
Compliance and Post-Agreement Bargaining

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Most literature on international cooperation focuses on the phase leading up to the signing of a treaty, while neglecting the dynamics of bargaining in the aftermath of an international agreement. Reviewing existing literature, we find that bargaining theory deals almost exclusively with the pre-agreement phase and that the enforcement and management schools in the study of compliance are predominantly static in their orientation. We present a framework for analysing the dynamics of compliance bargaining — which can be understood as a process of bargaining between the signatories to an agreement already concluded, or between the signatories and the international institution governing the agreement, which pertains to the terms and obligations of this agreement — and explore compliance bargaining in the EU in light of this framework. Specifically, the EU case illustrates third-party, as opposed to self-help, enforcement and points to sources of bargaining power in compliance bargaining.

As in law or business, statecraft illustrates the maxim that the real negotiation begins only *after* the agreement is signed.

(Crocker and Hampson, 1996: 57)

More negotiation is the inheritor of successful negotiation.

(Spector et al., forthcoming)

In International Relations research, compliance and bargaining have long been the objects of extensive attention, each as a separate phenomenon and each as a distinct area of study. Owing to this theoretical divorce of compliance and bargaining, International Relations scholars have largely neglected the pervasive occurrence of ‘post-agreement bargaining’, or ‘compliance bargaining’, in world politics today. Post-agreement bargaining

is the more generic term, referring to all those bargaining processes which follow from the conclusion of an agreement. For instance, many international treaties are developed from general framework agreements to increasingly specific protocols and contracts through a sequence of bargaining processes. Post-agreement bargaining has been the rule rather than the exception in the case of recent peace settlements. Israel and the Palestinian National Authority have argued about the terms and obligations of the Oslo agreement since just about the day the deal was concluded. Likewise, the Dayton agreement constituted the starting point rather than the end point of bargaining over Bosnia. These examples point to the significance of post-agreement bargaining — assessments of differential bargaining power and skills as well as likely outcomes look different today than at the time of the signing of the agreements.

In this article we focus on one particular form of post-agreement bargaining which we label compliance bargaining. By this we understand a process of bargaining between the signatories to an agreement already concluded, or between the signatories and the international institution governing the agreement, which pertains to the terms and obligations of this agreement. In the area of international trade, for example, the European Union (EU) and the United States have during 1997 and 1998 been involved in extensive bargaining concerning the lawfulness of the Helms-Burton Act in light of the rules of the World Trade Organization (WTO). Moreover, the EU is in itself an arena of institutionalized post-agreement bargaining, where the European Commission and the member-states settle compliance problems through amicable solutions.¹

Traditional conceptions of both compliance and bargaining must be revised in view of the phenomenon of post-agreement bargaining. Existing approaches view compliance either as an enforcement or a management problem, and negotiation theory is preoccupied with the process leading up to the signing of an agreement. However, bargaining follows as well as precedes an international agreement, which, in effect, simply creates a new bargaining situation. And compliance bargaining may involve elements of enforcement as well as management.

The article consists of three parts. First, we review the literature on compliance, and the literature on negotiation and bargaining, with respect to how they treat post-agreement bargaining. Second, we present an analytical framework or a prolegomenon to a theory of compliance bargaining. The framework outlines potential causes of bargaining, such as member-state non-compliance and treaty ambiguity, as well as common effects, such as influencing the level of compliance, providing definitions of compliance and affecting future gains from cooperation. Third, we analyse compliance bargaining in the EU, employing the concepts and causal

pathways elaborated in the analytical framework. The EU offers an excellent example of the phenomenon of post-agreement bargaining. Most important, the EU case illustrates the point that compliance must be understood in the context of bargaining, and that bargaining takes place after as well as before a deal has been struck.

Post-Agreement Bargaining: Often Mentioned, Seldom Elaborated

The phenomenon of post-agreement bargaining has largely escaped the attention of International Relations theorists. In view of the fact that state compliance is a prominent focus of post-agreement bargaining, we would expect this occurrence to be elaborated in either the literature on compliance or the literature on negotiation and bargaining. As it is, neither strand of literature pays more than scant attention to post-agreement bargaining. The literature on compliance concentrates on member-state actions in the post-agreement phase, but is static in its orientation and neglects dynamic processes such as bargaining. The literature on negotiation and bargaining, on the other hand, emphasizes process, but fails to extend this attention to the post-agreement phase. Indeed, ‘often mentioned, seldom elaborated’ is a maxim which well captures the approach to post-agreement bargaining in existing IR theory.

By analogy, lessons can be drawn from other research traditions. For instance, students of policy implementation at national and subnational levels have pointed out that politics does not end with the formulation and adoption of a policy and that ‘apparently simple sequences of events depend on complex chains of reciprocal interaction’ (Pressman and Wildavsky, 1974: xvii). Some scholars have explicitly advocated a bargaining approach to implementation, arguing that ‘the fact that bargaining is less visible does not mean that it does not go on’ (Barrett and Hill, 1984: 228). Similarly, legal scholars specializing in European Community Law recognize that the implementation of law can be highly political, requiring ‘the exercise of power and a choice between competing values’ and involving ‘conflict, negotiation, compromise and mutual adjustment’ (Snyder, 1993: 24, 26). In short, agreements — whether in political or legal garb, whether on national or international levels — do not put an end to political processes.

In this section, however, we concentrate on the existing IR literature on compliance, on the one hand, and negotiation and bargaining, on the other. We ask the same set of questions with respect to both traditions. First, to what extent does the literature *mention* post-agreement bargaining? Second, to what extent does the literature *elaborate* on post-agreement bargaining, in terms of analysing its essence, the reasons for its existence, and its effects

and implications? Third, if post-agreement bargaining has been largely neglected, why is that?

The Literature on Compliance

In the last decade, the study of compliance has primarily been concerned with the question of what specific treaty and regime characteristics are most conducive to a high degree of compliance. This question constitutes the bedrock of a scholarly debate in which the loosely configured parties can be described as the *management school* and the *enforcement school*.²

According to the enforcement school, non-compliance with international regulatory agreements will ensue in mixed-motive settings unless effective enforcement is provided.³ Mixed-motive settings are situations plagued by the dilemma of common interests, in which states would prefer that all parties comply, but where additional benefits may be gained by renegeing on one's commitments (Stein, 1983). States thus have an incentive to defect, since they gain more from an agreement if they reap all the benefits of cooperation without putting in their own fair share. As a consequence, if states are to comply and international cooperation is to survive, enforcement and punishment are required to deter states from shirking — 'A punishment strategy is sufficient to enforce a treaty when each side knows that if the other cheats it will suffer enough from the punishment that the net benefit will not be positive' (Downs et al., 1996: 385). This general logic of the enforcement school rests on the analytical foundations of game theory and collective action theory, which both emphasize the crucial role of enforcement.

Based on qualitative research on international regulatory agreements, the management school presents a picture at odds with the general conclusions of the enforcement school.⁴ First, the management school argues that compliance with international agreements is generally quite good. Compliance rather than defection is adopted as the background assumption, a position which is affirmed by practitioners. In real-life international relations, states meet their commitments almost all the time, it is argued. Second, this high level of compliance has been achieved in the absence of enforcement. As concluded by Chayes and Chayes in their survey of 125 international treaties, 'sanctioning authority is rarely granted by treaty, rarely used when granted, and likely to be ineffective when used' (1995: 32). Third, and perhaps most important, when compliance actually constitutes a problem, it is better addressed as a management rather than an enforcement problem. Non-compliance often does not reflect a deliberate decision to violate an agreement. Instead, it may be the product of treaty ambiguity, limitations on capacity or unexpected social and economic problems. As a

consequence, managerial solutions, such as mutual consultation and analysis, technical and financial assistance, enhanced transparency and improved dispute resolution procedures, hold the key to higher levels of compliance (Chayes and Chayes, 1995: Chap. 1).

To what extent, then, do the enforcement and management schools address compliance bargaining as a phenomenon within the realm of international cooperation? If, as we argue, bargaining constitutes a mechanism for enforcing compliance and managing problems arising from treaty ambiguity, then it is central to the propositions of both the enforcement and management schools. While the literature on treaty management mentions, but refrains from elaborating on, the distinct elements of compliance bargaining contained in the management strategy, the enforcement school makes no reference to the process of enforcement through bargaining.

