

From Contract to Treaty: the Legal Transformation of the Spanish Succession (1659-1713)

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Abstract

The problem of the Spanish Succession kept the European diplomatic system in suspense from 1659 until 1713. Statesmen and diplomats tackled the question. Their practical vision of the law is a necessary complement to legal doctrine. Louis XIV and Emperor Leopold I used incompatible and absolute claims, which started in private law and Spanish succession law. At the Peace of Utrecht, these arguments completely dissolved. The War of The Spanish Succession thus not only redesigned the political map of Europe. It altered the norm hierarchy in public law, strengthening international law as the framework of the “Société des Princes”.

Introduction

The War of the Spanish Succession (1701/1702-1713/1714) redesigned the political map of Europe. It sealed the definitive end of French encirclement by the Spanish Habsburgs. When Louis XIV died in September 1715, the heydays of the Spanish Monarchy were gone and a Bourbon King, his own grandson, reigned in Madrid. Both Spanish and French claims for universal monarchy had come to an endⁱⁱ. The Treaties of Utrecht and Rastadt/Baden created a balance of power on the continent between Versailles and Vienna, which was to last for 30 years. Finally, the war constituted the basis for British dominance as a commercial naval power, at the expense of the Dutch Republic.

However, the War also constituted a milestone for international law, as this article aims to demonstrate. The Spanish Succession was the major legal quarrel of the late seventeenth and early eighteenth century. Even after its solution, it occupied the mind of

the scholar. The originality of the solution proposed by the Treaty of Utrecht was the amendment of the fundamental laws of France and Spain, in order to conform to international realityⁱⁱⁱ. This strengthened the position of international norms, on the basis of changing power relations.

The story of the Spanish Succession occurs at the crossroads of international relations -the playing field of power politics^{iv}- and international law –which aims to theorize and to structure the loose ensemble of sovereign states into a rule-bound international society^v. For the first time since 1648, the so called “Westphalian” system prospered in a peaceful environment^{vi}. The importance of 1648 as a landmark has been overstated in legal literature. Can one actually speak of a new world order after the Thirty Year’s War, if it is followed by 70 years of nearly uninterrupted military conflict over the declining Spanish Empire ? Between 1701 and 1714, thirteen years of armed confrontation^{vii} did not bring a decision. Politicians, diplomats and jurists solved the conflict, not generals and marshals. It is not before 1713 that we can discern an international system, guaranteeing its state participants’ “life, truth and property” for an ensuing period of three decades^{viii}.

Starting with a ticking timebomb in a marriage contract in 1659, the legal schemes to escape private law-based and politically incongruent patrimonial discourse give us proper insight in the *context* that gave birth to the theories of eighteenth-century authors such as Emer de Vattel (1714-1767)^{ix}, Gaspard de Réal de Curban (1682-1752)^x or Johann Jacob Moser (1701-1785)^{xi}.

The theorists of public international law have received perhaps not all, but certainly a substantial part of the necessary attention in legal research^{xii}. However, they operated *outside* the wheels of power and tended to incorporate a normative dimension in their works, which brought them close to political philosophy. They stated how the international system *ought* to work and tried to systematise what was not necessarily congruent in

practice. Their writings should therefore to be reinterpreted in the context of diplomatic practice and general history^{xiii}.

The legal historian cannot limit himself to the law in the books, or, to be more precise, law in the treatises, if he wants to penetrate the working of the international system. If we take the French example, according to Frank Church, legal authors can be blamed for ceasing to be innovators in political theory^{xiv}. However, we should not forget that international law lived in the practice of statecraft, albeit behind the curtain of secrecy and *raison d'état*, without necessarily being brought out into the public printed sphere^{xv}.

In this article, we want to point to the long-term trend in negotiations which leads to the settlement of 1713. A legal interpretation of what was for a long time dismissed as Rankean political history helps us to understand both the modernity and the persistent elder trends in the “legal pluralism” of the 18th century. Power differences establish a norm hierarchy between formal domestic constitutional law, succession law and treaties.

We will proceed chronologically, starting with the 1659 peace treaty of the Pyrenees (I), following the question’s evolution through Louis XIV’s active reign (II) and concluding with the build-up to the 1713 Treaty of Utrecht (III). As the inter-dynastic imbrication of marriages is difficult to grasp without a graphic representation, we included a (simplified) genealogy in annex.

I. The legal origins of a conflict: dowry, testament, custom

“Mit den Pandekten wird die Welt nicht regiert”

Robert von Mohl^{xvi}

A. Hugues de Lionne’s “moyennant”, a French contractual timebomb

When the Thirty Years’ War came to its conclusion in 1648, the pacification of Europe was only partial. France and Spain were still at war in the Rousillon and the Southern Netherlands^{xvii}. It was only with the Treaty of the Pyrenees (7 november 1659) that the antagonists, albeit temporarily, buried the war hatchet.

As a symbol of reconciliation, Louis XIV (1638-1715) and Philip IV of Spain (1605-1665) exchanged the necessary ceremonial formalities for the peace on a platform on the Bidassoa River separating their kingdoms. Their agreement encompassed two themes. First, a peace treaty, ending the Franco-Spanish war that started in 1635^{xviii}, secondly, a Bourbon-Habsburg marriage with lasting consequences for Europe: the union between Louis XIV and the infanta Maria Teresia (1638-1683), eldest daughter to Philip IV.

The Austrian branch of the house of Habsburg, which had been delivering the candidates for the first Infanta’s hand for generations, made peace with the 5 year-old Louis XIV in 1648. Consequently, Vienna left Spain’s “Planet King” Philip IV behind with an insurrection in Portugal and a full-scale war with France on his hands. Thus, when Cardinal Mazarin (1602-1661) and don Luis de Haro (1598-1661) negotiated a peace agreement, the proposal of Maria Teresa’s hand was a possibility.

Consequently, Louis XIV was offered a “stock-option” on the Spanish Monarchy. Controlling Spain, Naples, Sicily, the Tuscan Presidia, Milan, Franche-Comté, the Spanish Netherlands and the overseas colonies, the Spanish Habsburg branch still held its rank as a territorial colossus, notwithstanding its financial and administrative strains^{xix}.

In dynastic practice, marriages between French and Spanish princes had been common. Due to the absence of a rule of female exclusion in Spanish public law, weddings never went ahead without a renunciation clause, whereby the spouse forfeited her claims on the Spanish crown, in exchange for the dowry agreed between her husband and her reigning father^{xx}. Well aware of this practice, Hugues de Lionne (1611-1671), member of the French negotiating team, suggested the insertion of a supplementary condition in the dowry clause of the marriage contract of 1659. Maria Teresa's renunciation was only to be effective "moyennant" the payment of 500 000 écus as a dowry (art. 4^{xxi}). This argument was upheld by French diplomats throughout the succession crisis and the negotiations, until the end of the War. Maria Teresa could not be excluded from her father's succession. Her renunciation was an obligation exclusively caused by and tied to the payment of a considerable sum of money. This payment was never executed by the Spanish king. Consequently, the *exception non adimpleti contractus* came into play: when Spain defaulted on its obligation, the remainder of the contractual obligations *stricti iuris* ceased to exist^{xxii}.

In contrast to the French interpretation, the Spanish negotiators firmly insisted on the limited character of the "moyennant"-clause. The Habsburg Monarchy would never have agreed to a text if it were to contain this reversal, threatening the unity of inheritance of its composite territories. Article 4 of the marriage contract only concerned private property. Article 5, where the King's public domain^{xxiii} was concerned, expressly stated Maria Teresa's exclusion, without a countervailing obligation to pay. Moreover, even in the restricted case of the private renunciation, the conditionality of the exclusion could not affect the obligations of Maria Teresa: the marriage contract was a *contractus bonae fidei*. Obligations originating in it stood on their own: the debtor could not be liberated by the non-performance of his contract partner^{xxiv}.

The French interpretation ignored the Spanish private/public distinction. According to French public law, public and private royal domain were assimilated. The

private obligation to pay the dowry could not be interpreted as separated from the public renunciation. The conditionality of Maria Teresa's exclusion thus applies to the public domain as well^{xxv}.

B. Keeping the House of Austria intact: Philip IV's Testament (1665)

After solemn registration of the Pyrenees Treaty and the subsequent renunciations in the Cortes as well as in the Parlement de Paris, the course of events deteriorated the Madrién position. Philip IV had only one male heir in 1659, the infant Felipe Próspero, born two years earlier. In September 1661, this prince died, creating an opportunity for Louis XIV to claim the entire Spanish Monarchy on behalf of his own son, Louis, the "Grand Dauphin"^{xxvi}, born on the first of November 1661.

The birth of the infant Carlos José (5th of November 1661) came as a general relief in Madrid. Although the new born's health was in a very poor state, a characteristic to remain constant during the 39 remaining years, the King of Spain had produced a new male heir^{xxvii}.

In an attempt to revive intra-Habsburg dynastic relations, Emperor Leopold I (1640-1705^{xxviii}) espoused the 12 year-old Infanta Margareta Teresa, the older sister of the infant Carlos (1651-1673) in 1666. In a secret annex to the marriage contract (18 December 1663^{xxix}), Philip IV obliged the Emperor and his new bride to send their second son to Madrid for his education and thus to found a second branch of the Habsburg Monarchy in the Southern Netherlands^{xxx}.

On 17 September 1665, two years after the redaction of Margareta Teresa's Marriage Contract, Philip IV died. In order to buttress the Spanish succession against French claims, a council of Spanish theologians and jurists repeated their interpretation of the Marriage Contract in a unilateral declaration in the dying Monarch's testament^{xxxi}. Following his predecessor Philip III's will, consideration 15 explicitly made the legal regime

of Queen Anna of Austria and Louis XIII's marriage, whose contract contained the identical articles V and VI, applicable to Maria Teresa's union^{xxxii}. Maria Teresa could only be reinstated as an heir to the throne in case of childlessness (which equalled the decease of the Grand Dauphin). As to the 500 000 écus dowry, the King urged his successor to pay the due sum^{xxxiii}.

