Compliance in Mercosur: Brazil Formal Commitments and Interests

Marcelo de Almeida Medeiros
Isabel Meunier
Janina Onuki
Deisy Ventura

“almost all nations observe almost all principles of international Law and almost all of their obligations almost all of the time”. (Henkin, 1979: 47)

Introduction

As a global player Brazil has, especially in the last few decades, attempted to develop its insertion at the international arena. From 2008 to August 2012 the country...
signed 1.794 international treaties\textsuperscript{6}, what may show its option for a foreign policy characterized by a trend towards bilateral and multilateral agreements and adhesion to a vast spectrum of international regimes.

In this context the Mercosur\textsuperscript{7} regional integration process comes into view as one of the most important \textit{locus} of deep and broad economical and political cooperation for Brasilia. As a result, this arena becomes a propitious level where one can observe how far Brazil has been taking seriously its regional and prior commitments. Has Brazil been complying with the Common Market of the South rules? There are some empirical evidences that Mercosur member-states, independently of their size and wealth, have critically problems to incorporate regional norms. Furthermore, some quantitative data findings point out that in some key issues the incorporation of norms are faster than in others. Why?

This situation, described by a lack of enforcement and illustrated by an inconsistency between the original political will and the subsequent juridical reality, does not encourage compliance practices. This paper propose to consider two arguments: (i) Brazilian public administration faces a problem of both coordination and heterogeneity of treatment regarding the internalization of regional norms; (ii) Brazilian formal commitments to regional integration contrast with its interest on developing a broad centre-state logic of international insertion, \textit{e.g.}: BRICS, IBAS, G-20, generating no significant compliance momentum towards Mercosur. These arguments are preceded by some theoretical considerations and followed by selected final remarks.

\textbf{1-Some theoretical considerations}

The concept of compliance cannot be understood in a single way. In recent years the increase of interdependence between States brought about by globalization, and also the consolidation of market-democracy principles worldwide suggests new manners to perceive compliance issues in the international arena.

\textsuperscript{6} Data provided by the Division of International Acts of the Ministry of Foreign Relations from Brazil.

\textsuperscript{7} Common Market of the South.
However, before studying the main debate on compliance, it is necessary to establish some brief and previous precisions to distinguish this concept from others. The most widely and concise used definition for compliance is probably the one proposed by von Stein: “the degree to which state behavior conforms to what the agreement prescribes or proscribes”. Accordingly to this definition, compliance is not implementation. As Mera (2007: 04) puts forward, implementation are “the measures that governments take to translate international accords into domestic law and policy”. Also, compliance is not effectiveness: an actor can comply without being effective, i.e., effectiveness refers to the extent to which an actor is able to achieve its objectives (Underdal, 1998). Finally, there is a subtle but important notion that is linked to compliance but is not the same thing: commitment. Actually, commitment is the device that connects compliance to implementation (Mera, 2007: 04). Commitment suggests both conformity to agreements and actions to make them real. In this study we are interested on compliance in Mercosur and more specifically on Brazil formal commitments.

Nevertheless, despite the importance of those different meanings, the main debate that has emerged in the last decades on compliance issues occurs between Managerialism and Enforcement theorists. If both of them have been seeking to understand why States comply, they have used distinct approaches to conceive and implement their research projects.

On the one hand, Enforcement theorists’ main argument is that “high compliance with international law is merely indicative of the shallowness of many international agreements and should not be generalized to more demanding cases” (Raustiala & Slaughter, 2002: 543). For them, the deepest agreements apply the most extensive enforcement mechanisms. In this sense, the case of the Court of Justice of the European Union (CJEU) is a consistent instance. According to European officials:

---

8 Here we only introduce some useful conceptual differences for this paper. It is just an alert and not a deep study.


“Since the establishment of the Court of Justice of the European Union in 1952, its mission has been to ensure that ‘the law is observed’ ‘in the interpretation and application’ of the Treaties. As part of that mission, the Court of Justice of the European Union: reviews the legality of the acts of the institutions of the European Union, ensures that the Member States comply with obligations under the Treaties, and interprets European Union law at the request of the national courts and tribunals”.

