Contemplating compliance: European compliance mechanisms in international perspective
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Citation for published version (APA):
Koops, C. E. (2014). Contemplating compliance: European compliance mechanisms in international perspective
CHAPTER 1
On Compliance and Enforcement
If you think it your duty to make children do what you want, whether they will or not, then it follows inexorably that you must make them afraid of what will happen to them if they don’t do what you want. You can do this in the old-fashioned way, openly and avowedly, with the threat of harsh words, infringement of liberty, or physical punishment. Or you can do it in the modern way, subtly, smoothly, quietly, by withholding the acceptance and approval which you and others have trained the children to depend on; or by making them feel that some retribution awaits them in the future, too vague to imagine but too implacable to escape.

Chapter 1 On Compliance and Enforcement

1. INTRODUCTION

In order to ascertain the effectiveness of compliance mechanisms in international organizations, first and foremost the concept “compliance” must be defined. A general understanding of the elements that constitute compliance is an essential prerequisite before any comparison of compliance mechanisms can be undertaken. This chapter will thus first examine existing theories and develop a working definition of the concept of compliance. Second, four questions related to the concept of compliance are posed to determine the type of obligations, compliance and relevant compliance mechanisms. The final part will discuss the concept of effectiveness in the context of this research.

2. TO ENFORCE OR NOT TO ENFORCE

States become members of international organizations for a multitude of reasons, such as to enhance economic cooperation,1 to tackle common problems together,2 or to maintain international peace and security through coordinated efforts,3 to name but a few. More broadly, international organizations and international law enhance cooperation to alleviate externality problems that arise

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1 As in the WTO: “The Parties to this Agreement, Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development[,]” (preamble of the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 2 (1999), 1867 UNTS 3, 33 ILM 1125 (WTO Agreement)).

2 For example, the WHO Constitution states: “For the purpose of co-operation among themselves and with others to promote and protect the health of all peoples, the Contracting Parties agree to the present Constitution and hereby establish the World Health Organization” (preamble of the Constitution of the World Health Organization, 22 July 1946, 14 UNTS 185, hereinafter WHO Agreement).

3 As stated in the preamble of the UN Charter: “We The Peoples Of The United Nations Determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, and for these ends, [..], have resolved to combine our efforts to accomplish these aims” (preamble to the Charter of the United Nations, 24 October 1945, 1 UNTS XVI, 1 UNTS XVI, hereinafter UN Charter).
when states act unilaterally.\textsuperscript{4} Furthermore, international laws may be used to discourage national governments from engaging in wasteful economic behavior due to their relations with international interest groups.\textsuperscript{5} Regardless of the regulatory context, it is hard to imagine states acceding to international organizations if they did not benefit in some way from the membership of these organizations. No country would willingly commit itself to the obligations that membership of an international organization entails if the cost of membership outweighed the benefits.\textsuperscript{6}

On the other hand, it is also difficult to understand why states would want to comply with international agreements, given that these agreements are usually costly in the short term, while generally no central enforcement system exists.\textsuperscript{7} In fact, countries in practice do indeed prove less willing to comply with the obligations they signed up for upon their membership to an international organization. Despite this existence of non-compliant behavior, however, it probably still holds true that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time (as stated by Henkin in 1968).\textsuperscript{8} In light of this reality, multiple theories have been developed over the past four decades to explain why states comply with their obligations.\textsuperscript{9} However, almost no theory exists on why states sometimes do not comply with their obligations, and even less theory on what should be done in the case of non-compliance.\textsuperscript{10}


\textsuperscript{5} Ibid.


\textsuperscript{7} Simmons, B.A., ‘Compliance with International Agreements’ (1998) \textit{1 Annual Review of Political Science}, p. 76.

\textsuperscript{8} Henkin (1979).

\textsuperscript{9} Most of the literature comes from the field of international relations. Section 3 further on in this chapter explains the main theories, including realism, institutionalism, or normative theories.

\textsuperscript{10} See section 3 and below in this chapter for an overview of the theories that relate to (non-}
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For sake of simplicity, and in line with Henkin’s statement, this research assumes that states have a natural propensity to comply with their treaty obligations: “For a study of the methods by which compliance can be improved, the background assumption of a general propensity of states to comply with international obligations [...] seems more illuminating.” The adoption of this assumption does not imply the absolute truth of this statement, but helps focus on the exception, rather than the norm; that is, cases where compliance with legal obligations is not achieved by the Member States of an international organization. Given the fact that obligations are usually adhered to even in the absence of an enforcement system, those relatively few cases where nations do not observe their obligations stand out all the more and deserve special attention. Although it is debatable whether perfect compliance is preferable to some level of non-compliance, it is clear that a certain level of compliance is needed for an international organization to function.

If it is difficult to understand why exactly states do not comply with their international agreements, it is even more complicated to find a way to induce compliance in situations where states do not adhere to the rules of the organization. One way to make states comply could be to introduce systems that are able to force Member States into compliance. However, enforcement requires an enforcer, which the international system as a whole does not have. Also, even where a specific body has been appointed as enforcer within the context of an international organization, certain underlying elements (e.g. the institutional set-up of the organization, its legal framework, political considerations) will often play a role in preventing or inducing Member State compliance, which the enforcer can only influence up to a certain point. When these elements can be

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12 This alludes to the theory of efficient breach, where economic theory suggests that when the benefits of breaching an agreement exceed the costs of complying with an agreement, the system governing the agreement should allow a party to breach the agreement and vice versa. In this manner efficient breaches will be allowed and inefficient breaches deterred. (See e.g. Posner and Sykes (2010), p. 243 or Morrison, R., ‘Efficient Breach of International Agreements’ (1994) Denver Journal of International Law and Policy, p. 183.)

13 What Chayes and Chayes call an “acceptable level of compliance” not only changes over time with the capacities of the parties and the urgency of the problem, but may also depend on the type of treaty, the context, or the exact behavior involved. (Chayes and Handler Chayes (1995), p. 17).


15 One could see the European Commission as the enforcer of EU law, given its function as Guardian of the Treaties as per Article 17 of the Treaty on European Union (“[The Commission] shall oversee the application of Union law under the control of the Court of Justice of the European Union”).

16 E.g. the influence of the Member States, the existence of more than one compliance mechanism,
identified, therefore, theories can be developed on how to construct a compliance mechanism that fits the existing order of things in order to increase compliance, through force or otherwise.

To find out which elements play a role in inducing compliance, the concept of compliance is defined in light of general compliance theories. Based on these theories, two main elements of non-compliant behavior are extracted that most influence the choice for a certain type of enforcement system. Two archetypes of compliance systems exist based on the enforcement model and management model, terms borrowed from international relations theory to identify the core of the non-compliance problem. Defining the term effectiveness, then, is the last step towards formulating a framework for analysis of the effectiveness of existing compliance mechanisms.

