Freedom Of Movement Under The Framework Of Regional Integration Processes In South America

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FREEDOM OF MOVEMENT UNDER THE FRAMEWORK OF REGIONAL INTEGRATION PROCESSES IN SOUTH AMERICA

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“Es una idea grandiosa pretender formar de todo el mundo nuevo una sola nación con un solo vínculo que ligue sus partes entre sí y con el todo. Ya que tiene un origen, una lengua, unas costumbres y una religión, debería por consiguiente tener un solo gobierno que confederase los diferentes Estados que hayan de formarse; mas no es posible porque climas remotos, situaciones diversas, intereses opuestos, caracteres desemejantes, dividen a la América.”

SIMÓN BOLÍVAR, JAMAICAN LETTER, 1815

“Migration is the oldest action against poverty”

J.K. GALBRAITH, 1979

“Solo voy con mi pena
Sola va mi condena
Correr es mi destino
Para burlar la ley
Perdido en el corazón
De la grande Babylon
Me dicen el clandestino
Por no llevar papel”

MANU CHAO, CLANDESTINO, 1998
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This Study addresses the question on whether the migratory phenomenon –considering with special attention the admission of non-nationals– might be regulated under the framework of regional integration processes, using the case of South America as an instance proclive to show how international law can be complemented and adapted to a specific context. It firstly elaborates a theoretical argument on the need to re-lecture the sovereign paradigm –according to which States have exclusive and excluding capacity to regulate the issue– so as to utilize cooperative schemes to develop a comprehensive legal framework provided the identification of migration as a common interest. Secondly, such frame is applied to the case of South American integration processes – The Andean Community and MERCOSUR– as illustrative examples of the potential of such instances due to its proximity and shared values, looking forward to set forth an effective area of unrestricted mobility sensible to the protection of human rights.
I. INTRODUCTION

In 1892 at its annual meeting in Geneva, the International Law Institute brought to the attention of the international community one of the greatest paradoxes that mankind has experienced over history; while inherently free and predisposed to be dynamic, human being is restricted by a spatial reality defined by political borders. Thus, it proposed a Draft International Regulation on the Admission and Expulsion of Aliens\(^1\) under the assumption that international law should deal with the migratory phenomenon, and more specifically, with the possibility to establish general parameters for an orderly management of the ingress and egress of non-nationals to any State.

One would say they were visionary. The project identified in such a lucid way the root of the issue, concretized in an apparent clash between two entitlements which might be conciliated; on the one hand, the right of a State to determine who to admit on its territory as a logical and necessary consequence of its sovereignty and independence\(^2\), and on the other, the individual’s right to freely mobilize without any unfounded restriction by virtue of the principles of humanity and justice\(^3\).

Unfortunately, despite that more than 100 years have passed since then and the evolution of international morality towards the recognition of the individual as the main objective of the system is an undisputable reality, it seems that international law has not been able to undertake the challenge that migration implies; although the latter has became a phenomenon of great magnitude affecting every region of the world, there is not a comprehensive regulation but a series of either incomplete or disperse norms, which were enacted under the influence of great political pressures and did not assume the abovementioned problématique as their steer. As main outcome, national policies and legislations have became harsher to the extent that we can envisage them both as systematic devises of discrimination and partly the cause of a humanitarian crisis which is hypocritically witnessed by the international community.

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2 « L'Institut de Droit international, Considérant que, pour chaque Etat, le droit d'admettre ou de ne pas admettre des étrangers sur son territoire, ou de ne les y admettre que conditionnellement, ou de les en expulser, est une conséquence logique et nécessaire de sa souveraineté et de son indépendance; »

3 « (...) Considérant, toutefois, que l'humanité et la justice obligent les Etats à n'exercer ce droit qu'en respectant, dans la mesure compatible avec leur propre sécurité, le droit et la liberté des étrangers qui veulent pénétrer sur ledit territoire, ou qui s'y trouvent déjà; »
In contrast and going along with the commented evolution of the international system, various processes of regional integration –being the European Union an archetype– have undertaken the migratory phenomenon as a situation comprising a shared interest to be regulated, due to its transcendence to the achievement of common development through an emerging economic space, as well as by reason of the modification of the mobility patterns over the last half century, since overseas migration has lost intensity *Vis à Vis* intra-regional movements.

The case of South America might constitute a good example to illustrate the potential of such regulatory scheme as an alternative to the inefficacy of universal politics and law-making procedures. On the one hand, there can be appreciated nations sharing historical, social and cultural backgrounds which assemble around the purpose of vindicate and achieve a series of common interests through cooperative schemes of integration –The Andean Community and MERCOSUR–. On the other, migratory patterns in the region have been altered from the pre-eminence of overseas mobility to the current notoriety of intra-regional migration as the main tendency of people moving across borders\(^4\).

Provided the precedent considerations, the main purpose of this study is to establish whether the migratory phenomenon –considering with special attention the admission of non-nationals– might be regulated under the framework of regional integration processes, using the case of South America as an instance proclive to show how international law can be complemented and adapted to a specific context.

In order to do that, the study is divided in two parts. Section I develops a theoretical framework to support the regulation of the migratory phenomenon, despite of the existence of a *sovereign paradigm* according to which States have an exclusive and excluding capacity to determine the policies concerning human mobility. Consequently, it is shown how the current architecture of international law may adopt a cooperative

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\(^4\) According to the latest available studies (Economic Commission for Latin American and the Caribbean-IMILA Project, 2000), while overseas migration went from 76.1% in 1970 to 39.4% in 2000, intra-regional migration increased from 23.9% in 1970 to 60.6% in 2000. In terms of the migrant stock, intra-regional migration increased in the decade of 1970 due to socio-political alterations in the region (doubled compared to the previous decade), reaching 2 million in 1980. During that decade, there was a slight increase in the stock to reach 2.2 million in 1990, provided the economic crisis that the region affronted, as well as the implementation of Structural Adjustment Programs. In the last decade, the progression grew again to 2.7 million in 2005 and 3 million in 2007. See **ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN - ECLAC. International Migration and Development in the Americas. Santiago: United Nations, 2001**, p.38.
scheme –regional integration– in order to identify the latter as a common interest and produce comprehensive regulation.

Subsequently, Section II focuses on the case of South America, firstly identifying the antecedents concerning the regulation of human mobility including the emergence of a collective interest of economic development at the region, which was the main boost for the development of regulation on the issue. Secondly, it analyzes in detail each one of the sub-regional integration processes which are currently taking place –The Andean Community and MERCOSUR– and the way on which they have assumed the issue and enacted norms on free circulation of persons, labour migration and provision of services, and their perspectives to become an effective mechanism to promote regional development and protect the human rights of migrants at the same time.

II. THE SOVEREIGNTY PARADIGM AND ITS IMPLICATIONS TOWARDS AN INTERNATIONAL REGULATION ON THE FREE MOVEMENT OF PERSONS

A. International Legal framework concerning the right to freedom of movement, especially on the admission of non-nationals

Migration is a dynamic phenomenon and consequently implies a series of stages. This is why it has been perceived in terms of movement, i.e., the individual’s intrinsic capacity to displace from a point in the space to another, which represented from a normative point of view, is an individual freedom.

Nevertheless, while an action related to territory, movement faces a clash with the reality of international order, since the existence of political units materially defined by borders implies that human displacement, although an inherent personal attribute, is framed under the dynamic of inter-State relations.

5 Hence, several elements can be extracted from the migratory phenomenon: displacement across political units; establishment after ingress to a State; definition of duration as temporary or permanent; settlement and satisfaction of basic needs. See VARLEZ, Louis. «Les Migrations Internationales et Leur Réglementation », in Académie de Droit International de la Haye. Recueil De Cours 1927 V Tome 20 de la Collection. Paris: Librairie Hachette, 1929, p.176.

6 In this sense Simma has pointed that “Unlike many other human rights and freedoms, its exercise does not produce effects only within a single State, but often affects at least two communities, that of the country to be left and that of the State to which ingress is sought”. See CASSESE, Antonio. “The international protection of the right to leave and return”, in Studi in onore di Manlio Udina vol. 1. Milan:
While International Law occupies both of the regulation of inter-State relations as well as the protection of human entitlements, migration should be considered one of its greatest challenges. In this way, one of the various ways on which such phenomenon has been acknowledged by the international system is through Human Rights Law, so as to develop a legal framework to vindicate certain individual entitlements related to the dynamics of human mobility: the right to freedom of movement.

1. Legal Formulation

A positive approach to freedom of movement and, in particular, to the right to leave a country and return to one's own has been adopted in almost all human rights instruments, both at the universal and regional levels, through a series of binding and non-binding instruments.

Regarding the universal level, three general human rights instruments expressly consecrate a right to freedom of movement; The Universal Declaration of Human Rights, the International Convention on the Elimination of all Forms of Racial Discrimination, and the International Covenant on Civil and Political Rights, whose authoritative interpretation was framed by the Human Rights Committee’s General Comment No. 27 of 1999. Complementarily, there are various thematic multilateral documents.
arrangements referring to specific aspects around such entitlement, especially in the case of certain groups of persons either vulnerable\textsuperscript{12} or privileged\textsuperscript{13}.

At the regional level, all the Human Rights Systems have recognized and incorporated such entitlement into their general binding instruments. While it was incorporated to the European Convention through Protocol No. 4\textsuperscript{14}, the Inter-American\textsuperscript{15} and African\textsuperscript{16} Human Rights Systems included freedom of movement since the enactment of their fundamental agreements. Finally, although the 1994 Arab Charter of Human Rights includes such right, it is not yet in force\textsuperscript{17}.

Several attempts have been undertaken to elaborate a declaration specifically devoted to the right to leave and return\textsuperscript{18}. Such were the final outcome of two colloquiums of

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\textsuperscript{12}“Article 28 of the 1954 Convention Relating to the Status of Refugees, regarding the issuance of travel documents; Article II of the 1973 International Convention on the Suppression and Punishment of Apartheid, concerning the prohibition of measures to prevent a racial group or groups from the enjoyment of the right to freedom of movement; Article 5 (2) of 1985 Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live and paragraph 7 of 1986 Human Rights Committee’s General Comment 15, concerning the right of non-nationals to leave the country where they reside; Article 10 of the 1989 Convention on the Rights of the Child, so as to promote family reunification through the exercise of the right; Article 8 of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, concerning the right to leave any State and return to the country of origin.” See U.N. HUMAN RIGHTS COMMITTEE. General Comment No. 15: The Position of Aliens under the Covenant (twenty-seventh Session), 1986.

\textsuperscript{13}1961 Vienna Convention of Diplomatic Relations, regarding privileges and immunities of diplomatic staff and the members of their families.

\textsuperscript{14}“Article 2 – Freedom of movement. (...) 2. Everyone shall be free to leave any country, including his own. 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others; Article 3 (...) 2. No one shall be deprived of the right to enter the territory of the State of which he is a national.”

\textsuperscript{15}The 1969 Inter-American Convention on Human Rights establishes: “Article 22. Freedom of Movement and Residence. (...) 2. Every person has the right to leave any country freely, including his own. 3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others. 5. No one can be expelled from the territory of the State of which he is a national or be deprived of the right to enter it. 6. An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law. 7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the State and international conventions, in the event he is being pursued for political offenses or related common crimes.”

\textsuperscript{16}The 1981 African [Banjul] Charter on Human and Peoples’ Rights establishes: “Article 12. (...) 2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.”

\textsuperscript{17}Article 21. No citizen shall be arbitrarily or unlawfully prevented from leaving any Arab country, including his own, nor prohibited from residing, or compelled to reside, in any part of his country. Article 22. No citizen shall be expelled from his country or prevented from returning thereto.

\textsuperscript{18}See CHETAIL, Vincent (Note 6), p.51.
experts which took place in the cities of Uppsala and Strasbourg at 1972 and 1986 respectively. The commented drafts are considered now as non-binding instruments since their crystallization as obligatory multilateral agreements resulted unsuccessful due to State’s lack of consent to be bound under such ground.

Likewise, within the frame of the United Nations’ purpose to develop and codify international law, the right to leave and return has been the subject of successive studies in order to define such entitlement as well as devise a mechanism for its enforcement in the light of norms, State’s practice and complementary jurisprudence.

On the one hand, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities decided to place on its agenda the question of discrimination in the trends of emigration, immigration and travel, defining the figure of a Special Rapporteur to prepare several studies on such grounds. Despite the wide content of such reports, there is controversy on the fact that the content of the right were delimited in order to exclude questions regarding immigration.

On the other hand, the UN International Law Commission included the issue of the expulsion of aliens as part of its work programme. Despite of the manifestation of various countries on the need to include the admission of aliens as a complementary ground to the principal topic, the Special Rapporteur Maurice Kamto surprisingly

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20 See CHETAIL, Vincent (Note 6), p.50.
21 The main subsidiary body of the former Commission of Human Rights, nowadays assumed by the Human Rights Council’s Consultative Committee.
24 Created by the UN General Assembly in 1947 by the Resolution 174 (III), in order to promote the progressive development of international law and its codification.
26 “12. With respect to content, the suggestions were more varied and at times contradictory, especially concerning the scope of the topic. While some representatives maintained on principle that all issues relating to immigration or border control policy (non-admission and refoulement) should be excluded.
determined that, although the situation of migrants crossing borders was a dramatic situation to the international community\textsuperscript{27}, it didn’t fall within the scope of expulsion of aliens\textsuperscript{28}.

2. Legal Content and Scope

Although each international agreement consecrating human rights is autonomous, it is possible to describe a general pattern concerning the commented entitlement. Since it is the normative manifestation of a dynamic process, the right to freedom of movement has been divided in two basic elements or sub-guarantees; on the one hand, the right to leave a country, and on the other, the right to return to one’s own country\textsuperscript{29}.

The first sub-entitlement grants the possibility of any individual\textsuperscript{30} to depart from a State in order to displace to another political unit, covering either the possibility of a temporary movement (right to travel\textsuperscript{31}) or a permanent mobilization (right to emigrate\textsuperscript{32}).\textsuperscript{33}

Consequently, it regards two types of conducts from the State; a negative obligation not to impede the departure of individuals from its territory, and the issuance of every document or requisite necessary for their normal exit, considering the realities of global migratory policies\textsuperscript{34}.

\textsuperscript{27} “20. Faced with an influx of poor immigrants, the developed countries are transforming themselves into impenetrable fortresses. Increasingly, they are closing their gates to certain categories of aliens by tightening control over immigration and making the conditions for entry or stay in their territories more stringent”. \textit{Ibid}, par. 20.

\textsuperscript{28} “40. The traditional notion of expulsion, however, concerns aliens whose entry or stay are lawful, whereas non-admission concerns those whose entry into or stay on its territory a State seeks to prevent; removal of an illegal immigrant who is at the border or has just crossed it is strictly speaking non-admission, not expulsion. It is by virtue of this judicious distinction that non-admission does not, in the opinion of the Special Rapporteur, fall within the scope of this topic” \textit{Ibid}, par.40

\textsuperscript{29} Complementary to the formulation of the right to leave and return, it is relevant to recall the transversal provision contained by article 5 of the International Convention on the Elimination of all Forms of Racial Discrimination, so as to guarantee equal treatment on the orbit of human mobility. See note 5.

\textsuperscript{30} All the universal and regional instruments set forth the basic right to leave without distinguishing between citizens and non-citizens. See \textit{Chetail}, Vincent (note 6), p.54.

\textsuperscript{31} See \textit{Hannum}, Hurst (note 19), p.46-52.

\textsuperscript{32} \textit{Ibid}, p.52-56.

\textsuperscript{33} See \textit{Chetail}, Vincent (note 6), p.54.

\textsuperscript{34} “Since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents” \textit{General Comment 27}, par.9. Moreover, “the right to leave and enter carries with it a right to those things necessary to the
Nevertheless, despite of the fact that the formulation of the right to leave entitles every individual\(^{35}\) to depart any country, it is not absolute since except for the Universal Declaration and the African Charter, all the other conventions provide restrictions to the enjoyment of the entitlement under certain circumstances\(^{36}\).

Hence, any restriction to freedom of movement has to be provided by law, entail the necessary protection of a legitimate interest—national security, public order, public health or morals, and the rights and freedoms of others—\(^{37}\), and be consistent with the other rights consecrated on the legal instrument\(^{38}\). It is disputed whether such limitations might grant broad capacity to States so as to determine discretionally whether an individual may exercise the entitlement as a whole, considering the brief definition on which the former was established\(^{39}\).

Secondly, the right to freedom of movement contemplates the individual’s prerogative to return to his own country, either formulated on the orbit of the right to leave or in a separate provision as an autonomous right, such as the case of the Protocol No. 4 to the European Convention and the Arab Charter.

Contrary to the comprehensive formulation of the right to leave in terms of the subject, the way on which this right is consecrated limits the unrestricted possibility to enter another political unit to the orbit of its nationals, thus highlighting the legal relationship between a person and a country\(^{40}\). In other words, individuals are not entitled to enter a country of which they are not nationals, but depend on the discrentional power of political units.

The latter implies that the right to freedom of movement, although consecrated in all the universal and regional human rights instruments, is an incomplete right since an

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\(^{35}\) “It therefore follows from the very nature of the right that, in the case of a citizen resident abroad it imposes obligations both on the State of residence and on the State of nationality”. \textit{Ibid}, p.20.

\(^{36}\) \textit{See CHETAIL, Vincent (note 6)}, p.55.

\(^{37}\) For an in depth explanation of the limitations to the right to leave and return see \textit{HANNUM, Hurst (note 19)}, p.25-41.

\(^{38}\) \textit{See CHETAIL, Vincent (note 6)}, p.55.

\(^{39}\) “The permissible limitations which may be imposed on the rights protected under article 12 must not nullify the principle of liberty of movement, and are governed by the requirement of necessity”. \textit{See U.N. SUB-COMMISSION, General Comment 27 (note11)}, par. 2.

\(^{40}\) \textit{Ibid}, par. 19.
effective exercise of the right to leave is therefore directly dependent on the ability to enter a country, which is not the case.

Thus, most people are free to leave their country, but only a minority of them have the right to enter another country of their choice\(^4\); despite of the concrete obligation to permit the egress of individuals from its territory, there is no correlative duty of a State to admit foreigners\(^4\).

3. Construction of the problem and historical background

Provided the legal framework concerning human mobility across borders, it has to be affirmed that under the framework of international law there is no general right of entrance to a country of which one is not a national\(^4\); the international legal framework of the right to freedom of movement is therefore far from being comprehensive, as on the one hand is broad, whether it gives great discretion for States to determine the operative conditions of the recognized entitlements, and on the other is incomplete, concerning the granting of a right to immigration, which should be considered naturally correlative to any permission to leave a political unit through the crossing of a border\(^4\).

The precedent formulation leads to the assumption of the following question; why the migratory phenomenon, specifically the admission of aliens, has not been comprehensively perceived and regulated by international law? Likewise, as Chetail has raised the inquiry;

« Le silence observé par les traités (…) sur la question de l’entrée et du séjour des étrangers signifie-t-il que la matière leur échappe et appartient au domaine réservé de l’Etat? »

Behind such controversy, an apparent collision of normative values can be perceived; the pre-eminence of individual’s significance, assumed as an international common

\(^4\) See CHETAIL, Vincent (note 6), p.57.
\(^4\) Seen from the point of view of the subjects involved, Kleven has pointed out that “international law favors the right to emigrate over the right to immigrate. The freedom to emigrate is treated as an individual right of high priority, a right that nations are not to override without good reason. On the other hand (…), the ability to immigrate is subject to nations' discretion, pursuant to their sovereign right of self-determination, to admit to their territories only those that they see fit”. See KLEVEN, Thomas. “Why International Law Favors Emigration over Immigration.” 33 The University of Miami Inter-American Law Review (2002), p.74.
interest i.e. a comprehensive right to freedom of movement *Vis à Vis* the placement of the State as an owner of a regulatory monopoly inside its jurisdiction\(^{46}\) i.e. an indisputable capacity to decide who to admit to and who to expel from its physical compartment\(^{47}\).

Moreover, if such clash is transplanted to the understanding of the International System’s structure\(^{48}\), the result is nothing but whether there is or not a justification to the fact that, despite the evolution of the global community towards the assumption of certain issues as of collective concern, States may keep exclusivity on the regulation of matters apparently related to their very existence and preservation\(^{49}\). This is, therefore, a discussion on the different positions on the meaning and place of *sovereignty* as responsible to the configuration of such normative (legal and politic) background\(^{50}\).

According to a classic view of sovereignty directly related to a Westphalian system of nation-States\(^{51}\), such political entities seem to be the only subject of international relations, physically defined by territorial boundaries, and invested with the primary entitlement to act and commit with the other subjects\(^{52}\); this logic emphasises the State’s control over territory and includes an internal dimension –capacity to govern an


\(^{48}\) The international system consists of sovereign, independent States, which are in theory equal in their relations with each other. Thus, from a traditional point of view international law rests on the consent of States, as an expression of sovereign will. See BROWN, Edith. “Rethinking Compliance with International Law.” The impact of International Law in International Cooperation; theoretical perspectives. Ed. Eyan Benvenisti & Moshe Hirsch. Cambridge: Cambridge University Press, 2004, p.137.


