FLANDERS AND THE SCHELDT QUESTION

A Mirror of the Law of International Relations and its Actors

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What is the 'international community' constantly referred to in present-day international affairs? Can or should it be defined by formal-legal standards — e.g. membership of the UN, legal capacity such as treaty-making power? Is it a shifting concept which matches different political realities according to a specific context — when, e.g., the USA and Israel are reported to walk out of an international conference on racism, does that mean that these countries no longer belong to the international community in the discussion on such issues? Can so-called 'rogue states' or terrorist organizations (which may well profess, at least in theory, universally respected long-term aims) be counted among the actors of the international community? How clearly defined or blurred is the phrase when used in a context of international politics, international law, or other issues in their own right, such as international trade, environmental protection — and so on? How relative is the concept in time (historically) and in space (from the perspective of different cultures)?

In spite of obvious restrictions, the issue known in the history of international relations and international law as the 'Scheldt Question'[1] offers an adequate illustration of the manifold answers these complex questions may receive in the

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[1] The best general study of the Scheldt Question from the 13th century until Belgium's independence remains: S.T. Bindoff, *The Scheldt Question to 1839* (London 1945), with can be updated for the following period with: P.-A. Bovard, *La liberté de navigation sur l'Escaut* (Lausanne 1950). Older, more conventional (and often positivistically inspired!) historical surveys tend to suggest that the Scheldt Question only began with the Westphalian Peace, e.g. A. Rotsaert, *L'Escaut depuis le Traité de Munster (1648), Aperçu historique* (Brussels/Paris 1918), or the otherwise for the nineteenth century very useful collection of documents *Tractaten en tractaatsbepalingen de Schelde betreffende sinds 1648* (The Hague 1919), which, however, only contains six documents prior to the Treaty of 19 April 1839.

Western tradition of the law relating to inter-polity relations. Hereafter, four moments from that on-going history, which now encompasses more than half a milennium, have been selected. For each moment, a Scheldt-related issue will be presented as a feature of the at the time prevailing concept of international relations. Each time, the same or different actors appear on the international stage. However, the international community is not merely defined by its actors of the moment. The variety of actors and their relationships show that the very structure of the international community is different from one era to another, depending *inter alia* on the diversity of the various types of actors, the ascendancy some may have over others, the extent to which these variables are integrated in a more or less coherent system, and also — this is where international law comes into the picture — the degree to which all those factors are formalised within a normative set of principles. Thus, at different periods in history, issues around the Scheldt estuary have each time reflected wider concerns of international politics prevailing at the time — including the limitations of these international views from the Western European perspective, but that, too, can be said to be part of the history of international law.

1. 1460-1504: Regional actors within the Burgundian state[2]

1.1 *Geo-political changes around the Scheldt Estuary*

Under the Burgundian regime, navigation in the Scheldt Estuary became a political issue which was repeatedly brought to the attention of the Duke's council. Geographical changes had affected its major waterways[3].

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[2] This first section is largely based on my own article 'Emergence et engloutissement judiciaires du 'Brabant maritime'. Les prétentions territoriales sur l'Escaut occidental durant la seconde moitié du 15e siècle', to be published in September 2002 in *Publication du Centre européen d'études bourguignonnes.*

[3] The geographic development of the Scheldt Estuary during the Middle Ages, the toponymy, the agriculture in the surrounding land, all these are issues which, in spite of a string of excellent historical studies, remain open to many controversies. Even the most recent and authoritative works cannot avoid some degree of speculation and, sometimes, more or less bold interpretations. For the late-medieval geography, the historian will continue to rely on M.K.E. Gottschalk's fundamental research: *Stormvloeden en rivieroverstromingen in Nederland*, 3 vol. (Assen 1971-77); the first two volumes relate to the source-material which is relevant for the present

Traditionally, the Eastern Scheldt (referred to as the Scheldt, which clearly shows that it was seen as the original and natural continuation of the Scheldt flowing from Antwerp) had been the main route for ships between Antwerp and the sea. From the late-fourteenth century onwards[4], and increasingly during the fifteenth century[5], the Honte or Western Scheldt became an attractive alternative for bigger vessels, due to floods and the deepening of its channel. At the same time, the position of Bruges was in decline and the Eastern Scheldt's capacity was decreasing.

The toll of Iersekeroord (situated on the Eastern Scheldt), itself a 'branch' of the Geervliet toll, was soon affected by these changes. As maritime trade

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section: I, *De periode vóór 1400* (Assen 1971), II, *De periode 1400-1600* (Assen 1975); by the same author: *Historische geografie van Westelijk Zeeuws-Vlaanderen*, [I], *Tot de St-Elisabethsvloed van 1404* (Assen 1955), and II, *Van het begin der 15e eeuw tot de inundaties tijdens de Tachtigjarige Oorlog* (Assen 1958); see also her monograph on a region directly linked to the Eastern Honte: *De Vier Ambachten en het Land van Saaftinge in de Middeleeuwen* (Assen 1984), for which the dissertation by A.M.J. de Kraker offers a useful supplement: *Landschap uit balans. De invloed van de natuur, de economie en de politiek op de ontwikkeling van het landschap in de Vier Ambachten en het Land van Saeftinghe tussen 1488 en 1609*, (Utrecht 1997). The latter author (together with several others) has published further relevant studies in *"Over den Vier Ambachten". 750 jaar Keure. 500 jaar Graaf Jansdijk*, (Kloosterzande 1993), see a.o.: K.J.J. Brand, 'De ontwikkeling van het polderlandschap in de Vier Ambachten en omringend gebied', pp. 41-60, including useful maps offering the author's attempts at reconstructing the development of the Western Scheldt (I hope that some of these maps will be included in the publication of my article mentioned *supra*, although Dr. Brand is himself preparing a new version of these maps); see also Dr. Brand's general synthesis and outline: 'Over het ontstaan en de ontwikkeling van de Hont of Westerschelde', in *Zeeuws Tijdschrift* 3 (1983), pp. 99-110.

4 The first important controversies between Antwerp and Zeeland regarding the levy of the toll of Iersekeroort on the Honte appear to have started shortly after the floods of 1375-7, E.M. Meijers, 'Des Graven Stroom', first published in 1940 and now included in: *Etudes d'Histoire du Droit*, vol. II (Leiden 1973), 98-167, p. 110 (in 1387, Antwerp obtained freedom of navigation on the Honte, but, as Meijers noted, one of the main issues of the controversy was precisely whether their exemption went beyond the *geleide*).

5 Gottschalk, *Historische geografie van Westelijk Zeeuw-Vlaanderen*, II, *o.c.*, pp. 36 (1429-30), 73 (before 1460), observing that navigation via the Wielingen was first mentioned in 1405 (p. 73, n. 4).

gradually favoured the Western Scheldt, its guards noticed the decline in passage — and hence, of their income — on the Eastern branch. Additional guards were posted on the Honte. Antwerp merchants, however, claimed freedom from the toll on this alternative waterway. Thus a growing conflict of interests developed between Antwerp, backed by industry and trade interests in Brabant, and Zeeland.

The economic interests for Brabant's trade in enjoying toll-free access to and from the sea were obvious. From the Zeeland perspective, the interests at stake were perhaps even greater. Because of its position, Zeeland derived a substantial income from interregional and international trade using its waterways, the unavoidable connection between the sea and the Germanic hinterland. Its toll system was devised to weave a watertight net across its estuaries, so that no ship could pass without being subject to tax. The network of tollhouses and guards ensured that the tax was effectively collected. The increase of maritime trafic on the Honte, precisely at a time when the Eastern Scheldt's importance was diminishing and Antwerp's attraction to international shipping was expanding, was therefore a serious threat to the Zeeland toll system and its control of maritime trade in the Low Countries.

Under Philip the Good, the principalities immediately adjacent to the Scheldt estuary had come under a common personal rule: the House of Burgundy had succeeded in acquiring most of the principalities in the 'Low Countries', across the fault line which divided the French Kingdom and the Empire. The Duke combined the titles, among others, of Count of Flanders, Duke of Brabant, and Count of Holland and Zeeland.

One of the corollaries of the Duke's personal union was that henceforth inter-provincial disputes required a common form of peaceful settlement. The settlement could be political, which implied a decision by the Duke himself, advised by his council. Gradually, however, a judicial alternative evolved within, and, by the mid-fifteenth century, distinctly from, the *curia ducalis*. The Great Council, first as a more or less distinctive section of the Duke's council, then as a separate institution, developed as a court which, representing directly the Duke's authority, could hear cases from the whole of his territories. Because it represented the Duke's authority at the pinnacle of the political system, above the particular interests of his individual principalities, it was also in a position

to exercise its jurisdiction over trans-provincial or inter-provincial conflicts[6]. As a court, its system for dealing with the settlement of disputes was far less flexible than that of a political body. It became dominated by academic lawyers, steeped in Roman and Canon law, who followed, by and large, proceedings inspired by French and ecclesiastical models, *viz.* the style of the Paris Parliament and the principles of the Roman-canonical procedure. The substantive law it applied could vary: the Duke's ordinances were a privileged authority, but legislation at that level remained comparatively limited; when a case was confined to a specific regional or local jurisdiction, the particular law of that jurisdiction (whether customary or statutory) would normally take precedence; all that, however, left a wide scope of applications for principles borrowed from the academic Roman and Canon law traditions. For inter-provincial disputes in particular, for which very little conventional law was available, recourse to Roman and Canon law (which, moreover, provided much material on *ius gentium* issues) was, certainly in the context of a superior court staffed by legists and canonists, inevitable.

1.2 *Legal proceedings and the peaceful settlement of disputes between 'sovereign' principalities*[7]

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[6] A. Wijffels, 'Höchste Gerichtsbarkeit als Instrument der Friedenserhaltung in interterritorialen Konflikten: Der Große Rat von Mechelen in den burgundisch-habsburgischen Niederlanden', in B. Diestelkamp and I. Scheurmann (Hrg.), *Friedenssicherung und Rechtsgewährung* (Bonn-Wetzlar 1997), 83-102.

[7] L.Th. Maes, 'Twee arresten van de Grote Raad van Mechelen over de tol van Iersekeroord', first published in 1977, now included in: *Recht heeft vele significatie. Rechtshistorische opstellen van Prof.Dr. L.Th. Maes* (Brussels 1979), 137-160. The following pages will not discuss litigation on the (Eastern) Scheldt, i.e. the part of the river upstream from Foxoirte, which had belonged to Brabant, but subsequently became the border between Brabant and Zeeland; upstream from the old Stockham, the river was Flemish, but the Duke of Brabant was entitled to exercise certain rights, which generated its own litigation, cf. mainly Meijers, 'Des Graven Stroom', *o.c.*, pp. 107-9 (on the river between Brabant and Zeeland: pp. 102-7); Ch. Divivier, 'L'Escaut est-il flamand ou brabançon?', in *Bulletin de la Classe des Lettres et de Sciences Morales et Politiques et de la Classe des Beaux-Arts* (Académie Royale de Belgique), 1899, pp. 721-68; H. Van Werveke, 'De rechten van de Graaf van Vlaanderen op de Schelde aan de Brabantsche grens', in *Bijdragen tot de Geschiedenis* 27 (1930), 224; F. Prims, 'De rechten van Brabant en van Vlaanderen op de Antwerpsche Schelde', in *Verslagen en Mededeelingen Koninklijke Vlaamsche Akademie voor Taal-en Letterkunde* 1931, pp. 889-964.

1.2.1 *The 1466-1469 proceedings*[8]

During the reign of Philip the Good, disputes about the collection of the Zeeland toll on the Honte were brought before the Duke and his council but remained unresolved. Provisional decisions explicitly referred to a settlement of the issue in the future. During the 1460's, interest-groups from Antwerp and Brabant became more pressing. By the time Charles was taking over the government of the Low Countries, the disputes were gradually reorientated to the Great Council, which meant that the parties had to conform to strict rules of litigation. It also meant that the political and economic conflict of interests had to be phrased and argued in legal terms.

1.2.1.1 *The litigants*

Several cases originated around the mid-1460's, which were partly joined together in two successive judgements of the Great Council[9]. One case involved an Antwerp ship-captain who had refused to pay the toll when summoned by the guard of the Iersekeroord toll on the Honte, and who was duly backed during the proceedings by the Antwerp city council. By 1467, the year Charles succeeded his father, the issue had raised such concerns that the deputies of the Brabant towns, joined by the Four Members of the County of Flanders, started a separate action against the farmers of the Iersekeroord toll,

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[8] The main primary sources are: the decisions of the Great Council dated 18 July 1468 (published in: W.S. Unger, *De tol van Iersekeroord. Documenten en rekeningen 1321-1572* ('s-Gravenhage 1939), No. 21, pp. 20-6) and 8 September 1469 (published in: E. Marshall and F. Bogaerts, *Bibliothèque des antiquités belgiques*, I (Antwerp 1833), pp. 148-59), and also part of the file submitted by Antwerp, EA 2673. The decisions are well-known, but the file, though calendared, seems to have been ignored, even by recent authors. I am preparing an edition of the full dossier.

[9] In the decision of 18 July 1468, the Brabant and Flemish litigants refer to another law-suit before the Great Council, opposing the Procurator-General and the farmers of the toll to the Antwerp city-council. Those proceedings were said to have been initiated following a dispute between the farmers and the Antwerp merchant Gerard Pels, who had refused to pay the toll. His case is referred to in several passages of the aforementioned judgement, which, in its final section (expressing the actual *res iudicata*), allows the release of Pels's ship provided a deposit of was handed over as surety.

whose case was handled by the Proctor-General, acting on behalf of the interests of the Count of Zeeland.

1.2.1.2 *The issues*[10]

The central issue of the various cases brought before the Great Council related to the Zeeland toll, and its application to Antwerp and Brabant merchants passing through the Honte. The case for Zeeland was that its toll-system applied to all waters under the Count's sovereignty, including the Honte; and that it was the Count of Zeeland's prerogative to place guards on all the waterways under his jurisdiction and to collect the toll[11]. Antwerp and Brabant, on the contrary, claimed freedom from the toll on the Honte, both for their own goods and (at least, in part) for goods of foreigners they might be carrying[12].

1.2.1.3 *The arguments*

(a) *The legal framework.*

Antwerp produced a variety of titles supposed to buttress the city's claim. However, it seems that even these titles were subordinated to a main line of argument which, at the time, was highly conventional in legal proceedings. As in much other contemporary litigation, the legal argumentation worked out by both sides in the dispute revolved around the Roman-canonic concept of

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10 A. Wijffels, 'La liberté de navigation sur l'Escaut à l'avènement de Charles le Téméraire', in: H. Van Goethem, L. Waelkens, K. Breugelmans (eds.), *Libertés, Pluralisme et Droit. Une approche historique* (Brussels 1995), 123-34.

11 On Iersekeroort as a 'branch' of the Geervliet toll: W.S. Unger, *De tol van Iersekeroord, o.c., passim.*

12 In the proceedings to which Antwerp was a party, the city's claim was that «par privilege ilz ne soient tenuz de paier aucun droit de tonlieu ne conduit dedens, empres ou partout la riviere de la Honte a cause de leurs navires ou biens, quelz quilz soient, ne en quelque maniere quilz soient chargiez, mais avec ce sainsi estoit quilz eussent chargie aucuns biens destrangés iceulx estrangiers a qui lesdits biens estrangés appartiennent ne doivent paier pour ledit droit de tonlieu et conduit que V s. III d. monnoie de Flandres selon la forme de leurdit privilege» (EA, document i, p. 1), a formulation which repeated literally the contents of the document of 1276 on which they relied (*ibidem*, doc. b).

possession. The Proctor-General claimed not only the original title and prerogative of the Count to levy and collect the toll, but insisted on the long-term possession of that prerogative. Conversely, the Brabant party's main legal argument consisted in demonstrating their long-term possession («from times immemorial») of the freedom from the toll on the Honte[13].

Tolls and exemptions from tolls had been a perennial problem for medieval trade. Nevertheless, the issue was not governed by a specific, more or less comprehensive body of law. In the absence of such a specific branch of 'Tax Law', the Roman-canonic rules on possession, based on both authorities among the texts of the *corpora iuris* and on an even larger body of doctrinal authorities, offered a general, but effective set of rules for the peaceful (and legal) settlement of disputes of all kinds. It was a well-trained, versatile, system, which could be applied both to minor quarrels between individuals, and to major conflicts between corporations or political bodies. Its advantage was that it prescribed generally recognised principles regarding the course of the procedure, the conditions which any alleged possession had to meet in order to enjoy legal protection, and the evidence which had to be adduced. In theory, it was not a merely neutral system, for it granted a privileged protection, pending the proceedings, to the party who had been dispossessed or whose possession had been disrupted or threatened. In practice, however, the concept of possession was so adaptable in late-medieval Roman-canonic law that both parties could usually claim a possession which had been challenged by the opponent. As a result, both parties were then in a position to claim judicial protection of their possession. In the case opposing Brabant and Zeeland, the former were claiming not only peaceful and long possession of freedom from the toll, but also from the toll-guards' interference with their possession. For the Count of Zeeland, The Proctor-General claimed both possession of the prerogative of levying and collecting the toll, and the attempts by Antwerp and its merchants to encroach upon that possession.

It would be wrong, however, to infer that the arguments were exclusively framed within those legal concept of rightful possession and interference with

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[13] On the importance of the concept of 'exemption from toll' during the Middle Ages: A.J. Stoclet, *Immunes ab omni teloneo. Etude de diplomatique, de philologie et d'histoire sur l'exemption de tonlieux au haut Moyen Âge et spécialement sur la 'Praeceptio de navibus'* (Brussels/Rome 1999).

such possession. The medieval Civil and Canon law traditions may have been the work of academic lawyers, but their reasoning seldom departed from considerations which would much later be referred to as *Interessenjurisprudenz*. Thus also in the arguments brought before the Great Council in the litigation arising from the toll-collection on the Honte: the Proctor-General had little difficulty in pressing the point of the Count of Zeeland's paramount interest in avoiding any breach in the Zeeland network of tolls; the Brabant towns countered by extolling the Duke of Brabant's interests in his subjects' exemption from the toll on the Honte, raising the prospect of the utter breakdown of the Antwerp fairs, and the dire consequences for the income of the Duke of Brabant[14]. In short, the Duke of Burgundy was told that his interests at stake as Duke of Brabant in this case outweighed any interests he might have as Count of Zeeland. In a more political register, the Brabant towns also raised the potential consequences of the issue if, in future, Charles's principalities were to be divided among his heirs[15].

(b) *Territorial disputes.*[16]

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[14] «.....que mon dit seigneur y perdroit le plus pour le moins; car par ce moien l'[exercité] de la marchandise seroit fort diminuee, sur quoy les dits païs de Brabant, Flandres, Hollande et Zellande sont principalement fondez, les foirs d'Anvers yroient au neant et les tonlieux d'illec. qui sont à mon dit seigneur, lui vauldroient moins trois mil escus, qu'ilz ne font à présent pourchacun an, sans les pertes de plusieurs tonlieux particuliers ...» (Judgement, 18 July 1468, *l.c.*, pp. 24-5).

