

## **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**

**Carlos Espósito\***

Professor of International Law, Universidad Autónoma de Madrid (UAM),  
Faculty of Law, 28049 Madrid, Spain  
carlos.esposito@uam.es

**Luciano Donadio**

Lecturer of International Law, Universidad Empresarial Siglo 21, Catamarca 895 1C, C.P.  
5000, Córdoba, Argentina; PhD Candidate in Law at the Universidad Autónoma de  
Madrid (UAM), Spain  
ldonadio@uesiglo21.edu.ar

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### **Abstract**

This comment discusses the request for an advisory opinion that originated in the case *Sancor c/ Dirección General de Aduanas*. This case emerged from the resolution of the Argentine Ministry of Economy which set export duties of 5% to certain milk products, without discriminating with regard to the destination of them, i.e. including members as well as non-members of the Southern Common Market (MERCOSUR). In this way, and after a long judicial process, in October 2009 Argentina's Supreme Court of Justice (CSJN) requested an advisory opinion from the Permanent Review Tribunal of the MERCOSUR, – Tribunal Permanente de Revisión – asking the question “Does the Treaty of Asunción require Member States of MERCOSUR the obligation not to impose duties on exports of goods which are originated in one of them and which have another Member State as its final destination?” This article describes the historical circumstances surrounding the Argentine governmental measure, and then analyzes three specific issues

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related to the request of the advisory opinion by the Supreme Court: 1) the place of international law in the Argentine legal system; 2) the procedural legitimacy of the decision of the Court; and 3) some substantive issues involved in the requested advisory opinion.

**Keywords**

MERCOSUR; judicial cooperation; advisory opinions; MERCOSUR's Permanent Review Tribunal; international law and domestic law; duties on exports

## I. Introduction

The request for the advisory opinion which we analyse in this article originated from the case of *Sancor Cooperativas Unidas Limitada v. Administración Federal de Ingresos Públicos – Dirección General de Aduanas (AFIP-DGA)*. This arose out of the implementation of Resolution 11/02 by the Argentine Minister of the Economy who fixed export duties at 5% for certain dairy products, without discriminating on the basis of the destination of the exports, i.e. between those going to member states and those going to non-member states of the Southern Common Market (MERCOSUR).<sup>1</sup>

Following a long legal process, on the 6th October 2009, Argentina's Supreme Court of Justice upheld the plaintiff (Sancor)'s application and requested an advisory opinion from the MERCOSUR's Permanent Review Tribunal<sup>2</sup> – *Tribunal Permanente de Revisión (TPR)* – following the “Olivos Protocol” on the Settlement of Disputes within the MERCOSUR,<sup>3</sup> in accordance with the requirements contained in the “Reglamento del Protocolo de Olivos”, passed by the Council of the Common Market, which requires: a) that the advisory opinion is requested by the highest courts with national jurisdiction in member states regarding cases which are still subject to proceedings in the domestic judicial system; and b) that it refers exclusively to an interpretation of a MERCOSUR norm, which in turn must be related to the case which gives rise to the advisory opinion.

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<sup>1</sup>) Agreement for Regional Integration, born out of the Asunción Treaty 1991 between Argentina, Brasil, Paraguay and Uruguay, to which Venezuela joined as a full member and Bolivia, Chile, Colombia, Ecuador and Peru as associated members. See [www.mercosur.org.uy](http://www.mercosur.org.uy).

<sup>2</sup>) Decision “S. 346. XLIII en SANCOR CUL (TF 18476-A) C/ DGA” available at <http://www.csjn.gov.ar/docus/documentos/verdoc.jsp>.

<sup>3</sup>) The Olivos Protocol was signed on 18 February 2002 in Ciudad de Olivos (Argentina), with the purpose of altering the mechanism for the resolution of disputes within the MERCOSUR, which had been regulated until then by the Brasilia Protocol, signed in Brasilia (Brazil) on 17 December 1991.

Argentina's Supreme Court found that both requirements were clearly met and in consequence the Court made the request, without considering themselves the substantive issues. It formulated the following question: "Does the Treaty of Asunción require of Member States of the MERCOSUR the obligation not to impose duties on exports of goods which are originated in one of them and which have another Member State as its final destination?"

In the end, the plaintiffs reached an agreement and consequently brought an end to the case, meaning that the advisory opinion requested by the Court, which must always be attached to a primary action, lost its purpose and thus the Court removed its request. In the following pages, we will present the historical context of the measure, taken by the Argentine minister and contested by Sancor, and we will analyse the judicial decision to request an advisory opinion, highlighting especially the following three issues: 1) the place of international law within the Argentine legal system; 2) procedural legitimacy of the decision of the court; and 3) some substantive issues involved in the requested advisory opinion.

## **II. The Political, Social and Economic Context Behind the Measure**

### *A. The Facts*

The former President Fernando De la Rúa assumed the Argentine presidency in December 1999, in the middle of an economic recession characterized by an overvaluation of the national currency and contagion from international economic crises which had materialized successively in Mexico (1994), South East Asia (1997) and Brazil (1999). From 1998, Argentina had begun to see the outflow of foreign capital, resulting from at least two main causes, namely: i) the fear of Argentina becoming the next in a chain of insolvent South American states and ii) the persistence, of both the previous Menem Governments (1989–1999) and the current De la Rúa administration (1999–2001), to remain within the scheme of currency convertibility with the dollar.<sup>4</sup> While this economic policy had been

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<sup>4</sup>) Currency convertibility was a monetary policy, which consisted in fact in an absence of monetary policy, and which saw the pegging of the Argentine peso with the US dollar. The Argentine Central Bank was restrained from issuing currency without proper support in foreign currency.

effective during the first few years of the 1990's, in the context in which we consider it, an overvalued exchange rate led to deflation, trade deficit, budget deficit and, consequently, deficit in its balance of payments. All of the national budgets were in the red and a definitive solution was sought, via the strengthening of international borrowing policies through international lending institutions or the private capital markets, where increasingly higher interest rates were paid.

