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

NOEMI GAL-OR*

I. INTRODUCTION: THE RELEVANCE OF LOcus STANDi FOR PRIVATE PARTIES IN NAFTA AND IN THE EU

The right to bring an action and have standing (locus standi) in a legal dispute 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. The territorial state gradually but consistently is making room for supranational entities to partake in a variety of affairs which, for the last three hundred years, were considered to be the state’s absolute prerogative. At the same time, numerous voices are demanding that similar rights be accorded to individuals as well. The individual is understood to be more than a private person. Thus, the individual’s welfare is embodied in the notion of “public interest.” This broader aspect of communalism needs to be taken into consideration as lawmakers create policies, the effects of which are no longer just local, but regional and international as well.1 Universally noted, as human rights and environmental policy advocates continue to remind policymakers and legislators, the drafters of large and complex international economic institution-establishing treaties have largely ignored the role to be played by individuals and non-state actors in general. Yet, in reference to the European Commu-

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1 Denise Manning-Cabrol, The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors, 26 Law & Pol’y Int’l Bus. 1169, 1169–99 (1995). Manning-Cabrol discusses the significance of the Calvo Doctrine in a world “trilaterally owned” (my interpretation) by supranational organizations, individuals, and states. See id. 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. See id. at 1172 n.15, 1180.
nities, Lord Gordon Slynn, a European Court of Justice (ECJ) judge, devoted a whole chapter to the question of how the European legal order created by the Treaty of Rome (hereinafter Treaty)\(^2\) affects the people. In this chapter, Lord Gordon Slynn stated that "[i]t 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."\(^3\) 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. While the North American Free Trade Agreement\(^4\) (NAFTA) has followed suit, it is still many steps 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 alone were able to avail themselves of international legal remedies. In its place, a new approach has emerged (at least in certain areas) in which individuals may also be the subjects of international law and, therefore, may participate in the international legal process. Among the primary examples of this evolution are the Nuremberg Trials and the post-war expansion of the international human rights movement. The development, however, occurred principally in the area of individual and collective human rights.\(^5\) This separation between human rights and the rights of the individual in other areas,
such as trade, is artificial. As early as the beginning of the 20th century, individuals have been entitled to bring direct claims for infringements on their rights, especially property rights, before international tribunals.6

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. When considering the individual as an actor in international trade, the following explanation 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 contention has been strengthened by the recognition of the intertwining relationship between foreign and domestic policies.8 When concluding international agreements, governments enter into commitments which inevitably, and more often than not, deliberately modify the domestic relationship between state and citizen. Of great 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. The citizens, however, play an extremely limited role in the creation of these laws.9 As issues affecting the lives of citizens increasingly evolve outside the domestic sphere, non-state actors' control over their lives ("public participation") diminishes proportionally. There are two aspects to this deficit. First, the ensuing weakening of representative democratic institutions is exacerbated by the fact that, in practice, civil rights can be compen-

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7 Mugerwa, supra note 5, at 318.
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."
sated for by the possession of economic might. In this process, economic inequality undermines formal legal equality. "Big business" easily exerts leverage within national and international systems in ways unavailable to ordinary persons, small businesses, and non-profit, non-governmental organizations (NGOs).

Second, international lawmaking through inter-governmental agreements only unsystematically and partially harmonizes law among the signatory states. Consequently, different domestic laws providing for varying degrees of access to justice bind citizens in different countries belonging to the same international legal regime. This results in varied access to justice. Thus, as a corollary to new rights and obligations, international lawmaking indirectly produces inequality before the law. Despite having set a progressive example to counter such effect, greater individual access should be granted in both the NAFTA and EU contexts as both of these institutions continue to evolve.

Under the regime of international trade agreements, what protection is extended to the aggrieved private party? Where does the ordinary person turn 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?

In answering these questions, this article will study the subject of locus standi of non-state actors within the dispute resolution regimes established by the EU and NAFTA. While NAFTA addresses this issue on a sectoral basis, the EU considers it an institutional and constitutional matter. The purpose of this article is to juxtapose the different approaches and their solutions to the issue of protecting the rights of private parties under the two regional arrangements. The first part of this article will discuss the nature of the two agreements, comparing NAFTA, a regional agreement without institutions, to the EU, an en-

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10 It should be noted, however, that in the European case a major part of the European Community's (EC) legislative activity is concerned with the harmonization of the laws of the Member States. There is a large body of case law of the European Court of Justice (ECJ) designed to reduce the problem of varying degrees of 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 EC's "new legal order" and has developed its own jurisprudence of human rights, drawing on the European Convention on Human Rights and the constitutional traditions of Member States.

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," and is the cardinal question also with regard to the NAFTA situation. See Nanette A.E. Neuwahl, Article 173 Paragraph 4 EC: Past, Present and Possible Future, 21 EUR. L. REV. 17, 19 (1996).
terprise in regional integration equipped with powerful and authoritative institutions. Second, this article will elaborate on the concept of "private party" and will review the choice of dispute resolution mechanisms. Third, this article will explore the distinction between direct and non-direct access, since the main challenge to the private party's right to remedy arising from the inter- and supra-national arrangements lies in this particular detail. Fourth, this article will analyze the private party direct access to dispute resolution in NAFTA. Most relevant to this analysis is the NAFTA Chapter 11, Section B, which deals with dispute resolution regarding investments and the investor's right of direct access. Dispute resolution and private party direct access in the EU requires a general discussion of the EU court system and, in particular, of Article 173(4) of the Treaty of the European Union. In conclusion, this article highlights the different approaches to private party direct access under NAFTA and the EU.

II. The NAFTA: A Regional Agreement Without Institutions

The primary purpose of NAFTA is to assist the North American region in becoming more economically competitive with the rest of the world. NAFTA is an international commitment made by the United States, Canada, and Mexico which sets forth rules concerning trade, investment, and the provision of services. The continuity and certainty that NAFTA provides enables each nation to allocate its resources optimally in the region; as a result, the region, as a whole, will become more competitive in the world economy.

NAFTA represents a market of 379 million people with $6.5 trillion in production. The impetus behind NAFTA was the establishment of a free trade area. Despite being a trilateral, but open, economic agreement of defined and limited scope aimed at increasing international trade through the elimination of trade barriers, NAFTA's found-

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12 See NAFTA, supra note 4, arts. 1101-1110.
13 See TEU, art. 173(4).
14 Jaime Jose Serra Puche, Secretary of Commerce and Industrial Promotion for Mexico, A Source of Competitiveness, Speech delivered before the Economic Club of Detroit (December 9, 1992) in ONE WORLD, MANY VOICES 233, 233–34 (Glenn Hastedt ed. 1995).
16 Id. at 1314–15. In comparison, the EU was formed to create a customs union. Frederick M. Abbott, The North America Free Trade Agreement and Its Implications for the European Union, 4 TRANSNAT'L L. & CONTEMP. PROBS. 119, 119–57 (1994) [hereinafter Abbott I];
ing members have not committed themselves to relinquishing their sovereignty to the same extent as the EU Member States.17

The comparatively modest goal of NAFTA explains its institutional meagerness. In addition, the decision to establish a free trade area rather than a customs union directly affected the choice of remedies available to the individual private party. Chapter Twenty of NAFTA establishes NAFTA’s institutions.18 The trilateral cabinet level Free Trade Commission19 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.20 It is aided by the Secretariat, an administrative body comprised of national officers in each Member State and funded for its operation by the relevant government.21 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.22 Although fulfilling important administrative roles, neither institution has the decision-making power to bind any of the Parties to NAFTA. Thus, 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.23 It is non-self-executing for Canada as well.24 This means that the treaty cannot be invoked in national courts as the legal basis for a cause of action. Mexico is the only member among the three to directly incorporate NAFTA within its national law.25

17 Chile has been in membership negotiations with both the Mercosur and NAFTA nations, and recently concluded a free trade agreement with Canada.
19 Id.
20 Id. at art. 2002. The list of these committees and working groups is set forth in Annex 2001.2.
21 Id. at art. 2002.
23 See Abbott I, supra note 16, at 122.
24 NAFTA Implementation Act, ch. 44, 1993 S.C. 1921 (Can.).
NAFTA's founding Member States had no intention of delegating lawmaking powers to any new institutional arrangement. Guided by political determination to avoid both the establishment of supranational institutions and the extension of a private right of action, the NAFTA drafters decided (1) to limit institutional aspects to minimal independent powers and (2) 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 Member States, in the absence of strong supranational legal and adjudicatory institutions, NAFTA ultimately leaves the "playing field" to the discretion of the national legal institutions and processes of each of the Member States. The obligation to follow the rules and the spirit of NAFTA is thus largely placed upon the individual governments, rather than being shared in a partnership among the Member States.

