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Diagonal Enforcement in International Trade Politics

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Abstract

Scholarship on the enforcement of international legal obligations often makes a fundamental division between "horizontal" (inter-state retaliation) and "vertical" (national court) enforcement mechanisms. This paper argues that such a division of treaty enforcement mechanisms fails to capture how "horizontal" and "vertical" enforcement relationships can be combined in one important scenario, where a state's acceptance of an obligation on their domestic courts to automatically enforce trade-based treaty obligations is matched by an abandonment by the state's trading partners of more common forms of retaliation-based enforcement mechanism. On the one hand, therefore, states allow their trade treaty obligations to be automatically enforced by domestic courts, while on the other, the beneficiaries of such a commitment in other states forego any rights to threaten trade sanctions to enforce treaty obligations. Such a "diagonal" enforcement mechanism is illustrated with examples drawn from the World Trade Organization, European Union, Andean Community, and NAFTA Side Agreements.

Keywords

Trade Politics, Dispute Settlement, Legalization, Domestic Courts, Retaliation, World Trade Organization, European Court of Justice, Andean Community, NAFTA.

Introduction¹

Current discussions on the politics of international law draw an important distinction between “vertical” enforcement mechanisms, where international law is enforced by domestic courts, often in cooperation with international tribunals, and “horizontal” enforcement mechanisms, where international law is enforced in an environment of threats of retaliatory action by policy-makers in other states. This paper will show that such a clear distinction between such “vertical” and “horizontal” enforcement mechanisms cannot always be maintained in international trade politics. National courts that automatically enforce trade treaty obligations, particularly where these are linked to treaty-based dispute settlement institutions, should be understood as benefitting policy-makers and organized interests in *other* participating states within a trade regime.

Many prominent, and repeatedly occurring, inter-state interactions have been usefully summarized through simplified incentive-based descriptions, such as ‘coordination games’, ‘enforcement’ mechanisms, and the ‘security dilemma’ (e.g. Jervis 1978; Stein 1982; Axelrod 1984; Martin 1992; Downs et al. 1996; Fearon 1998). This paper will provide a similar simplified description of a generalizable inter-state relationship: it describes a scenario where policy-makers are able to “consume” a demanding trade treaty relationship with another state without the constant possibility of inter-state trade retaliation at the “cost” of granting automatic domestic court enforcement to the treaty’s trade obligations, including the outcome of treaty-based dispute settlement institutions.

This paper proceeds as follows: the first section sets out the state of current research on “horizontal” and “vertical” mechanisms of enforcing international treaty obligations; the second section describes the essential features of the openly “horizontal” enforcement mechanisms found in many international trade regimes; the third section describes the “diagonal” enforcement strategy that characterizes automatic domestic court enforcement of international trade obligations; the fourth section elaborates this “diagonal” enforcement mechanism with examples drawn from the European Union, Andean Community, the Side Agreements of the North American Free Trade Agreement (NAFTA), and debates over domestic court enforcement of World Trade Organization (WTO) dispute settlement outcomes. The paper concludes with comments relevant to future research.

“Horizontal” and “Vertical” Enforcement Mechanisms in International Law and Politics

In contemporary studies of the politics of international law, many scholars clearly distinguish between compliance driven by “horizontal” inter-state reciprocity and retaliation on the one hand and compliance driven by the domestic mechanisms of “vertical” enforcement, particularly by domestic courts, on the other. As Moravcsik writes,

¹ Earlier versions of this paper have been presented at the Annual Meeting of the European Political Science Association in Barcelona in 2013, at the Faculty Seminar of the Department of Social and Political Science of the European University Institute in Fiesole in 2014, at the “EU in International Negotiations” workshop at the Robert Schuman Centre for Advanced Studies in 2014, at the Annual Meeting of the International Society of Public Law in Florence in 2014, at the Annual Meeting of the American Political Science Association in Washington DC in 2014, and at the Annual meeting of the American Political Science Association in San Francisco in 2015. I particularly thank Duncan McDonnell, Lauren Peritz, and Songying Fang for helpful feedback. Please note that the scholarly literatures on international relations theory, international law, WTO dispute settlement, and European law relevant to this paper are, each of them, extensive: citations have necessarily been kept to a minimum for reasons of space.

A traditional “horizontal” perspective treats international legal obligations as external institutional constraints on state sovereignty, enforced by interstate retaliation ... The “vertical” path to compliance foresees compliance and enforcement without retaliation. Instead it seeks to alter the preferences and relative influence of social (non-state) actors who favor and oppose compliance, locking in international norms domestically or transnationally by establishing new legal institutions... In rule-of-law systems, national officials and courts have some obligation to implement and enforce these [international] norms (Moravcsik 2013: 96ff).

This “vertical” enforcement mechanism is a central focus of contemporary studies of international law. The issue-area of international human rights politics is widely recognized as structurally ill-suited to ordinary forms of inter-state retaliation and reciprocity, as – for example – a state that violates a treaty agreement to protect the human rights of its citizens is unlikely to be influenced by a treaty partner threatening an ‘equivalent and reciprocal’ violation of the human rights of its own citizens (Simma 1994).

In the human rights area, therefore, scholarship has repeatedly emphasized the role of domestic courts, and sometimes transnational interactions between courts in different states, in enforcing international human rights norms. Indeed the “vertical” / “horizontal” distinction has perhaps been most influentially elaborated by Koh as a way to understand the enforcement of international human rights law, contrasting the way that states put pressure on each other, government-to-government, to observe human rights with the “transnational story” of the internalization of international human rights norms as domestic law, enforced by domestic courts, as international norms are incorporated into national legal systems (Koh 1999; for earlier discussions, see e.g. Falk 1959). The “vertical” metaphor captures the relationship between different “levels” of actors, with domestic courts “below” positioned national governments and treaty systems “above” them, while the “horizontal” metaphor characterizes the relationship between two states, both on the same “level” but separate sovereign entities. As Koh’s account indicates, the “horizontal” / “vertical” dichotomy can also be described as an “inter-state” / “transnational”, or even “international” / “constitutional”, distinction (Keohane et al. 2000).

Studies of “vertical” enforcement mechanisms in international human rights politics illustrate the diverse ways in which such mechanisms may function. An in-depth study of court decision-making in ‘common law’ countries, including the United States, argues for the ‘creeping’ influence of international human rights standards, as sympathetic judges ‘gild the lilly’, for example, by adjusting previous understandings of national constitutional rights in the light of the provisions of human rights treaties – at times even where those treaties have not been ratified or incorporated into domestic law (Waters 2007). For example, judges have used treaty provisions to develop the rights of immigrants facing possible deportation in ways that restricted the previous scope of policy-makers’ discretion. Another example is provided by prominent scholarship on the varied impact around the world of treaties protecting women’s rights, which argues that the impact of these treaties on domestic policy is systematically increased where women have access to more independent national court systems (Simmons 2009: 202-255). In each of these instances, the essential relationships emphasized by scholarship are first, between the national courts and the international treaty system, including any dispute settlement systems and perhaps international legal networks, and secondly, between those national courts and policy-makers in their own state, where the decision-making principles of national judges limit and shape national political outcomes. The essential relationships of the “vertical enforcement” of international human rights obligations are illustrated in Charts One and Two.

