Note de service

DATE :	Le 30 janvier 2001
DESTINATAIRE / PARA / TO :	Liette Vasseur, présidente du CCPM
C.C. :	Membres du CCPM, représentants suppléants, Stephen Kass, Janine Ferretti et Manon Pepin
EXPÉDITEUR / DE / FROM :	Geoffrey Garver, directeur, Unité des communications sur les questions d'application
OBJET / ASUNTO / RE :	L'expérience acquise dans le cadre du processus relatif aux communications visées aux articles 14 et 15 de l'ANACDE

Le Secrétariat de la CNACE apprécie l'occasion qui lui est offerte de faire part au Comité consultatif public (CCPM) de certaines de ses observations sur l'administration quotidienne du processus relatif aux communications visées aux articles 14 et 15 de l'*Accord nord-américain de coopération dans le domaine de l'environnement* (ANACDE). Il espère que ces observations seront utiles au cours de l'examen public que dirige le CCPM sur l'historique du processus en vue d'en tirer des enseignements[1].

Le CCPM a déjà cerné plusieurs critères essentiels pour le processus relatif aux communications. Ces critères, qui s'avèrent également valables dans le cadre de cet examen public, comprennent « l'accessibilité, la transparence, l'indépendance du Secrétariat, l'équilibre entre la Partie visée et l'auteur de la communication ou leur égalité, l'impartialité, la liberté d'action et la conformité à l'ANACDE[2] ». La présente note est surtout centrée sur les critères qui ont un rapport plus direct avec le rôle particulier et l'expérience du Secrétariat, à savoir son indépendance, de même que l'accessibilité et la transparence du processus. En outre, à divers endroits, elle examine la question de portée générale que représentent la rapidité et l'efficacité de ce processus.

1. Indépendance du Secrétariat

Durant ses cinq premières années d'existence, le processus relatif aux communications a soulevé plusieurs questions, dont celles de l'indépendance du Secrétariat et l'enjeu connexe que constitue l'étendue de ses pouvoirs[3]. L'examen public mené par le CCPM a offert une excellente occasion de réfléchir à ces éléments.

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[1] Il est tout à fait pertinent que le Conseil compte sur le CCPM — le porte-parole du public à la CNACE — pour formuler des recommandations sur un processus dont les Parties à l'ANACDE ont explicitement voulu qu'il soit un outil indispensable et accessible au public nord-américain.

[2] Avis du CCPM au Conseil n° 99-01.

[3] Par exemple, durant la constitution du dossier factuel relatif à la société BC Hydro, des questions ont été soulevées au sujet des faits sur lesquels le Secrétariat pourrait se pencher dans ce dossier ainsi que de son pouvoir de réclamer de l'information aux Parties, aux auteurs de communications et à d'autres intéressés.

Le Secrétariat est chargé de traiter les communications en instance et de se pencher, au mieux de ses capacités, sur les questions qu'exposent ces communications; mais les mesures qu'il prend à l'égard de l'une ou l'autre d'entre elles cadrent avec les pouvoirs explicites et implicites que lui confère l'ANACDE. Tout en accomplissant son mandat, il est tenu de s'assurer que le processus relatif aux communications demeure objectif et neutre. Le Secrétariat se penche donc sur les questions d'application et d'interprétation qui découlent inévitablement du traitement d'une communication en s'efforçant de faire preuve d'une grande rigueur analytique. En outre, dans le but de renforcer l'intégrité du processus, le Secrétariat sollicite l'avis d'un groupe de conseillers juridiques spéciaux réputés et objectifs, ainsi que l'appui d'experts-conseils neutres et compétents.

Afin de préciser son rôle dans le processus à la suite de préoccupations exprimées par l'une ou l'autre des Parties, le Secrétariat a consulté des spécialistes réputés du droit international[4]. Ils ont formulé les observations suivantes sur l'étendue des pouvoirs explicites et implicites du Secrétariat, de même que sur son indépendance dans l'administration du processus relatif aux communications :

- Le Secrétariat doit prendre des mesures à plusieurs stades précis du processus, et cela consiste notamment : à juger si une communication satisfait aux critères énoncés au paragraphe 14(1) de l'ANACDE; à déterminer, aux termes du paragraphe 14(2), si la communication justifie une réponse de la Partie visée; à informer le Conseil, le cas échéant, qu'à son avis une communication justifie la constitution d'un dossier factuel, conformément au paragraphe 15(1); à demander certains renseignements aux Parties; à constituer, si le Conseil lui en donne instruction, une version préliminaire puis finale du dossier factuel concernant une communication donnée, comme l'exigent l'article 15 de l'Accord et les *Lignes directrices relatives aux communications sur les questions d'application visées aux articles 14 et 15 de l'ANACDE* (les « Lignes directrices »).

- Les principes convenus d'interprétation des traités internationaux s'appliquent au Secrétariat par le fait qu'il représente une tribune internationale établie dans le but de prendre des mesures déterminées, et ce, en conformité avec les articles 14 et 15 et d'autres articles connexes. Ces principes comprennent celui de l'interprétation efficace et la doctrine des pouvoirs accessoires. Selon le principe de l'interprétation efficace, l'énoncé d'un traité doit être interprété de manière à contribuer à l'objet et au but de ce traité[5]. Quant à la doctrine des pouvoirs accessoires, elle découle également de la nécessité d'assurer l'application efficace d'un traité. En vertu de cette doctrine, « les organismes internationaux disposent autant des pouvoirs accessoires que leur confère leur charte que de ceux auxquels ils peuvent recourir, au besoin, pour exercer ces pouvoirs accessoires[6] ».

- En appliquant ces principes dans le cadre du processus relatif aux communications, le Secrétariat est tenu de donner suite aux motifs qui ont initialement poussé les Parties à

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[4] Voir en annexe D. McRae, *Information Developed by Independent Experts* et *Autonomy of the Secretariat of the Commission for Environmental Cooperation* (7 février 2000) (« note de service de D. McRae »), et A. Slaughter, *The Scope of the Secretariat's Powers Regarding the Communications Procedure of the North American Agreement on Environmental Cooperation under General Principles of International Law* (1er juin 2000) (« note de service de A. Slaughter »).

[5] Voir la note de service de A. Slaughter, p. 7.

[6] Note de service de D. McRae, p. 16. Voir aussi celle de A. Slaughter, p. 7 et 8.

adhérer à l'ANACDE et à instaurer ledit processus[7]. Ces motifs comprennent : l'amélioration de l'application de la législation de l'environnement des Parties à l'échelon national, le renforcement de la protection de l'environnement et l'incitation du public à demander des comptes aux Parties sur la manière dont elles appliquent leur législation de l'environnement. En outre, l'ANACDE accorde implicitement au Secrétariat un important degré de discrétion et d'indépendance, particulièrement lorsqu'il traite des communications et qu'il élabore ses procédures internes[8]. Par exemple, quand le Conseil le charge de constituer un dossier factuel, le Secrétariat est obligé d'user de discrétion pour déterminer de quelle manière constituer ce dossier et ce qu'il doit comporter[9]. Le Secrétariat dispose de pouvoirs accessoires, à moins que l'ANACDE ne l'empêche de les exercer[10].

- Le Secrétariat est généralement assujetti à l'encadrement du Conseil et doit se plier à la manière dont celui-ci interprète les dispositions de l'ANACDE. Cependant, lorsque cet accord donne au Secrétariat le pouvoir d'user de discrétion pour exercer ses fonctions, l'encadrement du Conseil doit normalement se limiter à veiller à ce que le Secrétariat n'abuse pas de ses pouvoirs explicites et implicites ou ne les outrepasse pas[11].

Par le passé, les contestations d'une ou plusieurs Parties quant à la manière dont le Secrétariat s'acquittait de ses obligations ont entravé le fonctionnement du processus et conduit le public à douter de sa crédibilité. Le Secrétariat est toutefois confiant qu'une meilleure compréhension de son rôle permettra au processus d'évoluer afin de constituer un mécanisme public rapide et efficace.

2. Transparence

L'engagement des Parties à favoriser la transparence de leurs efforts de protection de l'environnement et à multiplier les possibilités de participation du public constitue une caractéristique majeure de l'ANACDE[12]. Le processus relatif aux communications représente une manifestation probante de cet engagement. Néanmoins, plusieurs modifications et propositions ont remis en question la transparence de ce processus, notamment les suivantes :

- Le Secrétariat a reçu certaines allégations de confidentialité qu'il a estimées exagérément étendues et non fondées[13]. Les dispositions de l'ANACDE en matière de confidentialité sont

[7] Voir la note de service de D. McRae, p. 18, et celle de A. Slaughter, p. 24 et 25.

[8] Voir la note de service de D. McRae, p. 18 à 22. Il y expose l'étendue du rôle d'encadrement du Conseil à l'égard du Secrétariat et conclut que ce rôle est limité lorsque l'ANACDE accorde un pouvoir discrétionnaire au Secrétariat pour traiter les communications.

[9] Voir la note de service de D. McRae, p. 18 et 19.

[10] MM. Slaughter et McRae ont comparé de façon constructive les pouvoirs du Secrétariat avec ceux d'autres organismes internationaux constitués en vue d'examiner les activités des pays membres, par exemple, les Nations Unies, la Cour européenne de justice et le Comité des droits de l'homme des Nations Unies. Voir la note de service de D. McRae, p. 9 à 11 et p. 20, et celle de A. Slaughter, p. 9 à 20.

[11] Note de service de D. McRae, p. 20 et 21.

[12] Voir le préambule et l'alinéa 1*h*) de l'ANACDE.

[13] Par exemple, dans un premier cas, la Partie a retiré son allégation de confidentialité au bout de quatre mois. Dans un autre, la Partie a exigé que sa réponse soit confidentielle, même après avoir retiré de cette réponse l'information qu'elle considérait confidentielle. Dans un troisième cas, la Partie ne voulait pas divulguer le nom d'une entreprise même si cette information ne semblait manifestement pas confidentielle en vertu de la législation nationale, et la Partie ne voulait pas que soit divulguée une

importantes et nécessaires pour atteindre les objectifs d'application des lois et protéger les renseignements commerciaux et exclusifs, les renseignements personnels et les décisions gouvernementales à caractère confidentiel[14]. Toutefois, il existe des exceptions à l'engagement fondamental qu'énonce l'Accord en termes de transparence. Selon l'expérience acquise par le Secrétariat, le fait de protéger la confidentialité de l'information va à l'encontre du principe de transparence, car elle limite ses capacités d'exposer aux auteurs de communications, au Conseil et au grand public les conclusions de ses analyses de communications déterminées. C'est le cas, par exemple, lorsqu'il doit rejeter l'une d'elles ou estime qu'une autre justifie la constitution d'un dossier factuel. En outre, une telle mesure restreint les capacités du public de suivre le processus et d'obtenir de l'information pouvant permettre d'améliorer l'application des lois et la protection de l'environnement. L'expérience du Secrétariat en rapport avec des allégations de confidentialité exagérément étendues met en lumière la nécessité que toute Partie justifie une telle allégation et en limite le plus possible la portée lorsqu'elle estime nécessaire de réclamer cette confidentialité.

- Les membres du public ont noté que la section 10.2 des Lignes directrices limite la transparence en prescrivant au Secrétariat de garder secrète, durant trente jours, toute recommandation de constituer un dossier factuel ainsi que les motifs de cette recommandation jusqu'à ce que le Conseil décide d'autoriser ou d'interdire la constitution d'un tel dossier. Cette section place également le Secrétariat et les Parties dans une position embarrassante vis-à-vis du public lorsque celui-ci leur demande à quel stade en est rendu le traitement d'une communication, car elle limite la quantité d'information pouvant être divulguée. Le Secrétariat espère que le Conseil réexaminera cette ligne directrice puisqu'elle a un effet restrictif sur la transparence.

- Les documents que le Secrétariat peut rendre publics avant que le Conseil décide de publier un dossier factuel final a suscité une observation. Il a été proposé que le Secrétariat conserve confidentiels tous les documents sur lesquels se fonde le dossier factuel, y compris l'information disponible au public, sauf si le Conseil décide de rendre ce dossier public. Par ailleurs, une autre observation concernait la possibilité que le Secrétariat puisse rendre publique sa demande d'information à une Partie, en vertu de l'article 21 de l'ANACDE, ainsi que la réponse de cette Partie à une telle demande. À ce sujet, une proposition vise à interdire au Secrétariat d'afficher cette demande et la réponse de la Partie sur le site Web de la CNACE. Le Secrétariat est d'avis que les deux propositions qui précèdent sont exagérément larges et incompatibles avec l'engagement des Parties en matière de transparence. Il croit ne devoir tenir confidentielle que l'information que les Parties ou d'autres intéressés désignent comme telle, en vertu du paragraphe 11(8) et de l'article 39 de l'Accord ainsi que de l'article 17 des Lignes directrices, de même que (dans l'attente de la décision du Conseil de publier un dossier factuel) le dossier factuel préliminaire et les résultats des travaux connexes du Secrétariat exposant la démarche que celui-ci a effectuée au cours de la constitution de ce dossier.

