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International Legal Discourse Between Disintegration and Integration. The Case of the Peaceful Succession Struggles, 1713-1739

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## Introduction

'France was never our enemy but under Lewis the Fourteenth; at which time she was a foe to the whole world. She seeks not universal Empire now, she does not invade the rights of her neighbours, she has done signal benefits to us since the regency of the late Duke or Orleans'

(*The Censor*, December 1728[1])

The period stretching from the Peace of Utrecht (11 April 1713) to the outbreak of the War of the Austrian Succession (1740) is an exceptional interval of peace between European Powers. From the decease of Louis XIV (1 September 1715) to that of Emperor Charles VI (20 October 1740), an uncommon interlude of harmony fills the pages of Western history books.

Our discipline, legal history, accords a major place to the 1648 Peace of Westphalia as the 'terminus a quo' of a 'French age' of international law[2]. However, at that time, war waged on between France and Spain, the two major European powers of the moment[3]. From Louis XIV' accession to personal power in 1661 on, a balance in Europe could only be ephemerous[4]. We judge, with Heinhard Steiger[5], that, although the system of free and equal sovereign states was clearly conceived in Münster and Osnabrück through the attribution of a 'ius territorialis' to all 300+ members of the Empire, it could only start to function well in the 1713 multilateral stability[6].

After 1713, vacant successions, such as those in the duchy of Parma-Piacenza and the grand-duchy of Tuscany[7] in the present contribution, were a menace to the system, as they had been before[8]. Traditionally, such problems would have led to a big European war, as had been the case with the succession in the Palatinate (1688-1697). Not, however, in the Europe of "Walpole and Fleury[9]" or "Stanhope and Dubois[10]".

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[1] Quoted in Jeremy Black, *British foreign policy in the age of Walpole* (Donald 1984) 176.

[2] Wilhelm G. Grewe, *The Epochs of International Law* (De Gruyter 2000).

[3] René Vermeir, *In staat van oorlog : Filips IV en de zuidelijke Nederlanden, 1629-1648* (Shaker 2001).

[4] John A. Lynn, *The Wars of Louis XIV, 1667-1714* (H.M. Scott and B.W. Collins eds, Longman 1999).

[5] Heinhard Steiger, 'Rechtliche Strukturen der europäischen Staatenordnung 1648-1792' LIX Zeitschrift für ausländisches Öffentliches Recht und Völkerrecht 609-649.

[6] On the specific legal technique to create a multilateral order on the basis of bilateral treaties, see Christina Marek, 'Contribution à l'étude du traité multilatéral' in Emmanuel Diez, Jean Monnier and Jörg. P. Müller (eds), *Festschrift für Rudolf Bindschedler* (Stämpfli 1980). 'the manner in which the alliance tried to settle the outstanding problems between all the western powers and to guarantee their thrones provides ample reason for describing the treaty as an early collective security agreement' (Derek McKay and Hannish M. Scott, *The rise of the great powers 1648-1815* (Longman 1983) 115.

[7] J.H. Jones, *Great Britain and the Tuscan Succession Question, 1710-1737* (Vantage Pr 1999).

[8] Alison Anderson, *On the verge of war : international relations and the Jülich-Kleve succession crises (1609-1614)* (Humanities Press 1999).

[9] Paul Vaucher, *Robert Walpole et la politique de Fleury (1731-1742)* (Plon 1924).

[10] Guy Chaussinand-Nogaret, *Le Cardinal Dubois, 1656-1723 ou une certaine idée de l'Europe* (Perrin 2000).



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The model of a 'second hundred years war[11]' between France and Britain (1688-1815), from the coming to power of William III to the Battle of Waterloo, is thus false. In reality, France and Britain cooperated, rather than clashed. Their colonial rivalry in America was still nascent. European questions occupied the agenda[12].

Historians have not yet found a satisfying explanation. The renowned French historian Emmanuel Le Roy Ladurie pointed to the excellent personal relations between the protagonists in the small diplomatic society[13]. Richard Lodge saw them more as Spenlow and Jorkins in Dickens' *David Copperfield*[14]. However, facts often contradict apparently evident assumptions. The Franco-British bond was certainly stronger in the first half of this period, than in the last. British historian Jeremy Black goes so far as stating its demise from 1727 on[15].

Was this a pure matter of unprincipled 'high politics'? Legal historians of the early modern era tend to focus on 'big names[16]' such as Grotius, Rachel, Pufendorf, Wolff or Vattel[17], or, in other words, on the take-over by the school of natural law, to the detriment of the medieval 'mos italicus' and the renaissance 'mos gallicus'[18]. We argue that our attention should shift away from what happened at (Protestant, German) academia, often more 'de lege ferenda', than 'de lege lata'[19], to the actual legal practice in the foreign affairs bureaucracy. A more conceptual and sociological reading of diplomatic sources offers a more nuanced perspective[20].

## 1. Approach

### 1.1. A legal praxeology of the trente heureuses

To correctly understand the workings of international law in eighteenth century, we need to broaden the normative perspective. International law primarily is the law of obligations consented to by sovereign states[21]. Thus, for the post-Utrecht period, we dispose of the ample treaty collections by Jean Dumont de Carelskroon, imperial historiographer and legal adviser (1666-1727)[22], completed by the

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[11] J.M. Mattei, *Histoire du droit de la guerre, 1700-1819: introduction à l'histoire du droit international : avec une biographie des principaux auteurs de la doctrine internationaliste de l'Antiquité à nos jours* (PUAM 2006) 23.