For Madrid, strengthening the house of Habsburg was the core of the Spanish Succession^{xxxiv}. Since the days of Joan the Mad and Philip the Fair and the subsequent scission of the two branches between Charles V and Ferdinand I, dynastic loyalty had not been broken. In view of Maria Teresa's union with Louis XIV, the argument needed to be repeated, making clear that the offering of her hand to the French king in 1659 had been an exception to a general rule.

Consequently, since Maria Teresa was excluded, in the case of Carlos' decease, the Regency Council (established to exercise authority jointly with the relatively young widow Maria-Anna^{xxxv}) had to call on his older sister Margareta Teresa and her descendants^{xxxvi}. Here was the reason for the delay of the Austrian marriage (18 December 1663-25 April 1666). "Étant fort petite et délicate par son âge"^{xxxvii}, Margareta Teresa had to remain in Madrid until light would have been shed on the survival chances of the struggling Carlos José.

After Margareta Teresa, two further categories of successors were named:

- the descendants of Infanta Maria-Anna (1606-1646), sister to Philip IV and the spouse of the late Holy Roman Emperor Ferdinand III (1608-1657^{xxxviii}), inclosing those of her son, Emperor Leopold I, from his subsequent marriages, in case Margareta Teresa would not give birth to an heir

- the House of Savoy^{xxxix}.

C. Low Countries customs: the legal war of devolution (1667-1668)^{xi}

“En pays de dévolution, on ne peut abroger la loi par contrat de mariage : un mariage, même royal, est un acte commun”

Antoine Bilain, *Traité des droits de la reine* (1667)^{xli}

“Que si ce n'est pas une rupture, c'est une intrusion violente : si ce n'est pas une Guerre, c'est un brigandage & une piraterie ; & si ce n'est pas une infraction de la Paix, c'est un injuste attentat qui choque toutes les Loix & toutes les formes [...] Il n'y a donc que les Traictés publics qui puissent mettre des bornes à ses prétentions”

Franz Paul von Lisola, *Bouclier d'estat* (1667)^{xlii}

Following Philip IV's death, Hugues de Lionne could activate his carefully inserted “moyennant”-clause. Maria Teresia was the most senior surviving heir and the Salic Law, excluding women from succession, did not apply in the Spanish kingdoms. Since 1663, a team of jurists had been operating in the Louvre on order of Jean-Baptiste Colbert, Louis XIV's “contrôleur-général des finances” and prepared a propaganda storm. The *Traité des droits de la reine très-chrétienne*^{xliii}, compiled under the name of Antoine Bilain, defended the French thesis with two core arguments.

- an application of the causal theory in the private law of obligations to Maria Teresa's renunciation^{xliv}
- in addition to the “moyennant”-clause, an appeal to customary law.

As a daughter born from Philip IV's first marriage, Maria Teresia could rightfully claim a series of counties and duchies in the Southern Netherlands on the basis of the law of devolution^{xlv}. In force of the latter, children from the second marriage could not inherit any territory held by the common parent up to the decease of his first spouse, since the “propriété nue” had to remain with the children from the first marriage, to prevent them from suffering any material discrimination.

The legally more coherent attack on the dowry-settlement came from the angle Hugues de Lionne prepared eight years earlier. The renunciation was a contractual

obligation, which had only come into being because of a countervailing obligation freely consented to by Philip IV (and reiterated in his 1665 Testament): the payment of 500 000 écus. The fixed calendar for the payments had not been respected (*dies interpellat pro homine*^{xlvi}), which enabled the French court to invoke the *exceptio non adimpleti contractus* in order to liberate itself from the renunciation. Louis XIV could then dispense of the obligation of sending a formal declaration of war. He merely took possession, in his spouse's name, of what rightfully belonged to her as her father's daughter.

In answer to Bilain's pamphlet, the imperial diplomat Franz Paul von Lisola (1613-1674^{xlvii}) brandished his *Bouclier d'Etat* against the French claims. It was not the only publication^{xlviii} attacking the French private law-based reasoning, but we see it as the most pertinent to the general development of international public law.

Lisola reformulated arguments used by others. For instance, the autonomy of public and private law, with respect to Charles V's *Pragmatic Sanction*, which prohibited the fragmented inheritance of the Southern Netherlands. But the main maxim of his writings was a strong claim against French universal monarchy. When tensions around the Succession were again imminent in 1700, Lisola's text was reprinted and most of his arguments were repeated in new writings^{xlix}. In his pamphlet, we find the theoretical basis of the supremacy of the international legal order over the domestic.

The dispute the French king wanted to settle by arms, existed between sovereigns. They did not have to count with a superior judicial authority, unless Louis wanted to act on behalf of his wife as a vassal to the German Emperor, in which case he could take his demand before the Reichskammergericht¹. The Imperial origins of the law of devolution being one of the French arguments in favour of Maria Teresia's rights as first born daughter, this should have been the most appropriate way to deal with the case on a private law basis (as the French pamphlet argued).

However, as the Pragmatic Sanction of 1549 and the Transaction of Augsburg in 1548, detaching the Southern Netherlands as a whole from most of their imperial obligations, had already shown, these private norms were not pertinent^{di}. Moreover, Maria Teresia's renunciation, which was unconditional for the public possessions^{lii} she could inherit from Philip IV, was linked to article 33 of the Peace of the Pyrenees.

The king of France had the sovereign right to go to war, tearing up the peace treaty of the Pyrenees, or to settle by another treaty. Treaties, however, were in no way similar to private legal acts. They were concluded in order to avert war. Since war was the gravest of all ills that could befall a nation, the norms that averted it had a higher legal authority than any other. Public International law was a forum of its own. If the French king felt dissatisfied with a sovereign act of one of his fellow monarchs, he had to negotiate or to declare war formally.

However, taking into account the chaotic state of nature sovereigns are in with respect to each other, it was only through mutual arrangement that an international society could be built. The monarch who exposed his infidelity as a contractual partner, threatened the overall security the system ought to guarantee to every participant^{liii}. Lisola explained this argument with respect to the *de facto* political bargain behind the Peace of the Pyrenees. If Louis XIV had to accept Maria Teresia's renunciation, it was because of a countervailing concession by Philip IV. In fact, in 1659, Spain had ceded considerable parts of the Southern Netherlands (Arras, Le Quesnoy, Landrecies) and the Roussillon to France.

II. Treaties as a solution: partition or go to war

“Was hat die Staatskunst nicht alles versucht, um die spanische Erbfolge im voraus zu regeln, und wie haben doch die Ereignisse die Pläne der Minister auf den Kopf gestellt!”

Frederick II of Prussia (1712-1786), *Politisches Testament* (1768^{liv})

After the War of Devolution, Charles II sat infirmly on the Spanish throne, dominated by his Austrian mother Maria Anna of Austria and the revolting “Grandes”^{lv}. Thirty years later, the situation was not much more favourable. The declining health of the Spanish sovereign reached a point where Louis XIV and William III, stadholder in the Republic but since 1689 King of England, Scotland and Ireland, felt able to divide Charles’ succession between the Austrian and French pretenders, over the head of his Spanish counsellors.

At this point, the legal value underpinning a political compromise was no longer the respect of Philip IV’s will or of Maria Teresia’s rights. The overall European balance of power, which had been invoked by Lisola to stop Louis XIV, “engloutisseur de pays à tort et à travers^{lvi}”, which had mobilised the ensuing alliances against him, imposed a fair and equal division of the Spanish Empire.

A. Spain discarded: the Bavarian partition (1697-1699)

An arrangement on the Spanish Succession between the still formidable French army and the Maritime Powers equalled a true European settlement^{lvii}. “The French tyrant^{lviii}” was a player with a vested interest in the Spanish Succession. However, it was in his full interest to diminish his claims and to settle for a secure, even if less important, part of the inheritance, if this meant diminishing the Austrian Habsburg booty.

Louis and William discarded all of the previous norms, because it was necessary to conserve the tranquillity of Europe recently established at the peace of Rijswijk^{lix}. The

infant Prince Joseph Ferdinand of Bavaria, born in 1692 was to succeed to Charles II in Madrid, with the exception of the territories assigned to the French Grand Dauphin and the Austrian Archduke Charles (1683-1740) (art. V). Although he was a grandson of Margareta Teresia and Emperor Leopold, he was, nevertheless, in the first place the heir to the house of Wittelsbach. Joseph Ferdinand thus covered Dutch and British overseas trade and strategic interests, guaranteeing a barrier against France^{lx}. In exchange, Louis claimed the Kingdoms of Naples and Sicily, the Tuscan presidia, Finale, Guipuzcoa and parts of Navarra, establishing a strong French position in the Mediterranean (art. IV)^{lxi}. These territories were to be ruled by the Grand Dauphin, who would unite them to France once he became king. The Austrian candidate had to content himself with the duchy of Milan (art. VI).

This agreement was acceptable to Louis. But, most important of all, it was *enforceable* (art. IX)^{lxii}, since it was backed by both London and The Hague, who provided the treasury for every alliance against Versailles. Charles' protest from Madrid against the division of his inheritance did not have any effect^{lxiii}. Moreover, Maria Antonia, Joseph Ferdinand's mother and Margareta Teresia's daughter, had renounced to her rights to the Spanish throne when she married Elector Maximilian II Emmanuel of Bavaria in 1685^{lxiv}. Neither of these unilateral objections to the treaty stood in the way of its realisation.

The imperial reaction was furious. However, Vienna did not always refuse a multilateral settlement of the Spanish question. Austrian opposition to the Franco-British proposals in 1697 sharply contrasted with the Emperor's attitude during the Devolution War. In January 1668, Louis XIV's extraordinary envoy de Grémonville managed to sign a secret bilateral Franco-Austrian partition deal^{lxv}. Willing to leave the Spanish Netherlands to France, Leopold was mainly interested in the acquisition of Italy.

