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G. Graham Waite
University of Maine

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THE INTERNATIONAL JOINT COMMISSION—ITS PRACTICE AND ITS IMPACT ON LAND USE

G. GRAHAM WAITE*

SYNOPSIS

The work of the International Joint Commission presently is significant for private and public users of land whose activities contribute pollution to waters flowing along or across the boundary between Canada and the United States. Any organization desiring to use boundary waters in certain ways must obtain Commission permission. Investigations conducted by the IJC sometimes result in recommendations leading to basic changes in the economic and community patterns of organization for large regions straddling the border. Thus, the Commission currently exerts important controls on land use, albeit indirectly. In the future its importance as an agency of land use control may increase. Its international character, its flexibility achieved by use of technical experts organized in boards tailored for each particular problem, and the respect it enjoys in both countries give the Commission a unique chance to coordinate land use patterns in contiguous regions crossing the Canadian-American frontier. If the national governments of the two nations should ask the Commission to undertake this difficult task—one which countless numbers of adjoining units of local government have failed to do for their limited geographic areas—considerable expansion of IJC influence on land use controls might occur.

Situations generating pressure for international coordination of public controls of land use imposed by different units of local government are similar to those generating pressure for domestic coordination. A city may be flanked by suburban municipalities, many of whose residents work in the city. Different governmental units may share a single natural resource, such as a river. Or several different governments may share a complex of natural resources contained in a definable geologic and geographic package, such as a river basin. Other examples might be cited. In all of them the diverse activities of individuals striving to use land resources for their own advantage must be channelled into a coherent pattern of development, if the maximum advantage the resources offer is to be achieved for the greatest number of people. The same may be said of governmental activities as well. Whether it be a city creating a commercial zone next to its suburb's residential zone, a city dumping (or allowing others to dump) pollutants into a river which is the water supply for downstream cities and industries, a tax-hungry town allowing residential subdivision of fertile land needed to support agricultural processing industries lying out-

* Professor of Law, University of Maine. B.S. 1947, LL.B. 1950, S.J.D. 1958, University of Wisconsin. The research for this article was performed in the offices of the United States Section of the International Joint Commission in Washington, D.C. I am grateful for the courtesy and generous cooperation given me by all persons connected with the Commission. The opinions expressed in the article are my own and in no way are to be attributed to the Commission, or to any person associated with it.
side the town or of forested land needed to absorb rainfall to prevent river flooding—in every situation resources are wasted and land values destroyed through failure to mesh the separate mosaics of land use occurring within each governmental unit into a compatible whole. The waste and destruction occur equally well when the political boundaries involved include an international one as when they do not. On the Niagara Frontier, the Canadian shore of the Niagara River from Fort Erie to the Rainbow Bridge is largely residential, rural, or park land, whereas much of the opposite shore in the United States is given to industrial development, tending to impair the aesthetic value of the Canadian improvements.1 Cities on both sides of the boundary draw their water from the river,2 having to purify it of pollution from sources located on both sides of the frontier.3 Small indications of an existing, transboundary community—taxis displaying both Ontario and New York license plates, Ontario landlords advertising their Fort Erie accommodations in Buffalo newspapers with emphasis on proximity to downtown Buffalo, to name but two—suggest local international conflicts of land use may increase.

Because of the Commission's current impact on businesses and communities along the border, and because of its possible impact in the future, attorneys of both nations practicing near the boundary may find knowledge of IJC procedures useful. Practice before the IJC more resembles that before a legislative committee than before a court of law. Only the simplest pleading occurs, and that only when the proceeding is to obtain consent for some activity. Unlike courts, the Commission has its own boards of experts to make factual investigations and recommend solutions for matters pending before the Commission. When the proceeding essentially is investigatory, the board’s recommendations may be given the Commission before any public hearing is held. At IJC hearings usually there is no examination and cross examination of witnesses within the framework of judicial procedures and the rules of evidence. Instead, factual statements and arguments are made tending to show how the interest of both the Canadian and American publics affected will be served by the Commission action or recommendation the advocate urges. Commissioners

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1. It is hard to say how the economic value of Canadian residences and parks have been affected by the unsightliness of American industrialization. Even though the economic value of parkland where the view has been marred is unimpaired or even enhanced, the government and the people for whom it provided the park have still been harmed, however. Open land suitable for another park may be unavailable to the city, or available only at yet higher costs.

   It is said courts in this country recognize aesthetic values as legitimate objects of protection by zoning. Note, The Police Power, Eminent Domain, and the Preservation of Historic Property, 63 Colum. L. Rev. 708, 715 (1963). This seems particularly valid where the aesthetic values protected are found in land devoted to park purposes, purposes the land can fulfill chiefly because of its aesthetic value.

2. International Joint Comm'n, Report on the Pollution of Boundary Waters 241 (1951); International Joint Comm'n, Safeguarding Boundary Water Quality (1961) states at 10 that all the major communities bordering the boundary waters use them for domestic water supply. Throughout the notes that follow the International Joint Commission is termed either the IJC or the Commission.

ask questions, as may persons in the audience: as well, that often deal with engineering and other matters outside a lawyer's competence. Probably a prudent attorney would bring to the hearing experts in the fields in which questions might be anticipated. At times it may be most effective if the non-legal expert actually presents the statement, the lawyer remaining in the background.

Of course, an attorney appearing before the Commission must be familiar with the treaty that created the Commission and gives it its jurisdiction, and he may also have to deal with problems posed by differences existing among Canadian provinces and American states in the actual meaning of concepts mentioned in the treaty. Help in resolving such problems can be found in the law books, although the Commission's practical interpretation of treaty language and legal concept revealed in its files of day-to-day operation is of primary importance. The detailed story of IJC substantive law must await another time and another place. The bulk of the present article instead focuses on Commission organization and practice, with some parting comments relevant to land use controls.

I. THE INTERNATIONAL JOINT COMMISSION

A. Powers

The Commission stems from the Boundary Waters Treaty of 1909 entered into with Canada by the federal government of the United States pursuant to its treaty power. Its preamble shows the treaty is to accomplish more than the settlement of water disputes. The two governments declared themselves equally desirous to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise. . . .

The treaty created the IJC to bring about this adjustment and settlement. The Commission has used two powers in doing its work: investigative and

4. U.S. Dep't of the Interior, Documents on the Use and Control of the Waters of Interstate and International Streams: Compacts, Treaties and Adjudications, "Boundary Waters Treaty, 1909" (1956) 379. This publication is called Documents and the Boundary Waters Treaty is called the treaty throughout this article.

5. U.S. Const., Art. I, § 10. The treaty formally was executed with Great Britain, but the immediate impetus for the treaty came from a Canadian, Sir George Gibbons, who also was active in its negotiation. Activity under the treaty has always been with Canadians. Substantively, it is a treaty with Canada. See Bloomfield and Fitzgerald, Boundary Water Problems of Canada and the United States, ch. I, hereafter cited as Bloomfield and Fitzgerald. The authors point out that the 1909 treaty emerged from 125 years' experience of peaceful, treaty settlement of boundary disputes. This book is a useful guide to the records of the IJC's work. The records themselves are kept in the Commission's offices in Washington and in Ottawa.

6. Documents at 379.
Under the investigative power, the Commission may look into any "questions or matters of difference" arising between Canada and the United States "involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other along the common frontier," whenever the national governments ask it to do so.

The results of the investigation are given the two governments in Commission reports. The reports are not decisions of the questions or matters submitted, either on the facts or the law, but state the conclusions and recommendations of the Commission, within the limit of investigation prescribed by the terms in which the matter was referred to the Commission. The conditions investigated need have no particular location; the only requirement is that the rights, obligations or interests of either country in relation to the other, or to the inhabitants of the other, be involved.

The IJC's judicial powers extend to boundary waters, waters flowing from boundary waters, and transboundary waters lower than the boundary. In western New York the only watercourses within the Commission's judicial power are Lakes Erie and Ontario and the Niagara River. No new use, obstruction, or diversion of these waters, affecting the natural water level or flow on the other side of the boundary may be made except if approved by the IJC and the national government on whose side of the boundary the activity is to occur. To obtain the Commission's approval, an application must be made in accordance with procedures later to be described.

