I. INTRODUCTION

Since 1948 when its Charter was promulgated, the Organization of American States (OAS) has been the premier supranational organization governing the affairs of South America. It has passed numerous comprehensive human rights conventions\(^2\), created a judicial system to adjudicate state abuses\(^3\), established a working General Assembly and Permanent Council, instituted several mechanisms for the promotion of democracy, regional defense, healthcare improvement, and agricultural development\(^4\), and enjoyed some form of participation from almost every country in the Western Hemisphere.\(^5\) In 2008, however, the sway of the OAS in South America was checked by the creation of a new regional organization – the Union of South American Nations (UNASUR).

The signing of the UNASUR Constitutive Treaty which established UNASUR and created a uniform South American government, presidency, and financial system may usher in a new era of South American development and regional patriotism. But it may also create conflicts between the governance of its own laws and those of the OAS which could set the region in a tailspin.

For the sake of understanding how UNASUR might have to interact with the OAS and how states will have to balance their domestic responsibilities with

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\(^1\) J.D., University of Baltimore School of Law (2010). The author would like to thank Mr. Amged Soliman (J.D., 2011) for his invaluable advice and assistance with the drafting of this comment. The author would also like to thank Ms. Jennifer Stubbs (J.D., 2012) and Ms. Amanda Williams (J.D., 2012) for their timely and professional research assistance. Finally, the author would like to thank Professor Tim Sellers without whose support this article – as well as this journal – might never have happened.


\(^3\) The Inter-American Commission on Human Rights has original jurisdiction to resolve disputes and the Inter-American Court of Human Rights has appellate and final jurisdiction. For greater detail, see Gerald L. Neuman, Import, Export, and Regional Consent in the Inter-American Court of Human Rights, 19 Eur. J. Int’l L. 101, 102-03 (2008).

\(^4\) Some examples include the Inter-American Defense Board (IADB), the Inter-American Committee Against Terrorism (CICTE), the Pan-American Health Organization (PAHO), and the Inter-American Institute for Cooperation on Agriculture (IICA). For a greater list of OAS entities and initiatives, see Organization of American States – Our Structure, http://www.oas.org/en/about/our_structure.asp (follow “specialized conferences” or “specialized organizations” or “other entities”).

\(^5\) The only countries that haven’t participated in the past are Cuba, who was suspended in 1962 but reinstated in 2009, and Honduras, who was suspended in 2009 and remains so. See Suspension of the Right of Honduras to Participate in the Organization of American States, OEA/Ser. P, A.G./Res. 2 (XXXVII-E/09)rev. 1 (July 16, 2009).
these new regional priorities, this comment will conduct a comparative analysis of the two organizations. It will analyze each bodies’ respective histories, purposes, political jurisdictions, policies on interactions with third-parties, and conflict resolution mechanisms while analyzing possible consequences for legal friction and overlap. The comment will conclude by stating its position on whether or not, because of the pre-existence of a similarly-situated institution, UNASUR can really benefit the South American people.

II. THE ROAD TO UNASUR

A. The OAS, Dissent

As established by its charter on April 30, 1948, the main purpose of the OAS is to achieve an order of peace and justice in the Americas, to promote the solidarity of its Member States, to strengthen their collaboration, and to defend their sovereignty, territorial integrity, and independence. Headquartered in Washington, D.C., the OAS is composed of nearly every nation in the Western Hemisphere. At the same time, being a regional agency within the United Nations, the organization is also part of a larger political family focused on the global priority of international peace and security.

Nonetheless, the OAS has been the most influential and hands-on international organization in South America for decades. Its human rights system, which pre-dates the December 10th, 1948 Universal Declaration on Human Rights, has helped protect the interests and well-being of South America’s people throughout the turmoil of civil strife and coups in the last century. Its trade mechanisms have fostered dozens of free trade agreements and various customs unions which have made the Americas one of the most dynamic commercial environments in the world. The OAS has also led several initiatives to improve living conditions for the region’s poor by establishing the offices and policies of such agencies as the Department of Human Development and the Department of Social Development and Employment.

