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in the Early History of European law

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Abstract

As the ECJ's two most famous decisions, *Van Gend en Loos* and *Costa v. ENEL*, which established the direct effect and supremacy of European law, are commemorated on their fiftieth anniversaries, attention has also turned to another of the ECJ's early decisions. On 13th November 1964, in *Commission v. Luxembourg & Belgium*, the *Dairy Products* case, the ECJ rejected the use of 'self-help' countermeasures in the Community legal order, and therefore marked the fundamental distinction between European law and general international law. Drawing on writings by Robert Lecourt, Paul Reuter, and Paul Kapteyn, this paper demonstrates that a direct causal link between these three cases was recognized by ECJ judges and legal scholars as early as 1965. The historical evidence presented here therefore supports previous comparative analysis that has argued that these three decisions – *Van Gend*, *Costa*, and *Luxembourg & Belgium* – should be acknowledged as profoundly inter-connected, in that national court application of European obligations should be understood as a substitute for the enforcement of European obligations through inter-state countermeasures.

Keywords

History of European Law, European Law, Public International Law, Van Gend en Loos, Costa v ENEL, Commission v Luxembourg & Belgium

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SUPREMACY, DIRECT EFFECT AND *DAIRY PRODUCTS* IN THE EARLY HISTORY OF EUROPEAN LAW

William Phelan

Introduction

The study of the European legal order has recently taken a historical turn.¹² New studies of the design of the European treaties, of networking and scholarship by European legal elites, and of the reception of European law by judges and politicians, have greatly increased our understanding of court decisions, legal academia, and political actors in the formative decades of European legal integration. This new trend towards historical research has taken been reinforced by the events commemorating the fiftieth anniversaries of the European Court of Justice's (ECJ's) most famous two decisions, often considered as a pair: *Van Gend en Loos*, decided on 5 February 1963, and *Costa v. ENEL*, decided on 15 July 1964.

Recently, however, the argument has been advanced that a third judgment, *Commission v. Luxembourg & Belgium*, also decided by the ECJ in 1964, should also be considered fundamentally connected to *Van Gend* and *Costa*, turning the 'pair' into a 'troika', 'trinity' or 'trio'.³ In *Commission v. Luxembourg & Belgium*, as is widely known, the ECJ rejected any use by the member states of general international law's normal 'self-help' retaliation and countermeasure enforcement mechanisms. The new argument is that this rejection of enforcement through inter-state countermeasures, as set out in *Luxembourg & Belgium*, was premised on the member states' acceptance of national court enforcement of European law obligations, that is to say, the doctrines of direct effect, as set out in *Van Gend en Loos*, and supremacy, as set out in *Costa*. This claim has been supported by a variety of examples drawn from the politics of dispute settlement in other treaty regimes.

However convincing the comparative examples, such an argument has found, so far, little support in the now growing scholarship on the history of the early decades of European legal integration. Drawing on scholarly publications by ECJ judges and scholars both in the 1960s and later, this paper therefore sets out to demonstrate that scholars and legal actors in the period of the 'constitutionalization' of Community law were at times aware of the causal connection between these three cases. We will discuss contributions by three prominent legal writers – two of them, at one time, judges of the ECJ – that reveal, to varying degrees, an acknowledgment of this connection, thus

¹ For advice and assistance in the preparation of this paper, I would like to thank Gareth Davies, Simon Hix, Carolin Huebner, and Bernard Steunenberg, and participants at a panel at the European Political Science Association Annual Conference in Edinburgh on 20th June 2014. I thank Bruno de Witte, among others, for encouragement to work further on understandings of this topic at the time of the *Commission v. Luxembourg & Belgium* decision. The paper was completed during a visiting fellowship at the European University Institute in Fiesole, where I benefitted from the considerable and generous assistance of the EUI library staff. Funding from Trinity College's Arts and Social Sciences Benefactions Fund is gratefully acknowledged. It is a pleasure to write this paper in the fiftieth anniversary year of the ECJ's judgments in *Costa v. ENEL* and *Commission v. Luxembourg & Belgium*.

² B Davies and M Rasmussen, 'Towards a New History of European Law' (2012) 21 (3) *Contemporary European History* 305-318. For a most recent example, see e.g. M Rasmussen, 'Revolutionizing European law: A history of the Van Gend en Loos judgment' (2014) 12 (1) *International Journal of Constitutional Law* 136-163.

³ W Phelan, 'The Troika: The Interlocking Roles of *Commission v. Luxembourg and Belgium*, *Van Gend en Loos* and *Costa v. ENEL* in the Creation of the European Legal Order' (forthcoming) *European Law Journal* .

reinforcing previous comparative studies with material directly relevant to the history of the transformation of European law itself.

This paper proceeds as follows: the first section outlines the importance of *Commission v. Luxembourg & Belgium* in distinguishing European law from more common forms of treaty-based dispute settlement systems, as well as the more recent claim that *Commission v. Luxembourg & Belgium* should be seen as integrally connected with *Van Gend en Loos* and *Costa v. ENEL*. The second section considers a possible critique of this argument, based on the limited discussion of *Commission v. Luxembourg & Belgium* in recent historical studies, and offers reasons why such a critique may be less than compelling. The third section analyses scholarly publications discussing *Van Gend*, *Costa*, and the European legal order's break with self-help enforcement mechanisms, by three prominent lawyers participating in and analyzing the development of European legal integration: Robert Lecourt, Paul Reuter, and Paul Kapteyn. Together, these publications show that the logical connection between these three decisions has been at least intermittently recognized in the past, and the writings of Robert Lecourt, in particular, demonstrate that an important member of the ECJ itself was aware of this causal relationship at the time these judgments were made. This paper should therefore be of interest to analysis of both the *Van Gend en Loos* and *Commission v. Luxembourg & Belgium* judgments, and thus to the wide community of scholars working on the fundamental principles both of European Union law and of public international law. The final section concludes with an assessment and discussion of future research.

The Centrality of *Commission v. Luxembourg & Belgium*?

Perhaps the commonest understanding of the development of the European legal order is that it was transformed, even 'constitutionalised', by the ECJ in those famous two decisions of 1963 and 1964. *Van Gend en Loos* declared the direct effect of European law, requiring national courts to apply European law rights in litigation open to private parties, while *Costa v. ENEL* required that national courts resolve conflicts between national legal obligations and European law obligations in favor of the European legal obligations.⁴ By recruiting the national courts to vindicate European legal rights, and calling on the vigilance of private actors to monitor state compliance with obligations derived from the European treaties, the ECJ, national courts, and private litigants, in combination, interacted over time to produce a distinctive European rule of law. Thus the compliance procedure involving complaints by the European Commission or member states before the ECJ, provided for by Articles 169, 170 and 171 of the Treaty of Rome, came to be supplemented and overtaken by enforcement by private actors through domestic courts, linked with the ECJ by use of the preliminary reference procedure, provided for by Article 177 of the Treaty.⁵ The standard account of the development of the European legal order, emphasizing these two decisions above all, often appears compelling, coherent, and complete.⁶

⁴ ECJ Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR 1. ECJ Case 6/64, *Flaminio Costa v. ENEL*, [1964] ECR 585.

⁵ These treaty provisions have been renumbered as the European Treaties have been amended and revised in subsequent treaty-making. Because the focus of this paper is largely historical, we have used the original numberings of treaty provisions contained in the founding Treaty of Rome.

