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Law and Governance in Postnational Europe. Compliance beyond the Nation-State. By Michael Zürn & Christian Joerges (Eds.), Cambridge: Cambridge University Press, 2005. Pp. 297.

Reviewed by Günther Auth.

Understanding Compliance with International Law

Introduction

The conceptual category of ‘compliance’ gained salience when legal and socio-legal theorists began to query the role of law in the administrative welfare state. They saw that growing societal competition, functional specialization, and ensuing differentials in property-power had evolved more sophisticated class structures, and that legal politics assumed the tasks to correct market failures and (re-)distribute benefits in order to preserve order and the market-sphere proper. More and more issues had been subsumed to law’s dominion and control. Regulatory agencies passed ever more behavioral prescriptions so as to channel competitive interactions, minimize harm, and bolster hardships. The function of regulatory law was to accommodate societal conflict, normalize stratification, and de-politicize unrest in a competitive risk society¹. In this context, the so-called ‘deterrence model’, which hints at the certainty and severity of sanctions, no longer delivered the most persuasive explanations for compliance with law. Theorists considered prescriptive rules as relevant factors in their own right – at least if they formed part of larger scale regulatory projects that embodied prevailing assumptions concerning market and society. Some theorists noticed that rules set into motion interaction processes that eventually make actors accept a particular interpretation as binding. In this understanding, rules are integral parts of ongoing social processes that spur self-regulation on the parts of addressees – if they do². Legal rules impact upon social processes to

¹ See Michel Foucault, *The History of Sexuality, vol. 1. An Introduction* (London: Allen, 1979), who asserts, at p. 144, that the function of law as a coercive technique of sovereignty has been displaced and re-inscribed in its role in normalizing power through regulation.

² This understanding resonates with the view that the legal system itself is neither outside of society nor autonomous in determining what is legal or illegal. For “[...] there are many types of ‘participants’ [in the legal system]: laypeople and professional elites, for example. [...] Thus, there can be more than one ‘internal perspective’ because there are many different social groups who regard legal rules as norms for conduct. [...] Second, within each group of participants there are many different purposes for understanding the legal system, such as predicting what other legal officials will do, arguing for legal reform, or understanding the practical effects of legal norms. [...] Thus, there can be more than one ‘internal perspective’, because people who regard legal rules as norms for conduct can have more than one purpose in understanding law.” Jack Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, *Yale Law Journal*, vol. 103 (1993), pp. 105-174, at p. 128-9.

the extent to which they stabilize or transform prevailing ideas about appropriate modi of interaction³.

Yet there is more to the problem of compliance, as it often varies with the specific nature of the issue being regulated and the addressees of regulations, i.e. whose activities are being targeted. Some problems are harder to come by, which depends on whose interests are affected. Compliance is further complicated by the fact that regulatory systems are heavily bureaucratized. There thus needs to be a procedural consensus among competing groups, based on the belief that lawmaking processes balance interests and alleviate unequal amounts of influence. By seeking to make sense of a rather complex phenomenon, compliance research has since been devoted to identify variables that help explain compliance as a behavioral trait among actors that are situated in a normatively integrated setting and that are to different degrees implicated in the very process in which administrations and lobbyists negotiate comprehensive and codified systems of regulation so as to provide a context that balances interests and promotes orderly behavior. The most sophisticated theories of compliance have combined sociological, social psychological, and economic theorems⁴. Explanations have usually stressed a mix of ‘deterrence’, ‘legitimacy’, ‘obligation’, ‘socialization effects’ and still other factors which presumably influence the propensity of actors to adhere with regulations in interaction processes.

Puzzled by the growth of international law and institutions, theorists became sensitive to the problem of compliance with international regimes during the 1970s. They sought to explain whether and if so why governments of the most industrialized states conformed to regulations of the Bretton Woods institutions despite the absence of a centralized ordering instance. A quite sophisticated explanation for compliance had been derived from what was at that time the most elaborate theory of international law⁵. This theory had synthesized the

³ Cf. Lawrence M. Friedman, *The Law and Society Movement*, *Stanford Law Journal*, vol. 38 (1986), pp. 763-80, at p. 763: “Everybody concedes, or should concede, that impact is more than a matter of rewards and punishments. People are influenced by social roles; by family, friends, and neighbors; by religion and tradition; by ideas of right and wrong; by a mysterious something called legitimacy. How these feelings and motives arise, and what effect they have on impact, is a difficult, underdeveloped field. Here, too, it is appropriate to study the symbolic and expressive meanings of legal institutions and legal language.”

⁴ See, e.g., K. Kuperan & Jon G. Sutinen, *Blue Water Crime: Deterrence, Legitimacy, and Compliance in Fisheries*, *Law & Society Review*, vol. 32 (1998), 309-338; Jon G. Sutinen & K. Kuperan, *A Socio-Economic Theory of Regulatory Compliance*, 26 *International Journal of Social Economics* (1999), 174-193.

