The Mercosur Socio-Labour Declaration: The Development of a Common Regional Framework in the Global South

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The Socio-Labour Declaration is the legal instrument that protects fundamental labour rights within Mercosur and its Member States legal orders. Its 2015 revision enhanced quantitively and qualitatively the rights enshrined therein. Relying upon recent literature on Latin American regional integration, this article considers the complex institutional and legal framework in which the Declaration has been adopted and implemented. It examines how the intergovernmental character of Mercosur has shaped the legal content of the Socio-Labour Declaration. The institutional context of the Declaration requires the active cooperation and intervention of both regional and national actors. This article explores how Mercosur bodies have taken advantage of the flexible institutional framework to implement the Declaration through regional plans and policies. It also analyses the contrasting enforcement roles of the national executive and legislative powers, characterized by their timidity, and the judicial activism that is essential to consider the Declaration as a justiciable instrument. The article concludes that the Socio-Labour Declaration is a crucial instrument in protecting workers' rights in this trade bloc, and that the 2015 revision introduced substantial improvements that may provide the legal basis for future judgments, and regional and national labour laws reforms.

Keywords: Mercosur, Socio-Labour Declaration, Argentina, Brazil, Uruguay, Paraguay, Venezuela, Regional Integration, Labour Rights, Regional Trade Blocs, Latin America, Global South

1 INTRODUCTION

The Socio-Labour Declaration (hereinafter, the Declaration)[1] is the legal instrument that enshrines fundamental labour rights within Mercosur.[2] The economic

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1 When necessary, this paper refers to the original Socio-Labour Declaration, adopted on 10 Dec. 1998, as the '1998 Declaration', and to the revised Declaration, adopted 17 July 2015, as the '2015-Declaration'.

2 Mercosur was founded on 26 Mar. 1991 by Argentina, Brazil, Paraguay, and Uruguay. In 2012 Venezuela joined the bloc but is currently suspended due to alleged human rights violations. Moreover, Bolivia made a full membership application in 2015. There are also two types of Associate Members: first, members of title Asociación Latinoamericana de Libre Comercio (ALADI) Latin American Integration Association – Chile, Colombia, Ecuador, and Peru – with whom MERCOSUR concludes free trade agreements. They participate in meetings of MERCOSUR bodies

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integration of the region and the establishment of a common market are the primary goal of Mercosur. However, its original purely economic nature was quickly challenged mainly by trade unions that pressured Member States to adopt a regional social charter. Relying chiefly upon the technical assistance of the International Labour Organization[3] (ILO), the Presidents of the then four Member States, Argentina, Brazil, Paraguay, and Uruguay adopted the 1998 Declaration. While these countries intended to reinforce the social legitimacy of Mercosur, the trade unions considered the Declaration as the expression of 1990s neoliberal policies, based on the Washington Consensus,[4] implemented by national governments. Almost two decades later, the 2015 revision quantitatively and qualitatively enhanced the Declaration, reinforcing the social legitimacy of Mercosur and consolidating the common regional framework that protects workers' rights.

As a regional trade bloc, Mercosur adopted the Declaration in a period where the inclusion of labour provisions in free trade agreements (FTAs) was considered a possible response to the rapid and irreversible globalization of capital. The linkage between trade and labour has been frequently limited to social clauses or specific labour chapters. On the other hand, the Declaration is one of the few comprehensive fundamental labour rights instruments in a regional integration framework, along with the 1989 Community Charter of the Fundamental Social Rights of Workers. To the best of the author's knowledge, along with the 2003 Southern African Development Community Charter on the Fundamental Social Rights, it is also one of the only two purely Global South fundamental labour rights instruments adopted by intergovernmental organizations. Despite its relevance to the labour-trade linkage debate, particularly for the Global South, limited academic attention has been paid to the Declaration. This article aims to cast light on its role as an instrument to protect fundamental labour rights within a regional integration process in an intergovernmental setting.

The Declaration is a bold attempt to regulate labour relations at the regional level given the fragmentary and uneven development of Mercosur. In the year of Mercosur's thirtieth anniversary, and considering its recent revision, it seems necessary to examine the reception of the Declaration at the regional and national levels. The current Covid-19 crisis has slowed down economic activity to

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dealing with issues of common interest; second, countries with which MERCOSUR concludes agreements under Art. 25 of the 1980 Treaty of Montevideo, such as Guyana and Suriname.

3 Relasur consisted of tripartite meetings under the technical supervision of the ILO between 1993 and 1995. CMG/Resolution 49/92, 15 Dec. 1992.

4 Thuo Gathii, *The Neoliberal Turn in Regional Trade Agreements*, 86 Wash. L. Rev. 421, 439 (2011); Paul Kellog, *Regional Integration in Latin America: Dawn of an Alternative to Neoliberalism*, 29(2) New Pol. Sci. 187, 194 (2007).

unprecedented levels, resulting in massive job losses and a deterioration in the level and quality of employment.[5] The existing social, economic, gender, environmental, and digital inequalities in the region have been significantly widened. Ministers of Labour of Mercosur Member States have stated that achieving economic recovery and strengthening the social dimension are necessary to build more equitable and just societies. Respect for and promotion of the Declaration plays a key role in this process,[6] and its analysis thus becomes even more indispensable.

First, in contrast with the existing literature,[7] this article considers the intergovernmental framework and the inter-presidential relations within which the Declaration was adopted and implemented. Grounded in recent regional integration literature, the article examines the Declaration through a regional cooperation approach, rather than the traditional regional integration lens, with its focus on supranationalism, that better suits the European experience. It then explores the relevance of the trade-labour linkage from a Mercosur perspective (section 2).

Second, the article examines the axiological dimension of the Declaration. It explores its origins, that have shaped its content, its contentious legal nature, and its enforcement mechanisms. It then considers the values underlying the Declaration that have strengthened the social legitimacy of Mercosur (section 3).

Third, the article investigates the regulatory nature of the Declaration. It analyses its legal nature, as it was originally conceived as a political declaration. Relying upon international, national, and Mercosur law, the study considers the Declaration to be a legally binding atypical instrument that embodies the general principles of Mercosur. Furthermore, it explores the standards enshrined in the Declaration, with a particular focus on the evolution from the 1998 Declaration to the 2015 Declaration, that consolidated the common regional framework for fundamental labour rights (section 4).

Fourth, the article analyses the enforcement dimension of the Declaration. The limited role played by the Socio-Labour Commission (SLC) as the specialized

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5 *See* ILO, *2020 Labour Overview for Latin America and the Caribbean. Executive Summary*, https://www.ilo.org/wcmsp5/groups/public/—americas/—ro-lima/documents/publication/wcms_764633.pdf (accessed 1 Aug. 2021).

6 Declaration of the Ministers and High National Authorities of Labour of Mercosur regarding work, employment and actions against COVID-19, 20 Nov. 2020; and Declaration of the Ministers and High National Authorities of Labour of Mercosur regarding work, employment and actions against COVID-19, 1 June 2021.

7 César Arese, *Crítica de la nueva Declaración Sociolaboral del Mercosur*, 260 Derecho Laboral 555 (2015); Alejandro Castello, *Revisión y Actualización de la Declaración Sociolaboral del Mercosur*, 260 Derecho Laboral 637 (2015); Walküre Lopes Ribeiro da Silva, *Carta dos Direitos Fundamentais da União Europeia e Declaraçao Sociolaboral do Mercosul: origen, natureza jurídica e aplicabilidade*, 109 Revista da Faculdade de Direito da Universidade de São Paulo 349 (2014); Lucas Malm Green, *Eficacia Jurídica de la Declaración Sociolaboral del Mercosur*, V 8(2) Hologramática 95 (2008); Hugo Mansueti, *La Declaración Socio-laboral del Mercosur. Su importancia jurídica y práctica*', DPhil Thesis, Universidad Católica Argentina (2002).

enforcement agency of the Declaration is contrasted with its positive role as a social dialogue mechanism. Taking account of the significant regional institutional hurdles, this article unpacks the recent Administrative Labour Court case law, which considers the Declaration as an embodiment of the general principles of Mercosur law. The lack of supranational institutions has meant that the integration process is highly dependent upon the Member States.[8] Whereas under the pressure of trade unions presidents of the Member States played an important role in the adoption of the Declaration, the activism of national judges has been decisive for the recognition of the Declaration as a justiciable instrument (section 5).

Fifth, the article analyses the implementation of the Declaration. Despite the lack of supranational powers of the regional legislator, the Declaration provides the legal basis of several Mercosur labour plans and policies that must be followed by national labour laws. Even though national executive authorities and legislators have played a limited role in the implementation of the Declaration at the national level,[9] the 2015 revision may constitute a supplement to national labour laws on which national actors may act (section 6).

The article concludes that the Declaration is a crucial instrument in protecting workers' rights in Mercosur as a regional integration process. Despite the institutional hurdles inherent in an intergovernmental organization, characterized by strong presidentialism, both regional and national actors have turned the Declaration into a living instrument upon which workers and Mercosur citizens can rely. Furthermore, the 2015 revision substantially improved its provisions and may therefore constitute the legal basis for future judgments and legal reforms strengthening national labour laws.

2 LABOUR AND REGIONAL INTEGRATION IN MERCOSUR

2.1 Mercosur intergovernmentalism: Between presidentialism and regional cooperation

Traditionally, the EU approach, which heavily influenced the original economic objectives of Mercosur, was conceived as *the* way to achieve successful integration.[10] It was 'believed that integration could bring peace and economic

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8 Gian Luca Gardini, *MERCOSUR: What You See Is not (Always) What You Get*, 17(5) ELJ 683, 685 (2011).

9 One significant exception is the Uruguayan 2006 Freedom of Association Act (Law 17940, 2 Jan. 2006), which, relying upon Art. 9 1998 Declaration, protects trade union representatives.