Had the NAFTA negotiators pursued a more expansive vision and mandate, other elements would have captured the attention of the signatories. NAFTA, however, focuses only on economic free trade and not on integration, and ignores related social, cultural, and political aspects. Although free trade is expected to lead to integration, NAFTA did not create mechanisms to deal with 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. NAFTA's main references to social issues are found in the labor side agreement and by inference in the environmental side agreement. The labor side agreement, however, is a minimalist arrangement. NAFTA's 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 becomes economically compelling.

27 See id.
NAFTA does not provide for a human rights charter, and fails to address social issues associated with equality. NAFTA’s underlying assumption—and expectation—is that social benefits will ensue from the distribution of economic benefits, and that the pursuit and management of such benefits are separate from the latter and should remain in the hands of the responsible governments. As will be seen later, NAFTA’s coverage of a narrow spectrum of trade-related issues restricts its attention to only certain types of disputes. While other types of disputes may arise, NAFTA’s limited scope will prevent them from being addressed.

III. THE EU: REGIONAL INTEGRATION WITH CENTRALIZED INSTITUTIONS

The European Communities are no longer merely a supranational organization embracing fifteen Member States joined together by international agreements. Evolving to form a unique system, the Member States created a “new legal order” of Community law, separate and distinct from both the international and the national legal tradition. To enjoy the benefits of this order, Member States 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.”

The EU represents the current stage of integration of the so-called Western European countries. The EU had its origins in the aftermath of the Second World War with six founding members that grew to number fifteen. The original purpose of the EU was to explore and

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32 The European Union has been referred to as the “Common Market,” the “European Communities” and the “European Community.” Dinnage and Murphy draw attention to the problem of nomenclature in the European integrative process. See JAMES D. DINNAGE & JOHN F. MURPHY, THE CONSTITUTIONAL LAW OF THE EUROPEAN UNION 4 (1996). 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.” See id.
experiment with various strategies of cooperation and collaboration in an effort to avoid the recurrence of war among the Member States. Unlike NAFTA, the raison d'être of the EU consisted of ensuring 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 this 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.” European integration thus consisted of two premises completely impertinent to the negotiators of the NAFTA: (1) the existence of a commonality of values and cultural heritage to cement close cooperation, and (2) the need for political stability to ensure such cooperation. The European edifice was thus constructed around three treaties, the core institutions of which were later to merge into a single institution. In the course of its development, the supranational and confederate organization expanded in membership and deepened in content. It has put in place a European social order comprised of the following: (1) the free movement of labor, (2) common competition rules with an enforcement mechanism, (3) a plan to unify working conditions, (4) a common environmental regime, (5) rules for approximation of technical standards, (6) transfer payments to equalize regional development, and (7) “even transfer payments to assist the French family farmer.”

The structural foundation of the EU 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 degree, the institutional structure of the liberal democratic nation-state. While only gradually and reluctantly diminishing the sovereignty of their Member States, the European Treaties empowered the EU’s institutions to make binding decisions upon the Member States, institutions, and individuals. Other EU bodies possess only advisory powers.

The most important decision-making institution of the EU is the Council of the European Union (hereinafter Council). In accordance

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36 See generally EEC Treaty, supra note 2; ECSC, supra note 2; Euratom, supra note 2.
37 Abbott I, supra note 16, at 129.
38 Mathijsen, supra note 35, at 11.
39 The Council was formerly known as the Council of Ministers. See Mathijsen, supra note 35,
with the strategy of pursuing peace and stability in Europe via economic integration, the European Treaties went beyond the creation of a European customs union by expanding integration through the gradual harmonization of the Member States' economic policies. The Council, which consists of representatives of the Member States, is entrusted with ensuring the coordination of the general economic policies of the Member States. Being an institution and not merely an inter-governmental organization, the Council is expected to act in the interest of the EU. It exercises decision-making power by producing three types of rules: regulations, directives, and decisions. These rules resemble legislation and are limited by the provisions of the EEC Treaty. Unlike the Council, the Commission plays a law enforcement (executive) role by issuing regulations and directives, and making decisions at the administrative level. It is important to note that one of the unusual characteristics of the EU is that there is no clear separation of legislative and executive powers among EU institutions like that found in the United States. Nevertheless, the distinction between the rules, whether legislative or executive, is of crucial importance to private party access to EU dispute resolution.

The legal order created in the European Treaties established the EU court system, which has significantly influenced the development of European law. This court system deals with disputes between Member States, between Member States and EU institutions, between the institutions themselves, between individuals and Member States, and between individuals and institutions. The ECJ issues judgments only at 15-67. The Commission is the other decision-making body. The EP is an advisory and supervisory institution entrusted mainly with the power of recommendation. The EP is 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 189(b)), the EP has finally acquired a (admittedly limited) legislative role. See Maastricht, art. 189(b). This body, however, is of secondary relevance to the subject of the present article.

In addition to the Council, 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. See Mathijsen, supra note 35, at 41-43.

Council meetings are normally attended by the Member States' Ministers whose portfolios cover the subject under discussion.

Albeit the acts are not grounded in a popular and representative legitimacy basis.

The basic principle of "conferred powers" also applies, with few exceptions, with regard to Commission decision-making circumscribed by the provisions of the Treaty. Mathijsen, supra note 35, at 47-48.

See infra section VI.

Slynn, supra note 3, at 6.
when it is called upon to do so.\textsuperscript{47} It interprets EU rules by reference to their objective and consequently states the law when not explicitly provided for in the existing legislation.\textsuperscript{48} One of the chief challenges of the ECJ lies in the fact that it deals with international economic law which is constantly evolving and requires frequent adaptation of ambiguously drafted treaties.\textsuperscript{49} The establishment of the European Court of First Instance (CFI)\textsuperscript{50} introduced a partition of the judiciary, whereby the CFI hears in first instance certain categories of cases, including all cases brought by natural or legal persons.\textsuperscript{51} The ECJ still hears a range of direct actions and is exclusively empowered to address preliminary rulings and actions by Member States or EU institutions.\textsuperscript{52} Most importantly, this restructuring created a bifurcated jurisdiction, entrusting the ECJ with the new appellate role of reviewing lower CFI decisions on points of law.\textsuperscript{53} The EU court system along with the national court system are the fora in which private persons enjoy direct access for the settlement of disputes governed by EU law.