The treaty states policies to guide the Commission in disposing of applications. Existing uses of boundary waters on either side of the boundary are to remain undisturbed, and each national government is to have on its own side of the boundary equal and similar rights to use boundary waters. Also the Commission must observe the following precedence in granting applications:

1. Uses for domestic and sanitary purposes;
2. Uses for navigation, including the service of canals for the purposes of navigation;
3. Uses for power and irrigation purposes.

No use may be permitted that tends materially to conflict with a use occupying a higher place in the order of precedence. In approving applications, the

7. The term "judicial" may be misleading in view of the IJC procedures later discussed. The term is used by Bloomfield and Fitzgerald, however, and is used here to facilitate reference to that work.
9. Ibid.
11. Id., Art. IV, at 381.
12. Ibid.
13. See Bloomfield and Fitzgerald, Appendix 7, at 249. The authors describe the IJC's judicial power at 17-37.
15. Id., Art. VIII, at 383-84. Article VIII allows local variations between the two countries in water quantity where it is not feasible to maintain equality.
Commission may impose conditions to protect others from injury by the applicant's works.\textsuperscript{17}

The treaty statement 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"\textsuperscript{18} probably influences the exercise of IJC power. The IJC has investigated pollution of boundary waters in the Buffalo area, and has created a standing board to stimulate compliance with certain standards of water purity.\textsuperscript{19} Although pollution problems are not within the Commission's

| Table 1 | Principal Drainage Areas Tributary to Boundary Waters on the Niagara Frontier\textsuperscript{20} |
|---|---|---|
| Stream | Drainage Areas in Square Miles |
| | United States | Canada |
| **A. Lake Erie Tributaries** |
| Rush Creek | 11 |
| Smokes Creek | 33 |
| Two small streams | |
| **B. Niagara River Tributaries** |
| Buffalo River | 424 |
| Cazenovia Creek | |
| Buffalo Creek | |
| Cayuga Creek | |
| Tonawanda Creek | 530 |
| (Only in periods of heavy run-off; otherwise it flows easterly through the New York State Barge Canal.) |
| Ellicott Creek | 119 |
| (Same condition as applies to Tonawanda Creek.) |
| Scajaquada Creek | 22 |
| Cayuga Creek (Niagara Falls) | 34 |
| Welland River | 375 |
| (Carrying the Ontario Hydro Electric Power Commission's power canal and discharging at Queenston, Ontario.) |
| Black Creek | 37 |
| **C. Lake Ontario Tributaries** |
| Four Mile Creek | 44 |
| Six Mile Creek | 33 |
| Two Mile Creek | |
| Four Mile Creek | |
| Eight Mile Creek | |

By providing these conditions, the IJC may protect others from injury by the applicant's works. The treaty statement 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" probably influences the exercise of IJC power. The IJC has investigated pollution of boundary waters in the Buffalo area, and has created a standing board to stimulate compliance with certain standards of water purity. Although pollution problems are not within the Commission's

\textsuperscript{17} Ibid.
\textsuperscript{18} Documents, Art. IV, at 381.
\textsuperscript{19} See Dockets 4 and 55 summarized in Bloomfield and Fitzgerald at 76-79, 172-73.
\textsuperscript{20} Compiled from IJC, Report on the Pollution of Boundary Waters 228-30 (1931).
pollution might enter boundary waters. An attorney whose client's business discharges pollutants into a drainage area not listed in the table may not conclude that his client is free of Commission attention, however. The significant point is the fact of pollution of boundary waters, not the location of the source of pollution.21

B. Organization

The Commission is a joint Canadian-American body of six commissioners, three being appointed by the chief executive of each nation.22 Both the United States and Canadian sections of the IJC have appointed a secretary, these acting as joint secretaries at the Commission's joint sessions.23 The Canadian section has appointed engineering assistants and legal counsel,24 but the United States section uses personnel of other government agencies for needed services as the occasion arises. The State Department furnishes counsel to the United States section.26

Of the commissioners on the United States section, only the chairman receives a salary from IJC funds. The practice is to appoint persons to the unsalaried positions who are employed in federal agencies active in fields closely related to the Commission's work. Presently the United States section of commissioners is composed of two attorneys and an engineer; the Canadian section of one law-trained person, and two engineers.26

Much of the Commission's work is performed by persons it designates for the occasion to constitute a board of experts. Often these persons are employees of other federal, state or provincial government agencies working in matters pertinent to the work the Commission requires of the board. This practice avoids duplicating effort and brings experienced men to the work, often familiar with the local scene. The IJC's authority to use such persons in performing its judicial functions has arisen from Commission practice. When disposing

21. In addition to investigative and adjudicative powers, the IJC is given power to direct the measurement and apportionment of the St. Mary and Milk rivers in Montana, Alberta, and Saskatchewan in accord with principles established by the treaty. Documents, Art. VI, at 382. It also has power to arbitrate matters involving the rights, obligations, or interests of the two governments either in relation to each other or to their respective inhabitants, if the matter is referred to the IJC for decision. Documents, Art. X, at 384-385. The Commission has not yet used its arbitration power.
23. Id., Art. XII, at 385-86.
24. Ibid.
25. Interview with William A. Bullard, Secretary, United States Section, IJC, June 21, 1963.
26. In August, 1963, the Commission membership comprised:
Canadian Section—A. D. P. Heeney, Chairman, appointed October 2, 1962. Attorney, former Canadian Ambassador to the United States; Rene Dupuis, appointed 1958. Electrical engineer, Board member, Quebec Hydro-Electric Commission; Donald M. Stephens, appointed 1958; Engineer, Chairman, The Manitoba Hydro-Electric Board.
of applications under Articles III and IV of the treaty, the Commission needs to be assured that conditions are carried out that it may impose on approval of the application. As early as 1913 it created a board of technical experts to police the conditions on a continuing basis. Sometimes the Commission uses experts to gather facts for use in disposing of applications before it. The Commission does not appoint a board specially for this purpose, but asks an existing board appointed on another matter, or the relevant government agencies, to develop the needed information.

The IJC performs its investigative functions very largely through specially appointed boards of experts. The authority to do so is found in the terms of the reference itself. For example, the letters from the Secretary of State and from the Canadian Secretary of State for External Affairs asking the IJC to investigate and report on the pollution of boundary waters, stated that the two governments would, upon request, "make available to the Commission the services of engineers and other specially qualified personnel of their governmental agencies, and such information and technical data as may have been acquired by such agencies or as may be acquired by them during the course of the investigation."

Of course, the quoted language in the reference does not bind federal and state agencies in the United States. Federal agencies might decline to furnish personnel for Commission work because lacking an appropriation for the purpose; state agencies might because of their independence of federal officials. Fortunately, the Commission has found agencies at both levels of government pleased to have their personnel serve on Commission boards. Participation of state and provincial officials in the investigation and in the formulation of the technical board's recommendations is highly important. When coupled with public hearings at the communities near the area under investigation, it promotes local understanding and acceptance of whatever remedial measures result, two factors essential for the measures' success. The IJC mentioned another advantage of using government personnel, whether federal, provincial, or state, in its expression of satisfaction with the operation of one of its boards. The Commission said the arrangement was

...eminently satisfactory. The boards of technical advisers were made up of senior experts who held positions of responsibility in either country on some activity related to the pollution problem. These experts were able, as a result of their familiarity with the problem, to plan the investigation soundly and, through their official adminis-

27. Dockets 6 and 8, summarized in Bloomfield and Fitzgerald at 83-4, were the first within the judicial power to utilize a board. On this occasion the IJC only recommended the persons to serve on the board, the respective governments doing the actual appointing. Bloomfield and Fitzgerald at 33. This technique has persisted, but the IJC has also made appointments itself. Bloomfield and Fitzgerald at 34, citing Docket 68, an application by the two governments to develop power on the St. Lawrence river.