[12] Brendan Simms, *Three Victories and a Defeat: The Rise and Fall of the First British Empire, 1714-1783* (Allan Lane 2007).

[13] Emmanuel Le Roy Ladurie, *L'Ancien Régime. II: l'absolutisme bien tempéré (1715-1770)* (Hachette 1991) 93.

[14] Richard Lodge, 'English Neutrality in the War of the Polish Succession: A Commentary upon Diplomatic Instructions, Vol. VI, France, 1727-1744' XIV TRHS 147.

[15] Jeremy Black, *The Collapse of the Anglo-French Alliance, 1727-1731* (St Martin's Press 1987).

[16] Randall Lesaffer, 'The classical law of nations (1500-1800)' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011).

[17] Emmanuelle Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique* (Pédone 1998).

[18] Alain Wijffels, 'Early-modern scholarship on international law' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011).

[19] Mathias Schmoeckel, *Auf der Suche nach der verlorenen Ordnung : 2000 Jahre Recht in Europa; ein Überblick* (Böhlau 2005) 297.

[20] Lucien Bély and Georges-Henri Soutou, 'Les relations internationales' in Jean-François Sirinelli, Pascal Cauchy and Claude Gauvard (eds), *Les historiens français à l'oeuvre 1995-2010* (PUF 2010) 262.

[21] James Crawford, 'Sovereignty as a Legal Value' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge UP 2012).

[22] Jean Du Mont de Carels-kroon, *Corps universel diplomatique du droit des gens*, vol VIII (Pieter Husson & Charles Levier 1731).



Electronic copy available at: http://ssrn.com/abstract=2569073

Huguenot journalist Jean Rousset de Missy (1686-1762)[23]. In these volumes, we can find the explicitly agreed duties and obligations of states in the 'Society of Princes'[24]. However, the observance of most of these treaty clauses was far from strict, leading certain researchers to doubt the efficacy of compounds between distrustful states[25].

We argue that a legal historian should go further than a mere positivist *fact-check* of international engagements, or an academic genealogical exercise, backwards projecting contemporary international law in the past. Law is discourse. Law lives in society. Law reflects power relationships, and thus differences, between the members of that society. As a discourse, law serves as a vector to translate unilateral, political interests and make them acceptable to other states[26]. The French sociologist Pierre Bourdieu called this exercise of finding the implicit guiding principles behind human action, a praxeology. Diplomats behave themselves according to a habitus, or collection of unifying moving principles. The jurists' role is then to change the nature of facts by attributing them a qualification: 'Faisant croire que c'est vrai à des gens qui ont le pouvoir de faire exister le vrai, c'est-à-dire les puissants, il peuvent rendre réel ce qu'ils disent[27]'. Moreover, the fact that states are in a competition with each other does not exclude the possibility of a common discussion ground, in the form of the law: 'Autrement dit, pour qu'il y ait lutte dans un champ, il faut qu'il y ait accord sur les terrains de désaccords, sur les armes légitimes et légitimement employées dans la lutte, sur les critères mêmes du triomphe, ce qui fait qu'on peut apparemment parler d'une culture'[28].

A similar attention shift, away from the mere comparison of obligations and execution, has been proposed by the German historian Barbara Stollberg-Rilinger, in her cultural or symbolic history of the Old Imperial constitution. Instead of asking our sources questions that cannot properly be answered, since they refer to a closed, autonomous system of legal norms, which did not exist in the minds of contemporaries, we should adapt our inquiries to mentality and cultural practices of our target period[29]. Stollberg-Rilinger proposes a more complex grid of interpretation:

- positivist-legal (= published treaties)

- concrete constitutional practice (= diplomatic practice, or politics)

- theoretical-discursive (= academic explanation and systematisation)

- symbolic-ritual (= through the explicit symbolic of power rituals, or through the implicit symbolic of everyday interaction)

Stollberg-Rilinger's distinction is somehow mirrored in Jean de la Sarraz du Franquesnay's manual *Le ministre public dans les cours étrangères* (1731). Sarraz treats public law in a separate chapter of his relatively short (164 p.) work[30]. To start with, Sarraz explains why he treats public law at all, 'devant être supposé, pour parler vulgairement, que chacun sçait le métier qu'il fait'. In other words, public

[23] Jean Rousset de Missy, *Supplément au Corps universel diplomatique du droit des gens, contenant un recueil des Traitez d'alliance de paix, de trève, de neutralité* (Janssons à Waesberghe 1739).

[24] Lucien Bély, *La société des princes XVIe-XVIIIe siècle* (Fayard 1999).

[25] Katja Frehland-Wildeboer, *Treue Freunde ? : Das Bündnis in Europa 1714-1914* (Oldenbourg 2010).

[26] Constanze Villar, *Le discours diplomatique* (L'Harmattan 2006).

[27] Pierre Bourdieu, *Sur l'État: Cours au Collège de France (1989-1992)* (Seuil 2012) 425.

[28] Ibid.

[29] Barbara Stollberg-Rilinger, *Des Kaisers alte Kleider: Verfassungsgeschichte und Symbolsprache im Alten Reich* (C.H. Beck 2008).