[15] «... actendu, s'il advenoit, que comme fait à espérer et que chacun desire, que mon dit seigneur eust generacion de plusieurs enffans, et que les dits seignouries et païs feussent partiz en divisez, que en temps avenir grans differens, debas et discors se pourroient sourdre et mouvoir entre eulx, qui en seroient seigneurs, et leurs subgetz» (*ibidem*, p. 25). In a different register, it will be remembered that the contracts for farming out the toll usually contained a clause which provided for a suspension in case «hierbinnen den lande van Hollant of Zeelant in openbare orloge quamen tegens den lande van Brabant of Vlaendren of tegens der croonen van Ingelant, dairby dat die coopluyden mijns voirscr. genadichs heeren stroomen voirby der voirscr. tollen of wachten niet veylich varen of gebruycken en mochten» (Unger, *De tol van Iersekeroord*, *o.c.*, No. 23, p. 29 (ordinance on the farming of the toll, 1 September 1470); No. 26, p. 44 (idem, 17 October/9 December 1482); No. 29, p. 56 (art. 13 of the project of 20 March 1496).

[16] On the notion of 'stroom' in the relations between Flanders, Holland and Brabant, cf. the fundamental study by Meijers, 'Des Graven Stroom', who discusses not only litigation around the Honte (pp. 109-16), but also the status of the Eastern Scheldt in

Incidentally, the litigation also led to territorial claims, though these were merely arguments and no direct adjudication on these claims was sought. Both parties seem to have admitted that, «in recent times», the Honte had developed from a small and shallow waterway to a river fit for navigation by large ships. The Proctor-General asserted that these changes had all taken place on Zeeland territory, and thus did not affect the Count's rights[17]. On this issue, the Flemish litigants intervened: they claimed that the new, deeper, channel had worked its way entirely on the Flemish side, and that the Honte was therefore within the jurisdiction of the Count of Flanders[18].

Moreover, the litigants did not agree on the geographical extension of the

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the context of the relations between Brabant and Holland (pp. 102-7), and the status of the Scheldt as the border between Brabant and Flanders (pp. 107-9) — while a large part of the article investigates the Count of Flanders' 'territorial sea'. Meijers's article was supplemented on some points, together with a few new interpretations, by F. Doeleman, 'Zeggenschap op de Honte', in *Tijdschrift voor Rechtsgeschiedenis* 43 (1975), 23-43.

17 «et pour ce que ou temps passé l'eaue de la Honte estoit si petite, que nulz ou bien peu de navires, venans de la dicte ville d'Anvers, povoient passer par les dites rivieres, tous les navires passoient parmi le païs de Zellande, où il avoit ses gardes, assavoir à Yersekerhoirt et Geervliet, et que par les alluvions et inondacions des eaues la dicte riviere de la Honte estoit devenue plus na[vi]gable et plus parfonde, qu'elle n'estoit auparavant, tellement que presentement tous ou la pluspart des navires, allans et venans en la dicte ville d'Anvers, passoient par la dicte riviere de la Honte, par quoy mon dit seigneur perdroit le dit tonlieu, qu'il a droit de prendre en l'eau salee ...» (Judgement of 18 July 1468, *l.c.*, pp. 21-2).

18 «dirent les dits deputez de Flandres, que la dite riviere de la Honte depuis l'Eschault devant Chavestingues jusques `la mer salee et trois lieues en icelle mer est du tenement de la dicte conté dse Flandres, et que le conte de Flandres y a toute jurisdiction et nul autre n'y a que veoir ne que congnoisre, se non icellui conte et ses officiers, par quoy le dit conte de Hollande et de Zellande n'y peult mettre aucunes gardes. Dirent oultre plus les dits deputez, que la dicte alluvion, dont parle le dit procureur, fait pour eulx, car ce que la dite riviere a gaigné par alluvion, inondacion ou aultrement en largeur et parfondeur, elle l'a gaignié sur la terre et coste de Flandres, où est presentement la droite parfondeur, flux et strom, par où passent les dits navires; et avec ce dirent [...] que la dite riviere peut estre muee et devenue plus parfonde et na[vi]gable, n'eest point advenu fraudeleusement ne par fait ou engien d'homme, mais naturelement» (Judgement of 18 July 1468, *l.c.*, p. 23).

Honte[19]. According to the Zeeland thesis, possibly founded on the situation in more ancient times, only the waterway extending from the Scheldt around Saaftinge to Hulsterhaven could properly be referred to as the Honte[20]. The Flemish claim[21], on the contrary, asserted that the Honte referred to the waterway stretching all the way from the Scheldt right into the open sea[22].

(c) *The outcome.*
At least two judgements were given in these proceedings. The first, dated 18

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19 Meijers, 'Des Graven Stroom', *o.c.*, pp. 109-10.

20 «actendu que, comme ilz disoient. le flux et strom de la Honte failloit et perdoit son nom au lieu, appellé Hulsterhavene, et que tout le residu de l'eau, tirant devers la mer et devers Zellande, estoit nuement de la seignourie et jurisdiction du conte de Zellande» (Judgement of 18 July 1468, *l.c.*, p. 24). Even if at the time of the legal proceedings, the name of Honte was already in use for the whole Western river down to the sea, it may well be that the Zeelanders' restrictive use was founded on the usage dating from an earlier stage of development of the Honte, when it was but a branch between Hontemude and Hulsterhaven (Gottschalk, *De Vier Ambachten*, *o.c.*, p. 14). Hontemude may already have disappeared during the 14th-century floods (Gottschalk, *Stormvloeden*, *o.c.*, II, p. 12).

21 Stengthened by the evidence of several witnesses during the procedure, EA 2673, doc. 1, pp. 64 et seqq.

22 «que la dite riviere de la Honte et le fleux d'icelle prenoit commenchement depuis la dite riviere de l'Eschault devant Chavetingues en venant tout au lonmg de la coste de Flandres par devant la Neuze, Hulsterhavene et aussi joingnant Biervliet et l'isle de Cadsant jusques en ladite mer, où elle prenoit fin, comme dit est, lequel flux estoit et est entierement le vray strom de Flandres, et que nul n'y avoit juridiction que veoir ne que congnoistre, se non nuement le dit conte de Flandres et ses dicts officiers, et que avecn ce il n'estoit aucunement soustenable, que la dite riviere de la Honte preinst fin au dit lieu de Hulsterhavene, designé par les dits fermiers, veu qu'il convient, que icelle riviere, qui tousjours d'un costé castie la dite conté de Flandres, prendre vuydenge et yssue en la mer ou aultrement, fauldroit dire que ce feust ung sacq [...]» (Judgement of 18 July 1468, *l.c.*, p. 24). The concept of a 'sac' is similar to Doeleman's interpretation (in: 'Zeggenschap op de Honte', *o.c.*, pp. 32-3) of A.W. Vlam's study, 'Bijdragen tot de geschiedenis van de Schelde', in *Archief, vroegere en latere mededeelingen voornamelijk in betrekking tot Zeeland*, 1944-5, pp. 32-50; according to Doeleman, the Honte was originally «een waterloop, die ter hoogte van Hulsterhaven uit een waddengebied òm de kaap van Ossenisse heen *naar het oosten* vloeide en bij het inmiddels verdwenen Hontemuden in de Schelde viel» (my italics), although the author admits that, westwards, the Honte was already linked to the sea via the Dullaert and the Wielingen (p. 33).

July 1468, ordered further investigations and provisional measures[23] before a final decision could be reached. The Antwerp merchant who had been arrested with his ship was to be freed in return for a security. Ships passing through the Honte would not have to pay toll, but, in case the final decision would be in favour of the farmers and the Proctor-General, records were to be kept of their identity and cargo, and sureties would have to be offered. A special judicial commission would visit the estuary and carry out a full inquest on the issues. The report of the commission would also include a written survey, i.e. in all probability, a map, of the course of the Honte[24].

The following year, a second judgement made a final ruling in favour of the Antwerp merchant[25]. The other major issues remained outstanding.

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[23] This was in line with Burgundian and (during the early years) Hapsburg policies. Thus, in the judgement of 18 July 1468, The Flemish and Brabant litigants referred to (a) a 'provision(al) decree' of the Duke granted at Luxembourg in 1443, which suspended any levying of the toll on the Honte until such time a final decision was reached; (b) the 'Joyeuse Entrée' of Duke Charles; (c) another 'provision(al) decree', given at Luxembourg on 2 August 1467, which apparently confirmed that of 1443 (*l.c.*, p. 21).

[24] The maps which are now at the City Archives of Antwerp and at the General Archives of the Realm in Brussels were used for the publication of J. Denucé, *De loop van de Schelde van de Zee tot Rupelmonde in de XVe eeuw* (Antwerp s.d.), and have traditionally been associated with that judgement. A new edition of the maps would be necessary in order to further historical research. M.K.E. Gottschalk and W.S. Unger, 'De oudste kaarten der waterwegen tussen Brabant, Vlaanderen en Zeeland', in: *Tijdschrift van het Koninklijk Aardrijkskundig Genootschap*, 2e reeks, 67 (1950), pp. 146-64 (with appendices), have sharply criticised Denucé's interpretations. According to these Dutch authors, the Brussels map was probably drafted around 1468 and was subsequently used and modified during later legal proceedings, including the 1496-1504 proceedings. The purpose of that original map was, in their view, two-fold, as it was instrumental in the attempts to settle territorial disputes over the Scheldt from Rupelmonde onwards and over the Honte between Brabant, Flanders and Zeeland, but it was also used in the litigation about the toll on the Honte. On the other hand, Gottschalk and Unger argue that the Antwerp map was a new work, partly based on the Brussels copy, which was primarily aimed at the controversies over taxes (*geleide* and toll), which may explain why it also covers the Western area of the old Honte's estuary. A third map, which the city of Middelburg ordered in 1497, has been lost.

[25] The judgement of the Great Council of 8 September 1469 is largely a literal repetition of the 1468 judgement, but it states in its final section that the inquest has

1.2.2 *The 1496-1504 proceedings*[26]

In 1477, the untimely death of the Duke at the siege of Nancy forced his daughter into defensive positions. The Great Privilege was one in a series of concessions in which each principality sought the recognitions of their ancient rights and freedoms[27]. Under Maximilian, the civil war in the Low Countries was not propitious for asserting the sovereign's rights. Only in the 1490's, when the Hapsburg regime had restored the sovereign's authority and peace, and political stability was re-established, had the time come to reconsider the conflict of interests around the Honte[28]. The toll had been farmed out to Middelburg[29], a town which could now be counted upon to carry out vigorously the collection — partly because as one of Zeeland's most powerful corporate bodies, it could marshal forces to implement the collection, but partly also because as a commercial rival to Antwerp, it had an interest in challenging

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taken place and that the map is now ready. The decision definitively released G. Pels and his security; the judgement also confirmed the suspension ('surséance') of the toll in favour of Brabant (*l.c.*, pp. 158-9).

26 The main source remains the judgement of the Great Council of 11 October 1504 (of which there are several published versions, though many of these are either incomplete or based on second-hand transcripts). I have used (and will quote hereafter) the original draft from the Council's 'register of extended sentences', GCM 805.32. The corresponding file of these proceedings appear to be missing in the archives.

27 W.P. Blokmans (dir.), *Le privilège général et les privilèges régionaux de Marie de Bourgogne pour les Pays-Bas 1477* (Kortrijk-Heule 1985), particularly the contribution by R. Van Uytven, '1477 in Brabant' (including the edition of the 'Joyeuse Entrée' of 29 May 1477)h, pp. 253-372.

28 For the last two decades of the 15th century, the archives of the Great Council show important gaps, reflecting the troubled political situation at the time(J.Th. de Smidt and E.I. Strubbe, *Chronologische Lijsten van de Geëxtendeerde Sententiën en Procesbundels (dossiers) berustende in het archief van de Grote Raad van Mechelen*, I, *1465-1504* (s.l. 1966); A.J.M. Kerckhoffs-de Hey, *De Grote Raad en zijn functionarissen 1477-1531* (Amsterdam 1980).

29 According to the judgement, the farming of the toll was granted to Bergen-op-Zoom in 1499; the latter's levying of the toll was also challenged during the litigation involving Middelburg. According to Unger, *De tol van Iersekeroord*, *o.c.*, pp. XIV, 27 ss., Middelburg held the toll-farm between 1470 and 1499.

the latter's claims to exemptions[30].

In 1496, a series of incidents led to new proceedings before the Great Council. The central government must have looked with some apprehension upon the unfolding of the conflict before and during the legal proceedings, when the memory of the internal strifes was still fresh in everyone's mind. Antwerp's refusal to pay the toll led Middelburg to reinforce its guards on the Honte, posting a gunboat on the river as a display of its determination. Antwerp sent a small 'task force' which was meant to dissipate any impression that they were intimidated. The head of the guard, an octogenarian veteran of the estuary, and his watchmen were attacked and injured. The bailiff acting on behalf of Antwerp pursued his task with great energy, arresting Middelburg's councillors in their own town. At a later stage, during the proceedings, representatives of Middelburg were caught by Antwerp forces on their return from Malines — and thus under the sovereign's protection —, imprisoned and mistreated. Considering the interests at stake, such acts of violence and the contempt of the sovereign's authority could easily have been interpreted as provocation sparking off a much greater clash between the forces of different provinces[31].

1.2.2.1 *The litigants*

Nevertheless, the conflict remained by and large contained within legal proceedings. Antwerp and the Estates of Brabant were once again opposed to the farmer of the toll of Iersekeroord, who had by then been for a long time the city of Middelburg, joined by the Proctor-General, once again on behalf of the Count of Zeeland's interests. The Flemings were now absent from the proceedings.

1.2.2.2 *The issues*

Little had changed since the 1460's. The crux of the litigation was still the

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30 Possibly, the choice of Middelburg had therefore been inspired by political motives. Maes, 'Twee arresten van de Grote Raad', *o.c.*, p. 151, remarked that an earlier draft had granted the farming to private individuals. The renewal of the contract with Middelburg coincided with the *Magnus Intercursus* and the resumption of trade with England.

31 On these incidents, see GCM 805.32, ff. 157r, 160rv.

application of the toll to Antwerp merchants sailing via the Honte. The political and military upheavals since the late 1470's had only exacerbated, without resolving, the claims on either side.

1.2.2.3 *The arguments*

(a) *The legal framework.*

One recognises the same arguments as during the late 1460's. The possessory claims were reiterated on both sides, supplemented by diverging versions of the developments during the last two decades[32]. Brabant saw a confirmation of its position in the concessions made by Mary of Burgundy in 1477 and the non-implementation of the toll in the following years. The Proctor-General tried to show that the concessions, obtained under duress and the pressure of the mob, were void and had been repealed; during the civil war, the sovereigns' policy had been to maintain as much as possible their prerogatives, which, in any case, they had retained by their *animus possidendi*[33].

The titles Brabant referred to were much the same as those which Antwerp had already submitted in 1466: a 1276 agreement which was supposed to have been confirmed in 1343 by the Duke of Brabant and the Count of Holland and

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32 GCM 805.32, f. 163v (Procurator-General, offering a characteristic summary of the defects of the opponents' possession): «A la possession dont se vantoient lesdits des estas disoient qu'ilz n'avoient aucune possession et s'aucune avoient elle estoit sans tiltre, et se tiltre y avoit il estoit subreptif et obtenu par faulx, donné a entendre ou par commocion de peuple, et sy ne povoit estre paisible, veus les interruptions dessusdites»; f. 165r (States, challenging the possession of the toll by the Count of Zeeland): «que n'avions en ceste matiere possession par noz fermiers qui leur povoit nuyre, car se iceulx fermiers avoient levé aucune chose, ce avoit esté furtivement comme dit est, et aussi au desceu de noz predecesseurs et de nous».

33 GCM 805.32, ff. 158v-159r; f. 159v («...affin de nous remettre en nostre relle possession de ladite Honte, laquelle depuis lesdites commocions nous avions tousiours retenu de courage et de pensee»); f. 166r (the farmers of the toll had on several occasions been given directives, «que demonstre bien que nosdits predecesseurs et nous avons tousiours voulu retenir et continuer nostredite possession, laquelle tousiours avions retenu durant lesdites commocions saltem animo»).

Zeeland[34]; a 1304 unilateral declaration of the Duke of Brabant, in which he retracted the authorisation given previously to men-of-arms from Holland and Zeeland to capture enemy goods, allegedly on the waterway of the Honte[35]; the provisional decrees of the Dukes of Burgundy, at various dates, suspending the collection of tolls; and concessions granted, including in successive *Joyeuses Entrées*. All these titles (or their alleged import) were rejected by the Proctor-General, who countered with an even more ancient title, *viz.* the 1195 imperial grant to the Count of Holland to levy the toll on all waterways under his jurisdiction[36].

As in the 1460's, but perhaps less energetically, the economic arguments were also reiterated on both sides[37].

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[34] L.P.C. van den Bergh, *Oorkondenboek van Holland en Zeeland*, II (Amsterdam-The Hague 1873), No. 324, p. 139; J.G. Kruisheer, *Oorkondenboek van Holland en Zeeland tot 1299*, III, *1256 tot 1278* (Assen-Maastricht 1992), No. 1759, pp. 883-6. The document was referred to in order to argue «que la riviere de la Honte, partant de la mer et faisant passaige a tous marchans jusques en nostre ville d'Anvers, avoit de tout temps esté et encoirs estoit ung fleuve publique et franc appartenant au duc de Brabant» (GCM 805.32, f. 156r); see also f. 164v: «icelle sentence contenoit par expres que lesdits d'Anvers seroient francs de tous tonlieux et gheleydes sur ladite Honte sans riens reserver, ce que depuis avoit confirmé le conte de Zellande». Meijers, 'Des Graven Stroom', *o.c.*, pp. 111-2, does not seem to interpret that argument as a territorial claim, for he considers that «om aan te tonen, dat de Honte Brabantsch was, was door Brabant *alleen* beroep gedaan op een schrijven van Jan van Brabant van 1305, waarbij deze verlof had gegeven zijn vijanden uit Holland in Zeeland te arresteeren» (my italics).

[35] GCM 805.32, f. 164r. See also doc. c in the file EA 2673 and the Procurator-General's counter-argumentation in GCM 805.32, f. 161v.

[36] GMC 805.32, f. 158rv («comme conte de Zellande avons droit par privilege et don imperial de l'an mil C IIII^{XX} XV d'avoir et lever tonlieu sur tous les biens et marchandises appartenans a marchans et gens estrangiers non francs qui passent ou atouchent le stroom d'iceulx noz pays, une foiz en eaue doulce et une foiz en eaue sallee, et que de ce ensemble de mettre et changer ses et wachtes pour la garde du tonlieu partout nosdits pays ou bon nous semble»); see also f. 161r. For the 1195 document: L.P.C. van den Bergh, *Oorkondenboek van Holland en Zeeland*, I (Amsterdam-The Hague), No. 173, p. 107; A.C.F. Koch, *Oorkondenboek van Holland en Zeeland tot 1299*, I, *Eind van de 7e eeuw tot 1222* (The Hague 1970), pp. 382-4.

