2012 Draft Constitutive Agreement of the
Centre for the Settlement of Investment Disputes of the UNASUR
Unofficial translation prepared by Maria Gabriela Sarmiento*

Unofficial translation of the *Draft Constitutive Agreement of the Investment-related Dispute Settlement Centre of the UNASUR*, originally published in Spanish as an annex to the Final Act of the 7-9 November 2012, IV Meeting of the Working Group of High Level Experts on the Settlement of Investment Disputes at UNASUR.

2012 Draft Constitutive Agreement of the
Centre for the Settlement of Investment Disputes of the UNASUR

Title I. General Provisions

Article 1 *Nature and objective of the Agreement*. The agreement has the objective of constituting a UNASUR's Investment-related Dispute Settlement and Facilitation Centre

Article 2 *Scope*. This agreement will not affect the application of dispute settlement mechanisms and other compromises established in International Agreements signed and ratified by member-states.

Article 3 *Definitions*.

Member-State of the Centre or member-state: means the State that has signed and ratified the UNASUR's Constitutive Treaty, who is considered a member of the Centre and signatory Party of the Agreement.

National of another member-state a) is an individual who—by the time the parties consented to submit the dispute to the Centre and by the time the claim was filed and registered—is a national of either Contracting Party according to their domestic law, which is different from the Contracting Party part of the dispute. In those cases where an individual has more than one nationality, the effective nationality according to International Law will be taken into account. This

Agreement will not apply to individuals, whose nationality—by the time the parties agreed to settle a dispute to the Centre or by the time the claim was registered—was that of a member-state, who is one of the parties in conflict.[1]

Parties: the parties who have voluntarily decided to submit a dispute to the mechanisms established by the Centre.

Dispute: the dispute of a legal nature that arises directly from an investment. The dispute shall have taken place after the entry into force of the Agreement, unless otherwise agreed by the Parties.

All *days* that are referred to in this Agreement are considered c*alendar days*.

[Brazil would like to include a definition of *investment*]

Title II. Provisions on the Centre

Article 4 *Legal nature of the Centre*

The Centre is an institution with an international legal personality [Argentina and Brazil do not agree on this] with specialized activities that are independent and impartial and uses mechanisms where Investment-related Disputes could be submitted, according to Article 5.

Article 5 *Jurisdiction of the Centre*

The Investment-related disputes that can be submitted to the jurisdiction of the Centre, as a specialized Body, independent, and impartial, are a) those that can be originated between member-states of the Centre, which derive from the application of International Agreements, only if these member-states consented to settle their disputes by the mechanisms established within the framework of the Centre; b) those that could be originated between a member-state of

[1] '*b) Toda persona jurídica que, en la fecha en que las partes en la controversia prestaron su consentimiento a la jurisdicción del Centro para la controversia en cuestión, sea nacional de una Parte Contratante [Brasil: de conformidad con el ordenamiento jurídico [Argentina: del Estado receptor de la inversión]] y [Chile: propone eliminar referencia al ordenamiento jurídico], siendo esa nacionalidad distinta a la de la Parte Contratante en la controversia; [Chile: y las personas jurídicas que, teniendo en la referida fecha la nacionalidad del Estado parte en la controversia, las partes hubieren acordado atribuirle la nacionalidad de otra Parte Contratante, a los efectos de este Acuerdo];'*

the Centre and another member-state of UNASUR, who is not a signatory Party of the present Agreement, only when these member-states have consented to settle a particular dispute by the mechanisms established within the framework of the Centre; c) those that can be originated between nationals of the member-states of the Centre and other member-states of the Centre, only if the States have previously consented to settle the dispute through the mechanisms established within the framework of the Centre or if the States agreed to do so when the dispute arose; d) those that can be originated between the nationals of the member-states of the Centre and other member-states of UNASUR, which are not signatories of the present Agreement, if the States have consented to settle a specific dispute by the mechanisms established by the Centre; e) those originated between nationals of the member-states of the Centre with third States non-members of the UNASUR, and not signatory Parties of the present Agreement, if the States have consented to settle a particular dispute through the mechanisms established by the Centre.

