

BRAZIL AND THE SOCIAL SECURITY AGREEMENT IN THE SOUTHERN COMMON MARKET

BRASIL Y LOS ACUERDOS DE SEGURIDAD SOCIAL EN EL MERCADO COMÚN DEL SUR

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ABSTRACT: This article reviews the mechanisms that allow the transference of the social security rights for migrant workers defined by the regional governance formed by the States Party of the Southern Common Market (Mercosur) based on the negotiation process consolidated in social security agreements. For this purpose, the Brazilian government, aiming to ensure the social security protection to the workers who execute or will execute in-the-block job activities, established the Multilateral Agreement of Social Security. From the theoretical and documental methodology, with the analytical and deductive technique, it was concluded that the social security is a social right protected by the Public Power, however, the social security agreement of Mercosur ensures only four modalities to the migrant worker.

Keywords: Migrant worker. Social security agreements. Mercosur. Social security. Welfare.

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RESUMEN: Este artículo revisa los mecanismos que permiten la portabilidad de los derechos de protección social para los trabajadores migrantes dispuestos por la gobernanza regional, formada por los Estados partes del Mercado Común del Sur (Mercosur), con base en el proceso de negociación firmado en los acuerdos de seguridad social. Para tanto, el gobierno brasileño, objetivando garantizar la protección previsional a los trabajadores que ejercen o que vengán a ejercer actividad con vínculo laboral extra y dentro de bloque, firmó el Acuerdo Multilateral de Seguridad Social. A partir de la metodología teórico documental, con la técnica analítica deductiva se concluyó que la seguridad social es un derecho social protegido por el Poder Público, sin embargo, la portabilidad intrarregional de los beneficios previsionales garantiza solo cuatro modalidades al migrante laboral.

Palabras clave: Trabajador migrante. Acuerdos previsionales. Mercosur. Seguridad social. Protección social.

CONTENTS: 1. INTRODUCTION; 2. THE MIGRANT WORKER AND THE SOCIAL PROTECTION; 3. THE SOCIAL PROTECTION OF THE MIGRANT WORKER IN MERCOSUR; 4. THE SOCIAL SECURITY AGREEMENT OF MERCOSUR; 5. CONCLUSIONS; 6. REFERENCES.

1. INTRODUCTION

This article reviews mechanisms that enable the transference of the social protection rights to the migrant workers in the States Party of Mercosur that in the face of the growing international migratory movement of the last decades, in general, have been concerned about its consequences for the labour market and for the social security.

The objective is to present the importance of building a social security system that seeks to reduce the asymmetries in relation to the acquisition of social security benefits that arise when someone leaves the home country to reside and/or work in another one. It is precisely for this reason that it is necessary to ponder on the intraregional consequences resulting from the increase of the economic integration, the consolidation of the political-economic blocs and the movement of workers.

Therefore, the path will be to understand the international context of the social security whose labour modality is one of the assumptions of the globalization and requires mechanisms capable of safeguarding the migrants' social security rights. In this approach, it is verified a demand for the intersection between social security systems that can be shared among the nations and that ensure the social protection of the migrant worker, besides reducing inequalities between the social security policies that may represent a deterrent to this modality.

For the development of this text, the deductive approach method was used, adopting the monographic procedure and the exploratory and documental research techniques adopting as theoretical framework the relation between public international right and labour right. And in order to achieve the proposed objective, the literature review of the joint social protection systems, transnational social security rights and guarantees, was performed, and the social security in the scope of Mercosur was investigated.

The debate to the implementation and consolidation of the social security rights of the migrant workers in the States Parties of Mercosur is a particularly important theme because of the need of global social protection. Thus, the question is: what are the rights to social protection for migrant workers established by the regional governance constituted by the States Party of Mercosur?

The work will be presented in three chapters. The first one is about the social protection of the migrant worker. The second will expatiate about the social protection of the migrant worker in the scope of Mercosur, and the third one will analyze the social security agreement of Mercosur in order to, in the end, answer the proposed research problem.

2. THE MIGRANT WORKER AND THE SOCIAL PROTECTION

The International Social Security Agreements allow the migrant workers to have the transference of period of contribution between countries, but each country is responsible for the payment of the period worked in its territory. Therefore, such international agreements constitute a nexus of provision of social security benefits to be satisfied by each contracting Nation upon the presented analyses of the requests of benefits and decision in relation to the right and conditions, according to the respective pact and the current legislation (not implying alteration).

