archives), *SP* (State Papers Foreign) (see footnote 190) ; *AMAE* (Archives du Ministère des Affaires Étrangères et Européennes), *CP* (Correspondance Politique), *M&D* (Mémoires et Documents) (see footnote 192).

² The present article has been presented in an earlier stage to the Dutch-Belgian Study Group for the Reception of Roman Law at Leiden University on 21 October 2011. My thanks go to the audience for their remarks on my initial ideas, as well as to Dirk Heirbaut, Georges Martyn, Rik Opsommer, Magnus Ressel and Klaas Van Gelder, who commented on a later version of the draft.

³ Emer DE VATTEL, *Le droit des gens ou principes de la loi naturelle Appliqués à la Conduite & aux Affaires des Nations & des Souverains. Ouvrage qui conduit à développer les véritables Intérêts des Puissances*, Leide, Aux dépens de la Compagnie, 1758, 2^e éd., Book II, § 152.

⁴ *The Importance of the Ostend-Company consider'd*, London: Roberts, 1726, p. 52.

⁵ E.g. "La Belgique, sacrifiée sans pitié lors d'une négociation dont elle avait été exclue, se trouvait quasi étranglée, en attendant de devenir le champ de bataille de l'Europe"; Georges-Henri DUMONT, *L'Épopée de la Compagnie d'Ostende 1723-1727*, Bruxelles, Le Cri, 2000, p. 10.

dominions ruled by a far-away monarch, economically strangled on the conditions of the Treaties of Munster⁶, the former “staple of Europe” with cities as Antwerp, Malines, Brussels or Ghent had become a dormant territory in the heart of Europe, and nothing more than the privileged battlefield for first-rank powers such as France, Spain and Austria, Britain or the Dutch Republic.

The present contribution argues the fate of the Ostend Company was not a bilateral quarrel between North and South, dictated by anonymous or coincidental arrangements between Great Powers⁷, symbolising the triumph of *Realpolitik* over principles of natural law⁸. A reductionist view of the Ostend conflict ignores the European structure of international relations. On the one hand, the combination of political events and the Dutch Republic’s own legal logic offered a possibility for “Belgian” trade with the East Indies to flourish. On the other hand, explaining the Company’s demise by the Emperor’s desire to see his daughters succeed him in the Habsburg hereditary lands, is only a fragmentary explanation. The predominance of an international guarantee for his “Pragmatic Sanction” was not a mere chimera pursued by Charles VI⁹, but a consequence of a quest for international legitimacy shared by the main actors¹⁰, and of the changing legal discourse of the Peace of Utrecht (11 April 1713¹¹). To this end, an analysis of bilateral legal pamphlet literature¹² (I) ought to be complemented with diplomatic correspondence and the operation of international *law in minds* (II) within the European Society of Princes¹³.

The commercial enterprises leading to the Ostend Company were launched by Thomas Ray, a naturalised Irishman who had landed in Ostend in 1698, joining a growing disparate group of Irish merchants¹⁴. Ray found financial support in Ghent, Bruges and Dunkirk, to send an Ostend-based ship, the *Sint-Mattheus*, to

⁶ Treaty between Philip IV and the States-General, Munster, 30 January 1648, DU MONT DE CARELS-KROON (ed.), *Corps Universel Diplomatique du Droit des Gens, contenant un recueil des traités d’alliance, de paix, de trêve, de neutralité, de commerce, d’échange, de protection & de Garantie, de toutes les Conventions, Transactions, Pactes, Concordats, & autres Contrats, qui ont été faits en Europe, depuis le Regne de l’Empereur Charlemagne jusques à présent* [Further : CUD], The Hague, Husson & Levier, 1728 , VI/1, nr. CCXXXI, p. 429-441.

⁷ Frans DE PAUW, *Het Mare Liberum van Grotius en Pattijn*, Brugge, Die Keure, 1960 (Vlaamse Rechtskundige Bibliotheek; Nieuwe Reeks), p. 231.

⁸ The present contribution is limited to the political and legal discussions around the Company. For commercial aspects, I refer to Eduard J. BAELS, *De generale keizerlijke en koninklijke Indische Compagnie gevestigd in de Oostenrijkse Nederlanden genaamd de Oostendse Compagnie*, Oostende, Erel, 1972; Karel DEGRYSE, “De Oostendse Chinahandel (1718-1735), in *Revue Belge de Philologie et d’Histoire-Belgisch Tijdschrift voor Filologie en Geschiedenis*, LII (1974), Nr. 2, 306-347; John EVERAERT, “Les companies rivales des grandes Compagnies des Indes. Le défi de la Compagnie d’Ostende (1715-1745), in Christian BUCHET, Jean MEYER & Jean-Pierre POUSSOU (dir.), *La puissance maritime. Actes du colloque international tenu à l’Institut Catholique de Paris, 13-15 décembre 2001*, Paris, PUPS, 2004, p. 415-422 ; Jan PARMENTIER, *De maritieme handel en visserij in Oostende tijdens de achttiende eeuw : een prosopografische analyse van de internationale Oostendse handelswereld, 1700-1794* (diss. doc.), Gent: UGent, 2001, 4 v. ; Michael W. SERRUYS, “Oostende en de Generale Indische Compagnie. De opbloei en neergang van een koloniale handelshaven (1713-1740)”, *Tijdschrift voor Zeegechiedenis* XXIV (2005), Nr. 1, p. 43-59.

⁹ Henri PIRENNE, *Histoire de Belgique*, Bruxelles, Lamertin, 1926, v, p. 198: “Personne ne s’intéressait, en dehors de Hambourg, à la Compagnie d’Ostende. D’ailleurs les considérations dynastiques commençaient à déterminer la politique de l’empereur [...] il voulait passionnément assurer sa succession.”

¹⁰ Johannes KUNISCH, *Staatsverfassung und Mächtepolitik*, Berlin, Duncker & Humblot, 1979 (Historische Forschungen; 15), p. 54. See as well Charles INGRAO, “The Pragmatic Sanction and the Theresian succession: A re-evaluation”, in *Etudes danubiennes* IX (1993), p. 145-161.

¹¹ Treaties of Peace between Louis XIV and John V of Portugal, Louis XIV and Frederick William I of Prussia, Louis XIV and Queen Anne, Louis XIV and Victor II Amadeus of Savoy, Louis XIV and the States-General, 11 April 1713, CUD VIII/1, nrs. CLII-CLVII, p. 353-386.

¹² For a broader survey of pamphlets on the Ostend Company, I refer to Kris VAN DER MYNSBRUGGE, *De pamflettenoorlog rond de Oostendse Compagnie*, UGent: Faculty of Arts and Philosophy (master thesis in History), 1999-2000, p. 68-123 and 175-182. My thanks go to one of the anonymous referees for this article.

¹³ Lucien BÉLY, *La Société des Princes XVIIe-XVIIIe siècle*, Paris, Fayard, 1999; Ragnhild HATTON, “Louis XIV and his fellow monarchs”, in HATTON (ed.), *Louis XIV and Europe*, London, Macmillan, 1976, p. 16-59.

¹⁴ PARMENTIER, “The Irish Connection The Irish Merchant Community in Ostend and Bruges during the late Seventeenth and Eighteenth Centuries” in *Eighteenth Century Ireland* XX (2005), p. 37.

Surate in the East Indies, on 17 June 1714¹⁵. When the ship left Ostend, the Peace Treaty of Rastatt had been concluded three months earlier¹⁶. Louis XIV and Charles VI, representing the two main contending parties in the conflict over the Spanish Succession (1659-1715), had just put an end to the latest continent-wide war, which had divided Europe from 1701 on. Charles had been allotted the Spanish Netherlands, or the remaining ten provinces loyal to their Habsburg ruler after the split of the XVII Provinces¹⁷. During the war, as the Imperial candidate for the Spanish throne, Charles had claimed much more than merely the territories by the North Sea. The partition of the Spanish inheritance between Charles and the French candidate, Philip of Anjou, was, however, inevitable¹⁸. Neither the House of Habsburg nor that of Bourbon could be allowed to dominate the continent, threatening to engulf the other sovereigns. The expedition left before the conclusion of the Treaty of Antwerp on 15 November 1715¹⁹, which opened the way to the effective transfer of the Southern Netherlands to Charles. From 1706 on, effective control of most of the “Belgian” provinces had been exercised by the joint Anglo-Dutch occupation forces that had driven out those of Louis XIV and his grandson²⁰.

If the Habsburg claim on Spain had fully succeeded, Charles VI would have ruled over circa the same territories as, two centuries earlier, Charles V²¹. Control of the Burgundian inheritance, which served as the building block of Habsburg power in the late fifteenth and early sixteenth centuries, was crucial in the contest between Charles VI and the new King of Spain, Philip V (1683-1746)²².

Second, Thomas Ray had all reason to move to a Catholic country. As a naturalised Irishman, he can be seen as part of the “Jacobite diaspora”²³, which supported the claims of James II, the chased Catholic King of England (1633-1701). James fled to France in 1688. The Battle of the Boyne (12 July 1690) consolidated the British isles for his rival, William III of Orange (1650-1702). With the installation of Georg Ludwig of Hanover (1660-1727) as King of England²⁴ accepted by all major European powers by August 1714, the chances of the Stuarts ever returning to the throne were significantly reduced. In order

¹⁵ *Ibid.*, p. 38-42.

¹⁶ Peace Treaty between Charles VI and Louis XIV, Rastatt, 6 March 1714, *CUD*, VIII/1, nr. CLXX, 415-423.

¹⁷ Klaas VAN GELDER, “L'empereur Charles VI et "l'héritage anjouin" dans les Pays-Bas méridionaux (1716-1725)”, in *Revue d'histoire moderne et contemporaine* LVIII (2011), No. 1, p. 53-79.

¹⁸ Antonio ÁLVAREZ-OSSORIO, Bernardo J. GARCÍA GARCÍA & Virginia LEÓN SANZ (eds.), *La guerra de Sucesión por la Monarquía de España*, Madrid, Fundación Carlos de Amberes, 2007; Frederik DHONDT, “From Contract to Treaty: The Legal Transformation of the Spanish Succession, 1659-1715”, in *Journal of the History of International Law-Revue d'histoire du droit international* [Further : *JHIL*] XIII (2011), No. 2, 347-374; Marie-Françoise MAQUART, *Le réseau français à la cour de Charles II d'Espagne : jeux diplomatiques de fin de règne - 1696-1700* (diss. doc.), Villeneuve-d'Ascq, Presses Universitaires du Septentrion, 1999.

¹⁹ Treaty of the Barrier between Charles VI, George I and the States-General, Antwerp, 15 November 1715, *CUD*, VIII/1, nr. CLXXX, p. 458-468.

²⁰ Reginald DE SCHRYVER, “Who had sovereignty in the Southern Netherlands during the War of the Spanish Succession (1700-1715)?”, in X (ed.), *Liber amicorum Jan Buntinx. Recht en instellingen in de oude Nederlanden tijdens de middeleeuwen en de Nieuwe Tijd*, Leuven: Universitaire Pers, 1981, 483-497; VAN GELDER, “De Vooght versus Sersanders. De strijd om het presidentschap van de Raad van Vlaanderen en het probleem van de 'Anjouaanse' benoemingen in de Oostenrijkse Nederlanden (1716-1725)”, in *Pro Memoria. Bijdragen tot de rechtsgeschiedenis der Nederlanden*, XII (2010), p. 15-35.

²¹ LEÓN SANZ, *Carlos VI. El Emperador que no pudo ser Rey de España*, Madrid, Aguilar, 2003.

²² E.g. discussions on the Golden Fleece at the Cambrai conference, F. DHONDT, *Balance of Power and International Law. European Diplomacy and the Elaboration of International Order, 18th Century and Post 1945* (diss. doc.), Ghent, UGent, 2013, p. 248-251 (à paraître comme *Balance of Power and Norm Hierarchy. Franco-British Diplomacy after the Peace of Utrecht (1713)*), Leiden: Martinus Nijhoff, 2015 (Studies in the History of International Law; 7); Elena POSTIGA-O CASTELLANOS, “El cisma del toisón. Dinastía y orden (1700-1748)”, in Pablo FERNÁNDEZ-ALBALADEJO (ed.), *Los Borbones. Dinastía y memoria de nación en la España del Siglo XVIII*, Madrid: Marcial Pons, 2001, 331-380; Annemarie WEBER, *Der Österreichische Orden vom Goldenen Vlies. Geschichte und Probleme* (diss. doc.), Bonn, Friedrich-Wilhelms-Universität Bonn, 1971.

²³ Patrick CLARKE DE DROMANTIN, *Les réfugiés jacobites dans la France du XVIII^e siècle: l'exode de toute une noblesse pour cause de religion*, Pessac : Presses universitaires de Bordeaux, 2005.

²⁴ HATTON, *George I*, New Haven (Conn.), Yale UP, 2001 [1978] (Yale English Monarchs).

to return to Britain, James “III” (1688-1766), son of the deceased Catholic monarch, could only hope for a continental and Catholic coalition against Britain. To this effect, his supporters actively lobbied the courts of Versailles, Madrid and Rome²⁵. It should come as no surprise that a first series of British statutes against the Ostend enterprise were issued on 17 March 1714 and 18 October 171²⁶. The Jacobite network was not only political, but also commercial. It spanned the continent and was important for trade between Spain, Portugal, France and Britain²⁷. Nine out of ten members of the officer’s council on the *Sint-Mattheus* were of Irish origin²⁸. In the future Ostend Company’s ventures, one sailor out of five²⁹.

The scene seemed set for a classical opposition between the Protestant Maritime Powers and one of the two Catholic monarchs in Versailles or Vienna. After Louis XIV’s death in September 1715, Britain was busy negotiating a new deal with Charles VI, involving Italy and the recognition of the Emperor’s succession³⁰. The 1715 Barrier Treaty³¹ between the Maritime Powers and Charles VI was set up as a safeguard against French invasion, in order to prevent the scenario of the previous wars³². Direct French aggression against the Dutch Republic had to be rendered impossible, thanks to the occupation of a string of fortresses, paid for by Charles VI³³.

Yet, a decisive combination of issues caused George I to change sides and abandon his reconciliation with the Emperor. In France, Louis XIV’s death had opened the way for a Regency, assumed by the Duke of Orléans (1674-1723), cousin to the late Sun King. France’s regime was a matter of consensus between the remaining court parties³⁴. Philip of Orléans had all advantage in keeping out Philip of Anjou, Louis XIV’s second grandson, who ruled in Spain since 1700. As King of Spain, Philip V did not want to abandon the dream to return to Versailles and claim the crown. He challenged the validity of the British-imposed

²⁵ Basil WILLIAMS, *Stanhope: A Study in Eighteenth-Century War and Diplomacy*, Oxford, Clarendon Press, 1932, p. 212-213.

²⁶ Dates refer to the Old Style or Julian calendar, used in Britain until 1756. Gerald B. HERTZ, “England and the Ostend Company”, in *English Historical Review* [further: *EHR*] XXII (1907), No. 86 (Apr), p. 255-279.

²⁷ PARMENTIER, “The Irish Connection”, *op. cit.*, p. 53.

²⁸ *Ibid.*, p. 41.

²⁹ *Ibid.*, p. 42.

³⁰ Theo GEHLING, *Ein englischer Diplomat am Kaiserhof zu Wien, François Louis de Pesne, Seigneur de Saint-Saphorin, als englischer Resident am Wiener Hof, 1718-1727*, Bonn, Röhrscheid Verlag, 1964 (Bonner historische Forschungen. Bd. 25) p. 119, 123; Derek MCKAY, *Allies of convenience: diplomatic relations between Great Britain and Austria, 1714-1719*, New York, Garland, 1986 (Outstanding theses from the London School of Economics and Political Sciences). In the line of the Grand Alliance against Louis XIV, George I’s enthronization as British monarch could be seen as a sign of a stronger Austro-British relationship. Georg Ludwig had supported Charles’ claims to the Spanish inheritance and continued the struggle at the Emperor’s side after the British defected from the Alliance (HATTON, *Diplomatic relations between Great Britain and the Dutch Republic, 1714-1721*, London, East and West, 1950).

³¹ *Traité entre Charles VI. Empereur des Romains & Roi Catholique des Espagnes d’une part, George Roi de la Grande-Bretagne & les Seigneurs Etats Generaux des Provinces-Unies des Païs-Bas, d’autre part, pour la Restitution, à sa Majesté Impériale & Catholique de tout le Païs-Bas Espagnol, sous la reserve d’une forte & solide Barrière aux mêmes Païs-Bas en faveur de Leurs Hautes Puissances*, Antwerp, 15 November 1715, *CUD*, VIII/1, nr. CLXXX, p. 458-468.

³² Thirty Years War (1635), War of Devolution (1667), Dutch War (1672), War of the Réunions (1683), Nine Years’ War (1688) and War of the Spanish Succession (1701). See John A. LYNN, *The Wars of Louis XIV, 1667-1714*, London, Longman, 1999 (Modern wars in perspective).

³³ A sum amounting to a third of the Southern Netherlands’ annual budget (VAN GELDER, *Tien jaar Trial and Error? De opbouw van het Oostenrijks bewind in de Zuidelijke Nederlanden (1716-1725)* (diss. doc.), Gent, UGent, 2012, p. 145).