3. Defining Compliance

How can the concept of compliance be defined? Whereas the dictionary defines the term as “the acting in accordance with, or the yielding to a desire, request, condition, direction, etc.”, legal compliance can generally be captured by the definition given by Young, according to which “Compliance can be said to occur when the actual behavior of a given subject conforms to prescribed behavior, and non-compliance or violation occurs when actual behavior departs significantly from prescribed behavior”. Young’s definition thus captures both compliance as well as non-compliance, where it is interesting to note the choice of the term “significant departure”. This signifies the possibility for discretion in the determination of the occurrence of non-compliance. Raustiala then applies this definition to compliance with international rules as: “A state of conformity or identity between an actor’s behavior and a specified rule”; or also “an actor’s behavior that conforms to a treaty’s explicit rules”. Zürn and Joerges make a further distinction between two dimensions of compliance: compliance as i) the difference between obligation and behavior, and ii) the way this difference is dealt with – to what extent do addressees comply and how are accusations of non-compliance

the possibility of discrestional decision-making by the enforcer etc. Such elements will be encountered throughout the analysis of the seven compliance mechanisms investigated in this thesis.

17 Oxford English Dictionary
18 Young (1979), p. 3.
This chapter’s focus is on the second dimension of compliance – how instances of non-compliance are dealt with in a particular context.

From the above definitions it is not clear whether non-compliance should be seen as the mirror image of compliance. Young’s definition illustrates this best by stating that non-compliance occurs when actual behavior departs significantly from prescribed behavior. Not every instance of non-conformity to prescribed behavior therefore automatically constitutes non-compliance. As previously mentioned, it is debatable whether perfect compliance is preferable to some undefined degree of non-compliance. From an economic perspective at least, perfect compliance is neither practicable nor desirable. In deciding how much compliance is economically desirable, it is necessary to compare three factors: the avoided social losses, compliance costs and enforcement costs. In some cases, it may cost more to avoid or repair non-compliance than the actual harm that would occur in the event of non-compliance. There is thus a difference between optimal compliance and perfect compliance.

In most international organizations, this determination is left to the Member States. In the WTO, for example, only Member States can start proceedings against another Member State for non-compliance with WTO rules. The EU on the other hand has solved the determination problem by assigning the European Commission (“the Commission”) the role of Guardian of the Treaty. This means the Commission is the institution that decides if and when to start proceedings...

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21 The other dimension of compliance (the difference between behavior and obligation) will be explained in the context of the international organizations that are discussed in later chapters. In this current chapter, a theoretical framework is set out that is potentially applicable to all types of international (economic) organizations and thus all types of international obligations under the rules of those organizations.

22 See e.g. Abbot, C., Enforcing Pollution Control Regulation; Strengthening Sanctions and Improving Deterrence (Hart Publishing, New York 2009), pp. 1-17.


24 Article 17(1) TEU (ex 211 EC, as amended) confers the responsibility of the correct application of the Treaty onto the Commission: “The Commission shall promote the general interest of the EU and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of EU law under the control of the Court of Justice of the European Union. [...]”.
against a Member State for non-compliance (Article 258 TFEU). If the Commission chooses not to bring proceedings, other Member States also have the option of bringing an allegedly non-compliant Member State before the Court of Justice of the European Union (CJEU) (Article 259 TFEU). Ultimately, it is the CJEU that decides whether non-compliance exists or not (Article 260 TFEU). Be it through a Member State or a more central enforcement actor, a certain amount of discretion remains as to the determination of the existence of non-compliance, as well as regarding the decision to take action against this perceived non-compliance.

For the purpose of this research, the assumption is made here that the absence of perfect compliance is equal to non-compliance. This assumption, however, will need to take into account the discretion left to those making the actual decision on when behavior constitutes non-compliance in practice. A certain level of non-compliance may be acceptable within an international organization. However, since it is impossible to determine beforehand on what criteria these “enforcers” within international organizations will base their decisions, the assumption of non-compliance being equal to anything less than perfect compliance remains valid. After a discussion of compliance theories as well as compliance in practice in the following sections, a definition of non-compliance can be formulated that will be used in this study.

4. COMPLIANCE THEORIES

Compliance with international law is a complex and much-debated subject. Scholars from the fields of international law, international relations, social science and in particular political science have examined how international law can affect the conduct of states. The current chapter borrows from these various disciplines to create a general overview of the most important theories on why states do or do not comply with international law. First, an understanding is formed of why states comply with their international obligations without the existence of enforcement systems. These findings can then be used to see how, when “natural” compliance does not happen, “artificial” compliance can be induced through enforcement systems in the framework of international organizations. Artificial

25 This assumption is made for this chapter only. The analysis of the compliance mechanisms in later chapters is based on the assumption of non-compliance after a procedure has been set in motion. Before the application of a compliance procedure, any behavior by the Member States is apparently tacitly or explicitly condoned or accepted by the enforcer of that particular organization (be it a supra-national institution or the Member States themselves) and should be seen as compliant behavior.
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Compliance includes systems that target non-compliance by the use of, for example, peer pressure. Peer pressure is usually used to target non-compliance in those areas where other enforcement mechanisms do not exist, and is often used in international organizations as an official compliance-inducing mechanism—executed by publishing reports on rule adherence or by holding peer-review meetings, for example. Any compliance resulting from these types of peer-pressure actions thus cannot be seen as “natural” compliance in the sense that here outside pressure is also needed to induce compliance, and Member States do not comply only through internal pressure such as self-interest or moral obligations.

A traditional way of classifying theories on compliance with international law, originally stemming from the discipline of international relations, is to distinguish between realist theories and normative theories. A plethora of variations exist on these two strands of thought, including neo-realism, rationalism, liberalism, institutionalism, constructivism, enforcement theory, transnational legal process, and many others. However, all of these can be seen as variations or elaborations of the two main strands: realism and normative theories. The aim here is therefore not to give an overview of all theory on compliance within international relations literature, but to get an idea of what types of approach exist when studying compliance with international obligations. By discerning between realism and normative theories, the basic difference between compliance theories can be captured. This difference lies in the fact that on the one hand, non-compliance can be intentional, rational, or based on cost-benefit analysis, while on the other hand it may be unintentional, unknown to the actor or based on informational, communicational or capacity issues. As the current chapter will show, the distinction between the two theoretical sides is not as clear-cut as it may seem. Clarifying the specific elements of the two strands of compliance theory, however, is an essential step before constructing a model that can assess the effective functioning of compliance mechanisms.

26 As occurs in e.g. the Organization for Economic Cooperation and Development (OECD) and the WTO Trade Policy Review Mechanism (WTO TPRM), but also in certain areas of EU law. It will be seen, however, that sometimes peer review mechanisms exist alongside harder enforcement mechanisms, such as in the EU (see chapter 5 of this thesis) and the WTO (see chapter 6). On peer review, see e.g. Pagani, F., ‘Peer Review as a Tool for Co-operation and Change. An analysis of an OECD working method.’ (2002) 11 (4) African Security Review, or OECD (2003) Peer review: merits and approaches in a trade and competition context CCNM/GF/COMP/TR (2003)15.

