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The Advisory Jurisdiction of the Permanent Review Tribunal of the Southern Common Market

Jurysdykcja doradcza Stałego Trybunału Rewizyjnego Wspólnego Rynku Południa

ABSTRACT

The 30th anniversary of the signing of the Asunción Treaty which provided the basis for the creation of the Southern Common Market (Mercosur), was 26 March 2021. It is an economic integration process of all the markets in South America and the fifth economy in the world. The main goals of Mercosur include ensuring free trade and movement of goods, capital, services and people by eliminating custom duties, tariffs and other restrictions and establishing common external tariffs. During this time, the Member States as well as Mercosur itself undergone some significant changes. The evolution of integration processes has also been accompanied by development in the Mercosur dispute settlement mechanism. One significant modification was the establishment of the Permanent Review Tribunal (the PRT), which has contentious and advisory jurisdiction. Advisory opinions are still an underestimated tool in solving legal issues. Scholars primary focus on contentious jurisdiction of international tribunals, omitting or underestimating the value of advisory jurisdiction. Notwithstanding, advisory opinions issued by international tribunals are usually legal advice on a point of law, it is sometimes noted that they may be even seen as an integration instrument. This article argues that due to the non-binding character of advisory opinions they are a useful instrument of standardization of Mercosur law, strengthening integration processes and enabling the fulfillment of objectives set forth in the Asunción Treaty. The extent of their impact depends not only on the PRT itself, but also on whether the entity that has requested the advisory opinion, in particular the supreme national courts, is willing to follow the PRT guidance. This article contributes to the discussion on the impact of advisory opinions on the development of integration processes.

Keywords: advisory opinion; dispute settlement mechanism; Mercosur; Permanent Review Tribunal; integration processes

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INTRODUCTION

Article 33 of the United Nations Charter[1] specifies peaceful means of dispute settlement, i.a. negotiation, mediation, arbitration, judicial settlement and resort to regional agencies or arrangements. These means are important instruments to maintain international peace and security. The Permanent Review Tribunal (the PRT) of the Southern Market Community is one of such measures. It is an international court established by way of a regional economic integration agreement. Pursuant to the Olivos Protocol, the PRT is the highest instance judicial body in the dispute settlement mechanism of Mercosur. This judicial body is one of many regional tribunals of economic integration communities such as, e.g., the Court of the Eurasian Economic Union, the Andean Court of Justice, the Caribbean Court of Justice or the Common Market for Eastern and Southern Africa Court of Justice.[2] In principle, international tribunals have the power to settle disputes between Member States, and some of them also have the capacity to render advisory opinions. The main function of the PRT is to settle disputes among Members States and to give advisory opinions. There is no uniform legal definition of advisory opinion. In essence, they are guidance on a point of law, provided to the subject, body or entity which requested them.[3] Usually, the power to give advisory opinion is conferred on the international tribunal by its constituent instrument.[4] With regard to the PRT, the legal regime of advisory opinions is contained in Mercosur regulations of a very different nature, i.e., the primary law – the Olivos Protocol, and the secondary law – decisions of the Common Market Council and the internal rules of the Supreme Courts of Justice of Member States, which are not Mercosur integration law but rather national rules of a procedural nature issued for the execution of those rules.[5] Furthermore, any provisions that would explicitly determine the legal nature of advisory opinions are generally hard to find in documents on the advisory juris-

[1] United Nations Charter, Statute of the International Court of Justice and Agreement Establishing the Preparatory Commission of the United Nations signed on 26 June 1945, in San Francisco (Journal of Laws 1947, no. 23, item 90).

[2] For example, see *International Court Authority*, eds. K.J. Alter, L.R. Helfer, M. Rask Madsen, Oxford 2018, pp. 59–194.

[3] A. Aust, *Advisory Opinions*, "Journal of International Dispute Settlement" 2010, vol. 1(1), p. 123.

[4] For example, see Article 65 of the Statute of the International Court of Justice; Article 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, ETS No. 005; T. Thirlway, *Advisory Opinions*, "Max Planck Encyclopedia of Public International Law", April 2006, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e4?prd=EPIL (access: 7.6.2022), para. 4.

[5] M. Cienfuegos Mateo, *Opiniones consultivas en el Mercosur y cuestiones prejudiciales en la Unión Europea: estudio comparativo*, "Revista de Derecho Comunitario Europeo" 2012, vol. 16(42), p. 434.

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diction of international tribunals.[6] But in case of the PRT the non-binding nature of advisory opinions is expressly stated.

The purpose of this article is to determine that due to non-binding character, advisory opinions provide a convenient means of obtaining interpretation or verification of the validity of Mercosur primary and secondary law. They can be a very useful tool for the national courts of Member States before which cases concerning the interpretation of Mercosur law are pending. Therefore, advisory opinions can have an impact on the integration processes in the region. In order to prove the main thesis, it is indispensable, using the method of legal analysis, to describe concisely the evolution of the Mercosur dispute settlement mechanism, following which the PRT was set up. These processes represent the next step to establish a permanent Community court. Then, using the method of legal analysis, we examine the primary and secondary Mercosur norms governing the advisory proceeding as well as national rules but the main focus will be on advisory practice of the PRT.

The article is divided into five sections: introduction, the Mercosur dispute settlement mechanism in brief, advisory jurisdiction of the PRT, advisory cases, conclusions.

THE MERCOSUR DISPUTE SETTLEMENT MECHANISM IN BRIEF

The idea of cooperation between Latin American countries emerged in the early 19th century as part of Bolivar's concept of Latin American unity.[7] But the suggestion of creating the Latin American Free Trade Association was put forward at the United Nations Economic Commission for Latin America in order to revive trade in the region.[8]

The concept of establishing a common market was included in the Supplementary Economic Agreement of the Latin American Integration Association No. 14 of December 1990.[9] The Asunción Treaty, which established the Common Market of the South entered into force on 19 November 1991 and had five annexes attached

[6] For example, see Article 5 of Protocol 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 2 October 2013, CETS 214.

[7] C. Mik, *Wspólny Rynek Południa (Mercosur) z perspektywy prawa międzynarodowego*, "Kwartalnik Prawa Publicznego" 2017, no. 2, pp. 3–40; E. Chwiej, *Mercosur. Organizacja regionalnej współpracy gospodarczej w Ameryce Południowej*, Kraków 2010, pp. 32–39.

[8] T.A. O'Keefe, *Latin American and Caribbean Trade Agreements: Keys to a Prosperous Community of the Americas*, Leiden 2009, p. 5.

[9] Idem, *The Legal Framework and Institutions of Mercosur: The Newly Emerging Economic Bloc in South America's Southern Cone*, "Inter-American Legal Materials" 1992, vol. 6(1), p. 90.

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to it.[10] From its very beginning, the Treaty provided the framework for the creation of the Common Market and its provisions were applied during the transitional period, i.e. from its entry into force until 31 December 1994.[11] The Asunción Treaty set up a free trade area and a customs union.[12] Annex III of the Asunción Treaty set forth a provisional, non-judicial, three-tier dispute settlement mechanism.[13] In the first instance, State Parties in dispute should resort to direct negotiation, and if they fail to resolve it, the dispute should be submitted to the Common Market Group and if agreement is still not achieved, it should be referred to the Council. The Asunción Treaty stipulates also that by the end of 1994 a permanent dispute settlement mechanism for the Common Market should be established.