In the scope of the international experiences, the first efforts with the aim of coordinating the social security regimes via International Agreements of Social Security are prior to the Second World War. However, the reciprocal agreements, as we know presently, emerged only after the conflict (Taha, Astrid & Messkoub, 2015, p. 44).

In 1919, France and Italy were signatory with each other of a social security bilateral agreement, and dealt, in this pact, with the issue of the social benefits fragmented or lost to the migrant workers. Over the years, other countries followed the example and concluded bilateral and multilateral agreements on this matter (Fick & Flechas, 2007, pp. 49-51).

In practice, currently, each country defines its own rules. In United States, for example, originally, pension and retirement payments arose as a benefit of sick pay or disablement when the workers suffered injuries in the workplace, and, later, they began to include the retirement payment (Bateman, Kingston & Piggott, 2001, pp. 100-132).

The Member States of the European Union (EU) currently have the most complete system in terms of portability, and their citizens have full and undiscriminating access to the portability of most of the social benefits (D'addio

& Cavalleri, 2015, pp. 350-353). Such fact reflects a small percentage of EU citizens who notice the lack of portability as an obstacle to move to other Member Country.

Furthermore, the time of service appears as protection of the fundamental human rights of the migrant workers in the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, which was adopted by the United Nations (ON) General Assembly through the Resolution No. 45/158, of December 18th, 1990, in New York, United States (Organization of American States, 2016a), and came into force in July 1st, 2003, as its art. 87 determines, owning, in 2016, 48 States Party.

In Brazil, in December 15th, 2010, the Executive Power submitted the appreciation of its text to the National Congress through the Message of agreements, conventions, treaties, and international acts – MSC no. 696/2010, which is still in course (Mensagem de Acordos, convênios, tratados e atos internacionais n. 696, 2010). It is worth noting the understanding embodied on the Statement No. 7 of the National Social Security Institute (current Social Insurance Resources Institute):

The time of service provided abroad to a company that is not bounded to the Brazilian Social Service cannot be counted, except reciprocity treaty between Brazil and the foreign State where the work provided in one can be counted in the other, for the effect of the benefits in there stipulated. (Resolução no. 2, 1993).

The Brazilian government, in turn, follows the orientation of the Convention no. 118 of the International Labour Organization (ILO), which deals with the equality of treatment to national and foreign workers in relation to social security, and of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) of 1966 (Organização Internacional do Trabalho, 2013b; Decreto

n. 3197, 1999; Decreto n. 591, 1992). Brazil also follows the Convention no. 102 about social security minimum standards that brings the dispositions about minimum appropriate treatment to several benefits with social security nature (Organização Internacional do Trabalho, 2013a). It is important to highlight that the Brazilian doctrine and legislators use this expression as a synonym of solemn and multilateral treaty in which the parties involved have convergent positions.

The ILO Convention no. 118 and the ICESCR were formulated by the UN as a milestone in the establishment of a series of rights related to social security. They worked as incentives for multilateral and bilateral agreements with the coverage of several aspects of minimum coverage under the aspect of the social security as human right, whose contents deal mostly with benefits related to disablement, old-age, accident, and work-related diseases. In relation to the social security coverage, it would depend on the kind of agreement reached (Presotto, 2011, p. 15).

In fact, the agreements are elaborated considering a series of existing international diplomas about the rights of the migrant workers. Their fundamental objective is to establish rules to standardize fundamental principles corresponding to the treatment to migrant workers and their families, through an appropriate international protection, especially considering their vulnerable situation and distance from their home State.

Most of the agreements signed all around the world is referred to long-term benefits, such as the disability and age retirement, pension for death and other incomes (Sabates-Wheeler, 2009, pp. 19-20). The benefits related to the worker's health conditions are presented in a small-scale and, normally, are subjected to social security agreements. Besides, the benefits as care or maternity allowance are generally explicitly free from portability.

In South Asia and in sub-Saharan Africa the situation is harsher. The taxes of immigrants who have access to benefits coming from the portability are 0 and 4%, respectively, showing how the low-income countries still need the conclusion of International Social Security Agreements (Avato, Koettl & Sabates-Wheeler, 2010, pp. 459-463).

Currently, Brazil subscribes some bilateral social security agreements with Cape Verde, Chile, Spain, Greece, Italy, Japan, Luxembourg, Germany, Canada, France, Belgium, South Korea, Portugal, and Quebec. There are other multilateral agreements with countries such as Iberian Peninsula (Spain, Bolivia, Brazil, Chile, Portugal, El Salvador, Argentina, Ecuador, Paraguay, Peru, and Uruguay) and with the countries of Mercosur (Paraguay, Argentina, and Uruguay).

