



What Van Gend & Loos Should Have Said
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What *Van Gend & Loos* Should Have Said: *Van Gend & Loos* and the Transformation of Relationships between the European States

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ABSTRACT: The European Court of Justice famously declared the direct effect of European law in its *Van Gend en Loos* judgment of 1963, providing a new role for private individuals in the enforcement of EEC obligations. However, the wording of that judgment omits explicit discussion of its momentous consequences for the relationships between the European states. Here that omission is remedied by a ‘re-writing’ of *Van Gend en Loos* that highlights its role in suppressing inter-state retaliation between the EEC states. This ‘re-writing’ of *Van Gend en Loos*, drawing in the writings of judge Robert Lecourt, reveals the impact of the direct effect doctrine on both states and individuals within Europe’s new legal order.

KEYWORDS: European Court of Justice – *Van Gen den Loos* – direct effect – retaliation – EU law – Robert Lecourt.

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1. Mock Judgment of the Court of 5 February 1963 in Case C-26/62, *NV Algemene Transport- en Expeditie onderneming van Gend & Loos v Netherlands Inland Revenue Administration*.

In Case 26/62

Reference to the Court under subparagraph (a) of the first paragraph and under the third paragraph of Article 177 of the Treaty establishing the European Economic Community by the Tariefcommissie, a Netherlands administrative tribunal having final jurisdiction in revenue cases, for a preliminary ruling in the action pending before that court between

N.V. Algemene transport - en expeditie onderneming Van Gend & Loos, having its registered office at Utrecht, represented by H.G. Stibbe and L.F.D. ter Kuile, both Advocates of Amsterdam, with an address for service in Luxembourg at the Consulate-General of the Kingdom of the Netherlands

and

Nederlandse administratie der belastingen (Netherlands inland revenue administration), represented by the Inspector of Customs and Excise at Zaandam, with an address for service in Luxembourg at the Netherlands Embassy,

on the following questions:

1. Whether Article 12 of the EEC Treaty has direct application within the territory of a Member State, in other words, whether nationals of such a State can, on the basis of the Article in question, lay claim to individual rights which the courts must protect;
2. In the event of an affirmative reply, whether the application of an import duty of 8% to the import into the Netherlands by the applicant in the main action of ureaformaldehyde originating in the Federal Republic of Germany represented an unlawful increase within the meaning of Article 12 of the EEC Treaty or whether it was in this case a reasonable alteration of the duty applicable before 1 March 1960, an alteration which, although amounting to an increase from the arithmetical point of view, is nevertheless not to be regarded as prohibited under the terms of Article 12;

THE COURT

[...]

gives the following

JUDGMENT

[...]

Grounds of judgment

I – Procedure

[...]

II – The first question

A – Jurisdiction of the Court

The Government of the Netherlands and the Belgian Government challenge the jurisdiction of the Court on the ground that the reference relates not to the interpretation but to the application of the Treaty in the context of the constitutional law of the Netherlands, and that in particular the Court has no jurisdiction to decide, should the occasion arise, whether the provisions of the EEC Treaty prevail over Netherlands legislation or over other agreements entered into by the Netherlands and incorporated into Dutch national law. The solution of such a problem, it is claimed, falls within the exclusive jurisdiction of the national courts, subject to an application in accordance with the provisions laid down by Articles 169 and 170 of the Treaty.

However in this case the Court is not asked to adjudicate upon the application of the Treaty according to the principles of the national law of the Netherlands, which remains the concern of the national courts, but is asked, in conformity with subparagraph (a) of the first paragraph of Article 177 of the Treaty, only to interpret the scope of Article 12 of the said Treaty within the context of Community law and with reference to its effect on individuals. This argument has therefore no legal foundation.

The Belgian government further argues that the Court has no jurisdiction on the ground that no answer which the Court could give to the first question of the Tariefcommissie would have any bearing on the result of the proceedings brought in that Court.

However, in order to confer jurisdiction on the Court in the present case it is necessary only that the question raised should clearly be concerned with the interpretation of the Treaty. The considerations which may have led a national court or tribunal to its choice of questions as well as the relevance which it attributes to such questions in the context of a case before it are excluded from review by the Court of Justice.

It appears from the wording of the questions referred that they relate to the interpretation of the Treaty. The Court therefore has the jurisdiction to answer them.