In any event, the sole membership to the Centre will not impose an obligation to the States to settle a particular dispute via the mechanisms established within the framework of the Centre unless the State consents to the application of such mechanisms. The mutual agreement of the parties to settle a dispute through the Centre shall be expressed and take place on a case-by-case basis.

Should a dispute arise between member-states of the Centre, the parties are encouraged to engage all efforts to reach a mutually satisfactory solution, initially through consultations and negotiations via diplomatic channels within a maximum period of six months from the moment any of the parties made the request for consultation and negotiation.

[In Investor-State disputes] a member-state of the Centre can request the exhaustion of all domestic administrative or judicial recourses as a

primary condition to settle a dispute through the mechanisms established by the Centre. [Chile, Colombia, Uruguay, Venezuela, and Peru propose to eliminate this paragraph.] [Brazil, Argentina, Ecuador, Bolivia propose to keep the paragraph.]

When the parties have consented to settle a dispute via the mechanisms established by the Centre, the parties will not be able to withdraw unilaterally their consent.

The parties to a dispute being settled via the mechanisms available at the Centre can at any time negotiate and reach a mutual agreement before an Arbitral Award or other type of decisions of the Arbitral Tribunals or the Conciliation Commission are dictated.

[This article is subject to internal evaluation.]

Article 6 *Structure of the Centre*

The structure of the Centre will be based upon simplicity, flexibility and progressive principles.

A Board of Directors and a Secretariat will direct the Centre.

A legal representative and an alternate representative of each member-state will compose: 6.1. The Board of Directors of the Centre. The Board of Directors will organize periodical meetings preferably using virtual media.

Each Member-State of the Centre will have a vote on the Board of Directors, and decisions will be adopted by consensus. A decision will be considered adopted by consensus when none of the members of the Board of Directors would have had formal objections during the meeting where the adoption of such decision was discussed. [Ecuador proposed to adopt decisions by a majority of votes.]

A member-state of UNASUR that is not a signatory party to this Agreement can attend the meeting as an observer and will have the right to make observations, but not to vote.

The Board of Directors will have the following duties: a) to approve the Rules of the Centre; b) to adopt the Rules of Procedure to initiate

the facilitation, the conciliation, and the arbitration mechanisms that will be incorporated as part of the Rules of the Centre; c) to adopt the Procedural Rules applicable to Conciliation and Arbitration, which will be part of the Rules of the Centre; d) to adopt the annual budget of income and expenses of the Centre, at the request of the Secretariat. e) to evaluate the application of the Rules of the Centre, and the Rules of Procedure, as well as the Procedural Rules that are part of the later, and to adopt the necessary amendments and modifications [Bolivia's comment: f) to ensure the application of a special treatment, including the responsibility to provide legal assistance and facilitate technical support to least developed countries.]

The Board of Directors can execute the necessary and sufficient powers to undertake the activities considered indispensable to maintain the efficient accomplishment of its duties.

The President of the Board of Directors will alphabetically rotate among each member-state for a period of one year.

6.2. The Secretariat of the Centre will operate independently from the General Secretariat of the UNASUR, executing its duties under the direction and supervision of the Board of Directors. The Board of Directors will determine the headquarters of the Secretariat of the Centre. When this decision is taken, the corresponding hosting State and the Centre will conclude the *accord de siège*.

The General Secretariat of the UNASUR shall assume the duties of the Secretariat of the Centre until the Board of Directors designates the Executive Secretary of the Secretariat. It will assign the personnel and a corresponding budget to run the Secretariat of the Centre.

The Executive Secretariat will be the legal representative and main civil servant of the Centre and will be responsible for its administration.