⁵ Cf. the work of Myres S. McDougal, Harold Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, *Journal of Legal Education*, vol. 19 (1967), pp. 253-300. Some of the most important works of the so-called ‘New Haven School’ are to be found in M. S. McDougal & W. M. Reisman (eds.), *International Law Essays. A Supplement to International Law in Contemporary Perspective* (Mineola: Foundation Press, 1981). The sophistication of the NHS’s ‘theory about law’ has become manifest in the elaboration of a complex vocabulary by resort to which the dimensions of the new ‘international law of cooperation’ could be discerned, and by resort to which notions of the old ‘international law of power’ could be

findings of various academic discourses and offered a vast body of conceptual categories that cohered around two fundamental premises: the legitimacy of the institutional setup within which prescriptions materialize, and the likelihood that formal prescriptions may be enforced in the name of inclusive interests. The decisive factor triggering compliance was meant to lie in the appropriate mix of authority (signals) and control (intention)⁶. The end of the East West Conflict and the ensuing transformation set into motion by the US and other Western states cooperating within the European Union (EU) and the General Agreement of Tariffs and Trade (GATT), i.e. what has become the World Trade Organization (WTO) in 1995, has intensified research on compliance⁷. Students of international relations have subsequently elaborated detailed formal theories⁸.

Proponents of the so-called ‘managerial school’ have emphasized discursive processes among state-actors, aside from treaty organization and the wider public⁹. Qua being participants in processes of communication, actors learn that it is beneficial to honor agreements and to behave ‘normally’ since this spares them the effort to calculate the costs of non-compliance in recurring situations of choice. Norms and rules, in turn, contribute to the general tendency among states to comply, because they evoke a sense of obligation. Even more pronounced on this latter aspect has been the thrust of ‘legitimacy/fairness theory’¹⁰. In this view, compliance is triggered by a process of reflexive interaction leading to a perception of rules as being fair, on the one hand because they allocate scarce resources in an equitable fashion, and on the other because they emanate from ‘right process’, i.e. that actors have equal access to lawmaking. Another theoretical approach, ‘transnational legal process’¹¹, depicts

overcome. For a good delineation of the ‘law of power’, see Georg Schwarzenberger, *International Law and Order* (London: Stevens & Sons, 1971).

⁶ Cf. Oran Young, *Compliance and Public Authority: A Theory with International Applications* (Baltimore: Johns Hopkins University Press, 1979), who had studied with McDougal and whose earlier work is influenced by the ‘New Haven School’.

⁷ For a short overview of the history of compliance research, see Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in: W. Carlsnaes, T. Risse & B. A. Simmons, *Handbook of International Relations* (London: Sage, 2002), 538-558, at 539-545.

⁸ For surveys over approaches to compliance, cf. William C. Bradford, *International Legal Compliance: An Annotated Bibliography*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=577104#PaperDownload, at p. 2, who enumerates eleven different theories: realism, enforcement theory, rational choice theory, liberal theory, managerial theory, reputational theory, transnational legal process, legitimacy theory, constructivism, organizational-cultural theory, and personality theory. By contrast, Markus Burgstaller, *Theories of Compliance with International Law* (Leiden: Martinus Nijhoff, 2005), confines himself to five: realism, legitimacy theory, managerial theory, transnational legal process, and liberal theory.

⁹ Abram Chayes & Antonia H. Chayes, *On Compliance*, *International Organization*, vol. 47 (1993), pp. 175-205.

¹⁰ Thomas M. Franck, *Legitimacy in the International System*, *American Journal of International Law*, vol. 82 (1988), pp. 705-759; and by the same author, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995).

¹¹ Harold H. Koh, *Why Do Nations Obey International Law?*, *Yale Law Journal*, vol. 106 (1997), pp. 2599-2659.

compliance as based on the internalization of legal rules. The decisive point about compliance is that norms get internalized in the normative system of each individual actor from where they discipline its disposition and, thus, behavior. The norm in question is at first disputed and interpreted by interacting actors before it gets accepted and internalized so that it eventually functions as an intersubjectively shared guidepost for action. Emphasizing reputational concerns among state-actors, proponents of the ‘reputational theory’¹² perceive compliance as a result of cost-benefit calculations. The greater the costs, incurred by loss of reputation for violating international law, the greater the propensity of states to comply. The greater the benefits of defecting where the issue in question is critical to the state concerned, the smaller the likelihood of compliance. Sanctions play into this picture as well. For it is asserted that direct unilateral punitive and retaliatory measures may elicit conformity with norms and rules. The ‘enforcement model’¹³ is even more explicit about the role of threats and sanctions. States are in principle very likely to comply with rules if they are engaged in deep cooperation, but given that deep cooperation among states is actually very rare, it is the probability of one state entertaining retaliatory sanctions that induces actors to comply. Interestingly, whereas some theorists pondered the question how norms and rules operate as immanent constraints, others emphasized the role of norms as externally rooted instrumental concerns, just as if there would indeed be two different and mutually exclusive ‘optics’¹⁴.