[37] GCM 805.32, ff. 156v-157r.

(b) *Territorial disputes.*[38]

Predictably, the Zeeland position had not changed. The Proctor-General asserted more strongly than ever the Count's right to levy the toll on all his waterways, including the Honte[39].

The Brabant position, in the absence of the Flemish party, was now more difficult. The Estates decided to express the claim that the Honte, from the Scheldt to the sea, fell under the jurisdiction of the Duke of Brabant[40]. This argument may seem far-fetched, and its brief record in the Great Council's judgement does not make it possible to assess how it was effectively worked out by counsel during the proceedings[41]. Possibly, it relied on the Duke's ancient possession of territories West of the Scheldt, particularly the area south-west of the Beveland island known as 'between Honte and Hinkele', which had later been ceded to the Count of Holland[42].

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38 During the last years of the 15th century, the government was better informed on the geographic situation, partly through its policy aiming at securing a more effective protection of the adjacent territories, such as the *Vier Ambachten* (De Kraker, *Landschap uit balans*, *o.c.*, pp. 27 ss., 204-6, 302 ss.).

39 E.g. GCM 805.32, f. 158r: «...droit de lever tonlieu par tout nostredite conté [...] a gens non francs qui atouchent le stroom de nostredit pays de Zellande, soit par ladite Honte ou ailleurs, et de mettre et changer nos wachtes par tout ledit pays ...».

40 «... ung fleuve publique et franc appartenant au duc de Brabant», falling under «la jurisdiction et stroom du duc de Brabant» (GCM 805.32, ff. 156r and 164r).

41 GCM 805.32, f. 156r: «la riviere de la Honte, partant de la mer et faisant passaige a tous marchans jusques en nostre ville d'Anvers» — the passage is to some extent ambiguous, for the words «partant de la mer» would seem to refer to a geographic area, but the latter part («jusques en nostre ville d'Anvers»), which refers to a part of the river which had always been known as the Scheldt (upriver from Saaftinge), should perhaps be understood to refer to a commercial route. In any case, the passage appears to establish that in 1504, Brabant was using the name 'Honte' for at least the whole course of the river from the Scheldt (according to the traditional and ancient use of that name) to the sea, and that it claimed sovereignty over the entire stretch of the river thus referred to.

42 Doeleman, 'Zeggenschap op de Honte', *o.c.*, pp. 33-6, who analyses the different sources which establish the Duke of Brabant's authority in the region 'between Honte and Hinkele' (before it was ceded to the Count of Holland) in order to buttress

The territorial arguments also gave the Zeeland party an opportunity to minimise the Flemish claims, which were no longer represented. Having asserted the Count of Zeeland's rights over the Honte, the Proctor-General proceeded to concede that the Count of Flanders could claim a narrow strip along his county's coastline, according to a famous and since then often-quoted formula, «as far as he could enter into the water on horseback and touch the water with a lance»[43].

(c) *The outcome.*

The judgement of 1504[44] was a victory for Zeeland interests. The Great Council, recently permanently installed at Malines, decided that the Count of Zeeland was fully entitled to collect his toll on the entire course of the Honte, implying that the river came under the Count's jurisdiction[45]. The Brabant

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his own explanation why the Flemish-Zeeland border was close to the Flemish bank of the Honte. The same author also argues that the Flemish border was established on or near the bank-side because it followed the border-line of the Tournai diocese; later, when the diocese of Utrecht was created, the pre-existing limit became the common border and the water-area north of Flanders was thus automatically incorporated into Utrecht (p. 39). However, the interpretation of the agreement of 1200 between the Duke of Brabant and the Count of Flanders remains controversial (cf. Van den Bergh, *Oorkondenboek*, *o.c.*, No. 183, p. 112, especially the words «pro terra illa ... ultra versus Selandiam»).

[43] GCM 805.32, ff. 161rv, where the Procurator-General gainsays the Brabant territorial claims: «...mais mettoient en fait que ledit fleuve du tout en tout estoit fleuve et stroom de Zellande, sauf le comte de Flandres du costé et au long de Flandres y avoit autant et si avant juridiction qu'il povoit entrer en l'eau et attoucher d'une espee ou de la verge de justice ce qu'il a voulu exploitter, et n'y approche le duc de Brabant a VI lieues prez»); on this passage, see also Doeleman, 'Zeggenschap op de Honte', *o.c.*, pp. 24-6.

[44] Remarkably, members from other councils were asked for advice (Council of Flanders, Council of Brabant, Court of Holland), an unusual step before judgement was given («appelez et prins a icelle visitacion faire certains notables personnages jusques au nombre de six de nos consaulx de Brabant, de Flandres et de Hollande», GCM 805.32, f. 167r).

[45] GCM 805.32, f. 167rv: «... disons et declarons que le conte de Zellande a droit de lever et cueillir par luy ses fermiers receveurs et commis son tonlieu de Ghervliet et de Yrsekeroert generalement sans riens excepter par tout son pays et conté de

Estates were ordered to pay compensation for the lost income, although the compensation was set at a lump sum of 18.000 gold Philip guilders[46]. Antwerp and her agents who had been found guilty of violence and contempt were sentenced to a stiff fine[47].

Summary

The late-fifteenth century proceedings show that the Scheldt (or rather: Honte) Question was then mainly perceived as a conflict of interests between

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Zellande, cours d'eaues et strooms d'icelluy, *aussi bien la Honte que autres*, quelz qu'ilz soient et comment qu'ilz se nomment. Et ce de toutes navires, denrees et marchandises quelles qu'elles soient et de quelle part qu'elles viengnent, appartenans a marchans non francs, qui en alant, venant, montant, descendant et passant, atouchent aucun *des cours d'eaues et stroms dessusdits, la Honte ou autres*. Et que sembleblement le conte de Zellande a droit de mettre ses wachtes et gardes par chacun des dessusdicts *stroms et cours d'eaues aussi bien la Honte que autres*, et generalement sans riens excepter par tout sondit pays et conté de Zellande pour, par le moyen desdits wachtes et gardes, de tant mieulx et plus facilement recouvrer, recevoir et faire entierement venir ens les deniers et le droit d'icelluy son tonlieu» (my italics).

46 GCM 805.32, f. 167v: «Et condempnons lesdits des estas de Brabant impetrans a nous rendre et restituer tous les dommaiges et interestz que feuz nos predecesseurs et nous avons soustenu et souffert par leur moyen et empeschement depuis le commencement et meismes depuis l'an XLIII dernier. Et lesquelz dommaiges et interestz nous reduisons et moderons de grace a la somme de dixhuit florins d'or Phelipe». The Dutch version published by W.S. Unger, *De tol van Iersekeroord*, *o.c.*, No. 38, pp. 69-70, contains a more hefty (and realistic) sum: «ter somme toe van 18 dusent gouden philipusen».

47 GCM 805.32, f. 167v: «Et pour ce que par ce proces est soufisamment apparu des exces commis et perpetrez par lesdits d'Anvers, Anthoine van Zittert, messire Jean Dymersele et autres, nous condempnons lesdits d'Anvers pour amende et raparacion envers nous en la somme de huyt mil florins d'or Phelipe. Et en suspendant ledit Anthoine van Zittert de son estat et office de huissier, ordonnons que icelluy Anthoine et tous autres particulier qui se sont meslez des exces dessusdits seront adiournez en personne en la court de ceans a certain et competent jour pour repondre a telles fins et conclusions que le procureur vouldra prendre contre eulx et chacun d'eulx. Et sy reservons a Cornille Berthelz., Henry Braem et leurs consors inthimez et interessez leur action de injure et de interest contre les injurians et interessans dessusdits pour la povoir intenter en ladite court de ceans toutefois que bon leur semblera par la forme et maniere qu'il appartiendra que faire se devra par raison».

autonomous regional actors. Beyond the adjacent principalities, few references were made to a wider 'international community': a few arguments and witnesses mentioned the international trade, and on one occasion it was acknowledged that the ultimate authority to levy tolls resided with the Pope and the Emperor, the theoretical supreme authorities within the Western Latin *res publica Christiana.*

The ambivalence of the Dukes of Bungundy's personal union nevertheless gave the dispute some characteristic features. As the supreme political body of the principalities, the sovereign and his council could appear to be not so much a common, but rather a superior authority 'above' the individual principalities. In a relatively peaceful political context (a condition which was not fulfilled for most of Maximilian's reign), that superior authority seems to have been at least sufficiently strong for imposing a peaceful form of dispute settlement.

The means of peaceful settlement was that of a court of justice. As a result, the principles which governed both the procedure and the substantive rules applied by the court were to a large degree those of Roman-canonic law. The versatile format of possessory actions offered a fitting framework for trans-provincial or inter-provincial disputes, for which no body of legal rules outside the *ius commune* had yet been developed. In that sense, the Great Council was able to fulfill the role of a regional 'international court', settling disputes between actors whose 'sovereignty' was at the same time shared and distinct, i.e. integrated into a common political structure.

2. 1783-1786: The Scheldt Question in the era of the *Droit public de l'Europe*

2.1 *International relations and the European Law of Nations on the eve of the French Revolution*

By the 1780s, traditional diplomacy was less challenged by new philosophical ideas — bolstered, for a while, by the success of American independence — than by uncertainties about the long-term developments in the perceived balance of power. Ever since (at the latest) the Spanish Succession War, the rise of Britain's weight in European politics had seemed to have become the

main challenge to France's potential hegemony. At the end of the Seven Years' War, the time was ripe for a cautious alliance between France and her old arch-rival Austria. Peace with the Emperor meant that France could once again invest more resources in its overseas and maritime policy, the necessary condition if she were to break England's growing supremacy over the world's sea routes and maritime trade. The loss of England's most developed Northern American colonies appeared to many observers a clear indication that that supremacy was now declining. On the European Continent, the Anglo-Dutch war had broken England's ties with her long-term bridgehead for military interventions in Europe. The Dutch Republic, weakened and internally divided by the power-struggle of political factions which favoured different foreign policies and alliances, was tempted to rely on the protection of France.

In Central Europe, the rise of the Prussian state had become Austria's main source of concern. Prussian expansionism not only shattered the *modus vivendi* which had emerged after the Thirty Years' War within the Empire, it also fundamentally changed the situation in the shrinking Polish territories, where the regional Great Powers — Austria, Prussia and Russia — were increasingly heading towards direct confrontation.

2.2 *Joseph II's claim for free navigation on the Scheldt*

From Vienna's perspective, the Austrian Netherlands were an ambivalent political asset. No doubt the territories still carried a certain prestige because of their historical associations with the House of Burgundy and Charles V. More importantly, their strategic position ensured that the Emperor remained a prominent and necessary player in Western European politics.

However, the territories also had their drawbacks. They had been returned to the House of Austria mainly because the European Powers at Utrecht, and not least the Dutch, had wanted a major power to hold the vulnerable provinces between France and the United Provinces — an arrangement which had furthermore been reinforced by the *Barrière* system, which had already been eroded under Maria-Theresia and was finally abolished by her son. Since France was no longer seen as the main threat to the Emperor's interests, that purpose now seemed obsolete. Another consideration militating against the Emperor's interests in the Belgian territories was its lacklustre commercial position, much in contrast to the glorious past of such cities as Bruges, Ghent

and Antwerp. It was commonly believed that if these provinces could offer better access — both geographically and politically — to maritime trade, some of that commercial past could be revived. In line with such widely-held opinion, it was usually admitted that the Austrian Netherlands were exceedingly disadvantaged by the insufficient capacity of its few Flemish seaports (mainly, Ostend) and Antwerp's loss of any direct access to the sea since the partition of the Netherlands as a result of the Dutch revolt in the sixteenth century[48]. For Austria, which was struggling to set up international maritime trade through its few outlets on the Mediterranean, the prospect of acquiring overseas colonies (as other Western European Powers had, with various success), and of participating in world trade, was a recurrent vision which, witness the infamous end of the Ostend Company, the Dutch influence on European policies had repeatedly thwarted.

Joseph II may have had reasons to believe that in the aftermath of the Anglo-Dutch War during the first years of his reign, the circumstances were favourable for a change. England's ties with the Dutch had been severely strained and its influence in the Republic were at a low ebb. The United Provinces were seeking protection from France. Austria's alliance with France had lasted for more than a quarter of a century, and was part of France's policy to ensure that her hands were sufficiently free on the Continent to tackle England on the seas and in the colonies. The friendly relations with Catherine of Russia could reasonably be expected to thrive on the prospect of offering Russia's maritime ambitions privileged facilities on the North Sea, in the immediate vicinity of the Channel. Finally, the internal strife in the Dutch Republic would inevitably weaken its capacity to respond on the international scene.

A strategy was devised, the main aim of which was to obtain a Dutch concession opening the Scheldt to international navigation. The idea had already been vented by the Emperor at the beginning of his reign, around the same time when, for opportunist reasons, England, at war with the Dutch, had already made a similar suggestion to the Austrian government.

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[48] Some (particularly, Dutch) authors tend to interpret more restrictively the meaning of 'closure' regarding the history of the Scheldt, for a recent example, s. the dissertation of V. Enthoven, *Zeeland en de opkomst van de Republiek. Handel en strijd in de Scheldedelta c. 1550-1621* (Leiden 1996), Chapter 4, pp. 109-50 (and the additional thesis No. 3, «Op enkele korte perioden na is de Schelde nooit gesloten geweest»).

The main objection to the plan was seen to lay in art. 14 of the Treaty of Munster, which had sanctioned the closure of the Scheldt imposed by the Dutch Republic ever since Farnese had recaptured Antwerp[49]. Whatever the merits of the criticisms directed against that particular article one and a half centuries later, any European diplomat at the time would admit that a challenge of the article could easily be perceived as a challenge to a fundamental concept, even though perhaps outdated, of the international European political order.

2.2.1 *The sequence of diplomatic initiatives and military display*[50]

In 1783, Joseph II's government had established a plan of action which purported to obtain, ultimately, the 'freedom of the Scheldt', a purpose which, however, was camouflaged through a screen of other claims to be asserted in order of priority. A diplomatic note written in October 1783 stated that after the departure of the last Dutch garrisons in the Southern Netherlands, the question of the borders, and particularly the Northern border of Flanders, had to be settled; and only after the various other claims against the Republic had been put forward would the Dutch government be confronted with the question of free navigation on the Scheldt. In addition, the Austrian government intended to create the circumstances which would make the Dutch take the initiative and seek negotiations. A few minor incidents in October and November 1783 offered the Emperor's government the pretexts for stepping up the pressure on

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[49] Dutch version, according to a contemporary publication (*Articulen en conditien van den Eeuwigen Vrede. Ghesloten tusschen den Groot-machtighen Koninck van Hispaignen, etc. ter eender, ende de Hoogh-mogende Heeren Staten Generael der Vereenighde Nederlanden, ter ander zijde; onderteyckent ende bezegelt den 30 Januarij 1648.* Tot Rotterdam, By Haest Voortganck, Boeck-drucker van de Articulen van de Vrede, 1648): «De Riviere de Schelde, als mede de Canalen en 't Sas, Swijn ende andere Zeegaten, daer op responderende, sullen van de zijde van de Heeren Staten geslooten werden gehouden».

[50] The major study for this period remains: F. Magnette, *Joseph II et la liberté de l'Escaut. La France et l'Europe* [Mémoires couronnés et autres mémoires publiés par l'Académie Royale des Sciences, des Lettres et des Beaux-Arts de Belgique, in-8°, T. LV] (Brussels 1896-8). Some additional source-material is mentioned in A. Cauchie, 'Le comte L.C.M. de barbiano di Belgiojoso et ses papiers d'Etat conservés à Milan', in: *Bulletin de la Commission Royale d'Histoire*, T. 81 (Brussels 1912), 147-332, esp. pp. 176-200.

the Republic. But the Dutch government remained aloof and it was not before April 1784 that it finally sent its deputies to Brussels. There, the representatives were soon presented with the Emperor's *Tableau Sommaire*, which listed the Austrian claims, though, following the strategy established earlier, it fell short of raising the issue of navigation on the Scheldt[51]. The *Tableau* included the claims on the Flemish border, the Dutch forts on the Scheldt within the Austrian Netherlands, on various payments due by the Republic, and also on the sovereignty over Maastricht and the Outre-Meuse territories.

At that stage, Austrian diplomacy had planned to involve its French ally in its scheme. The main thrust of the plan was to ensure that French pressure on the Dutch would buttress the Austrian demands. More specifically, it had been hoped that the French government could be persuaded to convey the demands directly to the Dutch, who would thus be led to believe that the French government fully backed those demands[52]. The plan failed and Joseph II was forced to take up unilateral action by stepping up the pressure on the Dutch even further. As the latter were evidently dragging their feet in the Brussels negotiations, the Emperor decided that only a more robust display of force would bring them to make concessions. On 23 August 1784, an ultimatum which required the Dutch, *inter alia,* to allow free navigation on the Scheldt, expressly stated that any challenge to ships sailing under the Emperor's flag would be regarded as 'a formal act of hostility'[53]. The prospect of a war and its European ramifications instantly attracted the attention of all the major European powers and triggered off a series of pamphlets which soon circulated among 'European public opinion'. The tension increased when, on October 8th, a ship sailing from Antwerp came under fire from the Dutch guard on the Scheldt and was arrested. Diplomatic relations between Austria and the Republic were broken off and, at least formally, the two countries were deemed to be at war.

At first, the French government, while the Austrian-Dutch negotiations had been deteriorating, attempted to act, or rather to appear to act, as a 'honest

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51 Magnette, *Joseph II et la liberté de l'Escaut...*, pp. 75-6.

52 In this instance, again, it may be that the Emperor's strategy prevailed over Kaunitz's more realistic approach to the French government's position: Magnette, *Joseph II et la liberté de l'Escaut...*, pp. 117-8.

53 Cauchie, *Le comte ... di Belgiojoso...*, p. 183.

broker' between the two powers with whom it wanted to remain on friendly terms. After the breakdown of the talks and the preliminaries to an outbreak of war had become public, France decided that it could no longer remain neutral. On 20 November 1784, the King made it known to the Emperor that in this conflict, France would support the United Provinces[54]. At that point, the Austrian government finally decided to back down and avoid an armed conflict where it might well have been isolated. The French determination brought the parties to start peace negotiations in Paris, which started in April 1785[55]. Although by now, the Emperor was ready to forsake the issue by making himself major concessions, the Dutch proved obstinate negotiators and it took much French diplomatic pressure to reach an agreement. Finally, the peace of Fontainebleau was signed on 8 November 1785.

2.2.2 *The Scheldt Question as an issue of the Droit Public de l'Europe*

Art. 14 of the Munster Treaty proved to be a greater obstacle to Austrian ambitions than anticipated. Austrian diplomacy, possibly under pressure from the Emperor himself[56], seems to have underestimated the importance attached to that article by the Dutch, regardless of the faction they supported in their internal affairs. The closure of the Scheldt was seen as a fundamental achievement of their independence war, and it had been confirmed in the very treaty which finally gave full and formal recognition on the European scene to

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54 Magnette, *Joseph II et la liberté de l'Escaut...*, pp. 154-5. The French Minister Vergennes, in a letter to the Ambassador, explained that his government's decision was justified by the need to counter a policy «qui subvertirai[t] tout le sytème dedu droit des gens, et ren[d] précaires les propriétés comme la tranquillité de toutes les nations. [...] [*the French King should make it clear that he does not intend to abandon the*] rôle que sa puissance lui donne le droit de jouer dans toutes les affaires qui peuvent intéresser la balance et la tranquillité de l'Europe» (p. 157).