³⁴ Alexandre DUPILET, *La Régence absolue: Philippe d’Orléans et la polysynodie*, Seyssel, Champ Vallon, 2011 (Époques); Emmanuel LE ROY LADURIE, *Saint-Simon ou le Système de la Cour*, Paris, le grand livre du mois, 1998.

declaration of renunciation to the French throne³⁵. Consequently, Philip of Orléans' political fate depended on the Treaties of Utrecht³⁶.

On the other side of the Channel, George I's position as King of Great Britain was guaranteed internally by the Act of Settlement. However, James III's supporters denied the legal validity of Parliament's chasing James II in 1688, which only intervened after an invasion by the Dutch³⁷. Thus, George I needed an international back-up too, which could be found in the recognition of the Protestant Succession in Britain, as expressed in the Treaties of Rijswijk and Utrecht³⁸. George I was King of Great Britain, but a German Elector as well. As Duke of Hanover, he saw his interests compromised in Northern Germany. Emperor Charles VI delayed the issuing of letters of investiture for the acquisition of the duchies of Bremen and Verden. Moreover, in the Great Northern War, a conflict dragging on since 1700³⁹, George had fought Sweden, but feared an alliance between Russia, Sweden, Spain and Pretender James III. When Czar Peter the Great (1672-1725) stationed 40 000 troops in the Duchy of Mecklenburg, bordering on Hanover⁴⁰, Dubois' offer of an alliance with France was finally accepted. George I and his principal minister James Stanhope (1673-1721) opted for France in November 1716⁴¹. This fundamentally altered the whole of European politics, "North" and "South" combined.

The Anglo-French alliance, elaborated in the Summer and Fall of 1717, obtained Dutch accession, in the so-called Triple Alliance of 4 January 1717⁴². The Dutch Republic guaranteed Britain's and France's choice to discard constitutionally legitimate heirs to the throne⁴³. This new combination tied three previously unlikely partners together and left the Emperor aloof of three big powers neighbouring his possessions in the Southern Netherlands. When Philip V of Spain invaded Charles VI's island Sardinia, barely six months later, the Dutch steered an independent course and let the multilateral intervention to France and Britain. Dutch absence in the so-called Quadruple Alliance⁴⁴ (where the Republic's place was left open, to be never filled) implied Dutch absence at the Congress of Cambrai (1722-1725), designed to settle the quarrel between Philip V and Charles VI.

³⁵ Philip V had to renounce his rights before signing the Peace Treaty at Utrecht, text : Declaration of Philip V, Madrid, 3 July 1712, *CUD*, VIII/1, nr. CXXXI, 304. Alfred BAUDRILLART, "Examen des droits de Philippe V et de ses descendants au trône de France, en dehors des renonciations d'Utrecht", in *Revue d'Histoire Diplomatique* III (1889), p. 161-191 & 354-384; ID., *Philippe V et la cour de France: d'après des documents inédits tirés des archives espagnoles de Simancas et d'Alcala de Hénarès et des Archives du Ministère des affaires étrangères à Paris*, Paris, Didot, 1890, 5 v.

³⁶ Which provided his own Bourbon-Orléans branch with a remote possibility to claim the crown if Louis XV came to die without male issue (See Émile BOURGEOIS, *La Diplomatie secrète au XVIIIe siècle*, Paris, Armand Collin, 1909, I).

³⁷ Jonathan ISRAEL, *The Dutch Republic. Its Rise, Greatness and Fall 1477-1806*, Oxford, Clarendon Press, 1988², p. 452.

³⁸ Art. IV, Treaty of Peace between Louis XIV and Queen Anne, Utrecht, 11 April 1713, *CUD*, VIII/1, nr. CLI, p. 340.

³⁹ Erik SCHNAKENBOURG, *La France, le Nord et l'Europe au début du XVIIIe siècle*, Paris, Champion, 2008 (Bibliothèque d'histoire moderne et contemporaine; 26).

⁴⁰ Manfred HELLMANN, "Die Friedensschlüsse von Nystad (1721) und Teschen (1779) als Etappen des Vordringens Russlands nach Europa", in *Historisches Jahrbuch* XCVII/XCVIII (1978), p. 270-288.

⁴¹ Robert Walpole and Charles Townshend quit cabinet (the so-called "Whig Split"), but would continue a pro-French and anti-Imperial policy after Stanhope's decease allowed them to return to government in 1721 (John Joseph MURRAY, *George I, the Baltic and the Whig Split of 1717. A Study in Diplomacy and Propaganda*, London, Routledge & Kegan Paul, 1969). The link between Jacobitism and foreign policy was further exploited by Stanhope, when the Swedish ambassador Gyllenborg was arrested (29 January 1717) on rumours of a plot threatening the Protestant Succession (DHONDT, *Balance of Power*, p. 72-78).

⁴² Treaty between Louis XV, George I and the States-General, The Hague, 4 January 1717, *CUD* VIII/1, nr. CLXXXVI, p. 484-488.

⁴³ "Contre les partisans de la légitimé royale, le Régent passait un contrat avec les partisans du droit des peuples, avec les pays républicains", BOURGEOIS, *Diplomatie secrète*, p. 173-174.

⁴⁴ Treaty between Charles VI, Louis XV and George I, London, 2 August 1718, *CUD* VIII/2, nr. CCII, p. 531-541.

Consequently, whereas the Maritime Powers had been united in 1715 for the status of the Southern Netherlands, Britain went with France, as it had done before at the end of 1711, when separate Franco-British peace preliminaries showed the blueprint for the end of the War of the Spanish Succession⁴⁵. A major element of tension in European international relations during Louis XIV's reign, the opposition between France and the Protestant Maritime Powers⁴⁶, was relegated to the background. The application, interpretation and amending of the Peace of Utrecht united French and British diplomats⁴⁷.

The consequences for the status of the Austrian Netherlands were considerable. On the basis of the abovementioned diplomatic movements, Charles VI obtained leverage on Britain and the Dutch Republic. In order to solve a problem at the European table, French involvement was indispensable. As long as Charles remained in a deadlock with Philip V of Spain, France and Britain could make any concession towards the Emperor conditional on his acceptance of the broader diplomatic framework imposed by the Peace of Utrecht. Once Charles and Philip would have solved their bilateral issues, they could try to challenge the new consensus between the main power at sea, Britain, and the main land power, France. While the main powers in Europe were rapidly changing their positions, trade in Ostend continued: on 30 August 1716, the *Saint-Mathieu* returned from Surate on the Indian West coast and generated enormous profits for its initial investors.

Bilateral restraints: self-interest and opportunistic argumentation

Le Commerce est naturellement jaloux, & intéressé. Comme son objet prochain, & immédiat est le gain, & qu'on ne l'entreprend jamais, que pour gagner, c'est aussi toujours de ce côté là que se tourne la principale attention de ceux, qui s'en mêlent.

Du Mont, *La Vérité*, 35-36⁴⁸

The Dutch Republic and its East India Company (VOC⁴⁹) questioned the legitimacy of the Ostend trade, and were eventually prepared to use force to compel Charles VI⁵⁰. Already on 27 April 1719, the *Marquis de Prié* was confiscated at Cape Lahou, forty miles ahead of the Dutch fortress Laxim and thus well off the African coast⁵¹. On 4 July of the same year, sales of tea shipped to Ostend from Canton by the *Prince Eugène* alone amounted to a million florins. Determined not to let the seizure of the *Marquis de Prié* pass, captain De Winter took the Dutch yacht *Commanij*, filled with African elephant teeth, on 23 October 1719

⁴⁵ Preliminaries of Peace between Louis XIV and Queen Anne, London, 8 October 1711, *CUD*, nr. CXIX, VIII/1, p. 281. BELY, *Espions et ambassadeurs au temps de Louis XIV*, Paris, Fayard, 1990, p. 576-595; DHONDT, "L'équilibre européen et la Succession d'Espagne. L'épisode révélateur des négociations de Nicolas Mesnager en Hollande, 1707-1708", in Véronique DEMARS-SION et al. (dir.), *Diplomates et Diplomatie. Actes des Journées Internationales tenues à Péronne du 22 au 23 mai 2009*, Lille, Université Lille 2-Centre d'histoire judiciaire, 2013 (Société d'Histoire du Droit et des Institutions des Pays Flamands, Picards et Wallons), p. 97-112.

⁴⁶ Charles-Édouard LEVILLAIN, *Vaincre Louis XIV: Angleterre, Hollande, France, histoire d'une relation triangulaire 1665-1668*, Seyssel, Champ Vallon, 2010 (Époques).

⁴⁷ DHONDT, "Legal Discourse between Integration and Disintegration: The Case of the Peaceful Succession Struggles, 1713-1739", in Janwillem OOSTERHUIS & Emanuel VAN DONGEN (eds.), *European Traditions: Integration or Disintegration ?*, Nijmegen, Wolf Legal Publishers, 2013, p. 159-174.

⁴⁸ DU MONT DE CARELS-KROON, *La Vérité du fait, du droit, et de l'intérêt de tout ce qui concerne le commerce des Indes établi aux Pays Bas Autrichiens par octroi de Sa Majesté Imper. Et Catholique*, s.l., s.n., 1726, p. 35-36.

⁴⁹ On its legal structure, Matthijs DE JONGH, *Tussen societas en universitas. De beursvennootschap en haar aandeelhouders in historisch perspectief* (diss. doc), Rotterdam, Erasmus University, 2014, p. 59-131.

⁵⁰ Victor ENTHOVEN, "Dan maar oorlog! De reactie van de Republiek op de Oostendse Compagnie, 1715-1732", in PARMENTIER (ed.), *Noord-Zuid in Oost-Indisch Perspectief*, Zutphen: Walburg Pers, 2005, p. 131-148. The threat to use force was not only directed at the Emperor, but at potential investors as well. E.g. on 9 August 1723, a thousand copies of the VOC's memorandum was printed and distributed in Antwerp, where substantial capital had been raised for the Company (Michel HUISMAN, *La Belgique commerciale sous l'empereur Charles VI: la Compagnie d'Ostende: étude historique de politique commerciale et coloniale*, Bruxelles, Lamertin, 1902, p. 240).

⁵¹ DU MONT, *La Vérité du fait*, *op. cit.*, p. 22.

off the Belgian coast, an action approved by the Council of State in Brussels⁵². Southern Netherlanders founded trade posts on the Coromandel coast and in Bangladesh. Emperor Charles VI formalised the enterprise, now operating as a joint stock corporation, granting its formal permission on 19 December 1722⁵³. Few months later, on 5 April 1723, the Dutch resident Pestere presented memoranda drafted by the States-General and the VOC (drafted by their *avocat*, de la Bassecourt) to the Marquis of Prié⁵⁴. Simultaneously, Hamel Bruyninx (1661-1738), envoy of the Republic in Vienna, presented the same texts to Charles VI⁵⁵. In essence, Dutch argumentation constituted a 180 degree turn away from Grotius' famous seventeenth-century stand for free navigation on the high seas in *De Iure Praedae*⁵⁶. Whereas the famous jurist had argued that neither the Kings of Spain and Portugal⁵⁷, nor the King of England, could claim the exclusion of the Dutch from the ranks of the seafaring nations, the interests of the Republic were better served by the opposite point of view, a century later.

The Dutch East India Company and her legal weapons

Two more substantial, separately published treatises represent the Dutch vituperations against Ostend. Jean Barbeyrac (1674-1744)⁵⁸, professor of Public Law at Groningen, and Abraham Westerveen (°1647), former lawyer for the East India Company, attacked the Imperial Company with arguments from treaty law⁵⁹. The Peace Treaty of Munster between Spain and the Dutch Republic, concluded in 1648, constituted the core of Dutch pamphlets. Philip IV, at that time King of Spain, Duke of Brabant, Count of Flanders, Lord of Malines and sovereign in the remaining provinces left to him by Charles V, Philip II (1527-1598) and Philip III (1578-1621), conceded to the Seven Provinces of the North on multiple points. First, final recognition of the statehood assumed by the former Spanish provinces. Second, recognition of their colonial and commercial expansion. Finally, exclusion of his own subjects from trade in the Indies.

It was crucial for the VOC to prove that these limitations had been transmitted from Philip IV and his successor Charles II to Charles VI, who had been recognised as sovereign in the Southern Netherlands by Britain and the Dutch Republic in the Treaty of the Grand Alliance⁶⁰. This document constituted the core

⁵² Marquis de Prié to Charles VI, Report on his administration of the Southern Netherlands, 16 April 1725, published in Louis Prosper GACHARD (ed.), *Collection de documents inédits concernant l'histoire de la Belgique*, Bruxelles, Louis Hauman & Cie, 1835, III, p. 500-502 and p. 504-512.

⁵³ *Lettres Patentes d'Octroi, accordées par l'Empereur Charles VI. pour le terme de trente années à la Compagnie des Indes dans les Pais-Bas Autrichiens*, Vienna, 19 December 1722, CUD, VIII/2, nr. XIX, p. 44-51. The formalisation of the Ostend enterprise should not obscure the abovementioned private initiatives from Ostend or "Flemish" participation in e.g. French smuggling trade with the East Indies (DEGRYSE, "De vrienden van 'Mijnheer Crozat' of de Zuid-Nederlandse betrokkenheid bij de Franse handel op de Stille Zuidzee (1710-1719)", in PARMENTIER & S. SPANOGHE (eds.), *Orbis in Orbem. Liber Amicorum John Everaert*, Gent, Academia Press, 2001, p. 157-170.

⁵⁴ E.g. Memorandum presented by Ernst Pestere, resident of the States-General in Brussels (1717-1728) to the Marquis of Prié, Brussels, 5 April 1723, DU MONT, *La Vérité du fait*, op. cit., p. 85-87.

⁵⁵ DU MONT, *La Vérité du fait*, op. cit., p. 22.

⁵⁶ Robert FEENSTRA & Jeroen VERVLIET (eds.), *Hugo Grotius' Mare Liberum: 1609-2009*, Leiden: Martinus Nijhoff, 2009.

⁵⁷ Seraphim DE FREITAS, *Freitas contre Grotius sur la question de la liberté des mers. Justification de la domination portugaise en Asie* (trad. Alfred GUICHON DE GRANDPONT), Paris, Gaillard & Cie, 1893.

⁵⁸ Not "Barbeyron" (DUMONT, *L'épopée de la Compagnie*, p. 197). Barbeyrac had been active as a classics teacher in Berlin, where he translated Pufendorf's *De Jure Naturae et Gentium* (1706) to French. In Lausanne, Barbeyrac taught *droit et histoire* from 1710 to 1717, to be called to Groningen as *professor ordinarius in droit public et particulier*. In 1724, Barbeyrac completed his translation of Grotius' magnum opus *De Iure Belli ac Pacis Libri Tres*, following a critical edition in 1720. Barbeyrac's translations were of paramount importance for diplomatic practice, since his French translations were more accessible than the Latin originals.

⁵⁹ Abraham WESTERVEEN, *Vertoog van het regt, Dat de Vereenigde Nederlandsche Oost-Indische Maatschappye Heeft op de Vaart en Koophandel Naar Oost-Indiën; Tegen de Inwoonders van de Spaanse, nu de Oostenrykse Nederlanden*, Amsterdam, Johannes de Ruyster, 1722. See as well, in a shorter version, CUD, VIII/2, nr. XXI, p. 78-80.

⁶⁰ Tractatus Foederis inter Sacram Caesaream Majestatem Leopolum I. Regiam Majestatem Britanniae Wilhelmum III. Necnon Praepotentes Ordines Generales Foederatarum Belgii Provinciarum, ad procurandum Suae Caesareae Majestati ratione praetensionis suae in Successionem Hispanicam satisfactionem aequam & rationi

of the grand coalition against Louis XIV and his grandson Philip V. Charles of Habsburg, at that time Archduke and younger brother to Archduke Joseph (1683-1711), King of the Romans (and thus his father's designated successor as Emperor), had been promised nothing more than a just and reasonable satisfaction in the Spanish Succession⁶¹. This was even more true when Charles was elected Emperor himself, after Joseph's unexpected decease in April 1711. In the Grand Alliance, the Southern Netherlands had been identified as the prime bulwark against future French aggression (*obex et repagulum, vulgo Barrière*). The formal recognition of Charles VI's sovereignty happened at the Treaties of Utrecht (11 April 1713, France/Britain) and Rastatt (6 March 1714, France/Emperor), stating that the Southern Netherlands would be transferred to the Emperor in the same status they had belonged to Charles II of Spain (*tels que feu le Roy d'Espagne Charles II. les a possédés ou dû posséder, conformément au Traité de Ryswick*⁶²). The Barrier Treaty confirmed -in a general way- all relevant trade clauses of the Treaty of Munster⁶³. If the exclusion of all Spanish subjects included inhabitants of the Spanish Netherlands, this limitation had to be continued under Austrian rule.