\(^{50}\) Following Lui, “The fundamental social norm of international relations is still State sovereignty, which conveys a number of other norms such as sovereign equality, territorial integrity of States, non-intervention in internal affairs of States. The society of sovereign States is the cornerstone of international order. This society, with its rules of engagement, principles of legitimacy, and diplomatic machinery preserve the liberty of autonomy of States”. See LUI, Robyn. “State Sovereignty and International Refugee Protection.” Re-envisioning Sovereignty. Ed. by Trudy Jacobsen, Charles Sampford & Ramesh Thakur. Hampshire, Ashgate, 2008, p.152.


\(^{52}\) In line with the attributes of a State defined by the 1933 Montevideo Convention on the Rights and Duties of States: permanent population, defined territory, government and capacity to enter into relations with other States.
internal space— and an external dimension—immunity from the interference by others—.

Borders are, therefore, integral to sovereignty. They represent both the physical expression of sovereignty when defining territorial space—the State’s authority over people or jurisdiction, as well as the symbolic delimitation of the State they mark under the ambit of application of the principle of non-intervention under a logic of sovereign equality between political units.

But likewise, such logic establishes a link between a physical space and the individual, which is seen as a dichotomy between those who belong to the political unit and those who don’t—nationals Vis à Vis non-nationals/aliens. Therefore, this kind of membership allows the State to enact rules that determine consequences for each category, such as who can be admitted to or expelled from the territory, and even further, making extensive a kind of criminal seal to those who have crossed borders in spite of their incapability to comply with the discretional requirements for ingress: the so-called “illegals”.

If this point of view is seen from a human rights perspective, a universal aim on the conferral of entitlements is challenged by human being’s subject to a distinctive mark which enables them to be under the recognition of the political units. Thus, there is a fundamental contradiction between the notions according to which emigration is widely

54 KESBY, Alison (note 46), p.108.
55 “The question whether a certain matter is or is not solely within the jurisdiction of a State is essentially a relative question; it depends upon the development of international relations”. See Tunis-Morocco Nationality Decrees, 1923 PCIJ, ser. B, No. 4, at 24 (Advisory Opinion of February 7).
56 As Stated by the International Court of Justice in the Corfu Channel case, “(...) between independent States, respect for territorial sovereignty is an essential foundation for international relations”. ICJ Rep 1949, 4 at 35.
57 From the perspective of the individual, it is often at the border that distinctions between citizens and non-citizens are drawn. See KESBY, Alison (note 46), p.109.
58 “The moral geography of sovereign State maps political life inside/outside boundaries, this distinguishing the community of citizens from the mass of non-citizens. Borders divide and connect. They raise crucial ethical issues because which side of the border people find themselves on can have profound consequences for their freedom, welfare, identity and even survival. Sovereignty is the power to decide and fix the boundaries between whom or what is included and excluded”. See LUI, Robyn (note 50), p.152. In the same way, “Technically, anyone who is present in a nation State without either nationality or authorization under law is an illegal migrant. (...) The term “illegal” has escaped its legal, and even grammatical, mornings and now stands alone as a noun”. DAUVERGNE, Catherine (note 53), p.599.
regarded as a matter of human rights while immigration is regarded as a matter of national sovereignty. This is why, paradoxically, in a world where unrestricted mobility of capital, goods and services is the common denominator, the relation between migration laws and national identity, i.e. law-making monopoly and discretionary admission and expulsion of non-nationals, is considered as the last bastion of sovereignty.

Now, what is certainly surprising is that such logic of State’s utter dominion on the migratory issues—which apparently is the predominant idea among their practice—is neither of an antique consecration nor of a consistent development, as it might be thought; the influence of an absolutist vision of sovereignty on the design and content of normative structures concerning the admission and expulsion of aliens is as recent as approximately one century, which contrasts with the fact that migration is a phenomenon attached to the very history of mankind.

The view by virtue of which the reception and treatment of aliens is a matter of extensive discretion appears to have arisen as a consequence of certain Anglo-American jurisprudence produced in the period of 1899-1913 as a judicial response to a westward migration of Chinese labourers, apparently based on a highly selective snippets from the writings of the XVII and XVIII century publicists. Consequently, such

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60 See Chetail, Vincent (note 45), p.18; Dauvergne, Catherine (note 53), p.588.

61 This is; how it has been effectively embodied into an internal normative structure concerning the admission and expulsion of aliens.


63 Historically, there was little support to the absolute exclusion of aliens, limited to rare cases of closed cities or other territories to which no aliens are admitted. With the assumption of the Westphalian system of State-nations, classic publicists faced with a new tension between traditional freedom of movement and the emerging concept of the sovereign State, favouring of the latter without ruling out the former. Contrary to the way on which the publicists’ work was used to support a doctrine on the discretionary admission of aliens, it has been sustained that in the past there was some consensus as to either the existence by virtue of the droit de gens, of a general duty to admit aliens, or conversely exceptional circumstances imposing to the States the duty of admission in certain cases due to imperious necessity. Hence, starting from the premise of the existence of a society of nations governed by a law deduced from natural reason, Vitoria’s Ius communis appeared as a truly right to freedom of movement, while a universal entitlement derived from natural law in order to maintain pacific relations between peoples. Likewise, and complementing the work of Grotius and Pufendorf, Vattel’s synthesis of natural law (internal law of nations) and positivism (external law of nations), with an emphasis on the latter, strongly influenced the development of modern migration law. Following Chetail on Vattel’s thought, « Le Droit de Nécessité s’impose alors comme un « droit parfait », dont il n’appartient plus au Maître des lieux de juger de son bien-fondé, mais bien à l’étranger lui-même. C’est dire que, loin de consacrer le principe de la compétence discrétionnaire de l’État qu’on lui attribue si souvent, Vattel reconnaît tout au contraire une
argumentative manoeuvre resulted on the formulation of a general and direct proposition according to which:

“It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to its self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases upon such conditions as it may see fit to prescribe.”  

Likewise, and conversely with even stronger influence provided the relevance of the opinion of scholars in the evolution of the commented discipline, the maxim was paradoxically formulated by some recognized authors as a principle of international law such as Hans Kelsen, who on his well known work Principles of International Law pointed out that every State has the right of refusing to permit a foreigner to enter its territory and at any time to expel anyone. In the same way, as sufficiently illustrated by Professor Varlez on his lectures at The Hague Academy of International Law in 1927:

« Il y a incontestablement des questions domestiques qui sont de la compétence exclusive des gouvernements intéressés. Il faut le reconnaître franchement et le proclamer bien haut, dans l’intérêt même des solutions internationales. Il est des problèmes de migrations qui intéressent exclusivement les pays d’émigration, comme il en est d’autres qui concernent les pays...»


Without suggesting that it should be considered as an exclusive and excluding provision, article 38 of the Statute of the International Court of Justice establishes that “the teachings of the most highly qualified publicists of the various nations” are considered as subsidiary means for the determination of rules of law, which reinforces the task of the academic appointments on the legal nature of the State’s discretionary power to admit the entrance of aliens.

In 1892, the English scholar Montague Crackenthorpe, Q.C. wrote that “it can hardly be disputed that every civilized State is entitled to make what regulations it pleases both as to emigration from, and immigration into its territory”. The Statement was either supported by scholars such as Anzilotti, Oppenheim and de Ward, and in general the Anglo-Saxon theorists of the early twentieth century. See Pledger, Richard (note 62), p.61, 72-76.

In practice, the influence of the sovereign paradigm on the regulation of migratory issues can be perceived twofold and complementary;

Firstly, States have tried –through action or omission– to restrict the issue from the evolution of the international system whether on the one hand, none of the international agreements concerning the comprehensive promotion and protection of human rights include a general right to immigrate as a sub-component of the right to freedom of movement, and on the other practically every comprehensive global deliberation concerning the admission of aliens has been limited to those belonging to special categories such as refugees, Stateless persons and migrant workers.

Secondly, as contemporary migration laws are associated with the essence of the nation, most of the regulation on the admission of aliens is the result of internal law-making procedures, since the preponderant view remains that these are matters essentially within the reserved domain of domestic jurisdiction, under a logic according to which territory remains vital to sovereignty because the populations remain territorial.

In sum, it seems that a) a traditional account of sovereignty through the inclusion of a simplistic lecture of the droit de gens doctrine on the admission and exclusion of non-nationals as well as b) the supporting opinion of certain scholarship, have contributed to develop the present normative framework of international migration, and specifically the actual configuration of migration laws; thus, such State’s ideological and normative

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68 See VARLEZ, Louis (note 5), p.330. In the same way, Visscher Stated that « Le droit pour tout Etat de refuser aux immigrants l’établissement sur son territoire, sous réserve des traités qui règlementent ces matières, est certain et jusqu’à présent la pratique internationale ne fait pas d’exception à ce principe, même quand ce droit est exercé de façon discriminatoire contre les ressortissants de certains Etats ».

69 See section II (A) (1).

70 With the exception of the World Trade Organization’s sponsored GATS/ mode 4 on the provision of services.


72 See DAUVERGNE, Catherine (note 53), p.589.

73 See GOODWIN-GIL, Guy S. (note 63), p.94.

74 DAUVERGNE, Catherine (note 53), p.594.
monopoly would be instituted as “a primary truth, an unquestionable paradigm, without which it would be impossible to conceive migration”\textsuperscript{75}.

Nevertheless, it has to be argued that despite of the unenthusiastic approach provided by the former considerations, the migratory phenomenon and concretely the admission and expulsion of non-nationals might and ought be regulated by international law, since the international system has evolved from a static frame of co-existence to become comprehensive and dynamic scheme of co-operation among States, ethically influenced by the placement of human being as its principal referent\textsuperscript{76}, as it will be illustrated on the next section.

\textit{B. Re-lecture of the sovereign paradigm towards the possibility to regulate the admission of non-nationals}

The purpose of this section is to show that international law has plain possibilities to regulate human mobility across borders –specially concerning the admission of aliens by States–, and how it could make it, provided the present situation of the international system. Therefore, it will be shown firstly why the commented maxim has to be considered obsolete in the light of a re-lecture of the concept of sovereignty, and secondly which is the potential of international law to develop an effective normative framework, considering the existence of a series of common values around the migratory phenomenon that have to be protected.

1. Re-lecture of the concept of sovereignty

Reassuming the main inquiry of the study, the possibilities of international law to deal with the issue of admission of aliens are disputed under the maxim according to which States have an exclusive and excluding legislative capacity by virtue of their sovereign prerogative. Seen from a normative point of view, the latter represents a clash between

\textsuperscript{75} « Sera érigée en une vérité première, un paradigme incontestable, sans quoi il ne serait pas possible de penser la migration » See CHETAIL, Vincent (note 45), p. 34.

\textsuperscript{76} As Perruchoud has pointed out, « Le droit international de la migration est peut-être celui qui ressemble le plus au droit international public en général, un droit dynamique, en évolution constante, aux contours parfois flous, un droit imparfait mais nécessaire pour mieux appréhender et gérer un des problèmes le plus aigus de notre époque » \textit{Ibid.}, p.21.
legal orders –international Vis à Vis internal– which apparently are different and antagonist.\footnote{\textit{Thus, under such prism of analysis, sovereignty of the State means only that the State is no subject to a legal order superior to its own legal order, i.e., the national law. See Kelsen, Hans “Sovereignty and International Law.” 48 \textit{The Georgetown Law Journal} (1960), p.627.}}

In that way, the sovereign paradigm on the admission of aliens resemble a dualist conception of the relation between international and internal law according to which there are two normative realms radically independent of each other in their validity but simultaneously valid, represented by the State’s legal system on the one side and international law on the other,\footnote{\textit{See \textit{Ibid.}, p.629. Taking into account that the dualist theory obtained its main support from the Anglo-Saxon legal thought it is quite understandable why the sovereign maxim on the admission of aliens was elaborated by jurisprudential pieces enacted by United States’ and Canadian courts.}} in opposition to a monist conception, which advocates for a harmonized relation between normative orders since they form an unity based on a single logic of validity and judgment of conducts.\footnote{\textit{Following De Visscher regarding the influence of the debate monism-dualism on the relation between man and State, « Quant au droit international, ses déficiences doctrinales furent plus graves encore. S’inspirant de la séparation dualiste de l’ordre interne et l’ordre international, il affecta de ne s’intéresser à l’homme considéré d’ailleurs comme simple objet des rapports internationaux, que dans la mesure où son traitement à l’étranger pouvant influencer les relations entre Etats ».}}

Notwithstanding these alternative postures, the real issue is that any clash between legal systems is illusory, so it should be instead conceived as a matter of the reference frame from which a subject assumes the commented relation; this is to say, whether internal law primes over international law\footnote{\textit{Then, international law becomes part of the national order, and the reason of validity of international law is placed in this national legal order, wherefrom the relation between them is construed”. See Kelsen, Hans (note 77), p.630.}} or vice versa,\footnote{\textit{An universal legal regime where “International Law legitimates the coercive order of a State as a legal order valid within the territorial and temporal sphere of its factual efficacy and the community constituted by this legal order as a State” \textit{Ibid.}, p.632.}} due to the fact that it can’t be possible to assume two different systems of validity under a single reality. Law has a single logic, although there may be diversity of political structures (be them national or supra-national) issuing rules of behavior.

Under such premise, a maxim by virtue of which States have an inherent prerogative to exclusively regulate the admission and expulsion of non-nationals as a matter of their self-preservation is distant from the harmonized nature which should be extracted from
the relation between international and national regulatory systems, and consequently loses its support\(^82\).

Moreover, the idea of State sovereignty is not in conflict with international law because such framework is valid for the State only if recognized by this State by virtue of such quality\(^83\). Thus, recalling one of the UN International Law Commission’s most challenging codification intend, “Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law”\(^84\).

Nonetheless, this is not to say that international law should always regulate any issue incumbent to domestic matters, but that provided the existence of a common interest it has the potential to assume it, despite of any pretension to establish an \textit{a priori} delimitation of competences which in any case would deny the existence of universal, shared values among nations, and more important, among people. Anyhow, States keep a relative freedom to act under informed conviction (customary law), as well as to voluntarily assume international obligations by treaty in order to configure their relations as equals\(^85\).

Hence, any conception of sovereignty should be re-conducted as to illustrate that States are equally entitled as subjects of an upper structure called international community, so in that way, a) international law is hierarchically superior to national legal orders, b) has a harmonizing function, and c) may regulate whether there is a common interest to be highlighted and protected\(^86\).

\(^82\) As Juss has Stated, “The notion that a State may exclude all aliens is no more than a maxim; it lacks concrete justification”. JUSS, Satvinder S. (note 63), p.322.

\(^83\) KELSEN, Hans (note 77), p.637.

\(^84\) INTERNATIONAL LAW COMMISSION. \textit{Draft Declaration on the Rights and Duties of States, Article 14.} (GA Res. 375 IV), 6 September 1949.

\(^85\) “International legal obligations existed, and still exist, at the level of relations between States individually. (…) international law does not generally oblige States to adopt a certain conduct in the absolute but only in relation to the particular State or States to which a specific obligation under treaty or customary law is owed” See SIMMA, Bruno. “From bilateralism to Community Interest in International Law.” Académie de Droit International de la Haye. \textit{Recueil De Cours} 1994 VI Vol. 250. The Hague, Martinus Nijhoff Publishers, 1997, p. 230.

\(^86\) Under the logic of the maintenance of good relations among States and the preservation of certain universal values; this is to say, a logic of co-operation, whether the Charter of the United Nations seems to encourage as a constitutional principle from its article 1(3).
This is to say then, that a traditional conception of international law defined as “the minimal law necessary to enable State-societies to act as closed systems internally and to act as territory-owners in relation to each other”\(^\text{87}\) is to be revaluated.

2. The existence of a common interest linked to the migratory phenomenon

The existence and recognition of a common interest implies a consensus on a concrete issue, according to which respect for certain fundamental values is not to be left to the free disposition of States individually or \textit{inter se}\(^\text{88}\) but is recognized and sanctioned by international law as a matter of concern to \textit{all}\(^\text{89}\) States, and consequently delimitates their spheres of sovereignty in space and time\(^\text{90}\).

In the case of freedom of movement –as the normative expression of migration whether a social reality– the determination of a common value proclive to be regulated by international law corresponds to an ethical review on what human mobility signifies under the political frame of a global society\(^\text{91}\). Paradoxically, although nowadays is highly restricted by States, the migratory phenomenon appears as a catalytic converter to the formation of societies. Hence, following Varlez;

« Il n’est peut-être aucun phénomène qui ait exercé un rôle aussi important que les migrations sur l’histoire de l’humanité. C’est grâce à elles que la terre s’est peu à peu peuplée, qu’elle a été occupée dans toutes ses parties, que la mainmise de l’homme a pu s’effectuer sur tous ses éléments et que l’habitat des hommes a pu confondre avec l’entendue même du Monde »\(^\text{92}\)

Under such logic of reflexion, movement is seen as freedom\(^\text{93}\) and entails an assertion of the right of individual self-determination\(^\text{94}\); thus, prior to the formation of any

\(^{87}\) See SIMMA, Bruno (note 85), p.229.

\(^{88}\) This is to say, bilateral relations.

\(^{89}\) “All”, understood likewise from a regional point of view, where the membership is limited to certain number of States with common characteristics.


\(^{92}\) See VARLEZ, Louis (note 5), p.169.

\(^{93}\) Such position has been developed by a well-known academic sector which sympathizes with a universalist-oriented conception of ethics and a consequent impact of liberal ideology on international law; hence, Juss has pointed out that “Freedom of movement is the first and most fundamental of man’s liberties, [so] the world order depends on freedom of movement”. See JUSS, Satvinder S. (note 63), p.289.

\(^{94}\) KLEVEN, Thomas (note 44), p.75; PURCELL, Joy M. “A Right to Leave but Nowhere to Go: Reconciling an Emigrant’s Right to Leave with the Sovereign’s right to exclude” \textit{39 The University of Miami Inter-American Law Review} (2007), p.182.
sovereign government each individual had, at the very least, the liberty to choose his own acts without external compulsion as long as other’s rights wouldn’t be infringed.\textsuperscript{95}

Henceforth, until their voluntary entry into a society which necessarily will restrict his rights in the pursuit of common well-being, he should be free to decide where to develop himself as part of a community, and if necessary mobilize from a place to another so as to consolidate such decision. In other words, migration enables individuals everywhere to have the essential alternative of participating in the social processes of another State in an effort to develop their own freedom and appreciation of life.\textsuperscript{96} Liberty of movement is an indispensable condition for the free development of a person.\textsuperscript{97}

Complementary to the latter, the principle of non-discrimination appears to be another common interest to be taken into account for the intend to regulate migration, provided that the reality around such phenomenon has shown that in an important amount of situations, State’s discretion on the admission of non-nationals entails discriminatory practices.\textsuperscript{98} Whereas it may be uncertain to what extent the question regarding admission of aliens or their exclusion is solely within the reserved domain of States under the present conditions of international law, there should be no doubt that the racial, ethnic and cultural distinctions for the determination of these questions, should be outlawed by international law.\textsuperscript{99} All these considerations greatly illustrate the situation of accentuated vulnerability of migrant population, regardless of their motivation and precedence.\textsuperscript{100}

In conclusion, human mobility constitutes a shared interest to the international community since it constituted a catalyser to the formation of societies, it is an

\textsuperscript{95} In this way, Hannum has commented that “In 1963, an influential UN study equated these rights with that of “personal self-determination” (...) may be the ultimate means through which the individual may express his or her personal liberty (personal autonomy)”. See HANNUM, Hurst (note 19), p.4.

\textsuperscript{96} See JUSS, Satvinder S. (note 63), p.290.

\textsuperscript{97} See U.N. HUMAN RIGHTS COMMITTEE, \textit{General Comment No.27} (note 11), par.1.

\textsuperscript{98} As Dauvergne has pointed out, “for those with more, globalization makes more available, for those with less, there is less. Inequalities are increased; exclusions are underscored”. See DAUVERGNE, Catherine (note 53), p.603.

\textsuperscript{99} See JUSS, Satvinder S. (note 63), p.325.

\textsuperscript{100} Following Pécoud and Guichetenerie, “Respect for rights means that even undocumented migrants enjoy a minimal degree of legal protection; according to the philosophy of human rights, individuals are protected on the basis of personhood, not of nationality or citizenship, and the enforcement of these rights sometimes takes place supra-nationally, thereby constraining governments’ autonomy”; See PÉCOUD, Antoine and DE GUICHTENIERE, Paul (note 42), p.5.
instrument for preservation of friendly global relations, and it could be a means of accommodating basic human needs and human dignity\textsuperscript{101}. Such interest is under risk whether States, although sovereign entities capable to determine conditions for the admission of non-nationals, may adopt discriminatory provisions under a presupposition of absolute discretion\textsuperscript{102}.