\section*{IV. THE DEFINITION OF PRIVATE PARTY}

As economic globalization expands and the world economy aligns into regional trade blocks, social problems, which traditionally were controlled and managed within the individual state, are now acquiring a regional existence and are becoming subject to intra- and inter-regional relations. The concern is that without both effective enforcement of existing obligations as well as avenues for public participation, neither the removal of trade barriers, nor the enhancement of reciprocal national treatment will produce the results expected by the founders of regional trade blocks.\textsuperscript{54} Unfortunately, this problem represents

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\begin{itemize}
\item \textsuperscript{47} See \textit{id}.
\item \textsuperscript{48} See \textit{id}.
\item \textsuperscript{49} See MATHIJSEN, supra note 35, at 55.
\item \textsuperscript{50} See SEA, art. 32(d); Neville Brown, \textit{The First Five Years of the Court of First Instance and Appeals to the Court of Justice: Assessment and Statistics}, 32 \textit{COMMON Mkt. L. Rev.} 743, 743–44; TIMOTHY MILLETT, \textit{THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES} 6–7 (1990). 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.
\item \textsuperscript{51} See Brown, supra note 50, at 743–44; MILLETT, supra note, 50, at 6–7.
\item \textsuperscript{52} See Brown, supra note 50, at 743–44; MILLETT, supra note, 50, at 6–7.
\item \textsuperscript{53} See Brown, supra note 50, at 743–44; MILLETT, supra note, 50, at 6–7.
\item \textsuperscript{54} See J. Scott Bodie, The NAFTA's Institutions and Dispute Resolution Mechanisms: A Case for
\end{itemize}
only the economic aspect 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.55

Social stability within the new economic and political world order is contingent upon popular approval of the economic, particularly trade, arrangements. The revolutionary transformations of both national and international economic processes and structures have generated great economic and social insecurity in the individual person. Such worries can be alleviated if individuals are guaranteed the existence and access to remedies for injustice. Consequently, socio-political stability, a condition of economic growth, depends to a large extent on equal private party access to justice during both 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 thus parallels the concern about social stability, and imposes some conceptual difficulties. The EU vernacular distinguishes between “public/privileged” and “non-privileged/private” applicants.56 The private party, whether representing a public or a truly private interest,57 encompasses all that is non-state and non-EU institutions.58 Under the category of the so-called “non-privileged/private” party, the EU further discerns, in the words of the TEU,

Public Participation (1994) (unpublished L.L.M. thesis, University of British Columbia). Of particular concern are the results expected to happen through the mechanism of comparative advantage. See id.


56 See Carol Harlow, Towards a Theory of Access for the European Court of Justice, 12 Yb. Eur. L. 213, 214 (1992). I will use the terms “individual” and “private party” interchangeably throughout the article. 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.

57 For an article discussing public interest, private interest, and Community interest, see Amtenbrink, supra note 34.

58 For a more detailed description, including the problem of defining the “individual” or “private party,” see A.G. Toth, 1 Legal Protection of Individuals in the European Communities 99 (1978).
between "natural" and "legal" persons and accords them limited space for "individual action."\textsuperscript{59}

According to accepted Western theory of corporate personality, "natural" and "legal" persons are assimilated, the assumption being that corporate bodies possess 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.\textsuperscript{60}

A private party may have several identities and forms.\textsuperscript{61} It may consist of an individual person, a small business, a multinational corporation, an interest group, or a class registered as an association. The financial and legal resources at the disposal of the private party may determine its nature.\textsuperscript{62} Accordingly, the legally unincorporated person may litigate as (1) an individual, (2) a "litigation coalition" representing a group of individuals coalescing for a particular \textit{ad hoc} case and purpose, (3) a group that registered separate applications, but is heard as a joint case, (4) 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 (5) as "representative groups" acting only as intervenors in litigation for non-parties and claiming to represent the public interest.\textsuperscript{63} The "legal" person, however, must have "the necessary independence to act as a responsible body in legal matters."\textsuperscript{64} This classification reflects the road

\textsuperscript{60} See \textit{id.} at 231.
\textsuperscript{61} See \textit{id.}.
\textsuperscript{62} See \textit{id.}.
\textsuperscript{63} See \textit{id.} at 241–42.
\textsuperscript{64} Case 18/74, Syndicat Général du Personnel v. Commission, 1974 E.C.R. 933, ¶ 7; see also
EU law has travelled since its inception, gradually expanding to include social conflicts, in addition to economic issues, as important causes of action. Traditionally, the private party category was largely represented by natural persons and associations alleging economic violations and human rights abuses. These natural persons and associations had access to the European Commission of Human Rights, which is not an institution of the EU. However, as Gerhard Bebr suggests:

[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 (hereinafter Treaties). 65

The Treaties lack an EU notion of a legal person. 66 When examining the capacity of a legal person to bring an action, the Court resorts to the relevant national law. “Thus, the legal personality under national law is required to exercise the right of action, as provided for by the Treaties.” 67

Since NAFTA addresses the issue of locus standi differently than the EU, 68 it is difficult to find an explicit general reference to the nature of the private party. The private party is identified in his, her, or 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.” 69 It refers only to an investor of another Party, not to a Party’s own investors. 70

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65 GERHARD BEBR, DEVELOPMENT OF JUDICIAL CONTROL OF THE EUROPEAN COMMUNITIES 32 (1981) [emphasis added].

66 See id.

67 See id.

68 The EU set the conditions for standing at the outset, in the TEU, whereas NAFTA addresses these conditions as it proceeds sector-by-sector, and in Chapter Twenty, when addressing the dispute resolution mechanisms. See TEU, art. 173(4); NAFTA, supra note 4, ch. 11.

69 NAFTA, supra note 4, art. 1001.

70 PATERSON, supra note 22, at 3.7(a) (i).
tional justice under the NAFTA, however, private party appears to mean "an individual (or non-governmental organization) residing in a NAFTA party," who must not be a national of any of the Parties. This is an interesting point for comparison with the EU. Within the EU, subjects of EU 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." In fact, nationality or residence has no bearing on standing under Article 173, as the dumping cases illustrate.

Furthermore, the private party is defined according to the sectoral subject matter of the dispute. Hence, a private party can take the form of an intellectual property right (IPR) holder, an enterprise engaged in NAFTA trade, or an association representing a social interest in the environment, labor, or other social cause. From the definitional point of view, therefore, no fundamental difference exists 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 a large multinational corporation, such as IBM, from smaller groups, such as the Pulp, Paper and Woodworkers of Canada and the self-employed desk-top publisher. These three types of private parties also diverge in their ability to engage effectively in political lobbying to advance their cause when a dispute arises. Furthermore, larger and more powerful private parties, such as corporations, enjoy greater access to available remedies. 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 is crucial to securing a just dispute resolution process, and the equalization of the various types of private parties before the law.

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72 Toth, supra note 58, at 32 [emphasis added].
73 See Christopher Harding, Who Goes to Court in Europe? An Analysis of Litigation against the European Community, 17 Eur. L. Rev. 105, 120-22 (1992); Arnull, supra note 64, at 31-33; Amtenbrink, supra note 34, at 36.
74 Miller, supra note 15, at 1313-17.
75 See id.
V. The Choice of Remedy

As states pool their sovereign powers and join with other states in creating new institutions and organizations governed by new legal regimes, the extent of legal recourse traditionally available to the private person either erodes or is transplanted to new authorities. While the EU has developed the doctrines of "direct applicability" and "direct effect" to ensure that EU law is self-executing, the NAFTA negotiators, who were reluctant to pool sovereignty, resorted to non-traditional/alternative dispute resolution (ADR) mechanisms. 77

In the domestic context, the choice of dispute resolution mechanisms consists of legal action or a resolution procedure amenable to the parties to the dispute. ADR, however, is not yet the norm in the domestic context and much weight is placed on formal adjudication. Consequently, a perception prevails that private party access to the courts is of prime importance. As ADR evolves, litigation may perhaps lose 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 favor, "the only formal means of dispute resolution that find broad acceptance in the international context are those created by agreement of the parties." 78 It is important to note, however, that since these Parties are governments of states, the private party is excluded from negotiations and determining the terms of the agreement. The three main dispute resolution methods arising by agreement are: (1) mediation, which is based on the process, but does not result in the issuance of a report or decision, (2) non-binding arbitration concluding with a non-compulsory decision, or (3) binding arbitration. 79

76 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.