This argument, too, is therefore unfounded.

B – On the substance of the Case

The first question of the Tariefcommissie is whether Article 12 of the Treaty has direct application in national law in the sense that nationals of Member States may on the basis of this Article lay claim to rights which the national court must protect.

To ascertain whether the provisions of an international Treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions.

The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.

In addition the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals.

The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

With regard to the general scheme of the Treaty as it relates to customs duties and charges having equivalent effect it must be emphasized that Article 9, which bases the Community upon a customs union, includes as an essential provision the prohibition of these customs duties and charges. This provision is found at the beginning of the part of the Treaty which defines the 'Foundations of the Community'. It is applied and explained by Article 12.

The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.

The implementation of Article 12 does not require any legislative intervention on the part of the states. The fact that under this Article it is the Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation.

In addition the argument based on Articles 169 and 170 of the Treaty put forward by the three Governments which have submitted observations to the Court in their statements of case is misconceived. The fact that these Articles of the Treaty enable the Commission and the Member States to bring before the Court a State which has not fulfilled its obligations does not mean that individuals cannot plead these obligations, should the occasion arise, before a national court, any more than the fact that the Treaty places at the disposal of the Commission ways of ensuring that obligations imposed upon those subject to the Treaty are observed, precludes the possibility, in actions between individuals before a national court, of pleading infringements of these obligations.

A restriction of the guarantees against an infringement of Article 12 by Member States to the procedures under Article 169 and 170 would remove all direct legal protection of the individual rights of their nationals. There is the risk that recourse to the procedure under these Articles would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty.

Slowness is not the only flaw in the non-compliance procedure. There is another, less apparent but legally more serious one. It concerns cases where, despite a judgment establishing its failure, the State concerned fails to take the necessary measures to comply with the Court's judgment.

The result is that, despite a breach that has been judicially condemned, coupled with the failure to comply with the judgment, nothing prevents the non-compliant State from continuing to enjoy all the benefits of the Treaty.

The risk of degradation of this type of action would be all the more worrying because the principle of reciprocity between the Member States depends on the exact implementation of the Treaty by each one. None of them can hide behind the failure of another State to justify its own irregularities. This essential principle might be put at risk if to the shortcomings of the Article 169 infringement procedure, should also be added the absence of any right of action by private persons.

The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States.

It follows from the foregoing considerations that, according to the spirit, the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.

III – The second question

A – *The jurisdiction of the Court*

According to the observations of the Belgian and Netherlands Governments, the wording of this question appears to require, before it can be answered, an examination by the Court of the tariff classification of ureaformaldehyde imported into the Netherlands, a classification on which Van Gend & Loos and the Inspector of Customs and Excise at Zaandam hold different opinions with regard to the ‘Tariefbesluit’ of 1947. The question clearly does not call for an interpretation of the Treaty but concerns the application of Netherlands customs legislation to the classification of aminoplasts, which is outside the jurisdiction conferred upon the Court of Justice of the European Communities by subparagraph (a) of the first paragraph of Article 177.

The Court has therefore no jurisdiction to consider the reference made by the Tariefcommissie.

However, the real meaning of the question put by the Tariefcommissie is whether, in law, an effective increase in customs duties charged on a given product as a result not of an increase in the rate but of a new classification of the product arising from a change of its tariff description contravenes the prohibition in Article 12 of the Treaty.

Viewed in this way the question put is concerned with an interpretation of this provision of the Treaty and more particularly of the meaning which should be given to the concept of duties applied before the Treaty entered into force.

Therefore the Court has jurisdiction to give a ruling on this question.

B – *On the substance*

It follows from the wording and the general scheme of Article 12 of the Treaty that, in order to ascertain whether customs duties or charges having equivalent effect have been increased contrary to the prohibition contained in the said Article, regard must be had to the customs duties and charges actually applied at the date of the entry into force of the Treaty.

Further, with regard to the prohibition in Article 12 of the Treaty, such an illegal increase may arise from a re-arrangement of the tariff resulting in the classification of the product under a more highly taxed heading and from an actual increase in the rate of customs duty.

It is of little importance how the increase in customs duties occurred when, after the Treaty entered into force, the same product in the same Member State was subjected to a higher rate of duty.