Once this bilateral and conventional argument was accepted, Barbeyrac and Westerveen needed to buttress it against challenges stemming from natural law. Didn't the *Digest* state that the navigation on the high seas, necessary means of communication between nations, was a natural right⁶⁴? Even more, Hugo Grotius had famously leaned on this statement to defend Dutch pretensions against Spain and Portugal, a century earlier⁶⁵. The VOC's advocates turned to the ruse of *mare natura liberum, pactis clausum*⁶⁶ ("the sea is free by nature, but can be closed by treaties"). Although navigation on the high seas pertained to all nations, they could renounce this right *merae facultatis* in a convention. Renunciations were coupled with reciprocal advantages, and would not have been contracted without cause. However, if one assumed the opposite position (namely that free navigation on the high seas constituted a peremptory norm of natural law, overriding contrary treaties concluded between states), another hot issue in North/South-relations resurfaced. The Treaty of Munster had closed (art. XIV) the navigation of the Scheldt and other embouchures on the North Sea, which reflected the military state of affairs from early in the Dutch Revolt⁶⁷. Neny⁶⁸, who defended the Southern Netherlands' point of view, had put this at the same level as

convenientem, uti & ad adipiscendum pro Rege Magnae Britanniae & Dominis Ordinibus Generalibus securitatem particularem & sufficientem, The Hague, 7 September 1701, *CUD*, VIII/1, nr. XIII, p. 89-91.

⁶¹ DU MONT, *La Vérité du fait, op. cit.*, p. 49; See DHONDT, "Entre droit privé et droit international : la succession d'Espagne aux XVIII^e et XVIII^e siècles", *Cahiers du centre de recherches en histoire du droit et des institutions: Histoire(s) du droit*, dir. Marie MOULART et Emmanuël FALZONE. n° 35-36 (2011), p. 61-102.

⁶² Art. XIX Treaty of Rastatt; BARBEYRAC, *Défense du droit, op. cit.*, p. 13; art. I, Barrier Treaty; WESTERVEEN, *Vertoog van het regt, op. cit.*, p. 8.

⁶³ Art. XXVI, Barrier Treaty: *sur le pié établi, & de la manière portée par les Articles du Traité fait à Munster le 30. Janvier 1648.*

⁶⁴ VATTEL, *Le Droit des Gens, op. cit.*, Book II, § 132: *La propriété n'a pu ôter aux Nations le droit général de parcourir la terre, pour communiquer ensemble, pour commercer entr'elles, & pour d'autres justes raisons.*

⁶⁵ Monica BRITO VIEIRA, "Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden's Debate on Dominion over the Seas", *Journal of the History of Ideas* LXIV (2003), No. 3 (Jul), p. 361-377.

⁶⁶ Theodor GRAVER, *Dissertatio juridica inauguralis, de mari natura libero, pactis clauso*, Utrecht, Willem vande Water, 1728.

⁶⁷ HUISMAN, *La Belgique commerciale*, p. 5.

⁶⁸ Patrice DE NENY, *Démonstration de l'injuste et chimérique prétention que les Directeurs de la Compagnie des Indes en Hollande forment afin de faire révoquer, ou du moins rendre inutile l'Octroy que Sa Majesté Imperiale & Catholique a accordé à ses Sujets des Païs-bas Autrichiens pour l'Etablissement d'une Compagnie de Commerce & de Navigation aux Indes Orientales & Occidentales*, s.l., s.d., 1724. Patrice de Neny, originally Patrick Mac Neny (1675-1745), studied law at the University of Leuven (1691-1702). An *avocat* at the Council of Brabant (1703), he climbed to the rank of councillor in the Council of Finance (1713) at the end of the War of the Spanish Succession. At the 1718-1719 negotiations on the amendment of the Barrier Treaty, Neny was sent to The Hague. In 1724, Eugene of Savoy, governor-general of the Southern Netherlands, appointed him as Secretary of State and War, a position which he occupied until his death. Neny was the main person of confidence for the Marquis of Prié (1658-1726), minister plenipotentiary of Charles VI in Brussels. See Bruno BERNARD, "Patrice Mac Neny (1676-1745) Secrétaire d'État et de Guerre", *Études sur le XVIII^e siècle* XII (1985) (Hervé HASQUIN & Roland MORTIER (eds.), *Une famille de hauts fonctionnaires : les Neny*), Bruxelles,

the supposed renunciation of the Southern Netherlanders' right to sail to the Indies: *un entier renversement des Loix du Droit des Gens, parce qu'on y prive toutes les Nations du Monde de la Liberté Naturelle que Dieu Leur a donnée, par l'Interdiction qu'on leur a faite d'entrer dans les Provinces de Brabant, & de Flandres avec Leurs propres Vaisseaux & Marchandises*⁶⁹.

Barbeyrac's *Défense du droit de la Compagnie Hollandoise des Indes Orientales* appeared on 17 January 1725. By then, the Congress of Cambrai had been busy for almost a year. The treatise was framed as a response to Neny. Just as with his French translations of Pufendorf⁷⁰ and Grotius⁷¹, Barbeyrac reached a more substantial audience in French-speaking Europe than with a treatise in Latin or Dutch, wherein Westerveen published his defence of the VOC⁷². Neny, by contrast, had written in French and thus potentially harmed the Dutch case by reaching out wider. Like Westerveen in a second version of his *Dissertatio*, a year earlier⁷³, Barbeyrac offered to correct Neny's errors, *d'éplucher tout, & de ne rien laisser passer, qui ne fut une répétition toute pure*. If the Dutch based their defence on the 1648 Treaty of Munster, chronological coincidence seemed to be on the Austrian side. Grotius' major works coincided with important evolutions in the Eighty and Thirty Years' War, the conflicts that ended in 1648. If Grotius stated in *De Iure Praedae* (XII, 1-216⁷⁴) that all peoples equally enjoyed the right to visit other nations and carry on their trade, how could this argument of natural law be cast aside by the positive law of nations ?

As a professor of public law at Groningen and a recognised expert in the law of nations (on the basis of his translations, as well as the edition of treaties from Antiquity), Barbeyrac claimed the objectivity of his method equalled that of other types of scholarly activity⁷⁵. In spite of Barbeyrac's reputation as a systematic thinker, he composed a hodgepodge of diverse arguments drawn from any possible source. For instance, he took the long delay between the origin of times and 1722 as a sign that the inhabitants of the Southern Netherlands forfeited their right to navigation, or implicitly recognized they were under a limitation based on the Treaty of Munster⁷⁶. Barbeyrac, in his defence of the Republic's exclusive rights, even quoted Zypaeus, who defended the claims of the King of Spain on maritime dominium in the seventeenth century: *Mare non liberum, ut voluit Grotius, sed potius Iberum hodie sit censendum*⁷⁷.

Primary natural law v. voluntary law of nations

ULB, 1985, p. 7-78 ; Jacques LEFÈVRE, "NENY (Patrice DE)", *Biographie Nationale de Belgique*, I (fasc. 1), Bruxelles, Bruylant, 1956, p. 406-407 ; VAN GELDER, *Tien jaar Trial and Error ?*, p. 137-138 and 299-303.

⁶⁹ NENY, *Démonstration de l'injuste et chimérique prétention*, *op. cit.*, p. 42.

⁷⁰ Samuel VON PUFENDORF, *Les devoirs de l'homme, et du citoyen, tels qu'ils lui sont prescrits par la loi naturelle* (transl. J. Barbeyrac), Amsterdam, Pierre de Coup, 1715³.

⁷¹ Hugo GROTIUS, *Le droit de la guerre et de la paix*: (trad. BARBEYRAC), Amsterdam, De Coup, 1724.

⁷² Abraham WESTERVEEN, *Dissertatio de Jure, Quod Competit Societati Privilegiatae Fœderati Belgii Ad Navigationem & Commercia Indiarum Orientalium, Adversus Incolas Belgii Hispanici-hodie-Austriaci*, Amsterdam, Wetstein, 1722 ; BARBEYRAC, *Défense du droit*, *op. cit.*, Avertissement.

⁷³ WESTERVEEN, *A Second Dissertation Concerning the Right of the Dutch East-India Company To the Trade and Navigation of the East-Indies, Against the Inhabitants of the Spanish, now Austrian Netherlands, In Answer to the objections of Mr. P. Mac Neny, Counseor & Proc. Fiscal, to His Imperial & Catholick Majesty*, The Hague, Johnson, 1724; Dutch version: *Europische Mercurius* XXXV (1724), p. 212-248.

⁷⁴ *Hoc igitur jus ad cunctas gentes aequaliter pertinet: quod clarissimi jurisconsulti eousque producunt, ut neget ullam rempublicam aut Principem prohibere in universum posse, quominus alii ad subditos suos accedant et cum illis negotientur.*

⁷⁵ BARBEYRAC, *Défense du droit*, *op. cit.*, Avertissement: *J'ai examiné les matières non seulement avec beaucoup d'attention, mais encore avec la même indifférence & la même impartialité, que si j'avois eû à discuter un point de l'Histoire Ancienne, & à chercher, par exemple, le vrai sens d'un Traité fait entre Philippe de Macedoine, & les Athéniens.*

⁷⁶ BARBEYRAC, *Défense du droit*, *op. cit.*, p. 2. VATTEL (*Le Droit des Gens*, *op. cit.*, Book I, §285) refuted this : although any state can decide not to engage in commerce or renounce it on a contractual basis, this implies an act of will. In absence of this, prescription (i.e. the mere passage of time) cannot provoke the loss of this faculty. Moreover, Du Mont argued that, while under Spanish domination, the Southern Netherlands were deprived of the exercise of their legal capacities: *Non valenti agere non currit praescriptio* (DU MONT, *La Vérité du fait*, *op. cit.*, p. 33).

⁷⁷ Franciscus ZYPAEUS, *Notitia iuris belgici*, Antwerpen, Verdussen, 1635, p. 284.

According to Barbeyrac, the VOC's right to trade and navigate was grounded on *Privilèges & Traitez solennels qui les lui ont assurez d'une manière irrevocable par rapport aux Habitans des Païs-Bas Autrichiens*⁷⁸: by not questioning the VOC's right to sail to the Indies and conversely abstaining from doing the same, Philip IV's and Charles II's subjects had both forfeited their own right⁷⁹ and confirmed that of the Dutch. Westerveen supported this position leaning on Baldus' commentary on the *Digest*, according to whom distinctions between states could be applied at sea as well as on land⁸⁰, on the Church Father Ambrosius or John Selden (whose theses had been opposed to those of Grotius in the seventeenth century⁸¹). Moreover, Spanish state practice to exclude foreign nations from direct commerce with Spain's colonies in the Indies provided the world with clear boundaries, which were an essential precondition to international stability⁸². Finally, the right thus accorded to the Dutch by treaty did not necessarily amount to full *dominium*. In analogy with civil law, real property rights of use or enjoyment, including the right to exclude third party-access, could be granted to states, distinct from property⁸³.

Barbeyrac tackled the issue of free navigation head-on: *Le vaste Océan n'est à personne: d'accord [...] Mais qu'est-ce qui empêche que deux Princes ou deux Peuples conviennent entr'eux, que l'un ne mettra point de Vaisseaux en mer, ou qu'il n'en envoie que jusqu'à un certain endroit de l'Océan, ou de quelque autre Mer moins vaste, ou qu'il n'ira point commercer en tel ou tel endroit*⁸⁴? In other words, Barbeyrac distinguished between a hard right to navigate, and a (soft) possibility to exercise that right, the latter leading to a reliable promise to another sovereign, whose consent is needed to recover the initially forfeited right. *Mare liberum* is thus turned into a disposition of supplementary law: *mare liberum... pactis clausum*. Barbeyrac found a legitimacy for renunciation in the general reciprocity between nations: we forfeit our right to navigation "*en comptant sur ce que les autres veulent à leur tour nous céder des leurs*⁸⁵." In the "Belgian" case, Philip IV acted on behalf of his territories by the North Sea, and rightly so, as their legitimate sovereign. Philip ratified the treaty as King of Castille, Duke of Brabant and Count of Flanders, obliging all of his vassals and subjects alike⁸⁶. In case his subjects would not have consented to the imposition of this limitation, they had to make this known within a reasonable lapse of time⁸⁷.

Westerveen distinguished between situations leading to an opposable claim on international trade. The Dutch trading companies had acquired their exclusive right to sail to the part of the Indies they controlled at the Treaty of Munster. This Peace Treaty ended the Eighty Years' War. Consequently, the Dutch Republic had obtained an exclusive right, following the Spanish renunciation on behalf of Philip IV's citizens, on the basis of a right of conquest. The outcome of an armed conflict could put the rules of the initial state of nature, wherein navigation on the high seas was free, aside. Just as the state of nature between individuals did not know appropriation yet, the status of the high seas as the common heritage of men was a merely transitory one. The Dutch Republic could thus acquire the exclusive right to sail to the

⁷⁸ BARBEYRAC, *Défense du droit*, *op. cit.*, p. 11.

⁷⁹ *Après quoi, il ne sauroit légitimement se plaindre, de ce qu'il n'a plus la liberté de disposer à sa fantaisie d'une chose qui lui appartenait (sic) à l'exclusion de tous les autres. A plus forte raison, auroit-on mauvaise grâce que de vouloir revenir d'une Renonciation, qui a pour objet des choses auxquelles auparavant on n'avait qu'un droit commun* (BARBEYRAC, *Défense*, p. 4).

⁸⁰ Ad L. I. Dig. De Rer. Div.

⁸¹ WESTERVEEN, *Vertoog van het regt*, *op. cit.*, p. 3; Andrea WEINDL, "Grotius's Mare Liberum in the Political Practice of Early-Modern Europe", *Grotiana* XXX (2009), No. 1, p. 131-151.

⁸² WESTERVEEN, *Vertoog van het regt*, *op. cit.*, p. 4.

⁸³ In the same sense, Grotius provided for a right of exclusion, distinct from full appropriation by the VOC (Martti KOSKENNIEMI, "International Law and the Emergence of Mercantile Capitalism: Grotius to Smith", in Pierre-Marie DUPUY & Vincent CHETAIL (eds.), *The Roots of International Law – Les fondements du droit international. Liber amicorum Peter Haggemacher*, Leiden, Martinus Nijhoff, 2014 (Legal History Library; 11/Studies in the History of International Law; 5; ed. Randall LESAFFER), p. 21.

⁸⁴ BARBEYRAC, *Défense du droit*, *op. cit.*, p. 4.

⁸⁵ *Ibid.*

⁸⁶ WESTERVEEN, *Vertoog van het regt*, *op. cit.*, p. 22.

⁸⁷ BARBEYRAC, *Défense du droit*, *op. cit.*, p. 5.

Indies for the VOC. Conversely, the Ostend Company could not unilaterally claim the same without right of conquest or sovereign (Dutch) consent concerning the King of Spain's renunciation of his subjects' right⁸⁸. Erecting trade posts, fortifications or settlements on the Dutch's East Asian shores, unilaterally claiming part of the VOC's profit without consent, equalled restarting the military conflict between the States-General and the sovereign of the Southern Netherlands⁸⁹.

Positive law

According to Barbeyrac, the Southern Netherlands' treaty-based exclusion from navigation did not date back to 1648 or 1598, but to 1609, at the time of the Twelve Years' Truce between Philip III, the Archdukes Albert of Austria (1559-1621) and the Infant Isabella of Spain (1566-1633), on the one hand and the Dutch Republic, on the other hand⁹⁰. Initially, the treaty restored trade between North and South. Yet, this is immediately limited to the "*Royaumes, Provinces, Pays & Seigneuries qu'il [Philip III] tient & possede en Europe*"⁹¹. Trade outside of Europe was subject to royal approval. Barbeyrac and Westerveen⁹², however, read this as including the VOC's (national) privilege of 1602, and applying only to inhabitants over whom the King of Spain still exerted control. In their view, in 1621, at the creation of the Dutch West India Company (WIC), the Southern Netherlands did not utter any protest. At the conclusion of the Truce, a declaration interpreting article IV as including Spanish territories outside Europe as well, had been accepted by Philip III's delegates⁹³.

The Treaty of Munster brought Spanish recognition for both VOC and the WIC⁹⁴. Philip IV renounced to all establishments in both Indies occupied by any of the Dutch companies, and extended their privileges to all Spanish possessions within Europe⁹⁵. However, article V of the Treaty of Munster created difficulties for Barbeyrac. The Spanish negotiators had opted for the term *Castillans* or *Espagnols* to designate Philip IV's subjects. Preparatory meetings and memoranda from both companies used the terms indistinctly for all subjects, argued both Westerveen⁹⁶ and Barbeyrac: article VI relating to the West Indies mentioned all subjects of Philip's Kingdoms and Provinces and should be read as an elaboration of the preceding article⁹⁷.

How could Philip have meant to exclude his non-Castilian subjects? The Dutch Republic would have lost its advantage in contracting such a restricted commercial renunciation clause. Contracts ought to be interpreted according to party intent, and –following Cicero– the requirements of good faith push to

⁸⁸ WESTERVEEN, *Vertoog van het regt, op.cit.*, p. 14: *zodanige verschillen moeten afgedaan werden, na 't eerste Volker-regt, volgens welke by na alles gemeen was, daar nogtans geleerden en ongeleerden beyde bekend is, dat door 't regt, 't geen nu plaats heeft, en by alle volkeren even zeer werd bewaard, veele dingen onderscheyden zyn, die in ouder tyd niet onderscheyden waaren.*

⁸⁹ WESTERVEEN, *Vertoog van het regt, op.cit.*, p. 14, referring to the Dutch East Indies trade as the main reason for the end of the Twelve Years' Truce.