77 The fact that EU law is self-executing means that it is immediately applicable within domestic law and invocable by private parties (thus allowing for private party direct access in matters of EU law to the state's domestic courts).


79 See id. A discussion of the merits and shortcomings of the three ADR mechanisms is beyond the scope of this article.
Both the contrast between ADR and formal adjudication in international disputes, and the question of preference and quality of justice do not arise only by analogy with domestic disputes. Rather, they result 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 (1) is independent of agreement by the disputing parties (either contractual or not), (2) can be invoked in the event of failure to reach such agreement, and (3) is non-negotiable. It equalizes the parties before the law in a more formalized manner, adding a degree of certainty to the dispute resolution process. Thus, for the EU, court action ranks higher than ADR. It follows that access to the courts holds the promise of a "better quality of justice" than does access to ADR. The NAFTA arguably does not share this perception.

EU law recognizes three groups of actors: Member States, EU institutions, and individuals. This creates six different types of bilateral legal relationships which may arise between these actors, and which affect the legal position and protection of private persons under EU law. Four main bodies are responsible for the enforcement of EU law: the national courts of the Member States, the Commission, the ECJ and the CFI, and the Ombudsman.

Accordingly, private parties have access to four forums in which they may obtain remedies, but only two of these forums, the CFI and the ECJ and the national courts, allow for litigation. The determination of which judiciary to use is neither easy nor clear, and depends upon

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80 See Toth, supra note 58, at 33.
81 See id.
82 See EEC Treaty, art. 169. Article 169 provides for the complaint procedure to the Commission which is also open to private parties and indeed is most often used by them. See id. 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 54, at 207–08.
83 The European Court of Human Rights (ECHR), formerly the European Commission on Human Rights provides an additional non-EU avenue. This is only of secondary importance in the context of this article. 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? IRISH LAW TIMES, July 1995, at 168.
84 See TEU, art. 138(e). The Ombudsman created under the Maastricht Treaty, has the power only to create a report in response to an individual complaint. See id. As it is an institution falling
three different considerations. First, if a person is seeking the remedy, the EU court system is generally, but not exclusively, available for actions against EU institutions, as are the national courts, for actions against the Member States and individuals. Second, the purpose of the action is controlling. Generally, though not conclusively, if the individual challenges the legality of an institution’s acts or seeks protection against an obligation or sanction imposed by such institution, the EU courts are the appropriate forum. If the individual’s purpose is to enforce rights arising from EU law, however, the national courts are available. Finally, a third 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. For non-directly effective provisions, the EU courts are not available in all cases, as the availability depends 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 harmonization of national remedies in respect of Community provisions, however desirable this may seem, has not yet been attempted.

While the avenues available under EU law comprise both legal action and ADR means, the ultimate tool to guarantee the resolution of disputes is still litigation, although many disputes never reach this stage and are settled outside of this realm.
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 include arbitration, consultation, mediation, and the issuance of reports. Unlike the complex matrix of acknowledged legal relationships in the EU, and in the absence of formal institutions, NAFTA primarily creates a state-to-state obligation by which the private party is accorded an inferior status.93

The resolution of international commercial disputes by arbitration has found much favor with critics and has gained NAFTA94 considerable support. Arbitration, provides all of the advantages of faster, cheaper, and more certain procedures, such as those often devised by the consenting parties.95 While the choice of law and the discretion of the process (it is not made public) are listed among the major benefits of arbitration,96 the tendency to compromise, inherent to this process, may be seen as a major disadvantage.97 Arbitration may be binding and non-binding, and NAFTA employs both types.98 NAFTA, however, utilizes consultation or mediation as steps preceding arbitration.99 Once arriving at arbitration, NAFTA opts for the non-binding version.100 NAFTA, however, provides for binding arbitration in two categories of disputes: (1) investment disputes between a Party and a private party of another Party (Chapter Eleven), and (2) disputes arising under the anti-dumping and countervailing duty laws involving private parties and another Party (Chapter Nineteen).101

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 26, at 27.

93 By definition, the NAFTA choice of an alternate approach to dispute resolution does not necessarily imply that a qualitatively different resolution of the dispute and remedy to the injustice ensue as compared with the EU remedies. This is a subject deserving a thorough analysis which is beyond the scope of this article.

94 NAFTA is usually perceived as strictly a trade agreement. See Symposium, supra note 25, at 986–96. As already mentioned earlier, the social implications of the trade arrangements have largely been ignored.

95 For an elaborate discussion of the pros and cons of arbitration and mediation and the reasons and modes of employment by NAFTA, see Johnson, supra note 78, passim.

96 See id.

97 See id. at 2176.

98 See id. at 2178.

99 See Johnson, supra note 78, at 2180.

100 See id. at 2181.

101 See id. at 2183.
Flowing from the selection of available remedies is the choice of bodies to facilitate their administration in structure and in process. NAFTA does not provide for a court system. The Free Trade Commission (FTC) (Chapter Twenty) is the body entrusted with supervising NAFTA's implementation and resolving "disputes that may arise regarding its interpretation or application" and with governing the mediation process. The drafters of the NAFTA arbitration procedure abstained from creating a permanent arbitration tribunal and elected the ad hoc tribunal. This tribunal, comprised of members from a roster selected in advance by consensus between the Parties, forms a pool of arbitrators as disputes arise. The process, however, diverges depending upon the sectoral nature of the issue at dispute.

VI. DIRECT VERSUS NON-DIRECT ACCESS

Both NAFTA and the EU are international arrangements which introduce new laws regulating the lives of the societies under their regimes. NAFTA, a conspicuously state-to-state agreement, leaves very little direct access available to private parties. Generally, individuals, both natural and legal, may find remedies to disputes arising from NAFTA mainly under the national law of their country. This arrangement is important in two respects. First, in the absence of legal institutions under NAFTA, there is no international forum in which to bring complaints. 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), ICSID's "Additional Facility," and the 1957 United Nations Commission...
sion on International Trade Law (UNCITRAL).\textsuperscript{109} 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.\textsuperscript{110} In addition, NAFTA’s Chapter Nineteen on anti-dumping and countervailing duty effectively provides for private party direct access.\textsuperscript{111} Direct access, thus, largely remains a privilege reserved to the Parties to NAFTA, and hence, only indirectly to the nationals of the Parties.\textsuperscript{112}

Second, since NAFTA is not a self-executing treaty in the United States or in Canada,\textsuperscript{113} access to U.S. and Canadian law cannot be equated with access to the law of NAFTA. As the goals of NAFTA are narrowly focused on trade\textsuperscript{114} and not on the harmonization of laws designed to directly affect those operating in the market,\textsuperscript{115} 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 is therefore 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. Second, given the economic disparity between big and small businesses, the absence of private party direct access results in inequality before the law, for the former can more readily compensate for lack of legal remedies through economic strength.\textsuperscript{116} 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 contrast, American private parties


\textsuperscript{110} See infra part VII A.

\textsuperscript{111} See infra part VII B.

\textsuperscript{112} In the case of investment, direct access is also indirectly reserved to non-nationals of any of the Parties.

\textsuperscript{113} Mexico is the only Party to incorporate NAFTA into its national laws. See Symposium, supra note 25, at 987 (Trevino presentation).

\textsuperscript{114} Specifically, NAFTA’s goals focus on 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. See NAFTA, supra note 4, pmbl.