3. Regional Integration as an effective way to regulate the migratory phenomenon

The evolution of the international system under a complex network of inter-State relations and towards the vindication of a series of common interests, has implied an ideological transition from a classic configuration of co-existence\textsuperscript{103} to a scheme of co-operation. Under the latter, there is a pattern of State’s reciprocal action in order to interact with the others instead of standing aloof or being hostile towards the achievement of common aims\textsuperscript{104}.

Furthermore, a Co-operative scheme of inter-State relations has a normative dimension; it intends to bind a group of States in similar and reciprocal undertakings in order to obtain uniformity on conducts, essential to the protection of a common interest. In that way, if international law is to constitute the shared language of all nations and States, it must be multilateral\textsuperscript{105}.

\textsuperscript{102} The principle of self-determination is prominently embodied in Article I of the Charter of the United Nations. Its inclusion in the UN Charter marks the universal recognition of the principle as fundamental to the maintenance of friendly relations and peace among States. Likewise, it is recognized in many other international and regional instruments, including the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States adopted by the UN General Assembly in 1970.
\textsuperscript{103} For an approach to the concept of co-existence under the framework of this study, see notes 44 and 46. The transit from co-existence to co-operation, raised by Wolfgang Friedmann at The Changing Structure of International law, has its parallel on Rene-Jean Dupuy’s « Droit relationnel », and is relevant since it represents the mindset by which the sovereign paradigm on the admission of aliens was developed. See FRIEDMANN, Wolfgang. The Changing Structure of International Law. London: Stevens & Sons, 1984, p.89; DUPUY, René-Jean. « Communauté Internationale et Disparités de Développement - Cours Général de Droit International Public». Académie de Droit International de la Haye, Recueil Des Cours 1979 IV Vol. 165. The Hague, Martinus Nijhoff Publishers, 1981, p.46.
\textsuperscript{105} See BLUM, Gabriella. “Bilateralism, Multilateralism and the architecture of International Law.” 49 Harvard Journal of International Law Vol.2 (2008), p.334. Additionally, under the framework of the architecture of international law –the way by which such normative system is designed to be effective–, multilateralism implies two ideas; a) In terms of the legal source, that the most suitable law-making procedure would be the express manifestation of consent to be bound i.e., a treaty; b) In terms of the scope, that any intend to deal with a common interest implies the necessity to include all the relevant subjects as parties to the agreement.
Nevertheless, multilateralism is a flexible mechanism since each interest faces a specific context in order to be regulated, and behind an inter-State dynamic there is a politic, historic and social context. Thus, the progressive extension of the co-operative logic to such political interests that previously –because affecting national sovereignty– had been considered beyond its scope\textsuperscript{106} raises several challenges to the international legal architecture, mainly regarding the need to retain a measure of adaptability as well as variegation so as to cover specific circumstances\textsuperscript{107}.

Depending on the extent of the shared interests that bind participants, as well as on the arguable existence a more closely knit community of values and purposes\textsuperscript{108} among a group of States, multilateralism is to be tailored to different levels of universality and institutionalization in opposition to a simple and wide conception of global community\textsuperscript{109}.

This is to say that, since multilateral treaties don’t always achieve success due to the fact that in reality material inequality collides with the preached equality of States before the law, the quest to realize certain community interests through multilateralism has led to an ever stronger institutionalization, or organization, of international society\textsuperscript{110}, such as through \textit{regional integration processes}\textsuperscript{111}.

At the regional level, multilateralism adopts then a distinctive structure; the fact that some countries are territorially closer and share historical roots, ethnical identities and cultural values with relative proximity would facilitate the effective regulation of free movement of persons / admission of non-nationals, and consequently to foster the common interest of individual self-determination. Following Friedmann:

\begin{footnotesize}
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\item[\textsuperscript{106}] See LOWENSTEIN, Karl (note 104), p. 225.
\item[\textsuperscript{107}] Following Blum, “This problem is the doubtful assumption of value-coherence or of universal natural law; it is the question whether the international community could actually agree on a truly universal constitution espousing common norms and values. It is here where legal rhetoric hides deep moral and political disagreements”. BLUM, Gabriella (note 105), p.337.
\item[\textsuperscript{108}] See FRIEDMANN, Wolfgang (note 103), p.62.
\item[\textsuperscript{109}] “Despite the strong intuition that “global problems require global solutions” at times, more limited solutions are actually better suited to meet certain global problems. In designing the right legal architecture, one should consider the type of regime sought, the type of good regulated, whether the activity imposes externalities on others, and what would be the most efficient bargaining process for both present and future purposes”. See BLUM, Gabriella (note 105), p.362.
\item[\textsuperscript{110}] See SIMMA, Bruno (note 85), p.235.
\item[\textsuperscript{111}] It has been disputed by relevant academics on the field whether regional integration has to be seen either as a process or as a result. This study assumes the former connotation since different stages and variables may be preached; membership, binding degree of legal framework, substantive content, etc.
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“certain groupings of nations, more closely bound to each other by common values, common interests, common fears and stronger affinities in their social and legal structure, are proceeding to develop common legal organizations and a corresponding evolution of their substantive laws in fields where mankind as a whole is still too disunited or too disparate to attempt legal organization and integration”

As illustrated supra, previous intends undertaken by human rights agreements to recognize and regulate a right to immigration resulted fruitless. At the universal level, the issue faced two types of limitations:

- The scope of a right to freedom of movement was limited to the possibility to leave a country and return to one’s own without any chance to claim the access to another political entity. Likewise, the regional human rights instruments followed a wide scheme and sanctioned an incomplete right to mobility.
- Although some other international human rights instruments regulate more comprehensively the case of specific groups of migrants (refugees, migrant workers, family reunification, etc), they haven’t been adopted neither by a significant number of States nor by the distinctive receiving countries; the whole of migrant population is not wrapped under such protection; and in any case they don’t cover the right to immigrate.

Those limitations are nothing but the sample of the State’s reluctance to enlarge a restricted vision of sovereignty, which in practical terms imply the intention to keep strong controls over the movement of people across borders through the discretionary and selective implementation of discriminatory requisites for the ones who want to have access to their territory. Therefore, certain types of mobility are discouraged, forbidden, or even criminalized through the enactment of domestic laws.

By contrast, regional organizations could play a significant role in the field under consideration. Unlike the universal level, multilateralism may have a regional focus since international agreements may address distinctly regional concerns or arise through membership of regional institutions.

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112 See FRIEDMANN, Wolfgang (note 103), p.63.
113 See Section I (1)
114 As Blum suggests, “Some Multilateral treaties do in fact enjoy widespread ratification, thus becoming truly universal. But others fail to attract a substantial number of parties. See BLUM, Gabriella (note 105), p.335.
115 See PECOUD, Antoine and DE GUCHTENIERE, Paul (note 42), p.75.
116 See OPESKIN, Brian (note 47), par.14.
Thus, from an economic point of view, the homogeneity on which such institutional forms are usually based has led to the proliferation of free trade as a mechanism to promote greater levels development. However, a process of economic integration limited to movement of goods and capitals would result short to achieve its purpose, and consequently requires of human mobility as a means to create a complementary mechanism for the accommodation of labour forces and consumers.\(^{117}\)

Therefore, economic integration would make it more feasible for States to reduce border barriers by limiting the exercise of their rights concerning admission of non-nationals. Stronger action could therefore be taken within regional organizations to allow citizens of member States to freely circulate among these States\(^{118}\), generating a potential to impact on the regulation of the migratory phenomenon and the protection human rights.

The example of the European Union\(^{119}\) shows that the most significant developments regarding freedom of movement are likely to result from regional arrangements\(^{120}\) whose point of departure was an economic interest. It seems to be the only region in the world in which free trade agreements have been coherently accompanied by a substantial degree of human mobility\(^{121}\), by virtue of which complementary substantive rights in favour of the non-nationals were created\(^{122}\).

Likewise, other regional integration processes have been settled all around the world\(^{123}\), including the co-operative scheme developed by most of South American countries since the beginning of XIX century to present times, so as to create and institutional scenario to develop common public policies and enact community legislation on several grounds: on the one hand The Andean Community of Nations, and on the other The Southern Common Market – MERCOSUR.

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117 See OPESKIN, Brian (note 47), par. 92.
119 The 1985 Schengen Agreement and its 1990 implementing Convention adopted measures to promote free movement of persons within Europe, being applicable to member States of the European Communities.
120 See GOODWIN-GILL, Guy S. (note 63), p.57.
121 See PECOU, Antoine and DE GUCHANTHEIRE, Paul (note 42), p.11.
123 Such as ECOWAS in Africa, CARICOM in Central America and ASEAN in Asia.
III. REGIONAL INTEGRATION PROCESSES IN SOUTH AMERICA AND THEIR POSSIBILITIES TO REGULATE FREE MOVEMENT OF PERSONS

A. Antecedents concerning the regulation of human mobility in South America

1. Panamericanism and human mobility (1826-1960)

Since independence, Latin American countries have gradually built a sophisticated and highly developed system of regional international law and institutions, including regional norms regulating their international and domestic behaviour. Among these regional norms are the principle of sovereignty, commitment to political legalism, democracy and human rights.\(^{124}\)

Regional integration in Latin America is not just the oldest process, but also one of the most prolific concerning the development and strengthening of a supra-national structure to produce regulation on several grounds,\(^ {125}\) including direct and indirect considerations on human mobility as a cohesive factor to the expectations of political and economic union. It had its beginnings in a hemisphere where there existed from the outset a propitious environment for rapprochement and solidarity among peoples and governments, determined by favourable circumstances including a common origin and historical evolution, geographic proximity and similarity of political institutions.\(^ {126}\)

Coming from European colonialism, Latin American nations gained definitive independence in the first half of XIX century. They suddenly turned to be republican governments inspired by the thought of iconic leaders who, despite of virtual divisions inherited from the former administrative partition of the Spanish and Portuguese

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\(^{125}\) According to Gómez de la Torre, the Latin American integration process constitutes the oldest regional agreement in history. While the League of Nations was established in 1920, the Pan-American Union had been existed for thirty years, and by the time the United Nations Organization was created in 1945, it had been spread an intense activity. See GÓMEZ DE LA TORRE, Mario. *Derecho Constitucional Interamericano*. Quito, Editorial Universitaria, 1964, p.43.

territories overseas, idealized a single Latin American nation in order to consolidate such new political status from any intend of re-conquest.\footnote{127}

A first period acknowledged as pre-Panamericanism (1826-1889), witnessed the parallel consolidation of Latin American States and the first efforts of supra-national institutionalization and production of regional norms; the first inter-governmental meetings (Inter-American conferences) gathered representatives of the majority of the new nations, looking to promote the enactment of preliminary integration agreements\footnote{128} in order to fulfil –through a scheme of union– the punctual objective of strengthen the status of each incipient political unit.

Despite that such treaties were never ratified by the rising nations, they resulted transcendental for the subsequent development of international relations at the region; they embodied the intend to create an institutional framework to grant inter-State co-operation, mechanisms of collective security from external aggressions, instances for the solution of intra-regional disputes, and in a lower degree provisions related to free trade, navigation and communications\footnote{129}.

Under such context, human mobility wasn’t directly undertaken as a subject matter of regulation. The explanation rests on several factors around Latin America in the XIX century; the majority of population was located in the countryside and didn’t have neither the desire nor the need to migrate; the infrastructure and means of transportation didn’t favoured massive intra-regional movements; the configuration of migration in the region had a different dynamic since it was a receiving zone of people coming from

\footnote{127}{The principal apostle and most active promoter of these aspirations for union and hemisphere solidarity was the Liberator Simón Bolívar, who for many years had cherished the ideal of a strong and united America under the shield of law and democracy. See INTER-AMERICAN INSTITUTE OF INTERNATIONAL LEGAL STUDIES (note 126), xv.}

\footnote{128}{The following Congresses took place on such period with the correspondingly international agreements:
- Santiago (1856): Continental Treaty of Alliance and Reciprocal Assistance.
- Lima (1864-65): no treaties enacted.
Apart from the first meeting, which was premeditatedly conceived as a constitutional event for a union of American States, such meetings were mainly convoked due to punctual menaces of aggression from the European monarchies, willing to re-conquer their old colonies.}

\footnote{129}{GÓMEZ DE LA TORRE, Mario (note 125), p.54.}
overseas rather than a sending one. Such factors had as a consequence the absence of formal controls at the intra-regional borders.

Even so, some provisions embodied by the abovementioned agreements—while neither directly developing a right to free movement nor defining a discretional treatment of migration by domestic legislation—are relevant for the following consideration of human mobility as a common interest for the region.

Firstly, State sovereignty was clearly upheld and encouraged. For instance, the 1826 Treaty on Union—considered as the constitutional instrument for this preliminary phase of integration and the main antecedent of regional integration in Latin America—stated that the observance of such agreement wouldn’t interrupt the exercise of State’s sovereignty regarding international relations since the latter were not in opposition with the former.\footnote{See Article 28 of the 1826 Treaty of Union, League and Perpetual Confederation.}

Secondly, the essential link between individuals and political units was remarked. Regional citizenship was formulated as an aspiration\footnote{See Article 8 of the 1856 Treaty on the Confederation of Hispano-American States.}, and so the equal treatment of nationals and non-nationals on the right to work and the protection of property\footnote{See article 23 and 24 of the 1826 Treaty of Union, League and Perpetual Confederation, and article 1 of the 1856 Continental Treaty of Alliance and Reciprocal Assistance.}. This can be interpreted as the assumption of human mobility as something natural to the region and complementary to the enjoyment of basic rights at any part of the projected confederated territory; therefore, freedom of movement was permitted and actually encouraged for several objectives such as commerce, defence and the consolidation of nationalities.

The latter affirmation is additionally supported by the inclusion of provisions containing the authorization for free transit of troops\footnote{See Article 4 of the 1826 Treaty of Union, League and Perpetual Confederation and Article 16 of the 1848 Treaty of Confederation.} and freedom of navigation\footnote{See article 5 of the 1826 Treaty of Union, League and Perpetual Confederation, the 1848 Treaty on Commerce and Navigation, article 2 of the 1856 Continental Treaty of Alliance and Reciprocal Assistance, and article 9 of the 1856 Treaty on the Confederation of Hispano-American States.}, the homologation of professional degrees\footnote{See article 8 of the 1856 Continental Treaty of Alliance and Reciprocal Assistance. This provision might be considered relevant as to the case of qualified migrant workers, since it constitutes a type of “pull factor” encouraging people to mobilize for exercising their office at other countries of the region.}, and the abolition of slavery and prohibition of
slave trafficking. Whether such norms didn’t refer to the possibility to move freely within the region, they drafted a permissible framework to conceive migration as a social fact.

In general terms, the *ouvrage* of pre-Panamericanism reveal the constant yearn of Latin American to regulate their relations by the codification of the principles of international law applicable to the regional context; consequently, the latter has undeniable merits since it prepared the ground for subsequent instances of codification on which the common interest identified where traduced into normative provisions.

In the following years (1865-1889) serious problems arose in Latin America, among them, civil strife and wars between the brother countries which, from the political standpoint, mad all efforts toward hemisphere solidarity more difficult, despite of certain advances on the codification of international private law.

A second phase of the process –Panamericanism, going from 1889 to 1948– witnessed the influence of the United States of America into the discussions around regional integration, enlarging thus an initial scope of union and normative production located in a specific region to the whole continent, despite the U.S.’ reluctance to contract international obligations on some grounds.

During such period, integration efforts were institutionalized into a permanent structure –The Inter-American Bureau of Commercial Matters, forerunner of the Organization of American States–, so the enactment of multilateral agreements became usual to the majority of Latin American States, inspired by an undeniable policy of solidarity and co-operation coming from the preliminary phase of amalgamation. Under the framework of a stable structure, the fact that periodic conferences took place in order to discuss the existence of common interests generated that codification of regional norms was prolific.

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136 See Article 27 of the 1826 Treaty of Union, League and Perpetual Confederation.
137 See GÓMEZ DE LA TORRE, Mario (note 125), p.70.
138 The War of the Triple Alliance (1865-1870) and the War of the Pacific (1879-1884).
139 INTER-AMERICAN INSTITUTE OF INTERNATIONAL AND LEGAL STUDIES (note 126), xviii-xix.
140 This, as an indirect influence of the Monroe Doctrine, tendency that had great influence on USA’s foreign policy since the beginning of XIX century.
141 To be analyzed *infra*. 

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In that way, several regional instruments produced on such period contained relevant provisions to the ground of intra-regional human mobility. On the one hand with indirect influence as it follows:

- Convention Relative to the Rights of Aliens (1901), reiterating the recognition of civil rights to non-nationals in the same extent as to nationals, except to what is disposed on each country’s constitution\(^\text{142}\).

- Convention Establishing the Condition of Naturalized Citizens who again take up Residence in the Country of their Origin (1906), referring to the nationality status of persons re-establishing at their source country\(^\text{143}\).

- Conventions on Political (Territorial) and Diplomatic Asylum, delimiting the ground for the applicability of such exceptional regime of admission of non-nationals\(^\text{144}\).

- Conventions on Consular Agents, and Diplomatic Officers\(^\text{145}\).

On the other hand, several legal instruments enacted on such phase contain provisions that, although not regulating human mobility in a comprehensive way, dealt with the issue provided the intention to strengthen State’s sovereignty at the region.

The 1928 Convention on the Status of Aliens codified for the first time on a Latin America’s regional agreement the State’s prerogative to establish by domestic law the conditions for the admission of non-nationals to its territory, as well as the possibility to expel them under the advent of unfavourable circumstances able to affect public order and security\(^\text{146}\). Complementarily, the 1954 Convention on Territorial Asylum confirmed the latter as a truly State’s right of admission under the exercise of its

\(^{142}\) “Artículo 1. Los extranjeros gozan de todos los derechos civiles de que gozan los nacionales, y deben hacer uso de ellos en el fondo, en la forma o procedimiento y en los recursos a que den lugar, absolutamente en los mismos términos que dichos nacionales, salvo lo que disponga la Constitución de cada país”.

\(^{143}\) “Article 1. If a citizen, a native of any of the countries singing the present Convention, and naturalize in another, shall again take up his residence in his native country without the intention of returning to the country in which he has been naturalized, he will be considered as having reassumed his original citizenship, and as having renounced the citizenship acquired by the said naturalization”.

\(^{144}\) As it follows: Convention on the Right of Asylum (1928); Convention on Political Asylum (1933); Convention on Diplomatic Asylum (1954); Convention on Territorial Asylum (1954).

\(^{145}\) Both signed at February 20, 1928.

\(^{146}\) “Article 1. States have the right to establish by means of laws the conditions under which foreigners may enter and reside in their territory; Article 6. For reasons of public order or safety, States may expel foreigners domiciled, resident or merely in transit through their territory. States are required to receive their nationals expelled from foreign soil who seek to enter their territory.”
sovereignty, notwithstanding the exceptional possibility to grant asylum even to persons who entered into their territorial jurisdiction surreptitiously or irregularly.\(^{147}\)

Likewise, the 1948 American Declaration on the Rights and Duties of Man established the Right to leave one’s own country\(^{148}\), which was subsequently developed at 1969 by the American Convention on Human Rights, as explained in the first part of the study\(^{149}\). Although the former was not a treaty but a political commitment, the Inter-American Court of Human Rights has established that despite of its non-binding character it owns undisputable legal effects to the OAS’ member States\(^{150}\).

Therefore, by that moment the main purpose of Latin American co-operation was limited to develop a legal framework on inter-State relations; Panamericanism was a scheme of political integration for the enactment of provisions on common defence, dispute settlement, International Private Law and diplomatic relations, rather than a scenario prepared to impulse the achievement of wider and greater common interests, despite of the undisputable milestone reached by the production of regional norms.

In that way, the migratory phenomenon was not directly undertaken by the regional block since it wasn’t identified as a common concern subject to regulation. Despite of the codification of the sovereign paradigm at 1928 –an influence coming from the political reality of international relations rather than an arguable rejection of free movement in Latin America–, the enactment of norms concerning displacement across borders lacked interest due to its low rate, \textit{de facto} permissibility and detachment from critic issues affecting the region at that time.

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\(^{147}\) "Article 1. Every State has the right, in the exercise of its sovereignty, to admit into its territory such persons as it deems advisable, without, through the exercise of this right, giving rise to complaint by any other State; Article 5. The fact that a person has entered into the territorial Jurisdiction of a State surreptitiously or irregularly does not affect the provisions of this Convention."

\(^{148}\) "Article VIII. Every person has the right to fix his residence within the territory of the State of which he is a national, to move about freely within such territory, and not to leave it except by his own will."

\(^{149}\) See Section I (A) (1).

\(^{150}\) "45. For the member States of the Organization, the Declaration is the text that defines the human rights referred to in the Charter. Moreover, Articles 1(2)(b) and 20 of the Commission's Statute define the competence of that body with respect to the human rights enunciated in the Declaration, with the result that to this extent the American Declaration is for these States a source of international obligations related to the Charter of the Organization." \textsc{Inter-American Court of Human Rights. Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights.} Advisory Opinion OC-10/89 of July 14,1989. Series A No. 10, par.45.
2. The raise of economic integration as a common aim and its incidence on the regulation of human mobility

By the end of the decade of 1950 a new milestone in the process of Latin American integration was reached with the consolidation of Panamericanism into a permanent structure: The Organization of American States (OAS)\(^\text{151}\). Likewise, the scope of integration experienced a great turn from an accentuated political approach to an economic-oriented atmosphere, with the inclusion of development as the principal motivation for the consecution of co-operative efforts among States\(^\text{152}\).