⁹⁰ GARCÍA GARCÍA (ed.), *Tiempo de Paz. La Pax Hispanica y la Tregua de los Doce Años*, Madrid, Fundación Carlos de Amberes, 2010.

⁹¹ BARBEYRAC, *Défense du droit, op. cit.*, p. 7.

⁹² WESTERVEEN, *Vertoog van het regt, op.cit.*, p. 6.

⁹³ Protest by the Deputies of the States-General of the United Provinces of the Netherlands, Antwerp, 31 March 1609, published in DU MONT, *La Vérité du fait, op. cit.*, p. 80: *les dits Sieurs Roy Tres-Chrestien, & de la Grande Bretagne [mediators for the truce] ci devant priés de la part des Estats de se vouloir rendre garants de l'observation dudit Commerce comme promis & accordé par les dits articles aussi valablement que si le mot des Indes y estoit exprimé*; Declaration by the King of Spain and the Archduke's Deputies in favour of the States General of the United Provinces of the Netherlands, Antwerp, 9 April 1609, DU MONT, *La Vérité du fait, op. cit.*, p. 81. See as well Treaty of Guaranty concluded between Henry IV of France and James I of England, The Hague, 7 June 1609, DU MONT, *La Vérité du fait, op. cit.*, p. 82-83.

⁹⁴ The WIC also published a memorandum against the Ostend Company, *CUD*, VIII /2, nr. XXIV, p. 78.

⁹⁵ BARBEYRAC, *Défense du droit, op. cit.*, p. 9.

⁹⁶ In line with the VOC's remonstrances to the States General, The Hague, 1723, DU MONT, *La Vérité du fait, op. cit.*, p. 87-92.

⁹⁷ WESTERVEEN, *Vertoog van het regt, op.cit.*, p. 22.

recognize dubious words as creating obligations, rather than as discharging debtors from what is due to their creditor⁹⁸. Eliminating all non-Castilian subjects of Philip IV would equal the exclusion of the inhabitants of the conquered parts of North Brabant and Flanders (*Generaliteitslanden*) on the Dutch side⁹⁹. Taken together with Philip III's restricted royal authorisation to his Castilian subjects to navigate and trade¹⁰⁰, the inhabitants of the Southern Netherlands should be seen as excluded from participation in it. At the end of the sixteenth century, the Act of Cession (6 May 1598¹⁰¹) issued by Philip II to confer sovereignty over the Southern Netherlands to his daughter Isabella and her husband, Archduke Albert of Austria, did contain an explicit interdiction in its eighth article¹⁰², which was effectively applied on an Antwerp vessel sailing to the East Indies in 1600¹⁰³. Westerveen further pointed to the Bastiaan Brouwer-case, where a subject of Philip IV had sailed to Batavia in 1653. The local Dutch court, the *Hooge Raad der Nederlandsche Indiën*, had used article V of the Treaty of Munster to forbid the activities of this Spanish merchant.

Imperial passports granted to individuals sending out vessels for the Ostend Company contained an interdiction clause, containing the African coasts, or other places *où il n'est pas permis suivant les Traitez, aux Sujets de Sa Maj. Imper. & Cath. de commercer*. Following the VOC's argumentation, Barbeyrac launched the obvious rhetorical question: *Quels sont donc ces Traitez, si ce n'est celui de Munster & les derniers qui le confirment?*¹⁰⁴ Charles VI denied being under any limitation concerning the navigation of the high seas, and - at the same time- confirmed the existence of positive law-limitations! If looked closer at the Barrier Treaty, the instrument containing the precise conditions of the transfer to Charles VI, article XXII stated that the new sovereign would execute all obligations pending on Charles II, mainly concerning the military expenses paid by the Maritime Powers to chase the French and Spanish from the Southern Netherlands. Barbeyrac sees here an indication of the more general nature of Charles VI's accession to the inheritance of Charles II, referring back to the general rule in the law of nations, according to which sovereigns generate obligations for themselves and their successors as well¹⁰⁵. The analogy with civil law was obvious, with reference to the VOC's initial memorandum: *selon le Traité de Munster, mais aussi selon Droit par la nature même de la chose, sçavoir que celui, qui succede par Droit de Succession en la place du deffunt, est tenu, & engage d'observer, & d'exécuter tous les Traitez & engagements, que le deffunt à (sic) fait, & contracté avec d'autres*¹⁰⁶. The more considerable the part received by the Emperor, the less likely he could be considered as a specific legatee. If, moreover, the Emperor was held answerable for the debts contracted by Charles II for the preservation of his part of the inheritance, it would be more likely to see the Austrian Habsburgs as general successors,

⁹⁸ WESTERVEEN, *Verhoog van het regt*, *op.cit.*, p. 25. Which is the opposite of the normal rules of interpretation, restricting dubious words against the drafter.

⁹⁹ Since the *Generaliteitslanden* (Generality Lands; see ISRAEL, *The Dutch Republic*, *op. cit.*, p. 297-300) did not form part of the seven provinces which seceded from the XVII Provinces, they were put under direct administration by the States-General in The Hague.

¹⁰⁰ An impression reinforced by the existence of the *Casa de Contratacion* in Seville, which served as a mandatory hub for foreign merchants trading with the Spanish West Indies (HUISMAN, *La Belgique Commerciale*, *op. cit.*, p. 12).

¹⁰¹ Georges MARTYN, "How 'sovereign' were the Southern Netherlands under the Archdukes?" in LESAFFER (ed.), *The Twelve Years Truce (1609-1621)*, Leiden, Martinus Nijhoff, 2014 (Studies in the History of International Law; 6), 2014, p. 196-209.

¹⁰² *L'Infante & Son Epoux ni aucun de Leurs Successeurs [...] ne feront aucun Commerce, trafic, ou contractation dans les Indes Orientales, ou Occidentales, ni n'enverront dans ces Pais-là aucune sorte de batimens sous quelque titre, nom., ou pretexte, que ce puisse être* BARBEYRAC, *Défense du droit*, *op. cit.*, p. 6; DU MONT, *La Vérité du fait*, *op. cit.*, p. 89; WESTERVEEN, *Verhoog van het regt*, *op.cit.*, p. 7.

¹⁰³ WESTERVEEN, *Verhoog van het regt*, *op.cit.*, p. 8.

¹⁰⁴ BARBEYRAC, *Défense du droit*, *op. cit.*, p. 108.

¹⁰⁵ Memorandum VOC, DU MONT, *La Vérité du fait*, *op. cit.*, p. 89. See as well G. Réal de Curban, *La Science du gouvernement, t. 5: contenant le droit des gens, Qui traite les Ambassades; de la Guerre; des Traitez; des Titres; des Prerogatives; des Prétentions, & des Droits respectifs des Souverains*, Paris, Les libraires associés, 1764, p. 620.

¹⁰⁶ Memorandum VOC, DU MONT, *La Vérité du fait*, *op. cit.*, p. 89.

for benefits as well as burdens¹⁰⁷. A sovereign bound to a treaty cannot lift his obligations arising from the latter by concluding another treaty contrary to it¹⁰⁸.

From the British side, commercial competition –in this case for the East India Company- was not the only argument used¹⁰⁹. The anonymous pamphlet *The Importance of the Ostend-Company consider'd*, which appeared in London in 1726, had a double argument¹¹⁰. On the one hand, the “Netherlands” or Austrian Netherlands had proven their commercial genius in the past. The renaissance of Antwerp, Malines, Brussels, Oudenarde, Courtrai, Ghent or Bruges¹¹¹ would put an end to a mere transitory episode since the separation of the XVII Provinces. As formerly, those countries would become the “staple of Europe”¹¹², popish merchants returning to the South from the Dutch Republic¹¹³. On the other hand, the decline of Dutch commerce would inevitably lead to the demise of the state as such¹¹⁴, leaving Britain alone to uphold the balance of power between Protestants and “Popery”, more specifically the Catholic House of Austria¹¹⁵. Yet, the utility of religiously framed arguments was principally domestic. The diplomatic probability of a Catholic alliance between France, Spain and the Emperor was rather small, and remained so until the end of the War of the Polish Succession (1733-1738). French long-term geopolitical interest in dividing the Holy Roman Empire against the Habsburgs dominated.

In Defence of Flanders and the Emperor: Neny and Du Mont

Un droit de la nature & des gens, auquel [les bons & fideles Sujets] n'ont jamais renoncé.

*Remonstrance by the States of Brabant on the Ostend Company, 23 March 1724*¹¹⁶

Un droit primordial, qui autorise celle du Païs-Bas Autrichien à porter son Commerce aux Indes; [...] ce droit [...] n'est autre que le Droit Naturel, & des Gens. Droit aussi ancien que le Monde, dont l'étendue embrasse tout le circuit du Globe terrestre, dont l'evidence est au dessus de toute preuve, & la durée au de là de toute Prescription. C'est ce droit, qui fait le Premier Titre de nos Belges Autrichiens.

Jean Du Mont de Carels-kroon, *La Vérité*¹¹⁷

Neny's *Demonstration de l'injuste et chimérique pretention*¹¹⁸ was directed at the official VOC memorandum and its more elaborate version written by Westerveen. Neny positioned his pamphlet as restricted to the

¹⁰⁷ Interests on debts due to the Dutch Republic amounted to 9,35% on average of the annual budget of the Southern Netherlands (Van Gelder, *Tien jaar Trial-and-Error*, p. 146).

¹⁰⁸ VATTEL, *Le Droit des Gens, op. cit.*, Book II, §165.

¹⁰⁹ *The Importance*, 32. The British seized vessels as well, such as the *Flandria* off Bencoulen (British possession on Sumatra) on 9 August 1721 (Huisman, *La Belgique commerciale*, 195). British nationals operating from Ostend were seen as contravening to the East India Company's monopoly. From a legal point of view, the British supported the Dutch claims based on either the Barrier Treaty, to which they were party, and the general guarantee obligation in the bilateral treaty of 6 February 1716, or the constant practice since Munster to exclude the Southern Netherlanders from trade (*Ibid.*, p. 231).

¹¹⁰ See as well, Anonymous (William Pulteney), *Mr. Forman's letter to the Right Honourable William Pulteney, Esq; Shewing how Pernicious, the Imperial Company of Commerce and Navigation, lately established in the Austrian Netherlands, is likely to prove to Great Britain, as well as to Holland*, London, Buffey, 1725.

¹¹¹ *The Importance of the Ostend-Company consider'd*, London, Say, 1726, p. 40.

¹¹² *Ibid.*, p. 39.

¹¹³ *Ibid.*, p. 18, 19, 30.

¹¹⁴ *For it is, I Think, impossible to assign any other reasons for the Riches, Power, and Grandeur of the Phoenicians, Carthaginians, Athenians and Rhodians of old; and of the Hand Towns, Genoa, Venice, the Province of Holland &c. at this Day.* (*Ibid.*, p. 38).

¹¹⁵ *Ibid.*, p. 29.

¹¹⁶ Remonstrances by the States of the Duchy of Brabant to Charles VI, on the subject of the Ostend Company, Brussels, 23 March 1724, *CUD*, VIII/2, nr. XXVI, p. 80-82

¹¹⁷ DU MONT, *La Vérité du fait, op. cit.*, p. 23.

analysis of positive emanations of the law only, *sans citations des Auteurs*. The allegations of *des Ecrivains mal appliqués* had obscured the core of the dispute between North and South in such a way, that it had become unrecognisable. The Ostend Company's fate ought to be decided as *un cas de fait, qui n'admet pas des interprétations arbitraires, ni subtilités du Barreau*¹¹⁹. The reaction to Barbeyrac did not come from a Southern Netherlander, but from Jean Du Mont de Carels-Kroon¹²⁰, Imperial historiographer and author of the most impressive treaty compilation of the age, the *Corps Universel Diplomatique du Droit des Gens*, later continued by Jean Rousset de Missy (1686-1762)¹²¹. Both Du Mont and Rousset were Huguenots¹²². Barbeyrac's treatise consisted of 285 paragraphs in 131 pages, but Du Mont remarked it scantily answered the arguments of Neny¹²³. His own treatise tried to formulate the Company's case in a period of international tension between Charles VI and the Maritime Powers, which ended on 31 May 1727 with the Parisian Preliminaries of Peace, which signed the Company's death sentence¹²⁴. Karel Filips Pattijn (1687-1773)'s treatise, which was distributed at the Congress of Soissons (1728-1730) following the Preliminaries, could not alter the participants' views, even those of the Imperial representatives, who had buried the Company¹²⁵.

Free navigation on the high seas as a peremptory norm

No private person could claim ownership or any exclusive right on the high seas, its use and the freedom of trade, "*des choses incontestablement imprescriptibles*"¹²⁶. Neny found it striking that other nations could carry on their activities where the Ostend Company was active, without provoking Dutch anger¹²⁷. How could the VOC argue that it had acquired an exclusive right in those parts of the East Indies sailed by other nations? Wasn't trade by its nature *changeant & muable* and thus inappropriate to lead to the acquisition of full dominium¹²⁸? Even if the VOC and WIC existed for over a century, what did this change to the imprescriptible nature of free navigation on the high seas¹²⁹? Next, according to Du Mont, couldn't the

¹¹⁸ Short version: Copy of the Memorandum presented to Prié on 22 October 1723 to serve as an answer to the Remonstrances of the VOC Directors, *CUD*, VIII/2, nr. XXVI, p. 82-85.

¹¹⁹ NENY, *Démonstration de l'injuste et chimérique prétention*, *op. cit.*, p. 3.

¹²⁰ HUISMAN, *La Belgique commerciale*, *op. cit.*, p. 402.

¹²¹ DHONDT, *Balance of Power*, *op. cit.*, p. 18-26.

¹²² Georg Friedrich VON MARTENS, "Recherches sur la vie et les écrits de Jean du Mont baron de Carels Kroon, rédacteur du Corps Universel Diplomatique du droit des gens", in MARTENS, *Supplément au recueil des principaux traités d'alliance, de paix, de trêve, de neutralité, de commerce, de limites, d'échange, etc.*, Göttingen, H. Dieterich, 1802, I, p. lxiv-xciv; Graham C. GIBBS, "Some intellectual and political influences of the Huguenot Emigrés in the United Provinces c. 1680-1730", in *Bijdragen en Mededelingen tot de Geschiedenis der Nederlanden – The Low Countries History Review* XC (1975), No. 2, p. 255-287; ID., "The role of the Dutch Republic as the intellectual entrepot of Europe in the seventeenth and eighteenth centuries", *ibid* LXXXVI (1971), No. 3, p. 323-350; Linda & Marsha FREY, "DUMONT, JEAN, BARON DE CARLSCROON (1667-1726)", in L. & M. FREY (eds.), *The Treaties of the War of the Spanish Succession: an Historical and Critical Dictionary*, Westport (Conn.), Greenwood Press, 1995, p. 139; ISRAEL, *Radical Enlightenment: Philosophy and the Making of Modernity 1650-1750*, Oxford, Oxford UP, 2001, p. 577; Stephan VEROSTA, "Droit international et droit interne chez Jean Dumont (1666-1727)", in *Mélanges offerts à Henri Rolin*, Paris, Pedone, 1964, p. 479-487.

¹²³ DU MONT, *La Vérité du fait*, *op. cit.*

¹²⁴ Art. I, Preliminary Articles concluded between Charles VI and the Allies of Hanover, Paris, 31 May 1727, *CUD* VIII/2, nr. LVII, p. 146-148. Strictly interpreted, the article only foresaw a seven-year suspension of the Company's *privilegium, vulgò* (Octroy).

¹²⁵ *L'Empereur n'a jamais prétendu tirer des trésors des Païs-Bas autrichiens; et son intention n'est que de les garder pour le bien de la cause commune et de les conserver dans un état de défense, jugé nécessaire par le traité de Barrière, sans qu'il soit obligé, ny à surcharger pour cet effet ses fidels sujets, ny à employer les revenus de ses autres Païs héréditaires* (Instructions for Kinsky and Fonseca, Austrian plenipotentiaries at the Soissons conference, February 1729, quoted in HUISMAN, *La Belgique commerciale*, *op. cit.*, p. 446).

¹²⁶ NENY, *Démonstration de l'injuste et chimérique prétention*, *op. cit.*, p. 21.

¹²⁷ *Les Flamands et les Brabançons ne font leur Commerce aux Indes, que dans les Lieux où toutes les autres Nations trafiquent librement, & qu'il Leur est défendu par l'Octroy de S.M.I. & C. de le faire ailleurs.*

¹²⁸ NENY, *Démonstration de l'injuste et chimérique prétention*, *op. cit.*, p. 21.

¹²⁹ *Ibid.*, 21.

Spanish and Portuguese, who had sailed the world seas for nearly a century without competition, have excluded the Dutch based on this argument¹³⁰ ? What to think of French, British or Danish expeditions¹³¹ ? Moreover, if the Southern Netherlanders had abstained from sailing to the Indies, this was a consequence of the opulence which was theirs in the sixteenth century, before the Dutch Revolt: *Mais pour peu qu'on fasse reflexion, à la richesse du Commerce dont ces Peuples étoient alors uniques Possesseurs, on comprendra aisement, qu'ils n'avoient pas sujet de porter envie à celui la. Ils regardoient les Castillans comme des Avanturiers, qui n'ayant que le Cape, & l'Epée, ne faisoient pas mal d'aller chercher fortune en ces Regions sauvages & éloignées*¹³².

