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THE SOCIAL DIMENSION OF MERCOSUR

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The Social Dimension of MERCOSUR

*Mauro Pucheta**

Abstract

The Common Market of the South (MERCOSUR in Spanish) is one of the most important trade blocs around the world –it is the third largest integrated market after the EU and NAFTA–, which is made up of Argentina, Brazil, Paraguay, Uruguay, and Venezuela. It was set up in 1991 with the principal aim to establish free movement of goods, capital, services and people among its Member States. Its ultimate purpose has been and still is to create a Common Market. It should be pointed out that MERCOSUR was created in a context where neoliberalism prevailed. Therefore, its objectives and methods were pervaded with an economic rationale that shaped the way MERCOSUR has addressed the social issues. This paper argues that there were two main reasons for creating the MERCOSUR social dimension in spite of these origins: on the one hand, in spite of the minimal influence of the economic integration into the national legal orders due to its inter-governmental character, MERCOSUR Member States were aware of the need for a creation of a social dimension. On the other hand, crises and major political changes changed the perception of the integration process and underlined the necessity of a stronger social integration. Given this evolution, the paper argues that MERCOSUR's social dimension has developed considerably, while much still remains to be done. However, the development of the social rules has an intrinsic limit, which is the inter-governmental feature of MERCOSUR. A major reform seems necessary in order to address efficiently the new social issues arisen in this context of crisis.

This paper is organized as follows. It first explains the structure of MERCOSUR and its methodological approach as an intergovernmental organisation. I then analyse the social dimension of MERCOSUR, both its rationale and its structure. Furthermore, I study the social policies developed; I explore specifically the MERCOSUR Social Program, the Free Movement of Work rules, the Socio-Labour Declaration, and the redistribution mechanisms. Finally, I consider MERCOSUR's response to the different crises.

1. INTRODUCTION

Nowadays, MERCOSUR is made up of 5 full Member States; Argentina, Brazil, Paraguay, Uruguay, and Venezuela, which became a full member on 12 August 2012. Its population reaches 275 million inhabitants and its geography is so diverse that MERCOSUR is one of the richest places in terms of natural resources on Earth. In spite of some twists and turns, MER-

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COSUR continues to expand, and it is expected that Bolivia will become a full member in early 2015. Ecuador has also applied for membership.

As Duna (2006: 5) states the construction of regional markets poses special challenges. The interaction between people and their displacement across the different regions might cause numerous conflicts, in particular, because of their diverse backgrounds and the various national economic and social realities. This has a crucial impact on the social field because even though there is no free movement of workers in MERCOSUR, an agreement of free residence has been established between its full members and some other countries, such as Bolivia, Chile, Colombia, Ecuador, and Perú.

MERCOSUR has developed a social dimension in the last fifteen years, even though at the beginning it was a clear mercantilist integration process. Two important milestones seem to allow this major development. On the one hand, it should be pointed out that political, social, and economic actors' awareness of the importance of an "integrated" regional process has been fundamental in the creation and development of the social dimension. On the other, the sweeping political change across the region and the implementation of new policies with the aim of strengthening this social dimension at both national and regional level have improved this new aspect. In short, it is undeniable that the creation and development of a social aspect within MERCOSUR has been a major step towards both confirming the existing "*acquis social*" and improving labour conditions in MERCOSUR and its Member States. However, there are still many difficulties in order to reach this objective prompted, in principle, by the fact that MERCOSUR remains an intergovernmental organization and its institutions lack capacity to regulate any kind of relationship without the consent of each Member State.

The notion of "social dimension" has countless meanings. As it is beyond the scope of this article to analyse and revisit the complex discussion about its definition, I will refer to the areas which might have any impact on the social aspects of the regional integration, notably, the policies or decisions which seek, on the one hand, to regulate the labour market within the regional area and, on the other, to implement redistribution mechanisms. In particular, in this article, I will consider the regional rules and policies related to labour rights, free movement of workers, equal treatment of citizens, social security rights for free moving workers, and redistributive instruments, alongside some of the MERCOSUR Member States' legal rules and case law.

Since MERCOSUR is an inter-governmental organisation, its rules are not directly applicable within its Member States. Consequently, from a legal perspective, national legal orders are not under so much "pressure" as those in the EU nowadays. This is also reflected in the reluctance of Brazil and Uruguay's constitutional systems to recognize the supremacy of MERCOSUR's rules. Therefore, considering that the economic integration seems to be less determining than in the EU, the paper aims to analyse the reasons of the creation of a social dimension within MERCOSUR. Furthermore, the article endeavours to describe the current state of the social dimension. Finally, during its 23 years of existence, MERCOSUR and its Member States have suffered the consequences of both internal and external economic cri-

ses. Therefore, the paper seeks to determine the usefulness of the MERCOSUR social dimension during these difficult periods.

For this purpose, I will proceed as follows: firstly, I will briefly present MERCOSUR's institutional framework and its legal order. Then, I will analyse the social dimension, notably, its objectives and the reasons for its creation. I will try to determine whether the economic integration and the political context have had any impact whatsoever in the social field. Finally, I will consider in the last sections, MERCOSUR's social policies on the one hand and MERCOSUR's reply to the recent economic crises on the other.

2. MERCOSUR: AN INTERGOVERNMENTAL ORGANISATION

Regional integration processes are not recent phenomena in Latin America. As mentioned by Guerra (2013: 277), in the aftermath of the independence of Latin American countries in the 1820's, Simón Bolívar dreamed and fought for Latin-American integration. Argentina, Brazil, and Chile also tried to sign an integration treaty. However, these attempts were unsuccessful.

Integration processes regained importance after World War II, as exemplified by the founding of regional organisations such as the Latin American Free Trade Association (LAFTA – known in Spanish as ALALC) in 1960¹, which became the Latin American Integration Association (ALADI)² during the 1980s.

The bilateral cooperation between Argentina and Brazil has always driven forward regional integration in Latin America, notably, during the 1980s after the return of democracy to the region. In 1985, Argentina and Brazil signed the “Acta de Foz de Iguazú”³ that committed the countries to strengthen democracy and economic development. Then, at the end of 1988, both countries signed the Treaty for Integration, Cooperation, and Development⁴ committing Argentina and Brazil to work towards the establishment of a common market.

At the end of 1980, neoliberal political parties came into power in both countries. Their focus was no longer on industrial policies but on privatization and deregulation. In this context, MERCOSUR was created in 1991.

The Treaty of Asunción sets forth that MERCOSUR had initially targeted free-trade zones between Argentina, Brazil, Paraguay and Uruguay. Furthermore, MERCOSUR would reach a customs unification and, finally, a common market will be established. The foundational treaty aimed at the establishment of an area where goods, services, capital, and labour could circulate free from tariff and nontariff barriers. It was also sought to fix a com-

1 Created by the Treaty of Montevideo, adopted 18 February 1960.

2 Created by the Treaty of Montevideo, adopted 12 August 1980.

3 Acta de Foz de Iguazú (Argentina-Brazil), adopted 30 November 1985, Foz de Iguazú (Brazil)

4 Treaty for Integration, Cooperation, and Development (Argentina-Brazil), adopted 29 November 1988, Buenos Aires.

mon external tariff (CET) and adopt a common trade policy vis-à-vis states not member of MERCOSUR.

Although it is beyond the scope of this paper, it is important to mention that MERCOSUR has not yet established the aforementioned common market and it is still a mixture of a free trade area and a custom union. MERCOSUR has been classified as an “incomplete or imperfect custom union”⁵. According to these scholars (Cardona Montoya, 2013, Bouzas, 2003), MERCOSUR has not yet, strictly speaking, become a custom union. This is so because not all Member States apply the same custom tariffs, on the one hand, and because being a “perfect or complete custom union” requires the existence of a supranational entity, which it has not been created yet (Cardona Montoya, 2013), on the other.