55 Magnette, *Joseph II et la liberté de l'Escaut...*, p. 178.

56 Cf. the initially cautious and reluctant attitude of Kaunitz to the Emperor's reaction in 1781 to the English suggestions of reopening the Scheldt to international trade: the Chancellor's memorandum referred explicitly to the importance of art. 14 of the Munster Treaty and its later confirmations (Magnette, *Joseph II et la liberté de l'Escaut...*, pp. 21-3; see also the Austrian authorities' reactions to Brabant revendications, p. 28). The same year, the Emperor himself reminded the burgermaster of Antwerp that the Treaty of Munster was an insuperable obstacle to the reopening of the Scheldt (p. 37).

their independence. Any attempt to erode the treaty, apart from the Dutch concerns to prevent any competition to the position of Amsterdam and to diminish in any way the full sovereign control over Zeeland's waterways, was perceived as a direct threat to the Republic's most fundamental interests[57].

For other powers, not in the least France, the Treaties of Munster also had a significance beyond the specific arrangements they contained. The 'Peace of

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[57] Magnette, *Joseph II et la liberté de l'Escaut...*, pp. 84-5, quoting the French government's representatives in The Hague, 6 July 1784. The 350th anniversary of the Peace in 1998 has inspired much fresh scholarship on the subject and generated a host of publications, too many to mention here. H. de Schepper, *Rond de Vrede van Munster* (Brussels-The Hague 1999), has reiterated some of his earlier arguments to show that, in spite of the division, some 18th-century sources continued to present or view the Southern and Northern Netherlands as an identity with common features, possibly still with a common destiny. More generally, however, the *Nachleben* of the Westphalian Peace (throughout the Ancien Régime) has enjoyed comparatively less attention. The United Provinces are practically left out from the otherwise eminent collection of essays published by L. Bély and I. Richefort (eds.), *L'Europe des Traités de Westphalie. Esprit de diplomatie et diplomatie de l'esprit* (Paris 2000), which on the other hand contains a contribution on England. They appear more prominently in the three volumes *1648. War and Peace in Europe* (K. Bussmann and H. Schilling, eds.: exhibition catalogue and two volumes of essays, Munich 1998): esp. J. Israel, 'The Dutch-Spanish War and the Holy Roman Empire', pp. 111-31 in the vol. *Politics, Religion, Law and Society*, which contains several articles on the long-term importance of the Peace. For Dutch commemorations (in which the Scheldt Question, unsurprisingly, hardly appears), see a.o.: J. Dane (ed.), *1648. Vrede van Munster. Feit en verbeelding* (Zwolle 1998); *1648. De Vrede van Munster. Handelingen van het herdenkingscongres te Nijmegen en Kleef, 28-30 augustus 1996, georganiseerd door de Katholieke Universiteit van Nijmegen, onder auspiciën van de Werkgroep Zeventiende Eeuw* (Hilversum 1997), esp. the contribution assessing the short- and long-term economic effects of the Peace Treaty by A.M. van der Woude, 'De vrede van Munster en de economische ontwikkelingen in de Republiek', pp. 99-119. H. Lademacher, '"Ein letzter Schritt in die Unabhängigkeit" — Die Niederländer in M_nster 1648', in: H. Duchhardt (ed.), *Der Westfälische Frieden. Diplomatie, politische Zäsur, kulturelles Umfeld, Rezeptionsgeschichte* (M_nich 1998), pp. 335-48. C.G. Roelofsen, 'Völkerrechtliche Aspekte der Verträge von Münster und Osnabruck vom 24. Oktober 1648', in: O. Moorman van Kappen and D. Wyduckel (eds.), *Der Westfälische Frieden in rechts- und staatstheoretischer Perspektive* (Berlin 1998), 175-88 [= *Rechtstheorie* 29 (1998)]. F. Dickmann, *Der Westfälische Frieden* (Münster 1998, 7th edn.), p. 440 et seqq.

Westphalia' had after all established France's continental supremacy against their Hapsburg rival, partly by diminishing the Emperor's influence in the autonomous territories of the Empire. The Spanish-Dutch settlement, which had ensured the independent position of the Republic against the Hapsburg power, also fitted into that general scheme. Thus, from the French perspective, too, any change to the 'system' of Westphalia, even on an issue which possibly did not directly affect French interests, could be seen, despite the profound transformations European policies had gone through since the mid-seventeenth century, as an overture to far greater changes of an order to which France remained on the whole attached, or which at least, in the present circumstances, it was not willing to give up for the sake of particular Austrian interests. Moreover, France's priority at the time was her struggle with England. As the Austrian efforts to press the Dutch Republic threatened the French policy aiming at an agreement with the United Provinces which would contribute to separate the Republic from England, the Austrian diplomatic initiative was seen as both a threat and an opportunity: if France stood by Austria, or remained indifferent in the conflict, the project of a French-Dutch alliance and the French influence in the Republic were lost; conversely, a strong support of the Dutch cause on an issue which the latter felt touched the very survival of their country, could only benefit the French ascendancy over the United Provinces. In addition, as France had reasons to expect that the Austrian insistence on their claims against the Dutch were strongly subordinated to other, more important geo-political concerns[58], the French government was in a position to antagonise its ally in Vienna on this issue without too great a risk of putting an end to the Austrian alliance.

In that sense, the controversy over the Scheldt raised by Joseph II can be seen as a classic example of eighteenth-century doctrines and theories on the European law of nations. The *Droit Public de l'Europe* was a concept of international law which strived to combine different, to some extent even diverging, approaches to the normative principles governing international relations between European nations. One of these approaches was strongly influenced by rationalist philosophy: it shared the general rationalist axiom of a

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[58] Cf. Joseph II's efforts to acquire the Bavarian territories in return for abandoning the Southern Netherlands, which would have strengthened his position within the Empire against the growing threat of Prussia (Magnette, *Joseph II et la liberté de l'Escaut...*, pp. 142-5).

general, 'rational' structure in the outer world, including the 'society' in which European nations interacted. Strongly influenced by the scientific models of the time, it assumed a rationally intelligible coherence or system in the way international relations, apparently exclusively moved by the *raison d'état* of each individual actor, had developed. In that view, the European statesman was someone whose insight in the system made him work out a policy which optimally combined the requirements of his country's *raison d'état* and those of the European 'system' of nations. The most salient feature of that rationalist thinking was no doubt the principle of the 'balance of power', which pervaded much of the diplomatic jargon and, more generally, discussions on international relations and the law of nations. The eighteenth-century concept of the 'balance of power' owed much to a general model borrowed from physics, as may be apparent from the insistence in contemporary diplomatic correspondence or political publications on the necessity to find the point of 'rest' or 'balance' in the continuous struggle between the powers or nations. References to the 'tranquillité' or 'repos' of Europe in the French diplomatic language of the time was therefore more than a mere rhetorical flourish[59].

The *Droit Public de l'Europe* was nevertheless much more than a transposition into legal terms of scientific rationalist thinking. Another approach it expressed was, paradoxically, one of *Realpolitik*: few systems of international law in Western history have been so close to the political principles of international relations, or, in other words, have sought to narrow to such extent the inevitable gap between international politics and the international rule of law[60]. The insistence, in the eighteenth-century law of nations, on the principle of efficiency, is but one example of that concern. The more specific rules governing the dynastic succession in particular countries, or the complex organisation of the Empire, or even the *Barrière* as a general principle, further illustrate how steeped in particular political compromises European

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[59] A. Osiander, *The States System of Europe, 1640-1990. Peacemaking and the Conditions of International Stability* (Oxford 1994), Ch. 3 (on the Peace of Utrecht).

[60] Notwithstanding, of course, some fundamental doctrinal and theoretical controversies, recently discussed by R. Tuck, *The Rights of War and Peace. Political Thought and the International Order from Grotius to Kant* (Oxford 1999), in particular Ch. 5, 6 and 7 for this period. In many ways, Mably's classic treatise remains the best contemporary outline (recently re-edited with an introduction and notes by M. Belissa: Gabriel Bonnot de Mably, *Principes des négociations. Pour servir d'introduction au droit public de l'Europe (1757)* (Paris 2001)).

international law could be. It also explains why, parallel to the meta-juristic works on international law which sought to elaborate a system of *ius naturae sive gentium* that would match the concept of *Vernunftrecht*, works on topics of international law which can accurately be characterised as early-positivistic were thriving[61]. To a legal or political mind of the time, there was no necessary contradiction, for if particular agreements were compatible with the general principles of the 'system', they were simply expressions, in the positive law of nations, of the system's immanent laws.

Even beyond the strictly legal arguments, these concepts played a role in the discussions inspired by political events. Thus, when the Austrian-Dutch dispute over the Scheldt reached a point where it could spill over into a wider European armed conflict, it became a topic for polemics in different countries[62]. Among the pamphlets published in 1784-5[63], the controversy

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61 For a recent and, in the current discussion, influential reference-work on 'early-positivism' in eighteenth-century international doctrines: K. Akashi, *Cornelius van Bynkershoek: His Role in the History of International Law* (The Hague etc. 1998).

62 Ch. Terlinden, 'The History of the Scheldt', in: *History, The Quarterly Journal of The Historical Association*, New Series, vol. IV (1919-20), 185-97, and vol. V (1920-1), 1-10, which is a brief general outline of the history of the Scheldt from the Middle Ages until the 19th century, gives in the second part, p. 9, bibliographical note V, a useful survey of pamphlets published during the 1780s. I hope to publish a separate article specifically dealing with the law of nations in the light of these polemical writings. F. Magnette, 'Un mémoire inédit sur la liberté de l'Escaut', in: *Compte rendu des séances de la Commission Royale d'Histoire, ou Recueil de ses Bulletins*, Cinquième série, T. V (Brussels 1895), 405-17, published an anonymous and undated argument from a manuscript in the French Foreign Office Records. According to Magnette, the author was a resident in Frankfurt, wrote the piece towards the end of 1784 and was clearly in favour of the Emperor's claim. The manuscript may be incomplete: while its title announces 'Sept questions politiques sur les affaires d'Etat actuelles de l'Empereur avec la Hollande', but Magnette's publication only contains one section (it may be of course that the other sections are not related to the Scheldt controversy). The location of the author in Frankfurt may be spurious: perhaps it is no more than a rhetorical flourish: the author opposes the opinions supported in Amsterdam and Vienna, and then presents himself as a free commentator residing in Frankfurt — a city conveniently located in-between, possibly a device aiming at emphasising that he is «exempt de partialité» (p. 410). Note 1, p. 413, which deals with Dutch fortifications on the banks of the Scheldt just North of Antwerp, might betray a familiarity with the local situation. The author's arguments against the Dutch are mainly based (a) on the freedom of the seas (the

between Linguet and Mirabeau is paradigmatic of the conventional argumentations and reasoning followed by the authors of pamphlets on issues of international politics and law[64].

For Linguet[65], the Scheldt incident was an opportunity to support the Emperor's case against the Dutch. His argumentation pretends to consider both the legal and the political issues of the question. In law, Linguet rejects any justification of the Dutch refusal to accept the Emperor's claims for free navigation on the Scheldt. This part of the argument is threefold: the Dutch position is said to be contrary to equity and reason, to natural law, and to the law of nations. Intermittently, these arguments are rhetorically strengthened by attacking the Dutch policies for being in breach of accepted European ethical standards. The general argument denounces the Dutch Scheldt-policy as inequitable, unreasonable and disproportionate[66]. Their reliance on the Munster Treaty is in general, according to Linguet's thesis, a spurious justification, for the author believes that any legitimate pretensions which may have justified the Treaty back in 1648, can now equally be asserted by the Emperor against the Republic. Far from acknowledging any privileged authority to the Treaty, Linguet objects to its validity — either because he

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Scheldt estuary being assimilated to a sea-arm); and (b) on the nullity of art. 14 of the Munster Treaty, a.o. because the Spanish Kings' powers did not include the right to cede any part of the Netherlands. More generally, the author challenges the consistency of the Westphalian Peace.

63 See also the articles in the *Gazette de Vienne* and the *Gazette the Leyde* referred to by Mirabeau in his pamphlet on the Scheldt Question (full reference *infra*), p. 91, N. 1.

64 For a brief analysis of the two pamphlets in the wider context of the French government's policy in international relations at the time and its concept of the law of nations: M. Belissa, *Fraternité universelle et intérêt national (1713-1795). Les cosmopolitiques du droit des gens* (Paris 1998), pp. 124-5.

65 Linguet's text appears in various imprints which would require a more thorough collation. The quotations hereafter rely on: *Dissertation intéressante sur l'ouverture et la navigation de l'Escaut, par M. Linguet.* A Londres; Et se trouve à Bruxelles, Chez De la Haye & Compagnie, vis-à-vis la rue des Lombards. M.DCC.LXXXIV.

66 *Dissertation intéressante...*, pp. 14, 21, 24, 27-8, 37, 55. Linguet (conveniently by-passing later confirmations in multi-lateral conventions) also doubts whether the Treaty could be opposed to non-contracting Powers (p. 48).

applies a principle which comes close to that of *rebus sic stantibus*[67], or because he argues that, at its root, it was excessively detrimental to the Southern Netherlands' interests. Moreover, any legitimacy the Dutch could claim for the Treaty was based on their superior power at the time it was concluded; the Emperor was now in a position to avail himself of the same legitimacy against the Dutch[68]. This general argument is then more specifically reinforced by arguing that art. 14 of the Munster Treaty violated fundamental principles of both natural law and the law of nations. The natural law argument[69] consists mainly in showing that the closure of the Scheldt is purely detrimental to the interests of Brabant and the Austrian Netherlands, without offering any substantial advantage to the United Provinces. The law of nations' argument[70] is mainly based on the principle of the freedom of the seas[71], which Linguet here extends to a tidal estuary as that of the Scheldt. In line with this argument, and elaborating on the general benefit of international trade, he anticipates the concern the law of nations would soon show for liberating navigation on international rivers[72] — though his science-fiction analogy with the international status of aircrafts reminds us that he was no infallible prophet[73]. These 'legal' arguments are rounded off by a series of

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67 *Dissertation intéressante...*, pp. 23, 26-7 («... et n'est-ce pas ici le cas de mitiger la rigueur du texte par un commentaire, ainsi que le texte lui-même par les variations de la fortune, et le changement des circonstances?» — in the following paragraph, however, Linguet reverts to the deficiencies of the Treaty *a radice*). On the *foi due aux traités*: p. 26.

68 *Dissertation intéressante...*, pp. 25-6. Linguet's argument resembles an opinion which the Emperor himself expressed in 1782 to Kaunitz and Mercy (quoted by Magnette, *Joseph II et la liberté de l'Escaut...*, pp. 47-8, a.o. «Pourquoi, au droit du plus fort, du vainqueur de 1648, ne pas opposer le droit de la nature, le droit des peuples?»).

69 *Dissertation intéressante...*, pp. 20, 29, 31-2, 35-7; on p. 34, presents a possible Dutch counter-argument against the objections based on natural law.

70 *Dissertation intéressante...*, § V, p. 38 et seqq. (*jo.* natural law, p. 48).

71 *Dissertation intéressante...*, p. 41.

72 *Dissertation intéressante...*, p. 47.

73 *Dissertation intéressante...*, pp. 43-4 («... tomberoit-on dans l'esprit d'un peuple quelconque de stipuler, en traitant avec des voisins même vaincus, que les aëronautes ne pourront traverser les nuages qui ombrageront son pays? Un Roi de France interdira-t-il à l'Espagne la faculté de faire voler ses couriers en ligne droite

considerations which are meant to demonstrate the weakness of the Dutch position in the European context. Using arguments which mirror remarkably accurately those expressed by Austrian diplomacy, Linguet, emphasising Holland's established position in international trade, minimises the Dutch fears of a reversal of fortunes for Amsterdam and Antwerp. Neither England nor France (a wrong assessment, as later events proved) had any interest in supporting the Dutch resistance against the Emperor's demand. France, he suggested, would even benefit from the opening of the Scheldt in favour of her Austrian ally. While Russia would see her European policies vindicated by the opening, Linguet doubted that Prussia would find any reason for intervening on behalf of the Republic. Any reader who had been persuaded by Linguet's arguments would have concluded that the Emperor's demand to free the navigation on the Scheldt was not only just, reasonable and lawful, but that the Dutch could not count on pitting the great European powers against each other in order to protect their interests[74] — which, whatever they claimed, were not as vital for the Republic's survival as they pretended.

Mirabeau's pamphlet[75], partly written in reaction to Linguet's[76], takes an opposing view. His arguments are directed against the Emperor, but he also proposes a new, and original, scheme to resolve the question, which no doubt would have been favourable to French interests, without necessarily strengthening the Dutch Republic. With greater emphasis than Linguet, Mirabeau works out his criticisms and proposals within the system of the *Droit*

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des Pyrénées aux Alpes, sous prétexe que se seroit déroger à sa souveraineté?»).

74 *Dissertation intéressante...*, pp. 62-4, Linguet concludes that if a war breaks out because of the Scheldt Question, it should only directly involve Austria and the United Provinces. His analysis nevertheless shows the interests other European Powers may gain or hope to gain from the outcome of the conflict.

75 References are to: *Doutes sur La liberté de l'Escaut Réclamée par l'Empereur; Sur les Causes et sur les Conséquences probables de cette Réclamation.* Par le Comte de Mirabeau. A Londres: Chez G. Faden, Géographe du Roi, Charing-Cross; Et se trouve chez J. Robson, New Bond-Street, & P. Elmsley, dans le Strand [s.d., the Preface dated «A Londres, 28 Décembre, 1784»]; a Dutch translation was published shortly afterwards: *Bedenkingen over de vrijheid der Schelde, door den Keizer gevorderd. Over de oorzaaken en waarnschijnlijke gevolgen van deze vordering.* Door den graave de Mirabeau. Te Leyden, Bij Frans de Does, MDCCLXXXV.