\textsuperscript{116} See Miller, supra note 15, at 1318–20.
involved in such disputes, do not enjoy direct access to the other Party's judiciary or to any of its other forms of ADR. Instead, they depend on the U.S. government to represent them before the other Member State. Yet, the indirect nature of the access is compensated for by the power of Section 301 of the U.S. trade law.117 Section 301 is applicable where the United States believes another trading partner is using offending trade measures or practices.118

The Section 301 process can be invoked in two ways: (1) by petition on the part of a party, or (2) upon the initiative of the U.S. Trade Representative, who considers the competing interests at issue that are allegedly harmed by unreasonable foreign trade practices.119 Once initially approved, the petition proceeds through a set of hearings.120 If the petition is sustained, the Section 301 process concludes with mandatory U.S. retaliatory action for unjustifiable practices and violations of trade agreements121 and discretionary retaliatory action against such "non-unjustifiable" behavior.122 At the end of this open and public process, a government report, which can be further used by the private party to lobby its case, is issued.123

Consequently, American private parties are armed with a powerful tool of influence to lobby their government to protect their interests when they are involved 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 subsequent action by the U.S. Trade Representative, it is a remedy nonetheless, accommodating the American party. This lobbying ability affords substantial protection to the American private party particularly when considering the relative sizes of the American, Canadian, and Mexican economies. Section 301, however, does not assist in compromising the international dispute, but rather escalates it, and in this sense, cannot be perceived as a just remedy.

118 The section has been labelled as "aggressive unilateralism" because its operation enables the United States to defy unilaterally 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 (1994) [hereinafter Bayard & Elliott].
119 "Unreasonable" and "unjustifiable" were variably interpreted at the different evolutionary stages of Section 301. See id. at 29-31.
120 See Bayard & Elliott, supra note 118, at 29-30.
121 Presidential discretion may waive this provision. See id. at 45-49.
122 Id.
123 Id.
In contrast, Canadian private parties do not have access to remedies comparable to those provided by U.S. section 301. 124 Canadian private parties may only 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 an imbalance, the private party right to remedy under NAFTA is arguably of crucial importance to Canadians.

Unlike NAFTA, the EU's goals encompass social, cultural, environmental, and even political issues as part of the integration process. Embedded in a customs union, achievement of these goals is enhanced in the harmonization of trade law; enforceability is secured through the device of "direct effect," whereby individuals enjoy direct access to EU law via their national courts. The EU has thus been evolving into a quasi-federal legal system where "constitutional" judicial review and an appellate court system are available at the highest level, namely the ECJ. Due to a persisting lack of clarity separating the jurisdiction of the EU courts from the national courts, gaps in private party access to remedies still exist. These gaps can be bridged only by the private party's invocation of national litigation in order to gain indirectly access to the EU courts. 125 There remains, however, a large body of non-direct effect law which gives rise to disputes between individuals and EU 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 EU legal recourse through EU institutions, including litigation for final judgment.

In addition to providing EU dispute resolution institutions, access to EU remedies 126 is determined according to the distinction between

124 Nor do Canadians have the comparable access to NAFTA through local institutions available in Mexico. See Symposium, supra note 25, at 987 (Trevino presentation).

125 These include the following EC 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 (defense of legality); Article 172 (appeals, for instance against fines); Articles 178 and 215(2) (regarding claims alleging non-contractual liability); Article 93(2) (appeals against decisions concerning state aids). See TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C 224) 1, (1992), [1992] 1 C.M.L.R. 573 (1992), arts. 175, 177(b), 184, 172, 178, 215(2), 93(2) [hereinafter EC TREATY].

126 Access to national courts is direct, while access to Community courts may be either directly or indirectly obtained.
types of EU legislation. Regulations create rights and obligations which are directly and uniformly applicable within the EU both to the Member States and to the individual nationals. There is disagreement, however, regarding the extent to which regulations create individual and enforceable rights in the national courts. Unlike regulations, directives are not directly integrated within the Member States' national law, but call upon the Member States to adapt national law to the common standards laid down by the EU institutions. They are, therefore, focused mainly on the legal relationship between the EU and the Member State. Consequently, directives generally do not create directly enforceable rights and obligations for individuals, although there are some important exceptions. Decisions, the third type of legislation, are measures 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 the implementation of legislation. Decisions are always directly applicable to those individuals to whom they are addressed and are true administrative acts. Such decisions under strict conditions (Article 173(4)), have traditionally provided the only opportunity for private party direct access to litigation in EU courts. As will be seen later, locus standi of private parties before the ECJ is determined by these distinctions and their interpretation in the evolving EU 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 inter-governmental and supranational institutions and a narrow scope of supranational jurisdiction for several reasons. First, the NAFTA drafters wished to make sure that the politi-

127 TOTH, supra note 58, at 55–61.
128 See id. at 57–60.
129 See id. at 61–64.
130 See id.
131 See id.
132 See TOTH, supra note 58, at 65–68.
133 See id.
134 This has changed since the Codorniu decision, which suggests that even a "true regulation" may be subject to attack by a private party if it is of individual and direct concern to that party. Case C-309/89, Codorniu SA v. Council, 1994 E.C.R. I-1879, [1995] 2 C.M.L.R. 561, 586–87 (1994).
135 See infra part VIII.
cal and economic inequality among the Parties would be neutralized in the post-agreement situation to make way for a new trilateral trade relationship among the United States, Canada, and Mexico. Also, notwithstanding the concern regarding the impact of imbalanced political and economic power, doubt prevailed among the drafters concerning the impartiality of the national courts in international dispute hearings. This sentiment explains their reluctance to employ litigation, and their 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 utmost regard for their national sovereignty. Based on previous experience, the NAFTA drafters believed that such a strategy held great promise because of success enjoyed under the United States-Canada Free Trade Agreement (FTA).

It is therefore reasonable to argue that the NAFTA dispute resolution mechanism reflects an adoption of the theory of ADR, as well as an extension of such procedures. This theory was founded on long-standing international trade experience evolving incrementally in the GATT, and subsequently improved and adopted by the FTA. The manner in which ADR was crafted into NAFTA, however, left little room for non-state parties to access dispute resolution directly 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. Robert F. Housman highlights direct access by the individual to the national courts of the Parties as the top ranking access in the NAFTA scheme. "[T]he strongest mechanism to achieve transnational justice" is provided in Article 1701(1) of Chapter Seventeen, the intellectual property rights (IPR) chapter, which ensures adequate judicial and administrative laws under each of the Parties' domestic laws, and allows for access to

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136 Factors of political and economic inequality include size of market and "developed" versus "developing country." See Johnson, supra note 78, at 2177–78.
137 Id. As pointed out earlier (supra section VI), however, this egalitarian approach does not apply to private parties, and at least leaves out those affected socially and laborwise. See also Miller, supra note 15, at 1316–17.
138 See Johnson, supra note 78, at 2178.
139 See id.
141 See Housman, supra note 71, at 532.
142 See id.
143 Id.
non-NAFTA IPR holders as well. Specifically, Article 1701 reads as follows:

Article 1701: Nature and Scope of Obligations.
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 legitimate trade. 144

When adding the consideration of equality under the law to this “hierarchy formula,” however, 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 second 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. 145 Below this level is non-binding arbitration, the level of consultation, mediation, and the issuance of non-binding reports. 146 Viewed from this perspective, the NAFTA has only one private party direct access mechanism which is provided for under Chapter Eleven on investment, representing NAFTA’s major contribution to the “equalization” of state and non-state actors. In addition to the importance of private party direct access, the provision mandating 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. 147 As mentioned earlier, NAFTA’s approach is sectoral, and the access question is therefore dealt with on a sectoral basis. Since investment activity can be carried out in a variety of economic sectors, however, its provisions are horizontally applied across the NAFTA board. Consequently, direct access to ADR through the investment chapter indirectly allows for direct access in other areas as well, such as transportation, telecommunications, and automobiles.

A. Chapter Eleven

Chapter Eleven is the Investment Chapter and Section B is its dispute resolution component. 148 When signed, “it [was] the only provi-

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144 NAFTA, supra note 4, art. 1701.
145 For the various ADR mechanisms, see Johnson, supra note 78, passim.
146 See id.
147 See NAFTA, supra note 4, art. 1130; Joint Working Group, supra note 102, at 835.
148 See NAFTA, supra note 4, arts. 1115–38.
sion in any of the world's major trade agreements which permit[ted] private investors to take governments to binding arbitration over violations of their treaty obligations." It has no counterpart in the FTA, and generally redefines the Calvo Doctrine.