The Rules of the Centre will regulate the election of the Executive Secretary by the Board of Directors as well as the conditions to be

elected Executive Secretary and the characteristics of the personnel to be nominated.

The Executive Secretary will be the Registrar and will have the power to authenticate the Arbitral Awards issued according to the present Agreement and to make certified copies of such Awards. The Board of Directors monitors annually the performance of the duties of the Executive Secretary.

[This provision is under internal evaluation.]

Article 7 *Financial Resources*

The main financial sources of the Centre will be as follows: a) Rights received or the services rendered by the Centre, paid by the parties of a dispute, which will be fixed by the Board of Directors; b) Contributions made by the member-states, such as administrative expenses due to their participation in the Centre.

When the expenses of the Centre could not be covered with payments described under 7.a), the difference will be covered with the contributions of the member-states in equal portions. To this end, the Executive Secretary will report to the Board of Directors, which will take a decision on such extraordinary contributions.

Other additional financial sources could be established by the member-states of the Centre, or they could come from external contributions or donations, subject to the ad-hoc approval of the Board of Directors.

[Article submitted to internal evaluations]

Article 8 *Diplomatic Protection and Excluding Jurisdiction of the Centre*

With regard to the cases submitted to the jurisdiction of the Centre according to article 5 of this Agreement, a State will not grant diplomatic protection or promote any international claim with regard to a dispute that one of its nationals and another State would have consented to settle through the mechanisms established by the Centre, unless the other State would not have executed the award or would have stopped its execution.

The informal diplomatic consultations willing to settle a dispute will not be considered diplomatic protection measures.

Once a dispute has been submitted to the jurisdiction of the Centre, this jurisdiction excludes any other national or international jurisdictions that the parties may try to use or that would indeed have tried to use to settle the dispute. [Brazil and Uruguay: this paragraph is under evaluation.]

Article 9 *Immunities and Privileges*

Not translated

Title III Provisions on the mechanisms established within the framework of the Centre

Article 10 *The Mechanisms of the Centre*

The mechanisms established within the framework of the Centre are: a) facilitations, b) conciliation (Ecuador: or mediation), and c) arbitration.

Chapter 3.1. Provisions on the facilitation mechanism

Article 11 *The facilitation*

The Investment-related Disputes that may take place between member-states of the Centre resulting from the application of International Agreements and that will stipulate a consultation or negotiation methods can be submitted to the facilitation mechanism. As part of this mechanism, the parties will be able to request specialized assistance from the Centre in order to reach an amicable solution to the dispute during the phase of consultation or negotiation.

Investment-related Disputes between national of member-states of the Centre and other member-states of the Centre, other member-states of the UNASUR that are not part of the present Agreement or with third States that are non-member of the UNASUR and not Parties to the present Agreement resulting from the application of International Agreements stipulating a direct treatment could submit their dispute to a facilitation mechanism. To this end, the parties will be able to request specialized assistance from the Centre in order to reach an amicable

solution to the dispute during the phase of direct treatment.

Disputes not arising from the application of pre-existing International Agreements stipulating a negotiation or consultation phase can also be submitted to a facilitation mechanism if the parties consent to submit their dispute to the Centre to solve it amicably.

[Chile considers that the mechanism might be politicized. It proposes to create a neutral technical body or a list of facilitators with no political intervention]

[Bolivia and Venezuela find it interesting but consider that the text could be improved.]

[Peru considers that the politicization risk could be avoided by granting legal personality to the Centre.]

[Colombia proposes to contact other entities to receive technical cooperation and assistance with regard to the facilitation methods.]

[Brazil finds it interesting but prefers to wait for the results of the discussion on facilitation methods within the Mercosur]

Chapter 3.2. Provisions on the mechanism of conciliation

Article 12 *The conciliation request, and the constitution of the Conciliation's ad-hoc Commission*

Any member-state of the Centre or national of a member-state of the Centre willing to initiate a conciliation procedure shall send the request to the Executive Secretary, who will send a copy of the request to the other Party.