On 17 December 1991, the Brasilia Protocol was signed.[14] This document supplements the provisions of the Asunción Treaty. It contains a procedure for dispute settlement arising not only between Member States but also between private parties and Member States. The latter consists of three stages: direct negotiations, and if negotiation fails the next step will be submitting the dispute to the consideration of the Common Market Group. The last stage was an arbitration proceeding and in that case the dispute should be lodged to an *ad hoc* Arbitration Tribunal.[15] Pursuant to Article 25 of the Brasilia Protocol, individuals or legal persons may seek resolution of a dispute with a Member State in case of application of "legal or administrative measures which have a restrictive, discriminatory or unfairly competitive effect, in violation of the Treaty of Asunción, of the agreements celebrated within its framework, the decisions of the Common Market Council or the resolutions of the Common Market Group". Private parties should submit the case with the National Section of the Common Market Group.

The next step in the evolution of Mercosur and its dispute settlement mechanism was the adoption of the Ouro Preto Protocol on 17 December 1994. Article 43 set forth that all disputes concerning interpretation, application or non-fulfilment of the Asunción Treaty provisions and other agreements or decisions of the Common Market Group and directives of the Trade Commission shall be subject to the settlement

[10] Treaty establishing a Common Market (Asunción Treaty) between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (with annexes), Asunción, 26 March 1991, UNTS, vol. 2140, I-37341, pp. 257–359.

[11] A. Pastori, *The Institutions of Mercosur: From the Treaty of Asunción to the Protocol of Ouro Preto*, "Inter-American Legal Materials" 1992, vol. 6(3–4), p. 1.

[12] E. Teubal Alhadeff, *Argentina-Brasil-Paraguay-Uruguay: Additional Protocol to the Treaty of Asuncion on the Institutional Structure of Mercosur ("Protocol of Ouro Preto")*, "International Legal Materials" 1995, vol. 34(5), p. 1244.

[13] R. Olivera García, *Dispute Resolution Regulation and Experiences in Mercosur: The Recent Olivos Protocol*, "Law and Business Review of the Americas" 2002, vol. 8(4), p. 538.

[14] Protocol of Brasilia for the Settlement of Disputes, done at Brasilia, 17 December 1991, "International Legal Materials" 1997, vol. 36(3), pp. 693–699.

[15] See R. Olivera García, *op. cit.*, pp. 539–545.

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procedures laid down in the Brasilia Protocol. What is more, the Ouro Preto Protocol stipulates that State Parties should review and adopt a permanent mechanism of dispute resolution. The Brasilia Protocol was replaced by the Olivos Protocol of 18 February 2002[16], which entered into force on 1 January 2004.[17] It contains a four-step procedure of dispute settlement: compulsory negotiation, submission of the dispute, by common consent, to the Common Market Group, *ad hoc* arbitration, and a procedure for reviewing the decisions of the *Ad Hoc* Arbitration Tribunal.[18] Furthermore, the PRT was established, which is the judicial body of the highest instance within Mercosur.[19] Article 1 of the Protocol Amending the Olivos Protocol[20] stipulates that the PRT is composed of one regular arbitrator and one alternate from each Member State for a period of 2 years, renewable for two consecutive periods. If the number of arbitrators is equal, an additional regular arbitrator and an alternate shall be elected, by unanimous agreement of the States Parties, for a period of 2 years renewable for two consecutive periods. In the absence of unanimity, a draw of lots shall be held.[21]

In accordance with Article 22 of the Olivos Protocol, the PRT is also the court of appeal. It has the power to uphold, modify or reverse the legal reasoning and decision of the *Ad Hoc* Arbitration Tribunal. Under Article 17 (2) of the Olivos Protocol, the right to apply for review of the decisions of the *Ad Hoc* Arbitration Tribunal may refer to legal issues concerning the dispute and the legal interpretation contained in the decision of the *Ad Hoc* Arbitration Tribunal. In the light of Article 34 of the Olivos Protocol, the *Ad Hoc* Arbitration Tribunal and the PRT resolve disputes regarding provisions of the Treaty, Protocol, decision of the Council of the Common Market, resolutions of the Common Market Group, and directives of the Mercosur Trade Commission, as well as apply the principles and provisions of international law. Furthermore, both organs have the power to decide a case *ex aequo et bono* if parties so agree. Disputes may also be subject to the dispute mechanism settlement of the WTO or any other agreed by the parties to the dispute (Article 1 (2) of the Olivos Protocol).

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[16] Southern Common Market (Mercosur): The Olivos Protocol [February 18, 2002], "International Legal Materials" 2003, vol. 42(1), pp. 2–18.

[17] J. Thornton, *Courts and Tribunals Established by Regional Economic Integration Agreements*, [in:] *The Rules, Practice, and Jurisprudence of International Courts and Tribunals*, ed. C. Giorgetti, Leiden–Boston 2012, p. 492.

[18] R. Olivera García, *op. cit.*, pp. 546–547.

[19] L. Druetta, *The Permanent Review Court of the Mercosur ("Mercado Comun del Sur" or Common Market of the South)*, "International Judicial Monitor" 2012, http://www.judicialmonitor.org/archive_winter2012/spotlight.html (access: 28.12.2021).

[20] Protocolo Modificatorio del Protocolo de Olivos para la Solución de Controversias en le Mercosur, Rìo de Janeiro, República Federativa del Brasil, 19 de enero de 2007, https://www.tprmercosur.org/es/norm_juridica.htm (access: 7.6.2022).

[21] C. Baudenbacher, M.J. Clifton, *Courts of Regional Economic and Political Integration Agreements*, [in:] *The Oxford Handbook of International Adjudication*, eds. C.P.R. Romano, K.J. Alter, Y. Shany, Oxford 2014, p. 266.

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ADVISORY JURISDICTION OF THE PERMANENT REVIEW TRIBUNAL

The power of the PRT to give advisory opinion is provided for in the Olivos Protocol (Article 3). According to Article 47 of said Protocol, in order to ensure the effectiveness of the mechanism, the Council of Common Market issued a decision to implement the provisions of the Olivos Protocol.[22] Chapter II of Annex to the decision of the Council covers the institution of advisory opinions. Entities entitled to request advisory opinion are listed in Articles 2 and 3 of the Annex, i.e.: State-Parties acting together, the Council of Common Market, the Common Market Group, the Mercosur Trade Commission and the Supreme Courts of the State Parties.[23] This means that lower courts of State Parties have no power to file directly a request to the PRT.[24] Furthermore, pursuant to Article 13 of the Constitutive Protocol of the Mercosur Parliament, the advisory jurisdiction may be invoked by the Parliament.[25] The Parliament is an advisory body and has no real legislative power.[26] Nonetheless, this body is entitled to make recommendations, request information, issue opinions concerning draft regulation. The Parliament also prepares reports and its budget.[27] On 14 September 2015, the Draft regulating the rules of procedure for the Parliament to request an advisory opinion was presented,[28] which was adopted by the Committee on Legal and Institutional Affairs on 9 October 2017.[29] In July 2018, with the consent of the Parliament, the Draft was

[22] Reglamento del Protocolo de Olivos para la Solución de Controversias en el Mercosur, MERCOSUR/CMC/DEC Nº 37/03, XXV CMC – Montevideo, 15 de diciembre de 2003; T.A. O'Keefe, *Latin American…*, pp. 153–154.