At the end of November 2001, the banking system collapsed due to capital flight. The Ministry of the Economy reacted by imposing severe restrictions on the withdrawal of deposits from Argentine banks, which was popularly referred to as the “*corralito*”,<sup>5</sup> (enclosure) and provoked a generally negative reaction, especially amongst the middle classes, which catalysed the deepening of the crisis from an economic one to a political one. A month later, 19 and 20 December 2001 saw the famous “*cacerolazos*”<sup>6</sup> (pot-banging protests) to the rhythm of a song whose lyrics read “*Que se vayan todos (...)*” (all must go), resulting eventually in the resignation of President De la Rúa.<sup>7</sup>

The political crisis did not end with this resignation, in fact completely the opposite occurred: in ten days, the fallen president De la Rúa was followed by four others (Ramón Puerta – provisional President of the Senate, Adolfo Rodríguez Saá – Governor of the San Luis Province, Eduardo Camaño – President of the Chamber of Deputies and Eduardo Duhalde – Senator of the Buenos Aires Province), all of whom were members of the Partido Justicialista (Justicialist Party – Peronistas), the opposition party to the prior Government who were trying to create alliances to form a transitional government. The ephemeral nature of the possession of power was not conducive to making very important decisions for the Republic. Rodríguez Saá, in his first speech to the Legislative Assembly

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The first few years of the policy were successful; it managed to stop the hyperinflationary crisis of 1989–1991 and the Bank's reserves grew steadily with foreign investment following privatisations of public enterprises. However, over time, the policy came to suffocate the economy, because it did not allow it to react to changing international circumstances.

<sup>5</sup> See La Nación, “Disponen un blanqueo provisional”, Monday 3 December 2001, available at [http://www.lanacion.com.ar/nota.asp?nota\\_id=356311](http://www.lanacion.com.ar/nota.asp?nota_id=356311).

<sup>6</sup> See La Nación, “Cacerolazo, marchas e incidentes”, Thursday 20 December 2001, available at [http://www.lanacion.com.ar/nota.asp?nota\\_id=360761](http://www.lanacion.com.ar/nota.asp?nota_id=360761).

<sup>7</sup> See La Nación, “Renunció De la Rúa: el peronista Puerta está a cargo del Poder Ejecutivo”, Friday 21 December 2001, available at [http://www.lanacion.com.ar/nota.asp?nota\\_id=361035](http://www.lanacion.com.ar/nota.asp?nota_id=361035).

which had appointed him, declared that Argentina was to default on its international obligations;<sup>8</sup> Eduardo Duhalde, also in his first speech to the Assembly, ordered the devaluation of the currency.<sup>9</sup>

In macroeconomics terms, according to data from the National Institute for Statistics and Censuses<sup>10</sup> (Instituto Nacional de Estadísticas y Censos, INDEC), the recessionary period and the immediate aftermath of the crisis (June 1998 to 2002 inclusive) gave rise to the following results: GDP suffered a fall of 19.5% YTD, the largest drop coming in the final year of the crisis with a 10.9% decrease. The increase in the inequality of the distribution of wealth was overwhelming. Poverty affected 51.4% of the population, extreme poverty 42.6% and unemployment 21.5%, all of which are record levels for the country. Central bank reserves fell by 63% YTD, registering a drop of 43% during 2002. Tax revenues collapsed by 8.5%.

The shift in policy was significant, moving from the neo-liberal policies of the “Washington Consensus” towards significant state intervention with the aim of containing the social and economic fabric of a country broken by the crisis. This change led to an increase in public spending, which together with the reduction in tax revenues and foreign capital outflow, urged the State to impose new taxes on industries that to some extent had benefited from the new situation following the devaluation. These industries were primarily producers of raw materials and primary industrial products, which saw their competitiveness increase following the devaluation. Hence, exports were subjected to special export duties, known as retentions<sup>11</sup> from 2002, achieving the objectives of, on one hand increasing tax revenues in order to sustain the growing level of public spending while allowing for deficit reduction and, on the other hand, moderating the negative side effects of the high real exchange rate caused by the devaluation.

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<sup>8</sup>) See La Nación, “Asumió Rodríguez Saá y suspendió el pago de toda la deuda externa”, Monday 24 December 2001, available at [http://www.lanacion.com.ar/nota.asp?nota\\_id=361787](http://www.lanacion.com.ar/nota.asp?nota_id=361787).

<sup>9</sup>) See La Nación, “Asumió Duhalde; propondrá al Congreso una devaluación del 30%”, Thursday 3 January 2002, available at [http://www.lanacion.com.ar/nota.asp?nota\\_id=363776](http://www.lanacion.com.ar/nota.asp?nota_id=363776).

<sup>10</sup>) The information is available at <http://www.indec.mecon.ar>.

<sup>11</sup>) Export duties – commonly known as retentions – are tax obligations which demand cash payment on the passing through customs borders by goods or services. They are paid by exporters after the declaration to customs and the retention of the tax occurs with the clearance of the exports, although frequently advances are made to the State for future exports.

Some authors<sup>12</sup> have suggested that this commercial policy is not new in Argentina, because since 1930 the imposition of export duties as a fiscal instrument has been used by a number of Governments in times of crisis as a mechanism to increase tax revenues within the national Treasury. However, Nogués highlights an important issue: regional and multilateral commercial regulations show a clear contrast between the approaches towards barriers to import and export duties. The Argentine situation which we are considering shows this: although import duties appear stable, a situation which Nogués attributes to the pressure emerging from WTO rules and the MERCOSUR common external tariff, the same was not achieved with regard to export duties, which have in recent years increased. Until not long ago, this increase could have been explained as a consequence of the inexistence of multilateral or regional rules regulating export duties.<sup>13</sup>

All of this can be seen in the decisions adopted by the World Trade Organisation, which recently for the first time considered the creation of a Special Group at the request of the US, EU and Mexico against China, given the latter's application of export duties to raw materials (bauxite, coke, magnesium, manganese and other minerals). In December 2009, the Dispute Settlement Body ordered the creation of a Special Group to examine matters SD394, SD395 and SD398, "*China – Measures related to the exportation of various primary materials*" and the group was established in March 2010. In the Protocol of Accession of China to the WTO, China assumed the obligation not to implement such export tariff measures. This obligation has not been adopted by Argentina, however it reserved its third party rights in cases involving other States in order to maintain its interests in different international forums, since those arguments used in disputes involving China and their Accession Protocol may be used *a posteriori* by Argentina in any disputes to which it is a party.

In short, we can state that it is from this context of legal uncertainty that the disputed measure emerged, the legality of which Argentina's Supreme Court was required to consider, leading to the Court's request for an advisory opinion. This measure was namely Resolution Number 11/02 of the

<sup>12</sup> Julio Nogués, "The Domestic Impact of Export Restrictions: The Case of Argentina", in *IPC Position Paper – Agricultural and Rural Development Policy Series – International Food & Agricultural Trade Policy Council*, Washington (2008), 1, 6.

<sup>13</sup> Julio Nogués, *op. cit.*, 1, 6.

