Secretariat of the Commission for Environmental Cooperation

**Determination in accordance with Article 14(1)
of the North American Agreement for Environmental Cooperation**

Submitters:	Friends of the Earth Canada Friends of the Earth - U.S. People to Save-the-Sheyenne River, Inc. Thelma Paulson and Gary Pearson D.V.M. of North Dakota Claire Sevenhuysen and Lawrence Price of Manitoba
Represented by:	Sierra Legal Defence Fund
Parties:	Canada and United States
Date received:	30 March 2006
Date of this determination:	21 August 2006
Submission I.D.:	SEM-06-002 (Devils Lake)

I. INTRODUCTION

On 30 March 2006, the Submitters listed above filed with the Secretariat of the Commission for Environmental Cooperation (the "Secretariat") a submission on enforcement matters pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* ("NAAEC" or "Agreement"). Under Article 14 of the NAAEC, the Secretariat may consider a submission from any nongovernmental organization or person asserting that a Party to the Agreement is failing to effectively enforce its environmental law if the Secretariat finds that the submission meets the requirements of Article 14(1). If the Secretariat determines that a submission meets those requirements, it then determines whether the submission merits requesting a response from the Party named in the submission (Article 14(2)).

The Submitters asserted that Canada and the United States are failing to effectively enforce their treaty obligations under Articles IV, IX and X of the 1909 Treaty Relating to Boundary Waters between the United States and Canada ("Boundary Waters Treaty") in connection with construction and operation by the state of North Dakota of an outlet to drain water from Devils Lake into the Sheyenne River, the Red River basin, Lake Winnipeg, and ultimately the Hudson Bay drainage system. Specifically, the Submitters contended that the Devils Lake outlet will result in transboundary water pollution that both countries are obligated to prevent, and that the countries are obligated to refer issues regarding this alleged transboundary pollution to the International Joint Commission ("IJC"), either jointly or unilaterally.

On 8 June 2006, the Secretariat determined that the submission did not satisfy Article 14(1), and on 7 July 2006, the Submitters filed a revised submission. In the revised submission, the Submitters focus solely on the assertion that Canada and the United States are failing to effectively enforce Article IV of the Boundary Waters Treaty, which provides that boundary waters and waters flowing across the boundary between the United States and Canada shall not be polluted. They no longer make formal assertions regarding enforcement of Articles IX and X of the Treaty. The Submitters incorporate by reference the appendices to the original submission, and file four additional appendices along with the revised submission.

The Secretariat has again determined that the submission does not satisfy Article 14(1) and provides the reasons for this determination below.

II. SUMMARY OF THE REVISED SUBMISSION

As noted above, the revised submission asserts that Canada and the United States are failing to effectively enforce their obligations under Article IV of the Boundary Waters Treaty in connection with construction and operation by the state of North Dakota of an outlet to drain water from Devils Lake into the Sheyenne River, the Red River basin, Lake Winnipeg, and ultimately the Hudson Bay drainage system. The Submitters state that "[t]he perceived need to lower the level of Devils Lake has been created in part by the mostly unauthorized drainage of nearby wetlands and poor land use planning."[1] The Submitters contend that the Devils Lake outlet project "threatens direct and negative environmental impacts on Canadian waters, including the introduction of biological pollutants such as invasive species."[2]

The revised submission asserts that the state of North Dakota began diverting water through the Devils Lake outlet in September 2005.[3] The Submitters contend that the water in Devils Lake contains "biota of concern," such as blue-green algae species and fish parasite species that are not found in the Canadian waters to which the diverted waters flow, as well as "high levels of pollutants such as sulphate, mercury, phosphorous and arsenic."[4] The Submitters assert that these biota of concern and other pollutants threaten irreparable harm to the ecosystem of Lake Winnipeg and that these environmental impacts may be exacerbated if a May 2006 request by the North Dakota State Water Commission for modification of the permit to discharge Devils Lake surface water into the Sheyenne River is granted.[5]

The revised submission asserts that the Devils Lake drainage outlet relates to a larger scheme to install an outlet from the Missouri River through Devils Lake and the Sheyenne River into the transboundary Red River system, and that the IJC issued a report in 1977 finding that introduction of unwanted foreign biota from such a diversion "posed an unacceptable risk to the detriment of the people of Canada and to the general ecology of the region, and beyond."[6] The revised submission asserts that despite public pressure to refer issues regarding the Devils Lake

[1] Revised submission at 2.
[2] *Id*. at 1.
[3] *Id.* at 2.
[4] *Id.* at 2-3.
[5] *Id.* at 3-4.
[6] *Id.* at 4.