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grande quantité de renseignements qui ne révélaient même pas le nom de l'entreprise. En outre, ces trois allégations de confidentialité contenaient des faits tirés de dossiers publics.

[14] Paragraphes 11(8) et 39(1) de l'ANACDE.

3. Accessibilité

Les Parties ont manifestement voulu que le processus relatif aux communications soit un outil indispensable et accessible au public, libre d'obstacles qui pourraient indûment l'empêcher d'y avoir recours. Il s'agit d'un processus aussi unique qu'avant-gardiste en matière de participation du public à la protection de l'environnement, en grande partie grâce à son vaste champ d'application et au nombre relativement restreint de conditions à remplir pour présenter une communication. Pour que son accessibilité soit réelle, le processus doit également être rapide et efficace.

Le Secrétariat se charge de veiller à cette accessibilité. Plusieurs des décisions qu'il a prises dans le cadre de ce processus mentionnent que l'ANACDE ne vise pas à empêcher indûment les membres du public de recourir à ce processus[15]. Le Secrétariat n'a donc pas entravé son utilisation en rejetant automatiquement des communications au stade de l'examen de leur admissibilité. En outre, la création de l'Unité des communications sur les questions d'application a permis d'améliorer l'accessibilité au processus, d'une part en le rendant plus visible au sein de la CNACE et, d'autre part, en améliorant l'efficacité du traitement des communications.

Le Secrétariat est en train de prendre les mesures supplémentaires suivantes pour améliorer l'accessibilité à ce processus :

- Il élabore des procédures internes qui permettront au public et aux Parties de mieux comprendre de quelle manière il entend traiter les communications et échanger avec les auteurs, les Parties et d'autres intéressés au cours du processus. En élaborant ces procédures, il examinera celles que d'autres institutions internationales, comme le Comité d'inspection de la Banque mondiale et le Comité des droits de l'homme des Nations Unies, ont déjà mis sur pied.

- Il perfectionne le site Web de la CNACE, ce qui comprend des améliorations au registre public des communications afin de le rendre plus convivial.

- Il envisage d'engager d'autres employés au sein de l'Unité des communications afin d'améliorer l'efficacité et la rapidité avec lesquelles ces communications sont traitées.

- Il est prêt à travailler de concert avec les Parties et le Conseil pour s'assurer que ce dernier réponde le plus rapidement possible à ses recommandations de constituer des dossiers factuels[16].

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[15] Par exemple, au sujet de la communication SEM-96-001, voir la recommandation du Secrétariat au Conseil de constituer un dossier factuel conformément aux articles 14 et 15 de l'ANACDE, p. 5 (7 juin 1996), dans laquelle le Secrétariat interprète librement les dispositions du paragraphe 14(2) et se penche sur la question de savoir si la communication fait état d'un préjudice à son auteur en déterminant s'il y a lieu de demander à la Partie visée d'y répondre. Voir également la communication SEM-97-005, décision du Secrétariat en vertu du paragraphe 14(1), p. 3 (26 mai 1998), dans laquelle « le Secrétariat est d'avis que l'article 14, et plus particulièrement le paragraphe 14(1), ne sont pas destinés à servir de dispositif de sélection insurmontable ».

[16] En général, le délai qu'il a fallu au Conseil pour agir à la suite des recommandations formulées par le Secrétariat aux termes du paragraphe 15(1) a sérieusement augmenté avec le temps. À ce jour, le Secrétariat a avisé le Conseil qu'il estimait nécessaire de constituer un dossier factuel concernant sept communications. En ce qui concerne les deux premières, SEM -96-001/ Cozumel et SEM-97-001/ BC Hydro, le Conseil a pris deux mois pour adopter une résolution répondant à la recommandation du Secrétariat. Plus récemment, il lui a fallu neuf mois pour répondre à la recommandation du Secrétariat concernant la communication SEM-97-006/ Oldman River, qui est encore en suspens, et plus de six mois pour répondre à celle concernant la

4. Conclusion

En examinant le déroulement du processus relatif aux communications à ce jour, il faudrait tenir compte du fait qu'il est relativement récent et qu'il fallait s'attendre à une « crise de croissance » à ses débuts. Néanmoins, certaines questions, particulièrement celles concernant la transparence et l'étendue des pouvoirs du Secrétariat, ont exigé un temps considérable et, en déviant l'attention portée à d'autres questions, ont entravé l'administration quotidienne du processus. Le Secrétariat est confiant que grâce, surtout, à l'instauration du mécanisme faisant intervenir le CCPM, le processus relatif aux communications est dans une période de transition qui lui permettra ultérieurement de fonctionner plus adéquatement et de mieux cadrer avec les objectifs qui ont motivé sa création.

Cette prochaine phase coïncide avec le fait qu'un plus grand nombre de communications sont arrivées au stade de la constitution d'un dossier factuel ou en sont proches. Il est peut-être encore trop tôt pour tirer des conclusions générales concernant l'efficacité de ce processus, mais au cours de cette prochaine phase, on disposera d'une information plus étoffée qui aidera à évaluer de quelle manière les communications et les dossiers factuels permettront de prendre des mesures qui amélioreront l'application des lois et la protection de l'environnement.

Annexes

communication SEM-97-003/ Fermes porcines du Québec. Le Conseil n'a pas donné suite à une autre recommandation du Secrétariat concernant la communication SEM-98-006/ Aquanova, qui est restée en suspens pendant près de six mois, ou encore concernant la communication SEM-99-002/ Oiseaux migrateurs, qui n'est restée en suspens qu'un peu plus d'un mois. Cette tendance à l'accroissement des délais comporte une seule exception, soit la communication SEM-98-007/ Metales y Derivados : le Conseil a pris deux mois pour répondre à la recommandation du Secrétariat.

Information Developed by Independent Experts and the Autonomy of the Secretariat of the Commission for Environmental Cooperation (CEC)

prepared for

the Secretariat

of the

Commission for Environmental Cooperation (CEC)

by

Donald M. McRae
University of Ottawa
7 February 2000

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2. The Autonomy of the CEC Secretariat

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Conclusion

1. You have asked me to consider two questions. First, can the CEC Secretariat include in a "factual record," information developed by independent experts? Second, what is the scope of the Secretariat's autonomy in applying the North American Agreement on Environmental Cooperation (NAAEC). Although, to a certain extent, these questions are linked, I shall deal with them separately.

2. Since the NAAEC is an international agreement between the governments of Canada, Mexico and the United States, it is to be interpreted and applied in accordance with international law. The starting point for the interpretation of treaties under international law is the rules of interpretation set out in Article 31 and 32 of the Vienna Convention on the Law of Treaties. Canada and Mexico are both parties to this Convention. Although it is not a party to the Vienna Convention on the Law of Treaties, the United States has, in a number of fora, including North American Free Trade Agreement (NAFTA) dispute settlement,[1] accepted that the Vienna Convention rules on interpretation reflect customary international law.

3. In approaching this question, I shall consider the relevant provisions in the NAAEC and how they are to be interpreted. I shall also consider the practice of other international bodies with similar mandates.

1. The Inclusion of Information Developed by Independent Experts in a Factual Record.

1. What is a "Factual Record"?

4. A "factual record" is a document prepared by the Secretariat on the instructions of the Council pursuant to NAAEC Article 15. It is a step in a process that begins when a non-governmental organization or person makes a submission to the Secretariat, under NAAEC Article 14, asserting that a Party is "failing to effectively enforce its environmental law." The Secretariat must first determine whether the submission is admissible, on the basis of the criteria set out in Article 14.1. In the event of an affirmative determination, the Secretariat must then decide, guided by the factors set out in Article 14.2, whether the submission "merits a response from the Party."

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[1] *In the Matter of: Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products* (Final report of the Panel, 2 December 1996, CDA-95-2008-01) para. 119.

5. After receiving a Party's response, the Secretariat must determine whether the submission "warrants developing a factual record". If the Secretariat decides in the affirmative, then in accordance with Article 15.1, it must "so inform the Council and provide its reasons." If, by a two-thirds vote, the Council instructs the Secretariat to prepare a factual record, then the Secretariat must do so.[2] The draft factual record is then submitted to the Council. On receipt of comments by the Parties on the accuracy of the factual record, the Secretariat prepares a final factual record which is submitted to the Council. The Council may, by a two-thirds vote, make that factual record publicly available.

2. What can be Included in a Factual Record?

6. The text of the NAAEC provides no definition of what constitutes a "factual record" or of what can be included in it. However, it does set out what the Secretariat is to consider in preparing the factual record. Article 15.4 provides that the Secretariat:

> shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information: (a) that is publicly available; (b) submitted by interested non-governmental organizations or persons; (c) submitted by the Joint Public Advisory Committee; or (d) developed by the Secretariat or by independent experts.

The *Guidelines for Submission on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*[3] also throw some light on the process under which factual reports are prepared. The *Guidelines* provide that where relevant technical, scientific or other information is provided by the Joint Public Advisory Committee (JPAC) to the Secretariat relating to the development of a factual record, the Secretariat will forward copies of the information to the Council.[4] It is also provided in the *Guidelines* that "contributors to the factual record process are encouraged to submit only relevant information, reducing wherever possible the volume of material submitted."[5]

7. However, the *Guidelines* go further than this. They provide that a factual record prepared by the Secretariat will contain:[6]

> (a) a summary of the submission that initiated the process;

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[2] Article 15.2.

[3] Adopted by Council Resolution 99-06, 28 June 1999.

[4] Guideline 11.2.

[5] Guideline 11.3.

[6] Guideline 12.1

(b) a summary of the response, if any, provided by the concerned Party;
(c) a summary of any other relevant factual information; and
(d) the facts presented by the Secretariat with respect to the matters raised in the submission.

The *Guidelines* also provide that "the final factual record will incorporate, as appropriate, the comments of any Party."[7] Since the *Guidelines* were adopted by the Council, they must represent the agreement of the Parties as to how the NAAEC is to be applied.[8]

(1) The Meaning of the Term "Factual Record"

(1) The Ordinary Meaning of the Term

8. The correct approach to the interpretation of the term "factual record" in accordance with the interpretative rules of the Vienna Convention on the Law of Treaties is to give the words their ordinary meaning in their context and in the light of the object and purpose of the treaty as a whole.[9] According to the *Oxford English Dictionary*, the term "record" means "the fact or attribution of being or having

[7] Guideline 12.2.

[8] Guideline 18.1 provides: "These guidelines are not intended to modify the Agreement. If there is a conflict between any provision of these guidelines and any provision of the Agreement, the provision of the Agreement will prevail to the extent of the inconsistency."

[9] Article 31 of the *Vienna Convention* provides: " A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

been committed to writing as authentic evidence of a matter having legal importance" or the "attestation or testimony of a fact."[10] *Webster's Dictionary* states that record means, "something set down in writing for the purpose of preserving the knowledge of it as an authentic or official account of facts or proceedings."[11] The common element of these definitions is that they refer to something in writing that constitutes an authentic account of what is written. However, neither definition prescribes any specific content for a "record".

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[10] *The Oxford English Dictionary*, 2nd ed., (Oxford: Clarendon Press, 1989).

[11] *Webster's New Twentieth Century Dictionary of the English Language*, 2nd ed. (New York: Simon and Schuster, 1979).

9. The term "record" is frequently used to refer to the account of a court proceeding. *Black's Law Dictionary* defines a "record" as a "a written account of some act, court proceeding, transaction or instrument drawn up under authority of law by a proper officer and designed to remain a memorial or permanent evidence of the matters to which it relates."[12] What constitutes the record of a lower court or tribunal for the purposes of judicial review has been the subject of some debate. Here, the issue revolves around whether the evidence heard by a tribunal is properly part of the record.[13] Clearly, what constitutes a record, even for the purposes of judicial review will depend upon context and on the mandate of the person charged with creating the "record."

10. In the present case, "record" is qualified by the term "factual". This raises the question of what constitutes a "fact" for the purposes of the compilation of a "factual record." One approach might be to distinguish between matters that are of matters of fact and those that are matters of opinion. But this distinction may not be of much assistance. For some purposes statements of opinion may also be treated as statements of fact.[14] And, in any event, the fact that an opinion is held is a matter of fact. Equally, attempts to draw a distinction between matters of "fact" and matters of "law" have to be considered with caution. Whether a statement can be characterized as a statement of fact or a statement of law may depend on how it is phrased.[15] The statement that a person is a citizen of Canada is both a statement of fact and a statement of law. Indeed, many statements of fact assume or presuppose some knowledge of law.[16]

11. Nevertheless, in a general sense the distinction between law and fact is understood by lawyers although not always clearly defined. Under the jury system a distinction is made between the role of the jury as a trier of fact and that of the judge as the trier of law. Moreover, an appellate court generally can consider only appeals on matters of law and not on matters of fact.[17] Furthermore, it is unlikely that

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[12] *Black's Law Dictionary*, 6th ed., (St. Paul: West Group, 1991).

[13] D. P. Jones and A. de Villar, *Principles of Administrative Law* (Edmonton: Carswell, 1979) 410-421.

[14] Thus, a representation of opinion may be treated as a misrepresentation of fact: *Esso Petroleum* v. *Mardon* [1976] 1 Q.B. 801 (CA).