[23] C. Espósito, L. Donadio, *Inter-jurisdictional Co-operation in the MERCOSUR: The First Request for an Advisory Opinion of the MERCOSUR's Permanent Review Tribunal by Argentina's Supreme Court of Justice*, "The Law and Practice of International Courts and Tribunals" 2011, vol. 10(2), p. 274.

[24] P. Wojcikiewicz Almeida, *The Case of Mercosur*, [in:] *The Legitimacy of International Trade Courts and Tribunals*, eds. R. Howse, H. Ruiz-Fabri, G. Ulfstein, M.Q. Zang, Cambridge 2018, p. 249.

[25] Protocolo Constitutivo del Parlamento del Mercosur, MERCOSUR/CMC/DEC Nº 23/05, XXIX CMC – Montevideo, 8 de diciembre de 2005.

[26] B. Olmos Giupponi, *International Law and Sources of Law in Mercosur: An Analysis of a 20-Year Relationship*, "Leiden Journal of International Law" 2012, vol. 25(3), p. 711.

[27] R.A. Porrata-Doria Jr., *Mercosur at Twenty: From Adolescence to Adulthood*, "Temple International and Comparative Law Journal" 2013, vol. 27(1), pp. 27–28.

[28] Reglamentación del Procedimiento para la Solicitud de Opiniones Consultivas al Tribunal Permanente de Revisión por el Parlamento del MERCOSUR y Otras Modificaciones, MERCOSUR/PM/Proyecto de Norma N°/15, https://www.parlamentomercosur.org/innovaportal/file/15511/1/mep-108-2015.pdf (access: 7.6.2022) 1.

[29] Comisión de Asuntos Juridìcos e Institucionales, MERCOSUR/PM/CAJI/INF No. 027/2017, Montevideo, 9 de octubre de 2017, https://www.parlamentomercosur.org/innovaportal/file/14420/1/mep-444-2017.pdf (access: 7.6.2022).

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examined in a plenary session.[30] Once again, a parliamentary debate on the Draft was held on 15 May 2021 during its 74th ordinary session, via electronic means,[31] and in April 2022 during its 80th ordinary session.[32]

Under Article 3 (2) of the Annex, a State Party or State Parties, which decided to request an advisory opinion shall submit a draft request to other State Parties in order to agree on its object and content. If consensus has been reached, the temporary Presidency shall prepare the text of the request and submit it to the PRT through its Secretariat. In the case of the Mercosur decision-making bodies, the request should be recorded in minutes of the meeting and submitted to the PRT in the same manner as for States Parties.

Article 3 (1) and Article 4 (1) of the Annex regulate the substantive scope of advisory opinions. According to Article 3 (1), when a request is made by State Parties or Mercosur bodies, the question may concern any legal matter covered by the Treaty, Protocol, the protocols and agreements concluded in connection with the conclusion of the Asunción Treaty, decisions of the Common Market Council, resolutions of the Common Market Group and directives of the Mercosur Trade Commission. It also concerns requirements of the request and advisory proceeding (Articles 5–6 of the Annex). These provisions are similar to those concerning requests submitted by Supreme Courts of the Mercosur Members, which are described below.

When the request is filed by the Supreme Courts of Justice of State Parties, the question may only concern interpretation of Mercosur law, provided that they are related to cases pending before such courts.[33] Thus, the question can only refer to the interpretation and not the validity of Mercosur law. The procedure for submitting the request for advisory opinions should be regulated by the Supreme Courts of the Mercosur Members (Article 4 (2) of the Annex). The Permanent Forum of the Supreme Courts of Mercosur Members on Judicial Matters Relevant to Latin American Integration Processes with Special Reference to Mercosur was established in 2004, and in 2005 it prepared a draft procedure for referring requests for advisory opinions from the Supreme Courts to the PRT. Then the Working Group

[30] Proyecto que reglamenta opiniones consultivas al Tribunal Permanente de Revisión del Mercosur es analizado en el Parlasur, Agencia Parlasur, 25 de julio de 2018, https://www.parlamentomercosur.org/innovaportal/v/15511/1/parlasur/proyecto-que-reglamenta-opiniones-consultivas-al-tribunal-permanente-de-revision-del-mercosur-es-analizado-en-el-parlasur.html (access: 7.6.2022).

[31] See Parlamento del Mercosur, *Parlasur debatirá proyecto que reglamenta opiniones consultivas al Tribunal Permanente de Revisión del Mercosur*, https://www.parlamentomercosur.org/innovaportal/v/19235/1/parlasur/parlasur-debatira-proyecto-que-reglamenta-opiniones-consultivas-al-tribunal-permanente-de-revision-del-mercosur.html (access: 7.6.2022).

[32] Parlamento del Mercosur realiza su Sesión Plenaria presencial en Montevideo, https://www.parlamentomercosur.org/innovaportal/v/20195/1/secretaria/parlamento-del-mercosur-realiza-su-sesion-plenaria-presencial-en-montevideo.html (access: 7.6.2022).

[33] See C. Espósito, L. Donadio, *op. cit.*, p. 274.

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was set up in order to elaborate proposals. In November 2006, representatives of the Supreme Courts of the Mercosur Member States reached an agreement on a draft text that was sent to the Common Market Council.[34]

The Common Market Council adopted on 18 January 2007 a Decision[35] which stipulates that each Supreme Court of the States Parties adopts internal rules for lower courts concerning the filing of requests for advisory opinions.[36] The Supreme Courts of the State Parties, i.e. Argentina,[37] Brazil,[38] Paraguay,[39] and Uruguay,[40] have also adopted corresponding rules that govern the internal processing of requests for advisory opinions. These provisions differ from each other. Argentina and Brazil have provided that requests for advisory opinions can only be made on questions of interpretation of Mercosur law. On the other hand, Paraguay and Uruguay allow questions concerning the validity of Mercosur acts.[41]

The courts listed in Article 2 of the 2007 Decision may delegate their power under certain conditions. Article 4 of the 2007 Decision sets out the form and content of the request: a statement of the facts and subject matter of the request, a statement of the reasons for the request, a precise indication of the Mercosur provisions that relate to the matter that is the subject of the request. The request may be accompanied by the submission of the parties or the prosecutor, any documents that may contribute to the clarification of the case. The PRT may also request the national courts to provide the documents and/or explanations it deems necessary.[42] It is also reiterated that the request may only relate to the interpretation of the Asunción Treaty, the Ouro Preto Protocol, the protocols and agreements concluded in connection with the conclusion of the Asunción Treaty, decisions of the Common Market Council, resolutions of the Common Market Group and directives of the Mercosur Trade Commission. The questions must relate to cases that are pending before national courts, and the answer may contribute to the resolution

[34] M.A. Jardim de Santa Cruz Oliveira, *Judicial Diplomacy: The Role of the Supreme Courts in Mercosur Legal Integration*, "Harvard International Law Journal Online" 2007, vol. 48, pp. 98–99.

[35] Reglamento del Procedimento para la Solicitud de Opinions Consultivas al Tribunal Permanente de Revisión por los Tribunals Superiors de Justicia de los Estados Partes del Mercosur, MERCOSUR/CMC/DEC N° 02/07, XXXII CMC – Rio de Janeiro, 18 de enero de 2007.

[36] See P. Wojcikiewicz Almeida, *The Case*…, p. 250.

[37] Acordada N° 13/08 de la Corte Suprema de Justicia de la Nación, Buenos Aires, 18 de juni de 2008. All Supreme Courts of Justice regulations are available at: http://www.tprmercosur.org/es/sol_contr_reglam.htm (access: 7.6.2022).