*The Treaty of Munster did not concern La Nation Belgique*¹³³

Neny tried to distinguish two aspects of the Spanish Habsburg rulers of the Netherlands. On the one hand, he saw them continuing the Burgundian heritage, on the other hand, they wore the crown of Spain. In 1648, Philip IV would have ruled over the Spanish Netherlands as George I did in 1714 over Hanover¹³⁴. Consequently, treaties contracted into as head of the Burgundian territories, could not bind Spanish subjects and vice versa. Barbeyrac refuted this distinction. First, Charles V inherited Brabant and Flanders from his grandmother Mary of Burgundy, and explicitly detached the Southern Netherlands from the Holy Roman Empire at the Transaction of Augsburg¹³⁵ (26 June 1548). Consequently, Spain and the XVII Provinces had always been tied together. Seeing a distinct succession by Charles VI, as Archduke in Austria, King of Bohemia, King of Hungary, King of Sardinia, Duke of Milan and the other “Austrian”

¹³⁰ DU MONT, *La Vérité du fait*, *op. cit.*, p. 13.

¹³¹ *Ibid.*, p. 23.

¹³² *Ibid.*, p. 18.

¹³³ *Ibid.*, p. 17.

¹³⁴ NENY, *Démonstration de l'injuste et chimérique pretention*, *op. cit.*, p. 5.

¹³⁵ The question was actually a matter of debate between Spain and the Austrian Habsburgs in the 17th century. The revenues in the Duchy of Brabant assigned to the contribution for the Imperial Chamber Court remained unpaid for several years, in spite of a condemnation by the Council of Brabant. Although the Circle of Burgundy remained a part of the Holy Roman Empire, calls for assistance by Spanish representatives at French invasions under Louis XIV remained unanswered as well. Neither side executed the obligations contained in the Transaction of Augsburg ! Leopold I (1640-1705) called for assistance of the Circle of Burgundy at Louis XIV's aggression in 1683, but most of these troops were stuck in the parallel siege of Vienna. During the Nine Years' War (1688-1697), requests from the Spanish Netherlands were subject to a discussion on the nature of their specific status as a Circle of the Empire. Was a financial contribution to the military forces of the Empire sufficient to be counted as a full member, or had the Spanish Netherlands been merely associated to the Empire in case of military peril ?

In the preamble to the Treaty of the Grand Alliance (7 September 1701), Britain and the Dutch Republic had invoked the rights of the Holy Roman Empire to the Southern Netherlands, qualifying them as fiefs of the Empire, just as the Spanish domains in Italy (DU MONT, *La Vérité du fait*, p. 48). During the War of the Spanish Succession, the Empire counted the Southern Netherlands as contributors to the common military effort, but without any countervailing advantage. Joseph Clement of Bavaria, Bishop of Liège and Elector-Archbishop of Cologne, allowed French troops from the Southern Netherlands in his own fortresses, pretending they ought to be considered as troops of an Imperial circle. The Imperial court of Joseph I, however, preferred contingents from the Westphalian Circle and considered the Circle of Burgundy as not an *integral* part of the Holy Roman Empire. Max Emanuel of Bavaria did see them as part of the Empire, but only in case he would rule over them as a sovereign as a compensation for the loss of Bavaria after the battle of Blenheim (1704), in order to keep his influence in Imperial politics. In the Wittelsbach's view, Philip V's accession to the Spanish throne was linked to the quality of ruler of the Southern Netherlands, automatically classifying his troops as Imperial ones, sent out by an Imperial Circle. Joseph I and Leopold I, however, firmly denied that Lorraine and the Southern Netherlands were ordinary members of the Holy Roman Empire. They served as mere keys and borders to the Empire, and could only count on the Emperor's personal *Rath und That* (verbal and physical support). See Émile DE BORCHGRAVE, *Histoire des rapports de droit public qui existèrent entre les provinces belges et l'Empire d'Allemagne depuis le démembrement de la monarchie carolingienne jusqu'à l'incorporation de la Belgique à la République Française* Bruxelles, Palais des Académies, 1871 (Mémoires de l'Académie Royale de Belgique; XXXVI), p. 292, 304, 313-314, 327-329 and 331. De Borchgrave finds support in Johann Jakob MOSER's *Teutsches Staatsrecht*, Frankfurt/Leipzig, s.n., 1774, I, p. 317-319. The situation was not without relevance the British diplomacy in the multilateral game around the Company, since George I, as Elector of Hanover, could not be seen to commit aggression on a member of the Empire (Brendan SIMMS, *Three Victories and a Defeat: The Rise and Fall of the First British Empire*, London, Penguin, 2008, p. 193-194).

possessions on the one hand, and his dominions in the Southern Netherlands, as heir to the Dukes of Burgundy, on the other, was contrary to common sense. Charles VI received the Southern Netherlands as heir of part of Charles II's composite monarchy, and not separately as the successor of the House of Burgundy, as Neny alleged on the basis of the Rastatt and Barrier Treaties¹³⁶. For Neny, the mention of the union between the Austrian Netherlands and the hereditary dominions of the House of Austria within the Empire equalled the construction of the dominions of Maximilian I of Habsburg. Charles VI was nothing but a specific legatee in Charles II of Spain's will. He could only have succeeded as a universal heir to the Spanish throne, if the latter document would have appointed him so. Instead, Charles II's will, which designated Philip of Anjou as his successor, ruled out the possibility to appoint Charles of Habsburg as King of Spain. Neny further supported his claim by pointing to the distinction made in article II of the Barrier Treaty, which stipulated a link between sovereignty over any part of the Southern Netherlands, on the one hand, and the sovereignty over the Habsburg hereditary dominions in the Holy Roman Empire, on the other. The Barrier Treaty thus excluded a transfer of sovereignty to a French (or Wittelsbach, Farnese...) prince, linking the Southern Netherlands to the traditional Habsburg family¹³⁷. Moreover, Neny contested that the conditions under which Charles VI obtained the Southern Netherlands, were of the same nature as those they were under during Charles II's reign. In reality, the Barrier Treaty established an entirely new legal regime for the Southern Netherlands. Consequently, Charles ought to be seen as a specific legatee, and not as a universal heir. Thus, obligations and limitations of all kinds pending on the Spanish Netherlands before 1715 could not be applicable any more without explicit confirmation... and Charles VI's royal consent¹³⁸.

Neny's third argument was based on an alleged right of conquest on the basis of which Charles VI would have obtained the Southern Netherlands, allowing the Emperor to start with a clean sheet¹³⁹. As far as the military events of the War of the Spanish Succession were concerned, Neny allowed himself a great deal of liberty. He had to reconcile two opposites: one the one hand, Charles VI needed the right of conquest in order to undo the existing limitations on his sovereignty in the Southern Netherlands. On the other hand, mainly British and Dutch-financed German troops had effectively conquered his new territories¹⁴⁰. In his zeal to serve Charles VI's cause, Neny obscured the substance of the Dutch assistance in beating the French in Flanders, and even accused them of lack of sincerity in their commitment to the general obligations foreseen by the Treaty of the Grand Alliance¹⁴¹. As a proof of this, the States-General allegedly refused to cede the Spanish residence in The Hague to Charles VI, despite strong instances by Sinzendorf¹⁴². This is without doubt the weakest part of Neny's argumentation: Archduke Charles' accession to the Imperial throne had been unforeseen, after his brother Joseph I's sudden decease. This course of events pushed Britain, not the Dutch Republic, to desert the Grand Alliance and agree to French proposals of peace, which had previously been refused by Imperial general Eugene of Savoy (1663-1736), the British commander Marlborough (1650-1722) and Heinsius, pensionary of Holland (1641-1722)¹⁴³. As far as the war was concerned, the Dutch did fight by the Emperor's side until the Battle of Denain (24 July 1712), whereas the Duke of Ormonde, commander of the British forces, had received his famous "restraining orders" from Whitehall (31 May 1712), where a peace-inclined Tory government

¹³⁶ NENY, *Démonstration de l'injuste et chimérique prétention*, *op. cit.*, p. 5.

¹³⁷ *Ibid.*, p. 7.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*: *le droit de Conquête, qui l'exempte de toutes les obligations, conventions & contracts de quelque nature qu'ils soient, que les autres Possesseurs pourroient avoir fait, & par conséquent les Sujets en demeurent aussi libres, & independants sous la Domination du nouveau Souverain Conquerant.*

¹⁴⁰ Neny did not deny this, but found it nothing both a natural consequence of the Grand Alliance, for which no reward was due to them (NENY, *Démonstration de l'injuste et chimérique prétention*, *op. cit.*, p. 26).

¹⁴¹ E.g. concerning the conquest of Italy, which was left to the Austrians.

¹⁴² NENY, *Démonstration de l'injuste et chimérique prétention*, *op. cit.*, p. 32.

¹⁴³ BÉLY, "Les larmes de M. de Torcy: la leçon diplomatique de l'échec, à propos des conférences de Gertruydenberg (mars-juillet 1710)", *Histoire, Économie & Société* 1983, No. 3, p. 429-456.

was negotiating with Louis XIV. Neny further accused the Dutch of passive bribery. The city and citadel of Lille, the most formidable conquest of Louis XIV (1667), which had fallen in 1708, was returned to France at the Treaty of Utrecht. According to Neny, France and the Princess of Épinoy had paid the Dutch plenipotentiaries at Utrecht to return this important place in the Southern Netherlands to France, and thus take it from Charles VI, in whose name the town had been conquered¹⁴⁴. The conclusion of the Peace at Utrecht without Imperial consent, finally, constituted a betrayal and a violation of article VIII of the Treaty of the Grand Alliance¹⁴⁵.

Barbeyrac, on the other hand, clung on to the possession of the Southern Netherlands in the same state Charles II had enjoyed it¹⁴⁶. *Accessorium sequitur principale*: limitations contracted by Philip IV for the whole of his territories and still intact at the time of Charles II's decease, did not disappear at Charles VI's accession. *Cela est fondé sur une règle incontestable du Droit des Gens, aussi bien que du Droit Civil*¹⁴⁷. Secondly, if Neny considered the Burgundian Netherlands as a separate entity, from Maximilian I to Charles VI, would this imply that all intervening acts of public law, such as the Augsburg Transaction or the Treaty of Munster, would not apply? *On ne sauroit se persuader, que Sa Majesté Impériale approuve cette manière de plaider devant le Tribunal de toute l'Europe, & les contradictions où nos deux Avocats de la Compagnie d'Ostende font tomber leur Auguste Souverain*¹⁴⁸.

In spite of his strong arguments on the general nature of Charles of Habsburg's accession to the Southern Netherlands, Barbeyrac did in part misread Neny's argument. The latter did not contend that the inhabitants of the Southern Netherlands were excluded from overseas trade at the time of the conclusion of the Treaty of Munster. Articles V and VI only concerned *les Espagnols Castillans qui négocioient seuls aux Indes & y possédoient des Seigneuries, Villes, Forteresses, &c.* In other words, there was no reason for Philip IV to present an extensive interpretation of the word "Castillans", since his Spanish subjects were the only ones actually allowed to sail to the Indies¹⁴⁹. Consequently, any bans on the liberty of his subjects in the Southern Netherlands were a purely domestic affair, and not guaranteed to the Dutch Republic as a treaty partner on the inter-sovereign level. Irrespective of the above-mentioned discussion on the nature of Charles VI's succession (specific or universal legatee, answerable or not for debts and limitations imposed by the deceased), the international nature of the impediments imposed on the inhabitants of the Southern Netherlands can be seen as doubtful. Prohibitions such as that of 1598 decreed by Philip II or by Philip III in 1604¹⁵⁰ were a domestic affair¹⁵¹, concerning the organisation of the composite Spanish monarchy, and thus not pertinent to the international and bilateral question between the Dutch Republic and the sovereign in the Southern Netherlands¹⁵². The latter had the competence to forbid, as well as to give his

¹⁴⁴ NENY, *Démonstration de l'injuste et chimérique prétention*, *op. cit.*, p. 31.

¹⁴⁵ *Ibid.* On this question, see Réal de Curban, *Science du Gouvernement*, V, p. 637 : alliance partners cannot – in this French author's view – be unreasonably compelled to stick to their initial alliance, if the initial objective has been reached. Charles VI's insistence on continuing the war with France could thus be seen as unreasonable, since he already had obtained the Spanish Netherlands, Milan, Sardinia and Naples.

¹⁴⁶ Art. I, Barrier Treaty.

¹⁴⁷ BARBEYRAC, *Défense du droit*, *op. cit.*, p. 105.

¹⁴⁸ *Ibid.*, p. 112.

¹⁴⁹ NENY, *Démonstration de l'injuste et chimérique prétention*, *op. cit.*, p. 20.

¹⁵⁰ Restricting all trade with the Spanish Indies to Spaniards or Portuguese, excluding all foreigners, including his own non-Castilian subjects, such as Neapolitans, Aragonese or Sicilians (*Historie of Tegenwoordige Staat van Alle Volkeren*, Amsterdam, Isaak Tirion, 1738, X, p. 449; Memorandum VOC, DU MONT, *La Vérité du fait*, p. 88).

¹⁵¹ HUISMAN (*La Belgique commerciale*, *op. cit.*, 11) accessorially pointed to the granting of a general commercial concession in the East Indies to his subjects in the Spanish Netherlands by Philip IV in 1640, cancelling out the *Transport's* eighth article (see as well letter from the Cardinal-Infant, Governor-General of the Spanish Netherlands, to the Antwerp Magistrate, Brussels, 25 October 1640, DU MONT, *La Vérité du fait*, *op. cit.*, p. 84: *Sa Majesté [...] pour bénéficier les bons Fideles Sujets de par deça, Elle leur a fait ouverture du Commerce des Indes Orientales avec faculté d'y pouvoir entrer, ensemble à tous les Inhabitans du Septentrion, non obstant que cela n'ait été permis jusques aujourd'hui.*

¹⁵² Neny, *Démonstration*, p. 17.

subjects permission (“to bind as well as to unbind”: *Ejus est solvere, cuius est ligare*, cf. infra). Consequently, on instigation of the Count of Bergeyck (1644-1725)¹⁵³, Charles II allowed the creation of a *Compagnie Royale des Pays-bas* (7 June 1698) with the explicit competence to trade *Aux Indes Orientales, & en la Guinée* [...] *Sans contrevenir aux Traitez de Paix que nous avons avec la France, l’Angleterre, les Provinces-Unies, & autres Princes, & Estats de l’Europe*¹⁵⁴.

Du Mont, finally, reformulated the application *ratione personae* of article V in rhetorically appealing terms. First, the Spaniards or Castilians mentioned in article V of the Treaty of Munster, were the inhabitants of the Iberian peninsula who could trade with the Indies, not the inhabitants of the Southern Netherlands, excluded in 1598 by Philip II and afterwards by Philip III¹⁵⁵. Thus, how could Philip IV have excluded them from a trade they were not involved in¹⁵⁶? Secondly, the Treaty of Munster could not treat them as Spaniards, since they were only part of a composite monarchy: *Les Peuples du Pais Bas Autrichien ne sont Espagnols ni par Nature, ni par Conquête, ni par Subjection, ni par Dependance, ni par Incorporation, ni par aucune sort d’Union politique*¹⁵⁷. Finally, if “Spaniards” in article V had to be read as “subjects and inhabitants of the Southern Netherlands”, how could Barbeyrac or Westerveen explain the sentence stipulating that *be inhabitants and subjects* [...] *would keep their Navigation as they have it at present in the East Indies, without any further extension of it*?¹⁵⁸ If only the Castilian subjects of Philip IV were allowed to sail to the East Indies, the interdiction of article V could not have been applicable to Aragonese, Neapolitans, Valencians, Catalans or any other people of the Spanish Monarchy. Consequently, Du Mont could present his European readers with a simple syllogism. The Spaniards in article V were those who had the right to sail to the East Indies, in 1648 (Maior). The inhabitants of the Southern Netherlands, even if we assume they were Spaniards, did not have the right to sail and trade there (Minor). Thus, the inhabitants of the Southern Netherlands were not included in the reservation Philip IV made towards the United Provinces (Conclusion)¹⁵⁹.

Cause theory

Neny further argued that, even if the Treaty of Munster had been applicable to the Southern Netherlands, the main motive for Philip IV to introduce a limitation on trade with the Indies, was that he could set one category of his subject apart, and favour another, i.e. the inhabitants of Spain itself. Charles VI, however, did not have this faculty, and was confronted with a purely comminatory clause, that was not any more counterbalanced by an advantage. Neny applied the causation theory from general contract law to the agreement between Philip IV and the Dutch Republic and concluded that the limitations imposed on Philip IV’s Belgian subjects were not any longer justified¹⁶⁰.

¹⁵³ DE SCHRYVER, *Jan van Brouhoven graaf van Bergeyck 1644-1725 : een halve eeuw staatkunde in de Spaanse Nederlanden en in Europa*, Brussel: Paleis der Academiën, 1965.

¹⁵⁴ NENY, *Démonstration de l’injuste et chimérique prétention*, op. cit., p. 18 ; DU MONT, *La Vérité du fait*, op. cit., p. 85.