These departure from purely political expectations to other grounds resulted from the assumption of *economic and social development* as a common interest to be reached by Latin American nations; on the one hand the incipient situation of poverty and social inequality in the region implied the need to look for means to improve the life conditions of population, and on the other, the burst of globalization onto the dynamics of economy generated a significant boost on the circulation of productive inputs\(^\text{153}\). Such logic was reflected in the process of integration both at the normative level as well as at the enactment of regional public policies.

The Charter of the OAS embodied on its purposes and principles the idea of economic integration as a co-operative tool to accelerate regional development\(^\text{154}\), which should be channelled through multilateral organizations without prejudice to bilateral cooperation between Member States\(^\text{155}\). Furthermore, it highlighted the need to undertake common efforts to bring about the access of the American States to world markets\(^\text{156}\), the establishment of a common market in the Americas\(^\text{157}\) and the

\(^{151}\) Established by the Charter of The organization of American States, signed in Bogotá in 1948.

\(^{152}\) See INTER-AMERICAN INSTITUTE OF INTERNATIONAL LEGAL STUDIES (note 126), p.282-283.

\(^{153}\) The resources employed to produce goods and services; capital, primary goods, labour force, etc.

\(^{154}\) “Article 2. The Organization of American States, in order to put into practice the principles on which it is founded and to fulfil its regional obligations under the Charter of the United Nations, proclaims the following essential purposes: (...) f) Promote by cooperative actions economic, social and cultural development; Article 3. The American States reaffirm the following principles: (...) k) Economic cooperation is essential to the common welfare and prosperity of the peoples of the continent; Article 31. Inter-American cooperation for integral development is the common and joint responsibility of the Member States, within the framework of the democratic principles and the institutions of the inter-American system. It should include the economic, social, educational, cultural, scientific, and technological fields, support the achievement of national objectives of the Member States, and respect the priorities established by each country in its development plans, without political ties or conditions.”

\(^{155}\) See Article 32 of the Charter of the OAS.

\(^{156}\) “Article 39. The Member States, recognizing the close interdependence between foreign trade and economic and social development, should make individual and united efforts to bring about the following: a) Favorable conditions of access to world markets for the products of the developing
harmonization of social legislation as a means to grant basic labour conditions, human dignity and social security.\textsuperscript{158}

In short, following a subsequent report of the OAS’ Secretary General, the Charter’s innovative approach to the achievement of development through economic integration in the region was based on the following principles: a) The development of Latin America must be a multilateral effort; b) Economic development and social progress must occur simultaneously; c) Latin American economic development must be based on the formulation of comprehensive plans and on the initiation of effective planning procedures; and d) Latin America’s potential development depended to a large extent on its ability to expand and diversify its exports, to gain freer access to foreign markets, and to integrate its compartmentalized economies into a common market.\textsuperscript{159}

While the Charter of the OAS introduced the ideological base for a new model of regional integration in Latin America, the issuance of operative policies to implement such aspirations took place under the framework of Operation Pan America, an action program conceived to accelerate economic and social development through the undertaking of multilateral co-operative measures,\textsuperscript{160} subsequently complemented by

\textsuperscript{157} “Article 42. The Member States recognize that integration of the developing countries of the Hemisphere is one of the objectives of the inter-American system and, therefore, shall orient their efforts and take the necessary measures to accelerate the integration process, with a view to establishing a Latin American common market in the shortest possible time.”

\textsuperscript{158} “Article 46. The Member States recognize that, in order to facilitate the process of Latin American regional integration, it is necessary to harmonize the social legislation of the developing countries, especially in the labor and social security fields, so that the rights of the workers shall be equally protected, and they agree to make the greatest efforts possible to achieve this goal.”


\textsuperscript{160} Operation Pan America’s nature, characteristics, and basic aims were set forth in an \textit{Aide-Memoire}, presented to the American governments by Brazil in August 1958, from an initiative of its president Juscelino Kubitschek in order to set a reorientation of hemispheric policy regarding the solution of problems of underdevelopment through the enactment of co-operative measures. As a result of such
the Charter of Punta del Este (1961) which established that the institutional frame to develop such policies should be a common market\textsuperscript{161}.

At the institutional level, the main outcome of those processes was the creation of the Latin American Free Trade Association (LAFTA)\textsuperscript{162}, which has to be recalled as the first intend to develop a block of economic integration gathering the countries of South America and an intermediate step of a broader process to conform a Latin American Common Market\textsuperscript{163}. Conceived as a free trade zone for a gradual reciprocal reduction of all duties, charges, and restrictions on commerce to be improved in a period of 12 years, LAFTA grouped the majority of the States of South America\textsuperscript{164} plus Mexico, an usual commercial partner of the latter, as well as a nation sharing similar levels of development and historical, cultural and social values.

LAFTA was the first institutional scenario that directly considered human mobility as an issue with common relevance to the States of the region, consequently subject to be regulated by a multilateral agreement; hence, on its fourth period of sessions, the Conference of LAFTA’s State Parties recommended that dully attention should be paid to grant facilities concerning the transit of persons\textsuperscript{165}. After the discussion of several proposals presented by experts on the topic, a Protocol concerning the free transit of initiative, several Meetings of Consultation sponsored by the OAS took place, and there were produced relevant resolutions including the 1960 Act of Bogotá, which prepared the terrain for the definitive incursion of the economic integration blocks into the region.

\textsuperscript{161} “Title I. Objective of the Alliance for Progress. It is the purpose of the Alliance for Progress to enlist the full energies of the people and governments of the American republics in a great cooperative effort to accelerate the economic and social development of the participating countries of Latin America, so that they may achieve maximum levels of well-being, with equal opportunities for all, in democratic societies adapted to their own needs and desires. The American Republics agree to work toward the achievement of the following fundamental goals in the present decade: (...) 11. To strengthen existing agreements on economic integration, with a view to the ultimate fulfilment of aspirations for a Latin American common market that will expand and diversify trade among the Latin American countries and thus contribute to the economic growth of the region.”

\textsuperscript{162} Constituted through the signing of the Montevideo Treaty, on the 18 of February 1960, notwithstanding the parallel constitution of the Central American Common Market at the same year.

\textsuperscript{163} “Article 54. The Contracting Parties shall carry out their best efforts to orient their policies towards the creation of favorable conditions for the establishment of a common Latin-American market. For this purpose, the Committee shall perform studies and shall consider projects and plans for the consecution of this objective, seeking the coordination of its work with the ones performed by other international entities.”

\textsuperscript{164} Argentina, Bolivia, Brazil, Colombia, Chile, Ecuador, Paraguay, Peru, Uruguay and Venezuela.

\textsuperscript{165} See Article 24 (6) of the Resolution 100 (IV) of 1964, of the Conference of State Parties.
individuals over the territory of the abovementioned nations was approved by the Conference of State Parties the 12 of December 1966, entering into force in 1969.  

Thus, a right to freedom of movement guaranteed to nationals and non-nationals permanently residing at one of the State parties was designed under the following conditions:

- Unrestricted ingress, transit and egress across the territory of the parties is only abided to the possession of a passport or valid identity document, without the need of visas or further requisites.

- Persons moving across borders are not exempted from obligations contained by domestic law regarding the exercise of lucrative activities (labour or provision of services).

- Temporal stay at the territories (up to 90 days), but with the possibility for the individual to be automatically readmitted to the territory of residence.

- The right to freedom of movement can be limited either due to either the temporal suspension of the agreement without the need to obtain consent from other parties or domestic legal dispositions, or to circumstances of public order, sanity or security included on the domestic legislations.

The LAFTA’s Protocol on transit of persons resulted innovative whether it established the need to assume intra-regional human mobility as a social fact linked to achievement of a common interest. While it can be said that in terms of the quality of the regulation it

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166 Consequently, Resolution 17 of the First Meeting of the Ministers of Foreign Affairs commended to the Executive Committee the appointment of a specialized conference in order to establish the basis of a multilateral agreement to facilitate the intra-regional movement (ingress, transit and egress) of the Member States’ nationals as well as non-nationals with permanent residence.

167 “Artículo 1. Los nacionales por origen, naturalización o legales de los países de la ALALC, portadores de un pasaporte o documento de identidad válido, podrán ingresar, transitar en o salir del territorio de cualquiera de las Partes Contratantes sin necesidad de visas o permisos especiales.”

168 “Artículo 2. Las personas mencionadas en el artículo anterior no están eximidas de la obligación de conformarse a las leyes y reglamentaciones del país en cuanto al ejercicio de actividades lucrativas independientes o remuneradas.”

169 “Artículo 3. La permanencia en el país será de hasta noventa días, renovables de acuerdo a las disposiciones vigentes en el territorio. Durante esta permanencia las personas en tránsito no serán pasibles de impuestos o tasas superiores a las que se aplica al nacional del país del territorio; Artículo 4. Cada una de las Partes se compromete a admitir nuevamente, en cualquier momento y sin formalidades, las personas que hubieran ingresado al territorio de la otra parte contratante valiéndose de las cláusulas del presente acuerdo.”

170 “Artículo 5. Todas las ventajas que se contemplan en este acuerdo se entenderán sin perjuicio de las disposiciones internas de cada Parte Contratante en materia de orden público, policía o sanidad; Artículo 6. Cada una de las Partes podrá suspender temporalmente la vigencia de este acuerdo, sin necesidad de consentimiento de las demás, por razones de seguridad o de orden público.”
is too broad—however natural since it was a preliminary intend—, it has the credit for
embody the purpose to implement a right to freedom of movement as a complement to
the free trade area, for the achievement of economic and social development.

This new approach—the task of integration as a tool to achieve better standards of
economic and social development—modified in a decisive way the conception held by
South American nations regarding migration; from been treated as a reality neither
encouraged nor prohibited whose regulation was left to each political unit, it turned to
be conceived as a dynamic process able to concede positive contributions. Under such
logic, States would ease a tough position regarding sovereignty in order to co-operate
for a common aim.

Nonetheless, the Protocol’s novelty ended as an unfruitful mechanism since it followed
the institutional fragility of LAFTA on several grounds; firstly, instead of a strong
structure like in the case of the OAS, it functioned through periodic meetings and only
had a permanent Executive Committee in charge of administrative coordination\footnote{Following Cárdenas, “the formula on which LAFTA was structured looked to provide the organization
with powers that, although enough to assure functional efficacy, didn’t affect the free exercise of national
sovereignty.” CÁRDENAS, Emilio J. “Hacia un Derecho Común Latinoamericano” 1 Derecho de la
Integración (1967), p.34.}, and
secondly, due to LAFTA’s intergovernmental character, decisions adopted by its organs
lacked direct executive force\footnote{Ibid., p.34.}.

Consequently, the lack of tools and political commitment for both the implementation
of the new policies proposed and the harmonization of their legislations so as to
formalize the economic integration, generated that the aim to put into practice a free
trade zone in 12 years had to be revised and extended to a new period of 20 years, so the
transit of persons around the territories conforming the economic block suffered
likewise a negative impact while dependant of the main objective around the
organization\footnote{By 1980, when the new deadline proposed by the member States into the 1969 Protocol of Caracas
wasn’t either fulfilled, LAFTA was replaced by a new scheme of economic integration, the Latin
American Association of Integration (ALADI), with lesser political expectations and more economy-oriented than its predecessor.}.
The idea of supra-nationality\textsuperscript{174} then seems to have an important role on the efficacy of law-making at a regional level whether a common interest wants to be regulated. Following Abbot;

“Because a plurilateral agreement entails significant substantive commitments that participating States have incentives not to perform, the supporting institution must include informational and reporting capacities that encourage members to comply, and perhaps even some capacity for enforcement of the agreed rules”\textsuperscript{175}.

Such lack of a supra-national institutionalization joined to unequal levels of development among the South American nations turned to be the reasons for a change on the scope of regional integration at the coming years. From a stage of continental integration that didn’t achieve the expected results, nations with similar levels of development and closer links decided to undertake a new scheme of co-operation. This is how two sub-regional integration blocks emerged at South America; the Andean Community of Nations (CAN) and the Common Market of the South (MERCOSUR).

\textit{B. Sub-regional Integration Blocks in South America: a shift from a purely political to an economic space and its effects on the management of migration.}

The antecedents on the South American process show that until 1948 –and pragmatically until 1960 with the creation of LAFTA– the idea of regional cohesion wasn’t directly related to the assumption of a common project of development through economic integration, but mostly to political aspirations on the creation of a single nation, and afterwards regarding the apprehension and regulation of shared interests such as defence, diplomatic and consular relations, harmonization of international private law, etc. Under such landscape, the migratory phenomenon was lightly included in the agenda.

The emergence of an alternative approach on the project of integration in South America implied the superposition of a new economic space –characterized by the existence of links of economic interdependence– into a well-defined political space of

\textsuperscript{174} The concept of Supra-nationality should be associated with the idea of an organization equipped with sufficient authority to adopt, under the limits imposed by its own constitutional instrument (competence), decisions having a direct binding character both to member States and individuals, without the need of further legislative processes at the local level, but merely executive acts.

sovereign States. This new panorama carried on the need of the latter to adapt to the former, since their dynamics do not coincide; that is to say, the political entities are obliged to give up part of their sovereignty in order to allow the normal circulation of the factors of production.

In that way, the individual is a vital element of such process, and depending on the framework from which is acknowledged, he relates with the State/region twofold; on the one hand, as a factor of production which has to circulate for the efficiency of the emerging market; and on the other as a subject of rights and obligations who is classified either with full entitlements –national– or with restricted guarantees –foreigner– depending on where is located.

Since these different views have to be harmonized, human mobility and the accessory issues attached to the double condition of the individual have to be identified as a priority interest to be regulated. This is how the migratory phenomenon –as a dynamic of circulation of factors of production which carries out the need to protect the rights of the individuals who are moving across borders– is currently assumed as a relevant matter by the emerging sub-regional blocks in South America.

Therefore, the following pages will describe their structure, public policies and regulations related to migration, especially on the block’s assumption that human mobility is a fundamental element for the development of the region.

1. The Andean Community of Nations (CAN)

In 1969 Bolivia, Colombia, Chile, Ecuador and Peru subscribed the sub-regional integration agreement known as the Cartagena Agreement or Andean Group. Later on, Venezuela joined through Decision 70 of 1973. Chile withdrew in 1976 arguing differences on the conception and implementation of economic policies. In 1996, the group went through a process of restructuring by which the Andean Community of

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177 Moreover, although movements between the region’s countries date back a long way, in this stage they became more pronounced and assumed increased visibility as a result of the disappearance of migratory flows from overseas, so from a factual point of view the migratory phenomenon requires a privileged treatment. See MAGUID, Alicia. “Migration Policies and Socioeconomic Boundaries in the South American Cone”. Migration without Borders: Essays on the Free Movement of People. Ed. By Antoine Pécoud and Paul de Guchteneire. Paris: Unesco Publishing, 2007, p.261.
178 See Annex I for an index of CAN’s regulation on the migratory phenomenon.
Nations (hereinafter CAN) was created\textsuperscript{179}. Finally, Venezuela withdrew in 2006, arguing that a change on the conditions of the process took place due to the signing of free trade agreements between some of its members and the United States of America.

Although attached to the objectives of LAFTA\textsuperscript{180}, the Andean Group (and subsequently CAN) was conceived as a parallel experience of integration, aiming to concentrate a smaller group of countries with similar levels of development and geographical proximity, in order to facilitate the former process and amend the hurdles that impeded the establishment of a common market in South America under the preliminary phase of economic integration\textsuperscript{181}.

Currently, CAN is composed by Bolivia, Colombia, Ecuador and Peru, and has as associates the members of the parallel process of integration in South America (MERCOSUR)\textsuperscript{182}, as well as the parties who previously withdrew; despite the fact that some countries don’t have full membership, the whole block usually negotiate and prescribe regulation on specific grounds with repercussion on the whole region.

The constitutional instrument of the sub-regional block and the basis for the development of a regional policy on migration is the abovementioned Cartagena Agreement. Its main objective is to promote the balanced development of the member countries and accelerate their economic growth\textsuperscript{183} through the progressive

\begin{flushleft}
\textsuperscript{179} Reform carried out under the framework of the political document “New Strategic Design” of 1995 and finally the Protocol of Trujillo, signed the 10 of March 1996. Nowadays, the Andean Community of Nations has around 100 million inhabitants living in an area of 4,700,000 square kilometers, whose Gross Domestic Product amounted to US$745.3 billion in 2005 including Venezuela, a member back then.


\textsuperscript{181} “Artículo 1. El presente Acuerdo tiene por objetivos promover el Desarrollo equilibrado y armónico de los Países Miembros, acelerar su crecimiento mediante la integración económica, facilitar su participación en el proceso de integración previsto en el Tratado de Montevideo y establecer condiciones favorables para la conversión de la ALAC en un mercado común, todo ello con la finalidad de procurar el mejoramiento persistente en el nivel de vida de los habitantes de la Subregión.”

\textsuperscript{182} Argentina, Brazil, Paraguay and Uruguay since 2005, and Chile since 2006. This move reciprocates the actions of Mercosur which granted associate membership to all the Andean Community nations by virtue of the Economic Complementarily Agreements (Free Trade agreements) signed between the CAN and individual Mercosur members. This is why, as it will be illustrated supra, the regulation of free movement of persons developed on each block can be extended to the whole region (South America).

\textsuperscript{183} See note 181.
\end{flushleft}
harmonization of economic and social policies by means of the alignment of the correspondingly national laws\textsuperscript{184}.

Since its formation, the Andean integration project looked to achieve goals that went beyond the strictly economic and commercial, working more on communitarian, social and cultural aspects\textsuperscript{185}. Moreover, it developed a series of organs and attributed competences in order to regulate the abovementioned common interests through biding community norms; in that way, the Council of Ministers of Foreign Affairs and the Andean Commission are the organs in charge to produce regional law, formalized by acts called Decisions. On the other hand, such instruments may be regulated through Resolutions, enacted by the Secretary General.

An initial approach to the formulation of policies on the orbit of human mobility was dealt by the “Simón Rodríguez Convention”\textsuperscript{186}, stamping a marked socio-labour viewpoint to the possibility to circulate across borders. Such instrument was conceived as a long-term plan for the harmonization of national policies and legislations, having as one of its focal points the definition and coordination of community strategies on the promotion of employment, vocational and labor training, health and safety in the workplace, social security and labor-related migration\textsuperscript{187}.

As noted, the main scope of such plan was to achieve the amendment of local regulation according to the regional policies produced; thus, although it may conversely be said that there was an influence on the subsequent enactment of community regulations concerning labour migration, there was no direct impact on such process. That would come at a preliminary level through Decisions 113 and 116 of 1977, on social security and labour migration respectively\textsuperscript{188}.

On the one hand, the Andean Instrument on Social Security (Decision 113) intended to establish a unified regime of health services and pension rights to workers and their

\textsuperscript{184} See Article 3 (b) of the Agreement of Cartagena.
\textsuperscript{185} See SANTESTEVAN, Ana María (note 180), p.375.
\textsuperscript{186} Firstly signed in 1973 at the Second Meeting of the Ministers of Labour, it was amended in 1976 and subsequently replaced by a new agreement in 1990 and thereafter through a Substitutive Protocol in 2001, although keeping the same objectives originally Stated.
\textsuperscript{187} See article 2 (b) of the Simón Rodríguez Convention, 2001.
\textsuperscript{188} Santestevan argues that it was in the context of the Simón Rodríguez Convention that the issue of labour migration was addressed in a concrete and specific way through such Decisions. See SANTESTEVAN, Ana María (note 180), p.377.
family members around the region, supported by the parallel consecration of the principle of equal treatment to the nationals of any of the State parties in terms of the coverage of basic guarantees on such grounds.

On the other hand, the Andean Instrument on Labour Migration (Decision 116) developed an ambitious system of labour-oriented migration based both on the existence of well defined categories of trans-national workers (qualified, frontier-inhabitant, temporal and undocumented) as well as on the verification of a contractual relation in order to allow their free movement across borders.