[30] Jean de la Sarraz du Franquesnay, *Le ministre public dans les cours étrangères* (Aux dépens de la compagnie, 1731) 104-132.

law is implicitly present and does not exist in the eyes of practitioners as a separate corpus of knowledge. The accession to this corpus runs on four ways:

1° celle des Ecoles publiques [...] Quoiqu'on sçache fort bien que ce que l'on y apprend là-dessus ne soit jamais capable de former seul un Ministre, il ne faut pas s'imaginer que ce moyen soit inutile; on y apprend la Théorie de ce droit; on y prend une idée précise de ce qu'il est par les définitions de son tout & de ses parties, par ses distinctions, divisions & sous-divisons & dans les théses publiques qui se soutiennent là-dessus ; on y apprend les fondements généraux & particuliers de la science speculative du droit public, quand on a déjà une tenture suffisante du droit de la Nature & des gens, dont la connoissance est si utile en tant d'occasions

2° la lecture des Traités qui se sont faits sur les diverses branches de cette science […] L'Allemagne est le pays du monde où l'on a le plus & le mieux écrit là-dessus ; il n'est guére de parties du droit public de l'Empire qu'ils n'ayent maniées sçavamment & l'on ne peut ignorer que le fond du droit public etant le même par tout & n'y ayant de différence que dans le plus ou le moins d'etenduë, que les usages locaux & les circonstances peuvent lui donner […]

3° celle de la réflexion, de la méditation & des conversations qu'on peut avoir avec des gens bien versés dans la connoissance de toutes les parties de cette science

4° la voie beaucoup plus parfaite que toutes les autres, c'est celle de la pratique : celle-ci est une école infaillible, dont toutes les décisions sont des règles ; les trois autres voies ou les trois premiers mettent le Ministre en etat de se bien conduire dans la 4°, où les connoissances reçoivent le sceau de leur achevement, par l'experience.'

We could not better illustrate Stollberg-Rilinger's structure. What is taught (1°), transmitted through oral dialogue (3°) and what is in the books (2°) can but give an impression of the role of law in practice. Consequently, we need an 'action theory', and not a 'theory of theories'. Rather than concentrating on the exact wording or systemic explanation of the words 'balance of power[31]', or 'tranquility of Europe', we need to understand what they mean in context[32].

1.2. Contemporary Sources

Dumont de Carelskroon and Rousset de Missy's treaty collections were of prime importance to diplomatic practitioners[33]. As repositories of obligations between states, they could serve as the starting point for the redaction of an argumentarium[34]. However, they were far from sufficient. International treaties constituted but one of several sources of law. As Rousset de Missy's *Intérêts présens des puissances de l'Europe*, a collection of pending legal quarrels between European states,

[31] William C. Wohlforth and others, 'Testing Balance-of-Power Theory in World History' XIII EJIR 155-185.

[32] Bern Rill, *Karl VI. : Habsburg als barocke Grossmacht* (Verlag Styria 1992) 138.

[33] La Sarraz 129: 'ces Traités font un Code de Droit public & deviennent loix obligatoires pour tous les Etats qui y sont entrez'.

[34] E.g. when the French plenipotentiaries arrived at Soissons for the congress in 1728, they asked for 'le Recüeil des Actes d'Utreck avec celuy de Rousset qui en est naturellem[en]t la suite […] la traduction du Grotius par Barbeyrac avec le T[rai]té de Pattyn sur le Commerce d'Ostende […] la suite des Mercures historiques après 1720' (Count Brancas-Cereste to Chauvelin, Soissons, 2 September 1728, AMAE MD France 499 f° 48r°.).

shows[35], other legal systems constituted legitimate sources of law: feudal law, succession law and imperial law, often going back to medieval arrangements[36].

Rousset's writings were used by diplomats, but circulated in the nascent European 'public space'. Behind the curtain of secrecy, however, practitioners put their own application in writing. The rich and vast diplomatic archives in France and Britain constitute our main sources. The 'bureaux des affaires étrangères', strongly reorganised under Louis XIV (1638-1715), had several 'premiers commis'[37] competent for every European region. Those experts in the diplomatic archives, where legally binding treaties were systematised, exercised considerable symbolic authority in the elaboration of policy. The advice of prominent bureaucrats as Antoine Pecquet sr.[38] and Nicolas-Louis Le Dran[39] shaped not only the verbal qualification of outstanding issues, but their resolution as well. Only the jurist brings legitimacy to monarchal acts.

## 2. The Peaceful Successions

### 2.1. The Italian Fiefs

#### 2.1.1. The Spanish Succession and its consequences

The War of the Spanish Succession considerably changed the political map of Europe. Whereas, before 1700, Spain controlled the Southern Netherlands (present-day Belgium), Southern Italy (Kingdoms of Napels and Sicily), Northern Italy (Duchy of Milan, Tuscan 'praesidia' or harbours) and the isles of Sardinia, Mallorca and Menorca, in addition to its colonial empire, this bloc was torn in two parts. The Utrecht Peace treaty partitioned the lands of the ever-sickly Charles II of Spain (1662-1700). Philip V (1683-1746), grandson of Louis XIV of France, would rule Spain and the colonies. The Italian possessions (with the exception of Sicily) and the Southern Netherlands went to Emperor Charles VI of the Holy Roman Empire.

The legal basis of the Utrecht arrangement was a small revolution in European public law. Traditionally, royal succession was seen in terms of domestic law. Unwritten 'lois fondamentales', as in France (salic law/indisposability of the crown[40]), testaments or solemn registered renunciation declarations before the highest court of the realm[41] were the only relevant categories in legal discourse. However, as those claims accumulated, it became increasingly clear that they could never satisfyingly

[35] Jean Rousset de Missy, *Les intérêts présens des puissances de l'Europe, Fondez sur les Traitez conclus depuis la Paix d'Utrecht inclusivement, & sur les Preuves de leurs Prétentions particulieres* (Adrien Moetjens 1733).