The management school depicts a management process which shares core characteristics with compliance bargaining. In particular, it captures the elements of persuasion and iteration, which are essential to all kinds of bargaining. Persuasion is the overarching characteristic of the atmosphere and framework within which the management process proceeds. As Chayes and Chayes (1995: 25) put it when summarizing the constitutive parts of the management strategy:

These disparate elements — transparency, dispute settlement, capacity building — all of which are to be found in some regimes, can be considered to be parts of a management strategy. They merge into a broader process of ‘jawboning’ — the effort to *persuade* the miscreant to change its ways — that is the characteristic method by which international regimes seek to induce compliance.

Besides acknowledging the power of persuasion in making states comply, the management school also captures the element of iteration, which can be considered a defining characteristic of any bargaining process. Communication and cooperation, rather than deterrence and retaliation, define the management way of dealing with compliance problems — ‘[T]he fundamental instrument for maintaining compliance with treaties at the acceptable level is an iterative process of discourse among the parties, the treaty organization, and the wider public’ (Chayes and Chayes, 1995: 25).

However, as much as aspects of compliance bargaining are caught in the inductive sweep of the management school, these bits and pieces do not resemble anything close to an elaboration of the phenomenon. While touching upon explanations of compliance bargaining (e.g. ambiguous treaty texts), the process of compliance bargaining (e.g. persuasion, iteration) and the effects of compliance bargaining (e.g. levels of compliance), the management school does not weld these observations into an elaborate conception of the phenomenon as such.

The primary reason for the enforcement school's neglect of compliance bargaining, despite its suggested relevance, rests with the level of abstraction at which the enforcement logic is pitched. Owing to the microeconomic and game-theoretical roots of the enforcement school, it operates at a level of abstraction that precludes a focus on the means by which the logic operates. To repeat the main proposition, compliance on the part of the signatories requires a threat and use of sanctions which would outweigh the expected benefits of free-riding. Consequently, what matters to the enforcement school is the level rather than the means of enforcement — 'The specific mechanism by which states punish violations is less relevant . . . than is the magnitude of enforcement' (Downs et al., 1996: 386). Whether enforcement is executed through means of bargaining or not, remains an issue of, at most, peripheral importance to the conclusions of this approach. Whereas the management school catches elements of post-agreement bargaining thanks to its wide, inductive sweep of international treaty compliance, the enforcement school misses those same elements owing to its deductive and highly parsimonious approach. For an elaboration of the argument that process matters, we turn to bargaining theory.

The Literature on Negotiation and Bargaining

Post-agreement bargaining has not been a prominent aspect in the rich and variegated theoretical and empirical literature on international bargaining and negotiation either. The predominant focus has been the process leading up to the signing of an agreement. Whereas the pre-negotiation phase has attracted increased attention among researchers (Saunders, 1985; Stein, 1989), post-agreement bargaining is only recently coming into focus (Spector et al., forthcoming). One comprehensive bibliography on international negotiations, covering literature up to 1988, contains just a couple of entries under 'compliance' and 'post settlements' (Lakos, 1989).

Some recent texts do include chapters on implementation, an aspect largely neglected in previous works on bargaining, and advise negotiators to take implementation requirements into account when formulating their goals and bargaining strategies (Breslin and Rubin, 1993: 291; Lebow, 1996: 155). While such prescriptions are helpful reminders of the importance of the post-settlement phase of negotiations, they neglect one crucial aspect — that implementation and compliance can be understood in bargaining terms as well. In other words, compliance ought to be the concern not only of negotiators but of negotiation theorists as well.

If we proceed from the assumption that the 'compliance game' is indeed a form of bargaining process, we can seek inspiration from some of the classic works on international negotiation. Iklé, for instance, discusses 'carry-

over for future negotiations' and notes that 'there is often considerable justification in viewing the prior and succeeding conferences as a single negotiation' (1964: 22). An agreement does not solve all problems once and for all, but simply creates a new bargaining situation. Iklé's advice, in short, is to extend the analysis of international negotiations to include the post-agreement phase as well. However, he does not address the question whether post-agreement bargaining has any distinctive features which set it apart from pre-agreement bargaining.

Schelling (1960: 134), another classic in bargaining theory, points to the relationship between commitments and enforcement. A negotiated agreement is, in effect, an exchange of promises, and a promise can be seen as 'a commitment that the second party can enforce or release as he chooses'. Schelling argues that 'agreements are unenforceable if no authority exists to enforce them or if non-compliance would be inherently undetectable'. At the same time, he notes, agreements that depend on some kind of coordination or complementarity may be enforceable in the absence of an outside authority. The implication of Schelling's argument is that post-agreement bargaining rests on commitments that are enforceable to varying degrees. These commitments create a new bargaining situation and distribute bargaining power among the parties to the treaty.

The voluminous literature on disarmament and arms control negotiations during the Cold War era is replete with discussions of safeguards, verification, inspection, control, enforcement, and the like. The reasons for this are obvious — non-compliance might have momentous consequences, and the two superpowers were continuously at issue over control questions. While the literature on verification of compliance to arms control agreements tended to become quite technical, it also raised more principal questions of relevance beyond the realm of arms control. For instance, the distinction between the efficacy of monitoring systems in terms of *detering* non-compliance, on the one hand, and in terms of *discovering* violation, on the other, is relevant to our purposes, as is the observation that such systems can err in two ways — either by missing violations or by producing mistaken evidence that non-compliance has occurred (Schelling and Halperin, 1961: 94).

In the literature on international business negotiations, the problem of compliance is frequently noted, albeit less frequently theorized. It has been suggested that 'many international business negotiations are in reality negotiations of preexisting commitments' resulting from contractual instability (Salacuse, 1993: 341). Cultural factors are often cited as contributing to contractual instability. Similarly, intercultural differences in attitudes to formal agreements are alluded to in studies of diplomatic negotiations (e.g. Ting-Toomey, 1985; Jönsson, 1990; Cohen, 1991).

In sum, the most general lesson from the negotiation literature is that process determines outcomes. By implication, the post-agreement phase opens up new processes which may yield outcomes that differ from the agreement itself. Compliance bargaining, more specifically, presupposes (a) either a self-enforcing agreement or an outside authority, and (b) methods of detecting non-compliance. Furthermore, a monitoring system may be useful either by discovering or by deterring non-compliance, at the same time as it risks either missing violations or producing mistaken evidence of non-compliance. Finally, the international compliance game rests not only on rational calculations but typically involves intercultural aspects as well.

The Anatomy of Compliance Bargaining: An Analytical Framework

In this section, we present the contours of a framework for analysing compliance bargaining. The outline of the framework is guided by three questions, each forming the centerpiece of a subsection. First, what is the essence of compliance bargaining? Second, what are the causes of compliance bargaining? Third, what are the effects of compliance bargaining?

The Essence of Compliance Bargaining

In the introduction we defined compliance bargaining as ‘a process of bargaining between the signatories to an agreement already concluded, or between the signatories and the international institution governing the agreement, which pertains to the terms and obligations of this agreement’. There are four important components or distinctions in this definition, which together capture the essence of compliance bargaining.

First, we employ the wider concept of *bargaining* rather than the more narrow term negotiation. Negotiation generally refers to a formalized process of direct, face-to-face, verbal communication, while bargaining also encompasses indirect and non-verbal communication between the parties (e.g. Schelling, 1960: 21; Schelling and Halperin, 1961: 77–80). Since the empirical phenomenon we seek to pinpoint is not limited to direct and verbal communication, but also involves, for example, implicit threats of sanctions, it is best described as bargaining rather than negotiation. Second, this bargaining is characterized by a continuous *process* rather than a static bargaining situation. Bargaining processes refer to ‘back-and-forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed’ (Fisher and Ury, 1983: xi). Moreover, compliance bargaining can be considered a phase in a more extensive process of bargaining, which means that it cannot be

analysed in isolation from the pre-agreement negotiations. Third, this bargaining process is *post-agreement*, in the sense that it takes place after a deal has been concluded and concerns the terms and obligations of this agreement, rather than new questions which in time will make for future rounds of negotiations. Its primary object is member-state non-compliance. Fourth, this process may appear in two different forms, depending on whether the structure of interaction is one of *self-help* or *third-party*. These two forms constitute ideal types, and concrete conflicts and bargaining situations may exhibit features of both or may oscillate between the two. The distinction is essential and requires further elaboration.