CHART ONE –
“VERTICAL” ENFORCEMENT OF INTERNATIONAL TRADE OBLIGATIONS :
DOMESTIC COURTS’ RELATIONSHIP WITH TREATY SYSTEMS

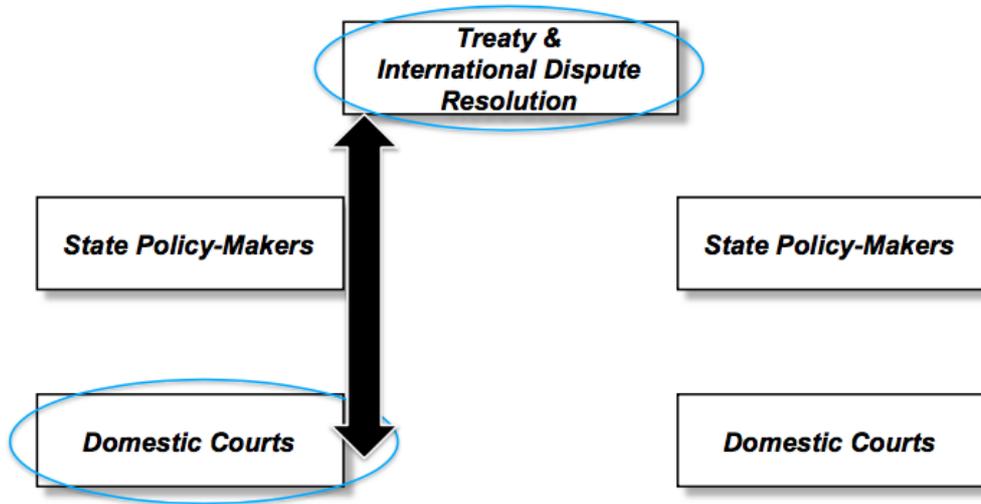
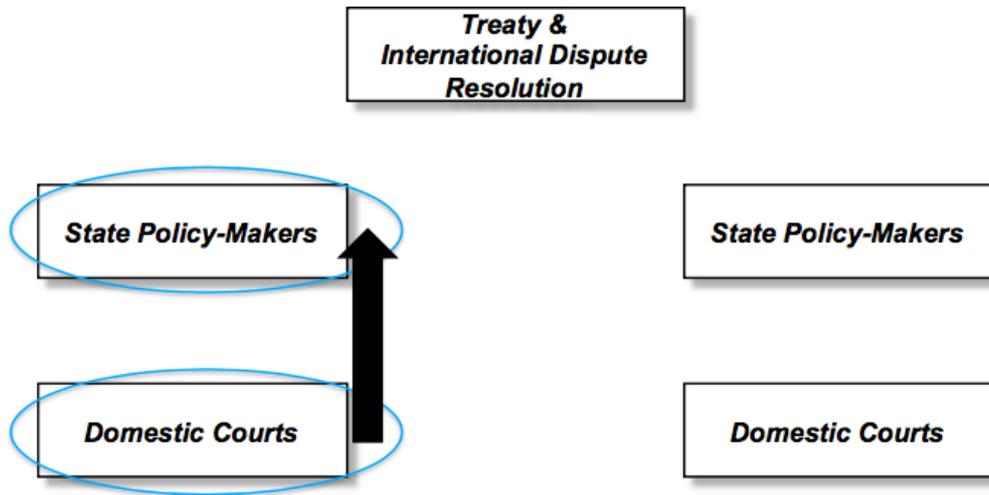


CHART TWO –
“VERTICAL” ENFORCEMENT OF INTERNATIONAL TRADE OBLIGATIONS:
DOMESTIC COURTS’ INFLUENCE ON DOMESTIC POLICY-MAKING



Note that in neither of the examples discussed above is this ‘vertical’ enforcement role by national courts in international human rights treaties linked to the solution of international collective action problems, or the solution of international externalities of domestic policy. It is individuals and groups – individual people facing deportation, or women as a group, for example – within states whose courts are influenced by (and whose policy-makers may therefore be at least somewhat constrained by) such international human rights obligations that are the beneficiaries of such enforcement mechanisms, not policy-makers or interest groups in other treaty-participating states, except perhaps in an indirect and attenuated manner. Simmons’ discussion is clearest here: the role of domestic court enforcement of international human rights regimes is vitally important exactly because such treaties “engage practically no important interests among states *in their mutual relationships with each other*” (Simmons 2009: 126).²

Outside the human rights area, and of more direct interest to our purpose here, the role of domestic courts as a “vertical” enforcement mechanism in international law has been most emphasized in the case of legal integration in the European Union (EU). There it is primarily a demanding international trade regime – the European single market – that is enforced by domestic courts in the European states. Very similarly to the scholarship on the enforcement of international human rights obligations, it has been argued that the internalization of European treaty obligations by domestic courts in the European states has provided the essential enforcement mechanism of the intra-European trade regime, in an environment of transnational interactions and dialogues between the national courts of the European member states and the EU’s tribunal, the European Court of Justice (Weiler 1991 ; Burley [Slaughter] and Mattli 1993 ; Alter 2001 ; Stone Sweet 2004). These legal “actors above and below the nation-state”, so the argument goes, provide the incentives that create the European legal order (Burley [Slaughter] and Mattli 1993: 59).

Thus common discussions of “vertical” means of treaty enforcement tend to group together diverse aspects of domestic court involvement in the enforcement of international legal obligations, including enforcement by domestic courts within their own states, dialogues between domestic courts across states, interactions between domestic courts and international tribunals, as well as treaty enforcement across a variety of issue-areas, including both trade and human rights (Conant 2013). In fact, there is great diversity in the ways that national courts approach the question of whether treaty obligations can be enforced before domestic courts. These range from whether national legal orders are ‘monist’ – in principle allowing national courts to apply a state’s valid treaty obligations even in the absence of domestic authorizing legislation – or ‘dualist’ – in principle only permitting national courts to apply treaty obligations where these have been incorporated into national legislation, although national court practice may be less starkly differentiated than these categories suggest. Another debate addresses circumstances under which treaty obligations are ‘self-executing’, or enjoy ‘direct application’, or ‘direct effect’, in national legal orders – broadly similar terms each of which describes a scenario where national courts would directly enforce treaty obligations – as well as the extent to which national courts may interpret domestic legislation in conformity with a state’s international obligations. Courts of the United States of America, for example, tend take a restrictive view of circumstances under which trade treaty obligations should be considered ‘self-executing’, and, for that matter, policy-makers in the United States frequently specify in implementing legislation that treaty obligations not be

² Similarly, Simmons’s extensive discussion of the role of national courts in enforcing such treaties omits any mention that those courts would be vindicating the interests of policy-makers outside their own states, or that domestic courts could also be used to enforce treaties where these were indeed related to important mutual relationships among states (Simmons 2009: 129-135).

directly enforceable in U.S. courts, but both domestic courts and policy-makers in other states have at times accepted or welcomed such developments.³

Scholarship on this issue often relates to ‘at the margin’ variation across national court systems in their willingness to allow their decisions to be influenced rather more or less by their states’ international obligations, whether according to foundational principles of differing national legal systems or in different political and cultural conditions. This paper will take a different track, however, focusing not on often relatively modest at the margin changes in whether national courts enforce treaty obligations a little more or less, but concentrating on one particular scenario, where the acceptance of an clear and unequivocal obligation for domestic courts to automatically enforce trade-based treaty obligations is matched by an explicit abandonment of more common forms of retaliation-based enforcement mechanism.⁴ Before we describe that arrangement in detail, we will first outline the essential features of “horizontal” enforcement mechanisms in international trade politics, to set the stage for a better understanding of “diagonal” enforcement of trade treaty obligations by national courts.

“Horizontal” Enforcement Mechanisms in International Trade Politics

A retaliation strategy is often understood as involving two component parts. The first is the triggering ‘event’. For common forms of “horizontal” enforcement in international trade politics, the triggering event consists of a state adopting policy ‘measures’, that is, substantive policies, that are inconsistent with their international trade obligations. Thus a state that imposes tariffs or non-tariff barriers contrary to a prior agreement, or uses ‘escape mechanisms’ such as anti-dumping duties other than as provided for in the rules of a trade treaty, may prompt ‘self-help’ retaliatory behavior by their state trading partners.

The second aspect of such an enforcement mechanism is the ‘punishment’ behavior adopted by the retaliator. Again, for the most common forms of “horizontal” enforcement mechanisms in trade politics, the punishment consists of a state withdrawing or suspending ‘equivalent’ trading opportunities to those that the defaulting state has removed by its policy measures inconsistent with prior agreements. Thus a state that imposes trade barriers contrary to a prior agreement therefore may face the imposition of an approximately equivalent (‘proportionate’) increase in trade barriers by affected trading partners, with all the associated uncertainty and disruption to international exchange that may be involved for potential “retaliation victims”, often firms and individuals in the defaulting state operating in sectors unrelated to the original dispute.