29. Letter From the Secretary of State to the United States Section, IJC, April 1, 1946, reprinted in IJC, Report on the Pollution of Boundary Waters 13 (1951).
trative connections, were able to bring the full resources of appropriate governmental agencies in both countries to bear directly upon the problem. Circuitous, time-consuming procedures were thus avoided and the investigations were more comprehensive, more efficiently conducted, and more economical than would have been possible by other procedures.\(^{30}\)

The Commission particularly cited the "excellent cooperation" of the state and provincial representatives.\(^{31}\)

The fashion in which the Commission is organized contributes importantly to its success. Placing persons from the two nations on the same body, whether it be the IJC itself, a supervisory board, or a team of field workers, to resolve problems arising on either side of the boundary, eases the task of resolving differences on a basis mutually acceptable to both nations. Disagreement over facts narrows drastically when experts of the two countries work together in the investigations. The possible solutions of a problem also narrow drastically when there is agreement factually of what the problem is. Using personnel of existing government agencies avoids creation of a new bureaucracy with its attendant risk of hobbling, interbureau rivalries. However, it is doubtful that any mode of organization can or should completely eliminate each commissioner's awareness of his own nation. The difficulty commissioners experience in accepting a recommended solution of a problem when to do so means limiting their nation's vital interests provides an effective limit to the Commission's ability to recommend settlements of boundary problems.\(^{32}\)

C. Procedure

1. Judicial Proceedings

The Commission has promulgated rules of procedure\(^{33}\); but the methods

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30. IJC, Report on the Pollution of Boundary Waters 16 (1951). This board supervised the investigation of pollution in boundary waters, the field work being performed by personnel of the various agencies represented on the advisory board. Id. at 14-16. For a short, informative progress report on the joint effort, sparked by the IJC, to clean up the boundary waters, see IJC, Safeguarding Boundary Water Quality: A Cooperative Effort between United States and Canada under International Treaty (1961).


32. See Docket 57, summarized in Bloomfield and Fitzgerald at 177-80, a reference to investigate and make recommendations regarding water requirements and apportionment of the Waterton and Belly Rivers. The Commission could not agree on a recommendation, the split following national lines. On the other hand, the Commission has reached recommended solutions of pollution problems, where the interests of the two nations tend to coincide, or the conflict is not of vital national importance. See Dockets 25, 53, 55, and 61, summarized in Bloomfield and Fitzgerald at 137-38, 172-73, and 183-85, respectively.

When the Commission divides evenly on a reference, separate reports are made by the commissioners on each side to their own government. Documents, Art. IX, at 384. The same occurs when there is an even split among the commissioners on an application. Documents, Art. VIII, at 383-84. When a minority of commissioners dissent from the report to the governments made to close a reference, their views may be expressed either in a joint report to both governments or in separate reports to the dissenters' own governments. Documents, Art. IX, at 384. There is no provision for dissenting opinions in the disposition of applications.

33. IJC, Rules of Procedure and Text of Treaty (1947). The rules and the treaty also appear in Bloomfield and Fitzgerald in Appendices 3 and 1, respectively. In addition
by which it actually does its work, as revealed in the files of dockets opened since 1958, differ widely from those suggested by the published rules. Reading the rules pertinent to handling applications under Articles III and IV of the treaty, one's impression is that the Commission operates much like a court of law, with pleadings, pretrial conference, a hearing at which witnesses are examined and cross examined by counsel, and finally a written disposition of the application. Reading the transcripts of hearings, the official documents, and the correspondence relevant to the dockets of the recent past, one concludes that IJC hearings and related activities more closely resemble those of a legislative or administrative body than they resemble those of a judicial one.

The divergence between the written rules and the current practice is understandable when one remembers the time of the Commission's creation, the job it is to do, and the failure ever to revise the written rules. In 1912 when the Commission first met, the great development of administrative procedures was still in the future. The procedure with which lawyers were familiar was judicial procedure; thus, it was natural for the Commission, largely made up of lawyers, to adopt similar procedures. But the IJC's work in disposing of applications is but one phase of its general mission to promote adjustment and settlement of questions arising along the frontier. Performing such a mission involving two independent nations requires procedures that assure thorough, impartial exploration of each country's interests, with the least possible disturbance to national pride. In the long run, the people of both nations must be convinced their interests and their nation's interests have received fair, serious consideration if decisions in some respects perhaps adverse to their immediate interests are to be accepted and implemented. Applications to do work in one country affecting boundary or transboundary waters in the other often involve projects believed essential to the economic development of large sections of both nations, and hence involve the public interest to a high degree, even though to the rules appearing in these publications, the Commission adopted Rule 29 July 18, 1961. The promulgation of the rule follows:

Consideration having been given to the need to provide the Commission with a basis for proceeding with despatch in dealing with Applications requiring very urgent consideration, the Commission adopts the following language as Rule 29 of the Rules of Procedure of the International Joint Commission.

"The Commission may, where it considers that it would be in the interests of all concerned, and consistent with justice and equity, reduce the length of the periods of time stated in Rules 9, 10, 11 and 20 provided such action will not, in the opinion of the Commission, prejudice the right of interested parties to be heard in accordance with Article XII of the Treaty."

34. Bloomfield and Fitzgerald summarize Dockets 1 through 72. I have read the files of Dockets 73 through 78 and discuss them in the text.

35. Although the published rules of procedure do not indicate when each rule was adopted, it is likely most were adopted when IJC membership was dominated by lawyers, and hence that the rules primarily reflect lawyers' thinking. During the first two years of the IJC's existence, five of the six commissioners were lawyers, and for the next twenty years the commissioners always counted four lawyers in their number, except during brief periods when there were less than six commissioners appointed. See Bloomfield and Fitzgerald, Appendix 4. Bloomfield and Fitzgerald at 14 say the rules were adopted in 1912, without indicating whether all the rules were adopted then or not.

36. See Documents, Preamble at 379.
the immediate applicant may be a private business concern. In light of these factors, the adversary procedure used by common law courts in settling controversies between private individuals is not appropriate for the Commission. Neither Canadians nor Americans are likely to allow such important matters to be settled by solutions reached through manipulation of legal procedural machinery and of concepts non-lawyers often denounce as "legal technicalities." An international body must avoid the appearance of nit-picking if its decisions and recommendations are to rally public opinion behind them. Also, the adversary method often creates tensions and antagonisms among opposing parties in private litigation, which suggests its use by the IJC might increase international tensions rather than reduce them.

Although the Commission's formal rules have not been updated to conform in all respects with its practice, they cannot be ignored. Some have vitality; others might have in the future, as will be discussed in the context of a particular application.

a. The Application. The first step in presenting an application to the Commission from a private individual or company is to write to the government within whose jurisdiction the desired privilege is to be exercised. Thus, an application to do something in the United States is sent to the Secretary of State. Although the Commission's formal rules have not been updated to conform in all respects with its practice, they cannot be ignored. Some have vitality; others might have in the future, as will be discussed in the context of a particular application.

The application states the facts that prompt its filing and describes the approval desired. The Power Authority of the State of New York provides a recent example. PASNY applied under treaty Article III for permission to lower a certain shoal in the Niagara River in order that ice might pass more easily along the American shore and over Niagara Falls. The application itself was a two-page letter to the Secretary of State. It opened by stating generally the work for which approval was sought, and that it was to occur on the American side of the boundary. It named the treaties pursuant to which the request was made. Next it drew attention to two attached drawings indicating the area of the proposed work. Three brief paragraphs told why the proposed work was needed—certain control works in the river had previously been extended with Commission approval to aid river ice in passing over the Falls; experience suggested reduction of the shoal would increase the efficiency of the previously constructed works in flushing ice along the United States shore; reduction of the shoal also would help maintain established water levels, help prevent floods, and make it easier to use all the water a particular treaty allocated for power purposes. A possible objection to the application was anticipated. The application stated that reducing the shoal would not impair ability

37. E.g., Letter From James A. FitzPatrick, Chairman, Power Authority of the State of New York, to Dean Rusk, Secretary of State, April 8, 1963, in Basic Documents file of Docket 78 Niagara River Shoal Removal, IJC offices, Federal Trade Building, Washington, D.C. The Power Authority hereafter is called PASNY. See IJC, Rules of Procedure, Rule 6(b). A national government applies directly to the Commission. Rule 6(a). A private person would direct an application for a structure to be located in Canada to the Canadian Secretary of State for External Affairs.
to maintain pool levels and to distribute the flows over the Falls as required by treaty. The application closed with statements that the applicant's Canadian counterpart, the Hydro-Electric Power Commission of Ontario, concurred in deeming the proposed construction necessary and desirable; that the applicant would be responsible for claims for injury to persons or property caused by the construction work, as well as for the construction work itself; and that neither national government would have to bear any of the project's costs.

b. **Preparation for the Hearing.** After writing to the Secretary of State, an applicant may concentrate on preparing for the hearing ultimately to be held on his application. The actual filing of the application with the Commission is done by the Secretary of State, and the Commission itself gives notice to the other government and to interested parties, schedules and gives notice of a hearing. In special cases, these steps may be taken quite rapidly, and a report on early progress of the application given the applicant as well. An application requiring speedy disposition may be further expedited after the hearing. To avoid the few days' delay involved in executing the order of approval, the Commission may notify the applicant informally that work may proceed. Using such nimble procedures in the shoal removal application, the Commission was able to permit the work to start only thirty-nine days after the applicant wrote to the Secretary of State.