outlet project to the IJC in light of Canadian concerns, "both the U.S. and Canadian governments failed to prevent the diversion and unlawful pollution of waters flowing across the boundary, contrary to the Treaty."[7] The Submitters contend that the United States government failed to accept formal invitations from the Canadian government in 2004 and 2005 for a joint referral of the Devils Lake project to the IJC, and that both governments failed to make a unilateral reference to the IJC.[8]

Based on these assertions, the Submitters contend that both Canada and the United States are failing to effectively enforce Article IV of the Boundary Waters Treaty.[9] They contend that the outflow from Devils Lake is an unlawful cause of pollution and that the governments are failing to enforce the agreement reflected in Article IV that "boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other."[10] The Submitters assert that Article IV is a mandatory provision creating an absolute prohibition of transboundary pollution, that it is up to the parties to the Treaty to prevent transboundary water pollution under Article IV and that the parties have failed to prevent such pollution.[11]

The Submitters assert that the alleged failure to enforce the anti-pollution provision in Article IV of the Treaty "is not a reasonable exercise of discretion" and that "[l]ack of full scientific certainty should not be used as a reason for postponing effective measures to prevent environmental degradation."[12] They also contend that an alleged deferral of issues regarding the Devils Lake outlet project to the U.S. Council on Environmental Quality ("CEQ") does not address the mandatory anti-pollution provision in the Treaty and usurps the jurisdiction of the Boundary Waters Treaty and the IJC, and that a temporary arrangement brokered through the CEQ "could not have prevented the pollution of Canadian waters."[13] The Submitters suggest that a "Factual Record could examine not only the pollution and the physical outlet and its effectiveness, but also the factual trail of the avoidance of the Treaty dispute resolution mechanisms."[14]

III. ANALYSIS

Article 14 of the NAAEC directs the Secretariat to consider a submission from any nongovernmental organization or person asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. When the Secretariat determines that a submission meets the Article 14(1) requirements, it then determines whether the submission merits requesting a response from the Party named in the submission based upon a consideration of the factors contained in Article 14(2). As the Secretariat has noted in previous Article 14(1)

[7] *Id.* at 5.
[8] *Id.* at 5-6.
[9] *Id.* at 8.
[10] *Id.*
[11] *Id.* at 8-9.
[12] *Id.* at 9-10.
[13] *Id.* at 10-11. The submission indicates that the temporary arrangement involved the use of a gravel filter at the Devils Lake outlet.
[14] *Id.* at 10.

determinations,[15] Article 14(1) is not intended to be an insurmountable procedural screening device.

The opening phrase of Article 14(1) authorizes the Secretariat to consider a submission "from any nongovernmental organization or person asserting that a Party is failing to effectively enforce its environmental law […]." In its 8 June 2006 determination, the Secretariat found it unnecessary to address the initial question of whether Article IV of the Boundary Waters Treaty constitutes "environmental law" within the meaning of NAAEC Article 45(2)(a). The Secretariat now considers this question with respect to the revised submission.

Article 45(2)(a) defines "environmental law" (in relevant part) as:

> any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through
> (i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants,
> (ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or
> (iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party's territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.

Because the provision in Article IV prohibiting pollution of transboundary waters clearly involves the prevention, abatement or control of pollution, the key to answering this question for both the United States and Canada is whether the anti-pollution provision in Article IV is a provision of a "statute or regulation" within the meaning of Article 45(2)(a). In analyzing the definition of "environmental law" with respect to a previous submission, the Secretariat distinguished between domestic and international legal obligations and suggested that only international obligations that are considered part of a country's domestic law can be included within the definition of "environmental law" in Article 45(2)(a).[16]

In the United States, the Supreme Court has stated:

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. . . . The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that "this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the

[15] *See e.g.* SEM-97-005 (Biodiversity), Determination pursuant to Article 14(1) (26 May 1998) and SEM-98- 003 (Great Lakes), Determination pursuant to Article 14(1) & (2) (8 September 1999).

[16] SEM-97-005 (Biodiversity), Determination under Article 14(1) (26 May 1998). *Cf. Mexico-Tax Measuers on Soft Drinks and Other Beverages,* AB-2005-10, Report of the Appellate Body at ¶ 70 (WTO 2006) (finding that the term "laws and regulations" in Article XX(d) of the GATT 1994 refers "to rules that form part of the domestic legal system of a WTO Member and do not extend to the international obligations of another WTO Member.").