Nowadays, as Arias (2013: 8) points out, whilst MERCOSUR still aims to reach a complete intraregional liberalisation, its diverse national interests make it difficult to achieve a coherent and effective external trade policy. In order to overcome these difficulties, MERCOSUR adopted the regional Custom Code in 2010. It is too recent to go into detail regarding its applications and its consequences.

2.1 Institutional Frame

The Protocol of Ouro Preto⁶ has set up the institutional framework of MERCOSUR. It provides the organic structure, the way the regional rules are created and finally, the mechanisms to settle the trade disputes within MERCOSUR. Even though the protocol has been modified, it remains the main instrument related to the institutional framework.

As mentioned, MERCOSUR is an intergovernmental organisation. The decision-making bodies consist of national representatives who have extensive freedom of action without being dependent on a regional bureaucracy. The Member States have not delegated any competence to a supranational entity. Accordingly, the Member States remain the masters of the integration process. Moreover, the Treaty of Asunción introduces the principle consensus, which means that every decision is made by all Member States. Therefore, this entails that if a country does not agree with a decision, it can veto it.

a) - Main Regional Bodies

- Common Market Council (CMC - Consejo del Mercado Común in Spanish)

The CMC consists of the ministers for Foreign Affairs and for Economy of the member countries. It is the highest-level agency of MERCOSUR in charge of conducting its policy according to the objectives laid down in the Treaty of Asunción and the related legislation.

⁵ It is worthy to point out that this description has been criticized because of the lack of practical relevance.

⁶ Additional Protocol to the Treaty of Asunción on the Institutional Framework of MERCOSUR (Protocol de Ouro Preto), adopted 17 December 1994, Ouro Preto (Brazil).

- Common Market Group (CMG - Grupo del Mercado Común in Spanish)

The CMG is the executive body of MERCOSUR, and is made up of the Ministries of Foreign Affairs of the Member States, four incumbent members and four alternates from each country from the ministries of Foreign Affairs, Economy and the Central Banks.

Its main tasks are to establish compliance with the Asuncion Treaty and to take resolutions required for implementation of the decisions made by the Council. Furthermore, it can initiate practical measures for trade opening, coordination of macroeconomic policies, among others. It can also participate when needed in resolving controversies within MERCOSUR.

- Trade Commission (Comisión del Comercio de MERCOSUR in Spanish)

This body assists the MERCOSUR executive body. It aims at supervising and implementing the instruments for common trade policy within MERCOSUR and between MERCOSUR and third countries.

- MERCOSUR Secretariat (Secretaría del MERCOSUR in Spanish)

At the beginning the MERCOSUR Secretariat was an administrative secretariat. However, in 2002 this Secretariat turned into a Technical Secretariat. The Decision 30/2002 entrusted new functions to the Secretariat, notably, to provide technical support to the MERCOSUR bodies and to follow up and evaluate the development of the integration process. It has to ensure the legal consistency of the MERCOSUR rules as well.

- Parliament of the South (Parlasur in Spanish)

It is the regional legislative body that is composed of national representatives. The main task is to ensure compliance with the MERCOSUR rules. It also has to uphold the respect for democracy across the region. It has an advisory function and it can issue recommendations, which have to be approved by the CMC.

To sum up, even though there has been a development towards a more profound institutionalization within MERCOSUR, Brazil and Argentina have preferred to stay flexible as, in their view, the integration process would evolve more smoothly.

2.2. Institutions relevant to the Social Dimension

Some of the aforementioned bodies can have an influence on the social field of MERCOSUR. For the sake of clarity and in order to correctly assess their potential, I will describe the different bodies that can have an influence on the social dimension following the structure defined by the Protocol of Ouro Preto.

a) - The Economic-Social Consultative Forum

Although it is a consultative body, its importance should not be neglected because it is the sole institution which has an influence on the social dimension created by MERCOSUR's primary law. One of its main tasks is to issue non-binding recommendations upon request of Member States or of its own initiative.

As established by Article 28 of the Protocol of Ouro Preto, it has a multilateral structure with representatives from the social and economic sectors of the Member States, such as workers, businesses and civil society organisations. However, in practice this participation has

been reduced to an exchange of opinions on the development of the main aspects of the negotiation agenda.

b) - Council of the Common Market (Meeting of Labour Ministers)

It is an auxiliary body within the CMC sphere. It is a space of political coordination where the Ministers foster initiatives related to the labour dimension. Their recommendations have been crucial to incorporate some rights such as protection against unfair dismissal, unemployment benefits, protection of wages.

c) - Common Market Group

Working Subgroup N° 10: Labour Relations, Employment and Social Security

This working group was created by the Protocol of Ouro Preto (1994), which replaced the Working Subgroup N 11 (1991). It was set up within the scope of the CMG and it has an intergovernmental formation which includes the social partners.

Its main role is to undertake diagnostic exercises, comparative studies and detect asymmetries among the members legal systems, with a view to harmonizing or converging them. Moreover, it has played an important role in the labour dimension. The creation of the Labour Market Observatory and the promotion of the Socio-Labour Declaration might be mentioned amongst its major achievements.

MERCOSUR Labour Market Observatory

The observatory is a technical permanent body responsible for advising the CMG and the High-Level Employment Group on the labour-market information.

One of the main problems within MERCOSUR is the lack of reliable statistical data. To overcome this problem, MERCOSUR created this observatory that has as a main task to promote the production, collection, analysis and dissemination of information including data related to employment, labour migration, vocational training, social security, labour market policies.

According to the GMC 45/08 Resolution, the observatory has a tripartite structure, and includes representatives from Government, trade Unions, and employers' associations.

The Socio Labour Committee

Article 20 of the Socio-Labour Declaration provides that a Commission will be created in order to assist Member States in the implementation of the declaration. In 1999, the Common Market Group⁷ created this Committee as an auxiliary body in order to examine any consultation related to the implementation of this declaration.

It should be pointed out its tripartite structure, which grants an important role to the social partners.

7 CMG, Res. 15/99, 09/03/1999.

High-Level Employment Group

The CMC created the High-Level Employment Group⁸, whose main purpose is to draw up a MERCOSUR Strategy for employment growth. It can be seen as an inclusion of a social element in the development of macro-economic policies.

It also has a multilateral structure. This group is made up of representatives of the ministry of Labour, of Economy, and of Foreign Affairs, and social partners

2.3 – MERCOSUR Legal Order

The sources of the MERCOSUR law have been set forth in the Protocol of Ouro Preto. Article 41 provides that the Treaty of Asunción and its complementary legal instruments, such as the aforementioned Protocol about the institutional structure of MERCOSUR or the Protocol of Olivos for the resolution of disputes, are MERCOSUR's primary law. In addition, the agreements reached within the framework of the Treaty of Asunción and its protocols will be considered as primary law as well.

Moreover, the MERCOSUR legal framework provides for secondary law, encompassing the decisions of the Common Market Council, the resolutions of the Common Market Group, and the directives of the Trade Commission. Despite a large number of rules created by MERCOSUR's bodies, nowadays most of them are ineffective, in particular, due to the so-called constitutional asymmetry between Member States. This term refers to different approaches to international law and is said to prevent them from creating a supranational organization, which would guarantee legal certainty of the MERCOSUR legal order.

a) Constitutional Asymmetry

One of the major problems in the South-American integration, in particular in MERCOSUR, is the difference between member states' constitutional systems. There are asymmetries that have prevented and continue to prevent a further integration in the Southern Cone.

At the constitutional level, two major concerns have been raised by South-American scholars (Feldstein de Cárdenas and Scotti, 2013, Martínez Puñal, 2008, Ventura, 2005). Firstly, the legal force of international treaties, in particular, the integration treaties within national legal orders, has been discussed among the scholars. In this regard, whilst some member states applied the international law directly, there are others that need an internal rule in order to ensure the international rules come into force. Secondly, the member states have a dissimilar recognition of the secondary law within their legal framework.

