

1993

## Structural and Functional Models for the Proposed North American Commission on the Environment

Lloyd J. Spivak

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [Law Commons](#)

---

### Recommended Citation

Spivak, Lloyd J. "Structural and Functional Models for the Proposed North American Commission on the Environment." American University International Law Review 8 no. 4 (1993): 901-936.

This Comment or Note is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University International Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [fbrown@wcl.american.edu](mailto:fbrown@wcl.american.edu).

## COMMENT

# STRUCTURAL AND FUNCTIONAL MODELS FOR THE PROPOSED NORTH AMERICAN COMMISSION ON THE ENVIRONMENT

Lloyd J. Spivak\*

## INTRODUCTION

On August 12, 1992,<sup>1</sup> the United States, Canada, and Mexico completed negotiations for the North American Free Trade Agreement (NAFTA).<sup>2</sup> Former President Bush labeled the agreement historic<sup>3</sup> and stated that it would create jobs and generate economic growth in all three countries. He also stated that it contained "stringent provisions to benefit the environment."<sup>4</sup> The President's comment, along with statements made by other administration officials,<sup>5</sup> was clearly in response to

---

\* J.D. Candidate, May 1994. Washington College of Law, The American University. Approximately one month prior to publication (during the week of August 16, 1993), the governments of the United States, Canada, and Mexico announced completion of the parallel agreement that will establish the NACE. Consequently, a few elements in this Comment are already outdated. In particular, where this Comment addresses the United States Government's proposal for the NACE, the reader should mentally insert the word "original."

The intent of this Comment was to provoke debate, not to provide a detailed blueprint for the structure and functions of the proposed NACE. Some of the recommendations herein may be superfluous under the new accord, but most of the proposals should remain useful while Congress debates NAFTA. Even after the NACE is established and operating, the advice given here will remain cogent.

1. OFFICE OF THE U.S. TRADE REPRESENTATIVE, HIGHLIGHTS OF THE NORTH AMERICAN FREE TRADE AGREEMENT, DESCRIPTION OF THE PROPOSED NORTH AMERICAN FREE TRADE AGREEMENT, Aug. 12, 1992 [hereinafter HIGHLIGHTS].

2. North American Free Trade Agreement, Draft, Sept. 6, 1992 [hereinafter NAFTA], available in LEXIS, Genfed Library, Extra File.

3. OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE, Statement by the President, Aug. 12, 1992, reproduced in 9 Int'l Trade Rep. (BNA) 1450 (Aug. 12, 1992).

4. *Id.*

5. See USTR Hills Says There Will Be No 'Downward Harmonization' Under

previous criticism of the environmental provisions of the agreement. Congress had expressed its concerns in a resolution passed on August 6, 1992.<sup>6</sup> Environmental organizations criticized NAFTA long before the negotiations were completed.<sup>7</sup> In June 1992, a coalition of environmental groups issued a position paper proposing the formation of a North American Commission on the Environment.<sup>8</sup>

In response to the proposal and to the general environmental criticism of NAFTA, the three governments agreed in principle to the formation of a North American Commission on the Environment (NACE or the Commission).<sup>9</sup> The Administrator of the U.S. Environmental Protec-

---

NAFTA, 9 Int'l Trade Rep. (BNA) 1096 (June 24, 1992) [hereinafter *USTR Hills*] (summarizing a letter from U.S. Trade Representative Carla Hills to Sen. Max Baucus); *President Bush Announces NAFTA Accord, But Labor, Others Promise Renewed Attack*, 9 Int'l Trade Rep. (BNA) 1375 (Aug. 12, 1992) (describing Hills' statement at a press briefing); *Reilly Says NAFTA First Trade Pact With Sustainable Development As A Goal*, 9 Int'l Trade Rep. (BNA) 1387 (Aug. 12, 1992) (quoting EPA Administrator William K. Reilly's characterization of the NAFTA negotiations as resulting in "the greenest international trade treaty the world has ever seen").