The application of Article 12, in accordance with the interpretation given above, comes within the jurisdiction of the national court which must enquire whether the dutiable

product, in this case ureaformaldehyde originating in the Federal Republic of Germany, is charged under the customs measures brought into force in the Netherlands with an import duty higher than that with which it was charged on 1 January 1958.

The Court has no jurisdiction to check the validity of the conflicting views on this subject which have been submitted to it during the proceedings but must leave them to be determined by the national courts.

IV – Costs

The costs incurred by the Commission of the EEC and the Member States which have submitted their observations to the Court are not recoverable, and as these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the Tariefcommissie, the decision as to costs is a matter for that court.

On those grounds,

Upon reading the pleadings:

Upon hearing the report of the Judge-Rapporteur;

Upon hearing the parties;

Upon hearing the opinion of the Advocate-General;

Having regard to Articles 9, 12, 14, 169, 170 and 177 of the Treaty establishing the European Economic Community;

Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;

Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

In answer to the questions referred to it for a preliminary ruling by the Tariefcommissie by decision of 16 August 1962, hereby rules:

- 1. Article 12 of the Treaty establishing the European Economic Community produces direct effects and creates individual rights which national courts must protect.**
- 2. In order to ascertain whether customs duties or charges having equivalent effect have been increased contrary to the prohibition contained in Article 12**

of the Treaty, regard must be had to the duties and charges actually applied by the Member State in question at the date of the entry into force of the Treaty.

Such an increase can arise both from a re-arrangement of the tariff resulting in the classification of the product under a more highly taxed heading and from an increase in the rate of customs duty applied.

3. The decision as to costs in these proceedings is a matter for the Tarief-commissie.

2. Explanatory note

Everyone knows *Van Gend & Loos*. But *Van Gend & Loos* is not well understood. The most important consequence of the judgment is in fact routinely omitted in scholarly discussion. A large part of the reason must be that the text of the judgment itself fails to highlight all essential aspects of the case.

The fundamental inadequacy of the text of *Van Gend & Loos* is that it compares the enforcement of European law by private parties before national courts with a brief and incomplete account of the likely consequences of the alternative system, the enforcement of European law only by the European Commission directly before the Court of Justice, as outlined in Article 169 of the Treaty of Rome. However, a better understanding of the impact of direct effect can be conveyed by comparing the enforcement of European treaty obligation by private parties before national courts with a fuller account of more common forms of enforcement mechanisms for treaty obligations in classical international law.

The key sentence in the text of *Van Gend & Loos* that describes the weakness of the Article 169 procedure is as follows:

‘There is the risk that recourse to the procedure under these Articles would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty’.¹

This terse discussion does not sufficiently develop the envisaged scenario. The Article 169 procedure could only produce a declaratory judgment by the Court of Justice, with the consequence, per Article 171, that the State would ‘be required to take the necessary measures to comply with the judgment of the Court’. What if however a Member State did not in fact take ‘the necessary measures’? That is the problem that, so Weiler argues, is addressed by the direct effect of European law:

‘The fact that the national court renders the final judgment is crucial to the procedure. The binding effect and enforcement value of such a decision, coming from a Member State’s own court, may be contrasted with a similar decision handed down in declaratory

¹ Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1, 13.

fashion by the European Court under the previously discussed Article 169 procedure. A national court opinion takes care of the most dramatic weakness of the Article 169 procedure: the ability of a Member State, *in extremis*, to disregard the strictures of the European Court. Under the 177 procedure [direct effect] this disregard is impossible'.²

This scenario leads us to the essential question – what would have been the consequence of a Member State disregarding a declaratory judgment of the Court under the 'Article 169 procedure' *in the absence of the direct effect doctrine*?

The immediately apparent answer might be that the European Treaty would be less effectively enforced and implemented. The more penetrating and precise answer is that the EEC Member States would have been prompted to make use of the normal means of addressing such a scenario in a trade Treaty system – the threat and use of inter-state retaliation.

To take the best known example in today's international trade law, the Dispute Settlement Understanding of the World Trade Organization [WTO] authorises a complaining WTO member to impose retaliatory trade sanctions ('suspension of concessions', 'equivalent' in nature), on a self-help basis, in response to another WTO member's failure to implement the final decision of the WTO's dispute settlement institutions.³ This example is contemporary, but the idea that trade treaties are enforced by the threat or practice of inter-state trade retaliation is as old as the hills, and a widely acknowledged consequence of the pervasive logic of reciprocity in international law.⁴ After all, states cannot be expected to fulfil their own (demanding, difficult) treaty obligations if their treaty partners defaulting on their treaty obligations, even after dispute settlement processes have confirmed their default.