27 See e.g. Keohane (2005).

28 For an overview of existing theories, see e.g. Burgstaller (2005).
4.1. Realism

Realism is based on the belief that states sometimes follow international law, but only when it is in their self-interest to do so. Most realists do not see rules as affecting state behavior, but rather as reflecting states’ interests.\(^{29}\) Therefore, compliance will occur when a state’s international interest concurs with its national self-interest.\(^{30}\) According to this view, non-compliance can be attributed to the lack of a central enforcement agency in the international community.\(^{31}\) A central enforcement agency can make non-compliance more costly by introducing sanctions or using force, thereby increasing a state’s self-interest in complying with its international obligations. Without this central enforcement agency, compliance thus depends on the outcome of strategic interaction, based on cost-benefit analysis.\(^{32}\)

Another element influencing compliance is the nature of the underlying obligation a state has committed itself to comply with. Haas, for example, argues that according to realism, compliance patterns vary with the extent to which territorial integrity would be at risk. Compliance would therefore be strongest in the area of human rights, followed by the environment, then trade and finally arms control. Within the trade area compliance levels would vary accordingly, with the lowest level of compliance for technologies with potential military applications.\(^{33}\)

The subsequent presumption is then that when the interests of a state are not in alignment with its international obligations, a state will only comply when it is compelled to do so, either by a dominant state or some type of enforcement system. This enforcement will realign interests with obligations, since it will be in the state’s self-interest to not be punished by other states or the international organization of which it is a member. Realism, in short, says that either 1) a hegemonic state forces or induces other states to comply (coercion), 2) treaty rules merely codify parties’ existing behavior or expected future behavior, thereby aligning national with international interests, or 3) the treaty resolves a coordination game where no party has an incentive to violate the rules once a stable

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\(^{29}\) Ibid., p. 96.

\(^{30}\) Ibid.


\(^{32}\) Ibid.

\(^{33}\) Haas (1998).
equilibrium has been achieved. Most importantly, according to this theory the adoption of treaty rules themselves can correlate with, but not cause compliance.  

An example of a domestic, national theory of compliance is based on the realist assumption that individuals are purely driven by self-interest, and weigh only the potential gain of non-compliance against the potential costs. Becker first developed this approach in his famous article on crime and punishment, in which he shows that the optimal amount of enforcement depends on the cost of enforcement, the nature of the sanctions and the responses of offenders to changes in enforcement. His basic deterrence model assumes that the threat of sanction is the best policy mechanism to improve compliance with regulations. This instrumental perspective on compliance assumes that individuals are driven by self-interest and respond to changes in the tangible, immediate incentives and penalties associated with a certain act. It is thus evident that in the domestic (as well as the international) context, enforcement and punishment play an important role in inducing compliance with obligations in self-interested individuals or states.

The rationalist theory of institutionalism builds on the realist theory in its view that states are the primary actors, whereby a game-theoretic approach is taken to the study of the international system. Institutionalism, however, goes on to say that states can combine to create institutions that can autonomously create rules that in turn affect state behavior. Institutions can reduce incentives to cheat, increase the value of reputation and facilitate the monitoring and surveillance of compliance. By lowering information and transaction costs and increasing the repeated nature of interaction, institutions can enhance cooperation and thereby increase compliance. International institutions can facilitate cooperation that is in the state’s long-term interests and thereby prevent short-term defections that may jeopardize these interests. Institutionalism posits that power and interests alone cannot explain behavior: Other forces, such as transparency, reciprocity, accountability and regime-mindedness matter as well. Creating institutions to support the influence of these forces will thus help in

37 On the impact of reputation, see also in general Chayes and Handler Chayes (1995); Downs and Jones (2002); Keohane (2005). The role of reputation is re-examined when discussing peer review mechanisms in later chapters.
38 See Burgstaller (2005).
gearing a state’s self-interest towards compliance. While this theory is good at explaining compliance with international law, it does not account well for acts of non-compliance (unless the absence of institutions is taken into account).

4.2. Normative Theories

Normative theories do not posit that state behavior can be explained solely on the basis of a state’s self-interest or cost-benefit analysis. Rather, states are assumed to comply with norms guided by morality and ethics taken from natural law and justice. As Burgstaller phrases it: “normative theories basically argue that norms qua norms influence and induce states’ behavior.” The central assumption underlying normative theories is that states obey international law out of a moral obligation to do so.

Different varieties of normative theories exist. Franck, for example, posits a rather narrow normative theory focused on a norm’s “compliance pull”, meaning that the higher a norm scores on legitimacy, the more compliance with that norm is likely. Franck defines legitimacy as follows: “a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.” On the other hand, some believe this is an overly narrow normative view of compliance. For one thing, international law, as a product of negotiations among bureaucrats and politicians (treaties), or as a description of empirical regularities in the behavior of nations (customary international law), cannot be seen as having a compliance-inducing moral force of and by itself. International law is thus not neutral, but rather designed to further a certain purpose. Compliance with international law should therefore serve some kind of function as well.

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44 Posner and Sykes (2010)
45 Ibid., p. 245.
4.3. Management and Enforcement

A somewhat more recent take on the compliance debate focuses on regime characteristics that are able to induce compliance by Member States.\(^4^6\) The two most important perspectives in this debate are referred to as the enforcement approach and the management approach. It can be quite illuminating to define compliance in terms of enforcement and management rather than realist or normative theories. These two models incorporate most elements of realist and normative theories without distinguishing between the different variations on those theories.

4.3.1. Management

One broader and more realistic\(^4^7\) variation on the normative theory is *managerialism*, as described by Chayes and Chayes.\(^4^8\) This model proposes a theory of why states sometimes do not comply despite strong compliance-inducing factors. The authors assume that states do not violate international law either intentionally or when it suits them. Other forces, such as reciprocity, transparency and accountability, can better explain their behavior towards compliance. Chayes and Chayes argue against realism’s basic proposition in which non-compliance is based upon a cost-benefit calculation, which would mean that non-compliance is always a premeditated and deliberate violation. In reality, according to the Chayes’, this type of violation only happens very infrequently.\(^4^9\) The authors therefore assume that states have a general propensity for complying with their treaty obligations. According to the Chayes’, there are three main considerations that support this general assumption: efficiency, interests and norms.\(^5^0\)

The factor of *efficiency* contends that decisions are not a cost-free good, given that governmental resources for policy analysis and decision-making are costly and in short supply. It is therefore not feasible to continuously recalculate costs and benefits if the circumstances have not changed substantively since the original decision was taken. The most efficient alternative, therefore, is to follow the established treaty rule until the circumstances have changed – as Chayes and Chayes put it: “compliance saves transaction costs”.\(^5^1\)

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47 Realistic, not realist.
48 Chayes and Handler Chayes (1993).
50 Ibid. p. 4.
51 Ibid.
The interests factor then posits that international obligations are largely endogenous. An international treaty has no force unless a state has agreed with it – it is a consensual instrument. Since international obligations are made and enforced by states, these same states are assumed to have an interest in complying with them. In an organization such as the WTO, which calls itself a “member-driven” organization, this feeling might be especially strong, with the Members formally being able to join every one of the more than 70 different institutional bodies of the organization. Particularly the process by which treaties are formulated and concluded ensures to some degree that the treaty will represent the Member States’ interest.