Decision 116 dealt with every aspect of the regulation on the field of labour migration; provided the verification of the abovementioned requisites, it pointed out the need for member countries not to raise obstacles for the free movement of migrant workers covered by an employment contract, according to the community instrument and the local migratory laws. In that way, there are punctual references to the unrestricted mobility of temporal workers and frontier workers as a means to develop their activities. Complementarily, it is recognized the possibility to regulate specific issues

189 “Artículo 3. Las disposiciones del presente instrumento serán aplicables a las personas, miembros de sus familias y a los sobrevivientes que estén protegidos por la legislación de seguridad social de uno de los países miembros”.
190 “Artículo 4. Todo país miembro concederá a las personas de los otros países miembros mencionados en el artículo anterior igual trato que a los nacionales en todas las ramas de seguro social que se refiere el artículo 2.”
191 “Artículo 1. Para los efectos del presente instrumento se entiende por: (...) f) trabajador migrante: Todo nacional de un País Miembro que se traslade al territorio de otro País Miembro con el objeto de prestar servicios personales subordinados. Comprende las siguientes categorías: i) Trabajador calificado (...) ii) Trabajador Fronterizo (...) iii) Trabajador Temporal (...) g) Trabajador migrante indocumentado: Todo nacional de un País Miembro que está ejerciendo actividades lícitas, por su propia cuenta o bajo cualquier tipo de contrato de trabajo, en el territorio de otro país miembro, sin contar con documentos oficiales idóneos o de viaje que acrediten su nacionalidad y permanencia legal en otro País Miembro; Artículo 18. El ingreso de trabajadores migrantes temporales al país de inmigración, además de cumplir con los trámites migratorios y con lo establecido en el literal d) del artículo 8, requerirá la existencia de un contrato que determine con precisión la labor que desarrollará el trabajador”.
192 “Artículo 4. Los Países Miembros no obstacularizarán la entrada o salida de trabajadores migrantes contratados conforme a este instrumento y a las leyes migratorias del país de inmigración.”
193 “Artículo 19. Se garantiza a los trabajadores migrantes temporales la protección y facilidades que requieran para sus actividades laborales, y en especial, las siguientes: a) La libre circulación y salida a la iniciación y terminación de las labores que van a desarrollar y durante la época de su ejecución”.
194 “Artículo 24. Se garantiza a los trabajadores migrantes fronterizos la protección y facilidades que requieran para sus actividades laborales, y en especial, las siguientes: a) La libre movilidad en el área fronteriza”.

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not mentioned by the Decision through bilateral agreements, such as the determination of the frontier zones on which free movement of migrant workers might be allowed.\(^{195}\)

Regarding the rights of migrant workers circulating around the Andean territory, the regional instrument enacted a general guarantee of non-discrimination on the ground of sex, ethnic origin, religion or nationality and consequently identical labour rights than the workers of the immigration country.\(^{196}\) and likewise, the equality of treatment to migrant workers and the members of their families regarding the rights to housing, education, health and social security was consecrated.\(^{197}\) Finally, there is a compromise to regularize the undocumented workers who may credit a formal labour legal link\(^{198}\), and to adopt any necessary provisions to adapt their national legislations to the Andean instrument.\(^{199}\)

Although it was considered pioneer by the time of its enactment due to its novelty on the consecration of a free movement regime for migrant workers, the 1977 Decision followed the same destiny of LAFTA’s 1966 Protocol on free circulation of persons and could not take precedence over national legislations and was thus unable to become a real communication instrument with binding effect in the member States.\(^{200}\) As main reasons for such situation there can be mentioned the disparity on the level of development of the countries at the Andean region, the economic crisis suffered at the late seventies and eighties, and the lack of strong supra-national institutions to support a scheme of ordered migration.\(^{201}\)

\(^{195}\) “Artículo 5. Los Países miembros podrán, mediante acuerdos bilaterales, estipular disposiciones tendientes a la solución de problemas especiales no contemplados en este instrumento. (...) En ningún caso podrán acordarse condiciones estipulaciones contrarias o condiciones inferiores a las establecidas en el presente instrumento.”

\(^{196}\) “Artículo 12. No podrá haber discriminación alguna en el empleo de los trabajadores migrantes en razón de sexo, raza, religión o nacionalidad; Artículo 22. Los países miembros definirán por acuerdos bilaterales las zonas de sus territorios que deban considerarse fronterizas, para los efectos de este instrumento.”

\(^{197}\) “Artículo 13. El trabajador migrante y su familia tendrán los mismos derechos que los nacionales en lo que respecta a educación, vivienda, salud y seguridad social.”

\(^{198}\) “Artículo 27. Los Países Miembros adoptarán previsiones tendientes a facilitar la regularización de la situación de los indocumentados que prueben haber ingresado antes de que este instrumento entre en vigencia.”

\(^{199}\) “Artículo 33. Los gobiernos de los Países Miembros se comprometen a adoptar todas las providencias que sean necesarias para incorporar las presentes normas en sus respectivos ordenamientos jurídicos internos dentro de los doce meses siguientes a la aprobación de este instrumento.”

\(^{200}\) SANTESTEVAN, Ana María (note 180), p.377.

\(^{201}\) See Decision 545 of 2003, p.1.
Nevertheless, the reconsideration of the scheme developed by the Andean Pact which led to the creation of the Andean Community of Nations brought a new opportunity for the regulation of free movement of individuals across borders. Therefore, this second phase implied the development of new institutions, policies and legal instruments on migration.

Currently and under the present structure of the Andean Community of Nations, the management of public policies on migration is handled by the Andean Committee of Migration Authorities (CAAM)\(^202\). By virtue of such institutional strategy it is established as the main objective that under the ground of the Andean citizen’s free circulation over the community space, CAN has to undertake actions to progressively allow unrestricted movement of persons. It assumes the community as one territory and looks to favour an ordered and legally ruled migration whether the latter is deeply linked with the process of regional development, the main aim of the mechanism of integration\(^203\).

Hence, such framework envisages human mobility under two grounds: extra-community migration and intra-community migration. Correspondingly, the latter is equally divided twofold depending on the nature of the migratory movement: on the one hand \textit{short duration}, and on the other \textit{long duration}\(^204\).

\begin{itemize}
  \item \textbf{a. Intra-Community short duration migratory policies and legal instruments}
\end{itemize}

Intra-community short duration migratory policy was structured to facilitate and simplify control over the ingress and egress of tourists coming from any of the member countries. Hence, free circulation of persons is conceived as one of the conditions required for the gradual creation of an Andean Common Market, as well as an entitlement to its nationals and foreigners with a permanent resident status in order to progressively consolidate a common identity, whether in compliance with national

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\begin{itemize}
\item \textsuperscript{202} The Andean Committee of Migration Authorities comprises ministers of the member States responsible for migration, and is a consultative organ of the Council of Foreign Affairs Ministers. The public policy on migration in the Andean Region was initially formulated by CAAM’s working document SG/dt 421 of 26 August 2008 “Las migraciones Intracomunitarias y Extracomunitarias en la Agenda de la Comunidad Andina”, containing a Proposal of the Secretary General dated 3 August 2006 (SG/Propuesta 154/Rev.1). Despite that to the date such proposal has not been formalized into a Decision, the legal instruments which support the latter are in force so it can be considered as relevant to the study.
\item \textsuperscript{203} CAAM. \textit{Las migraciones Intracomunitarias y Extracomunitarias en la Agenda de la Comunidad Andina} SG/Propuesta 154/Rev.1, 2006, p.1, 17.
\item \textsuperscript{204} \textit{Ibid.}, p.2-7.
\end{itemize}
migratory laws. For that purpose, CAN –through the Council of Ministers of Foreign Affairs– issued Decisions 397 of 1996 and 503 of 2002, related to the creation of the Andean Migration Card and the recognition of travel documents respectively.

Firstly, the creation of the Andean Migration Card looked to unify the format to be presented at the authorized spots upon ingress to any member country, as well as to harmonize the type of information given to migratory authorities regarding the persons entering to the political unit. Its content is determined by Resolution 527 of 2006, which regulates the commented Decision.

Secondly, the Decision on the recognition of travel documents intends to harmonize the patterns of identification to facilitate the free movement of persons within the sub-region. It affirms that national identification documents are the only requirement for nationals and foreigners resident in the member States to travel within the integrated territory as tourists. In this regard, Decision 503 establishes the following dispositions;

- No passport or visa required for circulation inside CAN territory for tourism purposes less than 90 days, whether only national identification documents are necessary for entry.
- Equality of treatment between nationals and tourists, without prejudice to national dispositions on migration, national security and public health.
- National documents of identification are valid for judicial and administrative proceedings at any member country.
- Migratory authorities may impede the ingress of people whether it is proved that they didn’t fulfill the legal requisites established either by the Decision or by national norms.

205 “Artículo 1. Crear la Tarjeta Andina de Migración (TAM), la misma que contendrá la información y se adecuará al formato que al efecto establezca la Junta mediante Resolución. Dicha tarjeta constituye el único documento de control migratorio y estadístico de uso obligatorio, para el ingreso y salida de personas del territorio de los Países Miembros, ya sea por sus propios medios o utilizando cualquier forma de transporte. Su uso no excluye la presentación del pasaporte, visa u otro documento de viaje previstos en las normas nacionales o comunitarias, así como en los convenios bilaterales vigentes.”
206 “Artículo 1. Los nacionales de cualquiera de los Países Miembros podrán ser admitidos e ingresar a cualquiera de los otros Países Miembros, en calidad de turistas, mediante la sola presentación de uno de los documentos nacionales de identificación, válido y vigente en el país emisor y sin el requisito de visa consular, bajo los términos y condiciones señalados en la presente Decisión.”
207 “Artículo 2.- Los turistas nacionales de cualquiera de los Países Miembros gozarán de los mismos derechos que los nacionales del País Miembro en donde se encuentren, sin perjuicio de las disposiciones nacionales referidas a migración, orden interno, seguridad nacional y salud pública.”
208 “Artículo 5.- El documento nacional de identificación con el cual se realizó el ingreso será reconocido por las autoridades del País Miembro receptor para todos los efectos civiles y migratorios, incluyendo trámites judiciales y administrativos.”
Despite of the enactment of such Decision and the potential benefits to be reach in terms of integration and encouragement of tourism in the region, Venezuela decided not to sign it due to an argued differentiated situation regarding migratory movements from Colombia. After two years of negotiations, Decision 603 of 2004 was issued, determining that for the specific case of such country the visa requisite would be demanded except for the case of tourists with a valid passport entering to the country by airplane, provided they show a round-trip airplane ticket and hotel reservation. Even if it was either establish the possibility to make applicable the initial Decision in the future, Venezuela withdrew from CAN in 2006.

b. Intra-Community long duration migratory policies and legal instruments

The policy on intra-community long duration migration is generally supported on the progressive assumption of free circulation of persons as one of the conditions required for the gradual creation of an Andean Common Market. Although it was projected to consider a wide number of related situations such as the case of businessmen, students and citizens located at the borders, currently is mainly focused on labour migration, assuming the latter as a focal point of CAN’s approach that assumes the pairing migration-development.

The regulation on labour migration is contained by Decision 545 of 2003, which intends to establish a set of rules allowing the unhampered circulation of Andean nationals at the region, whether the cause of such mobilization is the assumption of a waged activity supported by a legal bond—an employment contract—, excluding activities contrary to morals, preservation of public order and heath, and national security.

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209 “Artículo 6.- Las autoridades migratorias de cada País Miembro podrán impedir el ingreso de turistas o cancelar la autorización de quienes ya hubieran ingresado, cuando se compruebe que los mismos no cumplan los requisitos legales establecidos por la presente Decisión o infrinjan las normas migratorias.”

210 Such Decision was enacted as a result of a solicitude made by the Andean Labour Consultative Council in order to revise Decision 116 of 1977, since it became inapplicable due to the changing circumstances concerning integration in South America. Decision 545 was based on a draft presented by CAN’s Secretary (working document 95/Rev. 1).

211 “Artículo 1. El presente Instrumento tiene como objetivo el establecimiento de normas que permitan de manera progresiva y gradual la libre circulación y permanencia de los nacionales andinos en la Subregión con fines laborales bajo relación de dependencia.”

212 “Artículo 2. La presente Decisión se aplicará a los trabajadores migrantes andinos, quedando excluidos de la misma el empleo en la Administración Pública y aquellas actividades contrarias a la moral, a la preservación del orden público, a la vida y a la salud de las personas, y a los intereses esenciales de la seguridad nacional.”
In the same way that Decision 116 disposed it, such aim is backed up by a classification to establish the persons allowed to mobilize around the region depending on the type of work they are undertaking (individual displacement, company worker, seasonal worker and frontier worker)\textsuperscript{213}. Likewise, the principle of non-discrimination and equality on both labour guarantees and opportunities to access an employment is consecrated\textsuperscript{214}.

The new instrument was formulated on the basis of a model of full regional integration through the recognition of fundamental rights to migrant workers and their families\textsuperscript{215}, including trade union entitlements\textsuperscript{216}, measures for the protection of migrant worker’s family—especially the possibility to freely circulate around the region—\textsuperscript{217}, and specific guarantees such as the possibility to transfer remittances, the prohibition of double taxation of salaries, the right to access to justice and the inclusion on the coverage of social security systems\textsuperscript{218}. Such configuration carries on one of the greatest impacts of the new legislation, since it extended the influence of labour-related human rights to the
whole orbit of the migratory phenomenon as a way to contend irregular migration in the ground of family reunification.

Along with such chart of entitlements, Decision 545 includes a called Program of Liberalization in order to make them operative under the compromise to progressively recognize freedom of circulation of Andean Migrant workers and consequently avoid the adoption of restrictive measures to the mobility of workers at the sub-region\textsuperscript{219}. Therefore, it contains concrete dates to implement specific measures, and a differential regime with transitory dispositions for the case of Venezuela as it follows\textsuperscript{220}:

- Starting from the enactment of the instrument (31 December 2010 for Venezuela): workers with employment contract may freely circulate around the region provided they fulfill the arranged requisites. Frontier workers may undertake temporal employments and circulate for a period less than 90 days extendable for 90 more days, once per year.

- At the latest 31 December 2003 (31 December 2011 for Venezuela): Modification of national legislations in order to include Andean nationals as part of the proportion of national workers who a company should hire, if considered.

- At the latest 31 December 2004 (31 December 2012 for Venezuela): Every Andean worker may undertake temporal employments and circulate for a period less than 90 days extendable for 90 more days, once per year.

- At the latest 31 December 2005 (31 December 2013 for Venezuela): Simplification of administrative procedures to change migratory status. Andean workers may change their migratory condition without having to leave the country where they are working, whether they have been formally contracted 180 days previous to application.

Since Venezuela withdrew from CAN at 2003, the special dispositions once designed to include the latter on the agenda of unrestricted circulation of workers went out of context, affecting the necessary development of a complementary regulation and the

\textsuperscript{219} “Artículo 20. Los Países Miembros se comprometen a: a) Reconocer la libertad de circulación de los trabajadores migrantes andinos dentro de la Subregión, sin perjuicio de lo dispuesto por la Decisión 503 y otras normas comunitarias; y, b) No adoptar nuevas medidas que restrinjan el derecho a la libre circulación y permanencia para los trabajadores migrantes andinos.”

\textsuperscript{220} “Artículo 21. A fin de instrumentar y asegurar la plena vigencia del principio de la libre circulación y permanencia de nacionales andinos con fines laborales bajo relación de dependencia en el territorio de los Países Miembros, se establece el siguiente programa.”
implementation of the Decision at the national level. Nevertheless, unilateral and bilateral efforts have been undertaken by CAN’s member States in order to save its relevance and applicability, provided its comprehensive treatment and advantages for the consolidation of the integration process in the Andean region.

Last but not least, CAN enacted two complementarily Decisions so as to compensate the effect of labour migration at the internal level, provided the existence of issues operatively linked to the conception of employment in conditions of dignity and the often variability at each country’s legislation. On the one hand, Decision 583 of 2004 containing the Andean Instrument on Social Security, and on the other, Decision 584 of 2004 on Safety and Sanitary Conditions at Work.

The former is the result of the revision of the previously commented Decision 113 of 1977, and regulates the due guarantee of social security services and acquired entitlements to Andean migrant workers and their family members independently of their nationality at any part of the region, in order to avoid the infringement of their social rights as a consequence of migration. For that purpose, it intends for the harmonization of internal legislations in order to recognize to Andean migrant workers located at any of the member States the same rights and obligations concerning social security in relation to the nationals of such countries.

The latter replaces Decision 547 of 2003, and seeks to promote and regulate actions to be undertaken at labour centers in order to diminish or eliminate potential damages to the employee’s safety and health through the application of measures of control and the development of activities for the prevention of risks derived from work.

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221 See SANTESTEVAN, Ana María (note 180), p.380.
222 Recently, CAN’s official website has informed about the reactivation of technical discussions concerning the definitive regulation of the Andean legal instruments on labour migration and social security. See http://www.comunidadandina.org/prensa/notas/np15-6-10.htm.
223 “Artículo 1. La presente Decisión tiene como objetivos: a) Garantizar a los migrantes laborales, así como a sus beneficiarios, la plena aplicación del principio de igualdad de trato o trato nacional dentro de la Subregión, y la eliminación de toda forma de discriminación; b) Garantizar el derecho de los migrantes laborales y sus beneficiarios a percibir las prestaciones de seguridad social durante su residencia en otro País Miembro; c) Garantizar a los migrantes laborales la conservación de los derechos adquiridos y la continuidad entre las afiliaciones a los sistemas de seguridad social de los Países Miembros; y d) Reconocer el derecho a percibir las prestaciones sanitarias y económicas que correspondan, durante la residencia o estada del migrante laboral y sus beneficiarios en el territorio de otro País Miembro, de conformidad con la legislación del país receptor.”
224 “Artículo 2. Las normas previstas en el presente Instrumento tienen por objeto promover y regular las acciones que se deben desarrollar en los centros de trabajo de los Países Miembros para disminuir o eliminar los daños a la salud del trabajador, mediante la aplicación de medidas de control y el desarrollo
Finally, under the framework of CAN several Decisions on the provision of services have been enacted, focusing on the mobility of persons who are not tied by an employment contract at the place where they are going to develop their professional activity. In that way, free circulation of services is a fundamental element for the consecution of an Andean common market since the need to regulate the practice of professionals and technicians is seen as one of its main challenges.\(^{225}\) Firstly, Decision 399 on 1997 on the international carriage of goods intended to create a legal basis to liberalize its supply and eliminate any restrictive measure to its optimal operation under the framework of an area of economic integration; secondly, Decision 439 of 1998 developed a general set of economic, social and legal conditions on the basis of which community norms for the liberalization of the provision of services at the region may be elaborated;\(^ {226}\) and thirdly, Decision 510 of 2001 contains an inventory of measures which can be considered restrictive to the provision of services at the region, including such related to labour or migratory issues whether they oppose to the principles of access to markets and national treatment.

2. The Common Market of the South MERCOSUR\(^ {227}\)

Along with CAN, the Common Market of the South –MERCOSUR– is the other regional integration block at South America. Created in 1991 by Argentina, Brazil, Paraguay and Uruguay through the signature of the Treaty of Asuncion, was later amended and updated by the 1994 Protocol of Ouro Preto, which gave it its final institutional structure. While Venezuela signed a membership agreement in 2006 after withdrawing from CAN, Bolivia, Chile, Ecuador, Colombia and Peru are associated

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\(^{225}\) See SANTESTEVAN, Ana María (note 180), p.382.

\(^{226}\) “Artículo 12. Los Países Miembros facilitarán el libre tránsito y la presencia temporal de las personas naturales o físicas, así como de los empleados de las empresas prestadoras de servicios de los demás Países Miembros, en relación con actividades que estén dentro del ámbito del presente Marco General, de conformidad con lo acordado por el Consejo Andino de Ministros de Relaciones Exteriores sobre la materia.”

\(^{227}\) See Annex II for an index of MERCOSUR’s regulation on the migratory phenomenon.

\(^{228}\) Although Venezuela’s membership is still under discussion, having opposition from some of the State members due to political issues.
members, so they have the capacity to contract and be bound under the framework of some of the block’s agreements.\(^{229}\)

Similarly to CAN, MERCOSUR has under its current structure an organ composed by the Ministers of Foreign Affairs of the member States –The Council of the Common Market– which is responsible of the formulation of **Decisions** containing agreements to be implemented by the parties and associates. Likewise, the Common Market Group is the executive organ and is in charge to implement the acts made by the Council through **Resolutions**.

Originally conceived as a plain trade agreement, MERCOSUR focused on the objective to reach economic integration at the region so the Treaty of Asuncion contained almost no references to social objectives –in this regard, CAN is more comprehensive and is equipped with a better setting to attend such types of common interests–.\(^{230}\)

Nevertheless, as Santestevan highlights, it is commonly agreed that every process that seeks to achieve an advanced level of integration, although born from a markedly economics-oriented perspective, will in time come to constitute an authentic common labour market.\(^{231}\) Moreover, MERCOSUR’s member States currently own more parity concerning their levels of development, marking a difference to CAN’s main obstacle for integration and therefore, the management of migration.

In this way, MERCOSUR has experienced different approaches to the issue of the migratory phenomenon, which have evolved from an initial recognition of the issue at the institutional level, going afterwards through a subsequent left-out to secondary levels of importance provided the re-formulation of its institutional scheme –an imperfect customs union that limited the ambition of integration– as disposted by the Protocol of Ouro Preto,\(^{232}\) and finally becoming one of the main points on the agenda

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\(^{230}\) As Maguid points out, the objectives of the Treaty of Asuncion and the mechanisms to achieve them have been essentially economic, commercial and customs-related, being directed at bringing about a process of integration that would in the future lead to the construction of a common market. See MAGUID, Alicia (note 177), p.268; SCHAEFFER, Kristi (note 229), p.833.