The request shall include basic data about the dispute, the identity of the parties, the consent given by both parties to solve their dispute through a conciliation procedure according to the Rules of Procedure to be followed to initiate a facilitation, a conciliation, and an arbitration, which are part of the Rules of the Centre.

The Executive Secretary shall register the request unless it is observed from the content of the request that the dispute cannot be settled within the jurisdiction of the Centre. The Executive Secretary shall

immediately notify the parties either of the registration or of the denial of registration of the request.

Once the request is registered, the Conciliation Commission shall be formed. The Conciliation Commission will be integrated by a unique conciliator or by an odd number of conciliators. If the parties are unable to reach an agreement on the number of conciliators and on nomination procedure, the Conciliation Commission will be formed by a sole Conciliator designated with the mutual agreement of the parties.

If the Commission is not formed within 90 days from the date of the notification of the Registration's Act made by the Executive Secretary or within any other term agreed by the parties the Executive Secretary, at the request of any of them, and whenever possible, after consulting both parties, shall designate the unique Conciliator. The unique conciliator designated by the Executive Secretary must appear in the List of Conciliators and cannot be a national of the State involved in the dispute or of the member-state whose national is involved in the dispute.

The use of the List of Conciliators is facultative, except in the previously described case.

Article 13 *The List of Conciliators*

The Centre will keep a List of Conciliators proposed by the member-states of the Centre, in conformity with the Rules of the Centre.

Each member-state of the Centre can propose five persons to be included in the Conciliators' List. These persons can be nationals of the member-state that proposes them.

The list shall be composed by qualified persons having moral values, such as renowned, experienced specialized professionals who are reliable and trustworthy persons that are independent and neutral.

Every three years, the list of Conciliators shall be renewed. If someone dies or desists from being a conciliator, the member-state that proposed this person shall be granted the right to choose a new person for the

remaining duration of the mandate.

A person listed as Conciliator can also be part of other lists of the Centre.

When the same person is proposed by more than one member-state, he or she is considered to have been proposed by the member-state who first proposed the person. However, if the person is a national of one of the two member-states, the person will be considered to have been proposed by this member-state.

Article 14 *Principles applicable to the Conciliation's Procedure*

The Conciliation Commission will decide on its own *Kompetenz.*

If it is argued on good grounds or with sufficient elements that the dispute is outside the limits of the jurisdiction of the Centre, or for other reasons the Conciliation's Commission lacks the competence to settle the dispute, the Conciliation's Commission will determine whether the issue will be solved as a preliminary question or with the merits of the dispute.

Article 15 *The Conciliation's Procedure*

The Rule of the Centre will include a detailed section with regard to the Rules of Procedure and Procedural Rules applicable to the conciliation.

Unless otherwise agreed by the parties, no party could invoke in any procedure, arbitral or judicial or before any authority, the considerations, declarations, admission of facts, and settlement offers made by the other party within a conciliation procedure or by the report or recommendations proposed by the Conciliation Commission.

Chapter 3.3. Provisions for the Arbitration Mechanism

Article 16 *The Arbitration's request, and the constitution of the Arbitral Tribunal*

Any member-state of the Centre or national of a member-state of the Centre willing to settle a dispute via an arbitration procedure at the Centre shall submit a written request to the Executive Secretary, who will send a copy of it to the other party. The request shall include the

basic data of the disputed subject matter, the identity of the parties, and the consent of both parties to settle their dispute through an arbitration procedure, in accordance with the Rules of Procedure for the facilitation, the conciliation and the arbitration, which will be part of the Rules of the Centre.

The Executive Secretary shall register the request unless it is observed from the content of the request that the dispute cannot be settled within the jurisdiction of the Centre. The Executive Secretary shall immediately notify the parties of either the registration or the denial of the registration of the request.

When the request is registered, the Arbitral Tribunal shall be formed.