[36] Heinhard Steiger, 'Völkerrecht versus Lehnsrecht ? Vertragliche Reglungen über reichsitalienische Lehen in der Frühen Neuzeit' in Matthias Schnettger and Marcello Verga (eds.), *L'Imperio e l'Italia nella prima età moderna/Das Reich und Italien in der Frühen Neuzeit* (Duncker & Humblot, 2006) 115-152.

[37] Jean Baillou, *Les Affaires étrangères et le corps diplomatique français; 1: de l'Ancien régime au Second Empire* (Paris 1984), Jean-Pierre Samoyault, *Les bureaux du secrétariat d'État des Affaires Étrangères sous Louis XIV* (Paris 1971).

[38] Antoine Pecquet, *Discourse on the Art of Negociation* (First published 1737, translated by Aleksandra Gruzinska and Murray D. Sirkis, Peter Lang 2004).

[39] Christian Fournier, *Nicolas-Louis Le Dran, 1687-1774, "homme de Mémoires"* (Paris 2009).

[40] Francis Garrison, 'Lois fondamentales' in Lucien Bély (ed.), *Dictionnaire de l'Ancien Régime* (PUF 2010) 735-757.

[41] Delphine Montariol, *Les droits de la reine. La guerre juridique de dévolution (1667-1674)* (Toulouse 2005).

solve the quarrels between two as absolute opponents as the Bourbons and the Habsburgs, who would both gather coalitions against the other[42].

Imperial diplomat Franz Paul von Lisola (1613-1674)[43] pointed to this problem in his pamphlet *Bouclier d'Estat et de justice*[44]: rules of private or domestic law could not apply between sovereign and equal monarchs, who had no judge. Kings can only negotiate, or go to war. Consequently, this led to partition treaties, concluded between Louis XIV and Emperor Leopold I (1640-1705)[45] in 1668, between William III, the States-General and Louis XIV in 1697 and 1700[46]. The validity of such a legal approach was not contested by the parties. Britain ultimately left the coalition against Louis to prevent a Habsburg hegemony.

The separation of the crowns of France and Spain, where Philip V was to install a 'secundogeniture' or junior branch of the Bourbon family, was essential. British jurists drafted Philip's renunciation declaration, whereby he forsook succession rights to the French throne for himself and his descendants. In spite of protest at the Parliament of Paris, his words were registered and superseded the French 'lois fondamentales'[47]. Treaty clauses superseded internal norms and a beginning of normative hierarchy between international (horizontal, consensual) and national (vertical, hierarchical) came into being

2.1.2. Spanish revisionism

Philip V of Spain wanted to restore Spanish power in the Mediterranean, unjustly shattered by the British, who allotted considerable parts of Italy to the Austrian Emperor, without however enabling him to dominate the navigation of the Mediterranean[48]. The Duke of Savoy, who before the War only controlled a buffer zone between France (Provence) and the Habsburg (Milan), was rewarded for skilfully swapping sides in the middle of the war. He became king of Sicily in 1713[49].

Philip allied himself to the Duke of Parma-Piacenza, Francesco Farnese (1678-1727), by marrying his niece Elisabeth (1692-1766). She would soon turn out to be one of the most turbulent queens in Europe[50]. Her uncle was unhappy with the Utrecht settlement and pleaded for a Spanish invasion. Bringing back Spain on the peninsula would balance the Austrians and give more freedom of action to the smaller Italian sovereigns[51]. Spanish prime minister, but foremost former Parmezan diplomat

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[42] Pierre Le Bailly, *Louis XIV et la Flandre, problèmes économiques, prétextes juridiques* (Paris 1970).

[43] Markus Baumanns, *Das publizistische Werk des kaiserlichen Diplomaten Franz Paul Freiherr von Lisola (1613-1674)* (Duncker & Humblot 1994).

[44] Franz Paul von Lisola, *Bouclier d'estat et de justice contre le dessein manifestement découvert de la monarchie universelle, sous le vain prétexte des prétentions de la reyne de France* (1667).

[45] Jean Bérenger, 'Une tentative de rapprochement entre la France et l'Empereur' in Daniel Tollet (ed), *Guerres et paix en Europe Centrale aux époques moderne et contemporaine : mélanges d'histoire des relations internationales offerts à Jean Bérenger* (PUPS 2003).

[46] Arsène Legrelle, *La Diplomatie française et la Succession d'Espagne: 1659-1725, Vol. II* (Dullé-Plus 1889).

[47] Alfred Baudrillart, 'Examen des droits de Philippe V et de ses descendants au trône de France, en dehors des renonciations d'Utrecht', III RHD 161-191.

[48]Derek McKay, 'Bolingbroke, Oxford and the defence of the Utrecht Settlement in Southern Europe', (1971) LXXXVI EHR 264-284.

[49] Christopher Storrs, *War, diplomacy and the rise of Savoy, 1690-1720* (Cambridge UP 1999).

[50] Edward Armstrong, *Elisabeth Farnese. "The Termagant of Spain"* (Longman 1892).

[51] Prime minister Alberoni, often identified with the Spanish aggression of 1717 and 1718, was only an instrument of these policies (Émile Bourgeois, *La Diplomatie secrète au XVIIIe siècle, ses débuts. II. Le Secret des Farnèse, Philippe V et la politique d'Alberoni* (Armand Colin 1909) 254.

Guilio Alberoni, launched an attack on Sardinia (22 August 1717), at a time where the bulk of the Austrian forces were fighting the Turk on the Balkans[52].