- Argentina, Paraguay and Venezuela

Argentina, Paraguay and Venezuela place international treaties and the "community law" such as MERCOSUR law above the national law. The 1994 Argentine constitutional reform has attributed a major role to international law (art. 75 paragraph 22), in particular, the human rights legal instruments. Concerning the regional dimension, Article 75 paragraph 24 sets forth that as long as some requirements are met, such as reciprocity, respect of human

⁸ CMC, Decision 46/04, 20/07/2006.

rights and democracy, the Treaty of Integration and the secondary law will prevail over the national law. The delegation of competences and jurisdiction to supranational organizations has also been permitted.

In the same vein, the 1992 Paraguayan Constitution provides that international law prevails over national law (arts. 137, 141, 145). The delegation of competences and jurisdiction to a supranational legal system has also been agreed on conditions of reciprocity. Unlike the Argentine constitution, it does not provide any rule that recognises the prevalence of regional secondary law over national law.

Similarly, Venezuela recognised in the 1999 Constitutional Reform, notably in the preamble, the importance of the consolidation of Latin-American integration. Likewise, article 153 provides that Venezuela can participate in a supranational organization and it can delegate any sort of competences in order to achieve a deeper integration. It also recognises the direct applicability of the community law and its preferential application over national law.

- Brazil and Uruguay

By contrast, Brazil's and Uruguay's constitutional systems prevent, in principle, the supremacy of international treaties and their secondary law over national law.

In the case of Brazil, article 4 sets forth that an economic, political, social, and cultural integration will be sought with the Latin-American countries. However, there are no provisions which allow the delegation of competences and jurisdiction to any supranational organization. Furthermore, the Constitution provides no rule related to the relation between international and national law. Yet, the Constitution does establish that any international rule has to be transposed to the national law so as to be legally binding. It therefore follows that an international rule has the same legal value as an internal provision. The treaties have the same legal value as national law. Hence, a posterior law can abrogate an international treaty.

Given the fact that MERCOSUR was inspired by the EU with its supranational law, one might have thought that the relationship between MERCOSUR and Brazilian law could be different. However, the Brazilian Tribunal Supremo Federal⁹ has ruled that the MERCOSUR norms need to be transposed to the national law like any international law.

Against this daunting scenario, it should be noted that some progress has been made, in particular, Brazil has recognised the possibility to assign constitutional hierarchy to the human rights legal instruments (art. 5 paragraph 3).

The Uruguayan Constitution admits the importance of the Latin-American integration as well (art. 6). However, it does not settle the problem between the international and MERCOSUR law, and the national law. Neither has it recognised any rule related to the delegation of competences and jurisdiction to a supranational organization.

⁹ Judgment, 17-08-1998, *Diario da Justica*, 10-08-2000, p. 6.

In this respect, in a recent decision, the Uruguayan Supreme Court¹⁰ ruled that the Constitution does not authorize the Uruguayan Republic to be part of a supranational organization.

However, some well-known scholars (Perotti, 2005) have stated that even in the current legal situation, it would be possible to create a supranational law system within MERCOSUR.

b) Primary Law and its direct applicability

Some questions have been raised about the direct applicability¹¹ of MERCOSUR primary law, in particular, the rules enacted by the Treaty of Asunción. As Klumpp (2013: 440) reminds us, there have been some arbitration panels which have recognised that there are self-executing provisions in MERCOSUR's primary law, for example, the automatic trade liberalisation programme of the Treaty of Asunción.

Within MERCOSUR's Member States' case law, it should be pointed out that some Argentine Court of Appeals' rulings have admitted that the MERCOSUR law prevails over the national law¹². In addition, they have ruled that the Treaty of Asunción rules are directly applicable; therefore an internal provision is not needed. It is not surprising given the constitutional recognition made by the Argentine legislation about the integration treaties and its regulations. Nonetheless, the case law on this subject is far from uniform. Within the same Court of Appeal, other Chambers¹³ have decided that the Treaty of Asunción contains programmatic rules. Therefore, the MERCOSUR's citizens cannot invoke the regional rules, unless they have been transposed into the national law.

c) The Transposition of Secondary Law into the National Law

The Protocol of Ouro Preto has granted binding effect to secondary law, that is the decisions of the CMC, the resolutions of the CMC and directives of the CCM. Nonetheless, these MERCOSUR's norms could be classified, as Dallari (2007: 42) has said, as "*political determinations that oblige the State Parties to undertake the appropriate adjustments in their domestic legislation.*"

At national level, there are no constitutional rules that provide any solution for the incorporation of the secondary law into the national legal systems. It is therefore necessary to turn to the MERCOSUR law, in particular, the Protocol of Ouro Preto. A rule enacted by the CMC, the CMG or a recommendation of the Trade Commission must first be internalized in the Member States legal system to come into force. Article 42 provides that once approved, Member States must transpose the MERCOSUR rules into the national law. In spite of this general obligation, the MERCOSUR legal system does not set any time limit to transpose the

10 Uruguayan Supreme Court of Justice, 16-12-2011, Nro. 4765, "XX c. Ministerio de Economía y Finanzas y otro – Cobro de Pesos – Casación y Excepción de Inconstitucionalidad Art. 585 de la ley Nro. 17.296"

11 It is worthy to mention that the term direct applicability as its synonyms such as "self-executing character" or "direct effect" refer to the fact that primary law requires no implementing legislation within each Member State.

12 Chamber V of the Administrative Federal Court of Appeal, Buenos Aires, "Sancor C.U.L. c DGA" 14-09-2006

13 Chamber III of the Administrative Federal Court of Appeal, Buenos Aires, "Whirlpool Argentina S.A. (TF 24128-A c. DGA), 07-07-2010.

regional rule. In addition, these rules will be transposed according to the national procedures. Therefore, the lack of uniformity in the transposition rules causes both a legal uncertainty and ineffectiveness of regional rules.

Additionally, it is important to point out that MERCOSUR has adopted the “*simultaneous validity procedure*”, which implies that any MERCOSUR rule will come into force once each Member State has translated the regional norm into their national laws (art. 40 POP). This system makes it even more difficult for the MERCOSUR norms to enter into force.

It is important to highlight that MERCOSUR rules that have not yet been fully transposed in all Member States can be enforced against Member States governments. Nonetheless, these rules cannot be invoked by individuals in any court or before any authority in the Member States.

2.4 Dispute Settlement System

The Treaty of Asunción did not establish an institution intended to verify that the Member States respected the MERCOSUR Law. It only contained a few provisions concerning the dispute settlement system between the Member States.

The Brasilia Protocol then replaced that “system”, and it first established an arbitration mechanism for dispute settlement. It created a procedure, whose last step was an ad-hoc arbitration panel. This protocol was modified and reformed by the Protocol of Olivos in 2002. It set up the Permanent Review Court of the MERCOSUR (PRC), which can act, as Klumpp (2007: 440) puts it, either as appellate body for arbitration or as a single level of jurisdiction. It also has another major role: that of enacting preliminary rulings. In this role, the PRC¹⁴ issued an “advisory opinion” that it has already recognized the primacy of MERCOSUR’s primary law over national legal orders.

The Court deals with conflicts between member states about possible disputes that arise out of the interpretation of the Treaties, Protocols and decisions, resolutions or directives adopted by the CMC, CMG and the MTC. It should be noted that private parties cannot submit a claim directly to the Court. Yet, if they feel restricted or discriminated by MERCOSUR’s regulation they can refer to the national courts (Peña 2013: 620).

Furthermore, the regional tribunals have no sanctioning power, which entails serious risk to the legal certainty and the further development of the MERCOSUR Law.

Consequently, due to a lack of effectiveness, in 2010, the MERCOSUR Parliament proposed to modify the dispute settlement system, in particular, the representatives wanted to establish a Court of Justice, which would replace the Permanent Review Court. It is clear that the European Court of Justice was the main inspiration for this project. However, there is not yet any certainty about how this reform will evolve in the future.

¹⁴ PRC, OC, 01/08.