76 In particular the Third Letter of the pamphlet, pp. 90-153.

Public de l'Europe and the balance of power[77]. Following what appears to have been a widely shared consensus, he concedes that the Emperor's claims for the Scheldt are legitimate in terms of natural law, *viz.* the principles of free navigation and trade[78]. However, Mirabeau here introduces his own brand of natural law theory, which he opposes to the law of nations. The natural law in his view reflects the state of nature of competing nations; and, as in the case of the primary state of nature of individuals, these natural laws offer no protection to the weaker actors[79]. The law of nations, on the contrary, encompasses the body of rules which govern an organised society of nations. Through treaties, in Mirabeau's view, the society of nations gradually builds up a positive international law which, for the sake of preserving the international legal order, should prevail over natural law[80]. In that context, the Treaty of Munster is seen as one of the most fundamental 'laws' of that European international order[81]. Any attempt to violate or to change that fundamental law should therefore be

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77 In this pamphlet, Mirabeau, does not seem to use the phrase *droit public de l'Europe*, but he regularly refers to the European 'system' and speaks of the whole complex of treaties which, together, «assurent l'existence politique de l'Europe» (*Doutes sur la liberté de l'Escaut...*, p. 25) and form «le code politique de l'Europe» (p. 12; translated in the Dutch version as «het staatkundig wetboek van Europa»); but he rejects any 'utopia' (p. 32), or considering in his own day any politically integrated system such as 'the Republic of Henry IV, or the European Assembly of the Abbé de Saint Pierre' (pp. 26-7). The balance of power, on the other hand, is a concept Mirabeau frequently refers to as a conventional device for securing peace — conventional in the sense that, as a fundamental principle of political theory, it does not appear to be subject as such to critical scrutiny.

78 *Doutes sur la liberté de l'Escaut...*, p. 22 et seq.

79 *Doutes sur la liberté de l'Escaut...*, pp. 22, 27, 28-9, 32, 91. A brief reference to Rousseau serves the purpose of buttressing the idea that positive laws, not natural law, are the foundation of the social order (p. 26).

80 *Doutes sur la liberté de l'Escaut...*, pp. 26 («Les conventions sont donc la case de tous les droits. Faudra-t-il désormais les violer toutes, détruire tous les établissemens politiques, sapper touts les autorités, et porter le trouble dans chaque Etat, sous prétexte d'y ramener les principes du droit naturel dont on s'est écarté [...]?»), 29-30 («...car il n'est que deux droits sur ce globe: celui de la force, et celui des conventions [...]. nulle société n'existe qu'à l'abri des conventions»), 32 (the author, referring to his earlier statements, declares that he will not discuss whether the system of European international relations is good or bad: «Il s'agit de droit public, et non de droit naturel»).

81 *Doutes sur la liberté de l'Escaut...*, pp. 10, 12.

regarded as a threat to the international order itself. Switching to the register of international politics, Mirabeau argues in favour of French intervention on behalf of the Dutch. His argument rests on the view that England is too weakened to be expected to intervene; and in Central Europe, his analysis suggests that Prussia is hard pressed to counter the combined forces of Austria and Russia. Both the law of nations and the general interest of Europe militate against the Emperor's demands.

Nevertheless, Mirabeau's pamphlet is not just a plea for supporting the Dutch against the Austrian claims and maintaining a status quo. Whether as a more or less realistic proposition or as an intellectual exercise in the theory of international relations, he takes the opportunity to make a proposal which would drastically change the political outlook of the Low Countries, but — perhaps his main purpose — provides an opening for expressing his views in favour of a more free and democratic regime[82]. In the best interest of all the European powers directly or indirectly involved in this conflict[83], he advocates the independence of the Austrian Netherlands under a free republican constitution. Inspired by the ideals of American independence[84], he favours the emergence of free, democratic republics as the best guarantee for peace in Europe. The Belgian provinces, in his somewhat idealistic presentation, offer excellent prospects for such a regime, better at any rate than the United provinces. The political independence and economic prosperity of the Belgian Republic would commend itself to other European nations, remove all threat to

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82 *Doutes sur la liberté de l'Escaut...*, Fourth Letter, pp. 154-168: «Qu'elles se forment en Etats fédératifs ces dix Provinces favorisées par la Nature, qui leur destina surtout la liberté!» (o. 154), «Que les Pays-Bas Catholiques soient indépendans» (p. 155), «Les Pays-Bas [*i.e. the Southern Netherlands*] sont dans une situation plus favorable que les Hollandois eux-mêmes pour former une République» (p. 156), etc. Some of Mirabeau's remarks echo those he expressed in his Letter to the Dutch regarding the political role of the *Stadhouder*.

83 Cf. his survey, country by country, of the individual interest each Power or principality may have in Belgium's independence as a 'free Republic', *Doutes...*, p. 161 et seqq.

84 More or less explicit references to the newly independent United States appear throughout the pamphlet. Even so, Mirabeau takes sides in the debate between Federalists and their opponents (*Doutes sur la liberté de l'Escaut...*, p. 156, and *ibidem* N. 1) advocating for Belgium «une fusion de toutes les parties, qui forme un corps, UN et homogène, dont aucun Etat fédératif n'offre encore de modèle»).

its neighbours, and ensure its security in the European system[85]. Somewhat as a corollary, Mirabeau adds that the new Republic could negotiate the opening of the Scheldt with the United Provinces on an equal footing, and he does not appear to allow for any fundamental objections from the latter. Except for this last part of his analysis, Mirabeau's project anticipated the situation which in very general terms, albeit in a very different political context, and after the European system he had in mind had given way to a thoroughly reshaped international order, would come out of the Belgian independence in 1830 — a prophecy which can, however, hardly be attributed to Mirabeau in 1785.

2.2.3 *The short-term outcome of the 'Kettle-War': the Treaty of Fontainebleau (8 November 1786)*

During the Paris negotiations, the Scheldt estuary was no longer the real issue[86]. The Flemish border, Maastricht and the Outre-Meuse territories, custom duties and the trade in the Indies dominated the agenda. The Scheldt

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[85] *Doutes sur la liberté de l'Escaut...*, p. 166: «Quand [la politique humaine] formera-t-elle de bonne foi le désir d'établir une paix fondée sur l'intérêt de tous; une paix durable, dis-je, c'est-à-dire après la liberté, tout ce qu'il y a de bon sur la terre? — Je ne sais si ce jour luira jamais pour l'humanité; mais si quelque chose pouvoit en hâter l'aurore pour notre malheureuse Europe, ce seroit sans doute la fondation de la République Belgique»; see also p. 167 *infra*. Arguably, this is Mirabeau's main concern in his discussion of the Scheldt Question, *viz.* arguing for the emergence and development of free democracies in Europe as a prerequisite to overcoming the traditional Great Power politics; against a passage from Montesquieu («que les Déserts étoient la barrière nécessaire des vastes Etats»), he argues in favour of: «Des Républiques, des Républiques! Telle est la frontière qui convient aux Monarchies [...]. Ces Républiques, quand elles ne seroient qu'écarter la guerre qui seroit leur ruine, ne peuvent qu'ajouter à la prospérité de leus voisins» (pp. 165-6). This grand geo-political design is not necessarily incompatible with a *realpolitische*, and perhaps more cynical, approach, in the interest of France (pp. 164-5).

[86] Magnette, *Joseph II et la liberté de l'Escaut...*, pp. 178-94. Cauchie, *Le comte ... di Belgiojoso...*, p. 199, quotes a letter from Joseph II to Belgiojoso dated 29th September 1785, in which the Emperor states: «Voilà donc cette déagréable affaire finie et, dès que l'objet unique, savoir l'entière et libre navigation sur l'Escaut avoit manqué, tout le reste ne valoit plus la peine...» — a statement which is largely confirmed by the Emperor's outline of his strategy in 1783 and in 1784 (quoted *ibidem*, p. 52).

Question nevertheless re-emerged during the discussions because of Vienna's insistence that the peace treaty should not refer explicitly to art. 14 of the Munster Treaty, while the brief of the Dutch delegation aimed at obtaining an explicit or literal confirmation of the same article[87]. The Count of Mercy, Austria's main negotiator in Paris, tried to avert the difficulty by suggesting that the estuary would be regarded as open sea, but the inference of such a proposal was immediately understood and rejected by the Dutch. In the end, Austria succeeded in preventing any full reference to art. 14, but the price for that minor success was high, for art. 2 of the Fontainebleau Treaty stated that «the Treaty of Munster of January 30th, 1648, will serve as the basis for the present treaty», and art. 7 recognised the sovereignty of the States-General over the Scheldt from Saaftingen to the open sea (arguably a recognition that went a step further than the Munster Treaty), and confirmed that the Scheldt estuary «would remain closed, as would the channels of Sas, the Zwin and other openings to the sea, *according to the Treaty of Munster*». Dutch diplomacy, supported by France, had by and large prevailed, while no material concession had been made to the Emperor.

Summary

The diplomatic manoeuvring and the pamphleteers' polemics around Joseph II's unsuccessful attempt to obtain a Dutch concession allowing free navigation on the Scheldt offer in many ways a classic example of the intricate relationship between international politics and international law as *Droit Public de l'Europe* towards the end of the *Ancien Régime*. It shows how heterogenous arguments referring to the theory of international relations, to natural law, and to the law of nations could be pressed into service in order to buttress different political agendas, which all had to accommodate both specific national interests and the more general and vaguer interests of the international community, represented by the flexible concept of the European 'system'.

Many of the strategies and polemical arguments in such a context were a mere *trompe l'oeil*. Linguet can be said to have used the controversy around the Scheldt to promote the paramount importance of great power 'blocks' as the essential elements of the European order. Mirabeau's discursion on the

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87 Magnette, *Joseph II et la liberté de l'Escaut...*, pp. 179-81, 189-93.

independence of a Belgian Republic served the purpose of propagating his constitutional preferences. More fundamentally, historical assessments of the Austrian claims against the Dutch Republic remained speculative when it came to establishing to what extent these claims were put forward in their own right, or as part of a larger strategy whose aim remained the acquisition of the Bavarian territories.

As the episode of the Antwerp and Brabant representations to the Austrian authorities reminds us, the Austrian Netherlands had been eliminated as an autonomous actor. As many other fringe territories in Europe, their value to their sovereign was that of barter-countries to be used for the grander designs or the necessities of their foreign policies. But even for the great powers, the *raison d'état* was by now more clearly than ever subordinated to the constraints imposed by the interdependence of the European nations. The *Droit Public de l'Europe* and its associations with various concepts of a European 'system' were primarily the expression of that interdependence. The unfolding of the Scheldt Question under Joseph II showed that even for an apparently regionally defined conflict, strategies and priorities had to be assessed in a general European perspective.

Ironically, on the eve of the French Revolution and the ensuing disintegration of the old European order, efforts to break the authority of the Treaties of Westphalia could still be thwarted. The principle of free international navigation and trade, which was to be asserted so strongly in later years, was generally recognised, but set aside when it was deemed to contradict political expediency (expressed either as *raison d'état* or as peace in Europe) or even the fragmentary conventional foundations of the European international order. It may well be that the incidents of 1784-5 contributed to associating the Scheldt Question with the principle of freedom of navigation which would later prevail, but that prevalence, as the contemporary discussions show, was the fruit of a different political order than that which formed the touch-stone of the *Droit Public de l'Europe.*

3. 1863: Bilateral and multilateral diplomacy in the age of positivism and 'absolute' sovereignty of Nation-States (The Treaties on the Redemption of the Scheldt-Toll)[88]

[88] This section relies very much on the thorough study of the redemption's political and

3.1 *The recognition of the Scheldt Toll by the Treaty of London (1839): an anachronism?*

Within a decade after Joseph II's failed attempt to change the international status of the Scheldt, the military successes of the French revolutionary armies created a territorial and political reshuffle in the Low Countries which, in France's interest, entailed the reopening of the estuary to maritime trade. The Austrian Netherlands became part of the French Republic, while the United Provinces were able to survive for a while as the Batavian 'sister' Republic. In addition to territorial concessions (the territories administrated as *Staats-Vlaanderen* were included in those annexed by France), the Dutch were forced to give way to the commercial and military importance attached by the French to Antwerp and the Scheldt. As tolls were ideologically included in the ragbag of 'feudal rights' which the revolutionary regime was set to eradicate[89], navigation on the Scheldt became free and was further strongly encouraged under Napoleon. The creation of the ephemeral Kingdom of Holland and the short-lived annexation of the remaining Dutch territories by the Empire brought the whole of the Scheldt, Meuse and Rhine estuaries into the French orbit. The decision at the Congress of Vienna to bring the Dutch and Belgian territories together into a single Kingdom was part of a global European strategy which aimed at creating around France and in Germany sufficiently resilient territorial 'blocks'[90] which, in the case of the Kingdom of the Netherlands, were expected to develop a viable national political structure based on the integration of complementary economic assets and interests, and some degree of common cultural traditions. Thus, from about 1795 until 1830, maritime traffic to and from Antwerp (and, to a lesser degree, with the Terneuzen canal, to and from Ghent) was able to develop on a new basis, soon fostered by the incremental Industrial Revolution in some of the Belgian provinces.

These benefits of maritime trade were immediately threatened by the onset of

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diplomatic history by R. Depoortere, *Le rachat du péage de l'Escaut* (Brussels 1991), who also provides references to all relevant primary and secondary sources. Essential source-material is to be found in: Baron Guillaume, *L'Escaut depuis 1830* (Brussels s.d. [1903?], 2 vols.

89 Cf. the Decree of the Republic's Executive Committee, 22 November 1792, *Moniteur universel*, No. 327, p. 1387.

90 A. Osiander, *The States System of Europe...*, p. 227.

the Belgian struggle for independence. The Dutch King promptly closed the Scheldt to any traffic to and from the rebel provinces. In the post-Vienna European order, however, the issue was soon in the hand of the Great Powers. Moreover, the risk of seeing the strategic Belgian territories once again tumble under French influence ensured that the British government took a particular interest in controlling the outcome of the Belgian secession. A provisional settlement[91] ensured a.o. that the Scheldt would remain open to maritime trade pending a definitive agreement. The nascent Belgian state therefore continued to enjoy, during the very first, fragile, years of its existence, a toll-free connection with the sea via the Scheldt. That benefit was not to last. The London Conference, which involved the Great Powers, the Netherlands and Belgium, illustrates how, on this issue, Britain's prominent role strongly contributed to the final settlement laid down in the Treaty of London (19 April 1839)[92]. The Treaty, less favourable to Belgium than the provisional settlement, established that the Dutch were entitled to levy toll on the Scheldt and it also fixed its rate[93].

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91 According to Depoortere, *Le rachat du péage...*, pp. 20, 26 et seqq., the plenipotentiaries at the London Conference were unaware that no toll was levied in 1814; on the other hand, it is also clear that the Vienna Act on the Rhine Navigation and, more generally, the restriction of tolls on international rivers were, at the time, interpreted with many qualifications.

92 C. Smit, *De Conferentie van Londen. Het vredesverdrag tussen Nederland en België van 19 april 1839* (Leiden 1949).

93 Compare however with Lord Palmerston's 'Theme' of 1832, which specifically stated, regarding the toll: «...S.M. le Roi des Belges aura en outre la faculté de se libérer pour toujours de ce paiement au moyen d'une capitalisation» (draft art. 9, par. 3 *in fine*, as quoted by Baron Guillaume, *L'Escaut depuis 1830*, p. 62). A practical (and long-lasting) result of the London Treaty was the establishment of a joint Permanent Scheldt-Commission: for a well-informed and readable survey of that Commission's background and history, see C.B. Wels, 'De Grote Mogendheden en de Schelde in 1839', *Zeeland* 10 (2001), 1-10, whose analysis emphasises that the 1839 settlement was part of a more general European arrangement agreed by the Great Powers; the author also shows how, following the Congress of Vienna, the Dutch restrictive interpretation and practice regarding the status of the navigation on the Rhine had generated a great deal of apprehension among German merchants in the German Rhineland and more generally among European maritime Powers (see also the illustrated brochure including a general outline of Prof. Wels's thesis: *De instelling van de Permanente Commissie van Toezicht op de Scheldevaart, een wijs besluit van de grote mogendheden in 1839* (s.d.n.l. [=2001]). I am grateful to Prof.

Because of the great commercial impact the toll might have on Belgium maritime trade, but partly also because of the need to avoid any implementation of the toll-system which would have hampered the navigation on the Scheldt and dented the perception of Belgium's independence from the Netherlands, the Belgian authorities decided that the toll would be paid by the Belgian state. This system was enacted (Act of 5 June 1839) but was also included as a Belgian obligation in bilateral commercial treaties concluded during the following years[94]. As time passed and such treaties were (often, tacitly) renewed, the payment of the Scheldt toll tended to be perceived, at least abroad, as a duty which the Belgian state had undertaken at the time in order to obtain recognition of its independence. In 1839, the annual sum total of the toll duties had been expected to amount to a figure around half a million francs. By 1860, it was costing the Belgian state more than one-and-a-half million francs, and the expanding maritime traffic on the Scheldt was making it increasingly onerous. At that time, the Scheldt toll accounted for more than 1% of the expenses of Belgium's total budget[95].

Meanwhile, the international acceptance of tolls was waning. The Congress of Vienna had already paved the way for a new regime of commercial navigation on international rivers by preparing a status for the navigation on the Rhine. Although in the following years, these openings had often been limited through the restrictive interpretations and practices of governments, the general tendency by the 1850s, fostered by liberal, free-trade policies[96], was against

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Wels for sending me a copy of the brochure and the text of a speech he gave for the Brabo-club in Antwerp on 5 October 2001.

94 Depoortere, *Le rachat du péage...*, pp. 38-45 and, as regards the international treaties signed by Belgium, pp. 47, 65, 82.

95 Depoortere, *Le rachat du péage...*, pp. 54-5 («Le facteur financier, voilà le principal sinon l'unique motif qui poussa notre pays à vouloir se libérer du péage de l'Escaut»); by 1860, the cost of reimbursement exceeded the 1% threshold (*ibidem*, p. 93).

96 « On tablait à Bruxelles sur le fait qu'un à un tous les pays européens — ou du moins les principaux partenaires commerciaux de la Belgique — finiraient bon gré mal gré par adopter le 'free trade' [...] Le rachat du péage de l'Escaut et l'extension de la politique commerciale belge de libre-échange belge sont indissolublement liés» (Depoortere, *Le rachat du péage...*, pp. 124-5; see also the author's general conclusion, pp. 366-7).

levies which impeded the development of industry and trade, especially when they were associated with the political pretensions of a bygone age. Levies on international commercial navigation which could not be justified as the remuneration of real charges and expenses made for the benefit of that navigation, became inadmissible. The law gradually followed suit as the economic doctrine gained ground. An ancient toll such as that on the Sund, which could look back upon several centuries of recognition by the international community, had by now outlived its justification. It was redeemed by a general treaty: the international community of merchant states contributing to its payment, each state paying a share proportional to its part in the maritime trade that sailed through the Sund. A few years later, a similar fate put an end to the *Staderzoll*: here, too, a general treaty arranged for the toll to be bought off by proportionally calculated contributions of the maritime powers whose merchant navies were involved in the navigation on that part of the Elb[97]. In this context, it is little surprising that by the late 1850s, the Belgian government started considering both the redemption of the toll through capitalisation (a modality which had been considered by Palmerston in 1832), and the possibility of involving the international community of commercial maritime powers in contributing to raise the capital sum that would be required.

