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What will the recent entry into force of the UNASUR Treaty mean for investment arbitration in South America?

Christian Leathley (Herbert Smith Freehills LLP) · Wednesday, April 13th, 2011 · Herbert Smith Freehills

On 11 March 2011, the UNASUR treaty entered into force. UNASUR (the Union of South American Nations) is a regional organisation that comprises all twelve South American countries: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay and Venezuela. The entry into force of the treaty is an important development for the international arbitration community given some of the proposals that UNASUR is advancing, particularly in the field of investor-State arbitration.

Amongst other things, UNASUR is proposing an arbitration centre and rules that will change – in some respects controversially – the practice of investment arbitration. The proposals (as they currently stand) include the promotion of diplomatic protection, a sitting appellate tribunal and awards with precedential value. There are also unanswered questions, such as how will parties refer disputes to the UNASUR centre in the first place, what international or regional standards will be protected by the centre, and how will the centre co-exist with existing treaties/investment agreements and existing institutions?

Inter-governmental negotiations over these rules start this month, and while it would be an expedient conclusion to say that this is simply “one to watch”, such a conclusion is not warranted here because if UNASUR’s plans do proceed, we will be unable to ignore it.

The birth of UNASUR can be traced back to the First South American Summit, held in Brasilia in 2000, but it was not until the Third South American Summit that the predecessor to UNASUR was officially constituted by the Cusco Declaration. The Cusco Declaration, dated 8 December 2004 established the South American Community of Nations (or CSN). Eventually, at the South American Energy Summit held in Venezuela on 16 April 2007, the member states of CSN adopted the name Union of South American Nations (UNASUR).

The UNASUR Treaty was signed on 23 May 2008 in Brasilia, requiring nine ratifications to enter into force. In the following order, Bolivia, Ecuador, Guyana, Venezuela, Peru, Argentina, Chile, Suriname, Uruguay and Colombia all ratified the Treaty. As of today, the two countries that have not yet ratified it are Brazil and Paraguay.

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In June 2009, the UNASUR heads of state approved a mandate to create a UNASUR mechanism

for the resolution of investment disputes. The heads of state have met on a number of occasions, including on 4 May 2010 when they reaffirmed the importance of reaching an agreement on this initiative.

In November 2010, during the IV UNASUR summit of the heads of state, held in Georgetown, Guyana, it was announced that a working group would be established that would look at creating (1) a centre for the resolution of investment disputes, (2) an advisory centre for investment disputes, and (3) a code of conduct for the members of the arbitral tribunals constituted under the centre's rules. The working group will hold its first meeting in mid-April 2011. Thereafter, it has 90 days to present its conclusions.

As this initiative gained support in November 2010, Ecuador took the lead to develop this proposal, and published draft provisions for the centre. (These have already evolved slightly, and are considered here below.) Simultaneously, President Correa of Ecuador emphasised his desire that an arbitration centre be established promptly. Focusing his criticism on mid-level public officials, President Correa accused them of "mental atavism." In particular, President Correa noted that some mid-level officials continue to believe that UNASUR member states are incapable of establishing an alternative investment arbitration regime that meets international standards. He recognised the "serious problems" in trying to establish such a system, however, he also expressed exasperation at the "intellectual colonialism" that plagues many, and compounds what he sees as the misconceived belief of some that to resolve an investment dispute one must go to Washington, London or Paris.

While the establishment of an alternative court or tribunal to resolve investment arbitration disputes has been on the agenda for a while (not least in Latin America, and with the support of institutions such as UNCTAD), the fact UNASUR has now come into formal existence is a significant development. UNASUR is the first regional institution for some time that comprises all South American countries. This is quite an achievement, and some even fear UNASUR may displace the Organisation of American States (OAS) in terms of its regional significance. Perhaps a critical advantage of UNASUR is that policies can be introduced and implemented by consensus rather than unanimity.

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The object of the centre is described as providing a regulatory basis for disputes between UNASUR member states, including between investors and UNASUR states. The centre would hear such State-State disputes as are submitted to it. In addition, it would also hear such State-State or investor-State disputes as are referred to it by virtue of any contractual provision or provision in an "international instrument." However, it is envisaged that the centre's dispute resolution system will apply to different investors and States on an incremental basis.

First, the centre will be available exclusively for the use by UNASUR member states (and investors from UNASUR member states) for a period of three years. Second, from the start of the third year of the centre's existence, its services would be extended to Central American and Caribbean states (and their investors). Third, from the sixth year onwards, the centre's services would be available to any States and investors that wish to either submit their dispute to the centre, or have so agreed to submit their disputes in any contract or international instrument. The idea is that the centre would be permitted time to establish itself and develop a reputation – during which time non-UNASUR investors and States could consider incorporating reference to UNASUR into

their contracts/treaties.