3. THE SOCIAL DIMENSION

3.1 Original Objectives of the Treaty of Asunción

MERCOSUR was created at a time when both Argentina and Brazil were revisiting their development strategies. During the 1980's, the regional integration had been characterised by protectionist measures and integration managed by states.

Nevertheless, there was a major change at the beginning of the 1990's with the new political and economic trends in South America. The international financial organisations such as the International Monetary Funds, World Bank, amongst others, played a considerable role in the application of the "Washington Consensus", which advised to reduce import barriers and leave aside active states policies seeking to protect the industrial sector.

This new political and economic tendency led to a new regionalism called "open regionalism"¹⁵. It sought a further trade opening and an implementation of deregulation policies. Within this context, apart from rules that aimed to facilitate a deeper economic integration, no social rule was laid down by the Treaty of Asunción. The only reference to a social objective could be found in the Preamble, which states *"the expansion of their domestic markets, through integration, is a vital prerequisite for accelerating their processes of economic development with social justice"*.

As Olmos Giupponi (2011: 128) states, free movement of workers was not explicitly recognised, labour was just considered *"as a productive factor in the achievement of the common market"*.

3.2 The Emergence of the Social Dimension

a) Integration Rationale

As stated above, MERCOSUR is an inter-governmental organisation so its law is not directly applicable into the Member States' national legal orders. The "economic integration" within MERCOSUR could not affect the national social systems in the same way as EU law could do it within the EU. Although it could have been a reason for not establishing a social dimension, this was not the path chosen.

Despite the fact that the Treaty of Asunción makes no reference to the labour and social dimension, both trade unions and scholars identified in the Preamble of this legal instrument itself the *"legal justification for the construction of a social space within MERCOSUR"* (Ermida Uriarte, 1997: 17).

As Tokman and Martínez Fernández (1997: 4) put it, *"almost from the beginning of the negotiations, the countries were fully aware of the need to bring social and labour aspects within*

¹⁵ CEPAL (Economic Commission for Latin America and the Caribbean), *El regionalismo abierto en América Latina y el Caribe. La integración económica en servicio de la transformación productiva con equidad*, LC/G.1801(SES.25/4)/E, Enero 1994, Libros de la CEPAL, Nº 39.

the ambit of negotiations to give effect to the objective of “speeding up economic development with social justice”.

There are two main reasons for pushing ahead with the creation of the social dimension of MERCOSUR. Firstly, the MERCOSUR's Member States have contrasting characteristics from an economic, political, and social point of view. In particular, the economic and social asymmetries within Member States could have worsened without establishing a social dimension. In order to avoid a widening gap between the richest regions and the poorest ones, the Member States decided to enact some social rules. Furthermore, the creation of a region where all MERCOSUR inhabitants could travel, and eventually reside and work in the Member States was another major reason to establish some social and labour rules.

On 9 May 1991, the Labour Ministers of Argentina, Brazil, Paraguay and Uruguay issued the *Declaration of Montevideo*, which made reference to the need to give due attention to the labour aspects of MERCOSUR in order to ensure that it produced an effective improvement in conditions of employment.

MERCOSUR first considered the social aspect at the end of 1991, when creating the Working Subgroup No. 11¹⁶ –it was replaced later by the Working Subgroup No. 10– which was in charge of eight committees to examine labour relations, employment and migration issues, vocational training, health and safety at work, social insurance and labour costs in specific sectors and international labour standards.

MERCOSUR legislation first created an “independent” social body in the Protocol of Ouro Preto (1994). Under this rule, the MERCOSUR Economic and Social Consultative Forum was created.

Despite this institutional development, a major step was only made in the social field towards the end of the 90's. MERCOSUR Member States decided to implement measures intended to afford a more effective protection of the social dimension.

In that context, social rules were enacted, namely, the Socio-Labour Declaration and the “Multilateral Agreement” on Social Security. Both regulations intend to facilitate another objective of MERCOSUR; that of the labour mobility and the coordination of policies on labour relations and migration.

Firstly, MERCOSUR adopted the Multilateral Agreement on Social Security (1997)¹⁷, which establishes a standardized coordination mechanism of social welfare systems within the scope of MERCOSUR. This agreement allows MERCOSUR's workers or their dependants to preserve their rights acquired or in the process of being acquired when they are in the territory of signatory countries.

¹⁶ MERCOSUR/GMC/RES Nº 11/91: Creación del SGT Nº 11: Asuntos Laborales.

¹⁷ MERCOSUR Multilateral Social Security Agreement, signed in December 1997 (Member States and Associated States), 15/12/1997, Montevideo (Uruguay).

Secondly, the Social-Labour Declaration was signed (1998)¹⁸, which expressly recognized freedom of association, collective bargaining, the right to strike, the elimination of forced labour, the special protection of child labour, the obligation to practice non-discrimination and effective equal rights in employment or occupation, amongst others.

This declaration also specified the reasons for establishing a social dimension within the regional integration process. The Head of State of the Member States asserted with crystalline clarity:

“Whereas the Ministers of Labour of MERCOSUR have stated in their meetings that regional integration cannot be confined to the commercial and economic spheres, and must also incorporate social issues, as regards the adaptation of the regulatory frameworks for labour to the new circumstances resulting from integration and the process of economic globalization”¹⁹

b) Political Rationale

The political environment had an influence on the way the regional integration was conceived. When created in 1991, as already mentioned, MERCOSUR was a trade bloc that had as a main objective to further regional economic interdependence. In order to achieve this, MERCOSUR's creators established as central objectives the elimination of tariffs and non-tariff barriers and, finally, the creation of a common market. At this first stage, there were no rules or objectives aimed at promoting social policies.

- A Response to the Global and Regional Crises

The 1994 Tequila Crisis (Tansini and Vera, 2001) and 1997 Southeast Asian Financial Crisis (Tansini and Zejan, 1998) had a harsh impact on South American countries' economies, in particular, Argentina and Brazil. It caused a serious regional crisis that reinforced the awareness of the need for a regulation in the social field. As a result, MERCOSUR Member States, Bolivia and Chile signed the Buenos Aires Charter (2000)²⁰. A consensus was reached about the need for a deeper social integration and further independence from international financial institutions.

The creation of the MERCOSUR's Meeting of Ministers and High Authorities of Social Development (RMADS in Spanish), through the CMC 61/00 Decision²¹, represented the beginning of a new era within this integration process.

¹⁸ The Socio-Labour Declaration of MERCOSUR was approved by the Common Market Council (CMC) in the framework of the Summit of the Heads of State of MERCOSUR, Rio de Janeiro (Brazil) in 1998.

¹⁹ 9th Recital, Socio-Labour Declaration of MERCOSUR.

²⁰ XVIII CMC, Decisión 23/00, Buenos Aires (Argentina), 29/6/00

²¹ XIX CMC, Decisión 66/00, Florianópolis (Brazil), 14/12/00.

- A Political Change

This evolution was further accentuated from 2003 when most of MERCOSUR Member States elected left-wing and moderate left-wing presidents.

Within MERCOSUR, the involvement in the social field has also evolved over time. In particular, most South American countries have seen the pendulum swing from one extreme –a neoliberal and capitalist perspective– to another –progressive governments– in just one decade. This major change has prompted a shift as regards the function of labour law and the way that regional integration should be addressed.

As a result, the social realm has become more important within MERCOSUR's framework. A process seeking to complement the trade dimension with policies in social and productive areas was launched at the end of the '90s. The former Brazilian president Lula da Silva (2012: 10) put it clearly "*MERCOSUR's social development represents a priority axis of this new perspective related to the regional integration*".

3.3 A New Model of Integration in the MERCOSUR

As mentioned, the generator of South American integration was the Argentina-Brazil axis, which means that MERCOSUR did not make any progress whenever the relationship was strained. For example, after the economic crisis of the late 90s, the political and economic objectives were brought closer, so both countries worked to re-launch MERCOSUR. As Briceño-Ruiz (2014: 1) reminds us, the model of economic integration centred on trade was left behind and that was the time to complement the trade dimension with social and productive policies.

