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Private Party Direct Access: A Comparison of the NAFTA and the EU Disciplines*

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I. Introduction: The Relevance of *locus standi* for Private Parties in NAFTA[1] and in the EU[2]

The right to bring an action and have standing *(locus standi)* in a legal dispute or review has become increasingly significant as the new world order unfolds into a web of treaties and agreements creating ever broader economic and political jurisdictional regimes. As the territorial state gradually but consistently makes room for supranational entities to partake in a variety of affairs which for the last 300 years were considered to be the state's absolute prerogative, more voices are heard that demand to accord similar rights also to individuals. The individual is understood to be the private person but also the "general individual" embodied in the "public interest" to be taken into consideration, and allowed to have input in, the governance of affairs which are no longer local, but at least regional if not international.[3] Universally noted, as the advocates of human rights (and of the environmental cause) keep reminding policy makers and legislators, the role to be played by individuals and non-state actors in general has largely been ignored by the drafters of economic large and complex international (regional and global) institution-establishing treaties. Yet, talking about the European Communities (as they were), Lord

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[1] *The North American Free Trade Agreement Between the Government of the United States, the Government of Canada, and the Government of the United Mexican State*, 17 December 1992, Can.T.S. 1994 No. 2, forthcoming (entered into force 1 January 1994) [hereinafter NAFTA].

[2] *Treaty Establishing the European Economic Community* (Rome, 25 March 1957; TS 1 (1973); Cmnd. 5179)(EEC Treaty) and *Treaty Establishing a Single Council and A Single Commission of the European Communities* (Brussels, 8 April 1965) (Merger Treaty). For simplification, reference will be to the European Union (EU) as a generic term (which includes the three founding treaties: the two sectoral treaties of the European Coal and Steel Community(ECSC), and the Treaty Establishing the European Atomic Energy Community (Euratom), and the European Economic Community (EEC), both latter known as the Treaty of Rome), the Single European Act and the Maastricht Treaty, the Protocols, and the Statutes. Specific reference will be made where required.

[3] Denise Manning-Cabrol, "The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors" (1995) 26 Law and Policy in International Business 1169, discusses the significance of the *Calvo Doctrine* in a world "trilaterally owned" (my interpretation) by supranational organizations, individuals, and the state. Equal treatment of states and individuals is currently on the agenda, a sort of remodelling of the *Calvo Doctrine* of equality of foreigners and nationals which appears to have become part of regional law. *Ibid.* at 1172 note 15, and 1180.

Gordon Slynn, Judge at the European Court of Justice devotes a whole chapter to the question of how the European legal order created by the Treaty of Rome affects the people : "It is plain that many of the steps taken to bring about a common market or a single market will have an effect on the lives of people."[4] Indeed, the European Union (EU) attests to a history of recognition of the right of non-state actors to exercise some direct control over how the Community affects their rights. The North America Free Trade Agreement (NAFTA) has followed suit albeit many steps still behind the EU example.

The post-war period has seen international law and the international legal process move away from the traditional approach under which states were the subjects of international law, and only states were able to make use of international legal remedies, to the current situation where, at least in certain areas, it is fully recognized that individuals may also be the subjects of international law and participate in the international legal process. Primary events marking this evolution include, among others, the Nuremberg Trials and the post-war expansion of the international human rights movement. The development however occurred principally in the area of human rights (individual and collective)[5], and it is my contention that this separation between human rights and rights of the individual in other areas, e.g. trade, is basically artificial. To be sure, individuals have already been entitled as early as the beginning of the 20th century to bring direct claims for remedies regarding injury to their rights (particularly in matters of property) before international tribunals.[6]

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[4]Gordon Slynn, *Introducing a European Legal Order* (London: Stevens and Sons/Sweet and Maxwell, 1992) at 85.

[5] See L. C. Green, *Law and Society* (Leyden: A.W. Sijthoff, 1975) at 241-282, Nkambo, Mugerwa, "Subjects of International Law" in Max Sorensen, *Manual of Public International Law* (Toronto: Macmillan, 1968) 224; Oda, Shigeru, "The Individual in International Law", *ibid.* 469; Yoram, Dinstein, *The International Non-National Law* (Tel Aviv: Schoken Publishing, 1979, Hebrew).

[6] Shigeru, *ibid.* at 511-513.

Observations made almost thirty years ago about the shortcomings of the status of the individual person as a subject of international law are still valid today as they were then. When it comes to the individual as an actor in international trade the following continues to apply:

> "[t]he position of the individual as the subject of international law [is] greatly obscured by a failure to distinguish between the recognition of rights enuring to the benefit of the individual and the enforceability of these rights at his instance. The fact that the beneficiary is incapable of taking independent steps in his own name to enforce them does not signify that he is not a subject of the law or that the rights in question are vested exclusively in the agency which possesses the capacity to enforce them.[7]

This is all the more valid as the intertwined nature of the relationship between foreign and domestic policies has long been recognized by students of international relations.[8] In concluding international agreements governments enter into commitments that inevitably, and more often than not deliberately, modify the domestic relationship between state and citizen. Of important significance, especially concerning representative democracies, is the fact that by creating international legal regimes (e.g., trade, security, culture) governments bind their citizens to laws in the creation of which the latter play an extremely limited role.[9] As issues affecting the lives of citizens increasingly take shape outside the domestic sphere, non-state actors' (citizens but also residents and foreigners) control over their lives ("public participation") shrinks proportionally. There are two

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[7] Mugerwa, *ibid.* at 318.

[8] Henry A. Kissinger, "Domestic Structure and Foreign Policy" in James N. Rosenau, ed., *International Politics and Foreign Policy*, (New York: The Free Press, 1969) 261.

[9] The European Parliament (EP), which is a unique international representative institution of citizens within a multilateral legal area, is an exception to the rule although it cannot be parred with any known model of a representative-democratic national legislature. It has attracted criticism for failing to effectively represent the cause of the European citizen, and consequently tainting the European Union with the so-called "democratic deficit".

aspects to this deficit. First, the ensuing weakening of representative democratic institutions is exacerbated by the fact that want of civil rights can in practice be compensated for by possession of economic might. In this process, economic inequality undermines formal legal equality. Big business is able to, and does, exert leverage within national and international systems in ways and quality unavailable to the ordinary person (small business, or non-profit NGO).

Second, international law-making only unsystematically, and most often only partially, harmonizes law among the signatory states. Consequently, citizens in different countries belonging to the same international legal regime are bound by different domestic laws providing for different access to justice. Thus all too often, as a corollary to new rights and obligations, international law-making indirectly produces also inequality before the law.[10] Despite having set a progressive example to counter such effect, greater individual access should be granted in both the NAFTA and EU contexts. Being the counter-part of public participation, this, I believe, will happen as both of these institutions continue to evolve.

Under the regime of international trade agreements, what protection is extended to the wronged private party? Where does the ordinary person turn to in seeking remedy to injustice? Is direct access to justice accorded and if so, how is the dispute resolution process activated and the settlement enforced?

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[10] It should be noted however that in the European case a major part of the EC's legislative activity is concerned with the harmonization of the laws of the member-states. There is a large body of case law of the ECJ designed to reduce the problem of different access to justice in the member states. More specifically, the ECJ has been very explicit in recognizing that the protection of fundamental human rights is an integral part of the European Community's "new legal order" and has developed its own jurisprudence of human rights, drwaing on the European Convention on Human Rights and the constitutional traditions of member states.

This paper will study the subject of *locus standi* of non-state actors within the dispute resolution regimes established by the EU and NAFTA.[11] While NAFTA addresses the issue on a sectoral basis, the EU deals with it as an institutional and constitutional matter. The purpose of the paper is to juxtapose the different approaches and their solutions to the issue of the protection of the rights of private parties as devised in the two regional arrangements. The first part will discuss the nature of the two agreements and will focus on NAFTA as a regional agreement without institutions in comparison to the EU which represents an enterprise in regional integration equipped with powerful and authoritative institutions. The setting explained, I will elaborate on the concept of private party and follow with a general review of the choice of remedy (or the selection of dispute resolution mechanisms). Then, the distinction between direct versus non-direct access will be explored, for the main challenge to the private party's right to remedy arising from the inter- and supranational arrangements lies in this particular detail. Next, I will analyze the private party direct access to dispute resolution in NAFTA. Most relevant to this paper is the NAFTA Chapter 11 Section B dealing with dispute resolution regarding investments and the investor's right of direct access. Dispute resolution and private party direct access in the EU will involve a discussion of the Community court system and of Art. 173(4) of the EC treaty in particular. The paper will conclude with observations on the difference between NAFTA and the EU concerning approaches to private party direct access.

II. The NAFTA: A Regional Agreement without Institutions

> I would like to talk to you about what I think is the core of NAFTA, which is how NAFTA can help the North American region to become more competitive. ...

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[11] "As we shall see, the question of *locus standi* is a matter of policy as well as law, and it is necessary to protect the individual against illegal acts of the Community institutions as well as it is to safeguard the efficiency of decision-making" (Nanette A.E. Neuwahl, "Article 173 Paragraph 4 EC: Past, Present and Possible Future" (1996) 21 European Law Review 17 at 19) is the cardinal question also with regard to the NAFTA situation.

> NAFTA is an international commitment made by three countries which defines from the outset the rules of the game to trade, to invest, and to provide services. ...The continuity, the permanence, the certainty that NAFTA provides will help us to allocate our resources optimally in the region, and therefore the region will gain competitiveness.[12]

NAFTA represents a market of 379 million people with $6.5 trillion in production. The rationale leading to the conclusion of NAFTA was in the establishment of a free trade area - not a customs union, which is how the EU began, and not an economic union to which it is ultimately committed - to serve this market in the most effective, competitive and efficient way.[13] Being essentially a trilateral (but open) economic agreement of defined and limited scope designed to increase international trade through the elimination of barriers, the founding members have not committed themselves to the lessening of their sovereignty to the same extent that the member-states of the EU have.