Argentine Ministry of the Economy which fixed export duties at 5% on certain dairy products, including those produced by Sancor Cooperativas Unidas Limitada.

*B. The Disputed Measure*

The parties proposed different interpretations to justify or question the constitutionality of the content of Resolution Number 11/02 of the Ministry of Economy. These arguments can be summarised as follows:

- a. The plaintiffs contend that the imposition of export duties by the State is unconstitutional, since it violates the international obligations on the Treaty of Asunción to the MERCOSUR which provides for the elimination of customs duties and non-tariff based restrictions as well as measures with equivalent effect<sup>14</sup> given that Articles 31 and 75, paragraphs 22 and 24 of the Constitution, place international law above domestic law. The plaintiffs considered that when the Treaty refers to customs duties, it does not refer only to import duties but also to export duties.
- b. The defendants argue that although international law does contain provisions which are operative and others merely programmatic, the plaintiffs could not show that the provision which they cited, namely Article 1 of the Treaty, is operative, and added that the function of the Treaty itself is merely to offer guidance to Member States and is not operative, which means that one cannot infer the existence of an obligation on the part of Argentina to abstain from establishing export duties. Further, this is especially so given that the Ministerial Resolution finds its legal basis in the delegation of competences from the National Congress, which had as its contextual backdrop the serious reduction in tax revenue during the devastating political-economic crisis which originated in 2001.

The arguments of the defendants were upheld by the Fiscal Court at first instance. The court upheld the legality of the customs duties contained in the aforementioned Ministerial Resolution and this forms the structural argument of the Attorney General in his opinion before the Supreme

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<sup>14</sup>) Article 1, paragraph 2 of the Treaty of Asunción.

Court, in which he adds two further points: a) the imposition of export duties does not compromise, in principle, trade between Member States; and b) the type of Ministerial decisions questioned by the plaintiffs invoke a question of opportunity, merit or convenience upon which it is not for the Courts to judge. According to the Attorney General, this is a “non-justiciable political question”.

On the contrary, the plaintiff’s arguments were accepted by the Appeals Court, Administrative Division at second instance, which revoked the Fiscal Court’s prior decision which led to the Directorate General of Customs launching an appeal to the Supreme Court. Finally, over the course of this final step in the judicial process, the plaintiff asked that the Court requested an Advisory Opinion from the Permanent Review Tribunal of the MERCOSUR in order to clarify the scope of the obligations emerging from the MERCOSUR Treaty. This has a double significance; on one hand it marks the beginnings of an inter-jurisdictional co-operation between the domestic courts of Member States and the Permanent Review Tribunal of the MERCOSUR, given that this is the first request for an Advisory Opinion formulated by the Supreme Court of Argentina, and on the other hand it provides the opportunity for an international court to adjudicate on a controversial issue, and a question within which there currently exists a legal loophole subject to judicial interpretation.

### **III. The Decision of the Supreme Court of Justice of Argentina**

#### *A. International Law Within the Argentine Legal System*

The constitutional system in Argentina, set out in the Constitution of 1853, which remained in force until 1994, was characterised by its inclusion of a norm establishing a normative hierarchy of the entire legal order. Article 31 of the National Constitution stipulated that “the Constitution, the laws of the Nation dictated by Congress and international treaties with foreign powers are the supreme law of the nation”. For more than a century, this constitutional precept, which established a relationship of normative equality, constructed the relationship between the aforementioned norms within the judicial system. The results, as much as could have been expected from such an undetermined hierarchy, were discordant: the Supreme Court at various times gave primacy to internal law over interna-



tional law and at other times did the opposite by applying the general principle of law *lex posteriori derogat priori*.

Nevertheless, in the early 1990's two events occurred which changed the regulation of the normative structure of the Argentine legal order. The first was a decision of the Supreme Court that maintained in the case *Ekmekdjian v. Sofovich*<sup>15</sup> that the Vienna Convention on the Law of Treaties – in force in Argentina since 1980 – and Article 27 in particular, gave primacy to international law over national law. As a result, it was no longer correct to maintain that “a fundamental norm did not exist to accord priority to the treaty above the law”, as had been decided in previous cases.<sup>16</sup> This doctrine was reaffirmed a year later when, in 1993, in the case *Fibraca v. Comisión Técnica Mixta de Salto Grande*,<sup>17</sup> the Supreme Court held that international treaties are hierarchically superior to ordinary laws but inferior to the National Constitution.<sup>18</sup>

The second of the two formative events was the constitutional reform itself in 1994 out of which Article 75 paragraph 22 was introduced, which recognised that international treaties take priority over ordinary national laws. The Article outlines a series of treaties and statements relating to international human rights law that enjoy constitutional status although, according to the majority opinion regarding the constitutional doctrine of Argentina, the treaties listed are in accordance with the National Constitution, but do not form part of it.<sup>19</sup> Moreover, where an apparent conflict exists it must be resolved by a systematic and harmonious interpretation on the part of the judges. It is worth mentioning that in the Arancibia Clavel affair, the then Minister of the Court, Boggiano, expressed in his vote (for the majority) “(...) The harmony or concordance between the treaties and the Constitution is a constituent judgment (...) (treaties) cannot and have not been able to curtail the application of the Constitution as this would be a contradiction attributable to the Constituent (...) treaties

<sup>15</sup> *La Ley*, 1992-C-540, Buenos Aires.

<sup>16</sup> *Fallos*, 257:99 and 271:7.

<sup>17</sup> *El Derecho*, 23rd September 1993.

<sup>18</sup> Miguel Ángel Ekmekdjian, *Tratado de Derecho Constitucional*, (Ed. Depalma: Buenos Aires, 2004), Vol. 4, 614.

<sup>19</sup> Miguel Ángel Ekmekdjian, *op. cit.*, 621; Germán Bidart Campos, *Tratado elemental de Derecho Constitucional*, (Ediar: Buenos Aires, 1995), Vol. 4, 555; Roberto Dromi and Eduardo Menem, *La Constitución Reformada*, (Ed. Ciudad Argentina: Buenos Aires, 1994), 259; Helio Juan Zarini, *Derecho Constitucional*, (Astrea: Buenos Aires, 1999), 82.

complement constitutional norms concerning rights and guarantees (...) both constitutional and treaty clauses have the same hierarchy, are complementary and, therefore, cannot displace or destroy one another (...).<sup>20</sup>

With regard to the treaties of integration, one must take into account that the 1994 Reform included Article 75 paragraph 24, within which a distinction is made between certain treaties. In effect, the first category listed in Article 75 paragraph 22 refers to Human Rights treaties with Constitutional hierarchy. Following that, Article 75 paragraph 24 outlines the treaties of integration themselves which can be classified into two categories: the first being those formed by integration agreements with Latin-American countries and the second being integration agreements formed with Non-Latin-American Countries. The distinction arises from the different majorities and number of Parliamentary votes constitutionally required to approve each respective agreement.<sup>21</sup>

It is noteworthy that Article 75 paragraph 24 of the Constitution not only mentions the original right of the integration blocks, but also grants a “superior hierarchy than the law” to norms issued as a result of them, i.e. law derived from supra-state or supra-national organizations from a treaty of integration. Therefore, even secondary or derivative integration law is recognized as having normative supremacy above domestic law regulations.