¹⁵⁵ Leaning on the conditionality of the donation of the Southern Netherlands by Philip II to Albert and Isabella, DU MONT (*La Vérité du fait*, op. cit., p. 30) argued that the archdukes’ childless existence had revoked the entire act, including the trade restrictions. Consequently, the only interdiction the Spanish Netherlands were under, in his view, was the internal one, imposed by Philip III, becoming applicable at the extinction of Philip II’s act. *Qui ne sçait, que cette Donation ne subsiste plus ? Et quel Droit peut on tirer d’un Contract éteint, & fini, en vertu de ses propres Stipulations, il y a plus de cent ans ?*

¹⁵⁶ DU MONT, *La Vérité du fait*, op. cit., p. 29.

¹⁵⁷ *Ibid.*, p. 28.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*, p. 29.

¹⁶⁰ DU MONT, *La Vérité du fait*, op. cit., p. 15 argued that Charles II of Spain had obtained trading privileges for the Southern Netherlanders on an indirect basis. Negotiating trade agreements with Britain (23 May 1667 and in July 1670), Spanish diplomats had asked for the same trading advantages in the Indies as the Dutch had obtained.

Barbeyrac, again, saw this as an ungrateful attitude by Charles VI as an heir to part of the Spanish monarchy. Accepting the gains from an inheritance implied paying for the annexed debts as well¹⁶¹. Moreover, in the VOC's argumentation, the Dutch Republic would never have consented in the Treaty of Munster without the exclusion of the Spanish Netherlands from the East India trade. In other words, the cause theory was used on the Dutch side as well. If Charles VI unilaterally removed the essential motive for the 1648 peace treaty, it would become void as a whole¹⁶². This had consequences for Munster's confirmation in the Barrier Treaty as well: if the exclusion had been the core of the peace treaty, this could not have been ignored at the time of the 1714-1715 Antwerp conferences.

However, the imbalance between gain and cost for Charles VI was striking. The Emperor started as sovereign with a clean sheet and new burdens incomparable to those put upon the Southern Netherlands under Charles II's sovereignty. The Emperor acquired Tournay, but had to agree to the cession of several smaller entities in Flanders and Guelders to the States-General¹⁶³. Not only the debts contracted before and during the War of the Spanish Succession, the closure of the Scheldt or the alleged limitations in trade with the Indies, but foremost the stationing of Barrier garrisons and the upkeep of considerable armed forces at his own expense¹⁶⁴, had been alien to the previous regimes in the Southern Netherlands. The customs regime was tailor-made for the Dutch, who abused of the simultaneous Austro-Turkish war (1716-1718) in the Balkans to impose their *tyrannique Domination* in import and export duties¹⁶⁵. Article XXVI of the Barrier Treaty, relative to trade, was strictly limited to the latter aspects and could not be extended to the Indies¹⁶⁶. Moreover, the Dutch soldiers at Namur, Ypres, Menin, Tournay, Furnes or Termonde were exempt of import duties, which they abused to sell Dutch cheese, fish and butter to the local population, to the detriment of Belgian merchants¹⁶⁷. During their administration of the greater part of the Southern-Netherlands (the so-called "Anglo-Dutch Condominium in Flanders and Brabant"¹⁶⁸), Neny judged the Dutch had extorted the population and corrupted public institutions¹⁶⁹.

Finally, Neny remarked with irony that the Dutch invocation of Alexander VI's partition of the Indies in 1494 between Spain and Portugal equalled recognising a state of affairs which all powers in Europe¹⁷⁰, including the Dutch themselves, strongly challenged in the seventeenth century¹⁷¹. What else did the Republic try to impose in articles V and VI of the Treaty of Munster, than a partition of the world between two sovereigns ?

The sovereignty of the Dutch Republic and the VOC, an usurpation ?

¹⁶¹ BARBEYRAC, *Défense du droit*, op. cit., p. 107 : *qui refusoit de payer ses Dettes ; ou de se soumettre à la Condition imposée ; sous prétexte que par là il ne retire pas de la Succession tout le profit qu'il en auroit autrement.*

¹⁶² VOC memorandum, DU MONT, *La Vérité du fait*, op. cit., p. 90. Supplementary, the violation of articles V and VI could be seen as rendering the whole treaty void, following Grotius, who prescribed the explicit mention of any incidental nullities (VATTEL, *Le Droit des Gens*, op. cit., Book II, §202).

¹⁶³ NENY, *Démonstration de l'injuste et chimerique pretention*, op. cit., p. 27-28.

¹⁶⁴ Art. XX, Barrier Treaty; Neny, *Demonstration*, p. 27.

¹⁶⁵ NENY, *Démonstration de l'injuste et chimerique pretention*, op. cit., p. 28.

¹⁶⁶ DU MONT, *La Vérité du fait*, op. cit., p. 30, not applicable to trade between Charles VI's subjects and other nations.

¹⁶⁷ NENY, *Démonstration de l'injuste et chimerique pretention*, op. cit., p. 30.

¹⁶⁸ Augustus Johannes VEENENDAAL sr., *Het Engels-Nederlands condominium in de Zuidelijke Nederlanden tijdens de Spaanse successieoorlog 1706-1716*, Utrecht, Kemink, 1945.

¹⁶⁹ NENY, *Démonstration de l'injuste et chimerique pretention*, op. cit., p. 26 : *tant par les exactions rapineuses qu'ils y ont pratiquées de toute maniere, que par la vente de plusieurs Emplois qui étoient vacants.*

¹⁷⁰ DU MONT, *La Vérité du fait*, op. cit., p. 13-15, pointing to Louis XIII's defence against Spanish maritime hegemony, *La Cour de France ayant jugé [...] que son Droit de Navigation, de Commerce, d'Habitation, de Colonie, & de Conquêtes, par toute Mer, & par toute Terre; decouverte, & à découvrir, n'avoit pas besoin du consentement de l'Espagne.*

¹⁷¹ NENY, *Démonstration de l'injuste et chimerique pretention*, op. cit., p. 33. DU MONT, *La Vérité du fait*, op. cit., p. 32 : *Le Roy de France est bon Catholique, & il ne laisse pas de posseder de grandes & vastes Regions aux indes Occidentales, contre les Dispositions formelles de la Bulle.*

In his closing remarks, Neny challenged the opponent's very existence in public international law. Basing his reasoning on the mention of Emperor Rudolph II (1552-1612) on the donation by Philip II of the Southern Netherlands to Albert and Isabella, Neny equalled the omission of Emperor Ferdinand (1608-1657) in the Treaty of Munster to a breach of Imperial law, leading to nullity. The States-General of the Dutch Republic lacked any *Titre competent & legitime* to count as sovereigns, but were in reality mere *Sujets & Vassaux de Sa Majesté Imperiale et Catholique, à qui Ils doivent obéir comme à Leur Souverain legitime*¹⁷². Recognition by the elder branch of the House of Habsburg (that of Philip IV) was independent from that of the younger (Austrian), the Treaty of Munster between Spain and the Republic lacking the Emperor's ratification concerning the Southern Netherlands, territories of the Empire¹⁷³. The restitution of Maastricht and the illegal retention of ecclesiastical goods (art. XLIII, Treaty of Munster) were further signs of the implacable hatred of the Dutch Regents against their Southern neighbours¹⁷⁴. If healthy competition from the Ostend Company drove prices down to more reasonable levels, to the common benefit of the Republic's population, the Dutch trading companies were solely concerned with their shareholders' interest, most of them not even residing in the Seven Provinces¹⁷⁵.

Du Mont respected the Treaty of Munster regarding the Republic's recognition by Philip IV. However, he had trouble in conceiving the *Heren XVII*, or the VOC's principal administrative organ, as exercising the organisation's sovereign powers in Asia. How could these men be subjects of the Dutch Republic's provinces, and, at the same time, wield sovereign power thousands of kilometres away? The seizure of Ostend ships was mainly the work of the VOC, who represented in their own right to the States-General, and against whom Neny and du Mont had to argue¹⁷⁶.

Ejus est solvere, cujus est ligare: Charles VI could undo what Philip III had imposed

In his 1726 memorandum, Du Mont de Carelskroon referred to the adagium *ejus est solvere, cujus est ligare, & cui unum competit, eidem utique & alterum*. This religious phrase was frequently used in canon law, and signifies that the authority conferred upon a person or institution to dissolve, or to pronounce sanctions, is indispensably linked to the capacity to found or to bring together¹⁷⁷, since both are two sides of the same (contractual) medal¹⁷⁸. E.g. a bishop cannot forgive an excommunicated individual without papal instruction, since only the pope has the competence to admit and exclude from the Church¹⁷⁹. It is impossible to unilaterally quit a contractual relationship, if its existence was dependent on the other party's

¹⁷² *Ibid*, p. 41.

¹⁷³ *Ibid*, p. 39.

¹⁷⁴ *Ibid*, p. 25.

¹⁷⁵ *Ibid*, p. 25.

¹⁷⁶ *Il est inconcevable, qu'une Société de mille personnes au plus, qui sont Presque tous Bourgeois de quelque Ville de Hollande, responsables en leurs biens, & en leurs vies à sa Jurisdiction civile & criminelle du Magistrat, & qui ont pour Chefs, ou plutôt pour premiers Administrateurs, dix sept Hommes, soumis comme eux à la Puissance Souveraine, & Municipale de la Province, & de la Ville, où ils habitent [...] que ces mille Particuliers forment en Asie une Republique, formidable à tous les Princes de ces Regions là, à l'exception peut-être du Sophy, du Mogol, & des Rois de la Chine, & du Japon* (DU MONT, *La Vérité du fait*, *op. cit.*, p. 36). On the VOC and its incipient stages in East Asia, see J. A. SOMERS, *De VOC als volkenrechtelijke actor* [SI-EUR], Gouda, Sanders, 2001.

¹⁷⁷ E.g. Pierre Toussaint DURAND DE MAILLANE, *Dictionnaire de droit canonique et de pratique bénéficiale, conféré avec les maximes et la jurisprudence de France*, Lyon, Benoît Duplain, 1770, p. 175 ; J. Pontas, *Dictionnaire de cas de conscience ou décisions des plus considerables difficultez touchant la Morale & la Discipline Ecclesiastique*, Paris, Le Mercier, 1726, p. 975 (a priest suspended by a sentence pronounced by an ecclesiastical court of law can only be absolved of it by the bishop or Metropolitan who is his hierarchical superior).

¹⁷⁸ François BABIN, *Conférences ecclésiastiques du diocèse d'Angers, sur les censures*, Anger/Paris, Dubé, Guerin, 1767, p. 608 : *l'ordination & le bénéfice qui y étoit toujours joint, formoient une espèce de contrat sinallagmatique, dont une des obligations de la part du clerc ordonné, étoit de demeurer fixe dans le poste qui lui étoit assigné. CE contrat passé avec l'église ne pouvoit se dissoudre que par l'évêque qui étoit son représentant ; c'est ce qui a donné lieu d'appliquer aux démissions des bénéfices, les maximes, ejus est solvere cujus est ligare ; illius est destituere cujus est instituere.*

¹⁷⁹ Michel ANDRÉ, *Cours alphabétique et méthodique de droit canon dans ses rapports avec le droit civil ecclésiastique*, Paris, Boulotte, 1859, p. 286.

consent¹⁸⁰. If the Treaty of Munster did not apply to the Southern Netherlands and Philip III did install an internal prohibition on his “Belgian” subjects, Charles VI, as his successor, could lift it again, just as Charles II had done when allowing for the creation of a Company in 1698. William III and the States-General had not uttered a single reproach at that time. Consequently, the Dutch Republic had to abstain from intervention in these internal matters. *Si cette Règle est bonne entre les particuliers, elle vaut à plus forte raison entre le Souverain, & son Peuple, & quand ces deux sont d'accord, les Etrangers n'ont rien à y revoir*¹⁸¹.

Multilateral diplomacy

Il me paroît que c'est une affaire désespérée; ils [the plenipotentiaries at the Soisson Conference] avouent que le droit de Sa Majesté [Charles VI] est clair, mais un droit de convenance qu'ils appellent, est entièrement en faveur de Leurs Hautes Puissances [States-General], et n'est d'aucune considération pour les sujets des Pays-Bas autrichiens.

Karel Filips Pattijn to Visconti, Austrian representative in London, 1728¹⁸²

Rhetoric on the Ostend Company should not be framed as a mere bilateral dispute around the freedom of navigation on the high seas. Bilateral aspects of the Ostend Company-quarrel, as examined until now in this contribution, belong to a classical scheme of diplomatic and legal history¹⁸³. Yet, our analysis could not be complete without the implication of Europe's multilateral diplomatic system, as the words of Karel Filips Pattijn quoted above indicate¹⁸⁴. The working of international relations is not a product of crude power configurations and political compromise. Implicit norms or habits shape the expression of the latter, and constitute the essential nexus between diplomatic history and academic attempts at systematisation through legal concepts¹⁸⁵. Classical international law in scholarly treatises¹⁸⁶ and political practice consolidated in preceding treaties¹⁸⁷ were elements of a diplomatic culture, serving as building blocks for reasoning.

Manuals such as those of Wicquefort¹⁸⁸, Caillières¹⁸⁹ or la Sarraz¹⁹⁰ emphasized the intricate links between legal theory and diplomatic practice. Although the latter was considered as the sole and privileged way to

¹⁸⁰ *Encyclopédie méthodique*, Paris/Liège, Panckoucke/Plomteux, 1783, III, “démission”, p. 609: *l'ordination et le bénéfice qui y étoit toujours joint, formoient une espèce de contrat sinallagmatique, dont une des obligations de la part du clerc ordonné, étoit de demeurer fixe dans le poste qui lui étoit assigné. Ce contrat passé avec l'église ne pouvoit se dissoudre que par l'évêque qui étoit son représentant; c'est ce qui a donné lieu d'appliquer aux démissions des bénéfices, les maximes ejus est solvere cujus est ligare: illius est destituere cujus est instituere.*

¹⁸¹ DU MONT, *La Vérité du fait*, *op. cit.*, p. 33.

¹⁸² Quoted in HUISMAN, *La Belgique commerciale*, *op. cit.*, p. 438.

¹⁸³ DE PAUW, *Mare Liberum*, *op. cit.*.

¹⁸⁴ DHONDT, “Lodewijk XIV als spelverdelers in de Spaanse Successie”, in *De Achttiende Eeuw: Tijdschrift van de Belgisch-Nederlandse Werkgroep de 18^{de} eeuw*, XLII (2010), No. 2, p. 283-319.

¹⁸⁵ DHONDT, “Looking Beyond the Tip of the Iceberg: Diplomatic Praxis and Legal Culture in the History of Public International Law”, in *Rechtskultur - Zeitschrift für Europäische Rechtsgeschichte/European Journal of Legal History/Journal européen d'histoire du droit* 2 (2013) [Méthode der Rechtsgeschichte und ihrer Nachbarwissenschaften beim Umgang mit rechtshistorischen Quellen], p. 31-42.

¹⁸⁶ LESAFFER, “The Classical Law of Nations (1500-1800)”, in Alexander ORAKHELASHVILI (ed.), *Research Handbook on the Theory and History of International Law*, Cheltenham, Edward Elgar, 2011, p. 408-440, Jean-Mathieu MATTÉI, *Histoire du droit de la guerre 1700-1819*, Aix-en-Provence, PUAM, 2006 (Collection d'histoire du droit. Thèses et travaux).

¹⁸⁷ LESAFFER (ed.), *Peace treaties and international law in European history: from the Late Middle Ages to World War One*, New York, Cambridge UP, 2004.

¹⁸⁸ BÉLY, “L'ambassadeur et ses fonctions de Wicquefort”, in Alain Pekar LEMPEREUR & Aurélien COLSON (dir.), *Négociations européennes d'Henri IV à l'Europe des 27*, Paris, AC2Médias, 2008, p. 53-63; Heidrun KUGELER, “Le parfait Ambassadeur”. Zur Theorie der Diplomatie im Jahrhundert nach dem Westfälischen Frieden”, in KUGELER, Christian SEPP & Georg WOLF (Hg.), *Internationale Beziehungen in der Frühen Neuzeit. Ansätze und Perspektiven*, Hamburg, LIT, 2006 (Wirklichkeit und Wahrnehmung in der Frühen Neuzeit; Hrsg. von Winfried SCHULZE), p. 180-211; Jean ROUSSET DE MISSY, *Mémoires sur le rang et la préséance entre les souverains de l'Europe*

access the inner workings of the international system, its conceptual language was asserted to be drenched in legal terms and the broader intellectual tradition of Roman and natural law. Primary legal documents, such as treaties, conventions, declarations or manifesto's, were eagerly published in collections such as Abraham Friedrich Glafey's update of the *Theatrum Europaeum*¹⁹¹ and the widespread *Les Intérêts présents des puissances de l'Europe*, a French adapted version by Jean Rousset de Missy¹⁹². Combined with memoranda and day-to-day correspondence in the vast French¹⁹³ and British¹⁹⁴ diplomatic archives, historians and jurists alike can unearth the practical legal culture of the "Trente Heureuses" following the Treaty of Utrecht, which have until now mostly been explained as a transitory parenthesis, the product of coincidental cordial relations between the main protagonists (Dubois, James Stanope, Fleury, Horatio Walpole¹⁹⁵).