The reader will be aware that similar logics are dominant in many aspects of organised social life – rotas for shared transport of groups of children to weekly sports training, for example – where persistent or repeated non-contribution by one party will likely prompt other parties to reduce the benefits that they are providing on a reciprocal basis.⁵

The enforcement of international trade agreements by threats and practice of inter-state trade retaliation is of course crude and disruptive. Trade retaliation may affect businesses and individuals completely unrelated to the original dispute. Trade retaliation reinforces international inequalities, being more available to larger, and politically more significant, states, than to smaller and weaker ones. Trade retaliation may prompt states facing retaliation to search for disputes to raise that may authorise their own right to retaliate. Trade retaliation, one can add, tends not to promote positive diplomatic relations between policy-makers in the treaty states.

² JHH Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403, 2421.

³ WTO, 'Understanding on rules and procedures governing the settlement of disputes', available at www.wto.org.

⁴ B Simma, 'Reciprocity' in R Bernhardt (ed), *Encyclopedia of Public International Law* (North-Holland 2000) 4, 29–33.

⁵ RM Axelrod, *The Evolution of Cooperation* (Basic Books 1984).

Nonetheless, it may appear that there is no ready solution to the problem addressed by the threat or practice of inter-state retaliation as a means of enforcing trade treaties. Declaratory findings of non-compliance by international tribunals in conjunction with a prohibition on consequent retaliation by injured states would significantly weaken incentives for the defaulting state to take the necessary measures to come into compliance. Other apparent solutions – like the payment of a financial penalty, or ‘fine’ – depend on the goodwill of the defaulting party, whereas inter-state trade retaliation, as a ‘self-help’ measure by the complaining state, can be implemented by the complaining party without the cooperation of the defaulting state. The apparently inescapable logic of inter-state trade retaliation as the last resort solution to persistent non-compliance by a trading partner in a trade treaty regime has been confirmed by many scholars. It appears to be derived from the structural nature of international relations, and cannot be remedied by, for example, better resourcing or more expert staffing of international tribunals.

There is however a solution to this problem, one which allows not only for the lack of inter-state trade retaliation actually being applied at any particular moment, which is of course common in many international trade regimes, but for a permanent and reliable rejection of inter-state trade retaliation as an enforcement mechanism even if states are sometimes in default of their treaty obligations and indeed sometimes persist in that default even after the declaratory finding by the appropriate international tribunal established by the treaty in question.

That solution is the sufficiently reliable enforcement of treaty obligations by private parties before domestic courts. If a state is found in default of a treaty obligation by a domestic tribunal with the power to apply treaty obligations directly, the issue is resolved internally to the defaulting state itself. The central scenario that tends to prompt the threat or practice of inter-state trade retaliation – where non-compliance has been identified by an international tribunal but the state persists in its non-compliance even so – does not even arise.

The consequence of the enforcement of European law by private parties before the domestic courts of the Member States is therefore to remove the threat or practice of inter-state trade retaliation between the European Member States. In other words, the consequence of *Van Gend & Loos* was to remove the threat or practice of inter-state trade retaliation between the European Member States.

This is of course reinforced by the Court of Justice’s 1964 judgment *Costa v ENEL*,⁶ as it is in fact the enforcement of European law by private parties before domestic courts, *contrary domestic law notwithstanding*, that provides the fuller removal of the threat or practice of inter-state trade retaliation between the European

⁶ Case 6/64 *Flaminio Costa v ENEL*, EU:C:1964:66.

Member States. Otherwise newly enacted national legislation contrary to the European treaty obligation would simply resuscitate the inter-state retaliation scenario which the direct effect doctrine had attempted to suppress.

It also makes the case for the intimate connection of *Van Gend & Loos* with the Court's other momentous decision in 1964, the *Dairy Products* judgment,⁷ in which the ECJ comprehensively ruled out the use of self-help retaliatory behaviours, common to more normal forms of international law, within the European Economic Community. As the Court of Justice there declared,

'In [the defendants'] view, ... international law allows a party, injured by the failure of another party to perform its obligations, to withhold performance of its own [...] However, this relationship between the obligations of parties cannot be recognized under Community law'.⁸

It is the enforcement of European law by private parties before domestic courts that facilitates the Court's revolutionary move in *Dairy Products*.