The handling of the shoal removal application shows the Commission tries hard—perhaps too hard in some respects—to comply with an applicant's request for speedy disposition of his case, when the applicant has some particular need for speed. On receipt of the State Department's letter transmitting the application, the secretary of the United States section, IJC, first informed his Canadian counterpart of the filing. On the same day the secretary informed

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38. Letter From James A. FitzPatrick, Chairman, PASNY, to Dean Rusk, Secretary of State, April 8, 1963, in Basic Documents file of Docket 78. See Rules of Procedure, Rule 6, requiring applications to state background facts and the approval requested “as fully as may be necessary for the information of the Commission,” and Rule 7, requiring drawings, profiles, plans of survey, specifications, and maps as may be necessary to illustrate the application. Rule 8 also requires filing of any federal governmental approval that may have been given the plans.

An application by a national government has the same contents as that of a private individual. Rule 6.

39. A copy of the letter, infra note 42, informing the Secretary, Canadian Section, IJC, that the application had been filed was sent the applicant. This worthwhile practice has arisen without compulsion of the printed rules, which only require that the other national government be notified that an application has been filed. Rule 9.

40. Letter From William A. Bullard, Secretary, United States Section, IJC, to E. V. Stalcup, Director of Power Utilization, PASNY, May 17, 1963, and telegram from Secretary Bullard to Mr. Stalcup May 22, 1963, both in Official Correspondence file of Docket 78.

41. The need present in the shoal removal matter was to start work soon after filing the application so that the benefit of removing the shoal might be enjoyed during the next ice season. Letter From U. Alexis Johnson, Deputy Under Secretary of State for Political Affairs, to the United States Section, IJC, April 11, 1963, in Basic Documents file of Docket 78.

42. Letter From William A. Bullard, Secretary, United States Section, IJC, to D. C. Chance, Secretary, Canadian Section, IJC, April 15, 1963, in Basic Documents file, Docket 78.
the International Niagara Board of Control of the filing.\textsuperscript{43} This step was taken because the activity proposed by this particular application involved boundary waters as to which the IJC had previously given the Board supervisory responsibilities.\textsuperscript{44} Since the application impinged on those responsibilities, the Board had to determine whether the application might be approved consistently with their discharge. The Board’s formulation of its position in the matter might also uncover facts helpful to the Commission in disposing of the application. The Commission’s published rules do not suggest this active role the Commission and its boards may play in investigating the relevant circumstances of an application.

c. \textit{Notice of Hearing}. In processing this application, the next step taken was to give public notice that the application had been filed, describing it and giving the time and place at which a public hearing on the matter would be held. It stated that all interested persons would be heard, either orally or in writing. The notice listed the addresses where copies of the application, including its accompanying drawings, were available for inspection. Five addresses were in New York communities, four in Ontario; all were near the Falls.\textsuperscript{45} The notice was published April 22, 26, and May 3 in three newspapers in the United States and in two in Canada. It also appeared in the \textit{Federal Register} April 24 and in the \textit{Canada Gazette} April 27.\textsuperscript{46} The hearing itself was set for the morning of May 8 at Niagara Falls, New York.\textsuperscript{47}

Although the contents of the notice seem reasonably adequate to have

\begin{itemize}
  \item \textsuperscript{43} Letter From William A. Bullard, Secretary, United States Section, IJC, to Brig. Gen. T. DeF. Rogers, Chairman, United States Section, International Niagara Board of Control, April 15, 1963, in Official Correspondence file, Docket 78.
  \item \textsuperscript{44} The Board was created in 1953 to supervise operation of a control structure built to check erosion of Niagara Falls and to enhance their beauty, while at the same time increasing the water available for power generation. Both the control structure and the supervising Board were IJC recommendations after investigation pursuant to reference. See Docket 62, Preservation and Enhancement of Niagara Falls, summarized in Bloomfield and Fitzgerald at 188 as Docket 64. The discrepancy in docket numbering is unexplained.
  \item \textsuperscript{45} IJC, Public Notice, Removal of a Shoal in Niagara River, enclosure to Memorandum From Secretary Bullard to Commissioners Weber and Ross, April 18, 1963, in Official Correspondence file, Docket 78. The notice also stated that oral statements made at the hearing should be supported by a written submission of all important facts and arguments, fifty copies of the written submission to be filed with the Commission either before or after the hearing.
  \item \textsuperscript{46} Docket 78, Transcript of Proceedings before the IJC, Public Hearing on the Removal of a Shoal in the Niagara River, May 8, 1963, at 4. Rules of Procedure, Rule 9, require publication “for three successive weeks in the \textit{Canada Gazette} and in two weekly newspapers, published on each side of the international boundary line nearest the locality” where the proposed work is to occur. It is clear the Commission does not apply the rule literally. The required length of notice was not followed because Rule 29, \textit{supra} note 33, was applied. But the newspapers in which notice was published were the \textit{Buffalo Evening News}, \textit{Buffalo Courier-Express}, \textit{Niagara Falls Gazette}, Niagara Falls, New York; \textit{Niagara Falls Review}, Niagara Falls, Ontario; and the \textit{Toronto Globe and Mail}. Clearly they are not weekly papers and are not all located nearest the site of the proposed work. But the newspapers used are widely circulated near the site. The Buffalo papers, at least, are published in a city whose residents have a considerable interest in work affecting the Falls even though not located as close to the Falls as are some other communities. The choice of newspapers made in this instance was more sensible than literal application of Rule 9 would have allowed.
  \item \textsuperscript{47} \textit{Supra} note 45.
\end{itemize}
informed persons of their rights in the matter, it is doubtful that it gave
enough time before the hearing to permit their effective exercise. Only four
days intervened between the date of last publication and the hearing date.
Granting the need for prompt action, and that the Commission had given itself
authority to shorten the time of notice when quick disposition was desirable,
it still seems unlikely that four days is enough to allow a person, especially
even not an engineer, to formulate his attitude toward the application, to say
nothing of the time needed to prepare an effective presentation of the attitude
once formulated. No suggestion is intended that the Commission consciously
used short notice to muzzle expression of opinion at the hearing. Rather it
was used because the work proposed by the application did not appear contro-
versial, thus rendering the chance of opposition minimal, and because it was
desired to expedite consideration of the application. But actions are not always
justified by good intentions. The treaty requires that all interested parties be
given “convenient opportunity to be heard” and that procedural rules the
Commission adopts “be in accordance with justice and equity.” The notice
given in this application seems inconsistent with both requirements.