6. See H.R. Con. Res. 246, 102d Cong., 2d Sess. 138 CONG. REC. H7698, H7699 (Aug. 6, 1992) (rejecting a U.S.-Mexico free trade agreement that is incompatible with U.S. health, safety, labor, and environmental laws). The resolution was non-binding; it only expressed the view of Congress, and was passed unanimously. *Id.* at 7707.

7. See NATURAL RESOURCES DEFENSE COUNCIL, ENVIRONMENTAL SAFEGUARDS FOR THE NORTH AMERICAN FREE TRADE AGREEMENT: PRIORITY RECOMMENDATIONS TO NEGOTIATORS AND CONGRESS, WITH MODEL LANGUAGE FOR KEY PROVISIONS, POSITION PAPER, June 1992 [hereinafter ENVIRONMENTAL SAFEGUARDS] (recommending that NAFTA be modified to address environmental concerns). See also *USTR Hills*, *supra* note 5 (citing 9 Int'l Trade Rep. 516 (Mar. 25, 1992) (reporting that an early draft of NAFTA had been leaked to the press in March 1992, and that the Sierra Club objected to language directed at protecting economic activity from environmental standards)).

8. See ENVIRONMENTAL SAFEGUARDS, *supra* note 7 (listing the organizations in the environmental coalition as Arizona Toxics Information, Border Ecology Project, Center for International Environmental Law, Community Nutrition Institute, Defenders of Wildlife, Environmental Defense Fund, Friends of the Earth, Humane Society of the United States, Institute for Agriculture and Trade Policy, National Audubon Society, Public Citizen, Sierra Club, and Texas Center for Policy Studies). Mexican and Canadian environmental groups are also taking an active role in the ongoing NAFTA dialogue between environmental groups and the three governments. See Concerns of North American Environmental Organizations Regarding the Trade Agreement, Open Letter to U.S. Environmental Protection Agency Administrator William K. Reilly, July 20, 1992 (reiterating the common concerns of environmental groups; signed by representatives of 51 groups from all three countries).

9. PRESS OFFICE, U.S. ENVIRONMENTAL PROTECTION AGENCY, Press Release,

tion Agency (EPA), the Canadian Minister of the Environment, and the Mexican Secretary of Social Development met on September 17, 1992,<sup>10</sup> and proclaimed that NAFTA is the "most environmentally-sensitive trade agreement ever negotiated."<sup>11</sup> The participating officials stipulated that environmental cooperation among NAFTA parties required full respect for their national sovereignty.<sup>12</sup> They also agreed that any eventual mechanism for environmental cooperation would provide appropriate opportunities for public participation.<sup>13</sup> In addition, the participants signed a Memorandum of Understanding on Environmental Education.<sup>14</sup> They did not, however, agree on the structure or functions of the proposed Commission. Instead, they decided to have their officials meet again in early 1993<sup>15</sup> to negotiate the formation of NACE.<sup>16</sup>

The purpose of this Comment is to suggest an ideal outcome for the negotiations. This Comment compares the existing NACE proposals with two functioning models of international environmental cooperation: (1) The International Joint Commission of the United States and Canada (IJC);<sup>17</sup> and (2) the Article 169 complaint procedure utilized by the

---

Sept. 18, 1992, at 1 [hereinafter Press Release].

10. *Id.*

11. *Id.* at 2.

12. *See id.* at 1 (recognizing that environmental cooperation among the NAFTA parties is subject to national sovereignty).

13. *Id.* at 2.

14. PRESS OFFICE, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, MEMORANDUM OF UNDERSTANDING ON ENVIRONMENTAL EDUCATION AMONG THE DEPARTMENT OF THE ENVIRONMENT OF CANADA, THE SECRETARIAT OF SOCIAL DEVELOPMENT REPUBLIC OF MEXICO, AND THE ENVIRONMENTAL PROTECTION AGENCY OF THE UNITED STATES OF AMERICA, Sept. 17, 1992. The Memorandum does not mention a role for the proposed Commission. *Id.* Instead, it pledges the parties to cooperate in promoting and developing programs on environmental education and training. *Id.* art. II. For this purpose, they agreed to establish a trilateral committee, seemingly unrelated to the larger North American Commission on Environmental Cooperation. *Id.* art. IV. The Memorandum was explicitly intended to highlight "the commitment to increased cooperation" among the parties. Press Release, *supra* note 9, at 3.

