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Regional Courts and *locus standi* for Private Parties: Can the CJEU Learn Something from the Others?

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Abstract

The Court of Justice of the European Union (CJEU) has taken a restrictive approach when interpreting the standing requirements applicable to private parties wanting to challenge EU legal measures. The Lisbon Treaty introduced some change, but access to the Court remains overly restricted for private parties. The European Union is by far the most successful regional integration community there is, and it has been widely imitated. This article seeks to explore and compare the standing requirements applicable to private parties before the CJEU and other regional courts in order to see if the CJEU has something to learn from the others.

Keywords

locus standi – standing requirements – access to court – regional courts – regional integration

I Introduction

From its early beginnings as the European Coal and Steel Community in 1952, the regional economic integration community known today as the European Union (EU) has developed into a supranational entity with competences conventionally attributed to statehood only. Despite the current economic problems, the European integration project is a widely successful example of regional integration, and has been a source of inspiration for many other

regional integration efforts.¹ With executive competences being exercised at a level beyond that of the traditional nation state, national systems of judicial review will in many cases be unable to provide legal and natural persons (hereinafter referred to as “private parties”) the remedy they seek against measures taken by supranational institutions. Allowing private parties access to regional courts can thus be seen as an attempt to extend the checks and balances of a national legal system to the supranational level.² In the European Union, private parties have two possibilities to challenge the legality of EU measures, the action for annulment contained in Article 263(4) of the Treaty on the functioning of the European Union (TFEU), and the preliminary reference procedure provided for in Article 267 TFEU. Whereas the action for annulment enables private parties who have standing to challenge the legality of a measure directly before the Court of Justice of the European Union (CJEU), the preliminary reference procedure provides an “indirect” route to the CJEU, via the national courts, as the latter do not have competence to rule on the validity of EU law,³ and thus should refer any challenges to EU measures to the CJEU for determination.

The European Court of Justice stated already in 1986 in *Les Verts*⁴ that “the Treaty established a complete system of legal remedies and procedures”, but more than 25 years later, shortcomings in this supposedly complete system are still not hard to identify. The standing requirements provided under Article 263(4) TFEU for private parties continue to be restrictive, despite the minor changes introduced by the Lisbon Treaty. Challenging the legality of a EU measure in national courts instead is dependent on the correct application of EU law and the preliminary reference procedure by the national judge, of which there are no guarantees. This may create situations where private parties are affected by EU measures, and have valid arguments against the legality of the measures, but are in effect denied a real access to justice.⁵

1 Julia Lehmann, “Regional Economic Integration and Dispute Settlement Outside Europe: a Comparative Analysis”, 7 *International Law FORUM du droit international* (2005), 54, 55.

2 Karen J. Alter, “Private Litigants and the New International Courts”, 39 *Comparative Political Studies* (2006), 22.

3 Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

4 Case 294/83 *Parti écologiste “Les Verts” v European Parliament* [1986] ECR 1339, para. 23.

5 Especially in relation to NGOs, see, *inter alia*, Cases T-585/93 *Stichting Greenpeace Council (Greenpeace International) and Others v Commission* [1995] ECR II-2205 and C-321/95 P *Stichting Greenpeace Council (Greenpeace International) and Others v Commission* [1998] ECR I-1651.

From the viewpoint of effective judicial protection,⁶ the current situation is highly unsatisfactory and has been subject to criticism.⁷ The European Union is perhaps the most advanced and developed regional integration community the world has ever seen, but it is evident that the system of judicial review of the community's actions is far from perfect.

In the light of this situation, and working from the presumption that the current system in the EU is unsatisfactory in relation to effective judicial protection, as a result of the strict standing requirements in Article 263(4) TFEU, and the uncertainties of the preliminary reference procedure, the next logical step is to ask how it can be improved – is there a better solution to be found?

As mentioned above, the European integration project has served as an inspiration to other regions in the world, and a number of comparable regional integration communities (hereinafter referred to simply as “communities”) have been established during the last decades across the globe, especially in Latin America and Africa. Many of these communities also incorporate their own courts, many of which bear close resemblance to the Court of Justice of the European Union,⁸ to the extent that case law of the CJEU may be cited in their rulings.⁹ Could it be that the European Union, by far the most developed regional integration community there is, is in fact lagging behind its “imitators” in providing access to justice for private parties? Have any of the other courts more liberal *locus standi* requirements for private parties to challenge the actions of the community, resulting in a more complete system of judicial protection?

This paper tries to answer these questions by examining in detail the legal framework regulating access for private parties to other comparable regional courts having judicial review powers, pointing out similarities and differences with the CJEU. First, in Section 2, the methodology behind the selection of

6 For an introduction on the principle of effective judicial protection, see Anthony Arnull, “The principle of effective judicial protection in EU law: an unruly horse?”, 36 *European Law Review* (2011), 51.

7 See, *inter alia*, Albertina Albors-Llorens, “The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?”, 62 *Cambridge Law Journal* (2003), 72, and more recently, on the status after the Lisbon Treaty, Steve Peers and Marios Costa, “Court of Justice of the European Union (General Chamber), Judicial review of EU Acts after the Treaty of Lisbon; Order of 6 September 2011, Case T18/10 *Inuit Tapirüt Kanatami and Others v. Commission*; and Judgment of 25 October 2011, Case T262/10 *Microban v. Commission*, 8 *European Constitutional Law Review* (2012), 82.

8 See Karen J. Alter, “The Global Spread of European Style International Courts”, 35 *West European Politics* (2012), 135.

9 *Ibid.*, p. 146.

which courts to be included in the comparison is explained. In Section 3, the relevant treaty provisions and case law highlighting the *locus standi* rules and indirect access possibilities for private parties of these courts are presented. On this basis, in Section 4, a comparative analysis of the system of private party access is conducted. In Section 5, as a conclusion, the findings from the comparative analysis are applied to see if the EU can learn something from the other regional integration communities in securing effective judicial protection.

II Research Selection

Which courts are comparable to the CJEU, from the perspective of judicial review? In order to identify other regional courts with powers of judicial review, thus comparable to the CJEU for present purposes, the selection is based on the classification done by Karen J. Alter in “*The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review*”.¹⁰ The selection is restricted to international courts of regional integration communities (hereinafter “regional courts”) that have some power of judicial review, i.e. powers of administrative or constitutional review in Alter’s classification. This choice is made in the light of the fact that judicial review in the European Union has parallels with both administrative review and constitutional review. One can, for example, challenge the legality of a decision taken by the Commission, a clear example of administrative review. But raising a plea of illegality against a legislative instrument, based on an alleged incompatibility with the Treaties, clearly has more in common with constitutional review. Thus, only courts having administrative and/or constitutional review powers have been selected for the comparison with the CJEU.¹¹ For these regional courts, standing for private parties is a core issue as it can be

10 Karen J. Alter, “The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review”, *Buffett Center for International and Comparative Studies Working Paper Series*, Working Paper No. 12–002 July 2012. Available at: <http://www.bcics.northwestern.edu/documents/workingpapers/Buffett-12-002-Alter.pdf>.