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. Section A, which precedes the dispute resolution Section B, provides a list of obligations which, in the event of failure of compliance, are considered causes of action allowing a private party to file a claim for binding arbitration. The possible causes of action are as follows:

—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 the better of national treatment or most-favored-nation treatment;
—Failure by the host government to accord a foreign investor a minimum standard of treatment under international law;
—Imposition by the host government of specific performance requirements such as minimum export levels, domestic content rules, preferences 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;

149 Bodie, supra note 54, at 162. It also is the first time that Canada and Mexico have bound themselves in an international agreement allowing for arbitration between themselves and a foreign national. See id.; see also Harry B. Endsley, Dispute Settlement Under the CFTA and NAFTA: From Eleventh-Hour Innovation to Accepted Institution, 18 HAST. INT’L & COMP. L. REV. 659, 663 (1995).

150 See Endsley, supra note 148, at 688; Manning-Cabrol, supra note 1. Study of this effect is beyond the scope of this article.

151 My analysis of Chapter Eleven is based largely on Gary N. Horlick & F. Amanda DeBusk, Dispute Resolution under NAFTA, 10 J. INT’L ARB. 51 (1993); Endsley, supra note 148; PATERSON, supra note 22; Bodie, supra note 54; Daniel M. Price, An Overview of the NAFTA Investment Chapter: Substantive Rules in Investor-State Dispute Settlement, 27 INT’L LAW. 727 (1993). Other commentaries consulted will be mentioned where applicable.
—Failure by the host government to permit free transfers of profits, 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.152

As liberal as this list is, various factors, such as reservations declared under the Canadian and Mexican investment laws whereby Canada and Mexico have excluded certain types of legislation from obligations under Chapter Eleven, have circumscribed its scope.153

A supplement to the list of obligations is the list of conditions by which the investor must abide in order to advance a claim. Articles 1116 and 1117 provide that the investor, or a firm owned by the investor in the host country, must allege direct loss or damage incurred due to breach of a Section A obligation.154 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 should have known, of the alleged breach of NAFTA and the resulting damage.155 Article 1118 obliges the investor to attempt consultation and negotiation as a first step in dispute resolution, and thus avoids recourse to arbitration.156 Article 1119 requires the investor to serve notice of intent to submit a claim to arbitration at least 90 days before submitting it.157 Article 1120 provides further that the claim may be submitted only after six months have elapsed from the date of breach.158 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.159 Article 1122 requires

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152 In the quoted text, Endsley summarizes NAFTA Articles 1102(1), 1103(1), 1104, 1105, 1106(1), 1107(1), 1109(1)-(2), 1110(1) respectively. Endsley, supra note 149, at 687.
153 The argument that financial services are precluded is inaccurate as Chapter 14 on Financial Services does incorporate the Chapter 11 dispute resolution mechanism. See Endsley, supra note 149, at 688. 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. See NAFTA, supra note 4, art. 1138.
154 See NAFTA, supra note 4, arts. 1116, 1117. Certain provisions regarding government monopolies are also referenced in Chapter Fifteen on Competition Policy, Monopolies and State Enterprises. See id. at ch. 15.
155 See NAFTA, supra note 4, arts. 1116(2), 1117(2).
156 See id. at art. 1118.
157 See id. at art. 1119.
158 See id. at art. 1120.
159 See id. at art. 1121.
the governments of the Parties to provide advance consent to arbitration in order to prevent a host country from undermining the procedure.\textsuperscript{160} Canada has provided such consent by way of legislation.\textsuperscript{161}

The disputing investor may submit the claim for arbitration in one of the following three ways: (1) in accordance with ICSID rules provided that the investor's country and the host country are both parties to the Convention;\textsuperscript{162} (2) under the ICSID Additional Facility, which requires only one country to be a party to the Convention;\textsuperscript{163} or (3) before the \textit{ad hoc} arbitral tribunal in accordance with the UNCITRAL rules.\textsuperscript{164} Article 1123 provides for the establishment of a three-member arbitral tribunal.\textsuperscript{165} Each party to the dispute appoints one member to the tribunal and both agree on the presiding arbitrator.\textsuperscript{166} Article 1124 provides for an appointment procedure in the event the parties fail to reach an agreement.\textsuperscript{167} Article 1126 allows for the consolidation of multiple claims, and Articles 1127–1129 govern the communication of information to the non-involved Party and the enforceability of an award.\textsuperscript{168}

Important to private party direct access are the Article 1131 and 1132 provisions regarding the substantive law to be applied.\textsuperscript{169} The Articles specify that the guiding law for the arbitral tribunal must be in accord with NAFTA, the Commission’s interpretation of the agreement under Article 2001, and the applicable international law.\textsuperscript{170} While this enhances reliance on and the credibility of the process, the absence of a deadline for the resolution of an investment dispute by the arbitral

\textsuperscript{160}See NAFTA, \textit{supra} note 4, art. 1122.
\textsuperscript{161}NAFTA Implementation Act, \textit{supra} note 24.
\textsuperscript{162}See ICSID, \textit{supra} note 107: Neither Canada nor Mexico are parties to the ICSID, which excludes application of its arbitration rules under NAFTA for the time being.
\textsuperscript{163}See ICSID Additional Facility, \textit{supra} note 108. This procedure is available for use only in the event of the United States being the host government, or if a United States national is 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.
\textsuperscript{164}See New York Convention, \textit{supra} note 109.
\textsuperscript{165}See NAFTA, \textit{supra} note 4, art. 1123.
\textsuperscript{166}The question of the fees and expenses is also important as a factor in encouraging private party use of the process. Horlick \& DeBusk, \textit{supra} note 151, at 54.
\textsuperscript{167}NAFTA, \textit{supra} note 4, art. 1124.
\textsuperscript{168}Id. at arts. 1126–1129.
\textsuperscript{169}Id. at arts. 1131–1132.
\textsuperscript{170}Id.
tribunal may operate as a deterrent to private parties and discourage them from having recourse to this remedy.\textsuperscript{171}

Additionally, vesting private party direct access with tangible power depends on its enforceability and awards. Article 1136 provides that the panel’s decision is binding.\textsuperscript{172} Article 1136 states that the Parties undertake to enforce the award domestically.\textsuperscript{173} In the event of failure, the ICSID and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) or the Inter-American Convention on International Commercial Arbitration\textsuperscript{174} may be invoked under Article 1136.\textsuperscript{175} As a result, 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 has been questioned as a matter of \textit{de facto} norm creation.\textsuperscript{176} While this Article also allows for the opportunity to seek either revision or annulment of the award before enforcement is sought, Chapter Eleven itself is silent on challenges to panel decisions.\textsuperscript{177} The possibility of “appeal” remains subject to the rules of the relevant arbitral regime and thus possibility of appeal varies from case to case.\textsuperscript{178}

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

\textsuperscript{171} Horlick and DeBuck mention the length of the ICSID procedure as one among other factors for the infrequent use of the Convention. Horlick & DeBuck, \textit{supra} note 151, at 56. While there are deadlines dealing with the Party’s duties, or regarding the interpretative function of the Commission, NAFTA does not prescribe deadlines with regard to the tribunal decision. Similarly, the three international arbitral agreements do not provide any relevant limitations.

\textsuperscript{172} NAFTA, \textit{supra} note 4, art. 1136.

\textsuperscript{173} \textit{Id.}


\textsuperscript{175} Horlick & DeBuck, \textit{supra} note 151, at 56; NAFTA, \textit{supra} note 4, art. 1136.