Finally, there is a third category of treaties which comprises the rest of the international treaties to which Argentina is a party. These are not listed in the constitutional text, cannot be incorporated into the constitutional text through a legislative act of the National Congress – since they do not constitute human rights treaties – and do not require special majorities or declarations of admissibility – since they do not constitute treaties of integration. The difference between these three treaty categories could be interpreted, in turn, as a treaty hierarchy in the Argentine legal system.

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<sup>20)</sup> *La Ley* 2004-E, 827, Buenos Aires.

<sup>21)</sup> Article 75 paragraph 24 of the National Constitution states that the approval of these treaties (of integration) with Latin American States requires an absolute majority of all members of both chambers and in the case of treaties (of integration) with other States, the National Congress must have the backing of an absolute majority of the members present in each Chamber in order to declare the treaty suitable for approval and even then it will only be able to be approved by a vote of absolute majority of all members of each chamber, one hundred and twenty days after the declarative act.

In such a way, Drnas de Clement held that,

in order to determine the normative hierarchy of international treaties in domestic law, we cannot rely on considerations based solely on Argentine law, but instead must take into account certain substantive aspects of international law which determine treaty hierarchy, which ought to be interpreted in the context of international law as a whole, an idea addressed implicitly by Article 75 of the National Constitution.<sup>22</sup>

Although after the constitutional reform there is no doubt about the primacy of international law over domestic law, the application continues to face a specific problem stemming from the difference between operative and programmatic treaties, a distinction which arose from the jurisprudence of the Supreme Court in the case *Ekmekdjian v. Sofovich*, where the court held that “treaties are operational when they contain a specific enough propensity of the factual circumstances so as to enable its immediate implementation”. According to Ekmekdjian, this should have been how it was worded in the National Constitution amended in 1994,<sup>23</sup> since according to the current formulation, each time a human rights treaty is added to the list, the incorporation procedure should be activated, which incidentally involves a constitutional amendment.<sup>24</sup>

<sup>22</sup>) Zlata Drnas de Clement, “Constitución Nacional y Jerarquía de los Tratados”, Córdoba National Academy of Law and Social Sciences (Argentine Republic), available at <http://www.acader.unc.edu.ar>.

<sup>23</sup>) Miguel Ángel Ekmekdjian, *op. cit.*, 614.

<sup>24</sup>) We make reference to the fact that the “incorporation” of an international human rights law treaty into the National Constitution requires there to be a constitutional amendment because the National Congress, since it is not, strictly speaking, a constitutional power, by the very powers granted to it by the National Constitution may expand the list of human rights treaties with constitutional hierarchy through the procedure laid out in Article 75, paragraph 22 when it states “(...) *the remaining human rights treaties and conventions, after being approved by Congress, will require the vote of two thirds of all members of each Chamber in order to obtain constitutional status*”. The term “incorporation” is not used in reference to the dualist theory of the law, but in the instrumental sense, to signify the broadening of the list of human rights treaties with constitutional status. In fact, since the 1994 reform, the text of Article 75 paragraph 22 has changed on two occasions, when the following international instruments were joined to the list of treaties with constitutional status: through the Law 24,820 published on the 29th of May 1997, the Inter-American Convention on the forced disappearance of persons and through the Law

However, this pre-reform jurisprudential creation has given rise to a *contrario sensu* interpretation, which involves considering the existence of programmatic treaties even where no distinction of this sort arises from the constitutional text, which makes it procedurally possible to request the non-direct applicability of international law in so far as it is not proven that its clauses are operative.

In the case we are looking at this line of argument has also been used to try to differentiate between operative and programmatic treaties on behalf of the Attorney General which, moreover, is a commonly debated point in the Argentine Courts. In this respect, it is worth remembering that during the pending controversy between the Eastern Republic of Uruguay and Argentina, surrounded in 2006 with protests by local residents of the Argentine city of Gualeguaychú after the installation of two pulp mills in the Uruguayan city of Fray Bentos, situated on the banks of the Uruguay River, which led to transit cuts over the bridges that connected the two countries. Indeed, in that case Argentina, in their defence, argued that “it is questionable whether the requirement of free movement of goods arising from the Treaty of Asunción and the norms surrounding it are fully in force (...) since the goals of the Treaty of Asunción have not been fully achieved”.<sup>25</sup> It is understood that Argentina considers international treaties to contain operative and programmatic clauses, and regarding the first article of the Treaty of Asunción, the parties to the treaty have committed themselves to developing an integration process. As the word itself implies,

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25,778 published on 3rd September 2003, the Convention on War Crimes and Crimes against Humanity.

<sup>25)</sup> Paragraph 102 of the ruling 02/2006, by the MERCOSUR Ad Hoc Arbitral Tribunal, “Uruguay v. Argentina”: Argentina’s failure to adopt appropriate measures to prevent or eliminate the impediments to the free movement between the international bridges that unite both territories”, of 21 June 2006. It is noteworthy that, in the same context, Argentina sued Uruguay before the International Court of Justice for alleged violation of the Statute of the River Uruguay. See case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010. The ICJ made in that case the following findings: (1) that Uruguay has breached the procedural requirements of cooperation with Argentina and Uruguay River Management Commission (CARU) during the development of plans for CMB pulp mill (ENCE) and Orion (Botnia), and (2) that Uruguay has breached the procedural obligations of environmental protection under the Statute of the River Uruguay by authorising the construction and putting into operation the Orion pulp mill (Botnia). However, the Court also found that Uruguay has not breached its substantive obligations under Articles 35, 36 and 41 of the 1975 Statute of the River Uruguay. The full text of the judgment is available at <http://www.icj-cij.org/docket/files/135/15877.pdf>.

“process” means variability and so where these goals are not achieved in full, the obligations would not be enforceable for the contracting parties.