On the other hand, Managerialism theorists argue that:

“what matters is not whether the international system has legislative, judicial, or executive branches, corresponding to those we have become accustomed to seek in a domestic society; what matters is whether international law is reflected in the policies of nations and in relations between nations” (Henkin, 1979: 26).

For them, when States go into an international regime they do adjust their expectations and behaviors - ones more, others less – and violation emerges only as an exception. Besides, as Chayes & Chayes (1993) emphasize, compliance should not be used in a dichotomic way, because regimes are naturally conceived for being, in acceptable levels, disobeyed. Underdal (1998: 06) follows the same conception considering “compliance to be a matter of degree”. According to him:

“An actor may comply with some provisions (e.g. procedural obligations) but not with others (e.g. substantive rules requiring major behavioural change), and meet some obligations partially (for example, by reducing emissions, but less and/or later than required by the agreement)” (Ibid.).

If the debate between Managerialism and Enforcement theorists is definitely significant for the comprehension of compliance, it seems that in practice compliance varies in accordance to an array of variables. Each situation asking for a specific interpretation, sometimes enforcement matters; sometimes it does not.

Concerning the European Union (EU) experience, they point out that although enforcement mechanisms work in most of economic subjects – under the authority of the CJEU - if one takes the EU as a whole, there are several fields where enforcement is not present, especially those related to the Common Foreign and Security Policy (CFSP).

As a matter of fact compliance in Regional Integration Organizations (RIOs) is a specific topic and, as a result, should be studied in a particular perspective. Although they are very diverse, RIOs are characterized, in general, by regimes that are more
forceful than those established outside this kind of restricted frame. Some of them propose very deep nexus amid relatively homogeneous States, e.g. the European Union; others barely weak relations among vastly heterogeneous countries, e.g. Asia-Pacific Economic Cooperation - APEC.  

In this context, Mercosur, particularly, may be placed in the mid-way between these two instances. In fact its institutional design and purposes suggest that it could be qualified as a framework for intergovernmental cooperation, in other words, a kind of cooperation marked by a plethora of loyalties going from culture to trade (Medeiros, 2000: 467). With reference to decision-making process, consensus is the unique rule and Mercosurian norms need to be internalized into all national juridical systems. Nevertheless, this internalization procedure varies from country to country showing divergent levels of commitment to Mercosur (as defined above) amid member-states. This paper focuses Brazil’s internalization procedures in order to scrutinize its commitment to the regional organization, facing it with Brazilian foreign policy general lines and reliability to Mercosur.

2- The problem of coordination and heterogeneity of treatment regarding the internalization of regional norms

In Brazil, the internalization procedure does not happen in a homogenous or even completely predictable way. Actually, Brazilian public administration faces a problem of both coordination and heterogeneity of treatment regarding the internalization of regional norms. Mercosur produced 2,468 norms between 1991 and 2011, which encompass a wide range of subjects, thus presenting different degrees of coerciveness. This diversity reflects on different time lapses taken to complete internalization processes, generating an instability that contributes to the increase of legal uncertainty for economic and social actors.

Treaty of Asunción (Additional Protocol, art.42) establishes that all Mercosurian norms are mandatory to member-states, and must be internalized when necessary. This expression has allowed the interpretation of two different occasions when norms would be exempted from incorporation: if all member-states understand the norm as concerning internal functioning of Mercosur; or if there exists a national norm with the exact same content of the regional one. When Brazil understands the regional norm must be internalized, three procedures may take place: (i) the standard procedure of internalization: Executive officer send the norm to Congress appreciation, and then it is enacted by Executive; (ii) internalization by a Presidential decree; (iii) incorporation by an act from a Ministry or governmental agency.