Specifically related to Latin America, it is also worth highlighting two relevant treaties, elaborated by the Iberian-American Social Security Organization (OISS) and valid also in Brazil, namely: the Iberian-American Social Security Multilateral Convention, of November 10, 2007, and the Agreement of Application of the Iberian-American Social Security Multilateral Convention, of May 19, 2011.

In view of that, the Iberian-American Convention complements and, in many cases, substitutes a network of multilateral agreements between the countries of Latin America, and among these countries, Spain and Portugal (Hirose, Nikac & Tamagno, 2011, p. 58). It represents a great advance in the protection of the social security rights of the migrant workers and their families, however, it is not currently clear in which measure the Iberian-American Convention will substitute or complement the MSSA of Mercosur.

On May 22, 2018, one of the legislative houses of the Brazilian National Congress, the Federal Senate, approved of the text of the International Agreement of Social Security that would benefit about 1.3 million Brazilian

workers who reside in the United States, and more than 35 thousand North-Americans living in Brazil, who will soon be able to add the periods of contribution to the Social Security of these countries to achieve the minimum time necessary to the obtention of old-age and disability retirements, and also pension for death (Secretaria da Previdência). Meanwhile, in Mercosur there is not a unification or harmonization of the national legislations of the social security right (Rechsteiner, 2016, p. 115).

The reason is the diversity of management models and social security policies of the States Party that should incorporate the Social Security Conventions with regulations about «. . . transference of social security rights, when it is about countries with social security policies based on the individual capitalization, aiming at granting a better protection to the migrant workers» (Quinteros, 2006, p. 92). It should be noted that the Social Security Conventions provide an ethical and legal definition and basis for a national policy and practice in relation to foreign migrant workers and their family members, as well as tools to encourage Member States to adopt and improve the national legislation.

Conceptually, the migrant worker involves the person who will exert, exerts or exerted a paid activity in a State that is not his/her national, in the terms of art. 2º, item 1 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (Organization of American States, 2016a). In this perspective, the portability is a mechanism that lacks a strong development and presents a wide range of questions to be considered, which are not solvable as a whole and require specific agreements between countries or, in some cases, with another country. It happens mainly because there is no harmonization of the social security legislations, what entails different schemes of social security policies (Arrighi, 2006, pp. 165-168).

In reflecting on this theme, Schwarzer & Passos (2004, pp. 1-5) point that the international social security agreements need to overcome complex issues of fundamental rights of the human person. It is necessary to harmonize divergent minimum rules, since the effectiveness of the social security systems varies around the world. Furthermore, a potential transference of monetary values between countries will have to be submitted to a new tax legislation, new rules of capital and exchange market, besides that these agreements have to consider the fact that the social security legislation undergoes updates.

Castro (2014, p. 39) defends that the contributions already performed by the migrant worker must be kept in the host country and stay that until there is his/her concession, without any discrimination related to the beneficiary's nationality and without any harm to him/her. It was observed that the beneficiary must seek his benefit, the host country of his contributions, perhaps not the one of his labour activities, shall grant the contribution due to him or transfer them all to the new country, so that this one manages and ends up being the responsible for this new legal relationship, until the concession of the right happens.

It results the need of adequacy of the social security systems to the current scenario to enable the free circulation of workers in a regional level, what implies the abolition of any discrimination (Ginneken, 2013, pp. 212-213). This growing labour international mobility raises questions about the protection of the migrant workers.

The percentage of individuals living out of their home country has grown significantly after the 1960s, reaching 3.3% of the world population in 2015, what represents about 244 million people (Holzmann, 2016a, p. 6). The relevance of this study focus on the estimative of conational residents abroad which, in 2015, was of 3,123 million (residents in 193 countries), and, according to data from the

Welfare Office of the Ministry of Finance, around 88.60% were covered by social security agreements (Secretaria de Previdência, 2015).

The world is underestimating the mobility dynamic of the migrant work and that, although it is difficult to quantify this dynamic because of the multiple migrations of individuals, sometimes to several countries, the fact is that the residence time of this worker out of his home country is increasing (Holzmann, 2016b, pp. 55-59). In the European Union, the number of citizens who will spend at least part of their adult life living out of their home countries has been growing and, soon, this proportion will be of one in five individuals in the world (Pennings, 2013, pp. 118-119).