The reader will note that, on this understanding, the beneficiaries of *Van Gend & Loos* are only in small part the individual parties directly involved in litigation to enforce their European law rights, or the national judges apparently 'empowered' by the ability to enforce European law within their own courts.⁹ Rather *Van Gend & Loos* sets up a system of treaty enforcement of benefit to trading businesses and other individuals throughout the European Member States, even if they are never involved in European law litigation, and indeed to state policy-makers as well, who are not required to threaten or resort to the archaic retaliatory methods of classical international law.

So the essential task in re-writing *Van Gend & Loos* is to draw the reader's attention to its most important, and perhaps most overlooked, impact – its role in removing the role of inter-state reciprocity and retaliation as enforcement mechanisms between the European states within the European legal order.

This could be highlighted by many revisions of course. However perhaps the most appealing approach is to use the words employed by one of the Court of Justice's most influential judges, Robert Lecourt. Appointed to the Court by the French government in 1962, Lecourt was immediately active in the struggle over the *Van Gend & Loos* judgment, where he, with Italian judge Trabucchi, overturned the initial opposition of then President of the Court Andreas Donner to issue to the *Van Gend & Loos* judgement as we now know it. Later, after retiring himself as President

⁷ Joined Cases 90/63 and 91/63 *Commission v Luxembourg and Belgium (Dairy Products)* EU:C:1964:80.

⁸ Ibid 631.

⁹ As for individuals, see JHH Weiler, 'Van Gend & Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy' (2014) 12 *International Journal of Constitutional Law* 94. As for national court empowerment, see Weiler (n 2); A-M Burley and W Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47 *International Organization* 41.

of the Court of Justice in 1976, and indeed after retiring again as a member of France's *Conseil Constitutionnel* in 1989, Lecourt wrote a short paper entitled – *Quel eut été le droit des Communautés sans les arrêts de 1963 et 1964?* – ‘What would the law of the Communities have been without the judgments of 1963 and 1964?’ Lecourt's answer to this question was not merely the bland observation that the European treaties would have been a mere trade agreement like many others. He developed a much more specific answer, that the enforcement of European law by private parties before national courts allowed the European Economic Community to avoid the threat of, or resort to, retaliatory behaviours by states in the case of non-compliance after a judgment of the Court of Justice.

It is therefore judge Lecourt's own wording on the wider impact of the direct effect of European law, from his 1991 paper, that has been inserted into the rewritten text of *Van Gend & Loos* above.

‘Slowness is not the only flaw in the non-compliance procedure. There is another, less apparent but legally more serious one. It concerns cases where, despite a judgment establishing its failure, the State concerned fails to take the necessary measures to comply with the Court's judgment.

The result is that, despite a breach that has been judicially condemned, coupled with the failure to comply with the judgment, nothing prevents the non-compliant State from continuing to enjoy all the benefits of the Treaty.

The risk of degradation of this type of action would be all the more worrying because the principle of reciprocity between the member States depends on the exact implementation of the Treaty by each one. None of them can hide behind the failure of another State to justify its own irregularities. This essential principle might be put at risk if to the shortcomings of Art 169 infringement procedure, should also be added the absence of any right of action by private persons’.¹⁰

‘None of them can hide behind the failure of another State to justify its own irregularities’ is the essential sentence. In classical approaches to international law, it is exactly the failure of other states to comply, particularly after dispute settlement procedures are exhausted, that justifies states in reducing their own treaty compliance.¹¹

There are of course other examples of Lecourt drawing the logical connection between the enforcement of European law by private parties before domestic courts and the prohibition on ‘classical international law-style’ enforcement by retaliation within the European Economic Community. In the Spring of 1965, for example,

¹⁰ These passages of Lecourt's text are drawn from a somewhat longer discussion in Lecourt's 1991 article, from which some sentences have been removed better to fit into the *Van Gend & Loos* text, see R Lecourt, ‘Quel eut été le droit des Communautés sans les arrêts de 1963 et 1964?’ in *Mélanges Jean Boulouis: l'Europe et le droit* (Dalloz 1991) 349–361.