However, some feel that the OAS cannot engender the kind of unity envisioned for the good of South America. Many detractors of the OAS feel that the OAS has been too slow to react to crises in South America and too politically weak to manage them once a reaction has occurred. The Council on Hemispheric Affairs, a Washington-based think tank which has commented extensively on OAS policies, has echoed these sentiments concerning the OAS lack of response to the 1954 Guatemalan coup d’etat, the 1989 US incursion in Panama, and...
the inability of the OAS to confront the 2009 Honduran coup d’etat without UN involvement.\textsuperscript{12}

Others rebuff the OAS because of a perceived indulgence in catering to the United States. A favorite argument for decades among staunchly leftist governments in South America is that the United States is an imperial force manipulating South American affairs for diabolical purposes. Recently, Venezuelan president Hugo Chavez, commenting on an on-going rift between his country and its neighbor Colombia which has received political and military support from the United States, characterized the United States as a “Yankee empire” ready to take “bellicose action” against Venezuela at any moment.\textsuperscript{13} Such sentiments towards the US have overflowed onto the OAS on numerous occasions due to heavy US involvement in the organization,\textsuperscript{14} further enervating the legitimacy of the OAS in the eyes of some South Americans.

B. \textit{UNASUR and its Precursors}

Alternatively, when UNASUR was formed by its Constitutive Treaty of May 23\textsuperscript{rd}, 2008, although not created explicitly with anti-OAS intentions, it provided a new transnational platform by which South America might govern its affairs. The most recent maneuver by the continent’s body politic to accomplish efficient regional unification, to many UNASUR is a step forward in the never-ending bid for improved social conditions, greater political autonomy, and assured financial self-reliance. Some leaders, such as Bolivian president Evo Morales, Nicaraguan president Daniel Ortega, and aforementioned Venezuelan president Hugo Chavez, also see it as the completion of the political vision espoused by the continent’s renowned 19\textsuperscript{th} century liberator Simon Bolivar and embodied in the 1826 Congress of Panama.\textsuperscript{15}

However, UNASUR is hardly South America’s first post-Bolivarian attempt at unification. The first truly modern ventures into South American

\textsuperscript{12} Andres Esteban Ochoa, \textit{The UN and the OAS: There is a Choice to be Made}, http://www.coha.org/the-un-and-the-oas-there-is-a-choice-to-be-made/ (last visited Aug. 22, 2010). It should be noted that as of this writing, the political stand-off in Honduras between the deposing government and the OAS has not been resolved as many South American states still refuse to recognize the new Honduran government. The inability to bring the impasse to a conclusion continues to reinforce the image of weakness with which the OAS contends. Marc Larcey, \textit{Latin America Still Divided Over Coup in Honduras}, N.Y. TIMES, June 6, 2010 at A10.


\textsuperscript{15} Leader of a cosmopolitan army of South Americans who cast off their Spanish colonizers, Simon Bolivar liberated six nations and instituted the first of many efforts at South American continental unification. For a good account of Bolivar’s life, military campaigns, and political contributions to South America, as well as his role in the Congress of Panama, see \textit{JOHN LYNCH, SIMON BOLIVAR: A LIFE} (2006).
regionalism were in the field of trade, starting with the Latin America Free Trade Association (LAFTA).\(^{16}\) Created in 1960 by the Treaty of Montevideo,\(^ {17}\) LAFTA sought to eliminate trade restrictions on goods imported from member states and generally to improve economic conditions for the people of the region.\(^ {18}\) The result, though, was that with an unbalanced application of standards and an absent impetus within the framework of LAFTA for installing and enforcing measures against trade barriers, the organization instead proved insufficient.\(^ {19}\)

Thus, in 1980, another treaty signed in Montevideo replaced LAFTA with the Latin American Integration Association (ALADI).\(^ {20}\) ALADI, which still exists today, functions with the understanding that the region’s less-developed nations must, if the region is to be financially co-productive, receive support from the region’s bigger economies. It also allows for the employment of regional trade preferences and scope agreements.\(^ {21}\)

However, the first modern efforts at one common South American market did not start until 1969 with the founding of the Andean Group (also known as the Andean Pact). Created by the Cartagena Agreement,\(^ {22}\) the Group sought to improve economic conditions and galvanize development efforts primarily by forming a common market by 1980. It also sought to reduce national tariffs, create a uniform external tariff simultaneously with the common market, employ an immediate minimum common external tariff, and permit preferential treatment for less-developed member states similar to what ALADI would later invoke.\(^ {23}\) The Group experienced early success, lending towards its continued operation today, and in 1996 the Group changed to the Andean Community by means of the Trujillo Protocol to reflect its growing role in the region.\(^ {24}\)

In 1991, the common market that the Andean Community ultimately sought materialized with the formation of the Common Market of the South (MERCOSUR). Instituted by the signing of the Treaty of Asuncion,\(^ {25}\) MERCOSUR sought to exist within the measures created by ALADI as well as take advantage of the fact that six years earlier, Argentina and Brazil had successfully integrated their markets by means of the Iguazu Declaration of