Self-help bargaining refers to bargaining between states, that is, traditional interstate bargaining, now taking place in the post-agreement phase. Anarchy, or lack of a common authority to enforce rules, is the defining characteristic of the setting within which self-help bargaining occurs (Waltz, 1979; Oye, 1986; Milner, 1991). There is no higher international authority which can impose costs on violators and to which states can appeal when treaties are breached. Which actions actually constitute compliance is subject to competing interpretations, and the acceptable limits are set in post-agreement negotiations between states. If and when sanctions are launched against a non-complying signatory, these are imposed by sovereign states (Baldwin, 1985; Hufbauer et al., 1985; Martin, 1992).

Self-help bargaining has been the predominant form of post-agreement bargaining to date. An archetypical example is the negotiations between Germany and its former enemies in the aftermath of the Versailles settlement. More recent instances of self-help bargaining are those occurring between Israel and the Palestine National Authority as regards the Oslo agreement, and between the EU and the US on the lawfulness of the Helms–Burton Act in light of WTO rules. In international trade, self-help bargaining has always been a common way of solving post-agreement conflicts, which have become more prevalent with the emergence of non-tariff barriers as the most popular form of protectionism. Unlike tariffs, which are highly transparent and leave little to dispute as to what constitutes compliance, non-tariff barriers to trade are opaque in nature and thus more easily become subject to controversies and competing interpretations.

Third-party bargaining has as its defining and unique characteristic the existence of an international institution which interacts with the signatories of an agreement in the interpretation of compliance and the settling of disputes.⁵ Third-party bargaining may be of two kinds, depending on whether the international institution acts as ‘judge’ or ‘prosecutor’. The traditional conception of international institutions as third parties is that of a judge. Member-states in conflict over treaty compliance and interpretations bring the case before a dispute-settlement body, such as a court or a panel,

to have the case settled by a third party recognized by both. The dispute-settlement body issues an interpretation that is either considered binding or non-binding, depending on what the parties have agreed on beforehand. Bargaining, in this context, takes place between the disputing states within the framework of the dispute-settlement process. International institutions as judges are a common form of third-party enforcement in international trade. The GATT dispute-settlement system rested on these principles, and the new dispute-settlement mechanism of the WTO further reinforces the power of the institution to issue interpretations and settle disputes between member-states (Petersmann, 1994; Trebilcock and Howse, 1995: Ch. 15). Similar dispute-settlement mechanisms are provided for in the EU through the European Court of Justice and Article 170 of the EEC Treaty, and in NAFTA by way of dispute-settlement panels.

An alternative conception of international institutions as third parties, and one which has become more prevalent in recent years, is that of a prosecutor (e.g. Yarbrough and Yarbrough, 1992: Ch. 5; Tallberg, 1997). Institutions as prosecutors do not issue interpretations as much as they act independently and strike down on member-states suspected of violating the treaty. Bargaining, in this context, primarily takes place between the international enforcement institution and the signatory suspected of non-compliance. Institutions as prosecutors are a less common form of third-party enforcement, with the prime examples being the European Commission of the EU and the International Atomic Energy Agency (IAEA). The European Commission is equipped with enforcement powers which, at its own discretion, may be used against member-states in breach of EC law. The Commission can, for example, charge member-states with non-compliance and initiate infringement proceedings under Article 169 of the EEC Treaty. Similarly, IAEA may strike down on states and request on-the-spot investigations when it suspects signatories to be in breach of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons.

Under third-party enforcement generally, bargaining results from the combination of a 'sanctioning ladder' and the interest of all parties to settle disputes at an early stage, rather than letting cases or conflicts run their full course. We use the term sanctioning ladder to denote the consecutive steps which may be taken to induce compliance, and which typically are characterized by a progressive increase of pressure and costs of non-compliance.⁶ Unlike, for example, Chayes and Chayes, who adopt a narrow definition of sanctions — treaty-based military and economic sanctions, membership sanctions and unilateral sanctions — we consider sanctions to be any measure taken toward a state with the deliberate purpose of increasing the cost of non-compliance (Chayes and Chayes, 1995: 29–30). The sanctioning ladder thus consists of a number of consecutive steps,

starting with the act of charging a state with non-compliance and ending with the act of imposing actual economic or military sanctions. In between these two end points, the progression of the dispute-settlement process, the infringement procedure or the preliminary investigation, gradually increases the pressure on the state charged with violation to rectify its behaviour. The combination of states' interest to minimize costs and a sanctioning ladder, which offers a number of steps where conflicts can be resolved and which gradually increases the costs of non-compliance, thus provides for a context highly amenable to bargaining.

To explain why bargaining outcomes may vary across different instances of compliance bargaining, we need a conception of the sources of bargaining power. Drawing on existing theory on bargaining, we consider the ability of an actor to influence outcomes in its favour to depend on two kinds of bargaining power — structural and behavioural (e.g. Habeeb, 1988: Ch. 2). Structural power, which may be conceived in both aggregate and issue-specific forms, refers to an actor's resources, capabilities and position vis-à-vis its counterpart. Structural power thus includes such traditional sources of power as economic strength and military might. Behavioural power refers to the tactics employed by an actor in the bargaining process. Examples of common tactics in negotiation and bargaining include commitments, threats, warnings, promises, rewards, side-payments, punishments, concessions, coalition building, linkage, stalling.

The leverage that actors may get out of these two kinds of bargaining power varies depending on whether the situation is one of self-help or third-party bargaining. Structural power is more likely to be a significant factor in determining bargaining outcomes in self-help bargaining with another state than in third-party bargaining with an international enforcement institution. Military and economic strength may be useful sources of bargaining power in relations with other states, but are neither deemed as legitimate nor likely to be as effective in negotiations over compliance with an international institution. Behavioural power, on the other hand, is a relatively more important determinant of outcomes in third-party bargaining than in self-help bargaining. While tactics are essential also in self-help bargaining as a means of translating structural power into actual influence, they are the stuff that third-party bargaining is made of, given the 'impotence' of military and economic means.

In compliance bargaining the pertinent balance of commitments is between the guardians of the agreement, on the one hand, and violators or potential violators, on the other. The guardians, for their part, incur commitments designed to increase the costs of violation, for instance by threatening sanctions. Violators, in turn, incur commitments designed to increase the costs of sanctions for the guardians, for instance by threatening

recalcitrance in intersecting ongoing or future negotiations. The outcome of compliance bargaining hinges on the differential bargaining power of guardians and violators. In third-party bargaining, international institutions, by virtue of their role as prosecutor or judge, are endowed with a kind of bargaining power they did not have in the pre-agreement phase. We shall return to a discussion of differential bargaining power in more concrete terms in our EU illustration.

Causes of Compliance Bargaining

If post-agreement bargaining is a widespread phenomenon in international relations, and may occur in a variety of forms, what then are its causes? In effect, why is there compliance bargaining? We argue that there are two main causes — established violations and treaty ambiguity. Both apply to compliance bargaining generally, irrespective of whether it is based on a structure of self-help or third party. Moreover, both stem from the pre-agreement phase of international cooperation and signify the link between pre- and post-agreement bargaining. Given that a treaty marks the final point of a negotiation process, the crucial question is essentially why bargaining does not end with the signing or the ratification.

Bargaining situations are not unique to the interaction between the parties before an agreement, but also define the phase of implementation and application. In general terms, compliance bargaining arises because the parties have a common interest in maintaining the agreement, yet dispute the rights and obligations it confers. The closing of a deal gives birth to a new bargaining situation, where the premises may be different from previously, but where the underlying structure of cooperative and conflictual elements remains intact.

The first cause of compliance bargaining which we want to highlight is outright non-compliance with the rules of a treaty, whether it results from lack of capacity or lack of will to comply. Non-compliance is a carry-over from the pre-agreement phase in the sense that states may be more or less likely to comply depending on the extent to which the treaty conforms to capacity and interests. In short, states differ as to how well their capacity and interests are reflected in a treaty. Lack of technical, financial and administrative capacity is a well-documented and widespread source of non-compliance, making some states more prone to violate international agreements than others (Young, 1992: 183–5; Haas et al., 1993; Chayes and Chayes, 1995). Similarly, depending on their relative bargaining power in the pre-agreement phase, states' interests are unequally reflected in the rules and codes agreed upon (Jönsson, 1981; Habeeb, 1988: Ch. 2).