11 The following courts will be examined further: Court of Justice of the European Union, EFTA Court, Court of Justice of the Andean Community, Central American Court of Justice, Caribbean Court of Justice, Court of Justice of the Economic Community of West African States (ECOWAS), Court of Justice of the West African Economic and Monetary Union (WAEMU), Court of Justice of the Central African Economic and Monetary Community (CEMAC), Court of Justice of the Common Market for Eastern and Southern Africa (COMESA), and the Court of Justice of the East African Community.

seen as a prerequisite for a court to successfully fulfil a judicial review role.¹² Regional courts that are not operational, or do not have powers of judicial review, have not been included in the present comparison.¹³

III Legal Framework

In this section the legal framework of the different courts concerning access to judicial review for private parties is presented, with a focus on the underlying treaties and statutes, as well as any relevant case law. The presentation is limited to indirect and direct procedures allowing challenges to measures of the respective integration communities before their courts, and *locus standi* rules for other procedures are not to be explored in detail. The presentation starts with the yardstick of the comparison, the Court of Justice of the European Union, followed by other European courts. Subsequently, the standing rules of the selected American courts are presented, followed by those applicable before the different African regional courts.

A *Court of Justice of the European Union*

The possibility for private parties to directly challenge measures of the European Economic Community, later the European Community and currently the European Union, was catered for from the outset in Article 173(2) of the Treaty establishing the European Economic Community. With the Maastricht Treaty, the provision changed to Article 230(4) of the Treaty establishing the European Community, but the substance remained the same until the Lisbon Treaty and the new Article 263(4) TFEU:

Any natural or legal person may [...] institute proceedings against an act addressed to that person or which is of direct and individual concern to

¹² Alter, *supra* note 2, at 23.

¹³ These include the following courts: WTO Dispute Settlement Body, CIS Economic Court, Mercosur Dispute Settlement System, ASEAN Dispute Settlement Mechanism, European Court of Human Rights, Court of the Arab Maghreb Union, Court of Justice of the Economic Community of Central African States, Benelux Court, Tribunal of the Southern African Development Community, African Court of Justice and the Court of Justice of the Organization for the Harmonization of African Business Law. Pure human rights courts have also not been included in the comparison, such as the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court on Human and Peoples' Rights.

them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

The last limb of the provision was introduced by the Lisbon Treaty, which otherwise remained unchanged. According to Article 263(4) TFEU, two distinct requirements must be met in order to have standing to challenge an EU measure: direct concern and individual concern. “Direct concern” is a relatively clear requirement: according to the Court, in order to have direct concern, the applicant must show that the measure directly affects his or her legal position.¹⁴ “Individual concern” is, instead, a more ambiguous requirement. Its interpretation became an issue for the European Court of Justice (ECJ) in the 1962 case of *Plaumann*,¹⁵ where the Court stated that:

persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.

This restrictive interpretation severely limits the possibility for private parties to challenge EU measures other than decisions addressed directly to them, unless they belong to a closed category of stakeholders,¹⁶ or if the measure is in substance a decision, if not in form,¹⁷ or if the measure differentiates the applicant from all other stakeholders.¹⁸

Almost forty years after *Plaumann*, the Court of First Instance (CFI) introduced a broader interpretation of “individual concern” in *Jégo-Quéré*,¹⁹ but this was rejected by the ECJ on appeal,²⁰ who kept to the *Plaumann* formula.

14 See, *inter alia*, Case T-289/03 *British United Provident Association Ltd (BUPA) and Others v Commission* [2008] ECR II-81, para. 81 and Case T-262/10 *Microban v Commission* [2011] ECR II-07697, para. 27.

15 Case 25/62 *Plaumann & Co. v Commission* [1963] ECR 95, para. 10.

16 See, *inter alia*, Cases 41–44/70 *International Fruit Company BV v Commission* [1971] ECR 411 and Case C-519/07 P *Commission v Koninklijke Friesland Campina NV* [2009] ECR I-8945.

17 See, *inter alia*, Cases 789 and 790/79 *Calpak SpA and Società Emiliana Lavorazione Frutta SpA v Commission* [1980] ECR 1949.

18 Case C-309/89 *Codorniu SA v Council* [1994] ECR I-1853.

19 Case T-177/01 *Jégo-Quéré & Cie SA v Commission* [2002] ECR II-2365.

20 Case 263/02 P *Commission v Jégo-Quéré & Cie* [2004] ECR I-3425.

In another case, *UPA*,²¹ the ECJ discarded the arguments of the Advocate General (AG) in favour of broadening the interpretation, ruling that it was for the Member States, not the Court, to initiate any reform of the law on *locus standi*.²²

And some reform was indeed introduced by the Lisbon Treaty, as the last limb of Article 263(4) TFEU removes the need for individual concern regarding regulatory acts not entailing implementing measures. The latter qualification rules out directives, which necessarily have to be implemented by the Member States. But no definition of “regulatory act” is provided in the treaties, which only use the terms “legislative act” for legal acts adopted by a legislative procedure (Article 289(3) TFEU) and “non-legislative act” for legal acts adopted by the Commission (Articles 290(1) and 291(2) TFEU). The General Court has so far discussed the interpretation of the new provision twice, in *Inuit*²³ and *Microban*,²⁴ where the Court defined regulatory acts as “all acts of general application apart from legislative acts”.²⁵ Following this interpretation, the new wording in Article 263(4) thus eliminates the need for individual concern in relation to non-legislative acts only. This will make it easier to challenge implementing and delegated acts adopted by the Commission, but the strict *Plaumann* formula still applies to legislative acts such as Regulations adopted by the Council and Parliament.²⁶

The preliminary reference procedure, as currently laid down by Article 267 TFEU, provides an alternative route for private parties wanting to challenge the legality of EU measures. The procedure obliges national courts to ask the CJEU for a preliminary ruling if they are seized with a question concerning the validity of EU measures and if they consider “that a decision on the question is necessary to enable it to give judgment”.²⁷ Since the ECJ held in *Foto-Frost*²⁸ that national courts are not competent to rule on the validity of EU measures,

21 Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677.

22 Damian Chalmers, *European Union Public Law* (2010), 424.

23 Case T-18/10 *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* [2011] ECR II-05599.

24 Case T-262/10 *Microban v Commission* [2011] ECR II-07697.

25 Case T-18/10 *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* [2011] ECR II-05599, para. 56.

26 For a discussion on the situation after Lisbon with regard to *locus standi* for private parties, see Haakon Roer-Eide and Mariolina Eliantonio, “The Meaning of *Regulatory Act* Explained: Are There Any Significant Improvements for the Standing of Non-Privileged Applicants in Annulment Actions?”, *German Law Journal* (2013), forthcoming.