Another aspect of the length of notice given in this application may show
that a portion of the printed rules of procedure has become a dead letter.
The printed rules allow statements in response to the application to be filed
by the other government and by interested private persons obtaining the con-
sent of either government, these to be transmitted by the appropriate secretary
back to the government that initiated or transmitted the application. The
initiating or transmitting government may file a reply statement. Private
persons also may file a reply statement, but only those who initiated the
application. Except where the Commission shortens it under Rule 29, the
time in which the first of these statements may be filed is 30 days after
the application is filed. The second statement probably may be filed within 30
days after receiving notice that the first has been filed. It seems impossible
for the two statements—perhaps even for the first one—to be filed in four days. None of the few dockets opened in the past five years contained either statements in response or in reply. Perhaps these statements, suggestive of the pleadings used in courts of law, have been supplanted by other techniques of expressing and focusing the issues relevant to an application. If so, the Commission should consider revising its rules to conform with its practice in this area.

d. Preparation of Briefs; Conduct of the Hearing. The engineering aspects of the proposed work were emphasized both in the applicant's brief, and in the statements made at the public hearing. The brief dealt only in facts and conclusions of fact. It stated the expected results of reducing the shoal, and presented data compiled from tests conducted on a hydraulic model of the Niagara River and of the Falls. This data tended to show that reducing the shoal would not seriously impair the effectiveness of certain remedial works earlier installed to protect the beauty of the Falls.\footnote{56. Docket 78, Brief to the IJC, in which PASNY and the Hydro-Electric Power Commission of Ontario joined, On Proposed Reduction of Shoal Near Tower Island, Niagara River, April 24, 1963.}

So far as appears from the transcript of the public hearing, engineers presented all statements made by the applicant and interested parties. Attorneys represented both governments, but only established their governments' lack of objection to the application.\footnote{57. Docket 78, Transcript of Proceedings before the IJC, Public Hearing on the Removal of a Shoal in the Niagara River, May 8, 1963, at 36.} The applicant's statement generally followed the points made in its brief, but questions put by the commissioners elicited additional information and opinion.\footnote{58. Questioning by individual commissioners covered engineering problems generally. Questions of this type were whether most ice came down the American shore, whether removal of the shoal would require adjustment in gate settings at a dam designed to maintain water levels and flows above the Falls, how long the minimum flow over the Falls during construction of the coffer dam would last, whether there was a plan for disposing of excavated material, whether any excavated material would be dumped in the channel, how much material had to be excavated, how removal of the shoal would affect ice conditions downstream from the shoal, whether previous downstream ice blockages raising tailwater at the power installations were caused by sudden break-up of ice jams above the Falls and, if so, how removing the shoal would affect this occurrence, and whether downstream ice blockages occurred in midwinter, March, or April. Docket 78, Transcript of Proceedings, at 14, 14, 16, 16, 16, 17, 33, 34, and 35, respectively.} The only legal question that arose was resolved simply. The Hydro-Electric Power Commission of Ontario made a statement concurring in and supporting the application. A commissioner asked if Ontario Hydro would object to being jointly responsible with the applicant for carrying out conditions the Commission might impose on approval of the application, observing that joint responsibility would be natural since activities of the two power entities necessarily were interrelated in meeting requirements previously imposed by the IJC and the two governments. Another commis-
sioner wondered how Ontario Hydro could be held to conditions unless it also was an applicant. The representative of Ontario Hydro readily agreed that it should be bound by the conditions and that Ontario Hydro should be made a joint applicant. No evidence of the representative's authority to bind Ontario Hydro in this fashion appears, nor is there evidence that he consulted with Ontario Hydro lawyers in reaching his decision. The seeming casualness with which Ontario Hydro thus entered into serious financial commitments no doubt is explained by its history of participation in joint projects with PASNY.

The hearing in form resembled those held by a legislative body on proposed legislation. The applicant first made its statement and answered questions put by the commissioners. Ontario Hydro's supporting statement followed. Then the IJC's technical board spoke. Next, statements were made by persons attending the hearing.

The Commission made it easy for anyone in attendance to be heard. At the start of the meeting, the secretaries canvassed the audience for persons desiring to be heard, to assure that they would be called on to speak. Also, after the statements presenting the application, the meeting chairman inquired if any latecomers wished to speak, specifically asking for official representatives of Ontario or New York.

The invitation for a state official to speak may reflect a departure from the printed rules, although in fact no provincial or state official appeared. The printed rules permit "any person interested in the subject matter of the application" to be heard, and define "person" to include "individual, partnership or corporation." Although public corporations apparently come within the definition, it is hard to bring a sovereign government such as a state within it.

Persons in the audience could also question the applicant or others who made statements. The mode in which this was accomplished was to allow such questioning after all the statements presenting the application were completed. This method seems unfortunate, blunting the impact of the question by delaying it possibly a long time after the statement occurred to which it was directed. Consideration might be given to permitting questions from the audience during the presentation of the various statements, just as questions from the commissioners are permitted. If this procedure proved unworkable, questioning from the audience could be permitted at the close of each statement after questioning by the Commission. Increasing the effectiveness of audience

60. The International Niagara Board of Control did not oppose the application, but suggested if removing the shoal caused bad effects on the Falls that the applicants be responsible for correcting them. Docket 78, Transcript of Proceedings at 23.
61. Docket 78, Transcript of Proceedings at 24-25.
64. Docket 78, Transcript of Proceedings at 24.
questions is in the spirit of the treaty, since to do so increases the quality of opportunity to be heard the treaty requires interested parties be given.

The form of hearing held on this application does not conflict with any explicit provision of the printed rules of procedure, but certainly the context of the treaty and the rules arouse expectations of a judicial type hearing. The treaty gives the Commission power to administer oaths to witnesses and to take evidence on oath whenever deemed necessary, and the Commission may cause subpoenas to be issued to compel attendance of witnesses or production of books and other documents at Commission proceedings. The rules appear to contemplate that parties and interested persons will present evidence and arguments through counsel, although there is no requirement that counsel be a lawyer. Actually, neither in the hearing on the shoal removal application nor in the other dockets opened in the past five years were facts or opinion presented by witnesses responding to questions and cross questions of counsel. No statements were made under oath, nor were they made through counsel in the ordinary sense. However, witnesses might be questioned under oath by counsel and statements required to be sworn any time the Commission deems it advantageous.

The Commission presently allows all types of assertions to be made in the statements presented at hearings. Until it takes a more restrictive attitude, the term "evidence" as used in the treaty and the rules seems not to have technical meaning. Considering the absence of a jury in Commission proceedings, the availability to it of its own body of technical experts, and the desirability of avoiding the appearance of preoccupation with technicalities, probably any restrictions on presentations should only require them to be relevant and material to the application.

Under the printed rules the problem of defining evidence might arise if depositions are taken. No depositions have been taken in the dockets of the past five years, so the matter may be moot. However, the rules allow depositions. If taken, the rules require depositions to be given under oath, that cross examination be allowed, that testimony be confined to the subject matter in question, and that objections to the admission of evidence be entertained, to be "dealt with by the Commission at the hearing," where the deposition is to be "used in evidence, saving all just exceptions." The rule's wording suggests that relevancy is the test of evidence. Perhaps requiring that depo-

65. Documents, Art. XII, at 385-86; Rules of Procedure, Rules 17 and 18.
66. Rules of Procedure, Rules 13 and 20. Rule 13 states "Any person interested in the subject matter of the application, whether for or against, is entitled to be heard by counsel at the final hearing, and may, through counsel, with the consent of his Government, conduct or assist in conducting all proceedings in the case subsequent to the application." Rule 20 provides in part that, "The Commission may decide how many counsel are to be heard and what interests may be united for the purpose of the hearing."
67. Interview with Ely Maurer and Peter H. Pfiund, supra note 49.
68. Comment of Teno Roncallo, Chairman, United States Section, IJC, in conversation with the writer August 8, 1963.
sitions be under oath while not requiring statements made at the hearing to be sworn is justified by the deponent's probable absence from the hearing. But why specifically allow cross examination of deponents giving depositions, but not of persons presenting statements at the hearing?

One other comment regarding the conduct of the hearing. One suggested explanation for the lack of statements at the hearing by Ontario or New York representatives is that they may have attended a demonstration held at Islington, Ontario, the day before the hearing, and thus been satisfied that the application was unobjectionable. The suggestion is plausible. The demonstration occurred on a scale, hydraulic model of the River and Falls, including existing works and those proposed in the application. When water was poured through the model in quantities proportionate to those actually experienced in the Niagara River itself, the effects of the proposed works on the beauty of the Falls, on the efficiency of existing remedial works, and on the ability of ice to pass over the Falls would easily be seen.