Statistics show that, in all the countries of the European continent, the volume of pension benefits increased in the period of 2004 to 2014, but those paid to migrant workers expanded even faster, reaching 11.8% in 2014 in Austria, 6.9% in Germany, and 10.2 in Switzerland (Eurostat Statistics Explained, 2017). About the social security, Creveld (2004, p. 34) believes that the total independence of the State on elaborating about the entrance of foreigners cannot be supported this way, as it existed before the establishment of the International Human Rights Law, for the sovereignty of the State is not the same.

When the different practices currently valid are analyzed, it is noticed that different solutions have been implemented to solve the matter of the migrants' social protection. In Hong Kong, for example, the migrant workers have the possibility of opting for the social security system of their host country, voluntarily, or can prove they continue paying contributions for a system of pensions in their home countries or in any other country (Holzmann, Legros & Dale, 2016, pp. 43-44).

In some countries of the Persian Gulf, alternatively, the pension system is created as a system of social pensions for nonimmigrant workers, and these

immigrants cannot participate of the pension system of the host country, not even voluntarily (Guardiancich & Natali, 2012, p. 30). Both the situations demand that the migrant worker continues to contribute for the pension system of a different country of his host country or for private pension plan.

The globalization enabled the States to consider the possibility of incorporating to the Social Security Conventions, such as norms relative to the portability of the social security savings, when it is about countries with social security policies based on the individual capitalization, in order to grant a better protection to the migrant workers (Quinteros, 2006, p. 81). In this sense, the Social Security Agreements between countries are characterized as an international norm for the coordination of the national legislations in terms of social security with the aim of expanding the coverage, ensuring the right to the events of oldness, time of service, disablement, temporary inability, maternity, and death, as laid down in each Agreement and, in some Agreements, the coverage in the health area.

In this regard, one example is the Chilean legislation, Law no. 18.156, of August 25, 1982, which, among other determinations, authorizes, according to certain requisites, the devolution of the savings to foreigners who have contributed with a pension fund administrator in this country (Quinteros, 2006, p. 32). This is materialized with the funds handover to the worker.

The Chilean proposal is to incorporate the portability of the social security savings to the Social Security Convention among the countries that establish social security systems whose affiliated deposit their savings in individual accounts (Bertranou, Solorio & Van Ginneken, 2002, pp. 11-20). Therefore, those who move to another country for work-related reasons, among others, will be able to transfer to the social security system of their home country the funds

pertaining to them, thus, keep the social security nature of these, and avoid paying administrative costs in both States.

Although some countries' legislations include the possibility of the foreigner workers, who withdraw from the Country to take their social security contribution, in 2005 only 25% of the world migrants had the full portability of social security benefits relative to their home country (Holzmann & Koettl, 2014, pp. 378-380). The portability of the social security rights is necessary to respect the migrants' human rights (Taha, Astrid, & Messkoub, 2015, pp. 102-110).

From the human rights point of view, the individuals have the right to social protection, but a key question is if these human rights are applied to all the social rights, i.e., as they consume financial resources, one questions about the social trade-offs that can emerge between the countries. For Moles (1982, pp. 159-160), the social security bilateral agreements are considered crucial to establish a portability, but the functionality and the efficacy of these agreements have not been investigated yet, therefore, it lacks orientation for the policy makers in immigrant and emigrant countries.

What really matters for the migrant worker who moves to another work country, or even who returns to the home country, is that the social security benefits are not lost. Thus, the immigrant and emigrant countries may be interested in exporting or importing the social security benefits of this migrant, increasing the advantages of internationally mobile work force (Tseng, 2014, p. 29).

The Migration Law (Lei n. 13.445), with humanitarian nature, revoked the Statute of the Foreigner, considered with punitive and expulsion bias, now, a new model that consecrates the migrant and the visitor. It deals with the rights and duties of the migrant and the visitor in Brazil, regulates the entry and the stay of

foreigners and establishes norms of protection to the Brazilian people abroad, also provides, in an innovative way, the right to social security.

It is finally highlighted the possibility of transforming the National Immigration Council into Immigration Council of Mercosur, with powers to dispatch Resolutions destined to guide and coordinate the immigration activities and to arbitrate migration issues, including the institution of a single model of identity card for the migrant worker valid in all the territory of Mercosur, substituting the identity cards or other documents currently in force.

3. THE SOCIAL PROTECTION OF THE MIGRANT WORKER IN MERCOSUR

In the face of the growing geographic movement of workers due to the globalization, ILO, as UN's multilateral agency, recommends the State Parties to elaborate social security adjustments with each other so that the workers have social support (Nações Unidas, 2016; Castro, 2014, p. 103). For example, the *International Convention of the Migrant Workers and Members of Their Families*, and the *Convention (111) concerning Discrimination in Respect of Employment* (Organization of American States, 2016a, 2016b).