2.1.3. Multilateral diplomatic response

In the meanwhile, four years after Utrecht, the normative weight of the horizontal elements in the treaty had become even heavier. The reason lay with internal French and British politics. At first, until Louis XIV' decease, French diplomacy oriented itself on better relations with the Imperial court, away from the Franco-British tandem. Conversely, the new Whig-government in Westminster tried the same. After all, the British sovereign George I (1660-1727) was a prince of the Empire, who had a lot to gain from a good understanding with Charles VI.

However, this did not last long. Philip V contested his exclusion from the French throne. At Louis XIV' decease on 1 September 1715, his successor Louis XV was barely five years old. Hence, Philip of Orléans (1674-1723), who would assume the regency until Louis' majority at the age of 13, chose a foreign ally who needed external support himself[53]. Georg Ludwig, Duke-Elector of Hannover, inherited the British throne following the exclusion of the Catholic Stuart dynasty as a consequence of the 1688 Glorious Revolution. The 'Pretender' James Stuart (1688-1766), son of the late James II (1633-1701) travelled from one catholic continent court to another and was considered a serious menace to Britain's internal security. On 28 November 1716, France and Britain concluded a treaty of mutual guarantee at Palace Herrenhausen in Hannover, George's German residence.

The Italian case tested the alliance's for the first time. The Spanish attack had to be repelled. Charles VI could count on support from his colleagues. However, there could be no question of a reinforcement of Habsburg's position in Italy, which would make it too preponderant.

2.2. Autonomisation and Hierarchy: The Quadruple Alliance's article V and its fall-out

Philip V's legal pretension for the invasion was the securing of the succession in the Duchies of Parma-Piacenza and Tuscany for his son Carlos (°1717) born from his marriage with Elisabeth. The Farnese and de'Medici lines were not extinct yet, but Philip saw his manoeuvre as a preventive one. Emperor Charles considered these territories as imperial fiefs, meaning that they would return to him in case of vacancy (absence of male successors).

At the Treaty of London (2 August 1718)[54], concluded between George I, Louis XV and Charles VI, Philip was both repelled and satisfied. His pretensions regarding Parma-Piacenza and Tuscany were accepted. The Duke-King of Savoy-Sicily was the main loser[55]. While his island was invaded by the Spanish, he had to consent to exchange it for the poorer Kingdom of Sardinia, making the Emperor the sole master of Southern Italy[56].

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[52] Ivan Parvev, *Habsburgs and Ottomans between Vienna and Belgrade (1683-1739)* (Columbia UP 1995) 163.

[53] André Corvisier, *Les régences en Europe : essai sur les délégations de pouvoirs souverains* (PUF 2002).

[54] Treaty between George I, Louis XV and Charles VI, London, 22 July OS/2 August NS 1718, CUD VIII/1 531.

[55] Jean Dureng, *Le Duc de Bourbon et l'Angleterre (1723-1726)* (Impr. "du Rapide" 1911) 383.

[56] Franz Pesendorfer, *Osterreich--Grossmacht im Mittelmeer? : das Konigreich Neapel-Sizilien unter Kaiser Karl VI (1707/20- 1734/35)* (Böhlau Verlag 1998) and Elisa Mongiano, *"Universae Europae securitas" I trattati di cessione della Sardegna a Vittorio Amedeo II di Savoia* (Giappichelli Editore 1995).

Article V, which was to occupy European diplomacy for the coming twenty years, stated the following concerning Parma-Piacenza and Tuscany: 'quia vero eo casu, quo Magnum Hetruriae Ducem, prout etiam Ducem Parmae Placentiaeque, eorumque successores, absque liberis masculis decedere contingeret […] ut Status feu Ducatus […] ab omnibus Partibus contractantibus agnoscantur & habeantur pro indubitatis Sacri Romani Imperii Feudis masculinis. Vicissim Sua Majestas Caesarea, per se, ceu Caput Imperii, consentit, ut si quando casus aperturae dictorum Ducatuum, ob deficientiam Haeredum masculorum, contingat, filius dictae Hispaniarum Reginae primogenitus […]'

In other words: at the extinction of the ruling male lines, Parma-Piacenza and Tuscany would receive a successor and be regarded as imperial fiefs by all the contracting parties. However, the qualification of 'Feudus masculinis' hides an essential modification. Don Carlos' designation as new sovereign is based on his descendence from Elisabeth Farnese… a woman! The feudal law of the Empire[57] did not apply to this succession any more. In reality, the Emperor had to consent to the modification of the Italian fief's statute[58].

3. War as 'ultima ratio'

Unsurprisingly, the execution of the clause, which put treaty law apart from, and above domestic law, was a tiresome and tedious work. From August 1718 to the effective investiture of Don Carlos (late 1731), more than thirteen years passed[59].

Philip V adhered to the Quadruple Alliance in 1720, but it took two more years for a European peace conference to open in the French city of Cambrai. It got well out of the starting blocks in 1724, to shatter again in the Spring of 1725, when Habsburg and Spain decided to get rid of mediation[60]. However, the mechanism proved to be persistent.