3.2 *The Belgian government's policy: redemption by capitalisation*

Partly inspired by the outcome of the general treaties on the Sund toll and the Stade toll, the Belgian government's strategy consisted, in the first place, in seeking redemption of the toll by paying out a capital sum (instead of annuities,

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[97] See also the contemporary developments regarding the international status of the navigation on the Danube, for which the Treaty of Paris of 30 March 1856 extended the Vienna Act, stating that this extension would be henceforth regarded and guaranteed by the contracting parties as «partie du droit public de l'Europe» (art. 15). On the discussion in British politics, whether the redemption of the tolls on the Sund and the Elb could be seen as precedents for the Scheldt, cf. the opposing views held by Gladstone (Depoortere, *Le rachat du péage...*, pp. 222 and 248: against the payment by different countries) and Palmerston (*ibidem*, p. 235, N. 113), who accepted that there was an analogy between the different cases; Belgian propaganda in Britain presented the abolition of the tolls on the Sund and Elb as applications of «a principle of equity which has already been embodied in international law», from an article in the Glasgow Daily Herald, 12 February 1862, quoted *ibidem* p. 242).

as it had for a while been envisaged during the negotiations of the 1830s); secondly, the scheme seemed only feasible if each maritime state were to contribute to the payment according to its share (calculated by tonnage, as the toll was) in the global commercial traffic on the Scheldt upon which the toll was levied[98].

The implementation of that strategy was not straightforward, for in its negotiations with both The Netherlands and the other maritime powers, the Belgian government had to overcome two lines of resistance. The first was the refusal to consider the very principle of redemption through capitalisation. The second was that of the amounts to be paid, i.e. both the global amount for the redemption as a whole, and that of each power's share. The two difficulties were in some way linked, particularly in the relations between Belgium and the powers which were invited to pay a share, for their agreement on the principle could be linked to the actual amount they would have to pay, a question which was primarily to be settled between Belgium and The Netherlands.

As regards the capitalisation, its calculation rested on two basic parameters, *viz.* *(a)* the annual income of the toll, based on an average calculated over a period of years; *(b)* the rate of the capitalisation, which in the course of the negotiations fluctuated between 20 and 25. The importance of establishing the parameters, which was ultimately a matter of policy, was highlighted at an early stage of the Belgian-Dutch negotiations, when the Dutch advanced a much lower figure than the Belgians had reached in their own calculations. A misapprehension of the economics of the toll and the Scheldt trade had led the Dutch Ministry of Finance to apply a formula expressed in the Dutch civil code for the redemption of tithes: the formula took into account the average over the past fifteen years and applied a rate of 20. The Dutch government, however, soon realised its mistake[99]; and throughout the later negotiations, it insisted on

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98 For a general overview of the importance of international navigation on the Scheldt in the years 1842 and 1860, and of the sequence of negotiations: Depoortere, *Le rachat du péage...*, pp. 107 and 109.

99 The Treasury's mistake was based on art. 170 of the Dutch Civil code, a section dealing with the redemption of annuities on land, i.e. on an entirely different economic basis (Depoortere, *Le rachat de péage...*, p. 136). The incident may contain a moral for our time, now that, in The Netherlands, ideologically inspired quacks are succeeding in reinstating positive private law as the sole measure of all laws (including international law) in legal education: there may still be a bright

taking into account a much shorter period of the most recent years (as traffic, and therefore the income of the toll, was still growing), and tried to impose a rate of 25. The Belgian government, conversely, sought to extend the period of reference, and remained set on a rate of 20.

2.3 *A purely financial Belgian-Dutch issue?*

The Belgians realised that, in order to succeed, it was essential that their plan should be backed by the Great Powers, and by Britain in particular[100]. Not only would this help to convince the other powers to participate in the operation, but it would put additional pressure on the Dutch government to accept both the principle and moderate terms. A difficulty of that scheme was that the Powers, even if they could be persuaded to admit the principle of a collective redemption by capitalisation, wanted to know the figures which would determine the price-tag, both globally and for their individual share, attached to the purchase. A Belgian-DUtch agreement on the purchase-price appeared therefore as a necessary preliminary.

The principle seems to have been agreed by the Dutch at a comparatively early stage. Perhaps the Dutch government considered that in the light of recent developments in international law, the toll would increasingly come under pressure from the international maritime community, and that the time was therefore approaching when it made commercial and political sense to accept a (favourable) deal while the legitimacy of the toll was still widely recognised[101]. Other considerations may also have played a role. In general,

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future for Belgian and Flemish diplomats of the twenty-first century in their dealings with their Dutch counterparts!

100 Cf. Lambermont's argumentation dated 16 July 1861, emphasising the financial and commercial interests of 'England' in the redemption of the toll on the Scheldt, a river, he pointed out, «qui d'ailleurs fait face à la Tamise, [...] un fleuve plus encore anglais que belge ou néerlandais» (quoted in Depoortere, *Le rachat du péage...*, p. 218).

101 Cf. the message of the Dutch Minister van Zuylen to the Dutch Ambassador at St James, dated 18 August 1861, quoted in Depoortere, *Le rachat du péage...*, p. 135, «dat het hier voor Nederland alleen eene geldquaestie gold; dat het in de rigting van de tegenwoordigen tijd schijnt te liggen om dergelijken hinderpalen op te ruimen», with a reference to the suppression of the tolls on the Sund and the Stade-river. See

Dutch foreign policy wished to iron out any remaining major sources of contention with their Belgian neighbour. On some of these issues, such as the water-tapping (*prises d'eau*) from the Meuse and its effects in the Dutch Limburg and Northern Brabant provinces, the Netherlands had a strong interest in obtaining a more favourable regime. Other issues were more controversial, though perhaps more directly related to the Scheldt: one of the Dutch long-term plans was to connect the Zeeland islands of Walcheren and Beveland to the mainland, which implied the construction of bridges and dams which would cut off the Western Scheldt from the Eastern Scheldt and its surrounding waterways, and as a result also the inland waterway connections between Antwerp, the Western Scheldt and the Rhine. Belgium was paying an annuity in consideration of the Dutch commitment, laid down by international conventions, to ensure that Belgian river navigation would be offered equivalent facilities to reach the Rhine in the case of such alterations in the estuary.

The position of the other maritime powers was more complex. As the diplomatic history showed, both financial and political considerations, including sometimes considerations of foreign policy related to altogether different international regional concerns of the countries in other parts of Europe[102], were often invoked against the Belgian proposals. In addition, the Scheldt toll was not perceived by many to be *eiusdem generis* as the other, recently redeemed, tolls: according to a generally prevailing view, it had been established by the 1839 Treaty, as part of the general deal and agreement arranged by the Great Powers which had secured Belgian independence[103].

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also corresponding considerations in the Dutch press, e.g. the *Nieuwe Rotterdamsche Courant* (quoted *ibidem*, p. 158). At a later stage, the Dutch government became increasingly aware of the political and diplomatic backlash if they broke off negotiations with Belgium (*ibidem*, pp. 177-8, 183, 193, 198-9).

102 E.g. Prussia's decision, which, according to Depoortere, *Le rachat du péage...*, pp. 285 and 292, was largely inspired by the crisis of the *Zollverein* and the delays in ratifying the Prussian-French trade treaty.

103 Cf. the memorandum by Lambermont (one of the main architects, on the Belgian side, of the redemption), dated 23 May 1857, quoted in Depoortere, *Le rachat du péage...*, p. 60, n. 74: «Le Traité de 1839 est, au point de vue extérieur, la base de notre existence comme nation. Il ne reconnaît pas seulement, il garantit notre indépendance et notre neutralité...», emphasising also that the Belgian government could not afford to pick and choose from the Treaty of London those terms that were

The fact that the Belgian state had (albeit on a voluntary basis, which was not always apprehended) taken upon itself the payment of the toll was often understood as a further confirmation of Belgium's sole liability. Furthermore, several governments queried why their country should be required to pay for a burden which, if the Belgian state were to discontinue its policy of payment, would fall upon the private merchant navy, without any obligation on other states. Belgian diplomacy therefore faced the formidable task of conducting parallel negotiations with more than 20 governments while still facing an array of demands from the Dutch government on both the financial terms of the redemption and a series of different issues which the Dutch wished to link to their agreement on the Scheldt toll. The Belgian response to these difficulties was essentially two-fold. It became clear that the reluctance of many powers, including some of the Great Powers, to take part in the scheme, would be overcome if Britain were to express her adherence. Therefore, the main thrust of the Belgian diplomatic effort was directed at obtaining the support of the British cabinet. The second approach followed by the Belgian government consisted in negotiating individually with each power a series of additional commercial advantages, adapted to the specific interests of each nation, including sometimes a new commercial treaty, which to some extent could be regarded as indirect compensation for their financial contribution to the redemption. As a result, by the time the treaties on the redemption of the Scheldt toll were signed, Belgium had reorganised on a new footing its commercial relations with most other maritime powers.

Commercial negotiations were also at the heart of the British-Belgian endeavours to reach an agreement on the redemption of the toll, to which Britain, by far the most important maritime power represented in the Scheldt navigation, would have to contribute about a third of the total price. Even when agreement was reached, the Exchequer remained opposed, and it seems that in the end, political considerations on Belgium's and Antwerp's strategic importance for Britain[104], and the concern to prevent these interests being

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favourable, and avoid those that were onerous, without undermining that international foundation of the country's independence.

104 Cf. the Belgian King's somewhat forced reference, in a letter to the British Foreign Secretary (early 1863), to Antwerp as «a Northern English Gibraltar [...] of sufficient military and political importance to England» (quoted in Depoortere, *Le rachat du péage...*, p. 266). More importantly, Lord Russell and Lord Palmerston appear to have been convinced by geo-political considerations, e.g. the latter in a letter to the

jeopardised by French ascendancy, overcame the Chancellor's resistance. Once Britain's support was assured, most other powers which had expressed their refusal or had preferred to remain on the fence proved willing to negotiate their participation in the redemption.

3.4 *The Belgian-Dutch Treaty of 12 May 1863 and the General Treaty of 16 July 1863*

The redemption of the Scheldt toll required, partly because of its diplomatic history, two distinct treaties[105]. The first, concluded between Belgium and the Netherlands, established the price of the purchase and the modes of payment; it also contained detailed provisions aimed at ensuring that the toll would neither directly nor indirectly be revived through other or new levies; and it set the criteria on which other existing taxes would be established or reduced.

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former, dated 10 January 1863: «the French have a shut eye upon Belgium, and if amid other constructions they should invade that country Antwerp would be a Tête de Pont for us in its Defence; but in the hands of the French it would be another Cherbourg threatening all the East and South East Coast of England. *It has always been a fundamental Rule of Policy with English Statesmen to keep Antwerp out of the hands of France*» (quoted *ibidem*, pp. 266-7, italics added). Moreover, Depoortere concludes from her study of the British Cabinet's strategy that it decided to agree to contribute to the payment of the redemption independently of the attitude of other European Powers (p. 273).

[105] The combination of a bilateral and a multilateral treaty is in many ways characteristic of the ambivalence of the law of international relations at the time. Throughout the negotiations and preparation of the agreements, there was on the one hand emphasis on the issue as a bilateral one between Belgium and The Netherlands — a position which was often obviously inspired by the individual national interest of those expressing it (examples in Depoortere, *Le rachat du péage...*, a.o. pp. 79 (Dutch Treasury in 1857), 91 (Dutch Foreign Secretary, 1858), 179 (instructions to the Dutch Ambassador in London, 1862), 185 (Conference of London, 1839). On the other hand, it was also widely acknowledged that, if not *de iure*, the wider political, commercial and industrial interests of a large number of (a.o., maritime) nations gave the Scheldt Question a European and international dimension (e.g. the Duke de Broglie to Talleyrand in 1833: «La libre navigation de l'Escaut n'est pas un question hollando-belge; c'est une question européenne», *ib.*, p. 33; and J.-R. Thorbecke in 1858: if the toll were to be paid by the merchants carrying their goods on the Scheldt, the Scheldt-toll would become a European issue and soon or later, it would suffer the same fate as the tolls on the Sund and at Stade, *ib.*, pp. 91-2).

Although a bilateral treaty, it also contained a clause which recognised that the freedom from the toll would be extended to all flags.

The General Treaty was a multi-lateral international agreement between Belgium and twenty other powers. Its main purpose was to establish each country's contribution towards the payment of the redemption. The Netherlands, in spite of its merchant fleet having a substantial interest in the navigation on the Scheldt, was not party to the treaty. A protocol attached to the General Treaty nevertheless emphasised its connection with the Belgian-Dutch agreement. The Dutch plenipotentiary intervened to make a statement on behalf of the Dutch King confirming that the Netherlands was bound to extend the toll-freedom on the Scheldt to all nations.

Other countries, for a variety of reasons[106], only joined later. The United States, who had attended the general conference, did not sign the treaty but signed a separate treaty with Belgium, in accordance with its general policy of avoiding multi-lateral agreements[107].

Summary

The progress and the outcome of the redemption of the Scheldt-toll illustrate both the strength of the nineteenth-century emphasis on the individual responsibility of sovereign states in law and its limits in the (European) organisation of international relations. Ironically, the first hurdle, both legal and political, Belgian diplomacy had to overcome was that the Scheldt toll had been included in an international treaty guaranteed by the Great Powers of the time and which was perceived to be part of a general agreement which had resulted in the formal recognition by the international community of a new actor — but, whereas in 1785-6 this scenario had unfolded in favour of the

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[106] A fine example of counter-productive diplomacy was offered by the Holy See, which, because of its refusal to recognise its territorial losses to the Kingdom of Italy, insisted on paying a larger share than due, i.e. including a payment corresponding to its share in the trade before the losses had occurred (Depoortere, *Le rachat du péage...*, pp. 334-5)!

[107] Depoortere, *Le rachat de péage...*, pp. 341-4.

United Provinces on the basis of the Treaty of Munster, it was now the Treaty of London which had established Belgium as a nation-state in the *Concert de l'Europe* which was turned against the claimant. However, the combination of Belgium's relative importance, whether for its industry, its trade and market, or its geo-strategic position as a neutral country, gave it some leverage, which, strengthened by the wave of free-trade liberalism favoured by the leading Great Power, gave the country the diplomatic clout necessary to fight its own corner. A certain degree of anachronism notwithstanding, it could be argued that Austria's political calculations in resisting the Belgian initiative, and which were totally subordinated to its policy aimed against the growing Prussian hegemony in Germany and the *Zollverein* as the latter's instrument[108], illustrate how, almost a century after Joseph II, it would have thwarted the scheme for the sake of its own interests if it had retained any substantial ascendancy over its former territories of the Southern Netherlands. In that respect at least, Mirabeau's argument in favour of an independent and 'liberal' Belgium proved him right, however belatedly.

Political pressure for free trade, the growing objections to tolls and levies on international commercial navigation which could not be justified as a remuneration for services, were among the general factors which would arguably have made it more difficult for the Dutch to maintain the toll indefinitely. The primacy of industry and international trade in international relations during the 'British era' greatly contributed to the eventual success of Belgium's demand. That success was at a price. In its bilateral relations with the Netherlands, concessions had to be made regarding the share of Dutch navigation on the Scheldt, and more importantly, Dutch demands related to the Meuse had to be placated and were now diplomatically linked to Belgian (and later, Flemish) demands about the Scheldt. Other, potentially serious areas of contention directly related to the navigation on the Scheldt, in particular the Dutch plans for closing off the Eastern Scheldt and the Sloe, were not satisfactorily settled and would soon create fresh friction[109]. The concessions

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[108] Depoortere, *Le rachat du péage...*, pp. 285 et seqq., 293 et seqq.

[109] In the immediate aftermath of the 1863 Treaty, the celebrations in Antwerp and in Belgium contributed to associating in the mind of a broader public opinion Belgian patriotic feelings with the Scheldt Question. E. Van Bruyssel, *Histoire politique de l'Escaut* (Paris 1864), still expressed (pp. 234-5) a will of renewed cooperation between Belgium and the Netherlands. A few years later, however, the polemical

made to the other maritime powers were largely part of negotiations which reshaped and updated Belgium's relations with her trading partners.

4. 1994-1995: International Environmental Law in the hands of regional and state actors (The 1994/1995 Agreement on the Protection of the Scheldt)

writings around the Dutch works in Zeeland which threatened to cut off the Western Scheldt from the Eastern Scheldt estuary and thus from the Rhine and Maas estuaries, proved far more antagonistic: cf. a.o. H. Vigneron, *Guerre à la Hollande. Révision des traités de 1839* (Brussels 1867); J.W. van Lansberge, *A propos du barrage de l'Escaut* (The Hague 1867); *Du barrage de l'Escaut oriental et du Sloe au point de vue des traités et ds faits. Réponse M. van Lansberge* [...] *par un diplomate belge* (Bruxelles 1867);[G.A. Fokker], *Le barrage de l'Escaut oriental. Observation sur le rapport de la Commission internationale par un membre de la Seconde Chambre des Etats-Généraux des Pays-Bas* (The Hague 1867); *Erreurs ou sophismes? A propos des brochures d'un diplomate belge et de M. Garcia de la Vega sur le barrage de l'Escaut oriental par un ancien diplomate néerlandais* (The Hague 1867); G.G. Vreede, *Examen de la question du barrage de l'Escaut oriental* (Utrecht 1867). Another issue which would require a fresh historical investigation is the controversy around the 'neutral status' of the Scheldt, particularly before, during and immediately after the First World War: cf. a.o., much earlier, the Leiden dissertation of H.A. Crommelin, *De verplichtingen van Nederland als neutrale mogendheid ten opzichte der Schelde* (Leiden 1880); several pamphlets by J.C.C. den Beer Poortugael, *viz.*: *De Schelde-Quaestie in de Tweede Kamer* (s.l. 1910), *L'Escaut et la Neutralité permanente de la Belgique d'après les traités de 1839 et 1907* (The Hague 1910), *La neutralité sur l'Escaut* (The Hague 1911), the second of which inspired the Belgian international lawyer and historian of the law of nations E. Nys to write a refutation: *L'Escaut en temps de guerre* (Brussels 1910); W.G.F. Snijders, *Geen Verdedigingswerken aan de Wester-Schelde!* (Rotterdam 1911); L. Picard, *De vaart op de Schelde in vredes- en oorlogstijd. Het Groot-Nederlandsche standpunt* (Utrecht 1916); R.A. Klerck, *De Schelde-Quaestie* (s.l., 1917). Belgian-Dutch relations regarding the Scheldt did not improve following the (rejected) Belgian territorial demands at the end of the war at the expense of The Netherlands (see, e.g., on a specific aspect of the sea-territory involved: Brugmans, *La passe des Wielingen, droits et intérêts* [The Hague 1920]; H. De Hoon, L@Escaut et son embouchure. Le différend des Wielingn [Brussels 1927]), or the abortive attempt at regulating the issue on a new conventional basis (cf. a.o. M. de Vernon, *La question de l'Escaut* [diss. Toulouse 1920-1, Castres 121]; A.J. van Vessem, *De verrassingen van het tractaat met België* [Utrecht 1926]); Siotto Pintor, *Le régime international de l'Escaut* [Académie de droit international. Extrait du recueil des cours 1928]; S. Adanya, Le régime international de l'Escaut [Diss. Paris 1929]; A. Blondeau, *L'Escaut, fleuve international et le conflit hollando-belge* [Paris-Bordeaux 1932]).