\(^{231}\) See SANTESTEVAN, Ana María (note 180), p.365.

\(^{232}\)”Reaffirming the principles and objectives of the Treaty of Asuncion and mindful of the need to give special consideration to the less developed countries and regions of Mercosur; Mindful of the forces for change inherent in any integration process and the consequent need to adapt the institutional structure of Mercosur to the transformations that have taken place”.”
for integration, going along with the enactment of the Socio-Labour Declaration in 1998\textsuperscript{233}.

In a first stage, the issue of migration was dealt within two working sub-groups –No. 6 on Custom Issues, and No. 11 on Labour Relations, Employment and Social Security–, which approached it from different angles\textsuperscript{234}. Under the orbit of the latter, Commission No. 3 was directly in charge of the issue of freedom of movement, so a programme (Cronograma de Leñas) developed a proposal on the circulation of production factors to be implemented in 1995. Unfortunately, there was great pressure from several governments since they considered the latter as a menace to regional stability and internal economic policies, deeply marked at that time by a neo-liberal approach. Thus, under such background, although the issue was recognized, unrestricted human mobility around the region never came to be a political or legal fact\textsuperscript{235}.

In a second phase, the pace of negotiations of the issue slowed at the institutional instances in charge, especially after the signing of the Protocol of Ouro Preto, according to which the free movement of goods and capital became MERCOSUR’s exclusive focus\textsuperscript{236}; intra-regional human mobility was then seen solely in terms of labour, not as a dynamic social process implying a variety of effects to the national structures and thus requiring deep adjustments but restricted to entail minimum rights for the workers at the region.

In that way, the 1998 Socio-Labour Declaration disposed a set of entitlements vindicating the general principle of non-discrimination, the equality between the rights of migrant and national workers, as well as the facilitation of mobility and protection of frontier workers\textsuperscript{237}. It represents a more expansive Statement of support for the consideration of labour rights in the context of the Treaty of Asuncion\textsuperscript{238}.

\textsuperscript{233} “Considerando que los Estados Parte del MERCOSUR reconocen, en los términos del Tratado de Asunción (1991), que la ampliación de las actuales dimensiones de sus mercados nacionales, mediante la integración, constituye condición fundamental para acelerar los procesos de desarrollo económico con justicia social”\textsuperscript{,}

\textsuperscript{234} See MAGUID, Alicia (note 177), p.268.

\textsuperscript{235} See SANTESTEVAN, Ana María (note 180), p.366-367.

\textsuperscript{236} See MAGUID, Alicia (note 177), p.269.

\textsuperscript{237} “Artículo 4. Trabajadores Migrantes y Fronterizos. 1.- Todo trabajador migrante, independientemente de su nacionalidad, tiene derecho a ayuda, información, protección e igualdad de derechos y condiciones de trabajo reconocidos a los nacionales del país en el que estuviere ejerciendo sus actividades, de conformidad con las reglamentaciones profesionales de cada país. 2.- Los Estados Partes se comprometen a adoptar medidas tendientes al establecimiento de normas y procedimientos comunes relativos a la
A third phase on the treatment of the migratory phenomenon came with the definitive link established between the process of integration and the development of regional social policies, in order to concretize a common model of development. In that way, it was understood that human mobility should be considered as an issue relevant to the convergence of political spaces—the sovereign States—into an emerging economic space, characterized by the dynamics associated with the factors of production. Therefore, several changes on the treatment of the migratory phenomenon were produced. On the one hand, through the creation of specialized forums for the discussion and formulation of public policies related to the issue—the Socio Labour Commission and the Specialized Migratory Forum; on the other, via the enactment of political documents and Community Decisions containing a comprehensive set of norms regulating different aspects of human mobility, as it follows.

a. Decisions on general mobility and residence of migrants

The initial regulatory approach to human mobility at MERCOSUR was through the enactment of two legal instruments on the free movement of persons across neighbouring borders—Decisions 18 of 1999 and 14 of 2000—in order to provide better benefits to the citizens of the member States who live in areas close to a border, furnishing them with documentation that enables them to pursue remunerative activities and to have access to education on either side of the border.
In that way, Decision 18 established the creation of an identity credential in order to allow the unrestricted and agile transit of people legally residing at zones near to a frontier of a State member. Complementarily, Decision 14 recognizes the importance of bi-lateral or multilateral agreements in order to regulate such scheme of transit, conceding thus autonomy to member States depending on the context of each border.

Subsequently, Decision 28 of 2002 endorsed the Agreement on the granting of residence to nationals of any of the State parties, plus the ones of Bolivia and Chile. Even if the instrument was primarily designed to attend the regularization of immigrants already residing at the member State’s territory, it contains fundamental provisions related to the admission of nationals of MERCOSUR wanting to reside at any of those countries, whether temporally –up to 2 years– or in a permanent way, upon the application process and the accreditation of financial means of subsistence.

Under the assumption that the regional policy of free circulation of persons is essential for the strengthening and deepening of the integration process, The Agreement establish the right of migrants to freely ingress to, egress from and move within the receiving country without prejudice of exceptional restrictions due to circumstances of public order or security, as well as to have equal access to a remunerated activity under

244 “Art 1. Los ciudadanos nacionales o naturalizados de un Estado Parte o sus residentes legales, nacionales o naturalizados de otro país del MERCOSUR, que se domicilien en localidades contiguas de dos o más Estados Parte, podrán obtener la credencial de Tránsito Vecinal Fronterizo (TVF). La calidad de residente legal, a los efectos de este convenio, se determinará en base a la legislación de cada Estado Parte. Art 2. La credencial de TVF permitirá a su titular cruzar la frontera, con destino a la localidad contigua del país vecino, mediante un procedimiento ágil y diferenciado de las otras categorías migratorias. La obtención de la credencial será de naturaleza voluntaria y no reemplazará al documento de identidad el que podrá ser, ocasionalmente, requerido al titular.”

245 “Primero. La definición sobre quiénes podrán beneficiarse con el Régimen de Tránsito Vecinal Fronterizo, en cuanto a nacionalidad de origen y situación migratoria en el país de residencia, se fijará mediante acuerdos bilaterales o trilaterales, según corresponda, entre los Estados Partes o Asociados, que posean fronteras comunes.”

246 “Artículo 1. Objeto. Los nacionales de un Estado Parte que deseen residir en el territorio de otro Estado Parte podrán obtener una residencia legal en este último, de conformidad con los términos de este Acuerdo, mediante la acreditación de su nacionalidad y presentación de los requisitos previstos en el artículo 4 del presente.”

247 “Artículo 4. Tipo de Residencia a otorgar y Requisitos. 1. A los peticionantes comprendidos en los párrafos 1 y 2 del artículo 3º, la representación consular o los servicios de migraciones correspondientes, según sea el caso, podrá otorgar una residencia temporaria de hasta dos años, previa presentación de la siguiente documentación”.

248 “Artículo 5. Residencia Permanente. La residencia temporaria podrá transformarse en permanente mediante la presentación del peticionante ante la autoridad migratoria del país de recepción, dentro de los noventa (90) días anteriores al vencimiento de la misma, y acompañamiento de la siguiente documentación (…) d) Acreditación de medios de vida lícitos que permitan la subsistencia del peticionante y su grupo familiar conviviente”.

249 See Decision 28/02, Preliminary Considerations.
the same conditions than nationals. Likewise, and perhaps one of the greatest achievements of MERCOSUR’s policy on migration, it consecrates a bill of rights for the immigrants and their families: equality of civil rights, family reunion, equal treatment before the law, right to transfer remittances, specific entitlements to the immigrant’s sons.

The agreement has been ratified by all countries with the exception of Paraguay, so given its multilateral nature, it won’t enter into force until it is ratified by all countries; therefore, as the case of the Decision related to the free movement of persons across neighbouring borders, countries have signed bilateral treaties to implement such regulations.

Another important product of the MERCOSUR organs concerning the management of labour migration is the signing of the Multilateral Agreement on Social Security,

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250 “Artículo 8. Normas Generales sobre Entrada y Permanencia. 1. Las personas que hayan obtenido su residencia conforme lo dispuesto en el artículo 4º y 5º del presente Acuerdo tienen derecho a entrar, salir, circular y permanecer libremente en territorio del país de recepción, previo al cumplimiento de las formalidades previstas por éste y sin perjuicio de restricciones excepcionales impuestas por razones de orden público y seguridad pública. 2. Asimismo, tienen derecho a acceder a cualquier actividad, tanto por cuenta propia, como por cuenta ajena, en las mismas condiciones que los nacionales de los países de recepción, de acuerdo con las normas legales de cada país.”

251 “Artículo 9. Derechos de los Inmigrantes y Miembros de sus Familias. 1. Igualdad de Derechos Civiles: Los nacionales de las Partes y sus familias que hubieren obtenido residencia en los términos del presente Acuerdo gozarán de los mismos derechos y libertades civiles, sociales, culturales y económicas de los nacionales del país de recepción, en particular el derecho a trabajar; y ejercer toda actividad lícita en las condiciones que disponen las leyes; peticionar a las autoridades; entrar, permanecer, transitar y salir del territorio de las Partes; asociarse con fines lícitos y profesarse libremente su culto, de conformidad a las leyes que reglamenten su ejercicio. 2. Reunión Familiar: A los miembros de la familia que no ostenten la nacionalidad de uno de los Estados Partes, se les expedirá una residencia de idéntica vigencia de aquella que posea la persona de la cual dependan, siempre y cuando presenten la documentación que se establece en el artículo 3, y no posean impedimentos. Si por su nacionalidad los miembros de la familia necesitan visación para ingresar al país, deberán tramitar la residencia ante la autoridad consular, salvo que de conformidad con la normativa interna del país de recepción este último requisito no fuere necesario 3. Trato Igualitario con Nacionales: Los inmigrantes que gozarán en el territorio de las Partes, de un trato no menos favorable que el que reciben los nacionales del país de recepción, en lo que concierne a la aplicación de la legislación laboral, especialmente en materia de remuneraciones, condiciones de trabajo y seguros sociales. 4. Compromiso en Materia Previsional: Las Partes analizarán la factibilidad de suscribir convenios de reciprocidad en materia previsional. 5. Derecho a Transferir Remesas: Los inmigrantes de las Partes, tendrán derecho a transferir libremente a su país de origen, sus ingresos y ahorros personales, en particular los fondos necesarios para el sustento de sus familiares, de conformidad con la normativa y la legislación interna en cada una de las Partes. 6. Derecho de los Hijos de los Inmigrantes: Los hijos de los inmigrantes que hubieran nacido en el territorio de una de las Partes tendrán derecho a tener un nombre, al registro de su nacimiento y a tener una nacionalidad, de conformidad con las respectivas legislaciones internas. Los hijos de los inmigrantes gozarán en el territorio de las Partes, del derecho fundamental de acceso a la educación en condiciones de igualdad con los nacionales del país de recepción. El acceso a las instituciones de enseñanza preescolar o a las escuelas públicas no podrá denegarse o limitarse a causa de la circunstancial situación irregular de la permanencia de los padres.” See MAGUID, Alicia (note 177), p.270.

252 For instance, Argentina has signed bilateral treaties with Brazil, Chile, Bolivia, Uruguay and Peru on such grounds. See Ibid., p.270.
approved by the Common Market Group in 1997, but only fully in force at 2005, when the last State member –Paraguay– ratified the instrument\textsuperscript{253}. The main relevance of such normative piece is the recognition of the entitlements associated with the provision of social security to every person –whether national of MERCOSUR or with permanent residence at any of its shaping countries– who is or has carried out a labour activity at the territory of any of the State members, including their families and other beneficiaries\textsuperscript{254}.

Likewise, it is important to relate to the issue of general free circulation of persons around the region, on which various achievements have taken place since the early years of MERCOSUR, provided the relevance of activities such as intra-regional tourism for the economic growth of the block. In that way, Resolutions 44 of 1994 and 75 of 1996 established the possibility for the citizens of the State members to freely circulate around such territory without the need to hold a passport, but a recognized national identity document\textsuperscript{255}. Subsequently, Decision 03 of 2006 focused on the unrestricted mobility of tourists –native of the State parties of MERCOSUR–, conceeding them the possibility to enter and stay at its territory without a Visa for a period of ninety days, although they kept the right of non-admission according to their internal laws\textsuperscript{256}.

Last but with undisputable importance for the whole region, the process initiated by Resolutions 44 and 75 was enlarged to MERCOSUR’s associates and applicants to full membership (Bolivia, Chile, Colombia, Ecuador, Peru and Venezuela). Thus, by virtue of Act 02 of 2007, the Ministers of Interior of the member States requested the revision of such Resolution in order to permit the inclusion of the latter to the agreement and

\textsuperscript{253} See SANTESTEVAN, Ana María (note 180), p.368.
\textsuperscript{254} “Artículo 2.- 1. Los derechos de Seguridad Social se reconocerán a los trabajadores que presten o hayan prestados servicios en cualquiera de los Estados Partes reconociéndoles, así como a sus familiares y asimilados, los mismos derechos y estando sujetos a las mismas obligaciones que los nacionales de dichos Estados Partes con respecto a los específicamente mencionados en el presente Acuerdo. 2. El presente Acuerdo también será aplicado a los trabajadores de cualquier otra nacionalidad residentes en el territorio de uno de los Estados Partes siempre que presten o hayan prestado servicios en dichos Estados Partes.”
\textsuperscript{255} “EL Grupo Mercado Común Resuelve: Art. 1. Reconocer la validez de los documentos de identificación personal de cada Estado Parte para el traslado de personas dentro de los países del MERCOSUR que se establecen en el Anexo a la presente Resolución.”
\textsuperscript{256} “Artículo 1. A los nacionales de las Partes que sean admitidos para ingresar al territorio de alguna de ellas en calidad de turistas, se les otorgará un plazo de permanencia de NOVENTA (90) días. Artículo 2. <Las Partes conservan el derecho de no admitir el ingreso de personas a sus territorios, de conformidad a lo establecido en sus legislaciones internas.”
therefore, create a comprehensive area of free circulation of persons at most of South America. As a result, Decision 018 of 2008 was enacted, permitting the recognition of national identification documents as valid for travel within the territory of MERCOSUR and the associated States.

b. Decisions on the provision of services at the region

Concerning the provision of services at MERCOSUR, two legal instruments have been enacted in order to create a common framework for the expansion of such activity, which is a relevant element for the economic policies on the circulation of factors of production; on the one hand, Decision 048 of 2000 about Visa exemptions between the State members, and on the other, Decision 016 of 2003 concerning the creation of the Visa MERCOSUR for service providers.

The first agreement cover specific categories of persons in order to exempt them from a Visa requirement, depending on the activity they develop; thus, it is applicable to persons belonging to particular types of migrants native to one of the State parties, such as artists, scientists, athletes, journalists, specialized technicians and high-skilled professionals, who seek entry into the territory of another member in order to pursue that activity. They can freely enter into the territories of the other State parties for a period of up to 90 consecutive days extendable to other 90, provided the presentation of valid travel documents.

However, the instrument is not applicable to self-employed workers or workers with an employment contract who are waged at the destination country, so the additional

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257 “Artículo. 1 Reconocer la validez de los documentos de identificación personal de cada Estado Parte y Asociado establecidos en el Anexo del presente como documentos de viaje hábiles para el tránsito de nacionales y/o residentes regulares de los Estados Partes y Asociados del MERCOSUR por el territorio de los mismos.”


259 “Artículo 2. - (…) 2. El presente Acuerdo no ampara a los trabajadores autónomos o trabajadores con vínculo laboral que reciban remuneración en el país de ingreso. 3. Los documentos vigentes para viajar son: 3.1 Para la República Federativa de Brasil, pasaporte o cédula de identidad expedida por los Estados, con vigencia nacional. 3.2 Para la República de Argentina, documento nacional de identidad o la cédula

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requisite of evidencing that the hiring was carried out at the country of origin is requested\textsuperscript{261}.

Additionally, the agreement may be suspended by the member States upon the occurrence of circumstances of public order of security, maintaining the presence of the sovereign paradigm on the understanding and management of the migratory phenomenon\textsuperscript{262}.

Complementary to Decision 048, the second Agreement intends to create a general framework for the ordered mobility of high skilled persons who permanently provide special services at the countries of the region\textsuperscript{263}. In this case, the nature activity requires more time to be fulfilled than the situations covered by the former legal instrument, so the Visa requisite is requested to waged workers for a period of 2 years extendable for the same period of time, giving the right to multiple entries and exits\textsuperscript{264}.

3. Perspectives of regional integration and human mobility in South America

a. The impact of regional norms concerning freedom of movement on national migratory laws\textsuperscript{265}

\textsuperscript{261} “Artículo 3. Para la entrada en el territorio de cualquiera de los Estados Partes, el extranjero deberá comprobar la condición indicada en el art. 1° y que la contratación haya sido en el país de origen o de residencia habitual.”

\textsuperscript{262} “Artículo 7. Cada Estado Parte podrá suspender total o parcialmente la ejecución del presente Acuerdo por razones de seguridad o de orden público. En tal caso, dicha suspensión deberá ser notificada inmediatamente a los demás Estados Partes, por vía diplomática.”

\textsuperscript{263} “Artículo 1. Aplicación. El presente Acuerdo se aplica a gerentes y directores ejecutivos, administradores, directores, gerentes-delegados o representantes legales, científicos, investigadores, profesores, artistas, deportistas, periodistas, técnicos altamente calificados o especialistas, profesionales de nivel superior.”

\textsuperscript{264} “Artículo 2. De la Visa. 1. Se exigirá la “Visa MERCOSUR” a las personas físicas nacionales, prestadoras de servicios de cualquiera de los Estados Partes, mencionados en el Artículo 1, que soliciten ingresar, con intención de prestar, temporalmente, servicios en el territorio de una de las Partes bajo contrato para la realización de actividades remuneradas (en adelante “contrato”) en el Estado Parte de origen o en el Estado Parte receptor, para estadias de hasta 2 (dos) años, prorrogables una vez por igual periodo, hasta un máximo de 4 (cuatro) años, contados a partir de la fecha de entrada en el territorio del Estado Parte receptor. 2. La “Visa MERCOSUR” tendrá una vigencia vinculada a la duración del contrato, respetando el límite temporal máximo fijado en el párrafo anterior. 3. La concesión de la “Visa MERCOSUR” no estará sometida a ninguna prueba de necesidad económica ni a cualquier autorización previa de naturaleza laboral y estará exenta de cualquier requisito de proporcionalidad en materia de nacionalidad y de paridad de salarios. 4. La Visa MERCOSUR dará derecho a múltiples entradas y salidas.”

\textsuperscript{265} See ANNEX III to confront the conclusions here exposed with the internal legislation of each country.
National legislations regulating the migratory phenomenon in South America are mostly recent, given that with the exception of the 1980’s Brazilian regulation, the laws defining the admission, expulsion and status of immigrants were enacted between 1991 and 2008\textsuperscript{266}. Since such period coincides with the consolidation of the community regulations on human mobility at the sub-regional blocks, it is possible to infer that the current configuration of intern laws is influenced by the legal outcomes reached by the process of integration. Consequently, there can be established a series of patterns concerning the way on which intra-regional migration has been assumed by the internal legal system of each country part of CAN and MERCOSUR.

Regarding the normative structure, five common parameters on which national norms are arranged could be identified: a) consecration of a sovereign paradigm regarding the regulation of the migratory phenomenon; b) formulation of policies for the encouragement of migration under certain grounds; c) establishment of formal requisites for the admission of non-nationals; d) Express formulation of causes for non-admission; and e) the exceptional recognition of international law as a hierarchically superior source of regulation.

- Consecration of the sovereign paradigm

All the national regulations studied expressly consecrate the sovereign paradigm regarding the regulation of the migratory phenomenon. Following the universal tendency to assume it as the last bastion of internal sovereignty, they establish that control over the admission, permanence and expulsion of foreigners is a prerogative of the State based on a discretional selection of persons allowed to assume a position on its orbit of influence. On this ground, thus, the prevalence of State’s exclusive and excluding regulatory capacity is kept as a guarantee for their discretional control. As a matter a fact, their mere existence represents such idea.

As illustrative examples, such idea is literally consecrated in the case of Colombia, and is assumed as an obligation at Bolivian law. On the other hand, Brazilian and Chilean regulations establish an alternative policy through the insertion of a general clause of admission which is framed by broad exceptions –such as public order, national interest

\textsuperscript{266} As it follows: Argentina (2003); Bolivia (1996); Chile (1996); Colombia (2004); Ecuador (2004); Paraguay (1996); Peru (1991); Uruguay (2008); Venezuela (2004).
and national security—, allowing at the end the discreional action of governments when deciding who to admit or expel.

- **Policies concerning the encouragement of migration**

The common pattern concerning the encouragement of migration is to favor and simplify the ingress and permanence of specific categories of individuals, similar to the formulation found on community norms on free circulation and provision of services; tourists, students and persons either owning certain types of educational and technical qualifications which might be useful for the interests of the country, or having the intention to invest on activities to be developed at such State. Additionally, Bolivian law points out the importance of migration as a factor for economic and social development and provides land-incentives for immigrants. Likewise, Paraguay encourages migration for the colonization of priority areas for the development of agricultural activities.