The comparatively modest goal of NAFTA explains its institutional meagerness. Similarly, the decision to establish a free trade area rather than move in the direction of a customs union directly affected the choice of remedies available to the private party. Chapter Twenty establishes NAFTA's institutions. The trilateral cabinet level Free Trade Commission[14] oversees the implementation of the agreement, makes recommendations regarding further elaboration, supervises the work of the various committees and working groups established under the agreement, and resolves disputes regarding interpretation and application. It is aided by the Secretariat[15], a purely administrative body comprised of national officers in each member-state and funded for its operation by the relevant

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[12]Jaime Jose Serra Puche, Secretary of Commerce and Industrial Promotion for Mexico, "A Source of Competitiveness" (Speech delivered before the Economic Club of Detroit, 9 December 1992) in Glenn Hastedt, ed., *One World, Many Voices* (New Jersey: Prentice Hall, 1995) 233 at 233, 234.
[13]Frederick M. Abbott, "The North America Free Trade Agreement and Its Implications for the European Union" (1994) 4 Transnational Law and Contemporary Problems 119 ; Jonathan I. Miller, "Dispute Resolution under NAFTA" (1994) 21 Pepperdine Law Review 1313.
[14]NAFTA Art. 2001.
[15]NAFTA Art. 2002.

government. The Secretariat assists the Free Trade Commission and its working groups and committees, and plays a role in the operation of the dispute settlement procedures under Chapters Eleven, Nineteen, and Twenty.[16] Although fulfilling an important administrative role, neither institution has the power of decision-making to bind any of the Parties to NAFTA. Thus, the NAFTA does not provide for a legislative body, nor does it provide for a judiciary to settle disputes arising under it. Moreover, NAFTA is non-self-executing for the United States since the congressional implementing legislation denies it direct effect.[17] It is non-self-executing for Canada as well. This means that the treaty as such cannot be invoked in national courts and be the basis for a cause of action. Mexico is the only member among the three to directly incorporate NAFTA within its national law.

To be sure, NAFTA's founding member-states had no intention to delegate law-making powers to any new institutional arrangement. Guided by the political determination to avoid both the establishment of supranational institutions and the extending of a private right to action, the drafters of NAFTA (spearheaded by the U.S.) made a conscious decision to limit institutional aspects to minimal independent powers[18] and to sidestep a formal dispute settlement process. The ensuing relative institutional amorphism (compared to the EU and to the structure of the State) reflects the preference for decentralized over centralized integration. While creating a free trade area for its three Parties, in the absence of strong supranational law-making and law-adjudicating institutions, NAFTA nevertheless ends up leaving the "playing field" to the discretion of the national legal institutions and processes of each of its members-states. The onus to follow the rules and the spirit of NAFTA is thus largely placed on the individual

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[16]Robert K. Paterson, Martin M.N. Band, Jock A. Finlayson and Jeffrey S. Thomas, *International Trade and Investmet Law in Canada*, 2d.ed. (Scarborough, Ontario: Carswell, 1994) [hereinafter Paterson et. al.]; Abbott, *supra* note 9 at 121.

[17]Abbott, *ibid.* at 122.

[18]R. Jeffrey Kelleher, "NAFTA and the European Union Comparison and Contrast" (1994) 2 San Diego Justice Journal 19 at 25.

governments rather than shared in a partnership between new entity and constituent members.

Had the NAFTA negotiators pursued a more expansive vision and mandate, other elements would have captured the attention of the signatories. However, NAFTA focuses on economic free trade and not on integration, and deliberately leaves out the related social, cultural, and political aspects. Although free trade is expected to lead to integration, NAFTA does not prepare the ground for such subsequent developments. While the EU's theory recognizes that the free movement of goods, services, capital, and intellectual property must be supplemented by the free movement of people, NAFTA's conception remains very reserved in this respect. The main reference to social issues is found in the side agreement on labour[19], and can be inferred from the very concern for the environment embodied in the environmental side agreement.[20] However, the labour side-agreement is a minimalist arrangement. Its scant provisions are striking, especially when contemplating the immense social and political implications that will emerge once the allowance for and regulation of an internal NAFTA free trans-border movement of people will become (at least) economically compelling.

NAFTA does not provide for a human rights charter, and is not concerned with social issues pertaining to equality. The underlying assumption - and expectation - is that social benefits will ensue from the distribution of the economic benefits, and that their pursuance and management are separate from the latter and should remain in the hands of

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[19]*North American Agreement on Labor Cooperation Between the Government of the United States, the Government of Canada, and the Government of the United Mexican States*, 13 September 1993, Can.T.S. 1944 No. 4, forthcoming (entered into force 1 January 1994)[hereinafter NAALC].

[20]*North American Agreement on Environmental Cooperation*, 8 September 1993, Canada-Mexico-United States, Can.T.S. 1994 No. 3, forthcoming (entered into force 1 January 1994) [hereinafter NAAEC].

the responsible governments.[21] As will be seen later, the narrow spectrum of trade-related issues dealt with by NAFTA allows for only a certain nature of disputes to come to NAFTA's attention. Other types of disputes could of course arise, but due to the scope of NAFTA they will remain mute.

III. The EU: Regional Integration with Centralized Institutions

The European Communities are no longer merely a supranational organisation embracing 15 member-states tied together by international agreements. Evolving to form a unique system, they put in place a "new legal order" of Community law[22], which is separate and distinct from both the international and the national legal tradition. To enjoy the benefits of this order, they have further agreed to limit their sovereign rights and even allowed their nationals to join this new legal regime as its subjects. "The TEU introduces a - somewhat vague - concept of European citizenship..., a constitutional recognition of citizenship to the pre-Maastricht economic focus of individual rights.[23]

The EU (formerly colloquially known as the Common Market, then the European Communities, and later the European Community)[24] represents the current stage of integration of so-called Western European countries. Originating with six founding members and eventually expanding to number a club of fifteen, these states started

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[21] Abbott, *supra* note 13 at 128-129.

[22] An eralier characterization of the European Community as a "new legal order of international law", from the *Van Gend* case, has now been largely superseded by the reference in the ECJ's opinion in the *Costa* case to a "new legal order", without any reference to international law.

[23] Fabian Amtenbrink, "Public Interest Litigation before European Courts" (1996) 7 European Business Law Review 35 at 35.

[24] Dinnage and Murphy draw the attention to the problem of nomenclature in the European integrative process. They caution that "[t]he study of this subject therefore may perhaps be likened to the study of an unusual amorphous shape. At any moment it may be possible to describe it, assign a color or a weight to it and so on." James D. Dinnage and John F. Murphy, *The Constitutional Law of the European Union* (Cincinnati: Anderson Publishing Co., 1996) at 4.

immediately in the aftermath of the Second World War to explore and experiment with various strategies of cooperation and collaboration in an effort to structurally avoid the recurrence of war among them. Unlike NAFTA, the raison d'être of the EU consisted in insuring security and peace in Europe. Economic considerations, as important as they were to the reconstruction of Europe, were seen as providing the best available means to achieve the goal. In Winston Churchill's words, the "United States of Europe" was designed "to recreate the European family, or as much of it as we can, and provide it with a structure under which it can dwell in peace, in safety and in freedom."[25] European integration thus consisted of two premises completely impertinent to the negotiators of the NAFTA: first, that there exists a commonality of values and cultural heritage to cement close cooperation, and second, that political stability requires a structure to uphold it. The European edifice was thus constructed around three treaties[26], the core institutions of which were later to merge into single institutions. In the course of its development, the supranational and confederal organization expanded in membership and deepened in content. It has put in place a European social order consisting of the free movement of labour, common competition rules with an enforcement mechanism, a plan to unify working conditions, a common environmental regime, rules for approximation of technical standards, transfer payments to equalize regional development, and "even transfer payments to assist the French [sic] family worker."[27]

The structural foundation of the Community consists of four institutions: the Assembly (European Parliament), the Council (of Ministers), the Commission (the administrative bureaucracy), and the Court of Justice. This structure emulates to a certain extent (and with clear limitations and distinctions) the institutional structure of the liberal

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[25]P.S.R.F. Mathijsen, *A Guide to European Community Law*, 4th ed. (London: Sweet and Maxwell, 1985) at 5.
[26]See, *supra* note 2.
[27]Abbott, *supra* note 9 at 129.

democratic nation-state. While not abolishing, and only gradually and reluctantly gnawing at, the sovereignty of their member states, the European Treaties empowered the institutions to take decisions binding upon the member states, institutions, and persons. Other Community bodies carry only advisory capacity.[28]

The most important decision-making institution of the Community is the Council of the European Union (formerly, the Council of inisters).[29] In accordance with the strategy of pursuing peace and stability in Europe via economic integration, the European Treaties went further than the creation of a European customs union only, in expanding integration through the gradual harmonization of the economic policies of the member-states. The Council[30] - consisting of representatives of the members states (normally attended by the Ministers whose portfolios cover the subject under discussion) - is entrusted with ensuring the coordination of the general economic policies of the members states. Being an institution and not merely an inter-governmental organization, the Council is expected to act in the Community interest.[31] It exercises its decision-making power by producing three types of rules: regulations, directives, and decisions. These acts resemble legislation (albeit not grounded in a popular and representative legitimacy basis) and are limited by the provisions of the Treaty. Unlike the Council, the Commission power of decision is, with a few exceptions, not a law-making (legislative) power but a law-enforcement (executive) capacity to issue regulations, directives, and take decisions

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[28]Mathijsen, *supra* note 25 at 11.

[29]The Commission is the other decision-making body. The European Parliament is an advisory and supervisory institution entrusted mainly with the power of recommendation. While not a legislative body, and its powers not yet approximating those of a national parliament, after the Maastricht Treaty's introduction of the so-called co-decision procedure (Article 189b), the European Parliament has finally acquired a (admittedly limited) legislative role. This body however is of secondary relevance to the subject of the present paper. See, *ibid.* at 12-28.

[30]In addition, since 1975 the "European Council" - a forum of Heads of State or Government meets three times a year to issue general guidelines to be acted upon by the Council and the Commission. *Ibid.* at 34.

[31]*Ibid.* at 28, 29.

at the administrative level.[32] It is important to note, that one of the unusual characteristics of the Commission is that there is no clear separation of legislative and executive powers among Community institutions that one finds most particularly in the United States. Nevertheless, the distinction among the rules, whether legislative or executive, is of crucial importance to private party access to Community dispute resolution.[33]

The legal order created in the European Treaties established the Community court system which has significantly influenced the development of European law. Adjudication pertains to disputes between member-states, between member-states and Community institutions, between the institutions themselves, and between individuals (natural and legal) and member-states, and individuals and institutions.[34]The European Court of Justice (ECJ) can express itself only in judgments and when called upon to do so. It interprets Community rules by reference to their objective and consequently also states the law when not explicitly provided for in the existing legislation. One of the chief challenges of the ECJ lies in the fact that it deals with international (economic) law which is generally of an evolutive nature and requires constant adaptation of the only partially precisely drafted Treaties.[35]The establishment of the European Court of First Instance (CFI)[36] introduced a partition of the judiciary, whereby the CFI - not a "new" institution and not independent but attached to the ECJ - hears in first instance certain categories of cases now including all cases brought by natural or legal persons. The ECJ still hears a

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[32]The basic principle of "conferred powers" applies also with regard to Commission decision-making circumscribed by the provisions of the Treaty. Mathijsen, *supra* note 25 at 47-48.
[33]To be discussed later, *infra* section VI.
[34]Slynn, *supra* note 4 at 6.
[35]Mathijsen, *supra* note 25 at 55.
[36]In the Single European Act of 1986, in force since 1 July 1987. Neville Brown, "The First Five Years of the Court of First Instance and Appeals to the Court of Justice: Assessment and Statistics" (1995) 23 Common Market Law Review 743 at 743-744, and Timothy Millett, *The Court of First Instance of the European Communities* (London: Butterworth, 1990) at 6-7. For a discussion on the jurisdiction of these courts see *infra* section V. Members of the courts are chosen from persons whose independence is beyond doubt and with appropriate judicial qualifications, and are appointed by common accord of the member-states' governments. The number has increased over the years.

range of direct actions and is exclusively empowered to deal with preliminary rulings or actions by members-states or Community institutions. Most importantly, this restructuring created a two-level jurisdiction entrusting the ECJ with the new role of an appeal court from the lower CFI (on points of law only) . The Community court system along with the national court system are the places to which private persons enjoy direct access for the settlement of disputes governed by EU law.