Now, at this relatively broad level of abstraction and stripped of complicating details, this “horizontal” enforcement mechanism is a constituent element in a great many international trade interactions. This includes many institutionalized trade regimes, where the role of making an authoritative ‘declaration’ about whether policy measures employed by a participating state are inconsistent with treaty obligations, and whether retaliatory restriction of trading opportunities is authorized, is delegated to legalized international tribunals, in

³ US legislation implementing the WTO Agreement [Uruguay Round] states that “no provision of any of the Uruguay Round Agreements ... that is inconsistent with any law of the United States shall have effect”. An accessible introductory survey of the issues, touching on differing legal principles in various states, can be found in Jackson 1992.

⁴ Any at-the-margin ‘increase’ in the reliability of national court enforcement of trade obligations does, of course, at-the-margin favor policy-makers and interest groups in that state’s trading partners. The scenario discussed here goes beyond such modest changes to describe a qualitatively distinct form of inter-state interaction.

significant and varying ways.⁵ However, whether or not international institutions provide detailed procedures for determining violations or authorizing punishments, the essential arrangements remain the same: substantive policy measures inconsistent with treaty obligations may lead to inter-state punishments in the form of loss of equivalent trading opportunities.

This “horizontal” enforcement strategy therefore encompasses a wide range of international regime types and institutional arrangements. It is the underlying enforcement mechanism specified in the procedures not only of the contemporary World Trade Organization (WTO), but also within the dispute settlement arrangements of the General Agreement on Tariffs and Trade (GATT) from 1948 onwards (e.g. Pescatore 1993 ; Bown 2009). It is the enforcement mechanism assumed by a great many of the proposals made by both states and scholars for improving the WTO’s dispute settlement system in future trade rounds, even where these proposals advocate substantial changes to current world trade rules.⁶ It is also the enforcement mechanism underlying the dispute settlement processes of many other trade regimes, and, not at all coincidentally, the essential enforcement mechanism of ordinary forms of public international law, which permits states to impose ‘proportionate’ ‘countermeasures’ (‘reprisals’, ‘reciprocal measures’) against states who have committed an internationally wrongful act (Chase et al. 2013 ; Zoller 1984).

Furthermore, within the context of inter-state relationships governed by this enforcement mechanism, states exhibit a wide range of behaviors. States can vary in whether they behave in ways that prompt their trading partners to threaten retaliatory trade sanctions, and also in whether they are active or restrained in making use of opportunities provided by this enforcement mechanism to threaten other states with such punishments. The very different trade policy behaviors of the contemporary United States, Japan, China, India, Australia, South Africa, Argentina, Switzerland and the European Union (not a state, but an international organization that functions as single trade actor vis-à-vis the wider world) within the WTO regime are all examples of trade policy-making within the context of this particular “horizontal”, inter-state enforcement mechanism (Davis 2012; Bown 2009; Rickard 2010). Much of the study of contemporary international trade politics, and certainly of international dispute resolution in trade politics, is therefore the study of a variety of different dependent and independent variables relating to state behavior or international dispute settlement outcomes all within the context of a single, “horizontal”, enforcement mechanism as we have described it here.

Three salient features of this enforcement mechanism are worth emphasizing.

First, enforcement of international trade obligations by such “horizontal” mechanisms is straightforwardly compatible with most common understandings of the international externalities of domestic policy, and the domestic and international collective action problems, associated with international trade politics. That is to say, this is an enforcement instrument that is compatible with an understanding that domestic lobby groups may attempt to press state policy-makers to violate their trade obligations, but that, in a repeated interaction, such policy-makers be restrained by (among other factors) threats of inter-state retaliation, which activate political mobilization by export-orientated interests whose market access is under threat (Olson 1965 ; Olson 1982 ; Gilligan 1997). These enforcement

⁵ Such tribunals may be of particular assistance where trade barriers may have been imposed in a disguised or ambiguous manner (Kono 2006)

⁶ E.g. the 2002 proposal by Cuba and other states to relax conditions on retaliation affecting a sector or an agreement which has not been violated by the defending WTO member (WTO reference TN/DS/W/19).

mechanisms are straightforward illustrations of “Axelrod-Keohane” reciprocity-and-potential-retaliation relationships in international politics (Axelrod 1984 ; Keohane 1984).

Second, the statement that international trade between states is governed by this “horizontal” enforcement mechanism should not be confused with a claim that states are constantly imposing retaliatory trade penalties on each other for policies inconsistent with their trading obligations. In fact, the active imposition of such penalties occurs only rarely. The world of “horizontal” enforcement mechanisms is instead a world of the *constant possibility of inter-state retaliation* (Davis 2012: 18 ; Bown 2009). It has some similarities therefore with Thomas Hobbes’s famous description of the state of war in which, he claimed, states were permanently immersed, even when no actual war was taking place:

For as the nature of Foule weather, lyeth not in a showre or two of rain; but in an inclination thereto of many dayes together: So the nature of War, consisteth not in actual fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary. (Hobbes 1991 [1651]: 88-89)

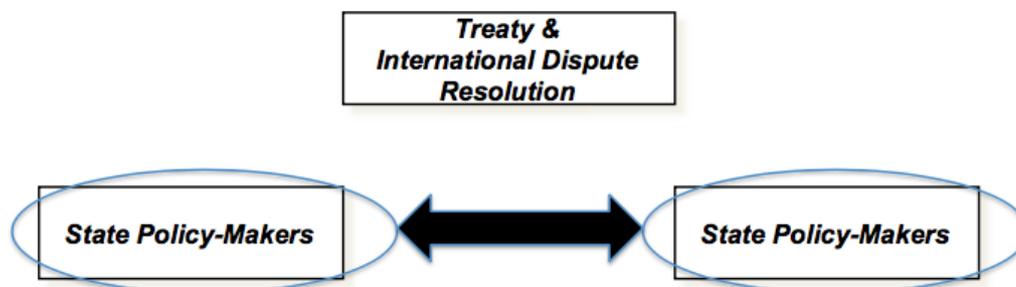
In the same way, the essential nature of ‘loss of equivalent trading opportunities’-based trade treaty enforcement mechanisms does not consist in actual inter-state retaliation, but in the ‘known disposition’ to such highly disruptive acts of inter-state retaliation, without any assurance to the contrary.

Third, because this inter-state enforcement mechanism, and even the threat of its effective use, depends on states’ willingness to actively impose penalties on each other, it is a trade politics enforcement mechanism where policy-makers are frequently relatively open about the punishments they may come to impose on other states, as well as in identifying the possibility that their trading partners may impose retaliatory trade sanctions against them. So in 2004 the then Speaker of the US House of Representatives Dennis Hastert, calling on Members of Congress to change US taxation regulations under the threat of WTO-authorized sanctions to be imposed by the European Union, spoke as follows:

My gut feeling about this is that we fought a revolution 230 years ago to stop Europeans telling us how we have to tax in this country ... It puts the hair up on the back of my neck that we have to consider this at all. But the fact is, we have to do it. The EU and the WTO have a sort of sword to our head. We don’t like it but we have to do what the Europeans are telling us to do. (Reid 2004: 238)

Public statements of this sort make clear to even the casual observer that ‘self-help’ coercion by one WTO member against another – in this case, by the EU against the US – is vital to making the whole system work. The obvious “horizontal” of this trade politics enforcement mechanism is illustrated in Chart Three.

CHART THREE –
 “HORIZONTAL” ENFORCEMENT OF INTERNATIONAL TRADE OBLIGATIONS:
 RECIPROcity AND RETALIATION BETWEEN POLICY-MAKERS IN DIFFERENT
 STATES



The “horizontal” enforcement mechanism, in a variety of forms, is, by far, the most common form of enforcement mechanism provided for in contemporary international trade agreements (Chase et al. 2013). It is not, however, the only inter-state enforcement mechanism in international trade politics, as the next section will explain.