⁶ E Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 (1) *American Journal of International Law* 1-27; GF Mancini, 'The Making of a Constitution for Europe' (1989) 26 *Common Market Law Review* 595-614 599-60; A-M Burley [Slaughter] and W Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47 (1) *International Organization* 41-76; UR Haltern, 'Integration Through Law' in A Weiner and T Diez (eds) *European Integration Theory* (Oxford University Press, Oxford 2004) 177-196 180-181; A Vauchez, 'The Transnational Politics of Judicialization, *Van Gend en Loos* and the Making of EU Polity' (2010) 16 (1) *European Law Journal* 1-28 1 B Davies,

One element frequently missing from such accounts, however, is the identification of a well-specified possible alternative outcome.⁷ That is where consideration of another, nearly contemporaneous, ECJ case, *Commission v. Luxembourg & Belgium* can make a particular contribution.⁸ Known variously as the *Dairy Products* case, the decision of ‘13 November 1964’, or ECJ Cases 90 & 91/63, this is the ECJ decision that best marks the European legal order’s break with the enforcement mechanisms of ordinary forms of international law.⁹ General international law incentivizes the fulfillment of treaty obligations by authorizing states to employ ‘self-help’ measures to impose costs on a defaulting party. As the arbitral tribunal in a dispute between France and the United States in 1978 explained: ‘If a situation arises which, in one State’s view, results in the violation of an international legal obligation, the first State is entitled ... to affirm its rights through countermeasures’.¹⁰ The logic of such ‘self-help’ behavior is often summarized in the maxim *exceptio non adimpleti contractus*, that is, the principle a contract does not need to be fulfilled in favor of a party that is themselves failing to execute it. Such self-help measures go under a variety of names including ‘reprisals’, ‘reciprocal measures’, or – as in the example above – ‘countermeasures’, and – particularly in trade-related treaty regimes – frequently involve the threat, and intermittently the practice, of inter-state trade retaliation. In the anarchical world of relations between states, where there is no institution with a ‘Weberian’ monopoly of the legitimate use of violence to enforce obligations, such ‘self-help’ enforcement mechanisms are often considered a vital incentive for states to follow demanding international legal obligations.

The substance of the dispute in *Commission v. Luxembourg & Belgium* involved an infringement case taken by the European Commission under Article 169 of the Treaty. The Commission alleged that the reorganization of customs duties arranged by the Luxembourg-Belgian dairy products market organization had resulted in an effective increase in the intra-Community customs duties applicable to these products in violation of the ‘standstill’ requirement, imposed by Article 12 of the Treaty, not to increase any intra-Community customs barriers.¹¹ However, an important point of legal principle was added to the case when Luxembourg and Belgium claimed that they should be considered released from these obligations because the European institutions had themselves failed to meet related obligations. More specifically, the Council had committed itself to introduce a European market organization for dairy products which would eventually replace the national market organizations, such as that in Luxembourg & Belgium connected with the infringements of Article 12. However, the Council had failed to do so by the appointed deadline, prompting Luxembourg and Belgium to seek to use the Council’s failure to justify their own non-fulfillment of their European obligations, in line with widely accepted principles of international law.

The ECJ, however, rejected the arguments of Luxembourg & Belgium in a far-reaching judgment, declaring that:

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Resisting the European Court of Justice: West Germany's Confrontation with European law, 1949-1979 (Cambridge University Press, Cambridge 2012) 1.

⁷ W Phelan, 'Why do the EU Member States accept the Supremacy of European Law? Explaining Supremacy as an Alternative to Bilateral Reciprocity' (2011) 18 (5) *Journal of European Public Policy* 766-777.

⁸ ECJ Cases 90&91/63, *Commission v. Luxembourg & Belgium*, [1964] ECR 625.

⁹ B Simma, 'Self-Contained Regimes' (1985) 16 *Netherlands Yearbook of International Law* 111-136; L Gradoni and A Tanzi, 'Diritto comunitario: una lex specialis molto speciale' in LS Rossi and G Di Federico (eds) *L'incidenza del Diritto dell'Unione Europea sullo Studio del Diritto Internazionale* (Editoriale Scientifica, Rome 2008) 37-70 .

¹⁰ *France v. United States*, 18 RIAA 417.

¹¹ This description relies on E Stein, P Hay and M Waelbroeck, *European Community Law and Institutions in Perspective: Text, Cases and Readings* (Bobbs-Merrill, New Yorks 1976) 372.

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.

In fact, the treaty is not limited to creating reciprocal obligations between the different natural and legal persons to whom it is applicable, but establishes a new legal order that governs the powers, rights and obligations of the said persons, as well as the necessary procedures for taking cognizance of and penalizing any breach of it. Therefore, ... the basic concept of the treaty requires that the Member States not take the law into their own hands. Therefore the fact that the [other party] failed to carry out its obligations cannot relieve the defendants from carrying out theirs.¹²

The far-reaching logic of the ECJ's decision, reinforced and elaborated by a stream of subsequent related judgments, mark *Commission v. Luxembourg & Belgium* as a decision of great importance.¹³ In the history of international law, threats that treaty partners will retaliate against treaty violations by suspending or restricting their own compliance have played an essential role in incentivizing compliance with demanding treaty obligations. Nonetheless, in *Commission v. Luxembourg & Belgium*, the ECJ dispensed with such mechanisms in sweeping fashion.¹⁴ No wonder that *Commission v. Luxembourg & Belgium* has, for several decades, attracted the attention of many of the most perceptive theorists of international law.¹⁵

Indeed, many have doubted, and continue to doubt, that the member states have indeed fully and completely given up their right, under more ordinary forms of international law, to take self-help measures if necessary to enforce their rights under the European treaties. The question of whether, and under what conditions, the European member states might 'fall back' on the use of inter-state countermeasures to vindicate their European law rights continues to be much debated.¹⁶

More recently, however, the argument has been made that these three cases – *Van Gend, Costa*, and *Commission v. Luxembourg & Belgium* – are profoundly inter-connected. States in the European Community could, so the argument goes, give up the use of inter-state countermeasures as a mechanism to enforce the obligations derived from the European treaties because, instead, the obligations of the Treaty of Rome would be enforced by the national courts of the European member states. On this logic, the rejection of inter-state countermeasures in *Luxembourg & Belgium* is

¹² ECJ Cases 90&91/63, *Commission v. Luxembourg & Belgium*, [1964] ECR 625.

¹³ E.g. Cases 142&143/80 *Amministrazione delle Finanze dello Stato v. Essevi* [1980] ECR 1413, Case C-38/89 *Ministère Public v. Guy Blanguernon* [1990] ECR I-83.

¹⁴ JHH Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403-2483 2422 : "The Community legal order, on this view, is a truly self-contained legal regime with no recourse to the mechanism of state responsibility, at least as traditionally understood, and therefore to reciprocity and countermeasures, even in the face of actual or potential failure. Without these features, so central to the classic international legal order, the Community truly becomes something 'new'". See also W Phelan, 'The European Union's Next Nobel Peace Prize' (2013) <<http://www.e-ir.info/2013/08/05/the-european-unions-next-nobel-peace-prize/>> : "Indeed, if you were to try to describe what is special about the EU's dispute settlement system in only one sentence, you could do much worse than the statement, the European legal order imposes demanding trade (and other!) obligations on the EU member states but rejects the inter-state retaliation mechanisms so central to ordinary international trade regimes."