In 2003, Argentina and Brazil signed the "Buenos Aires Consensus"²² that involved, as Mutti (2013) states, a turning point for MERCOSUR.

A new model of integration was esteemed necessary (Rodríguez, 2013: 18). In order to achieve this, it was necessary to restore the major role that Member States had played in implementing social policies. It was also considered important to put greater emphasis on the "positive integration" by creating new institutions and establishing new common politics.

The Structural Fund of Convergence (FOCEM in Spanish) can be highlighted as an example of this "new model". This fund seeks to finance any sort of project, whose main objectives are to improve the less-developed economies and reach a deeper social cohesion.

In 2005, the South American countries' Presidents created a *Strategic Committee*²³ in order to elaborate proposals to encourage the South American Integration Process. In particular, they criticised the mercantilist vision that had ruled up until that time. Within this frame-

²² Consenso de Buenos Aires (Argentina-Brazil), 16/10/2003.

²³ Decisión (UNASUR), 9/12/2005, Montevideo (Uruguay).

work, the Union of South American Nations (UNASUR in Spanish) was created. This new process seeks to strengthen the social dimension, at least in its declaration of objectives.

In the same line, within the XIII RMADS (2007), the Declaration of Principles of Social MERCOSUR was approved. It highlights the importance of a deeper social integration and it strongly criticises the 90's view according to which economic dimension should be the major priority in MERCOSUR.

Furthermore, new institutions and new plans have been put in place in order to reduce the social asymmetries. In brief, it should be pointed out the creation of the Social Institute of MERCOSUR²⁴ (ISM in Spanish), which has as major objectives to cooperate technically on the development of regional social policies, to gather and exchange good practices regarding social issues, amongst others.

In the same vein, the CMC (Common Market Council) adopted a decision (64/10)²⁵ aimed at establishing the Statute of MERCOSUR Citizenship by 2021. The main objectives are, on the one hand, to continue the process of simplifying the free movement of citizens and, on the other hand, to recognise the same fundamental political, social, economic, and cultural rights for all the MERCOSUR citizens in the five member countries.

Finally, the Strategic Plan for Social Action (PEAS in Spanish) was adopted in 2011²⁶. In this action plan, MERCOSUR seeks to emphasise the inseparability of economic and social policies to guarantee an equal integration and to guarantee protection and social promotion as central themes of the MERCOSUR policies.

4 MERCOSUR SOCIAL POLICIES

MERCOSUR has limited competences to reach its objectives in the social sphere. However, within this restrictive framework, MERCOSUR has undertaken measures to enhance the social dimension. Firstly, I will explore the MERCOSUR Social Program and its latest actions. Secondly, I will examine the free movement of workers' rules. Thirdly, I will study the instruments that grant subjective rights, in particular, the Socio-Labour Declaration. Finally, I will touch on the redistribution mechanisms.

4.1. MERCOSUR Social Program

As a result of MERCOSUR's re-launch, some policies were implemented in order to achieve further regional integration. The general measures are as follows:

- 1 South-American Council of Social Development, whose main purpose is to reinforce the regional social policies

²⁴ MERCOSUR/CMC/DEC. N° 03/07 , 18/1/2007, Rio de Janeiro (Brazil).

²⁵ MERCOSUR/CMC/DEC. N° 64/10, 16/12/2010, Foz de Iguazú (Brazil).

²⁶ MERCOSUR/CMC/DEC. N° 12/11, 28/6/2011, Asunción (Paraguay).

- 2 Structural Fund of Convergence (FOCEM in Spanish) created in 2005 in order to diminish inequalities and gaps between member countries and to improve their competitiveness
- 3 Social Institute of MERCOSUR (ISM) (2007) was created through the Decision of 03/07, with the goal being to consolidate the need to combine regional policies in social and economic issues.
- 4 Strategic Plan of Social Action (2011) launched by the ISM within the framework of the XV MERCOSUR Social Summit. One of the main objectives of this plan is to promote comprehensive social policies at a regional level.

In spite of the progress made in recent years, the following points are considered the current challenges of MERCOSUR in the labour dimension:

- Labour informality and child labour
- The absence of trade union representation
- Labour Inspectorate and their lack of financial and administrative resources.

Consequently, in order to meet these goals, attention should be drawn to the following plans developed by the Working Subgroup Nº 10:

a)- Combat against Child Labour

The plan approved through the GMC Resolution 36/06 has as major goal to implement a regional policy aiming to prevent and eradicate child labour.

The specific objectives are:

- the harmonization of the Socio-Labour Declaration with the international standards that ensure children's rights.
- The creation of mechanisms for monitoring and following-up the rules enacted by the member countries

b)- Labour Inspection (Inspectorate)

The main objective of this regional plan is to enhance the quality and quantity of inspections by creating a MERCOSUR Inspectors School. In addition, it seeks to engage the social partners in regional dialogue to improve the inspection procedures and techniques.

Furthermore, this plan sets up some Geographic Areas (Áreas Geográficas de Coordinación Estratégica Fiscalizadora – AGCEF in Spanish) so as to improve communication and information-sharing among the National Labour Inspectorate Services, in particular, in frontier zones.

c) – Free Movement of Workers

As will be described below, MERCOSUR has developed a plan in order to facilitate the free movement of workers within MERCOSUR. This plan has rather a practical approach since its main purpose is to provide the right conditions in order to ease the right to settle in another member state.

d) – Regional Policy on Health and Safety at Work

The Working Subgroup N° 10 created in November 2012 through the Acta [SGT 10] 2/12 a tripartite *ad hoc* group in order to move towards a regional policy in this area. This group has not yet produced any official document or results.

4.2 Free Movement of Workers

Free movement of workers is one of the implicit mandates contained in the Treaty of Asunción. This aspect is a cornerstone in the creation of a common market. In this regard, MERCOSUR has developed many regional instruments that seek to ensure the free movement of work, namely:

- a) Multilateral Agreement on Social Security
- b) Agreement Relating to Residency Permits for Nationals of States Parties to MERCOSUR, Bolivia and Chile
- c) Regional Plan to facilitate the Free Movement of Work

a) Multilateral Agreement on Social Security

The Treaty of Asunción recognises the free movement of goods, services, and production factor among the member countries.

As it has been pointed out by Cabañas (2007: 59), “international migration requires public policies that enclose the new Global development context, creating tools that allow migration of workers to occur without losing their social protection”.

One way of leveraging free movement of work is to articulate social security systems between national members. Before the Multilateral Agreement on Social Security was approved, each worker and each national social security agency had to transfer and validate their data manually. Obviously, that was a costly and ineffective system; hence free movement of work was undermined.

To address these major issues, MERCOSUR drafted and approved a Multilateral Agreement which was then adopted by all the Member States. Before signing this agreement, the Member States had already signed bilateral agreements in order to facilitate workers’ retirement and their entitlement to social benefits in other Member States. After the ratification process within each member country, the agreement came into force 1st of June 2005.

This multilateral agreement has had as a main goal to integrate the social security systems of the MERCOSUR countries through developing and implementing a Data Transfer and Validation System (DTVS) to process retiree benefits under MERCOSUR’s Multilateral Social Security Agreement. It specifies that social security rights “*will be afforded to workers that render or have rendered services in any of the Member States, the same rights being afforded to them, their families and dependants, while being subject to the same obligations as the na-*

*tionals of the Member States regarding those specifically mentioned by the Agreement*²⁷. It also considers the situation of workers of any other nationality living in a member state inasmuch as they render or have rendered services in said Member States. These provisions guarantee the principle of equality and non-discrimination between nationals and foreigners.

Furthermore, the agreement recognises the conservation of acquired rights, the cumulative nature of rights and pro rata. Those latter two principles are not expressly stated in the agreement, but they can be deduced from the text. According to the agreement, the periods of insurance or contributions paid in the territories of “any of the Contracting States will be considered for purposes of benefit entitlement”.