10 Ricardo Caichiolo, *Mercosur: Limits of Regional Integration*, 12 Erasmus L. Rev. 246–268 (2019); Tobias Lenz, *Spurred Emulation: The EU and Regional Integration in MERCOSUR and SADC*, 35 West Euro. Pol. 155–173 (2012).

development to other continents as it did in Europe'.[11] Unsurprisingly, regional integration theories have tended to be Eurocentric, thus overlooking the diverse economic, political, social, and cultural elements of other regions.[12] As a result, the EU approach may not be viable in Latin America and, more specifically, in the Mercosur countries.[13] Unlike the EU experience, which relies upon a mix of supranational and intergovernmental institutions, regional cooperation through intergovernmental organizations has been the main means of regional integration in Latin America, but it has never converged into a single project.[14]

Despite its influence, and its heavy reliance upon strong intergovernmentalism, Mercosur has never intended to emulate the EU institutional framework.[15] The founding Treaty of Asunción[16] and the Protocol of Ouro Preto[17] established the regional institutional and legal framework characterized by state-led integration and intergovernmentalism but Mercosur has not established any supranational bodies. This is reflected in the composition of the main regional bodies, consisting of ministers or representatives of Member States' governments.[18] Consensus among Member States is the main decision-making principle. The dependence of Mercosur on Member States' executive authorities has meant that the pursuit of common regional interests has varied as political authorities have changed.[19] The prevalence of strong presidential systems in the region has meant that 'inter-presidentialism' has been the main driving force of Mercosur.[20] This is reflected in the framing of the Declaration as a presidential declaration.

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11 Clarissa Dri, *Limits of the Institutional Mimesis of the European Union: The Case of the Mercosur Parliament*, 1(1) Latin Am. Pol'y 52, 54 (2010).

12 Mercedes Botto, *América del Sur y la integración regional: ¿Quo vadis? Los alcances de la cooperación regional en el Mercosur*, 11(21) CONfines 9, 13 (2015).

13 Renato Obikawa Kyosen, *A inadequação das teorias integracionistas eurocêntricas para analisar o MERCOSUL*, 16(8) Rev. secr. Trib. perm. revis. 29–43 (2020); Detlef Nolte, *Regional Governance from a Comparative Perspective*, in *Economy, Politics and Governance Challenges* 16 (Víctor M. González-Sánchez ed., Nova Science Publishers 2016).

14 Andrés Malamud, *Overlapping Regionalism, No Integration: Conceptual Issues and the Latin American Experiences*, EUI Working Papers – RSCAS 2013/20, 4.

15 Detlef Nolte & Clarissa Correa Neto Ribeiro, *Mercosur and the EU: The False Mirror*, 112 Lua Nova 87–122 (2021).

16 This is the foundational treaty that aims to establish a free trade zone, a customs union and, eventually, a common market between Argentina, Brazil, Paraguay and Uruguay, adopted on 26 Mar. 1991.

17 Based upon Art. 18 Treaty of Asunción, the Protocol of Ouro Preto was approved on 17 Dec. 1994 and came into force on 15 Dec. 1995.

18 The Council of the Common Market (hereinafter, CCM), composed of the Ministers of Foreign Affairs and the Economy, is the highest political institution and highest decision-making body of Mercosur; and the Common Market Group (hereinafter, CMG), coordinated by the Ministries of Foreign Affairs of the Member States, is the Mercosur executive branch, whose main task is to implement the decisions of the CCM.

19 Mikhail Mukhametdinov, *MERCOSUR and the European Union: Variation and Limits of Regional Integration* 106 (Palgrave Macmillan 2019).

20 *See* Andrés Malamud, *Presidentialism and Mercosur: A Hidden Cause for a Successful Experience*, in *Comparative Regional Integration: Theoretical Perspectives* 53–73 (Finn Laursen ed., Routledge 2003).

An autonomous legal order, whose primacy over national law is disputed, has been developed. The Mercosur Permanent Review Court[21] (hereinafter, PRC), as the highest regional jurisdictional instance since 2004, and some scholars[22] consider Mercosur law to be above ordinary law, but the intergovernmental nature of this regional legal order has reduced its effectiveness.[23] The primacy of Mercosur law over national law, its direct applicability and direct effect depend upon the legal order of each Member State.[24] This has been further exacerbated by the Member States' constitutional asymmetries that consider regional law differently within their legal systems. Whereas Argentina and Venezuela tend to be more receptive to Mercosur law and place it above ordinary law, Brazil, Paraguay, and Uruguay are much more reluctant to recognize its primacy and its direct applicability over national law.[25] This rather uneven legal framework has been a major obstacle to the adoption of the Declaration as a legally binding instrument and to enforcement by regional and national actors.

Against this backdrop, this article relies upon a regulatory cooperative approach, which considers the development of Mercosur possible even without supranational institutions.[26] In a shifting global context, this intergovernmental flexibility can constitute a positive aspect, all the more so when a regional integration process is established in this particular locus of intergovernmental organizations.[27] This overlapping 'system' has given rise to legal fragmentation

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21 *See* PRC Award 01/07, 8 June 2007; PRC Advisory Opinion 01/07, 4 July 2007; PRC Advisory Opinion 01/08, 25 Apr. 2008; and PRC Advisory Opinion 01/09, 15 June 2009.

22 PRC Award 01/05, 20 Dec. 2005. *See* Jamile Mata Diz & Augusto Jaeger Junior, *Por uma teoria jurídica da integração regional: a inter-relação direito interno, direito internacional público e direito da integração*, 12 Brazilian J. Int'l L. 139, 146 (2015).

23 Caichiolo, *supra* n. 10; Olivier Dabène, *The Politics of Regional Integration in Latin America* 94 (Palgrave 2009); John Vervaele, *Mercosur and Regional Integration in South America*, 54(2) Int'l Comp. L. Q. 387, 394 (2005).

24 Liliana Lizarazo Rodríguez & Philippe De Lombaerde, *Regional Economic Integration and the Reality of Strong National Constitutional Powers in South America. A Comparative Analysis*, 11(3) ICL J. 365, 368 (2017); Sara Feldstein de Cárdenas & Luciana Scotti, *Las asimetrías constitucionales: un problema siempre vigente en el Mercosur*, 1(2) Rev. secr. Trib. perm. revis. 271, 272 (2013); Felix Hummel & Mathis Lohaus, *MERCOSUR: Integration Through Presidents and Paymasters*, in *Roads to Regionalism: Genesis, Design, and Effects of Regional Organisations* 50–80 (Tanja Borzel et al. eds, Ashgate 2012).

25 *See* Constitution of Argentina, Art. 75, s. (22)-(24); Constitution of Paraguay, Arts 141 and 145; Constitution of Venezuela, Art. 153; Constitution of Brazil, Arts 4 and 5; and, Constitution of Uruguay, Art. 6. *See* Alejandro Perotti, *Habilitación constitucional para la integración* comunitaria (Konrad-Adenauer-Stiftung 2004); Feldstein de Cárdenas & Scotti, *supra* n. 24, at 271.

26 Caichiolo, *supra* n. 10; Detlef Nolte, *Latin America's New Regional Architecture: A Cooperative or Segmented Regional Governance Complex?*, EUI Working Papers RSCAS 2014/89, 10.

27 *See* Gian Luca Gardini, *Towards Modular Regionalism: The Proliferation of Latin American Cooperation*, 58(1) Rev. bras. polít. int. 210 Brasília (2015). This is a non-exhaustive list of the most active Latin American regional organizations: Organization of American States, Latin American Free Trade Association, Latin American Integration Association, The Caribbean Community and Common Market, The Latin American and Caribbean Economic System, The Central American Integration System, Mercosur, North American Free Trade Agreement (NAFTA), The Andean Community of Nations, The

and exacerbated implementation and compliance problems, eroding the legitimacy of regional organizations.[28] However, the establishment of multiple institutions has increased cooperation and may enhance the effectiveness of Latin American integration processes.[29] In this particular context, diverse actors such as regional and national bodies, Member States governments, employers, trade unions, and civil society may play a key role in leading this cooperative process to solve economic and political problems.[30] It is through this cooperative regional governance approach that the Declaration must be understood.

2.2 The trade and labour linkage: The distinctive approach of Mercosur

The triumph of free-market ideology and the consequent liberalization of trade has reshaped labour relations. Whereas the flow of capital has become increasingly globalized and mobile, labour remains static.[31] This has reduced the effectiveness of national labour regulations whose traditional remedies struggle to deal with the global dimension of capital. Since the late 1980s, a discussion has re-emerged on the link between trade and labour standards that could guarantee minimum labour standards around the globe.[32] This is even more relevant given the fact that by 2016, 136 countries had signed at least one FTA that included one labour provision.[33]

One of the proposals put forward to establish a linkage between trade and labour is the inclusion of social clauses or chapters in FTAs. Taking account of economic and normative imperatives, developed countries have argued that this linkage would protect their workers against unfair competition from developing

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Bolivarian Alternative for Latin America and the Caribbean, Unión de Naciones Suramericanas (UNASUR), the Comunidad de Estados Latinoamericanos y Caribeños (CELAC), the Pacific Alliance.

28 Laura Gómez-Mera, *Governance as regional integration. ALADI, CAN and MERCOSUR*, in *Handbook of South American Governance* 147–158, 156 (Pía Riggirozzi ed., Routledge 2017); Andrés Malamud and Gian Luca Gardini, *Has Regionalism Peaked? The Latin American Quagmire and Its Lessons*, 47(1) Int'l Spectator. Italian J. Int'l Affairs 116, 129 (2012); Dabène, *supra* n. 23, at 23.

29 Andrea Bianculli, *Regionalismo e integración regional en América Latina. El Mercosur: ¿un 'nuevo' espacio para la regulación social?*, Documentos de Trabajo 42/2021, Fundación Carolina' Laura Gómez-Mera, *Power and Regionalism in Latin America: The Politics of MERCOSUR* (University of Notre Dame Press 2013).