[15] Thus, in *Solle* v. *Butcher* [1950] 1 K.B. 671 (CA) the mistaken belief that an apartment was not governed by rent control legislation was treated as a mistake of fact.

[16] As Jessel M.R. said as early as 1876, "It is not less a fact because that fact involves some knowledge or relation of law. There is hardly any fact that does not involve it." *Eaglesfield* v. *Marquis of Londonderry* [1876] 4 Ch. D. 693 at 703.

[17] *Cross and Tapper on Evidence*, 9th ed., (London: Butterworths, 1999) 158.

a request to produce a record of the facts of a judicial proceeding would result in the inclusion of the tribunal's conclusions of law.

12. It is clear that the term "factual record" considered in the light of the ordinary meaning of the words used, including their use in a more technical legal context, does not have a single, all-purpose meaning. It is necessary, therefore, to look at the term more broadly in its context of the Article 14/15 process and of the CEC Agreement as a whole.

(ii) The Term "Factual Record" in Its Context

13. The term "factual record" in Article 15 of the NAAEC takes its meaning from the ordinary meaning of the term "record" in the light of the qualification of the term by the word "factual" and in the context of Article 15 and other relevant provisions of the NAAEC. In this regard, guidance can be obtained both from the *Guidelines* and from the surrounding provisions of Article 15.

14. The list set out in *Guideline* 12.2 of what may be included in the "factual record" suggests that the term "factual" is not intended to be interpreted restrictively. The first two items for inclusion are a summary of the submission, and a summary of the Party's response to that submission. A submission is an allegation. It will contain assertions of fact as well as argument to support the allegation that a Party is failing to effectively enforce its environmental law. Equally, a Party's response will contain both facts and argument to support its view that the submission is ill-founded. The fact that the Secretariat includes summaries of the submission and the response thereto indicates that a "factual record"can include arguments and opinions about whether a Party is failing to effectively enforce its environmental law.

15. The *Guidelines* also provide that the factual record can include summaries of "other factual information." In order to determine the meaning of this phrase, it is necessary to consider what "other factual information" might be available to the Secretariat. In this regard, it is useful to refer to Article 15. 4 which sets out the information that can be considered by the Secretariat in preparing a factual record.. This includes any "relevant technical, scientific or other information" that is publicly available, submitted by non-governmental organizations or persons or by the JPAC, or developed by the Secretariat or by independent experts.

16. Clearly, then, in the preparation of a factual record the Secretariat can consider "relevant technical, scientific or other information," including that developed by independent experts. If the Secretariat can consider such information, then it can, by necessary implication, include that information in the factual record. Such information would fall under the category of "other factual information" in Guideline 12.2. On this basis, the term "other factual information" in Guideline 12.2 must include any of the information that the Secretariat is entitled to consider under Article 15.4. This includes "technical, scientific or other information" obtained from a variety of sources including independent experts. Thus,

such "information" developed by independent experts could, in principle, be included in the "factual record" provided, of course, that it is relevant.

(a) The Scope of the Concept of "Information"

17. The question nevertheless arises whether the concept of "information" itself, has any limitations. The Secretariat can include summaries of "other factual information" in the factual record. In preparing the factual record it can consider "relevant technical, scientific or other

information" from independent experts. Is the scope of the concept of "information" limited in some way?

18. Two arguments present themselves. First, is the term "other information" in Article 15.4 to be read *ejusdem generis* with "technical" and "scientific"? Second, does the NAAEC as a whole impose some limitation on the kind of "information" that can be considered by the Secretariat and hence potentially be included in a factual record?

(i) Ejusdem Generis or Limited Class Rule

19. The question here is whether the term "other information" in the phrase "technical, scientific or other information" is confined by a *genus* created by the terms "technical" and "scientific". The rule of interpretation known as the *ejusdem generis* or limited class rule[18] is applied where the preceding words have a common characteristic that defines the class. The difficulty in the present circumstances is to determine what limited class is created by the words "technical" and "scientific". According to the *Oxford English Dictionary*, the word "technical" means "appropriate or peculiar to a particular art, science, profession or occupation," a definition that would clearly encompass the concept of scientific, which means, "of or pertaining to science." Given the broad ambit of the term "technical", which would in any event encompass the term "scientific", it is difficult to see what class or genus is limiting the concept of "other information".

20. Moreover, the limiting factor in respect of "technical, scientific and other information" in Article 15.4 is that it must be relevant. This distinguishes the obligation on the Secretariat in respect of information furnished by a Party and information derived from other sources. In the case of the former, the Secretariat has an obligation to consider "any information," and in the case of the latter, the Secretariat has the discretion to consider "relevant' information. Furthermore, in respect of this latter category, Article 15.4 is permissive. It does not put a limitation on what the Secretariat may consider. Nor does Article 15 appear to limit what may be included in a factual record to information that the Secretariat considers under Article 15.4.

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[18] Ruth Sullivan, *Statutory Interpretation*, (Concord: Irwin Law, 1997) 65-66.

21. In short, the wording of Article 15.4 does not impose any explicit limitations on the content of what may be included as "other factual information" in a factual record, although by implication the material included must be relevant.

(ii) The Broader Context of the NAAEC

22. Does a consideration of the broader NAAEC context suggest any limitations on the scope of the concept of "information" for the purposes of a factual record? The preparation of a "factual record" is part of a process that is triggered when a submission is made that a Party is failing to effectively enforce its environmental law. One of the objectives of the NAAEC, as set out in Article 1, is to "enhance compliance with, and enforcement of, environmental laws and regulations." Article 5 creates a commitment that each Party will "effectively enforce its environmental laws." One of the functions of the Council of the CEC is to encourage "effective enforcement by each party of its environmental laws and regulations"[19] and the Preamble to the NAAEC emphasizes the importance of public participation in conserving, protecting and enhancing the environment. The Article 14/15 process is, thus, designed to implement the objective of ensuring that the parties enforce their environmental laws and regulations and at the same time to enhance public participation in conserving, protecting and enhancing the environment.

23. The nature of this process, thus, will involve assembling significant amounts of information. Some of that information will be records of things that have occurred. Some of that information will involve claims about how environmental laws are or are not being enforced. Some of that information will be scientific, relating to causes and effects. And much of this information will be based on opinions, including the opinion of experts.

24. There is, however, an important limitation on the scope of this information. What the Article 14/15 process does not provide is a mechanism for making a determination that a Party has "failed to effectively enforce its environmental laws." The final stage in the process is simply the publication of the factual record. In this regard, the Article 14/15 process can be contrasted with the dispute settlement process in Part Five of NAAEC. A panel set up under that process is required to make a "determination as to whether there has been a persistent pattern of failure by the Party complained against to effectively enforce its environmental law."[20] Moreover, failure to remedy the deficiency in the enforcement of environmental law could lead to the implementation of sanctions. The Article 14/15 process stands in contrast to this. There is no provision in the Agreement for a determination under the Article 14/15 process that a Party has failed to effectively enforce its environmental laws. Such a determination could only result from the Part Five process being invoked.

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[19] Article 10.4.

[20] Article 31.2.

25. This distinction between the Part Five process and the Article 14/15 process has implications for what can fall within the scope of "relevant technical, scientific or other information." Since the Article 14/15 process does not lead to a determination that a party has failed to effectively enforce its environmental laws, then "relevant technical, scientific or other information" could not include a determination of whether a Party had failed to effectively enforce its environmental laws. In short, the concept of information is broad enough to include anything that does not constitute a determination of whether a Party has failed to effectively enforce its environmental law, a matter which, as will be pointed out later, involves an interpretation of Articles 14 and 45.

26. If determinations, within the meaning of Articles 14 and 45, of whether a party has failed to effectively enforce its environmental laws, are excluded from the scope of "technical, scientific or other information", then they would be excluded from the scope of "other factual information" that, in accordance with *Guideline* 12.2, the Secretariat can include in a factual record.

27. It is important, nevertheless, to distinguish between conclusions on factual matters, for example about what the facts in a particular case are, and conclusions on issues of law, that is conclusions that are to be drawn from the application of the relevant treaty provisions to the facts of the case. It is the drawing the latter conclusions for which no mandate exists in the Secretariat under Article 15. By contrast, paragraph (d) of *Guideline* 12.2 permits the Secretariat to state the facts of the claim. This involves determining what the facts are. But conclusions of this kind about the facts are quite separate from legal conclusions about whether these facts constitute a failure by a Party, within the meaning of the relevant provisions of the Agreement, to effectively enforce its environmental law.

(c) The Practice of Other Organizations

28. Some guidance in the interpretation of what might be included in a factual record can be gained from looking at the practice of other international bodies that have similar processes to the Article 14/15 process. In this regard, United Nations and regional human rights bodies deserve some attention. All embody a process whereby individuals can bring a complaint about the violation by a state of a particular obligation, a response by the state concerned, and the consideration of the complaint by the international body.

29. The United Nations processes, that of the United Nations Human Rights Commission under Resolution 1503[21] and of the Human Rights Committee under the Optional Protocol on Civil and Political Rights,[22] are less relevant. In those instances, a complaint is referred to the government

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[21] ECOSOC Resolution 1503: "Procedure for dealing with communications relating to violations of human rights and fundamental freedoms," 1693rd Plenary Meeting, (27 May 1970).

[22] *Optional Protocol to the ICCPR* (1966) 999 U.N.T.S. 302.

concerned for comment and then is considered on its merits by the Human Rights Commission, operating through its sub-commissions, in the case of the resolution 1503 procedure, or by the Human Rights Committee in the case of the Optional Protocol. Thus, the role of these bodies is that of decision-maker and thus they are different from the CEC Secretariat.

30. A closer parallel can be found with the work of the European Commission on Human Rights and that of the Inter-American Commission on Human Rights. Both are agencies that play a role in an individual complaints process, but they are not the final decision-makers. Since

the Inter-American Commission was modelled on the European Commission, attention will be focused on the European Commission.

31. The European Commission on Human Rights is an organ established under the European Convention on Human Rights.[23] It is composed of individuals elected by the Committee of Ministers of the Council of Europe. Under Article 25 of the Convention, the Commission may receive complaints from any person, non-governmental organizations or groups of individuals claiming a violation by a party. If it finds the complaint admissible, the Commission "shall, with a view to ascertaining the facts, undertake together with the representatives of the parties, an examination of the petition, and, if need be, an investigation."[24] In examining the matter, the Commission has broad powers to gather information, including the holding of hearings.

32. The Commission has the further responsibility of making itself available to the parties (that is the petitioner and the state concerned) with a view to securing a friendly settlement. If no such settlement is reached, the Commission must then "draw up a report on the facts and state its opinion as to whether the facts found disclose a breach by the state concerned of its obligations under the Convention."[25] That report is transmitted to the Committee of Ministers.

33. The Inter-American Commission has similar functions. It can undertake an investigation of the complaint and, when the matter is not resolved, it, too, files a report which includes its own opinion on the merits of the issue.

34. Clearly there are important differences in the structure and powers of the CEC Secretariat and the European and Inter-American Commissions. But, they have a common role in determining the admissibility of complaints and submitting a report on the complaint that encompasses the allegations

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[23] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, (1950) 213 U.N.T.S. 222.

[24] Article 28(a).

[25] Article 31(1).

and the facts on which the complaint is based. The difference, however, is that the European and Inter-American Commissions are required to include in their report their conclusions on the merits of the complaint. There is no provision in the NAAEC or the Guidelines for the CEC Secretariat to do so.

35. The mandate of the European and Inter-American Commissions in submitting a report on a complaint includes reaching conclusions on the merits of the complaint. The fact that this power was expressly given suggests that in the absence of a grant, the Commissions would not have had such a power. If such a power had not been granted to the Commissions, they could make findings of fact, they could assemble all of the information that would be relevant to making a determination on whether the complaint made was well-founded, but they would have been unable to take the final step of making a determination of whether the complaint was well-founded in fact.

36. The European and Inter-American practices, thus, give further insight into what may be included in a "factual record". The CEC Secretariat has not been granted an express power to include in the factual record a determination of whether a Party has failed to effectively enforce its environmental law within the meaning of the relevant provisions of NAAEC. Like the European and Inter-American Commissions it can assemble all the information that is relevant to making such a determination, but it cannot take the further step of making that determination.

(d) Conclusion

37. A consideration of the ordinary meaning of the term "factual record" in its context, together with a consideration of the concept of "information", suggests that there is a limitation on what can be included in a factual record. This limitation is that, a factual record cannot include a determination of whether a state is "effectively enforcing its environmental laws" within the meaning of Article 14. The Secretariat has no mandate to make such a determination and include it in the factual record. Equally this places a limitation on the scope of the "other factual information" that may be included by the Secretariat in a factual record. In the context of the question put at the outset, this means that a determination by an independent expert that a party is "failing to effectively enforce its environmental law" within the meaning of Article 14, could not be included in a factual record.