4.1 *Belgian-Dutch negotiations on the Scheldt issues caught between traditional diplomatic relations, the re-emergence of regional actors on the international scene, and growing European and international commitments*[110]

Perhaps the most common cliché on the Scheldt Question in the twentieth century became the linkage of the issues surrounding the Scheldt and the Meuse[111]. The linkage, as it has already been pointed out, had been a key-strategy of the Dutch government during the negotiations of the 1863 Treaty; and throughout the twentieth century, the Meuse remained one of the vexed issues in Belgian-Dutch relations. In addition to the traditional interest of the Netherlands in maintaining a sufficient and regulated flow of the river, some of the country's most populated areas became increasingly dependent on water from the Meuse for domestic use and drinking water. Thus, the issue of water quality would join that of quantity levels on the Dutch diplomatic agenda.

In the region of the estuaries, the large-scale development of the ports of Rotterdam and Antwerp, and the competition between the two harbours, ensured that the question of navigation on the Scheldt remained a matter of concern for the Belgian and Flemish side. The need to provide access and

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[110] The most complete analysis of the successive negotiation rounds, albeit without emphasising specifically the legal aspects (but focusing instead on the management of the decision-making process), is to be found in S.V. Meijerink, *Conflict and Cooperation on the Scheldt River Basin. A Case Study of Decision Making on International Scheldt Issues between 1967 and 1997* (Dordrecht etc. 1999), who, however, privileges Dutch (a.o. parliamentary) sources, but nevertheless provides useful information from interviews with different persons who were directly involved in the negotiations. The legal aspects are dealt with more in detail (and in a broad and conventional historical perspective) by P. d'Argent, 'L'évolution du statut juridique de la Meuse et de l'Escaut: une mise en perspective des accords de Charleville-Mézières du 16 avril 1994', *Revue belge de droit international* 1997, 133-71. For a general overview of the Meuse agreements: N. Bouman, 'A New Regime for the Meuse', RECIEL 5 (1996), 161-8. For brief outlines: F. Suykens, 'De historiek van het totstandkomen van de Vlaams-Nederlandse Waterverdragen', *Water* 14 (1995), 227-232, and J. Strubbe, 'Het verdrag inzake de verruiming van de Westerschelde in historisch perspectief', *Water* 14 (1995), 233-6.

[111] For a *status quaestionis* of the legal issues around the Meuse just before the outbreak of the Second World War: J. Barents, *Het internationaal statuut van de Maas* (Amsterdam 1940).

facilities to new generations of much larger ships forced the Belgian and Flemish authorities to consider major structural works in and around the Scheldt estuary, i.e. on Dutch territory[112].

4.1.1 *Belgian-Dutch negotiations: the linkage between the Scheldt and Meuse issues*

It is therefore not surprising that negotiation rounds which started in the 1960s remained largely perceived along familiar lines: Belgium was the asking party regarding the Scheldt, while the Netherlands had specific demands concerning the Meuse. The 1975 draft treaties between the two countries reflect the linkage of these respective interests. In 1967, the Belgian government declared its interest in two major projects, the aim of which was to improve the access to Antwerp: first, the straightening of the river-bend and the digging of a new channel near Bath, and secondly, the creation of the Baalhoek-canal, which would connect the West-Scheldt to the left-bank development of Antwerp harbour. Both projects would make substantial inroads into Dutch territory. The Dutch government agreed to negotiate on these issues, provided the negotiations would also deal with the quantity and quality of the water from the Meuse, and the water quality of the Scheldt[113]. Among the specific Dutch interests which the government declared it was anxious to preserve, the competition between Dutch and Belgian sea-ports was explicitly mentioned. The result of these negotiations was the three draft treaties of 1975 dealing with, respectively, the works around Bath, the Baalhoek-canal and water from the Meuse. The first draft also contained a chapter on the water quality of the Scheldt.

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[112] One of the crucial questions is whether maintaining an adequate navigation channel in the Western Scheldt is a Dutch international obligation (comp. Meijerink's reference to some Belgian critics in, *Conflict and Cooperation...*, p. 121: «... an improvement of the navigation channel in the Western Scheldt is a Belgian right that is formulated in the Scheldt statute. Consequently, a deepening of the navigation channel would never require a Belgian-Dutch convention. With the acceptance of the declaration of intent [in 1985] the Belgian government would give up practically the issues of the Baalhoek canal and the bend near Bath, and start negotiations on an issue for which according to international law no convention would be needed. Therefore, according to the critics, "this decision was a major tactical error"»).

[113] S. Van Damme *et al.*, 'De waterkwaliteit van de Zeeschelde: evolutie in de voorbije dertig jaar', *Water* 14 (1995), 244-56.

In Belgium, the political agenda of the 1970s was largely dominated by demands for increased cultural and regional autonomy, especially in Flanders and in Wallonia. The first steps were taken towards what would prove to be a fundamental long-term constitutional reform of the Belgian unitary state. Although the reform of the state into a federal state was on the whole a peaceful and fairly rational process, it inevitably exacerbated existing and new conflicts of interests between the different communities and regions. In such a political context and climate, it is perhaps not surprising that the global compromise which the draft treaties expressed was strongly challenged by representatives of Walloon interests. From the Walloon point of view, the Meuse draft treaty was seen as the Belgian negotiators' main ground for concessions in order to obtain their demands for improving the navigation on the Scheldt. The burden for what was perceived to be a mainly Flemish advantage was thus to be carried mostly by Wallonia. To mention but one example: as the Dutch had insisted on the construction of large dams and reservoirs in Walloon areas in order to secure the water supply it had requested, Walloon public opinion was easily swayed by the argument that their region was being excessively affected by the diplomatic bargaining of the central government. In the context of the internal political controversies which were flaring up in Belgium at the time of the constitutional reform, the Belgian government found itself unable to sign the draft treaties.

It took several years before new bilateral negotiations were able to start again[114]. In 1985 a joint declaration by the Belgian and Dutch ministers for foreign affairs announced that the draft treaties of 1975 would be reconsidered. Once again, the following negotiations aimed at reaching agreements on both the Scheldt and Meuse issues. As regards the Scheldt, the Belgian demands still included the Baalhoek canal, but the Bath-project had been replaced by demands for deepening the existing channel of the Scheldt on Dutch territory. In Belgium, the ongoing reforms strengthening regionalisation were still affecting the government's diplomatic strategies. In 1982, it had promised that in new negotiations with the Netherlands, the regions would be associated in so far as they were competent. Nevertheless, after it had been officially announced that the Belgian delegation (chaired by E. Davignon) would not include representatives of the regions, the Minister-President of the Walloon Region

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[114] Meijerink, *Conflict and Cooperation...*, p. 117.

initiated on 3 March 1987 special proceedings of concertation between the central government and the regional executives. These proceedings effectively halted the negotiations. However, international representation was then, according to Belgian constitutional law, still an exclusive prerogative of the King, i.e. the national government. It was only towards the end of 1989 that the Belgian government and the regional executives reached an agreement which guaranteed *inter alia* that each region would be specifically represented in the Belgian delegation.

4.1.2 *Regionalisation in Belgium and its effects on inter-state agreements and policies*

Meanwhile, the Belgian constitution had shifted water management competences to the regions. For a few years, this meant that although the Belgian state remained competent for foreign policy and international agreements on such matters, the regions were competent in domestic law and politics for the same questions. It seems that at government level, this did not in the short term affect Dutch diplomatic efforts insisting on maintaining the link between the Scheldt and Meuse issues. According to some sources, Dutch diplomatic strategy speculated on a Flemish-Walloon political agreement by which Flanders would directly or indirectly compensate Wallonia for the effects of a Meuse Treaty, in order to obtain its support for the Scheldt treaties[115]. In 1990-1, the Dutch representatives formulated a series of specific proposals for international cooperation and management of the quality of the water from the Scheldt and Meuse. At the same time, the Dutch maintained their demands regarding the water quantity of the Meuse. The proposals met with objections from the Walloon and Brussels representatives, whose willingness to agree on water quality control and management appeared to fall short of the Dutch ambitions; the Walloon authorities may also have wished to consider the Meuse quantity issue on a different footing.

The lack of progress made the Dutch decide to suspend negotiations (8 January 1991) and to submit a unilateral draft proposal (15 April 1991). The Dutch proposals, again, emphasised the need to establish standards for the water quality, and a common, international, institutional and procedural framework

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[115] Meijerink, *Conflict and Cooperation...*, pp. 143, 145-6, 151 *et passim.* By 1993-4, the linkage had become a Flemish-Dutch issue: p. 147.

for monitoring and cooperation, both for the Scheldt and the Meuse basins and drainage areas. The proposals also expressed the concern for coordination in preventing floods and confirmed, on the strength of the findings of expert technical research, that the deepening of the Scheldt channel did not raise insuperable objections. The Belgian delegation eventually submitted its own draft proposals, which, in the Dutch view, failed to improve the water quality of the rivers and did not comply with the Dutch (and European) 'polluter pays' principle. As regards the deepening of the Scheldt, the Belgians had stated that their demand was within the requirements of the international Scheldt status, but the Dutch delegation apparently was unwilling to include the status in the negotiations[116].

In March 1992, a meeting of Dutch and Belgian (including regional) ministers confirmed the will to maintain a link between negotiations on water quality and the deepening of the Scheldt. Later that year, an updated Dutch draft proposal nevertheless extended the scope of the treaties to include the entire course of the rivers, drawing France into the negotiations. And still later that same year, the Belgian-Dutch negotiators abandoned the project of a general treaty in favour of three distinct treaties (besides separate agreements on other related issues, which, however, were deemed to be of lesser importance): a multilateral convention between the basin states and the European Commission; and two bilateral Belgian-Dutch treaties on, respectively, the water distribution of the Meuse, and the deepening of the Scheldt.

In 1993, a further step forward in the regionalisation of the Belgian state was taken. Within their areas of competence, the regions were now given 'treaty-

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[116] On references to the international status of the Scheldt during successive negotiation rounds, cf. Meijerink, *Conflict and Cooperation...*, pp. 105, 110 («The Belgian government was of the opinion that the Dutch linkage between the 48'/43'/38' deepening programme and the Meuse issues was a violation of the Scheldt Statute»), 121 (the Belgian position was that «an improvement of the navigation channel in the Western Scheldt is a Belgian right that is formulated in the Scheldt statute. Consequently, a deepening of the navigation channel would never require a Belgian-Dutch convention»), 126, 134, 160, 186, 200. In 1994, the Antwerp Port Association (AGHA) suggested that the Belgian government should start proceedings before the International Court of Justice, following that «according to international law (the Scheldt Statute) the implementation of the deepening programme is a Flemish right» (pp. 170, 180). The question is still controversial (p. 200).

making power' (art. 167 Constitution). At that moment, it seems that the political dynamics and considerations of some of the (main) actors in the negotiations had shifted. To some Dutch observers (and participants), the acceptance of involving France (and other basin states) in the negotiations (an idea which had earlier on been mooted by Wallonia) implied that the strategy of linking Dutch demands (mainly, to Wallonia) on the Meuse and the (mainly, Flemish) demands regarding the navigation on the Scheldt had been abandoned. In the Netherlands, the linkage had been criticised for several years, although on different grounds[117]. To some, the issues relating to each basin and drainage area had become too complex to be amalgamated. By the end of the twentieth century, the issue of the water quality of the Scheldt, and concerns about the combined effects of the development of the harbours of Antwerp, Ghent and Flushing, and the ensuing increase of navigation, on the ecology of the estuary and its region were now deemed much more important than before and were put on the international agenda. Also, Dutch experience of negotiations with Belgium had convinced several observers that the Netherlands could not expect that their global linkage of Scheldt and Meuse issues would force a deal between Flanders and Wallonia. Many had come to the conclusion that Dutch interests, both economic and environmental, in better water quality from the Meuse and the Scheldt, would be better served if the Netherlands became more actively involved in projects facilitating such improvements.

Accordingly, a new, more flexible organisation of the negotiations was set up. Multilateral negotiations discussed the issues of the water quality of Scheldt and Meuse, while Flemish-Dutch negotiations discussed the deepening of the Scheldt and issues related to the flow of the Meuse in so far as under their control. Thus, in different contexts, the linkage of Scheldt-Meuse issues survived or was revived. Moreover, diplomatic — or, some would say, undiplomatic — linkages of the Scheldt issues to other issues were soon to be given even greater emphasis in some of the negotiations. In June 1993, the Flemish government apparently proposed linking the negotiations on the deepening of the Scheldt to those on the planning and construction of a high-speed railway line connecting Antwerp to Holland. If this was the case, it would seem that the move — which would later be referred to as a tactical blunder — backfired: the Dutch government accepted the Flemish proposal,

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[117] Meijerink, *Conflict and Cooperation...*, pp. 130 and 132.

but it soon became clear that whereas an agreement on the deepening of the Scheldt could now be worked out within a short space of time, the discussions on the railway line would prove to be far more arduous. The Dutch government, it seems, nevertheless insisted on obtaining an agreement on the railway line before it would accept signing an agreement on the deepening of the Scheldt[118].

Meanwhile, the extended multilateral negotiations were making headway, and perhaps because of their eventual success, several of the actors would later claim to have taken the initiative of reopening the talks between the contracting parties[119]. In spite of diverging views on what the treaties should regulate, an agreement was reached in March 1994. The convention was signed on April 26 at Charleville-Mézières[120] by the Netherlands, France, the Walloon Region and the Region of Brussels, but not by Flanders. A few days before the exchange of signatures, the Flemish government notified the Dutch government that although it approved the multilateral agreements reached on the Scheldt and Meuse, it would not sign the treaties until the Netherlands were willing to sign the agreement on the deepening of the Scheldt. This was interpreted by some as a Flemish ploy to break the linkage (said to have been put forward by the Flemish government in the first place) between the

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[118] Meijerink, *Conflict and Cooperation...*, p. 170. Cf. the author's general assessment regarding these strategies and policies of linking different issues, *ibidem...*, p. 215 (an assessment which turns out to be more positive than that by the Dutch Minister after the signing of the treaties («... that she, just like her Flemish colleague, [did] not want to hear the word linkage anymore»; for a direct quote: *ibidem*, p. 183).

[119] On the Dutch initiative: Meijerink, *Conflict and Cooperation...*, p. 141. On the Walloon initiative: P. d'Argent, 'L'évolution du statut juridique...', p. 149; similarly: J. Verhoeven, 'Les accords de Charleville-Mézières du 26 avril 1994 sur l'Escaut et sur la Meuse', *Annuaire français de droit international* 43 (1997), 799-809, at p. 802; and, inevitably, the Executive of the Walloon Region (cf. the parliamentary works: *Conseil Régional Wallon*, session 1994-5, No. 330/1, 16 March 1995, *Projet de Décret portant assentiment à l'accord concernant la protection de la Meuse, fait à Charleville Mézières, le 26 avril 1994, Exposé des motifs*, p. 2); the Council of State (*ibidem*, Appendix 1, p. 6), mentions the Belgian Foreign Office's intervention encouraging the regions to negotiate directly (see also No. 330/2, *Exposé du Ministre*, p. 3).

[120] English translation: 34 I.L.M. 851 (1995). See also the special issue of *Water, Tweemaandelijks tijdschrift over waterproblematiek* 14 (1995), 227-68 (with appendices pp. I-XX).

deepening of the Scheldt and the high-speed railway line, and at the same time to re-establish a link between the navigation on the Scheldt and quality of water issues related to the Meuse (and Scheldt). Some six months later, the Flemish and Dutch governments agreed on the proceedings for reaching a decision on the high-speed railway route. At that stage, the Dutch government was satisfied and both governments agreed (on 1 December 1994) to sign conventions on the deepening of the Scheldt, on the water-flow of the Meuse and on the revision of Scheldt regulations; the Flemish government would also sign the multilateral treaties on the protection of the Scheldt and the Meuse. This took place the following month: on 11 January 1995, Flanders and the Netherlands signed at Middelburg the convention on the revision of the Scheldt regulations; on 17 January, the same signed in Antwerp the conventions on the deepening of the Scheldt channel[121] and on the water-flow of the Meuse. That same day, Flanders also signed the two multilateral treaties on the protection of the Scheldt and the Meuse.

4.1.3 *The pressure of European integration and international environmental issues*[122]

As one of the critical commentators of the 1994/5 multilateral treaties on the protection of the Scheldt and the Meuse rightly observed, these agreements did not occur 'in an international legal vacuum'[123].

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[121] H. Belmans, 'De verdieping van de Westerschelde', *Water* 14 (1995), 259-64.

[122] For a *status quaestionis* of initiatives in the United Nations shortly after the Scheldt and Meuse Agreements were reached: T. Nussbaum, 'Report on the Working Group to Elaborate a Convention on International Watercourses', RECIEL 6 (1997), 47-53.

[123] F. Maes, 'The Content of the Agreements on the Protection of the Rivers Scheldt and Meuse', *Revue belge de droit international* 1997, 661-81, at p. 667; this article provides (p. 664 et seqq.) a very clear survey of the relevant authorities of international environmental law which form the context of the 1994-5 conventions. Meijerink, *Conflict and Cooperation...*, p. 66 et seqq., mentions the context of the international Rhine issues (important «because of the rapid development of the intensity and scope of international cooperation in the Rhine basin, [which means that the International Commission for the protection of the Rhine against Pollution is often used] as an example for the rivers Scheldt and Meuse», p. 67), the EU policies, the North Sea policies and the United Nations-Economic Commission for Europe river-policies (on the latter, see also pp. 140, 156, 163); on the resolution of the

Throughout the long period of negotiations (and delayed negotiations), various broader, international factors played a role. Direct interference from international bodies, whether from the Benelux or the European Communities, may on the whole be discounted. At critical stages of the negotiations, it could be anticipated that some pressure groups would advocate an action before the International Court of Justice. (Incidentally, legal actions by other pressure groups, threatened or pursued, before the national courts, are said to have been more effective in affecting the outcome of particular issues). Nevertheless, the negotiations remained in the hands of the states, and later (for Belgium) regions, directly concerned by the river basins and drainage areas of the Scheldt and Meuse.

The international influence on both the negotiations and their outcome was of a different nature. Gradually, in particular from the 1960s onwards, a growing concern for environmental issues was reflected in both domestic law and international agreements. The Netherlands, partly because of the concentration of population in the Randstad and its dependence on the Meuse for drinking water, was the actor who, at first, placed greatest insistence on water quality. One recurrent issue during the discussions was whether the treaty should set norms beyond those imposed by European law, and, if so, how the costs for achieving these higher standards should be distributed. In spite of persistent diverging approaches among the actors, there is little doubt that, through a combination of cultural and political factors (greater awareness of environmental issues and the emergence of 'Green' political parties and pressure groups), the Belgian regions became more willing to take on board the idea that environmental improvements (of a.o. the situation of the waterways) were not just a bargaining counter, but a common duty of the basin states and regions. During the late 1980s and early 1990s, the extensive coverage by the media of 'global' environmental issues and international conferences on those issues, and their resonance at different levels of Western-European society at large, put further pressure on political decision-makers to set up a visible institutional framework to deal with specific environmental problems. The Helsinki convention of 1992 on the protection and use of transboundary watercourses and international lakes[124] was one major catalyst for the basin

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Benelux Parliament (13/14 March 1992), p. 137.