¹⁵ Simma, 'Self-Contained Regimes'; Gradoni and Tanzi, '*Diritto comunitario: una lex specialis molto speciale*' .

¹⁶ Simma, 'Self-Contained Regimes'; D Dero, *La Réciprocité et le Droit des Communautés et de L'Union Européenne* (Bruylant, Bruxelles 2006); Gradoni and Tanzi, '*Diritto comunitario: una lex specialis molto speciale*' .

premised on the acceptance of direct effect / direct application (in *Van Gend en Loos* and in the Treaty of Rome itself) and supremacy (in *Costa*).¹⁷

The argument is therefore not merely that these three judgments are, each individually, important ECJ decisions – or even that these judgments are the ‘three most important’ ECJ decisions. The argument is rather that they constitute component parts of an international bargain that can only be understood in light of all three decisions together. To be sure, this bargain is implicit, as there is no discussion of Community law’s rejection of ‘self-help’ countermeasures in the *Van Gend* and *Costa* judgments, nor does the ECJ’s judgment in *Commission v. Luxembourg & Belgium* make any reference to the direct effect or supremacy doctrines of European law, the role of individuals in the enforcement of European law, or even specifically address the possible role of countermeasures *between the member states*, which is the most obvious use of self-help enforcement mechanisms in many treaty systems.¹⁸ Similarly, scholarly analysis of *Van Gend en Loos* rarely integrates its evaluation of that decision, or the doctrine of direct effect, with the European legal order’s break with the use of inter-state countermeasures. Indeed, the commonest explanation for the European legal order’s rejection of inter-state counter-measures is that this is a consequence of the ability of the European Commission, or the Member States themselves, to take direct actions against defaulting Member States before the ECJ, using the infringement procedures provided for in Articles 169, 170, and 171 of the Treaty of Rome. As Dehousse writes, “‘The Court has moreover held that the existence of these legal avenues in the treaty [that is, Articles 169 and 170] divests the member states of all possibilities to resort to the arsenal of unilateral countermeasures provided for in international law’”.¹⁹ Such an interpretation often rests on the understanding that the ECJ’s reference in *Luxembourg & Belgium* to the Community legal order’s providing “the necessary procedures for taking cognizance of and penalizing any breach of it” must refer to the procedures contained in Art 169, 170, and 171. However, this is unlikely to be a sufficient explanation for the European legal order’s break with inter-state countermeasures because it fails to address the possibility that a member state might fail to change their policy even after they had been condemned by the ECJ through the use of the Art 169, 170, or 171 procedures. Indeed that is exactly the scenario in which inter-state retaliation becomes a possibility in other trade-related treaty regimes, such as the WTO.²⁰

The logic of a grand bargain composed of all three of these decisions should nonetheless remain compelling, because an effective substitute must be provided if states are to accept the loss of their ordinary right to enforce treaty obligations through the possibility of ‘self-help’ action. *Commission v. Luxembourg & Belgium*’s importance in the study of the European legal order is, on

¹⁷ Phelan, ‘The Troika: The Interlocking Roles of *Commission v. Luxembourg and Belgium*, *Van Gend en Loos* and *Costa v. ENEL* in the Creation of the European Legal Order’.

¹⁸ Recall that the legal controversy in *Luxembourg & Belgium* itself concerned self-help behaviors by the two member states vis-à-vis the European institutions.

¹⁹ R Dehousse, *The European Court of Justice : the politics of judicial integration* (The European Union series, Macmillan, Basingstoke 1998) 20. Similarly, Dero, *La Réciprocité et le Droit des Communautés et de L’Union Européenne* esp 43ff. Such an interpretation is supported by decisions such as *Guy Blanguernon* where the ECJ stated “It must first of all be pointed out that, as the Court has consistently held, a Member State may not rely on the fact that other Member States have also failed to perform their obligations in order to justify its own failure to fulfill its obligations under the Treaty... In the legal order established by the Treaty, the implementation of Community law by the Member States cannot be made subject to a condition of reciprocity. Articles 169 and 170 of the Treaty provide the appropriate remedies in cases where Member States fail to fulfill their obligations under the Treaty.” Case C-38/89 *Ministère Public v. Guy Blanguernon* [1990] ECR I-83.

²⁰ Retaliation by one WTO member against another is the “last resort” available after a WTO member has been found by WTO dispute settlement institutions to have failed to fulfill its WTO obligations and has not altered its WTO inconsistent behavior within the specified time period (Dispute Settlement Understanding, World Trade Organization, Art 3(7), and throughout).

this logic, not only its declaration of European legal order's break with inter-state countermeasures, but also its identification of much the of significance of *Van Gend en Loos* and *Costa*, by demonstrating the contributions of those two decisions to inter-state law and politics.

The claim that these three decisions are essential elements in an implicit bargain to replace inter-state retaliation mechanisms with domestic court enforcement mechanisms can therefore be advanced from logic alone. Such conclusions however are further reinforced by comparisons between the European legal order and the politics and law of dispute settlement in two other trade-related treaty regimes. In the negotiations over the Environmental Side Agreement to the North American Free Trade Agreement (NAFTA) between the United States, Canada, and Mexico, Canadian policy-makers explicitly allowed dispute settlement outcomes to be enforced by national courts in order to remove the possibility of inter-state trade retaliation by the United States.²¹ Similarly, in the well-known debate over the possibility of granting direct effect to the outcomes of WTO-related dispute settlement mechanisms within the European legal order, scholarship straightforwardly connects arguments for enforcing trade-related treaty obligations by domestic courts – in this case, the ECJ as the ‘domestic court’ of the EU – as a means to remove the costs to firms and individuals affected by WTO-authorized trade retaliation.²² In simple terms, such scholars are advocating for the benefits of a *Commission v. Luxembourg & Belgium*-style end to the use of self-help retaliatory enforcement mechanisms by WTO members against the EU, and understand that this can only be obtained by a *Van Gend en Loos*-style granting of direct effect to decisions of the WTO dispute settlement institutions within the European legal order.

***Commission v. Luxembourg & Belgium* in the History of European Law**

From the perspective of legal theory, buttressed by comparisons with debates about dispute settlement in other treaty systems, the substitutability of inter-state countermeasures and domestic court application as alternative enforcement mechanisms in trade-related treaty regimes may appear persuasive. When this argument is applied to explanations of the development of the European legal order, however, a common response is to ask, where is the evidence that legal actors were, at the time, aware of the inter-relationship between *Costa*, *Van Gend*, and *Luxembourg & Belgium*? Were judges on the Court aware that these three decisions, together, made up such a remarkable bargain?

Such comments are particularly likely at a time of a great surge in interest in the history of the European legal order. In recent years, Bill Davies's fascinating new account of the reception of European law in Germany, Morten Rasmussen's revelations about behind the scenes manoeuvring in the *Van Gend en Loos* judgment, and Antoine Vauchez's investigations of the legal networks that propagandized the famous, ‘constitutional’, judgments of the ECJ in scholarship have produced revelation after revelation.²³ Such empirical studies of judges, lawyers, and legal scholarship are reshaping our understanding of the history of European law.