“Diagonal” Enforcement Mechanisms in International Trade Politics: Analysis

The starting point for understanding this alternative enforcement mechanism is the recognition that states can come to accept an international commitment that trade-related treaty obligations, particularly the outcomes of international dispute settlement procedures, are to be enforced by domestic courts. Thus if an international tribunal or dispute settlement panel requires that a state change a policy which is inconsistent with its treaty obligations, this requirement is directly and automatically enforced by the domestic court, in line with the interpretation provided by the treaty-based dispute settlement institutions.⁷

Perhaps the best way to understand the distinctive nature of domestic court enforcement of trade obligations in the scenario described here is to emphasize the loss of significance of the triggering event associated with common forms of “horizontal” enforcement mechanism. Where trade obligations are enforced by domestic courts, a finding by an international dispute settlement process that a state has adopted policy measures inconsistent with their treaty obligations does not lead to threats of inter-state trade sanctions, and there are no potential “retaliation victims” in the defaulting states. Instead, national policy is – after the use of international dispute resolution procedures where necessary – automatically made consistent with treaty obligations through the enforcement of treaty obligations by domestic courts. So in a stable equilibrium, national policy behaviors that are found to be inconsistent with treaty obligations do not prompt any behavioral response at all from policy-makers in a state’s trading partners.

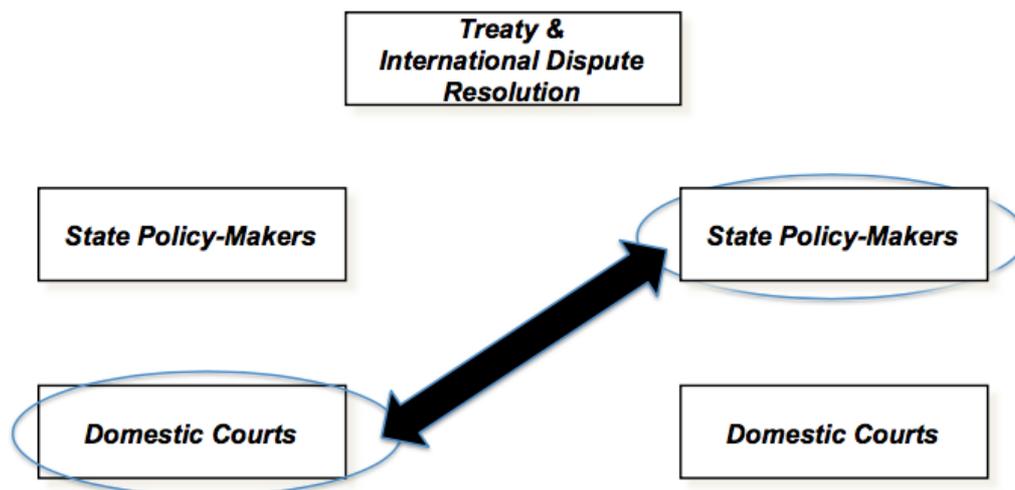
⁷ The potential involvement of treaty-based dispute settlement institutions can make a considerable contribution to such arrangements. Even if national courts are willing to enforce ‘self-executing’ treaty obligations within national legal orders, their unilateral interpretation of the content of such obligations may differ from that of other states and international tribunals. The connection of national court enforcement with the interpretations provided by treaty-based dispute settlement institutions addresses this difficulty.

Now, perhaps for this last reason, even where analysts are aware that important trade obligations are sometimes enforced by domestic courts, this is rarely understood to be an element in an enforcement strategy dependent on contingent behavior by other states. However, “vertical” and “horizontal” enforcement mechanisms in international law are not always so easily separated, certainly in the area of trade politics. The contingent behavior of other states can be an essential incentive for states to allow their domestic courts to enforce treaty obligations. Highly reliable domestic court enforcement of treaty obligations can be a constituent part of an inter-state treaty bargain: on the one hand, a state accepts automatic domestic court enforcement of treaty obligations, including the outcomes of treaty-based dispute settlement institutions, with all the associated restrictions on domestic policy-making autonomy, while on the other hand, their trading partners forego the right to impose inter-state countermeasures such as retaliatory trade sanctions.

An essential relationship underlying national court enforcement of international trade obligations in this scenario is therefore between domestic courts that enforce treaty obligations and state policy-makers outside their own country that are important beneficiaries of such behaviors.

This is certainly not an ordinary form of “horizontal” inter-state relationship, between policy-maker and policy-maker in different states. It is a “horizontal” relationship none the less because it connects important actors in one state to those in another. It may be best described as a “diagonal” relationship, a characterization that captures both the “horizontal”, state-to-state, dimension, and the “vertical” dimensions connecting policy-makers in one state with actors at a different “level” – courts – in another state. This “diagonal” relationship is illustrated in Chart Four.

CHART FOUR –
“DIAGONAL” ENFORCEMENT OF INTERNATIONAL TRADE OBLIGATIONS:
DOMESTIC COURTS’ RELATIONSHIP WITH POLICY-MAKERS IN OTHER STATES



Thus various elements of a “diagonal” enforcement mechanism come into view: because a trading state’s willingness to forego the possible use of trade sanctions as an enforcement mechanism is premised in this scenario on their trading partner ensuring reliable application of treaty obligations by domestic courts, any determined withdrawal of such automatic domestic court enforcement by a state’s policy-makers may prompt their trading partners to pick up the weapon that they have put down, by reverting to the possible use of trade sanctions.

Such a withdrawal of national court enforcement is possible because national courts remain, in the last resort, under the potential control of national policy-makers. State policy-makers can allow their domestic courts to enjoy powers to automatically enforce the obligations of particular international treaties but can equally insist on the withdrawal of those powers, including unilaterally and selectively. Domestic court enforcement of international obligations always lives with the possibility that national policy-makers will restrict or remove the role of domestic courts in enforcing an international bargain.⁸ Policy-makers and trading firms within a state tempted by unilaterally ousting such domestic court enforcement would, however, face the possibility of considerable costs. If their trading partner states responded by reverting to the use of ordinary inter-state sanctioning methods, that would involve the revival of all the forms of insecurity about foreign market access among a wide range of trading firms and political actors that automatic domestic court enforcement of treaty obligations had removed. Thus if a trading state unilaterally ousts or restricts the automatic enforcement of its trade obligations by its domestic courts, it risks being forced by its trading partners back into the uncertainties of the world of “horizontal” enforcement mechanisms.

Now, again at this relatively broad level of abstraction and stripped of complicating details, a wide range of state behaviors are possible within such a “diagonal” enforcement mechanism. It would cover both states whose policy-makers never behaved in ways that were found to have conflicted with their treaty obligations, as well as states whose policy-makers were frequently found to have adopted policies inconsistent with their treaty obligations. It would also cover a wide range of possible procedural arrangements by which domestic courts could be involved in enforcing trade-related treaty obligations, for example whether national courts are used only as enforcement mechanisms for disputes initiated between states, or whether private actors can also directly instigate disputes via litigation in domestic courts with institutionalized links to international tribunals. Just as with “horizontal” enforcement mechanisms, it describes an encompassing international environment within which otherwise highly diverse state behaviors and international institutional arrangements are possible. “Diagonal” enforcement mechanisms could also vary considerably in their scope of application, from being relevant only to particular treaty provisions all the way through to comprehensively addressing an entire inter-state trading relationship.

This “diagonal” enforcement mechanism has three features corresponding to those of the “horizontal” enforcement mechanism we have discussed above.

First, enforcement of international trade obligations by this “diagonal” mechanism is, just like enforcement through “horizontal” mechanisms, straightforwardly compatible with ordinary understandings of the collective action problems of international trade politics, where state policy-makers can be pressed by domestic lobby groups to violate their trade obligations, but can be restrained in a repeated interaction by (among other factors) risks of

⁸ Of course the organizing principles of national legal orders vary considerably, but in many states policy-makers possess legislative instruments that would allow them to straightforwardly withdraw national court enforcement of particular trade treaty obligations, by explicitly amending national legislation giving automatic national effect to treaty obligations. For the examples of Denmark, Ireland, the United Kingdom and Germany, e.g. Phelan 2010. For the United States, e.g. Jackson 1992.

retaliation by other states. It is thus much better matched to widely accepted understandings of the international externalities, and international and domestic collective action problems, of international trade than approaches that understand domestic court enforcement of trade treaty obligations as a purely “vertical” relationship, between domestic courts, state policy-makers, and international tribunals.