30 Nolte, *Regional Governance*, *supra* n. 13, at 3.

31 Koffi Ado, *Core Labour Standards and International Trade* 40 (Springer 2015).

32 For a detailed analysis, *see* Joo-Cheong Tham & K D Ewing, *Labour Provisions in Trade Agreements: Neoliberal Regulation at Work?*, 17 Int'l Org. L. Rev. 153–177 (2020); James Harrison, *The Labour Rights Agenda in Free Trade Agreements*, 20 J. World Investment & Trade 705–725 (2019); Paula Church Albertson & Lance Compa, *Labour Rights and Trade Agreements in the Americas*, in *Research Handbook on Transnational Labour Law* 474–494 (A. Blackett & A. Trebilcock eds, Edward Elgar 2015); Koffi Ado, *supra* n. 31; Christopher McCrudden & Anne Davies, *A Perspective on Trade and Labor Rights*, J. Int'l Econ. L. 43–62 (2000).

33 ILO, *Handbook on Assessment of Labour Provision in Trade and Investment Agreements* 11 (2017), https://www.ilo.org/wcmsp5/groups/public/—dgreports/—inst/documents/publication/wcms_564702.pdf (accessed 30 Oct. 2021).

countries whose labour standards are usually weaker and whose labour force is, consequently, cheaper. This would prevent a 'race to the bottom' with a migration of jobs from developed countries to emerging economies.[34]

Despite their laudable intentions, it has been argued that labour standards cannot be universalized.[35] Developing countries fear that this link between trade and labour may be used for protectionist purposes,[36] depriving them of one of their major sources of comparative advantage.[37] Although there is no definitive answer, a recent study suggests that there is no proof that these clauses have been used for protectionist purposes. Moreover, it seems that in certain cases the inclusion of labour standards in FTAs has strengthened labour standards.[38]

Social clauses and chapters have been the main instrument to materialize the trade and labour linkage. In contrast, the Mercosur Member States have decided to adopt a comprehensive fundamental labour rights instrument to protect workers' rights at national and regional level. Nonetheless, Mercosur has followed a weak approach in terms of enforcement mechanisms. Despite the existence of the SLC as a regional enforcement body and the Mercosur judicial system, the Declaration has weakened the trade and labour linkage by preventing Member States from invoking the Declaration in trade, economic, and financial matters (Article 31 2015-Declaration).[39] This seems to be in line with Tham and Ewing's scepticism, who consider labour regulations in FTAs as faux regulation.[40] Neoliberalism does not reject all forms of regulation, but 'it vigorously embraces regulation that foster markets and market competition'.[41] This justified scepticism needs to be re-evaluated in Mercosur given the positive activism of national judges.

Furthermore, the Declaration is one of the few exclusively Global South developing country instruments.[42] Although there is a growing number of South-South FTAs, most of them, including social clauses and chapters, are either

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34 Sean Ehrlich, *The Politics of Fair Trade: Moving Beyond Free Trade & Protection* (OUP 2018).

35 Evgeny Postnikov & Ida Bastiaens, *Social Protectionist Bias: The Domestic Politics of North-South Trade Agreements*, 22(2) Brit. J. Pol. & Int'l Rel. 3437–366 (2020); Lisa Lechner, *The Domestic Battle Over the Design of Non-trade Issues in Preferential Trade Agreements*, 23(5) Rev. Int'l Pol. Econ. 840–871 (2016); Jagdish Bhagwati, *Trade Liberalisation and 'Fair Trade' Demands: Addressing the Environmental and Labour Standards Issues*, 18(6)World Econ. 745–759 (1995).

36 *See* Rafael Peels & Marialaura Fino, *Pushed Out the Door, Back in Through the Window: The Role of the ILO in EU and US Trade Agreements in Facilitating the Decent Work Agenda*, 6(2) Global Lab. J. 189–2020 (2015); Bob Hepple, *Labour Laws and Global Trade* (OUP 2005).

37 Michael Trebilcock, *Understanding Trade Law* 172–173 (Edward Elgar 2011).

38 For further details, *see* Céline Carrère, Marcelo Olarreaga, & Damian Raess, *Labor Clauses in Trade Agreements: Hidden Protectionism?*, Rev. Int'l Org. (2021).

39 *See* s. 5.2.

40 Tham & Ewing, *supra* n. 32, at 157-159.

41 *Ibid*.

42 It has been argued that 85% of South-South agreements do not consider workers' rights: *see* Carrère et al., *supra* n. 38.

North-North or North-South agreements.[43] The Declaration may thus constitute an example of developing countries being global actors in the establishment of labour standards beyond their borders.

3 THE SOCIO-LABOUR DECLARATION AND THE SOCIAL LEGITIMACY OF MERCOSUR

3.1 Origins of the Socio-Labour Declaration

Following partially in the EU's footsteps,[44] Mercosur has pursued as one of its main goals the establishment of the Southern Common Market (Article 1, Treaty of Asunción). The aim is to integrate Latin American countries into the global economy by attracting foreign direct investment through the development of market-friendly states, entailing the structural reform of national labour markets.[45] Unsurprisingly, no reference was made to a regional labour dimension. A mere 'safeguard clause' was included in Annex IV Treaty of Asunción to protect employment, that could be affected by intra-Mercosur imports (Article 3(b)).

Despite the timidity of the founders, the preamble to the Treaty of Asunción has been essential in the construction of the Mercosur labour dimension. It states that 'the expansion of their domestic markets, through integration, is a vital prerequisite for accelerating their processes of economic development with *social justice*' (emphasis added).[46] This was rapidly supplemented by the 1991 Declaration of Montevideo,[47] which recognized that social issues must be addressed at the regional level to ensure equality in working conditions across Member States.[48]

Mercosur has attempted to protect fundamental labour rights through two different avenues.[49] First, the ratification of the most important ILO conventions would create a level playing field in the region. Working Subgroup

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43 *See* International Labour Organisation, *Handbook on Assessment of Labour Provision in Trade and Investment Agreements* 11 (ILO 2017); Carrère et al., *supra* n. 38.

44 Pía Riggirozzi & Jean Grugel, *Regional Governance and Legitimacy in South America: The Meaning of UNASUR*, 91(4) Int'l Affairs 781, 786 (2015); Félix Fuders, *Economic Freedoms in MERCOSUR*, in *The Law of MERCOSUR* 87 (T. Franca Filho et al. eds, Hart 2010).

45 Mahrukh Doctor, *Prospects for Deepening Mercosur Integration: Economic Asymmetry and Institutional Deficits*, 20(3) Rev. Int'l Pol. Econ.515, 518 (2013).

46 Tania Rodríguez, *Sindicalismo regional: Las estrategias de la CCSCS frente al Mercosur (1991–2017),* in *Derecho, lucha de clases y reconfiguración del capital en nuestra América* 107–128 (D. Sandoval Cervantes et al. eds, CLACSO 2019); Américo Plá Rodríguez, *Problemática de los Trabajadores en el Mercosur,* in *El Derecho Laboral del Mercosur Ampliado* 27 (Héctor Barbagelata ed., FCU 2000).

47 It was signed on 9 May 1991 by the Ministers of Labour of Argentina, Brazil, Paraguay, and Uruguay.

48 Santiago Pérez del Castillo, *MERCOSUR: History and Aims*, 132(5–6) Int'l Lab. Rev. 639, 644 (1993).

49 Lopes Ribeiro da Silva, *supra* n. 7, at 364; Plá Rodríguez, *supra* n. 46, at 28.

ten,[50] consisting of representatives of governments, unions, and employers' organizations, proposed the ratification of thirty-seven ILO conventions.[51] The Southern Cone Trade Union Coordinating Body[52] (hereinafter Coordinadora de Centrales Sindicales del Cono Sur (CCSCS), in Spanish) recommended the ratification of forty-three ILO conventions to create a regional labour framework.[53] However, the then four Member States agreed to ratify only twelve ILO conventions.[54]

Second, trade unions, particularly the CCSCS which raised the alarm around the possible negative effects of regional integration,[55] proposed the adoption of a regional social charter.[56] Negotiations with the EU also played a role in the consideration of adopting a charter.[57] The Interregional Framework Cooperation Agreement between the then European Community and Mercosur (1995), the basis of the 2019 EU-Mercosur FTA political agreement,[58] includes a specific provision recognizing that interregional integration should foster the creation and the quality of employment and contribute to the promotion of fundamental social rights (Article 10).[59] Although such a charter was not adopted, in 1998, the Heads of State and the Council of the Common Market (CCM) adopted the 1998 Declaration, which constitutes the backbone of the Mercosur labour dimension.[60]

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50 The Subgroup-10 on Labour affairs, employment and social security is an auxiliary body of the CMG and aims to strengthen the Mercosur labour dimension.

51 SGT-11, Commission No 8 on Principles, Act 4/92, 27 Nov. 1992: ILO Conventions 1, 11, 13, 14, 19, 22, 26, 29, 30, 77, 78, 79, 81, 87, 90, 95, 97, 98, 100, 105, 107, 111, 115, 119, 124, 135, 136, 137, 139, 144, 147, 151, 154, 155, 159, 162, and 167.

52 *Coordinadora de Centrales Sindicales del Cono Sur* is an agency created in 1986 that includes the main Mercosur Member States and the Chilean trade unions. It aims to coordinate the main unions of the Southern Cone.

53 Oscar Ermida Uriarte, *Instituciones y relaciones laborales del Mercosur*, in *Las dimensiones sociales de la integración regional en América Latina* 112 (R. Franco et al. eds, CEPAL 1999).

54 ILO Conventions No. 11, 14, 26, 29, 81, 95, 98, 100, 105, 111, 115, and 159.

55 Lopes Ribeiro da Silva, *supra* n. 7, at 364; Waldemar Hummer, *La elaboración de una Carta de los Derechos Fundamentales del Mercosur desde una perspectiva europea*, in *Anuario de Derecho Constitucional Latinoamericano* 692 (Konrad-Adenauer-Stiftung 2009); Plá Rodríguez, *supra* n. 46, at 28.

56 Rodríguez, *supra* n. 46, at 113; Juliana Peixoto Batista & Daniela Perrotta, *El Mercosur en el nuevo escenario político regional: más allá de la coyuntura*, 30-I Desafíos 91, 116 (2018). Plá Rodríguez, *supra* n. 46, at 27.