²¹ S Charnovitz, 'The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treaty-Making' (1994) 8 *Temp Int'l & Comp LJ* 257-314; GR Winham, 'Enforcement of Environmental Measures: Negotiating the NAFTA Environmental Side Agreement' (1994) 3 *Journal of Environment & Development* 29-41.

²² Discussion of granting direct effect to WTO obligations, or to decisions of the WTO's dispute settlement institutions, as a means to remove the damaging effects of WTO-authorized trade retaliation against the EU is widespread in this literature (e.g. P Eeckhout, *EU External Relations Law* (Oxford University Press, Oxford 2011); A Thies, *International Trade Disputes and EU Liability* (Cambridge University Press, Cambridge 2013)).

²³ Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European law, 1949-1979*; M Rasmussen, 'Constructing and Deconstructing 'Constitutional' European Law: Some reflections on how to study the history of European Law' in H Kochand others (eds) *Europe: The New Legal Realism: Essays in Honour of Hjalte Rasmussen* (Djøf

It must be admitted, however, that this recent historical scholarship thus far offers little support for the claim that the judges of the ECJ, or the wider scholarly community, acknowledged the importance of *Commission v. Luxembourg & Belgium*, let alone that that judgment is essential to understanding the meaning of *Van Gend en Loos* and *Costa*. This scholarship, now already extensive, discusses the politics of generating, propagandizing, and accepting those most famous two judgments of the ECJ without any direct connection to *Luxembourg & Belgium*, or the European legal order's break with inter-state countermeasures. So far, at least, the new historical research does not appear to support the claim that the Court, or the surrounding community of scholars, understood the logical inter-connections between these three decisions.

There are three possible responses to such a critique.

First, the current flourishing of historical research has not taken place in a theoretical vacuum. Empirical history is often influenced by explicit or implicit understandings of the causal mechanisms at work in historical change. Historians who investigate the causes of the First World War are likely influenced by previous debates, including social science debates, about the causes of war in 1914, and indeed the 'causes of war' more generally. The choice of objects related to the outbreak of the First World War that are worthy of detailed historical study is affected by broader understandings of the relative importance of the inter-state balance of military power, alliance structures, undemocratic forms of state organization, the crisis of capitalism, the impact of terrorism, the importance of nationalism, the state of military technology, and so on. Whether accepting or rejecting particular previous explanations, new contributions to such debates are heavily influenced by previous claims about causation in historical and social science research.

The same is doubtless true of historical research into the development of the European legal order. Such historical scholarship is, as these authors regularly allow, significantly influenced by previous social science explanations of the development of the European legal order. Despite their other contributions, however, many leading social science accounts of the development of the European legal order are, in turn, noteworthy for their persistent aversion to explaining the development of the EU's dispute settlement system by way of any form of detailed comparison with other treaty-based dispute settlement arrangements, particularly in trade-related treaty systems.²⁴ Perhaps as a result, the EU's remarkable break with inter-state countermeasures as a mechanism to enforce treaty obligations is often wholly omitted from the most influential such studies. None of the leading social science accounts of the EU's dispute settlement system so much as mention *Commission v. Luxembourg & Belgium*, for example, or give sufficient acknowledgement to the European legal order's persistent rejection of any form of inter-state countermeasures.²⁵ From the

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Publishing, Copenhagen 2010) 639-660; Vauchez, 'The Transnational Politics of Judicialization, *Van Gend en Loos* and the Making of EU Polity'.

²⁴ W Phelan, 'What is *Sui Generis* about the European Union? Costly International Cooperation in a Self-Contained Regime' (2012) 14 *International Studies Review* 367-385.

²⁵ See, among many examples, Burley [Slaughter] and Mattli, 'Europe Before the Court: A Political Theory of Legal Integration'; K Alter, *Establishing the Supremacy of European Law: the Making of an International Rule of Law in Europe* (Oxford University Press, Oxford 2001); A Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press, Oxford, New York 2004). These works of social science often rely on influential contributions in legal scholarship that themselves fail to address the EU's break with inter-state countermeasures, e.g. Stein, 'Lawyers, Judges and the Making of a Transnational Constitution'; Mancini, 'The Making of a Constitution for Europe'. For examples of the influence of this social science scholarship in prominent and recent historical research on the constitutionalization of European law, see, for example, Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European law, 1949-1979* e.g. 20, 36; Vauchez, 'The Transnational Politics of Judicialization, *Van Gend en Loos* and the Making of EU Polity' e.g. fts 31, 33, 101, 118.

perspective of the long history of reprisals, retaliation and ‘self-help’ behaviors in international law, however, *Luxembourg & Belgium* is a revolutionary novelty, whose exclusion is hard to justify.

In short, therefore, recent historical work on the development of the European legal order is highly influenced by social science scholarship that has not fully appreciated the significance of the EU’s break with the use of inter-state countermeasures. Instead this scholarship, particularly publications in the ‘neo-functionalist’ and ‘historical institutionalist’ traditions, tends to emphasize a ‘politics of courts’, a ‘politics of rights’, a ‘politics of litigants’, and a ‘politics of legal networks’, to the near-total exclusion of a ‘politics of inter-state relationships’.²⁶ It is therefore no surprise that recent historical research has failed to find or discuss significant evidence of the importance of the break with inter-state countermeasures in the development of the European legal order. Given the state of social science scholarship, it would perhaps have been a surprise, rather, if it had even been aware of it.

A second, possibly more significant, possible response to the failure of recent historical research to draw attention to material relating to the European legal order’s break with inter-state countermeasures, as anchored by the Court’s judgment in *Commission v. Luxembourg & Belgium*, would be to note that many early scholars of European law had incentives to present the European legal system in a certain, partial light. As Cohen and Vauchez explain, ECJ judges and their legal *attachés* “literally started to campaign” through their academic writings in favor of *Van Gend en Loos* and the ‘constitutional’ development of the European legal order.²⁷ Whether we prefer to call this ‘marketing’, ‘public relations’ or even ‘propaganda’, this feature was an essential aspect of the activities, and scholarly publications, of ECJ judges, their staff assistants, and the Euro-law network. To be sure, the academic publications produced by such lawyers were often thorough and impressive works of legal scholarship, but they were also, at the same time, and more so than ordinary academic scholarship, works of rhetoric and persuasion.

Now in terms of casting the momentous ECJ decisions of 1963 and 1964 in their most favorable light, an emphasis on *Van Gend* and *Costa* alone had many advantages. The claim that “the new system of European law vindicates the treaty-based rights of individuals – like you – in cooperation with national courts” has a certain easily understood intuitive appeal. An alternative claim – incorporating the connection of these cases to *Commission v. Luxembourg & Belgium* – that, for example, “the new system of European law subjects your national political and legal system to a binding constraint designed to remove the use of inter-state retaliation mechanisms within the Community” might have been somewhat less appealing. Such a description certainly places a greater stress on the policy-making autonomy being lost by national parliaments and court systems, and identifies a specific alternative enforcement mechanism to which some might have been attracted. The reader will realize, of course, that the system that vindicates the treaty-based rights of individuals in cooperation with national courts is *exactly the same* as the system that subjects the legal and political systems of the member states to a constraint designed to remove any rationale for enforcement through inter-state retaliation. These descriptions differ considerably, however, in terms of their rhetorical qualities.