In this context, Brazilian Executive body submits to Parliament appreciation less than one out of ten Mercosurian norms. This means that Executive branch is the sole responsible for incorporating more than 90% of these norms (VENTURA et al., 2012), which may raise some questionings about the regional organization legitimacy. In the case of internalization by Presidential decree, the article 84 of 1988 Constitution is used as grounds, stating that the President of the Republic is empowered to sanction, promulgate, and publish laws, and to emit decrees to their execution.

On the other hand, norms promulgated with Legislative intervention are based on article 49 of Brazilian Constitution, which requires Parliament appreciation for acts potentially founding new charges or commitments onerous to national Treasure. However, this condition is heterogeneously interpreted in different cases. For instance, Decree nº 6.964/2009 about residence to citizens from Mercosur member-states, or Decree nº 6.729/2009 about educational integration and recognition of studies. Both of them do not seem to create onerous charges to national Treasure, and they required Parliament appreciation to be internalized. Nevertheless, they open the debate about new subjects, which have not been treated by regional norms yet. Therefore, they would demand more support to their legitimacy (VENTURA et al., 2012).

The incorporation of Mercosur regional norms to Brazilian law with Congress participation may increase their legitimacy, as it confers them the authority of the government branch formed by citizens’ representatives, and it implies on more discussion about the norm inside national territory. On the other hand, this procedure to
incorporation takes an unpredictable time to be completed, usually longer than time taken to internalize the rule by Presidential decree. Among norms incorporated with Congress approval from 2005 to 2011, the average time taken between the Common Market Council decision and the Presidential enacting is 6 years (VENTURA et al., 2012).

Factors that seem to extend time taken to internalization comprehend: norms containing annexes or additional protocols that need to be refreshed; norms signed later by associated States, demanding a second internalization procedure; exceeding time lapses taken in bureaucratic dynamics, only to send the norm from one Chamber or commission to another; the same norm sent twice by Executive to Legislative, and thus following two different processes of incorporation; excessive time taken by Executive to send the norm to Parliament, and to enact the Legislative decree. Taken together, those factors seem to point out to a lack of coordination among government bodies, and inside them as well.

As diagnosed by Rodrigo Gabsch (apud VENTURA et al., 2012), it is difficult to distinguish clearly between the intentional delay based on political questions, and the involuntary one, due to procedural reasons. In this context, we may point out that incorporation process is unclearly predicted in regional and Brazilian law, what opens up space to different interpretations, and to heterogeneous internalization paths. The control of Brazilian incorporation processes is too much diffused, and the different actors involved are sparingly coordinated.

Some information may also be added up: regarding resolutions from the Common Market Group that do require internalization (55% of the total), we may observe the gradual increase of Brazilian rate of incorporation between 1991 and 2011, the peak being 2006, on the second term of President Lula da Silva. We may also remark that incorporation time lapse has been gradually decreasing (VENTURA et al., 2012).

In comparison to the other member-states, Brazil uses to deposit later the regional treaties (Uruguay being the latest one), which happens particularly with norms concerning penal law and cooperation. Norms about business and investments are the most efficiently deposited.
Evidences above show Brazil faces internal problems to efficiently incorporate regional norms. In spite of the difficulty to distinguish between political reasons to the delay and procedural ones, empirical data points to a deficiency of coordination among government sectors which indicates at least a lack of political will to homogenize and centralize the internalization procedures of norms from Mercosur. That being said, one may ask whether Mercosur is actually a priority to Brazilian foreign policy. As Malamud diagnoses, “Brazil’s foreign policy has not translated the country’s structural and instrumental resources into effective regional leadership” (2011: 1). If regional integration was a path to becoming a regional leader with the ultimate goal of global recognition, it is not the sole one: other paths have been taken towards the same objective. Whether Brazilian regional leadership is a reality, it is not a target of this paper. What we intend to show is how its foreign policy aims to diversify the strategies to consolidate a role of emergent global power.