The legal importance of the Grémonville treaty was constituted by the fact that it pushed the Spanish Succession out of the realm of private law (the appeal to the Law of Devolution formulated in 1667) and of Spanish national public law (where the Testament of Philip IV of 1665 commanded the unitary succession and Maria Teresia's renunciation of 1660 excluded the Bourbons). Leopold explicitly recognized the right of the Dauphin (born in 1661) to succeed to Charles II, by virtue of his direct descendance from Philip IV, his grandfather. He thereby attested the unreasonableness of an Austrian claim on the whole Spanish inheritance, to the exclusion of the French pretender.

At the time of the Grémonville Treaty, a quick succession was expected. If Charles II would have passed away, this arrangement between the two pretenders, which explicitly named *la conservation de l'Europe et de la chrétienté*^{lxvi} as a pretext for the division of the Spanish lands by treaty, would have had a very good chance of coming into effect. The binary choice was clear: partition or go to war. As Lisola indicated, the weight of this choice was sufficient to cast aside or to modify the norms from other legal orders as prestigious as fundamental (succession) laws.

B. The impossible triangular balance (1699-1700)

“La perte du petit Ferdinand-Joseph était une véritable calamité pour l'Europe, car elle ruinait la base d'un projet d'équilibre continental”

Arsène Legrelle^{lxvii}

When Joseph Ferdinand suddenly succumbed to illness in Brussels at the age of six, the whole partition effort had to start over again. But the context made a new binary partition between Vienna and Versailles impossible.

- (1) In 1699, geopolitical circumstances had become very favourable to the house of Habsburg^{lxviii}. Leopold I no longer thought of acquiescence in the succession quarrel. The Treaty of Rijswijk kept Louis XIV out of the Holy Roman Empire

in the West. Turkish Hungary was regained with the Treaty of Carlowitz, more than doubling the hereditary lands in surface. The Emperor could now aspire to become Louis XIV's *de facto* equal. Going to war against France was not any longer a remote possibility, but a real one. Archduke Charles had to found a second branch of the dynasty in Madrid, taking the whole inheritance for Habsburg, including the Italian possessions.

(2) The second partition treaty^{lxix} was also more contentious in the Franco-English relationship, since Louis and William had to strike a balance between the two direct competitors, Louis of France and Charles of Habsburg. If the possession of the Belgian buffer and control of the maritime links to the colonies (which were absolutely vital to William) could not fall into French hands, this meant compensations had to be found in Italy^{lxx}. Clearly, this division did not take account of the prime strategic interests of Emperor Leopold, who was now stripped off the Italian territories. William thus left the door open for an acrimonious competition between the unsatisfied Emperor and Versailles, and to a possible breakdown of the partition system^{lxxi}.

(3) In a triangular relationship between Leopold, William and Louis, one party had to come out as unsatisfied. Due to the absence of the Bavarian alternative, the French part of the spoils increased, to the detriment of the Emperor, who could direct his diplomatic initiatives at the Maritime Powers and detach them from the agreement with France.

C. Pyrrhic victory in Madrid (1697-1700): Louis XIV prepares for war

“Soyez bon Espagnol, c’est présentement votre premier devoir ; mais souvenez-vous que vous êtes né Français pour entretenir l’union entre les deux

nations ; c'est le moyen de les rendre heureuses et de
conserver la paix de l'Europe”

Louis XIV to Philip of Anjou, 16.XI.1700^{lxxii}

The monarchs did not follow the partition treaties in 1700. Even worse, another pan-European conflict erupted, causing hundreds of thousands of deaths, precisely what Louis XIV and William III had intended to avoid. Mistrust, however, was present on both sides. After Joseph Ferdinand's decease, the French court did not fully engage in negotiations with William. A second diplomatic stage opened in Spain, creating a ferocious opposition between Austrian and French ministers. Charles II's court resented the Franco-English partition game and still stuck to the theatre of national public law to settle the inheritance.

Leopold counted on his ambassador to make Charles II confirm Philip IV's will in his testament, to have a valid pretext to get around the second partition treaty. However, French diplomats achieved such successes in networking, that the “Austrian party” around Charles' second wife, Anna-Maria von Neubourg, lost ground with the “Grande” elite. Capturing important pieces on the chessboard like cardinal Portocarrero of Toledo (1635-1709), the French extraordinary envoy de Blécourt succeeded in thwarting the Habsburg plan.

On the second of October 1700, Charles II signed his last testament^{lxxiii}, repealing the renunciation of the late Maria Teresia^{lxxiv}. The document was drafted to the benefit of Philip of Anjou (1682-1746)^{lxxv}, second grandson to Louis XIV. Its motivation was entirely silent on the legal grounds on the basis of which Charles II could put aside Philip IV's will. The decision was purely political: no argument was given why the union of France and Spain would not be less prejudicial in 1700, than in 1665, 1659 or 1615. Moreover, Philip was to become Charles' first successor in *all* of his domains, which ran against the *opinion* of all major powers^{lxxvi}.

The War of the Spanish Succession had virtually begun. An impatient Leopold I dispatched Eugen of Savoy with 30 000 troops to reclaim the duchy of Milan. The Emperor accorded its investiture to his own son Archduke Charles in March 1701 and firmly brandished his absolute claim to the whole inheritance, six months before the conclusion of the Grand Alliance of The Hague^{lxxvii}. Preparing to fight a European war with, rather than against the Spanish, Louis XIV accepted the testament, throwing years of negotiation away^{lxxviii}. He astutely claimed the French *asiento de negros* for the Guinea Company^{lxxix} and sent Marchal Boufflers to occupy the Dutch Barrier fortresses in the Southern Netherlands (February 1701), on invitation of his 17-year old grandson, the new ruler of Spain.

In spite of the early recognition of Philip V by the States-General in The Hague, William III advantageously used Louis XIV's continuing support of the chased catholic Stuart monarchy to swing both of the Houses of Parliament on his side. The Spanish Netherlands, taken away by Boufflers, should serve as a *repagulum, vulgo Barrière* to the Republic^{lxxx}. On the 15th of May 1702, the Grand Alliance of The Hague declared war on Louis, with officially nothing but the conservation of Europe's equilibrium and tranquillity in mind. The Emperor was to receive *aequa et rationi conveniens satisfactio* in the question of the Spanish Succession^{lxxxi}.

III. Compromise through equilibrium (1702-1713/1714)

“Vous avouerez, Monsieur, que jamais monarque n’étant fait pour l’amour de la paix, ny porté aussy loin les facilitez pour le retablissement du repos general de l’Europe”

Torcy to Bolingbroke, 7.VIII.1712^{lxxxii}

Military success changed sides quite often during the conflict^{lxxxiii}. Given the practical constraints brought about by the cold season, the winter months left manoeuvring room for every participant’s diplomacy to destabilise the opponent. French diplomats targeted the Dutch Republic in the first place. William III deceased early in the war (8 March 1702), even before it was officially declared. A subtle rift arose between Britain and the Republic: national interests of both maritime powers were incompatible in the long run^{lxxxiv}. Therefore, the regents of the province of Holland, who adhered to the Partition treaties of 1697 and 1700, seemed the perfect audience for a reasonable exit out of a costly and useless war.

A. Lost opportunities: the case of Holland, 1707-1708

Between the campaigns of 1707 and 1708^{lxxxv}, Colbert de Torcy tried to approach the Dutch Regents through an unconventional channel. Tradesman Nicolas Mesnager (1658-1714) counted on the political divisions in the Dutch Republic. On one hand, the evermore pressing cost of the war^{lxxxvi}, on the other, the growing competitive disadvantage caused by booming British trade^{lxxxvii}, diminished the merchants’ interest in pursuing it against the French, from whom few was to be gained.

At that time, accepting the military *status quo* of 1707, which equalled leaving the Italian territories of the Spanish Monarchy to Charles of Austria^{lxxxviii}, and Spain and the colonies to Philip V^{lxxxix}, was not prejudicial to the prosperity of the Dutch. A multilateral treaty^{xc} should guarantee all nations of Europe access to the port of Cadiz, the gateway to

Spanish America and the Indies. At the same time, Mesnager assured Versailles that France could well have the upper hand on Spanish commerce^{xci}.

In spite of Mesnager's orientations, two factors prevented deeper discussion. Internally, a deliberate violation of the negotiations' secret by Michel Chamillart (1652-1721), War Secretary and a political rival to Torcy^{xcii}. Externally, Dutch nervousness at misleading the British allies put an end to the informal talks^{xciii}. This refusal, repeated in subsequent negotiations^{xciv}, was to prove a fatal error to the Republic, since it found itself overtaken by Britain on the seas and exhausted because of the war^{xcv}.

B. The Franco-British “revirement”, 1710-1711

While combat was raging in the North of France, in Spain, on the Rhine and in the colonies, the stubborn Dutch refusal between the campaigns was to be heavily paid^{xcvi}. Exploiting British political turmoil, Nicolas Mesnager extracted a deal out of the victorious Tory ministry in 1711, applying the principles of the earlier partitions. At this point, international law finally acquired its autonomy in the question of the Spanish Succession. Could a solution be imposed ignoring all of the fastidious national succession norms, even though it failed ten years earlier?

The Preliminaries concluded by Nicolas Mesnager and Henry St-John^{xcvii} in November 1711 and the Franco-English entente were as important to the European State System as the “Diplomatic Revolution” of 1756^{xcviii}. By this agreement^{xcix}, France accepted the British barrier in the Southern Netherlands, its commercial ambitions in the New World and the Protestant succession^c. In exchange, Britain ratified Louis' acquisitions up to 1697 and the French armed North-Eastern frontier. For the sake of the European Balance, British diplomacy openly left the House of Austria, the majority of German princes and the Dutch Republic to fight Louis XIV's armies alone^{ci}.