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19 Id. at 109-10.
22 Agreement on Andean Subregional Integration, Bol.-Chile-Colom.-Ecuador-Peru, May 26, 1969, 8 I.L.M. 910.
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1985.26 MERCOSUR enjoyed early success as the similarities of its signatory states bolstered the results of its transnational cooperation, led to effective freetrade agreements with non-member states, and even spoked rumors of plans for a common currency.27

Finally, in 2004, with the signing of the Cusco Declaration28, South America made its first move for comprehensive continental unity by announcing the creation of the South American Community of Nations (SACN), the precursor to UNASUR. Purporting the goal of completing Simon Bolivar’s vision as well as that of others “who built the great American Nation without borders,”29 the SACN was deliberately organized in a similar fashion to the European Union in the hope that South America could replicate the relative success of their trans-Atlantic counterpart.30 The SACN intended to merge the Andean Community and MERCOSUR trade blocs primarily through free trade zones while still maintaining the ideals of ALADI,31 promoting regional agricultural development,32 and fostering technological, scientific, and educational advances.33 Every nation in South America, with the exception of French Guyana, was a signatory.

III. UNION AND PURPOSE

With the signing of the 2008 Union of South American Nations Constitutive Treaty in Brasilia, Brazil,34 the presidents of the 12 signatory states to the Cusco Declaration moved to create UNASUR.35 Essentially the SACN by

27 Id. Problems have hit MERCOSUR, however, mostly due to the lack of any institutional enforcement mechanism. It has found itself subject to waves of protectionism, with member states refusing to adhere to certain policies for the sake of stimulating domestic growth as seen most glaringly during the 1998 recession that hit Brazil which ended up cascading throughout the continent.
29 Id. at pmbl.
30 Indeed, the European Union has reacted positively and even cooperatively to such posturing. See e.g. Communication from the European Commission, A Stronger Partnership Between the European Union and Latin America (2006), http://ec.europa.eu/external_relations/la/docs/com05_636_en.pdf.
31 Cusco Declaration, supra note 27, at art. II.
32 Id.
33 Id.
35 It is important to note here that this did not actually create UNASUR. As will be discussed below, the Constitutive Treaty requires the ratification of the treaty by at least nine States Party before it can enter into force. As of the writing of this article, the Constitutive Treaty has not obtained the ninth ratification.
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another name, the Constitutive Treaty nonetheless purposes UNASUR to a further extent than the SACN had previously expressed.

The treaty espouses the determination of UNASUR “to build a South American identity and citizenship” while at the same time “[integrating] regional space in the political, economic, social, cultural, environmental, energy, and infrastructure dimensions.” It speaks of the “strengthening of multilateralism and the rule of law in international relations” and the need to promote “a culture of peace . . . in a world free of nuclear weapons.” The treaty even extends the purpose of UNASUR geographically, making numerous references not only to the unification of South America but also to “the strengthening of Latin America and [the] Caribbean unity.” Importantly, for the sake of understanding the diplomatic dynamics a State Party must balance when participating with both UNASUR and the OAS, the Treaty also recognizes “the guiding principles” of “unlimited respect for sovereignty . . . [the] inviolability of States, self-determination of the peoples, solidarity, . . . reduction of asymmetries.”

Although these principles are necessary to espouse in order to assuage concerns about more sinking-ship scenarios which have pulled the continent’s collective economy into fiscal doldrums in the past, because they give State Parties the ability to champion their own causes over the organization’s, these and other declared concepts could nonetheless open again the revolving door of protectionism – a proven destroyer of cohesion in South America.

IV. JURISDICTION AND ORGANIZATION

Another vital matter that a State Party will have to contend with is the jurisdiction that UNASUR employs and how its political structures interact with its jurisdiction. An apt understanding of UNASUR’s jurisdiction will allow a potential State Party to appreciate the extent of UNASUR’s political and legal influence. At the same time, understanding the organization’s governmental structure and how it differs from the OAS will allow a State Party to understand how much influence the state might have within the organization.