38. The above does not preclude the Council from authorizing the Secretariat to reach conclusions on whether a Party is "failing to effectively enforce its environmental law". Indeed, in both of the cases so far in which the Council has instructed the Secretariat to prepare a factual record, it has directed the Secretariat "in developing the factual record, to consider whether the Party concerned "is failing to effectively enforce its environmental law" since the entry into force of the NAAEC on 1 January 1994."[26] Such an instruction clearly grants to the Secretariat an authority to consider the effectiveness of strategies designed to enforce environmental laws and to provide its own comments and opinions.

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[26] Council Resolutions 96-08 and 98-07.

3. The Scope of the Limitation on the Inclusion of Information Developed by Experts

39. What is the precise extent of this limitation on the information that can be developed by independent experts and included in a factual record? In this regard, it is useful to return again to the objectives of the NAAEC and the rationale for the Article 14/15 process. As pointed out earlier, these objectives include enhancing the enforcement of environmental laws and regulations. Moreover, the Parties specifically commit to enforcing their environmental laws and

regulations. The Article 14/15 process can, thus, be understood as a process that will assist in achieving those objectives.

40. However, the role played by the Article 14/15 process is not one that compels Parties to enforce their environmental laws and regulations. It provides information about whether a party is effectively enforcing its environmental laws and regulations. It does not reach a conclusion about whether a party is failing to effectively enforce. It is meant to provide the necessary information that will allow others to draw conclusions about whether or not a party is failing to do so. That is the point of the public release of a factual record. If the factual record did not provide the relevant information for the drawing of conclusions about the effectiveness of the enforcement of environmental laws, the Article 14/15 process would be a pointless exercise that did not promote the objectives of the Agreement.

41. In this light, the guiding point for the Secretariat in seeking information from independent experts that can be included in a factual record is whether the information will permit others to reach a conclusion on whether or not a Party against which the complaint has been brought is failing to effectively enforce its environmental law. What the Secretariat cannot do is itself make a determination whether the Party in question is effectively enforcing its environmental law. Equally, it cannot delegate to an independent expert the authority to make that determination.

42. What constitutes a "determination" that a Party is failing, within the meaning of Article 14, to effectively enforce its environmental law?

43. The Agreement does not define the term "effectively enforce its environmental law." However, Article 45 indicates circumstances where a Party would not be held to have failed to effectively enforce its environmental law' These are where action or inaction by agencies or officials of a Party:

> "(a) reflects a reasonable exercise of their discretion in respect of investigative, prosecutorial, regulatory or compliance matters; or (b) results from bona fide decisions to allocate resources to enforcement in respect of environmental matters determined to have higher priorities."

Thus, determining whether a party has failed to "effectively enforce its environmental law" within the

meaning of Article 14 also involves determining whether the provisions of Article 45 have been met. It is an exercise in determining the applicability of treaty provisions. And, such a process is different from merely holding an opinion on whether environmental laws are being effectively enforced.

44. Clearly opinions will be held about the efficacity of a Party's enforcement of its environmental laws, and independent experts may well hold such views. Moreover, the fact that such views are held may be an important part of the "information" that ought to be included in a factual report. Where then, is the line to be drawn between including opinions in a factual report and seeking to include formal determinations on the merits of the issue that is the subject of the submission?

45. In my view, the Secretariat could include in a factual record the opinions of those who even prior to the submission have expressed views on the matter, provided they are relevant. The existence of such opinions would constitute important factual information about the issue in question. Equally, the Secretariat could seek opinions from independent experts on the scope and application of the laws allegedly not being effectively enforced. It could seek information on how those laws are being enforced in fact. It could seek information on the effectiveness of strategies claimed by a Party to be an effective way of achieving certain environmental goals. It could seek expert opinion on what might constitute a reasonable exercise of discretion in respect of investigatory, prosecutorial, regulatory or compliance matters. All of this would be important information for anyone seeking to decide whether a Party is effectively enforcing its environmental laws within the meaning of Article 14 and Article 45.

46. More concretely, if a submission was made alleging that a Party was "failing to effectively enforce its environmental law" because of a lack of prosecutions under a particular statute, the Secretariat could seek opinions on whether the events alleged to have occurred would fall under the statute in question. It could seek opinions from independent experts on whether prosecutions are an effective means of dealing with the particular environmental problem. It could seek assessments of alternative means of dealing with those environmental problems. But, having assembled this comprehensive factual record, the Secretariat could not ask a legal expert, say a retired judge of the Supreme Court, to consider the record and determine whether the Party had failed to effectively enforce its environmental law within the meaning of Article 14 and 45 of the NAAEC.

47. Thus, the Secretariat cannot seek to have the issue of whether a Party is failing, within the meaning of Articles 14 and 45, to effectively enforce its environmental laws, determined by asking an independent expert to review the complaint and all of the assembled information and determine whether the complaint is well-founded. And, if an independent expert did in fact overstep his or her mandate and seek to make such a determination, the Secretariat could not include that determination in a factual record.

48. Obviously, the application of this limitation will involve the Secretariat in making some fine distinctions and exercising some judgment. However, as will be pointed out in the next section, the Secretariat has the power to do what is reasonably necessary to carry out its functions.

3. The Autonomy of the CEC Secretariat

49. The question to be considered is whether the CEC Secretariat has any autonomy in applying the NAAEC. The starting point for considering this question is the terms of NAAEC itself.

50. The Secretariat is one of the organs of the CEC, established under Section B of Part Three of the NAAEC. Headed by an Executive Director, the Secretariat is meant to have an "international character" and its members are not to "seek or receive any instructions from any government or any other authority external to the Council." The Parties are enjoined from seeking to influence members of the Secretariat in the discharge of their responsibilities.[27] Thus, at the outset, the NAAEC grants the Secretariat a degree of independence.

3. The Structure and Powers of the Secretariat

51. The structure of the Secretariat is set out in Article 11 which also lists certain of the Secretariat's responsibilities. These include, providing technical, administrative and operational support to the Council and such other support as the Council may direct,[28] providing the Parties and the public with information on where they may receive technical advice and information on environmental matters,[29] and protecting the identity of those making submissions, if they so request, and protecting confidential information from public disclosure.[30] In practice, as well, the Secretariat has the task of submitting an annual program and budget to the Council although that task is assigned formally by the Agreement to the Executive Director.[31]

52. Specific tasks are also specified for the Secretariat under Articles 12, 13, 14 and 15. These relate to the preparation of an annual report, the preparation of other reports, the receipt of submissions

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[27] Article 11.4.

[28] Article 11.5.

[29] Article 11.7.

[30] Article 11.8.

[31] Article 11.6.

from non-governmental organizations or persons, and the tasks associated with the preparation of a factual record.

53. Although a number of the tasks assigned to the Secretariat are administrative in character, the tasks assigned under Article 14 and 15 are of an executive, rather than an administrative nature. These relate to both matters of process and matters of substance. They include, the receipt of submissions and the determination of their admissibility, the decision whether to request a response from a Party, the decision to recommend to the Council that a factual record be established and the power to determine the reasons on which that recommendation is to be based, and the decisions on what should be included in the preparation of a factual record. Moreover, as paragraph (d) of *Guideline* 12.2 makes clear, the Secretariat is to reach its own conclusions on what the facts are.

54. The assigning of executive functions to a Secretariat or to a Secretary-General is not unusual in international organizations.[32] However, questions can arise as to the nature and scope of the powers that have been so assigned.

55. It is well-established in international law that international organizations have both the express powers that they are granted in their constitutions as well as the powers that can be implied as necessary for the carrying out of those express functions. In the *Reparations Case*,[33] the International Court of Justice stated, "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."[34] This principle was endorsed again recently by the ICJ in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*.[35] The Court said,

> "the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers known as 'implied powers'"[36]

Furthermore, this reasoning has been applied to the actions of an organ of an international organization as well. The General Assembly of the United Nations was found to have the authority to establish an

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[32] Henry G. Schermers, *International Institutional Law* (Vol I, 1972), 190.

[33] *Reparations for Injuries Case* [1949] I.C.J. Rep. 174..

[34] *Ibid*., at 182.

[35] Advisory Opinion of 8 July 1996.

[36] *Ibid*., at para. 25,

independent international tribunal, even though such a power was not provided for expressly in the UN Charter.[37] More recently, the Security Council of the United

[37] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* [1954] I.C.J. Rep. 47.

Nations, acting pursuant to its implied authority, established international criminal tribunals for the former Yugoslavia and for Rwanda.[38]

56. The implied powers of an international organ are not unrestricted. In the *Nuclear Weapons* case, the ICJ rejected the claim by the WHO to request an advisory opinion on the legality of the use of nuclear weapons. While the Court considered that issues relating to the effects of the use of nuclear weapons on health may have been within WHO's competence, the legality of the use of nuclear weapons was not.[39]

57. Applied to the CEC Secretariat, the existing law applicable to international organizations would suggest that the Secretariat has the specific powers assigned to it under the NAAEC, and additionally it has such powers as may reasonably be implied as necessary to carry out the specific functions assigned to it. In determining what it may do in the exercise of its implied powers, the Secretariat is of necessity involved in interpreting the Agreement. The question that arises, however, is to what extent are the powers of the Secretariat to be exercised subject to the control of the CEC Council.

4. The Relationship Between the Secretariat and the Council

58. The relationship of the Secretariat to the Council is not defined in detail in the Agreement. The Council is the "governing body of the Commission." Although it is composed of representatives of the Parties, the Council functions as the organ of the CEC with its own particular responsibilities and functions. However, its close relationship with the NAAEC Parties is illustrated in Article 9.5 which provides that in addition to its specific functions, the Council may "take such other action in the exercise of its functions as the Parties may agree." And, of course, ultimately the Parties can exercise control through their power to amend or even terminate the Agreement.

59. The Council has specific functions in relation to the Secretariat as well as the general responsibility "to oversee the Secretariat."[40] In approving the annual program and budget of the

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[38] SC Res. 827, S/RES/827(1993) (Yugoslavia), SC Res 955, S/RES/955(1994) (Rwanda).

[39] *Supra* note 35, at para. 21.

[40] Article 10.1.

Commission, the Council exercises control over what the Secretariat may do. The Council can also direct the Secretariat to provide certain support. It can provide instructions on the preparation of the annual report. It can instruct the Secretariat not to prepare a report on an environmental matter outside the scope of the annual program. The Council has, in addition, the power to instruct the Secretariat to prepare a "factual record."

60. However, in a number of spheres, the Agreement grants authority to the Secretariat to do things without the necessity for any prior review, approval or instructions from the Council. For example, the Secretariat can prepare a report for the Council on any matter within the scope of the program. It can consider submissions under Article 14 provided that they meet the criteria for admissibility. It can determine whether such a submission merits a response from a Party. It can decide whether to recommend to the Council that such a submission warrants the preparation of a "factual record." It can decide what to include in a factual record. It can decide whether to incorporate the comments of a Party on a draft factual record into a final factual record.

61. In all of these instances, the authority of the Secretariat as well as the parameters of that authority are set out in the Agreement. In no instance is the exercise of this authority stated to be subject to the approval of the Council. Moreover, in some instances the authority of the Council in relationship to the Secretariat is specifically circumscribed. Under Article 15.5, the Council is able to provide comments only on the "accuracy" of a draft factual report, not on any other aspects of it.

62. The relationship of organs within an international organization to each other has come up in United Nations practice, particularly in respect of the Security Council and the General Assembly. The approach of the ICJ has been to recognize the respective spheres and authority of the two organs.[41] Thus, the Security Council's "primary responsibility for international peace and security" did not result in paramountcy over the General Assembly or exclude the Assembly from acting in accordance with its own responsibilities in that area under the UN Charter.[42] By analogy, the fact that the CEC Council is the "governing body of the Commission" does not of itself give the Council a paramountcy over the Secretariat in areas where the Secretariat is given certain functions under the Agreement.

63. Does the fact that the Council has been granted the authority to "oversee the Secretariat" give the Council a veto over all Secretariat activities? In the context of the Agreement as a whole, it is difficult to conclude that it would have that effect. As mentioned earlier, the Agreement sets out certain responsibilities of the Secretariat that are explicitly under the control of the Council, such as providing administrative and technical support and preparing the annual report of the Commission. The Agreement sets out, as well, certain responsibilities where no specific role is given to the Council, such

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[41] See generally D.W. Bowett, *The Law of International Institutions* (3rd ed. 1975) 42-48.

[42] *Certain Expenses of the United Nations,* [1962] I.C.J. Rep. 151.

as the determination of the admissibility of a submission. To suggest that the power to "oversee" the Secretariat gives the Council a role in respect of matters relating to the Secretariat where no such explicit role has been given would render unnecessary those provisions in the Agreement that make certain Secretariat responsibilities subject to Council direction and control. It would be contrary to accepted

principles of treaty interpretation under which an interpretation should not be adopted that renders provisions of a treaty meaningless.[43]

64. In respect of the Article 14/15 process, it is clear that the Secretariat and the Council have defined, separate roles. The power to determine the admissibility of a submission is a power granted to the Secretariat. It is not a power that is to be exercised "subject to" the supervision of the Council. The decision to recommend that a factual report be prepared and the determination of the reasons for that recommendation are matters for the Secretariat, not for the Council. The process for assembling a factual record is a task assigned to the Secretariat, not to the Council. The Council's involvement in the process is to decide whether to instruct the Secretariat to develop a factual record, to comment on the accuracy of a draft report, and to decide whether a factual record is to be made publicly available. In short, Articles 14 and 15 set out a careful balance between the role of the Secretariat, the body with an "international character" which is meant to function with some degree of independence, and that of the intergovernmental body, the Council.