27 Art. 267(4) TFEU.

28 Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

national courts should refer any questions in effect concerning the legality of an EU measure to the CJEU. As such, the preliminary reference procedure can provide private parties who want to challenge an EU measure with “indirect” access to the CJEU, through national courts. Although the indirect route provided for by Article 267 TFEU supplements the direct route in Article 263(4) TFEU and thus enhances the possibilities for judicial review, it does not provide any guarantees. This was illustrated by Advocate General Jacobs in his opinion in *UPA*,²⁹ where he summarized why the preliminary ruling procedure is inadequate to ensure effective judicial protection: firstly, the national courts have discretion as to if and how a reference is made and can rephrase the applicant’s question; secondly, the indirect route might be unavailable if there are, for example, no implementing measures that are challengeable before national courts; thirdly the indirect route entails time and higher costs for the applicant, and interim measures might not be available.

B *EFTA Court*

The EFTA (European Free Trade Association) Court is competent to hear actions concerning the EFTA surveillance procedure, appeals to competition law decisions taken by ESA (EFTA Surveillance Authority), and settlement of disputes between EFTA States.³⁰ ESA is an executive organ of the European Economic Area (EEA) in relation to the participating EFTA States, and has some powers comparable with those of the EU Commission, especially regarding competition and state aid law.³¹ When discussing judicial review of supranational measures in the EFTA pillar of the EEA, decisions of ESA will thus be the focus of attention.

Article 36(2) of the EFTA Surveillance and Court Agreement (SCA)³² is the “equivalent” of Article 263(4) TFEU, and states that:

Any natural or legal person may, under the same conditions, institute proceedings before the EFTA Court against a decision of the EFTA

29 Opinion of Mr Advocate General Jacobs delivered on 21 March 2002 in Case C-50/00 P – *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, para. 102.

30 Art. 108(2) of the Agreement on the European Economic Area (EEA Agreement), OJ L 1, 3.1.1994, p. 3.

31 On ESA’s competence, see Art. 5 of the Agreement Between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement), OJ L 344, 31.1.1994, p. 3.

32 OJ L 344, 31.1.1994.

Surveillance Authority addressed to that person or against a decision addressed to another person, if it is of direct and individual concern to the former.

Formally, the requirement of direct and individual concern in order to have standing is thus the same as in the EU. But the question remains whether the provisions are also interpreted in the same way. Article 3(2) SCA requires that the EFTA Court “shall pay due account to the principles laid down by the relevant rulings”, when interpreting provisions of the EEA Agreement and the Surveillance and Court Agreement that are identical in substance to provisions in the EU treaties. Article 36(2) SCA can in that regard be said to be identical to Article 263(4) TFEU, as they utilize the same wording (“direct and individual concern”) and the EFTA Court has, in several instances, held that this goal of homogeneous interpretation is also applicable in relation to *locus standi* for actions of annulment.³³ Although due account is not the same as binding, the EFTA Court pursues a goal of homogeneity, and follows the case law of the CJEU where a provision or expression of EEA law is identical in substance to a provision or expression of EU law.³⁴ This is also true when it comes to *locus standi* to bring actions for annulment, clearly shown by the fact that the EFTA Court referred to *Plaumann*³⁵ when determining whether legal and natural persons have standing to challenge decisions of ESA under Article 36(2) SCA.³⁶

33 E-2/94 – *Scottish Salmon Growers Association Ltd v EFTA Surveillance Authority*, (http://www.eftacourt.int/uploads/tx_nvcases/2_94_Judgment_EN.pdf), paras. 11 and 13; Case E-2/02 – *Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation v ESA* (http://www.eftacourt.int/uploads/tx_nvcases/2_02_Judgment_EN.pdf), paras. 39–40; Case E-5/07 – *Private Barnehagers Landsforbund v EFTA Surveillance Authority* (http://www.eftacourt.int/uploads/tx_nvcases/5_07_Judgment_EN.pdf), para. 47.

34 Carl Baudenbacher, *The EFTA Court, Legal Framework and Case Law* (3rd ed., 2008), 15–16.

35 Case 25/62 *Plaumann & Co. v Commission* [1963] ECR 95.

36 Cases E-2/94 – *Scottish Salmon Growers Association Ltd v ESA* (http://www.eftacourt.int/uploads/tx_nvcases/2_94_Judgment_EN.pdf); E-4/97 – *Norwegian Bankers' Association v EFTA Surveillance Authority* (http://www.eftacourt.int/uploads/tx_nvcases/4_97_Judgment_EN_01.pdf); E-2/02 – *Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation v ESA* (http://www.eftacourt.int/uploads/tx_nvcases/2_02_Judgment_EN.pdf); E-9/04 – *The Bankers' and Securities Dealers' Association of Iceland v ESA* (http://www.eftacourt.int/uploads/tx_nvcases/9_04_Judgment_EN.pdf); E-5/07 – *Private Barnehagers Landsforbund v ESA* (http://www.eftacourt.int/uploads/tx_nvcases/5_07_Judgment_EN.pdf).

In the *Bellona*³⁷ case, the applicants, *inter alia*, a Norwegian environmental NGO (non-governmental organization), referred to the opinion of AG Jacobs in *UPA* in its arguments and argued that the EFTA Court was not bound to follow the EU case law, however the Court concluded that the applicants did not have standing as they were not adversely affected by the contested measure.³⁸ The threshold for legal and natural persons to have standing before the EFTA Court is thus in practice the same as before the CJEU, as both courts apply *Plaumann*. However, one should take into consideration that, after the Lisbon Treaty, there is no longer a need to show individual concern in order to challenge regulatory acts before the CJEU. The wording of the EFTA SCA has not been amended accordingly, and individual concern is still a requirement in order to have standing to challenge a Decision of ESA. By applying *Inuit* and *Microban*, comparable measures in the EU would fall into the category of “regulatory acts”, eliminating the need for individual concern. Unless the EFTA Court reinterprets Article 36(2) SCA more broadly in light of the recent developments, the result is that the EFTA Court will have stricter standing requirements for private parties than the CJEU.

As for indirect access to the EFTA Court, there is no preliminary reference procedure as provided for by Article 267 TFEU. Article 34 SCA does, however, provide for an advisory opinion procedure, but there are two significant differences between this procedure and the preliminary reference procedure: the opinions of the EFTA Court are not binding (as they are advisory only), and there is no obligation for national courts to refer, including for courts of last instance. Furthermore, Article 34 SCA only provides jurisdiction in relation to the interpretation of the EEA Agreement and not to review the legality of EEA measures. However, at least in the opinion of ESA, *Foto-Frost* implies that only the EFTA Court, not national courts, can rule on the legality of its decisions, and that national courts intending to overrule a decision of ESA must ask the EFTA Court for an advisory opinion.³⁹ Furthermore, the Court has construed its interpretive jurisdiction under Article 34 SCA broadly, finding that it is within its jurisdiction under that procedure to assess the competences

37 Case E-2/02 – *Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation v ESA* (http://www.eftacourt.int/uploads/tx_nvcases/2_02_Judgment_EN.pdf).

38 Carl Baudenbacher, “The EFTA Court, the ECJ, and the Latter’s Advocates General – a Tale of Judicial Dialogue”, in Anthony Arnall, Piet Eeckhout & Takis Tridimas (eds.), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (2008), 90, 118.