A. Geographic Limits

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36 This is not to say that UNASUR has officially replaced the SACN. The Constitutive Treaty does not make any such move explicitly and nothing has come forward since disbanding the SACN.
37 Constitutive Treaty, supra note 33, at pmbl.
38 Id.
39 Id.
40 Id.
41 For an intricate analysis of the various problems that South America has faced due to economic downturns, the protectionist policies the downturns provoked, and the resultant damage, see DEMOGRAPHIC RESPONSES TO ECONOMIC ADJUSTMENT IN LATIN AMERICA (Georges Tapinos, Andrew Mason, & Jorge Bravo, eds., 1998); DEVELOPMENT CHALLENGES IN THE 1990S: LEADING POLICYMAKERS SPEAK FROM EXPERIENCE 17-24, 167-78 (Timothy Besley & Roberto Zagha, eds., 2005).
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As stated supra, the OAS reaches all countries in the Western Hemisphere with the present exception of Honduras. With its organizational headquarters in Washington, D.C., its itinerate General Assembly holding sessions throughout the Americas from Santiago, Chile to Windsor, Canada, its Inter-American Court of Human Rights being seated in San José, Costa Rica, and all in addition to the fact that the OAS currently has 64 “Permanent Observers” from Algeria to the European Union and even the Holy See, the OAS wingspan births a wide sphere of influence.

The sphere of influence that UNASUR can potentially wield, however, will never be as large as that exercised by the OAS. The reason is due conceptually to the limitations that the Constitutive Treaty places on UNASUR as a force for South American unification. As a practical consideration, UNASUR actually does not enjoy any juridical jurisdiction at this time because per Article 26 of the Constitutive Treaty, the treaty does not enter into force until it receives at least nine ratifications. As of the time of this writing, only six countries have ratified – Bolivia, Ecuador, Venezuela, Guyana, and most recently Peru on May 7, 2010 and Argentina by unanimous consent of its Congress in June.

However, proceeding as if the ninth ratification has occurred, although Article 1 declares UNASUR to have “international juridical character,” as a regional body its ultimate responsibility is to the region it represents. Thus, geographically speaking, its prima facie political jurisdiction would reach only to South American nations, particularly those nations who are States Party to the Constitutive Treaty and have ratified it.

Geographic reach can expand, however, through the provisions provided in Articles 19 and 20. These articles manifest a greater ambition on the part of UNASUR to spread beyond South America to the nations of Latin America and the Caribbean. As Article 19 states, Latin American and Caribbean states – and

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42 See supra note 4.
43 For a list of locations where the General Assembly has convened, see Regular Session of the General Assembly, http://www.oas.org/columbus/GAREG.asp (last visited Sept. 8, 2010).
45 Permanent Observers are nations and entities not in the Western Hemisphere who nonetheless participate in OAS programs and advise the organization when necessary. The status of Permanent Observer was created by the Permanent Council in its first session in 1971. OEA/Ser. P, A/G Res. 50 (I-O/71).
46 Constitutive Treaty, supra note 33, at art. 26.
48 Constitutive Treaty, supra note 33, at art. 1.
49 Id. The nations who were States Party at the time of the formation of the Constitutive Treaty were Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Peru, Suriname, Uruguay, and Venezuela. Id.
only Latin American and Caribbean states - can make their first steps into inclusion in UNASUR by becoming “Associate States.” As an Associate State, the nation would have its rights and obligations within UNASUR regulated by the Council of Ministers of Foreign Affairs. However, per Article 20, achievement of the status of Member State can occur (1) after the Constitutive Treaty has been in force for five years and (2) after the fourth year of the proposed state’s status as an Associate State. The Constitutive Treaty makes no provisions for Permanent Observer-like inclusions of non-South American states and entities – an omission which, as discussed below, may provide more difficulty for UNASUR than expected.

B. Subject-Matter Jurisdiction And Organizational Oversight

Concerning its governing structure, the OAS generally follows the well-worn example of the United Nations. Per Article 53 of the OAS Charter, the highest bodies of the OAS are the General Assembly (the “supreme organ of the Organization of American States”), the Permanent Council, and the Secretary General. These groups are followed by the Inter-American Council for Integral Development, the Inter-American Juridical Committee, the Inter-American Commission on Human Rights along with the Inter-American Court of Human Rights, and various “specialized” conferences and organizations formed pursuant to the Charter, a General Assembly resolution, or Permanent Council action.

Each Member State maintains the right to preserve its sovereignty, independent judicial jurisdiction, and legislative character in the face of these organizations, the OAS limiting these functions “only by the exercise of the rights of other States in accordance with international law.”

Concerning UNASUR, once a nation becomes a Member State, that nation receives not only all the privileges and immunities inherent in UNASUR membership but also the attached responsibilities. For instance, Article 3 enumerates twenty-one objectives of UNASUR spanning from such matters as economic and financial integration to combating drug and human trafficking, providing universal education, integrating environmental policies and practices, and more.