57 Héctor Barbagelata, *Consideraciones Finales*, in *El Derecho Laboral del Mercosur Ampliado* 630 (Héctor Barbagelata ed., FCU 2000).

58 The agreement was reached on 18 June 2019. For further details, *see* https://ec.europa.eu/trade/policy/in-focus/eu-mercosur-association-agreement/index_en.htm (accessed 30 Oct. 2021).

59 Interregional Framework Cooperation Agreement between the European Community and Mercosur, 15 Dec. 1995 – Joint Declaration on political dialogue between the European Union and Mercosur, *IO L 69*, 19 Mar. 1996.

60 Kristi Schaeffer, *Mercosur and Labor Rights: The Comparative Strengths of Sub-Regional Trade Agreements in Developing and Enforcing Labor Standards in Latin American States*, 45 Columbia J. Transnat'l L. 829, 837 (2007).

According to the original Article 24, the Declaration was to be revisited two years after its adoption. However, due to multiple upheavals, it took seventeen years to be reformed (2015). In the aftermath of the 1998–1999 Brazilian and 2001–2002 Argentine crises, new governments came to power in the region. Their post-neoliberal approach,[61] promoting a neo-developmentalist economic agenda, resulted in a significant development of the political and social dimensions of Mercosur. This had a positive impact upon the legitimacy of Mercosur, which relied upon regional cooperation to overcome the Mercosur social deficit.[62] The 2008–2009 financial crisis resulted in the implementation of protectionist policies by the two major partners, Argentina and Brazil, leading to a complete stalemate of Mercosur activity. The accession of Venezuela in 2012 and the readmission of Paraguay in 2013 entailed a new dawn for the social dimension of Mercosur. One of the most iconic steps taken by the then five Member States of Mercosur,[63] before pro-business governments took office from 2015, was the revision of the Declaration in 2015. The adoption of several regional labour plans between 1998 and 2015, the changing world of work, and the need to bring up to date and align the 1998 Declaration to post-neoliberal development of the Mercosur social dimension contributed to the 2015 revision. This reform has not only been positive from a quantitative perspective – the Declaration has gone from twenty-five to thirty-four provisions – but also from a qualitative point of view.[64]

3.2 Values of the Socio-Labour Declaration

Three main elements define the axiological dimension of the Declaration. First, through the Declaration, Mercosur intends to ensure the protection of workers' rights, which may be endangered by the integration of the Member States' economies and the liberalization of their markets. The preamble to the Declaration recognizes that integration cannot be confined to the economic and trade dimensions but requires the creation of a regional social sphere.

Second, the 2015 Declaration enshrines in Article 2 the concept of decent work as a compass for regional and national labour regulations. The preamble also

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61 *See* Pía Riggirozzi & Diana Tussie, *The Rise of Post-Hegemonic Regionalism: The Case of Latin America* (Springer 2012).

62 Tomo Chodor, *The Changing Face of Mercosur: Legitimacy and the Politics of Scale in South American Regionalism*, 59(2) J. Common Mkt. Stud. 417–431 (2021).

63 The 1998 Declaration was adopted by the four original Member States.

64 Mauro Pucheta, *Regional Integration and Labour Law: A Comparative Analysis of The EU and Mercosur*, PhD Thesis 184 et seq. (University of Nottingham 2019); Castello, *supra* n. 7, at 645.

considers the 2004 Mercosur Employment Conference, which affirmed that decent work must be at the centre of any development strategy. The ILO was also an important source of inspiration for the Declaration.[65] Mercosur Member States have been part of the ILO since 1919 and have been active players in developing standards. Similar to several bilateral, multilateral, and regional FTAs, the 1998 Declaration relied specifically upon the then recently adopted 1998 ILO Declaration on Fundamental Principles and Rights at Work to reinforce the commitment of Member States to respect and enforce ILO standards.[66] It is worth noting that membership of the ILO obliges Member States to respect, promote, and realize the core labour standards regardless of the ratification of ILO Conventions, such as ILO Convention No. 87, which Brazil has not ratified. The preamble to the Declaration also points out that Mercosur Member States have ratified several ILO conventions, whose standards must be protected. The Preamble to the 2015 Declaration included the 2009 ILO Global Jobs Pact, which aims to promote a productive recovery centred on investment, employment, and social protection. It also relied upon the principles and values of the 1944 Philadelphia Declaration, which had been omitted from the original text.

Upholding universal and internally recognized values is the third axiological element of the Declaration. Member States have incorporated several international and human rights instruments as part of their *bloques de constitucionalidad*.[67] Their domestic constitutional status, above ordinary laws, has reinforced the protection of workers' rights. It has also informed national judges of the need to uphold the Declaration as a justiciable instrument upon which Mercosur citizens can rely. The preamble points out that the Declaration is informed by the 1948 UN Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, and the 1966 International Covenant on Economic, Social and Cultural Rights. The Declaration also relies upon the considerable breadth of labour rights recognized by the Inter-American Human Rights system, namely: the 1948 American Declaration of the Rights and Duties of Man, the 1947 Inter-

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65 Neiza Borrego, *Los actores sociales en el Mercosur. Una mirada hacia la participación en las relaciones de trabajo*, 17(3) Revista de Filosofia Jurídica, Social y Política 399–423 (2010).

66 Jordi Agustí-Panareda, Franz Ebert & Desirée LeClercq, *ILO Labor Standards and Trade Agreements: A Case for Consistency*, 36 Comp. Lab. L. & Pol'y J. 347, 354 (2015).

67 *Bloques de constitucionalidad* refer to norms, particularly human rights international instruments that are not included in national constitutions. Although they are not strictly speaking part of the constitution, they do have a constitutional status. *See* Constitution of Argentina, Arts 33 and 75 s. 22; Constitution of Brazil, Art. 5.2; Constitution of Paraguay, Art. 45; and, Constitution of Uruguay, Arts 72 and 332. *See* Manuel Góngora Mera, *La difusión del bloque de constitucionalidad en la jurisprudencia latinoamericana y su potencial en la construcción del Ius Constitutionale Commune Latinoamericano*, in *Ius Constitutionale Commune en América Latina* (A. von Bogdandy, Héctor Fix-Fierro & Mariela Morales Antoniazzi eds, UNAM 2014).

American Charter of Social Guarantees, and the 1948 Charter of the Organization of the American States.

The axiological dimension of the Declaration constitutes the compass for the labour dimension of Mercosur. In the most recent Meeting of Ministers of Labour of Mercosur Member States, in response to the Covid-19 crisis, the importance of upholding the Declaration values and principles in the adoption of regional and national labour regulations was reaffirmed.[68]

4 THE SOCIO-LABOUR DECLARATION: A COMMON REGIONAL FRAMEWORK

4.1 The contentious legal status

A social charter protecting fundamental labour rights was originally meant to be adopted as a legally binding additional protocol to the Treaty of Asunción.[69] In 1998, Argentine, Brazilian, and Uruguayan employers' representatives and Member States' governments staunchly opposed it. On the opposite side, the trade unions argued for the adoption of a legally binding instrument to oppose the implementation of national reforms seeking to make labour markets regulations more flexible.[70]

The Common Market Group (CMG) concluded that the social charter would not be adopted as a protocol and would not be subjected to the Mercosur dispute settlement system.[71] The four Member States' presidents adopted a political declaration. This choice and the exclusion of the Declaration from the Protocol of Ouro Preto – which defines the sources of Mercosur law (Article 41) – has led some scholars to affirm that it is not strictly speaking a source. As a result, it could not be considered a legally binding instrument.[72] Nevertheless, this seems to have become a minority position.

Two main arguments have justified the legally binding status of the Declaration.[73] First, most scholars argue that it is an international treaty.[74] The

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68 Declaration of the Ministers and High National Authorities of Labour of Mercosur regarding work, employment and actions against COVID-19, 1 June 2021.

69 Barbagelata, *Consideraciones, supra* n. 57, at 639.

70 Marcílio Ribeiro de Sant'Ana, *A declaração sociolaboral do MERCOSUL completa 10 anos: de hosanas a exéquias*?, 28(3) Comunicação & Política 193 (2008).

71 Mercosur/SGT-10/Act 1/98, 21 May 1998.

72 Wolney de Marcedo Cordeiro, *A regulamentação das relações de trabalho individuais e coletivas no âmbito do Mercosul* (LTr 2000); Jorge Cristaldo, *Armonización normativa laboral del Mercosur. Una propuesta unificadora* (Editora Litocolor 2000).

73 Tenile Mascolo Gil, *Les droits de l'homme dans le Mercosur* 341 (L'Harmattan 2018); Castello, *supra* n. 7, at 642; Lucas Lixinski, *Human Rights in Mercos*ur, in *The Law of MERCOSUR* 355 (T. Franca Filho et al. eds, Hart 2010).

74 Myriam Peña, *La declaración sociolaboral del Mercosur: su aplicabilidad directa por los tribunales paraguayos* 43, 65 (Instituto de Investigaciones Jurídicas 2014); Malm Green, *supra* n. 7, at 95; Oscar Ermida Uriarte,

Declaration enshrines fundamental rights that are protected by the most important international human rights instruments, in particular ILO conventions. Their *jus cogens* nature makes them directly applicable within the Mercosur and Member States' legal orders.[75] As a result, the Declaration is directly applicable, and the lack of compliance by Member States would engage their international responsibility.[76] Second, scholars have pointed out the relevance of the enforcement mechanisms to dismiss the mere political declaratory nature. The Declaration expressly states that Member States commit to respecting the rights recognized therein (Article 28). The existence of the SLC as a specific regional body in charge of the enforcement of the Declaration is incompatible with a non-legally binding instrument.[77]

Despite the strength of these arguments, the present author considers that both positions neglect almost completely Mercosur law when analysing the legal nature of the Declaration. It is true that it cannot be considered as a formal source of Mercosur law as recognized by the Protocol of Ouro Preto: it is not a *decision,*[78] nor a *resolution,*[79] nor a *directive*.[80] However, regional integration organizations do not have a *numerus clausus* system of sources of law. Atypical acts are a possible source of regional law. The EU is a prime example: beyond the provisions of Article 288 Treaty of the Functioning of the European Union, the EU institutions have adopted 'inter-institutional agreements, *sui generis* decisions, conclusions, incentive measures, guidelines and guiding directives, internal opinions, or rules of procedure for each institution'.[81] This reasoning makes even more sense in regional organizations that are more embryonic and whose institutional structure is more flexible, such as Mercosur.