These principles and guarantees are applied to the following benefits: retirement due to age (voluntary or compulsory), retirement due to disability, and pension upon death.

Additionally, the Agreement exempts the individual of contributions to the country of destination during temporary displacement (under twelve months), which may be extended for an equal period, upon previous authorization from the country of destination. Besides, the accord provides that temporarily displaced workers and their dependants will be entitled to free-of-charge medical assistance throughout the public healthcare network.

The application of the Agreement relies upon the Member States. However, the agreement set up a Multilateral Committee (art. 16), whose major role is to implement and to interpret the agreement. It consists of 3 representatives of each member state and they make decisions by consensus about the potential conflicts which may arise in the application of the agreement.

To sum up, despite the fact that changes are needed, this agreement has constituted an improvement in the current workers’ situation within MERCOSUR. It is a breakthrough both regarding the free movement of work and the recognition of rights within MERCOSUR’s legal framework.

b) Agreement Relating to Residence Permits for Nationals of States Parties to MERCOSUR, Bolivia and Chile

This agreement²⁸ is based on equal treatment and the recognition of equal rights between nationals and foreigners, as an essential step to strengthen the regional integration process.

In short, this agreement promotes regular migration and equal treatment between nationals. It also recognises fundamental rights to foreigners regardless of their status.

²⁷ Article 2, MERCOSUR Multilateral Social Security Agreement.

²⁸ Agreement approved by the Council of the Common Market, MERCOSUR/CMC/DEC No. 28/02. The agreements adopted on 5th and 6th December 2002, are: 1. Agreement No. 11/02, International Migratory Regularization of MERCOSUR Citizens, 2. Agreement No. 12/02, International Migratory Regularization Citizens of MERCOSUR, Bolivia and Chile, 3. Agreement No. 13/02, Residence for Nationals of the Member States of MERCOSUR, and 4. Agreement No. 14/02, Residence for Nationals of the Member States of MERCOSUR, Bolivia and Chile, implemented by Argentina through Resolution 345/2003 of the Ministry of Interior.

Citizens of MERCOSUR, as well as nationals of Bolivia and Chile are granted an automatic visa and the right to work and live within the territory of the State Parties. They can stay for up to 4 years in another member state for the purposes of providing services.

Moreover, despite the equal treatment between nationals and foreigners, the citizens have the right to family reunification, to transfer remittances. Besides, the children of immigrants' rights must be ensured and respected correspondingly as the nationals' children.

Moreover, given that Venezuela has fully joined MERCOSUR, its citizens are entitled to circulate and work freely respecting the terms of the agreement.

Later on, Peru (2011)²⁹, Colombia (2012)³⁰, and Ecuador (2011)³¹ also joined the agreement, which has created a substantial area of free of movement.

In conclusion, despite some practical difficulties and some doubtful requirements set up by the Member States, it represents without any doubt whatsoever, an important step forward as regards the free movement of workers and citizens.

c) Regional Plan to facilitate the Free Movement of Work

The Common Market Group has established a regional plan to facilitate the free movement of work within MERCOSUR through the 11/13 Resolution³².

This measure is a direct consequence of the evolution of migrant workers' legal protection. It seeks not only to facilitate the circulation of migrant workers, but also to establish an integral regulation of this issue such as the family dimension.

This plan is organised around two major axis; the free movement of work in general and; the free movement of frontier workers. In both cases, the objectives that have been set are to enhance the normative dimension, the institutional cooperation, social security and employment aspects, the role of social partners, the promotion of strategies for diffusion of information and free movement of work awareness.

This Plan commits MERCOSUR's bodies to carry out the aforementioned plan. Furthermore, it is worthy to note that this decision does not need to be transposed into the national laws because as it states Article 2, this decision regulates aspects of the general functioning of MERCOSUR. Therefore, the Member States are also committed to adopt all the necessary rules in order to achieve the objectives set out in this Plan.

4.3 Subjective Rights: The Socio-Labour Declaration

Regardless of its intergovernmental character, MERCOSUR has enacted some rules which grant subjective social rights to the citizens of MERCOSUR. In particular, I will explore the

²⁹ MERCOSUR/CMC/DEC. N. 04/11, June 2011.

³⁰ MERCOSUR/CMC/DEC. N. 18/12, 29 June 2012.

³¹ MERCOSUR/CMC/DEC. N. 21/11, June 2011.

³² MERCOSUR/GMC/RES. Nº 11/13, 10 July 2013.

MERCOSUR Socio-Labour Declaration (1998)³³, which establishes some fundamental social rights within the MERCOSUR legal framework.

The Socio-Labour Declaration (hereinafter called “declaration”) is one of the milestones of the MERCOSUR social dimension. The CMC and the Heads of State adopted this declaration during the Summit of Rio de Janeiro (10-12-1998).

The provisions contained by the declaration are a synthesis of the most important ILO Conventions. It recognises the minimum standards that Member States must respect vis-à-vis MERCOSUR’s workers, regardless of their nationality.

Essentially, the Declaration contains form and the substance rules, namely:

- *Individual Rights* (arts. 1 to 7, non-discrimination and equal treatment principle of migrant workers with national workers, elimination of forced labour and child labour).
- *Collective Rights* (arts. 8 to 13, freedom of association, collective bargaining, right of strike, social dialogue, among others).
- *Other Rights* (arts. 14 to 19, promoting employment, protection of the unemployed, professional training, health and safety at work, labour inspection and social security).

Additionally, the declaration has set up a *Socio-Labour Committee* that is in charge of promoting the social rights in the MERCOSUR sphere. As mentioned previously, it plays an important role in the analysis of any consultation related to the implementation of this declaration. Although it can receive any complaint submitted by the Member States, it has no sanctioning power³⁴ because the Committee is only entitled to prepare and write reports on the violations of the Socio-Labour Declaration.

Moreover, the declaration also provides that Member States undertake to respect all the rights laid down in it. However, some questions have been raised about whether it is or not a legally binding document, in particular, because there was neither legislative approval nor national law that transposed the declaration. Besides, not a single article requires that the declaration should be either approved or internalized.

Although at first some scholars had designated the Declaration as just a political force, nowadays most scholars (Perotti, 2005, Ermida Uriarte, 2001, Mansuetti, 2002) have recognised that the declaration is a legally binding instrument. Nonetheless, there is yet no agreement as to whether the declaration is a MERCOSUR legal source. As it has been stated previously, the Protocol of Ouro Preto sets out the sources of law in MERCOSUR. The Socio-Labour Declaration has not been included in this Protocol. Consequently, it has been argued that the Declaration would not be a source of law in the terms of the Protocol of Ouro Preto. Never-

³³ Socio-Labour Declaration, adopted 10 December 1998, Rio de Janeiro (Brazil).

³⁴ Article 1, RE-15-1999-GMC.

theless, some South-American scholars have recognized it as source of law (Perotti, 2005: 613), in particular, Ermida Uriarte (2001) has pledged that this Declaration constitutes a rule of *ius cogens*; hence, it is directly applicable within the MERCOSUR and Member States' legal orders. In support of the recognition of the Declaration as a source of law, it cannot be neglected the fact that the Secretariat of MERCOSUR has elaborated a collection of foundation legal instruments (2012), and the Declaration was included in it.

As pointed out by Perotti (2005: 619), Member States case law had been initially hesitant towards the legal force of the declaration. Yet, since the first decade of the 21st century, notably the Argentine, but also the Uruguayan and Paraguayan case law³⁵ have relentlessly affirmed and maintained that the Socio-Labour Declaration is a MERCOSUR legally binding instrument. Argentine Labour Courts have maintained that the declaration is a MERCOSUR legal source. There are no known Brazilian cases where the Socio-Labour Declaration is applied. Considering that Venezuela has only recently fully joined MERCOSUR, it is still under a transition period aimed at adapting their legal system to MERCOSUR rules; it is assumed that there is no case law which applies the declaration.