[38] Emenda Regimental N° 48/2012 del Supremo Tribunal Federal, 3 de abril de 2012.

[39] Acordada N° 549 de la Corte Suprema de Justicia, Asunción, 11 de noviembre de 2008.

[40] Acordada N° 7604 de la Suprema Corte de Justicia, Montevideo, 27 de agosto de 2007.

[41] P. Wojcikiewicz Almeida, *The Challenges of the Judicial Dialogue in Mercosur*, "The Law and Practice of International Courts and Tribunals" 2015, vol. 14(3), p. 396.

[42] See Article 8 of the Annex.

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of the case.[43] The Supreme Courts shall submit the request for advisory opinions to the Tribunal through the Registrar, with a copy to the Mercosur Secretariat and the Supreme Courts of the other States Parties. The Registrar sends the question received to the Tribunal and informs it whether requests have already been made in a similar case (Article 5 of the 2007 Decision). An application will be deemed to be filed if it originates from a Supreme Court designated by the States Parties, meets the requirements set out in Article 4 of the 2003 Decision, and the same issue has not been submitted to dispute settlement. If the criteria of admissibility are not met, the request is rejected and the applicant should be informed without delay.[44] Once the request is accepted, the President, in consultation with the other judges, will appoint the rapporteur. Consequently, account will be taken of those judges who have taken part in the drafting of an advisory opinion in a similar case. If no agreement is reached, the judge will be designated by lot. Article 9 of the 2007 Decision provides that the National Coordinators of the Common Market, within 15 days, through the Registrar, for information purposes only, may submit any observations on the subject matter of the request. It should be highlighted that Articles 8 and 9 were amended in 2010. Article 8 added that the Secretary shall inform the National Coordinators of the Common Market Group and the rapporteur when the request for an advisory opinion is accepted. Article 9 contains no significant changes. A request admitted or rejected will be referred to the requesting Supreme Court and notified, through the Secretariat, to all States Parties (Article 10 of the 2007 Decision). A copy shall be sent to the Mercosur Secretariat and Supreme Courts designated by the State Parties. According to Article 6 of the Annex, advisory opinions shall be issued by the full panel of 5 judges. The PRT shall deliver opinion within 45 days from the date of receiving the request (Article 7 of the Annex). However, provision of this article was amended on 2 August 2010 and the deadline was extended to 65 days.[45] In order to deliver its advisory opinion, the Tribunal will operate by remote means of communication, including fax, e-mail. Where it deems it necessary, the PRT will inform the State Parties of the need to provide adequate resources for its operation. Article 9 of the Annex sets out the content of an advisory opinion: the identification of the questions, a summary of the submission, the views of the majority of the panel, and dissenting opinions may be appended. Advisory opinions are signed by all judges participating in proceeding. Article 11 of the 2007 Decision regulates the

[43] See R. Virzo, *The Preliminary Ruling Procedures at International Regional Courts and Tribunals*, "The Law and Practice of International Courts and Tribunals" 2011, vol. 10(2), p. 289.

[44] See Articles 10–12 of the Annex; C. Espósito, L. Donadio, *op. cit.*, p. 275.

[45] Plazos para emisión de opiniones consultativas, XXXIX CMC – San Juan, 2 de agosto de 2010, CMC/DEC N° 15/2010, http://www.tprmercosur.org/es/docum/DEC_15_10_es_Plazo_OC.pdf (access: 4.12.2021).

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cost of advisory proceeding launched at the request of Supreme Courts of State Parties. It shall be borne by the State Party whose court referred the question. For this purpose, a special account was created within the Special Fund for Disputes. Initially, each State Party contributed $15,000,000. Following the amendments to Article 11, this amount was reduced to $6,000.[46] The lower fee will probably provide an incentive for states, especially poorer ones, to refer requests for advisory opinions. The funds are managed under separate sub-accounts for each State Party. The 2007 Decision also stipulates that if advisory opinions are issued at the joint request of State Parties or Mercosur decision-making bodies, expenses shall be borne in equal parts by the State Parties from the Special Account for Advisory Opinions. Advisory opinions are published in the Official Journal of Mercosur (Article 13 of the Annex), which contributes to promoting the PRT jurisprudence.[47]

According to Article 11 of the Annex, advisory opinions are not legally binding. The Mercosur Member States, bearing in mind the work of the European Court of Justice, have opted for this nature of advisory opinions in order to avoid the risk of judicial law-making by their courts. It is important to note that it is one of very few documents that *expressis verbis* define the legal nature of advisory opinions.[48] But the non-binding legal nature of advisory opinions was criticized by the PRT in its very first advisory opinion of 3 April 2007. The Court stated that the non-binding nature of advisory opinions is contrary to the idea, nature and purpose of proper judicial interpretation. It violates the process of consultation with the national judge, as part of the integration processes, which aims to ensure a consistent interpretation of Community law.[49] The PRT stressed that advisory opinions should be legally binding and referrals should be mandatory.[50] However, the PRT states that the authority that the opinion carries determines that the bodies requesting it are reluctant to depart from it.[51] It should be also kept in mind that the national courts of the Member States, even those of last instance, are not obliged to submit the question by way of an advisory procedure and decide for themselves whether to follow the advisory opinion.[52]

[46] Fondo Especial para Controversias, CMC (Dec. N° 20/2, Art. 6), Montevideo, 28 de septiembre de 2020, MERCOSUR/CMC/DEC N° 07/20.

[47] L. Klein Vieira, V. Volcato da Costa, *A opinião consultiva como ferramenta para a uniformização da interpretação e aplicação do direito do Mercosul, na temática migratória*, "Revista de la Secretaría del Tribunal Permanente de Revisión" 2019, vol. 7(14), s. 190.

[48] P. Wojcikiewicz Almeida, *The Challenges…*, p. 396.

[49] See Preparation of the Rules of Court of 30 January 1922, PCIJ, Series D, No. 2, p. 383.

[50] Opinión Consultiva N° 01/2007, 3 de abril de 2007, "Norte S.A. Imp. Exp. c/ Laboratorios Northia Sociedad Anónima, Comercial, Industrial, Financiera, Inmobiliaria y Agropecuaria s/ Indemnización de Daños y Perjuicios y Lucro Cesante", solicitud cursada por la Corte Suprema de Justicia del Paraguay con relación a los autos del Juzgado de Primera Instancia en lo Civil y Comercial del Primer Turno de la jurisdicción de Asunción, para. B (4–5).

[51] *Ibidem*, para. B (1).

[52] P. Wojcikiewicz Almeida, *The Case…*, pp. 249–250.