The question arises as to whether an atypical act can be a legally binding instrument. Grosse Ruse-Khan et al. argue that the distinction between typical and atypical acts 'does not coincide with the question of their character as legally binding or not'.[82] Although the authors refer to the EU legal order, it is undoubtedly applicable to Mercosur. Its institutional structure entails a certain flexibility in recognizing the legally binding nature of norms irrespective of their form.[83]

La Declaración Sociolaboral del Mercosur y su eficacia jurídica, 13(27) Revista IUS ET VERITAS 247–258 (2003).

75 Peña, *supra* n. 74, at 65; Oscar Ermida Uriarte, *La Dimensión Social del Mercosur* 33 (FCU 2004).

76 Arese, *Crítica, supra* n. 7, at 557.

77 Juan Martínez Chas, *La nueva declaración sociolaboral del Mercosur*, 4 Revista Derecho Social y Empresa 158, 171 (2015).

78 These are the most important Mercosur secondary norms adopted by the CCM.

79 These are adopted by the CMG and aim to address economic, regulatory, and institutional matters.

80 These are adopted by the Market Trade Commission and aim to ensure compliance with the customs union regulations and the common external tariff.

81 Henning Grosse Ruse-Khan, Thomas Jaeger and Robert Kordic, *The Role of Atypical Acts in EU External Trade and Intellectual Property Policy*, 21(4) EJIL 901, 903 (2011).

82 *Ibid*., at 904.

83 Ricardo Caichiolo, *supra* n. 10, at 246–268.

Given its objectives, content, and impact upon regional and national legal orders, the Declaration is more than a mere political statement. The preamble to the 1998 Declaration stated that one of its main functions was to ensure that economic integration is achieved with social justice. This was reaffirmed by the 2015 Declaration. The Declaration also constitutes the labour compass, with a particular emphasis on decent work, for the adoption of regional and national norms. This is reflected in the large number of Mercosur norms and plans that have been adopted to ensure the implementation and respect of the fundamental labour rights.

The provisions of the Declaration also point to the legally binding nature of this instrument. Article 31.2 states that Member States commit themselves to respect the rights therein recognized. They also have to foster the implementation of these fundamental labour rights in accordance with Mercosur law, national law, and collective agreements. Member States must also promote the Declaration in accordance with ratified international conventions. This is a crucial provision given that there is a wide range of fundamental labour rights recognized by human rights international instruments that are part of the Member States' body of national constitutional rules *(bloques de constitucionalidad)*.[84]

Furthermore, the concrete and tangible impact of the Declaration upon Mercosur and Member States' legal orders makes an important case in favour of its legally binding nature. It does not come as a surprise that the Declaration has been consistently used by national judges to protect labour rights. Albeit in a more modest fashion, the Mercosur Administrative Labour Court has included the Declaration as part of the general principles of Mercosur law.[85] In short, relying upon Mercosur law, international law, and Member States' legal orders, the Declaration constitutes an atypical Mercosur act of a legally binding nature.

4.2 The 2015 revision and the consolidation of the Socio-Labour Declaration

The regulatory dimension of the Declaration includes both individual and collective labour rights, as well as some employment and enforcement provisions. It adopts two main types of provisions: on the one hand, free-standing provisions that guarantee labour rights irrespectively of Member States legal orders. On the other, there are some labour rights, the content of which is mainly fleshed out by national

[84] Castello, *supra* n. 7, at 642; Peña, *supra* n. 74, at 104–114; Héctor Barbagelata, *El bloque de constitucionalidad de los derechos humanos laborales*, in *El Trabajo y la Constitución: Estudios en homenaje al Profesor Alonso Olea* 367 (Ed. Ministerio de Trabajo y Asuntos Sociales 2003).

[85] *See* s. 5.2.

legislations.[86] It has been argued that this *technique du renvoi* could undermine the independence of the Declaration vis-à-vis national legal orders.[87] This is not exclusive to the Declaration though – as seen in the case of the EU Charter of Fundamental Rights (Article 27).

Moving forward from the 1998 Declaration, the 2015 revision attempted to clarify its scope in Article 1 by stating that it is applicable to workers and employers. However, it does not provide any specific definition, which means that it is necessary to rely upon national laws. Article 31.1 states, though, that this Declaration is applicable to every inhabitant of the Member States.

The 2015 revision has had a dual positive effect on individual rights. It has strengthened the content of the rights recognized in the 1998 Declaration, namely: the right to non-discrimination and equal opportunities (Article 4), equal treatment between men and women and disabled workers (Articles 5 and 6), equal treatment between migrant and frontier workers and national workers (Article 7), elimination of forced labour (Article 8), and elimination of child and adolescent labour (Article 9).

Furthermore, new individual rights have been adopted, increasing from six to eleven provisions. The 2015 revision introduced four provisions relating to working time. It adopted a maximum workday of eight hours (Article 11). In addition, it upholds the right to daily and weekly rest time (Article 13). It also protects annual paid leave and emphasizes the key role that Member States must play to ensure the effective enjoyment of these rights.

It also introduced a provision relating to the right to a minimum wage (Article 14) and protection against unfair dismissal (Article 15). The wording of this article has given rise to criticism because it did not consider Articles 6 and 7 of the Protocol of San Salvador,[88] which adopts the term 'stability' when referring to the protection of workers in the case of the termination of the employment contract.[89]

One of the major reforms was the introduction of a fully fleshed out provision regarding health and safety at work (Article 25). Eleven paragraphs were added to this provision that guarantees the right to a healthy and safe environment. The right to leave the workplace, as protected by the ILO Conventions 155 (Article 13) and 167 (Article 12), if workers are in serious and imminent danger constitutes a great leap forward, particularly in connection with the Covid-19 pandemic.

Article 10 of the Declaration guarantees the right of employers 'to create, organize and manage economically and technically the enterprise'. Its inclusion is a rather

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86 Castello, *supra* n. 7, at 644.

87 Larissa de Oliveira Elsner & Luciane Klein Vieira, *A aplicação da Declaração Sociolaboral pelo Tribunal Administrativo Trabalhista do Mercosul*, 65(3) Revista da Faculdade de Direito – UFPR 9–35 (2020).

88 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador', 17 Nov. 1988.

89 Arese, *Crítica, supra* n. 7, at 562–564.

questionable choice because it appears to reinforce the economic nature of Mercosur. This has been partially materialized in the EU in the aftermath of the *AGET Iraklis* and *Alemo Herron* cases that seem to have prioritized the freedom to conduct a business over labour rights (Article 16 of the EU Charter of Fundamental Rights).[90] This is even more questionable in the case of Mercosur as the Declaration is an instrument that aims exclusively to protect fundamental labour rights.

The revision also reinforced collective rights. It improved and emphasized the importance of freedom of association (Article 16). It specifically imposed two duties on Member States: (1) a negative one that entails that they cannot intervene in the setting up and management of trade unions; (2) a positive one whereby Member States commit to ensure the right to set up and freely manage trade unions as well as to recognize and respect the role of trade union representatives. In the same vein, the 2015 revision strengthened the right to collective bargaining (Article 17) by adopting a specific provision regarding the public sector and by imposing an obligation on Member States to promote the exercise of this right at different levels. Similarly, the importance of social dialogue (Article 20) was reinforced by reference to the ILO Convention 144 on Tripartite Consultation (1976), which aims to bring together governments, employers, and workers to develop, implement, and promote international labour standards.

While the right to the promotion and development of alternative dispute resolution systems for industrial conflicts (Article 19) was not modified, the wording of the new Article 18 regarding the right to strike is slightly disappointing. The original Article 11 upheld the right to strike to 'every' worker. However, the current Article 18 states only that 'workers and trade unions' have this right. Leaving out the term 'every' has the potential to weaken the position of professions such as the armed forces and the police. More importantly, it can significantly reduce the protection of informal workers, who constitute a large part of the Mercosur workforce and are usually represented by de facto trade unionists.

The final section of the 2015 revision considered 'employment' as a central notion in the sphere of public policies to achieve sustainable development (Article 21). It supported the importance of the promotion of employment (Article 22), as well as the protection of the unemployed through the implementation of an adequate unemployment insurance and access to vocational skills and requalification programmes (Article 23). Likewise, Article 24 lays down that Member States must establish public employment agencies to guarantee the right to education, orientation, and professional training throughout the worker's career.

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[90] *See* Simon Deakin, *In Search of the EU's Social Constitution: Using the Charter to Recalibrate the Employment Relation*, in *The Charter of Fundamental Rights of the European Union and the Employment Relation* 65–68 (Filip Dorssemont et al. eds, Bloomsbury 2019).

Early on, labour inspection was considered an area requiring regional intervention.[91] The 1998 Declaration stated that labour inspectorates would be key actors in guaranteeing the right to a safe working environment. This led to the adoption of the CCM Decisions 32/06 and 33/06, on minimum requirements for labour inspection procedures[92] and labour inspectors.[93] The 2015 revision reaffirmed the importance of the labour inspectorate to ensure the protection of workers' rights, with a special focus on working conditions (Article 26).

The Declaration has undoubtedly moved on from a mere repetition of the ILO convention provisions to the adoption of a common regional framework that constitutes a compass for the adoption of regional and national labour regulations to ensure the protection of workers' rights.

5 THE DIVERSE REGIONAL AND NATIONAL ENFORCEMENT OF THE SOCIO-LABOUR DECLARATION

5.1 The limited role of the Socio-Labour Commission

Drawing upon the ILO monitoring system and Article 20 of the 1998 Declaration,[94] the CMG created the SLC as an auxiliary body to monitor and enforce the implementation of the Declaration.[95] Inspired by ILO tripartism, the SLC was composed of three members per Member State that represented governments, workers, and employers respectively.