The book under review, a compilation of four theoretical-conceptual and three empirical essays, is the result of a time-consuming and heavily funded research project carried out by four German researchers, involving numerous institutions and individuals predominantly situated in Germany and the US. The project’s avowed goal had been to corroborate the argument that, despite the absence of centralized authority structures, inter- and/or supranational law is possible, and that international order is a special kind of social order that depends on compliance with inter-/supranational regulatory prescriptions if it is to be seen as legitimate. To this end, the authors undertook to test several theories of compliance in order to bear out whether and under which conditions actors abide by legal rules. Their search had been for factors that help explain compliance across national, supranational, and international levels. So the authors compared the compliance behavior of state-actors at the federal level of the German state, the international level of GATT/WTO, and the

¹² Andrew T. Guzman, A Compliance-Based Theory of International Law, *California Law Review*, vol. 90 (2002), pp. 1823-1887.

¹³ See George Downs, David M. Roake & Peter N. Barsoom, Is the Good News about Compliance Good News about Cooperation?, *International Organization*, vol. 50 (1996), pp. 379-406.

¹⁴ Cf. Robert O. Keohane, International Law and International Relations: Two Optics, *Harvard International Law Journal*, vol. 38 (1997), pp. 487-502. See also Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005), at p. 100.

supranational level of the EU so as to isolate those independent variable(s) that could be demonstrated to foster compliance tout court. One conclusion was that internalization and judicialization, i.e. a process called ‘legalization’, would be a particularly suited mechanism by which to elicit compliance, and thus promote order based on law beyond states.

However, notwithstanding the rather heavy investments and the extensive work on the subject, the project as a whole did not succeed to foster understanding compliance with inter-/supranational regulatory law. The three empirical studies did not conclusively establish that and why ‘legalization’, complemented by monitoring/sanctioning, management, and/or reflexive interaction, would have to be considered as a particularly reliable mechanism. The authors of the book under review approached the phenomenon of compliance with a degree of formal exactness that it will not admit of. Wedded to the view that international law and politics are two distinct domains, trained to approach the social world with a static frame of reference, and fixated upon theorizing the determinants of social processes as thing-like beings, the conceptualization of the independent variables had been flawed, and critical independent variables had been ignored for the sake of vindicating the main claim in an elegant and parsimonious fashion¹⁵. In order to bear this out, I first comment upon the authors’ overtly formal take of international law’s role for compliance. I then show that the authors were not successful to empirically illustrate the influence of inter-/supranational regulatory prescriptions.

Preparing the Journey, Misreading the Map, Charting the Wrong Course

In the introductory essay of the volume¹⁶, Zürn correctly states that compliance with issue area specific regulations may be incidental, the difficulty being to clearly discern factors that induce actors to conform to law. Indeed, “[n]ot all countries comply with the same legal instruments, the same country may vary in its compliance with different legal instruments across functional areas and even within the same issue area, and such patterns may change over time.”¹⁷ For Zürn et al., the best way to circumvent this problem is to analyze

¹⁵ Taking issue with this flaw, see Martha Finnemore & Stephen J. Toope, Alternatives to ‘Legalization’: Richer Views of Law and Politics, 55 *International Organization* (2001), 743-758, esp. at p. 750-1.

¹⁶ Cf. Michael Zürn, Introduction: Law and Compliance at Different Levels, pp. 1-39.

¹⁷ Peter Haas, Choosing to Comply: Theorizing from International Relations and Comparative Politics, in: D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000), 43-64, at p. 44. See also Edith Brown Weiss & Harold K. Jacobson, Getting Countries to Comply with International Agreements, *Environment*, vol. 41 (1999), pp. 16-46, at p. 18: „Four broad categories of interrelated factors [...] affect the extent to which, and the way in which,

comparable cases in three different issue areas and across three levels of politics so as to make sure that variation in the issue area, the type of problem, and even the policy type under scrutiny are controlled. Whether Zürn et al. were well advised to settle, for explanatory purposes, with the – overtly abstract – notion of the state-as-actor, based on the assumption that (the behavior of) territorial political units – as regulatory addressees – are relevant as dependent variables¹⁸ is doubtful. The empirical studies did in any case not always stick with this assumption.

The central part in this chapter is the section where Zürn describes the theoretical perspectives that guided the authors' research about compliance, namely 'rational institutionalism', 'legalization', 'management', and 'legitimacy'. Given that these perspectives rest on incompatible assumptions¹⁹, this selection seems somewhat arbitrary. Yet Zürn maintains that they hold out concepts that define properties of the variables that presumably cause compliance and are therefore well suited to model compliance at the level of the German federal state, the supranational level of the EU, and the international level of the WTO. He points out that 'management' triggers compliance when iterative bargaining makes actors realize that it is in their interest to comply. Non-compliance may be caused by oversight or lack of ability, not necessarily by egotism or mal-intent. As regards 'legitimacy', Zürn states that compliance comes about when actors consider rules procedurally just and rooted in the broad public as far as their formulation and application are concerned. Zürn does not put it that way, but 'rational institutionalism' amounts to a blend of the received authority theory, reputation theory, and the enforcement model. According to this amalgamated view, international law operates as a system of legitimate constraint in which actors comply with rules of their own making because they have reasons to expect that, when adhering to consensually erected standards, the gains exceed the losses. Institutions, meaning densely patterned interactions such as processes of bargaining and/or legal argumentation in arenas of supra- or international agencies, provide independent third parties that ensure a fair distribution of costs and benefits; encourage the reliability of actors; and facilitate the sanctioning of norm-violations. Finally, Zürn's rendering of 'legalization' revolves around the view that juridification and internalization figure as determinants of compliance: the production of legal texts by authoritative third parties, preferably courts, ensures that regulatory prescriptions attain clarity, pertinence, stringency, adaptability, and a high degree

countries meet their commitments: the characteristics of the activity involved; the characteristics of the accord; the international environment; and factors involving the country."