IV. The Definition of Private Party

As economic globalization expands and the economy is restructuring into regional trade blocks, social problems which traditionally were intra-state controlled and to some extent inter-state managed, are now acquiring a regional existence and become subject to intra- as well as inter-regional relations. The concern that without both effective enforcement of existing obligations as well as avenues for public participation the removal of trade barriers and the enhancement of reciprocal national treatment will not necessarily produce the results expected by the founders of regional trade blocks[37], represents only the economic aspect of the issue of private party access to litigation. Broader in scope is the worry that:

> Problems associated with the phenomenon of social dumping loom, in my view, as the major trade-related issue of the next decade - more likely to give rise to serious popular dissatisfaction and intergovernmental conflict than issues with respect to the environment... This is an area of concern which we may therefore usefully begin to address from the standpoint of comparative regional systems.[38]

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[37]Expected to happen through the mechanism of comparative advantage. See the thesis by J. Scott Bodie, *The NAFTA's Institutions and Dispute Resolution Mechanisms: A Case for Public Participation* (LL.M. Thesis, University of British Columbia, 1994).

[38]Abbott, *supra* note 9 at 129, 130.

Social stability in the new economic world order (which necessarily also shapes the new political world order) is contingent on popular content or dissatisfaction with the economic, particularly trade, arrangements. The revolutionary transformations of national and international economic processes and structures have generated great economic and social insecurity in the individual person. Such worries can be alleviated or soothed if certainty in the existence of, and access to, remedies to misunderstanding and injustice is guaranteed. Consequently, socio-political stability - a condition of economic growth - depends to a large extent on equal private party access to justice during the period of restructuring and upon its completion.

As the systems change, so do the actors within these systems. The question of who is a private party is thus a direct corollary of the concern about social stability, and imposes some conceptual difficulties. The Community vernacular distinguishes between "public/privileged" and "non-privileged/private" applicants.[39] The private party (whether representing a public or a truly private interest[40]) should be understood as encompassing all that is non-state and non-Community institutions.[41] Under the category of the so-called "non privileged/private" party, the Community further discerns (in the words of the Treaty) between "natural" and "legal" persons and accords them limited space for "individual action".

> According to accepted Western theory of corporate personality, 'natural' and 'legal' persons are assimilated, the assumption being that corporate bodies possess

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[39]Carol Harlow, "Towards a Theory of Access for the European Court of Justice" (1992) 12 Yearbook of European Law 213 at 214. I will use the terms "individual" and "private party" interchangeably throughout the paper. Much of the discussion on the identity/nature of the private party revolves around the notion of public interest and its representation as a stage in the evolution of administrative law and the legal issues it raises.

[40]For an article discussing public interest, private interest, and Community interest see Amtenbrink, *supra* note 23.

[41]For a more detailed description, including the problem of defining the "individual" or "private party" see A.G.Toth, *Legal Protection of Individuals in the European Communities* (Amsterdam: North-Holland Publishing Company, 1978) Vol. 1 at 99.

> no 'real' existence. In other words, legal personality is 'merely a device of legal technique'. For procedural purposes, it then seems inevitably to follow both that corporate bodies are identical in character to individuals and that they must possess the same procedural rights. Unincorporated groups possess no legal personality hence, it is assumed, no separate identity and no interest distinct from those of the individuals which comprise them. For standing purposes, groups are implicitly subsumed either in the rights of 'natural' or of 'legal' persons, the latter being ... equated with individuals. To summarize, legal personality and with it, right of access to the legal system, are premised on a dual fiction: that corporate entities as well as groups are wholly assimilable to individuals.[42]

A private party may have either of several identities and forms. It may consist of an individual person, a small business, a multinational corporation, an interest group loosely organized, or a class registered as an association. The financial (and legal) resources at the disposal of the private party may determine its nature. Accordingly, the legal unincorporated person may litigate as an individual; as a "litigation coalition" representing a group of individuals coalescing for a particular *ad hoc* case and purpose; as a group which registered separate applications which however are heard as a joint case; as a "membership association" protecting a common mutual interest (e.g. staff associations, trade unions, consumer and environmental associations) either as intervenors or as plaintiffs; and as "representative groups" acting only as intervenors in litigation for non-parties and claiming to represent the public interest.[43] The 'legal' person must however have "the necessary independence to act as a responsible body in legal matters".[44] To be sure, this classification reflects the road Community law has traversed since it inception, gradually enlarging it to include social and not economic issues alone as important causes of action. Traditionally, the private party category was largely represented by traders and human rights issues brought by 'natural' persons and associations were dealt with in the

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[42] *Harlow, supra* note 39 at 231.
[43] *Ibid.* at 241-242.
[44] Citation from *Syndicat Général du Personnel* v. *Commission* (No. 18/74) [1974] E.C.R. 933, para 7 in Anthony Arnull, "Private Applicants and the Action for Annulment under Article 173 of the EC Treaty" (1995) 32 Common Market Law Review 7 at 12.

context of the European Commission of Human Rights (which is not an institution of the EU). However,

> [t]he capacity of the legal personality to bring action depends on the national law: ...[S]ince the EEC Treaty is not limited to special economic sectors, although it differentiates amongst them, there was no need to develop a special concept of enterprises as was necessary under the ECSC and Euratom Treaties. The Treaties know no *Community notion* of a legal person. Examining the capacity of a legal person to bring an action, the Court resorts to the national law concerned. Thus the *legal personality under national law is required* to exercise the right of action, as provided for by the Treaties.[45]

Since NAFTA deals with the issue of *locus standi* differently than the EU (the EU set the conditions for standing at the outset, in the Treaty, whereas NAFTA raises them as it proceeds sector-by-sector, and in Chapter Twenty, when addressing the dispute resolution mechanisms) it is hard to find an explicit general reference to the nature of private party. The private party is identified in his/her/its trade capacity. Consequently, a private party is most clearly defined as an investor in Chapter Eleven providing for private party direct access to arbitration in investment disputes between an investor and the host state. Article 1001 refers to investor of a Party, namely a private party only from among the Parties signatory of NAFTA, and defines the investor as "... a Party or state enterprise thereof, or a national or an enterprise of such a Party, that seeks to make, is making or has made an investment".[46] It refers only to investor of another Party, not to a Party's own investors.[47] However, in discussing the hierarchy of access to transnational justice under the NAFTA, private party appears to mean "an individual (or nongovernmental organization) residing in a NAFTA party"[48], i.e. who must not be a

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[45]Gerhard Bebr, *Development of Judicial Control of the European Communities* (The Hague: Martinus Nijhoff, 1981) at 32 [emphasis added].
[46]NAFTA, *supra* note 1 Art. 1001.
[47]Paterson et. al. *supra* note 16 at 3.7(a)(i).
[48]Robert F. Housman , "Access to Transnational Justice under the NAFTA: Different Interests, Different Access" (1994) 88 Proceedings of the American Society of International Law 531.

national of any of the Parties. This is an interesting point for comparison with the EU as subjects of Community law are primarily nationals of the member states although "...nationality of, *or residence or establishment within*, a Member State is not in every case a necessary prerequisite for bringing private persons within the scope of Community law."[49] In fact, nationality or residence has no bearing on standing under Article 173, as the dumping cases illustrate.

Beyond that, the private party will be defined according to the sectoral subject matter of the dispute, and could correspondingly be an intellectual property right (IPR) holder, an enterprise engaged in NAFTA trade, or an association representing a social interest in the environment, labour, etc. From the definitional point of view then, there is no fundamental difference between the meaning of private person in the EU compared with NAFTA law.

The nature of the private party is of cardinal importance to the party's ability to access justice. Availability of financial resources to bring and sustain legal action is a determinant factor distinguishing the status of a large business corporation of the scale of, for instance, IBM from a group such as the Pulp, Paper and Woodworkers of Canada, and the self-employed desk-top publisher. These three types of private party also diverge in their ability to effectively engage in political lobbying to advance their cause when a dispute arises. Furthermore, the bigger and more "corporate" the private party, the larger the selection of points and ways of access to remedies that are available to it. It follows that the formalization of access processes by the creation of formalized institutions is the key to neutralizing the interference of economic factors with the operation of justice. This

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[49]Toth, *supra* note 41 at 32 [emphasis added].

is pivotal to the securing of a just dispute resolution process, and to the equalization of the various types of private parties before the law.

V. The Choice of Remedy[50]

As the state gradually pools its sovereignty and joins with other states to create new institutions and organizations governed by new legal regimes, the extent of legal recourse traditionally open to the private person becomes either eroded or is transplanted to new authorities. While the EU has developed the doctrines of "direct applicability" and of "direct effect" to ensure that Community law is self-executing, i.e. immediately applicable within domestic law and invocable by private parties (thus allowing for private party direct access in matters of Community law to the state's domestic courts), the NAFTA negotiators, who were reluctant to pool sovereignty, resorted to non-traditional/alternative dispute resolution (ADR) mechanisms.

The main question in this section of the paper is: access to what and how effective? In the domestic context the choice of dispute resolution mechanisms consists of legal action or a resolution procedure as consented to by the parties to the dispute. There however, ADR is not yet the norm and much weight is laid on formal adjudication. Consequently, a perception prevails that private party access to the courts is of prime importance. As ADR evolves, litigation may perhaps loose its primacy and become less important as a recourse. Indeed, in contrast to the domestic realm, ADR has always been the norm in the area of international disputes. Since access to national courts has usually been barred for parties involved in international disputes, or has not carried much favour,

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[50]The concern about choice of, and access to, remedy arises primarily in the non-contractual state-to-party disputes. In contractual disputes, particularly in party-to-party disputes, the parties are at liberty to devise the provisions for dispute settlement by agreement.