In contrast with the previous cases of marked selectivity, the case of Argentina and Uruguay is especially relevant whether being the States with the newest enacted legislations in the continent, they have the most advanced and proactive norms in terms of the recognition of migration as a right inherent to the human being. Hence, in order to conduct the interpretation and application of migratory laws, both regulations formulated the following legal principles: respect for the human rights of migrants; family reunification as an ultimate aim; promotion of policies for the integration of immigrants at the receiving society; and equality and non-discrimination, especially concerning access to employment.

- **Formal requisites for admission**

Provided the general policy concerning the encouragement of migration, the ingress of a non-national to the territory of the State is *a priori* conditioned to the possession of valid travel documents and a visa, which is issued depending both on the motivation of the trip and the activities to be carried out by the person. Based on such grounds, national legislations have established a system of personal categorization to frame the cases where a person is allowed to enter and stay at the country, thus determining the types of visas to be granted and their specific conditions of operation; in that way, visas are usually framed on the categories of *resident* (permanent or temporal), *non-resident*, and certain covering specific cases.
Causes for non-admission

Complementing the visa typology, and provided the State’s capacity of taking discretionary decisions on entrance, national legislations have established two kinds of causes for the non-admission of foreigners. On the one hand, regulations contemplate generic motivations to impede the ingress of persons such as the existence of a threat to public order, the preservation of national interests and the maintenance of security. In that way, for example, Colombian legislation points out as general criteria the discouragement of the permanence of non-nationals compromising the working opportunities of nationals and the dissuasion of the presence of groups of migrants who due to their amount or location might be a threat to national interests or security.

On the other hand, specific situations for non-admission are pointed out: possession of false or adulterated documents; previous expulsion from another country; criminal antecedents or the commission of acts contrary to human rights and international humanitarian law\(^{267}\); avoidance of migratory controls; illness or insanity; unaccompanied minors or without authorization to circulate; the absence of financial means to support basic expenditures at the receptor country; and mendicancy or lack of profession\(^{268}\).

Exceptional recognition of international law as a source of regulation

Finally, it is relevant to highlight how national legislations make reference to a proactive relation relation between intern legislations and international law in the ground of migration, even if the influence of the sovereign paradigm on the State’s exclusive and excluding regulative capacity is an undisputable juridical fact. Hence, the exceptional recognition of international law as a source of regulation concerning the management of migration can be appreciated twofold;

Firstly, most regulations contain a general clause that formulates an assumption on international law as an exceptional source of regulation whether the application of national laws has to be in accordance with the international agreements signed by the State on specific grounds. In that way, it is important to bring out the fact that all South American nations have become parties to both universal and regional instruments on human rights, as well as to other international legal instruments managing labour

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\(^{267}\) This one specifically inserted on the legislation of Argentina and Uruguay.

\(^{268}\) This last condition is proper of Paraguayan legislation.
migration such as ILO’s conventions on the issue. Likewise, the Inter-American Court of Human Rights issued a Consultative Opinion on the juridical condition and rights of the undocumented migrants\(^{269}\), which has to be taken into account as a relevant standard for the whole region.

The latter implies that national legislations on the management of migration have to take into account such standards as principles of interpretation and application. Going further, Argentinean and Uruguayan laws expressly consecrate the respect of human rights standards and the honour of international agreements on the field as general principles for the understanding of the internal norms.

Secondly, national legislations recognize and encourage the signing of bilateral or multilateral agreements among the countries of the region in order to exclude the visa requisite for tourists, and regulate neighbouring-border transit and migrant workers’ mobility\(^{270}\).

According to the International Organization for Migration’s *World Migration Report 2008*, bilateral cooperation on temporary labour migration may aim to fulfil various economic, social and political purposes and take a number of different approaches\(^{271}\). Likewise, the bilateral level offers a wide range of possibilities for cooperation, including very concrete partnerships to enable the movement of targeted contingents of migrant workers\(^{272}\).

In that way, between 1991 and 2000, 35 bilateral agreements were signed between Latin American countries –5 for regularization, 5 labour conventions, 13 for free circulation and 12 for return—. During the same period, 47 bilateral agreements were signed between Latin American countries and other countries –nine for re-admission, one for regularization, five labour agreements, 18 for free circulation, 11 for return and three for migrant protection—\(^{273}\).

\(^{269}\) See *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, specially on the application of the principle of equality and non-discrimination to migrants (par. 111-127), the rights of migrant workers (par. 128-160) and the determination of State obligations when determining migratory policies in light of the international instruments for the protection of human rights (par. 161-172).

\(^{270}\) The latter issue is specifically inserted on the Paraguayan law.


Last but not least, special mention has to be made to the case of Argentina, since its migratory law concretely refers to the celebration of international agreements for the development of measures conducting to the ultimate objective of freedom of movement on the MERCOSUR territory, as well as to Venezuelan law, which recognizes regional integration agreements as a complementary framework and a source of regulation.

b. Towards the Union of South American Nations – UNASUR

After an initial phase of integration characterized by the intend to group all the South American nations (LAFTA), the process experienced a shift on its approach provided the fragmentation of the scheme into smaller blocks with similar levels of development and geographical proximity (CAN and MERCOSUR). Nevertheless, the tendency in the last years has been the regroup of such initiatives; on the one hand, through the reciprocal inclusion of the members States of a block as associates to the other, extending thus the possibility to enact regulation on mobility covering the whole region; on the other, the merging of the sub-regional processes into a new institutional mechanism –the Union of South American Nations, which has included the migratory phenomenon as a priority issue on its economic and social agenda.

Consequently, UNASUR has positioned the management of intra-regional migration and specifically free movement of persons as a topic that requires a comprehensive understanding due to its various facets and effects both for the development of the region and for the respect of human rights. Therefore, its 2008 Constitutive Treaty contemplates several objectives associated to the migratory phenomenon such as the

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274 Such as MERCOSUR’s Decision 018 of 2008 on the exemption of Visas. See MAGUID, Alicia (note 177), p. 270.
275 UNASUR was conformed due to the commitment of the presidents of the region, and has the Cuzco Declaration of 2004 as its foundational document, even if only until 2008 it was going to be officialised through the signing of its Constitutional Treaty at Brasilia.
276 “Article 2. Objective. The objective of the South American Union of Nations is to build, in a participatory and consensual manner, an integration and union among its peoples in the cultural, social, economic and political fields, prioritizing political dialogue, social policies, education, energy, infrastructure, financing and the environment, among others, with a view to eliminating socioeconomic inequality, in order to achieve social inclusion and participation of civil society, to strengthen democracy and reduce asymmetries within the framework of strengthening the sovereignty and independence of the States.”
277 The Quito Presidential Declaration of 2009 established on that regard: “25. Reafirman su compromiso de avanzar en la construcción de la ciudadanía suramericana, abordando el tema de la migración con un enfoque integral y comprensivo, bajo el respeto irrestricto de los Derechos Humanos de los migrantes y sus familias, conforme lo dispuesto en la Declaración de Cochabamba, de diciembre de 2006. Para ello, es necesario reforzar la cooperación y coordinación regional entre los estados miembros de la UNASUR y la Conferencia Sudamericana de Migraciones, a fin de construir un enfoque común regional que facilite la circulación de personas.”
consolidation of a South American citizenship\textsuperscript{278}, universal access to social security and health services, and the cooperation on issues of migration based on a holistic approach\textsuperscript{279}.

In that order, the presidents of South America signed in 2006 an agreement on the exemption from the requirement of a Visa for tourism and consequently, the recognition of national identity documents for the entrance and transit within their respective territories, even before the Constitutive Treaty was enacted in 2008, which shows the priority which was given to the management of migration at UNASUR\textsuperscript{280}.

Although is early to preview either the success or failure of this new integration scheme, what is undeniable is that UNASUR represent a truly regional consensus, identified migration as a priority, and adopted a comprehensive approach to the phenomenon which has permitted an initial intend of regulation. The experience accumulated by CAN and MERCOSUR, as well as the political influence of the regional consultative processes, will be definitive to its permeability across time.

c. The role of regional consultative processes on the management of human mobility in South America

As an inter-State forum, Regional Consultative Processes (RCP’s) appear as a necessary political complement to the tough task of regulate the migratory phenomenon, since most of the obstacles international law has experienced to accomplish such assignment

\textsuperscript{278} "Article 3. Specific Objectives. The South American Union of Nations has the following objectives: (...) j) The consolidation of a South American identity through the progressive recognition of the rights of nationals of a Member State resident in any of the other Member States, with the aim of attaining a South American citizenship."

\textsuperscript{279} "Article 3. Specific Objectives. The South American Union of Nations has the following objectives: (...) k. Universal access to social security and health services; l. Cooperation on issues of migration with a holistic approach, based on an unrestricted respect for human and labour rights, for migratory regularisation and harmonisation of policies."

\textsuperscript{280} "Article 2. - 1. Nationals from the Parties shall be allowed to enter, transit and leave the territory of the other parties as tourists without a Visa or passport by presenting a valid national identification document (...). 2. The rights and obligations of the nationals travelling as tourists under an identity document shall be the same as the rights and obligations of nationals travelling under a passport. 3. The exemption from the use of passport does not apply to the parties whose internal legislation and other international obligations forbid this practice. 4. The Parties which have internal limitations to the prompt elimination of the requirement for tourist visas from all the other parties commit to extend said facilities as soon as possible. (...) 7. Nationals of one Party shall be allowed to stay in the other Party’s territory, as tourists, for a period up to 90 (ninety) days, renewable according to the internal rules of each Party. (...) Article 7. This Agreement does not authorize nationals of one Party to engage in any gainful or for profit activity, occupation or professional work, nor to establish residence in the territory of another Party, except when the internal legislation of the host State so permits"
come from unilateral actions intended to weaken global law-making processes. Its main purpose is to discuss migration-related issues in a cooperative manner with a view to reaching a common understanding of, and where possible, effective solutions for regional migration management.\textsuperscript{282} While the evaluation of regional consultative processes is difficult to conduct on account of their informal and non-binding character, they have undoubtedly been helpful in strengthening interstate cooperation in the management of international migration.\textsuperscript{283}

Nowadays, the South American region is immersed on two RCP’s; on the one hand, the South American Conference on Migration,\textsuperscript{284} and on the other, Ibero-American Forum on Migration and Development, which ensembles the latter with the Regional Conference on Migration –involving the countries of Central and North America– and Spain into a hemispheric forum of discussion and formulation of policies related to the issue.\textsuperscript{285}

The outcomes of South American RCP’s as natural instances for the multilateral treatment of international migration can be seen twofold;

- Influence on the formulation of public policies, as well as on amendment or enactment of national laws in order to harmonize internal legal systems to the general standards on the management of migration that have been formulated at the heart of the RCP’s meetings.

- Persuade the signature of bilateral and multilateral agreements between countries –whether outside of the spectrum or under the framework of the sub-

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\textsuperscript{281} Such as the low ratification rate of the 1990 UN Convention on Migrant Workers.

\textsuperscript{282} As main strengths, RCP’s constitute a structure for dialogue, exchange of information and expertise without requiring a government to enter into formal commitments; States interact on equal terms; and participation is extended to non-State actors for a more comprehensive and inclusive discussion on the issue. See IOM, World Migration Report 2008, p.368.

\textsuperscript{283} Ibid., p.362.

\textsuperscript{284} Created in 1999, is considered both as a mechanism of multilateral dialogue and the main political instance on the management of migration at UNASUR’s integration process. It has two permanent secretaries (the technical assumed by IOM and the pro-tempore, in charge of the State that is organizing the annual meeting) and gathers once per year to discuss the evolution of the goals and political objectives inserted in the Plan of Action for the Management of Migrations at South America (Plan de Acción de Quito, 2002). Likewise, it formulates annual Declarations containing recommendations to the States associated to the topics discussed on each meeting.

\textsuperscript{285} Created in 2006 at the Ibero-American Summit that took place in Montevideo, it gathers every two years to analyze the experience of each RCP and determine the evolution of the regional policies on the pairing migration and development, which is the main focus of its own Plan of Action (Plan de Acción de Cuenca, 2008).
regional integration blocks— in order to include new common regulations at the regional level, since they crystallize standards previously discussed at the consultative forum.\textsuperscript{286}

IV. CONCLUSIONS

Even though the sovereign paradigm keeps and will conserve a privileged place on the management of the migratory phenomenon, it can be affirmed that the relation between the individual and the State has evolved to acknowledge the preponderance of the former on the Global System.

In that order, the current structure of International Law is equipped with structural and substantive tools to complement national legislations on the achievement of common interests, such as the ordered and safe movement of people—both as economic agents as well as subjects of rights and obligations—across borders. Moreover, said architecture is influenced by an ethic approach according to which the respect of individual self-determination and non-discrimination are to influence its setting, so any pretention to anyhow degrade migrants is out of place.

It was seen that at the regional level, the most significant outcomes have been achieved when the management of migration has been linked to broader economic integration endeavours supported by well-developed institutional frameworks, since it is seen as a dynamic tool for the distribution of economic benefits at a supra-national level, as well as a means to orderly equilibrate economic distortions.\textsuperscript{287}

In this way, a human rights approach for the protection of migrant’s entitlements should take advantage of said structural background and leverage its aspirations. Thus, by providing a normative framework, such regional undertakings create predictability and a legal basis for safeguarding the rights of migrants.\textsuperscript{287}

Both the Andean Community and MERCOSUR have the potential to be successful and develop a comprehensive legal framework to manage migration; they have been through


a process of institutional strengthening which may contribute to the unification of State’s behaviour provided the enactment of binding community law, and are about to start a new stage on the integration process under which the emergence of a new block gathering the latter is imminent. Nevertheless, the greatest obstacle against integration – particular political interests – is still there, so the challenge for the next decades is on the table.

To be the subject of further studies, the author would like to refer to the following issues; firstly, the impact of what has been acknowledged as the migration-development nexus\(^{288}\) under the framework of regional migratory policies and norms, since such equivalence is present since the issue was initially recognized as a shared interest to the region; secondly, the influence of consultative processes on the regional law-making procedures concerning the management of migration, provided the permanent dialogue between such forum of discussion and the sub-regional instances that deal with the issue; and thirdly, the potential of South American internal systems to absorb community law in order to include new legislation or adapt the existing one to the regional position on the topic.

Finally, beyond any pretention to preview a result on the capability of regional integration processes to effectively regulate migration or to establish a way on which such schemes should proceed to become efficient, the main intention of this study was to illustrate its potential through the South American case, and consequently raise a general reflexion on how law, as the outcome of social interactions, has a vital task on the preservation of fundamental values, whether universal or regional.

# ANNEXES

## ANNEX I. ANDEAN COMMUNITY - LEGISLATION ON MIGRATION

<table>
<thead>
<tr>
<th>ISSUE</th>
<th>REFERENCE/TYPE OF INSTRUMENT</th>
<th>CONTENT</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>GENERAL MOBILITY</strong></td>
<td>Decisión 397 de 1996 – Tarjeta Andina de Migración (TAM)</td>
<td>Andean Migration Card (unification of information systems on migratory movements)</td>
</tr>
<tr>
<td></td>
<td>Decisión 503 de 2002 – Reconocimiento de Documentos Nacionales de Identificación</td>
<td>Recognition of travel documents</td>
</tr>
<tr>
<td></td>
<td>Decisión 603 de 2004 – Participación de Venezuela en la Decisión 503</td>
<td>Recognition of travel documents in the specific case of Venezuela (differential regime)</td>
</tr>
<tr>
<td></td>
<td>Resolución 527 de 2001 – Reglamentación de la Decisión 397</td>
<td>Regulation of Decision 397 on the Andean Migration Card</td>
</tr>
<tr>
<td><strong>LABOUR MIGRATION</strong></td>
<td>Decisión 113 de 1977 - Instrumento Andino de Seguridad Social</td>
<td>Andean Instrument on Social Security</td>
</tr>
<tr>
<td></td>
<td>Decisión 116 de 1977 - Instrumento Andino de Migración Laboral</td>
<td>Andean Instrument on Labour Migration</td>
</tr>
<tr>
<td></td>
<td>Decisión 545 de 2003 – Instrumento Andino de Migración Laboral</td>
<td>Andean Instrument on Labour Migration</td>
</tr>
<tr>
<td></td>
<td>Decisión 583 de 2004 – Instrumento Andino de Seguridad Social</td>
<td>Andean Instrument on Social Security</td>
</tr>
<tr>
<td></td>
<td>Decisión 584 de 2004 – Instrumento Andino de Seguridad y Salud en el Trabajo</td>
<td>Andean Instrument on Safety and Health Conditions at Work</td>
</tr>
<tr>
<td><strong>PROVISION OF SERVICES</strong></td>
<td>Decisión 399 de 1997 – Transporte Internacional de Mercancías por Carretera</td>
<td>International carriage of goods by road</td>
</tr>
<tr>
<td></td>
<td>Decisión 439 de 1998 – Marco General de Principios y Normas para la Liberalización del Comercio de Servicios en la Comunidad Andina</td>
<td>General Framework of Principles and Norms to the Liberalization of the Provision of Services at the Andean Community</td>
</tr>
<tr>
<td></td>
<td>Decisión 510 de 2002 – Adopción de Inventario de Medidas restrictivas del Comercio de Servicios</td>
<td>Inventory of Restrictive Measures to the liberalization of the Provision of Services at the Andean Community</td>
</tr>
</tbody>
</table>
## ANNEX II. MERCOSUR - LEGISLATION ON MIGRATION

<table>
<thead>
<tr>
<th>Issue</th>
<th>Reference/Type of Instrument</th>
<th>Content</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>General Mobility</strong></td>
<td><strong>Decisión 018 de 1999 - Acuerdo sobre Tránsito Vecinal Fronterizo entre los Estados Parte del MERCOSUR</strong></td>
<td>free movement of persons across neighbouring borders</td>
</tr>
<tr>
<td></td>
<td><strong>Decisión 014 de 2000 - Reglamentación del Régimen de Tránsito Vecinal Fronterizo entre los Estados Parte del MERCOSUR</strong></td>
<td>free movement of persons across neighbouring borders (regulation of Decision 018)</td>
</tr>
<tr>
<td></td>
<td><strong>Decisión 03 de 2006 - Acuerdo para la Concesión de un Plazo de Noventa Días a los Turistas Nacionales de los Estados Partes del MERCOSUR y Estados Asociados</strong></td>
<td>Agreement on the granting of a ninety-days period to national tourists of the State members of MERCOSUR</td>
</tr>
<tr>
<td></td>
<td><strong>Decisión 18 de 2008 - Acuerdo sobre Documentos de Viaje de los Estados partes de MERCOSUR y Estados Asociados</strong></td>
<td>Agreement on travel documents</td>
</tr>
<tr>
<td></td>
<td><strong>Resolución 75 de 1996 - Documentos de cada Estado Parte que Habilitan el Tránsito de Personas en el MERCOSUR</strong></td>
<td>Agreement on travel documents (previous to the inclusion of Associates)</td>
</tr>
<tr>
<td><strong>Labour Migration</strong></td>
<td><strong>Decisión 19 de 1997 - Acuerdo Multilateral de Seguridad Social del Mercado Común del Sur</strong></td>
<td>Multilateral Agreement on Social Security</td>
</tr>
<tr>
<td></td>
<td><strong>Decisión 028 de 2002 - Acuerdo de Residencia para Nacionales de los Estados partes del MERCOSUR, Bolivia y Chile (Acuerdos 13 y 14 de 2003)</strong></td>
<td>Agreement on the granting of residence to nationals of any of the State parties, plus Bolivia and Chile</td>
</tr>
<tr>
<td><strong>Provision of Services</strong></td>
<td><strong>Decisión 048 de 2000 – Acuerdo sobre Exención de Visas entre los Estados Partes del MERCOSUR</strong></td>
<td>Visa Exemption for service providers</td>
</tr>
<tr>
<td></td>
<td><strong>Decisión 016 de 2003 – Acuerdo para la creación de la Visa MERCOSUR</strong></td>
<td>Creation of Visa MERCOSUR for service providers</td>
</tr>
</tbody>
</table>
## NATIONAL LEGISLATIONS ON MIGRATION

### ARGENTINA

#### MEMBERSHIP TO REGIONAL INTEGRATION BLOCKS

<table>
<thead>
<tr>
<th>Block</th>
<th>Membership</th>
</tr>
</thead>
<tbody>
<tr>
<td>MERCOSUR</td>
<td>Andean Community of Nations (Associate since 2005)</td>
</tr>
<tr>
<td>UNASUR</td>
<td></td>
</tr>
</tbody>
</table>

#### NATIONAL LEGISLATION

Ley 25.871 Política Migratoria Argentina, 17 de diciembre 2003

#### SOVEREIGN PARADIGM

"Artículo 1 - La admisión, el ingreso, la permanencia y el egreso de personas se rigen por las disposiciones de la presente ley y su reglamentación.”