¹⁸ Zürn, Introduction, at p. 13.

¹⁹ 'Management', 'legitimacy', and 'transnationalism' harbour notions of process and/or intersubjectivity that are difficult to reckon with from the perspective of 'reputation' and 'enforcement'.

of consistency. This, in turn, has the effect that states publicly express their intention to use those instruments so as to realize the goals to which they had originally consented.

Zürn treats available theorems of compliance as purely formal explanatory models whose concepts refer to clearly discernible referents. It even appears as if said concepts establish not only correlations between variables but serve themselves as empirical referents. For Zürn et al. legalization means that authorities codify clear-cut rules that then function as tools as they stabilize compliance and complement rational institutionalism; likewise, legitimacy means acceptance and underpins legalization if the latter comes under stress in the real world, as it were²⁰. The most serious flaw is that Zürn treats legal rules as given thing-like beings²¹ that are made available as instruments that actors at a subjugate level may avail themselves of. The insight that rules gradually ‘trickle down’ into domestic legal systems over time *after* legally oriented interactions have evolved intersubjectively shared norms among state-actors, and that interaction processes may alter the disposition of actors and induce them to cooperate²² is entirely ignored. Zürn does not elaborate the potential of a more reflective and process-oriented notion of law, despite occasional references²³. Neither does Zürn consider legitimacy explanations that are focused upon the perception of rules as fair *after* actors have been socialized by a normative discourse that takes place within epistemic communities²⁴. In Zürn’s presentation, norms and rules take a flat, static, and ostensibly self-coinciding form – just like objects. They remain separated from processes of interaction, interest formulation, and identity formation²⁵. Their quality as shared considerations among partners in a joint communicative endeavor is abstracted away, just as their transformative potential²⁶.

²⁰ Cf. Zürn, Introduction, at p. 33-4.

²¹ See the collection of essays in J. Goldstein, M. Kahler, R.O. Keohane & A.-M. Slaughter (eds.), *Legalization and World Politics*, A Special Issue of *International Organization*, vol. 54 (2000), pp 385-703.

²² Cf. Harold H. Koh, *Bringing International Law Home*, *Houston Law Review*, vol. 35 (1998), pp. 623-681, at p. 626-7.

²³ Compare the remark by Zürn, Introduction, at p. 33: “Compliance management through legalization in the form of juridification and legal as well as civil internalization can stabilize compliance and partially replace horizontal enforcement.” with the statement by Zürn & Neyer, *Conclusions – The Conditions of Compliance*, pp. 183-217, at p. 213: “Member states gradually become socialized in an intensifying network of transnational legal reasoning, and even undergo a redefinition of their political identity.”

²⁴ Cf. Koh, *Why Do Nations Obey International Law?*, *supra*, at p. 2645.

²⁵ Cf. the following statement by Zürn, Introduction, *supra*, at p. 24: “Legally internalized refers here to the fact that norms of conduct, developed beyond the nation-state, directly affect their addressees; civilly internalized means that those who are affected by the regulations have actionable civil rights.” Curiously, the ‘internalized’ impetus of norms becomes manifest in direct (external?) pressure and/or the having of rights but has nothing to do with consolidating individual beliefs, attitudes, and values along commonly shared norms, as one might otherwise presume.

²⁶ Law may be conceived as closely tied to social realms and concomitant practices. See Marc Galanter, *Law Abounding: Legalisation around the North Atlantic*, *The Modern Law Review*, vol. 55 (1992), pp. 1-24, at p. 14: “As perceptions or problems and estimates of alternative solutions vary, we use law more, both in its

In the second chapter, Neyer & Wolf undertake to refine and operationalize the four categories introduced by Zürn so as to yield empirically testable hypotheses²⁷. They associate the four independent variables with different indices from which they derive various hypotheses about relations between these variables and typical patterns of behavior. The good thing about this exercise is that Neyer & Wolf refine the analytical models conceptually without separating the four independent variables. They correctly state that understanding compliance requires taking all four perspectives, and their respective sets of variables, into account. If legalization turns out as the most fruitful perspective on compliance, it is presumably because it has greater explanatory potential relative to, and compared with, but not isolated from the other three perspectives. So rather than arbitrarily favouring one perspective over another, Neyer & Wolf seem more concerned to connect the four perspectives and their respective concepts in order to draw from hitherto achieved findings about compliance without falling prey to the danger of becoming prisoner to only one or another elegant construction. The bad thing about this exercise is that, precisely to the extent to which Neyer & Wolf engage in formal sub-categorization so as to operationalize the conceptual issues staked out by Zürn, they further narrow down the heuristic potential of available theories. The machinery of compliance mechanisms proposed by Neyer & Wolf is fine-tuned so as to bear out when and why actors exhibit typical patterns of (non)conformist behavior vis-à-vis typical problems in typical situations as they recur in specific issue areas. But precisely this accomplishment strikes me as a questionable gain. For it serves above all to retrieve overtly sterile formalizations of variant, and variable, goings on in the real world. By this, Neyer & Wolf rule out that law comes into the picture as a social institution that shapes the way actors view, evaluate, and act upon things in an orderly fashion.