"the only formal means of dispute resolution that find broad acceptance in the international context are those created by agreement of the parties."[51] It is however important to note that since these Parties are governments of states, the private party is excluded from negotiations and determining the terms of the agreement. The agreement may take the form of either of three main mechanisms: mediation which is based on the process but does not result in the issuance of a report or decision, non-binding arbitration concluding with a non-compulsory decision, and binding arbitration.[52]

The contrasting of ADR with formal adjudication in international disputes, and the question of preference and quality of justice do not arise only from the analogy with domestic disputes. Rather, they springs from the different nature of the regional legal regimes established by the EU and NAFTA. The EU departs from the norm governing international dispute resolution by incorporating a court system and a process of legal action embracing the domestic tradition. It thus adds to the option of "out of court" arrangements a tier which is independent of agreement by the disputing parties (either contractual or not), can be invoked in the failure to reach such agreement, and is non-negotiable. It equalizes the parties before the law in a more formalized manner adding an air of certainty to the dispute resolution process. It seems therefore safe to say that for the EU, court action ranks higher than ADR and it follows, that access to the courts holds the promise of a "better quality of justice" than access to ADR. The NAFTA seems not to be sharing this perception.

EU law recognizes three groups of actors: member-states, Community institutions, and individuals. This creates six different types of bilateral legal relationships

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[51] O. Thomas Johnson, "Alternative Dispute Resolution in the International Context: The North American Free Trade Agreement" (1993) 46 SMU Law Review 2175 at 2175.
[52] *Ibid.* A discussion of the merits and shortcomings of the three ADR mechanisms is beyond the scope of this paper.

which may arise between these actors, and which affect the legal position and protection of private persons under Community law.[53] Four main bodies are responsible for the enforcement of Community law: the national courts of the member-states, the Commission[54], the ECJ and the CFI (and the European Court of Human Rights (ECHR), formerly the European Commission on Human Rights provides an additional non-EU avenue[55]), and the Ombudsman.[56]

Accordingly, private parties have a quadruple system of remedies accessible to them, but only two allow for litigation, namely the CFI and the ECJ on the one hand, and the national courts on the other hand - two systems which are highly interwoven. The determination of which judiciary to use is neither easy nor clear, and depends upon three different considerations. If the consideration regards the *person* with respect to whom the remedy is sought, the EU court system is generally, but not exclusively, available for actions against Community institutions, and the national courts - for actions against the member-states and individuals. Next comes the consideration addressing the *purpose* of the action. Only in a general way and not conclusively, if the individual challenges the legality of an act (or omission) of an institution or seeks protection against an obligation

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[53]Toth, *supra* note 41 at 33.

[54]EC Treaty Art. 169 provides for the complaint procedure to the Commission which is also open to private parties and indeed is most often used by them. The Commission, unlike the national courts or the Community courts, cannot adjudicate. It prepares an opinion, which if not followed by the member-state (usually the party complained against), it may take the dispute to the Community court. This, however, falls squarely within the category of private party indirect access to the judicial institutions. See Bodie, *supra* note 37at 207-208.

[55]Which is only of secondary importance in the context of this paper. For an analysis of the "division of jurisdiction" between the ECJ and the ECHR see Michael O'Neill, "The Expansion of the ECJ's Fundamental Rights Jurisdiction: A Recipe for Tensions with Strasbourg?" (1995) 13 Irish Law Times 168.

[56]The Ombudsman created under the Maastricht Treaty (*Belgium-Denmark-France-Federal Republic of Germany-Greece-Ireland-Italy-Luxembourg-Netherlands-Portugal-Spain-United Kingdom Treaty on European Union and Final Act*, 7 February 1992, 31 I.L.M. 247 (1992) (entered into force 1 November 1993) [hereinafter Maastricht Treaty] has the power only to create a report in response to an individual complaint. As it is an institution falling within the competence of the European Parliament under EC Treaty Art. 138(e) it has no enforceability power. See Bodie, *supra* note 29 at 204-205.

or sanction imposed by it, the EU courts are the forum. But if the individual's purpose is to enforce rights arising from Community law, the national courts are available. Finally, to further focus the choice of remedy, a distinction is drawn between *directly effective* and *non-directly effective* provisions. The doctrine of "direct effect" was devised to allow the individual the option of proceeding against the member-state in the national court. As for non-directly effective provisions, the EU courts are not available in all cases, the availability being dependent upon the particular European Treaty in question:

> All that can be said concerning the question when to use which avenue of remedies ... is that this is never a matter of choice: the road to the European Court is open only in those relatively few, individually defined cases where the Court has been given jurisdiction under the Treaties. In all other cases, the national courts may be available subject to their own jurisdictional rules and system of remedies which, of course, may vary from Member State to Member State. A harmonisation of national remedies in respect of Community provisions, however desirable this may seem, has not yet been attempted.[57]

While the avenues available under Community law comprise both legal action and ADR means, the ultimate tool to guarantee the resolution of disputes is still the legal action in court, although many disputes never reach this stage and are settled outside of this realm.[58]

The drafters of NAFTA have consciously refrained from including formal adjudication as a dispute resolution mechanism. The means offered in the main agreement and its side agreements range from arbitration, through consultation and mediation to the issuance of reports. Unlike the complex matrix of acknowledged legal relationships in the EU, and in the absence of law-making, law-enforcing, and law-adjudicating institutions,

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[57] Toth, *supra* note 41 at 107 [emphasis added].

[58] The European Court of Justice considers the case and delivers, not conciliation advice, not a report, not an advisory opinion, but a judgment, binding on the litigating states. It is somewhat like the United States Supreme Court. The losing state might evade or drag its heels, but in the final analysis there is no question of disobedience.
Kelleher, *supra* note 18 at 27.

NAFTA is primarily a state-to-state obligation in which a minuscule status only is granted to the private party.[59]

The resolution of international commercial disputes by arbitration has found much favour with critics gaining NAFTA (which is perceived as strictly a trade agreement)[60] considerable support. Arbitration, it is argued, brings with it the advantages of fast, less expensive, and more certain procedures as they are often devised by the consenting parties. While the choice of law as well as the discretion of the process (it is not made public) are listed among its major benefits, the tendency to reach a compromise, inherent to this process, may be seen as a main disadvantage. Arbitration may be binding and nonbinding, and NAFTA employs both types. However, NAFTA prefers consultation or mediation as steps preceding arbitration. Once arriving at the arbitration stage, NAFTA opts for the nonbinding version. Only in two categories of disputes, namely investment disputes between a Party and a private party of another Party (Chapter Eleven) and disputes arising under the anti-dumping and countervailing duty laws involving private parties and another Party (Chapter Nineteen) does NAFTA provide for binding arbitration.[61]

Flowing from the selection of remedies available is the choice of bodies to facilitate their administration in structure and in process. NAFTA does not provide for a court system.[62]The Free Trade Commission (FTC) (Chapter Twenty) is the body

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[59]The NAFTA choice of a different approach to dispute resolution does not necessarily imply that by definition different final redress to dispute and injustice ensue as compared with the EU remedies. This is a subject deserving a thourough analysis which is beyond the scope of this paper.

[60]"Litigation, Arbitration, and Alternative Dispute Resolution" (Symposium) (1993) 15 Loyola of Los Angeles International and Comparative Law Journal 987. As already mentioned earlier, the social implications of the trade arrangements have largely been ignored.

[61]For an elaborate discussion of the pro and cons of arbitration and mediation and the reasons and modes of employment by NAFTA see Johnson, *supra* note 51.

[62]"...[T]he Working group continues to believe that the dispute settlement scheme of the NAFTA would be improved were there constituted a North American Trade Tribunal, the establishment of which was a

entrusted with the supervision of the implementation of the Agreement and the resolution of "disputes that may arise regarding its interpretation or application"[63] and as such governs the mediation process. Guided by the political master-minds, NAFTA's drafters of the arbitration procedure abstained from creating a permanent arbitration tribunal and elected the *ad hoc* tribunal to be comprised of members from a roster selected in advance by consensus between the Parties to form a pool of arbitrators as disputes arise. The process however diverges depending on the sectoral nature of the issue at dispute.[64]

VI. Direct versus Non-Direct Access

Both NAFTA and the EU are international arrangements introducing new laws regulating the lives of the societies under their regimes. NAFTA, as a conspicuously state-to-state agreement, leaves very little direct access open to private parties. Generally, individuals - natural and legal - may find remedy to disputes arising from the Agreement mainly under the national law of their Party. There are two aspects to this situation: One, that in the absence of NAFTA legal institutions there is no address to bring complaints to except for the national institutions. For arbitration and mediation, and where the Parties are bound by the provisions, NAFTA adheres to the rules of the International Centre for the Settlement of Investment Disputes (ICSID)[65], ICSID's "Additional Facility"[66], and the 1957 United Nations Commission on International Trade Law (UNCITRAL) (and for

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key recommendation in its report." The Joint Working Group of the American Bar Association, the Canadian Bar Association, and the Barra Mexicana, "Report on Dispute Settlement Procedures in the North American Free Trade Agreeement" (1993) 27 The International Lawyer 831 at 833, 835 [hereinafter Joint Working Group].

[63]NAFTA, *supra* note 1 Art. 2001.

[64]The majority of disputes resolution processes do not allow for private party direct access nor for final binding resolution and are thus beyond the scope of this paper.

[65]Established by the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 18 March 1965, 17 U.S.T., 575 U.N.T.S. 159.

[66]*ICSID Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings*, Doc. ICSID/11 (Washington: International Centre for the Settlement of Investment Disputes, 1979) [hereinafter ICSID Additional Facility].

purposes of enforcement recognizes the rules of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards[67]). There is however only one sector, namely investment dealt with in Chapter Eleven, where NAFTA explicitly provides for private party direct access and where these conventions are relevant. In addition, Chapter Nineteen on anti-dumping and countervailing duty effectively provides for private party direct access. Direct access thus largely remains a privilege reserved to the Parties to the agreement, and hence only indirectly to the nationals of the Parties (and in the case of investment - also indirectly - to non-nationals of any of the Parties as well).

Second, since NAFTA is not a self-executing treaty in the U.S. or in Canada (it is in Mexico), access to the law of the U.S. and Canada cannot be equated with access to the law of NAFTA. As the goals of NAFTA are narrowly focused on trade (the elimination of tariff and non-tariff barriers to trade and on the establishment of reciprocal national treatment obligations concerning trade in services and investment) and not on the harmonization of laws designed to directly affect those operating in the market[68], the focal subject of NAFTA is the member-state. The private party and direct access of private parties to remedies remain issues confined to the jurisdictions of each individual member-state. The outcome has therefore been threefold: First, representation of non-trade interests within the NAFTA forum is barred. Hence, although NAFTA may create trade-generated non-trade problems, it does not offer solutions.

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[67] *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10 1958, 30 U.N.T.S. 3. See, NAFTA *supra* note 1 Art. 2022.

[68] Frederick M. Abbott, "Integration Without Institutions: The NAFTA Mutation of the EC Model and the Future of the GATT Regime" (1992) 40 The American Journal of Comparative Law 917 at 935-936.