Second, while the international environment of “horizontal” enforcement mechanisms is a world of constant threats (tacit and open) of inter-state retaliation, the international environment created by “diagonal” enforcement mechanisms is an environment where threats of inter-state trade sanctions have been substantially removed. Whereas any international trade dispute in the context of a horizontal enforcement relationship involves at least the possibility of inter-state trade sanctions, international disputes within the context of domestic court enforcement of treaty obligations do not lead to threats of inter-state trade sanctions, even if a state is repeatedly found to have adopted policy measures inconsistent with its trading obligations, because any such finding is accompanied by the automatic enforcement by domestic courts of the results of international dispute settlement. In the world of domestic court enforcement mechanisms the pervasive possibility of inter-state retaliation has thus been deliberately suppressed. There is, to again follow Hobbes’s discussion of the state of war, ‘an assurance to the contrary’. This change can bring with it a considerable advantage in stability for international economic exchange between firms in different states. This altered relationship remains, nonetheless, an “international” one, without any creation of a coercive “Leviathan” above the participating states.

Third, because this “diagonal” enforcement mechanism does not involve a stream of threats of inter-state sanctioning – indeed, because this international relationship does away with the constant uncertainties associated with the threat of inter-state reprisals as a tool of statecraft – policy-makers in participating states do not need to be so open about the punishments they might impose on other states, or the punishments they might themselves incur, if national policy-makers ousted the domestic court enforcement of their trade obligations. So while open discussion of threats of trade sanctions (such as that by Speaker Hastert, above) makes the “horizontal” coercion inherent in WTO-style trade sanctions transparent to even a casual observer, the “horizontal” element – the “external institutional constraint” element, in other words – present in an inter-state relationship involving enforcement of trade treaty obligations by domestic courts may be somewhat submerged and rarely discussed (cf. Moravcsik 2013: 96). Indeed, it may appear that state policy-makers are quite literally “doing nothing” to make such an international bargain work, while all the important observable activity seems to involve “vertical” legal actors such as domestic courts and their various connections with international dispute settlement systems or transnational legal networks. This is undoubtedly a reason why discussions of the enforcement of trade treaty obligations by domestic courts are understood as purely “vertical” enforcement mechanisms. Nonetheless, even while enforcement is to be carried out by domestic courts, and within a context dominated by the overt activities of legal actors, including international tribunals, it may nonetheless be the contingent behaviors of a state’s trading partners, including the possibility of reversion to the use of “horizontal” enforcement mechanisms, at least as much as the autonomous behavior of courts themselves, that “locks in” the behaviors supporting the effectiveness of such an international trade regime. A latent inter-state punishment strategy may therefore underlie an apparently purely transnational legal process.

The essential features of the “horizontal” and “diagonal” enforcement mechanisms in international trade politics, as well as “vertical” enforcement mechanisms in international human rights politics, are summarized in simplified form in Table One.

TABLE ONE: VERTICAL, HORIZONTAL AND DIAGONAL ENFORCEMENT MECHANISMS IN COMPARISON

	Special Role for Domestic Courts?	Solution to International Collective Action Problems?	
Vertical Enforcement of Human Rights Treaties	YES	NO	
Horizontal Enforcement of Trade Treaties	NO	YES	Dispute settlement is always associated with possibility of inter-state retaliation, state policy-makers can accept risk of retaliation ('loss of equivalent trading opportunities') rather than comply
Diagonal Enforcement of Trade Treaties	YES	YES	Automatic domestic court enforcement of trade treaty obligations reduces state policy-makers' domestic autonomy, but provides a trading relationship without constant threats of inter-state retaliation

“Diagonal” Enforcement Mechanisms in International Trade Politics: Examples.

While examples of “horizontal” enforcement mechanisms in international trade politics are both numerous and well-known, the same cannot be said of “diagonal” enforcement mechanisms. This section will therefore discuss three examples of enforcement mechanisms of this type – in the European Union, in the Andean Community, and in the NAFTA Side Agreements – as well as the debate over the enforcement of WTO dispute settlement outcomes by domestic courts. Each of these regimes, to be sure, thoroughly deserves a full treatment in their own right. However, there are also advantages to discussing them as a group, identifying and drawing out important similarities in these treaty agreements in terms of illuminating a generalizable model of an important type of inter-state relationship. The particularities of each can also make a distinct individual contribution to our understanding of “diagonal” enforcement mechanisms in international trade politics, as is summarized in Table Two.

TABLE TWO:
ILLUSTRATIONS OF ASPECTS OF DIAGONAL ENFORCEMENT IN TRADE POLITICS

Trade Treaty Regime	Enforcement Mechanism
European Union	<u>Consistent</u> domestic court enforcement and <u>consistent</u> rejection of inter-state retaliation
Andean Community	<u>Inconsistent</u> domestic court enforcement and <u>intermittent</u> use of inter-state retaliation mechanisms
NAFTA Side Agreements	By domestic courts, with inter-state retaliation ruled out, vis-à-vis Canada, by inter-state retaliation, vis-à-vis the US
Debate over Domestic Court enforcement of WTO dispute settlement outcomes	Debate over domestic court enforcement explicitly as a tool to remove disadvantages of inter-state retaliation

Sources: see references relating to these treaty regimes in the discussion below.

The European Union

The EU is the international organization, founded in 1958 as the European Economic Community, through which its now twenty-eight member states organize the politics of externalities in trade and other issue-areas in their interdependent economies and societies. The original European treaties provided for a tribunal in the form of the European Court of Justice (ECJ), which developed the dispute resolution procedures established in the treaties into today's European legal order. The European legal order, like any well developed legal system, has many varied and complex features, including the important doctrinal claim to the 'supremacy' of European law over the national laws of its participating states (Weiler 1991). However, the key characteristic - widely acknowledged in both legal and political science scholarship - of the European legal order as the ECJ and the member states have developed it, is that within the EU, there is a clear and unequivocal obligation on domestic courts of the member states to automatically enforce EU obligations in litigation involving private parties, while referring questions of interpretation of European obligations to the ECJ itself through a 'preliminary reference' procedure. This obligation was set out by the ECJ, above all, in its famous 1963 judgment *Van Gend en Loos*.⁹

Leading works of scholarship on the European legal order tend to stress, above all, the role in its development of two political and legal relationships between international ('European level') legal actors, policy-makers in the member states, and national courts. The first relationship is the relationship between the ECJ and the domestic courts. Thus, so it is argued, the success of the EU's legal order was dependent on the ECJ inducing the national courts to cooperate in the domestic enforcement of European law, by engaging in 'inter-judicial dialogues', by encouraging national courts to submit 'preliminary references' on the legal interpretation of European obligations to the ECJ, and by sponsoring legal education and propaganda.¹⁰ Through such processes, national courts became "European courts". The expression, attributed to Weiler, that "the relationship between the European Court and the national courts is the most crucial element for a successful functioning of the European legal order" can stand as a marker of the essential logic of this particular approach (Keohane et al. 2000: 478; also Weiler 1991: 2417-2418).

The second relationship often stressed in such accounts is the distinctive relationship that the European legal order has produced between state policy-makers and their own domestic courts, a tense relationship in many ways because the domestic courts are responsible for enforcing EU obligations even when – indeed, especially when – these conflict with national policies. Because of the 'supremacy doctrine' of European law, domestic courts of EU member states apply European law even if it conflicts with other national, legal obligations.¹¹ The description of Robert Lecourt, leading ECJ judge in its 'founding years' between 1962 and 1976 – that national courts apply European law "even against their own State" – captures this essential aspect of the European legal order.¹²

The relationships between the ECJ and national courts, on the one hand, and between national policy-makers and their domestic courts, where, in brief, national courts ("below" the national governments) in concert with the ECJ ("above" the national governments) constrain the freedom of state policy-makers to control domestic policy outcomes, are those those

⁹ ECJ Case 26/62.

¹⁰ The EU-specialist literature might term these "neo-functionalism" interactions, e.g. Burley [Slaughter] and Mattli 1993: 71.

¹¹ ECJ Case 6/64.

¹² Speech on occasion of Lecourt's retirement from the ECJ, 7 October 1976. Lecourt was President of the Court from 1967 to 1976.

emphasized in “vertical” understandings of the enforcement of international law, as illustrated in Charts One and Two above (cf. Conant 2013: 397). These are the “actors above and below the nation-state” that have developed, and now maintain, the European legal order (Burley [Slaughter] and Mattli 1993: 59).