Indulging Form, Ignoring Content, Downplaying Process

Chapters three to five lay out how compliance had been investigated with respect to behavioral prescriptions concerning three distinct types of activities: state aid policy at the national, supranational, and international levels (chapter 3); trade in foodstuffs at the supra-

wholesale and *ex ante* forms of legislation and administrative regulation and in its retail and *ex post* form of litigation.”

²⁷ Jürgen Neyer & Dieter Wolf, *The Analysis of Compliance with International Rules: Definitions, Variables, and Methodology*, pp. 40-64.

and the international levels (chapter 4); and intergovernmental redistribution at the national and supranational levels (chapter 5)²⁸.

Dieter Wolf maintains that the rate of compliance with state aid control regimes was relatively low at the federal level of the German *Länder* and relatively high in the EU, the compliance rate in the GATT/WTO falling somewhere in-between²⁹. The EU arguably figures most prominently with respect to compliance since the early 1990's, when "[...] the Commission has managed to elicit an unusually high degree of compliance with the provisions of its system."³⁰ For Wolf, the relatively greater success of the EU system is owed to its having recourse to monitoring and sanctioning facilities, which are complemented by the adjudication function of the European Court of Justice (ECJ). Given the lack of effective third-party procedures, neither provisions of federal law nor those in intergovernmental agreements between the *Länder* governments could have been made more binding so as to exert enough pressure on the latter to curb subsidies to influential business organizations. The GATT/WTO system, in turn, attained monitoring procedures in 1995, but the effectiveness of regulatory prescriptions has so far been dependent on the willingness of member states to report their state aid schemes themselves and to monitor other members in a unilateral fashion. In the end, the correlation between the existence of monitoring/sanctioning facilities and legalization procedures on the one hand and the degree of compliance on the other allegedly demonstrates that "[...] it is necessary to install an independent third-party [...] and entrust it to monitor the national or regional systems autonomously. This task must be supported by strict rules."³¹ The problem with this argument is its surface plausibility. A closer look suggests that Wolf reads into the empirical record what he deems supportive of the project's main claim.

The role of normative views and political purposes for processes of interaction do not become relevant for compliance with state aid regulations. Regulatory law concerning state aid consists of purely formal rules with which abstract model actors choose to comply or not. What does not come into view is, first, that compliance problems are inextricably linked with the political system, meaning its invisible constitution as well as its peculiar institutions in the respective issue area; and second, that compliance is affected by the sort of interaction process

²⁸ Dieter Wolf, *State Aid Control at the National, European, and International Level*, pp. 65-117 (Chapter 3); Jürgen Neyer, *Domestic Limits of Supranational Law: Comparing Compliance with European and International Foodstuff Regulations*, pp. 118-148 (Chapter 4); Jürgen Neyer, *Politics of Intergovernmental Redistribution: Comparing Compliance with European and Federal Redistributive Regulations*, pp. 149-182 (Chapter 5).

²⁹ Wolf, *supra*, at p. 92.

³⁰ *Ibid.*, at p. 88.

³¹ *Ibid.*, at p. 115.

in which the actors are involved, i.e. whether they see themselves as competitors or as partners in a collaborative project.

These conceptual blindspots make it impossible for Wolf to even ponder whether conservative governments have, at the level of the *Länder*, been more willing to grant state aid due to their sympathy with the concerns of industrial corporations; whether the flow of subsidies has been facilitated by a relatively homogeneous and non-fragmented legislative in which no party assumes the function of control; whether the willingness to control state aid has been low in one-party and coalition governments but relatively high in multi-party governments; and whether subsidies have generally been lower in political systems with a higher degree of transparency³². In addition, Wolf himself remarks that the *Länder* governments saw the danger of getting involved in a competitive ‘subsidies race’ in the early 1980s³³, set into motion by multinational corporations playing off one state government against another. It would have been worthwhile to investigate whether and to what extent the hesitation of the federal government to monitor and sanction the implementation of state aid control measures was owed to a mixture of political persuasion, purpose, and process. For what is striking is that governments at the federal and at the level of the *Länder* were mostly staffed by members of the two popular parties, the CDU/CSU and/or the SPD. Any federal government exerting political control vis-à-vis *Länder* governments would have found its work hampered by ensuing intra-party cleavages. What is more, the federal government had been in the hands of the CDU/CSU between 1982 and 1998, which exhibited an understanding of the economy that made it seem counterproductive to curb subsidies and deter multinational corporations from investing in Germany. Owing to a specific macro-economic understanding of things, the federal government would not assume the function of neutral arbiter for purposes of economic growth. The institution of law and the relevant state aid regulations cannot be divorced from but must be seen as integral parts of this political context.