Clear and manifest violations rarely stand unchallenged. Rather, they are

bound to provoke reactions from the other parties to the agreement. Compliance bargaining primarily serves as a way for the other parties to persuade the signatory in breach of the benefits of compliance and the costs of continued violation, and for the alleged violator to justify its action/inaction and avoid sanctions. The means of persuasion and bargaining may include retaliatory counter-measures, as in the case of trade conflicts between the US, the EU and Japan over barriers regulated in bilateral and multilateral agreements. Bargaining in response to non-compliance may also consist of the initiation of infringement proceedings in international dispute settlement bodies, such as the WTO dispute-settlement procedure, the European Court of Justice and the NAFTA Commission and dispute-settlement panels. A third alternative is traditional negotiations, conducted with the aim of finding an amicable solution. Often, such negotiations complement retaliatory actions and form part of international dispute settlements.

The second cause of compliance bargaining is found in the ambiguity to which most international treaties and agreements are subject. For a number of reasons, treaty language is seldom as clear and precise as would be required for all parties to agree on the exact meaning of a phrase (Young, 1979: 106–7; Chayes and Chayes, 1995: 9–13). Ambiguous formulations may stem from the fact that these are necessary in order for the parties to reach a minimum level of consensus and come to an agreement at all (Lebow, 1996: 154). Broad and general language may also offer a ‘veil of uncertainty’, which permits a number of parallel interpretations and visions as to the future development of a cooperative endeavour (Young and Osherenko, 1993). Also related to the future, imprecision and ambiguity can serve the function of insurance policy or escape clause, when gains and costs from an agreement are unpredictable (Lebow, 1996: 154). Certainly, the Oslo agreement in the Israeli–Palestine peace talks is a pertinent example of such uses of ‘constructive ambiguity’. Yet another reason may be the inability of drafters to foresee all possible applications and to plan for all contingencies, with an ensuing mismatch between the coverage and formulations of the treaty and the practice it seeks to regulate (Chayes and Chayes, 1995: 10). Indeed, these are contractual problems not unique to the world of international cooperation, but are, for example, also important features in the contractual approach of the new institutional economics (e.g. Williamson, 1975, 1985). In sum, the consequence of treaty ambiguity is that, ‘more often than not, there will be a considerable range within which parties may reasonably adopt differing positions as to the meaning of the relevant treaty language’ (Chayes and Chayes, 1995: 11).

Diverging interpretations of treaty language provide a fertile ground for bargaining regarding what actions do and do not constitute compliance. In

the absence of international bodies which may issue authoritative interpretations, it is up to the parties themselves to try to persuade each other as to the logic and power of their positions. In the still fairly rare cases where dispute settlement mechanisms are provided for, these may settle the matter and further clarify the original treaty through interpretations and precedents. This is the case in the EU, for example, where the decisions of the European Court of Justice form a substantial body of case law, which has proven highly influential in elucidating and developing the original treaty articles.

Effects of Compliance Bargaining

To hypothesize about the causes of compliance bargaining is to answer but one of two questions which have to be asked when analysing a 'new' phenomenon in International Relations. Perhaps even more important is to establish the effects of compliance bargaining. In essence, why does compliance bargaining matter and why do we need to pay attention to it as an empirical phenomenon?

We argue that compliance bargaining may alter outcomes and affect future rounds of bargaining in three principal ways — (1) by influencing the level of compliance, (2) by defining what constitutes compliance and non-compliance, and (3) by affecting the distribution of gains in future bargaining. First, and most fundamentally, compliance bargaining influences the level of compliance. On the one hand, by ameliorating compliance problems, bargaining may contribute to a level of compliance which is higher than if non-compliance was allowed to persist. Compliance bargaining might, in the search for mutually acceptable solutions, put an end to actions perceived to be in breach by one of the parties. From the perspective of the guardians, compliance bargaining serves to induce and persuade violators to step into line, to the extent that it raises the cost of non-compliance. The mobilization of social and political pressure, and the risk of sanctions being imposed, are examples of bargaining strategies and threats which tend to make non-compliance a less favourable option. From the perspective of the violators, compliance bargaining serves to test the limits of the other parties' tolerance of deviant behaviour. To avoid costs, either by persuading the other parties of one's innocence or by promising to reward tolerance and/or threatening to retaliate sanctions, constitutes the violator's main bargaining strategy. Therefore, compliance bargaining may also contribute to making permanent a level of compliance which does not conform with the agreement entered into. The search for mutually acceptable solutions might entail compromises which do not fully conform with the letter of the treaty. To the extent that enforcing parties have few

means by which they can force violators into compliance, they might decide that some compliance is better than none, that more is better than less. Moreover, self-help bargaining between two states may break down, with the result that the persuading party also, in an act of retaliation, chooses not to comply.

Whether the consequent level of compliance corresponds more to the interests of the guardians or of the violators of international agreements essentially depends on the relative bargaining power of the parties. While little can be said *a priori* about who will have the upper hand in any given instance of bargaining, we hypothesize that bargaining under a third-party regime is more likely to improve compliance than under a self-help regime. First, international institutions have privileged access to bargaining tactics which make it possible for them to reduce the room for compromises and concessions on compliance. International enforcement institutions can credibly present their 'resistance points' as reasonably rigid. Being the guardians rather than the masters of the treaty, international institutions are more constrained in terms of what outcome they can accept. Their *raison d'être* is to supervise member-state behaviour, and to induce violators to fall into line. In terms of concessions, they can therefore hardly 'bargain away' the treaty. On the contrary, employing the tactic of 'issue-escalation', international enforcement institutions can transform bargaining over a single, concrete case of non-compliance into a matter of principle, e.g. the necessity to uphold the rule of law. Second, and somewhat paradoxically, the signatories of an agreement are likely to contribute more toward ensuring a high overall level of compliance when international institutions act as prosecutors, than when they bargain independently in a structure of self-help or before an international dispute-settlement body. In compliance bargaining based on self-help, complying states seek to persuade non-complying states back in line, often through the explicit or implicit threat of retaliation or sanctions of some kind — sanctions which are both costly and could provoke spirals of retaliation (Axelrod, 1984: 136–9; Keohane, 1986: 10–13). Moreover, the act of charging a fellow signatory with non-compliance always involves a diplomatic inconvenience which preferably should be avoided between partners in cooperation. When states can act against non-compliance indirectly through international institutions, however, they are relieved of the costs of sanctions, the risk of retaliation and the diplomatic inconvenience of the self-help option, and thus more likely to pay attention to, be concerned by and report other member-states' instances of non-compliance.

The second effect of compliance bargaining is to provide definitions of what constitutes compliance and what actions are or are not in line with a treaty. Whether or not the limits of compliance are defined through

interstate bargaining or an international dispute settlement body, the essential implication is the same — compliance as defined in post-agreement bargaining may not correspond to compliance as perceived by the parties when entering into the agreement. In other words, states settle for agreements and negotiation outcomes whose terms and distribution of gains they believe they understand and foresee, but which often are substantially altered when compliance is ultimately defined through post-agreement bargaining. To mention but one recent example from the EU context, Sweden concluded an accession agreement with the European Union in 1994 which, after lengthy negotiations, permitted Sweden to largely keep intact its state monopoly for the import and retailing of alcoholic beverages. Shortly after the Swedish accession, the state monopoly was challenged by a private retailer in a national court, which later referred the case to the European Court of Justice for interpretation. Following neither the opinion of its own advocate-general, who argued that the monopoly should be abolished, nor the Swedish government's intense and prolonged defence of a system it perceived to be in accordance with EC law, the Court in October 1997 declared certain aspects of the monopoly as constituting compliance, while disqualifying other parts. To be fully in compliance, Sweden was required to alter the import system for alcoholic beverages, despite the provisions of the accession agreement. Still, this was only a partial or temporary definition of compliance, since the European Commission is eager to follow up — in or out of court — on other aspects of the state monopoly which may or may not be in accordance with Community law (*Dagens Nyheter*, 27 March 1998).

The third essential effect of compliance bargaining is its influence on how gains are distributed in future rounds of bargaining. In a context where states interact on a regular basis, other states are more likely to enter into future agreements with a state, and on more favourable terms, if it carries a reputation for keeping commitments. Therefore, a good reputation is crucial to the realization of future benefits from cooperation (Kreps and Wilson, 1982; Keohane, 1984: 98–106; Kreps, 1990). Chayes and Chayes (1995: 27) even go as far as to argue that the concern with a 'good standing' in the international system has transformed the essence of state sovereignty:

[F]or all but a few self-isolated nations, sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in regimes that make up the substance of international life. To be a player, the state must submit to the pressures that international regulations impose. Its behavior in any single episode is likely to affect future relationships not only within the particular regime involved but also in many others as well, and perhaps its position within the international system as a whole.