It seems the already good public acceptance of IJC decisions would be further enhanced by opening demonstrations of this type to the public as part of the hearing. Witnessing the demonstration might afford the best basis for opposing or endorsing an application. Making the demonstration public would upgrade the quality of hearing for interested parties. In the shoal removal application, attendance at the demonstration was by invitation of the Commission. The public notices of the hearing did not mention that the demonstration would be held.

e. Disposition of the Application. An order dated nine days after the hearing closed approved the application subject to certain conditions. The conditions first made clear that no treaty violation was authorized. They also tended to assure reduction of property damage by ice, and that the scenic spectacle of Niagara Falls would be preserved. To make sure the conditions would be fulfilled, approval of construction plans by the International Niagara Board of Control was required before construction could be started, and, once started, it was placed under the Board's supervision. The IJC retained jurisdiction of the application and warned that it might make further orders after proper notice and hearing.

f. An Interpretation Problem. One aspect of the Commission's printed rules of procedure has not been involved in the dockets opened in the past five years, but dockets opened earlier invoking the IJC's judicial power show the practice does not follow the printed rules. There is no provision in the

70. Comment of Peter H. Pfund in course of interview, supra note 49.
71. Letter From E. V. Stalcup, Director of Power Utilization, PASNY, to Teno Roncallo, Chairman, United States Section, IJC, April 24, 1963, in Official Correspondence file of Docket 78. The letter states the expectation that the Commission will invite "additional observers who should in your opinion attend the demonstration," thereby suggesting other observers would be present which the Commission did not invite.
rules allowing a department of the federal government, a state, county, city, or other governmental unit to be an applicant itself. The rule relevant to applications provides only for applications by "one or the other of the Governments" and by "any private person." The context shows that "Government" in the rules means only national governments, presumably acting through their respective foreign offices. Although "person" is defined to include a corporation as well as an individual, "corporation" cannot include units of government in view of the adjective "private." However, the Commission has allowed as applicants a federal agency other than the State Department, an executive official of a state, an executive department of a state, and a city. The Commission's liberality in allowing state and local units of government to initiate applications seems desirable. A traditional responsibility of state and local government is to promote the general welfare, and the ability to file applications with the Commission may sometimes be important in its discharge. It is suggested the printed rule be amended to conform to the practice.

2. Investigative Proceedings

The procedural machinery through which the Commission performs its investigative functions under Article IX of the treaty also is largely created by Commission practice rather than by the printed rules. The rules of procedure only say the judicial rules shall apply to investigative proceedings so far as practicable. Additionally, various treaty provisions are pertinent to the form Commission investigations take. The IJC's power to administer oaths to witnesses, to take evidence on oath, and its obligation to give all interested parties convenient opportunity to be heard, all found in Article XII, have already been mentioned in relation to judicial matters. A feature of Article

75. Docket 40, Prairie Portage Dam, application under treaty Article III by the United States Forest Service. The docket is summarized in Bloomfield and Fitzgerald at 153.
76. Docket 49, Osoyoos Lake Control, application under treaty Article IV by the State of Washington on behalf of a town and county of that state. Summarized in Bloomfield and Fitzgerald at 161.
77. Docket 18, St. Croix River Fishways, application under treaty Article III by the Commissioner of Inland Fisheries and Game for the State of Maine. Summarized in Bloomfield and Fitzgerald at 111.
78. Docket 35, Montana Poplar River Dam, an application under treaty Article IV by the State Water Conservation Board of Montana. Summarized in Bloomfield and Fitzgerald at 147.
79. Docket 46, Skagit River Dam and Reservoir, application under Article IV by the City of Seattle, Washington. Summarized in Bloomfield and Fitzgerald at 159-60.
80. Although the IJC has preserved local governments' power to initiate public improvement programs involving boundary and transboundary waters, Commission activity necessarily diminishes local power in other respects. The IJC's actions implement a treaty and hence are part of the supreme law of the land. As such, they "occupy the field" and oust whatever state or local laws may conflict with them. See 4 A.L.R. 1377 (1915), 17 A.L.R. 655 (1922), and 134 A.L.R. 882 (1941).
XII particularly important for investigations gives the Commission power to make examinations through agents or employees, as well as in person.

a. Triggering the Investigation. It is not so easy to invoke the Commission's investigative jurisdiction as it is its judicial. Only the national governments themselves have power to initiate an investigation. This is done by referring the particular question to the Commission for examination and report.\textsuperscript{82} Although the treaty language speaks of "either" national government referring a question, in practice a reference is made only when both governments desire it.\textsuperscript{83} Sometimes one government has difficulty in persuading the other to make a reference.\textsuperscript{84} The terms of the reference delineate the subject matter of the investigation. Any question may be referred that involves "the rights, obligations, or interests" of either nation "in relation to the other or to the inhabitants of the other, along the common frontier."\textsuperscript{85}

Although references may only be made by the national governments, private and public groups may stimulate the governments to act. Writing in reference to a water pollution matter, a former chairman of the United States section, IJC, once stated that to start an IJC investigation "the first requirement is for interests on one side of the line to call attention" to the undesirable condition.\textsuperscript{86} "If," the chairman continued, "the two Governments agree that the problem merits study, they may ask the International Joint Commission to investigate and make recommendations."\textsuperscript{87}

In the same letter the chairman wrote that, to obtain an IJC investigation, the pollution of boundary waters or waters crossing the boundary must allegedly be "detrimental to health or property interests." Here the chairman's language was more conservative than that of the treaty. It is true the pollution forbidden by Article IV is only that which occurs on one side of the boundary "to the injury of health or property on the other,"\textsuperscript{88} but no such restriction appears in Article IX.\textsuperscript{89} Yet the reference ultimately made of the pollution problem interesting the chairman's correspondent stated that the two Governments

\textsuperscript{82} Documents, Art. IX, at 384.
\textsuperscript{83} Interview with William A. Bullard, Secretary to the United States Section, IJC, June 21, 1963.
\textsuperscript{84} Commenting on the Champlain-Richelieu Waterway Reference to report whether it is economic and feasible to improve the existing waterway from Sorel, Quebec, on the St. Lawrence, to Albany on the Hudson, a Canadian newsman said, ... official Ottawa is very cool to the whole idea.

The decision to go along with the study was taken after months of pressure from the United States.

Virtually all the important support for the project comes from south of the border.


\textsuperscript{85} Documents, Art. IX, at 384.
\textsuperscript{86} Letter From Douglas McKay, then Chairman, United States Section, IJC, to Carl F. Campbell, Baudette, Minn., April 28, 1959, in General Correspondence file, Docket 73, Rainy River and Lake of the Woods Pollution Reference.

\textsuperscript{87} \textit{Ibid.}
\textsuperscript{88} Documents at 381.
\textsuperscript{89} Id. at 384.
had agreed upon reference pursuant to Article IX, but "having in mind the provisions of 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 side."\(^{90}\) Identical language appears in the 1946 reference of the pollution of boundary waters.\(^{91}\)

It remains to be seen whether the chairman's letter and the terms of the pollution references reveal a limitation on the Commission's investigative power in the water pollution field. Perhaps the references used the language only because the situation alleged happened to violate Article IV. If so, there would be no implication that violation of Article IV must be alleged to cause a water pollution reference. It is hard to see any justification for restricting IJC power to investigate water pollution. It is almost equally hard to imagine a water pollution situation referable under Article IX that would not also violate Article IV, assuming a liberal construction of "property." Perhaps pollution by soil erosion which adversely affects wildlife habitat but in its initial impact does not harm human health is an example.

b. Organizing the Investigation. Once the Commission receives a reference, the first thing it does is to appoint a board of experts from both countries to conduct the technical investigation required.\(^{92}\) The appointing process takes several weeks. The terms of the reference usually suggest appropriate fields of expertise from which to select the board members, but there may be different opinions of which fields are most pertinent, or the need to keep the board to a workable size may require choices among different fields. Thus, before appointments can be made, the commissioners must agree upon the composition of the board.\(^{93}\)

The Commission has tapped persons representing different disciplines for its boards in the past five years. On two boards created during the period, engineering and the natural sciences appear to dominate.\(^{94}\) References requiring

90. Letter From Robert Murphy, Acting Secretary of State, to Douglas McKay, Chairman, United States Section, IJC, May 30, 1959, in Current file of Docket 73.