Of course, a state’s interests at the time of treaty conclusion may differ from those existing at the time compliance is called for. The treaty-making process is necessarily a process of compromise, in which every actor is at both the giving as well as the receiving end during the negotiations. However, compliance decisions are influenced by both the mutual expectations created by entering into the international agreement by the parties, as well as the fact that parties will not consent to a treaty without the notion that they will comply with the obligations they consent to. Moreover, treaties will usually be adapted along the way, either through formal amendments or more informal ways such as interpretation by courts or adaptations through votes of the parties in, for example, technical annexes.

The third factor, norms, is the basic thought behind normative theories, where compliance has to do with the sense of legal obligation induced in states with which they feel bound to comply. Treaties are legally binding on the parties that ratify them. The existence of a legal obligation usually translates into the presumption of compliance, unless there are compelling reasons to disobey. Chayes and Chayes call this the “legal obligation to obey and presumptively a guide to action”.

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52 See e.g. the WTO website: “The WTO is a rules-based, member-driven organization — all decisions are made by the member governments, and the rules are the outcome of negotiations among members.” http://www.wto.org/english/thewto_e/thewto_e.htm


55 In line with the notion of *pacta sunt servanda* – every treaty in force is binding upon the parties to it and must be performed by them in good faith (Article 26 of the Vienna Convention on the Law of Treaties).

When there is non-compliance by states, this is, according to Chayes and Chayes, not necessarily due to deliberate defiance of the legal standard. They propose that violations are rather due to:

1) The ambiguity and indeterminacy of treaty language, leaving too much room for uncertainty and thus unintended discretion;
2) A limited capability of parties to carry out their obligations (e.g. domestic regulatory capacity in the sense of scientific, technical, bureaucratic or financial capacity); or
3) The inherent temporal dimension of the social and economic changes contemplated by regulatory treaties, causing a time-lag between commitment and performance and thereby creating room for non-compliance.  

In conclusion, the management model is one of cooperation, where justification, discourse and persuasion form elements of remedies for non-compliance. Some of the main elements of the management approach are transparency, reporting and data collection, verification and monitoring, strategic (implementation) reviews and assessment techniques. Chayes and Chayes see enforcement happening through a combination of assistance and persuasion measures, rather than coercion. Formal enforcement measures or coercive informal sanctions should only be applied in those rare and few egregious cases that are left, once it is clear that it concerns a "black-and-white case of deliberate violation". 

4.3.2. Enforcement
In 1996, Downs, Rocke and Barsoom (DRB) published a direct response to Chayes and Chayes’ article. They propose the so-called enforcement model of compliance, which is based on cooperation, enforcement, and “the endogenous quality of rules”. According to this model, compliance is structured around state incentives in order to induce compliance, with the use of sanctions in the case of non-compliance. The enforcement model is a rather economic approach to compliance, where social control is replaced by ‘regime control’, and where compliance is coercive rather than persuasive.

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57 Ibid., pp 9-17.
60 Downs et al. (1996).
DRB argue that the findings of the managerial school, of which the Chayes’ are the founders (so to speak), are seriously flawed due to endogeneity and selection problems. The regulatory treaties examined in managerial literature experience a high level of compliance due to the fact that most of these treaties require Member States to depart only marginally from their “normal” behavior.\(^6\) DRB use the notion of “depth of coordination”, which refers to the extent to which a treaty requires states to depart from what they would have done in its absence.\(^6\) They see a logical connection between the depth of coordination and the amount of enforcement that is needed to elicit compliance by the treaty’s signatories.\(^6\) Therefore the proposition is that the deeper an agreement, the greater the incentives for non-compliant behavior and thus the need for enforcement will be.\(^6\) This poses a problem, however, for measuring the effectiveness of enforcement mechanisms.

A high rate of compliance may not be due to the availability or effectiveness of enforcement. Rather, the limited use of sanctions may be explained by the fact that most treaties require only modest changes in state behavior.\(^6\) According to DRB, international agreements thus tend to codify existing behavior, and thereby confront states with few incentives to defect, lessening the need for enforcement mechanisms. This means that enforcement is a necessary element in securing compliance for those treaties that require profound behavioral changes for states. The fact that there are not many cases of deliberate non-compliance does not mean, as the managerialists posit, that coercion is only to be used as a measure of last resort for those few egregious cases. Rather, DRB argue there are only a few treaties with deep coordination and thus few incentives to deviate. However, when deviation occurs, enforcement is indeed imperative.\(^6\)

Building on the model of DRB, the model was further expanded by Tallberg. He states there are two ways to gain from participation in a multilateral regime as it exists in international organizations: first, if states can benefit at little or no cost (‘free-riding’), and second, when the benefits of shirking from one’s oblia-

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61 Ibid., pp. 379-380.
62 Ibid., p. 383.
63 Comparable to what the Chayes’ label the interests-factor, where international obligations are largely endogenous. However, where the Chayes’ see this as a compliance-inducing factor, DRB turn the connection around by linking this endogeneity to the lack of enforcement mechanisms in international law. The less endogenous the rules are, the greater the depth of coordination and thereby the need for enforcement.
64 Downs et al. (1996).
65 Ibid., pp. 387-388.
66 Ibid., pp. 397-399.
Compliance problems are thus easiest solved or prevented by increased monitoring and sanctions. In contrast to the management theory, states, as rational actors that weigh the benefits and costs of their actions against each other, might willfully choose not to comply when this suits them. Even when the decision to sign a treaty has been made, subsequent decisions are not necessarily made in light of the signed treaty. The likelihood of free-riding is especially high in collaborative situations (as opposed to coordination situations), since after signing the agreement states can gain more if they merely reap the benefits of the agreement without putting in their own fair share. Of course, the game-theoretical problem here would be that if all states were to think this way, one would end up with a classic prisoner's dilemma, where all states possibly would attempt to free-ride, and no one would make any actual effort. To avoid a prisoner’s dilemma, enforcement methods such as monitoring and sanctions are required to prevent states from shirking.