There is reason, therefore, to expect that even if participants in, and observers of, the ECJ’s great decisions of the early 1960s were fully aware of the link between national court enforcement of

²⁶ E.g. Burley [Slaughter] and Mattli, ‘Europe Before the Court: A Political Theory of Legal Integration’; Alter, *Establishing the Supremacy of European Law: the Making of an International Rule of Law in Europe* .

²⁷ A Cohen and A Vauchez, ‘The Social Construction of Law: The European Court of Justice and its Legal Revolution Revisited’ (2011) 7 *Annual Review of Law and Social Science* 417-431 426.

European law and European law's break with inter-state countermeasures, there were incentives to for such scholars to explain these changes only as "expansions of rights", emphasizing *Van Gend* and *Costa*, without explicitly connecting these judgments to *Luxembourg & Belgium* or the end of inter-state counter-measures. That historical research focused on the publications, debates, and networks around the nascent European law has not, so far, discovered direct linkages between these three decisions is not, therefore, necessarily evidence that the participants in these activities were unaware of the logical connections.

The third – and perhaps best – response to the claim that historical research into the activities of judges and lawyers has not yet provided evidence of acknowledgment of the inter-connections between these three ECJ decisions is to provide new historical evidence that indicates that legal actors were indeed aware of the logical connection between these cases when the European legal order was being constructed. In the rest of this paper we will take a first important step in that direction.

We will not attempt a full history of how the ECJ's *Commission v. Luxembourg & Belgium* decision, or the EU's rejection of inter-state countermeasures, has been understood by scholars and judges since 1964. Reasons of space alone rule that out. Our focus is a narrower one, to *begin* a history of the relationship between *Commission v. Luxembourg & Belgium*, *Van Gend en Loos*, and *Costa v. ENEL*. As evidence for such a relationship, we require evidence that participants or observers understood not only *Luxembourg & Belgium*'s role in marking the distinction between Community law and general international law, but also its logical connection with *Van Gend* and *Costa*. At its most demanding, the claim requires evidence that scholars or participants understood that *Van Gend* and *Costa* were *causally* connected with *Luxembourg & Belgium*, as alternative mechanisms for enforcing demanding international treaty obligations, back in the 1960s when these historic judgments were made. We will not, of course, be able to demonstrate that the scholarly publications explaining the development of the European legal order were dominated by discussions of *Luxembourg & Belgium*. It is quite clear that they were dominated by a focus on *Van Gend* and *Costa*, and an emphasis on the rights to individuals declared by the ECJ. We will, however, attempt to demonstrate that the logical link between these decisions and Community law's break with inter-state countermeasures was at least intermittently recognized by leading lawyers and participants.

We will consider publications by Robert Lecourt, Paul Reuter, and Paul Kapteyn. For at least two of these publications, we can say that their significance has been completely neglected so far by scholarship on both *Commission v. Luxembourg & Belgium* and *Van Gend en Loos*,²⁸ and that, taken together, it is clear that a causal relationship between the ECJ's *Luxembourg & Belgium*, *Van Gend en Loos*, and *Costa v. ENEL* decisions was intermittently acknowledged by scholars or ECJ judges back in the 1960s when these remarkable decisions were being taken.

Lecourt, 1991

In his contribution to a 1991 *Festschrift* for Jean Boulouis, retired judge Robert Lecourt posed the vital question, What would Community law have been without the decisions of 1963 and 1964?²⁹

²⁸ Even recent examples of outstanding scholarship addressing the ECJ's decision in *Commission v. Luxembourg & Belgium* do not engage with the publications we discuss below by Lecourt and Kapteyn, and tend overwhelmingly to overlook the logical connection between these three decisions (e.g. Dero, *La Réciprocité et le Droit des Communautés et de L'Union Européenne*; Gradoni and Tanzi, '*Diritto comunitario: una lex specialis molto speciale*'). Research on *Van Gend en Loos* and *Costa v. ENEL* rarely mentions *Commission v. Luxembourg & Belgium* and has not, to our knowledge, addressed the direct link between these judgments set out by Lecourt.

²⁹ R Lecourt, 'Quel eut été le droit des Communautés sans les arrêts de 1963 et 1964?' *Mélanges Jean Boulouis: l'Europe et le droit* (Daloz, 1991) 349-361 .

His answer was largely the conventional story of how the ECJ's most famous two decisions – *Van Gend* and *Costa* – transformed European law, making it more effective, granting rights to individuals, and so on, combined with a criticism of the delays, and reliance on goodwill of the Commission, associated with the Article 169 procedure. Towards the end of the paper, however, appears a discussion of considerable significance. Lecourt wrote that the problems of delayed justice were not the only fault with the Article 169 procedure.³⁰ As Lecourt writes:

Delay is however not the only defect of the [Article 169] procedure. There is another, less apparent but legally more serious. It concerns the case where, despite an ECJ decision finding that it had failed to fulfil its obligation, the State does not take any effort to take measures to execute the judgment of the Court as provided for Article [171]³¹. That provision is, it is true, particularly laconic. It neither specifies what measures may be required by the Court nor within what period of delay they must be adopted, nor what sanction might apply to a State failing a second time. It does not arm the Court with legal, economic, or financial coercive measures.

As a result, despite a legally condemned failure to fulfill its obligations, doubled by the lack of execution of the Court's decision, nothing prevents a defaulting State from continuing to enjoy all the advantages of the Treaty. It is not without the ability, after long delays of procedure, to continue the irregularity of its situation even after the Court decision which is charged with putting an end to it. ...

If this situation did not become alarming, it is because, as well as the remedies available to the Commission against the member States, economic actors made use of all the legal means available to ensure the application of the rules of the Treaty. Dark indeed would have been the outlook if, without all means of direct access of individuals and all primacy for these rules, the only means for ensuring respect for the Treaty was recourse to Article 169.

The risk of ineffectiveness of [the Article 169 procedure] 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 the shortcomings of Article 169 infringement procedure were to have co-existed with the absence of any right of legal action by private individuals [through the Article 177 procedure].³²

The key to understanding this passage is the expression “None of them can hide behind the failure of another State to justify its own irregularities”. In more common forms of international law, states can indeed “hide behind” the failures of another state to justify their own non-compliance with treaty commitments. Members of the WTO, for example, justify their “suspension” of their WTO commitments when they impose trade retaliation to punish other members’ failures to meet their WTO obligations, indeed, exactly to prevent a party whose policies have been condemned by the WTO dispute settlement institutions from continuing to enjoy all the advantages of the WTO if they continue to refuse to alter their WTO-inconsistent practices. Read with an awareness of the enforcement mechanisms of general international law therefore, Lecourt’s 1991 paper straightforwardly connects *Van Gend* and *Costa* with the European legal order’s rejection of all threat or use of ‘self-help’ inter-state reciprocity or retaliation mechanisms.³³

³⁰ Lecourt, 'Quel eut été le droit des Communautés sans les arrêts de 1963 et 1964?' 358.

³¹ Lecourt writes Article 170, but it is clear in context that he refers to Article 171.

³² Lecourt, 'Quel eut été le droit des Communautés sans les arrêts de 1963 et 1964?' 358-359 [author’s translation].