91. The reference letter is quoted in full in IJC, Report on the Pollution of Boundary Waters (1951) at 13.

92. See discussion in the text at 8-10 supra.

93. The Commission may give the board power to establish committees and working groups itself. E.g., IJC Directive to International Champlain Waterway Board, October 2, 1962, in Official File, Docket 77. The fields of knowledge not represented in the board membership may be picked up in the membership of the board's committees. Even so, the IJC's first determination of the types of experts to serve on the board is likely to have great influence in shaping the investigation. The board is the parent of the working group or committee. The views of the subordinate body perhaps face some hazard of being shaped to those of its parent when conflicts occur through differences in goals of separate fields of knowledge. Persons whose training is to design and build great works which incidentally change the balance of nature, for instance, may have different opinions toward such works than do persons whose training is to preserve that balance. Also, persons themselves studying problems intensely from one point of view may be less able to see the need for study from another angle than are folks who are not so involved, which suggests the possibility the board will not appoint persons to its working committees whose training is greatly different from that of some board member.

94. United States members of the International Champlain Waterway Board are a civil engineer, an economist specializing in water transportation, and an individual on the Resources Program Staff, Office of the Secretary, United States Dep't of the Interior; Canadian members are an Asst Deputy Minister of Transport who is an economist, a civil engineer, and an
investigation and recommendations regarding development of entire river basins, possibly causing basic changes in the life patterns of large regions, perhaps would benefit by more use of persons trained to estimate the social effects of proposed changes.

Once having decided the types of experts to be included in the board membership, the persons to make up the board are selected. To obtain such persons the Commission contacts the chief of the government agency having responsibilities pertinent to the subject matter of the reference and employing the type of expert desired. The agency head normally will nominate appropriate persons to serve on the board, from whom the Commission creates the board. The Canadian and United States sections of the Commission separately appoint chairmen of the Canadian and United States sections of the board. The Commission as a whole promulgates a directive to the board guiding its activities much as the reference guides the Commission. At this point the board is ready to go to work. During the five year period studied three new boards were created. The time elapsed between the date of reference and the date of the Commission’s directive to the board was three, four and six and one-half months, respectively.

Members from both countries of the International Pembina River Engineering Board are all members of the International Souris-Red Rivers Engineering Board. IJC press release of April 3, 1962, in Official file, Docket 76, Pembina River Reference.

In the Champlain-Richelieu Waterway Reference, the IJC was asked to report whether it was feasible and economic to improve the existing waterway from Sorel, Quebec, to Albany, and, if so, to what dimensions; to estimate the costs in each country of doing so; to make an economic appraisal of the value to the two countries jointly and separately of such a project; to make a similar report on any other routes for a waterway connecting the St. Lawrence at or near Montreal with the Hudson at Albany by way of Lake Champlain; and in doing all the above to bear in mind the effects of the improvement or development on conservation, recreation, and other beneficial uses. Letter From Dean Rusk, Secretary of State, to United States Section, IJC, July 5, 1962, in Reference file, Docket 77.

Government personnel do not have to be used as board members, but such is the IJC’s practice. See text at 8-9 supra.

The correspondence relative to board appointments is found in the Board Membership file for each docket of a reference where a board is created. Docket 73 affords an example involving recruitment of state employees as well as federal.

The IJC directive to its International Champlain Waterway Board requires the Board to conduct technical studies necessary for the IJC to submit its report as requested in the reference (enclosing a copy thereof), allows the Board to establish committees and working groups as necessary, directs it to use such relevant information as has already been acquired, asks it to study the economic consequences of an improved waterway first, and directs it to submit semi-annual progress reports to the IJC at or before the IJC’s semi-annual meetings, plus such other reports as the IJC may direct or the Board choose to submit. Directive of IJC to International Champlain Waterway Board, October 2, 1962, in Official File, Docket 77.

The International Champlain Waterway Board, Docket 77; the International Pembina River Engineering Board, Docket 76; and the Advisory Board on Water Pollution, Rainy River and Lake of the Woods, Docket 73.

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Actually, in one circumstance a board in effect may start operating before receiving its directive. The two governments asked the Commission to maintain continuing supervision over boundary waters pollution through boards of control the IJC was to appoint.\(^{100}\) The boards were appointed and continue active today. As the Commission receives references requiring study of pollution problems in particular boundary waters, it may ask its standing boards to do preliminary work before the particular board is created and given its directive. In this way some work of the board that did not receive its directive until six and one-half months after the day of reference was done less than three months after the reference.\(^{101}\)

Appointing some members of the standing board to the particular board assures that the standing board's experience is available to the particular board. The practice also fosters colleagueship between Canadian and American board members, since it tends to lengthen the men's period of association with each other. Thus a board tends to attack problems as one entity, not as separate Canadian and American entities operating within one package.\(^{102}\)

If there is no need to appoint a new board, because a board to handle the investigation already exists, matters may move more swiftly. In one reference where pressure for speed was present, the Commission gave the investigation to its board just six days after the date of the reference.\(^{103}\)

A principal factor affecting the speed with which a board performs its work is the availability of money. The Commission itself has little money\(^{104}\) to finance its boards. Rather the boards are financed by the government agencies from which the board personnel come. For the boards this means dependence on governmental agencies to ask for supplemental appropriations, and on

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100. The request was an outgrowth of Dockets 53 and 55, Pollution of Boundary Waters, summarized in Bloomfield and Fitzgerald at 172.

101. Letter From L. F. Warrick, Chairman, United States Section, Advisory Boards to the IJC on Control of Pollution of Boundary Waters, to Eugene W. Weber, Commissioner, United States Section, IJC, July 24, 1959, in Current file, Docket 73. The letter indicates Mr. Weber had asked Mr. Warrick to confer with Ross Menzies, then Chief, Public Health Engineering Division, Canadian Dep't of National Health and Welfare, regarding possible procedures for obtaining data and information on pollution of the Rainy River. The letter reports the results of the conference with Mr. Menzies, which was attended also by other Canadians and Americans engaged in controlling water pollution.

102. Evidence of both features is found in the Warrick letter, supra note 101. The letter indicates that plans for the study were developed by American and Canadian pollution control personnel talking at a common conference table. The colleagueship among the group as a whole is demonstrated by the attendance and participation of Mr. Warrick and Minnesota state water pollution officials in conferences arranged by the Ontario Water Resources Commission with paper company and municipal officials, primarily to consider Ontario pollution problems.

103. In the Niagara Reference, Docket 74, the letter of reference was dated May 5, 1961. The letter in which the IJC asked its International Niagara Board of Control to perform the necessary investigations was dated May 11, 1961. Official file, Docket 74.

104. In one emergency the United States Section, IJC, did provide $4,000 from its appropriation to allow the United States Section of an IJC board to start work. See letter cited infra note 105, and letter from Harry J. Donohue, then Secretary, United States Section, IJC, to L. F. Warrick, Chairman, United States Section, Advisory Board on Water Pollution—Rainy River and Lake of the Woods, May 31, 1960, in General Correspondence file, Docket 73.
the appropriate legislative body to grant them. Occasionally boards have had to slow their work for lack of funds. Board sections from each country must cope with the problem. Sometimes if only one section is short of funds, the resulting delay in the investigation has been reduced by the other section picking up some basic portions of the work allocated to the underfinanced section.

**c. Performing the Investigation.** The boards work unobtrusively, holding no public hearings, and releasing no information to the press beyond the fact, if asked, that an investigation is being conducted. The idea is that the board is the technical fact gatherer and advisor of the Commission, and must perform its job free of public pressure. Board members may perform the field investigations themselves or recruit additional personnel, usually subordinate employees of the government agencies where the board members work. University students have been used in appropriate tasks.