In the last two decades Brazil became more and more interested in strategic partnerships through cooperation fora such as the IBSA Dialogue Forum, BRICS and the G-20. Regional integration processes in general, and Mercosur in particular, which used to be at the center of Brazilian foreign policy during the 1990s, started to be seen simply as an additional strategy for the country’s global insertion through south-south cooperation. Summing up, Brazilian commitment level to the Common Market of the South appears to gradually deteriorate.

Itamaraty’s foreign policy is traditionally viewed as neutral – one that tends to define power-related issues in civil and normative terms. After the Cold War, this trend returned as an attempt at relatively deep regional integration, modeled especially on Latin American regionalism patterns and based on supranational principles. Within this scenario Mercosur has obviously acquired a special role, which educational vocation

---

12 A first version of this topic is part of a paper presented by Medeiros & Steiner at the Thematic Section 49 Emerging Powers, Global Institutions and Crisis-Management in the 12th Congress of the French Political Science Association – Paris 9-11 July 2013.
and legitimizing character are undeniable. However, the abysmal economic gap between Brazil and its southern partners promotes increasing institutional barriers and a growing awareness that being an emerging country is a quality that must not be restricted by other nations’ interests. As a possible result, we may verify a detachment from the integrationist ideal and a shift to the virtues of simple interstate cooperation – including the so-called “diplomacy for development” (Dauvergne & Farias, 2012).

As a matter of fact, Brazil can be considered the most Western of emerging countries. The country’s legacy and cultural affinities with American and European values makes it an important ally for developed nations, which must cope more and more with such emerging countries. Thus, due to Brazil’s Western characteristics, it may also serve as an intermediary between developed nations and other emerging countries such as China, India and Russia, which civilizations encompass cultural idiosyncrasies that may have significant political consequences for the international system. In this context Brazil has acquired increasing status as a global leader that can help negotiate interstate interests and, in view of that, it has been changing its commitments to the Common Market of the South.

As a symptom both of a detachment from Mercosur and of a recognition of the country’s special status, one can point out the Brazil-European Union (EU) strategic partnership, launched at Lisbon on July 2007, in which Brazil seeks to overcome the difficulties of the Mercosur-EU negotiations supported on the EU perception that:\footnote{José Manuel Barroso, President of European Commission: \url{http://europa.eu/rapid/press-release_IP-07-725_en.htm?locale=en#PR_metaPressRelease_bottom} (April 04, 2013).}

\begin{quote}
Brazil is an important partner for the EU. We not only share close historic and cultural ties, values and a strong commitment to multilateral institutions, we also share a capacity to make a difference in addressing many global challenges such as climate change, poverty, multilateralism, human rights and others. By proposing stronger ties, we are acknowledging Brazil’s qualification as a ‘key player’ to join the restricted club of our strategic partners.”
\end{quote}

As a matter of fact, even though this partnership does not mention explicitly trade issues, it indicates a vast array of themes for cooperation. As mentioned by the \textit{7th EU-Brazil Summit Brussels, 24 February 2014 Joint Statement}:\footnote{Cf. \url{http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/141145.pdf} (April 17, 2014).}:

\begin{quote}
(\ldots)
\end{quote}
“Today, we focused our discussions on how to use and develop the full potential of our strategic partnership in three key areas of cooperation that are of vital interest to our citizens: first, how to ensure strong, balanced and sustainable economic growth and job creation, including in new emerging fields; second, how to cooperate more effectively on key foreign policy issues, as well as humanitarian cooperation; and third, how to further our partnership on addressing global challenges we face in areas such as sustainable development, climate change, environment, energy, human rights and international cyber policy”.