In light of the Argentine argument, the ad hoc Arbitral Tribunal ruled that even if the Argentine premise is true in the sense that the “processes of integration” are wide-ranging, that variety evolves and progresses constantly and results in the success of the “integration situations” which in turn would prevent a repeat of the process and the destruction of the achievements to date. In the words of the Tribunal, the journey so far has established specific and effective links involving enforceable commitments between State Parties.<sup>26</sup> It is therefore plausible to maintain that the argument of the Attorney General in this case is unfitting in instances of supranational decision-making regarding integration, as has been demonstrated by the case law of this arbitral tribunal.

#### B. *Mercosur Law: Advisory Opinions*

After the signing of the Treaty of Asunción in 1991, out of which MERCOSUR was established, Member States agreed to provide the bloc with an institutional structure, established in December 1994 by signing the Ouro Preto Protocol. The regulation of the dispute resolution procedure that could arise from the application of law originating in or derived from MERCOSUR took shape a little later in the Brasília Protocol of 1995. This regulation was in force for nearly a decade and was characterised by the marked political influence in its dispute resolution process, since the decision to establish the ad hoc tribunal came primarily from the prolonged and intense involvement of the political bodies.

In January of 2002 the Olivos Protocol was signed in which both the process for the resolution of differences and the structure of the courts were reformed. On the one hand, this protocol simplifies the procedure by containing rules which permit the quick establishment of an ad hoc tribunal. On the other hand, with regards to the jurisdictional structure, the Olivos Protocol established the Permanent Review Tribunal with contentious and advisory jurisdiction. The advisory jurisdiction is regulated by

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<sup>26</sup> Paragraphs 103 and 104 of the ruling “Uruguay v. Argentina on Argentina’s failure to adopt appropriate measures to prevent or eliminate the impediments to the free movement between the international bridges that unite both territories”.

decision 37/03 of the Common Market Council, whose essential features can be summarized as follows:

- a. Regarding the *locus standi* to seek advisory opinions, the decision of the CMC considers as legitimate assets: (1) all Member States acting jointly, (2) decision-making bodies of MERCOSUR, and (3) higher Courts of Justice with national jurisdiction.
- b. If we refer to the subject of advisory opinions, the decision of the CMC states that requests may be on “any legal question”<sup>27</sup> related to MERCOSUR and in the case of advisory opinions issued by the Superior Courts of Justice, questions will support the “interpretation of the MERCOSUR rules” with the added requirement that the legislation is “linked to causes that are pending in the Judicial Branch of the applicant State”. Moreover, each Member State’s Judicial Branch should have its own internal procedure to deal with requests for the Superior Courts’ advisory opinions from other judicial branches of the State. This information allows us to characterize the system of procedure as a “mechanism of direct judicial cooperation”,<sup>28</sup> similar, to a certain extent, to the preliminary question process in the European Union and the preliminary interpretation in the Andean Community. In fact, the “preliminary question” of European Union law intends to make the European Court of Justice the main interpreter of European Community law, as the body responsible for setting the common standards to be taken into account by the judges and national courts of the Member

<sup>27)</sup> This is an identical expression to that which is established in Article 96 of the UN Charter with regards to the object of the International Court of Justice’s Advisory Opinions. On this subject see Carlos Espósito, *La función consultiva de la Corte Internacional de Justicia*, (McGraw-Hill: Madrid, 1996), 81–83.

<sup>28)</sup> Alejandro Perotti, “Rol de los abogados y jueces en las Opiniones Consultivas al Tribunal Permanente de Revisión del MERCOSUR. Valor jurídico de las Opiniones Consultivas. Acordada N° 13/08 de la Corte Suprema”, in *Temas del Cono Sur – Dossier de Integración*, (February 2010), 13, 16–17. But note that some other authors have expressed that the advisory opinions in the MERCOSUR are not just a “jurisdictional cooperation mechanism,” because they are able to be activated by the political institutions of MERCOSUR and Member States, unlike what happens in European Union Law. See Manuel Cienfuegos Mateos, “La colaboración entre los jueces de los países del MERCOSUR y el Tribunal Permanente de Revisión mediante el procedimiento de opiniones consultivas,” in Alejandro Saiz (ed.) *Tribunales en Organizaciones de integración: Unión Europea, Comunidad Andina y MERCOSUR*, (Aranzadi-Thomson-Reuters, Cizur Menor, 2011), 30.

States, ensuring the correct application of Community law.<sup>29</sup> As for the “preliminary interpretation” of the Andean Community, this is a practice that has encouraged the development and evolution of integration law, which has become an instrument of cooperation between the national community and the national body.<sup>30</sup>

In both cases, the characteristics of the preliminary question of the EU and the preliminary interpretation of CAN are: a) the applicant body is a national court or tribunal which has the power to ask the question or make the preliminary appeal – in the case of not being the last petition of national resolution, or in the case of European community law if it were to be treated as a question of validity – ; b) the body urged to interpret Community law is the Court of Justice for either the European Union or the Andean Community, c) the community interpretation is binding and takes general effect, although in some cases additional questions may be accepted by other judges on the same issue in similar cases; d) the matter for interpretation constitutes a Community law norm meant to apply in a specific case which is pending before recurring judges’ national courts.

- c. With regards to the legal effect of advisory opinions issued by the TPR, the CMC decided that they will not be binding. Therefore they will only act as guidance as to the meaning of the rule subject to interpretation. In other words, it is at the discretion of the requesting body whether they wish to adopt the content of the solicited advisory opinion.

Also worth a mention are the reasons given in the Olivos Protocol why the TPR may refuse to answer an advisory opinion. The Protocol lists two grounds: a) the invalidity due to (i) the applicant’s lack of *locus standi* or (ii) the choice of a foreign forum to MERCOSUR for the handling of a main cause; and b) the existence of a dispute settlement procedure, or its set-up after the application for the advisory opinion and before the court’s response, which deals with the rule requiring interpretation.

<sup>29</sup>) Ricardo Alonso-García, *El juez español y el derecho comunitario. Jurisdicciones constitucionales ordinarias frente a su primacía y eficacia*, (Tirant lo Blanch: Valencia, 2003).

<sup>30</sup>) The Court of Justice of the Andean Community, Louis Vuitton Case, 6-IP-93 dated 25 February 1994, published in Volume III of the jurisprudence of the Court of Justice of the Cartagena Agreement, p. 101.