Archduke Charles of Austria, who had been unable to conquer the whole of Spain, was elected Holy Roman Emperor after the decease of his brother Joseph I (17 April

1711^{ci}). De facto, Britain chose the partition solution it advocated in 1697 and 1700. Not only French military resilience^{ciii}, but most of all the physical and resurrection of Charles V's sixteenth-century Empire in the person of the new Emperor-King Charles VI worked against dynastic Habsburg ambition.

C. All successions internationalised, 1712-1714

“D’autant que la Guerre, que la présente Paix doit éteindre, a été allumée principalement, parce que la seureté et la liberté de l’Europe ne pouvoient pas absolument souffrir que les Couronnes de France & d’Espagne fussent réunies sous une même teste, & que sur les instances de Sa Majesté Britannique, & du consentement tant de S.M.T.C. que de S.M. Cath. on est enfin parvenu, par un effet de la Providence Divine, à prévenir ce mal pour tous les tems à venir, moiennant des Rénonciations conçues dans la meilleure forme, & faites en la manière la plus solennelle.”

Art. VI, French/British Treaty of Peace^{civ}

The political Franco-British compromise, based on trade and territorial balance, was extended to the rest of Europe by the treaties of Utrecht of 11 April 1713^{cv}. At the end of 1713, Eugene of Savoy and Marshal Villars began negotiations between France and the Empire at Rastadt^{cvi}. The territorial concrete changes are of minor interest to the development of this article^{cvi}. However, the way in which stabilisation was achieved, shows a radically different solution to dynastic problems:

(1) As a counterpart to the international recognition of Philip on the Spanish throne, both he and Maria Teresia's remaining descendants had to renounce their incompatible claims on either of the Bourbon inheritances (cf. quotation above). The Dukes of Orléans (Louis XIV's younger brother) and Berry (Philip's younger brother) had to make a solemn declaration, registered by the Parliament of Paris^{cvi}. Philip had to do the same before the Cortes^{cix}. These documents were but a formal domestic translation of an

international agreement, as was already foreseen in the 1698 partition treaty between William III and Louis XIV^{cx}.

(2) In addition to this, the conclusion of the Spanish Succession question internationally fixed the case of the royal succession in Britain, where Queen Anne (1664-1714) had no Protestant heir^{cxⁱ}. Just as Philip IV's testament was insufficient to guarantee the Spanish Succession, the 1701 Act of Settlement needed international approval. In the view of the Jacobite party, which was used by Louis XIV during the war as a destabilising element behind enemy lines, the arrival of Georg of Hannover (1660-1727) ran contrary to the normal succession rules^{cxⁱⁱ}.

(3) When we turn to the situation of the Habsburg Emperor (the partner least willing to accept an international solution to the Spanish problem), the same pattern imposed itself. Emperor Charles VI wanted preferential treatment for his daughters, to the detriment of those of his older brother, the late Emperor Joseph I. Internal recognition of the exercise of centralized authority implied the acceptance of the Emperor's own 1713 "Pragmatic Sanction"^{cxⁱⁱⁱ} by all of the Habsburg lands in their State Assemblies. In a tiresome and self-torturing quest, Charles, ironically the symbol of unilateral and absolute claims in the Spanish Succession, needed to get this approved by the main international players as well. Since succession disputes were international, the norms governing them needed to be touched upon by every actor. As Kunisch^{cx^{iv}} remarks, the movement in which Charles wanted to put his own daughters before those of his late brother Joseph, was exemplary of a larger process, touching all European powers. Even the Emperor, who traditionally held a superior position in the European concert^{cx^v}, had to conform to this.

Conclusion: the legal shadow of the Spanish Succession

“C'est une erreur qui vient de ce que ce Jurisconsulte raisonnoit, dans une matière du Droit des Gens, sur les principes du Droit Civil qui n'y ont aucune application. Mille Ecrivains François ont copié cette erreur de Bodin.”

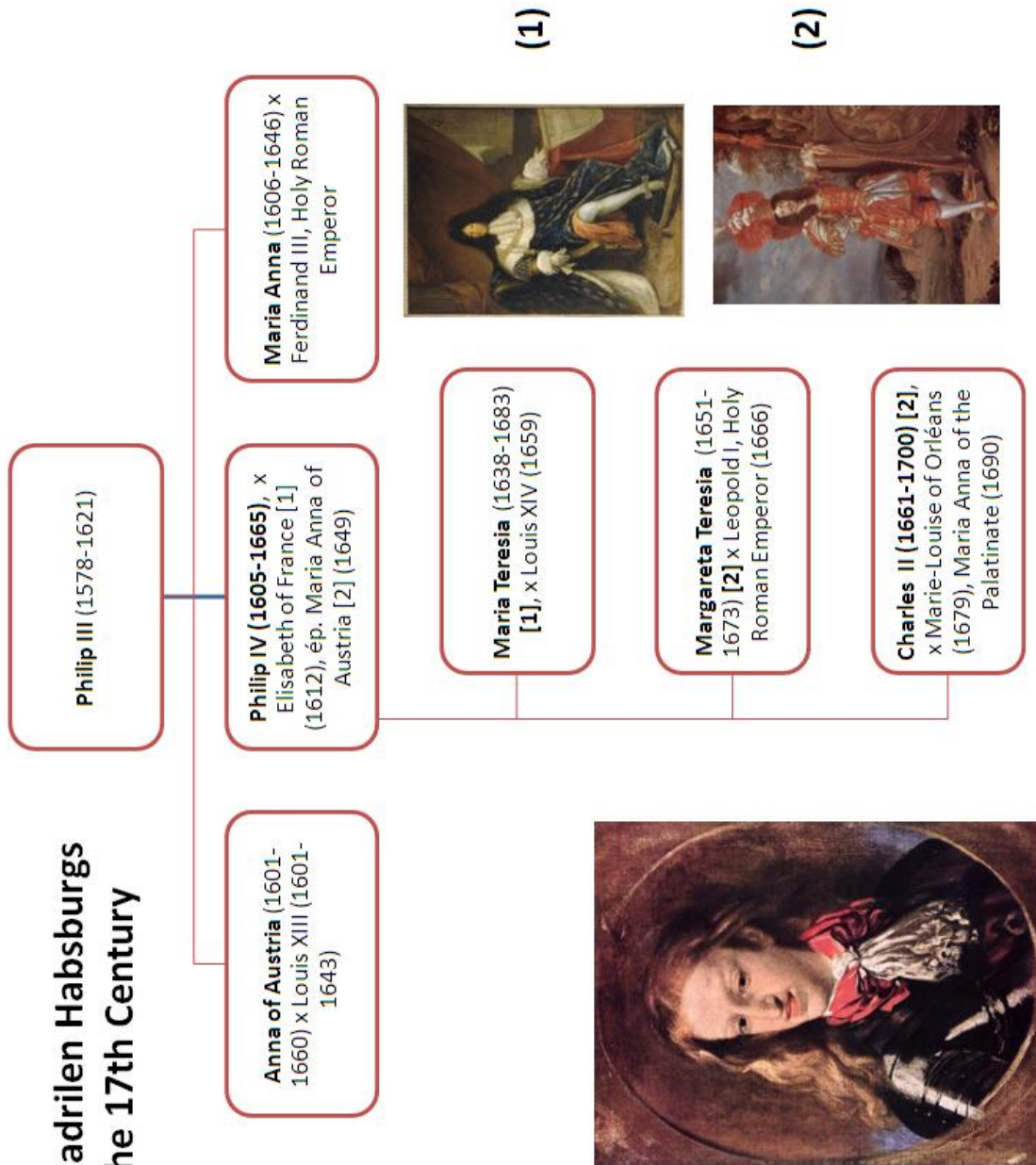
Réal de Curban (1764), condemning the elevation of the *lois fondamentales* above treaty obligations^{cxvi}

Earlier in our present contribution, in his devastating attack on Bilain's devolution pamphlet (1667), Lisola argued that the French King made an error in the choice of his forum. Private persons and Monarchs did not pass before the same judges and they did not obey to the same laws. Violate a treaty, whole societies go down in flames. Violate a contract, be judged in court. In essence, the War of the Spanish Succession demonstrated that no sovereign could get his way with a distorted unilateral claim as if he would have been but one of his subjects quarrelling over an inheritance.

This applied as well to the French, as to the Austrian pretentions. Even the most powerful sovereigns could not withstand the whole of Europe. France failed to claim military victory, even in association with the Spanish Bourbons. Austria and the Republic could not beat France without British assistance. A transgressor could be sanctioned by the actors of the European "Anarchical Society", but only in a continent-wide war (1702-1713/1714), which was to be avoided in any case after a century of almost continuous warfare^{cxvii}.

Thus, geopolitical giants could not unilaterally decide international problems, as Philip IV and Charles II tried to in their respective wills, affirming domestic theoretical indivisibility over political reality; nor could they practice legal cherry-picking as Louis did in the War of Devolution and Leopold with his March 1701 claim on Milan. Even if the Utrecht and Rastadt Treaties resided politically on a bilateral agreement, they made a generalised application of the core European norm in international relations: the avoidance of hegemony, and thus the need to continuously manage a delicate balance between multiple actors. In order to achieve this, actors needed to frame their demands in mutually accepted terms: the legal language of treaties.

The Madrilen Habsburgs in the 17th Century



Appendix: genealogy of the Madrilen Habsburgs in the 17th century

ⁱ We would like to thank Professors D. Heirbaut and G. Martyn for their constructive remarks to our draft.

ⁱⁱ Franz Bosbach, *Monarchia universalis. Ein politischer Leitbegriff der frühen Neuzeit* (Göttingen: Vandenhoeck & Ruprecht, 1988), p. 122-123.

ⁱⁱⁱ Heinhard Steiger, 'Rechtliche Strukturen der europäischen Staatenordnung 1648-1792', *Zeitschrift für ausländisches Öffentliches Recht und Völkerrecht*, Vol. LIX (1999), p. 609-649.