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Furthermore, the Mercosur Parliament, the so-called Parlasur, has also the capacity to request advisory opinions. Under Article 2 of the 2015 Draft, questions referred by the Mercosur Parliament may concern any legal matter covered by the Treaty of Asunción, the Ouro Preto Protocol, the protocols and agreements concluded in connection with the conclusion of the Treaty of Asunción, decisions of the Common Market Council, resolutions of the Common Market Group, directives of the Mercosur Trade Commission and other Mercosur standards. Pursuant to Article 3 of the 2015 Draft, the form and content of the proposal are defined in the same way as in Article 5 of the Annex, and the Parliament may also attach to the proposal such documents as it deems appropriate. Furthermore, the PRT may request from the Parliament such explanations and/or documents as it deems necessary for the exercise of its powers. In accordance with Article 4 of the 2015 Draft, questions shall be submitted through the Registrar of the Court. Article 5 of the 2015 Draft states that upon receipt of a request, the Registrar shall promptly send to all members of the Tribunal information as to whether advisory opinions have been requested in similar cases. In such cases, the identity of the member of the Tribunal who coordinated the drafting of the advisory opinion and the reply given must be included. The Registrar shall notify the receipt of requests, send copies to the Supreme Courts of all States Parties, and to the National Coordinators of the Common Market Group. Article 6 of the 2015 Draft set forth that the PRT shall examine the conditions of admissibility of the application and shall directly inform the Parliament if any of them are not met. In this case, the Parliament may complete the application and resend it. Once, the request is accepted, the President of the Tribunal, in consultation with the other members of the Court, will designate the rapporteur. In this connection, consideration will be given to judges who have participated in the settlement of similar cases. If consensus is not reached, the judge will be selected by lot (Article 7 of the 2015 Draft). The Registrar shall inform the National and Common Market Group Coordinators on the admissibility of a request for an advisory opinion, as well as the designation of the rapporteur. The National Coordinators, within 15 days of notification of the decision on admissibility of request, may submit written observations on the subject matter of the request (Article 8 of the 2015 Draft). The Court's acceptance or rejection of a request for an advisory opinion, as well as its response, shall be sent directly to the Parliament, and its copies to the Supreme Courts of all Member States and the National Coordinators of the Common Market Group (Article 9 of the 2015 Draft). Article 10 of the Draft provides for the replacement of the provisions of Articles 6, 9 and 10 of the 2007 Decision. The new Article 6 adds that a copy of requests for advisory opinions shall be sent to the Mercosur Parliament and the National Coordinators. According to the new Article 9, the Parliament and the National Coordinators may submit to the Court their observations on the subject matter of the request within 15 days from the date of notification of receipt of the request.

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The new Article 10 also provides that the acceptance or rejection of the request, as well as the answer to the question, will be sent directly to the applicant's Supreme Courts, with copies sent to the Mercosur Parliament and the other Supreme Courts of all States Parties and the National Coordinators. According to Article 11, new paragraphs 4, 5 and 6 have been added to Article 3 of Chapter II of the Annex of the Olivos Protocol regulation. Under these new paragraphs, when a request for an advisory opinion is received, the Registrar of the Court sends it without delay to the Members of the Court, informing them, where appropriate, of previous requests for advisory opinions related to the subject of the present question. The identity of the rapporteur who has coordinated the drafting of the reply and the text of the opinion must also be included. The Registrar shall also send a copy of the request for an advisory opinion to the Parliament of Mercosur. The Parliament may send the observation on the subject matter of the request for an advisory opinion within 15 days of notification of receipt of the request. The acceptance or rejection of the request, as well as the reply to the question, shall be sent directly to all State Parties or decision-making bodies of Mercosur with a copy to the Parliament. According to Article 12 of the 2015 Draft, advisory opinions are mandatory and legally binding. Article 13 of the 2015 Draft regulates the payment of costs associated with the giving of an advisory opinion.

The documents analyzed show that there are three functioning methods of proceeding for giving advisory opinions: two with the same procedure but a different form of presentation of requests – at the request of States Parties acting together and Mercosur decision-making bodies, and a third, with a partly special regime – at the request of the Supreme Courts of the State Parties. In the case of the third mechanism, the substantive scope of the Court's advisory competence is more limited.[53] As regards the Mercosur Parliament, the 2015 Draft governing the advisory procedure has not yet entered into force.

It is emphasized that the introduction of the institution of advisory opinions is one of the most important reforms of the dispute settlement mechanism and an important instrument to ensure uniform interpretation and application of Mercosur law. It guarantees legal certainty.[54] Advisory opinions are also a form of dialogue between national courts and the PRT, with the aim of ensuring uniform application of Mercosur law.[55]

[53] R. Puceiro Ripoll, *Opiniones Consultivas en el Régimen del Protocolo de Olivos, Consejo Uruguayo para las Relaciones Internacionales, 20 de abril de 2009, Análisis del CURI*, Análisis No. 04/09, http://curi.org.uy/archivos/analisis4de09Puceiro.pdf (access: 4.12.2021), pp. 2–3.

[54] *Ibidem*, p. 8.

[55] P. Wojcikiewicz Almeida, *The Challenges…*, pp. 395–396.

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ADVISORY CASES BEFORE THE PERMANENT REVIEW TRIBUNAL

The Tribunal issued three advisory opinions: the first on 3 April 2007 at the request of the Paraguayan Supreme Court,[56] the second on 24 April 2009,[57] and the third on 15 June 2009 at the request of the Uruguayan Supreme Court.[58] All of them concerned the interpretation of Mercosur law.[59] Two requests were declared inadmissible.[60]

In its first advisory opinion request, the Supreme Court of Paraguay asked whether the provisions of the Asunción Treaty oblige state parties not to impose duties on the export of goods originating in one of them and whose destination is another member state.[61] In contrast, both advisory opinions, issued at the request of the Uruguayan Supreme Court, concerned the reimposition of so-called consular fees. In the request, the Uruguayan Supreme Court submitted the following questions: (1) whether Community rules take precedence over the domestic laws of a Member State and, if so, which rules, Mercosur or domestic, should be applied by the national judge; (2) whether the provisions of the Asunción Treaty allow States Parties to approve domestic rules reimposing the consular fees.[62]

The question arose out from the case of *Sancor Cooperativas Unidas Limitada v. Administración Federal de Ingresos Públicos – Dirección General de Aduanas* (AFIP-DGA), in which the question of the compatibility or incompatibility of export duties provided for in Resolution 11/02 ME is discussed with Articles 1 and 5 of the Asunción Treaty of Articles and 1 and 2 of its Annex, i.e., commercial liberalization program – principle of free movement of goods.[63] On 22 May 2000, the Argentine

[56] Opinión Consultiva N° 01/2007, para. B (4).

[57] Opinión Consultiva N° 01/2008, 24 de abril de 2009, "Sucesión Carlos Schnek y otros c/ Ministerio de Economía y Finanzas y otros. Cobro de pesos", solicitud cursada por la Suprema Corte de Justicia de la República Oriental del Uruguay con relación a los autos del Juzgado Letrado de Primera Instancia en lo Civil de 1º turno IUE 2-32247/07.

[58] Opinión Consultiva N° 01/2009, 15 de junio de 2009, "Frigorífico Centenario S.A. c/ Ministerio de Economía y Finanzas y otros. Cobro de pesos. IUE: 2-43923/2007. Exhorto", solicitud cursada por la Suprema Corte de Justicia de la República Oriental del Uruguay con relación a los autos del Juzgado Letrado de Primera Instancia en lo Civil de 2º Turno.

[59] See P. Wojcikiewicz Almeida, *The Case*..., p. 250.

[60] Resolución N° 1/2018 del Tribunal Permanente de Revisión en el marco de la Opinión Consultiva N° 1/2018 formulada por el PARLASUR relativa al pago de dietas y demás beneficios a los Parlamentarios de la República Argentina, TPR/RES/N°03/19, Buenos Aires, 5 de diciembre de 2018, http://www.tprmercosur.org/es/docum/res/RES_3_2019_TPR_DietasParlasur_es.pdf (access: 8.12.2021).

[61] Opinión Consultiva N° 01/2007, para. A (1–3). In more detail, see C. Espósito, L. Donadio, *op. cit.*, pp. 261–284.