> supreme law of the land." A treaty, then, is a law of the land as an act of Congress is, *whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined*. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.[17]

Thus, the United States Supreme Court has indicated that for a treaty provision to have the status of a statutory provision under domestic law, it must be either self-executing or implemented through legislation.[18] Consistent with the Supreme Court language cited above, whether a treaty clause creates enforcement rights for individuals "is often described as part of the larger question of whether that clause is 'self-executing.'"[19] The mere inclusion of a treaty in the Statutes at Large or in the U.S. State Department's list of treaties in force does not show conclusively that the treaty has the same force of law domestically as a statute does.

The United States has not adopted legislation that implements any provisions of the Boundary Waters Treaty in the United States. Further, as far as the Secretariat has been able to discern, the courts that have considered whether the Boundary Waters Treaty is self-executing, in the sense that either its provisions may be directly enforceable or a federal action can be challenged for non-compliance with it in United States courts, have concluded that it is not.[20] Indeed, the treaty provides its own enforcement mechanism, by allowing the government parties to refer questions unilaterally or jointly to the IJC. Accordingly, the Secretariat cannot conclude that the anti-pollution provision in Article IV of the Boundary Waters Treaty is a provision of a "statute or regulation" of the United States within the meaning of NAAEC Article 45(2)(a).

In contrast to the United States, Canada has enacted the International Boundary Waters Treaty Act, 1910 (IBWTA, R.S., c 1-20), which provides legislative confirmation and sanction of the Treaty (IBWTA, section 2). Section 3 of the IBWTA states:

> The laws of Canada and of the provinces are hereby amended and altered so as to permit, authorize and sanction the performance of the obligations undertaken by His Majesty in and under the treaty, and so as to sanction, confer and impose the various rights, duties and disabilities intended by the treaty to be conferred or imposed or to exist within Canada.

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[17] *Head Money Cases*, 112 U.S. 580, 598 (1884). *See also Valentine v. United States*, 299 U.S. 5, 10 (1936); *De Lima v. Bidwell*, 182 U.S. 1, 195 (1901).

[18] The Migratory Bird Treaty Act, enacted in 1918 to implement the 1916 Migratory Bird Convention between the United States and Great Britain (for Canada), is an example of U.S. legislation that implemented a treaty entered into around the time the Boundary Waters Treaty was signed.

[19] *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937 (D.C. Cir.)(citing Riesenfeld, *The Doctrine of Self-Executing Treaties and* U.S. v. Postal: *Win At Any Price*?, 74 Am.J.Int'l L. 892, 896-97 (1980).

[20] *Miller v. United States*, 583 F.2d 857, 860-61 and n.6 (6th Cir. 1978)(BWT only creates treaty obligations between the United States and Canada, and not between between the United States and its own citizens, and it "creates no enforcement mechanism for Articles III and IV which could conceivably create a private cause of action."); *Haudenosaunee Six Nations of Iroquois (Confederacy) of North America v.Canada*, 1998 U.S. Dist. LEXIS 16265, *6-7 (W.D.N.Y. 1998)(BWT does not create private right of action); John Knox comments. *See also* Knox, J., *Proceedings of the Canada-United States Law Institute Conference on Multiple Actors in Canada-U.S. Relations: Cleveland, Ohio, April 16-18, 2004: Environment: Garrison Dam, Columbia River, The IJC, NGOs*, 30 Can-U.S. L.J. 129, 136-37 (2004) ("I think most observers would say that is going to be a long shot for Manitoba to convince a Federal Court that the 1909 Treaty obligation [under Article IV] is self-executing, and get an injunction against North Dakota. … There have been relatively few efforts to argue that the 1909 Treaty is self-executing in U.S. law, and they have failed when brought by a private individual").

Section 5 states: "The Federal Court has jurisdiction at the suit of any injured party or person who claims under this Act in all cases in which it is sought to enforce or determine as against any person any right or obligation arising or claimed under or by virtue of this Act." The IBWTA provides for the issuance of licenses for the use, obstruction or diversion of boundary waters in a manner that affects, or is likely to affect, the natural level or flow of the boundary waters on the other side of the border, and prohibits, except in accordance with such a license, the construction of works that raise or are likely to raise the natural water level on the other side of the border (ss. 11-12). It also prohibits the removal of water from the boundary waters outside the water basin of those waters (s. 13). The Act authorizes the Minister of Foreign Affairs to issue and administer the licenses allowed under the Act and to promulgate regulations regarding these licenses and prohibitions (ss. 16-21).[21] The Act provides for the punishment of offences under the Act and for injunctions (ss. 22-26). However, the Act does not explicitly mention licenses, regulations or other matters related to the rights, duties and disabilities associated with the prohibition of pollution of transboundary waters contained in Article IV of the Boundary Waters Treaty.