The Arbitral Tribunal will be integrated by a unique arbitrator or by an odd number of arbitrators that are nominated as agreed by the parties. If the parties are unable to reach an agreement on the number of arbitrators and the nomination procedure, the Arbitral Tribunal will be constituted by three arbitrators, each designated by one party. The third, who will chair the Tribunal, will be designated by the mutual agreement of the parties.

If the Arbitral Tribunal is not formed within 90 days from the date of the notification of the Registration's Act made by the Executive Secretary or within any other term agreed by the parties, the Executive Secretary, at the request of any party and whenever possible after consulting both parties, shall designate the missing arbitrator or arbitrators. The arbitrators designated by the Executive Secretary must appear in the List of Arbitrators. The majority of arbitrators and the President of the Arbitral Tribunal cannot be nationals of the State involved in the dispute, or of the member-state whose national is involved in the dispute.

The use of the List of Arbitrators is facultative, except in the previously described case.

[Brazil: article subjected to evaluation.]

[Colombia suggests the incorporation of possible causes for a State to file a claim against an investor.] [Chile and Peru are of the opinion that this can be contemplated under the State's Investment Agreements and Contracts.]

Article 17 *The List of Arbitrators*

The Centre will keep a List of Arbitrators proposed by the member-states of the Centre in conformity with the Rules of the Centre.

Each member-state of the Centre can propose five persons to be listed in the Arbitrator's List. These persons can be nationals of the member-state proposing them.

The list shall be composed of qualified persons having moral values, such as renowned, experienced specialized professionals who are reliable and trustworthy persons that are independent and neutral.

Every three years the list of Arbitrators shall be renewed. If someone dies or desists from being a conciliator, the member-state who proposed this person shall be granted the right to choose a new person for the remaining duration of the mandate.

A person listed as Arbitrator can also be part of other lists of the Centre.

[Ecuador and Chile consider that this is a non-convenient dubious provision for the possible conflict of interests that may appear.]

[Colombia suggests that the conflicts of interest be regulated by the Code of Conduct of the Arbitrators and Conciliators.]

When the same person is proposed by more than one member-state, he or she is considered to have been proposed by the member-state who first proposed the person. However, if the person is a national of one of the two member-states, the person will be considered to have been proposed by this member-state.

Article 18 *The principles applicable to the Arbitration's Procedure*

The Arbitral Tribunals are unique bodies capable of determining their own jurisdiction and competence.

If it is argued on good grounds or with sufficient elements that the dispute is outside the limits of the jurisdiction of the Centre, or that for other reasons, the Arbitral Tribunal lacks the competence to settle the dispute, the Arbitral Tribunal will determine whether the issue will be solved as preliminary questions or with the merits of the dispute.

[Colombia and Brazil consider that the competence should be preferably decided as a preliminary question.]

The law applicable to the dispute shall be the one agreed by the parties in dispute. When there is no agreement on this matter, the applicable law shall be the one of the State that received the investment. [Uruguay and Brazil: paragraph to be evaluated] [Chile: The paragraph does not apply to disputes between States.] [Peru will propose a new version of the provision.] [Colombia: When there is no agreement between the parties of the applicable law to the dispute, the principles of International Law applicable to the subject matter shall be applied.] [Argentina proposes to include the domestic International Private Law of the States in dispute, the Principles and Norms of International Law and the Human Rights (HHRR) Law, when applicable.] [Chile and Peru do not agree with the Argentinian proposal referring to HHRR.]

Whenever the Arbitral Tribunal shall make an interpretation—within the context of a particular dispute—of the provisions of the present Agreement or of other International Agreements, the usual norms of interpretation of the Law of the Treaties should be applied.

When expressly agreed by the parties, the Arbitral Tribunal can decide *ex aequo et bono*. [Brazil: paragraph subjected to internal evaluation]

The Arbitral Tribunal cannot refrain from issuing an Arbitral Award on the ground that there is no norm on which to base the decision or that the norms are obscure.