Table 1
Compliance Bargaining

Causes	Varieties	Effects
<ul style="list-style-type: none">• Non-compliance• Treaty ambiguity	<ul style="list-style-type: none">• Self-help bargaining• Third-party bargaining (prosecutor/judge)	<ul style="list-style-type: none">• Influences compliance• Defines compliance• Distributes gains

In the act of defining what behaviour constitutes compliance, and by turning the spotlight on non-complying states, compliance bargaining raises the consciousness among signatories as to which states are ‘good’ and ‘bad’ partners respectively. It thereby reinforces and contributes to the distribution of positive and negative reputational effects, a distribution which ultimately rests on how well states comply. Consequently, compliance bargaining does not only alter the distribution of gains in agreements already entered into, but also in those to come.

As an attempt to sum up, Table 1 outlines the main features of the analytical framework elaborated in this section — the varieties, causes and effects of post-agreement bargaining. Now let us apply this framework to one example of third-party bargaining, the EU enforcement process. This illustrative case also allows us to examine the hypothesized advantages of a third-party regime over a self-help regime in producing compliance.

Compliance Bargaining in the EU

The European Union provides a pertinent illustration of how post-agreement bargaining may solve conflicts over compliance in international affairs. In the words of Audretsch, in the EU, compliance ‘is generally achieved in an amicable way through negotiations between the supervising body and the state concerned’ (Audretsch, 1986: 410). In this section, we explicate the nature of EU compliance bargaining, relating our analysis to the concepts and causal pathways of the analytical framework. While the legal regime of the European Union has received increasing attention from political scientists in recent years, this work has predominantly been composed of neofunctionalist and intergovernmentalist interpretations of the European Court of Justice and national courts as strategic actors (e.g. Garrett, 1992, 1995; Burley and Mattli, 1993; Mattli and Slaughter, 1995, 1998; Alter, 1996, 1998; Garrett et al., 1998; Stone Sweet and Brunell, 1998a, b). To the extent that compliance bargaining in the EU has been the object of academic analysis, these contributions have been the work of

students of law rather than politics (e.g. Audretsch, 1986; Dashwood and White, 1989; Snyder, 1993).

As elaborated in the preceding section, compliance bargaining may occur in a number of different forms. Its specific character — self-help or third-party, judge- or prosecutor-based — largely depends on the nature of the dispute-settlement mechanism which applies to the particular agreement. In the EU, compliance bargaining is essentially third-party and prosecutor-based, with the European Commission pursuing cases against non-complying member-states in a hierarchical judicial system, where the European Court of Justice has the ultimate power to adjudicate disputes and issue interpretations. Thus, the compliance game is played ‘in the shadow of the law’ (Cooter et al., 1982). Clearly, dispute settlement as it exists in the EU, does not constitute the norm in international relations. Rather, in a comparative perspective, the EU legal system is placed at one end of a continuum of dispute-settlement mechanisms (Yarbrough and Yarbrough, 1997: 148). Had we chosen other international organizations for the purpose of illustration — e.g. the WTO or NAFTA — we therefore would have ended up with a different pattern of compliance bargaining. Consequently, we do not argue that the specific *pattern* of bargaining in the EU is generalizable to all other instances of compliance bargaining. All we say is that the EU offers an excellent example of the *phenomenon* of compliance bargaining generally and third-party processes in particular.

If anything, the EU is a hard case for illustrating the phenomenon of post-agreement bargaining over compliance. It is widely recognized that the EU rests on the rule of law to a higher degree than other instances of international cooperation. As, for example, Keohane and Hoffmann note — ‘No other international organization enjoys such reliably effective supremacy of its law over the laws of member governments, with a recognized Court of Justice to adjudicate disputes’ (1991: 11). Moreover, this kind of legally-based dispute settlement is generally differentiated from more power-oriented, diplomatic dispute settlement. While the latter is, by definition, characterized by bargaining and extra-legal pressures, legally-based dispute settlement is held to be more firmly rooted in the rule of law exclusively (Ehlermann, 1992: 219; Petersmann, 1994: 1169). In this section, we show, however, that even in the EU, bargaining is a fundamental aspect of solving compliance problems. While indeed resting on the rule of law, the EU’s procedures for making states comply provide ample room for ‘political’ solutions. One legal scholar puts it this way:

We usually think of negotiation and adjudication as alternative forms of dispute settlement. It may be suggested, however, that in the daily practice and working ideology of the Commission, the two are not alternatives but instead are complementary. The main form of dispute settlement used by the

Commission is negotiation, and litigation is simply a part, sometimes inevitable but nevertheless generally a minor part, of this process. (Snyder, 1993: 30)

Third-Party Enforcement in the EU: The Commission, the Court and the Article 169 Infringement Procedure

Compliance bargaining in the EU takes place within the formal framework of Community enforcement, as regulated in the EEC Treaty of 1957. The principal enforcement institutions of the EU are the European Commission and the European Court of Justice (ECJ).

The Commission's enforcement role is manifested in Article 155 of the Treaty, which states that the first duty of the Commission is to 'ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied'. The Commission is thus designated as the guardian of the treaties, a role which it primarily carries out by conducting monitoring and by initiating infringement proceedings against member-states which fail to fulfil their obligations under EC law. The European Court of Justice is the final arbiter in all legal questions concerning EC law, and its decisions are binding. Its role is expressed in Article 164 of the Treaty, according to which the ECJ 'shall ensure that in the interpretation and application of this Treaty the law is observed'. Like the officials of the Commission, judges are independent and do not serve as representatives of their states. The ECJ provides direct or indirect dispute settlement in conflicts between the Commission, member-states, firms and individuals. In addition, its rulings and interpretations build up a large and influential body of case law which further clarifies the treaties and provides precedents for future disputes.

The EU structure of supervision offers both forms of third-party enforcement — dispute settlement by the Court in disputes between member-states, and infringement proceedings against member-states with the Commission as prosecutor. The principal enforcement instrument of the Commission is the infringement procedure provided by Article 169 of the EEC Treaty. Article 169 grants the Commission the authority and responsibility to enforce compliance by way of initiating infringement proceedings against member-states which fail to fulfil their obligations. Parallel to this mechanism, however, the EEC Treaty also provides for a procedure under Article 170, where member-states can take action against each other. This infringement procedure has been invoked very rarely, however. As Dashwood and White put it — 'In practice the Member States have shown little enthusiasm for their independent right of action under Article 170' (1989: 409). In fact, only twice have cases reached the European Court of Justice,

and one of these was settled before the Court could deliver a judgement (Weatherill and Beaumont, 1995: 208).

The literature on EU enforcement stresses a number of advantages of the Article 169 procedure compared to the more self-help-like procedure under Article 170, making the former more attractive to member-states. First, it saves the member-states the cost of litigation (Weatherill and Beaumont, 1995: 208). Second, the Article 169 procedure reduces the risk of spirals of retaliation, since under Article 170, ‘a snowball effect might be the consequence of a complaint; where one State starts, another follows!’ (Audretsch, 1986: 237). Third, it offers an infringement procedure which satisfies the preference for diplomatic courtesy among the member-states (Audretsch, 1986: 403–4; Weatherill and Beaumont, 1995: 208). Fourth, as emphasized by Judge Pierre Pescatore, among others, the Article 169 procedure defuses the Article 170 procedure by providing a process of enforcement that is easier for states to accept, since the infringement proceedings are initiated by ‘an institution representative of the whole, and hence objective both by its status and its task’ (1974: 82).

Interests and Bargaining Power in the EU Compliance Game

Compliance bargaining in the EU primarily takes place within the framework of the Article 169 infringement procedure, which offers a number of steps where conflicts may be resolved and a sanctioning ladder where the costs of non-compliance are progressively increased. In general terms, the seemingly formal and inflexible framework of the infringement procedure provides ample room for bargaining in terms of direct and indirect verbal and behavioural communication between the Commission and the member-states. ‘Compliance through persuasion’ is the leitmotif of the Commission, and the Article 169 procedure its primary instrument. The Commission describes the purpose of the infringement procedure as being ‘to induce a Member State to come into line with Community law’, or ‘to put an end to infringements . . . without actions necessarily having to be brought before the Court of Justice’ (1996b: 5, 1992: II). In view of the procedure’s proved effectiveness, the Commission has even promoted it as an instrument of policy achievement, in particular with respect to the completion of the internal market programme — ‘Article 169 of the EEC Treaty is now an instrument for the achievement of a policy, and not solely an essential legal instrument’ (1988: 5).