Furthermore, it should be mentioned that the validity of this declaration does not just have consequences for the workers directly, but it also has an effect upon MERCOSUR and its member countries decision-making bodies (Corres 2014: 2). Finally, it is worth stressing that despite the discussions about its legal force, the declaration entailed a major step towards the goal of creating and reinforcing a social dimension.

4.4 Redistribution Mechanisms

The neoliberal doctrine embedded in the creation of MERCOSUR led scholars to think that the asymmetrical dimensions of the states would not affect the development of each one of them. The "automatic" commercial integration, without appropriately taking these asymmetries into account, would allow each of them to benefit equally or in similar way in the integration process.

Twenty years after the Treaty of Asuncion there is widespread acceptance by all the governments, of the importance and consequences of all kinds of asymmetries between the states and of the need to face them with effective programmes.

Within this framework, the Structural Fond of Convergence was created through CMC Decisions 45/04, 18/05, and 24/05. FOCEM is a redistributive instrument, which seeks to reduce the asymmetries between Member States. According to the aforementioned decisions, FOCEM aims to finance:

³⁵ Argentine Supreme Court, "Aquino Isacio c. Cargo Servicios Industriales SA s. Accidente", A.2652.XXXVIII, 21/9/2004; "Asociación de Trabajadores del Estado (ATE) s. Acción de inconstitucionalidad", Fallos, A. 598. XLIII., 18/06/13; Chamber II of the Paraguayan Labour Appeal Court, "María de Lourders de Barros Barreto B. Y otra c. Interventores de Multibanco SAECA s. Amparo Constitucional", 23/5/2005; Uruguayan First Instance Labour Court, "Barrios, Iris Noel y otros c. Sadarq Construcciones. Cobro de daños y perjuicios derivados de accidente de trabajo mortal", sent. 23, 30/3/2005.

- the development of competitiveness
- the promotion of social cohesion
- the institutional structure and the strengthening of the integration process

On the one hand, FOCEM is financed by annual contributions of the member countries and, on the other hand, by external contribution from international organizations, third countries, and institutions. Once a member country is assigned a specific budget allocation, it has to execute the project under its public sector responsibility. It also has to be adapted to the FOCEM programmes.

In spite of its recent creation, FOCEM is currently playing a major role in order to enhance the situation of vulnerable populations. From a social redistribution perspective, as Kingah (2013: 19) asserts it, *“the MERCOSUR Fund ... is regarded as one of the main achievements of MERCOSUR”*.

5. MERCOSUR AND THE CRISES

The current crisis is not the first that MERCOSUR has had to deal with. As Carranza (2010: 2) reminds us, in 1995 an auto parts trade dispute took place between the Member States. Since the largest partners adopted protectionist policies, the conflict had to be settled through presidential diplomacy.

Similarly, as a result of the 1999 global financial crisis, Brazil devaluated its currency and received a \$41.5 billion economic support package from the International Monetary Fund (IMF). Argentina was also badly affected by the crisis. Once again, presidential diplomacy was the chosen tactic to settle the crisis. In a similar vein, the 2001-2002 crisis needed the intervention of the Argentina-Brazil axis in order to solve the disputes. This showed the weaknesses of MERCOSUR's institutions and the fragility of the Member States relations.

The 2008-2009 global crisis has not been the exception and the response has been quite similar. Although there have not been the same negative consequences as in Europe, MERCOSUR Member States have not remained unaffected by the financial crisis. The aforementioned weaknesses reappeared, in particular, because each member country strengthened its role in its economy.

However, from a social perspective, there have been some positive repercussions. On the one hand, each member state adopted some protectionist measures, whose main purpose was to protect the local industries, thus reducing the adverse impact on the labour market. On the other hand, despite the intra-bloc disputes, there was an increased awareness of the need to protect employment. In this regard, the High-Level Employment Group developed a document aimed at protecting employment within the member countries labour market. This resulted in a document (2009) signed by the Member States ministries of Labour, whose main purpose was to adopt the necessary measures to avoid mass redundancies as well as to strengthen the unemployment insurance systems.

In 2013, when Uruguay held the pro tempore presidency of MERCOSUR, this group decided to regain the importance as regards the regional employment guidelines. In particular, frontier work, child labour, and informal employment are currently targeted by the group.

To be precise, even though MERCOSUR has extremely limited competences in this area, the social bodies have adopted possible measures to tackle the negative consequences of the crisis.

6. CONCLUSION

MERCOSUR emerged in a context dominated by “open regionalism”, which mainly aimed liberalise intra-regional markets and to reduce customs barriers between Member States, on the one hand, and to unify customs tariffs towards the world market, on the other hand. Within this framework, the social dimension was not considered in the foundational Treaty of Asunción. Nevertheless, some social bodies were conceived at the beginning of the integration process in order to address potential the social issues resulting from economic integration. This social dimension was further developed as result of the increasing awareness of Member States –in particular, due to the European experience– of the necessity of complementing the economic integration with a social dimension at regional level, instead of relying on national social policy alone.

The political and economic context also helped this evolution. Firstly, at the end of the 1990’s, in the aftermath of the Mexican and South-East Asian crises, Member States decided to adopt two of the most important social rules within MERCOSUR, namely, the Socio-Labour Declaration (1998) and the Multilateral Social Security Agreement (1997). Secondly, the new political trends during the beginning of the 2000’s would mark a turning point in the type of integration intended by Member States. Considering MERCOSUR’s size, its cultural diversity, its population, and the fact that there is a free residence agreement signed between MERCOSUR’s Member States Bolivia, Chile, Colombia, Ecuador, and Perú –although the free movement of workers has not been recognized, it has become much easier to reside and to have a work permit in this area–, the development of a stronger social dimension was required.

It is an undeniable fact that the evolution of the social aspect within MERCOSUR has been considerable. However, MERCOSUR has many weaknesses, in particular, in its structure and its legal system. Despite the intention of MERCOSUR’s bodies and even some of the Member States, the social dimension finds a major impediment in its foundations, which is its inter-governmental feature. An effective regulation is required to ensure direct applicability and uniformity throughout MERCOSUR. As Psarski Cabral and Lima Cabral (2014: 96) state, the regional legal integration is indispensable to the development of MERCOSUR.

In an attempt to improve MERCOSUR as an integration process, its institutional structure should be reshaped and its asymmetries should be aligned in order to create a more coherent legal system. This would ensure a greater legal certainty for the citizens of MERCOSUR; hence the Member States would be subjected to regional law.

MERCOSUR is far from reaching its main objectives, but it must not be overlooked that from its beginnings to the present it has been the most successful integration process in the region. In particular, MERCOSUR was only created in 1991, and is thus a relatively new regional integration process. In this short time frame, its social dimension has developed considerably from an institutional dimension as well as a normative perspective. However, that is not to say that the social objectives have been fully attained. On the contrary, a reform, which we deem necessary, could allow the MERCOSUR to further the social dimension and to procure better protection for the workers.