5. Conclusion

65. Thus, the CEC Secretariat has some degree of autonomy under the NAAEC. It has certain specific powers and functions, in particular in the context of the Article 14/15 process, and, in accordance with the law applicable to international organizations, it has in addition those powers that may be reasonably implied as necessary in order to carry out its express functions. In determining the extent of its function, the Secretariat, thus has the authority to interpret the Agreement.

66. This, however, does not mean that there are no restraints on the actions of the Secretariat. As a matter of law, as the decision of the ICJ in the *Nuclear Weapons* case shows, an organ or an organization has no authority to go beyond its constitutional mandate. The Secretariat has no authority to exceed its express or implied powers. The question that arises is what happens if it does exceed its authority. In this regard, the Council clearly has a role in pursuance of its mandate to "oversee the Secretariat." Thus, if the Council was of the view that the Secretariat was acting beyond the scope of

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[43] As expressed by the WTO Appellate Body in *United States - Standards fro Reformulated and Conventional Gasoline* (WT/DS2/AB/R 29 April 1996): "An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."

its responsibilities, it could draw the Secretariat's attention to this. If the Secretariat's actions were in respect of a matter on which the Council had authority under the Agreement to direct the Secretariat, it could direct the Secretariat to act accordingly.

67. However, if the Council had no authority under the Agreement to give directions to the Secretariat, it cannot direct the Secretariat to act. Of course, the Council could authorize the Secretariat to act in areas where the Secretariat lacks a mandate under the Agreement, provided that this is not contrary to the Agreement. Thus, as mentioned earlier, the Council can authorize the Secretariat to include in the factual record its own conclusions on whether a Party is "failing to effectively enforce its environmental law." In that sense it can supplement the Secretariat's authority.

68. However, the Council cannot direct the Secretariat not to act where the Secretariat has authority under the Agreement to act. Thus, the Council could not direct the Secretariat not to consider submissions under Article 14. If it sought to do so, the Council itself would be acting in excess of its authority. It would constitute an attempt to amend the Agreement, something that under Article 48 is the prerogative of the Parties, not of the Council. Thus, the Agreement sets out areas of jurisdiction an responsibility for each of the CEC organs and delineates their powers as distinct from the powers of the Parties themselves.

69. In the light of the above, in my view, the CEC Secretariat has a degree of autonomy in the application of the NAAEC. The extent of that autonomy is defined in the functions and powers of the Secretariat as set out in the Agreement, and it extends to powers that may be implied as necessary to give effect to those express functions and powers.

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7 February 2000

The Scope of the Secretariat's Powers Regarding the Submissions Procedure of the North American Agreement on Environmental Cooperation under General Principles of International Law

I. Issues

1. You have asked me to address two questions. First, you have asked me to explicate the international legal principles governing the interpretation of treaties and to describe the specific application of those principles by regional and global dispute resolution entities. Second, you have asked me to apply those principles, in light of the practice of other entities, to evaluate the scope of the Secretariat's powers under Article 15 of the North American Agreement on Environmental Cooperation (NAAEC).[1] This opinion extends and complements the analysis by Professor Donald McRae, prepared for the Secretariat in February, concerning *Information Developed by Independent Experts and the Autonomy of the Secretariat of the Commission for Environmental Cooperation*.

II. Overview

2. A treaty is an agreement between states, codifying obligations that they have voluntarily undertaken. These obligations may run toward one another, toward third parties, and toward the international community at large. States choose entirely of their own volition whether to enter into a treaty; indeed, one of the cornerstones of sovereignty is the capacity to conclude agreements with other states. The terms of a particular treaty

[1] North American Agreement on Environmental Cooperation, Sept. 8, 1993, 32 I.L.M. 1480 (1993) [hereinafter NAAEC].

similarly reflect an often lengthy negotiation process and a bargain struck to satisfy or at least mollify many different constituencies.

3. Once states actually consent to a treaty, however, they also consent to an entire corpus of international legal rules and practices governing the interpretation and application of its terms. This is the process of bringing a treaty to life, transforming it from legal language to everyday practice. In both civil and common law systems, codes and caselaw reflect this dynamic process of determining the actual meaning of abstract formulations.

4. The international legal principles governing treaty interpretation defer to the sovereignty of the states party by looking both to text and the parties' intent, but at the same time hold the parties to their word in terms of the overarching purposes the treaty is supposed to serve. The treaty text remains supreme, but the precise meaning given to that text derives from an understanding of the language chosen in the context of the treaty as a whole. It thus prevents parties from promising in the Preamble only to take away in the text.

5. To the extent that states wish to circumscribe this process of interpretation, they must spell out clearly a list of prohibitions as well as obligations. They must be explicit about the precise parameters of the bargain they have struck, ruling out specific evolutionary paths over the life of the treaty. Enhancing the precision of the treaty along these lines will certainly complicate the negotiating process, however, and may alienate many of the domestic constituencies whose support is critical to striking the initial bargain. States thus often prefer broader and more open-ended provisions, which must be interpreted to be effective in light of the overarching object and purpose of the treaty.

6. The principle of effective interpretation and the doctrine of implied powers are intermediate principles that bridge the lofty formulations of the Vienna Convention and the outcomes in specific cases. A treaty cannot achieve its object and purpose unless it is effective; treaty interpreters must thus read specific treaty provisions to maximize their effectiveness. Similarly, entities established by treaty must possess the powers necessary

to carry out the functions the parties intended them to exercise. If not explicit in the treaty text, such powers must be implied.

7. International institutions from courts to commissions have applied the principle of effectiveness and the doctrine of implied powers to achieve a wide range of substantive and procedural outcomes. The specific import of these principles depends on the nature and scope of the treaty subject to interpretation. But the process of applying these principles is the *practice* of interpretation, the actualization of the Vienna Convention. This practice offers a model for the Secretariat in exploring and defining the parameters of its role under the CEC.

8. The CEC is an unusual institution. Under the Preamble of the NAAEC, it is charged with "facilitat[ing] effective cooperation on the conservation, protection and enhancement" of the environment in the territories of the states party. It performs a variety of functions in the service of this goal, including overseeing the citizen submission process. Although the NAAEC provides for a fairly traditional inter-state dispute resolution process in Part V, relying on arbitral panels, the citizen submission process is a *sui generis* and highly innovative mechanism for enhancing each party's enforcement of its environmental laws through increased public participation. Indeed, the Preamble explicitly recognizes the importance of public participation to enhanced environmental protection.

9. The citizen submission process allows complaints concerning lack of enforcement to be brought, but no part of the CEC actually resolves or adjudicates these complaints. Rather, where they meet specific criteria, the complaints become a trigger for the provision of information to the public, the specific complaint, the parties' responses to it, and related scientific and technical information that will allow *the public* to reach a conclusion on the merits. Such a conclusion might then motivate further political action.

10. This process might be described as a dispute resolution process for the information age. Understanding its nature and purpose is critical to interpreting the specific treaty provisions that give it life. In particular, by the terms of the treaty itself

the Secretariat must be responsive not only to the Council but to the needs of the public both in disseminating information and placing it in sufficient context to aid public understanding. The Secretariat cannot itself offer a conclusion or a legal determination on the merits of the complaint. But, having committed themselves to the text, object and purpose of the NAAEC, the states party must acknowledge that the Secretariat has the powers necessary to do its job.

III. International Legal Principles for the Interpretation of Treaties

a) The Vienna Convention on the Law of Treaties

11. The Vienna Convention on the Law of Treaties provides, in Article 31, that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[2] The Vienna Convention's principles on interpretation, as set out in Articles 31 to 33, reflect customary international law.[3] The need to interpret a treaty with regard to its object and purpose, as expressed in Article 31 of the Vienna Convention, is recognized as a general and fundamental international legal principle.[4]

12. The "context" within which the terms of the treaty are to be understood is defined in Article 31(2) to include the preamble and annexes to the treaty in question, including "any agreement relating to the treaty which was made between all the parties in

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[2] Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

[3] *See* SIR IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 153 (2d. ed. 1984). Article 33, dealing with the interpretation of treaties authenticated in two or more languages, is not discussed here.

[4] The Vienna Convention includes in its scope "any treaty which is the constituent instrument of an international organization and … any treaty adopted within an international organization without prejudice to any relevant rules of the organization." Vienna Convention, art. 5.

connection with the conclusion of the treaty,"[5] and "any instrument which was made by one or more parties in connection with the conclusions of the treaty and accepted by the other parties as an instrument related to the treaty."[6] Subsequent practice, or agreement, between the parties regarding interpretation or application of its provisions, and any relevant rules of international law applicable in the relations between the parties, also form part of the context.[7]

13. Thus, in interpreting the terms of a treaty, the context and the object and purpose of that treaty are crucial elements. The object and purpose are not regarded as distinct from the ordinary meaning of a treaty's terms, to be referred to only in cases of ambiguity, but are, rather, a key factor in determining what that ordinary meaning is. The object and purpose of a treaty thus inform and condition the interpretation of that treaty from the outset.

14. The Vienna Convention's articles on interpretation reflect the underlying purpose of international legal principles of interpretation: to give effect to the intent of the parties.[8] Article 31 does not spell out every principle of interpretation used to achieve this result. Rather, it sets out a means of determining the parties' intent, taking into account the actual words used, while ensuring that those words are understood in their context as the parties intended them to be understood.

15. The object and purpose of a treaty, reflected in its terms, are a key element in this process of determining intent. The parties are free to state their intentions and codify their bargain, but they must understand that treaty interpreters will take them at their word when interpreting the express terms and determining the parties' intent. The

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[5] Vienna Convention, art. 31(2)(a).
[6] Vienna Convention, art. 31(2)(b).
[7] Vienna Convention, art. 31(3)(a)(b) and (c).
[8] LORD MCNAIR, THE LAW OF TREATIES 365 (1961) ("In our submission [the task of applying or construing or interpreting a treaty] can be put in a single sentence; it can be described as the duty of giving

international legal rules governing treaty interpretation thus acknowledge and respect the sovereignty of all states party to a treaty. At the same time, however, they assure the integrity of the agreement and the credibility and reputation of the parties to it.

16. Article 32 of the Vienna Convention adds supplementary means of interpretation, which include the preparatory work of the treaty and the circumstances of its conclusion. These supplementary sources can be used to confirm the meaning resulting from application of Article 31, to determine the meaning of the treaty's terms where Article 31's application results in ambiguity or obscurity, or where interpretation under Article 31 leads to a result that is "manifestly absurd or unreasonable."[9] Thus, where the text alone does not render a clear answer, the intent of the parties can be sought in other sources, provided any sources used shed light on the intent of the parties. The means provided for in Article 32 are merely supplementary ways of finding that intent.

17. Reference is also made in Article 31 to "good faith." Since it is the parties that are usually called upon to interpret the treaty, Article 31 requires that such an interpretation be done in "good faith," so as not to contravene the intent of the parties at the time the treaty was created. While subsequent practice demonstrating agreement by the parties may affect the interpretation of the treaty's terms, as indicated in Article 31(3), even such subsequent practice is restrained by the general duty of "good faith" placed on parties to a treaty. Article 26 of the Vienna Convention provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[10]

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effect to the expressed intention of the parties, that is, their intention *as expressed in the words used by them in the light of the surrounding circumstances*") (emphasis in original).

[9] Vienna Convention, art. 32.

[10] *See* SINCLAIR, *supra* note 3, at 83 (citing the view of the International Law Commission, which drafted the Vienna Convention, that the principle of *pacta sunt servanda* embodied in Article 26 of the Vienna Convention is "the fundamental principle of the law of treaties").

b) The Vienna Convention in Practice

18. The Vienna Convention provides a general framework for the interpretation of treaties, but it does not provide an operating manual. It requires that specific treaty terms be interpreted with reference to the parties' intent as set forth in the objectives of the treaty. In practice, however, intermediate principles are necessary to translate these general principles into specific applications. Over time, interpreters of treaties have developed two principles that serve this purpose: the effectiveness principle and the doctrine of implied powers. These principles provide a kind of interpretive technology, enabling a wide range of tribunals to interpret their respective treaties in line with the framework set out in the Vienna Convention. [11]

19. A treaty cannot advance its express object and purpose if it is not effective. Conversely, in interpreting a treaty it is often necessary to determine which interpretation of a particular treaty provision will be most effective in advancing the treaty's object and purpose. This is the **principle of effectiveness** or **effective interpretation**.

20. The second form of concrete application of the Vienna Convention's general principle of interpretation is the **doctrine of implied powers**. The need to imply certain powers may arise from a need to ensure the effective operation of the treaty and its regime. In this sense, the doctrine of implied powers is the flip side of the principle of effective interpretation. In addition, implied powers are necessary where the means of carrying out the express powers and duties under the treaty are not specified or are ambiguous.