Although scholarship adopting these approaches has contributed a great deal to our understanding of the politics of European law, it could also be further improved. It is quite common, for example, for leading accounts to focus on these two relationships, important as they are, to the exclusion of discussion of how the European legal order has changed the political and legal relationships between the participating states.¹³ More specifically, while existing scholarship correctly recognizes that EU obligations, as interpreted by the ECJ, are enforced by domestic courts in the EU member states, it misses the full meaning of this behavior, because it fails to connect domestic court enforcement with the EU’s rejection of inter-state retaliation as an international enforcement system.¹⁴

That is because the EU’s legal order contains a further key characteristic. Within the EU, the member states have been consistently required to forego any use of inter-state retaliation of the sort employed by more common forms of international trade regime, or, for that matter, general international law. This obligation was nowhere contained in the Treaty of Rome, but was set out for the first time in the ECJ’s remarkable *Dairy Products* judgment in 1964, nearly contemporaneously with the *Van Gend* decision.¹⁵ The principle outlined in the *Dairy Products* decision is widely acknowledged in comparative legal studies as the essential distinction between European law and ordinary international law (Simm 1985 ; Weiler 1991: 2422). However, most political science work on the development of the European legal order

¹³ Among EU specialists, this issue has perhaps been obscured by the fact that EU member states rarely make use of their ability to make direct legal complaints against each other, preferring instead to let the European Commission (the EU’s international secretariat/bureaucracy), as a third party, pursue legal actions against defaulting states before the ECJ (e.g. Burley [Slaughter] and Mattli 1993: 71-72). But this is to mingle two issues that should be kept distinct. Judgments by the ECJ itself finding a state in default, whether initiated by other member states or by the European Commission, are only ‘declaratory’, allowing the defaulting member state to continue their violation without further direct consequence, the sort of scenario which, in other trade regimes, tends eventually to prompt threats of inter-state retaliation. It is national court enforcement of EU obligations, not the European Commission litigation before the ECJ, which allows the EU to comprehensively reject inter-state retaliation. The writings of ECJ judge Lecourt, a vital participant in the creation of the founding principles of the EU’s legal system, contain explicit statements both that national court enforcement in the EU was required by the removal of inter-state retaliation mechanisms and that declaratory ECJ judgments instigated by the European Commission would not have prevented the emergence of inter-state retaliation between EU states, if national court enforcement of EU obligations had not been created (Lecourt 1965, Lecourt 1991). That perspective is, as we will see, reinforced by the debate over removing inter-state retaliation within the WTO system, which focusses overwhelmingly on domestic court enforcement, not on the possibility of ‘third party’ legal action against WTO members e.g. by the WTO secretariat. (To be complete, we should note that the ECJ was eventually granted the power to fine European member states in 1994, but this occurred several decades after the European Court had declared, in the 1960s, both the obligation on national courts to enforce EU law and the comprehensive rejection of inter-state retaliation within the EU). See Phelan 2015b for an extended discussion of the EU case.

¹⁴ It is true that the essential principles of the EU’s dispute settlement system were only partially set out in the founding Treaty of Rome, and were subsequently extended over time by the ECJ, sometimes in opposition to arguments advanced by lawyers representing the European states (Burley [Slaughter] and Mattli 1993). The leading role of the ECJ in extending the treaty’s provisions, however, does not rule out that the equilibrium obtained by the development of the European legal order also rests on the benefits provided by an international market free of threats of common forms of inter-state retaliation, as well as incentives for policy-makers to avoid putting that outcome at risk.

¹⁵ ECJ Cases 90&91/63.

has overlooked this distinction, and, therefore, their extensive discussions of the role of domestic courts are disconnected from the EU's break with inter-state trade retaliation.¹⁶

This understanding of domestic court enforcement of trade obligations within the European Union is supported by assessments of the European legal order both before and after it was fully constructed. The same prominent ECJ judge, Robert Lecourt, who declared that national courts must apply European law “even against their own State”, also stated in 1965 this national court enforcement of European law was required because “the member states have renounced their ability to take self-help [that is to say, retaliatory] action to enforce their legal rights” (Lecourt 1965). Lecourt explicitly connected the ECJ's 1963 *Van Gend* decision requiring automatic enforcement of European treaty obligations by national courts with the ECJ's 1964 *Dairy Products* decision ruling out the use of “horizontal” enforcement mechanisms in the EU. Many decades later, international legal scholarship continues to entertain extensive debates about the possibility of a ‘fallback’ to the active use of “horizontal” retaliatory countermeasures between the EU member states. That is, where “all the legal and political means within the EEC system have been exhausted to no avail”, many leading international legal scholars support the view that EU member states would be entitled to revert to the use of ‘self-help’ retaliation against other EU member states.¹⁷

It is therefore not just actors “above and below the nation-state” that provide incentives for states to accept the European legal order, but also, as is common in other trade-related treaty regimes, “policy-makers in other member states”, for whom these domestic and European courts are fulfilling a very specific function, as illustrated in Chart Four above.¹⁸

¹⁶ Influential and deservedly prominent scholarship on the EU's legal order that mentions neither the EU's comprehensive rejection of inter-state retaliation nor the ECJ's vital 1964 *Dairy Products* decision includes e.g. Burley [Slaughter] and Mattli 1993, Alter 2001, Goldstein 2001, Stone Sweet 2004, Vauchez 2010, Davies 2012. A strand of EU law scholarship does stress the role of European law in protecting ‘out of state’ interests (e.g. Maduro 1998), without however drawing a connection with the EU's ban on inter-state retaliatory mechanisms. Keohane et al. 2000 is an interesting partial exception, placing an analysis of EU-style domestic court enforcement and WTO-style retaliatory enforcement side-by-side. However, Keohane et al. 2000 is, as these authors allow, a suggestive and introductory analysis, and relies heavily on previous accounts (e.g. Burley [Slaughter] and Mattli 1993) that – unlike the account presented here – do not recognize the EU's use of domestic courts as an instrument that allows the EU's comprehensive rejection of retaliatory behaviors between the European member states. Simply put, the Keohane et al. paper dichotomizes these two systems as ‘inter-state’ and ‘transnational’, with the ‘transnational’ involvement of private litigants and courts largely distinct from any inter-state relationship, much like a demanding international human rights regime, while failing to recognize that that the automatic use of domestic courts in trade politics confers specific benefits on policy-makers in other states, within the EU and indeed elsewhere, as illustrated in Chart Four above.

¹⁷ e.g. Simma 1985.

¹⁸ As should be clear, there is no implication here that all EU member states are in consistent compliance with all EU obligations at all times. They certainly are not. The point is that they comply, or deviate, from their EU obligations within the context of the enforcement of treaty obligations by their domestic courts, rather than within the context of more common retaliatory enforcement mechanisms. This logic is also compatible with claims that the ECJ decision-making is at the margin less likely to involve ambitious decisions when more European states submit objections during the legal process (as well as various other possible variations within such a system), although the degree to which the Court is responsive so such concerns remains a matter of debate (e.g. Carrubba et al. 2008, Stone Sweet and Brunell 2012, Larsson and Naurin [Forthcoming]). The latter point can be generalized: domestic court enforcement of trade obligations can be substitute for inter-state retaliation mechanisms even if such domestic court systems are less than 100% perfect in their operation and vary somewhat in their effectiveness under various pressures, because the inter-state retaliation mechanisms they may replace are also less than 100% perfect in their operation and vary somewhat in their effectiveness under various pressures.

National courts in the EU states are, yes, ‘European courts’, but they are also, at least as importantly, the ‘courts of the other European member states’.

The EU may be the best example of an international trade regime that marries automatic domestic court enforcement of treaty obligations with a comprehensive rejection of inter-state trade retaliation. As we will see, however, there are at least two other examples of trade regimes that illustrate ways in which enforcement of treaty obligations by domestic courts can act as a substitute for inter-state trade sanctions.