As regards the compliance record of the EU and the ‘new’ WTO/GATT, it appears in Wolf’s own rendering that institutional processes and legalization operate differently in the WTO and, respectively, the EU. Yet the problem of compliance is not necessarily greater in the WTO because of its lack of third-party procedures of monitoring and sanctioning. The

³² Cf. Damien J. Neven & Lars-Hendrik Röller, The Political Economy of State Aid: Econometric Evidence for the Member States, in: D. J. Neven & L.-H. Röller (Eds.), *The Political Economy of Industrial Policy in Europe and the Member States* (Berlin: Edition Sigma, 2000), pp. 25-38, at p. 35, who assert that Germany, Great Britain, France, and the Netherlands are characterized by greater transparency than Belgium and Italy.

³³ Cf. Wolf, *supra*, at p. 71-2.

point is that the WTO has, for structural reasons, not been able to institute an independent third-party able to monitor and adjudicate non-compliance with subsidies regulations. Members of the WTO have been hesitant to transfer competencies because of their distrust of the very system. Parties to subsidy-disputes in the WTO have been engaged in rather lengthy processes of claims and counterclaims without, however, sharing much faith in the fairness of the working of the WTO. Wolf himself refers to the dispute between Canada and Brazil over the latter's alleged subsidy for export of an aircraft manufactured in Brazil by a Brazilian enterprise, and Brazil's complaint of Canadian subsidization of the export of a Canadian aircraft³⁴. This dispute is indeed telling as it went through the stages of WTO Panel and Appellate Body rulings, Compliance Panel and Appellate Body rulings. However, the government of Brazil reckoned very early that the trading system of the WTO has been built upon peculiar norms, and that its regulatory machinery has been so designed, that without major efforts to correct the asymmetry in WTO law, developing countries can never hope to industrialize and compete with highly industrialized nations in advanced high-tech industries and export markets³⁵. If the EU has been better able to monitor and sanction rule violations as regards state aid, then because there has been a greater homogeneity as regards the perceptions of the EU's legitimacy as a political system and as a common market: better compliance has been due to a greater consensus about the EU needing to curb *these kinds* of subsidies in *this specific* issue area. As is clear, this finding does not lend itself to generalization. For the compliance record among EU member states is rather disappointing in other vital issue areas³⁶; be it that consensus about the goals of the community has been spurious if not absent *there*³⁷, be it that supranational regulations have not been deemed legitimate³⁸, or be it that governments have been immune to socialization by the community, preferring to fleece each other instead, despite sanctioning measures by the Commission³⁹.

³⁴ Wolf, *supra*, at p. 80-2.

³⁵ Cf. Chakravarthi Raghavan, Rulings against India, Brazil raise WTO bias issues, *South-North Development Monitor*, SUNS, No. 4500, 1 September 1999.

³⁶ To name are, inter alia, regulations in the areas of health and consumer protection; energy and transport; and taxation and customs. See Commission of the European Communities, *22nd Annual Report from the Commission on Monitoring the Application of Community Law*, COM (2005) 570.

³⁷ To be sure, this does not only mean consensus among governments but between governments and influential societal actors, most notably those in industry and the financial sector, and between the latter themselves. See Stuart Holland, *The European Imperative: Economic and Social Cohesion in the 1990s* (London: Spokesman, 1993), at p. 100-113.

³⁸ Cf. Charalampos Koutalakis, *Making European Policies Work in the South. Explaining Non-Compliance in Italy and Greece*, <http://www.polwiss.fu-berlin.de/projekte/koutalakis/Summary%20MEPWORKS.pdf#search=%22compliance%20problems%20in%20the%20eu%22>, at p. 2, emphasizing that compliance problems in Italy and Greece are often the result of weak social mobilization and rather accentuated resistance of public and private actors to comply with EU law.

³⁹ Referring to instances of non-compliance that the Commission sanctioned with punitive fines, Phedon Nicolaides & Helen Oberg, *The Compliance Problem in the European Union*, EIPASCOPE 2006/1,

Wolf entertains in any case too formal a view of institutions and legalization. He thinks that law can be dissociated for explanatory purposes from the evolving 'constitution' of a political system and its very context of pertinent ideas and institutions. Yet if anything, norms and rules manifest themselves in a contingent process of interaction among real actors. Neyer is much more sensitive to these aspects in his investigation of (non)compliance with foodstuff regulations and, respectively, redistributive prescriptions⁴⁰. His argument is in either case that disciplining mechanisms, together with legalization of formal rules, do not suffice to elicit compliance.