Cooperation on these themes can progressively stimulate future bilateral trade relations and can have a positive indirect impact on the Mercosur integration process (i.e., if Brazil grows, Mercosur grows). On the other hand, it can directly reinforce the Brazilian trend to act as a lone runner at the international arena, especially because in the last EU-Brazil summit, pointed out above, it was clear that Mercosur represents a deadlock for Brazil trade negotiations. According to BBC:\(^\text{15}\):

“the dependency that Brazil has from Mercosur members to submit a proposal for trade openness is hurting the country, whose exports to the EU fell from 37.4 billion to 33 billion Euros between 2012 and 2013. Brazil’s trade balance with the block changed from a surplus of 3.3 billion Euros in 2011 to deficits of 2.3 billion Euros in 2012 and 7.1 billion Euros in 2013, according to Eurostat (the EU statistical agency). Brussels estimates that the EU-Mercosur agreement would create a free trade area of 59 million Euros and 12 percent increase in Brazilian exports to the European bloc”.

Actually, Brazil would have liked to conclude a trade agreement with the European Union sooner. The problem is that it can not do that without other Mercosur members’ concordance. However, it seems that Brazilian tolerance with its partners is coming to finish, as can be noted through Brazilian Finance Minister Guido Mantega’s discourse:\(^\text{16}\):

“We are negotiating a free trade agreement with the EU and we plan to do it with Argentina, which has had a positive reaction. This round started a year ago when we formally received a visit from the EU negotiating team”.

---


According to Ambassador José Botafogo Gonçalves, former Itamaraty’s Under Secretary for Integration and Trade\textsuperscript{17}:

"If Argentina is unable to make an offer that Europe considers valid, there is always the possibility of negotiating on behalf of Mercosur and implement [the agreement] at different speeds. Brazil, Paraguay, Uruguay implement faster and Argentina slower."

It could denote an interpretation that Mercosur individual member-states are not forbidden to build links with the EU at a variable geometry, meaning that individual customs agreements can be worked out\textsuperscript{18}. This attitude, once again, puts forward that Brazilian authorities shrink the State commitment to the Common Market of the South regional integration rationale.

Vigevani & Cepaluni (2007) highlight that Brazil’s growing interest in south-south cooperation cannot be viewed as a simple return to third-worldism, but as a proof for the existence of true common interests among such countries.

Participation in the IBSA Dialogue Forum is a good example. As put by Dauvergne & Farias (2012: 910): “What is significant here is how these three countries without a history of strategic partnering – with benign but thin relations – came together in a process of mutual identification”. And although the emphasis is on technical cooperation, commerce has also benefitted from this arrangement as seen in data from the Brazilian Ministry of External relations: imports from the other members of this group increased 681.3% between 2002 and 2012, while exports grew 549.2%; overall commercial exchange increased 601.4% for the period stated. It is important to note that such numbers were almost twice as high as the total increases in imports and exports recorded for the period (301% and 372%, respectively) (Figures 01-02) MRE/DPR/DIC, 2013).


\textsuperscript{18} Meanwhile, the economic crisis in Argentina has been beating stronger in Brazil than in other neighboring trading partners, while China grasps Brazil’s share in the Argentine market. Chinese products more than tripled their share in the past decade, according to a study by the CNI (National Confederation of Industry) at the request of the Folha de São Paulo. The Brazil has come to account for 36.5% of all the Argentinians bought from abroad in 2005. Last year was 26.5% and in the first two months of this year, the share has fallen to 24.8%. Cf. Folha de São Paulo: \url{http://www1.folha.uol.com.br/mercado/2014/04/1442731-china-abocanca-fatia-do-brasil-nas-importacoes-da-argentina.shtml} (April 19, 2014)
BRICS is another example. Brazil has used this forum to promote progressive ideas regarding renewable energy, for instance (i.e., biofuels\(^{19}\)) (Dauvergne & Farias, 2012).

A recent BRICS advance that is worthy of mention is the BRICS Development Bank, proposed by the five states at a summit in early 2013. Even if it is not put effectively in practice, it signals towards this group’s effort to promote cooperation and quality growth among developing countries, as discussed ahead with the idea of “diplomacy for development” put forth by Dauvergne & Farias (2012).