21. The precise import of both principles depends on the object and purpose of the agreement under question. For instance, the effective interpretation of the Treaty of

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[11] *See* MCNAIR, *supra note* 8, at 385 ("In short, we doubt whether this so-called rule [of effectiveness] means more than to say that the contracting parties obviously must have had some purpose in making a

Rome[12] or the European Convention on Human Rights[13] will clearly yield very different outcomes than the effective interpretation of the NAAEC. Similarly, the powers of the Secretariat of the CEC will depend not on the powers granted to or developed by the European Court of Justice or the European Court of Human Rights, but on the text of the NAAEC.

22. Nevertheless, the invocation of effectiveness and the need for implied powers in these institutions' interpretation of their constituent treaties is relevant to the Secretariat of the CEC. The practice of the Human Rights Committee, acting under the International Covenant on Civil and Political Rights,[14] is similarly relevant. The practice of all three bodies demonstrates the specific techniques of treaty interpretation. Thus, while the outcome of particular cases cannot provide a model for the Secretariat, the process by which these institutions reach those outcomes provides a model of interpretation that must guide the Secretariat in interpreting its role under the NAAEC.

23. Further, the entities discussed below, and the treaty regimes under which they function, are all concerned with more than the enforcement of reciprocal obligations between states. The aim of these regimes is not solely to benefit the signatory parties but also to achieve a neutral, commonly agreed goal, which can be identified as the object and purpose of the treaty. Human rights regimes, like regimes developed to further protection of the environment, are concerned not only with reciprocal obligations between states, but also with the progressive development of human rights in the signatory states.

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treaty, and that it is the duty of a tribunal to ascertain that purpose and do its best to give effect to it, unless there is something in the language used by the parties which precludes the tribunal from doing so").

[12] Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (1958).

[13] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention].

[14] International Covenant on Civil and Political Rights and Optional Protocol, adopted Dec. 16, 1966, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 301 (1967) (entered into force Mar. 23, 1976) [hereinafter ICCPR and OP, respectively].

24. The NAAEC has a similar aim with regard to the environment: the aim of protecting and improving the environment is stated as the first objective of Article 1.[15] The NAAEC's objectives also include enhancing compliance with, and enforcement of, environmental laws and regulations, and promoting transparency and public participation in the development of environmental laws, regulations and policies.[16] The application of the principle of effective interpretation and the doctrine of implied powers by these tribunals thus has direct relevance for interpretation of the NAAEC.

(i) Effective Interpretation

The European Court of Justice

25. The European Court of Justice (ECJ) has relied on arguments of effectiveness since 1962 to further the object and purpose of the EEC Treaty. In its foundational opinion, *Van Gend en Loos*, the Court pointed out that the objective of the Treaty was to "establish a Common Market," which in turn meant that the Treaty did not merely create mutual obligations between the contracting states, but also created both obligations and rights for individuals.[17] Referring to the objective of the EEC Treaty, the Court declared that to "ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of these provisions."[18] Taking these considerations into account, the Court established the doctrine of direct effect, which allows individuals to invoke certain provisions of

[15] NAAEC, art. 1(a). *See also* NAAEC, Preamble, para. 5.
[16] NAAEC, art. 1(g) and (h).
[17] Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1, 12.
[18] *Id*.

Community law before their domestic courts even before such provisions are incorporated into domestic law.

26. In *Costa v. ENEL*, the ECJ established that Community law prevailed over conflicting member state law. Although the Treaty did not specify this hierarchy in terms, the Court argued that the "executive force of Community law cannot vary from one State to another …, *without jeopardizing the attainment of the objectives of the Treaty* set out in Article 5(2) and giving rise to the discrimination prohibited by Article 7."[19]

27. Addressing the same issue in *Administrazione delle Finanze dello Stato v. Simmenthal SpA (II)*, the ECJ refused to accord legal effect to national legislation that encroached on Community competences. It reasoned that to grant such effect "would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by the Member States pursuant to the Treaty and would thus imperil the very foundations of the Community."[20] Here the logic of the effectiveness principle is very clear. If states mean what they say in undertaking an obligation, then what they say must be interpreted so as to advance their meaning.

28. In recent cases, the ECJ has found that a state can be liable for damage caused by its breach of Community law, even without an express provision to that effect in Community instruments. In *Francovich v. Italian Republic*, the Court reasoned that "[t]he full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress

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[19] Case 6/64, Costa v. ENEL, 1964 E.C.R. 585, 594 (emphasis added). Article 5 read: "Member States shall take appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. ¶ They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty." This provision is now Article 10 of the Treaty of Amsterdam, 2 Oct. 1997, 37 I.L.M. 56 (1998).

[20] Case 106/77, Administrazione delle Finanze dello Stato v. Simmenthal SpA (II), 1978 E.C.R. 629, para. 18.

when their rights are infringed by a breach of Community law for which a Member State can be held responsible."[21]

The European Court of Human Rights

29. The principles of Articles 31 and 33 of the Vienna Convention have consistently and expressly guided the European Court of Human Rights (ECHR) in its interpretation of the provisions of the European Convention on Human Rights (European Convention), applying this principle of interpretation to the particular objects and purposes of that Convention.[22]

30. *Golder v. United Kingdom* provides the most cogent explanation of the ECHR's approach, indicating that the object and purpose of the treaty are crucial factors in any determination of the ordinary meaning of its words:

> In the way in which it is presented in the "general rule" in Article 3l of the Vienna Convention, the process of interpretation of a treaty is a unity, a single combined operation; this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of [Article 31 of the Vienna Convention].[23]

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[21] C-6 & 9/90, Francovich v. Italian Republic, 1991 E.C.R. I-5357, para. 33. The ECJ confirmed this approach in *Brasserie du Pêcheur and Factortame III*, noting the absence of an express provision in the Treaty concerning liability for failure to correctly implement Community law. Cases C-46 & C-48/93, Brasserie du Pêcheur and Factortame III, 1996 E.C.R. I-1134, para. 20.

[22] *See* J.G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 69 (1993). *See also* Golder v. United Kingdom, 18 Eur. Ct. H.R. (ser. A), para. 29 (1975) (stating that the Court should be guided by Articles 31 to 33 of the Vienna Convention on the Law of Treaties).

[23] Golder v. United Kingdom, *supra* note 22, para. 30. The four paragraphs of Article 31 of the Vienna Convention referred to by the ECHR in *Golder* can be summarized as follows: (1) A treaty must be interpreted in good faith in accordance with the ordinary meaning of its terms in their context and in the light of its object and purpose (art. 31(1)); (2) Context includes the text, preamble and annexes, and also includes any agreement and instrument made in connection with the treaty by the parties (art. 31(2)); (3) Any subsequent agreement and subsequent practice between the parties, and any relevant rules of international law applicable between the parties are to be taken into account (art. 31(3)); (4) A special

In *Golder*, the ECHR espoused the principle of objective interpretation of the rights protected under the Convention. Here again, "object and purpose" is not a subsidiary principle of interpretation, but rather a key parameter of meaning.

31. In seeking to apply this general principle of interpretation, the Court has frequently invoked the effectiveness principle, both in determining its own role within the regime created by the European Convention, and in interpreting the substantive provisions of the Convention.

32. In *Loizidou v. Turkey*, for example, the Court, interpreting the Convention in the light of Article 31 of the Vienna Convention,[24] noted that "the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective."[25] In the Court's opinion, states could not make a reservation to the Convention that would remove the jurisdiction of the Court, given the role of the Court in enhancing the effectiveness of the Convention. Allowing such reservations, the Court argued, "would not only seriously weaken the role of the Commission and Court in the discharge of their functions but would also diminish the effectiveness of the Convention as a constitutional instrument of European public order (ordre public)."[26]

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meaning shall be given to a term if it is established that the parties so intended (art. 31(4)). *See* Vienna Convention, art. 31. *See also supra* paras. 11-17 (discussing Article 31 of the Vienna Convention).

[24] Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A), para. 73 (1995).

[25] *Id*. para. 72.

[26] *Id*. para. 75. *See also id.* para. 70: "The Court observes that Articles 25 and 46 of the Convention are provisions which are essential to the effectiveness of the Convention system since they delineate the responsibility of the Commission and Court "to ensure the observance of the engagements undertaken by the High Contracting Parties" (Article 19), by determining their competence to examine complaints concerning alleged violations of the rights and freedoms set out in the Convention. In interpreting these key provisions it must have regard to the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms."

33. Referring again to effectiveness, the ECHR has granted the admissibility of a case even where the would-be litigant cannot show specific harm from a measure due to its secrecy:

> In the Court's view, the effectiveness (l'effet utile) of the Convention implies in such circumstances some possibility of having access to the Commission. If this were not so, the efficiency of the Convention's enforcement machinery would be materially weakened. The procedural provisions of the Convention must, in view of the fact that the Convention and its institutions were set up to protect the individual, be applied in a manner which serves to make the system of individual applications efficacious.[27]

34. In the interpretation of the substantive rights under the Convention, the Court has similarly emphasized effectiveness. Thus, in *Airey v. Ireland*, the Court rejected Ireland's argument that Mrs. Airey had access to the court because she could represent herself even if she could not afford a lawyer. As the Court said, "[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective."[28] This need to ensure that the rights protected under the Convention are practical and effective is evident in numerous cases.[29]

The Human Rights Committee

35. The practice of the European Court of Justice and the European Court of Human Rights demonstrates both the necessity and value of the effectiveness principle in enabling them to carry out their tasks. But these entities are charged with interpreting treaties that impose a set of complex and far-reaching obligations on signatory states and

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[27] Klass v. Germany, 28 Eur. Ct. H.R. (ser. A), para. 34 (1978).
[28] Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A), para. 24 (1979).
[29] *See, e.g.*, The Belgian Linguistic Case, 6 Eur. Ct. H.R. (ser. A), paras. 3 and 4 (1968). Golder v. United Kingdom, *supra* note 22, para. 35. Luedicke, Belkacem and Koç v. Germany, 29 Eur. Ct. H.R. (ser. A), para. 42 (1978). Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A), para. 31 (1979). Artico v. Italy, 37 Eur. Ct. H.R. (ser. A), para. 33 (1980). Kamasinski v. Austria, 168 Eur. Ct. H.R. (ser. A), para. 65 (1989).

are themselves granted the full panoply of judicial powers. Their construction of the scope of these powers within the context of their respective treaties is correspondingly bold and broad. The Human Rights Committee stands on a different footing. Its application of the effectiveness principle thus leads to a different result.

36. Unlike the ECJ and the ECHR, the Human Rights Committee (HRC) is not a judicial body. The Committee was established by the International Covenant on Civil and Political Rights (ICCPR), under which it considers and studies national reports submitted by states pursuant to the ICCPR. It can also be declared competent to receive and consider communications regarding the inter-state complaint procedure under the ICCPR.[30]

37. In addition, under the First Optional Protocol (OP) to the ICCPR,[31] the Committee considers written communications from individuals alleging personal harm due to a violation of the provisions of the ICCPR. In such cases it has taken on quasi-judicial functions in interpreting the treaty.[32] It has accordingly relied on the principle of effectiveness to further the object and purpose of the Optional Protocol.

38. In *Antonaccio v. Uruguay*, a submission was made to the HRC on behalf of Raúl Antonaccio, then in detention, by his wife. She requested that all written material pertaining to the proceedings be sent to the alleged victim. The Committee agreed.[33] The Committee also agreed that the victim should be given the opportunity to communicate directly with the Committee. There is no express provision for either in the Optional Protocol. The Committee explained:

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[30] The Committee's role and mandate under the ICCPR are set out in Articles 28 to 45 of the ICCPR.
[31] Optional Protocol, *supra* note 14 [hereinafter OP].
[32] Lawrence R. Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 341 (1997).
[33] Antonaccio v. Uruguay, *Report of the Human Rights Committee*, U.N. GAOR, 37th Sess., Supp. No. 40, at 114, 117-8, paras. 10-11, U.N. Doc. A/37/40 (1982).

> If governments had the right to erect obstacles to contacts between victims and the Committee, the procedure established by the Optional Protocol would, in many instances, be rendered meaningless. It is a prerequisite for the effective application of the Optional Protocol that detainees should be able to communicate directly with the Committee.[34]

39. In considering burden of proof questions, the Committee has interpreted Article 4(2) of the OP to ensure that a state's failure to cooperate cannot interfere with the effectiveness of the OP procedure. Article 4(2) requires the state party against whom a complaint has been made "to submit written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State." According to the Committee in *Bleier v. Uruguay*, "[i]t is implicit in article 4(2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities." Where the alleged victim has provided information supported by substantial witness testimony, and where further clarification depends on the state and is not forthcoming, the Committee "may consider [the] allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party."[35]

(ii) Implied Powers

40. In the jurisprudence discussed above, the need to imply certain powers and rights arises from the need to ensure the effective operation of the applicable treaty.[36] In

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[34] *Id*. at 120, para. 18.