4.3.3. Management and Enforcement in Practice
One drawback of management and enforcement models is the fact that the institutional design of enforcement systems does not play an important role. Where Chayes and Chayes argue that “On the whole, it has not seemed to matter whether the dispute settlement procedure is legally required or the decision is legally binding, so long as the outcome is treated as authoritative,” DRB state: “The specific mechanism by which states punish violations is less relevant to the specific relationship between depth of cooperation and enforcement, than is the magnitude of enforcement. Although we motivate the model by using a case of

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67 Tallberg (2002).
68 Game theory is the analysis of strategies for dealing with competitive situations where the outcome of a participant’s choice of action depends critically on the actions of other participants.
69 A prisoner’s dilemma is a situation in which two players each have two options whose outcome depends on the simultaneous choice made by the other. This situation is often illustrated in terms of two prisoners separately deciding whether to confess to a crime (the idea was originally thought of by A.W. Tucker in 1950). For example, if prisoner A confesses and betrays B, A will not go to prison, but B is jailed for 10 years (and vice versa). If both confess, they each get 3 years; but if neither confesses, they both get only 6 months. The best option for both, therefore, would be to confess – hoping their fellow prisoner does not betray them. Since both will probably think alike, they will both confess and betray the other, and each thus gets a longer prison sentence than if they had kept quiet. See Axelrod, R., *The Evolution of Cooperation* (Basic Books, Cambridge, MA 1984), for further explanation of the prisoner’s dilemma.
centralized enforcement for convenience, nothing in the analysis precludes effective decentralized enforcement schemes.\footnote{Downs \textit{et al.} (1996), p. 386.} \footnote{Tallberg (2002).}

One important difference in institutional design essential to the current research is the distinction between interstate and supranational supervisory systems. The literature suggests that the design of compliance systems can be seen as a continuum, with two ideal-types of a supranational (as embodied by the EU infringement procedures) or interstate (as e.g. within the WTO dispute settlement procedure) system at the two opposite ends of the continuum.\footnote{Tallberg (2002).} However, as will be shown, within both these organizations there are also examples of stronger and weaker variations of these systems, where the effects of applying enforcement and management systems can be discerned.\footnote{See chapters 3-8 below for illustrations and an analysis of these findings. See also ibid., or in more detail Keohane, R.O. \textit{et al.}, ‘Legalized Dispute Resolution: Interstate and Transnational.’ (2000) 54 (3) \textit{International Organization}.}

4.3.4. A Management-Enforcement Ladder

In addition to, or rather drawing on the management and enforcement approaches, Tallberg puts forward a third approach. The author proposes to further integrate the two models by positing the idea of a “management-enforcement ladder”: a twinning of cooperative and coercive instruments.\footnote{Tallberg (2002), p. 610.} He takes the EU centralized compliance mechanism (the infringement procedures) as an example of how the combination of management and enforcement mechanisms forms a ladder of measures, consisting of preventive capacity building and rule interpretation, systems of monitoring, informal channels of bargaining, legal proceedings against violators and the final option of sanctions. In his article, Tallberg shows how, with every step in the centralized infringement procedures and the accompanying step up the management enforcement ladder, a sharp reduction of violations is achieved.\footnote{Ibid., pp. 615-618. More on these centralized procedures in chapter 4 below.} Tallberg’s ladder has four steps:\footnote{Ibid., pp. 632-633.}

1) **Prevention** - preventive capacity building and rule clarification that reduce the risk of violations due to incapacity or inadvertence;

2) **Monitoring** - forms of monitoring that enhance the transparency of state behavior and expose violators;

\footnote{Ibid., pp. 615-618. More on these centralized procedures in chapter 4 below.}
3) **Legal framework** - a legal system that permits cases to be brought against non-compliant states and that further clarifies existing rules; and

4) **Sanctions** - deterrent sanctions as a final measure if states refuse to accept the rulings of the legal system.

According to Tallberg, this ladder is especially active in the EU, which makes the EU exceedingly effective in combating detected violations, reducing non-compliance to a temporal phenomenon.\(^7\) The institutional enforcement element plays a much more important role in his view, where three institutional factors have played a particularly essential role in establishing effectiveness in the EU: the delegation of supervisory powers to the supranational institutions, EU institutions’ autonomous transformation of available compliance procedures, and the willingness of domestic actors to play a role in EU enforcement.\(^8\) Given the fact that these three factors are quite specific to the EU, however, it remains to be seen in how far the institutional enforcement framework of the EU would be replicable in other international organizations. Nevertheless, by looking at the EU management-enforcement ladder in comparison with the institutional framework in other international organizations, it should be possible to discern some general elements or variables that are conducive to establishing compliance with the obligations under the rules of an international organization.\(^9\)

5. **SOFT AND HARD MECHANISMS**

Now that the basic theories underlying the management and enforcement models have been outlined as well as Tallberg’s hybrid form, the different types of compliance mechanisms will be examined. Two dimensions are identified regarding compliance: compliance with a basic, primary set of rules, and compliance with a complementary set of rules, which is meant to induce compliance with the primary rules.\(^10\) The primary set of rules includes all rules that the members of an organization should comply with, including primary and secondary law, while the complementary set comprises those rules meant to ensure compliance

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78 This means that the solution to non-compliance problems will take time – but compliance will be achieved in the end.
80 For another take on integrating normative and realist models of compliance, see Beach (2006), pp. 113-142.
81 Note that these dimensions do not refer to Hart’s primary and secondary legal rules (Hart, H.L.A., *The concept of law* (Oxford University Press, New York and London 1978)).
with the primary rules. The complementary set thus includes rules on, for example, monitoring, sanctioning and enforcement, but also court jurisdiction. It is necessary to achieve the best “fit” of the complementary rules with the primary set in order to achieve the highest level of compliance with both sets. To find the optimal fit, the sources of non-compliant behavior need to be addressed as well as the character of the underlying obligations.

5.1. The Sources of Non-Compliant Behavior

According to the management model, the complementary set of rules is usually not necessary, since non-compliance is due to ambiguous treaty language, capacity limitations and a certain temporal dimension. These elements most often cannot be solved effectively by an enforcement system as laid down by complementary rules. The enforcement model, on the other hand, relies on the complementary set of rules to induce compliance with the primary set. The assumption underlying the enforcement model is that non-compliance is intentional, and thus that any enforcement mechanism should be coercive rather than persuasive in order to be effective.

The source of non-compliant behavior should thus indicate which type of step to take in order to induce compliance. When non-compliance is intentional, a coercive method would work best; but when non-compliant behavior is not intentional, a managerial model will probably be more effective. A combination of the two models, then, may thus be most successful in those organizations where both underlying causes occur.

5.2. The Character of the Underlying Obligations

Apart from the reasons for non-compliance, the character of the underlying obligations can also be an important factor in the occurrence of non-compliance. Here a distinction can be made between softer and harder obligations, which can be matched by softer and harder enforcement strategies. The term “soft obligations” here refers in the first place to non-binding obligations, or “soft law”. Soft law is a term about which much has been written and spoken over the past years.

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82 See supra, section 4.3.1.
83 See supra, section 4.3.2.
A clear definition of this term, first attributed to Lord McNair, does not exist. Soft law is not law in the sense of a binding agreement and does not constitute a legal norm. It includes those instruments that have legal effects, but do not amount to real law. Positivist legal scholars take issue with the existence of the term, however. The positivist assumption holds that soft law cannot exist, since law by definition is binding. Non-binding law is therefore impossible.