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50 Id. at art. 19.
51 Id.
52 Id. at art. 20.
53 O.A.S. Charter, supra note 5, at art. 54.
54 Id. at art. 80-92.
55 Id. at art. 107-21.
56 Id. at art. 93-98.
57 Id. at art. 99-105.
58 Id. at art. 106.
59 Id. at art. 122-30.
60 Id. at art. 13.
61 Constitutive Treaty, supra note 33, at art. 22. As both the preamble to the Constitutive Treaty and Article 3 intone, such privileges presumptively include the right to travel freely between Member States and reside therein, universal citizenship for the state’s people in UNASUR, and the right to trade comparatively unencumbered with other UNASUR Member States.
and even disclosing otherwise protected national security information.  

Although a state could approach the responsibility to meet these objectives “according to its own reality,” and in a “participatory and consensual manner,” it nonetheless follows that failure to make a good faith effort to meet these objectives could render the state politically isolated should UNASUR receive the regional participation it desires. The result could be economically and socially detrimental to the state, even disastrous, should the state be a relatively small player in South American affairs and dependent on others for import and export activity and investment.

Concerning the oversight of political jurisdiction of UNASUR, the Constitutive Treaty charges five bodies with this task: the President Pro Tempore, the Council of Heads of State and Government, the Council of Ministers of Foreign Affairs, the Council of Delegates, and the General Secretariat. Although the Pro Tempore Presidency, found in Article 7, is essentially the face of UNASUR, representing UNASUR in international affairs and signing treaties, the Council of Heads of State and Government, found in Article 6, is actually the supreme political organ in UNASUR. Consisting of the presidents and prime ministers of the various Member States, its main responsibility is to oversee the transition of the region from a conglomeration of independent, autonomous nations to an integrated trade and political bloc. That said, however, the General Secretariat, found in Article 10, has the responsibility of implementing and enforcing the directives and policies of all UNASUR political and legislative organs. Thus, the General Secretariat plays arguably the most executive role out of all the governing bodies.

62 Id. at art. 3.
63 Id. at pmbl.
64 Id. at art. 2.
65 A sixth body - the South American Parliament – is actually contemplated in Article 17. However, contemplation is all that the Treaty accomplishes as it does not actually establish the Parliament. In fact, Article 17 only establishes two things: (1) that the Parliament will sit in Cochabamba, Bolivia and (2) that the Parliament’s creation will occur in a future Additional Protocol. Constitutive Treaty, supra note 33, at art. 17. As of the time of this writing, the Additional Protocol has not been drafted. Thus, the South American Parliament does not yet exist. Most likely, though, it will follow the example of the Andean Community’s Andean Parliament based in Bogotá, Colombia. See Constitutive Treaty of the Andean Parliament, Articles 12-15, Oct. 25, 1979, http://www.parlamentoandino.org/images/pdf/tratadoconstitutivo.pdf (stating “Son propositos del Parlamento Andina . . . coadyuvar a la promocion y orientacion del proceso de la integracion subregional andina; sustenar . . . el pleno imperio de la libertad, de la justicia social, y de la democracia . . .; contribuir al afianzamiento de la paz y justicia internacional”).
66 At the time of this writing, the President Pro Tempore is Rafael Correa, the President of Ecuador. However, as per Article 6 President Pro Tempore Correa can hold the position for only a year, in a matter of months a new President Pro Tempore will preside. In fact, the head of state for Guyana will be the next President Pro Tempore as the selection of the President Pro Tempore is done alphabetically by country among the heads of state for the various UNASUR Members. 67 See Constitutive Treaty, supra note 33, at art. 10(a),(b). On May 4th, 2010, the Council of Heads of State and Government selected former Argentine President Nestor Kirchner as the first
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However, similar to the OAS General Secretariat⁶⁸, not all executive functions fall to the Secretariat, specifically the creation and implementation of UNASUR foreign policy. The bulk of this responsibility instead falls on the Council of Ministers of Foreign Affairs, followed by the Council of Delegates.