[124] 31 I.L.M. 1312 (1992).

states of the Scheldt and Meuse which pressed them into institutionalising their cooperation[125].

In spite of all these factors, both domestic and international, and of the long history of negotiation rounds, the treaties of 1994/5 have not received unqualified acclaim. Most commentators concede that the obligations imposed on the contracting parties remain very limited, and that the main achievement of the agreements consists in providing a permanent forum for the exchange of information and experience, which may facilitate the use of common standards and techniques in assessing environmental river issues, and perhaps more specific common purposes[126]. As they stand, the treaties are not much more

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[125] R. Zijlmans, 'Het verdrag van Helsinki: wegbereider voor de waterverdragen', *Water* 14 (1995), 242-3.

[126] Meijerink, *Conflict and Cooperation...*, p. 68, N. 22 («The Scheldt water quality convention concluded in 1994 marked the beginning of the preparation of joint water quality policies for the Scheldt basin, but did not yet contain concrete policy objectives or policy programmes»), 183, N. 100, 211, 216, 219. As a forum for technical cooperation: J. Verhoeven, 'Les accords de Charleville-Mézières du 26 avril 1994 sur l'Escaut et sur la Meuse', p. 808. P. d'Argent, 'L'évolution du statut juridique...', p. 156, concludes a legal analysis of the contracting parties' obligations and its restrictions and strikes a more positive note: in spite of the somewhat vague expressions and qualifications, «il serait [...] abusif de déduire des formules qui y sont employées que les accords de 1994 ne seraient pas des conventions en droit mais de simples engagements 'politiques' soustraits aux règles élémentaires de la responsabilité internationale», and who reminds the reader that as regards water quality, the substantive law is in any case mainly governed by European directives (p. 1p. 158, 160). F. Maes, 'The content of the agreements...', pp. 680-1, on the contrary, concludes his (otherwise very similar) analysis of the conventions by deploring that these are «rather weak in expressing the obligations [...] There are no real obligations of result, except the financial contributions of the different parties in the budget of the Commissions», and notes that the 1992 Helsinki Convention (of which the 1994-5 convention is supposedly an specific legal implementation) imposes higher standards of quality and control; the same author, 'De verdragen ter bescherming van de Maas en de Schelde in een diplomatieke en internationaal milieurechtelijke context', *Tijdschrift voor Milieurecht* 1996, 329-44, reiterates his critical assessment, and remarks that, as Belgium is not a contracting party, the jurisdiction of the International Court of Justice may implicitly be excluded (p. 344). A. Gosseries, 'The 1994 Agreements Concerning the Protection of the Scheldt and Meuse Rivers', *European Environmental Law Review* 1995, 9-14, recognises that the actual object of the conventions is rather institutional than a substantive

(nor less) than cooperation agreements. The paradox remains that to many observers, the decision-making power and the authority of the European Union may prove to offer a more adequate political lever for imposing more active and exacting environmental policies than international negotiations between a limited number of member-states, even though the common denominator acceptable to all members of the European Union would inevitably be lower. The paradox, if justified, would be a strong argument against the technique of linking different issues (environmental and non-environmental) in negotiations on specific environmental matters. If, as one may object, a material connection exists between per se non-environmental issues and their environmental effects, which is clearly the case in the demands for improving commercial navigation on the Scheldt, a global integrated approach, at least at the level of the river basin and drainage area, appears to be necessary.

4.2 *Flanders and the Scheldt Treaties of 17 January 1995*

4.2.1 *Flemish foreign policy on the Scheldt — a mixture of international cooperation and 'Realpolitik'?*

If, as may be expected in the forseeable future, environmental concerns will continue to claim a more prominent place on the domestic and international political agendas, this is bound to impose more constraints on the development of Flemish ports depending on the Scheldt navigation. That will only make it more difficult to reach a compromise in the conflict between economic and environmental interests, and this difficulty will affect the Flemish Region more than any of the other actors around the Scheldt estuary.

Already during the early stages of regionalisation, the Flemish authorities had realised that in order to gain credibility and good-will in their relations with their Dutch counterparts, Flanders had to provide tangible signs of its commitment to improve the quality of the Scheldt water. A few incidents notwithstanding (such as the attempt to give an alternative use to the Tessenderlo pipe-line), the Flemish Region (to some extent of course also influenced by domestic pro-environmental political pressures), may have successfully established its willingness to address such issues. In the long-term however, it is uncertain whether the price (one is tempted to use the phrase,

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regulation of standards (p. 14).

toll!) to pay in order to satisfy legitimate environmental demands may not adversely affect the competitive position of the Flemish ports, Antwerp in particular. As cooperation between the members of the International Commission for the protection of the Scheldt develops[127], demands for further programmes towards the improvement of water quality can be expected to be proposed. The pattern of negotiations which led to the signing of the 1995 water-treaties suggests that, under pressure, the Flemish Region could be tempted to subordinate negotiations on an integrated approach of the environmental and economic Scheldt-issues to agreements on other, unrelated, issues.

Such a temptation ought to be resisted. It should be clear that the 'treaty-making power' which the Belgian regions acquired in 1993 should not be viewed (as some self-congratulatory comments at the time the 1995 treaties were signed and ratified might suggest) as a belated step towards a sovereignty as it was conceived in the heyday of Western nation-states. Even the Belgian federal state or the unitary Dutch state no longer enjoy such sovereign prerogatives (if they ever did). It is significant that during the course of the negotiations, traditional foreign office diplomacy seems to have been increasingly sidelined and that the process of working out bilateral or multilateral agreements was largely delegated to government departments with ad hoc (technical) competences and experience. Without denying that even at that level, conflicts of territorially defined interests occurred, it is evident that the cooperation of such technical departments may benefit from a greater degree of common purpose, in particular if their task is focused on a particular (transboundary) region. Nevertheless, the lack of any substantial decision-making competences of the International Commission for the protection of the Scheldt is a reminder that its activities are still closely dominated by political actors of the traditional mould, albeit as regions of a federal state.

4.2.2 *The long shadow of the Belgian state over the Scheldt issues*

The Kingdom of Belgium, i.e. the federal state, was not a contracting party to

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[127] For an early example: H. Maeckelberghe, 'Internationale Commissie voor de Bescherming van de Schelde (ICBS). Samenvatting van het rapport: "De kwaliteit van de Schelde in 1994"', *Water* 14 (1997), 107-12; F. Van Sevencoten, 'De Internationale Commissie voor de bescherming van de Schelde', *Water* 14 (1998), 338-42.

the 1994/5 treaties on the protection of the Scheldt and Meuse, although admitted as an observer and although the treaty leaves open the possibility of its later accession. Perhaps this was the result of a political will to advertise the newly-acquired power of the regions to negotiate and conclude international treaties in their own right (and within their areas of competence), and the agreements on the Scheldt and Meuse certainly would have in that respect a highly symbolic significance. Another, more traditional, reason, may have been the reluctance of one or more of the states (i.e. especially Belgium, France, The Netherlands) to commit themselves in regard of radioactive waste and the risks of pollution.

The exchange between the Belgian Council of State and the Flemish Government may serve as an example of the avoidance of issues which would have required the involvement of the Belgian federal state[128]. Formally, the exchange was simply part of the obligatory procedure (though in this case, forced through as an alleged matter of urgency) whereby the Council had to verify that the proposed agreement was not trespassing on federal competences (in which case it would qualify as a 'mixed' treaty, i.e. involving both federal and regional competences). Even so, beyond the purely formal legal questions on constitutional competences, fundamental flaws are recognisable in the treaties' scope and restrictions[129]. Two of the issues raised by the Council of State make the point very clearly. The first, already mentioned, is that of radioactive and nuclear pollution — not a merely theoretical hypothesis, considering the presence of nuclear plants directly situated on the Meuse and Scheldt, and, for the latter, on Belgian territory in Doel. The potential objection was eluded by a statement that the states wished to reserve those issues because they were covered by the terms of the Euratom Treaty. As a result, only non-

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[128] Parliamentary works: draft of the Decree ratifying the Treaty on the Protection of the Scheldt (Charleville-Mézières 26 April 1994/Antwerp 17 January 1995), Flemish Council 1996-6, No. 162/1, 16 November 1995: *Advies van de Raad van State* (11 July 1995), pp. 14-21. Similar document regarding the Treaty on the Protection of the Meuse (No. 163/1, pp. 14-21). The (formal) discussion in the Flemish Council (*Vlaamse Raad, Handelingen*, No. 16, 20 December 1995, pp. 879-90), aptly illustrates the priority most Flemish interest-groups and political parties gave to the improvement of the navigation on the Scheldt.

[129] On the lack of clear policies and objectives in the treaty of 1994, comp. Meijerink, *Conflict and Cooperation...*, pp. 68 N. 22, p. 183, N. 100 (criticisms expressed by NGOs), 211, 216, 219.

radioactive and non-nuclear waste and pollution from the plants are deemed to be a matter for the Commissions. The second issue was no less significant, because it was not possible to pass the responsibility to the European level: the Council wondered whether art. 5,1 of the Agreement, which assigns to the International Commission, among other tasks, «to organise cooperation between the different national and regional warning and alert networks and to promote the exchange of information with a view to preventing and combatting accidental pollution» (a somewhat attenuating translation, as the Dutch original refers to 'calamiteuze verontreiniging', i.e. literally 'calamitous pollution'), did not imply an involvement of the emergency services of 'civil protection', which, in Belgium, were still under the authority of the federal state. The Flemish government's reply to the objection was that the agreement did not include the intervention of that emergency service, as the Commission's task was limited to 'cooperation and exchange of information obtained from the warning and alert networks'.

At a different level, the international status of the Scheldt is another issue over which the Belgian state may well continue to cast its long shadow. At successive stages of the negotiations, some Antwerp and Flemish interest groups claimed that issues such as the deepening of the Scheldt fell under the river's international status, which would impose an obligation on the Dutch state to ensure that the river remained accessible to maritime navigation, even if the requirements of that navigation had altered. All actors seem to have preferred in the end to set aside the issue for the purpose of the negotiations and agreements, but in the light of the future development of the navigation on the Scheldt, it is inevitable that, if only in order to determine the respective rights and obligations of the Belgian state and the Flemish Region regarding the international status of the Scheldt, the question will in due time resurface[130].

Summary

During the last thirty years of the twentieth century, the dynamics of

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[130] Belgium's involvement may also be required when negotiations on the Schledt are linked to other issues, for which the federal state is competent or has an interest (comp. Meijerink, *Conflict and Cooperation...*, p. 212).

international relations around the Scheldt estuary have been influenced by several factors. As regards the actors, the (re-)appearance of the Belgian regions as international subjects was no doubt a significant phenomenon. The gradual transfer of powers from the Belgian state to the regions not only affected diplomatically and politically the course of the negotiations, it also forced the other actors (both the Netherlands and Belgium, in particular) to reconsider their strategies and aims. Continuing European integration was another factor. On questions of trade, for example, the competition between Dutch and Belgian interests — such as the rivalry between the ports of Rotterdam and Antwerp —, though still very much alive, has been somewhat restrained by a trans-national concern for cooperation which is not merely inspired by a sense of European solidarity, but also by economic arguments in favour of a larger, integrated complex of infrastructures which only together can form an attractive pole for maritime shipping and internationally oriented investments in trade, commercial services and industry. A third factor has been the rapid internationalisation of environmental issues and its political weight in Western European politics.

So far, the results of these developments fall short of the problems international cooperation around the Scheldt estuary have had to address. Only comparatively short-term goals have been achieved. Moreover, whatever the official political messages to reassure public opinion, even these achievements remain largely contradictory. A comprehensive, trans-national restructuring of the harbour facilities along the North Sea from the Northern French ports to the Dutch harbours is still wanting. Even within the Flemish region, it may be difficult to discern a constant and global strategy in the use of the resources of Antwerp, Ghent and Zeebrugge. The environmental 'compensations' for the continuing expansion of the Flemish harbours remain vulnerable to further expansion, and elude the issue of environmental and cultural damage to a vastly growing geographic area of harbour activities and their ramifications. An analysis of the negotiation rounds which led to the 1994-5 treaties gainsays the official stance of Flemish political leaders at the time, to whom the treaties made the point that 'what the Flemish region was doing on its own strength, it did better'. No doubt the direct participation of the regional actors — one would have wished that Zeeland interests had been allowed to voice their concerns more independently and officially[131] — is both legitimate and

[131] On the involvement of Zeeland interests in the negotiation rounds, cf. Meijerink,

necessary for a balanced outcome, but the outcome of the negotiations also shows that on both economic and environmental issues involved in the Scheldt estuary, the unravelling of the states' sovereignty (not only in Belgium, which was the most spectacular case) has not yet been adequately replaced by effective governmental power in the context of the European Union. Ultimately, regional actors and weakened state actors are unlikely to achieve by themselves trans-boundary decisions which may sufficiently offset particular regional and inter-regional interests.

Conflict and Cooperation..., pp. 104 (criticisms of the Dutch national authorities' approach (in 1984) expressed by provincial authorities and by local authorities); 112 («an important regional arena in the Dutch province of Zeeland, which consists of regional directorates of national ministries, regional and local governments, and NGOs»); 123, N. 16 (1986); 124-5 (in 1987, various NGOs voiced their protests against what they perceived would be the environmental effects of the decisions-in-progress, and following these protests, «the regional Directorate Zeeland of Rijkswaterstaat [took] the initiative to start informal deliberations with Flemish water managers to discuss Scheldt water quality issues»; in 1988, the Province of Zeeland requested the mediation of the European Commission in the negotiations on the water quality of the Scheldt, see also p. 160); 127, 132 (Zeeland opposition to the Baalhoek canal); 135 (1988: the Dutch delegation in the Technical Scheldt Commission refers to the need to foster public support for the projects in Zeeland); 138, 150 (the regional Directorate for Zeeland is represented in the 'OostWest' working party, 1990-2); 144 (joint meeting of representatives of the Dutch provinces of Zeeland, North-Brabant and Zeeland discussing the creation of a fund for the cleaning of the Scheldt and Meuse rivers); 160 («Partly because the Dutch national government seemed to be more interested in the water quality and quantity of the Meuse than in the water quality of the Scheldt, some Dutch municipalities along the Western Scheldt tried to reduce their dependence on the national governments of the basin states. They took decisions, which made it obligatory to apply for a permit based on the Dutch Act on Land-use Planning for dredging and dumping activities on their territories. By that the municipalities did get an indispensable resource for the implementation of the deepening program. In addition, the municipalities founded the Task Group for the Western Scheldt, and by that formed an important coalition»); 171 (opposition of the Southern Dutch provinces and several NGOs and pressure groups to the Dutch government's decision «to unlink the negotiations on the deepening programme and the water quality of the Scheldt and the Meuse, and the decision to make a linkage between the deepening programme and the HSL», which meant that «the environmental problems in Scheldt and Meuse [were] made subordinate to the economic interests of the Dutch Randstad»); 189 (involvement of representatives of the Province of Zeeland and of the Task Group for the Western Scheldt in preparing the 'Scheldt Action Programme' 1995-7).

Understandably, much emphasis was laid, especially by the regional actors, on their emergence as fully emancipated subjects of international law for the purpose of negotiating and concluding international treaties within the ambit of their competence. It may also explain why their action on that international stage was largely modelled on that of traditional state-actors in international relations. All that, however, should not obfuscate the fact that their emergence (or, in a wider historical perspective, re-emergence) is primarily a symptom of profound changes in the structure of the West-European international community, where the classic concept of sovereignty has been eroded by both supra-national and infra-national factors.

Conclusion

Until the late sixteenth-century in theory, and much longer — if not always — in practice, sovereignty, however it was expressed, was a relative concept. During the middle ages, that allowed a great variety of actors to intervene in inter-polity relations and inter-polity law. Moreover, the 'international community' of these actors was, at least within Latin Christendom, sufficiently integrated so that a minimum of common values and norms were shared, and a politically flexible hierarchy recognised. When, under Burgundian rule, the conflicting economic interests of the regional actors around the Scheldt estuary had to be settled through peaceful means, the political and military power of the Duke may have been the decisive consideration for those actors bringing them to accept a peaceful settlement, but such a settlement was only possible because a legal mechanism of peaceful conflict resolution was available and already widely established throughout Western Europe.

In the age of Enlightenment, sovereignty was still an ambivalent political concept. Theoretically, there may have been equal sovereignty over all the territories ruled by a monarch (or, in some cases, a 'republic'), but in fact not all the territories within a realm were on a par with each other. A monarch's dynasty had its own heartlands and power-base, which somehow had become more strongly identified with their political sovereignty on the European stage. More peripheral territories, often the object of bartering during negotiations, may have added to the prestige, wealth or security of the realm, but were not as essential to the monarch's status as sovereign. Moreover, sovereignty was seen

as a force within a coherent 'system' of nations, which ultimately deferred to the principles which maintained the system in place. Peripheral territories, in such a 'rationally' conceived system of the international community, were mainly envisaged as masses (in the physical sense) which were driven (or manipulated) by outside forces. Whatever the respective skill and force of the players on this European political billiard-table, the effects and ultimate outcome of each move were meant to be ruled by principles which were no less inescapable and immanent than the 'laws of nature' in the physical world. The diplomatic strategies and the pamphleteers' arguments inspired by Joseph II's ill-fated attempt to 'open' the Scheldt to international maritime navigation illustrate how the issue was primarily analysed with regard to its anticipated effects on the dynamic balance of powers within Europe, taking into account both the immediate neighbours (provided they could act as an autonomous force) and the Great Powers.

The nineteenth century was the high-water mark for the sovereign nation-state. The principle of equality among these exclusive actors of the international community was strongly mitigated by the recognised superior authority of the Great Powers. Again, this is reflected in the negotiations and the formalisation of the 1863 Treaty on the Redemption of the Scheldt-Toll. The agreement as such was a bilateral issue between Belgium and the Netherlands. However, as the diplomatic history of the negotiations clearly demonstrates, the issue was also a concern of the larger maritime international community, and, of course, Britain's role in the acceptance and implementation of the multi-lateral agreement between Belgium and the maritime powers was crucial. It is also clear that the principles governing the international relations around the redemption of the toll were not exclusively of a legal nature, but belonged to prevailing (though not universally accepted) ideas of economic and trade policy, for which Britain, again, was a decisive actor.

Finally, the 1994-5 treaties show, though still very modestly, that the (Western European) international community is engaged in a new process of metamorphosis. The political will to co-operate in what is perceived to be a common, transnational interest may have become a driving force, but the actual means of cooperation remain very limited. Even so, the return of regional actors on the international stage, which may herald a greater variety of such actors, but also, in future, of other actors (such as NGOs, whose actions became increasingly important during the latest negotiations rounds), and the

so far rather indirect influence of the European institutions, are all indications that not only the nature of the actors is changing, but also the structure of the international community in which they evolve. So far, the development is one of transition, and a coherent theoretical model of the new international community that is emerging from the relative erosion of the sovereign state in favour of sub-national, trans-national and supra-national actors has yet to be worked out and to reach a relative consensus.