On the other side of the spectrum are scholars such as Abbot and Snidal, who provide a very specific definition of hard and soft law. They define hard law as “legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law”. Soft law, then, is everything that does not fit this definition: “the realm of ‘soft law’ begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision and delegation”. Thus, if an agreement is not formally binding and/or not precise and/or not delegated to a third party for monitoring, interpretation or enforcement, it is seen as soft law. This definition, however, takes an ex ante negotiation perspective of actors’ choices, where certain types of agreements are used in order to further particular aims, but which have unpredicted effects ex post.

A more useful point of view for the purposes of this study is the more binary ex post enforcement perspective, where a given instrument is either legally binding or non-binding, and thereby enforceable (or not) in court. Non-binding instruments can be quite influential and sometimes eventually lead up to binding instruments. The strength of soft law comes from the intention of the parties as laid down in the non-binding instruments – although they are not binding in a legal sense, they are often perceived as, or in any case acted upon as if they were binding in a moral sense. They may be perceived as binding because of their authority, rather than their coerciveness.

How soft law is complied with can be observed in, for example, the Organization for Economic Cooperation and Development (OECD), an organization that operates mostly through non-binding soft law. Were the OECD to have a judicial body such as exists under several other organizations (which it does

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84 Although he himself does not use the expression in his seminal work on the Law of Treaties (McNair, L., The Law of Treaties (Clarendon Press, Oxford, 1961)).
87 Ibid., pp. 421-422.
89 E.g. the Court of Justice of the EU, or the quasi-judicial WTO Dispute Settlement Body for that
not), a Member State could not be brought before this body to be forced in any way to comply with these soft obligations. The way the OECD works, however, is through the authority of the soft obligations themselves. Member States commit to adhering to these obligations, not only on becoming a member of the organization, but also upon the issuance of OECD recommendations, statements and so on. These types of reports do not hold any legal obligations for the Member States concerned, but through the power of the authority, and persuasiveness qua scientific background of the writings, as well as the fact that the Member States themselves are involved in the drafting of the reports or at least commit themselves to accepting the outcome, the reports in practice have a great impact on the actual behavior of Member States.\(^90\)

In other international organizations, the instrument of soft law also exists in combination with similar types of softer compliance mechanisms. However, these softer mechanisms are sometimes also applied in organizations in cases where the underlying obligations are, in fact, binding obligations. Apparently the fact that the underlying obligation is of a hard, binding nature is not enough by itself for a hard system to be applied, at least not on first sight. In the European Union, peer pressure mechanisms exist for binding internal market law. The Internal Market Scoreboard (IMS), for example, compares Member States’ performance in applying internal market rules on a scale to other Member States’ performance. This type of comparison creates peer pressure through the fact that the worst-performing Member States are questioned by other States, their bad performance is discussed in the media and on certain political levels, thus motivating the Member State concerned to improve its behavior before the next report comes out. A Member State that performs particularly well as compared to other Member States is viewed and treated more favorably by other Member States and other institutions within the EU. A country with a good compliance reputation might be regarded as a more trustworthy partner for other Member States than one with a bad reputation.\(^91\)

The underlying obligations for which progress concerning compliance is reported on by the IMS, however, are of a particularly binding nature.\(^92\) Non-com-
Compliance in that area can certainly be the subject of an infringement procedure, the hard procedure, if deemed necessary by the Commission. It is difficult to determine which type of mechanism, the harder or the softer procedure, can most effectively induce compliance with internal market rules, since they can both work alongside each other. If the IMS report were to come out at the same time as the start of an infringement procedure by the Commission targeting the same non-compliant behavior, it would be impossible to state with certainty whether eventual compliance had then been induced by the IMS or by the infringement procedure. More likely, it would be the combination of the two systems that led to greater adherence to the rules.  

5.3. Compliance Variables

We have just discussed two elements that should be taken into account when determining what type of mechanism can be applied to induce compliance with Member State obligations: the source of the non-compliant behavior, and the character (bindingness) of the underlying obligations. The variables that were discussed in the above sections can be mapped in the following Table 1.1.

It was shown that when non-compliance is intentional, theory would predict that an enforcement model is most effective in inducing compliance. An enforcement approach increases the cost of non-compliance, thereby tipping the outcome of a cost-benefit analysis for non-compliance towards compliance. This holds true when the underlying obligations are of a hard nature, and can indeed be enforced through courts, coercion or other compliance mechanisms. When the underlying obligations are of a soft nature, however, theory currently holds

<table>
<thead>
<tr>
<th>Character</th>
<th>Source</th>
<th>Intentional non-compliance</th>
<th>Unintentional non-compliance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Soft underlying obligations</td>
<td>Management</td>
<td>Management</td>
<td></td>
</tr>
<tr>
<td>Hard underlying obligations</td>
<td>Enforcement</td>
<td>Management or Enforcement</td>
<td></td>
</tr>
</tbody>
</table>

strict; in fact, in the Treaty on the Functioning of the European Union a new paragraph was added to what is now Article 260 TFEU, providing a fast-track procedure in case of non-notification of measures implementing a directive. More on this addition in chapter 4.5.

93 An analysis of this assumption can be found in part II and III of this book.
that the enforcement model would not work. Soft obligations are not binding in court and cannot be enforced. Here, a management model would be better at predicting compliance outcomes.

The same holds true, and even more so, in cases where the underlying obligations are of a soft nature and non-compliance was unintentional. Not only would an enforcement approach be inappropriate, it would also not be effective. Since the non-compliance was not caused by cost-benefit analysis but rather by other factors, merely increasing the costs of non-compliance cannot induce adherence to the rules. However, when non-compliance was unintentional but the underlying obligations are of a harder nature, it is unclear which model would work best. Hard underlying obligations are enforceable in court, and an enforcement approach would thus theoretically be more appropriate. On the other hand, when non-compliance is unintentional, management theory predicts that an enforcement model will not work well since the non-compliant behavior is not based on the outcome of a cost-benefit analysis. A combination of the two systems could be an option – first trying to induce compliance through managerial efforts (such as increasing awareness, cooperation, transparency etc.), and when the results remain unsatisfactory, backing it up with an enforcement approach. This is precisely what Tallberg shows in his management-enforcement ladder.