Found in Article 8, the Council of Ministers of Foreign Affairs is responsible for, *inter alia*, developing and promoting “political dialogue and coordination on themes of regional and international interest.”⁶⁹ It also drafts “policy guidelines” for interacting with third-parties i.e. international entities outside of UNASUR.⁷⁰ At the same time, the Council of Delegates, found in Article 9, exists in a quasi-supportive role for the Council of Ministers of Foreign Affairs. Besides preparing meetings for the Council of Ministers and implementing Council of Ministers resolutions, the Council of Delegates also acts as a check on the Council of Ministers as the Council of Delegates also oversees regional and international policy-making.⁷¹

V. THIRD-PARTY INTERACTIONS

This all said, however, a Member State of both UNASUR and the OAS should give considerable attention to the political jurisdiction that these two organs as well as UNASUR as a whole exercise when interacting with third parties. Such interaction is crucial to understand when debating inclusion in UNASUR as the potential for political friction with the OAS most likely lies here.

In the OAS, the Charter is clear about how the OAS expects Member States to negotiate conflicts between its mandates and those of others. Concerning the United Nations who slightly pre-dates the OAS and with whom early conflicts such as the ones contemplated by this article were possible, Article 131 states bluntly that nothing within the Charter “shall be construed as impairing the rights and obligations of the Member States under the Charter of the United Nations.”⁷² Indeed, the primary principles declared within the OAS Charter are that the relations between states should be conducted in accordance with international law,⁷³ that the faithful fulfillment of obligations arising from treaties and “other sources” of international law should be a part of that conduct,⁷⁴ and ultimately that “good faith” should govern States’ relations.⁷⁵ Finally, the Charter sets down numerous stances on the importance of cooperation, in balance with the state’s resources and abilities to cooperate, for the sake of achieving the integral

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⁶⁹ Constitutive Treaty, *supra* note 33, at art. 8(d).
⁷⁰ *Id.* at art. 8(h).
⁷¹ *Id.* at art. 9(a),(b),(f).
⁷³ *Id.* at art. 3(a).
⁷⁴ *Id.* at art. 3(b).
⁷⁵ *Id.* at art. 3(c).
development to which the OAS aspires.\textsuperscript{76} Thus, although it requires adherence to the principles it espouses and the conventions created under its auspices, the OAS also understands that proprieties exist under international law – namely those within customary international law – that must take precedent if the OAS does not already contemplate them.

Concerning UNASUR, however, the analysis is altered. The organization generally approaches relationships with third parties depending on which one of two categories the third party resides in: (1) third parties with whom a Member State already has a relationship with and (2) third parties with whom UNASUR does not currently have a relationship but one day might.

Concerning the former, which would include not only such matters as pre-existing exclusive trade agreements but also obligations Member States have to other organizations such as the OAS and the United Nations, UNASUR appears to know its place. Article 13 of the Constitutive Treaty declares:

“Programmes, institutions, and organizations in which Member States participate prior to the entry into force of this Treaty may be considered as UNASUR programmes, institutions, or organizations . . .”\textsuperscript{77}

Concerning the latter, Article 15 states that UNASUR will “seek to strengthen cooperation mechanisms with other regional groups, States and other entities with international legal character,” particularly in such areas as economics, education, energy, and social policies.\textsuperscript{78}

Both of these Articles give the impression that UNASUR would have to back down in any conflicts that might occur between Member States’ UNASUR responsibilities and OAS responsibilities. At the very least, Article 15 appears to require UNASUR’s cooperation in the case of a conflict with either OAS or even with another nation such as the United States. Of course some South American governments would hesitate to take such a course of action, especially when environmental, trade, and energy disputes are involved.

An enormous caveat exists in Article 13, however, which would not only give UNASUR the ability to push back in a conflict but which could also spur conflict. In order for third-party programs to be considered UNASUR programs and ergo avoid disputes as to which organization to abide by, UNASUR must first adopt those programs.\textsuperscript{79}

Adoption, overseen primarily by the Council of Delegates, occurs on the initiative of a Member State who must submit a proposal for adoption to the Delegates. The Council of Delegates must approve the proposal by consensus. Upon this happening, the Council of Delegates then passes the proposal on to the Council of Ministers of Foreign Affairs who then passes the proposal on to the

\textsuperscript{76} Id. at art. 30-32.
\textsuperscript{77} Constitutive Treaty, supra note 33, at art. 13.
\textsuperscript{78} Id. at art. 15.
\textsuperscript{79} Id. at art. 13.
Council of Heads of State and Government, both of which must approve the proposal by consensus. If the proposal has survived this process without one objecting vote, the adoption cannot even be implemented unless (a) at least three Member States agree to implement it and (b) the possibility of greater Member State cooperation in the future exists. But even if an adoption proposal fights through the hedges of Council approvals and meets both requirements, the Constitutive Treaty allows a Member State to flat-out refuse to participate with the newly adopted and otherwise UNASUR-wide policy.\textsuperscript{80}

Thus, although UNASUR is mindful of the potential for conflicting obligations between its Member States and third party organizations, the path to pre-emptive resolution of these conflicts by UNASUR is wrought with obstacles. These hindrances ultimately render resolution efforts futile by a deficiency of mechanisms to compel Member State cooperation. The UNASUR Member State hoping to avoid clashing obligations with third parties will therefore most likely need alternative diplomatic routes to such conflict resolution as the Constitutive Treaty does not appear to provide a practical one.