The boards receive good cooperation from both industry and municipalities in making investigations. The boards try to respect competitive secrets of companies investigated, believing this policy materially aids in obtaining frank, detailed information. For the same reason the boards avoid using the powers of subpoena and cross examination. Instead, the boards' approach is that of consultation with persons in the spirit of enlisting their aid in the investigation. Field investigations of pollution have involved tours of municipal and industrial activities producing pollution and conferences with appropriate officials of the pollution producers, as well as measurement of the pollution present in the waters involved.

The Commission itself further encourages cooperation from the investigated entities by not generally disclosing the contents of the boards' reports. The facts discovered in the investigation are stated in the reports, together with any board recommendations for improving the situation. The reports also describe any progress private and public bodies have achieved in complying with prior board recommendations that may have been adopted by the Commission. The reason for keeping the reports confidential is clear in a pollution investigation. The policy spares polluters adverse publicity that would single them out by name, at the same time the Commission's power to publicize the reports probably stimulates polluters' efforts to clean up their operations.

Board studies may be extensive as well as intensive, as a report to help the Commission make recommendations for developing a river basin demonstrates. The study included engineering and geologic field surveys of the basin, and pertinent economic data. The latter included field surveys of flood damages and determinations of high-water elevations; classification of irrigable land;

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105. See Letter From Eugene W. Weber, Acting Chairman, United States Section, IJC, to Edward Foss Wilson, Ass't Secretary, Dep't of Health, Education and Welfare, May 31, 1960, in General Correspondence file, Docket 73.
106. Interview with William A. Bullard, Secretary, United States Section, IJC, August 12, 1963.
and determination of crop yields, land use, prices, and farm budgets. Municipal and industrial water needs were determined, as were water requirements for fish and wildlife and pollution abatement. The recreation potential was explored and existing water development projects tabulated. Hydrologic studies were performed to determine which land areas contributed water to the basin and which did not.

The Commission learns much from the board reports, and board recommendations for corrective action give the Commission important guidance. However, the Commission does not rely exclusively on its boards in making its report to the governments, which marks the close of the reference. Its practice is to make a familiarization tour itself of the region affected by the reference. Later the Commission holds public hearings in cities of the region at which the views of interested parties are received for consideration in the conduct of the investigation. Written submissions are preferred but oral statements are permitted.108

In one reference opened during the five year period studied, no public hearing was held. The reference asked a relatively simple question—whether certain standards for preserving the beauty of Niagara Falls could be met if a certain control structure was extended.109 The two power entities, Ontario Hydro and PASNY, urgently desired a speedy response to the reference so that, if favorable, they soon could start using all the water the treaty allowed for power. In this situation, the Commission gave the investigative work to an already established board and received its favorable report less than a month later. The Commission conferred with an official authorized to speak for the Niagara Frontier State Park Commission and the New York State Council of Parks who stated that he was fully informed of the proposed extension and that he thought the extension would not harm the beauty of the Falls. The park official agreed with the Commission that a hearing at the time was unnecessary, the Commission intending to hold hearings when another question of the reference was considered.110 However, the other question later was withdrawn from the reference111 and no hearing was held. The Commission submitted its report to the governments seven weeks after the date of reference, the shortest time among the references examined.

108. Interview with William A. Bullard, Secretary, United States Section, IJC, August 7, 1963.
109. See Letter From Dean Rusk, Secretary of State, to the IJC, May 5, 1961, in Reference file, Docket 74. The reference also asked the IJC to estimate the advantages to accrue from the recommended works, and to make recommendations concerning (1) the nature and design of the proposed additional works; (2) the allocation of the construction work between the two countries; and (3) the cost of the construction work and its allocation. Another question, whether flows over the Falls could be less than those required by treaty without impairing the Falls' beauty, was withdrawn by letter from U. Alexis Johnson, Deputy Under Secretary of State, to the IJC, April 2, 1962, in Reference file, Docket 74.
110. See Memorandum for the Record from Harry J. Donohue, then Secretary, United States Section, IJC, June 25, 1961, in Official file, Docket 74.
111. Supra note 109.
Perhaps the actions described above indicate the Commission interprets the language of treaty Article XII, apparently requiring public hearings in connection with all matters within Commission jurisdiction, not to apply to references that are to be expedited. In the reference under discussion, even if the contemplated later hearing had been held, it could not have afforded opportunity to be heard on the extension question, since the hearing would have occurred after the Commission had made its recommendations relative to the extension. When permission was sought to perform the very work the Commission had recommended only five weeks earlier, the Commission held a hearing on the application.\textsuperscript{112} Literally, the series of events demonstrates more rigid adherence to the hearing requirement in judicial matters than in investigative ones. But since the Commission knew at the time of the reference that an application was intended to be filed if the Commission’s report on the reference was favorable,\textsuperscript{113} one may wonder if the hearing on the application was viewed as a hearing on the extension phase of the reference as well. Additional instances of Commission practice in disposing of urgent references are needed in order to determine Commission policy on public hearings in such references.

II. THE INTERNATIONAL JOINT COMMISSION AS AN AGENCY OF LAND USE CONTROL

Commission recommendations adopted by the governments may have great effects on land use. The Pollution of Boundary Waters reference\textsuperscript{114} affords a ready example. In its report for that reference, the Commission recommended certain objectives of boundary water cleanliness be adopted by the governments, and that the Commission be authorized to achieve compliance with them by supervising pollution through Commission appointed boards of control.\textsuperscript{115} The governments adopted the recommendations. The reports of the supervisory boards reflect continual pressure on polluters to embark on a clean-up program the board geared to each polluter’s situation, a program in which successive subsidiary goals of achievement are marked on the road to compliance with the control objectives. Thus, one municipality was urged to formulate definite plans for financing and building treatment facilities. In one area, treatment by all communities of municipal wastes by sedimentation and disinfection of the effluent was established as a first step in pollution abatement, with more efficient, secondary treatment as the second. Suggestions were made to one industry to establish time schedules for pollution abatement, to another that wastes be used, and thus not permitted to enter boundary waters, or controlled through treatment. Although neither the Commission nor its boards themselves have

\begin{itemize}
\item \textsuperscript{112} Docket 75, Niagara Application; Memorandum for the Record from Harry J. Donohue, \textit{supra} note 110, July 11, 1961, in Official file, Docket 74.
\item \textsuperscript{113} A Joint Brief of the two power entities was enclosed with the letter of reference from the Secretary of State. See letter from Dean Rusk cited in \textit{supra} note 109. The Joint Brief is filed in Docket 74.
\item \textsuperscript{114} Dockets 53 and 55, summarized in Bloomfield and Fitzgerald at 172-73.
\item \textsuperscript{115} IJC, \textit{Report on the Pollution of Boundary Waters} 18-19, 21-22 (1951).
\end{itemize}
authority to force compliance with their suggestions through legal action, the frequent presence on the boards of federal, provincial and state officials able to use such authority may stimulate compliance. As compliance is achieved, land uses slowly change. Waters are no longer used as sewers; uplands may no longer be used as percolation fields; industrial processes producing pollution may be altered, in extreme cases even closed.

Recommendations relative to river basin development may affect land use over large areas. Implementation of the recommendations may entail enactment or amendment of zoning and other public controls of land use to preserve fertile soil for farming, suitable sites for industry, land and water suitable for recreation, and all the other activities envisioned by the particular development plan. Creation of a standing board of land use planning experts from both countries to prod communities to change their scheme of public controls as necessary to effectuate the basin development plan will tend to create a region crossing the international boundary, as well as subordinate political boundaries, in which land use controls of all the local governments are coordinated to allow the fullest possible development of each land use without undue interference with the others. In this way regional planning on an international level may be achieved.

The task of coordinating public controls of land use along the international border in areas not involved in a river basin development reference has not been given the Commission. The governments might now consider referring the matter to the Commission for investigation and recommendation of coordination standards, such standards as the governments might adopt to be administered by Commission appointed boards. For the many sparsely populated areas along the border the program would afford a good chance that land use controls would be imposed sufficiently early in the areas' development to achieve worthwhile effects. The program would increase the ability of urbanized areas to ease existing land use conflicts, and to prevent more serious ones from developing. For all the border region the program would constitute an important social mechanism from which a more closely-knit international community might evolve than now exists.