Regarding commerce, Brazilian imports from other BRICS countries rose from US$3 billion in 2002 to US$43.8 billion in 2012. Similarly, exports increased from US$5.4 billion in 2002 to US$54.2 billion in 2012. Overall commercial exchange grew from US$8.2 billion in 2002 to US$98 billion in 2012 (Figures 01-02). Considering 2013 data (January-April), this forum is presently responsible for 20.5% of Brazilian commercial exchange, and is only behind Asia\(^{20,21}\) (MRE/DPR/DIC, 2013).

As a matter of fact, with respect to Brazilian foreign policy efforts to increase the number of international partners, one can identify: (i) convergence between discourse and action; and (ii) state-centric bias. The trade data concerning IBAS and BRICS cooperation initiatives clearly shows their consistency and corroborates the idea that Brazil has been favoring individual actions over those anchored on Mercosur.

\(^{19}\) According to Dauvergne & Farias (2012), Brazil also has technical cooperation agreements on biofuels with two multilateral institutions (the Economic Community of West African States and the European Union) and 70 countries, most of them developing countries.

\(^{20}\) Obviously both Asia and BRICS numbers include great participation from China (including Hong Kong and Macau), which is currently responsible for 17% of Brazilian overall commercial exchange.

\(^{21}\) Numbers for Asia do not include Middle Eastern countries, which are considered separately and are currently responsible for 4% of overall Brazilian commercial exchange (January-April 2013).
Figure 01. Evolution of Brazilian exports to other BRICS and IBSA countries between 2002 and 2012\textsuperscript{22}.

Figure 02. Evolution of Brazilian imports from other BRICS and IBSA countries between 2002 and 2012\textsuperscript{23}.

Summarizing, as it has been stated above, Brazilian formal commitments to regional integration contrast with its interest on developing a broad center-state logic of

\textsuperscript{22} Data compiled from MDIC (2013).

\textsuperscript{23} Data compiled from MDIC (2013).
international insertion, e.g.: BRICS and IBAS, producing, in macro analytical terms, no significant compliance momentum towards Mercosur.

4 – Final Remarks

Regional integration organizations imply intense domestic-international dynamics that may be analyzed as a two-level arena to enable the understanding of certain aspects (Putnam, 1998). In the context of Mercosur, investigating compliance to the regional level is a valuable tool to visualize member-states interests and commitment to the organization. In this paper, we focused the case of Brazil:

One dimension of analysis of compliance to the regional organization is the incorporation of its norms. In Brazil, internalization procedures of Mercosurian norms have an unclear legal prediction, what opens up space to different interpretations, and to heterogeneous internalization paths. There is not a centralization of incorporation processes, and we may not affirm the different actors involved act coordinately. Even if we recognize this as a consequence of Brazilian institutional design, we may not neglect the Executive lack of effectiveness as a whole and Foreign Ministry in particular in centralizing and coordinating these procedures. As Milner (1997: 33) stresses:

“When domestic actors share power over decision making and their policy preferences differ, treating the state as a unitary actor risks distorting our understanding of international relations”.

Accordingly, it is hard to identify the part of some political will in order to voluntarily scuttle the implementation procedure and the part of involuntary actions due to the inefficiency of the Brazilian institutional design. Probably norms that are rapidly internalized should benefit of more convergence between domestic actors. However, it is almost certain: taking into consideration the internalization of regional norms, Brasília, ultimately, does not comply with Mercosur.

At the same time, Brazil, as a result of its economic development in the last two decades, seems to develop a broad center-state logic of international insertion, acting actively in fora such as BRICS and IBAS, in spite of its formal commitments to the Common Market of the South regional integration. This attitude seems to go against the very idea and principles of Mercosur.
Allied to the domestic factors stated above, all this points to the conclusion that Brazil presently shows no significant compliance momentum towards Mercosur.

Bibliography


***

DRAFT - SHOULD NOT BE QUOTED