The construction of the Anglo-French alliance

Most of European diplomacy between 1717 and 1731 turned around the apportioning of the duchies of Parma, Piacenza and the Grand-Duchy of Tuscany¹⁹⁶. The Emperor had obtained a dominating position on the Italian peninsula after the Utrecht treaties, following the confiscation of the Duchy of Milan in 1700 and the conquest of Naples in 1707¹⁹⁷. Previously, Spain did hold the upper hand in the Italian balance, as a result of Charles V's military campaigns in the 16th century and the inheritance of his grandfather, Ferdinand of Aragon. As the cards were redistributed during the War of the Spanish Succession, Britain had foreseen to install the Duke of Savoy as King of Sicily, as a counterweight¹⁹⁸.

The remaining Italian princes, however, feared Imperial pressure would lead to German domination. Duke Francesco Farnese of Parma-Piacenza (1678-1727), whose agent Alberoni had risen to Philip V of Spain's royal favourite¹⁹⁹, hoped for a return of the traditional Bourbon-Habsburg antagonism. If Spain's new monarch reclaimed the position once held by the Spanish Habsburgs, Charles VI would have a fully-fledged opponent. A "Spanish Risorgimento" in the Mediterranean after Utrecht did not only

et entre leurs ministres représentans suivant leurs différens Caractères. Pour servir de supplément à l'ambassadeur et ses fonctions de Mr. de Wicquefort, Amsterdam, François l'honoré, 1746.

¹⁸⁹ François DE CAILLIERES, *De la manière de négocier avec les souverains*, Amsterdam: au dépens de la Compagnie, 1716 ; LEMPEREUR, "Les manières de l'orateur-négociateur chez François de Caillières (1716)" in LEMPEREUR & COLSON, *Négociations européennes, op. cit.*, p. 65-77.

¹⁹⁰ Jean DE LA SARRAZ DU FRANQUESNAY, *Le ministre public dans les Cours étrangères, ses fonctions, et ses prérogatives*, Amsterdam, Au dépens de la compagnie, 1731.

¹⁹¹ Frank-Steffen SCHMIDT, *Praktisches Naturrecht zwischen Thomasius und Wolff: Der Völkerrechtler Adam Friedrich Glafey (1692-1753)*, Baden-Baden, Nomos Verlag, 2007 (Studien zur Geschichte des Völkerrechts; 12); Christoph Herrmann SCHWEDER, *Theatrum Historicum praetensium et controversiarum illustrium, oder historischer Schauplatz der Ansprüche und Streitigkeiten hoher Potentaten und anderer regierender Herrschafften in Europa*, s.l., s.p., 2.v.

¹⁹² ROUSSET DE MISSY, *Les intérêts présents des puissances de l'Europe, Fondés sur les Traités conclus depuis la Paix d'Utrecht inclusivement, & sur les Preuves de leurs Prétentions particulières*, La Haye: Adrien Moetjens, 1733, 2 v.; ID., *Recueil historique d'actes, négociations, mémoires et traités, depuis la Paix d'Utrecht*, La Haye: Scheurleer, 1728, 23 v.

¹⁹³ Archives du Ministère des Affaires Étrangères et Européennes (La Courneuve) [further : AMAE], series Correspondance Politique [further : CP] and Mémoires et Documents [further : M&D].

¹⁹⁴ National Archives [further : NA], series State Papers [further: SP], France (78).

¹⁹⁵ LE ROY LADURIE, *L'Ancien Régime, T. 2: l'absolutisme bien tempéré*, Paris, Hachette, 1991, p. 93.

¹⁹⁶ GEHLING, *Saint-Saphorin, op. cit.*

¹⁹⁷ José Ignacio RUIZ RODRIGUEZ & Pier Luigi NOCELLA, "Cambio dinástico en los dominios de la Italia del sur y la Guerra de Sucesión", in Friedrich EDELMAYER LEON SANZ & RUIZ RODRIGUEZ (eds.), *Hispania – Austria III: der Spanische Erbfolgekrieg – La guerra de Sucesión española*, Wien: Verlag für Geschichte und Politik, 2008 [Studien zur Geschichte und Kultur der Iberischen und Iberoamerikanischen Länder/Estudios sobre historia y cultura de los países ibéricos e iberoamericanos ; 13], p. 295-317.

¹⁹⁸ Derek MCKAY, "Bolingbroke, Oxford and the defence of the Utrecht Settlement in Southern Europe", in *EHR* LXXXVI (1971), nr. 339 (Apr), p. 264-284.

¹⁹⁹ BOURGEOIS, *La diplomatie secrète au XVIII^e siècle*, Paris, Arman Collin, 1910, II.

benefit Spain itself, but was welcomed by Italian rulers²⁰⁰. The children born from Philip V's marriage with Elisabeth Farnese²⁰¹ could thus be seen as Parmesan, as well as Bourbon princes. Their succession in the duchies of Parma and Piacenza, as well as in the Grand-Duchy of Tuscany, where the Medici-family faced extinction in the male line, would prevent an Imperial take-over of these fiefs of the Empire.

France and Britain did intervene when Spain invaded first Sardinia and then Sicily, but were not averse to a more balanced distribution of power on the peninsula. When Philip V was forced to adhere to the clauses of the Treaty of the Quadruple Alliance in February 1720²⁰², the solution imposed on him was not punitive. France and Britain imposed themselves as mediators, guaranteeing a strict observance of the partition of the Spanish composite monarchy agreed at the end of the War of the Spanish Succession. In an ongoing permanent process of negotiation, the diplomatic efforts deployed by the mediators continued the coercive work of their armies²⁰³. The States-General did pass a resolution in favour of accession to the Quadruple Alliance²⁰⁴. Yet, Amsterdam, worried about the fall in Dutch commerce with Spain since the death of Charles II, preferred to stay aloof from the alliance. Consequently, the Republic acted as *medius in bello*, able to trade with all contending partners alike²⁰⁵.

Cambrai

Amsterdam-induced abstention in the War of the Quadruple Alliance switched to active engagement once the Ostend Company was on the table. As the general picture of Dutch commercial activity turned grim, with diminishing returns from the Spanish dominions or the Levant, the East India markets were the prime asset of the Republic's trade²⁰⁶. The Dutch, party to, invoked this treaty to bring both Britain and France to military action. Charles VI's decision to grant permission for the Ostend Company, published on 28 July 1723²⁰⁷, constituted a *casus foederis*²⁰⁸. After his unsuccessful remonstrances, Pestors, usually based in Brussels, was sent to Hanover, George I's Summer residence, to convince George I's ministers that the Ostend affair fell within the perimeter of the bilateral Anglo-Dutch Treaty of Guarantee of 1716²⁰⁹ and, thus, required action. On 2 October 1723, a new anti-Ostend bill completed earlier decisions of 26 April,

²⁰⁰ Christopher STORRS, "The Spanish Risorgimento in the Western Mediterranean and Italy 1707-1748", in *European History Quarterly* LXII (2012), No. 4, p. 555-577.

²⁰¹ DHONDT, "Bring this mad woman to reason ! Elisabeth Farnese as a female ruler in 18th Century Europe", in Bruno DEBAENST et al. (eds.), *(W)omen and the Law: Acta of the XIXth European Forum of Young Legal Historians*, Brussels, Royal Academy of Sciences, 2014 (Iuris Scripta Historica) (forthcoming).

²⁰² Philippi V. Regis Hispaniarum Accessio iterata, & per Plenipotentiarium suum, ad Tractatum sive Concordatum Londini 2. Augusti ejusdem anni initum, extenso, The Hague, 17 February 1720, *CUD*, VIII/2, nr. XI, p. 26-27.

²⁰³ DHONDT, "La représentation du droit dans la communauté des diplomates européens des « Trente Heureuses (1713-1740) », in *Tijdschrift voor Rechtsgeschiedenis – Revue d'Histoire du Droit - The Legal History Review* LXXXI (2013), No. 3-4 (forthcoming).

²⁰⁴ ISRAEL, *The Dutch Republic, op. cit.*, p. 988.

²⁰⁵ Johann Ludwig KLÜBER, *Droit des gens moderne de l'Europe*, Paris, Guillaumin, 1874, § 279, p. 353. Commercial competition constituted a valid motive for the union of the Maritime Powers. In situations where one of them kept out of an armed conflict, it could reap profits from trade diverted from its competitor. During Louis XIV's Dutch war, Britain was first allied to France (Treaty of Dover, 1670), but quit the conflict in 1674. Consequently, (mainly Amsterdam-based) merchants implored William III not to prolong the conflict needlessly, in view of the loss of traffic to the British (ISRAEL, *The Dutch Republic, op. cit.*, p. 824).

²⁰⁶ ISRAEL, *The Dutch Republic, op. cit.*, p. 1001-1002. Since 1647, Spain and the Spanish Americas were of paramount importance to the Amsterdam trade (*ibid.*, p. 783).

²⁰⁷ Jean DURENG, *Le Duc de Bourbon et l'Angleterre 1723-1726* (diss. doc.), Toulouse, impr. Du Rapide, 1911, p. 48.

²⁰⁸ VATTEL, *Le Droit des gens, op. cit.*, Book III, § 88: *Le Casus Foederis [...] se trouve dans le concours des circonstances pour lesquelles le Traité a été fait, soit que ces circonstances y soient marquées expressément, soit qu'on les ait tacitement supposées.*

²⁰⁹ Treaty of Friendship and Alliance between George I and the States-General, Westminster, 6 February 1716 OS, on line at http://www.ieg-friedensvertraege.de/treaty/1716_II_6_B%C3%BCndniserneuerung/t-1225-18-de.html?h=7 (last consulted on 14 March 2014). DURENG, *Le Duc de Bourbon, op. cit.*, p. 48.

punishing participation in the Company with confiscation, lifelong imprisonment or death. Townshend followed the Dutch resident's point of view and suggested joint military action under the terms of the Triple Alliance²¹⁰.

However, Ostend did not amount to a *casus belli* for France. In the words of Antoine Pecquet sr., senior adviser to Morville (1686-1732), secretary of state for foreign affairs: *Les puissances maritimes ont leurs raisons de parler ainsi, Elles ressentent déjà les effets de l'Etablissement de la Compagnie d'Ostende qui leur cause un notable prejudice ; mais a l'Egard de la France, il semble qu'elle doit considerer si pour elle un mal a venir, et peut etre tres éloigné doit l'engager dans une guerre où elle s'exposerait à plus perdre qu'elle n'a à gagner*²¹¹. Seen from Versailles, a slight tension between Charles VI and the Dutch Republic was preferable to a full-blown military conflict²¹².

In January 1724, the Congress of Cambrai was finally set to start major discussions²¹³. Ostend and the recognition of Charles VI's Pragmatic Sanction were no core matters on the agenda, but were used in a reciprocal game of deterrence by Spain and the Imperial delegates Windischgrätz and Penterriedter, who happened to have been shareholders in the Company²¹⁴. Dissatisfied with the slow advancement of the talks, the Spanish ambassador Pozzobuono²¹⁵ presented a memorandum against the Ostend Company at George I's court. This might seem surprising, as Spain had but scant interest in the affair of the East India trade. However, Spain's first objective was to bring Charles VI to concessions at the Cambrai negotiating table. In that particular setting, France and Britain had an ambiguous role as both mediators (Treaty of the Quadruple Alliance, 1718) and allies of the King of Spain, the latter as the result of alliances posterior to the Quadruple Alliance itself (1721)²¹⁶. A military conflict with Charles VI had been foreseen as a possibility²¹⁷. For the Spanish, the *lex posterior derogat priori*-principle (recent treaties override older ones) had to play. The mediators, however, clung to the priority of the Utrecht settlement over incidental bilateral promises.

Moreover, the Dutch attitude in 1718 had left the British plenipotentiaries at the conference sceptical: *The Dutch would not enter into any engagements which were taking for the Publick Tranquillity of Europe; and yet pretended to make use of them whenever their Private Interests were concerned. By which they would share the advantage*

²¹⁰ Émile BOURGEOIS, *La Diplomatie secrète au XVIIIe siècle*, Paris, Armand Collin, 1910, III, 375; DURENG, *Duc de Bourbon, op. cit.*, p. 81. On British-Dutch relations in the 1720s, see Hugh L.A. DUNTHORNE, *The maritime powers 1721-1740. A study of Anglo-Dutch relations in the age of Walpole*, New York, Garland, 1986.

²¹¹ AMAE, M&D, France, 495, Antoine PECQUET sr. (1666-1728), "Reflexions sur les differens motifs qui ont pû déterminer la France a prendre des Engagemens avec l'Angleterre, la Hollande, et autres alliez", f. 2r^o.

²¹² *By doing just enough to encourage them in the Spirit of opposition rather than design to assist them heartily in obtaining satisfaction by a total Suppression of the Company at Ostend* (NA, SP, 78, 174, Polwarth and Whitworth to Newcastle, Cambrai, 11 May 1724, ff. 1v^o-2r^o).

²¹³ DHONDT, "La culture juridique pratique au Congrès de Cambrai (1722-1725)", in *Revue d'Histoire Diplomatique* CXXVII (2013), N° 3, p. 271-299.

²¹⁴ HUISMAN, *La Belgique Commerciale, op. cit.*, p. 243. See as well Jelten BAGUET, *De Oostendse Compagnie, haar directeurs en de Oostenrijkse Bewindvoerders. Een casuïstische analyse van hun onderlinge interactie (1722-1731)*, UGent: Faculty of Arts and Philosophy (master thesis in history), 2012-2013

²¹⁵ Jacinto de Pozobuono y Belver (1659-1729), born in Ninove (Spanish Netherlands), military career under Charles II of Spain, governor of Trapani (Sicily, 1699), resident in London between 16 December 1720 and 17 January 1727 (Didier OZANAM & Denise OZANAM, *Les diplomates espagnols au XVIIIe siècle*, Madrid/Bordeaux, Casa de Velázquez – Maison des Pays Ibériques, 1998 (Collection de la Casa de Velázquez; 64 - Collection de la Maison des Pays Ibériques; 72), p. 403.

²¹⁶ Treaty between Louis XV and Philip V, Madrid, 27 March 1721, AMAE, Base des Pactes (<http://www.diplomatie.gouv.fr/traites/afficheTraite.do?accord=TRA17210007>, last accessed 14 March 2013); Treaty between Louis XV, George I and Philip V, Madrid, 13 June 1721, *CUD*, VIII/2, nr. XV, p. 34-36.

²¹⁷ It is however interesting to note that Townshend insisted on a guarantee of non-invasion of the Austrian Netherlands, which Dubois adamantly refused (AMAE, CP, Angleterre, 336, Destouches to Dubois, London, 11 May 1721, f. 150r^o, quoted in BOURGEOIS, *Diplomatie secrète, op. cit.*, III, p. 274).

*without taking upon themselves any part of the risque or trouble for the future [...] They might have acted for themselves in the affair of the East India Trade, and would then have been intitled to the best assistance their Friends could give them*²¹⁸.

France and Britain insisted on the vagueness of promises made to Philip V, *inter alia* the restitution of Gibraltar, which was constitutionally impossible for George I²¹⁹. Frustrated with the slow course of affairs, Spain tried to provoke a conflict between Charles VI and the mediators in other issues, such as the Ostend Company. The latter was not foreseen as part of the agenda in Cambrai. The congress was solely directed towards the final details of the Spanish Succession quarrel. The Imperial delegations could retort by bringing the recognition of Charles VI's succession on the table and supported reprisals in case of British or Dutch depredations on the Ostend Company's trade. This deadlock made the conference grind to a halt.

Mare liberum, pactis apertum ! Cursing in the public coffee-house of Europe

Les Couronnes de France & d'Espagne demeurent séparées & désunies [...] Leurs Majestez Royales prendront un soin sincere & feront leurs efforts, afin que rien ne donne atteinte à ce fondement du salut public, ni ne puisse l'ébranler

Art. VI, Treaty of Peace between Louis XIV and Queen Anne, Utrecht, 11 April 1713²²⁰

As expounded previously (I.B), Neny and Dumont had challenged the contractual basis for the exclusion of Charles VI's Belgian subjects. They lost the battle in doctrine, as e.g. Vattel copied Barbeyrac's pro-Dutch point of view concerning the alienability of the right to navigation on the high seas²²¹. Diplomatic practice, however, added a legal performance that brought the very essence of treaty law to the front. If Westerveen and Barbeyrac founded the exclusion on a voluntary act by two sovereigns, they could hardly oppose a norm of the same value.

On 30 April/1 May 1725, Charles VI and Philip V provoked what seemed a revolution in the European diplomatic system²²². They had been bitter enemies. At Cambrai, France and Britain got exasperated by their unwillingness to compromise. Whereas, in 1717, Charles VI had sent out corsairs from Ostend to cruise on Philip V's vessels²²³, both men were all of a sudden reconciled, boosting the Ostend trade. Philip's clandestine agent in Vienna, the Dutch "adventurer"²²⁴ Johan Willem Ripperda (1682-1737), transmitted Elisabeth Farnese's wrath with the disloyal behaviour of France. The Duke of Bourbon (1692-1740), Prime Minister of the 14 year-old Louis XV after Orléans' decease, had decided to cancel the projected marriage between the still minor infant Maria Anna Victoria (°1718) and his sovereign (°1710). Moreover, during the Cambrai talks, French and British mediators played out Spain and Austria against each other. Ripperda persuaded Eugene of Savoy and Sinzendorf to bury the war hatchet and jointly oppose the mediators. Coupled with a projected marriage between Don Carlos (°1716), son of Philip V

²¹⁸ Polwarth and Whitworth (plenipotentiaries for George I) to the Duke of Newcastle (secretary of State for the Southern Department), Cambrai, 11 May 1724, very private, SP, 78, 174, f. 1v°.