^{iv} Johannes Kunisch, *Staatsverfassung und Mächtepolitik* (Berlin: Duncker & Humblot, 1979).

^v Hedley Bull, "Society and anarchy in international relations", in: H. Butterfield and M. Wight (eds.), *Diplomatic Investigations: essays in theory of international politics*, (London: Allen & Unwin, 1966), p. 39.

^{vi} Heinhard Steiger, *Rechtliche Strukturen...*, p. 622.

^{vii} J. Falkner, *Great and Glorious Days: The Duke of Marlborough's Battles 1704-09* (London: Spellmount, 2003); Ciro Paoletti, *Il Principe Eugenio di Savoia* (Roma: Stato Maggiore dell'Esercito, 2001). The overall attention for battles in the War of the Spanish Succession is misleading. Fundamentally, none of the military confrontations was more decisive than those of the 17th Century (Martin L. Van Creveld, *Supplying war: logistics from Wallenstein to Patton* (Cambridge: Cambridge University Press, 1977), p. 25; Brent Nosworthy, *The anatomy of victory: battle tactics, 1689-1763* (New York: Hippocrene Books, 1992), p. 72-73).

^{viii} Hedley Bull, *The anarchical society: a study of order in world politics* (London: Macmillan, 1977), p. 4-5. "Life" consisting in existential security through peace and the avoidance of warfare, "truth" in respecting international agreements, "property" in the stability of the main territorial division.

^{ix} Emer de Vattel, *Le droit des gens ou principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains* (Buffalo: Hein, 1995 [1758]), 3 vol.; Emmanuelle Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique*, (Paris: Pédone, 1998), 490 p.

^x Gabriel de Réal de Curban, *La science du gouvernement – V: le droit des gens* (Paris: les libraires associés, 1764).

^{xi} Johann Jacob Moser, *Grund-Sätze des jetzt-üblichen europäischen Völker-Rechts in Friedens-Zeiten* (Hanau 1750), 615 p.

^{xii} E.g. Dominique Gaurier, *Histoire du droit international* (Rennes: Presses Universitaires de Rennes, 2005); Jean-Mathieu Mattei, *Histoire du droit de la guerre 1700-1819* (Aix-en-Provence: Presses Universitaires d'Aix-Marseille, 2006).

^{xiii} Authors such as Leibniz or Pufendorf emerged from a specific German political (Hanoverian) situation, which made their immediate impact on the negotiations in the present article very uncertain. Pufendorf benefitted from the tolerant and open court culture of the Brunswick-Lüneburgs, but it is not clear if he influenced George I of Great Britain/Hannover's political concepts at all (Knud Haakonssen, ed., *Grotius, Pufendorf and modern natural law*, (Ashgate: Aldershot, 1999).

^{xiv} Frank Church, 'The Decline of the French Jurists as Political Theorists, 1660-1789', *French Historical Studies*, Vol. V, No. 1 (Spring 1967), p. 1-40.

^{xv} John C. Rule, 'Louis XIV, Roi-bureaucrate', in John C. Rule, (ed.), *Louis XIV and the craft of kingship*, (Columbus: Ohio University Press, 1969), p. 1-101.

^{xvi} Robert von Mohl, *Die Geschichte und Litteratur der Staatswissenschaften*, III, (Erlangen: Enke, 1858), p. 719.

^{xvii} René Vermeir, *In staat van oorlog: Filips IV en de zuidelijke Nederlanden, 1629-1648* (Maastricht: Shaker, 2001), XXIX + 341 p.

^{xviii} Randall Lesaffer, 'Defensive warfare, prevention and hegemony: The justifications for the Franco-Spanish War of 1635', *IIIJ Working Paper* 2006, 8.

^{xix} R. A. Stradling, *Europe and the decline of Spain: a study of the Spanish system, 1580-1720* (London: Allen & Unwin, 1981), 222 p.

^{xx} Lucien Bély, *La société des princes XVIe-XVIIIe siècle*, Paris 1999, p. 127. Laurent Mayali, *Droit savant et coutumes. L'exclusion des filles dotées, XIIe-XVe siècles* (Frankfurt am Main: Klostermann, 1987), VIII + 128 p.

^{xxi} "[...] En sorte que l'entier payement de 500 000 écus d'or ou leur juste valeur, sera fait en dix huit mois de temps: et que moyennant le payement effectif fait à Sa Majesté Très Chrétienne de cette somme aux termes qu'il a été dit, la Sérénissime Infante se tiendra pour contente et se contentera de cette dot, sans que par cy-après elle puisse alléguer aucun sien autre droit - ni tenter aucune autre action ou demande, prétendant qu'il lui appartienne ou puisse appartenir autres plus grans biens, droits, raisons et actions pour cause des héritages et plus grandes successions de leurs personnes ou en quelque autre manière, ou pour quelque cause et titre que ce soit, soit qu'Elle le scût ou qu'elle l'ignorât, attendu que de quelque qualité et condition que les choses ci-dessus soient, Elle en doit demeurer excluse à jamais avec toute sa postérité masculine et féminine, ensemble de tous les états et dominations d'Espagne, à la charge néanmoins que si Elle demeure veuve sans enfans du Roy Très Chrétien, elle rentrera dans tous ses droits et sera libre et franche de ces clauses, comme si elles n'avaient point été stipulées" (published in Pierre Le Bailly, *Louis XIV et la Flandre, problèmes économiques, prétextes juridiques* (Paris: Université de Paris, 1970), p. 157-158). (our underlining)

^{xxii} Domat's theory of synallagmatic contract was not taught in France in the 1660s, nor was this the case with Pothier's "cause honnête". Le Bailly (p. 172-174) ascribes the invocation by Bilain's team of the *exceptio non adimpleti contractus* to a combination of arguments drawn from Baldus (an obligation can be *nudum a solemnitate, sed non nudum a causa*) and Du Moulin (*payer acquit de la charge et précède la jouissance du profit*).

^{xxiii} "royaumes, Etats, seigneuries, dominations, provinces, îles adjacentes, fiefs, capitaineries et frontières" (ibid.).

^{xxiv} A confirmation of this opinion can be found in Philip IV's will (cf. infra), consideration 16, where it is argued that Charles II should pay the dowry, although in Philip's view, Maria Teresia's renunciation was never delivered in due form by the French court.

^{xxv} Bély, *La société des princes...*, p. 206-208.

^{xxvi} Matthieu Lahaye, 'Louis Ier d'Espagne (1661-1700): essai sur une virtualité politique', *Revue historique*, Vol. 647, No. 3 (Fall 2008) p. 605-626.

^{xxvii} Philip IV's second spouse, Queen Maria Anna (1635-1696) had initially been destined for Infant Baltasar Carlos (1629-1646). When she arrived in Madrid, her promised husband had already deceased. At 14, she married Philip IV (41). See genealogy in annex.

^{xxviii} Jean Bérenger, *Léopold Ier (1640-1705) : fondateur de la puissance autrichienne* (Paris : PUF, 2004).

^{xxix} Auguste Mignet, *Négociations relatives à la succession d'Espagne sous Louis XIV ou correspondances, mémoires et actes diplomatiques concernant les prétentions et l'avènement de la maison de Bourbon au trône d'Espagne* (Paris : Imprimerie Royale, 1835), I, p. 308.

^{xxx} Auguste Mignet, *Négociations*, p. 309. In analogy to the reign of Archduke Albert and Infanta Isabella of Spain, 1598-1621.

^{xxxi} Testament of Philip IV, 14 September 1665, Madrid, published in Arsène Legrelle, *La Diplomatie française et la Succession d'Espagne: 1659-1725*, (Gent: Dullé-Plus, 1888), I, from p. 548 on.

^{xxxii} Anonymous, *Défense du droit de la maison d'Autriche à la Succession d'Espagne et la vérification du Partage du Lion de la Fable dans les conséquences de l'intrusion du Duc d'Anjou* (Cologne: chez Pierre Marteau, 1703), p. 164.

^{xxxiii} Consideration 16. Which proved to be quite problematical, in view of the 21 million écus deficit left by Philip IV (Marie-Françoise Maquart, *Le réseau français à la cour de Charles II d'Espagne : jeux diplomatiques de fin de règne – 1696-1700*, (Villeneuve-d'Asq : Presses universitaires du Septentrion, 1999), p. 175).

^{xxxiv} Consideration 65, Testament of Philip IV, Marie-Françoise Maquart, *Le réseau français...*, p. 387.

^{xxxv} Consideration 24. See also Maquart, *Le réseau français...*, p. 42-59.

^{xxxvi} Consideration 12.

^{xxxvii} French Ambassador d'Embrun to Louis XIV, 6 June 1663, Madrid, published by Mignet, *Négociations...*, I, p. 301-302.

^{xxxviii} Consideration 13.

^{xxxix} Consideration 14. The connection between the two houses has been established by Catharina of Austria's (daughter to Philip II) marriage to Duke Charles Emmanuel I of Savoy (Bély, *La société des princes...*, p. 319).

^{xl} Delphine Montariol, *Les droits de la reine. La guerre juridique de dévolution (1667-1674)* (Toulouse : Université Toulouse I, 2005).

^{xli} Le Bailly, *Louis XIV et la Flandre...*, p. 201.

^{xlii} François Paul Baron de Lisola, *Bouclier d'etat et de justice contre le dessein manifestement découvert de la monarchie universelle, sous le vain prétexte des prétentions de la reine de France* (s.l. : s.n., 1667), p. 44 and 93.

^{xliiii} Antoine Bilain, *Traité des droits de la reine très chrétienne sur divers États de la monarchie d'Espagne* (Paris : Imprimerie Royale, 1667).