³³ Lecourt also mentions that without *Van Gend* and *Costa* the Treaty would have become a simple convention organizing reciprocal cooperation between states Lecourt, 'Quel eut été le droit des Communautés sans les arrêts de 1963 et 1964?' 360.

The authority of the author could not be more impressive, for Robert Lecourt was himself a judge on the ECJ when the *Van Gend* and *Costa* decisions were made. Furthermore, recent historical research has demonstrated that Lecourt, together with Judge Antonio Trabucchi, were the main authors of the *Van Gend* decision, against the initial opposition of the then President of the ECJ, Andreas Donner.³⁴ Pierre Pescatore, a leading member of the ECJ from later in the 1960s, has talked of the ‘jurisprudential miracle’ of ‘Lecourt years’ of the Court, from 1962 onwards.³⁵ Lecourt himself later went on to become President of the ECJ from 1967 to 1976. It is therefore one of the architects of the ECJ’s revolutionary jurisprudence who is answering the question “what would European law have been without *Van Gend* and *Costa*?” by referring to the Community law’s ability to break with ordinary forms of inter-state reciprocity. This passage of Lecourt’s 1991 paper is therefore powerfully suggestive of a causal link between the direct effect and supremacy of European law, on the one hand, and the European law’s break with international law’s ordinary inter-state retaliation mechanisms on the other.

For our purposes, however, Lecourt’s 1991 paper has, nonetheless, two significant limitations.

The first is that Lecourt’s paper does not mention the ECJ’s judgment in *Commission v. Luxembourg & Belgium* by name. Indeed the paper explicitly refers to ‘two decisions’ – meaning *Van Gend* and *Costa* – transforming the Community legal order.³⁶ Thus while Lecourt’s paper is powerful testimony that its author recognized the logical link between *Van Gend* and *Costa*, on the one hand, and the European legal order’s break with inter-state retaliation, on the other, it is only somewhat persuasive evidence that its author recognized a causal link between *Van Gend*, *Costa*, and *Luxembourg & Belgium* in particular. To be sure, it is fully compatible with a direct link between those three cases, particularly for those aware of the significance of the *Luxembourg & Belgium* decision from the perspective of theoretical debates in international law. But Lecourt himself does not draw the link.

The second limitation is more important. This paper is evidence that Lecourt recognized the causal link between *Van Gend* and *Costa* and Community law’s break with inter-state retaliation in 1991. It is only indirectly suggestive that Lecourt may have recognized this logical connection back in the early 1960s when these momentous judgments were being taken. For more direct evidence that this logical connection was recognized in the early 1960s, we will have to look elsewhere.

Reuter, 1968

As his contribution to a 1968 *Festschrift* for Paul Guggenheim, prominent international law scholar Paul Reuter submitted a paper entitled, “The Court of Justice of the European Communities and International Law”.³⁷ In that paper, Reuter discussed a selection of judgments by the ECJ that, in his analysis, best demonstrated the Court’s engagement with Community law relationship with, and

³⁴ Rasmussen, 'Revolutionizing European law: A history of the Van Gend en Loos judgment' esp 153. Similarly, the interview with Pierre Pescatore in 2003, available at http://www.cvce.eu/obj/interview_with_pierre_pescatore_the_early_judgments_of_the_court_of_justice_1962_1966-en-1238d611-2883-43fa-921f-ac5861229ffa.html

³⁵ P Pescatore, 'Robert Lecourt (1908-2004): Eloge funèbre prononcé par Pierre Pescatore ancien Juge de la Cour, à l'audience solennelle du 7 mars 2005' (2005) (3) *Revue trimestrielle de droit européen* 589-597.

³⁶ Lecourt, 'Quel eut été le droit des Communautés sans les arrêts de 1963 et 1964?' .

³⁷ P Reuter, 'La Cour de justice des Communautés européennes et le droit international' *Recueil d'études de droit international en hommage à Paul Guggenheim* (Éditions de la Faculté de Droit de l'Université de Genève/Institut Universitaire des Hautes Études Internationales, Geneva 1968) 665-686 .

distinctions from, international law. Reuter's overall theme was a rejection of the perspective that Community law was a closed system, foreign to international law, and he emphasized the variety of international legal problems and concepts with which the ECJ would continue to engage.³⁸

The cases Reuter discussed included, among a few others, *Van Gend en Loos*, *Costa v. ENEL*, and *Commission v. Luxembourg v. Belgium*.³⁹ Reuter's analysis of *Commission v. Luxembourg v. Belgium* was penetrating. He recognized that this decision, while in direct substance concerning only relations between the European institutions and the member states, had powerful implications for the possibility of the application of the principle of reciprocity, the international law maxim *inadimplenti non est adimplendum*, and the use of peacetime reprisals, between the member states themselves.⁴⁰ He noticed that the ECJ had justified its decision by an appeal to the 'économie' of the treaties – that is, to the ultimate general characteristics of the European Communities.⁴¹ Like many others since, Reuter also doubted that the ECJ's declaration that such international law mechanisms were not applicable in the Community legal order was the final word on the matter, depending as it would on the Community institutions and mechanisms themselves being able to guarantee effective execution of the Treaty's obligations.⁴² As Reuter explained:

The exact scope of the Court's decision can nonetheless be debated in view of all possible concrete contingencies. In fact, it remains always to be demonstrated that an effective Community remedy exists, because the condition that the Community is capable of overcoming the obstacles facing it cannot be left out.⁴³

Reuter's 1968 paper is good evidence that the importance of *Commission v. Luxembourg & Belgium* could be recognized by legal theorists in the 1960s, that it could be included in a very select group of ECJ decisions that also included *Van Gend* and *Costa*, and even that some of the later conundrums of *Luxembourg & Belgium* decision – would the ban on use of inter-state retaliation mechanisms hold under all possible conditions? – could be readily identified. Reuter's 1968 paper is not, however, strong or sufficient evidence for an acknowledgement that *Luxembourg & Belgium* constituted one part of an interlocking bargain also involving *Van Gend* and *Costa*. Rather, Reuter's analysis merely considers all three as important ECJ judgments relevant to understanding the relationship between international and European law. For a closer connection than that, we will need to look elsewhere and further back.

Kapteyn, 1965

For an ECJ judgment that has later inspired a great deal of theoretical analysis, *Commission v. Luxembourg & Belgium* appears to have attracted little in the way of immediate scholarly comment. One of the few contemporary commentaries on the case was a short analysis published by Paul J. P.

³⁸ Reuter, 'La Cour de justice des Communautés européennes et le droit international' 667.

³⁹ The other ECJ decisions were judgments 10/61, 20&25/59, 9/61, and 7/61.

⁴⁰ Reuter, 'La Cour de justice des Communautés européennes et le droit international' 683-684.

⁴¹ Reuter, 'La Cour de justice des Communautés européennes et le droit international' 684-685.

⁴² Reuter, 'La Cour de justice des Communautés européennes et le droit international' 685.

⁴³ Reuter, 'La Cour de justice des Communautés européennes et le droit international' 685 [author's translation]. Reuter was more explicit in a 1969 publication that the member states could resort to international law reprisals if Community procedures were ineffective, see P Reuter, 'Le Droit International comme Source de Droit Communautaire' in WJ Ganshof van der Meersch (ed) *Les Nouvelles: Droit des Communautés européennes* (Larcier, Bruxelles 1969) 437-440 439.