Subsequently, four policy decisions of MERCOSUR's decision-making bodies were adopted relating to the TPR's advisory opinions. Three of them relate merely to how the body functions,<sup>31</sup> whilst the other lays down basic elements to be included in the application. The latter, Decision 02/07, establishes that the request for the advisory opinion should contain the following elements: a) a statement of the facts, b) the subject of the application, c) the motivation, and d) an indication of the MERCOSUR rule to be interpreted.

The TPR has issued three advisory opinions. Some critical assessments involving their legal status were developed in the first, asserting that:

In reality, applying the dispute settlement system to an integration process, especially regarding queries arising in the national courts, the concept of advisory opinions is unsuitable. In fact preliminary interpretations are involved or in any case, preliminary inquiries.<sup>32</sup>

Furthermore, it became clear that the non-binding nature of the advisory opinion for the national judge who applies for it in the course of a main proceeding “completely distorts the concept, nature and purpose of what should otherwise be a proper system of judicial interpretation.” Adding that this feature “principally attacks the purpose of the consultation with the national judge in the context of an integration process whose aim is to achieve a consistent interpretation of Community Law throughout the integrated territory (...).”<sup>33</sup>

Taking into account these considerations, the TPR respectfully urged the relevant authorities to improve the regulation of advisory opinions to bring them in line with comparative law both in relation to “the mandatory character of the question posed and the binding nature of the TPR's response.”<sup>34</sup>

As stated by the TPR, the nature of MERCOSUR's advisory opinions is said to be more in line with the European Judicial Institute than with the

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<sup>31)</sup> The 17/04 CMC decision relating to the creation of the Special Fund for Controversial Solutions, and GMC Resolutions 40/04 and 41/04 relating to the emerging fees for advisory opinions.

<sup>32)</sup> Advisory Opinion of the TPR 1/2007 considering No. B.1.

<sup>33)</sup> Advisory Opinion of the TPR 1/2007 considering No. B.4.

<sup>34)</sup> Advisory Opinion of the TPR 1/2007 considering No. B.4. In the same sense, The Foro Permanente de Cortes Supremas de Justicia of MERCOSUR has expressed its opinion. See these statements in <http://www.stf.jus.br/forum/principal/principal.asp>.



views of the International Court of Justice. Finally, the regulation of the right to solicit advisory opinions remains to be evaluated. Aside from MERCOSUR's own limitations in this area, it has the right to intervene in the founding of a regional legal system. This was noted by some authors,<sup>35</sup> with particular reference to three situations:

First, in cases of breach of MERCOSUR law by a State Party from which the person affected is a national or within which lies their business headquarters, the advisory opinion is the only option that the individual has to protect their rights, so the classic MERCOSUR dispute settlement system, in claims cases in particular, requires that the complaint is made by him before the said State, which if it sees fit, may back the claim and raise it in the GMC. Therefore, if the offender of the regional law is the State itself, the individual cannot complain since it is inconceivable that the same State would incriminate itself before MERCOSUR. It is worth mentioning that the success of this mechanism will also depend on its use by individuals, legal operators and national judges.

Second, regarding the legality of MERCOSUR standards, the traditional dispute settlement system does not regulate any direct action – not even those initiated by a State Party – in which the validity of an act of one of the institutions of MERCOSUR (CMC, GMC and CCM) might be challenged for infringing, for example, the Treaty of Asunción or the Ouro Preto Protocol. Therefore, the advisory opinion is a means of making it easier for the national courts to seek a review from the TPR regarding the compatibility of secondary legislation in relation to the law originating from MERCOSUR.

Thirdly, in this situation, to grant to the national courts standing to seek an advisory opinion from the TPR would avoid the risk that incompatible MERCOSUR law might be applied in Member State territory. The advisory opinion is a fundamental means of interpreting the law, of great legal significance in the application and coherent interpretation of

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<sup>35)</sup> Alejandro Perotti, *op. cit.*, 13, 21–22; Martha Lucia Olivar-Jimenez, “El derecho del MERCOSUR y el derecho internacional – La lucha por independencia,” 18 *Revista Electrónica de Estudios Internacionales* (2009), 1, 21; Alejandro Perotti, “El control de legalidad de las normas del MERCOSUR por el juez nacional,” 3 *DeCitas. Derecho del Comercio Internacional. Temas y actualidades* (2005), 551–560; Roberto Díaz Labrano, “Las opiniones consultivas ante el Tribunal Permanente de Revisión del MERCOSUR a través de los tribunales superiores de los Estados parte,” *Anuario de Derecho Constitucional Latinoamericano* (2006), 629, 632; Adriana Dreyzin de Klor, “La primera opinión consultiva en MERCOSUR ¿Germen de cuestión prejudicial?” 23 *Revista Española de Derecho Europeo* (2007), 437, 459 y ss.

MERCOSUR law, establishing certain precedent and affirming the Community's legal order.

In any case, it must also be noted that upon further reading of the doctrine there is less optimism regarding the potential of the instrument, since it is considered relatively sluggish, inoperative and ineffective, hence why it is so little used by the judges.<sup>36</sup> Moreover, it is argued that the regional process has a typically intergovernmental character, reflected by the TPR, which ends up producing a political attachment and a move away from solid institutionalism. For Dreysin de Klor the MERCOSUR advisory opinions are a breakthrough, but are insufficient,<sup>37</sup> hence why a Supreme Court of Justice for MERCOSUR is continuously being advocated as a tool for the institutional strengthening of the regional bloc.<sup>38</sup>

This proposal has found its best expression in the approval of the project of norm number 02/10 on 13 December 2010 by Parliament of MERCOSUR (Parlasur). The Parliament of MERCOSUR has recommended to the Council of the Common Market to promote a special protocol for the establishment of the Supreme Court of MERCOSUR. The proposal considers the transformation of advisory opinions into judicial preliminary questions, with more similarities to the EU system of preliminary judgments. Another topic regulated in the proposal is linked with capacity to request advisory opinions, which would be more open than present, including all national tribunals, three “decision taking” institutions, Parlasur and the Administrative Secretary of MERCOSUR. Finally, the biggest change will be the binding character of the new preliminary questions.

### *C. The Procedural Aspects of the Case*

The procedural controversy examined in this case is whether or not it is legitimate to require an advisory opinion. This point was touched upon in the dissenting opinion of the Justice Highton de Nolasco who considered that the Regulation contained in the Olivos Protocol, set up by the Common Market Council, restricts such legitimacy to the Member States acting jointly or to the National High Courts of Justice of each State in pending cases. Therefore, in her opinion in this particular case, the Argen-

<sup>36</sup> Adriana Dreysin de Klor, “El MERCOSUR: Escenario de nuevas opiniones consultivas”, 32 *Revista Española de Derecho Europeo* (2009), 537, 543.