15. Press Release, *supra* note 9, at 4.

16. *See generally* OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, DRAFT OUTLINE FOR TRILATERAL ENVIRONMENTAL COMMISSION, Sept. 16, 1992 (outlining the initial proposal by the United States for a North American Commission on the Environment) [hereinafter DRAFT OUTLINE]. The actual name of the proposed Commission remains undecided. The draft outline uses North American Commission on the Environment. *Id.* To eliminate confusion, the remainder of this Comment will use this name or the resulting acronym.

17. *See infra* notes 68-95 and accompanying text (describing the history, structure

Commission of the European Communities.<sup>18</sup> These two existing models include structural and functional elements that suggest constructive modifications to the current NACE proposals. This Comment recommends a NACE that incorporates positive aspects of both the IJC and European Community (EC) procedure.

Part I of this Comment provides a background summary of the environmental provisions of the NAFTA draft. Part II outlines the original and subsequent Commission proposals. Part III describes the IJC and the Commission of the European Community's Article 169 complaint procedure, two functioning models of international environmental cooperation and dispute resolution. Part IV analyzes how the IJC and the EC complaint procedure have functioned in practice. Part IV also compares the existing NACE proposals with the organizational and structural components of both models. Part V recommends what may be considered ideal components of an effective NACE, and also considers alternative structures and functions for the NACE.

## I. BACKGROUND ON ENVIRONMENTAL PROVISIONS OF NAFTA

While NAFTA may be the "most environmentally-sensitive trade agreement ever negotiated,"<sup>19</sup> the draft agreement contains relatively few specific references to the environment.<sup>20</sup> The NAFTA Preamble commits the agreement's signatories to promoting sustainable development and strengthening the enforcement of environmental laws and regulations.<sup>21</sup> Article 104 provides that the trade obligations stemming from five international environmental agreements will supersede NAFTA provisions in the event that the other treaty's provisions are inconsistent with NAFTA.<sup>22</sup> In addition, Chapter Seven of NAFTA addresses sani-

---

and functions of the International Joint Commission (IJC)).

18. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], art. 169.

19. Press Release, *supra* note 9, at 2.

20. See NAFTA, *supra* note 2 (incorporating fewer than a dozen sections referring specifically to the environment or environmental regulations). The environment, or environmental laws and standards, are specifically referred to in the Preamble, Article 104 and Annex 104, Article 904, Article 906, Article 909, Article 915, and Article 1114. *Id.* While the entire agreement is approximately one thousand pages, environmental provisions represent only a tiny portion of the text.

21. *Id.* Preamble.

22. See *id.* art. 104 (specifying three treaties: Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973; the Montreal Protocol

tary and phytosanitary measures.<sup>23</sup>

Chapter Nine of NAFTA concerns environmental standards more explicitly, but primarily as a technical barrier to trade.<sup>24</sup> Article 904 stipulates that the parties may adopt, maintain, and apply standards-related measures, including those intended to protect the environment.<sup>25</sup> The parties have the right to establish their own appropriate levels of protection, provided that they pursue "legitimate" objectives.<sup>26</sup> The parties

---

on Substances that Deplete the Ozone Layer, Sept. 16, 1987, as amended June 29, 1990; and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989 (applying upon entry into force for Canada, Mexico, and the United States)). *See also id.* Annex 104.1 (adding two bilateral agreements to the list: the Agreement Between the Government of Canada and the Government of the United States Concerning the Transboundary Movement of Hazardous Waste, Oct. 28, 1986; and the Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area (La Paz Agreement), Aug. 14, 1983). In addition, the parties are permitted to amend Annex 104.1 to include any other environmental or conservation agreement. *Id.* art. 104.