\textsuperscript{176} Price argues that tribunals will probably consider decisions of other tribunals. Price, \textit{supra} note 151, at 735; NAFTA, \textit{supra} note 4, art. 1136.

\textsuperscript{177} See Horlick & DeBuck, \textit{supra} note 151, at 56.

\textsuperscript{178} \textit{Id.}
B. Chapter Nineteen

Besides Chapter Eleven, NAFTA provides for two other important ADR mechanisms. Chapter Nineteen (modeled after the FTA Chapter Nineteen), the anti-dumping and countervailing duty (AD/CVD) chapter, establishes 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."\(^{179}\) Despite the fact that this ADR process allows only for indirect private party access, it operates similarly to a fully direct process. Article 1904(5) stipulates that only an involved party may request a panel review, but that a Party must request a review when requested to do so by a private party.\(^{180}\) Thus, unlike Chapter Twenty, it provides for private party initiation of the process.

According to Rule 33(1) of the NAFTA Rules of Procedure for Article 1904 Binational Panel Reviews\(^{181}\) ("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.\(^{182}\) An "interested person" according to the 1904 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.\(^{183}\) Canada and the United States have already provided for such laws before NAFTA, and Mexico committed itself to amend its laws accordingly.\(^{184}\) The interested 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.\(^{185}\) The request being made, any interested person alleging an error either of fact or law regarding the investigating authority may file a Complaint.\(^{186}\) Also, the investigating authority and

\(^{179}\) Homer Moyer 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." Homer E. Moyer, Jr., Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort, 27 Int'l. Law. 707, 707 (1993).

\(^{180}\) See NAFTA, supra note 4, art. 1904(5).


\(^{182}\) 1904 Rules, supra note 181.

\(^{183}\) Id.

\(^{184}\) Horlick & DeBuck, supra note 151, at 59.

\(^{185}\) Bodie, supra note 54, at 94–97.

\(^{186}\) Id.
any other interested person not filing a Complaint may file a Notice of Appearance.187 Persons filing either a Complaint or a Notice of Appearance have the right to make representations to the panel and to participate fully in the proceedings.188

Chapter Nineteen's ADR mechanism also provides for the so-called "extraordinary challenge" exception to the non-reviewable and binding nature of the panel decisions.189 This procedure resembles judicial review in that it addresses issues of procedural unfairness in the conduct of proceedings.190 While any interested person in fact has access to the bi-national panel review mechanism, the initiation of the "extraordinary challenge" remains completely at the discretion of the Parties.191 Nevertheless, the interested person has the right to participate fully in the proceedings.192

Since NAFTA provides for minimal guidelines regarding harmonization and standardization of AD/CVD laws among the Parties governed by the World Trade Organization (WTO),193 it establishes the lowest common denominator, namely that the standard of review applied by the panel is that of the importing country.194 Speed of review is also an important concern in the Chapter's procedure195 and may be seen as a means to enhance access.196

187 Id.
188 Id.
189 Moyer, supra note 179, at 709.
190 See id.
191 NAFTA, supra note 4, art. 1904(13).
192 See id. The Extraordinary Challenge Committee (ECC) is "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 179, at 709; see also Paterson, supra note 22, at 3.9(b); Bodie, supra note 54, 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. See Bodie, supra note 54. The Joint Working Group is satisfied with the de facto private party access established in this chapter. See Joint Working Group, supra note 102, at 835.
193 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. The parties must be notified in advance of the change's enactment, 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. In Article 1903, NAFTA provides for the establishment of a bi-national panel to issue a declaratory opinion regarding the consistency of the change with Article 1902(2) and with any earlier panel decision if applicable. See NAFTA, supra note 4, arts. 1902(2), 1903.
194 See Moyer, supra note 179, at 708.
195 See id. at 716.
196 See Moyer, supra note 179, at 716–18.
C. Chapter Twenty

Chapter Twenty, entitled “Institutional Arrangements and Dispute Settlement Procedures,” is the institutional chapter of NAFTA.197 The institutions and procedures developed therein focus on cooperation between the Parties and are designed to assist them in avoiding conflict. For this purpose, Chapter Twenty establishes a sequential process of dispute resolution starting with consultation, but which may end in arbitration. This mechanism applies only to state-to-state disputes and precludes private party direct access or initiation. Article 2021 on Private Rights states 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.”198 Thus, it leaves the lobbying of the respective government as the only redress available to the individual. As discussed in Section VI of this article, this is, at best, indirect/representative access to justice, and discriminates against private parties where success in eliciting their government’s attention and support depends on differences in domestic legislation and avenues for access.199

D. The Side-Agreements

The two side agreements to NAFTA, on labor (NAALC)200 and on environmental cooperation (NAAEC),201 provide for limited private party access in their respective areas.202 As NAFTA only marginally addresses labor issues, Article 4 of the Labor accord contends with a requirement of the Parties to grant individuals access to administrative, quasi-administrative, judicial, or labor tribunals to enforce the domestic labor laws.203 Article 5 provides an equity and transparency requirement, as well as some due process rights.204 The NAAEC establishes a submission procedure205 available for private parties which must be ranked at the lowest end of the ADR scale for two reasons. First, it

197 See NAFTA, supra note 4, ch. 20. This chapter is tailored after, and expands upon, the FTA Chapter 18. See Endsley, supra note 149, at 676.
198 NAFTA, supra note 4, art. 2021.
199 Bodie, supra note 54, at 141.
200 See NAALC, supra note 29.
201 See NAAEC, supra note 30.
202 See NAALC, supra note 29, art. 6; NAAEC, supra note 30, art. 4.
203 Paterson, supra note 22, at 5.11(b)(iii).
204 Id.
205 NAAEC, supra note 30, arts. 14, 15, (and for an even weaker mode of access, art. 13).
results in a report on environmental law violations which may be made public at the discretion of the NAAEC Council.\textsuperscript{206} Second, this report has, at best, the power of sensitizing public opinion and embarrassing the Party violator. While generally presented as part of NAFTA, these agreements are true “side-agreements,” marginal both 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 adjudicatory 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.\textsuperscript{207} The right of appeal is a right not subject to any screening, and there is no need to obtain leave to appeal.\textsuperscript{208}

The judicial procedures provided by the EC Treaty are concentrated in Articles 169, 177, and 173.\textsuperscript{209} Article 169 gives the Commission the sole right to file proceedings regarding the non-, or deficient, implementation of Community law by Member States.\textsuperscript{210} Under Article 170, Member States also have the right to file such proceedings.\textsuperscript{211} These articles exclude the private party for both purposes of direct litigation and intervention.\textsuperscript{212} Under Article 177, the private party may be represented by the Member State which files a preliminary reference with the ECJ.\textsuperscript{213} The national court makes the reference.\textsuperscript{214} Both the parties to the action before that court and the Member State in which it is

\textsuperscript{206} Paterson, supra note 22, at 3.11(a)(iii).

\textsuperscript{207} See Brown, supra note 50, at 743–44.

\textsuperscript{208} See id. Grounds for appeal are comprised 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. See id. at 744, 746, 753.

\textsuperscript{209} See Amtenbrink, supra note 34, at 36, 37.

\textsuperscript{210} See id. at 36.

\textsuperscript{211} See id.

\textsuperscript{212} See id.

\textsuperscript{213} See id. at 36.

\textsuperscript{214} See Amtenbrink, supra note 34, at 37.
situated have the right to submit written and oral observations to the ECJ independently. This procedural device may be used to review the validity of Community legislation, as well as to protect private party rights arising from the Community's legal order against any obstructing national legislation. 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) 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.