39 EFTA Surveillance Authority, *Notice on the co-operation between the EFTA Surveillance Authority and the courts of the EFTA States in the application of Articles 53 and 54 of the EEA Agreement*, OJ C 305, 14.12.2006, p. 19.

of the EEA Joint Committee,⁴⁰ in effect making itself competent to perform judicial review of alleged *ultra vires* actions under the advisory opinion procedure. Also, a recent ruling by the EFTA Court seems to suggest that the duty of loyalty under Article 3 EEA Treaty might imply that national courts of last resort should ask for an advisory opinion,⁴¹ stretching the limits of the advisory opinion procedure.⁴²

C Court of Justice of the Andean Community

The European Court of Justice has been a model for the Court of Justice of the Andean Community (CJAC),⁴³ which is also reflected in the rules governing judicial review in the CJAC Treaty. Article 17 of the revised 1996 Treaty,⁴⁴ *inter alia*, gives the court judicial review powers, and creates a direct action for annulment of Community measures.⁴⁵ Article 17 confers standing on the Council, the Commission, the General Secretariat and natural or legal persons in accordance with Article 19 of the Treaty, which states:

Natural or artificial persons may bring a nullity action against the Decisions taken by the Andean Council of Foreign Ministers or the Andean Community Commission, General Secretariat Resolutions,

40 Case E-6/01 – *CIBA Speciality Chemicals Water Treatment Ltd and Others v The Norwegian State, represented by the Ministry of Labour and Government Administration* (http://www.eftacourt.int/uploads/tx_nvcases/6_01_Judgment_EN.pdf), para. 23.

41 Case E-18/11 – *Irish Bank Resolution Corporation Ltd v Kaupping hf*, (http://www.eftacourt.int/uploads/tx_nvcases/18_11_Judgment_EN.pdf), para. 58.

42 Benedikt Pirker, “Case E-18/11: Small steps towards a preliminary reference procedure for the EEA EFTA countries?”, *European Law Blog* (16 January 2013), retrieved from <http://europeanlawblog.eu/?p=1450>.

43 Carl Baudenbacher, “Judicialization: Can the European Model Be Exported to Other Parts of the World?”, 39 *Texas International Law Journal*, 381, 392.

44 Treaty Creating the Court of Justice of the Cartagena Agreement, as amended by the Cochabamba Protocol, Cochabamba 1996 (CJAC Treaty 1996). Consolidated version retrieved in English from <http://www.comunidadandina.org/en/TreatiesLegislation.aspx?id=14&title=treaty-creating-the-court-of-justice-of-the-cartagena-agreement&accion=detalle&cat=1&tipo=TL>.

45 *Acción de Nulidad*, referred to as “nullity action” in the English translation. For more on the different actions before the ATJ, see Ricardo Vigil Toledo, “La Solución de Controversias en el Derecho Comunitario Andino”, in Julio Lacarte & Jaime Granados (eds.), *Solución de Controversias Comerciales Inter-Gubernamentales: Enfoques Multilaterales y Regionales* (2004), 159, 164–169. Retrieved from <http://www.iadb.org/intal/intalcdi/PE/2007/00640.pdf>.

or Agreements that affect their subjective rights or their legitimate interests.⁴⁶

From the wording of the article, it is evident that the standing requirements for private parties are alternative and not cumulative; it is sufficient that the measure affects a subjective right, or that it affects the legitimate interests of the applicant. Unlike its European counterpart, the Court of Justice of the Andean Community has not interpreted its *locus standi* requirements restrictively⁴⁷ and allows relatively broad access to private parties in actions for annulment.

With these rules, the 1996 revised treaty provided a liberalization of the *locus standi* requirements compared to the wording in the original CJAC Treaty from 1979,⁴⁸ of which Article 19 provided that

Natural and juridical persons may bring actions of nullification against Decisions of the Commission or Resolutions of the Junta which are applicable to them and cause them harm.

The 1996 Treaty thus made it easier for private parties to gain standing as it no longer is necessary to show that the measure caused harm,⁴⁹ it suffices to show that subjective rights or legitimate interests have been affected. This reform was referred to as a broadening of public participation by the Court in its judgement in case AN-14-2001.⁵⁰ In that case the applicant was deemed to have standing, as he was considered to have a legitimate interest by virtue of being an Andean citizen and a lawyer, thus being affected by Andean law. The standard thereby set by the Court is thus almost close to an *actio popularis*, as, following the threshold set by the Court, virtually everyone can be considered as having a legitimate interest.

In addition to this direct route, there is also an indirect route to the CJAC for private parties wanting to challenge the legality of a Community measure,

46 Wording of the English translation of the Treaty published by the Andean Community on their website.

47 Tribunal de Justicia de la Comunidad Andina, Proceso AN-14-2001 (<http://intranet.comunidadandina.org/Documentos/Procesos/14-an-2001.doc>) p. 7.

48 Treaty Creating the Court of Justice of the Cartagena Agreement. Cartagena 1979 (ATJ Treaty 1979). Available in English in 18 *International Legal Materials* 1979, pp. 1203–1210.

49 Karen J. Alter, Laurence R. Helfer & Osvaldo Saldías, “Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice”, 60 *The American Journal of Comparative Law* (2012), 629, 651.

50 Tribunal de Justicia de la Comunidad Andina, Proceso AN-14-2001 (<http://intranet.comunidadandina.org/Documentos/Procesos/14-an-2001.doc>).

just as is in the European Union. Article 20 of the CJAC Treaty provides for a preliminary reference procedure that complements the action for annulment in Article 19. If the validity of a Community measure is challenged before any national court, not only courts of last instance, the court is obliged to stay the proceeding and refer the matter to the CJAC.⁵¹

D *Central American Court of Justice (CACJ)*

The Protocol of Tegucigalpa,⁵² which founded the Central American Court of Justice (CACJ), is silent on the standing requirements applicable before the Court, instead referring to the CACJ Court Statute.⁵³ The preamble of the Statute confers broad standing to private parties, stating that “[N]atural and legal persons whose rights have been affected by the acts of states or organs of the Central American Integration System [SICA] also have access to the Court”.⁵⁴ Article 22 of the Statute further discusses the competences of the Court, stating, *inter alia*, that the Court has jurisdiction:

- b) To hear actions that relate to the nullification or nonfulfillment of the agreements of the organisms of the Central American Integration System. [...]
- g) To hear matters that are submitted directly by individuals who are affected by the agreements of the organs or organisms of the Central American Integration System;

Whereas the preamble states that access to the Court is given to private parties whose rights have been affected, Article 22(g) of the Statute does not mention rights at all, only that standing is granted to individuals affected by SICA measures. Furthermore, the preamble refers to “legal and natural persons”, where the article simply refers to “individuals.” The Court does not seem to have addressed these ambiguities in its case law. However, as the binding part of the treaty should be considered as prevailing over the preamble, it could be

⁵¹ CJAC Treaty 1996, Art. 20(3).