Previous to the arrival of arbitration tribunals or permanent international courts, sovereigns possessed an array of tools to settle a dispute:

- Direct negotiation: linking the injury suffered to a compensation in another outstanding quarrel with the counterparty
- Third-party mediation: implying a delegation of authority over the negotiations and its dynamics to third parties, who can amend an initial demand conforming to their own wishes, or to those of the counterparty, to whom they might feel more inclined. This approach has two disadvantages: independence menaces his loyalty, dependence his credibility
- Retorsions or reprisals: mostly in maritime or trade cases, proportional measures to those suffered by the hands of the counterparty can be applied
- War: not the first option, since the preceding alternatives can be less costly. Postponing the solution of a political problem does not come without potential reputational losses, but avoids the disruption of trade and the mobilisation of the military, which has its repercussions on

[57] Rüdiger Freiherr von Schönberg, *Das Recht der Reichslehen im 18. Jahrhundert. Zugleich ein Beitrag zu den Grundlagen der bundesstaatlichen Ordnung* (Müller 1977).

[58] See Heinhard Steiger, 'Völkerrecht versus Lehnsrecht ?'. During the negotiations of the Italian intervention, the Imperial court repeatedly made a point of not conceding a modification of the internal rules, but to no avail (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* (Röhrscheid Verlag 1964) 144).

[59] Résolution Imperiale pour l'Emancipation de la Tutelle de l'Infant d'Espagne don Carlos, 16 October 1731, CUD Suppl. II-2 316.

[60] Frederik Dhondt, 'Law on the Diplomatic Stage: the 1725 Ripperda Treaty' in Viktoria Draganova and others (eds), *Die Inszenierung des Rechts - Law on Stage Yearbook of Young Legal History 2010* (Martin Meidenbauer Verlag 2011).

fiscal pressure. Nevertheless, war is considered a normal option of dispute settlement, in the absence of an authority above the sovereign partners in the state system[61].

3.1. Congress, Rupture, Congress (1722-1729)

Since direct negotiations between Charles VI and Philip V were difficult, the second option was initially preferred. However, as France and Britain intervened in the first place on behalf of threatened Austria, they gradually changed positions in the run-up to the Congress. Once Philip had evacuated Sicily[62] (gain for the Emperor) and Sardinia (compensation for Victor Amadeus of Savoy), to adhere to the terms of the alliance[63], the burden of execution of the famous article V fell on Charles VI.

Charles retarded the issuing of an expectative, or promisory letter to Don Carlos, on which the Spanish conditioned the opening of the Congress, until 1724. The Imperial Chancery, led by Vice-Chancelor Bishop Friedrich Karl von Schönborn (1674-1746[64]), tried to bypass the imposition of treaty language on what it considered to be an internal German and feudal affair, leading to the insertion of the word *'ligus'* in its 1722 draft of the expectative. This term, designating the submission of a vassal to a specific sovereign, was unacceptable to France and Britain, who, in order to maintain the balance in Italy, insisted on Don Carlos' future independence and the introduction of Spanish garrisons in the main fortresses of the disputes territories, awaiting their rulers' death.

At this point, the Emperor created a complex package deal for the other European powers. Considering the elevation of the Italian successions to the European playing field, Charles VI decided to do the same for the Habsburg lands. The Emperor was tied to the conditions of a 'Pactum Mutuae Successionis', concluded in 1703 with his elder brother Joseph I (1674-1711)[65]. In case Joseph would decease without male issue (which happened in April 1711, causing Charles to come back from Spain, where he fought Philip V), Charles' own children could only inherit before Joseph's daughters if they were male. In case Charles would only leave daughters, they would come second after Joseph's. Shortly after taking power, Charles VI issued a 'Pragmatic Sanction', which was slowly adopted by the provincial estates in the Habsburg lands. Instead of stopping the movement here, Charles took the issue to the international forum, and asked for recognition of this settlement[66].

The French mediators wanted to keep this out of the Cambrai Congress, whose agenda was already overloaded with Italian frontier and investiture quarrels, blurring the main outstanding issues between Philip and Charles. However, another issue popped up. British and Dutch[67] disgruntlement with the flourishing East India trade at the port of Ostend in Charles VI' Belgian provinces[68] was so great, that the British –although in a position as mediator- menaced to bring this to the table as well[69].

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[61] 'L'imperfection du contrat international' Maxime Lefebvre, *Le jeu du droit et de la puissance. Précis de relations internationales* (PUF 2000) 4.

[62] Evacuation Convention between Philip V, Charles VI, with British mediation, 6 May 1720, Palermo, CUD VIII/2 27.

[63] Declaration of Accession of Philip V, 17 February 1720, The Hague, CUD VIII/2 26.

[64] Franck Lafage, *Les comtes Schönborn 1642-1756. Une famille allemande à la conquête du pouvoir dans le Saint Empire romain germanique, tome I : Les fondateurs. Tome II : Les héritiers* (L'Harmattan 2008).

[65] Marsha Frey and Linda Frey, *A Question of empire : Leopold I and the war of Spanish succession, 1701-1705* (Columbia UP 1983).

[66] Johannes Kunisch, *Staatsverfassung und Mächtepolitik* (Duncker & Humblot 1979) 75.

[67] Accession to the Quadruple Alliance on 30 June 1719.

[68] Octroy for Thirty Years to the East India Company in the Austrian Netherlands, given by Charles VI, Vienna, 19 December 1722 See Michel Huisman, *La Belgique commerciale sous l'empereur Charles VI : la Compagnie d'Ostende* (Lamertin 1902).

[69] Dureng 185.