The draft rules of procedure for the centre in many ways reflect the modern practice of international arbitration however, they also display key differences. Naturally, there will likely be movement between member states as they negotiate these draft provisions in the coming weeks, but the starting point offers an insight to the ambitions of UNASUR. Selected provisions of interest include the following:

• Article 3(2) of the proposed rules limits the jurisdiction of the centre – precluding disputes concerning health, education, taxation, energy, the environment and others, unless expressly stated otherwise in the relevant treaty or contract. This is clearly a critical provision that will require elaboration.

• Article 3(3) provides that in no circumstances will an arbitral tribunal, constituted in accordance with the rules of the centre, have jurisdiction to resolve disputes concerning the internal laws of a UNASUR member state. This preclusion also extends to the economic effects of a general norm. Again, this will require careful elaboration to have any meaning.

• Article 3(4) provides that states can require, as a precondition to their consent to arbitrate, the exhaustion of domestic judicial and administrative remedies. In circumstances where a claim arises in relation to an administrative act of a State, it will always be necessary to exhaust domestic remedies. (See also Article 6(1)).

• In the event the parties are unable to reach agreement, the parties can resort to international arbitration in accordance with the rules of the centre. Those rules provide that where an investor brings a dispute against a UNASUR member state, the investor must first inform its own State of the dispute. In a unique reinstatement of the principle of diplomatic protection, it is also stated in the rules (Article 6(2)), that if it is in the "highest interests" of the home State, it should commence a mediation between its investor and the host State, if the host State agrees.

• Arbitrators appointed to the arbitral tribunals established under this system would be selected from an Indicative List of Arbitrators that would be comprised of lawyers with experience in public law, arbitration, and commercial and investment law – or have experience in the subject matter relevant to the dispute. Two arbitrators could be added to the Indicative List, by each member state, and their name would be held for four years. For new arbitrators to be added to the list, they would have to satisfy certain qualifications, and complete certain public exams as stipulated by each member state. The centre would also envisage promulgating a code of conduct for arbitrators.

• Without entering into details of the arbitral process, awards would have to be rendered by the arbitral tribunals constituted under the centre within a period of 240 days from the date of the constitution of the tribunal, extendable up to 120 days with the agreement of the parties. Unless the parties agree otherwise, hearings could take place at UNASUR's headquarters in Quito, Ecuador. Awards would be published and have precedential value, thus leading to a UNASUR arbitral jurisprudence.

• Awards could be appealed to an appellate tribunal which would have the power to review questions of law. Eight arbitrators would constitute the pool for the appeal tribunal, which would be comprised of three arbitrators for any given case. Appeals would have to be decided within 60 days from the appellate tribunal's constitution.

• The enforcement regime envisaged by the centre demands parties to comply immediately with an award, or in the event this is not possible, within a time frame agreed by the parties. Such time limit can be extended to 180 days in the event of justifiable circumstances, such as civil or economic emergencies. The only basis for denying recognition and enforcement of the award would be when, in accordance with the host state's constitution, the subject of the dispute is not arbitrable or is contrary to public policy. This also is an area that will require further elaboration, in particular in terms of how such a system would co-exist with State obligations owed under both the New York and Panama Conventions.

• In the event the award is not honoured, the matter may be returned to the original arbitral tribunal that heard the dispute. Subject to certain criteria, in investor-State disputes where the respondent State does not comply (wholly or partially) with the award, the home State may suspend temporarily concessions and obligations owed to the host state, in the sector that is relevant to the dispute. Such suspension would have to be proportional to the degree of non-compliance.

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Any observer would be forgiven for, on first impression, dismissing UNASUR as an initiative much like others in the region, and assume that real change and pan-regional convergence of practice is unlikely. However, already UNASUR has achieved success at the intergovernmental level – for example, diffusing internal tensions in Bolivia, diffusing tensions between Venezuela and Colombia, as well as finding common ground on the question of Las Malvinas (The Falkland Islands). Therefore, is UNASUR in danger of becoming a success, and could that success spill over into the world of international arbitration, in terms of effecting real change for South America?

In January 2011, Dr. Marcos Albuja Martinez, the Government of Ecuador's Legal Coordinator was named Ecuador's representative to UNASUR. Dr. Albuja Martinez's responsibilities include liaising with other UNASUR representatives to negotiate the creation of a centre for the resolution of disputes and a legal advisory centre in the context of investment arbitration. It is anticipated in the UNASUR working group schedule that all member states will have designated representatives by mid-April when the first working group meeting is convened. To date, in addition to Dr. Albuja's appointment by Ecuador, Chile, Peru, Bolivia, Uruguay and Paraguay have also designated representatives. The remaining six countries (Argentina, Brazil, Colombia, Guyana, Suriname and Venezuela) have yet to do so. In the 90 days commencing from mid-April, an ambitious schedule of negotiations is expected to be led by Dr. Albuja who shall seek to finalise a text agreeable to all member states. These proposals would then fall to be discussed at the VI Summit of the UNASUR heads of state in mid-2011.

Christian Leathley, a member of Herbert Smith LLP's International Arbitration Group, is author of "International Dispute Resolution in Latin America: An Institutional Overview" published by Kluwer Law International, a revised edition of which is due to be published in 2011.

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