The Andean Community

The Andean Community is the international organization through which its now four member states – Bolivia, Colombia, Ecuador, and Peru – in the Andean region of the Americas organize the politics of externalities in trade and other issue-areas in their interdependent economies and societies. Andean treaties provided for an Andean Tribunal of Justice (ATJ), modeled in part on the EU’s ECJ, which, together with subsequent treaty revisions, have developed the dispute resolution procedures established in the treaties into an Andean legal system. The Andean legal order, like any well developed legal system, has many varied and complex features, including an important doctrinal claim to the ‘supremacy’ of Andean law over the national laws of its participating states. From the point of view of discussion we have developed here, one key characteristic of Andean law as the ATJ has developed it is its requirement that Andean obligations be directly enforced by domestic courts in the Andean member states, while referring questions of interpretation of Andean obligations to the Andean Tribunal itself through a ‘preliminary reference’ procedure (Alter and Helfer 2010).

In many ways, therefore, the rules of the Andean Community, and particularly its dispute settlement arrangements, were designed to closely replicate many aspects of the then European Economic Community, today’s EU. However, there have been two significant differences.

First, the domestic courts of the Andean member states do not recognize their obligation to directly enforce Andean obligations or the supremacy of Andean law over conflicting national law as reliably as courts in the EU have come to do so (Alter and Helfer 2010).

Second, the Andean treaties provide that the ATJ may authorize inter-state trade sanctions between one Andean state and another.¹⁹ Thus in a dispute over the application of Andean rules to Colombia’s alcohol monopoly, Colombian courts decided not to directly enforce these Andean obligations, but instead to leave it to the Colombian government to seek to make its domestic policies conform with its Andean obligations (Alter and Helfer 2010: 566-567 ; Alter et al. 2012: 657-659).²⁰ Since the Colombian government failed to do so, the

¹⁹ Article 27 of the Treaty Creating the Court of Justice of the Cartagena Agreement (Amended by the Cochabamba Protocol), available at: http://www.comunidadandina.org/ingles/normativa/ande_trie2.htm. Because the Andean treaties explicitly authorize the possible use of inter-state trade sanctions as an enforcement mechanism, while the EU treaties certainly do not, claims in (otherwise highly stimulating) recent publications by Alter & Helfer that Andean dispute resolution procedures were designed as a “replica” of the EU’s legal arrangements are not fully convincing. Rather, by including both retaliation-based and domestic-court-based enforcement mechanisms within the same trade regime, the design of the Andean Community can be understood as ambiguous or inconsistent. The role of inter-Andean retaliation in the Andean Community where declaratory judgements of the Andean Tribunal are ineffective further reinforces the view, expressed above ft 13, that inter-state retaliation would have found a role within the European Union in the absence of automatic domestic court enforcement of European obligations.

²⁰ ATJ Case 3-AI-97.

Andean institutions employed the non-compliance procedure provided in the treaties, with the result that in November 2000 the ATJ authorized the other Andean member states to impose increased tariffs against imports of selected Colombian products (Secretaría General 2004: 10 ; Secretaría General 2011). To be sure, not all examples of inter-Andean trade retaliation are necessarily so obviously directly linked to specific failures of domestic court enforcement. The Andean Community is, however, a trade regime that combines both a failed attempt to ensure reliable domestic court enforcement of treaty obligations and the relatively frequent authorization of inter-Andean trade sanctions (Phelan 2015a).

The special contribution of the Andean Community, and the Andean legal order, to this discussion, is to demonstrate in concrete terms that international trade agreements that seek to use domestic courts to enforce treaty obligations can indeed “fall back” on the trade retaliation alternative where domestic court enforcement fails to be sufficiently reliable. That is to say, a possible reversion to “horizontal” enforcement mechanisms underlies apparently “vertical” enforcement mechanisms in international trade politics.

The Dispute Settlement Arrangements of the NAFTA Side Agreements

The third trade-related treaty regime that employs domestic court enforcement to avoid the use of trade sanctions as an enforcement mechanism is the treaty regime of the NAFTA Side Agreements, specifically as they apply to Canada.

NAFTA – the North American Free Trade Agreement – is the regional trade regime incorporating the United States, Canada, and Mexico. The original trade agreement came to be supplemented by two Side Agreements containing obligations to ‘effectively’ enforce their national laws in the areas of the environmental and labor respectively. The requirement for ‘effective’ enforcement of national laws was potentially a demanding one, as it allowed the international dispute settlement process to make an independent finding as to whether such national environmental laws were being ‘effectively’ enforced in the three NAFTA states, and indeed to specify a detailed ‘action plan’ requiring a NAFTA state to remedy any defects identified. The obligations of these Side Agreements can be enforced through an international dispute settlement procedure which culminates, should disagreements persist, in the possibility that a dispute settlement panel may authorize the “loss of benefits” – that is, the imposition of “horizontal”, state-to-state trade retaliation – between one NAFTA member and another (Hufbauer et al. 2003: 29).

That is, at least, the Side Agreements’ dispute settlement procedure as it applies to complaints against the United States or Mexico. However, in the case of complaints against Canada, a different procedure applies. Throughout the negotiations, Canadian policy-makers refused to accept any possibility that the Side Agreements would lead to any increased opportunities for the United States to impose trade sanctions against Canada. Instead they proposed, and United States policy-makers came to accept, that, on the one hand, the results of international dispute settlement under the Side Agreements would be enforced directly by Canada’s domestic courts, and on the other, the United States would lose the right to impose trade sanctions as an enforcement mechanism. As Mayer writes, “The United States and Mexico agreed that in extreme cases of failure to enforce national law [in the manner required by the treaties], an international dispute panel could authorize trade sanctions. Canada, unwilling to allow the possibility, however remote, that international trade sanctions could be used against them ... , agreed instead to make the decisions of the international dispute panel enforceable in Canadian courts.” (Mayer 1998: 166) Canadian courts would thus become “courts of the NAFTA Side Agreements”, yes, but they would also be “courts of the other NAFTA states”. It is true of course, that Canada’s incentives to accept such a mechanism may have derived in large part from the relatively greater retaliatory power possessed by its main NAFTA trading partner, the United States, but that is a general feature of such enforcement mechanisms: the amelioration of disadvantages associated with inequalities in retaliatory

potential is, together with the greater stability of trading conditions by the removal of the possibility of disruptive trade sanctions, one of the main consequences of an effective system of enforcing trade-related treaty obligations through domestic courts.

If the Andean Community demonstrates that *ex post* failures of the reliability of domestic court enforcement can lead to a reversion to the use of “horizontal” sanctions, the NAFTA Side Agreements by contrast demonstrate that *ex ante* states can accept clear and unequivocal obligations to employ “diagonal” enforcement mechanisms explicitly as an attempt to forestall the use of “horizontal” sanctioning systems.

The Debate over Domestic Court Enforcement for WTO Dispute Settlement Outcomes within the EU

Our final example relates to an important treaty regime – the WTO – that does not provide for domestic court enforcement of its trade obligations. The WTO’s Dispute Settlement Understanding is, indeed, widely taken as the paradigmatic example of a “horizontally” organized enforcement system, which provides that, after a lengthy process of decisions by dispute settlement institutions, an injured WTO member may be authorized to impose ‘equivalent’ trade sanctions in response to persistent violations by a trading partner. The rules of WTO dispute settlement, therefore, do not provide an example of diagonal enforcement mechanisms in international trade politics. Certain proposals to reform the way that the domestic legal systems of particular WTO members interact with these WTO dispute settlement processes do, however, provide such an example.

This debate is particularly intense in the EU, which is both a treaty-based trade regime, managing trade relations between its participating member states, and also itself an important participating member of a wider trade-based treaty regime, the WTO. (The famous Russian *Matryoshka* dolls may provide a helpful metaphor here: the European states are members inside the EU, which is in turn a member inside the WTO). Perhaps because the community of legal experts working on the EU’s relationship with the WTO is well aware of the use of national courts to enforce EU obligations within the European states (France, Sweden, Germany, Ireland, and so on) as state members of the EU, they are therefore inspired to think about how similar domestic court mechanisms could be used to enforce WTO obligations within the EU as a member of the WTO, in the EU’s capacity as a unitary trade actor vis-à-vis the world outside Europe.

Such academic scholarship frequently considers, and often supports, proposals that the outcomes of the WTO dispute settlement processes should be automatically enforceable within the EU through litigation before the EU’s ‘domestic’ courts, including the ECJ itself (e.g. Eeckhout 2011 ; Thies 2013; for similar proposals for GATT as a whole, e.g. Tumlir 1983). Both EU policy-makers and the ECJ itself have in fact consistently opposed granting automatic domestic court enforcement of decisions arising from WTO dispute settlement institutions within the EU, but the scholarly debate remains lively nonetheless (Phelan 2015c).