During the Congress, the role of France and Britain had become so blurred, that they lost credibility. When they pleaded the Spanish cause, they were accused of reneging their role of 'guarantees' of the treaty of the Quadruple Alliance, contracted against Philip's aggression. In fact, they were helping Spain to modify the text and enlarge its scope. If, conversely, they advanced the Imperial quest for recognition of the Pragmatic Sanction, Spain felt they forsook their original mission of 'mediation', leading to specification and execution of the treaty, i.e. installing Don Carlos as an independent sovereign. As a result, the 1725 Ripperda Treaty between the Emperor and the King of Spain[70] was a welcome wake-up call, which helped to clarify the negotiating positions.

In exchange for a fake promise to wed one of the two archduchesses to Don Carlos (and thus to give him a perspective on the Imperial Crown, which could not be wore by a woman), Charles obtained the recognition of his Pragmatic Sanction by his historically toughest adversary and considerable subventions. Needless to say, this course of action fell very badly with the other delegations at the congress, who saw the resurrection of Charles V' universal monarchy[71].

The ensuing period of international tension saw the building-up of two blocs within the German Empire: one catholic and revisionist, on the axis Madrid-Vienna, with the aid of the Russian Tsarina, and a protestant, the other protestant and loyal to the Utrecht treaties, driven by the Elector of Hannover/King of Britain, supported by France[72], which eventually agreed on paper to a military destruction of the port and harbour of Ostend[73].

Paradoxically, the tensions between Spain and Britain grew stronger than those between Britain and the Emperor. Philip V reclaimed Gibraltar and menaced to retaliate on British contraband trade in violation of the 1713 Utrecht agreements. Consequently, the new French principal minister, Cardinal Fleury (1653-1743), approached the Imperial court. In the Parisian Preliminaries (31 May 1727[74]), a new call for a congress was issued. In exchange for prospects on the recognition of the Pragmatic Sanction at the outcome of the new multilateral round, Charles dropped the Ostend Company, whose permission to trade was suspended for seven years.

3.2. Britain between Spain and Habsburg (1729-1733)

The Congress of Soissons (1728-1729[75]) eventually led to a separate Franco-British-Spanish treaty at Seville (9 November 1729[76]), imposing Spanish garrisons in Italy. Emperor Charles VI being the only party not participating in the treaty, the Spanish court hoped for military action to enforce Don Carlos' rights, within four months after its conclusion. However, Britain nor France were willing to participate in it and hoped to 'extort[77]' Vienna's assent by diplomatic means only. Another round of negotiations

[70] Treaty of Peace between Charles VI and Philip V, Vienna, 30 April/1 May 1725, CUD VIII/2 XXXVI 106.

[71] E.g. 'Les vues de l'Empereur […] sont aussi étendues et aussi dangereuses à l'Europe en général et à notre pays en particulier que celles de Louis XIV' (British Secretary of State Charles Townshend to Robert Walpole, 18 December 1725, cited in Dureng 429. See Brendan Simms 191.

[72] Frederik Dhondt, 'So Great A Revolution: Charles Townshend and the Partition of the Austrian Netherlands, September 1725' XXXVI Dutch Crossing: Journal of Low Countries Studies 50-68.

[73] Dureng 375.

[74] Preliminaries of Peace between Louis XV and Philip V, Paris, 31 May 1727, CUD VIII/2 146.

[75] C. Höfler, *Der Congress von Soissons* (Kaiserlich-Könliglicher Hof- und Staatsdruckerei 1871).

[76] Treaty between Louis XV, Philip V and George II, Seville, 9 November 1729, CUD VIII/2 158. Richard Lodge, 'Presidential Address: The Treaty of Seville (1729)' XVI THRS 1-43.

[77] Lodge, 'English Neutrality' 148.

started, but this time Britain went alone to the Emperor[78], who had sent Austrian troops to seize Parma and Piacenza at Antonio Farnese's decease (20 January 1731). In exchange for British recognition of the Pragmatic Sanction, Charles VI repealed the Ostend Company's Imperial Patent (19 March 1731[79]). Moreover, he promised to give Don Carlos at last the investiture of Parma-Piacenza and Tuscany. The Spanish prince effectively took possession of the former on 9 February 1732.

3.3. War ? (1733-1738)

'Fleury distribua généreusement les couronnes comme s'il se fût agi de hochets d'enfant[80]'

A coincidence, namely the decease of August the Strong, Elector of Saxony and King of Poland[81], on 1 February 1733, brought new tensions to the international system. At this time, France allied itself to Spain, side-lining Britain and the Dutch Republic in a neutrality convention for the Austrian Netherlands (24 November 1733[82]). For the first time in almost twenty years, a French army invaded Germany[83] and a coalition of Spain, Savoy and France attacked all of Habsburg Italy. Regardless of the pretensions of Louis XV' father-in-law Stanislas Leczysnki (1677-1766) on the Polish throne, France wanted the duchy of Lorraine. A historical left-over from the Carolingian middle-empire, this Imperial territory was a thorn in the eastern side of the country. The opportunity presented itself, as the contestation of the Habsburg presence in Italy and the vacancy in Poland offered ample bargaining possibilities.

Deserted by their maritime allies, Charles VI' senescent generals suffered defeat. All of Italy was lost. Consequently, the Emperor treated directly with France (Preliminaries of Vienna, 3 October 1735)[84]. Britain and Holland fruitlessly presented their mediation, while France could count its bounty: in exchange for an untenable Polish throne[85], Fleury installed Stanislas (with an automatic reversion to France) in the duchy of Lorraine, whose duke, Francis Stephen (1708-1765[86]), Maria Theresia's promised husband, was due to succeed to the last Grand Duke of Tuscany[87]. Conversely, to make up for the loss of Tuscany, Don Carlos was promoted King of Naples and Sicily, leaving Parma-Piacenza to Charles VI. Mediation could not have been effective in this context. For Spain, British mediation

[78] This treaty also allowed George II to obtain the investiture for the duchies of Bremen and Verden, which his father bought from Sweden in 1715, a transaction until then never ratified by the Emperor (28 February 1732 Investiture for the Duchies of Bremen and Verden, Vienna, 28 February 1732, Supplément au CUD II-2 416. See G. Mecenseffy, *Karl VI. spanische Bündnispolitik, 1725-1729. Ein Beitrag zur österreichischen Aussenpolitik des 18. Jahrhunderts* (Universitäts-Verlag Wagner 1934) Vaucher 37.