In 1935, with the publication of ILO Convention no. 48, it was started to consider the matter of the acquisition and maintenance of social security rights for the migrant workers (Süssekind, 1998, p. 67). After this period, other important ILO Conventions dealt with the theme migrant worker, such as Convention no. 97, of the year 1949 (Süssekind, 1998, p. 129); Convention no. 102, of 1952 (Süssekind, 1998, p. 118); Convention no. 143, of 1975, and Convention no. 157, of 1982 (Süssekind, 1998, p. 301).

In the scope of UN, the first Convention is related to the rights of the migrant workers when the Economic and Social Council, in 1972, approved of the

Resolution no. 1.706 (appendix LIII) which warned against the exploitation and forced labour of workers from African countries in conditions similar to slavery and the problems of illegal transportation of workers to European countries (Piovesan, 2016, p. 304). ILO Convention no. 97/1949, still not endorsed in Brazil, provides not inferior treatment to the legal migrants than to the nationals, and enables that these migrants seek information on their legal situation.

ILO adopted Convention no. 102, in June 28, 1958, known as minimum rules of social security, only ratified by Brazil in 2008, with the approval of its text by the Legislative Decree no. 269, of September 19, 2008. The rule in question concentrates several preparatory instruments and establishes necessary conditions to each circumstance, linking the coverage, the equivalent provisions, and the situations of access.

It is necessary, at first, a conceptual distinction of the systems of social security and social protection by the specialized literature which, in this article, draw near. The social security is a range of norms integrated by several precepts of different hierarchy and configuration (Araújo Neto, 2016, pp. 85-87; Silva, Puty, Silva, Carvalho, & FrancÊs, 2017, pp. 4-5), whereas the social protection is a stability factor in the economic development and "results of the public action that aims to safeguard the society from the effects of the classic risks that produce dependence and insecurity: sickness, oldness, disability, unemployment, and exclusion" (Duarte, Marcelino, Boccolini & Boccolini, 2017, p. 3516).

ILO Convention no. 143/1975, still not endorsed in Brazil, deals with the abusive conditions on the immigrations and seeks to promote the equality of opportunities and treatment to migrant workers. ILO Convention no. 157/1982, in turn, is related to the preservation of the social security of the human rights of workers, and it is the only convention destined specifically to reinforce the portability, but has the support of only three countries: Philippines, Spain, and

Sweden (Holzmann, Legros & Dale, 2016, pp. 43-44). In Brazil, the 1988 Federal Constitution (1988) ensured to every person the right to receive from the State the benefit that assures the subsistence to the Brazilian people regardless of contribution or economic condition (Martins & Pereira Siqueira, 2017, p. 298). Ergo, the retirement as a right to every urban or rural worker, including the domestic workers, is contained in article 6º of the Constitution, provided that the requisites to acquire the social security benefit are fulfilled. Therefore, article 201 (1988) expresses the condition for the assurance of the retirement in the General Social Welfare Policy (RGPS), and makes no distinction if the insured person is or is not in national territory (Castro & Lazzari, 2016, p. 78).

In relation to the non-national workers, the Brazilian government seeks to establish International Social Security Agreements to streamline and uniform the recognition of rights of the insured and beneficiaries of the Social Security. These agreements do not imply the transformation of the valid legislation of the agreeing countries, and may adapt, according to their own applicable legislation, and respecting every agreement signed (Steinmeyer, 2006, pp. 69-72).

Every social security agreement of international scope has their own specificities regarding the ways of payment and the benefits supported. For this reason, the social security agreements between Brazil and their partners do not harbinger other events, neither create new benefits besides those already established in their respective legislations, and, in each agreement, there are precise and defined demarcations of the legal areas in which it must be applied (Raulino, 2000, p. 46).

The main problem with the portability of the pensions seems to be that, in the lack of a Bilateral or Multilateral Agreement, the contribution periods are not summarized, what implies disadvantages for the international migrants. In the absence of an agreement, the migrants may not have the right to retirement

because they do not have the minimum of contribution years in some or in all the systems to which they contributed, although in terms of summarized contribution period they may have worked enough time (Holzmann, Koetl & Chernetsky, 2005, p. 33).