Kapteyn in *Ars Aequi*, the Dutch legal journal.⁴⁴ Kapteyn has been a Community law scholar of some significance, and later served as judge of the ECJ between 1990 and 2000.

Kapteyn's analysis recognized the importance of the case for relations between the member states themselves, and for the vital question of whether the ECJ's rejection of inter-state retaliation would stand in all conceivable scenarios. Kapteyn openly doubted that the ECJ really meant to rule out inter-state retaliation in all circumstances, which he allows that one reading of the Court decision would seem to suggest. As Kapteyn asked, "What happens if a State does not respect the ruling of the Court? ... It seems inconceivable that the Court has, at a stroke, cut itself off from the possible use of such mechanisms if the procedures of the Court itself do not lead to the cessation of treaty violations."⁴⁵ Noting the ECJ's claim that the Community legal order provided "the necessary procedures for taking cognizance of and penalizing any breach of it", Kapteyn distinguished between the ECJ's ability to recognize such breaches, which certainly existed, and the then non-existent means for "penalizing any breach of it". After all, the Treaty of Rome did not provide any actual *sanction* to be derived from the ECJ's decisions.⁴⁶ In these various comments, Kapteyn, writing in 1965, anticipated a considerable amount of later scholarship on *Commission v. Luxembourg & Belgium*.

Relevant to our particular question here, Kapteyn directly connected the *Luxembourg & Belgium* decision to *Van Gend* and *Costa*. As he wrote:

The Court rejected [Belgium & Luxembourg's argument based on the international law maxim *exceptio non adimpleti contractus*] out of hand ... It argued that the EEC Treaty is not a "contractus" in the sense of a purely bilateral contract, where only reciprocal types of interrelated services are exchanged between the legal parties. The Court understands those rights to be enjoyed not only between the six states but also their nationals, according to the judgments of *Van Gend en Loos* and *Costa-ENEL*. The EEC Treaty may take the form of an agreement between six parties but, in essence, it is much more in the eyes of the Court: it creates a new legal order with powers, rights and obligations for all enjoying those rights and provides means to address treaty infringements.⁴⁷

This assessment demonstrates that Kapteyn understood the essential connection between *Luxembourg & Belgium*, *Van Gend*, and *Costa*. Inter-state retaliation is not justified, so Kapteyn explains, because the rights holders in the European Community are not only the member states, but also individuals ("their nationals") who themselves enjoy legal rights and means to address treaty infringements through the mechanisms of supremacy and direct effect. This passage of Kapteyn's analysis recognizes the causal connection between *Luxembourg & Belgium* and the other two cases.

Nevertheless, on balance, Kapteyn's overall assessment does not contain a full recognition of the relationship between *Commission v. Luxembourg & Belgium* and the other two decisions as we have explained it here, i.e. that the member states can forego the use of inter-state countermeasures to

⁴⁴ PJG Kapteyn, 'EUROPA-RUBRIEK' (1964-65) *Ars Aequi* 238-244. There is also a commentary by Teitgen that emphasizes, without much elaboration, the ECJ's claim of the impossibility of member state recourse to exceptions based on the principles of *tu quoque* or *non adimpleti contractus*, P-H Teitgen, 'Chronique Générale de Jurisprudence Administrative Européenne' (1965) (June) *Actualité juridique - droit administratif* 345ff 346.

⁴⁵ Kapteyn, 'EUROPA-RUBRIEK' 242, 243. Kapteyn may therefore perhaps be the first contributor to the long debate about the possibility of the European member states "falling back" onto the use of international law countermeasures.

⁴⁶ By contrast with the Art 88 procedure available in the ECSC treaty, Kapteyn, 'EUROPA-RUBRIEK' 242. Gradoni & Tanzi describe the ECJ as invoking a "phantom" sanctioning mechanism in *Commission v. Luxembourg & Belgium*. Gradoni and Tanzi, *Diritto comunitario: una lex specialis molto speciale* .

⁴⁷ Kapteyn, 'EUROPA-RUBRIEK' 243 [author's translation].

enforce the Treaty of Rome because national courts are taking on the role of directly applying treaty obligations. Kapteyn's consideration of the possibility of 'falling back' on inter-state countermeasures is also disconnected from the logic of *Van Gend* and *Costa*, or the idea that national court enforcement of European obligations may be sufficient to make such mechanisms unnecessary. It is a remarkably sharp analysis which intermittently acknowledges the causal relationship between these three cases, but perhaps does not demonstrate that Kapteyn consistently understood that they formed part of an inter-locking bargain.

From the 1990s back to the 1960s, therefore, these various scholarly publications demonstrate a variety of understandings of the relationship between *Van Gend*, *Costa*, and *Commission v. Luxembourg & Belgium*. From Lecourt in 1991, we can see the recognition of the relationship between *Van Gend*, *Costa*, and the end of inter-state retaliation – although not explicitly, the ECJ's judgment in *Luxembourg & Belgium*. From Reuter in 1968, we can see the understanding that all three decisions belong to the select group of ECJ judgments that best distinguish Community from classical forms of international law. From Kapteyn in 1965, we can see an understanding that the ECJ's decision in *Luxembourg & Belgium*'s is connected to *Van Gend* and *Costa*'s emphasis on the place of individuals in Community law. Taken together, these works of scholarship are powerfully suggestive of the fact that leading scholars of European law recognized, at least intermittently, the logical interconnections between the three cases in the construction of the European legal order, and that, particularly from Kapteyn's paper, this connection was largely recognizable even in 1965. This conclusion is further reinforced by another little known paper published in 1965.

Lecourt, 1965

In early 1965, just a few months after the *Commission v. Luxembourg & Belgium* decision, then ECJ judge Robert Lecourt published a short paper on "The Judicial Dynamic in the Building of Europe."⁴⁸ This analysis appeared not in a law journal, but in *France Forum*, a Christian Democrat 'journal of ideas' affiliated with the MRP political party of which Lecourt had been a leading member. In this analysis, Lecourt offered an explanation and assessment of the development of the European legal order including its most famous cases, drawing on comparisons of the role of law in the unification of states in France and Germany.

Starting by noting that the Treaty had not provided the European Community with a system of arbitration or an ordinary international court,⁴⁹ Lecourt offered the following story to justify the ECJ's ambitious decisions, developing the logic step by step, and stitching passages drawn from the Court's judgments into his narrative. Let us read along, watching for the surprise in the final sentence of Lecourt's elaboration and defense of *Van Gend* and *Costa*:

Therefore the Court was led to conduct a sort of x-ray analysis of the Treaties to discover the solution to certain legal cases. If it [the Court] therefore claimed that "contrary to ordinary international treaties" the Treaty of Rome had "instituted its own legal order, integrated into the judicial system of the member states", it was to observe that the Treaty imposes its obligations on

⁴⁸ R Lecourt, 'La Dynamique Judiciaire dans l'Édification de l'Europe' (1965) 64 (April-May) *France Forum* 20-22. This publication of Lecourt's has been noticed before (e.g. A Vauchez, 'Judge-made law: Aux origines du « modèle » politique communautaire (retour sur *Van Gend & Loos* et *Costa c. ENEL*)' in O Costa and P Magnette (eds) *Une Europe des élites ? Réflexions sur la fracture démocratique de l'Union européenne* (University of Brussels Press, Brussels 2007) 139-165 162 ft 73; K Alter, *The European Court's Political Power: Selected Essays* (Oxford University Press, Oxford 2009) 35 ft 1). Lecourt's discussion here of the ECJ's *Commission v. Luxembourg & Belgium* decision has not yet been noted by scholarship, however.