Second, given the economic disparity between big and small businesses, the absence of private party direct access ensues in inequality before the law for the former can more readily compensate for lack of legal remedies by display of economic muscles.[69]

Third, and perhaps of greatest concern, is the inequality between the private parties according to their nationality. In a dispute with another Party, Mexican private parties (and those residing in Mexico) have direct access to domestic remedies. In a dispute with another Party, the American private parties do not enjoy direct access to the other Party's judiciary or to any of its other forms of ADR. They depend on the U.S. government to represent them before the other member-state. Yet, the indirectness of the access is being compensated for by the power of Section 301 of the U.S. trade law. Section 301 is applicable where the U.S. perceives another trading partner to be using offending trade measures or practices.[70]

The Section 301 process can be invoked with a petition on the part of a party, or upon the initiative of the U.S. Trade Representative, who consider their interests and the U.S. interests respectively, to be harmed by unreasonable or unjustifiable foreign trade practices.[71] Once initially approved, the petition proceeds through a set of hearings and if sustained concludes with mandatory U.S. retaliatory action for unjustifiable practices and violations of trade agreements (but allowing presidential discretion to waive), and discretionary retaliatory action against such "non-unjustifiable" behaviour.[72] This is an

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[69]Miller, *supra* note 13 at 1318-1320.

[70]The section has been labelled as "aggressive unilateralism" because its operation enables the U.S. to unilaterally defy international obligations instead of resolving the underlying dispute through prescribed international avenues of dispute resolution. For a detailed analysis of Section 301 see Thomas O. Bayard & Kimberly Ann Elliott, *Reciprocity and Retaliation in U.S. Trade Policy* (Washington: Institute for International Economics, 1994) [hereinafter Bayard & Elliott].

[71]"Unreasonable" and "unjustifiable" were variably interpreted at the different evolutionary stages of section 301.

[72]Bayard &Elliott, *supra* note 70 at 42-49.

open and public process at the end of which a government report is issued, which can be further used by the private party to lobby its case.

Consequently, American private parties in the U.S. are armed with a powerful tool of influence to lobby their government to protect their interests when in an international (including NAFTA) dispute. While this does not represent *direct* access to remedy in the strict sense, for it requires the filing of a petition and the subsequent activation of the U.S. Trade Representative, it is a remedy nonetheless as it accommodates the American party. It grants considerable protection to the American private party particularly when bearing in mind the comparative size of the American versus the Canadian and Mexican economies. Of course, Section 301 does not assist in compromising the international dispute (it rather escalates it) and in this sense cannot be perceived as a just remedy.

Canadian private parties have no avenue for access to remedies comparable with the U.S. section 301 or with the access to NAFTA through local institutions as available in Mexico. All that Canadian private parties can do is to lobby their government. There is no open and public process available to the private party nor must there be any report issued at the end of the lobbying effort. Thus, the private party may often be kept in the dark by a government refraining from providing reasons for its refusal to proceed with its case. In view of such imbalance, private party right to remedy under NAFTA must be of crucial importance at least to Canadians.

Unlike NAFTA, the EU's goals encompass social, cultural, environmental, and even political aspects as part of the integration process. Embedded in a customs union, achievement of these goals is enhanced in the harmonization of trade law and enforceability is secured through the device of "direct effect" whereby individuals enjoy direct access to Community law via their national courts. The EU has thus been evolving

into a quasi-federal legal system where "constitutional" judicial reviews and an appeal system are available at the higher instance, namely the ECJ. Due to persisting unclarities in the blurry area separating the jurisdiction of the EU courts from the national courts, gaps in private party access to remedies are still prevailing. These can be bridged only by the private party's invoking of national litigation in order to indirectly gain access to the Community courts.[73] There remains however a large body of non-direct effect law which gives rise to disputes between individuals and Community institutions (and between member-states and institutions as well) that cannot be addressed in the national courts. In this area, there is only limited room available for direct access by private parties to Community legal recourse through Community institutions, including litigation for final judgment.

In addition to providing Community dispute resolution institutions, access to EU remedies (direct or indirect to Community, direct to national court) is determined according to the distinction between types of EU legislation. *Regulations* create rights and obligations which are directly and uniformly applicable within the Community both to the member-states and to the individual nationals, and are of general application. However, there is disagreement with regard to the extent to which they create individual rights enforceable in the national courts.[74] Unlike regulations, *directives* are not directly integrated within the member-states' national law, but call upon them to adapt their law to the common standards laid down by the Community institutions. They are therefore focused mainly on the legal relationship between the Community and the member-state. Consequently, directives generally do not create directly enforceable rights and

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[73]These include the following treaty articles: Article 175 (action against inactivity); Article 177(b) (preliminary rulings concerning the legality of Community measures which has proven to be a fairly effective tool); Article 184 (defence of legality); Artlicle 172 (appeals, for instance against fines); Articles 178 and 215(2) (regarding claims alleging non-contractual liability); and Article 93(2) (appeals against decisions concerning state aids).

[74]Toth, *supra* note 41 at 55-61.

obligations for individuals (although there are some important exceptions).[75] *Decisions*, the third type of legislation, may be measures specifically formed that produce specific and binding legal effects upon those to whom the decision is addressed; they may also be non-binding informal acts of a general nature requiring legislation in order to be implemented. Decisions addressed to individuals are always directly applicable to those they address and belong to the category of true administrative acts.[76] It is the decisions which have traditionally provided - under strict conditions (Article 173(4)) - the only opening for private party direct access to litigation in Community courts.[77] As will be seen later, *locus standi* of private parties before the ECJ is determined by these distinctions and their interpretation as they evolved in the Community case law.

VII. Dispute Resolution and Direct Private Party Access in NAFTA

The NAFTA negotiators opted for a dispute resolution mechanism based on a minimal number of intergovernmental/supranational institutions and a minimal scope of supranational jurisdiction for several reasons. For once, the NAFTA drafters wished to make sure that the political and economic inequality among the Parties (size of market and developed versus developing country) would be neutralized in the post-agreement situation to make way for a new trilateral trade relationship among the United States, Canada, and Mexico.[78] Also, besides the concern regarding the impact of imbalanced political and economic power, doubt was prevailing as to the impartiality of the national

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[75] *Ibid.* at 61-64.
[76] *Ibid.* at 65-68.
[77] This has changed since the *Codorniu* decision, which suggests that even a "true regulation" may be attackable by a private party if it is of individual and direct concern to that party. *Codorniu SA* v. *Council* (No. C-69/68) [1994] E.C.R. 1-1853.
[78] Johnson, *supra* note51 at 2177-2178. However, as pointed out earlier (*supra* section VI), this egalitarian approach does not apply to private parties, and at least leaves out those affected socially and labourwise. See also Miller, *supra* note 13 at 1316-1317.

courts in international disputes hearings.[79] This explains the reluctance to employ litigation, and the preference for ADR - the mechanisms of which seemed better suited to address both the balance of power among the Parties while at the same time ensuring maximal regard of their national sovereignty. Based on previous experience, the NAFTA drafters had reason to believe such strategy to be promising for they had the successful model of the United States-Canada Free Trade Agreement as an encouragement.[80] It is therefore reasonable to argue that the NAFTA dispute resolution mechanism reflects an adoption in principle of the theory of ADR as well as an extension of such procedures - both which were founded on long international trade experience evolving incrementally in the GATT, and subsequently improved and adopted by the FTA. However, the way ADR was further crafted into NAFTA left little room for non-state parties to directly access dispute resolution on the transnational level.

NAFTA provides for three main dispute resolution mechanisms which may be arranged in a hierarchy according to the degree of access to transnational justice accorded to the individual. Housman distinguishes direct access by the individual to the national courts of the Parties as the top ranking access in the NAFTA scheme.[81] "The strongest mechanism to achieve transnational justice"[82] is provided in the intellectual property rights (IPR) Chapter Seventeen Article 1701(1) which ensures adequate judicial and administrative laws under each of the Parties' domestic laws, and allows for access to non-NAFTA IPR holders as well:

Article 1701: Nature and Scope of Obligations.

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[79] *Ibid.* at 2178.
[80] *United States-Canada Free-Trade Agreement*, 2 January 1988, Can.T.S. 1989 No. 3 (entered into force 1 January 1989) [hereinafter FTA].
[81] *Supra* note 48 at 532.
[82] *Ibid.*

> 1. Each Party shall provide in its territory to the nationals of another Party adequate and effective protection and enforcement of intellectual property rights, while ensuring that measures to enforce intellectual property rights do not themselves become barriers to trade.

However, when adding the consideration of equality under the law to the "hierarchy formula", access to different laws in different national courts does not provide for the highest quality of access (which consists of access to the same law).

The next level in the access hierarchy is private party direct access to transnational binding arbitration which due to the provision of final decision also satisfies the equality requirement. Descending on the scale, it is followed by non-binding arbitration unto the level of consultation, mediation, and the issuance of non-binding reports. Viewed from this perspective, the NAFTA has really only one private party direct access mechanism which is provided under Chapter Eleven on Investment and represents NAFTA's major contribution to the "equalization" of state and non-state actor. In addition to the importance of private party direct access, the provision that disputes between the private investor and the state be governed by the relevant rules of international law ensures Party-to-party equality under the law.[83] As mentioned earlier, NAFTA's approach is sectoral, and the access question is therefore dealt with on a sectoral basis. However, since investment activity can be carried out in a variety of economic sectors, its provisions are horizontal and apply across the NAFTA board. Consequently, direct access to ADR through the investment chapter indirectly opens the gates to direct access in other areas as well.

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[83] Art. 1130. See, Joint Working Group, *supra* note 61 at 835.

A. Chapter Eleven

Chapter Eleven is the Investment Chapter and Section B is its dispute resolution component. When signed "it [wa]s the only provision in any of the world's major trade agreements which permit[ed] private investors to take governments to binding arbitration of their treaty obligations."[84] It has no counterpart in the FTA, and generally re-defines the *Calvo Doctrine.*[85]

The dispute resolution mechanism in Chapter Eleven provides for consultation and binding arbitration for the settlement of investor-state disputes embedded in existing international law conventions.[86] Section A preceding the dispute resolution Section B provides a list of obligations which in the event of failure of compliance are considered as causes of action allowing a private party to file a claim for binding arbitration. These are:

> - Failure by the host government to accord an investor national treatment with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments;
> - Failure by the host government to accord a foreign investor most-favored-nation treatment with respect to such activities;
> - Failure by the host government to accord a foreign investor better of national treatment or most-favored-nation treatment;
> - Failure by the host government to accord a foreign investor minimum standard of treatment under international law;

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[84]Bodie, *supra* note 37 at 162. It also is the first time that Canada and Mexico bound themselves in an international agreement allowing for arbitration between themselves and a foreign national. *Ibid.*; see also Harry B. Endsley, "Dispute Settlement Under the CFTA and NAFTA: From Eleventh-Hour Innovation to Accepted Institution" (1995) 18 Hastings International and Comparative Law Review 659 at 663.