On the surface, the Article 169 procedure is a strictly judicial process in which the Commission initiates and pursues infringement proceedings against member-states which have committed clear and objectively identifiable violations of Community law. Beneath the surface of neutral and

objective law, however, Article 169 proceedings are highly political and subject to substantial discretion on the part of the Commission. In the words of Audretsch, the Commission exercises its supervisory function ‘not only from a purely technical, but also from a political point of view — not incidentally, but permanently’ (1986: 408). When deciding about infringement proceedings against member-states, the obligation of the Commission is dependent on its own view of the situation at hand. Furthermore, it is extremely difficult for other parties to judge whether the Commission acts in accordance with its enforcement obligations as handed down by Article 169. As a consequence, the Commission’s discretion with respect to infringement proceedings is significant (Audretsch, 1986: 36; Dashwood and White, 1989: 399; Mendrinou, 1996: 11–16).

In particular, the discretion of the Commission is apparent and notable with regard to three essential aspects of the Article 169 procedure — the decision of whether to initiate infringement proceedings or not, the decision of what the time limits should be within which member-states will have to comply in order for the Commission not to bring the case yet one step further in the procedure, and the decision of when and how to close formal infringement proceedings. In all three respects, the Commission enjoys considerable discretion as to how it may act in relation to member-state compliance and non-compliance.

It is this discretion on the part of the Commission which opens up for compliance bargaining in the EU context. In essence, the discretion gives the Commission room for manoeuvre and bargaining within the confines of its formally delegated role.⁷ Commission discretion provides for a setting in which bargaining is possible and compromises are not ruled out. As Audretsch expresses it in his seminal work on EU enforcement, the Commission is in a position where it may arrive at ‘compromise solutions in a flexible way through negotiations, conciliatory measures, and mutual concessions’ (1986: 449). Expressed differently, had the discretion of the Commission been very limited, or even non-existent, there would have been little scope for bargaining, since the Commission would not have had anything to ‘offer’ member-states and would not have been able to compromise. Bargaining, by definition, requires a zone of acceptance within which both parties may consider compromise solutions, if there is to be any agreement at all.

This process of post-agreement bargaining over compliance contains both cooperative and conflictual elements. With respect to conflictual elements, the parties disagree as to what actions are in breach of Community law. Member-states generally maintain that their actions are justifiable and in compliance. The Commission’s reasons for pursuing infringement proceedings are either based on flawed legal assumptions and interpretations, or

reflect a failure to comprehend domestic political processes and preferences, the member-states contend. The Commission, on the other hand, bases the initiation of infringement proceedings on the fundamental notion that member-states are in breach of EC law. In its role as guardian of the Treaty, it is the obligation of the Commission to fight such non-compliance by way of infringement proceedings, the Commission holds.

These conflictual elements are necessary, but not sufficient, conditions for compliance bargaining. Had not the member-states and the Commission also had interests in common, there would have been no basis for compliance bargaining. As it is, they do. All parties share a preference for amicable solutions, and neither the states nor the Commission desire infringement proceedings. As one Commission official puts it, 'legal proceedings are not good for anyone' (interview, 24 September 1996). From the perspective of member-states, infringement proceedings in general, and ECJ judgements in favour of the Commission in particular, are highly uncomfortable and tarnish the member-states' reputation as cooperative partners. 'The ultimate fate of having their failure to fulfil an obligation under the EEC Treaty formally established by the European Court is one the Member States are evidently anxious to avoid' (Dashwood and White, 1989: 411). As a result, 'Member States endeavour, by means of a variety of objections, as far as possible to avoid Judgments being given against them in proceedings for failure to fulfil a Treaty obligation' (Everling, 1984: 221).

The Commission's desire to close infringement proceedings and put an end to violations by way of amicable solutions, stems from its dual role in European integration and its limited resources. First, in addition to its role as Community watch-dog, the Commission also serves as policy initiator and prime promoter of European integration. While disconnected in theory, these repressive and creative functions are not as easily separated in practice. The Commission's approach toward a member-state in the field of enforcement invariably affects its relations with this member-state in the policy-making area. As Audretsch succinctly puts it — 'Suing a Member State for (alleged) failure, and trying to obtain its fiat for a political compromise are often hard to combine' (1986: 277). At a more general level, the Commission must ensure the continued cooperation of member-states for integration to proceed. As a consequence, '[p]olitical considerations might induce the Commission to make concessions to national interests and pressure of the States. The Commission knows after all that the progress of integration depends to a high degree upon the willingness and the cooperation of the States. It is extremely important for the Commission to ensure this cooperation permanently' (Audretsch, 1986: 420).

Second, the Commission is subject to resource constraints. With limited staff and an extremely heavy workload, the option of informal and amicable

solutions is very attractive in comparison to the resource-intensive alternative of continued infringement proceedings (European Commission, 1989: 13; interview, Commission official, 24 September 1996). As Evans establishes with respect to the Commission's preference for informal settlements, 'it is doubtful whether the Commission has sufficient manpower to utilise the cumbersome Article 169 procedure in every case where it "considers" that a breach of Community law has been committed by a Member State' (1979: 450). Compliance bargaining is the fundamental result of these common and conflictual interests. Both parties share a preference for amicable solutions, yet they disagree as to whether or not the member-state is in breach of EC law.

The Commission's bargaining power ultimately rests with its unilateral authority to bring a case to the next step in the infringement procedure, with the final threat of referring the case to the Court of Justice. First, a member-state's cost of non-compliance increases with each step in the procedure, as the violation becomes more generally known and thereby incurs more wide-ranging negative reputational effects. Concludes Audretsch — 'When the State appears to persist in the violation, an attempt will be made to raise the cost of violation or to lower its profit. The threat of political and social pressure tends to raise the cost' (Audretsch, 1986: 410–11). Second, since the entry into force of the Maastricht Treaty in November 1993, the Commission and the Court may, under a revised Article 171, impose lump sum penalties on member-states which refuse to comply with ECJ judgements. In cases where member-states have not taken measures to comply with the Court's judgement within the assigned time period, the Commission may propose a penalty to be approved or dismissed by the Court. In all of the few cases where the Commission has threatened to use this new sanction by way of proposing penalty payments to the ECJ, member-states have backed down in face of the often extremely high sums involved (interview, Commission official, 24 February 1998).

Third, the bargaining power of the Commission is further strengthened by the Court's strong tendency to rule in favour of the Commission in cases which go all the way to a full court. About 90 percent of all judgements are in favour of the Commission's position (e.g. Audretsch, 1986: 363; European Commission, 1996b: 113–14). There is no doubt that the Court's judgement record constitutes a significant deterrent, which provides strong incentives for member-states to reach a solution at an earlier stage of the procedure. A fourth and final aspect of the Commission's bargaining power is its ability to present itself as bound by EC law, which has the advantage of providing a firm and tangible resistance point (interview, Swedish government official, 6 December 1996). Conditional on its credibility, which ultimately depends on member-states' earlier experience of

Commission discretion, this resistance point remains a powerful instrument for narrowing the zone of acceptance to the advantage of the Commission.

The member-states' bargaining power rests with their physical control over compliance and non-compliance and the relative weakness of the Commission's position. First, the enforcement authority of the Commission and the Court has been delegated to them by the member-states, the masters of the treaty, and may be subject to revisions if so desired by the member-states (Pollack, 1997). Second, as discussed earlier, the Commission requires and desires the continued and constructive cooperation of member-states in the policy-making phase, if integration is to progress. Third, the Commission prefers 'acceptable solutions' to continued non-compliance, since the latter endangers the authority of the Community's legal system (Audretsch, 1986: 439). Fourth, member-states are unilaterally in control of the decision whether or not to comply, and the Commission is physically unable to exert compliance by way of force. Combined, these aspects translate into a dependency of the Commission on state collaboration and a resulting bargaining power on the part of the member-states.