⁵² 1991 Tegucigalpa Protocol to the Charter of the Organization of Central American States (ODECA), retrieved in English from http://www.sica.int/busqueda/busqueda_archivo.aspx?Archivo=prot_320_1_04052005.htm.

⁵³ Statute of the Central American Court of Justice (CACJ Statute), done at Panama City, 10 December 1992. English translation retrieved from 34 *International Legal Materials* (1995), 921.

⁵⁴ *Ibid.*, at 927, second para.

concluded that the standard is that of “affected”, which seems to constitute a low threshold to be met.

Article 22 also provides for an advisory opinion procedure. The wording of the provision is however ambiguous as to whether the Court’s jurisdiction under this provision is limited to the interpretation of Community law, or if it is also possible to challenge the legality of Community measures under this procedure since Article 22 states that the Court has jurisdiction:

k) To resolve all pre-judicial consultations as requested by any judge or judicial tribunal which is hearing a pending case or which wants to obtain a uniform application or interpretation of the norms that conform to the legal principles of the “Central American Integration System” created by the “Protocol of Tegucigalpa”, its complementary instruments or acts derived from the same.

The procedure is in any case incapable of providing efficient access to judicial review, as there is no obligation for national courts to ask the CACJ for advisory opinions.⁵⁵ It is in any event clear that subparagraphs (b) and (g) together mean that the Court is competent to hear direct actions for the annulment of SICA measures, and that private parties also can bring such actions if they are affected by the measure in question. Under the SICA legal framework, private parties thus have a direct route to challenge the legality of SICA measures, but there is no effective indirect route through national courts such as those provided for by the European and Andean preliminary reference procedures.

E *Caribbean Court of Justice (CCJ)*

The Caribbean Court of Justice (CCJ) has a twofold jurisdiction,⁵⁶ but only the applicable *locus standi* rules for private parties with regard to its original jurisdiction, i.e. within the legal framework of the Caribbean Community (CARICOM), are examined further as they are relevant for the comparison at hand. The CARICOM Treaty⁵⁷ outlines the role of the Court in relation to the Community, with further details on the Court’s original jurisdiction being pro-

55 Roberto Virzo, “The Preliminary Ruling Procedures at International Regional Courts and Tribunals”, 10 *The Law and Practice of International Courts and Tribunals* (2011), 285, 298.

56 The CCJ is also the court of last resort in the national judiciaries in some of the CARICOM Member States.

57 Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy 2001 (CARICOM Treaty), Art. 187(c). Consolidated version retrieved from http://www.caricom.org/jsp/community/revised_treaty-text.pdf.

vided for in Part II of the CCJ Agreement.⁵⁸ The Court has judicial review powers within its original jurisdiction, and Article 187(c) of the CARICOM Treaty specifically mentions disputes on alleged *ultra vires* actions by organs or bodies of the Community. This is especially relevant with regard to the Commission, which is conferred a wide range of powers by Article 174 of the Treaty. Judicial review over these powers is provided for by Article 175(12) of the Treaty, which states:

A party which is aggrieved by a determination of the Commission under paragraph 4 of Article 174 in any matter may apply to the Court for a review of that determination.

Article 211(1) of the Treaty provides an outline of the Court's power in more general terms, with subparagraph (d) being of particular interest:

Subject to this Treaty, the Court shall have compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty, including: [...]

(d) applications by persons in accordance with Article 222, concerning the interpretation and application of this Treaty.

Article 211 thus grants private parties access to the Court, conditional upon the provisions of Article 222 of the Treaty on the "Locus Standi for private entities", which provides:

Persons, natural or juridical, of a Contracting Party may, with the special leave of the Court, be allowed to appear as parties in proceedings before the Court where:

(a) the Court has determined in any particular case that this Treaty intended that a right or benefit conferred by or under this Treaty on a Contracting Party shall enure to the benefit of such persons directly; and

(b) the persons concerned have established that such persons have been prejudiced in respect of the enjoyment of the right or benefit mentioned in paragraph (a) of this Article; and

⁵⁸ Agreement Establishing the Caribbean Court of Justice (CCJ Agreement), retrieved from http://www.caribbeancourtofjustice.org/wp-content/uploads/2011/09/ccj_agreement.pdf.

(c) the Contracting Party entitled to espouse the claim in proceedings before the Court has:

- (i) omitted or declined to espouse the claim, or
- (ii) expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled; and

(d) the Court has found that the interest of justice requires that the persons be allowed to espouse the claim.

The CCJ Agreement adds nothing further on the standing requirements for private parties, as the relevant articles, XXII and XXIV, merely reiterate the wording of Articles 211 and 222 of the Treaty, respectively. The Treaty thus provides the Court with powers of judicial review, and allows access to private parties, but at first sight also limits this access rather restrictively, as the four cumulative conditions contained in Article 222 first have to be fulfilled. The *locus standi* rules for private parties provided for by the Treaty are also imprecise in relation to actions against Community institutions, as the condition in Article 222(c) only makes sense in actions against CARICOM's Member States. Except for the procedure in relation to decisions taken by the Commission provided for by Article 175 of the Treaty, the Treaty does not clearly provide a procedure for a general action for annulment as can be found in the Andean and European systems, despite the fact that Article 187 of the Treaty makes clear that the Court is competent to hear disputes on alleged *ultra vires* actions of all Community organs, not only those of the Commission.

This ambiguity on the procedure for judicial review of Community actions in general and on the standing of private parties in particular became a matter for the Court in the second case ever to be decided by the Court.⁵⁹ The applicant, TCL, a Caribbean cement company, applied for leave in accordance with Article 222 of the Treaty to challenge before the Court decisions taken by CARICOM's Council for Trade and Economic Development (COTED) and the CARICOM Secretary-General. The decisions in question suspended CARICOM's Common External Tariff (CET) on cement in several Member States, which was unfavourable for TCL as a domestic Caribbean producer of cement. The respondent argued that Article 187 of the Treaty, in conjunction with Article 211,

59 Case [2009] CCJ 2 (OJ), In the Caribbean Court of Justice, Original Jurisdiction, CCJ Application No AR 3 of 2008 between *Trinidad Cement Limited APPLICANT and The Caribbean Community RESPONDENT*, 2009/02/05, (http://www.caribbeancourtofjustice.org/judgments/ar3_2008/ar32008.pdf).

implies that claims concerning alleged *ultra vires* actions by a Community organ are “are only justiciable by the Court if made in a dispute brought to the Court by a Member State.”⁶⁰ This was however rejected by the Court, which instead held that Article 211, together with Article 222, enable private parties to access the Court in all types of disputes, including allegations that a body of the Community has acted *ultra vires*.⁶¹

Having established that private parties may have standing also in cases concerning *ultra vires* judicial review, the Court proceeded to consider if TCL had standing in the present case, i.e. if they fulfilled the *locus standi* criteria in Article 222 or not. The Court found that the CET did provide TCL with a direct benefit (222(a)),⁶² that the benefit had been prejudiced (222(b)),⁶³ that the claim had not been espoused (222(c)),⁶⁴ and that it was in the interest of justice that TCL should be given leave to commence proceedings (222(d)).⁶⁵ As all standing requirements had been fulfilled, the Court granted TCL special leave to commence proceedings.

