



CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

October 17, 2001

Re: US Position on Migratory Bird Submission

Dear JPAC Member;

I write to raise an important issue regarding the Article 14/15 process in hopes that you will give the matter consideration at your upcoming meeting. The United States has announced its intention to vote yes on the pending Migratory Bird Submission (SEM-99-002), but to seek a limitation on the scope of the Secretariat's inquiry that raises fundamental issues regarding the interpretation and application of the citizen submission process.

The US position seeks to prevent the Secretariat from considering issues of general enforcement raised in the submission by limiting the scope of the factual record to only two specific examples mentioned by way of illustration in the original submission.

As the Secretariat has pointed out in its carefully reasoned recommendation in favor of the preparation of a factual record in this case, nothing in the NAAEC or its guidelines suggests that the process is intended to focus only on specific instances of enforcement failures. The US position, if adopted by the Parties, would thus set a precedent that would make it far more difficult for citizens to raise and the Secretariat to examine general enforcement issues.

The US position raises a number of fundamental issues for the process, including *inter alia*: Is there any basis in the NAAEC for the type of limitation on the discretion of the Secretariat that the US is proposing? Does a Party's assertion that prosecutorial discretion or lack of resources is to blame for an enforcement failure preclude any independent examination of a general failure to enforce an environmental law? How exactly are citizens going to be able to raise issues of general enforcement? Are submitters in the Migratory Bird context now required to return with additional submissions that document additional specific cases where logging activities harm migratory birds without the permit required under the Migratory Bird Treaty Act – an effort that is beyond the resources of non-profit NGOs?

In addition, the US has indicated that it will seek to require the Secretariat to submit a workplan prior to undertaking the factual record. While seemingly innocuous, requiring a workplan constitutes a further intrusion by the Parties upon the independence and impartiality of the Secretariat. This represents a dangerous precedent that would allow a

Party to manipulate the preparation of a factual record, further undermining the integrity of the citizen submission process.

Finally, if the US position stands, it risks doing significant damage to the integrity of the Article 14 and 15 process and public confidence in the ability of trade and investment regimes to balance commercial and public values. At a time when many are concerned with the direction of international trade and investment regimes, these concerns are likely to be exacerbated by what can only be perceived as an attempt to limit the utility of the citizen submission process.

Our understanding of Council Resolution 00-09 is that “issues concerning the implementation and further elaboration of Articles 14 and 15” will be referred to the JPAC for a public review prior to action being taken. At a minimum, Resolution 00-09 allows the JPAC to raise such issues on its own accord. The US position on the Migratory Bird submission raises not only substantive issues regarding the implementation of Articles 14 and 15, but also reflects a willingness to circumvent the process for dealing with such issues established in Dallas last year. We urge you to take immediate action on these questions and provide specific advice to the Parties before the next Alternative Representatives’ meeting. As the official representatives of the public in the CEC structure, we hope that you will act expeditiously and decisively to defend the integrity and effectiveness of the unique and fragile citizen submission process.

If, despite the clear backdoor attempt by the United States to significantly alter the scope and operation of the citizen submission process through its position on the Migratory Bird submission, JPAC decides not to take action, please refer the issues raised here to the Council as per Resolution 00-09. We hope that the Council would then ask JPAC to convene a public process to examine the issues and report back. The Center for International Environmental Law looks forward to assisting your effort in any way we can.

Sincerely,

[Original signed]

Stephen Porter
Senior Attorney

CC: Ms. Norine Smith
Ms. Judith Ayers
Ms. Olga Ojeda