REFERENCES

- ARIAS, A. (2013), "La política comercial en el MERCOSUR: ¿Cambio de lógicas o fracaso de instrumentos?", Buenos Aires, FLACSO.
- BAKKER, F. E. (2013), "Economic asymmetry and institutional shortfall in MERCOSUR? Predictions for deepening MERCOSUR integration", 'Master's Thesis', Centre International de Formation Européenne.
- BARRETTO GHIONE, H. (2002), "Consecuencias de la Declaración Sociolaboral del MERCOSUR en la interpretación y aplicación de las normas laborales en los ordenamientos nacionales", *Gaceta Laboral (Venezuela)*, vol. 8, núm. 3, septiembre-diciembre, pp. 355-372.
- BOUZAS, R. (2003), "Acerca de cuatro falacias", *Revista TODAVIA*, Nro. 5 available at <http://www.revistatodavia.com.ar/todavia21/r.bouzanostal>
- BRICEÑO-RUIZ, J. (2014), "Regional dynamics and external influences in the discussions about the model of economic integration in Latin America", EUI Working Paper RSCAS, N° 2014/11, pp.1-15.
- CABAÑAS, M. (2007), "The MERCOSUR Multilateral Social Security Agreement", *Revista Seguridad Social CISS*, N° 257 pp.57-72
- CARDONA MONTOYA, G. (2013), "¿Es MERCOSUR una Unión Aduanera Imperfecta? Análisis conceptual y aplicado de la realidad y el potencial de la integración del Cono Sur", *Revista Escenarios: Empresa y Territorio*, No. 2, ene-dic, 2013, p.55-70;
- CARRANZA, M. (2010), "The Global Economic Crisis, and the New Architecture of Regionalism in The Americas", *FLACSO Working Paper*, N° 125, pp.1-37
- CERIANI CERNADAS, P. (2013), "Apuntes críticos sobre derechos humanos, migraciones y libre circulación de personas en el MERCOSUR", in ZAFFARONI, Eugenio (ed.) *Libro de Derechos Humanos. Reflexiones desde el Sur*, Buenos Aires, Ed. Infojus, pp.83-118.
- CORRES, G. (2001), "La declaración sociolaboral del MERCOSUR: un instrumento para el desarrollo social", *Revista Pistas*, N° 3.
- . (2014), "La dinámica de las relaciones laborales en el MERCOSUR", *Micro Juris*, Argentina, MJD6718.

DALLARI, P. (2007), "O Mercosul perante o sistema constitucional brasileiro", in BASSO, Maristela (ed.) *Mercosul: Seus efeitos jurídicos, econômicos e políticos nos Estados membros*, São Paulo: Ed. Atlas, pp. 39-52.

DELUCA, S. (2012), "El MERCOSUR necesita su Maastricht", *Revista Pensar en Derecho*, Ed. UBA, pp. 247-265.

DRNAS de CLEMENT, Z. and GARRIGA, A. (2005), "Políticas Sociales en el MERCOSUR", in DRNAS de CLEMENT Zlata (ed.), *Desarrollos del MERCOSUR. Aspectos Jurídicos-Sociales. Políticas Sociales*, Córdoba: Ed. Lerner, pp. 31-76.

ERMIDA URIARTE, (1997), "Labour institutions and labour relations in MERCOSUR", in: *MERCOSUR: The impact of economic integration. A case study*, ILO, Labour Education 1997/4, No. 109, pp. 16-26.

---. (2001) "La Declaración Sociolaboral del MERCOSUR y su aplicabilidad judicial", *Revista Pistas*, Nº 5 Octubre.

FELDSTEIN DE CARDENAS, S. and SCOTTI, L. (2013), "Las asimetrías constitucionales: un problema siempre vigente en el MERCOSUR", *Revista de la Secretaría del Tribunal Permanente de Revisión*, Año 1, Nº 2, pp. 271-311.

FERNANDEZ REYES, J. (2006), "El Orden Jurídico del MERCOSUR", *Revista de Derecho de la Universidad de Montevideo*, Año 5, Nº. 9, pp. 27-51.

GUERRA, S. (2013), "MERCOSUL: do ideal bolivariano para a realidade atual", *Revista de la Secretaría del Tribunal Permanente de Revisión*, Año 1, Nº 1, pp. 275-293.

JAEGER JUNIOR, A (2014), "Metodologia Jurídica Europeia e Mercosulista: Considerações Fundamentais", *Revista de la Secretaría del Tribunal Permanente de Revisión*, Marzo 2014, pp. 117-157

KINGAH, S. (2013), "Regionalising Global Social Policy in Times of Economic Crisis", *UNU-CRIS Working Papers*, Nº W-2013/7, pp.1-27

KLUMPP, M. (2013), *Schiedsgerichtsbarkeit und ständiges Revisionsgericht des MERCOSUR : Integrationsförderung durch zwischenstaatliche Streitbeilegung und Rechtsprechung im MERCOSUR*, Ed. Heidelberg : Springer

LULA DA SILVA, L. (2012), Prólogo in ARAGAO, Carla (ed.), *La dimensión social del MERCOSUR: Marco conceptual*, Ed. Instituto Social del MERCOSUR: Asunción, Paraguay, pp.9-11.

MANSUETTI, H. (2002), "Naturaleza jurídica y proyección institucional de la Declaración Sociolaboral del MERCOSUR", Ph.D. Thesis, Universidad Católica Argentina: Argentina.

MARTÍNEZ PUÑAL, A. (2008), "En torno a las normas del MERCOSUR: clasificación y jerarquía, incorporación, vigencia (simultánea) y dificultades constitucionales" in Waldemar Hummers (Ed.), DRNAS DE CLÉMENT, Z., *MERCOSUR y UNIÓN EUROPEA*, Ed. Lerner Editora S.R.L., Córdoba, pp. 223-249.

MUTTI, M. (2013), "El MERCOSUR a principios del siglo XXI: ¿Superando el "Regionalismo Abierto"?", Cuadernos sobre Relaciones Internacionales, Regionalismo y Desarrollo, Vol. 8, No. 16, Julio-Diciembre 2013, pp.81-107.

OLMOS GIUPPONI, M. (2011), "Citizenship, migration and regional integration: Re-shaping citizenship conceptions in the Southern Cone", Source: European Journal of Legal Studies, Volume 4, Issue 2 (Autumn/Winter), pp. 104-136.

PEÑA DE PINON, M. (2010), "La Corte Suprema y el derecho del MERCOSUR", Revista El Derecho, N° 23.469, pp. 903-922

---. (2013), ¿Una Corte de Justicia para el MERCOSUR?, Revista de Derecho Privado y Comunitario, Ed. Rubinzal-Culzoni, N° 2013-1 pp.615-660.

PEROTTI, A. (2005), "El Fallo 'Aquino' de la Corte Suprema: Una Introducción a la Aplicación Judicial de la Declaración Socio-Laboral del MERCOSUR", Revista de Derecho Privado y Comunitario, Ed. Rubinzal-Culzoni, N° 2005-3 pp.607-633

PSARSKI CABRAL, A. and LIMA CABRAL, C. (2014), "O MERCOSUL e a crise: A Integração da América do Sul e o aparente paradoxo europeu", Revista de la Secretaría del Tribunal Permanente de Revisión, Año 2, No. 3, pp. 77-99.

RODRIGUEZ, G. (2013), "MERCOSUR: what kind of integration is possible?" Rethinking regionalisms in times of crises: A collection of activists' perspectives from Latin America, Asia, Africa and Europe / Instituto Equit Género, Economía e Ciudadanía Global. (ed.) – Rio de Janeiro: Instituto Equit, pp.19-23.

ROBLES, A. (2005), "Integración regional, democracia y relaciones laborales contractuales: un análisis desde la experiencia sudamericana", Cuaderno de Relaciones Laborales, 24, N° 1, pp. 57-83.

SCOTTI, L. (2013) "El Derecho de la Integración en el MERCOSUR", in NEGRO, Sandra (ed.), *Manual de Derecho de la Integración, 2ª edición. Revisada, ampliada y actualizada*, Ed. Bdef, Buenos Aires, pp. 57 – 139.

TANSINI, R. and VERA, T. (2001), "Los Procesos de Integración en América Latina: El caso del MERCOSUR", Revista de Economía, ICE, Febrero-Marzo 2001, Nro. 790, pp. 107-118.

TANSINI, R. and ZEJAN, M. (1998), "El impacto de la crisis asiática en el Cono Sur Latinoamericano", Economistas, Año N° 17, N° 80, 1999 , pp. 132-142.

TOKMAN, V. and MARTINEZ FERNANDEZ, D. (1998), "Labour issues in MERCOSUR" in: *MERCOSUR: The impact of economic integration. A case study*, ILO, Labour Education 1997/4, No. 109, pp. 1-15.

VENTURA, D.(2005), "Asimetrías cruzadas o cubismo formativo. La incorporación de normas en el MERCOSUR", *Deeper Integration of MERCOSUR: Dealing with Disparities*, Technical Workshop, IDB Headquarters, Washington DC.