[85]*Ibid.* at 688, and Manning-Cabrol, *supra* note 3. Study of this effect is beyond the scope of this paper.

[86]My analysis of Chapter Eleven is based largely on Gary N. Horlick and F. Amanda DeBusk, "Dispute Resolution under NAFTA" (1993) 10 Journal of International Arbitration 51; Endsley, *supra* note 84; Paterson at al., *supra* note 16; Bodie, *supra* note 37; and Daniel M. Price, "An Overview of the NAFTA Investment Chapter: Substantive Rules in Investor-State Dispute Settlement" (1993) 27 International Lawyer 727. Other commentaries consulted will be mentioned where referred to.

-Imposition by the host government of specific performance requirements such as minimum export levels, domestic content rules, preference for domestic sourcing, trade balancing, exclusive supply, and technology transfer requirements;
- Imposition by the host government of a requirement that the senior management be of a particular nationality;
- Failure by the host government to permit free transfers of profit payments and other investment returns in a freely usable currency, or to permit the conversion of local currency into foreign currency at prevailing market rates;
- Noncomplying expropriation of the investment by the host government.[87]

As liberal as this list is, its scope is circumscribed by various factors such as reservations that have been taken under the Canadian and Mexican investment laws whereby these Parties have excluded certain types of their legislations from obligations under Chapter Eleven, and more.[88]

A supplement to the list of obligations is the list of conditions the investor must abide by in order to be able to advance a claim. Articles 1116 and 1117 set forth that the investor, or a firm owned by him/her in the host country, must allege direct loss or damage incurred due to breach of a Section A obligation (and certain provisions regarding government monopolies in Chapter Fifteen on Competition Policy, Monopolies and State Enterprises). The claim must be timely submitted - according to Articles 1116(2) and 1117(2) - within three years of the date on which the investor knew, or must have known, of the alleged breach of NAFTA and the resulting damage. Article 1118 obliges the investor to attempt consultation and negotiation as a first step in dispute resolution, and thus avoid recourse to arbitration; and Article 1119 requires the investor to serve notice of intent to submit a claim to arbitration at least 90 days before submitting it. Article 1120 provides that the claim may be submitted only after six months elapsed from the date of

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[87] Arts. 1102(1), 1103(1), 1104, 1105, 1106(1)1107(1), 1109(1)-(2), 1110(1) respectively, Endsley, *ibid.* at 687.

[88] The argument (*Ibid.* at 688) that financial services are precluded is inaccurate as Chapter 14 on Financial Services does incorporate the Chapter 11 dispute resolution mechanism. With regard to Parties' decisions, for instance, the host government may invoke national security as an exception to Chapter Eleven Section B, or require the screening of investors as provided under Canadian and Mexican laws.

breach. There is no mandatory arbitration, and Article 1121 establishes that the aggrieved investor must consent to arbitration and waive the right to initiate or continue the dispute through other avenues. Article 1122 requires Parties' (governments') advance consent to arbitration in order to prevent a host country from undermining the procedure. This has been done in Canada by way of legislation.

The disputing investor may submit the claim for arbitration in accordance with ICSID rules under the condition that the investor's country and the host country are both parties to the Convention[89]; under the ICSID Additional Facility which requires only one country to be party to the Convention[90]; before the *ad hoc* arbitral tribunal in accordance with the UNCITRAL rules.[91] Article 1123 provides for the establishment of a three-member arbitral tribunal. Each party to the dispute will appoint one member (who must not be a national of any NAFTA Party) and both will agree on the presiding arbitrator.[92] Article 1124 provides for an appointment procedure in the failure of agreement between the parties. Article 1126 allows for the possibility of the joining of multiple claims into one, and Articles 1127-1129 govern information to the non-involved Party and enforceability of an award.

Important to private party direct access are Articles 1131 and 1132 provisions regarding the substantive law to be applied. They specify that the guiding law for the arbitral tribunal must accord with NAFTA (as well as with the Commission's

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[89]See, *supra* note 65. Neither Canada nor Mexico are parties to the ICSID which excludes application of its arbitration rules under NAFTA for the time being.

[90]See, *supra* note 66. This procedure is available for use only in the event of the United States being the host government, or if a United States national was involved in an investment dispute with either nationals of Canada or Mexico, or the latter countries being the host governments. It is not available for investment disputes involving a Canada-Mexico relationship.

[91]*Supra* note 67.

[92]The question of the fees and expenses is also imporant as a factor in encouraging private party use of the process. Horlick and DeBusk, *supra* note 86 at 55.

interpretation of the agreement under Article 2001) and with the applicable international law. While this should enhance reliance on, and credibility of, the process, the absence of a deadline for the resolution of an investment dispute by the arbitral tribunal (while there are deadlines dealing with the Party's duties, or regarding the interpretative function of the Commission, none is prescribed by NAFTA with regard to the tribunal decision and neither are any relevant limitations provided in the three international arbitral agreements) may operate as a deterrent to private parties and discourage them from having recourse to this remedy.[93]

Credibility of the process rendering the entire procedure meaningful to the claimant and hence vesting private party direct access with tangible power, depends also on its enforceability and the awards. Article 1135 determines that the panel's decision is binding. Article 1136 states that the Parties undertake to domestically enforce the award. In the event of failure to do so, Chapter Twenty or the ICSID and the United National Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) or the Inter-American Convention on International Commercial Arbitration (the Panama Convention) may be invoked[94] and the investor will not be denied the right to seek the enforcement of the award. Article 1136 specifies that the awards have no precedential effect, a provision which nevertheless has been questioned as a matter of *de facto* norm creation.[95] While this article also allows for the opportunity to seek revision or annulment of the award before enforcement is sought, the chapter itself is silent on challenges to panel decisions. The possibility of "appeal" remains subject to the rules themselves and thus varies from case to case.[96]

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[93]Horlick and DeBuck, *ibid.* at 56 mention the length of the ICSID procedure as one among other factors for the infrequent use of the Convention.

[94]*Supra* note 67, and *Inter-American Convention on International Commercial Arbitration*, 30 January 1975, 14 I.L.M. 336. Only the United States and Mexico are Parties to this Convention.

[95]Price, *supra* note 79 at 735 argues that tribunals will probably consider decisions of other tribunals.

[96]Horlick and DeBuck, *supra* note 86 at 56 maintain that this shortcoming undermines the integrity of

Chapter Eleven is a first model for private party direct access and will therefore probably be improved upon in future agreements. It must however be borne in mind that it offers direct access to arbitration only and not to formal adjudication. From the Canadian and American enforceability point of view, this does not represent a shortcoming at all since in both countries foreign arbitral awards are easier to implement than foreign court judgments.

B. Chapter Nineteen

Besides Chapter Eleven, NAFTA provides for two other important ADR mechanisms. Chapter Nineteen (modeled after the FTA Chapter Nineteen) which is the anti-dumping and countervailing duty (AD/CVD) chapter lays down the procedure for the review of relevant administrative determinations that are made under national law. It provides a mechanism based on panels that "would serve simply as surrogates for reviewing courts and decide cases in accordance with the same legal standards that courts would apply."[97] Despite the fact that this ADR process allows only for indirect private party access, in fact it operates almost as a fully direct process. Article 1904 (2) stipulates that only an involved party *may* request a panel review *but* that a Party *must* request a review when requested so by a private party. Thus, unlike Chapter Twenty, it allows for private party initiation of the process.

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the system, and insist that it must be balanced with a policy prohibiting such challenges to become protracted and costly.

[97]Homer E. Moyer, Jr., "Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort" (1993) 27 The International Lawyer 707 at 707 makes a point in adding "that notwithstanding numerous parallels with the domestic courts they supplant, five-member panels are obviously different from courts and create different dynamics in the review process."

According to Rule 33(1) of the NAFTA Rules of Procedure for Article 1904 Binational Panel Reviews[98]("1904 Rules") any person interested in AD/CVD proceedings may serve a Notice of Intent to Commence Judicial Review on the involved Secretariat and all other persons involved in the final determination proceedings. Qualifying as an interested person according to the Rules is any person who by the laws of the country where the final determination is made would be entitled to appear and be present in a judicial review. Canada and the U.S. had already provided for such laws before NAFTA, and Mexico committed itself to amend its laws accordingly. The Party has no discretion but to make the actual request for the panel review once the Notice of Intent to Commence Judicial Review is served. The request being made, any interested person alleging an error of either fact or law regarding the investigating authority may file a Complaint. Also, the investigating authority and any other interested person not filing a Complaint may file a Notice of Appearance. Both persons filing a Complaint and persons filing a Notice of Appearance have the right to make representations to the panel and to participate fully in the proceedings.

Chapter Nineteen's ADR mechanism provides also for the so-called "extraordinary challenge" exception to the nonreviewable and binding nature of the panel decisions. This procedure may remind one of judiciary review to address issues of procedural unfairness in the conduct of proceedings. However, while any interested person in fact does have access to the binational panel review mechanism, the initiation of the "extraordinary challenge" remains completely at the discretion of the Parties. Nevertheless, the interested person has the right to participate fully in the proceedings[99].

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[98]*North American Free Trade Agreement Rules of Procedure for Article 1904 Binational Panel Review* issued in February 1994 reprinted in 1 Nafta Treaty Materials (Dobbs Ferry N.Y.: Oceana Publications, 1994). For a detailed discussion of private party access in Chapter 19 see Bodie *supra* note 37 at 94-97.

[99]Based on the ICSID Convention a Party may apply to an Extraordinary Challenge Committee (ECC) "available only under unusual circumstances comprising of gross misconduct, bias, breach of fundamental procedures, or action that manifestly exceeds the authority panels have been given." Moyer, *supra* note 97

Since NAFTA provides for minimal guidelines regarding harmonization and standardization of AD/CVD laws among the Parties governed by the World Trade Organization (WTO)[100], it contends with the establishment of the lowest common denominator, namely that the standard of review to be applied by the panel be that of the importing country. Speed is also an important concern in the Chapter's procedure[101] and may be seen as a means to enhance access.

C. Chapter Twenty

The "generic" Chapter Twenty on "Institutional Arrangements and Dispute Settlement Procedures" is as its title shows, the institutional chapter of NAFTA[102]. The institutions and procedures developed therein focus on cooperation between the Parties designed to assist them in avoiding conflict. For this purpose, it establishes a sequential process of dispute resolution starting with consultation but which may culminate in arbitration (yet not in adjudication). This mechanism applies only to state-to-state disputes and precludes private party direct access (or initiation). Article 2021 on Private Rights

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at 709. See also NAFTA, *supra* note 1 art. 1904(13) and Paterson et al., *supra* note 16 at 3.9.(b). See Bodie, *supra* note 41 at 94-97. While impressed by the initiation provision (of indirect access), Bodie deplores the lack of private party access to the ECC procedure where even access through the government is precluded.The Joint Working Group is satisfied with the *de facto* private party access established in this chapter. See, *supra* note 61 at 835.