Article 19 *The Arbitration Procedure*

The Rule of the Centre will include a detailed section with regard to the Rules of Procedure and Procedural Rules that are applicable to the

arbitration.

Article 20 *The Arbitral Awards and the Recourses*

The Arbitral awards of Arbitration Tribunals will be decided by a majority of the arbitrators. The decisions shall be in writing and the reasons for taking such a decision shall be expressed. The Rules of the Centre will establish the other conditions of the Arbitral Awards.

The following recourses are available against Arbitral Awards:

a) Clarification—when there are differences in the interpretations made by the parties to the Arbitral award. The recourse can be submitted within 120 days from the date of the Award; b) Revision—when a fact that would have substantially influenced the Awards is recently discovered. Revision is possible only when by the time of the issuance of the Award, neither the tribunal nor the party requesting the revision were aware of the facts, and the lack of knowledge is not due to negligence. The revision can be requested within 90 days from the discovery of the facts, and in any case, within three years after the date of the issuance of the Award; c) Annulment—when i) the tribunal was not correctly constituted, ii) the tribunal issued an *extrapetita* Award, that is, it took a decision that went beyond the disputed matter and the plaintiff's request, iii) any of the members of the Arbitral Tribunal was subjected to corruption methods, iv) a procedural norm would have been gravely infringed, or v) the motivation of the Award is missing.

[Peru proposes to include the situations of *ultrapetita* Arbitral awards where arbitrators decide beyond the petition of the claimant or beyond the pleadings.]

The annulment recourses shall be submitted within 120 days from the date of the Award. If there was corruption of any of the member of the Tribunal as foreseen by Article 20.c.iii, the 120 days will be counted from the moment the illicit act was discovered but not later than three years after the issuance of the Award.

[Chile suggests clarifying that the same Arbitral Tribunal should not

decide on the recourse of annulment and proposes the creation of a Permanent Tribunal that will hear the recourses of annulment against the Arbitral Awards.]

The Arbitral Award is mandatory between the parties and can be executed within the territory of each Contracting Party as it would be a sentence issued by a domestic judicial tribunal of each party.

[Brazil proposes that Arbitral Award be mandatory and executable once the domestic procedure of recognition and enforceability of such Awards are completed.]

Title IV ***Final Provisions***

Article 21 *Entry into Force*

The present Agreement will enter into force 30 days after the date of reception by the depository of the third ratification's instrument. [Chile: 30 days after the date of deposit of the third ratification's instrument.] [Brazil and Argentina: they abstain from mentioning the number of required ratifications.]

The ratification's instruments will be deposited at the General Secretariat of the UNASUR, which will act as the depository of the present Agreement, to be registered in conformity with the provisions of Article 102 of the United Nations Charter. The Depository will communicate to the other parties the date of deposit of the ratification's instruments as well as the date of the entry into force of the present Agreement.

(The last paragraph was not translated.)

Article 22 *Interpretation*

The differences that might arise between the Contracting Parties with respect to the interpretation and application of the provisions of this Agreement will be solved through direct negotiations.

(Article partially translated)

Article 23 *Evaluation of the Centre*

Every five years

(Article partially translated)

Article 24 *Amendments*

Can take place by consensus.

(Article partially translated)

Article 25 *Denunciation*

This Agreement will have an infinite duration.

Any Contracting Party can denounce the Agreement at any time.

(Article partially translated)

Article 26 *Reserves*

The Contracting Parties cannot formulate reserves.

(Article partially translated)

30 November 2015.

Note: This research was completed in November 2015 as part of a more extended investigation to prepare the article *UNASUR Member states' Disparate Policy Stances and Strategies. Will the UNASUR's Centre for the Settlement of Investment Dispute Ever See the Light?* As part of a JWIT Call for Papers for a Special Edition on Latin America to be published in 2016. By the time I write this note, the article on the UNASUR has been accepted but a final approval is required.

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