The case is a landmark in the jurisprudence of the CCJ, not only as one of the first cases ever to be decided, but also as it confirmed *locus standi* for private parties also in cases concerning judicial review. As for the cumulative standing requirements in Article 222 of the Treaty, the Court seemed quite flexible in their interpretation, and rejected the arguments of the defendant for a more restrictive approach. It is difficult to deduce any abstract principles from the judgement on when a private party will fulfil the standing requirements, but the judgement indicates that it is not overly difficult to fulfil the criteria, at least not for economic operators affected by a decision of a Community organ. However, the nature of the procedure remains restrictive, as private parties have to ask the Court for special leave in order to have standing. It should also be noted that Article 222 restricts access to legal or natural persons of a Contracting Party, barring foreign nationals⁶⁶ and entities not incorporated in a CARICOM State from the procedure.

60 *Ibid.*, para. 27.

61 *Ibid.*, para. 30.

62 *Ibid.*, para. 34.

63 *Ibid.*, para. 37.

64 *Ibid.*, para. 38.

65 *Ibid.*, para. 39.

66 Or possibly non-residents, as the Court has so far not provided guidance on whether “of a Contracting Party” refers to residence or nationality in relation to natural persons.

The Court does have a preliminary reference procedure, but only in relation to questions “concerning the interpretation or application of [the] Treaty”.⁶⁷

F *ECOWAS Court of Justice*

Initially, private parties did not have access to the Economic Community of West African States (ECOWAS) Court of Justice at all.⁶⁸ *Locus standi* for legal and natural persons was however provided for by a supplementary protocol in 2005, one year after the Court had confirmed in its very first case that individuals did not have direct standing before the Court.⁶⁹ The supplementary protocol⁷⁰ amends the original Court Protocol from 1991,⁷¹ and provides a new Article 9 on the jurisdiction of the Court and a new Article 10 on access to the Court. Article 9(1)(c) provides the Court with powers of judicial review in relation to ECOWAS measures:

The Court has competence to adjudicate on any dispute relating to the following: [...]

c) The legality of regulations, directives, decisions and other legal instruments adopted by ECOWAS.

In relation to judicial review and standing for private parties, subparagraphs (b), (c), and (d) of Article 10 are of interest, in that they provide that access to the Court is open to:

- b) Member States, the Council of Ministers and the Executive Secretary in proceeding for the determination of the legality of an action in relation to any community text;
- c) Individuals and corporate bodies in proceedings from the determination of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies;

67 CARICOM Treaty, Article 214.

68 Alter, *supra* note 8, at 148.

69 Henry Onoria, “*Locus Standi* of individuals and non-state entities before regional economic integration judicial bodies in Africa”, 18 *African Journal of International and Comparative Law* (2010), 143, 149.

70 ECOWAS Court Supplementary Protocol 2005, retrieved from http://www.courtecowas.org/site2012/pdf_files/supplementary_protocol.pdf.

71 ECOWAS Court Protocol 1991, retrieved from http://www.courtecowas.org/site2012/pdf_files/protocol.pdf.

d) Individuals on application for relief for violation of their human rights; [...].

The Court thus has powers to review the legality of ECOWAS measures, but private parties are not granted standing in such proceedings. Private parties do, however, have the possibility to challenge an act of a Community official, but only if a right of the party has been violated. According to the Court, this includes parties “whose interest is directly and immediately affected by the act [...] that is being contested.”⁷² Furthermore, while Article 10(c) expressly mentions only the possibility to bring a claim against an “act of a Community official”, there is reason to believe that Article 10(c) can be relied upon to challenge a broader category of ECOWAS measures, as the Court has held that individuals can access the Court in accordance with Article 10(c) to “react against an act or inaction of the Community or its agents who have violated the individual’s rights.”⁷³ Furthermore, Article 10(d) provides private parties with *locus standi* to challenge ECOWAS measures on human rights grounds.

An optional preliminary reference procedure is outlined in Article 10(f), but only for the interpretation of ECOWAS law.

G WAEMU Court of Justice

The legal framework for the West African Economic and Monetary Union (WAEMU) Court is provided by the revised WAEMU Treaty,⁷⁴ together with the Protocol on the Court,⁷⁵ which is an integral part of the Treaty.⁷⁶ Article 8(1) of the Protocol empowers the Court to rule on the legality of WAEMU measures (regulations, directives and decisions),⁷⁷ and also provides that such challenges can be brought by Member States, the Council and the Commission.

72 ECOWAS Case ECW/CCJ/JUD/07/12 *Mrs. Oluwatosin Rinu Adewale v Council et al.* (http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2012/MRS_OLUWATOSIN_RINU_ADEWALE_v_COUNCIL_OF_MINISTERS_ECOWAS_&_3_OR_S.pdf), para. 45.

73 *Ibid.*, para. 39.

74 *Traité modifié de l'Union Economique et Monétaire Ouest Africaine 2003 (WAEMU Revised Treaty)*. Retrieved from <http://www.uemoa.int/Documents/TraitReviserUEMOA.pdf>.

75 *Protocole additionnel N° I relatif aux Organes de contrôle de l'UEMOA (WAEMU Court Protocol)*. Retrieved from http://www.uemoa.int/Pages/Actes/NewPages/Protocole_additionnel_I.aspx.

76 AICT-CTIA Website, http://www.aict-ctia.org/courts_subreg/waemu/waemu_home.html.

77 “Règlements, directives et décisions.”

In addition, Article 8(2) grants legal and natural persons *locus standi* to challenge the legality of Community measures as well, if they are “adversely affected” by the measure in question.⁷⁸ The Court does not seem, to date, to have interpreted the threshold of “adversely affected” and some cases which concerned claims on the legality of WAEMU measures have been dismissed on other grounds (e.g. expiry of the two-month deadline provided for in the Treaty) without the Court having to decide on the standing issue.⁷⁹ It is consequently uncertain how the condition that applicants must be adversely affected is to be interpreted. Under the circumstances it is difficult to ascertain the real accessibility of the procedure for private parties, as it will depend on how restrictive the condition is interpreted by the Court.

However, private parties can also access the Court to challenge the legality of Community measures indirectly through national courts, as Article 12 of the Protocol provides for a preliminary reference procedure similar to that of the European Union, both for questions on the interpretation of Community law and for questions on the legality of Community measures. National courts of last instance are obliged to refer, whereas it is optional for lower courts.⁸⁰

H CEMAC Court of Justice

The Economic and Monetary Community of Central Africa (CEMAC)⁸¹ Court Convention,⁸² in its Article 14, provides that pleas of illegality can be raised *inter alia* against CEMAC legal acts, and confers standing on Member States, CEMAC organs and legal and natural persons with a “concrete and legitimate interest” (*intérêt certain et légitime*). Private parties wanting to challenge the legality of CEMAC measures thus have a possibility of direct access to the Court. However, how broad this access is in real cases will of course depend on how the Court construes the requirement of an *intérêt certain et légitime*. The Court has so far decided relatively few cases, and, from an analysis of those

78 “Le recours en appréciation de la légalité est ouvert, en outre, à toute personne physique ou morale, contre tout acte d'un organe de l'Union lui faisant grief.”