²¹⁹ The letter of George I to Philip V, dated 12 June 1721, can be found in AMAE, CP (suppl.), Angleterre, 7, f. 14r°. Its wording explicitly refers to parliamentary consent : *Je ne ballance plus à assurer V.M. de ma promptitude à la satisfaire par rapport à sa demande touchant la restitution de Gibraltar lui promettant de me servir des premieres occasions favorables p[ou]r regler cet article du consentement de mon Parlem[en]t.*

²²⁰ CUD VIII/1, nr. CLI, p. 340.

²²¹ VATTEL, *Le droit des Gens, op. cit.*, Book I, § 284.

²²² Peace Treaty between Charles VI and Philip V, Vienna, 30 April/1 May 1725, CUD VIII/2, nr. XXXVI, p. 106-113; Treaty of Alliance between Charles VI and Philip V, Vienna, 30 April/1 May 1725, CUD VIII/2, nr. XXXVIII, p. 113-114; Peace Treaty between Charles VI (as Holy Roman Emperor) and Philip V, Vienna, 7 June 1725, CUD VIII/2, nr. XXXIX, p. 121-125.

²²³ WESTERVEEN, "Tweede Vertoog", in *Europische Mercurius* XXXV, p. 247.

²²⁴ BELY, *Les relations internationales en Europe, XVIIe-XVIIIe siècles*, Paris, PUF, 1992, (Thémis), p. 459.

and Elisabeth Farnese, with an archduchess (one of Charles VI's three daughters), the new alliance could dominate the continent²²⁵.

The Commercial treaty reversed the prevailing legal logic and confirmed Charles' Belgian subject's right to navigation. Whereas Neny had argued that the liberty of the Southern Netherlanders rested on a pure application of peremptory natural law, the VOC had preferred stressing self-inflicted limitations on this right. Yet, the latter strand of argumentation came under pressure. If access to the high seas had been conditional on the absence of a bilaterally concluded renunciation by the ruling Spanish monarch in the 17th century, the latter could cease to exist decades later, when his successor Philip V explicitly opened the Spanish Indies to merchants under Charles VI's sovereignty. Spain could incur a separate bilateral liability to the Dutch Republic, if the Treaty of Munster was still operative, in the sense read by Barbeyrac and Westerveen. Yet, between the new ruler of the Southern Netherlands and the sovereign in the Spanish Indies, no impediment existed.

The Treaty of Commerce and Navigation negotiated by Ripperda merits more attention than it has hitherto received²²⁶. Dutch arguments according to which the Spanish exclusion of Philip IV's former subjects in the Southern Netherlands was a proof of the possibility to conventionally close navigation on the high seas, were completely shipwrecked, to sink to the bottom of the sea at dazzling speed. Philip V allowed the "Belgians" what had been taken away under his Habsburg predecessors. The Dutch East and West India Companies' legal objections had been spectacularly emasculated: if a treaty could have closed the sea to Belgian entrepreneurs, it had now been opened at large by a new one²²⁷.

In 47 articles, drafted by Du Mont²²⁸, Philip V conceded extensive privileges to the subjects of Charles VI operating on Spanish soil (art. XXI-XXIV)²²⁹, as well as to the Ostend trade. Unlimited access to the Spanish colonies (art. IV, Treaty of Alliance, art. II, IX and XIII, Treaty of Commerce and Navigation) shredded the commercial dominance obtained by Britain in the War of the Spanish Succession. Next to Philip's renunciation to the French throne, Britain had imposed an annual so-called "permission vessel" sailing from Cadiz to the Spanish Americas, as well as the contract allotting the monopoly on the black slave trade, the so-called *Asiento de Negros*²³⁰. Philip V took the liberty to modify the pecking order

²²⁵ DHONDT, "Law on the Diplomatic Stage: The 1725 Ripperda Treaty", in V. DRAGANOVA et al (eds.), *Inszenierung des Rechts – The Law on Stage*, München, Meidenbauer Verlag, 2011 (6 Jahrbuch Junge Rechtsgeschichte – Yearbook of Young Legal History 2010), p. 303-324; Max BRAUBACH, *Prinz Eugen von Savoyen; eine Biographie*, München, Oldenbourg, 1964, III, p. 226-236; Sytze VAN DER VEEN, *Spaanse Groninger in Marokko. De levens van Johan Willem Ripperda (1682-1737)*, Amsterdam, Bert Bakker, 2007, p. 228-288.

²²⁶ Treaty of Navigation and Commerce between Charles VI and Philip V, Vienna, 1 May 1725, *CUD*, VIII/2, nr. XXXVIII, p. 114-121; E.g. BUSTOS RODRÍGUEZ, *Le Consulat des Flamands à Cadix après la Paix d'Utrecht (1713-1730)*: Jacques Vermolen", in PARMENIER & SPANOGHE (eds.), *Urbis in Orbem, op. cit.*, p. 119-120 saw parallels in earlier proposals by Jacques Vermolen, Austrian consul in Cadix. Alfred Baudrillart (*Philippe V et la cour de France*, IV, 186) mentioned parallels with the Most Favoured Nation Status granted to the Hanse.

²²⁷ Du Mont saw precedents throughout the seventeenth century: e.g. when Spain concluded bilateral treaties of commerce and navigation, it had to consent to the other contracting party the same advantages and privileges enjoyed by the Dutch, e.g. in the Anglo-Spanish Treaty of 23 May 1667 (DU MONT, *La Vérité du fait, op. cit.*, p. 15).

²²⁸ GEHLING, *Saint-Saphorin, op. cit.*, p. 209; Grete MECENSEFFY, *Karl VI. spanische Bündnispolitik, 1725-1729. Ein Beitrag zur österreichischen Aussenpolitik des 18. Jahrhunderts*, Innsbruck, Universitäts-Verlag Wagner, 1934, p. 30.

²²⁹ Ana HERNANDEZ CRESPO, "El Interés público y el interés particular: una visión comparativa en las representaciones de los mercaderes flamencos en la corte de Felipe V", in Réne VERMEIR, Maurits EBBEN & Raymond FAGEL (eds.), *Agentes e Identidades en Movimiento. España y los Países Bajos Siglos xvi-xviii*, Madrid, Sílex, 2011, p. 373-402. Du Mont, who drafted the treaty, explicitly referred to the pre-existing "*Confreres de la Chapelle de St André*" in his own treatise on Ostend (DU MONT, *La Vérité du fait, op. cit.*, p. 20).

²³⁰ Georges SCELLE, *Histoire politique de la traite négrière aux Indes de Castille : contrats et traités d'Assiento*, Paris, Larose & Tenin, 1906 ; Andrea WEINDL, "The Asiento de Negros and International Law", in *JHIL* X (2008), No. 2, p. 229-258.

between European trade partners (art. XLVII²³¹), imposed at Utrecht, which equalled cursing in the public coffee-house of Europe. All factories and trade posts in the East Indies were recognized. Letters of reprisal against Spanish or Habsburg subjects cancelled, and seizures against common enemies projected (art. XLI-XLIII). Finally, the “Flemish” nations in Spain obtained their own extraterritorial jurisdiction (art. XXVII-XXX) and could count on a bilateral system of judiciary assistance and ambassadorial services for international successions, which guaranteed the transmission of family patrimony to individual merchants (art. XXXI-XXXII).

The “Austro-Spanish commercial cartel” thus constructed not only threatened the geopolitical balance in Europe, but British and Dutch commercial primacy as well²³². In 1725-1726, the Ostend Company controlled half of European tea imports²³³. The alliance was drafted to the detriment of Spain in general. The projected marriage between Don Carlos and one of the Austrian Archduchesses was hypothetical, but annual payments amounting to 3 million florins to the court of Vienna were not²³⁴. Already in June 1725, protest against the treaty appeared in the Madrilene press²³⁵.

The Republic had no other choice but to join the Alliance of Hanover (3 September 1725²³⁶). Not only to suppress the Ostend Company. The combination of Spain and Austria was a potential geopolitical threat. Moreover, a conflict with them could escalate if Brandenburg-Prussia stepped in on the side of the Emperor, which would endanger the Republic’s eastern border²³⁷.

²³¹ “We have convened that everything granted in favour of the subjects of the British nation by the Treaties of Madrid (23 May 1667, 1 July 1670), as well as the Peace and Commerce treaties done at Utrecht in 1713, or posterior conventions, & which is not expressed, or sufficiently explained in the present, will be held for expressly inserted, in favour of the subjects of [Charles VI], for as far as they will be applicable to them. Idem for all that has been accorded to the subjects of the States-General, by the Peace Treaty of Munster (1648), the Marine Treaty of The Hague (1650), or the Peace and Commerce Treaty of Utrecht (1714)” (my translation from Latin).

²³² SIMMS, *Three Victories and a Defeat, op. cit.*, p. 185.

²³³ Hanna HODACS & Leos MÜLLER, “European Market for Tea and the Swedish East India Company, c. 1730-1760”, in: Maxine BERG (ed.), *Goods from the East: Trading Eurasia 1600-1830. Conference at the Palazzo Pesaro-Papafava, Venice, 11 -13 January 2013* (forthcoming).

²³⁴ Basil WILLIAMS, *The Whig Supremacy 1714-1760*, Oxford, Clarendon Press, 1900 (The Oxford History of England), p. 255.

²³⁵ BAUDRILLART, *Philippe V et la cour de France, op. cit.*, III, p. 202.

²³⁶ Treaty of Alliance between George I, Louis XV and Frederick William I, Hanover, 3 September 1725, CUD VIII/2, nr. XLI, p. 127-129; John F. CHANCE, *The Alliance of Hanover. A study of British foreign policy in the last years of George I*, London, John Murray, 1923; DHONDT, “So Great A Revolution: Charles Townshend and the Partition of the Austrian Netherlands, September 1725”, *Dutch Crossing: Journal of Low Countries Studies* XXXVI (2012), No. 1 (Mar), p. 50-68; GIBBS, “Britain and the Alliance of Hanover, April 1725-February 1726” in *EHR* LXXIII (1958), No. 288 (Jul), p. 404-430.

²³⁷ Conflicts with the Bishophric of Münster had been notorious in the 17th century, Prussian acquisitions at the Treaty of Utrecht and Frederick William I’s support for the House Orange against the republican party in the United Provinces had increased tension. Israel, *Dutch Republic*, 989 and Kristof SELLESLACH, “*Amitié sincère?*” *Het prinsbisdom Münster en de Haagse Alliantie tijdens de Spaanse Successieoorlog (1701-1714)* (Master Thesis in History), Leuven, KULeuven, 2001. Frederick William I (1688-1740), on one hand, was still claiming the title of Prince of Orange after the decease of Johan Willem Friso, nephew of William III (Treaty between Frederick William I and the States-General, on the Partition and Accomodation of the Succession of the House of Orange, Berlin, 14 May-16 June 1732, ROUSSET DE MISSY, *Supplément au Corps Universel Diplomatique du droit des gens*, Amsterdam/The Hague, Janssons à Waesberghe, 1739, II, nr. CLVII, p. 335-340). and, on the other hand had obtained territorial enlargement at Utrecht, turning Maastricht, Roermond and Venlo into enclaves. Next, the Hohenzollern pretentions on the duchies of Jülich and Berg, situated in the Rhineland, included the seigneurie of Ravenstein, an enclave in the Generality Lands (ISRAEL, *The Dutch Republic, op. cit.*, p. 989-991 and DHONDT, “German or European? Jülich and Berg between Imperial and Public International Law”, *Beiträge zur Rechtsgeschichte Österreichs: recht [durch] setzen: Making Things Legal. Gesetzgebung und prozessuale Wirklichkeit in den europäischen Rechtsstraditionen*, Hrsg. von K. STAUDIGL-CHIECHOWICZ e.a., III (2013), Nr. 2, p. 355-362).

Conclusion

The suppression of the Ostend Company became central to the Republic's foreign policy in the 1720s. Pensioner Simon Slingelandt (1664-1736), in function from 1727 on, even convinced the City of Amsterdam to accept a rise in the *verponding* (real estate tax) pursuant to a recalculation of the land register, with the prospect of hard action against the competitor in the Southern Netherlands²³⁸.

The managers of European international relations between 1713 and 1740 avoided the sudden eruption of a continent-wide military conflict²³⁹. In order to succeed in this objective, all pending bilateral issues had to be solved conformable to the power consensus imposed by arms during the War of the Spanish Succession and translated into legal language at the conclusion of the peace treaties. Bilateral argumentation, such as that of the VOC, could not intervene in the conclusion of a treaty between Philip V and Charles VI, opening trade in the Indies to the Ostend Company. Yet, one overarching principle was the touchstone of all European affairs: the upholding of the European balance. By tying the commercial treaty to a projected marriage between Don Carlos and an Austrian archduchess, Charles VI and Philip V had openly violated the balance of power. The latter was not a mere power configuration, but the expression of a system of legal hierarchy, delimitating the scope of any legal instrument. Between treaty law and constitutional law²⁴⁰, but between fundamental and secondary treaty norms as well. At the draft of the Ripperda treaties, the balance principle was invoked, but only to obscure its violation in the ensuing paragraphs²⁴¹.

At the Congress of Soissons (1728-1730), Horatio Walpole (1678-1757) and William Stanhope (1690-1756), British plenipotentiaries, insisted on seeing the Ostend Company as an application of a more general reasoning²⁴². As an *accessorium* to the general power distribution in Europe, its legal status fell under the 1713 Great Power consensus, which was still intact. The countervailing Dutch arguments, presented by Slingelandt²⁴³, according to which Philip V could not have opened access to the Spanish Indies without prior consultation of the Dutch Republic, with whom he had to respect the Treaty of Munster just as Charles VI had, or without violation of the *loix fondamentales de l'Espagne*, forbidding access to and trade in the Indies for all foreign nations, were not relevant any more. Multilateral decision-making, implying Charles VI's consent to drop the Company successively in 1727²⁴⁴ and 1731²⁴⁵, decided on its fate. Yet,

²³⁸ J.A.F. DE JONGSTE, "Een bewind op zijn smalst. Het politiek bedrijf in de jaren 1727-1747", in Dirk Peter BLOK, Walter PREVENIER et al. (eds.), *Algemene Geschiedenis der Nederlanden*, Haarlem, Fibula-Van Dishoeck, 1980, IX, 47; ISRAEL, *The Dutch Republic, op. cit.*, p. 993.

²³⁹ DHONDT, "Balance of Power Language and Mediation Rituals: The Quadruple Alliance's Italian Investitures (1718-1727)", in 2000: *The European Journal* XIII (2012), No. 2 (Dec), p. 10-13.

²⁴⁰ If looked at Philip V's or Orléans' renunciations or the recognition of George I to the detriment of James III. DHONDT, "From Contract to Treaty".

²⁴¹ DHONDT, "Law on the Diplomatic Stage".

²⁴² *We observed that France has the same grounds with His Maj[es]ty & the States to complain against the Treaty of Commerce concluded at Vienna, & having jointly with them entered into the Treaty of Hanover for obviating the Mischiefs apprehended from the Treatys made between the Emperer & Spain, it would have a better appearance of Union between the allies, if France, instead of having a particular article for preserving their Rights and Privileges of Trade with Spain as seems intended [...] should be made a party to this article jointly with His Majesty and the States.* (NA, SP, 78, 188, Notes on a conference between Chauvelin (French Secretary of State for Foreign Affairs, 1727-1737), Horatio Walpole (British envoy extraordinary at Paris 1723-1730) and William Stanhope (ambassador in Madrid, 1721-1727, Secretary of State for the Northern Department, 1730-1740) on a draft peace treaty for the Congress of Soissons, Paris, s.d., f. 551v^o).

²⁴³ NA, SP, 78, 188, "Memoire des Demandes faites au Congrès de Soissons par les Plenipotentiaires des Provinces Unives des Paÿs-Bas, présenté au Nom des Alliés d'Hanover aux alliés de Vienne", Soissons, 20 June 1728, f. 527v^o. The memorandum took over arguments from Westerveen and de la Bassecourt's reactions ("les fougoux publicistes", HUISMAN, *La Belgique commerciale*, p. 332) to the Ripperda commercial treaty. I limited myself to the most substantial memoranda on the Ostend question. See further: DE PAUW, *Mare Liberum, op. cit.* and HUISMAN, *La Belgique commerciale, op. cit.*, p. 379-403.

²⁴⁴ Art. I Preliminary Articles concluded between Charles VI and the Allies of Hanover, Paris, 31 May 1727, *CUD* VIII/2, nr. LVII, p. 146-148.

this process had not been arbitrary or induced by domestic preoccupations, but was the expression of an implicit legal logic in the structure of day-to-day diplomatic process.

²⁴⁵ Art. V, Treaty of Alliance between Charles VI and George II, Vienna, 19 March 1731, Rousset, *Supplément*, II, nr. XLII, p. 288-291.