⁴⁹ Lecourt, 'La Dynamique Judiciaire dans l'Édification de l'Europe' 20.

all without exception (decision of 15 July 1964). ... The result of this is that individuals can invoke a direct right to ensure the respect of the directly applicable provisions of the treaties. This right was disputed. But the Court finally observed that in instituting certain obligations in relation to individuals the Common Market should also inevitably confer on them “rights that enter into their judicial patrimony” (decision of 5 February 1963) and which should be protected by national courts.

But a delicate problem emerged which would engage the future of the Community : what is then the authority of the common law in the face of national law? The question is one of importance. To refuse the priority to community law would be to allow the possibility that courts would give preference to national law over it, which would then permit a simple national rule to deprive the treaties of their substance. By contrast, to affirm the superiority of the common law would lead to the question of the legal value of a contrary national law. The future of Europe would depend on the Court’s solution to this serious problem.

... To decide such a finding in respect of the Treaty, it was necessary to analyze its terms and spirit. That is what the Court did, in judging that the texts “make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity”. Otherwise the law derived from the Treaty would not be able to “vary from one state to another” without provoking prohibited discriminations or even putting the goals of the Treaty itself in danger”. The law common to six states “could not be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question”. No unilateral legal act of a state “can prevail against the Treaties” (decision of 15 July 1964) because the States “have renounced the ability to take self-help action to enforce their legal rights” (decision of 13 November 1964).⁵⁰

The ‘decision of 15 July 1964’ is *Costa v. ENEL*, the ‘decision of 5 February 1963’ is *Van Gend en Loos*, and the ‘decision of 13 November 1964’ is, of course, *Commission v. Luxembourg & Belgium*, the *Dairy Products* case.

By linking passages from these Court judgments in this way, Lecourt’s analysis does not merely suggest that these are three important decisions by the ECJ, or even that they constitute the three ‘most important’ decisions that the ECJ has made – although that may perhaps be implied by Lecourt’s discussion of these three ECJ judgments and no others. Rather Lecourt says something much more specific: the national courts must directly apply European legal obligations (*Van Gend*) and allow these to prevail over conflicting national law (*Costa*) because the member states have given up ‘self-help’ forms of treaty enforcement (*Luxembourg & Belgium*). Here Lecourt, undeniably, sees these three decisions as a logical ‘troika’, and recognizes the causal relationship of *Luxembourg & Belgium* to the other two cases as we have defined it. Thus while leading current scholarship most often justifies *Luxembourg & Belgium* by reason of the availability of the Article 169, 170, and 171 procedures, here, in Lecourt’s account, *Luxembourg & Belgium* justifies, and is in turn justified by, the European law doctrines of direct effect and supremacy, and the role they grant to individuals and national courts in the enforcement of European law.

⁵⁰ Lecourt, ‘La Dynamique Judiciaire dans l’Édification de l’Europe’ 21-22. [Author’s translation]. To more closely follow the wording of the official English translation of *Commission v. Luxembourg & Belgium* the last sentence could be translated ‘the States “have renounced the ability to take the law into their own hands”’, a translation which, while suggestive, may obscure the connection to states’ self-help methods of enforcing international law. Lecourt’s words in French are “des lors que les États ‘ont renoncé à se faire justice eux-mêmes’ (arrêt 13 Novembre 1964)”. Note that the ECJ’s judgment does not contain the exact phrase that Lecourt attributes to it: the ECJ’s expression is “l’économie du traité comporte interdiction pour les états membres de se faire justice eux-mêmes”.

Lecourt's analysis also suggests that one object of the ECJ's analysis in *Luxembourg & Belgium* was the possibility of 'self-help' forms of retaliatory enforcement *between* the European member states. After all, the direct effect of European law in the national legal order would not be particularly relevant to resolving disputes where the European institutions themselves were alleged to have failed to fulfill their duties, which was the topic directly under dispute in the *Luxembourg & Belgium* litigation. It was certainly relevant to justifying the removal of inter-state countermeasures as possible responses to violations by the member states, however.

Compared to the discussions of *Luxembourg & Belgium* by Reuter and Kapteyn, not to mention much subsequent scholarship, Lecourt's paper is notable for omitting any discussion of a possible 'fall back' on the use of inter-state countermeasures by the European member states. To be sure, the mention is a brief one, with little elaboration. But if *Luxembourg & Belgium* is as inter-connected with *Van Gend* and *Costa* as Lecourt's analysis implies, then, contrary to Kapteyn's and Reuter's conjectures, it was entirely conceivable for the ECJ to have "at a stroke, cut itself off" from the possibility of enforcing the Treaty of Rome through inter-state countermeasures, and for that judgment indeed to effectively amount to the ECJ's "final word" on the matter. To do otherwise would be to implicitly admit the possible inadequacy of the doctrines of supremacy and direct effect, and to question the solidity of the legal order being constructed on those foundations.

We should note that this 1965 paper may be the only occasion that Lecourt drew such a strict causal connection between these three ECJ decisions. He did not describe the relationship in the same way in *L'Europe des juges*, his 1976 book, or, to our current knowledge, in his other writings.⁵¹ On the other hand, the passage of his 1991 paper, which we have discussed above, may suggest that Lecourt had a relatively consistent understanding of the link between these three remarkable ECJ decisions over many years.

Conclusion

This preliminary research into early understandings of the relationship of *Commission v. Luxembourg & Belgium* with *Van Gend en Loos* and *Costa v. ENEL* has confirmed that the logical connection between these three decisions was intermittently acknowledged in the early years of European legal integration. Not least, a causal relationship between this 'trio' or 'troika' was straightforwardly described by Robert Lecourt, arguably the driving force behind the 'constitutionalization' of the treaties by the ECJ, in a paper published in 1965, a mere few months after the judgments in question. This paper thus adds significant support to the argument, previously based largely either on legal theory or comparative studies of dispute settlement in other treaty regimes, that *Van Gend en Loos* and *Costa* must be understood, not just as a vehicle of individual rights, but, at least as importantly, as an instrument of interstate law and politics, and that each of these three famous ECJ decisions must be studied in the context of its intimate relationship with the other two.

With this beginning of a history of the relationship between *Commission v. Luxembourg & Belgium*, *Van Gend*, and *Costa*, we hope to influence the growing area of historical work on the development of the European legal order. Such historical inquiry has already contributed greatly to our understanding of European law, European legal networks, and state policy-makers, in the early years of European legal integration. It will likely contribute more – finding new objects to investigate, and new ways of understanding the legal activities and rhetorical strategies of courts, European institutions, state policy-makers, and scholars – if it incorporates an acknowledgment of the European

⁵¹ R Lecourt, *L'Europe des juges* (Bruylant, Bruxelles 1976).

legal order's break with inter-state countermeasures, and the logical connection between *Van Gend en Loos*, *Costa v. ENEL* and *Commission v. Luxembourg & Belgium*, into its agenda for future research.