Locus standi is thus narrowly defined, limiting access to the following situations: (1) where the private party is challenging the decision that is addressed to it, (2) where the “decision” is in the form of a “regulation,” or (3) where the decision which is addressed to another person is of “direct and individual concern.” As mentioned earlier, in light of the ECJ’s decision in the Codorniu case, this is no longer conclusive. A central bone of contention, this has drawn much criticism against the EU law. The main areas of criticism concern the (1) definition of “individual concern,” (2) the determination of “class of persons generally affected” versus “individualization,” (3) the definition of “direct concern,” and (4) the distinction between decisions addressed to the Member States and those addressed to private parties. As the EU law evolves, the Courts, and not the Council, have gradually 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.

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215 Id.
216 See id.
217 See id.
218 Formerly 173(2).
219 See Amtenbrink, supra note 34, at 37. The time limit is two months after enactment of the decision. BEBR, supra note 65, at 34 n.70.
221 Id.
222 See Amtenbrink, supra note 34, at 36.
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.\textsuperscript{223} In adjusting to this reality, a strong argument has been made in favor of expanding, if not totally removing, the \textit{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.\textsuperscript{224}

The range of issues raised by the legislative juxtaposition of the nature of the private person (whether a natural individual, a "legal person" such as companies and corporations, or interest and pressure groups in a "class action"); the nature of the legal act (regulation or decision, the correlated 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.\textsuperscript{225} As one author stated, "individuals are not exactly queuing at the door of the registry to file actions in the Court of Justice";\textsuperscript{226} only one significant case so far has been lodged individually by a natural person.\textsuperscript{227} The difficulty of access has been bypassed in a variety of ways. For instance, individuals have joined together to enhance their access.\textsuperscript{228} The recent Co-

\textsuperscript{223} See Harlow, \textit{supra} note 56, at 217.

\textsuperscript{224} See generally Harlow, \textit{supra} note 56, at 217–18. 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. \textit{Id.} at 239.

The most restrictive is to accord standing, or \textit{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 \textit{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 dissolution of \textit{locus standi}.

Arnull, \textit{supra} note 64, at 7. 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), \textit{see} Hjalte Rasmussen, \textit{Why is Article 173 Interpreted Against Private Plaintiffs?}, 5 EUR. L. Rev. 112 (1980).

\textsuperscript{225} 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 article. This must include a detailed review of the relevant European case law.

\textsuperscript{226} Harlow, \textit{supra} note 56, at 232.


\textsuperscript{228} Twenty-three individual fishermen joined together with forty-six more represented by an
The *Codorniu* case 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.230

Non-individuals such as companies and corporate bodies have used Article 173(4) to protect and promote their interests, employing a range of litigation strategies including the "repeat player" and the "saga" or the "big issue."231 As observed earlier regarding access to NAFTA, this ability sets non-individuals apart from the individual private party and creates a *de facto* situation of inequality in the EU. In the EU, this is true with respect to access to litigation. This deficiency can be overcome only partly by a less stringent standing law.232

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) proceedings.233 It has, for the first time, suggested the possibility of a private party to challenge a true regulation.234 The *Codorniu* decision, moreover, has lifted the inflexible requirement of bringing proceedings only against decisions, or having to show that a regulation was, in fact, a decision "in guise" of a regulation.235

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."236 The Court made clear, however, that these economic consequences must be of such a nature as to


229 Case C-309/89, Codorniu v. Council, 1994 E.C.R. I-1879, [1995] 2 C.M.L.R. 561 (1994). This is one of the last judgments of the ECJ before the transfer of all private party direct actions to the CFI.

230 Representative bodies are permitted standing in annulment proceedings in the context of dumping.

231 See Harlow, supra note 56, at 236–37.

232 Even the removal of *locus standi* will not suffice to overcome the impact of disparities in the availability of economic resources which play an equally important role in enhancing access in both transnational and domestic law. This has resulted in a demand for new and more legal aid provisions 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*, 14 DUBLIN U. L.J. 51, 62–64 (1992).


234 Id.

235 Id.

236 Id.
differentiate the applicant from all other persons affected by the contested provision. 237

First, the contested provision "must place the applicant at a disadvantage on the market or, in other words, affect its competitive position on the market." 238 Second, 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." 239 Consequently, the nature of the concern, and the requirement that it be an individual concern, appear to be the most serious obstacles to significant relaxation of the locus standi law. 240 The law currently in place is found in the ECJ definition of "individual concern" in the Plaumann judgment, 241 where the Court 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. 242

In 1996, the Intergovernmental Conference on the Amendment of the Treaty on European Union began to review the list of Community acts. 243 It was expected to introduce some hierarchy of norms in the hope of fostering certainty and harmonization, and of improving performance. The question of locus standi of private parties, one of the more complicated laws of the EU, will undoubtedly represent a crucial issue on the Conference's agenda.

237 Id.
239 Id.
240 Unlike other commentators, Neuwahl raises the argument that an overbroad relaxation of the standing rule may create serious problems that may lead to considerable uncertainty, particularly in the economic context. See Neuwahl, supra note 11, at 18.
242 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 to concentrate on individual concern for the purpose of anti-dumping measures. This subject is however beyond the scope of this article.
243 Id. at 17.
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 an economic union. 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. Both NAFTA and the EU, however, are regional trade agreements and, as such, impact the lives of the people living within the Member States. This, in itself, justifies a comparison.

The NAFTA-model FTA, while more limited in purpose than the customs union (CU), is therefore likely to be more diversionary. Consequently, the FTA may be more limited than a CU because it is a less economically important phenomenon. A FTA, such as NAFTA, however, is at least as economically significant as the EU customs union.

Designed to establish trade regimes, both the EU and 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 an endeavor. 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. Rather, it suggests that individuals secure their position in well designed contracts when engaging in trade not involving governmental action. This, however, leaves the non-contractual third party vulnerable to the impact of the inter-governmental and multilateral regime. In this respect especially, the broader, principled approach of the EU offers a greater advantage to the private party, both to the national of the EU and to the non-national party trading with the EU.

Private party direct access to justice is purely an economic/trade issue for NAFTA. In contrast, private party direct access for the EU.

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244 Abbott II, supra note 115, at 919.
245 Id.
246 See id.
247 See Miller, supra note 15, at 1367, 1319.
248 See id. Miller 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. See id.
encompasses economic and human rights issues. While the NAFTA stands for a decentralized regime, the EU represents the model of a centralized and harmonized economic area. The comparison between the approaches and provisions in the two regional arrangements may help answer the question concerning "the extent to which decentralization and the absence of approximation measures" can successfully proceed. Such success depends on effective dispute resolution. Abbott, however, dismisses the possibility of weak regional dispute settlement institutions, which are unable to enforce their decisions on the member Parties and to carry out their mandate effectively.

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

A strong argument can be made in recommending the expansion of NAFTA's Chapter Eleven dispute resolution mechanism to other areas. Since the Parties agreed on private party direct access in the field of investment—an area traditionally of utmost importance in domestic law—it seems most likely that they are capable to agree on private party direct access for the settlement of disputes in other trade sectors which attract investors.

The direct initiation of the arbitration process is the ultimate goal. Under both trade regimes, however, indirect initiation also plays an important role. Under NAFTA's Chapter Nineteen, the government must represent the requesting private party. 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,

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249 Abbott I, supra note 16, at 123.

250 "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 grant." Abbott II, supra note 115, at 944-45. The limited access provision to private parties can be read into this weakness because Abbott bases his observation on a comparison with the EU.
while the private party in the EU enjoys dual 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 in the application of the law in two ways. First, an uncertain panel under NAFTA's Chapter Eleven may request the Free Trade Commission's 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,\(^{251}\) will represent a step in that direction.

Private party direct access, whether to arbitration or to formal adjudication, represents an important step in enhancing trust in the established trade regime. The extent to which NAFTA offers this access is presently limited to one or two trade sectors. In this respect, the EU is significantly more advanced, but has also enjoyed a significantly longer history in which to experiment with this issue. It remains to be seen, however, if this difference will affect the economic success of both the EU and NAFTA.

\(^{251}\) See Johnson, supra note 78.