6. A COMPLIANCE PYRAMID

Tallberg shows how in the EU, a combination of cooperative and coercive elements work together to reduce non-compliance. The four steps of the ladder lead from prevention, through monitoring, a legal framework and the use of sanctions, up to increased compliance with the rules of the organization. This current research proposes to use this model to analyze the operation of compliance mechanisms in general, not only in the EU but in other international organizations as well. However, the ladder will not only be used to analyze each individual mechanism, but also more generally to include the multiple different but interacting mechanisms within a single organization. Rather than a two-dimensional ladder, Tallberg’s model needs to be adapted to provide a more three-dimensional

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94 Since a Member State would be punished for not adhering to non-legally binding rules.
95 See supra, section 4.3.4. This holds true to a certain extent for all types of non-intentional non-compliant behavior. When, for example, non-compliance is due to a lack of capacity, which makes it impossible to implement a certain directive in the way or by the deadline that is demanded, the managerial efforts need to be targeted at creating that capacity. In such a case, enforcement options come into view only when capacity-building efforts have been deployed to the fullest extent.
perspective on the inner workings and external interactions of compliance mechanism. Therefore a three-dimensional pyramidal model – where steps on all sides of the issue will eventually lead up to the ultimate goal of compliance – enables a comparison of the ways the different compliance mechanisms function as well as their effectiveness. The figure below shows what the model would look like in this pyramidal shape. Figure 1.1A shows a front view, while B depicts the pyramid as seen from above.

Figure 1.1: Routes to Compliance
A: Side view
B: Top view

A pyramid is usually depicted as having four faces (not including the base), as familiar from the architectural structures of ancient Egypt. These four sides correspond to the number of mechanisms under investigation in this thesis: first, the EU infringement procedures and three EU alternative mechanisms; second, the EU infringement procedures and three other international organizations.

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96 The idea of a pyramid to illustrate the increasing hardness of enforcement measures has been introduced before, but was applied to the infringement procedures only in a more abstract, limited manner, not including any specific steps toward compliance. (See e.g. Andersen, S., The Enforcement of EU Law: The Role of the European Commission (Oxford University Press, Oxford 2012), pp. 128).

97 The title of the figure is a reference to Tallberg’s paper called ‘Paths to Compliance: Enforcement, Management and the European Union’ (2002) 56(3) International Organization.

98 The geometrical shape called a pyramid is in fact a polyhedron of which one face is a polygon of any number of sides, and the other faces are triangles with a common vertex. A pyramid with an $n$-sided base will have $n + 1$ faces (including the base). This means that the pyramid shape can have a square base and thus have four triangular faces, but might just as well have a triangular or hexagonal base and thus have three or six triangular faces respectively. For more on pyramids, see e.g. Wenninger, M.J., Polyhedron Models (Cambridge University Press, Cambridge, 1974). Following the
PART I  Theory and Methodology

The pyramid is used here merely to illustrate the three-dimensional multi-
level aspect of the management-enforcement compliance issue. As subsequent
chapters will show, not all mechanisms investigated in this thesis (the sides of
the pyramid) include all four steps. In fact, the “sanctions” step, for example, only
exists within the mechanism of the EU infringement procedures, although some
kind of sanctioning system is found in other organizations as well. Moreover,
skipping a step does not necessarily lead to slipping and falling to the ground,
but may bring compliance into view sooner than when all steps are followed.
Moreover, one can sometimes cross over from side to side. Thus, if compliance
cannot be reached by climbing one side of the pyramid, it might be achieved by
following the route with more or less steps.

7. DEFINING NON-COMPLIANCE

On the basis of compliance theories, the previous sections determined the main
elements that may theoretically determine the choice for a certain type of reac-
tion to non-compliance: the source of the non-compliant behavior, and the char-
acter of the underlying obligations. The effectiveness of a compliance mecha-
nism can be assessed by using these elements in the application of a compliance
pyramid model. Before this model can be applied to the compliance mechanisms
in this research, the concept of compliance requires further definition. At the
beginning of this chapter, some general definitions of the term were provided. In
practice, however, international organizations entertain quite different concepts
of compliance.

Table 1.2 provides an overview of the meaning of non-compliance as well as
possible subsequent enforcement actions, both in theory as well as for the four
organizations that will be discussed in much greater detail in part II of this
study. When this table is examined, three important differences can be dis-
cerned between the definitions of non-compliance in general and those in the
context of international organizations. It is important to keep these differences
in mind when applying the management-enforcement theories to the four orga-
nizations in parts II and III.

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pyramid analogy, an international organization can also have more or fewer mechanisms available to
induce compliance, and thus need more or fewer faces on the pyramid. (Note that the analogy stops
for international organizations with less than three mechanisms, but there Tallberg’s original ladder
can be applied, which can of course have one or two faces.)

99 The actions in case of non-compliance given in this table refer to official action according to the
rules of the organization.
Chapter 1  On Compliance and Enforcement

Deterrence
First, the literature refers to a concept of compliance where an actor’s prescribed or expected behavior is set against his actual behavior. When the organizations’ founding treaties are examined, on the other hand, non-compliance refers not only to actual behavior, but also to possible future behavior as set out in national legislation. Infringement or other enforcement actions, therefore, focus on past, actual as well as possible future non-compliant behavior, while in more general theoretical definitions, the prevention of future behavior (deterrence) is not incorporated. Deterrence is therefore an additional aspect that may have to be taken into account when examining Member State behavior in the context of international organizations.100

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100 In the EU for example, the introduction of the possibility of sanctions in Article 260 TFEU has had a significant deterrent effect (see chapter 3).
Discretion
A second important element is that, for international organizations, no objective standard can be found against which compliance (or non-compliance) can be measured. As was discussed earlier, the determination of the existence of non-compliant behavior, or at least the decision to take enforcement actions, is in all cases left to the discretion of other Member States or a more or less independent body. If these Member States or bodies decide that there is no occurrence of non-compliance, or the non-compliance is not of such a nature as to call for enforcement action, no action will be taken. This means that non-compliance can be allowed to occur even when it is known to exist. This element of determining non-compliance or starting enforcement action is missing from the more general definitions given in dictionaries or by scholars – compliance is then implicitly assumed to be objectively observable.

Enforcement
A third noticeable difference between compliance in theory and in practice is that in practice, non-compliance is usually backed up or countered by a certain type of enforcement or at least compliance-inducing action. When there is non-compliance, there is thus a possibility of making Member States comply – at least in the organizations examined here, whether mentioned explicitly in the rules of the organization or in practice. Whether the mechanisms that can come into play in case of non-compliance are actually effective in inducing compliance in those international organizations remains to be seen.

Given the findings above, the concept of non-compliance in international organizations can now be redefined as follows:

Non-compliance occurs when a Member State’s actual or expected future behavior does not conform to the expected behavior as outlined in the organization’s rules, while the determination of the existence of non-compliant behavior is left to the discretion of the organization’s other Member States or an independent body. Enforcement or other compliance-inducing action might then occur after such a determination of non-compliance, a determination which is in some cases confirmed by judicial or arbitral bodies.

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101 Action by Member States is furthermore often subject to having a legal interest in bringing a case. More on this in the discussion of the individual mechanisms in chapters 3 to 7.

102 Here the notion of perfect compliance not being equal to optimal compliance returns. A certain degree of non-compliance can be deemed acceptable.
It was concluded previously that two main elements are essential in determining which type of compliance-inducing mechanism should follow non-compliant behavior: the source of (reason for) non-compliant behavior, and the character (bindingness) of the underlying obligations. Two additional elements should now be added: 1) which behavior is expected from Member States under the rules of a certain international organization, and 2) in how far the element of discretion can influence the outcome of the determination of whether actual behavior is different from expected behavior.