The agreements create the possibility for the individual who migrates between countries to: (i) have access to medical assistance; (ii) use, in an agreeing country, in case of temporary work, or, also, under some additional special conditions, benefits of the general social security policy of the home country; and (iii) require benefits expected in the general social security policy of the country where the worker emigrated to (Schwarzer, 2009, pp. 191-200). In the latter case, it is computed, moreover, the time of contribution in the home country, and in some cases, the time of contribution in third countries that, in turn, have an agreement with any of the States Parties.

Even if the public and private pensions are fully transported, the surprise can occur after the retirement and on the receipt of the benefits, for the pension sent abroad runs the risk of being taxed or untaxed or suffering a double taxation, both in the home country and in the country of residence (Holzmann, 2016b, p. 45). According to the researcher, it can affect and distort the mobility of the work and the decision of residence, creating undesirable tax effects to the countries.

With this new overview, the international agreements also predict the institute of the "temporary displacement", by which there are no social contributions in the destination country, both for the company and for the employee, and the worker is linked only to the social security policy of its home country.

In this sense, article 635 of INSS/PRES No. 77, of January 21, 2015, provides that:

The employee of the company placed in one of the agreeing countries, who was sent to the territory of the other, by the period planned on the Agreement for the exemption of contribution in the destination country, will still be subject to the social security legislation of the home country, provided that in conjunction with the Temporary Displacement Certificate that must be required by the employer [...] (Instrução Normativa, No. 77, 2015).

This avoids double taxation, i.e., incidence of social contributions, for the company and the insured person, both in the social security system of the home country and in the country where the worker is displaced. By these means, the contributions are incorporated to the social security system of the home country. In this aspect, Gensen & Holzmann (2018, pp. 2-15) propose a new conceptual framework for the taxation of the old age and disability retirements in a world of high and growing cross-border mobility of workers and pensioners.

The bilateral agreements apparently are the best solutions to the portability of the benefits, since they can avoid disadvantages of benefits and, to a great extent, establish the tax equity to the countries under development (Holzmann, Palacios & Zviniene, 2004, p. 26). In this sense, the portability of pensions seems to be reasonably profitable after the conclusion of the agreements, even though there are not definitive studies on the matter.

About the social security portability, Holzmann (2016b, p. 78) asserts that during their stay abroad, the international migrants often acquire rights to social benefits that want to export to their families left behind or for future social benefits – mainly oldness pensions and health care – that they want to take with them when they migrate. This phenomenon originates the issue of the portability of the social benefits, in other words, the capacity of preserving, keeping, and transferring social security rights regardless of the nationality or the country of residence.

The lack of social security portability complicates the geographic and occupational mobility of the migrant workers (Guardiancich & Natali, 2012, p. 46). Therefore, the workers' mobility is affected by the lack of social security portability, to which they should have acquired rights essential for the planning of the global cycle of life of the citizens. From the point of view of the human rights, the migrants have the right to social protection, according to the national legislation and international conventions (Piovesan, 2016, p. 707).

In the face of the growing phenomenon of the migration and with the consciousness of its impact, a kind of «single social security market», which could help to preserve the rights of the mobile workers, should be created. In the field of the taxation, the migrant worker can analyze the social security portability and make the decision about the most appropriate and advantageous benefit (Fornalé, 2017, p. 35).

Although there are a few definitive researches about how portability, or its lack, affects the mobility of the migrant work, it is assumed that the inability of transferring acquired rights influences the decision of the work market, as well as the ability of the individuals and their families to properly manage the social risks and the planning of the cycle of life. Anyway, the macroeconomic and political context influences the capacity of performing their rights (Bonnet, Ehmke & Hagemeyer, 2010, pp. 51-54). The ongoing recession complicated the effective portability of the social security for the intra-community migrants. Such structural factors deserve a more detailed investigation.

The migration era will enable the creation of solutions that exceed the territorial boundaries of the State. Vedovato (2013, p. 179) considers unswerving the fact that the States are more and more diversified in relation to culture, religion, and ethnic formation, what eases the creation of transnational networks,

in which the State will have little importance when compared to what it used to hold in the mid-20th century.

The benefits are not portable, so the individuals can decide not to migrate or return or can offer jobs in the informal sector, with implication for the general tax revenues and the economic growing of the host and home countries (Holzmann, Palacios & Zviniene, 2004, pp. 37-41). Besides, the insufficient portability comes into conflict with the people's rights to social protection, established in several international agreements.