In Neyer's view, the EU and the WTO are plagued by high degrees of non-compliance with inconvenient foodstuff regulations concerning trade with hormone-treated beef, despite the availability of monitoring, sanctioning, and (quasi-)judicial proceedings. These instances of non-compliance were arguably induced by both a lack of legitimacy of said regulations and a rather low level of participation among affected parties, i.e. governmental actors and societal groups, in multilateral processes of lawmaking⁴¹. So unlike Wolf, Neyer does seem aware of the role that normative considerations play in the process of interaction. Yet, because his analysis is still too wedded to the assumption that law and politics are two distinct domains, and because his analysis is locked within the conceptual confines of formal compliance theory staked out by Zürn, his findings are not entirely persuasive. To be sure, Neyer is wary of the rather accentuated controversies accompanying the 1999 EU decision prescribing non-discriminatory treatment of British beef on the one hand, and the 1998 WTO decision disallowing the ban of hormone-treated beef from the US on the other⁴². He sets out that the refusal to comply with these decisions, orchestrated mainly by the German government, had its roots in a quite fundamental divergence of views concerning the level of safety standards that marketable beef would have to satisfy before being traded within the EU and, respectively, the WTO. The governments of several European states, facing pressure from their alerted constituencies, stressed the need to uphold high levels of consumer protection. The governments of the US and Great Britain, in turn, endorsed the position of their respective industrial clients and advocated a turnaround of the hitherto valid precautionary principle: trade with beef was to be liberated from all import restrictions unless

http://www.eipa.nl/cms/repository/eipascope/Scop06_1_2.pdf#search=%22intentional%20non-compliance%20in%20the%20eu%22, at p. 5, mention the cases of Greece in July 2000, Spain in November 2003, and France in July 2005.

⁴⁰ Jürgen Neyer, *Domestic Limits of Supranational Law: Comparing Compliance with European and International Foodstuffs Regulations*, pp. 118-148 and by the same author, *Politics of Intergovernmental Redistribution: Comparing Compliance with European and Federal Redistributive Regulations*, pp. 149-182.

⁴¹ Neyer, *Domestic Limits of Supranational Law*, at p. 147-8.

⁴² *Ibid.*, pp. 125-9.

there being scientific evidence about its posing a threat to the safety of consumers. In the end, Neyer's point is that greater participation in the making of foodstuff regulations by official and societal actors would have increased the rate of compliance with formal rules. Allegedly, the process of law-making would have allowed to overcome fundamental divergences and to arrive at compromise solutions, i.e. formal regulations, which all parties would accept as binding. This is doubtful, however, given the acuteness of the dispute between two philosophies underlying trade in foodstuffs, namely consumer protection versus free trade. Neyer's argument holds only if the political and the legal would not interpenetrate each other in the real world. But precisely this is the case.

It would have been mandatory to acknowledge that the EU and the WTO have become arenas in which the concerns of transnationally operating industrial corporations weigh much more heavily than other societal interests. Under the direction of some particularly influential governments, the economic law of either political system has come to be a repository of industrial interests. The constitution of either system inevitably embodies a severe conflict that is not to be resolved from within existing procedures. It so comes that securing compliance with formal regulations of EU and WTO law presupposes misinformation and exclusion of the public, which is precisely what both systems do; the EU when it yields 'input'-legitimation, and when it endogeneizes democratic accountability in order to remain able to conduct business-as-usual; the WTO when it exempts the work of law-making organs, such as the Codex Alimentarius Commission (CAC), from public scrutiny. In this context, it may seem evidence to the contrary that the Federal Minister of Health, Andrea Fischer, played a pivotal role in the formation of political resistance to compliance with the EU's foodstuff regulations⁴³. Yet, Neyer forgets to mention that, being a member of the Green Party, Fischer's resistance was due to her (party's) political persuasion and probably reinforced by the pressure of the media, which scandalized the controversy over hormone treated beef, as Neyer points out⁴⁴.

Now, given that both the EU and the WTO are smoothly working regulatory machineries if and to the extent to which large parts of their constituencies are precluded and if scandals do not attain broad media coverage⁴⁵, it may be maintained that compliance with formal regulations had been greatly facilitated if 'outside' actors had not disturbed the process, and if it the issue had not become public. At the same time, to maintain that

⁴³ *Ibid.*, at p. 146.

⁴⁴ *Ibid.*, at p. 131.

⁴⁵ Notice that the work of the CAC with respect to guidelines for vitamins and minerals in foods has similarly far-reaching effects but has so far not attracted much public awareness.

compliance with regulations of the EU depends on an overlap of consumer preferences, interests of industrial corporations, and priorities of governments, and/or that compliance benefits from greater inclusion of affected parties pays lip service to the theories of legitimacy and management but begs the very question. For it is simply not the case that trans- and supranational institutions are built upon a broad public consensus. There is growing opposition to the (neoliberal) regulatory project of the powers-that-be. In the end, Neyer ponders only the extent to which a very specific rationality of inter- and supranational economic law had been subject to arguing, bargaining, and compromise in a rather thinly conceived political process. His analysis shows, again, that understanding compliance requires that inter- and supranational law be not dissociated from the constitution and process of the respective political systems from which regulations emanate and upon which they presumably work back, if they do.