[79] Treaty between Charles VI and George II, 19 March 1731, Vienna, CUD Suppl. II-2 287.

[80] Guy Chaussinand-Nogaret, *Le cardinal de Fleury: le Richelieu de Louis XV* (Payot 2002) 102.

[81] J.L. Sutton, *The King's Honor and the King's Cardinal: the War of the Polish Succession* (Kentucky UP 1980).

[82] Olaf Van Nimwegen, *De republiek der Verenigde Nederlanden als grote mogendheid : buitenlandse politiek en oorlogvoering in de eerste helft van de achttiende eeuw en in het bijzonder tijdens de Oostenrijkse Successieoorlog (1740-1748)* (Bataafsche Leeuw 2002) 67.

[83] Declaration of War by Louis XV against Charles VI, 10 October 1733, Paris, CUD Suppl. II-2 459.

[84] Preliminaries of Peace concluded at Vienna between Charles VI and Louis XV, communicated to George II and the States-General, 3 January 1736, CUD Suppl. II-2 546.

[85] 'On ne peut gueres imaginer de Motif plus frivole que celui que la Couronne de France emprunte de l'Election d'un Roi de Pologne, pour rompre ouvertement le Traité conclu à Bade avec Sa Maj. Imp. le 7. de Sept. 1714' (Imperial Commission Decree on the Motives invoked by France in its Breach of Peace with His Imperial Majesty, Vienna, November 1733).

[86] Renate Zedinger, *Franz Stephan von Lothringen (1708-1765) : Monarch, Manager, Mäzen* (Böhlau 2008).

[87] On 12 July 1737, Francis Stephen took possession of the Grand-Duchy of Tuscany after Gian Gastone de'Medici's (1671-1737) decease.

posed questions of ‘confidence’ and ‘impartiality’[88]. As for the French side, Fleury’s manoeuvring amounted to ‘bamboozle[89]’ the British.

Again, the elaboration of the basic treaty took a couple of years. Not until 1738 were the final acts signed. The final legitimacy for the Italian territories changing sides was not feudal or imperial law anymore. Right of conquest and multilateral state consent (‘convenance’[90]) to international treaty were sufficient, as the following articles demonstrate:

‘L’Empereur consent que le Roi, Beau-Pere de S.M.T.C. sera mis en possession paisible du Duché de Bar, & de ses Dépendances […] De plus, il consent que, dès que le Grand-Duché de Toscane sera échu à la Maison de Lorraine […] le Roi Beau-Père de S.M.T.C. soit encore mis en possession paisible du Duché de Lorraine & de ses Dépendances.’ (art. I)

‘Les Royaumes de Naples & de Sicile appartiendront au Prince qui en est en possession, & qui en sera reconnu Roi par toutes les Puissances qui prendront part à la Pacification.’ (art. II)

However, this should not obscure that Franco-British cooperation continued. Britain stayed aloof[91] from the continent, but was building up confrontation with Spain in the colonies[92]. When it came to tackling Philippe V’s ‘guardacostas’, Britain sought to renew its defensive alliance with France, on the model of those contracted in 1717 and 1725[93].

Conclusion

Regardless of whether this cascade of dispute resolution mechanisms served to ‘postpone war, rather than to avert it[94]’, diplomatic practice gives us insight in the operation of the European diplomatic system in three unusually quiet decades. ‘Balance of Power’ was a matter of interest politics. Its operation, however, was far more subtle than a mechanical reading of events would prove. The rhetorical device of legal language served to elevate treaty arrangements to a higher level, exerting a civilising normative pull on all actors and, thus, possibly making peace last further than its original power foundations.

Or, to put it in Bourdieu’s words: ‘Le moins que puisse faire un juriste, c'est de dire: "C'est bien comme ça, mais c'est encore mieux si je dis que ça doit être comme ça."[95]’.

[88] Vaucher 98.

[89] Lodge, ‘English Neutrality’ 166.

[90] Heinz Duchhardt, *Balance of power und Pentarchie* (Schöningh 1997) 17.

[91] ‘Le Roi a meme affecté une parfaite indifference pour la Pologne, qu'elle etoit trop Eloignée de luy pour la connoitre, ni pour se soucier de la connoitre’ (French Ambassador Chavigny to Secretary of State of Foreign Affairs Chauvelin, London, 30 November 1733, AMAE CP Angleterre, 382, f° 195r°).

[92] Jeremy Black, ‘British neutrality in the war of the Polish succession, 1733-1735’ VIII IHR 345, 361.

[93] E.g. NA SP 78 217, ff. 194r°-204r° (synoptical tables on the negotiation of a new defensive franco-british alliance, comparing with the 1717 and 1725 provisions).

[94] Lodge, ‘English Neutrality in the War of the Polish Succession: A Commentary upon Diplomatic Instructions, Vol. VI, France, 1727-1744’ 170.

[95] Bourdieu 504-505.