Despite its important task, the SLC had no powers to sanction violations of the Declaration. This was the result of the business groups' stance, which fiercely opposed granting any sort of jurisdictional powers to this commission.[96] This flawed structure constituted a major weakness in the enforcement framework of the Declaration.[97] The creation of an independent supranational institution has been suggested as a better solution to ensure the effectiveness of the Declaration.[98] Although the 2015 revision introduced less ambitious changes, they may have a positive impact upon the SLC's role.[99]

Subsequent to the 2015 revision, the CMG Resolution 22/18[100] repealed and replaced the CMG Resolution 12/00, which originally set up the SLC.

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91 GMC/Resolution 115/96.
92 Mercosur/CCM/Decision 32/06, 15 Dec. 2006.
93 Mercosur/CCM/Decision 33/06, 15 Dec. 2006.
94 Castello, *supra* n. 7, at 649.
95 Mercosur/CMG/Resolution 15/99, 9 Mar. 1999.
96 Valter de Almeida Freitas, *A circulaçao do trabalho no MERCOSUL e na União Europeia* 274 (EDUNIS 2009).
97 Lopes Ribeiro da Silva, *supra* n. 7, at 366; Schaeffer, *supra* n. 66, at 838;.
98 Schaeffer, *supra* n. 66, at 839.
99 Castello, *supra* n. 7, at 649; Arese, *Crítica, supra* n. 7, at 555.
100 Asunción, 16 July 2018.

Although the SLC does not have powers to impose sanctions in cases in which the Declaration is not respected, it does have powers to design action plans and recommendation projects to foster compliance with the Declaration (Articles 3(f) and 10). Furthermore, it has powers to examine requests by trade unions, employers' associations, and governments regarding the scope of the Declaration (Articles 3(g) and 17). Although these *opinions* are not legally binding, they may impact upon the national authorities' interpretation of the Declaration.

The SLC has also been one of the most significant social dialogue mechanisms in Mercosur. The SLC examines national reports *(Memorias)* drawn up by Member States with the contribution of trade unions and employers' organizations that are presented every six months, and it suggests possible reforms to national legal orders (Article 29). Similarly, it can propose the periodical revision of the Declaration as it did for the 2015 revision to strengthen and update its content (Article 3(i)). It has been one of the most active regional bodies on the adoption of declarations related to the Covid-19 crisis and on the lobbying to regulate teleworking at the regional level in future reforms.[101] More recently, it has lodged a project of Recommendation related to the strengthening of working conditions in Mercosur'.[102]

5.2 The incipient role of the regional judge

The role of regional judges is crucial for the enforcement of regional norms and, consequently, the development of regional organizations.[103] The Court of Justice of the European Union is a prime example of how the judiciary can foster regional integration.[104] Nevertheless, Latin American integration processes are not characterized by 'political integration by jurisprudence'.[105]

The PRC aims to ensure the homogeneous interpretation of Mercosur law.[106] However, it has only delivered six awards and three advisory opinions. Its modest activism is certainly explained by its intergovernmental nature and its limited enforcement powers in the case of lack of compliance with Mercosur law

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[101] Mercosur/CSLM/Acta 01/20, 16 June 2020 and Mercosur/CSLM/Acta 02/20, 15 Nov. 2020.
[102] Mercosur/CSLM/Acta 01/21, 21 May 2021.
[103] Alejandro Perotti, *Algunos desafíos que presenta la constitución de un Tribunal de Justicia Comunitario*, 241 El Derecho 867 (2011).
[104] Antoine Vauchez, *The transnational politics of judicialization. Van Gend en Loos and the making of EU polity*, 16(1) Euro. L. J. 1–28 (2010); Clifford J. Carrubba & Lacey Murrah, *Legal Integration and Use of the Preliminary Ruling Process in the European Unio*n, 59(2) Int'l Org. 399–218 (2005); JHH Weiler, *A Quiet Revolution: The European Court and Its Interlocutors*, 26 Comparative Pol. Stud. 510 (1994).
[105] Dabène, *supra* n. 23, at 65.
[106] Belén Olmos Giupponi, *Sources of Law in MERCOSUR: Analysis of the Current Situation and Proposal for the Future*, in *The Law of MERCOSUR* 65 (T. Franca Filho et al. eds, Hart 2010).

(Article 31–32 Protocol of Olivos (PO)).[107] This has reduced the incentive of Member States to bring claims to it. Political diplomacy has been the preferred means to settle disputes and conflicts. Another institutional obstacle is the indirect *locus standi* granted to individuals to make claims in the event of breach of Mercosur law. They need to go through the national section of the CMG and potentially through the CMG to challenge Mercosur law. However, if no settlement is reached, only Member States can use the Mercosur dispute resolution system.

The Declaration has added another institutional obstacle. Both the 1998 Declaration (Article 25) and the 2015 Declaration (Article 31) expressly stated that labour should be separated from trade. Consequently, the rights and review mechanisms recognized in this instrument cannot be used in any conflict involving trade, economic, and financial matters. As a result, the lack of compliance with the Declaration cannot trigger, for instance, the suspension of tariff advantages.[108] It is not surprising that no labour matters have been heard by the PRC. However, the 2015 reform incorporated an exception to this provision, which stipulates that labour dispositions enshrined in the Declaration 'would apply to natural and legal persons participating in projects funded by Mercosur'. However minor this progress may seem, it does constitute an important step towards the materialization of the link between trade and labour at the regional level.

Mercosur established the Administrative Labour Court in 2004 to hear cases related to employees of the Secretariat of Mercosur and other regional bodies, as well as workers that perform specific services for Mercosur.[109] Unlike the PRC system, individuals can bring legal actions directly to this court, which plays a crucial role in upholding the rights of Mercosur employees. Although it has only delivered four judgments thus far, they have all referred to the Declaration.

Judgments 1 and 2 dealt with employment issues between the Secretariat of Mercosur and its employees.[110] Although there was a specific regime for Mercosur employees,[111] the Administrative Labour Court considered the Declaration,

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[107] The Protocol of Olivos, which replaced the Protocol of Brasilia (1991), establishes the regional settlement of disputes mechanisms in order to consolidate legal certainty within Mercosur. *See* Paula Wojcikiewicz Almeida, *La difficile incorporation et mise en œuvre des normes du Mercosur. Aspects généraux et exemple du Brésil*, 154–163 (LGDJ 2013).

[108] Castello, *supra* n. 7, at 650.

[109] Mercosur/CMG/Resolution 54/03, 10 Dec. 2003 (updated by Mercosur/CMG/Resolution 32/15, 15 July 2015). *See* Larissa de Oliveira Elsner & Luciane Klein Vieira, *supra* n. 87.

[110] Judgment 01/2005, *Maureen Margaret Mackinnon Gómez c. Secretaría Administrativa del Mercosur*, 26 Sept. 2005; Judgment 02/2005, *Raulino Carvalho de Oliveira c. Secretaría Administrativa del Mercosur*, 23 Sept. 2005.

[111] Mercosur/CCM/Decision 30/02, 6 Dec. 2002; Mercosur/CMG/Resolution 42/97, 5 Sept. 1997; and Mercosur/CMG/Resolution 01/03, 4 Apr. 2003.

among other instruments, to be applicable. In judgment 3, a contractual conflict arose between the Mercosur Social Institute and one of its employees.[112] The Administrative Labour Court based its judgment upon the new specific regime of Mercosur employees.[113] It also recognized that in the event of lack of clarity of the specific legislation, which was not the case in this particular judgment, the Court could rely upon the ILO Declaration on the Fundamental Principles and Rights at Work and on the Declaration as the general principles of international and regional law respectively.

In judgment 4, the Administrative Labour Court once again considered the Declaration as a generally applicable instrument.[114] Mr Flores was an administrative secretary of Parlasur – the legislative body of Mercosur – in representation of Uruguay, which decided not to renew his contract. He claimed that the lack of renewal of his employment contract was due to his trade union activity. Mr Flores argued that, due to the absence of specific legislation, the Mercosur civil servants' regime should apply to him and that, as a result, he should be reinstated in his functions. However, the regional court considered that the political nature of Parlasur employees prevented it from applying the general regime. This did not stop the regional judge from stating that, if necessary, they would rely upon 'general principles of international law and regional law that enshrine rights of the highest value and effectiveness, which are essential for the universal legal system'.[115] Although they did not apply it in the specific case, they did include the Declaration as part of the Mercosur general principles of law, which reinforces its legally binding nature.

5.3 National judicial activism: The declaration as a justiciable instrument

Member States remain the masters of the integration process and must ensure that Mercosur law is implemented and complied with within their legal orders.[116] Article 1 Treaty of Asunción mandates that Member States have a legal obligation to harmonize their legislation to achieve Mercosur goals. Similarly, Article 38 Protocol of Ouro Preto sets out that the parties commit themselves to adopting the necessary measures to ensure compliance with Mercosur law. Despite the modest intervention of the national executive and legislative authorities, national judges have been key players in upholding

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[112] Judgment 03/2015, *María del Carmen García c. Instituto Social del Mercosur*, 10 Dec. 2015.
[113] Mercosur/CCM/Decision 07/07, 18 Jan. 2007.
[114] Judgment 04/2017, *Luis Flores c. Parlamento del Mercosur -PARLASUR*, 23 Oct. 2017.
[115] Judgment 04/2017, *Luis Flores c. Parlamento del Mercosur -PARLASUR*, 23 Oct. 2017.
[116] Luciana Scotti, *Diálogo de Fuentes: Las Normas Regionales del Mercosur y las Nuevas Disposiciones del Derecho Internacional Privado Argentino*, 4(7) Rev. secr. Trib. perm. revis. 152, 158 (2016); Wojcikiewicz Almeida, *La difficile incorporation*, *supra* n. 107, at 307; Adriana Dreyzin de Klor, *The Legal-Institutional Structure of Mercosur*, in *The Law of MERCOSUR* 55 (T. Franca Filho et al. eds, Hart 2010).

the legally binding nature of the Declaration. Although they were initially hesitant,[117] national judges have consistently recognized the Declaration as a legally binding instrument.