As regards compliance with redistributive policies, Neyer maintains that the EU member states show a better compliance record than the *Länder* at the federal level of Germany. The stronger countries in the EU have so far refrained from openly putting into question the idea of redistribution. The net contributing *Länder*, by contrast, openly asserted their dissatisfaction with the idea of unconditional solidarity with weaker *Länder*. Some *Länder* governments even questioned the legitimacy of the very constitutional arrangement. According to Neyer, the rate of compliance with redistributive regulatory schemes is higher in the EU than at the federal level because the EU's arrangements concerning redistribution are tied to an institutional framework that is able to adjust conflicts of interest in light of changing social preferences⁴⁶. The good thing in Neyer's rendering is, again, his apparent sensitivity for the role of the process in and through which actors accommodate their conflicting views. As in his analysis of foodstuffs regulations, however, Neyer does not take into account that and how the constitution of the respective political system shapes the interaction process. He ignores that law works at a deeper level when it moulds what the actors make of formal regulatory law in their interactions.

(Stop) Making Sense Of Compliance

The final chapters by Zürn & Neyer and Joerges are meant to discuss and put the results of the respective chapters into perspective⁴⁷. The main conclusion is that law beyond the state is

⁴⁶ See Neyer, *Politics of Intergovernmental Redistribution*, at p. 174.

⁴⁷ Zürn & Neyer, *Conclusions – The Conditions of Compliance*, pp. 183-217 and Christian Joerges, *Compliance Research in Legal Perspectives*, pp. 218-261.

possible, meaning in particular that compliance is a relatively frequent phenomenon in political systems such as the EU that lack a coercive/material hierarchy but that draw from institutional/legal hierarchy instead. The relatively good compliance record of the EU allegedly suggests that centralized coercion is not the only, not even the most important factor triggering compliance. Rather, “[...] the interactive effects between variables from different theoretical perspectives are decisive in understanding compliance records.”⁴⁸ It is a peculiar mix of monitoring/sanctioning, juridification/internalization, participation/acceptance, and/or reflexivity/capacity (of implementation) that triggers compliance. In my opinion, the conclusion of the authors reveals above all that many important factors pertaining to compliance have not been taken into consideration.

The most severe problem is that regulations are ascribed object-form. For Zürn et al. the law has identity, constancy, and boundedness. In the linear understanding of the authors, rules-as-things are part of the world-that-is against which behavior varies. Hitherto unresolved jurisprudential problems such as indeterminacy, incoherence, or illegitimacy are only superficially treated, if at all. Closely related with this, the authors work with a static and non-recursive frame. They abstract from temporality and evolutionary change. All this is not very helpful for an understanding of compliance. The common market of the EU and the trading system of the WTO are systems that rest on more or less overlapping functional considerations among their respective members/participants. The federal system of Germany, by contrast, is obviously much more than a common market or a trading system. It is a federation composed of units, i.e. the *Länder*, that pursue ends, vis-à-vis each other as well as the federation as a whole. And these ends are by their very nature political⁴⁹. The very consensus that is built into these different political systems, and that translates itself into the respective legal systems, is of an entirely different nature. If the EU fares best as regards compliance with regulatory prescriptions in issue areas such as subsidies, foodstuffs, and redistribution, then this has much to do with the fact that its members subscribe, however wilfully, to the same politico-economic philosophy. Put differently, the member states of the EU conform to regulations because their governments are persuaded that liberalization and harmonization of prescriptions in specific sectors benefit their clients. If member states of the WTO are more hesitant to comply with regulations in areas of subsidies and foodstuffs, then this is because there is greater disunity among governments about the underlying rationale

⁴⁸ Zürn & Neyer, Conclusions, supra, at p. 183.

⁴⁹ The difference between the political and the functional may be seen in that the former has always to do with questions pertaining to the organization and structure of a collective, whereas the latter is essentially about the satisfaction of (individual) wants.

concerning trade. Governments are more hesitant to comply because conformity with trade law may mean that they or their clients are worse off. If compliance with regulatory law concerning subsidies and redistribution is lowest in the federal system of Germany, then this has much to do with the fact that the *Länder* governments have over time appropriated political dispositions that eroded the once existing commonality of views regarding these issues without, however, putting into question the federal system as a whole.

In the final chapter, Joerges claims to put the findings of the authors into a more enlightened legal perspective. In my estimation, he completely fails to do so because he evaluates said findings against a rather dubious criterion: whether the authors manage to understand the problem of compliance not only in terms of political science but in the language of law⁵⁰, from within Law's Empire, as it were. But what good is it for explanatory purposes to assume the rule of law and subordinate empirical analysis of compliance to the normative commitments of legal discourse(s)? The inevitable result of this is that every type of activity is ipso facto scrutinized under the assumption that it is essentially justified, coherent, rational, and even good. Aside from this, Joerges appears in any case more concerned about making a case for the study of the EU as a multilevel governance system. The last part of the book contains a good bibliographical record and a very concise indexical apparatus.

⁵⁰ See Joerges, *Compliance Research in Legal Perspectives*, supra, at p. 220.