Process and Procedure: Patterns in EU Compliance Bargaining

Compliance bargaining within the framework of Article 169 consists of bargaining in a wide sense — indirect and direct verbal and behavioural communication. In letters and face-to-face meetings, the Commission attempts to persuade member-states to comply by explaining their violations under EC law, by communicating the threat that the Commission may bring the case to the next step in the procedure, and by reminding states that economic sanctions may be imposed on them if they fail to comply with Court judgements (European Commission, 1995b: 1e; interview, Swedish government official, 6 December 1996). Moreover, the Commission attempts to raise the cost of non-compliance by mobilizing social and political pressure, thus exploiting states' concern with reputational repercussions. To this end, the Commission presents official reports on suspected and established infringements, publicly announces its initiation of infringement procedures under Article 169, and reports non-compliance patterns at Council of Minister meetings.⁸ Member-states, for their part, attempt to explain to the Commission the political, economic, social or administrative reasons and rationales behind the measures under review. Member-states may also present alternative interpretations of the problem at hand, suggest compromise solutions or signal the unilateral decision not to budge and let the case run its course.

The Article 169 infringement procedure consists of four phases. In the

first, informal phase, the Commission notifies the member-state in question of its alleged act of non-compliance and the member-state is given the opportunity to respond. In case the matter is not settled in the first, informal phase, the infringement proceeding continues by way of formal means. In the second phase, the Commission sends a letter of formal notice to the member-state, whereby the Commission informs the state of its grounds for complaint and invites it to submit its views. The third phase consists of the Commission giving a reasoned opinion. The difference compared to the letter of formal notice is basically that, while the letter describes the violation in terms of subject-matter, the reasoned opinion presents the legal arguments that the Commission relies on. If the member-state fails to comply with the reasoned opinion and continues its action in breach of EC law, the infringement proceeding enters into the fourth and final stage of referral to the European Court of Justice.

Informal as well as formal bargaining aimed at finding mutually acceptable solutions takes place at all stages of the Article 169 infringement procedure. Compliance bargaining is, however, most intense in the early stages of the procedure and close to non-existent in the last stage (before the Court). In fact, Steiner and Woods argue that the very rationale behind the earliest stages of the procedure is to find solutions through bargaining — ‘The initial stages, both formal and informal, between the Commission and the States, are designed to achieve compliance by persuasion’ (1996: 413).

The four stages can be seen as an example of a ‘sanctioning ladder’ with a progressive increase of pressure and costs of non-compliance. In the first of these four stages, ‘the conciliatory phase’ (Cahier, 1967: 136), about one-third of all cases are settled (Steiner and Woods, 1996: 411). A significant share of the remaining cases are settled at the second and third stages of the Article 169 infringement procedure. Of all cases between 1978 and 1995 where letters of formal notice were issued, only one-third reached the stage of reasoned opinions and only 10 percent were referred to the European Court of Justice (see Statistical Appendix). The notion that the existence of a sanctioning ladder provides a context amenable to bargaining is confirmed by the Commission — ‘The Commission endeavours to make the fullest use of the pre-litigation stage of the infringement proceedings to persuade the offending Member State to remedy its deficiency or to negotiate a settlement. As the Court has held, referral of an action to it is the last resort, the *ultima ratio* enabling the Community interests enshrined in the Treaty to prevail over the inertia and resistance of the Member States’ (1996b: 9). States are equally anxious to close cases before they reach the Court, since, as one Commission official puts it, ‘no member state wants to

have infringement proceedings in front of the Court of Justice against it' (interview, 24 September 1996).

Once a case has been referred to the Court of Justice, the room for bargaining is significantly reduced, as the responsibility shifts from the 'political' Commission to the 'judicial' Court. The cases that indeed are closed before an ECJ judgement is delivered are generally the result of member-states getting cold feet, rather than amicable settlements (Everling, 1984: 221).

All member-states participate in compliance bargaining and all member-states display the same preference for backing down or finding amicable solutions at an early stage of the infringement procedure. Yet, member-states differ in terms of their bargaining profiles, which may be attributed to differences in bargaining and compliance culture.⁹ In particular, and as indicated by the Statistical Appendix, states vary as to when in the formal infringement procedure they tend to settle cases. Some states, notably Denmark, the UK, the Netherlands and Spain, go to great lengths to close cases as early as possible in the procedure. Other states, such as Italy, Belgium and Greece, tend to persist in their violations and end up having a higher share of cases referred to the Court of Justice. Portugal, alone, demonstrates the strategy of being recalcitrant in the early stages of the procedure, only to settle more cases than any other state in the third stage of the procedure, when it faces the risk of having the cases referred to the Court. Germany, France, Luxembourg and Ireland signify the average EU bargaining profile of about 35 percent of formal infringement proceedings reaching the stage of reasoned opinions, and about 10 percent being referred to the ECJ.

As noted earlier, Article 169 has spawned bargaining in a wide sense. Since the late 1980s, compliance bargaining in this wider sense has been supplemented with direct, formal and institutionalized negotiations, so-called 'package meetings', in matters concerning the European internal market and environmental regulation. The Commission describes package meetings as 'an instrument of partnership between the Commission and the Member States which is designed to arrive at non-contentious solutions to existing litigation concerning national compliance with Community law' (1993a: 13). At package meetings, the Commission meets with one member-state at a time to discuss all cases currently under review by the Commission, whether at the informal or the formal stage of the Article 169 procedure.

Package meetings are conducted with each member-state about every second year. First, Commission and member-state officials meet in Brussels for a preparatory meeting, at which the future package meeting is planned and the cases to be discussed are reviewed. Second, the actual package meeting takes place in the member-state capital. At this meeting, the

member-state and the Commission develop their positions and search for solutions. Third, there is a follow-up meeting, at which the same cases are discussed and new cases are included if such have arisen. Fourth, the package meeting process is closed with a concluding meeting, where progress on the cases under negotiation is reviewed. All meetings are preceded as well as followed by communication between the parties, and the entire process is generally described as one of ‘dialogue’ (European Commission, 1994b: 57, 1995b: 26; interview, Swedish government official, 6 December 1996).

The Commission credits package meetings for being a very effective way of settling infringement cases, since they are both resource efficient and permit the Commission to focus on one member-state at a time. Declares the Commission — ‘These meetings ensure that the situation is constantly under review and allow the Commission to bring extra pressure to bear on the competent national departments’ (1992: 2). According to Commission reports, 74 of the 217 cases terminated in 1994, and 60 of the 238 files closed in 1995 in the area of free movement of goods were, for example, settled through the process of package meetings (1995a: 26, 1996a: 23). As the Commission concludes, ‘Pragmatic solutions in keeping with Community law can thus be sought jointly as early as at the complaint stage’ (1989: 14).

Summing up, EU compliance bargaining, within the framework of the Article 169 infringement procedure, provides a pertinent illustration of how bargaining and compliance may be linked in the post-agreement phase of international cooperation. Alleged non-compliance produces a bargaining process of direct and indirect verbal and behavioural communication, which in turn influences the level of compliance, elucidates the agreement and affects future cooperation by distributing reputational effects. Moreover, our case suggests ways of analysing compliance bargaining within this crude framework. Specifically, a bargaining perspective on compliance points to the need to conceptualize power in relational terms and to look for informal processes in the shadow of formal structures. Moreover, compliance bargaining within the EU suggests that third-party enforcers can draw on sources of bargaining power which make them relatively more effective in inducing compliance than the sort of decentralized enforcement we find in self-help systems. While perhaps one of the most prominent examples of the compliance–bargaining link, the EU case constitutes but one instance of the pervasive phenomenon of post-agreement bargaining.

Where Do We Go from Here? A Concluding Note on Future Research

This article started from the observation that, while world politics today hosts plenty of examples of post-agreement bargaining, this phenomenon

has largely escaped the attention of International Relations theorists. Neither the literature on compliance nor that on negotiation and bargaining has so far elaborated on the nature, causes and effects of bargaining after an agreement has been struck. In short, post-agreement bargaining is a theoretical lacuna worthy of exploration.

In this article, we have made a first attempt to examine post-agreement bargaining in theory and practice. We have reviewed existing literature on compliance and bargaining, presented an analytical framework for analysing compliance bargaining and explored compliance bargaining in the EU in light of this framework. This article is but a first attempt to address a neglected empirical phenomenon. Compliance bargaining is prevalent in world politics and deserves careful attention and analysis beyond the confines of this article.