The Argentine Supreme Court has been proactive in referring to the Declaration alongside other constitutional norms and human rights international instruments in the *ratio decidendi* of key cases.[118] The Supreme Court referred to it for the first time in the *Aquino* judgement[119] in recital 12 in which it highlighted the importance of the Declaration as a necessary legal instrument to attain the objective of economic development with social justice within Mercosur and its Member States. In the same vein, in the *Álvarez* judgment, the Court stressed the importance of the Declaration in protecting equal treatment in employment and occupation, particularly in a case where the applicants had challenged the constitutionality of the Occupational Safety and Health Act.[120] Similarly, provincial supreme courts[121] and some employment appeal courts[122] have concluded that the Declaration, as a Mercosur instrument, is above ordinary law and, along with ILO instruments, constitutes a source of subjective rights.

In the same vein, the Uruguayan Supreme Court has considered the Declaration to be part of the 'constitutional bloc' of the Uruguayan legal system.[123] This approach has been consistently followed by Uruguayan employment appeal courts.[124] Relying, inter alia, upon the Declaration as part of the constitutional bloc,

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117 Alejandro Perotti, *El Fallo 'Aquino' de la Corte Suprema: Una Introducción a la Aplicación Judicial de la Declaración Socio-Laboral del MERCOSUR*, 3 Revista de Derecho Privado y Comunitario 607–633 (2005).

118 *Aquino, Isaac c/Cargo Servicios Industriales S.A. s/accidente - ley 9688*, 15 July 2004; *Silva, Facundo Jesús v. Unilever de Argentina SA*, 18 Dec. 2007 regarding health and safety at work; 330:5435; *Aerolíneas Argentinas SA v. Ministerio de Trabajo*, 24 Feb. 2009 regarding working conditions and the obligation of the state to enforce labour legislation; *Torrillo, Atilio Amadeo y otro c/ Gulf Oil Argentina S.A. y otro*, 31 Mar. 2009 regarding health and safety in the workplace; *Pérez, Aníbal Raúl c/ Disco S.A.*, 1 Sept. 2009 regarding the protection of wages.

119 Perotti, *supra El Fallo 'Aquino', supra* n. 117, at 607.

120 *Álvarez, Maximiliano y otros c. Cencosud S.A. s/acción de amparo*, 7 Dec. 2010, recital 7.

121 Suprema Corte de Justicia de Mendoza, *Sindicato Unido de Trabajadores de la Educación c. Gobierno de Mendoza p/ Acción de Inconstitucionalidad*', 8 May 2018, which has relied upon the Declaration to protect freedom of association and social dialogue.

122 First judgment: C.N.A.T., Sala VI, *Stringa Domingo Alberto c/ Unilever de Argentina S. A. s/ despido*, 23 Oct. 2000. For a detailed list, *see* César Arese, *Derechos Humanos Laborales* 333–354 (Rubinzal Culzoni 2014).

123 Judgment 106/2006, *Comision Tecnica Mixta de Salto Grande c. Damado Campos, Walter – Ejecucion de Laudo Extranjero de Condena", Fa. 1–57/05*, 21 July 2006; Judgment 775/2014, *Asociación Departamental de Empleados Municipales de Canelones y Otros c/ Intendencia Municipal de Canelones – Ley Nro. 17.940 – Casación*, 28 Aug. 2014.

124 Tribunal Apelaciones Trabajo 4T, *Judgment 354/2014, G.M., Oscar C/ Bowil SA y Otros – Proceso Laboral Ordinario (Ley 18.572), Recursos Tribunal Colegiado*, 19 Nov. 2014 (Art. 9 1998 Declaration, Freedom of Association); Judgment 29/2015, *Domínguez, Norberto y otro c/ G4s Security Services Uruguay SA – Reinstalación Tutela Especial*, 5 Feb. 2015 (Art. 9 1998 Declaration, Freedom of

they have considered labour rights, in particular decent work, as a key element to protect workers' dignity.[125] Furthermore, an employment appeal court, drawing upon Article 4 of the Declaration, has explicitly ruled that the Uruguayan judiciary power – as part of the Uruguayan State – has a legal obligation to respect the principle of non-discrimination when delivering judgments in matters related to employment.[126] This means that the Declaration cannot only be relied upon against other individuals, such as employers, but also against the State in a broader sense.

Paraguayan courts have also affirmed that the Declaration is a legally binding instrument.[127] Although there has not been a Paraguayan Supreme Court judgment in this matter, this principle has been defended by Myriam Peña, a former judge of the Paraguayan Supreme Court.[128]

In contrast, the Brazilian courts have been much more reluctant to refer to Mercosur norms. Until recently, the Supreme Labour Court had only referred to the Declaration four times, albeit not in the *ratio decidendi* of those judgments.[129] However, in 2019, this court took a big step towards the recognition of the Declaration as an instrument of a constitutional nature.[130] In a case that involved discrimination on the ground of disability, the court relied on a large number of international documents and Article 4 of the Declaration to stress the importance of the principle of equality and non-discrimination in the Brazilian legal order. This approach is in line with what the current president of this court pointed out when analysing the 2004 constitutional reform regarding human rights: the Declaration could constitute a constitutional norm.[131]

The original intention of Member States' Presidents was to issue a political declaration. However, national judges have stepped in and considered the

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Association); Judgment 275/2016, *UOC y Otro c/ Dofin S.A. – Reinstalación*, 7 Sept. 2016 (Art. 9 1998 Declaration, Freedom of Association).

125 Tribunal Apelaciones Trabajo 1T, Judgment 280/2019, *Cardinal Analía y otro c/ Asociación Civil Amigos de Padre Pío. Recursos Tribunal Colegiado*, 11 Sept. 2019.

126 Tribunal Apelaciones Trabajo 1T, Judgment 368/2019, *Poblete, Elda c/ Agesil S.A. Recursos Tribunal Colegiado*, 13 Nov. 2019.

127 Cámara Laboral de Apelaciones, *DIAGRO S.A. c/ Resolución No. 668 de fecha 14 Nov. 2001, dictado por el Vice Ministerio del Trabajo y Seguridad Social*, 4 Mar. 2003; Sala II, *María de Lourdes de Barros Barreto B. y otra c. Interventores de Multibanco SAECA s. Amparo Constitucional*, 23 May 2005. *See* Peña, *supra* n. 74; Ramiro Barboza, *Eficacia jurídica de la declaración sociolaboral del Mercosur en Paraguay*, in *Eficacia jurídica de la declaración sociolaboral del Mercosur* 107 (OIT 2002).

128 Peña, *supra* n. 74.

129 Gills Vilar Lopes & Dalliana Vilar Lopes, *Uma análise mercosulina do Direito do Trabalho nas decisões do Tribunal Superior do Trabalho (TST)*, in 38º Encontro Nacional da ANPOCS, Caxambu/MG. Anais GT29 (2014).

130 Tribunal Superior do Trabalho, Recurso de Revista n° TST-RR-1076-13.2012.5.02.0049, *Juliana Aparecida Tanso Spiandon c. Itaú Unibanco S.A.*, 24 Apr. 2019.

131 *See* Maria Irigoyen Peduzzi, *Aplicabilidade da Declaração Sócio-Laboral do Mercosul nos Estados-Partes*, 1 Feb. 2014, https://ambitojuridico.com.br/edicoes/revista-121/analise-critica-da-declaracao-socio-laboral-do-mercosul-de-acordo-com-o-direito-do-trabalho-material/ (accessed 1 Aug. 2021).

Declaration a legally binding document that enshrines subjective rights that can be directly invoked by citizens in national courts.

6 THE IMPLEMENTATION OF THE SOCIO-LABOUR DECLARATION: A POLICY INSTRUMENT

6.1 Mercosur labour plans

Under Article 1 of the Treaty of Asunción, Member States commit themselves to harmonizing their legislation in the relevant areas when necessary. Since the labour dimension was not considered in the foundational treaty, unsurprisingly, there are no specific legal instruments regulating employment matters. This has not prevented Mercosur from adopting regional plans and policies to ensure the implementation of the Declaration.

Child labour is an endemic problem in the region.[132] This has been one of the key areas where both the 1998 Declaration and the 2015 Declaration (Articles 6 and 9 respectively) have been the legal basis of one the most comprehensive Mercosur plans: 'Plan to Prevent and Eliminate Child Labour',[133] which aims to harmonize the Declaration with international standards to protect children's rights. Similarly, the CCM has adopted five important recommendations to tackle the scourge of child labour through a tripartite strategy, particularly in domestic services, the artistic field, and the sports domain.[134] It has also urged trade unions and enterprises to adopt a national strategy and Member States to ensure the respect of compulsory education by preventing children from accessing the labour market.[135]

Informal work is another significant challenge in the region.[136] This constitutes a considerable barrier to the effectiveness of labour rights.[137] Mercosur has developed a considerable breadth of regional norms in the labour inspection realm to better ensure the enforcement of labour rights. Relying upon ILO Convention 81 on Labour Inspection, ratified by all Member States, CCM Decisions 32/06 and

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[132] According to the ILO statistics, there are roughly 5.7 million children working in Latin America. *See* https://www.ilo.org/ipec/Regionsandcountries/latin-america-and-caribbean/lang–es/index.htm (accessed 1 Aug. 2021).

[133] Mercosur/GMC/Resolution 36/06, 18 July 2006.

[134] Mercosur/CCM/Recommendations 02/15 and 04/15, 16 July 2015, and Mercosur/CCM/Recommendation 01/17, 20 July 2017.

[135] Mercosur/CCM/Recommendation 01/15, 16 July 2015, and Mercosur/CCM/Recommendation 02/17, 20 July 2017.

[136] ILO, *The Employment Crisis in the Pandemic: Towards a Human-Centred Job Recovery,* Apr. 2021, https://www.ilo.org/wcmsp5/groups/public/—americas/—ro-lima/documents/publication/wcms_779118.pdf (accessed 1 Aug. 2021).