[62] Opinión Consultiva N° 01/2009, para. 9. See Institute for the Integration of Latin America and the Caribbean – IDB-INTAL, MERCOSUR Report No. 14, Buenos Aires, February 2010, 2008 (Second Semester) – 2009 (First Semester), pp. 66–67.

[63] C. Espósito, L. Donadio, *op. cit.*, pp. 262–263.

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company Laboratorios Northia S.A.C.I.F.I.A. entered into a distribution agreement with the Paraguayan company Norte S.A Importación–Exportación. According to para. 22, all issues arising out of this agreement are subject to the Argentine law. The Paraguayan company has sued the Argentine one for damages and lost profits before the jurisdiction of Asunción. On the other hand, the Argentine company has raised a plea of lack of jurisdiction, arguing that the Buenos Aires Protocol on International Jurisdiction in Contractual Matters (approved by CMC Decision No. 01/94)[64] has primacy over Paraguayan national law. Both Argentina and Paraguay are parties to the Protocol. It is argued that, with due respect for the contractually agreed choice of jurisdiction, in accordance with the aforementioned Protocol, the Treaty shall prevail over the Paraguayan Law.[65] Therefore, the Argentina's Supreme Court of Justice of the Nation, by majority vote, has decided to seek the first advisory opinion of the PRT of Mercosur.[66]

First of all, the PRT refers in the opinion to the institution of advisory opinions. Then it considers the question of primacy of community law over national law. The PRT pointed to three characteristics of Community law: immediate application; direct effect, and its primacy over national law. The PRT stressed that the main reason for the primacy of community law over national law is that integration law, by its very concept, nature and purpose, should always prevail over national law. What is more, the anteriority or posteriority of the national rule becomes absolutely irrelevant. The national legislature is thus unable to modify, replace or repeal the generally applicable law in force in its territory. In order to confirm this interpretation, the PRT referred to the milestone judgment of the Court of Justice of the European Union (the CJEU) *Flamino Costa vs. ENEL*,[67] as well as the views of legal scholars.[68] Then the PRT analyzed the issue of primacy of integration law over public and private international law. In this context, the PRT noted that although community law stems from international law sources such as treaties, they acquire upon their entry into force absolute autonomy and independence from international law.[69] The PRT also pointed to primacy of the community legal order over national

[64] Protocolo de Buenos Aires Sobre de Jurisdicción Internacional en Materia Contractual, Decisión del Mercosur 1/1994, 5 de agosto de 1994, Id SAIJ: RMD199400000, http://www.saij.gob.ar/1-internacional-protocolo-buenos-aires-sobre-jurisdiccion-internacional-materia-contractual-rmd1994000001-1994-08-05/123456789-0abc-de1-0000-04991dserced (access: 7.6.2022).

[65] See El Sistema de Solución de Controversias en el Mercosur, Las opiniones consultivas, Departamento de Integración y Comercio Internacional Dirección de Investigación y Análisis, http://www.ciu.com.uy/innovaportal/file/494/1/el_sistema_de_solucion_de_controversias_en_el_mercosur_las_opiniones_consultivas.pdf (access: 7.6.2022), pp. 15–16; Opinión Consultiva N° 01/2007, paras G, I.

[66] See A.D. Perotti, *La primera opinion consultative de un tribunal argentino*, https://www.mercosurabc.com.ar/la_primera_opinion_consultiva_de_un_tribunal_argentino (access: 7.6.2022).

[67] Judgment of 15 July 1964, Case C-6/64 *Flamino Costa vs. ENEL*.

[68] Opinión Consultiva N° 01/2007, para. C (3–6).

[69] *Ibidem*, para. D.

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and international public law order. First, it distinguished national and international public orders. Then it stated that the integration system constitutes in fact a regional public-law order, which prevails, as a general rule, over any other concept of public-law order within the integration area in question. Thus, the national judge, when interpreting and applying law, should take into account the community or regional framework. In addition, the above is reflected in the jurisprudence of some of the supreme courts of the State Parties.[70] The PRT reiterated the view expressed by the arbitration tribunal that the Mercosur legal system is a system that has its own sources, with its own bodies and procedures capable of legal interpretation, as well as impose sanction for non-compliance with it and its violations.[71] In the end, the majority judges stated that the Buenos Aires Protocol applies in the states which adopted it. According to Article 4 of the Buenos Aires Protocol, the intervening parties are entitled to choose the applicable forum for any matter arising from the contract in question, subject only to one condition, i.e., that the agreement in question could not be classified as wrongfully obtained. The intention of the drafters of this exception is the protection of the weaker party to the relevant negotiation.[72] It is up to the national judge to assess whether the agreement adopted has been concluded in contrary to national law or affects international public order and makes it manifestly inapplicable in a particular case. As to the applicability of the Santa Maria Protocol on Consumer Relations,[73] the judges have been unanimous that the Protocol is not applicable to the case due to not being ratified by any State Party and because it refers to consumer relations, which are expressly excluded from the Buenos Aires Protocol. Under Article 2 of the Buenos Aires Protocol, consumer sales contracts are excluded due to special protection covering the weaker party under such a contract. What is more, this Protocol does not apply when one of the parties involved in the contract is not a final consumer, e.g., a private person or someone who carries out an activity as a non-professional.[74] Some judges in the concurring opinion pointed out that the norms of Mercosur law prevail over the norms of the internal law of the State Parties. Consequently, in this case the Buenos Aires Protocol prevails over the Paraguayan national law No. 194/93. Furthermore, such precedence results from the very nature of Mercosur law.[75]

Both advisory opinions, issued at the request of the Uruguayan Supreme Court, concerned the reintroduction of so-called consular fees. In the request, the Court

[70] *Ibidem*, para. E (1–3).

[71] *Ibidem*, para. G (2) (iii).

[72] *Ibidem*, para. F (4–5).

[73] Protocolo de Santa María Sobre Jurisdicción Internacionalen en Materia de Relaciones de Consumo, MERCOSUR/CMC/DEC N° 10/96, XI CMC – Fortaleza, 17 de diciembre de 1996.

[Opinión] Consultiva N° 01/2007, paras 1–10.

[74] *Ibidem*, para. F.

[75] *Ibidem*, paras 1–10.

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asked the following questions: (1) whether Community rules take precedence over the domestic laws of a Member State and, if the answer is in the affirmative, which rules, Mercosur or domestic, the national judge should apply; (2) whether the provisions of the Asunción Treaty allow States Parties to approve domestic rules on reintroducing the consular fee.[76] Both cases concerned Uruguayan companies, which sued the Uruguayan State for the return of amounts that have been illegitimately collected. Said amounts would be charged for the collection of "consular fees". The applicants requested also prohibition of its future collection and non-application of provisions of national law, which violated Mercosur law as well as international law, i.e., Articles 26 and 27 of the Vienna Convention on the Law of Treaties.[77] The applicants argued that these fees constituted tax or levy.[78] In both advisory opinions, the PRT confirmed primacy of Mercosur law over national law of State Parties. The PRT took also into account the context of international law, especially the principle of *pacta sunt servanda*.[79] The PRT stated that the primary law ratified and incorporated into national law is legally binding and generates rights and obligations. The secondary law, once incorporated into the legal systems of the State Parties, is also legally binding within the legal systems of these State Parties.[80] The PRT declared itself as having no power to rule on constitutionality, applicability or nullity of national law. These questions are within the jurisdiction of the national courts.[81] It is up to the national organ to decide whether the aforementioned amount of money – reintroduced consular fees – are tax or levy as defined in Annex I of the Asunción Treaty.[82] In order to give answer to the question, it is indispensable to construe the concept of "approximated cost of services rendered" stipulated in Annex I of the Asunción Treaty and the amounts charged to the applicants and their relation to "the services rendered". Therefore, the PRT is constrained in its competence to conduct advisory proceeding without clarifying essential issues within national jurisdiction.[83] The PRT pointed out that a State Party is competent to enact national taxation laws but they may be discriminatory, in which case these laws may be considered incompatible with the Mercosur law.[84] It also highlighted that was not empowered to give a preliminary ruling provided for in, e.g., EU

[76] See Institute for the Integration of Latin America and the Caribbean…, pp. 66–67.