^{xliiv} Le Bailly, *Louis XIV et la Flandre...*, p. 25-164. Bilain based his attack on the renunciations on the non-existence of a *loi salique* in Spanish succession law (only the *Cortes*, representing the assembly of the Castilian people, can validate a renunciation to sovereign rights), authorities as diverse as Roman legist Papinian (condemning vicious *stipulationes*), canon law developed by pope Bonifatius VIII in the late 13th century (who desired to validate his predecessor Celestinus V by retroactively safeguarding the latter's renunciation to the papacy, limiting the grounds for nullity to the payment of dowry, fraud or violence and the absence of negative effect to third parties) and the state of 17th century natural law (which –in his interpretation- prohibited a father from stripping his children off their inheritance rights). In addition to this, Maria Teresia (twenty-one years of age at the moment of the marriage) was the victim of "brouillards et vapeurs [qui] offusquent la raison des enfants" under the age of twenty-five, the Roman Law limit for *tutela* (Antoine Bilain, *Traité*, p. 90). Bilain, still blurring the separation between public and private, further sustained that it was contrary to natural law to renounce for Maria Theresia's unborn descendants. To the jurists of the early Louis XIV period, marriage contract and renunciation were seen as acts between individuals. At the end of the period discussed, this opinion is no longer sustained: treaties which were concluded by the monarch, but this meant "tant pour lui que pour ses héritiers successeurs [...] de sorte que ces Traités sont faits pour

durer autant que l'Etat, qui ne meurt jamais" (Réal de Curban, *La Science du Gouvernement...*, V, Ch. III, Section VI, art. VI, p. 631).

Hugues de Lionne, who drafted the *moyennant*-clause, contested the French strategy of leaning on arguments of private law. Maria Teresa's succession could be attacked with arguments of Spanish public law. According to Lionne, when the infanta abandoned her right of succession, she renounced her *mayorazgo*, or primogeniture, which should be restrictively interpreted in all of the Spanish kingdoms (Markus Baumanns, *Das publizistische Werk des kaiserlichen Diplomaten Franz Paul Freiherr von Lisola (1613-1674)* (Berlin: Duncker & Humblot, 1994), p. 93-94).

^{xlv} The previous arguments developed by Bilain still makes the French claims face the problem of Charles II's place in the succession: being the only male heir, he took precedence over his sister. The law of devolution, part of the customary law in the duchy of Brabant, the duchy of Limburg, the marquisat of Antwerp, the seigneurie of Malines, the counties of Alost, Namur, Hainault, a third of the Franche-Comté, the duchies of Cambrai, Chiny and a quarter of that of Luxembourg (Le Bailly, *o.c.*, p. 181-191) gave an argument to put Charles aside. From 1644 on, Bilain claimed, when Philip IV lost his first wife Elisabeth of France, Maria Teresa was bequeathed with the naked property of the mentioned lands, whereas her father could not do anything exceeding the boundaries of the usufruct. This in order to prevent Philip to favour his second spouse in detriment of his children's rights (cf. Philippe Godding, *Le droit privé dans les Pays-Bas méridionaux du 12e au 18e siècle* (Bruxelles : Palais des Académies, 1991, II, p. 358-364). However, Lisola doubted if this theoretical capacity, which only prevents Philip IV from alienating the property in question, permitted Maria Teresa to administer the territories Louis XIV claimed (Lisola, *Bouclier d'estat...*, p. 114).

^{xlvi} Bilain cites the authorities of Cujas and Dumoulin (Le Bailly, *Louis XIV et la Flandre...*, p. 180), interpreting absence of an execution modality in the phrase: "Sa Majesté Catholique promet et demeure obligée de donner et donnera à la Sérénissime Infante Dame Marie-Thérèse en Dot et en faveur de Mariage à sa Majesté Très Chrétienne, ou celui qui aura pouvoir et commission d'Elle, la somme de 500 000 écus d'or, ou leur juste valeur, en la ville de Paris, le tiers au temps de la consommation du mariage, l'autre tiers à la fin de l'année depuis la consommation et la troisième partie six mois après." (Mariage Contract 1659, art. 4). (our underlining)

^{xlvii} Lisola, *Bouclier d'estat...*; Baumanns, *Das publizistische Werk...*

^{xlviii} Hervé Hasquin, *Louis XIV face à l'Europe du Nord* (Bruxelles : Racine, 2005), p. 125.

^{xlix} E.g. Anonymous, *Défense du droit de la maison d'Autriche à la Succession d'Espagne et la verification du Partage du Lion de la Fable dans les consequences de l'intrusion du Duc d'Anjou* (Cologne: Pierre Marteau, 1703); Claire Gantet, *Guerre, paix et construction des États 1618-1774* (Paris: Seuil, 2003), p. 204.

¹ In this respect, Lisola stuck to his overall theory of sovereignty. He was willing to except a trial over Maria Teresa's rights as the alleged duchess of Brabant before the Reichskammergericht, but added immediately that Charles II remained her sovereign in any case. Sovereignty was territorial, and not personal. Ironically, this was the same reasoning applied by Louis' *Chambres de Réunion* to territories in Alsace and the Southern Netherlands: territorial sovereignty superseded personal feudal allegiance (Frederik Dhondt, *Nec Pluribus Impar? De campagnes en onderhandelingen van Lodewijk XIV in de Zuidelijke Nederlanden, 1707-1708* (Gent: Universiteit Gent, 2008), p. 35, note 249).

ⁱⁱ Lisola, *Bouclier d'Estat...*, p. 71.

ⁱⁱⁱ Art. 5 of the Marriage Contract: "États, seigneuries, dominations, provinces". Lisola considered the non-fulfillment of the dowry obligation a valid pretext to generate extra interests on the sum in the contract, but this only concerns a civil obligation (François Paul baron de Lisola, *Bouclier d'Estat...*, p. 125). For Bilain, this argument was not valid: Maria Teresa's possessions fell into the public domain once she espouses the king of France.

ⁱⁱⁱⁱ Lisola, *Bouclier d'Estat...*, p. 93.

^{lv} Cited (in German) by Gustav Berthold (Hrsg.), *Die Politischen Testamente Friedrich des Grossen* (Berlin : Hobbing) 1920, p. 211.

^{lv} Maquart, *Le réseau français...*, p. 267-284.

^{lvi} Joël Cornette, *Le roi de guerre : essai sur la souveraineté dans la France du Grand Siècle* (Paris :Payot, 1993), p. 142.

^{lvii} Maquart, *Le réseau français...*, p. 692.

^{lviii} After a successful anonymous pamphlet dated 1702, Peter Burke, *Louis XIV, les stratégies de la gloire*, (Paris: Seuil, 2007), p. 161.

^{lix} Partition treaty for the Spanish Succession between Louis XIV, William III and the Estates-General, The Hague, 11 October 1698, published by Jean Dumont de Carels-kroon, *Corps universel diplomatique du droit des gens* (Den Haag: Pieter Husson, 1731), VII, p. 442. Art. III: "Sa Majesté catholique n'ayant point d'enfants, & la Succession venant à manqué, cela causeroit infailliblement une nouvelle Guerre, si le Roi Très Chrétien vouloit soutenir ses Prétensions, ou celles du Dauphin, à toute la Succession d'Espagne, & si l'Empereur vouloit soutenir les seines, celles du Roi des Romains & de l'Archi-Duc son second Fils, &

l'Electeur de Bavière, celle du Prince Electoral son Fils aîné, à ladite succession [...]” Art.IV: “souhaitant par dessus toutes choses la Conservation de la Tranquilité publique, & voulant empêcher une nouvelle Guerre en Europe” (our underlining)

^{lx} Justus Kraner, *Bayern und Savoyen im Spanischen Erbfolgekrieg. Überlegungen zu einem neuen Konzept frühneuzeitlicher Diplomatiegeschichte* (Leipzig : Meine, 2008), p. 54.

^{lxi} 1698 Partition Treaty, Art. IV.

^{lxii} “Mais si l'Empereur, le Roi des Romains, ou le Duc de Baviere refusent d'y entrer, les deux Rois, & les Etats Généraux empêcheront le Prince, Fils, ou Frere de celui qui en aura fait refus, d'entrer en Possession & jouissance de ce qui a été assigné, & sa Part & Portion demeurera en sequestre, entre les mains des Vice-Rois, Gouverneurs, & autres Régens qui gouverneront de la part du Roi d'Espagne, & qui ne s'en dessaisiront que du consentement des deux Rois & des Etats Généraux, jusques à ce qu'ils soient convenus desdits Partages & de ce Traité; Et en cas que nonobstant cela, il voulût par force prendre Possession de la Part & Portion, ou de ce qui sera assigné à d'autres, les deux Rois, ainsi que ceux qui seront satisfaits & contents de leur Part & Portion, conformément à cet Accord, l'empêcheront autant qu'ils le pourront.” (art. IX) (our underlining)

^{lxiii} The King drafted a first testament in 1696 (13 September), whereby he would inherit the *entire* Spanish Succession, just as Philip IV wanted to keep the Spanish possessions united under Margareta Teresia's descendents in 1665 (Maquart, *Le réseau français...* p. 284). In reaction to the first treaty between Louis XIV and William III, Charles repeated this by a second testament, but to no avail.

^{lxiv} Emperor Leopold imposed this condition on the Bavarian elector, in order to keep the crown of Spain in the hands of the Austrian Habsburgs. Maria Antonia (1669-1692) was the only surviving child from his union with Margareta Teresia. Archdukes Joseph (1678-1711) and Charles (1685-1740) were the children of Eleonora of Neuburg (1655-1720), his third wife. Charles II disagreed with Maria Antonia's renunciation, because he saw a chance in Joseph Ferdinand to keep the Spanish dominions separate from Austria and united under one hand. Reginald De Schryver, *Max II. Emmanuel von Bayern und das spanische Erbe: die europäischen Ambitionen des Hauses Wittelsbach 1665-1715* (Mainz: Philipp von Zabern, 1996), p. 33.