[35] Bleier v. Uruguay, *Report of the Human Rights Committee*, U.N. GAOR, 37th Sess., Supp. No. 40, at 130, 135, para. 13.3, U.N. Doc. A/37/40 (1982). *See also* Birindwa and Tshisekedi v. Zaire, *Report of the Human Rights Committee (Volume II)*, U.N. GAOR, 45th Sess., Supp. No. 40, Annex IV (I), at 77, 83, para. 12.4, U.N. Doc. A/45/40 (1990). Romero v. Uruguay, *Report of the Human Rights Committee*, U.N. GAOR, 39th Sess., Supp. No. 40, at 159, 162, para. 12.3, U.N. Doc. A/39/40 (1984). Scarrone v. Uruguay, *Report of the Human Rights Committee*, U.N. GAOR, 39th Sess., Supp. No. 40, at 154, 157, para. 10.2, U.N. Doc. A/39/40 (1984).

[36] As noted above, *supra* para. 20, the effectiveness principle and the doctrine of implied powers are often two sides of the same coin: the aim of ensuring that the intent of the parties are given effect in the

addition, however, the principle that an organization established under a treaty has the implied powers necessary to carry out its express powers stands as a doctrine in its own right, expressly recognized by the International Court of Justice.[37] Many other international entities have found this doctrine essential to their interpretation of their mandate.

The European Court of Justice

41. In addition to furthering the effectiveness of the Treaty through cases like those discussed above, the ECJ has also found it necessary to find implied powers for other institutions established by its founding Treaty. Thus, the Court decided in *Commission v. Council* (*'ERTA')* that, although the Treaty did not grant the Community express powers to enter into agreements with a non-member, this power might in particular cases be inferred from a general competence to deal with the issue concerned.[38] In addition, where this power could be found, either expressly or impliedly, the Court held that "the

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interpretation of a treaty. They are, therefore, often indistinguishable in the practice of tribunals and international institutions. *See, e.g.*, Case 9/74, Casagrande v. Landeshauptstadt München, 1974 E.C.R. 773. Under E.C. Regulation 1612/68, Article 12, the children of nationals of a member state working in another member state were to be "admitted to the same general educational, apprenticeship and vocational training courses under the same conditions" as the nationals of that state if they resided in the new state. The European Court of Justice was asked, in *Casagrande*, whether this included a right for a child to be given the same grant given to low-income families who were nationals of the host state. Although the Community had no competence in the area of education at the time, the Court found that the right to freedom of movement, and references in the Regulation to the need for obstacles to that right to be removed, including obstacles to the integration of the worker's family into the host country, meant that a right to receive the assistance was presupposed. *Id.* at paras. 6-9. The Court continued, "[a]lthough educational and training policy is not as such included in the spheres which the Treaty has entrusted to the Community institutions, it does not follow that the exercise of powers transferred to the Community is in some way limited if it is of such a nature as to affect the measures taken in the execution of a policy such as that of education and training." *Id.* para. 12.

[37] Reparations for Injuries [1949] I.C.J. Rep. 174, 182. Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict**,** 8 July, 1996, para. 25. *See* Donald McRae, *Information Developed by Independent Experts and the Autonomy of the Secretariat of the Commission for Environmental Cooperation,* submitted to the Secretariat of the CEC, 7 February, 2000, at paras. 55-56.

[38] Case 22/70, Commission v. Council ('ERTA'), 1971 E.C.R. 263, paras. 12-16.

Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules."[39]

The European Court of Human Rights

42. In its first decision, *Lawless v. Ireland*, the European Court of Human Rights had to deal with a procedural challenge to the case at bar which concerned the powers of the Convention's European Commission on Human Rights.[40] After deciding to refer the case to the Court, the Commission had communicated its report to the original applicant and solicited comments that it could then represent to the ECHR. Under the Convention, the individual petitioner has no right to be heard by the ECHR; the Commission had developed the procedure at issue under its Rules of Procedure so that the individual complainant's views could be represented in the judicial proceeding. The state concerned, Ireland, objected and argued that due to the procedural violation, the Court could not hear the case. The ECHR, however, accepted the Commission's argument that "subject to the express provisions of the Convention, *[the contracting states] had conferred on it the necessary powers to fulfill effectively the functions entrusted to it by Article 19 of the Convention.*"[41] The Court noted the absence of a provision in the Convention forbidding the Commission from publishing its report or communicating it to anyone it wished when it considered that the fulfillment of its functions so required.[42]

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[39] *Id*. para. 17.
[40] Lawless v. Ireland, 1 Eur. Ct. H.R. (ser. A) (1960).
[41] *Id*. at 12 (emphasis added).
[42] *Id*.

The Human Rights Committee

43. The European Union and the European Convention on Human Rights created regimes with several institutions, a binding court, and specific obligations for the states party. Once again, the powers that must be implied for such systems to function will be different from the powers of an institution with limited functions under a simpler treaty regime. The use of implied powers by the Human Rights Committee is therefore very different from the interpretation of a doctrine of implied rights by the two courts discussed above. Yet the HRC's practice indicates that certain implied powers are necessary in order for the HRC to carry out its express functions.

44. Under the Optional Protocol, the HRC has established procedural rules in order to allow it to perform its functions, since the Protocol did not elaborate those rules. Some of these rules adopt procedures not expressly provided for in the Protocol. A provision for interim measures, for example, is now contained in Rule 86. Under this rule, the Committee "may inform the State of its views whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation."[43] Although these requests for interim measures, just like the final views of the Committee, are not legally binding on states, this implied power has been used to important effect. Stays of execution have been requested and, occasionally, granted, for a number of individuals.[44] Further, the HRC now has a special rapporteur on death penalty cases, authorized to take Rule 86 decisions on behalf of the HRC.[45]

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[43] *See* DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE 131 (1991).
[44] *Report of the Human Rights Committee*, U.N. GAOR, 43rd Sess., Supp. No. 40, at 154, para. 655, U.N. Doc. A/43/40 (1988) (reporting that, pursuant to Rule 86, stays of execution were requested of two states parties for a number of applicants with cases before the HRC in 1988, and that stays of execution were granted). *See generally* MCGOLDRICK, *supra* note 43, at 131-132.
[45] *Report of the Human Rights Committee*, *supra* note 44, at 154, para. 656. *See also* MCGOLDRICK, *supra* note 43, at 213, fn. 130.

45. Under Article 5(4) of the Optional Protocol, the HRC "shall forward its views to the State party concerned and to the individual."[46] This is the final outcome of the Protocol's individual petition process, and the OP says nothing more about the content of these final views. However, the HRC has developed the content of its final views under the Optional Protocol procedure. It now incorporates in these views a statement of the view of the HRC on the 'obligation' of the state party in the light of the HRC's findings, some of which are quite specific, even though the Protocol does not provide for such a statement.[47] Further, since 1982, the letter accompanying the Committee's views invites the state party to inform the HRC of any action pursuant to its views.[48]

46. In addition, the Human Rights Committee performs functions under the ICCPR.[49] Here, the Committee has established procedures in order to enhance the effectiveness of its mandate. The Committee has produced guidelines for the assistance of states party in complying with their reporting requirements.[50] It has also developed a procedure for examining the reports it does receive by questioning representatives of the state concerned, a procedure that has made the examination "in most cases more rewarding that the initial report itself."[51]

47. The HRC's mandate does not expressly provide for the receipt of information other than from the signatory states. Initially, in order to supplement the inevitably subjective content of states' reports, individual Committee members frequently drew on their own personal knowledge, occasionally citing the source of their information, but

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[46] OP, art. 5(4).
[47] *See* MCGOLDRICK, *supra* note 43, at 152-3.
[48] *Id.* at 155. *See, e.g.*, Birindwa and Tshisekedi v. Zaire, *Report of the Human Rights Committee (Volume II)*, *supra* note 35, at 84, para. 14.
[49] *See* ICCPR, Articles 23-45.
[50] *General Guidelines Regarding the Form and Content of Reports from States Parties under Article 40 of the Covenant, Report of the Human Rights Committee*, U.N. GAOR, 32nd Sess., Supp. No. 44, Annex IV, at 69-70, U.N. Doc. A/32/44 (1977). *See* MCGOLDRICK, *supra* note 43, at 63. Torkel Opsahl, *The Human Rights Committee*, *in* TORKEL OPSAHL, LAW AND EQUALITY: SELECTED ARTICLES ON HUMAN RIGHTS, at 465, 500-502 (1996) [hereinafter Opsahl].
[51] Opsahl, *supra* note 50, at 503.

more frequently making no reference to a source.[52] Over time, and increasingly since 1986, it has become accepted practice for the Committee to cite non-state and non-UN sources of information, to maintain good relations with non-governmental organizations, and to receive a wide range of material.[53] The use of outside information by Committee members is no longer remotely controversial.[54] The receipt of information not expressly referred to under its mandate is crucial to ensuring that the HRC does not have to rely only on the information received by the states. It is therefore a necessary corollary to the Committee's role of overseeing the implementation of the ICCPR.

IV. Applying Interpretive Principles to the NAAEC

48. A brief review may be helpful. Under international law, treaty terms are to be interpreted with reference to their context and their object and purpose. These injunctions are entirely consistent with the overarching duty of any treaty interpreter to determine the intent of the parties. That intent is itself expressed in the treaty as a whole; in its Preamble and statement of purpose just as much as in its substantive provisions. In order to ascertain that intent, interpreters of treaties have developed two interpretive technologies, the effectiveness principle and the doctrine of implied powers.

49. These interpretive technologies are highly context-specific. They are text-based and do not rely on any overriding view of what the parties *should* have agreed. Thus, while the interpretive principle remains the same from context to context, it is necessary to consider the object and purpose of the treaty at hand in order to determine what will make it effective and what powers may need to be implied. The object and purpose of

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[52] MCGOLDRICK, *supra* note 43, at 77-78.
[53] *Id*. at 79.
[54] *Id*. at 79. *See also* Opsahl, *supra* note 50, at 506-7.

the NAAEC are thus central to any consideration of the Secretariat's role under the NAAEC's submissions procedure.

50. The Secretariat of the CEC is an independent body,[55] entrusted in Article 14 with the power to develop a factual record, subject to the initial approval by a two-thirds vote of the Council and subject to the terms of the Agreement.

51. The NAAEC was established as an environmental side-agreement to the North American Free Trade Agreement (NAFTA). NAFTA includes in its Preamble a resolution to strengthen "the development and enforcement of environmental laws and regulations"[56] and the NAAEC makes express reference to this provision of NAFTA in its own Preamble.[57] The objectives of the NAAEC, set out in Article 1, include enhancing "compliance with, and enforcement of, environmental laws and regulations" and promoting "transparency and public participation in the development of environmental laws, regulations and policies."[58]

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[55] Article 11(4) states: "In the performance of their duties, the Executive Director and the staff shall not seek or receive instructions from any government or any other authority external to the Council. Each Party shall respect the international character of the responsibilities of the Executive Director and the staff and shall not seek to influence them in the discharge of their responsibilities."

[56] North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289, Preamble [hereinafter NAFTA].

[57] NAAEC, Preamble, para. 5. The Preamble to the NAAEC discusses both the importance of environmental protection and the sovereign right of states to pursue their own environmental and development policies. The Preamble also emphasizes "the importance of public participation in conserving, protecting and enhancing the environment." NAAEC, Preamble, para. 6. *See also Id.*, para. 9, which recalls the parties' "tradition of environmental cooperation" and expresses the parties' "desire to support and build on international environmental agreements and existing policies and laws, in order to promote cooperation between them."

[58] NAAEC, art. 1(g) and (h).

52. Similarly, in the CEC Council's June 1999 *Revised Guidelines for Submission on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*,[59] the Preamble recognizes that "the revisions are designed to improve transparency and fairness of the public submissions process and are consistent with Article 11(4) of the [NAAEC][60] and the Council's commitment to a process that honors the Secretariat's decision-making role under Article 14 of the Agreement."[61]

53. Continuous improvement of the environment, transparency and public participation, and effective enforcement of domestic environmental laws are therefore key objectives of the NAAEC. The preparation of a factual record under Article 15 of the NAAEC is a crucial means of achieving these objectives. The NAAEC provides for arbitration between the parties related to a complaint by one party about a persistent failure of effective enforcement by another party.[62] This process begins with consultations, first between the parties concerned, and, second, if necessary, at Council level, in order to reach a mutually satisfactory result.[63] No minimum criteria are specified for this result. If the complainant party is still unsatisfied, the Council, by a two-thirds vote, will convene an arbitral panel. However, this arbitral panel is limited to dealing with specified situations involving inter-state trade or competition.[64] Thus, the process is limited in scope. Further, experience with other tribunals shows that inter-

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[59] *Revised Guidelines for Submission on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* [hereinafter Revised Guidelines]. Adopted by Council Resolution 99-06, June 28, 1999.
[60] *See supra* note 55.
[61] The Revised Guidelines are not intended to alter the meaning of the NAAEC in any way. *See* Revised Guidelines, *supra* note 59, para. 18.1.
[62] NAAEC, art. 22(1). *See generally* NAAEC, arts. 22-36.
[63] NAAEC , art. 22 and 23.
[64] NAAEC, art. 24(1). An arbitral panel will be convened on a two-thirds vote "where the alleged persistent pattern of failure by the Party complained against to effectively enforce its environmental law relates to a situation involving workplaces, firms, companies or sectors that produce goods or provide services: (a) traded between the territories of the Parties; or (b) that compete, in the territory of the Party complained against, with goods or services produced or provided by persons of another Party."

state dispute resolution procedures generate far fewer cases than dispute resolution procedures involving individuals or private groups.[65]

54. The mechanism for private parties to make submissions concerning a failure in effective enforcement and the possible preparation of a factual record thus provide a parallel path to achievement of effective enforcement. The Secretariat's role in this process is central. The factual record, through the gathering and publication of information, provides the means by which compliance can be monitored by the states party and by the public. As preparer of this factual record, the Secretariat must be credible to a variety of constituencies. To maintain this credibility, its autonomy must be preserved and must be seen to be preserved.