4. THE SOCIAL SECURITY AGREEMENT OF MERCOSUR

Mercosur is a project of regional integration created by the Treaty of Asunción, in March 26, 1991, and it is framed into the «new regionalism» imposed by globalization. These are the effective members (or States Parties) of Mercosur: Argentina, Brazil, Paraguay, Uruguay (since 1991), and Venezuela (since 2012 and suspended on December 1, 2016). Associated members: Chile (since 1996), Peru (since 2003), Colombia, Ecuador (since 2004), Guyana and Surinam (both since 2013), and Bolivia (since December 7, 2012 when the Protocol of Accession was signed. Currently, it is in process of ratification, only pending on the acceptance of the Paraguayan congress, however, on the 48th Summit Meeting of the Head of States of Mercosur, which took place on July 15th, 2015, its entry to the block was officially formalized) (Mercosur, 2018).

As previously said, Mercosur has «States Parties» and «Associated States». The main difference is on the power of decision that the first ones have in relation to the important matters of the bloc. The associated ones, for example, do not have the right of voting the endorsement of the entry of new Members States to the organization.

During the 13th Board Meeting of Mercosur, performed in December 15, 1997, in Montevideo, Uruguay, the States Parties established the Multilateral Social Security Agreement (MSSA) of Mercosur, adopted by Brazil with the promulgation of the Legislative Decree no. 451/2001 (2001), in order to show reciprocity to the social security treatment among its workers, valid from July 1, 2005. It is highlighted that the MSSA of Mercosur is found open to possible adhesions of other nations that join the Treaty of Asunción, creator of the bloc. Therefore, after the entry in Mercosur, Venezuela, in November 2006, during a meeting of the Permanent Multilateral Commission of the States of the bloc, joined the mentioned Agreement, committing itself to harmonize the security internal legislation with the other nations (Considera, 2016, p. 113).

In 1997, the Common Market Group ensured the reciprocity in the treatment of the social security rights among the Country Members. Before the impossibility of unifying their national legislations, they sought to harmonize them through work and social security matters, aiming to ensure the security to their migrant workers (Uriarte, 2004, p. 8).

The MSSA celebrated, thus, by the States Parties in-the-block enabled, among other things, social protection for those workers that exercise a labour practice under the cloak of the different social security systems in Mercosur (Winter & Gunther, 2015, p. 98). The Socio-occupational Declaration of Mercosur (DSLIM), which indicated, with pragmatic regional integration principles, with the opening to every migrant worker the same rights as of the national people, including the social security. Therefore, the DSLIM is one of the first instruments of Mercosur that recognized the need of furnishing the process of regional integration to a real socio-occupational dimension.

That Agreement and Declaration firmed on the scope of Mercosur represented an important advance in the matter of guarantee of social protection

to the workers, considering the constant migratory flow of workers among the countries, notably, in the execution of temporary and permanent jobs. It recognizes and ensures to the migrant workers and their families and suchlike, the same rights and the same obligations of the social security as the national workers of the States Parties (Alves, 2012, p. 90).

Consequently, the Declaration ensures to every worker the right to assistance, to information, to protection, to equality of rights and labour conditions, as well as right to access to the public services, recognized to the national people of the country in which they are exercising their activities, in conformity with the legislation of each country, in the terms of the article 7º, item 1 (Ministério das Relações Exteriores, 2015).

It is worth noting that the International Social Security Agreements, specifically, establish a relation of provision of social security benefit that does not imply the modification of the current legislation of the country. In Brazil, the International Social Security Agreements ensured the access to the social benefits of the social security system to Brazilian citizens and to the signatory countries (Rechsteiner, 2016, p. 115).

Each State Nation should analyze the requests of benefits presented and decide about the right and conditions, according to its own applicable legislation (Mercosur, 1997). This is reproduced on the nationalist and private Mercosur model of treatment to foreigner immigrant (Redin & Mezzaroba, 2012, pp. 360-361).

The national legal diplomas do not anticipate a unification of the social security legislation inside the Regional Bloc, but an asymmetry among the distinct legislations of each State Party that must continue providing assistance in accordance with the internal legislation (Balera, 2005, p. 11, 250). In the light of what art. 7º, item 1, of the MSSA foresees the object of bilateral compensation

will be only the old age, advanced age, disablement or death benefits (Decreto n. 5.722, 2006). Therefore, the Agreement in the scope of Mercosur contemplates the old-age or disability retirement, the sick pay, and the death pension, what excludes the other social security benefits: Special Retirement, Retirement due to Contribution Time, Workers' Compensation, Reclusion Aid, Child Benefit and Maternity Pay.