[77] Opinión Consultiva N° 01/2008, paras 8–9; Opinión Consultiva N° 01/2009, paras 7–8.

[78] Opinión Consultiva N° 01/2008, para. 54.

[79] *Ibidem*, para. 28.

[80] *Ibidem*, paras 2–4 (dispositive part); Opinión Consultiva N° 01/2009, para. 2 (dispositive part).

[81] Opinión Consultiva N° 01/2008, paras 33, 5 (dispositive part); Opinión Consultiva N° 01/2009, para. 3 (dispositive part).

[82] Opinión Consultiva N° 01/2008, paras 53–54; Opinión Consultiva N° 01/2009, para. 22.

[83] Opinión Consultiva N° 01/2008, paras 5–59; Opinión Consultiva N° 01/2009, paras 24–25.

[84] Opinión Consultiva N° 01/2009, para. 23.

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law.[85] That is why it is the responsibility of a national judge to decide which rule will eventually be applied.[86]

Pursuant to Article 13 of the Protocol establishing the Parliament of Mercosur, the Secretariat of the Court received on 22 October 2018 a first request, from the Parliament of Mercosur, dated 1 October, on the provisions concerning the rules for the payment of allowances and other benefits to Parliamentarians of the Argentine Republic and a number of other questions relating to the payment of benefits to parliamentarians.[87] The Court followed a rather peculiar procedure in these proceedings. It set very long deadlines – 45 days – for the Parliament to submit its observations, as well as for the State Parties, in particular the National Coordinators of the Common Market Group.[88] On 26 April 2019, the PRT declared the request inadmissible. The laws were not adopted by the appropriate majority as determined by the Parliament itself in its Rules of Procedure. Therefore, it cannot answer a question that relates to a situation in which the body governing it has not followed the procedure adopted.[89] The opinion requested by the Parliament of Mercosur was considered by the Court to be closer to those that can be requested by the Mercosur decision-making bodies. Therefore, also the costs of the procedure, as provided for in Article 12 of the 2007 Decision, should be paid from the Special Fund instead of being paid from the Parliament's budget, as suggested by some Member States in their observations.[90] However, the PRT charged the Parliament for the costs of the proceeding, since it was a body directly concerned with the opinion and an independent and autonomous body of Mercosur, with its own budget.[91] In August and September 2021, requests for advisory opinions were submitted to the PRT by an individual and a national court of Argentina. The PRT declared them inadmissible because they contained formal failures and were submitted by entities not entitled to do so.[92]

[85] See M. del Pilar García Martínez, M. de la Paz Herrer, S. Victoria Olivera, *La naturaleza de las opiniones consultivas en el Mercosur. Análisis comparativo con la Unión Europea*, "Revista Electrónica del Instituto de Investigaciones" 2013, no. 10.

[86] Opinión Consultiva N° 01/2009, para. 18.

[87] Resolución N° 1/2018, paras 14–20.

[88] *Ibidem* para. 3.

[89] *Ibidem*, para. IV.

[90] See A.D. Perotti, *¿Quién debe pagar las opiniones consultivas solicitadas al Tribunal Permanente de Revisión por el Parlamento del MERCOSUR?*, Año XX, N° 5193, DC272D, 5 de Abril de 2019, Sistema Argentino de Información Jurìdica, Id SAIJ: DACF190185.

[91] Resolución N° 1/2018, paras 20, IV B.

[92] Resolución Nº 1/2021 de Presidencia, RES.P/TPR/Nº01/2021, Asunción, 16 de septiembre de 2021.

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CONCLUSIONS

In comparison with EU law, the PRT does not have the right to issue preliminary rulings,[93] but is empowered to give advisory opinions.[94] Just like advisory opinion, preliminary ruling is a tool of legal integration in the EU, which ensure uniformity in interpretation and application EU law.[95] The main differences from Mercosur's advisory opinion are that in the EU law the request for a preliminary question is obligatory and the interpretation of the law contained therein is binding not only for the judge who requested the consultation, but for all judges in all EU Member States. Furthermore, the circle of entities entitled to request an advisory opinion is much broader than those entitled to request a legal question in preliminary reference procedure. In addition, first instance courts, other than Supreme Courts, of Mercosur Member States may not directly address questions to the PRT.[96] As with advisory opinions, the legal culture of a Member State plays an important role in referring legal questions to the CJEU and implementation of the judgment.[97] In contrast to advisory opinion of the PRT, preliminary ruling may undermine the role of national courts in implementation of the EU law as the CJEU closely supervises them for fear of incorrect implementation of EU law.[98] So far, the PRT has issued only three advisory opinions. Three of five requests for advisory opinions were brought by the national Supreme Courts. Two requests for advisory opinions submitted by the Supreme Court of Argentina have been withdrawn.[99] However, Supreme Courts can only refer to the PRT questions concerning the interpretation of Mercosur law. This

[93] For example, see Z. Czarnik, *The Legitimacy of Preliminary Questions to the Court of Justice of the European Union (CJEU) on the Legal Status of Supreme Court Judges in Poland*, "Studia Iuridica Lublinensia" 2021, vol. 30(5), pp. 155–157; M.V. de Azevedo Cunha, D. da Costa Leite Borges, *The Influence of CJEU Judgments on Brazilian Courts*, European University Institute, Department of Law Research, Paper No. 2019/02, pp. 6–7.

[94] See M. Cienfuegos Mateo, *op. cit.*, pp. 433–476.

[95] T. de la Mare, C. Donnelly, *Preliminary Rulings and EU Legal Integration: Evolution and Continuity*, [in:] *The Evolution of EU Law*, eds. P. Craig, G. de Búrca, Oxford 2021, pp. 363–406.

[96] P. Wojcikiewicz Almeida, *The Case…*, p. 249.

[97] T. de la Mare, C. Donnelly, *op. cit.*, pp. 381–382.

[98] *Ibidem*, pp. 391–392.

[99] Resolución N° 1/2014 de Presidencia en el marco de la Opinión Consultiva N° 1/2014 solicitada por la Corte Suprema de Justicia de la Nación de la República Argentina con relación a los autos del Juzgado Nacional de Primera Instancia en lo Contencioso Administrativo Federal N° 6 de la Cuidad Autónoma de Buenos Aires "Dow Química Argentina S.A. c/ E.N. –DGA.– (SANLO) Resol. 583/10 y otros s/ Dirección General de Aduanas", Asunción, 27 de marzo de 2014; Resolución N° 2/2014 de Presidencia en el marco de la Opinión Consultiva N° 2/2014 solicitada por la Corte Suprema de Justicia de la Nación de la República Argentina con relación a los autos del Juzgado Nacional de Primera Instancia en lo Contencioso Administrativo Federal N° 2 de la Cuidad Autónoma de Buenos Aires "S.A. La Hispano Argentina Curtiembre y Charoleria C/ E.N. –DGA.– (SANLO) s/ Dirección General de Aduanas", Asunción, 12 de agosto de 2014.