Importantly for our purposes, such debates are forthrightly focused on removing the use of “horizontal” enforcement mechanisms by other WTO members against the European Union. So the use of WTO-authorized trade sanctions by the United States against the EU in a dispute over EU limits on imports of bananas, and the use of WTO-authorized trade sanctions by, again, the United States against the EU in a dispute over EU limits on imports of beef grown with the use of certain hormones are a central part of proposals to allow the results of WTO dispute settlement to be automatically enforced by the ECJ and other European courts (Devereaux et al. 2006). The demand for such automatic domestic court enforcement of WTO dispute settlement results within the EU is driven above all by concern for “retaliation victims” and “international trade bystanders”, that is, EU-based firms at the receiving end of

WTO-authorized sanctions for WTO-inconsistent policies adopted by EU policy-makers (Thies 2013: 1 ; Dani 2010). This policy proposal therefore recognizes, entirely straightforwardly, that automatic domestic court enforcement of international trade obligations is a tool to remove the use of inter-state trade sanctions as an enforcement tool in international trade politics, effectively by granting policy-makers in other WTO members, such as the United States, the right to have outcomes of disputes they “win” in treaty-based dispute settlement litigation automatically enforced within the EU by European courts. As Eeckhout explains, if the outcomes of WTO dispute settlement procedures were automatically enforced by courts within the EU, the EU’s Hormones Directive would “no longer be on the books” within the EU after the WTO’s dispute settlement institutions had decided it was inconsistent with the EU’s WTO obligations, and therefore no retaliation by the US against EU firms would have occurred (Eeckhout 2002: 93).

Each of these examples, therefore, in their different ways, demonstrate the trade-offs between domestic court enforcement and inter-state retaliation in “diagonal” enforcement mechanisms in international trade politics. At one end of the spectrum, the EU provides an example of treaty regime which has combined effective enforcement of trade-related treaty obligations by domestic courts with a consistent rejection of inter-state enforcement mechanisms. The Andean Community and the NAFTA Side Agreements provide divergent examples of intermediate regimes. The Andean treaty regime combines frequently ineffective domestic court enforcement of treaty obligations with intermittent use of inter-state enforcement mechanisms, while the NAFTA Side Agreements demonstrate how the same treaty provisions can be enforced by “horizontal” mechanisms vis-à-vis some participating states, but by “diagonal” enforcement mechanisms vis-à-vis others. Finally, at the other end of the spectrum, the debate over the possibility of granting domestic court enforcement to decisions of WTO dispute settlement institutions within the EU demonstrates how, even within regimes whose rules provide for classically “horizontal” enforcement mechanisms, we can see an awareness of how domestic court enforcement of dispute settlement outcomes would confer benefits on policy-makers in other WTO members.

Together, in their various ways, these examples illustrate the “diagonal” enforcement method in international trade obligations: a scenario where a state’s policy-makers are able to “consume” a demanding trade treaty relationship with another state without the constant possibility of inter-state trade retaliation at the “cost” of granting automatic domestic court enforcement to the treaty’s trade obligations, including the outcomes of treaty-based dispute settlement institutions.

Conclusion: National Courts as Courts of Other States

The reader may have been struck by the many resemblances between the “horizontal” and “diagonal” enforcement mechanisms as we have described them here. Both are forms of “institutionalism” in international relations, illustrating the ways that international rules and decision-making procedures can reduce uncertainty and transaction costs in international interactions. Both can be considered “Axelrod-Keohane” reciprocity-and-potential-retaliation relationships, even if the distinctive contribution that can be made by national courts rarely features in discussions of such relationships (Axelrod 1984 ; Keohane 1984). At the same time, the qualitative shift in trade dispute settlement associated with a change from the mechanisms of inter-state retaliation to enforcement by domestic courts is a remarkable one. This particular, “diagonal”, inter-state interaction therefore deserves inclusion among the simplified descriptions of generalizable inter-state interactions that are the building blocks of contemporary international relations scholarship. It is a type of inter-state relationship distinct from common forms of enforcement in both trade and international human rights politics.

This discussion should also be of interest to a variety of state policy-makers. On the one hand, policy-makers of states currently trading within retaliation-based treaty regimes

such as the WTO may be interested to know of a perhaps underappreciated alternative means of enforcing trade obligations. On the other hand, policy-makers of states currently trading within domestic court-enforced treaty regimes such as the EU – and perhaps chafing at the loss of domestic autonomy involved – may benefit from an appreciation that retaliation-based enforcement mechanisms, with all their disadvantages, are likely the obvious alternative.

While each of these enforcement mechanisms already constitutes a relatively encompassing framework for state interactions, covering a wide range of possible state behaviors, research on dispute settlement in international trade relationships, will be improved by situating itself within the even more encompassing framework comprised by these two enforcement mechanisms taken together. Failure to do so artificially truncates the range of possible institutionalized trade interactions between states. Future research projects on dispute settlement in international trade politics, whether case studies, formal models, or quantitative analyses, will therefore benefit from understanding the wider range of variation in inter-state trade interactions associated with these two distinct enforcement mechanisms. In particular, the integration of this discussion of “horizontal” and “diagonal” enforcement mechanisms in trade politics may have much to contribute to existing debates on the “institutional design” of international organizations, including “obligation-enforcement”, “depth-flexibility”, and “depth-stability” trade-offs, as well as the related question of how state policy-makers manage diverse export-orientated and import-competing interests in such regimes, in light of the fact that greater stability of trading opportunities may largely favor export-orientated interests (Koremenos et al. 2001 ; Rosendorff and Milner 2001 ; Rosendorff 2005 ; Baccini et al. 2012 ; Johns 2014). It also suggests that the ways that states may organize their trade regimes may vary not only according to variation in interdependence and other well-known political economy factors, but also according to variation in the independence and effectiveness of national court systems within their important trading partners. Some states may be able to “deploy” their national courts as instruments of trade politics statecraft, while others may not, and, outside of trade politics, some issue-areas associated with international externalities may be better suited than others for domestic court enforcement mechanisms where important beneficiaries include policy-makers of other states.

To be sure, the horizontal and diagonal enforcement mechanisms discussed here surely do not exhaust all possible forms of enforcement mechanism in international trade politics or for that matter the influence of national and international courts in trade politics. Many treaty systems may be so new and relatively untested, or alternatively so settled into inefficiency, that it is hard to establish whether they have any functional enforcement mechanism (Gray [Unpublished Paper]). Others may contain detailed dispute settlement mechanisms which nonetheless remain largely unused if states prefer nonetheless to employ the WTO’s more established (and “horizontal”) dispute settlement procedures (Froese 2014). Others still may be silent as to any enforcement mechanism, or silent specifically on how to address the situation where a defaulting state continues a violation even after an adverse finding by an international tribunal, leaving open questions about the possible application of the “horizontal” countermeasures allowed by general international law (Chase et al. 2013: 38). This paper has set out only one new generalizable form of enforcement scenario in international trade politics, there are no doubt others, and of course each individual treaty may also have peculiarities all of its own.

For existing debates on “vertical” enforcement mechanisms in the politics of international law, this discussion may counsel caution about too-ready assimilation of instances of national court application of international human rights obligations, on the one hand, with examples of national court application of international trade obligations, on the other. Trade politics operates firmly within the context of widely-recognised international externalities and the possible use of inter-state retaliation mechanisms, whether active or latent, whereas international human rights politics often does not.

Finally, this specification of the transformation of inter-state trade politics through reliable national court of trade obligations may prompt some to doubt the continuing usefulness of the foundational concept of ‘anarchy’ in international relations scholarship. After all, the concept of anarchy has been intimately associated with the concept of ‘self-help’, and states within these legal regimes have, for these trade relationships, renounced even such mild forms of self-help as retaliatory trade sanctions (Waltz 1979). Others may answer, persuasively perhaps, that the diagonal enforcement mechanism in inter-state trade politics demonstrates the continued creativity of policy-makers, international institutions, and private actors in the management of international relationships, even while the essential condition of international anarchy – the absence of a ‘state above states’ – remains unaltered.

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