[100]According to Article 1902(2) on the Retention of Domestic Antidumping Law and the Countervailing Duty Law, a Party may change its AD/CVD law as it applies to other Parties. However, only if such change is explicitly applicable to the other Parties and is consistent with GATT law and the object and purpose of NAFTA, must the Parties be notified in advance of the enactment of the change. In Article 1903 NAFTA provides for the establishment of a binational panel to issue a declaratory opinion regarding the consistency of the change with Article 1902(2) and with any earlier panel decision if applicable.

[101]Moyer, *supra* note 97 at 716. The "touchiness" regarding supranationality of the ADR devised in Chapter Nineteen has become manifest through constitutionality actions taken in the U.S. *Ibid.* at 712. See also Bodie, *supra* note 37 at 97.

[102]Tailored after, and expanding on, the FTA Chapter 18. See *supra* section II. See also Endsley, *supra* note 84 at 676.

provides that "[n]o Party may provide for a right of action under its domestic law against any other Party on the ground that a measure of another Party is inconsistent with this Agreement". It thus leaves the lobbying of the respective government as the only redress available to the individual . As discussed in Section VI of this paper, this is at best indirect/representative access to justice, and discriminates against private parties where success in drawing their government's attention and eliciting its support depends on differences in domestic legislation and avenues for access.[103]

D. The Side-Agreements

The two side agreements to NAFTA, on labour (NAALC)[104] and on environmental cooperation (NAAEC)[105] provide for limited private party access in their respective areas. As NAFTA only marginally addresses labour issues, Article 4 of the Labour accord contends with a requirement of the Parties to accord individuals access to administrative, quasi-administrative, judicial, or labour tribunals to enforce the domestic labour laws. Article 5 provides an equitability and transparency requirement as well as some due process rights.[106] The NAAEC establishes the submission procedure[107] available for private parties, which must be ranked at the lowest end of the ADR scale since its final culmination is in a report on environmental law violations which may be made public at the discretion of the NAAEC Council, and which at best has the power of sensitizing public opinion and embarrassing the Party violator. While generally presented as part of NAFTA, these agreements are indeed what they were labeled as - true "side-

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[103]Bodie, *supra* note 41 at 141.
[104]*Supra* note 19.
[105]*Supra* note 20.
[106]Paterson et al., *supra* note 16 at 3.11(b)(ii).
[107]NAAEC, *supra* note 20 Arts. 14, 15, and for an even weaker mode of access Art. 13.

agreements", currently still marginal in importance and impact in comparison to the main trade agreement.

VIII. Dispute Resolution and Private Party Direct Access in the EU

Unlike the NAFTA, the EU prefers the traditional formal adjudicative resolution of disputes over ADR methods. The question of access is therefore largely a question of access to the judicial institutions of the Community. Since the establishment of the CFI access no longer centers on the ECJ. While the CFI maintains jurisdiction over *any* category of direct action by private parties, the ECJ covers preliminary rulings and serves as a court of appeal on points of law. The right of appeal is a right not subject to any screening, and there is no need to obtain leave to appeal. [108]

The judicial procedures provided by the EC Treaty concentrate in Articles 169, 177, and 173.[109] Article 169 gives only the Commission the right to file proceedings regarding the non, or deficient, implementation of Community law by member-states. Under Article 170 members-states also have the right to file such proceedings. These articles shut out the private party for both purposes of direct litigation and intervention. Through Article 177, the private party may be represented by the member-state which files a preliminary reference with the ECJ. The reference is made by the national court. Both the parties to the action before that court and the member-state in which it is situated have the right to submit observations (written and oral) to the ECJ independently of each other. This device may be used to review the validity of Community legislation, as

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[108]Brown, *supra* note 36 at 743-744. Grounds for appeal comprise of lack of competence of the CFI, a breach of procedure before the CFI which adversely affects the interests of the appellant, and infringement of Community law by the CFI. If the appeal is upheld, the ECJ may quash the CFI decision and give either a final judgment (where permitted by the law), or refer it back to the CFI for judgment. The judicial history so far shows that most appeals have failed. *Ibid.* at 744, 753, 746 respectively.
[109]Amtenbrink, *supra* note 23 at 36, 37.

well as to protect the right of the private party arising from the Community's legal order against any national legislation that may obstruct it. As this procedure requires representation by the state, the question of standing is subject to disparities among the various national legal orders.

EC Article 173(4)[110] provides the only allowance for private party direct access to the CFI and allows an annulment action under the following conditions:

> [A]ny natural or legal person may ... institute proceedings against a decision addressed to that person or against a decision, which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.[111]

Locus standi is thus narrowly defined to limit access to situations where the private party is challenging the decision that is addressed to it or, where the "decision", although in the form of a "regulation", or where the decision is addressed to another person, is of "direct and individual concern". As mentioned earlier, in light of the ECJ's decision in the *Codorniu*[112] case, this is no longer a conclusive situation. A central bone of contention, this has drawn much criticism against the Community law. The main areas of criticism revolve around the definition of "individual concern" involving the determination of "class of persons generally affected" versus "individualisation", and the definition of "direct concern" which relates to the distinction between two types of decisions: those addressed to the member- states and those addressed to private parties.[113] As the EU law is evolving, the Courts, and not the Council, have gradually

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[110]Formerly 173(2).
[111]Bebr, *supra* note 45 at 32. The time limit is two months after enactment of the decision.
[112] *Supra* note 77.
[113]*Ibid.* at 65 -83.

expanded the application of Article 173(4) with respect to the groups of applicants and the nature of the legal acts that can be annulled.[114]

To be sure, due to the so-called "democratic deficit" and the limited legislative competence of the European Parliament, the European courts have by default become entrusted with such power. In adjusting to this reality, a strong argument has been made in favour of expanding, if not totally removing, the *locus standi* requirement so as to enable effective public interest representation at least in the Courts where part of the law appears to be made.[115]

The range of issues raised by the legislative juxtaposition of the nature of the private applicant (natural or legal, i.e. individual, companies and corporate, and interest and pressure groups); the nature of the legal act (regulation or decision, the correlate question of the effective remedy in case of breach of the law); and the nature of the interest at point (direct and individual), resulted in a complex matrix of legal questions to which the Courts were forced to address their attention.[116] As a matter of fact, "individuals are not exactly queuing at the door of the registry to file actions in the Court

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[114]Amtenbrink, *supra* note 23 at 36.

[115]Harlow, *supra* note 39 at 217-218. Among the many ways to remedy the situation Harlow proposes to base access rights on procedural rights, which is a common administrative law technique, and to use the concept of "legitimate interest" as the basis for standing. *Ibid.* at 239. See also Arnull, *supra* note 38 at 7:

> The most restrictive is to accord standing, or *locus standi*, only where some legal rights of the applicant have been infringed by the contested measure. A more liberal approach is to accord standing where, although the applicant cannot point to an infringement of his legal rights, he can show that he has been adversely affected in some other way. The most liberal approach is to allow an *actio popularis*, or citizen's action, to be brought on the basis that every citizen has an interest in ensuring that public bodies act within their powers. This approach, it has been observed, is tantamount to "the disolution of *locus standi*".

For an excellent review and analysis of the range of reasons for the blocking of private party access by the Courts' application of Article 173(4) see Hjalte Rasmussen, "Why is Article 173 Interpreted against Private Plaintiffs?" (1980) 5 European Law Review 112.

[116]Evidently, an exhaustive study of the impact of standing in the European Courts requires a more thorough examination than is possible within the confines of this paper. This must include a detailed review of the relevant European case law.

of Justice"[117] and only one significant case so far was lodged individually by a natural person.[118] The difficulty of access has been by-passed in a variety of ways, for instance, by individuals grouping together to enhance their access.[119] The famous and recent *Codorniu* case[120] has broadened the *class* of potential applicants suggesting that representative bodies will have standing to bring annulment proceedings on behalf of their members in a growing number of contexts (it has already been permitted in the context of dumping).

Non-individuals such as companies and corporate bodies have used Article 173(4) to protect or promote their interests employing a range of litigation strategies including the "repeat player" and the "saga" or the "big issue". As observed earlier regarding access to NAFTA, this ability sets them apart from the individual private party and creates a *de facto* situation of inequality - in the EU as well - regarding access to litigation. This deficiency can only partly be overcome by a less stringent standing law.[121]

The *Codorniu* case has raised hopes for liberalization in another aspect of the standing rule, namely with regard to the *nature of the act* involved in the Article 173(4)

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[117]Harlow, *supra* note 39 at 232.

[118]Stanley Adams brought the action in *Hoffmann-La Roche* v. *Commission* (No. 85/76) [1979] E.C.R. 461, and *Stanley George Adams* v.*Commission* (Nos. 145/83, 53/84) [1985] E.C.R. 3539. *Adams* was an action for damages under the 2nd para. of article 215, not an action for annulement under Article 173. See also Christopher Harding, "Who Goes to Court in Europe? An Analysis of Litigation against the European Community" (1992) 17 European Law Review 105.

[119]Twenty-three individual fishermen joined together with forty-six more represented by an association in the *Spanish Fisheries* case *Asociaciòn provincial de Armadores de buques de pesca de Gran Sol de Ponteverda (Arposal)* v. *Council* (No.55/86) [1988] E.C.R. 13.

[120]*Supra* note 77. This is one of the last judgments of the ECJ before the transfer of all private party direct actions to the CFI.

[121]Even the removal of *locus standi* will not suffice to overcome the impact of disparities in the availability of economic resources which play a role as important in transnational law as in the context of domestic law in enhancing access. This has resulted in a vocal demand for new and more legal aid provisions which should be based on an EU legal right of access to the courts. See Mel Cousins, "Access to the Courts. The European Convention on Human Rights and European Community Law" (1992) 14 Dublin University Law Journal 51.

proceedings. It has for the first time suggested the possibility for a private party to challenge a true regulation, and has thus lifted the inflexible requirement of bringing proceedings only against decisions, or in the alternative, to have to show that a regulation was in fact a decision "in guise" of a regulation.