The objective of the Agreement is to harmonize and not unify the social security legislations of the members of the in-the-block, and this directive is defined on article 4° when declaring that the migrant worker will be submitted to the legislation of the State Party whose territory executes labour activity (Silva, 2012, p. 101). The benefits that the worker will count on, when transiting by the social security systems of the integrating countries of Mercosur, must be identified, considering that all the benefits will be covered by MSSA.

In the terms of the administrative regulation of the Social Security Agreement of Mercosur, for the application of the Agreement with the periods of security or contribution completed in the territory of the States Parties will be considered for the concession of the old-age, advanced age, disablement or death benefits, observing the following rules:

- a) each State Party will consider the periods completed and certified by another State, since they do not overlap as periods of insurance or contribution, according to their own legislation;
- b) the periods of insurance completed before the commencement of the Agreement will only be considered when the worker has periods of work to complete from that date;
- c) the period completed in one State Party under the voluntary scheme of insurance will only be considered when it is not simultaneous to an insurance period or mandatory contribution fulfilled in another State.

Therefore, it is necessary to clarify that the Social Security Agreement of Mercosur is an administrative coordination to facilitate the process social security benefits, however, without any agreement on the aggregation, this system benefits only national workers of the four countries that fulfilled the minimum periods of acquisition (Pasadilla & Abella, 2012, p. 24). Therefore, only four modalities of benefits are conceded in the scope of the MSSA of Mercosur, according to Board 1.

Board 1 – Guarantees and social rights of the migrant worker in Mercosur

Countries of Mercosur	Social security benefits
Brazil, Argentina, Paraguay and Uruguay	Pension for death
	Old-age retirement
	Disability retirement
	Sick pay

Source: adapted of Decreto n. 5.722 (2006) and Secretaria de Previdência Social (2007).

It is important to understand that, for the right to the use of the MSSA of Mercosur, the benefit will be paid solely due to what is available in the national legislation, prevailing the valid criteria in each State Party to those which, including their dependents, are or have been subject to the social security legislation of the members of Mercosur. Therefore, operationally, the States Parties of Mercosur, through the agreement, make payments to the beneficiary workers of the agreement of all the States Parties, but the payment made is only related to the part worked in the country.

5. CONCLUSIONS

This article reviewed the mechanisms that enable the portability of the rights of social protection for the migrant workers in the States Parties of Mercosur. Thenceforth, the normative and legal aspects involving Brazil and the MSSA of Mercosur were analyzed.

Although it represents a comparatively small portion of migrant workers, temporary or permanent, the bibliographic review concluded that the migrants have gradually obtained social protection and resulting from several social security agreements signed among the States. The challenges shall take into considerations the migration and mobility perspectives in the world, besides the construction of the migratory policy, since they commute both as workers and as tourists.

It is necessary to increase the international cooperation in the field of the migration, by means of the specific policy to deal with the illegal migration. It is highlighted that the special focus must be on the ethnic matter, on the social diversity and on the social changes, based on their consequences for the Nation State.

The States have the tendency to protect their possibility of total freedom regarding the regulation of the migration; however, the global economy, the cultural integration, and the international treaties are undermining the full sovereignty of the State. The international migration era can be marked by the weakening of the nationalism and state sovereignty, although religion, racial and cultural matters are also faced.

In this sense, analyzing the matter of the rights and social security guarantees of the global-regional immigrant in the scope of the socio-economic bloc between the aspect of the private international right and the individual

labour law, it is intended to harmonize or standardize the social security law. In a limited extent, it only seeks to decrease the disadvantages in relation to the acquisition of social security benefits that arise when someone leaves the home country to reside and/or work in another one.

It is verified that the MSSA of Mercosur enabled an extension of the social security protection and strengthened the countries of Mercosur in relation to the movement to workers in the bloc, however, there is still a long way to guide the political decisions on what is the best and the most appropriate to ensure the international portability of the social security benefits.

The MSSA of Mercosur encompasses only four modalities of necessary social security benefits, therefore, expanding other social security benefits to the migrant workers. Furthermore, the MSSA of Mercosur will elicit new legal matters about the work relations considering its importance for the construction of a fairer and more egalitarian society. Therefore, it is necessary to ponder correctly the social security as a social right protected by the Public Power that can affect the socio-economic and financial development of a country.

It is suggested that future researches analyze empirically practical dispositions of the agreement. By these means, one of the challenges to be faced by the States Parties of Mercosur will be to comply with the conventions that deal with the portability of social security rights and guarantees of the migrant worker.

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