We end by suggesting that the phenomenon of post-agreement bargaining has implications and calls for research in four particular areas. First, post-agreement bargaining is capable of altering the fundamental premises of both the old and more recent versions of the realist–liberal debate in International Relations theory.¹⁰ Rather than arguing that the power of international laws, regimes and agreements takes on either high values (liberal idealism) or low values (classical realism), post-agreement bargaining can be introduced to explain variation. More specifically, it can be argued that the power of international laws and rules partly depends on the bargaining strength of guardians and violators. General propositions within IR theory on the power of international rules are therefore likely to be misleading to the extent that these are not sensitive to the relative bargaining strength of states and international enforcement institutions in the post-agreement phase. In the same way, a conception of post-agreement bargaining may affect the fundamental positions and premises of the neorealist–neoliberal debate. If post-agreement bargaining may alter outcomes of agreements already entered into, then post-agreement bargaining is crucial to how international cooperation distributes gains among states. To focus solely on how gains are distributed in pre-agreement negotiations, as neorealism and neoliberalism do, is to neglect the central implication of post-agreement bargaining. Regardless of whether states are motivated by absolute gains only or relative gains as well, post-agreement bargaining may redistribute gains and thus alter the terms on which states entered into the agreement.

Second, the literature on negotiation and bargaining will remain incomplete as long as it does not incorporate compliance bargaining. Bargaining follows as well as precedes international agreements, and negotiation and bargaining theory would gain by reducing its preoccupation with pre-agreement processes, in favour of addressing post-agreement bargaining as

well. To the extent that this literature pays attention to compliance and implementation, it emphasizes the need for negotiators to consider implementation beforehand and *ex ante* design mechanisms for ensuring compliance. Negotiation and bargaining theorists need, however, to think about compliance as a process which in itself can be understood in bargaining terms, not only as a matter to be considered in pre-agreement negotiations. Moreover, if we conceptualize bargaining as a process that does not end with the signing of an international agreement, it becomes clear that any final assessment of bargaining power, skills and success must await the results of post-agreement bargaining, and would be premature if based only on pre-agreement negotiations. Other aspects which are relevant from a negotiation and bargaining perspective typically address the nature of compliance bargaining, and raise questions such as how post-agreement bargaining differs from pre-agreement negotiations, and how the characteristics of various kinds of post-agreement bargaining vary.

Third, post-agreement bargaining is of immediate relevance to the study of compliance and implementation in International Relations theory. Existing approaches to compliance, such as the enforcement and management schools, dispute the sources of compliance and non-compliance. Irrespective of whether they emphasize sanctions or capacity building as solutions to compliance problems, these approaches are predominantly static in their orientation. By explicitly recognizing post-agreement bargaining as a process through which compliance problems are often addressed, these approaches would be better equipped to account for the dynamic elements of enforcement and management. Moreover, a focus on bargaining may thereby contribute to bridging the divide between these approaches, since bargaining may involve aspects of enforcement as well as management. Indeed, compliance bargaining lends some support to both these approaches, but also suggests how they have to be refined to gain greater explanatory power. While confirming the notion that enforcement is an essential element in making states comply, compliance bargaining also indicates that some forms of enforcement, i.e. third-party, may be more effective in ensuring compliance than others, i.e. self-help. Similarly, compliance bargaining verifies that the management strategy of jaw-boning is important in improving compliance, but demonstrates that this is just half the story, since international institutions also might have to yield in the two-way process of bargaining over compliance. In general terms, the phenomenon of post-agreement bargaining calls for research related to how state compliance is affected by bargaining as a means for solving compliance problems. What are the effects of bargaining on compliance, given variations in bargaining power, resistance points, opportunities for side-payments, self-help/third-party regime, multi-level games, etc?

Fourth, post-agreement bargaining demands research as a phenomenon in and of itself. In the analytical framework presented in this article, we have pinpointed a number of varieties, causes and effects of compliance bargaining. Given the exploratory nature of this article, we do not view these suggestions as final and exhaustive. Rather, we encourage future research to explore and refine the various forms of post-agreement bargaining, to tease out additional sources and effects, and to be sensitive to variations in causal patterns. For too long, post-agreement bargaining has been a neglected area of International Relations. It is about time we think as seriously about the bargaining which follows an agreement as we do about the bargaining leading up to one.

Notes

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1. On 1 November 1993, the European Community became one 'pillar' of the European Union, which also includes two primarily intergovernmental pillars. We refer to the European Union by its current name, but use the term European Community (EC) law when we refer to its law, as the law-making powers of the EU are restricted to the European Community pillar.
2. This division was first suggested by Chayes and Chayes (1995) and Downs et al. (1996). Obviously, this division of the compliance literature into two main camps does not fully capture the richness of this growing literature. For examples of more eclectic approaches, see, e.g. Mitchell (1994), Haas (1998), Underdal (1998). None of these works, however, captures the phenomenon of post-agreement bargaining.
3. For examples of works which may be referred to the enforcement school, see Olson (1965), Oye (1986), Hungerford (1991), Martin (1992), Yarbrough and Yarbrough (1992), Bayard and Elliott (1994), Downs et al. (1996), Dorn and Fulton (1997).
4. For examples of works which may be referred to the management school, see Chayes and Chayes (1991, 1993, 1995), Haas et al. (1993), Keohane (1986), Keohane and Levy (1996), Sand (1990), Young (1979, 1989, 1994).
5. See Yarbrough and Yarbrough (1997) for a careful and systematic elaboration of various kinds of third-party dispute-settlement mechanisms in international trade. On third parties and international law generally, see Kratochwil (1989: 181-7). In addition to international institutions, hegemons may also act as third-party enforcers. We have, however, decided to limit the concept of third-party bargaining to the role of international institutions in order to reduce confusion. On hegemons as third parties and enforcers, see Yarbrough and Yarbrough (1987, 1992), Mitchell (1994: 40-1).

6. Dorn and Fulton (1997: 35–6) use the term ‘compliance ladder’ to denote a similar process. See, also, Ury et al. (1993: 305–8) on how dispute-resolution systems, which offer low-cost procedures for settling disputes, make it more likely that these procedures will be chosen.
7. While indeed often great, the Commission’s discretion is not unlimited. In particular, the discretion is limited by the need and desire of the Commission to remain credible as an enforcer of EC law. It would certainly hurt the Commission in its role if it failed to pursue infringement proceedings in cases of clear and manifest violations. Moreover, too much discretion could affect the Commission’s bargaining power negatively, if member-states perceived the Commission to be no longer bound by its role as guardian of the treaty.
8. The Commission publishes annual reports on its monitoring of member-state compliance with EC law. See, for example, European Commission (1993b, 1994a, 1995b, 1996b, 1997). On public announcements and press releases, see, for example, European Commission (1990: IV, 1993b: 10), as well as concrete examples in the Commission’s magazine *Single Market News* and on the Commission’s homepage on the Internet. On Council of Minister meetings, see, for example, European Commission (1994b: xiii). Also emphasized in interviews with Commission officials, 22 March and 25 September 1996.
9. On negotiation culture in the EU, see, for example, Abélès et al. (1993), Elgström (1996). On compliance culture in the EU, see Siedentopf and Hauschild (1988: 63–5); Bergquist (1991: 51–4).
10. For classic realist formulations, see, for example, Carr (1939), Morgenthau (1948), Waltz (1954). For liberal idealist formulations, see, for example, Angell (1933). For neorealist contributions to the debate, see, for example, Grieco (1988, 1990, 1993), Mearsheimer (1995a, b). For neoliberal contributions to the debate, see, for example, Axelrod and Keohane (1986), Keohane (1989, 1993), Keohane and Martin (1995), Powell (1991, 1994), Snidal (1991).

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*Statistical Appendix: Cases per Member-State in the
Article 169 Procedure, 1978–95*

	Proceedings initiated	Reasoned opinions	Referrals to ECJ
Belgium	1018	40.8%	15.5%
Denmark	533	15.6%	3.6%
Germany	910	36.2%	9.2%
France	1210	35.4%	10.2%
Ireland	793	31.5%	8.7%
Italy	1459	49.4%	20.2%
Luxembourg	765	32.7%	9.5%
Netherlands	764	27.9%	6.7%
UK	789	23.3%	4.4%
Greece	1146	39.4%	10.3%
Spain	732	28.3%	5.1%
Portugal	773	31.8%	1.9%
EU 12	10,912	34.6%	9.9%

Source: Based on data collected from the Commission's reports on the monitoring of Community law (1984: 24, 1990: 45, 1995b: 90, 1996b: 111).