79 Affaire n° 01/01 Société des Ciments du Togo, SA contre Commission de l'UEMOA, available at http://www.izf.net/upload/Documentation/Rapports/CourJusticeUEMOA/Recueil1996_2001.pdf.

80 WAEMU Court Protocol, Article 12(2).

81 Acronym derived from the Community's French name, *Communauté Économique et Monétaire de l'Afrique Centrale*.

82 Convention régissant la cour de justice de la C.E.M.A.C. 1996 (CEMAC Court of Justice Convention). Retrieved from <http://www.ehu.es/ceinik/tratados/11TRATADOSOBREINTEGRACIONYCOOPERACIONENAFRICA/115CEMAC/1C1155.pdf>.

that are publicly accessible, it does seem the Court has provided guidance on how the condition should be interpreted.⁸³

In addition to this direct route, Article 17 of the Convention provides private parties with an indirect route to challenge the legality of CEMAC measures through national courts, as it provides for a European-style preliminary ruling procedure. National courts may refer questions raised on the interpretation of CEMAC law or on the legality of CEMAC measures to the CEMAC Court. As in the EU, national courts of last instance are required to refer.

I *COMESA Court of Justice*

Locus standi for private parties before the Common Market for Eastern and Southern Africa (COMESA) Court was introduced by the COMESA Treaty⁸⁴ in 1991.⁸⁵ Article 26 of the Treaty provides that:

Any person who is resident in a Member State may refer for determination by the Court the legality of any act, regulation, directive, or decision of the Council or of a Member State on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of this Treaty [...]

First of all, “any person” covers both natural and legal persons, such as companies.⁸⁶ Article 26 thus provides private parties with standing to challenge the validity of a measure of the COMESA Council, based on unlawfulness or incompatibility with the Treaty. Access is only granted to residents of the COMESA, but is otherwise unconditional. Private parties resident in a COMESA country thus have direct access to the Court, and are offered remarkably broad standing to challenge measures of the COMESA Council.⁸⁷

83 There are no official publications of CEMAC case law. A limited selection of judgements is however available from secondary sources such as www.juricaf.org.

84 Agreement Establishing the Common Market for Eastern and Southern Africa (COMESA Treaty), retrieved in English from http://www.comesa.int/attachments/article/28/COMESA_Treaty.pdf.

85 Onoria, *supra* note 69, at 149.

86 *The Republic of Mauritius vs Polytol Paints & Adhesives Manufacturers Co Ltd*, Preliminary Application No 1 of 2012, decided 6 December 2012 (http://www.comesa.int/index.php?option=com_content&view=article&id=499:companies-can-sue-governments-in-the-comesa-court-&catid=6:press-releases&Itemid=57 (summary)).

87 Article 26 also makes it possible for private parties to challenge measures of a Member State, but in such cases there is a requirement that domestic remedies have been exhausted.

This liberal approach is also complemented with an indirect route to the Court through national courts. A preliminary reference procedure is enshrined in Article 30 of the Treaty, which provides:

1. Where a question is raised before any court or tribunal of a Member State concerning the application or interpretation of this Treaty or the validity of the regulations, directives and decisions of the Common Market, such court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling thereon.
2. Where any question as that referred to in paragraph 1 of this Article is raised in a case pending before a court or tribunal of a Member State against whose judgment there is no judicial remedy under the national law of that Member State, that court or tribunal shall refer the matter to the Court.

J *East African Court of Justice (EACJ)*

The East African Community (EAC) Treaty of 1999 belongs to a modern generation of treaties granting standing to legal and natural persons.⁸⁸ Following two controversial decisions, the treaty has, however, been amended and it has become more difficult for private parties to bring actions against Member States.⁸⁹ The Court is competent to review the legality of Community measures, and Member States have standing to challenge a measure “on the ground that it is ultra vires or unlawful or an infringement of the provisions of this Treaty.”⁹⁰ Private parties also have standing to challenge Community measures according to Article 30 of the Treaty, which provides:

[...] any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.

88 Onoria, *supra* note 69, at 149.

89 Henry Onoria, “Botched Up Elections, Treaty Amendments and Judicial Independence in the East African Community”, 54 *Journal of African Law* (2010), 74, 86.

90 Article 28(2) of the Treaty for the Establishment of the East African Community. Arusha 1999 (EAC Treaty). Consolidated version, as amended on 14 December 2006 and 20 August 2007, retrieved in English from <http://www.eacj.org/docs/Treaty-as%20amended.pdf>.

The Treaty thus confers very broad standing on private parties resident in an EAC Member State, as the only condition that has to be fulfilled is the residence requirement. This liberal approach has been confirmed by the jurisprudence of the Court.⁹¹ The practical implications of the broad standing rules were illustrated in the *Calist Mwatela* case,⁹² where members of the East African Legislative Assembly challenged, with a reference under Article 30, alleged *ultra vires* actions of the EAC Council of Ministers.⁹³

In addition to this very accessible direct route to the Court, Article 34 of the Treaty provides an indirect route as it establishes a preliminary reference procedure for questions on the interpretation of the Treaty or the validity of Community measures. Interestingly, all national courts, not only those of last instance, must refer such questions to the Court “if it considers that a ruling on the question is necessary to enable it to give judgment”.

IV Comparative Analysis

A Comparison and Findings

With the above outline of the different *locus standi* rules of the selected courts in relation to judicial review in mind, this section tries to highlight the differences and the similarities of the different standing requirements for private parties. Particular attention is paid to how the other courts compare to the CJEU. The schematic overview presented in Figure 1 outlines a simplified version of the reality, but can in any event be useful in identifying the most obvious differences in the thresholds private parties have to meet, in order to have standing before regional courts to challenge measures of regional integration communities.

All the regional integration communities included in the comparison grant standing to private parties to challenge measures of the community, but to a varying degree and not without conditions. The requirements may vary according to the nature of the measure in question; in the EU different conditions apply to regulatory and legislative acts, and in CARICOM certain decisions of the Commission are subject to a separate review procedure. The nature of

91 Brian Sang Yk, “Friends, Persons, Citizens: Comparative Perspectives on Locus Standi and the Access of Private Applicants to Sub-Regional Trade Judiciaries in Africa”, 13 *Oregon Review of International Law* (2011), 355, 368.

92 *Calist Mwatela et al. v East African Community*, Application No 1 of 2005 (http://www.eacj.org/docs/judgements/EACJ_reference_No1_2005.pdf).