#### REQUISITES FOR ADMISSION

<table>
<thead>
<tr>
<th>Provision</th>
<th>Content</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. 20-24</td>
<td>Types of admission and permanence: permanent; temporary (migrant worker, investor, pensionist, scientific and specialized personnel, academics, artists and athletes, medical patients, asylum seekers and refugees, nationals of MERCOSUR); transitory (tourists, transit, border population, crew members, seasonal workers).</td>
</tr>
<tr>
<td>Art. 2</td>
<td>Definition of migrant: every foreigner who wishes to ingress, transit, reside or establish either definitively or transitory at the country.</td>
</tr>
<tr>
<td>Art. 3</td>
<td>General principles on the migratory policy: respect of human rights of migrants; family reunification; due process; respect of international agreements of which Argentina is party; insertion and labour integration policies; facilitate the ingress of people to encourage tourism, trade, scientific activities and international relations.</td>
</tr>
<tr>
<td>Art. 4</td>
<td>Right to migration as essential and inherent to human being</td>
</tr>
</tbody>
</table>

#### ENCOURAGEMENT OF MIGRATION

<table>
<thead>
<tr>
<th>Art. 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right to migration as essential and inherent to human being</td>
</tr>
</tbody>
</table>

#### NON-ADMISSION

<table>
<thead>
<tr>
<th>Art. 29</th>
</tr>
</thead>
<tbody>
<tr>
<td>Impediments for admission: present false or adulterated documents; previous expulsion; criminal antecedents or sentence; have taken part in acts contrary to human rights and international humanitarian law; avoidance of migratory control.</td>
</tr>
</tbody>
</table>

#### EXCEPTIONAL RECOGNITION OF INTERNATIONAL LAW AS SOURCE OF REGULATION

<table>
<thead>
<tr>
<th>Specific cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agreements to exclude visa requisite for tourists as fixed by international agreement (Art. 10)</td>
</tr>
<tr>
<td>Art. 28</td>
</tr>
<tr>
<td>Recognition of bilateral agreements for the regulation of specific trans-border issues, as well as for the development of measures conducting to the ultimate objective of freedom of movement on the MERCOSUR territory.</td>
</tr>
</tbody>
</table>
| Membership to Regional Integration Blocks | Andean Community of Nations  
| | MERCOSUR (Associate)  
| | UNASUR |
| National Legislation | Régimen Legal de Migración - Decreto Supremo No. 24423 de 1996 |
| Sovereign Paradigm | “CONSIDERANDO Que es obligatoriedad del Estado regular el movimiento de ingreso y salida de personas al y desde el territorio nacional, así como las condiciones para la permanencia de extranjeros en éste, para lo que se hace necesario determinar los organismos y medios que permitan controlar el movimiento migratorio y turístico.” |

| Requisites for Admission | Provision | Content |
| | Art. 26 | Visa |
| | Art. 27 (Types of Visas) | Diplomatic, official, transit, tourism, specific objective, student, multiple, courtesy. |
| | Art. 34-36 (Authorized permanence) | Temporal; permanent; asylum seekers and refugees. |

| Encouragement of Migration | Art. 1 | Migration is a relevant factor to economic and social development |
| | Art. 5 | Definition of migrant under the grounds of economic capacity or special qualifications |
| | Art. 6 | Types of migrants |
| | Art. 7 | Lands regime benefits conceded to migrants |

| Non-admission | Art. 46 | Impediments for non-admission: false documentation, criminal antecedents, previous expulsion, insanity, minor without authorization, persons not accrediting financial means to settle expenditures. |

| Exceptional Recognition of International Law As Source of Regulation | Specific cases | Agreements to exclude visa requisite (Art. 26, 26(d)). |
| **Brazil** |
|-----------------|-----------------|
| **Membership to Regional Integration Blocks** | MERCOSUR  
Andean Community of Nations (Associate since 2005)  
UNASUR |
| **National Legislation** | Ley No. 6815, de 19 de agosto de 1980 |
| **Sovereign Paradigm** | “Art. 1. Em tempo de paz, qualquer estrangeiro poderá, satisfeitas as condições desta Lei, entrar e permanecer no Brasil e dele sair, resguardados os interesses nacionais.” |

<table>
<thead>
<tr>
<th><strong>Requisites for Admission</strong></th>
<th><strong>Provision</strong></th>
<th><strong>Content</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Visa</td>
<td>Art. 4</td>
<td>Types of visas: transit, tourism, temporal, permanent, courtesy, official, diplomatic</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Encouragement of Migration</strong></th>
<th><strong>Provision</strong></th>
<th><strong>Content</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Art. 2,3</td>
<td>Policy of general authorization, but under the premise of protecting national interests (national security, institutional organization, political, social and economic interests, and defence of national workers).</td>
</tr>
<tr>
<td></td>
<td>Art. 28</td>
<td>Dispositions on asylum</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Non-admission</strong></th>
<th><strong>Provision</strong></th>
<th><strong>Content</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Art. 7</td>
<td>Impediments for admission: minor without authorization; threat to public order or national interests; previous expulsion from territory; criminal antecedents; insanity.</td>
</tr>
</tbody>
</table>

<p>| <strong>Exceptional Recognition of International Law as Source of Regulation</strong> | <strong>Specific cases</strong> | Agreements to exclude visa requisite for tourists as fixed by international agreement (Art. 10) |</p>
<table>
<thead>
<tr>
<th>MEMBERSHIP TO REGIONAL INTEGRATION BLOCKS</th>
<th>MERCOSUR</th>
<th>Andean Community of Nations (Previous member until 1976, Associate since 2006)</th>
</tr>
</thead>
<tbody>
<tr>
<td>NATIONAL LEGISLATION</td>
<td>UNASUR</td>
<td>Decreto Ley 1.094 de 1975 Normas sobre Extranjeros en Chile (modificado por la ley 19.476 de 1996)</td>
</tr>
<tr>
<td>SOVEREIGN PARADIGM</td>
<td></td>
<td>“Artículo 1°.- El ingreso al país, la residencia, la permanencia definitiva, el egreso, el reingreso, la expulsión y el control de los extranjeros se regirán por el presente decreto ley; Artículo 2°.- Para ingresar al territorio nacional los extranjeros deberán cumplir los requisitos que señala el presente decreto ley, y para residir en él deberán observar sus exigencias, condiciones y prohibiciones. Por decreto supremo podrá prohibirse el ingreso al país de determinados extranjeros por razones de interés o seguridad nacionales.”</td>
</tr>
<tr>
<td>REQUISITES FOR ADMISSION</td>
<td>PROVISION</td>
<td>CONTENT</td>
</tr>
<tr>
<td>Art. 5</td>
<td>Visa</td>
<td>Types of admission and permanence: Tourists; residents (worker, student, temporary, asylum seekers and refugees); official residents; immigrants (subject to Law No. 69 of 1983).</td>
</tr>
<tr>
<td>Art. 4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ENCOURAGEMENT OF MIGRATION</td>
<td></td>
<td>No disposition concerning Chile’s migratory policy</td>
</tr>
<tr>
<td>NON-ADMISSION</td>
<td>Art. 2</td>
<td>Prohibition to ingress on the grounds of national interest or security through the enactment of a supreme decree.</td>
</tr>
<tr>
<td>Art. 15</td>
<td>Impediments for admission: Agitators; lack of economic means or activity to satisfy expenditures; criminal antecedents; insanity; previous expulsion.</td>
<td></td>
</tr>
<tr>
<td>Art. 16</td>
<td>Other situations for non-admission: Minor without authorization; previous expulsion from other country; criminal sentence.</td>
<td></td>
</tr>
<tr>
<td>EXCEPTIONAL RECOGNITION OF INTERNATIONAL LAW AS SOURCE OF REGULATION</td>
<td>Specific cases</td>
<td>Agreements to exclude visa requisite for tourists (Art. 45); Transit across borders of neighbour countries without visa requirement (Law 19.581 of 1998).</td>
</tr>
<tr>
<td><strong>COLOMBIA</strong></td>
<td></td>
<td></td>
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<tr>
<td>---------------------------------------------</td>
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</tr>
<tr>
<td><strong>MEMBERSHIP TO REGIONAL INTEGRATION BLOCKS</strong></td>
<td>Andean Community of Nations</td>
<td></td>
</tr>
<tr>
<td></td>
<td>MERCOSUR (Associate)</td>
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<tr>
<td></td>
<td>UNASUR</td>
<td></td>
</tr>
<tr>
<td><strong>NATIONAL LEGISLATION</strong></td>
<td>Ley de Extranjería, Decreto 4000/2004</td>
<td></td>
</tr>
<tr>
<td><strong>SOVEREIGN PARADIGM</strong></td>
<td>“Artículo 1. Es competencia discrecional del Gobierno Nacional, fundada en el principio de la soberanía del Estado, autorizar el ingreso y la permanencia de extranjeros al país. (…) Sin perjuicio de lo dispuesto en los tratados internacionales, el ingreso, permanencia y/o salida de extranjeros del territorio nacional, se regirá por las disposiciones de este decreto y por las políticas establecidas por el Gobierno Nacional”.</td>
<td></td>
</tr>
<tr>
<td><strong>REQUISITES FOR ADMISSION</strong></td>
<td><strong>PROVISION</strong></td>
<td><strong>CONTENT</strong></td>
</tr>
<tr>
<td></td>
<td>Art. 5</td>
<td>Visa</td>
</tr>
<tr>
<td></td>
<td>Art. 6</td>
<td>Entry and permanence permit (when no visa required)</td>
</tr>
<tr>
<td><strong>ENCOURAGEMENT OF MIGRATION</strong></td>
<td>Art. 3</td>
<td>Encouragement to the ingress of qualified individuals as well as investors</td>
</tr>
<tr>
<td></td>
<td>Art. 21 - 56 (types of visas)</td>
<td>Courtesy; Business; Crew member; Temporal (worker, family, student); Resident (family, qualifications, investor); Visitor (tourist, technical expertise)</td>
</tr>
<tr>
<td><strong>NON-ADMISSION</strong></td>
<td>Art. 4</td>
<td>Avoid the irregular ingress of foreigners (art. 69 defines such condition as evasion of migratory control, use of false documentation or entrance through irregular means); discourage the permanence of non-nationals compromising the working opportunities of nationals; dissuade the presence of groups of migrants who due to their amount or location might be a threat to national interests or security.</td>
</tr>
<tr>
<td></td>
<td>Art. 73</td>
<td>Prohibition of ingress under specific grounds: illness, lack of economic means or activity, criminal antecedents, previous expulsion, discretionary qualification of the authority as a “threat” to national security, and conducts of irregular ingress.</td>
</tr>
<tr>
<td><strong>EXCEPTIONAL RECOGNITION OF INTERNATIONAL LAW AS SOURCE OF REGULATION</strong></td>
<td>Art. 1 (general clause)</td>
<td>“Sin perjuicio de lo dispuesto en los tratados internacionales, el ingreso, permanencia y/o salida de extranjeros del territorio nacional, se regirá por las disposiciones de este decreto y por las políticas establecidas por el Gobierno Nacional”.</td>
</tr>
<tr>
<td></td>
<td>Specific cases</td>
<td>Agreements to exclude visa requisite (Art. 43); Transit across borders of neighbour countries without visa requirement (Art. 59).</td>
</tr>
<tr>
<td><strong>ECUADOR</strong></td>
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</tr>
<tr>
<td><strong>MEMBERSHIP TO REGIONAL INTEGRATION BLOCKS</strong></td>
<td></td>
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</tr>
<tr>
<td>Andean Community of Nations</td>
<td></td>
<td></td>
</tr>
<tr>
<td>MERCOSUR (Associate)</td>
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<tr>
<td>UNASUR</td>
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</tr>
<tr>
<td><strong>NATIONAL LEGISLATION</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ley de Extranjería - Codificación 23 de 2004</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>SOVEREIGN PARADIGM</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art. 8.- Todo extranjero que solicite su admisión en el Ecuador en calidad de inmigrante o de no inmigrante con excepción de los transeúntes, deberá estar provisto de una visa emitida por un funcionario del servicio exterior ecuatoriano que preste servicios en el lugar de domicilio del extranjero o en su falta, el del lugar más cercano.</td>
<td></td>
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</tr>
<tr>
<td><strong>REQUISITES FOR ADMISSION</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>PROVISION</strong></td>
<td><strong>CONTENT</strong></td>
<td></td>
</tr>
<tr>
<td>Art. 8</td>
<td>Visa (except for transit)</td>
<td></td>
</tr>
<tr>
<td><strong>ENCOURAGEMENT AND CATEGORIES OF PEOPLE FOR ADMISSION</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art. 4</td>
<td>Right to asylum under the grounds of violence or political prosecution</td>
<td></td>
</tr>
<tr>
<td>Art. 9</td>
<td>Migrants: People living with personal rent, investors, persons with technical expertise, qualified workers, family, persons exercising any other licit activity.</td>
<td></td>
</tr>
<tr>
<td>Art. 12</td>
<td>Non-migrants: diplomats and consular staff, students, temporary workers, refugees, religious and cultural missions, tourists, persons exercising any other temporal licit activity.</td>
<td></td>
</tr>
<tr>
<td><strong>NON-ADMISSION</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No mention of specific cases of non-admission.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>EXCEPTIONAL RECOGNITION OF INTERNATIONAL LAW AS SOURCE OF REGULATION</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art. 1 (General clause)</td>
<td>Los preceptos de extranjería establecidos en leyes especiales o convenios internacionales vigentes para el Ecuador, serán aplicados en los casos específicos a que se refieren.</td>
<td></td>
</tr>
<tr>
<td>PARAGUAY</td>
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<td>------------------------------------------</td>
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</tr>
<tr>
<td><strong>MEMBERSHIP TO REGIONAL INTEGRATION BLOCKS</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>MERCOSUR</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Andean Community of Nations (Associate since 2005)</td>
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<tr>
<td>UNASUR</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>NATIONAL LEGISLATION</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ley de Migraciones No. 978 de 1996</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>SOVEREIGN PARADIGM</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>“Artículo 3o. La admisión, el ingreso, la permanencia y el egreso de extranjeros se rigen por las disposiciones de la Constitución Nacional, de esta ley y su reglamentación.”</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>PROVISION</strong></td>
<td><strong>CONTENT</strong></td>
<td></td>
</tr>
<tr>
<td>Art. 8, 54-61</td>
<td>Visa</td>
<td></td>
</tr>
<tr>
<td>Art. 12-30</td>
<td>Categories for admission: permanent residents (investors, capital owners pensionist, family); temporary residents (students, businessmen, scientists and researchers, journalists, athletes, artists, asylum seekers and refugees; religious missions); Non-residents (tourists, transit)</td>
<td></td>
</tr>
<tr>
<td>Art. 2</td>
<td>Migration of qualified human resources, foreigners with capital to cover expenditures or invest, and agriculture work force favourable to colonize priority areas.</td>
<td></td>
</tr>
<tr>
<td>Article 13</td>
<td>Activities considered useful to the development of the country.</td>
<td></td>
</tr>
<tr>
<td>Art. 6, 59</td>
<td>Impediments for admission: insanity (physical and mental); mendicancy; criminal antecedents or sentence; lack of profession or lucrative activity; previous expulsion (some exceptions to the prohibitions in art. 7)</td>
<td></td>
</tr>
<tr>
<td><strong>EXCEPTIONAL RECOGNITION OF INTERNATIONAL LAW AS SOURCE OF REGULATION</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Specific cases</td>
<td>Transit across borders of nationals of neighbour countries (Art. 55), migrant workers from neighbour countries (Art. 90).</td>
<td></td>
</tr>
<tr>
<td>Requisites for Admission</td>
<td>Provision</td>
<td>Content</td>
</tr>
<tr>
<td>--------------------------</td>
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</tr>
<tr>
<td>Art. 12, 13</td>
<td>Visa (temporal and resident)</td>
<td></td>
</tr>
</tbody>
</table>

**Encouragement of Migration**

- Art. 11 (types of visas)
  - Temporal visa: tourism, business, artists, crew members, transit, others depending period of stay.
  - Resident visa: refugees, religious, students, workers, investors, migrants.

**Non-admission**

- Art. 29
  - Prohibition of ingress under specific grounds: previous expulsion or fugitive for crimes prescribed by Peruvian law.

- Art. 30
  - Authority may impede ingress to territory under specific situations: Insanity, criminal antecedents, lack of economic means to settle expenditures.

**Exceptional recognition of international law as source of regulation**

- Art. 2 (general clause)
  - “Esta Ley es de aplicación en lo que no se oponga a los Tratados y Convenios Internacionales, de los cuales el Perú sea parte y que contengan normas referidas a extranjeros.”

- Specific cases
  - Agreements to exclude visa requisite (Art. 19); Transit across borders of neighbour countries without visa requirement (Art. 20).
<table>
<thead>
<tr>
<th>URUGUAY</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>MEMBERSHIP TO REGIONAL INTEGRATION BLOCKS</strong></td>
</tr>
<tr>
<td>MERCOSUR</td>
</tr>
<tr>
<td>Andean Community of Nations (Associate since 2005)</td>
</tr>
<tr>
<td>UNASUR</td>
</tr>
<tr>
<td><strong>NATIONAL LEGISLATION</strong></td>
</tr>
<tr>
<td>Ley de Migración 18.250 de 2008</td>
</tr>
<tr>
<td><strong>SOVEREIGN PARADIGM</strong></td>
</tr>
<tr>
<td>“Artículo 2. La admisión, el ingreso, la permanencia y el egreso de las personas al territorio nacional se regirán por las disposiciones de la Constitución, de la presente ley y de la reglamentación que a sus efectos se dicte.”</td>
</tr>
<tr>
<td><strong>PROVISION</strong></td>
</tr>
<tr>
<td><strong>REQUISITES FOR ADMISSION</strong></td>
</tr>
<tr>
<td>Art. 1</td>
</tr>
<tr>
<td>Art. 31-36</td>
</tr>
<tr>
<td><strong>ENCOURAGEMENT OF MIGRATION</strong></td>
</tr>
<tr>
<td>Art. 4</td>
</tr>
<tr>
<td>Art. 16</td>
</tr>
<tr>
<td><strong>NON-ADMISSION</strong></td>
</tr>
<tr>
<td>Art. 45</td>
</tr>
<tr>
<td><strong>EXCEPTIONAL RECOGNITION OF INTERNATIONAL LAW AS SOURCE OF REGULATION</strong></td>
</tr>
<tr>
<td>Art. 71</td>
</tr>
<tr>
<td>Art. 83</td>
</tr>
</tbody>
</table>
**VENEZUELA**

**MEMBERSHIP TO REGIONAL INTEGRATION BLOCKS**

- Previous member of the Andean Community of Nations (2006)
- MERCOSUR (Associate)
- UNASUR

**NATIONAL LEGISLATION**

- Ley de Extranjería y Migración No. 37.944 de 2004

**SOVEREIGN PARADIGM**

“Artículo 1. Esta Ley tiene por objeto regular todo lo relativo a la admisión, ingreso, permanencia, registro, control e información, salida y reingreso de los extranjeros y extranjeras en el territorio de la República, así como sus derechos y obligaciones, con la finalidad de facilitar la formulación, ejecución, seguimiento y evaluación de las políticas y estrategias que en materia migratoria dicte el Ejecutivo Nacional.”

<table>
<thead>
<tr>
<th>REQUISITES FOR ADMISSION</th>
<th>PROVISION</th>
<th>CONTENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. 7, 10</td>
<td>Visa and presentation at authorized locations for ingress</td>
<td></td>
</tr>
<tr>
<td>Art. 6 (categories of admission)</td>
<td>Non-migrant; temporal migrant; permanent migrant (regulated by executive provisions)</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ENCOURAGEMENT OF MIGRATION</th>
<th>PROVISION</th>
<th>CONTENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. 16</td>
<td>Labour authorization</td>
<td></td>
</tr>
<tr>
<td>Art. 17</td>
<td>Exceptions to labour authorization (temporal activities): scientific and technical missions; academic staff; cooperation; journalism; research.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>NON-ADMISSION</th>
<th>PROVISION</th>
<th>CONTENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. 8</td>
<td>Impediments for admission: circumstances of public order, criminal antecedents, violation of human rights, international humanitarian law or other dispositions contained by international agreements of which Venezuela is party, insanity, antecedents on drug trafficking or connected activities.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>EXCEPTIONAL RECOGNITION OF INTERNATIONAL LAW AS SOURCE OF REGULATION</th>
<th>PROVISION</th>
<th>CONTENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. 1 (General clause mentioning integration agreements)</td>
<td>“Lo dispuesto en esta Ley se aplicará sin perjuicio de los tratados suscritos y ratificados por la República, los acuerdos de integración y las normas de Derecho Internacional.”</td>
<td></td>
</tr>
<tr>
<td>Specific cases</td>
<td>Agreements to exclude visa requisite (Art. 7)</td>
<td></td>
</tr>
</tbody>
</table>

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289 Despite of the withdrawal of Venezuela from CAN, certain regional agreements derived from such membership are still in force.
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