55. To fulfill its functions, the Secretariat has a range of powers. Some of these powers are expressly set forth in the treaty.[66] Under Articles 14 and 15 of the NAAEC the Secretariat may "consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law" if the Secretariat determines that certain specified criteria are fulfilled.[67]

56. In deciding whether to request a response from the state party concerned, and in deciding whether to recommend to the Council the preparation of a factual record, the

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[65] *See* Helfer and Slaughter, *supra* note 32, at 286.

[66] In addition to the submissions procedure under Articles 14 and 15, the Secretariat also has wide-ranging power and discretion under Article 13 of the NAAEC to produce reports. The powers of the Secretariat to gather information and produce reports under Article 13 of the NAAEC demonstrate that among the Secretariat's most important roles is the gathering of information to enhance cooperation on protection of the environment and thus aid in the continuous improvement of the environment. NAAEC, art. 13. The Council can object to the preparation of a report by a two-thirds vote, but need not affirmatively approve it. The Secretariat may not produce a report that includes issues related to whether a party is failing to effectively enforce its environmental laws.

[67] NAAEC, art. 14(1). If the Secretariat determines that a submission merits a response from the party, such a response will be requested, and should be supplied by the party. NAAEC, art. 14(2) and (3). If the Secretariat then considers that the submission warrants developing a factual record, it will inform the Council, providing reasons for its view. NAAEC, art. 15(1).

Secretariat has much discretion.[68] To determine whether a submission warrants the preparation of a factual record, the Secretariat will have to assess and evaluate the substance of the claim as a preliminary matter to determine whether the allegations made have enough weight to go forward.

57. The Secretariat prepares a factual record if the Council, by a two-thirds vote, instructs it to do so.[69] In preparing this factual record, the Secretariat shall consider any information furnished by a party, and is also given broad discretion to consider "any relevant technical, scientific or other information: that is (a) publicly available; (b) submitted by interested non-governmental organizations or persons; (c) submitted by the Joint Public Advisory Committee; or (d) developed by the Secretariat or by independent experts." [70]

58. The final draft of a factual record is submitted to the Council. Any party may submit comments "on the accuracy of the draft" within 45 days, which the Secretariat shall incorporate as appropriate. The final factual record is then submitted to the Council, which may, by a two-thirds vote, make this record publicly available.[71]

59. In addition to its express powers, the Secretariat must have additional subsidiary powers that are clearly necessary for it to fulfill its prescribed function. In light of the goals of the NAAEC, and the express functions of the Secretariat as preparer of the factual record, the Secretariat must be able to determine what information is relevant and to gather such information. This power in turn requires that the Secretariat consider a

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[68] *See* NAAEC, art. 14(2) and 15(1).
[69] NAAEC, art. 15(2). The preparation of a factual record is without prejudice to any further steps that may be taken with respect to any submission. NAAEC, art. 15(3).
[70] NAAEC, art. 15(4). *Cf*. NAAEC, art. 30. Article 30 deals with the powers of an arbitration panel set up under Part V of the NAAEC to gather information. Unlike the Secretariat, these panels' ability to gather information from experts is made expressly subject to the control of the Council: "On request of a disputing Party, or on its own initiative, the panel may seek information and technical advice from any person or body that it deems appropriate, *provided that the disputing Parties so agree and subject to such terms and conditions as such Parties may agree*" (emphasis added).
[71] NAAEC, art. 15(5)(6) and (7).

range of issues that allow it to determine what is relevant and to present a complete picture. Thus, the Secretariat must be able to exercise the following powers as it gathers information:

- The ability to determine what information is relevant and to gather such information.
- The ability to consider alternatives to the enforcement activities actually undertaken by the state party.
- The ability to anticipate current and potential obstacles to effective enforcement.
- The ability to canvass the actual and likely outcome of any proposed enforcement action.
- The ability to perform its functions without interference, although subject to the overall control of the Council.

60. The Secretariat may consider all relevant information under Article 15. Determining what is relevant, however, depends on both technical and legal context. It requires knowledge of which activities constitute enforcement activities and which activities are effective. For instance, it may require inquiry into the level of government activity, including the level of government investment, the results of such activity, and whether that activity is credible to the public as a good faith effort. Determining relevance may further require developing a standard of what effective enforcement would entail as a means of assessing what information regarding actual enforcement practices is relevant. The Secretariat must have the power to gather all such information.

61. More generally, the Secretariat must have the power to gather and consider information on alternatives to the enforcement actions actually undertaken. Implicit in the stated objectives of enhanced public participation and transparency is the requirement

that a factual record, if made public, have sufficient context for evaluation of technical, scientific, and other information.[72] A particular course of action may appear to be effectively implemented; it may only be relatively ineffective in comparison with other possible and available practices. To this extent, the Secretariat must have the power to develop and publish such alternatives to ensure effective public participation.

62. The Secretariat must similarly be able to anticipate current and potential obstacles to a state's planned enforcement practices. To the extent such obstacles are readily apparent to environmental experts and policymakers, their emergence is a critical part of the context in which information regarding current practices must be assessed. The Secretariat must be able to gather and consider the information that provides this context. The public needs to know. Equally important, however, state officials need to know to improve their own performance.

63. Conversely, the Secretariat must also be able to gather and consider information regarding the actual and potential impact of any enforcement action a party is taking or proposes to take. This may include possible effects on other environmental protection efforts, either due to environmental side-effects or due to a shift in the resources towards the matter under consideration. Or it may mean gathering information about the net impact of a proposed measure based on computer models or experience elsewhere. Information concerning the degree of compliance with environmental laws on the part of a regulated community is also clearly relevant in this regard.

64. The Secretariat is subject to the overall control of the Council.[73] However, in exercising such control, the Council cannot intervene in the necessary and effective performance of the Secretariat's mandate. Allowing the Secretariat to carry out its functions and to gather and present relevant information in a manner that will ensure its

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[72] NAAEC, art. 15(4).
[73] NAAEC, art. 10(1)(c).

legitimacy, credibility and independence conforms with the duty of good faith in Article 26 of the Vienna Convention. The duty to allow the Secretariat to perform its functions without interference also flows from the requirement in Article 11(4) of the NAAEC, that "[e]ach Party shall respect the international character of the responsibilities of the Executive Director and the staff and shall not seek to influence them in the discharge of their responsibilities."

65. In every case to date where the Council has approved the preparation of a factual record, it has included in the Secretariat's mandate instructions to consider whether the party concerned is "failing to effectively enforce its environmental law."[74] The powers described above are all integral to the ability of the Secretariat to fulfill this mandate. These powers allow the Secretariat to gather and consider the information necessary for it to fulfill its express powers in light of the object and purpose of the NAAEC. On the other hand, to "consider" is not to conclude. The consideration of information related to effective enforcement and the inclusion of such considerations in the factual record are quite different from a legal determination concerning whether enforcement has been effective under the definition of those terms in the NAAEC.[75]

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[74] *Instruction to the Secretariat of the Commission for Environmental Cooperation with Regard to the Assertion that Mexico is Failing to Effectively Enforce Articles 134 and 170 of the General Law on Ecological Balance and Environmental Protection.* (regarding SEM-98-007), Council Resolution 00-03, May 16, 2000. *Instruction to the Secretariat of the Commission for Environmental Cooperation on the Preparation of a Factual Record Regarding the "Effective Enforcement of s. 35(1) of the Fisheries Act with respect to certain hyrdo-electric installations in British Columbia, Canada (SEM-97-001)"*, (regarding SEM-97-001), Council Resolution 98-07, June 24, 1998, Doc. C/C.01/98-00/RES/03/Rev.3. *Instruction to the Secretariat of the Commission for Environmental Cooperation on the Preparation of a Factual Record Regarding the "Construction and Operation of a Public Harbor Terminal for Tourist Cruises on the Island of Cozumel, State of Quintana Roo, Mexico,"* (regarding SEM-96-001), Council Resolution 96-08, August 2, 1996.

[75] Under the definitions of Article 45, a party has not failed to effectively enforce its environmental law where the action or inaction in question "(a) reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance measures; or (b) results from bona fide decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities." NAAEC, art. 45(1)(a) and (b).

66. The Council has acknowledged the simple reality of the choices and judgments involved in preparing a factual record for public consumption. In instructing the Secretariat to consider whether the party is failing to effectively enforce its environmental laws, it acknowledges that the preparation of a factual record is not merely a technical function or rote assignment.[76] It is a complex task, requiring discretion on the part of the Secretariat and the ability to exercise such discretion in the gathering of relevant information. Safeguarding the Secretariat's autonomy to perform this function protects the credibility of the parties and advances the effectiveness of the NAAEC as a whole.

V. Conclusion

67. At international law, a treaty must be interpreted in accordance with the ordinary meaning of its terms when viewed in their context and in the light of the treaty's object and purpose. These familiar cadences acquire concrete meaning through the application of two intermediate principles of interpretation: the principle of effectiveness and the doctrine of implied powers. A wide range of international entities established under specific treaties have relied on these principles to achieve specific results when confronted with collisions between treaty provisions and the facts of actual cases. The results of these cases are generally inapposite to the CEC, but the practice of interpretation offers a model for the Secretariat in exploring and defining the scope of its own role within the CEC and under the NAAEC more generally.

68. The object and purpose of the NAAEC are expressly stated as including continuous improvement of environmental quality, effective enforcement of the states party's domestic environmental law, and enhancement of public participation and transparency. The submissions procedure under Articles 14 and 15 of the NAAEC is a

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[76] *See supra* note 74.

key means of achieving these objectives, allowing citizens to make submissions directly to the Secretariat in an effort, subject to Secretariat and Council discretion, to trigger a process that will culminate in the provision of information back to the public.[77]

69. Under Articles 14 and 15, the Secretariat is charged with preparing a factual record when it has determined that a submission is credible under criteria specified in the NAAEC and when requested to do so by a two-thirds majority of the Council. The Secretariat has necessary discretion to determine what information is relevant to the question of effective enforcement and to public participation in enhancing the process of enforcement. Such information can include a hypothetical standard of effective enforcement, an elaboration of obstacles to effective enforcement, and alternatives to the enforcement mechanisms proposed by the defending party. It can also include an assessment of the actual and likely impact of a present or future course of action undertaken by a party. The Secretariat has the power to gather such information and include it in its factual record. What the Secretariat may not do, however, is to reach any final opinion or determination concerning whether a party's practice would constitute "effective enforcement" as a matter of law under the NAAEC. "Effective" in this sense is a term of art, to be determined only by an arbitrator or national legislator.

70. The guiding principle for the Secretariat must be the needs of the public in accessing and digesting the factual record. What does the public need to know to participate more effectively in promoting enforcement of environmental laws and actually enhancing the environment? A patient cannot evaluate a proposed course of treatment without knowing the alternatives and the actual and potential outcomes of all the therapies proposed, or indeed of having some measure of health itself. No more can

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[77] The factual record will not be made public without the approval of two-thirds of the Council. NAAEC, art. 15(7). The Secretariat must safeguard from disclosure information that could identify a non-state party making a submission, where they so request or where the Secretariat considers it appropriate, and must safeguard from public disclosure any information designated as confidential or proprietary by the non-state

the public make sense of facts concerning a particular case without supporting information designed to create a context for evaluation.

71. The parties wish to engage the public in improving the enforcement of environmental laws. This aim is one of the objects of the NAAEC. Articles 14 and 15 must be interpreted in light of this object. The Secretariat must thus have the discretion to determine what kinds of information are relevant to effective enforcement in such a way as to facilitate the public in making its own assessment. The Council can always vote not to instruct the Secretariat to prepare a factual record or not to make the resulting record public. But it may not constrain or censor the preparation process beyond the limitations expressly set forth in the NAEEC.

72. The autonomy of the Secretariat safeguards the credibility of the entire citizen submission process. To the extent that the Secretariat is impartial and independent, and is *seen* to be impartial and independent, all parties to a dispute concerning effective enforcement of environmental laws have an incentive to resort to that process in accordance with the terms of the NAAEC. That is the intent of the states party to the NAAEC. Under the guiding principles of international law, as applied to the NAAEC, the Secretariat has the discretion to make its own function effective in light of the goals the treaty intends it to serve.

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party which provided it. NAAEC, art. 11(8). Article 39 protects State parties from being required to disclose certain information, including information that is confidential or proprietary. NAAEC, art. 39.