

Manon Pepin
CEC

RE: Request for Public Comments on the preliminary report for JPAC public meeting on issues related to Articles 14 and 15

Greetings,

I have reviewed the preliminary report written for the JPAC public meeting on issues related to Articles 14 and 15 and would like to submit my opinions on this matter. I am writing as an individual citizen with a background in environmental science and community economic development. I have attended JPAC and CEC meetings before and am familiar with their objectives and processes.

I am very concerned about the information revealed in this report. I agree wholeheartedly with their conclusions regarding the mandate and role of the CEC, and the risk of compromising it by continuing to limit the extent of factual record reporting. The CEC has no enforcement capabilities and exists purely to provide a venue for citizens to make public their concerns about member countries lack of compliance with environmental regulations. Given this limited scope, it is vital that the CEC is capable of preparing and presenting factual records of a nature and scope that are:

- i) accessible to the public; and
- ii) capable of galvanizing public opinion in order to create political pressure for a real, legal, enforcement solution.

This report documents several cases where the CEC has opted to limit the scope of the factual record to such an extent that the record is both an inappropriate response to the citizen submission and an ineffective tool for informing and motivating public response.

As a concerned citizen, I recommend that the CEC develop a clear-cut set of guidelines that indicate when they can use this discretionary power, and eliminate the possibility of limiting the scope of politically sensitive factual records. This is crucial because

- i) it's the mandate of the CEC to create these records;
- ii) a tremendous amount of citizen time and energy is going into generating this submissions and they deserve the according respect and support; and
- iii) these reports are only generated when there is significant evidence that member governments are ignoring their own legislation at the cost of the environment which is completely unacceptable.

Thank you very much for this opportunity. I have included below excerpts from the conclusion that I strongly agree with. I hope that the CEC takes these concerns into account and changes its way of proceeding in these matters.

"If current trends continue, the CEC Council appears unlikely to approve development of factual records on allegations of widespread, systemic patterns of ineffective enforcement, beyond the specific examples of such a pattern that are detailed in the submission. Although the submitters of the four factual records examined in Part I put forth evidence of such widespread failures—such as a lack of prosecutions with respect to entire industries, governmental memoranda stating policies of non-enforcement, and indications of severe staff and resource shortages for enforcement—the Council declined to order a factual record on these issues. Rather, the Council narrowed the scope of the factual record to specific instances mentioned in the submissions as examples of the widespread enforcement failures. The resulting factual records, scoped down to one or two specific instances, had limited usefulness for the submitters. For the most part, they failed to address the issues that had prompted the submission, and that the Secretariat had identified as “central questions” in its determination. They were unable to examine alleged patterns of non-enforcement, governmental policies underlying such patterns, and the cumulative impacts of such failures to enforce. By limiting the focus of the Secretariat’s investigation to a few specific instances, the Council diminished the potential of the factual record to reveal the widespread enforcement failures that generate the public outcry and political embarrassment that can ultimately compel change. Moreover, by interfering in the fact finding process, the Council threatened to undermine the independence of the Secretariat and the credibility of the process.”

“This report also examined the Council’s authority under the Agreement to narrow the scope of the factual record or to require the submitters to provide additional information beyond what the Secretariat had already determined was “sufficient.” The report first looked at the plain meaning of the terms of the Agreement, outlining the key textual arguments that have been or could be made to suggest that the Council’s resolutions were ultra vires. These textual arguments—although perhaps persuasive—are by no means decisive, as there are also textual arguments that may support the Parties’ position that the Council possesses the ultimate authority regarding both scope and sufficiency issues. Thus, the text of the agreement is inconclusive. However, even if arguably consistent with the letter of the Agreement, the Council’s resolutions seem to contravene its spirit. As discussed throughout the report, the Agreement is rooted in principles of public participation and transparency. The Council’s resolutions undermine these objectives by diminishing the usefulness of the factual record to submitters, imposing prohibitively high “pleading” requirements that discourage citizen submissions, threaten the independence of the Secretariat and thus public credibility in the process, and minimize the amount and focus of the “sunshine” that is intended to enhance transparency and thus improve environmental governance.”

“Certainly, practical realities dictate that there must be some limit on the scope of citizen submission to avoid overly burdensome and time-consuming investigations, as well as a certain evidentiary threshold to filter out speculative or frivolous allegations. The Agreement provides the Secretariat with a range of tools to address these practical realities. For example, the Secretariat has the explicit authority and mandate to determine whether the submission contains “sufficient information,” whether it is aimed at “promoting enforcement rather than at harassing industry,” and whether it “raises matters whose further study would advance the goals of the Agreement.” Moreover, in developing the work plan for the investigation, the Secretariat can develop a manageable scope of the factual record, for example, by identifying illustrative or representative examples for investigation.”

The Agreement appears to contemplate that this is the role of the Secretariat—the fact-finding body with the independence, mandate and expertise to be making these practical decisions—and not that of a politically-motivated Council whose very enforcement practices are the subject of the investigation.

Sincerely,

Chris Lindberg
16 Hatt Street
Dundas, ON L9H-2E8 CANADA
Phone: 905-627-7488
E-mail: clindber@sfu.ca