VI. CONFLICT RESOLUTION MECHANISMS

Finally, an important matter a state should consider when debating involvement in UNASUR is the means for resolving disputes with another Member State. Although states usually have the ability to resolve disputes in whatever non-violent, non-disruptive manner they see fit, international organizations typically outline procedures for solving conflicts that can have an impact on domestic policy-making. However, as the differences between the OAS and UNASUR explained below exhibit, not all organizations have the same resolution priorities.

A. OAS Procedure

In the OAS, each state, upon ratifying the OAS Charter, agrees to the rights and duties provided. This includes, \textit{inter alia}, the obligation of each Member State to have their disputes among each other settled by peaceful means.\textsuperscript{81} The Charter states that this requirement “shall not be interpreted as an impairment of the rights and obligations of the Member States under Articles 34 and 35 of the Charter of the United Nations.”\textsuperscript{82}

The peaceful procedures set forth by the Charter include direct negotiation, good offices, mediation, investigation and conciliation, judicial settlement, arbitration, and those which the parties to the dispute may agree upon at any time.\textsuperscript{83} Generally, however, the Member States agree to engage in any peaceful procedures that will enable them to reach a solution “in the event that a

\textsuperscript{80} Id.
\textsuperscript{81} O.A.S. Charter, supra note 5, at art. 24.
\textsuperscript{82} Id.
\textsuperscript{83} Id. at art. 25.
dispute arises between two or more American States which, in the opinion of one of them, cannot be settled through the usual diplomatic channels . . . “

B. **UNASUR Procedure**

In UNASUR, however, the process for resolving international disputes takes a very different tone. Article 21, which governs the resolution of conflicts, mandates that State Parties may only use one medium by which they can solve differences on their own – direct negotiation.\(^8\) Even then, direct negotiation is required only when a conflict arises concerning the implementation or interpretation of the Constitutive Treaty.\(^6\) All other UNASUR-related differences, if not concerning the Constitutive Treaty, have no mandated procedures for resolution.

If direct negotiation does not resolve the issue, then UNASUR will intercede. A dispute unresolved by negotiation must go immediately to the Council of Delegates who will formulate “appropriate recommendations” within 60 days.\(^7\) If, however, the Council of Delegates cannot return a decision on the dispute, the issue then transfers to the Council of Ministers of Foreign Affairs who will issue a final resolution.\(^8\)

The differences between the OAS and UNASUR in resolving international conflicts is telling. Whereas the OAS Charter provides for a number of means for resolving disputes, almost all of which essentially require the Member States to solve the problem without OAS involvement, conflict resolution in the UNASUR Constitutive Treaty can quickly become an exercise in international governmental interjection.

The result can be unfavorable for both the State Parties and UNASUR. On the one hand, the State Parties may feel their options for resolution improperly limited. On the other hand, the UNASUR governing bodies could find themselves expending more resources than necessary addressing disputes better left to politically-detached third parties such as an arbitral tribunal or an independently-based constitutional court. At any rate, though, the UNASUR approach to conflict resolution is one more matter that a state contemplating ratification must consider as potentially adverse to domestic policy.

**VII. CONCLUSION: FOR THE GOOD OF SURAMÉRICA?**

The Santiago-based think tank *Libertad y Desarrollo*, a non-profit organization which has monitored affairs in Chile and South America for 20 years, issued a report on July 9th, 2010 concerning whether Chile, who is currently contemplating ratification of the UNASUR Constitutive Treaty, should in fact

\(^8\) *Id.* at art. 26.
\(^6\) *Id.* at art. 26.
\(^6\) *Id.*
\(^7\) *Id.*
\(^8\) *Id.*
The Union of South American Nations, the OAS, and Suramérica

ratify. The report gives due praise to the ambition from which UNASUR has been born. However, the report gives UNASUR a cold reception.