[137] This has been repeatedly pointed out by the Paraguayan Trade Union's Observations: Mercosur/CSLM/Acta No. 01/21, 21 May 2021.

33/06, and specifically on Article 18 1998 Declaration (Article 26 2015 Declaration), Mercosur has adopted the ambitious Labour Inspection Plan to ensure a common framework in the region for a better enforcement of national labour laws.[138]

Health and safety at work has been another key area where Mercosur, relying upon Article 17 1998 Declaration, has adopted a regional plan[139] aiming to ensure coordination in the design of labour public policies. The plan also aims to raise awareness of workers' rights and duties as well as to develop training for inspectors in this area. The most comprehensive Article 25 of the 2015 Declaration has been the legal basis of two recommendations, which provide precise and detailed provisions regarding the assessment of occupational risks and the definition of serious and imminent risks in construction sites that Member States must adopt.[140]

Forced labour and human trafficking for labour exploitation are important challenges in the region. Article 8 of the 2015 Declaration has provided the legal basis of a regional plan, which aims to prevent and eliminate forced labour and human trafficking.[141] Furthermore, drawing upon Articles 1 and 4 1998 Declaration (Articles 4, 5 and 7, 2015 Declaration), the CMG has designed and implemented a regional Plan to Facilitate the Free Movement of Work within Mercosur,[142] aiming to further simplify free movement of workers by ensuring the same fundamental political, social, economic, and cultural rights for all Mercosur citizens in every Member State.

Mercosur bodies have taken advantage of the flexible institutional framework to adopt regional labour plans and to create a regional framework to ensure the implementation of the Declaration at a Mercosur level. These regional norms also constitute the basis for the implementation of the Declaration by national governments, which according to Article 31(2) must guarantee the protection of fundamental labour rights.

6.2 A SUPPLEMENT TO NATIONAL LABOUR LAWS

Originally, given the content of the 1998 Declaration, it was unclear whether the Declaration could contribute to reinforcing domestic legal orders. Despite these uncertainties, the 1998 Declaration was one of the key instruments to reform child labour regulations in Argentina through the adoption of the Child Labour Prohibition and

138 Mercosur/CMG/Resolution 22/09, 2 July 2009.
139 'Plan on Health and Safety at Work', Mercosur/CMG/Resolution 04/15, 29 May 2015.
140 Mercosur/CCM/Recommendation 01/19, 16 Sept. 2019, and Mercosur/ CCM/Recommendation 02/19, 16 Sept. 2019.
141 Mercosur/CMG/Resolution 27/2019, 5 June 2019.
142 Mercosur/CMG/Resolution 11/13, 10 July 2013, and Mercosur/CMG/Resolution 21/15, 15 July 2015.

Adolescent Work Protection Act in 2008.[143] The then Article 6 (now Article 9) sets out that domestic legislation determines the minimum working age. However, it also prescribes that Member States cannot authorize young people under the compulsory schooling age to work. Despite such a clear provision, it took ten years for the Argentine legislature to expressly prohibit the work of every young person under the age of sixteen.[144]

The 2015 revision reinforced the common regional framework of labour rights and may constitute the legal basis to challenge two specific areas of domestic legislation: working time and freedom of association.

The working time regulation in Argentina and Uruguay is partially at odds with the current content of the Declaration. In particular, Uruguay enacted rules regarding working time early in the twentieth century (1915).[145] However, apart from the Domestic Service Act[146] and the Rural Workers Act,[147] the current legal order does not guarantee a minimum daily rest. According to Article 12 of the Declaration, workers have the right to a minimum daily rest. This can constitute the legal basis for a reform of Uruguayan working time law. Relying upon the ILO and other international instruments, that rest could be a minimum of nine hours.[148] National judges could also decide, if a challenge was brought, that the current legislation does not respect the Declaration.

Similarly, Argentina has had limited working time since 1929.[149] However, the current Argentine legislation allows a maximum forty-eight-hour working week. It then authorizes a nine-hour workday without overtime pay. These provisions clash with the Declaration which sets an eight-hour workday as a maximum (Article 11). Either the President or Congress could introduce a bill relying upon this provision to reform the working time regulation. National judges can also continue to play an active role by deciding that Article 11 should prevail if workers decide to challenge the current legislation.

On the other hand, the Declaration upholds the protection of freedom of association, collective bargaining, and the right to take collective action (Articles 16, 17, and 18). These provisions, which rely heavily upon ILO Conventions No. 87 and 98, could be the legal basis to challenge the current Brazilian trade union system, based upon the principle of *unicidade*

143 Law 26390, 4 June 2008, Argentina.
144 *See* Rafael Lirman Mabé, *La Declaración Sociolaboral del Mercosur y el trabajo desarrollado por menores de 18 años en la República Argentina*, 1(3) Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo 2–4 (2013).
145 Law 5350, 17 Nov. 1915, Uruguay.
146 Law 18065, 5 Dec. 2006, Uruguay.
147 Law 18441, 24 Dec. 2008, Uruguay.
148 Castello, *supra* n. 7, at 647.
149 Law 11544, 12 Sept. 1929, Argentina.

sindical[150] – not modified by the 1988 constitutional reform[151] – whereby only one trade union can be created in a specific sector in the same territory. This conflicts with the principle of freedom of association because the workers' right to choose a trade union is greatly reduced. This is worsened by the fact that Brazil does not have a legislation against anti-union acts.[152] Arguably, the State also enjoys too much power in regulating and registering trade unions' activities.[153] Unsurprisingly, Brazil has not ratified ILO Convention No. 87. However, the preamble to the Declaration refers to the 1998 ILO Declaration on Fundamental Principles and Rights at Work, which considers freedom of association and the right to collective bargaining as fundamental principles. More importantly, the Declaration expressly adopts this principle in Articles 16 and 17, which has led trade unions to argue that Brazil has violated freedom of association and the right to collective bargaining. This was worsened by the 2017 labour law reform that aimed to further restrict trade unions' powers.[154]

A possible reform and/or legal challenge should certainly be based upon the Declaration, which is hierarchically superior to ordinary laws.[155] It could rely upon the case of Argentina, which had adopted a similar trade union system.[156] This was challenged by one of the major Argentine trade unions in the public sector, *Asociación de Trabajadores del Estado*, which resulted in a landmark judgment of the Argentine Supreme Court which declared the unconstitutionality of this system relying upon multiple international human rights instruments, ILO instruments as well as Article 14 of the 1998 Declaration.[157] Although a major legal reform has not yet taken place, it is possible to see that the Declaration offers numerous possibilities to national actors, be they executive, legislative, or judicial, to reform and strengthen national labour laws.

7 CONCLUSION

Influenced by ILO conventions, the European experience, and the pressure of trade unions, Mercosur and its Member States considered the adoption of a regional social charter necessary to strengthen the social face of Mercosur, to

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150 1988 Brazilian Constitution, Art. 8, II.
151 *See* Mauricio Godinho Delgado, *Constitución de la República, Sistema Laboral Brasileño y Derecho Colectivo del Trabajo*, LVII (259) Derecho Laboral 350 (2015).
152 Brazilian Trade Union's Observations: Mercosur/CSLM/Acta No. 01/21, 21 May 2021.
153 *See* Bruno Ferraz Hazan, *A incompatibilidade do modelo a partir da incorporação brasileira dos parâmetros da liberdade sindical*, 2(1) Revista de Direito & Desenvolvimento da UniCatólica 26 (2019).
154 Brazilian Trade Union's Observations: Mercosur/CSLM/Acta No. 01/21, 21 May 2021.
155 Hazan, *supra* n. 153, at 39.
156 Law 23551, 23 Mar. 1988, Argentina.
157 *ATE s/acción de inconstitucionalidad*, 18 June 2013.

ensure decent work, and to uphold fundamental labour rights protected by international human rights law. However, given the regional institutional setting and the lack of political will of the then Member State governments and employers' associations, the Declaration was adopted by means of a presidential declaration.

This article argued, however, that given its objectives, content, and impact upon regional and national legal orders, the Declaration constitutes a legally binding atypical act that forms part of the general principles of Mercosur law. The over-reliance of the 1998 Declaration on ILO instruments was left behind by the 2015 revision, which substantively improved the contents of the Declaration. It set a floor of fundamental labour rights across the region, which may constitute an added value to national legal systems, particularly in the field of working time, freedom of association, and labour inspection.

The intergovernmental nature of Mercosur, in line with Latin American integration processes, and its inter-presidentialism have constituted a major challenge to the effectiveness of the Declaration. Latin American governments are reluctant to confer sovereignty on supranational organizations. Regional bodies have used the flexible Mercosur institutional structure to bring the Declaration to life. The limited enforcement role of the SLC can be contrasted with its function as a social dialogue mechanism. It is worth noting too the incipient role of the Administrative Labour Court that has considered the Declaration to be part of the general principles of Mercosur law. Regional actors have also implemented the Declaration through the adoption of several regional labour plans and policies, which must be considered and respected by Member States.

Even though Member States remain the masters of the integration process and the regulation of employment relations, national executive and legislative powers have played a timid role in the enforcement and implementation of the Declaration. Instead, national judicial activism has been crucial to consider the Declaration as a justiciable instrument, allowing Mercosur citizens to invoke it when labour rights have been at stake.

The Declaration is a dynamic document, as defined by Article 32, that should be revisited every six years, the next review falling in mid-2021, which has been delayed given the current Covid-19 crisis. The development of the Declaration and its positive influence upon domestic legal orders as well as workers' rights do not mean that future reforms are not necessary. The current political situation in the region may suggest that a major institutional reform of Mercosur is inconceivable. As a result, the enactment of regional supranational norms is not plausible. However, regional and national actors can carry on playing an important role in strengthening and developing the

Declaration as they have done thus far. National legislatures and executive authorities may emerge from their lethargic state and emulate national judges in the implementation of the Declaration.

Mercosur has been in constant crisis since its inception back in 1991. This has reduced the effectiveness of its regulations. However, the Declaration has defied the most pessimistic predictions and has been consolidated as one of the most important Mercosur legal instruments, which has undoubtedly reinforced workers' rights across the region.