> In *Codorniu*, the Court indicated that an applicant may be individually concerned by a regulation if that regulation has special and *serious economic* consequences for him. However, the Court made clear in *Codorniu* that these economic consequences must be of such a nature as to differentiate the applicant from all other persons affected by the contested provision.
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> Firstly, the contested provision must place the applicant at a disadvantage on the market or, in other words, affect its competitive position on the market.
>
> Secondly, the contested provision must concern an important part of the applicant's economic activities and must represent a serious risk for the profitability of the applicant's business.[122]

Thus, the nature of the concern, and the requirement for it to be an individual concern, appears to be the most serious stumbling bloc still remaining on the way to significant relaxation of the *locus standi* law.[123] The law currently in place is found in the ECJ definition of "individual concern" in the *Plaumann* judgment[124] where it established that

> somebody cannot claim to be individually concerned by a measure when he belongs to a general group of traders similarly affected by and defined in abstract terms in the measure which is being challenged. He must be distinguished in some form or other just as an addressee.[125]

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[122] *Ibid.* at 268.

[123] Unlike other commentators, Neuwahl, *supra* note 5 at 18 raises the argument that too broad a relaxation of the standing rule may create serious problems leading to considerable uncertainty, particularly in the economic context.

[124] *Plaumann* v. *Commission*(No. 25/62) [1963] E.C.R. 95.

[125] Neuwahl, *supra* note 11 at 20. This, along with the other definitional problems of Article 173(4) raised the issue of whether anti-dumping regulations are regulations or decisions, and whether they are specifically addressing imports and importers. To avoid uncertainty, the Court decided to drop the question of the nature of the act and concentrate on individual concern for the purpose of anti-dumping measures. This subject is however beyond the scope of this paper.

In 1996 the Intergovernmental Conference on the Amendment of the Treaty on European Union has begun to review the list of Community acts. It is expected to introduce some hierarchy of norms in view of fostering certainty and harmonization, and improving performance. The question of *locus standi* of private parties - one of the more complicated laws of the Community - will undoubtedly feature as a crucial issue on the Conference's agenda.

IX. *In lieu* of Conclusion: Does the Difference between NAFTA and the EU Regarding Private Party Direct Access Really Matter?

While NAFTA is a free-trade agreement, the EU is more than a customs union, indeed even broader than an economic union. The NAFTA is defensive about national sovereignty, whereas the EU deliberately thrives on the transfer of sovereign powers. At first glance, it would therefore appear that to compare the two arrangements amounts to comparing apples and oranges. However, both NAFTA and the EU are regional trade agreements and areas and as such impact on the lives of the people living under their regime. This in itself justifies a comparison.

> The NAFTA-model FTA while more limited in purpose than the CU [customs union] is therefore likely to be more diversionary. It may therefore perhaps be more limited than a CU's because it is a less economically important phenomenon than a CU....[However] a FTA such as ...NAFTA is at least as significant a phenomenon from an international economic stand-point as a customs union such as the EC.[126]

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[126]Abbott, *supra* note 68 at 919.

Designed to establish trade regimes, both arrangements (organizations would hardly be the appropriate term for NAFTA) share the purpose of promoting market reliance and activity. Private party access to dispute resolution, and the quality of such access, are important factors in the success of such endeavour. While NAFTA does not address the question directly, the entire approach to dispute resolution adopted in the agreement sends a strong message that individuals should not rely on the representation of their interests by their governments, and should, when engaging in trade, and where it does not involve governmental action, secure their position in well designed contracts.[127] This, however, leaves the non-contractual third party still vulnerable to the impact of the intergovernmental and multilateral regime. It is in this regard especially (but not exclusively), that the broader, principled approach of the EU offers greater advantage to the private party - both to the national of the Community as well as to the non-national party trading with the Community.

Private party direct access to justice is a purely economic/trade issue for NAFTA. It is a blend of economic and human rights issues for the EU. While the NAFTA stands for a decentralized regime, the EU represents the model of a centralized and harmonized economic area. The comparison between the relevant approaches and provisions in the two regional arrangements may assist in answering the question about "the extent to which decentralization and the absence of approximation measures"[128] can successfully proceed. Such success depends on effective dispute resolution, and Abbott dismisses the possibility of weak regional dispute settlement institutions, which are devoid of

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[127]Miller, *supra* note 13 at 1367 and 1319 draws attention to the increasing degree of protection evolving in the field of state contracts with foreign investors, and to the fact that NAFTA is almost mute in relation to private commercial disputes.
[128]Abbott, *supra* note13 at 123.

enforcement power on the member Parties, to be able to effectively carry out their mandate[129].

However, ADR is not by definition weaker than court action nor is there anything inherently superior in formal adjudication over arbitration. On the contrary, that arbitration is the preferable course to ensure states' compliance with international agreements is a fairly compelling argument. Arbitration is based on the prerequisite that the parties to the dispute mutually consent to settle the disagreement between them. Therefore, unlike the formal adjudication procedure, which is independent of the parties' will, and which is imposed on them, the arbitral award stands better chances of being effectively enforced. This has also been the practice in international agreements.

A strong case can be made in recommending the expansion of NAFTA's Chapter Eleven dispute resolution mechanism to other areas. If the Parties succeeded to agree on private party direct access in the field of investment - traditionally of utmost importance in domestic law - it seems most likely that they are capable to agree on it also for the settlement of disputes in other trade sectors.

The direct initiation of the arbitration process is, of course, the ultimate goal. However, under both trade regimes, indirect initiation also plays a priceless role. Under NAFTA's Chapter Nineteen, the government must represent the requesting private party.

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129 Weak regional dispute settlement institutions, i.e. without power to force compliance by member countries, fail by design to facilitate the necessary moves towards the harmonization of legal regimes. ... A structure such as that provided for in ... NAFTA, which permits parties to accept the withdrawal of concessions rather than conform their laws to decisions of dispute settlement panels, appears really to countenance the slow disintegration of the union because it encourages the parties to gradually withdraw the trade concessions they initially granted.
Abbott, *supra* note 68 at 944-945.
I will read into this weakness the limited access provision to private parties because Abbott bases his observation on a comparison with the EU.

In the EU - the national government must initiate a Community legal process upon the initiation of a private party legal action on the domestic level. Nevertheless, while in the EU the private party enjoys double access - to the national as well as to the neutral Community institutions - NAFTA does not provide access to an institution but only to a process.

The institutional aspect of access is significant with regard to certainty and determinacy in the application of the law in two ways. First, an unsure panel under NAFTA's Chapter Eleven may request the Free Trade Commission for an interpretation but is powerless in the event of the Commission's inaction. In comparison, due to its institutional structures, the EU provides not only for an international legal "umbrella" allowing for a unified interpretation of the treaty, but also for a mechanism to generate such interpretation. Second, domestic courts diverge as to the rules of their jurisdiction. Some degree of harmonization achieved through the Free Trade Commission's interpretation is, however, insufficient to alleviate the inequalities resulting from the differences in the courts' rules of jurisdiction. Consequently, empowering the Free Trade Commission respectively, or the establishment of a NAFTA Trade Arbitration Tribunal[130] will represent a step in that direction.

Private party direct access - whether to arbitration or to formal adjudication - represents in itself an important step in the direction of enhancing trust in the trade regime established. The extent to which NAFTA offers this access is for the present limited to one or two trade sectors at least. In this respect, the EU is significantly more advanced but - it has also enjoyed a significantly longer period to experiment with this. It remains to

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[130] See the suggestion, *supra* note 61.

be seen in the coming years in what ways, if at all, this difference has bearing on the economic success of the two regions.

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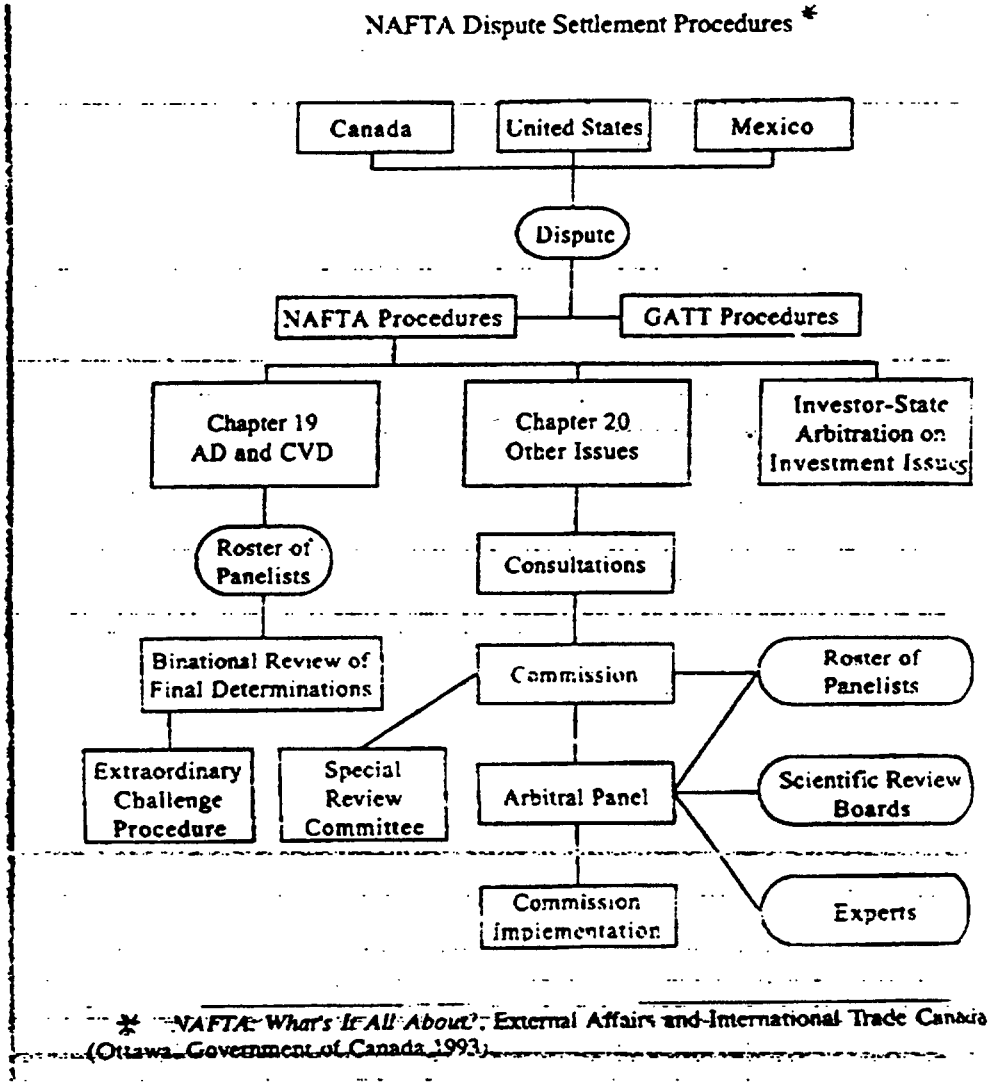
Appendix A: Diagram of NAFTA's Alternative Dispute Resolution Mechanism



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