Characterizing the organization as “polemical since its very beginning,” the report observes correctly that because the engine driving the UNASUR process is political, it is much more vulnerable to ideological schisms – some of which started gnawing at the fabric of the organization even before the formation of the SACN in 2004. This stands in contrast to past unifying initiatives such as ALADI and MERCOSUR whose core threads of economic and commercial improvement have provided relatively few points of discord while making general acceptance easier.

The report goes on to color the Constitutive Treaty as a “bad institutional proposal which duplicates other institutions that have existed in the region for decades.” It condemns UNASUR for not taking a stronger stance on defending democracy. Furthermore, it argues that although the concept of a uniform South American currency may one day benefit the region, most of the economies of South America’s nations are still far too weak to withstand the upheavals that the installation of a common currency can create.

One of the greatest complications for UNASUR that the report articulates, though, is the “political weakening” of the OAS that would result should UNASUR receive the ninth ratification. Indeed, the conclusion that juridical recognition of UNASUR in its current form would weaken the OAS is not easy to avoid. Although the Constitutive Treaty does not shape UNASUR as facially antagonistic to the OAS, the anti-American rhetoric that launched the opening movements towards UNASUR and which still infiltrates its operations will, if not curbed, eventually carve a line in the proverbial sand between UNASUR and the US-based OAS.

In fact, the beginnings of that line may have already been cast when UNASUR and the OAS appeared to come at odds over the handling of a 2008 political crisis in Bolivia when UNASUR sought to quiet the internal unrest on its own, exclusive of the OAS who felt the matter was quintessentially theirs to resolve.

The inquiry then is whether, in South America, a weakening of the OAS matters. The answer to this question should be an unequivocal yes. It is true that the OAS has failed to unite South America into a strong, cohesive political unit. However, such was never the stated goal of the OAS in the first place. Economic

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89 Libertad y Desarrollo, UNASUR: Should Chile Become a Member?, PI-973, July 9th, 2010.
90 Id. at p. 1.
91 Id.
92 Id. at p. 5.
93 Id.
94 Id.
95 Id.
96 Id.
97 As the Libertad y Desarrollo report points out, Venezuelan president Hugo Chavez has repeatedly characterized UNASUR as “a defeat for the United States.” Id. (citing Raúl Ferro, UNASUR: Y Aquí Vamos De Nuevo, CADAL (May 26th, 2008)).
improvement, greater political cooperation, better social protections, and other similar goals are certainly objectives of the OAS but its focus has always been on all of the Americas, North, Central, and South. And concerning these objectives and their fulfillment in South America, the OAS has made great strides in conjunction with the International Monetary Fund, the World Bank, and the various trade blocs that South America has birthed over the last 40 years.

In addition, a weakened OAS does not have the same ability to guard democracy or serve as a bulwark against the military takeovers that plagued South America for much of the late 20th century and hit Honduras in 2009. At the same time, UNASUR itself suffers from a democratic deficiency as no South American Parliament exists, the creation of which is hardly mandated.\(^{99}\)

In addition, even with MERCOSUR and CAN, because the political and economic capital of Mexico, the United States, and Canada are absent, UNASUR is ultimately under-equipped. As of now, it simply cannot abate major internal bloodshed such as that which wrecked Guatemala in the 1980s or international crises such as the 1982 Falklands War between Argentina and Great Britain\(^ {100}\) or the economic calamity that gripped South America in the late 1990s.\(^ {101}\)

Most importantly, though, a weak OAS will not be able to protect the human rights of the peoples of South America as well as they need. As stated above, the OAS catalog of human rights conventions pre-dates even the vaunted Universal Declaration of Human Rights, giving the OAS system over 60 years to mature and congeal. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have worked for decades to battle state abuses, constructing a significant lexicon of adversarial and advisory opinions in the process.\(^ {102}\) UNASUR, however, is not equipped to fill the absence of OAS human rights protections in any way, shape, or form. UNASUR does not even have a court of which to speak. Thus, if UNASUR in its current form becomes the sole international political force unifying South America as some have aspired it to be, the rights of the South American people – or at least those of UNASUR Member States – may become extremely vulnerable.

\(^{99}\) See supra note 64.

\(^{100}\) To be fair, though, the OAS did not prove very influential in the resolution of the Falklands War as it chose to allow the United States to actively support Great Britain despite the collective security provisions in the OAS Charter at Articles 28 and 29.

\(^{101}\) For more on the South American economic crisis of the late 1990s, from an Argentine perspective, see Javier Auyero, Poor Peoples Politics: Peronist Survival Networks and the Legacy of Evita (2000).