93 Yk, *supra* note 91, at 362.

the applicant itself can also be of importance; before the CCJ standing is only granted to persons of a contracting party, and in the COMESA and EAC legal systems access is limited to residents in Member/Partner States. Such conditions of course severely limit the number of possible applicants from the outset. On the other hand, the COMESA Court of Justice and EACJ can also be seen as the most open courts in the comparison, as the residence requirement in fact is the only requirement private parties have to fulfil in order to have standing. The result is broad standing being granted to a limited group of persons.

Court	Locus standi for private parties	Residence/ Nationality Requirement	Other standing requirements	Indirect route
CJEU	Yes	No	direct concern [individual concern]*	Yes
EFTA Court	Yes	No	direct and individual concern	No
CJAC	Yes	No	affect their subjective rights or their legitimate interests	Yes
CACJ	Yes	No	affected [alt. rights have been affected]**	No
CCJ	Yes	Persons of a Contracting Party	standing by special leave only/ [aggrieved]***	No
ECOWAS CJ	Yes	No	violation of a right/[violation of a human right]****	No
WAEMU CJ	Yes	No	adversely affected	Yes
CEMAC CJ	Yes	No	concrete and legitimate interest	Yes
COMESA CJ	Yes	Residents in Member States	None	Yes
EACJ	Yes	Residents in Partner States	None	Yes

* not a requirement in relation to "regulatory acts"

** wording in the preamble

*** in relation to decisions of the Commission

**** separate head of jurisdiction

FIGURE 1

None of the other courts have residence or nationality requirements, but other conditions create a situation whereby more restricted standing is granted to a broader group of persons. In most of the legal systems examined, there is a requirement that there is some connection between the measure that is challenged and the applicant. In the EU, the requirement of individual concern has been interpreted narrowly, limiting standing for private parties in judicial review cases. The Lisbon Treaty did however remove this condition in relation to regulatory acts. The same requirement, “individual concern”, is also applicable to private parties wanting to challenge a decision of the EFTA Surveillance Authority before the EFTA Court. EFTA has a separate legal order, and these requirements were subsequently not changed by the recent treaty amendments in the EU. As there currently is no need to show individual concern to challenge comparable regulatory acts in the EU legal system, the *locus standi* rules of the EFTA Court, which used to be identical to those of the CJEU, are now in effect stricter.

Furthermore, the EU and EFTA both require “direct concern”, whereas private parties wanting to challenge a measure in the Central American Court of Justice have to be “affected” by the measure in question in order to have standing. Decisions of the CARICOM Commission can only be challenged by persons “aggrieved” by the decision, and in the WAEMU legal system one needs to be “adversely affected” in order to have standing.

Some of the *locus standi* rules examined have a clearer *recours subjectif* element in them, where applicants have to demonstrate a legal interest or right. Before the Court of Justice of the Andean Community, an action for annulment is only admissible if the measure in question affects a subjective right or a legitimate interest of the applicant. Private parties wanting to challenge a CEMAC measure need to have a concrete and legitimate interest in order to have standing. The ECOWAS Court of Justice is also rights-focused, as acts of officials only can be challenged if they violate a right of the applicant. The special leave procedure of the Caribbean Court of Justice, where the existence of a right or benefit is a condition, also belongs to this category. The COMESA Court of Justice and EACJ on the other hand, are good examples of a *recours objectif* approach, where it is not necessary to show any kind of connection with the measure in question.

Whereas there are clear differences in the legal framework of the courts that have been included in the comparison, there is one striking similarity. All of the courts have a procedure whereby national courts can refer questions to the regional court. Such procedures can provide private parties, wanting to challenge a community measure, with an additional indirect route through national courts. This is certainly the case in the EU, and the CJAC, and the WAEMU Court

of Justice, CEMAC Court of Justice, COMESA Court of Justice and the EACJ have similar procedures. The referral procedures of the EFTA Court, the CACJ, the CCJ and the ECOWAS Court of Justice are however not capable of providing an effective indirect route for private parties wanting to challenge measures of the respective communities, as they are limited to questions on interpretation of community law, and/or it is optional for national courts to refer.

V Concluding Remarks

The intention behind the comparison above was to see how the standing requirements of the CJEU applicable to private parties compare with the requirements of other similar regional courts. From the analysis carried out above, it seems clear that, while some comparative points can be made after having explored the formal framework provided for by the relevant treaties and statutes, the effective access for private parties to procedures for annulment will always depend on how the courts interpret the formal conditions provided for by the treaties. For the EU, “individual concern” was interpreted restrictively in *Plaumann*, limiting access to the procedure. In comparison, the provisions of the CARICOM Treaty impose several conditions on the access for private parties, but the CCJ has so far been flexible when interpreting the requirements in its case law. It is thus difficult to assess how accessible courts such as the WAEMU Court of Justice and the CEMAC Court of Justice really are, as case law and thus interpretive guidance is limited.

There is no easy way to rank the courts according to how accessible they are for private parties, i.e. how liberal are the standing requirements they have, as this will depend on a variety of factors, such as the measure in question and the attributes of the applicant. For residents of the COMESA and the EAC, their respective regional courts are very accessible as everyone has standing to bring an action for annulment; there are no further conditions to be met at all. But for non-residents the courts are completely inaccessible, as they do not meet the residence requirement. The same court can be said to have very liberal standing requirements, or very restrictive, depending on the perspective.

What appears from the analysis is also that, in comparison with the other courts, the legal framework of the CJEU provides a comprehensive set of remedies for private parties wanting to challenge Community measures. After the Lisbon Treaty, it is easier to challenge measures where no direct checks have been exercised by the European Parliament. It remains difficult to challenge legislative acts, but these measures have at least been approved directly by an

elected assembly. In addition, the preliminary reference procedure provides an indirect route to the Court and further enhances accessibility, even if it is not a perfect alternative to the direct action for annulment. Access is not unconditional as may be the case for the COMESA Court of Justice and the EACJ, but then again there is no residence requirement that restricts standing. Standing requirements and overall accessibility also compare favourably with the EFTA Court and the ECOWAS Court of Justice, and the indirect route provided by the preliminary reference procedure in practice also makes the CJEU more accessible than courts such as the CACJ and the CCJ as well. In total, the current system in the EU does not compare unfavourably with the systems in place in other regional integration communities.

Does the EU then have something to learn from the others? The current system of judicial protection in the EU is not perfect, but neither are other systems in comparable regional communities. Ignoring the residence requirement, the otherwise unconditional COMESA/EAC approach is not without its appeal. One can however question whether it would work in the EU, where the sheer number of measures adopted each year could create an unmanageable caseload. What the EU, and, especially, the CJEU can learn from other regional integration efforts is that, what matters more than the threshold set for standing by the Treaty makers is the courts' interpretations of these requirements, as the experience of the Court of Justice of the Andean Community goes to illustrate. Despite the CJEU's assertions to the contrary,⁹⁴ the requirement of "individual concern" in its current *Plaumann* interpretation is a creation of the Court and it is for the Court to choose whether to broaden the door to private parties' challenges of EU measures.

94 Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-06677, para. 45: "While it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force."