^{lxv} Jean Bérenger, ‘Une tentative de rapprochement entre la France et l'Empereur’, in Daniel Tollet (dir.), *Guerres et paix en Europe Centrale aux époques moderne et contemporaine : mélanges d'histoire des relations internationales offerts à Jean Bérenger*, (Paris : Presses de l'Université Paris-Sorbonne, 2003), p. 221-236. The treaty was effectively “secret” until Auguste Mignet brought it to attention in his *Négociations...*, II, p. 441-448. (Collection de documents inédits sur l'histoire de France ; Première série ; histoire politique)

With respect to the French long-term strategic interests, 1668 offered an extraordinary occasion to grapple the Southern Netherlands and to end the continuous northern threat (Frederik Dhondt, ‘L'équilibre européen et la Succession d'Espagne. L'épisode révélateur des négociations de Nicolas Mesnager en Hollande, 1707-1708’, in Sarah Castelain, (dir.), *Diplomates et diplomatie. Actes des journées de la société d'histoire du droit et des institutions des pays flamands, picards et wallons, Historial de Péronne, 22 et 23 mai 2009* (Lille : Université Lille 2-Centre d'histoire judiciaire, 2010), forthcoming ; Peter Sahlins, ‘Natural Frontiers Revisited : France's Boundaries since the Seventeenth Century’, *American Historical Review*, Vol., XCV, No. 5, (Dec. 1990), p. 1423-1451).

^{lxvi} Art. 3, 1668 partition treaty.

^{lxvii} Legrelle, *La diplomatie française...*, II, p. 643.

^{lxviii} In 1668, the Austrian Habsburgs were only just recovering from the Thirty Year's War (which had isolated them from the Protestant Reichsstände) and from Turkish peril (see Michael. Hochedlinger, *Austria's wars of emergence: war, state and society in the Habsburg monarchy 1683-1797* (London: Longman, 1977).

^{lxix} Treaty of partition between the King of France, the King of Great Britain and the States-General, 3/24 March 1700, published in Legrelle, *La diplomatie française...*, p. 690-706.

^{lxx} The Dauphin (whose territories were to be united to the French crown after Louis XIV's death) was promised the Tuscan presidia, Finale, Naples, Sicily, in Spain Guipuzcoa and part of Navarra. In an exchange with duke Charles IV, the Dauphin would obtain the duchy of Lorraine and cede the duchy of Milan (Art. IV). Charles of Habsburg could thus succeed to Charles II in Spain, the Southern Netherlands, Sardinia and the colonies (art. VI).

^{lxxi} Derek McKay, *Prince Eugen of Savoy* (London: Thames & Hudson, 1977), p. 55-56.

^{lxxii} Cited in Voltaire, *Siècles de Louis XIV et Louis XV* (Paris : Didot, 1817), p. 233.

^{lxxiii} *Testament de Charles II Roy d'Espagne fait le 2. d'Octobre 1700*, Paris, Frédéric Léonard, Imprimeur ordinaire du Roy, 1700, 57 p.; Marie-Françoise Maquart, ‘Le dernier testament de Charles II d'Espagne’, in Lucien Bély (dir.), *La présence des Bourbons en Europe, XVIe-XVIIe siècles* (Paris : PUF, 2000), p. 111-123.

^{lxxiv} “XIII. Reconociendo conforme à diversas consultas de Ministros de Estado y Justicia que la razon, en que se funda la renuncia de las Señoras Doña Ana, y Doña Maria Teresa, Reynas de Francia, mia tia, y hermana, à la sucesion de estos Reynos, fue evitar el perjuycio de unirse à la Corona de Francia; y

reconociendo que viniendo à cesser este motivo fundamental, subsiste el derecho de la sucesion en el pariente mas immediato conforma a las leyes de estos Reynos” (*Testament de Charles II*, p. 15). (our underlining)

^{lxxv} Henry Kamen, *Philip V of Spain: the king who reigned twice* (New Haven: Yale University Press, 2001).

^{lxxvi} “L. Conformandome con las leyes de mis Reynos, que prohiben enagenacion de los bienes de la Corona, y Señorios de ellos, ordeno y mando à mi sucessor, y à otro qualquiera sucessor que por tiempo fuere, que no enagenen soca alguna de dichos Reynos, Estados, y Señorios, ni los dividan ni partan aunque sea entre sus propios hijos, ni en otras personas algunas. Y quiero que todos ellos, y lo que à ellos, y à cada uno de ellos pertenezca, ò pudiere pertenecer, y qualquiera otros Estados, y que por tiempo me tocara la succession, y à mis herederos despues de mi, anden y ester siempre juntos, como bienes indivisos e impartibles en esta Corona, y en las demas de mis Reynos, Estados, y Señorios, segun que al presente lo estar.” (*Testament de Charles II*, p. 48). (our underlining)

^{lxxvii} This on the basis of the extinction of the Spanish Habsburg line, which held the duchy as a vassal of the Holy Roman Emperor. Leopold I reclaimed the territory on the basis of (public) imperial feudal law: the bond with his vassal being personal, there was no title for occupation of the duchy by a third party (Steiger, *Rechtliche Strukturen...* p. 640).

^{lxxviii} Jean Bérenger, ‘Une décision de caractère stratégique: l’acceptation par Louis XIV du testament de Charles II d’Espagne’, *Revue internationale d’histoire militaire*, No. 82 (2002), p. 95-111; Jean-Philippe Cénat, *Stratégie et direction de la guerre à l’époque de Louis XIV: Jean-Louis Bolé de Chamlay conseiller militaire du Roi* (Paris: Université Paris I Panthéon-Sorbonne, 2006), p. 246-254.

^{lxxix} Adrea Weindl, ‘The Asiento de Negros and International Law’, *Journal of the History of International Law*, Vol. X, (2008), p. 229-258.

^{lxxx} Art. V, Treaty of the Grand Alliance.

^{lxxxi} Art. III, Treaty of 7 September 1701 between the King of Great Britain, the States-General and Leopold I, published in Heinrich Ritter von Srbik, *Österreichische Staatsverträge. Niederlande. Band I: bis 1722* (Wien: Adolf Holzhausen Verlag, 1912)-, p. 343-350.

^{lxxxii} Torcy to Bolingbroke, Fontainebleau, 7 August 1712 N.S., National Archives (Kew), State Papers Foreign, France, 78-154, f. 362v.

^{lxxxiii} E.g. French victories at Friedlingen (1702), Höchstädt/I-Landau (1703), Ekeren (1703), Cassano (1705), Almanza (1707), Ghent/Bruges (1708), Villaviciosa (1710), Denain (1712), Freiburg-im-Breisgau (1713). Allied victories at Blenheim-Höchstädt/II (1704), Gibraltar (1704), Huy (1705), Ramillies (1706), Turin (1706), Lille (1708), Bouchain (1711). Stalemate at Calcinato (1706), Toulon (1707) or Malplaquet (1709).

^{lxxxiv} A fact generally recognized throughout Europe, e.g. this pro-Habsburg manifesto: “Il y a aussi un parti en Hollande, qui n’a en veuë que le Commerce, & qui veut la Paix, pour le conserver [...] on le croit toujours dispose à sacrifier l’intérêt public” (Anonymous, *Défense du droit de la maison d’Autriche...*, p. 10.; Jean-Pierre Poussou, *Les îles britanniques, les Provinces-Unies, la guerre et la paix au XVIIe siècle* (Paris: Economica, 1991), p. 116-118).

^{lxxxv} Frederik Dhondt, ‘De Spaanse Successieoorlog en de slag bij Oudenaarde (11 juli 1708)’, *Handelingen van de geschied- en oudheidkundige kring van Oudenaarde*, Vol. XLIV (2007), p. 23-74; Id., ‘De Slag bij Oudenaarde en de Spaanse Successieoorlog’, in: Pieter-Jan Lachaert (ed.), *Oudenaarde 1708. Een stad, een koning, een veldheer* (Leuven: Davidsfonds, 2008), p. 51-78; Clément Oury, *Blenheim, Ramillies, Audenaarde. Les défaites françaises de la guerre de Succession d’Espagne (1704-1708)* (Paris, École des Chartes, 2005).

^{lxxxvi} The Dutch Republic could not sustain its effort of paying 119 000 troops and assembling 3/8 of the allied fleet, with a population of barely 2 million (Jonathan Israël, *The Dutch Republic. Its rise, greatness and fall 1477-1806* (Oxford: Oxford University Press, 1995), p. 970).

^{lxxxvii} The commercial part of the Methuen Treaties (27 December 1703), accompanying the adherence of King Joao V of Portugal to the Grand Alliance of The Hague, guarantees British access to Brazil, at the expense of their allies (William Doyle, *The Old European Order 1660-1800* (Oxford: Oxford University Press, 1992), p. 93).

^{lxxxviii} After Eugene’s victory at Turin (September 1706), the French army had been expelled of Northern Italy. However, the failed siege of Toulon, the ensuing year, did not permit the allies to penetrate into France.

^{lxxxix} We refer to the situation after the decisive victory obtained by the Duke of Berwick (illegitimate son of the Catholic Stuart King James II) at Almanza in May 1707 and the failure of the allied siege of Toulon, strategic French port for the control of the Mediterranean.

^{xc} Ministère des Affaires Étrangères et Européennes, Archives Diplomatiques, Correspondance Politique, Hollande, 213, f. 105v-106r (Mesnager to Torcy, 12 January 1708, Rotterdam); Hollande, 214, ff. 105r-109v (“Reflexions sur les moyens qui peuvent ayder à déterminer les Hollandois à la paix”, 24 February 1708, The Hague). Dhondt, *Nec pluribus impar...*, p. 319-210.

^{xc} “Il semble que cette égalité de traitement entre des étrangers et des regnicoles, soit le comble des avantages que l’on puisse faire à des alliés, mais, cette même égalité ouvrira un moyen pour mettre des justes bornes à la cupidité des Hollandais” (AE, CP, Hollande, 214 f. 108r.).

^{xcii} Dhondt, *Nec pluribus impar...*, p. 317 ; Emmanuel Pénicaut, *Faveur et pouvoir au tournant du grand siècle*, Michel Chamillart : *Ministre et secrétaire d’état de la guerre de Louis XIV* (Paris : Ecole Nationale des Chartres, 2004).