Submission SEM-97-005 (Biodiversity) raised the questions of whether a ratification instrument for an international agreement of which Canada was a party had the effect of bringing the international obligations contained in the agreement within the definition of environmental law in NAAEC Article 45(2). The Secretariat concluded that the ratification instrument alone could not be considered a "statute or regulation" under that definition, reasoning as follows:

> The central argument in the Submission is that the Ratification Instrument "obligates" Canada to fulfill the obligations of the *Biodiversity Convention.* The Submission argues that Canada has not met the requirements of Article 8(k) of the *Biodiversity Convention*, and so has therefore failed to "enforce" the Ratification Instrument. However, with respect, the Secretariat is of the view that the Submission fails to make a critical distinction between "international" and "domestic" legal obligations. The purpose and effect of the Ratification Instrument is simply to confirm Canada's international obligations in respect of the *Biodiversity Convention.* In Canada, there is a fundamental and long-standing constitutional principle, derived from Canada's legal heritage, that the ratification process does not import international obligations into domestic law. Until international obligations are implemented by way of statute or regulation pursuant to a statute, those obligations do not constitute the domestic law of Canada.[22]

In this case, the IBWTA serves to ratify the international obligations in the Treaty; "to permit, authorize and sanction the performance of the obligations undertaken by His Majesty in and under the treaty"; and "to sanction, confer and impose the various rights, duties and disabilities intended by the treaty to be conferred or imposed or to exist within Canada."[23] While the IBTWA therefore clearly brings certain provisions of the Boundary Waters Treaty within Canadian domestic law, it does not clearly do so with respect to the anti-pollution provision of Article IV. It has been argued that despite the IBTWA, Article IV "is not incorporated into Canadian law [because] the rights and remedies provision of Article II[24] is specifically bestowed

[21] In 2002, the federal government promulgated the *Internatioanl Boundary Waters Regulations*, SOR/2002-445. The regulations are silent on pollution of boundary waters and waters flowing across the boundary.
[22] SEM-97-005 (Biodiversity), Determination under Article 14(1) (26 May 1998) (citations omitted).
[23] The Secretariat notes that the Submitters assert only a failure to enforce Article IV of the Treaty, and not any provision of the IBWTA.
[24] Article II states:

on individuals in a statute [i.e. the IBWTA - whose provisions focus on licenses for use, obstruction or diversion of boundary waters and remedies for non-authorized obstructions, uses or diversions]; all other provisions of the BWT therefore are to be carried out or enforced only by the governments in accordance with the statute that gives the authorities the necessary mandate to perform international duties."[25] Although it is arguable that, contrary to this analysis, the IBTWA does incorporate all provisions of the Boundary Waters Treaty into Canadian domestic law, the Secretariat finds the lack of clarity on that question significant.

In sum, it seems likely that the anti-pollution provision in Article IV of the Boundary Waters Treaty would not be considered part of United States domestic law, while in Canada the matter is less clear. Nonetheless, the question remains unresolved in both countries. Considering that the law is unclear and unsettled on whether Article IV is considered part of the domestic law in Canada or the United States so as to be considered equivalent to a statutory provision, the Secretariat is unable to conclude that the anti-pollution provision in Article IV meets the definition of "environmental law" in NAAEC Article 45(2)(a). Additional clarity would be required on these questions for the Secretariat to proceed with a submission asserting a failure to effectively enforce the anti-pollution provision in Article IV.[26]

IV. DETERMINATION

For the foregoing reasons, the Secretariat has determined that revised submission SEM-06-002 (Devils Lake) does not contain assertions that can be considered under Article 14. Pursuant to Guideline 6.3 of the *Guidelines for Submission on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, the Secretariat hereby terminates the Article 14 process with respect to this submission.

> Each of the High Contracting Parties reserves to itself or to the several State Governments on the one side and the Dominion or Provincial Governments on the other as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters; but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; but this provision shall not apply to cases already existing or to cases expressly covered by special agreement between the parties hereto.
>
> It is understood, however, that neither of the High Contracting Parties intends by the foregoing provision to surrender any right, which it may have, to object to any interference with or diversions of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary.

[25] P. Muldoon, D. Scriven and J. Olson, *Cross-Border Litigation* (Carswell: Toronto 1986), at 121-22.
[26] The Secretariat notes that the Submitters have not identified any effort on their part or the part of others to seek a resolution of those questions through domestic proceedings in Canada or the United States prior to the filing of the submission.

Respectfully submitted,

Secretariat of the Commission for Environmental Cooperation

(original signed)
William V. Kennedy
Executive Director

c.c.: Judith E. Ayres, US-EPA
David McGovern, Environment Canada
Jose Manuel Bulas, SEMARNAT
Submitters