¹¹ Lecourt's account therefore goes one step further than Weiler's above, because it indicates what would happen *after* a Member State had persistently disregarded a judgment of the ECJ arising from an Article 169 procedure, in the absence of the direct effect doctrine.

Lecourt published an article in *France-Forum* where he explained that the direct effect and supremacy of European law were required by the elimination of self-help enforcement mechanisms that the ECJ had declared in the Court's 1964 *Dairy Products* judgment.¹² Similarly, when speaking to national judges visiting Luxembourg in July 1965, and addressing the question of why national courts must apply European law, judge Lecourt posed the question 'what in fact is this Community law?' [*qu'est-ce que c'est que ce droit communautaire, qu'est-ce que c'est ?*]. Lecourt's answer emphasised, as well as the existence of the European institutions, that within the Community's new legal order Member States are prohibited from using self-help measures to enforce their legal rights.¹³ This is one of the things, Lecourt told the visiting judges, that revealed that they were in the presence of something new [*quelque chose de neuf*], completely different from the classical international order.

The above passage from Lecourt's 1990 article, however, perhaps fits most easily into a rewritten *Van Gend & Loos* judgment. Indeed if similar words had been included in the original text of the judgment, much subsequent ignorance and confusion about the logic and purpose of the direct effect doctrine would happily have been avoided. To be sure, these few sentences do not elaborate on all the possible links and permutations of this relationship. They do however sufficiently highlight *Van Gend & Loos*' profound impact on inter-state relationships within the EEC, and more specifically on the prohibition of international law's more normal forms of inter-state retaliation and reciprocity in the European legal order.¹⁴

We will finish with two brief methodological notes of more general application. First, the best way to understand the European institutions, in all their novelty, is often not by comparing one aspect of the European treaties to another, but by comparing the European institutions to more common behaviours and institutions in international law. Thus the novelty of European law's direct effect is best understood by comparison to ordinary international law, rather than by comparison to the text of the Article 169 procedure. Similarly, the novelty and powers of the European Commission are most starkly revealed by comparison to, say, the Secretariat of the World

¹² R Lecourt, 'La dynamique judiciaire dans l'Édification de l'Europe' (April–May 1965) 64 *France-Forum* 20.

¹³ CJEU Archives, 'Rencontre avec les Hauts magistrats des Etats membres', 10 and 11 June 1965, Fonds CJUE-3459, 106–108 (1965).

¹⁴ For a fuller elaboration, across the foundational judgments of the European legal order of the 1960s and 1970s, see W Phelan, *Great Judgments of the European Court of Justice: Rethinking the Landmark Decisions of the Foundational Period* (Cambridge University Press 2019) particularly 136–151, which offers an alternative 're-writing' of *Van Gend & Loos* inspired by the Court of Justice's 1972 judgment in *International Fruit* (Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit*, EU:C:1972:115), which rejected the direct effect of GATT obligations within the European Community. See also W Phelan, *In Place of Inter-State Retaliation: The European Union's Rejection of WTO-style Trade Sanctions and Trade Remedies* (Oxford University Press 2015).

Trade Organization, rather than (as is more common) by comparisons to the European Coal and Steel Community's High Authority.¹⁵ The advantages of such external comparisons cannot be overemphasised.

Second, to understand the Court of Justice in its 'heroic years', it is essential to engage with the lives and writings of the ECJ's early judges. It is in fact only because European law scholarship so pervasively ignores the writings and activities of the ECJ's early judges that the connection between the direct effect doctrine and the European legal order's rejection of inter-state retaliation has gone so unremarked. After all, the writings and speeches of Lecourt, perhaps the most influential judge in the early years of the Court, draw out this connection again and again.¹⁶ Here too the potential advantages of active integration of the study of the ECJ's *judges* into the study of the ECJ's *judgments* should not be ignored.

¹⁵ E.g. N Nugent and M Rhinard, *The European Commission* (Palgrave Macmillan 2015) 26–29.

¹⁶ For outline biographies of all the early ECJ judges and advocates general, see V Fritz, *Juges et avocats généraux de la Cour de Justice de l'Union européenne (1952–1972): une approche biographique de l'histoire d'une révolution juridique* (Klostermann 2018). For recent biographical research on Robert Lecourt, see W Phelan, 'Europe's Legal Revolution and France's Article 49-3: The Constitutional Audacity of Robert Lecourt' (2024) 3 *European Law Open* 226.