<sup>37</sup> Adriana Dreysin de Klor, (2009) *op. cit.*, 537, 559.

<sup>38</sup> Adriana Dreysin de Klor, (2007) *op. cit.*, 437, 460; *id.* (2009) *op. cit.*, 537, 560.

tine Supreme Court should resist falling back on this point of reference since individuals do not have direct access to the Regional Court and it is inappropriate that the Court may rely on an individual's claim. In other words, the Minister argues that there is no *locus standi* in so far as individuals do not have access to MERCOSUR's dispute settlement system nor have they been granted the possibility to seek advisory opinions from the Permanent Review Tribunal. Consequently, in her view, it would not be possible to process SANCOR's submission.

The majority vote ignores Justice Highton de Nolasco's arguments and maintains that, under the rules of the Olivos Protocol, the standing question is irrelevant since it is the court who shall submit the application to the Permanent Review Tribunal for an advisory opinion: SANCOR's role has been to propose, within the powers of the parties in a judicial proceeding, a viable and useful tool for the interpretation of regional standards. In effect, in agreement with Article 378 of the Code of Civil and Commercial Procedure, the parties are free to try the process and the advisory opinion is to be seen as an ideal instrument to test that the interpretation of the Treaty of Asunción conforms to the standards of the relevant Community Authority in this regard. Moreover, the judges themselves might be able to do it through the powers granted to them by Article 36(4)(b) of the Code of Civil and Commercial Procedure which permits them, in any stage of the proceedings, to decide the attendance of the parties themselves, the witnesses, experts and/or technical consultants as a better means of gathering evidence and relevant information to the cause. In this case, the opinion of the judges of the Permanent Review Tribunal is made out to be the most suitable for the interpretation of a MERCOSUR rule.

However, most striking is the allocation granted by the Supreme Court itself through the agreement 13/2008, which regulates the power conferred by the Olivos Protocol Regulation, as mentioned in Article 1 of the agreement's Annex which says that "all judges of the Republic, both of the national and the provincial jurisdiction, may be able to make a request, upon application or ex officio, for an advisory opinion from the MERCOSUR Permanent Review Tribunal concerning a case pending in his own court."<sup>39</sup>

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<sup>39</sup>) Cf. The obligation to request preliminary hearings from the European Court of Justice according to European Law, which in some Member States such as Spain have been set up to be a fundamental right which the natural judge holds. Ricardo Alonso-García and José María Baño-León, "El recurso de amparo frente a la negativa a plantear la cuestión prejudicial ante el Tribunal de Justicia de la Comunidad Europea", in 29 *Revista Española de Derecho Administrativo* (1990),

In virtue of these legal arguments, the Court held that the plaintiffs had standing to petition the court to request an advisory opinion from MERCOSUR's Permanent Review Tribunal and consequently, in a shared decision, gave way to the plaintiff's request.

#### D. *The Substantive Question of the Case*

In the run up to the final decision of the Court another conflicting argument emerges from the Office of the Attorney General. We refer to the definition of the Advisory Opinion's purpose as a "non-justiciable political question." According to the Attorney General, this qualification is based upon the fact that the imposition of export duties, which the plaintiff challenges, is derived from the fiscal crisis in which the country found itself embroiled in 2002. On the basis of this argument he contends that the Court should refrain from making a ruling on the issue and, therefore, deny the request of the plaintiff, since the subject of advisory opinions can only consist of a "legal question" and the subject in this case constitutes a "political question".<sup>40</sup>

It is interesting to analyze a potential claim from the Attorney General's Office to filter the "political questions" as a valid reason to establish a restriction on the freedoms contained in the treaties of integration. In this respect, in MERCOSUR's sphere, Annex 1, Article 2b of the Treaty of Asunción incorporates, by reference, the exceptions to free trade laid out in article 50 of the 1980 Treaty of Montevideo which creates the Latin-American Integration Association.<sup>41</sup> Moreover, the TPR, in the ruling 01/2006, flagged up for evaluation the question analysing the category "mandatory requests in the public interest," created by the Court of Justice

193, 193 onwards; and, more generally, Ricardo Alonso-García, *El juez español y el Derecho comunitario* (Tirant lo Blanch: Valencia, 2003).

<sup>40</sup> Cf. The same argument is found in the International Court of Justice's jurisprudence, which until now has always denied that the legal issues presented to the Court had to be rejected for being political questions. See Carlos Espósito, *op. cit.*, 85–89.

<sup>41</sup> Art. 50 TM says: "Nothing in this Treaty shall be interpreted as precluding the adoption and enforcement of measures aimed at: a) the Protection of public morality; b) the application of laws and safety regulations; c) the Regulation of imports and exports of arms, ammunition and other weaponry and, in exceptional circumstances, all other military equipment; d) the Protection of life and health of people, animals and plants; e) the Import and export of gold and silver metals; f) the Protection of national artistic, historic or archaeological treasures, and g) the Export, use and consumption of nuclear materials, radioactive products or any other material used in the development or use of nuclear energy."

of the European Communities (CoJEC) adding these requirements to the reasons invoked in justification of a restriction on trade freedom.<sup>42</sup> The importance of this case is that, besides the debate surrounding whether “fiscal fragility” or “economic emergency” alleged by the Attorney General to be an exceptional foundation of the internal norm attacked by the plaintiff is or is not a justification for the breach of an international obligation like that at the root of this controversy, i.e. the obligation on the Member States not to introduce customs duties, this is a legal question and therefore an obvious matter for an advisory opinion.

There is another recurring theme in the arguments against the request for an advisory opinion which concerns the claim that the imposition of such export duties does not harm MERCOSUR’s other members.<sup>43</sup> If this were true, it would be an argument that is comparable to the defence of “abstract questions” in the advisory jurisdiction of the International Court of Justice, which if it makes sense regarding the dispute in question,<sup>44</sup> has no basis for blocking the court acting in an advisory capacity.<sup>45</sup> In any case, as in the previous argument, this is an issue which requires a legal response and therefore may be subject to an advisory opinion from the TPR. In our opinion, it is conceivable that the position these arguments defend is very difficult to maintain convincingly, not least given MERCOSUR’s process of integration, which maintains a strong interdependence between its members, since it is becoming increasingly difficult to find situations in which the decision of a State has no impact on its members.<sup>46</sup> What is more, in this specific case, the argument about the lack of effects on Argentine trading partners could be challenged from a substantive point of view, since the rising price of Argentine exports due to the imposition of customs duties necessarily means a decrease in foreign consumption of the

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<sup>42</sup>) Amongst these new grounds for the justification of creating new case law, after the *Cassis de Dijon* sentence (120/78, rec. P. 649), are “the effectiveness of fiscal supervision, fairness of commercial transactions, consumer protection or of the environment” and after the *Schmidberger* sentence “the protection of fundamental rights is a legitimate interest that justifies, in principle, a restriction on the obligations of free movement of factors”.