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means that individuals only have access to the PRT indirectly by asserting their rights before national courts, which may ask the highest courts to submit a request for an advisory opinion.[100] The Supreme Courts that have submitted requests for advisory opinions have not always followed the interpretation made by the PRT. In the case of the first advisory opinion, the national court reached similar conclusions as the PRT, but by adopting different reasoning. In contrast, for the second and third advisory opinions, the national courts did not follow the PRT's opinions.[101] Thus, it is stressed that they constitute an inadequate remedy, since national courts are not obliged to submit requests for advisory opinions and do not have to follow the interpretation of Mercosur law made therein.[102] It is difficult to agree with this view because the problem lies elsewhere and it is not the lack of obligation to address requests for advisory opinions and the non-binding nature of advisory opinions but rather the lack of good knowledge of Mercosur law by national judges of Member States,[103] misunderstanding and underestimating the role played by the national judge in integration processes and the value of uniform interpretation and application of Community law. Due to the non-binding nature of advisory opinions, the court has the possibility to go beyond the scope of the question itself. A good example of this practice is the advisory activity of the Inter-American Court of Human Rights, which on many occasions has not limited itself to answering the question referred.[104] In addition, despite its non-binding nature advisory opinions are used quite frequently by other economic communities courts such as, e.g., the Court of the Euroasian Economic Union[105] or the West African Economic Monetary Union Court of Justice[106] in order to unify the interpretation and application of community law. This is because those entitled to request advisory opinions are aware of their importance for integration processes. Moreover, the fact that

[100] P. Wojcikiewicz Almeida, *Access Individuals to the Mercosur Tribunals: Filling the Gap Via Advisory Opinions*, "Nomos. Revista do Programa de Pós-Graduação em Direito da Universidade Federal do Ceará – UFC" 2018, vol. 38(2), pp. 588–589; W.M. Kühn Baca, *The Draft Protocol on the Creation of the Court of Justice of Mercosur: A New Milestone in the Judicialisation of Regional Integration Law*, "Anuario Mexicano de Derecho Internacional" 2017, vol. 17, p. 412.

[101] P. Wojcikiewicz Almeida, *Access…*, p. 591.

[102] *Ibidem*, p. 589, 592.

[103] *Ibidem*, p. 592.

[104] For example, see IACHR 1982, Advisory Opinion OC-2/82 of September 24, Series A, No. 2, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*; IACHR 1999, Advisory Opinion OC-16/99 of October 1, Series A, No. 16, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law*; J. Contesse, *The Rule of Advice in International Human Rights Law*, "American Journal of International Law" 2021, vol. 115(3), pp. 369–389.

[105] See Court of the Eurasian Economic Union, http://courteurasian.org/page-27151 (access: 6.4.2022).

[106] See Cour de Justice l'UEMOA, avis, https://courdejusticeuemoa.org/avis (access: 7.6.2022).

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in most cases the national courts have not followed the PRT guidance, allegedly due to its non-binding nature, also does not prove that it is an inadequate instrument for strengthening integration processes. If this were the case, it would be enough to grant the PRT only the competence in contentious cases, and the states would implement the rulings that are binding for them. Unfortunately, states do not execute binding judgments either. Failure to follow the advice is as common as non-compliance with judgments. It should be emphasized that the question to be interpreted through advisory opinion is a point of law. After all, one can hardly expect the national supreme courts to act in accordance with an advisory opinion when the PRT itself has held that it is inappropriate to use the institution of advisory opinions as part of the dispute settlement mechanism of the integration processes, especially with regard to questions from high-level national courts.[107]

Despite all controversies surrounding the PRT's advisory jurisdiction, the PRT reaffirmed fundamental rules of the community law: autonomy, supremacy of the Community law over national law, its immediate application and direct effect.[108] These principles are the leitmotiv of integration processes. In absence of this principles, the concept, nature and, above all, the purpose not only of the right of integration, but also the integration process, would be distorted.[109] In this regard, in order to strengthen its arguments, it has also referred to subsidiary means for the determination of rules of law, such as the positions presented by scholars or judicial decisions of other community tribunals and national supreme courts, i.e., the CJEU and the Court of Justice of the Andean Community, the Argentine Supreme Court of Justice. The PRT has also indicated which issues fall within the competence of national courts of the Member States. This aspect of the advisory opinion is particularly important as sometimes Member States and national courts are concerned about undue interference by the community courts in their national legal order. Furthermore, the PRT also looked to external sources, namely the Vienna Convention on the Law of Treaties and the fundamental principle on which all treaty law is based, namely *pacta sunt servanda*. The recourse to this principle is important in the context of Member States' fulfilment of their obligations arising out in particular from primary law.

[107] Opinión Consultiva N° 01/2007, para. B (1).

[108] See E. Tino, *Settlement of Disputes by International Courts and Tribunals of Regional International Organizations*, [in:] *Evolutions in the Law of International Organizations*, eds. R. Virzo, I. Ingravallo, Leiden–Boston 2015, p. 501.

[109] Opinión Consultiva N° 01/2007, paras 2–3.

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ABSTRAKT

W dniu 26 marca 2021 r. minęła 30. rocznica podpisania Traktatu z Asunción, który stanowił podstawę utworzenia Wspólnego Rynku Południa (Mercosur). Jest to proces integrowania wszystkich rynków Ameryki Południowej i stanowi on piątą gospodarkę światową. W ciągu tego okresu zarówno w państwach członkowskich, jak i w Mercosur nastąpiły znaczne zmiany. Wraz z pogłębianiem się procesów integracyjnych miała miejsce ewolucja mechanizmu załatwiania sporów. Jedną z istotnych zmian było powołanie Stałego Trybunału Rewizyjnego, który posiada kompetencję do rozstrzygania sporów oraz do wydawania opinii doradczych. Opinie doradcze stanowią jednak niedoceniane narzędzie rozwiązywania kwestii prawnych. Przedstawiciele nauki prawa międzynarodowego w swoich badaniach skupiają się głównie na jurysdykcji trybunałów międzynarodowych w sprawach spornych, pomijając lub ignorując znaczenie postępowania doradczego. Opinie doradcze wydawane przez trybunały międzynarodowe, mimo że co do zasady stanowią poradę prawną w kwestiach prawa, niekiedy uznaje się za jeden ze środków służących do pogłębiania procesów integracyjnych. W artykule stwierdzono, że ze względu na niewiążący charakter opinii doradczych stanowią one dogodny instrument standaryzacji prawa Mercosur, wzmacniają procesy integracyjne w regionie i umożliwiają realizację celów określonych w Traktacie z Asunción. Zakres ich oddziaływania zależy nie tylko od samego Trybunału, lecz także od tego, czy podmiot, który zwrócił się o opinię doradczą, w szczególności jeżeli jest to sąd najwyższy, będzie skłonny do stosowania się do wskazówek Trybunału. Artykuł stanowi wkład do trwającej dyskusji na temat wpływu opinii doradczych na rozwój procesów integracyjnych.

Słowa kluczowe: opinia doradcza; mechanizm załatwiania sporów; Mercosur; Stały Trybunał Rewizyjny; procesy integracyjne