^{xciii} The dilatory interventions of Willem Buys (1661-1749), pensionary in Amsterdam between 1693 and 1725 and close to the Duke of Marlborough, stalled the talks. Antonie Heinsius (1641-1720), the most prominent figure in the Republic as pensionary of the States of Holland, did not dispose of enough margin to come to terms over an agreement without the “*No peace without Spain*”-clause imposed by the Whigs and the Austrians. The abdication of Philip V was not vital to the Republic. The Barrier in the Netherlands and access to the Spanish were far more predominant.

^{xciv} Lucien Bély, ‘Les larmes de Monsieur de Torcy, essai sur les perspectives de l’histoire diplomatique, à propos des conférences de Gertruydenberg, mars-juillet 1710’, in: Lucien Bély, *L’art de la paix en Europe: naissance de la diplomatie moderne, XVIIe-XVIIIe siècles* (Paris: PUF, 2007), p. 431-364.

^{xcv} Ragnhild Hatton, *Diplomatic relations between Great Britain and the Dutch Republic, 1714-1721* (London: East & West Ltd., 1950), p.12.; Geertruida Stork-Penning, *Het grote werk: vredesonderhandelingen gedurende de Spaanse Successie-oorlog 1705-1710* (Groningen: Wolters, 1958), xx.

^{xcvi} Although this exceeds the limits of this article, the Dutch and British position gave rise to disputes concerning the interpretation of the 1701 Treaty of Alliance. Did Britain violate the common obligation not to conclude a separate peace with Louis XIV before “*Caesarea sua Majestate satisfaction aequa, & rationi conveniente [...] provisum fit*” ? (art. VIII). The Dutch refusal to accept the conditions offered by Louis XIV in 1708, 1709 and 1710 could however be qualified as a violation of the principle that “*les Alliés seront obligés d’accepter les conditions raisonnables qui leur seront offertes [...] Si un Allié refuse obstinément la paix, à des conditions réellement avantageuses, il viole lui-même l’Alliance, en s’éloignant de l’esprit qui l’a formée, & il dispense les Alliés de concourir avec lui*” (G. Réal de Curban, *La Science du gouvernement...*, V, p. 637, Ch. III, Section VI, art. VIII, consideration IX). The latter argument would also be used from the Dutch and British allies’ point of view against Charles VI in 1713, when he refused to conclude a peace treaty at Utrecht.

^{xcvii} 1st viscount Bolingbroke (1678-1751), cf. B.W. Hill, ‘Oxford, Bolingbroke, and the Peace of Utrecht’, *The Historical Journal* Vol. XVI, No. 2 (Jun. 1973), p. 241-263.

^{xcviii} Derek McKay and Hamish M. Scott, *The rise of the great powers 1648-1815* (London: Longman, 1983), p. 110. This is in itself a denial of a so-called “Second Hundred Years war” between France and Britain from 1688 to 1815.

^{xcix} Preliminaries of Peace between the King of France and the Queen of Great Britain, 8 October 1711.

^c Legrelle, *La diplomatie française*, IV, p. 604.

^{ci} We refer to the restraining orders given to the Duke of Ormonde, the British commander replacing the Duke of Marlborough: Clyve Jones, ‘The Vote in the House of Lords on the Duke of Ormond’s ‘Restraining Orders, 28 May 1712’, *Parliamentary History*, Vol. XXVI, No. 2 (2007), p. 160-184.

^{cii} Karl Othmar von Aretin, *Kaisertradition und österreichische Grossmachtpolitik (1684-1745)* (Stuttgart: Klett-Cotta, 1997), p. 229-234.

^{ciii} Since 1708, the Duke of Marlborough did not achieve any significant victory in the North, in December 1710, the Duke of Vendôme decisively beat an Austro-British force at Villaviciosa (Dhondt, *Nec pluribus impar...*, p. 352.

^{civ} Treaty of Peace and Friendship between Louis XIV and Queen Anne, 31 March O.S./11 April N.S. 1713, published in Dumont, *Corps diplomatique universel...*, VIII/1, CLI, p. 339-342 (here p. 340).

^{cv} Lucien Bély, *Espions et ambassadeurs au temps de Louis XIV* (Paris: Fayard, 1990); Andreas Osiander, *The states system of Europe, 1640-1990: peacemaking and the conditions of international stability* (Oxford: Clarendon Press, 1994), p. 90-165.

^{cvi} We refer to the published treaty texts with Henri Vast, *Les grands traits du règne de Louis XIV. III: la Succession d’Espagne* (Paris: Picard, 1899), from p. 68 on. Note that no formal peace was signed between Philip V of Spain and Emperor Charles VI, until 1725.

^{cvi} For an analysis of the new territorial power division in Europe, we refer to Pierre Muret, *La prépondérance anglaise (1715-1763)* (Paris: Librairie Félix Alcan, 1937), p. 11-16: Britain blocks the Franco-Austrian contact zones on the Rhine by interposition, the Franco-Dutch field by interposition of the Austrian Netherlands and the Franco-Austrian in Italy by extension of Victor Amadeus of Savoy’s territory. In addition, it obtains the demolition of Dunkirk in the Channel, the control of Menorca and Gibraltar in the Mediterranean and has full access to Brazil through the Methuen Treaty. Georges Livet talks of Europe-wide “barrier fever” (Georges Livet, *L’équilibre européen de la fin du XV^e siècle à la fin du XVIII^e siècle* (Paris, PUF, 1976), p. 102-103).

^{cviii} 15 March 1713. See *Lettre patente de Louis XIV supprimant celles du Mois de Décembre 1709, admettant & autorisant la Renonciation de Philippe duc d'Anjou, comme Roi d'Espagne, à la Couronne de France, & celles de Charles Duc de Berri, Philippe Duc d'Orléans, comme Princes de France, à la Couronne d'Espagne, données à Versailles, au Mois de Mars de l'an 1713*, Jean Du Mont de Carels-croon, *Corps universel* ..., VIII-1, p. 324-325.

^{cix} Renunciation of Philip V of Spain, pronounced on 5 November 1712 before the *Cortes* of Castille in Madrid, confirmed at *Buen Retiro* in front of royal notary de Vadillo Velasco, published in Dumont, *Corps universel*..., VIII-1, p. 310-312.

French Foreign Minister Torcy did not think highly of the legal value of this renunciations, since they ran counter to the *lois fondamentales du Royaume*, which would call Philip V to the throne in any case. This opinion, which was also defended by Jean Bodin, saw the king as mere usufructuary, unable to alienate rights or goods belonging to his successors (see Réal de Curban, *Science du Gouvernement*, V, ch. III, Section V, art. V, p. 620; Alfred Baudrillart, 'Examen des droits de Philippe V et de ses descendants au trône de France, en dehors des renonciations d'Utrecht', *Revue d'histoire diplomatique*, Vol. III (1889), p. 161-191, 354-384). Just as the indivisibility proned by Philip IV and Charles II, this domestic principle came in collision with international order.

^{cx} "Le Roi T[rès].C[hrétien] tant en son nom qu'en celui du Dauphin [...] pour eux-mêmes, leurs Enfants Mâles ou Femelles, Heritiers ou Successeurs, nez ou à naître, promet & s'engage de renoncer, au tems de la susdite Succession, comme ils renoncent dès à présent par ces presentes, à tous leurs Droits & Prétentions qu'ils pourroient avoir à ladite Couronne d'Espagne, & autres Royaumes, Isles, Etats, Païs & Places, qui en dependent à present, & qu'ils en feront expedier des Actes authentiques, pour cet effet, dans la plus forte & meilleure forme que faire se pourra, lesquels seront delivrez au tems de la Ratification de ce Traité" (art. IV, 1698 Partition Treaty). (our underlining)

^{cxi} Artt. IV-V, Treaty of Peace and Friendship, *Corps diplomatique universel*, p. 340.

^{cxii} In the same sense, the attacks on the Protestant succession (which was confirmed in the Treaty of Utrecht) denied the international community's ability to change domestic succession norms. Jacobitism based its defense of the Pretender James III on the denial of the modification of Britain's Succession rules in the Act of Settlement, adopted by a Parliament which derived its legitimacy from the 1688 events. The Glorious Revolution, although its effects were recognized by Louis XIV on the occasion of the 1697 Rijswijk Treaty, took place without Royal consent of the chased James II. Consequently, applying Bracton, Glanville, Buchanan and other authors, the Jacobites any deny legal effects to the international recognition any sovereign since James II's decease in September 1701. E.g. Anonymous, "Manifeste de Jaques 3 Roy d'Anglet.", NA, SP, 78-200 (France, Jan-Jul 1732), ff. 61r-75r.

^{cxiii} For the context of this measure, see the mutual pact between Joseph and Charles, which the latter tried to reverse (Marsha and Linda Frey, *A Question of Empire: Leopold I and the war of Spanish succession, 1701-1705* (New York: Columbia University Press, 1983), p. 67). The Pragmatic Sanction of 19 April 1713 is published with its acceptances by all of the Diets in Gustav Turba, *Die Pragmatische Sanktion. Authentische Texte samt Erläuterungen und Übersetzungen* (Wien: k.k. Schulbücher-Verlage, 1913), 202 p.

^{cxiv} Kunisch, *Staatsverfassung*..., p. 75.

^{cxv} Jean Rousset de Missy, *Mémoires sur le rang et la préséance entre les souverains de l'Europe 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 et Fils, 1746), p. 2.

^{cxvi} Réal de Curban, *Science du Gouvernement*, V, Ch. III, Section V, art. V, p. 620.

^{cxvii} André Corvisier, 'Présence de la guerre au XVIIe siècle', in Lucien Bély, Jean Bérenger et André Corvisier (dir.), *Guerre et Paix dans l'Europe du XVIIe siècle*, (Paris : SEDES, 1991), p. 13.