<sup>43</sup>) See the reasoning in Attorney General’s Opinion Number 4 and the reasoning in Justice Highton de Nolasco of the SCJN in vote number 6.

<sup>44</sup>) *Nuclear Test* case, ICJ Reports 1974, p. 272 (Australia v. France), ICJ Reports 1974, p. 477 (New Zealand v. France). Also the issue of the Northern Cameroons, ICJ Reports 1963, p. 34.

<sup>45</sup>) See Carlos Espósito *op. cit.*, 89–91.

<sup>46</sup>) Eloisa Raya de Vera, “Comentario sobre el fallo de la Corte argentina sobre la opinión consultiva en el Mercosur” in *Temas del Cono Sur – Dossier de Integración*, (February 2010), 7, 10.

products, given that the products as they existed prior to the implementation of the export duties are no longer accessible. It is very difficult to argue otherwise without ignoring basic principles of economic theory and regional integration.

In her vote, Justice Highton de Nolasco said that the court should not be permitted to seek an advisory opinion given both its lack of standing<sup>47</sup> and for substantive reasons. In relation to the content or substance of the question, Justice Highton of Nolasco reiterates the idea of harm or link with another Member State that we have just contested and she reaffirms the need to find a “foreign element” to justify seeking an advisory opinion. In this regard, it should be noted that this is not a requirement of the Olivos Protocol or from its regulatory development. The only requirement imposed by this body of rules is the need to interpret an institutional source – of MERCOSUR law – that would be applicable to the case in question. Taking this into account, the Justice de Nolasco’s vote might be seen as an opinion involving a very strict interpretation of the rule governing the application procedure for advisory opinions to the Permanent Review Tribunal. This restrictive interpretation is consistent with the idea that judicial action in this area exceeds the strict competencies of the Argentine Supreme Court of Justice and could “jeopardize the current development of the integration process and especially the consistency of achievements gained in the context of Mercosur”.

Most of the Members of the Argentine Supreme Court took a different view and voted in favour of the request for an advisory opinion, thereby welcoming a real inter-jurisdictional cooperation that could help develop and strengthen the law of MERCOSUR and the process of integration among its Member States.

#### *E. The Outcome of the Case*

It is now necessary to stress that, beyond the institutional importance of this first request for an advisory opinion by the Supreme Court of Argentina as an initial step in increased inter-jurisdictional cooperation between national courts and judges of the MERCOSUR’s Permanent Review Tribunal, the months following the request saw a number of events which

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<sup>47)</sup> *Supra* Part III.C.

directly affect this judicial decision and its material content. Firstly, in fact, as was mentioned in the introduction, the *Sancor v. Dirección General de Aduanas* case, which gave rise to the request for an advisory opinion to the Permanent Review Tribunal, the plaintiff withdrew their action after reaching an agreement with the defendant. On the basis of this agreement in April the Supreme Court withdrew the request for an advisory opinion, finding that the issue had become merely abstract, without any remaining economic interest.

Some commentators felt that this apparent lack of economic interest was merely relative, given that there remained a number of pending court cases brought by other parties on the subject of export duties which contained arguments similar to those presented in SANCOR, which meant it remained possible that a similar request, based on the same juridical question, would be launched in the near future. Importantly, at the last meeting between the presidents of the MERCOSUR held in San Juan, Argentina, on 3 August 2010, the MERCOSUR Customs Code was approved, providing for a legal position similar to the arguments put forward by Argentina in the SANCOR case, whereby it allows Member States the right to apply export duties unilaterally, since the Code considers this a matter excluded from MERCOSUR regulation.

Article 7 of the MERCOSUR Customs Code was the last that remained to be negotiated; after a consensus was reached between the respective presidents of Argentina and Uruguay, the latter being the negotiating party to oppose the express or tacit recognition of the right to unilateral application of export duties, it was finally possible to conclude the article as follows:

This Code does not deal with export duties and therefore the laws of the party States shall apply to existing customs territories with the enactment of this Code, respecting the rights of the party States.

Thus we can conclude that future approaches to export duties will not be regulated via the MERCOSUR but will be subject exclusively to the domestic legislation of Member States. It is worth mentioning however that since the Customs Code requires approval from the parliaments of all Member States and Associates, it is possible that its entry into force will be slow at best, or even extended indefinitely, as with many examples of

MERCOSUR norms which emanate from the decision-making bodies of the organization and are ineffective within the States due to unfinished parliamentary procedures.<sup>48</sup>

#### **IV. Final Considerations**

In order to conclude, it remains necessary to note that despite the eventual frustration of the request for an advisory opinion in this specific case “SANCOR v DGA” because of the termination of the action by the plaintiff, the importance of the request which we have considered in these pages is that it could be seen as the start of an inter-jurisdictional cooperation between domestic courts of Member States of the MERCOSUR and the Permanent Review Tribunal of the MERCOSUR. Indeed, this could be considered as a starting point in a process which would see the consolidation of a practice which encourages the development of regional integration, which at this moment manifests itself in the Argentine Supreme Court’s willingness to seek an advisory opinion. Beyond the result in this specific case, that judicial initiative continues to retain its value.

Finally, it should be mentioned that these initiatives act also as a tool for greater control of judicial activity; a request for an advisory opinion requires the Permanent Review Tribunal to consider the facts and analyse the attitudes of the national judges as well as to decide on the case in front of them. The judges of the Permanent Review Tribunal must determine whether this Community procedure is merely a formal matter or if it requires the substitution of the regional court’s interpretation for that of the Permanent Review Tribunal.

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<sup>48)</sup> Perhaps such cases in the future will see the development of a jurisprudence which grants the right of appeal to individuals affected by fault or negligence at the time of incorporation of MERCOSUR norms into domestic systems. The individual, who can show that the MERCOSUR norm is precise and unconditional and that it affects them directly, could then invoke this against their state in an action of effective direct effect, comparable with the jurisprudence of the European Court of Justice on unimplemented or poorly implemented directives.