In conclusion, therefore, the following four questions have to be taken into account when examining compliance-inducing mechanisms in international organizations:

1) Which obligations should Member States adhere to? (expected behavior)
2) What is the character of these obligations? (hard or soft)
3) When is a Member State non-compliant? Who determines when a Member State is not in compliance, and what role is played by the element of discretion? (actual behavior ~ discretion)
4) What caused the alleged non-compliant behavior? (intentional or non-intentional)

A combination of the answers to these four questions will theoretically predict which type of compliance mechanism or combination of compliance mechanisms may be most effective in inducing compliance by the Member States. It will be seen that the international organizations discussed in this thesis have several different mechanisms to induce compliance with their rules. As was mentioned before, not all of these mechanisms include all steps of the pyramid, and switching between the sides of the pyramid remains a possibility.

8. EFFECTIVENESS

Now that the concept of compliance has been discussed and the four questions essential for theoretically predicting the effectiveness of compliance mechanisms have been formulated, the concept of effectiveness itself needs to be defined to enable a test of these theoretical assumptions.
8.1. Effectiveness vs. Efficiency

Effectiveness and efficiency are terms that are unfortunately often used interchangeably. However, these two terms, although related, do not have the same meaning. A procedure can be held to work in an efficient manner when optimal output is achieved with minimum input, at minimum cost. Efficiency can thus be described by the relation between input and output, with the objective of maximizing output for a given amount of inputs, or of minimizing inputs for a given output. In order to determine efficiency, therefore, one needs to examine both input and output. Effectiveness, on the other hand, which can be defined as the degree to which objectives are achieved, focuses on the outcome only; it relates the input or output to the final policy objective (the outcome).

When determining the effectiveness of the procedures, the focus is not (or at least, not at first) on the cost of these procedures, but only in their capability of achieving what they set out to accomplish – the assessment of the success in the use of public resources for achieving a given set of objectives. Figure 1.2 below shows these relationships.¹⁰³

Figure 1.2: Efficiency and Effectiveness

When this concept is translated into the subject of the infringement procedures, the following results.¹⁰⁴ The infringement procedures induce compliance with EU law through a combination of management and enforcement (as visualized in the compliance pyramid). This means: if possible in an informal setting of cooperation and communication (management in the preliminary stages), otherwise by enforcement through judicial proceedings and if necessary through the imposition of lump-sum and/or penalty payments. The final objective of the procedures is to induce the highest degree of compliance possible, where transposition

¹⁰³ Based on the figure used in Mandl, U. et al., ‘The effectiveness and efficiency of public spending’ (European Economy - Economic Papers, Directorate General Economic and Monetary Affairs, European Commission, Brussels 2008).

¹⁰⁴ A more elaborate application of the model to the infringement procedures is undertaken in chapter 3 of this dissertation. The stages of the procedure as well as the managerial or enforcement elements on those phases are explained in more detail in that chapter.
deadlines are met on time, directives are transposed correctly and Member States apply EU law as required. Most interesting, in case of the EU, thus is the capacity of the infringement procedures to achieve this objective, given a certain set of theoretical parameters.

It is a prerequisite for an efficient system to start with an effective system. Obviously, a system that works perfectly effectively, but where the costs of the system outweigh the benefits of this effectiveness, will perhaps not be desirable in terms of public policy. However, the measure of effectiveness in terms of reaching public policy objectives precedes an evaluation on efficiency grounds. When a system does not achieve the goals it was created to accomplish, the usefulness of the system should be reassessed. If it only partly achieves its goals, one could adapt the system to make it more effective, design complementary systems that can improve effectiveness, or find alternative systems that are more effective.

8.2. Relative Compliance

In international legal compliance scholarship, a distinction is often made between the terms compliance and effectiveness. Whereas compliance in that context indicates the conformity of behavior to prescribed rules, effectiveness indicates the degree to which a regime is successful in transforming state behavior consistently with the norms that underlie the regime. A certain set of rules may be complied with to a very large extent, but this does not necessarily indicate that the rules are effective in changing state behavior. Compliance in this case could also indicate that the prescribed rules were already in line with pre-existing actual behavior, thus not necessitating any change in behavior after the introduction of the rules. What the current research examines, however, are those cases in which states do not naturally adhere to the primary set of rules that was instated (the legal obligations), and the effectiveness of a subsequent complementary system of rules that is meant to induce compliance with the primary set (the enforcement mechanism). In order to ascertain this effectiveness, it needs to be determined whether state behavior with regard to the primary set of rules is

105 This objective also operates under the constraint of Commission discretion, which always needs to be taken into account when assessing compliance mechanisms (as was discussed above). This means that some degree of non-compliance will probably remain acceptable, for reasons of budget constraint, time limits, political or other. For more on Commission discretion and its consequences, see also chapter 3.
106 See e.g. Guzman (2002).
actually affected by the application of the complementary set of rules, whether their nature be managerial (authoritative) or enforcing (coercive).

The usual problem with determining the effectiveness of legal rules is that it is not possible to directly observe whether the law has been effective in the sense of influencing the conduct of states (due to the interference of pre-existing behavior or other compliance-inducing factors that interact with any possible effect from a change in legal rules). On the other hand, meanwhile, it is possible to determine compliance with these rules (meaning, whether the rules are observed in reality or not). Changes in outcome (compliance) can be observed, but these differences often cannot objectively be linked to alterations of the legal rules. Some degree of correlation may be established between the two, but it cannot be determined whether any causal link from legal to behavioral change existed. This problem is partly solved in this research however, since it is possible to assess the effectiveness of the complementary set of rules by looking at the effects of this complementary set on compliance with the primary set of rules. This means that not absolute compliance is examined (whether legal rules affect behavior), but rather relative compliance (whether an enforcement mechanism makes a difference to how legal rules affect behavior before and after the application of the enforcement mechanism).

9. CONCLUSION

The analysis in this chapter has shown there are several steps toward determining a compliance mechanism’s level of effectiveness. The first step is to determine what the mechanism intends to achieve: Is it meant to induce compliance with certain obligations? Second, the four questions formulated in the previous paragraph will need to be answered in the context of each of the mechanisms studied in order to determine how effective the chosen mechanism is in attaining the formulated goals (compliance). An investigation has to be made into the behavior expected of the Member States, whether obligations are hard or soft, what role (if any) discretion plays in the determination of compliance, as well as the underlying causes for non-compliant behavior: Does the mechanism target intentional or unintentional non-compliance? All of these steps of the model can be applied to different compliance mechanisms, providing a three-dimensional comparative analysis of their effectiveness. A comparison of the outcome of the model for mechanisms both within the EU as well as in other international organizations

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107 Guzman (2008).
will add further depth to the results. That way it is possible to determine not only what makes a mechanism effective, but also whether the interaction with or replacement by other compliance mechanisms could lead to a higher level of effectiveness.