23. *See* NAFTA, *supra* note 2, at Ch. 7, Subch. B, art. 766 *et seq.* (defining sanitary and phytosanitary measures as measures protecting human, animal, and plant life from diseases, disease-causing organisms, pests, and contaminants and toxins in food, beverages, and feedstuffs). Although sanitary and phytosanitary measures may be regarded as a subset of environmental regulations, the NAFTA definitions imply that they are limited to those primarily natural hazards that are direct threats to human, animal, or plant life. *Id.* Under the NAFTA definitions, regulations that protect the general environment from damages caused by human activities could not be considered sanitary or phytosanitary measures. *Id.* Examples of valid sanitary or phytosanitary measures might include prohibitions on the importation of produce infested with fruit flies or coated with dangerous pesticide residues. *Id.* Generally, Chapter Seven of NAFTA acknowledges the parties' rights to adopt such measures, and to establish appropriate levels of protection. *Id.* arts. 754(1) and 754(2). These rights are, however, subject to the qualifications that sanitary and phytosanitary measures should be based on relevant international standards, and should not create disguised restrictions on trade. *Id.* arts. 755 and 754(6).

24. *Id.* Ch. 9. Chapter Nine of NAFTA is entitled "Standards-Related Measures." *See id.* Part Three "Technical Barriers to Trade" (including only Chapter Nine). *See id.* art. 904 (enumerating safety, health, environmental, and consumer standards as being permissible types of standards-related measures). Since the agreement treats these standards as potential trade barriers, it is arguable that Chapter Nine was designed to preclude such standards from impinging on trade.

25. *See id.* art. 904(1) (allowing the parties to adopt, maintain, and apply standards-related measures).

26. *See id.* art. 904(2) (permitting parties to establish a level of environmental protection consistent with legitimate objectives). *See also id.* art. 915(1) (defining legitimate objectives to include safety, the protection of human, animal, or plant life

may prohibit the importation of goods that do not comply with applicable standards-related measures.<sup>27</sup> The parties, however, must grant the other parties non-discriminatory treatment, and may not create unnecessary obstacles to trade.<sup>28</sup> Article 906(1) commits the parties to joint enhancement of the level of environmental protection.<sup>29</sup> Article 906(2) states that the parties will endeavor to make their standards-related measures compatible.<sup>30</sup>

Chapter Nine also requires notice, notification of the other parties, and publication when a party wishes to adopt or modify a technical regulation.<sup>31</sup> Article 913 establishes a committee on standards-related measures which will monitor and report annually on the implementation and administration of the Chapter Nine provisions, assist in the harmonization of standards-related measures, provide a forum for consultations between the parties, and otherwise improve cooperation with regard to

---

or health, protection of the environment, protection of consumers, and sustainable development). The protection of domestic production is not a legitimate objective. *Id.*

27. NAFTA, *supra* note 2, art. 904, para. 1.

28. See NAFTA, *supra* note 2, art. 904, paras. 3-4 (prohibiting respectively discriminatory treatment and unnecessary obstacles to trade). See also *id.* art. 905, para. 1 (requiring the parties to use applicable international standards as the basis for their own standards-related measures, unless such international standards are inadequate to fulfill their legitimate objectives). But see *id.* art. 904, para. 3 (enabling the parties to adopt higher standards to achieve their legitimate objectives).

29. See NAFTA, *supra* note 2, art. 906, paras. 1-2 (obligating the parties to make their standards-related measures compatible for the purpose of promoting trade, subject to the qualification that this must be done without reducing standards). Taken together, the provisions of this article could imply a commitment to upward harmonization of environmental standards. See *id.* (advocating the enhancement of standardized protections). A modest incentive towards upward harmonization is built into Article 906(4), which states that "[e]ach importing Party shall treat a technical regulation adopted or maintained by an exporting Party as equivalent to its own where the exporting Party . . . demonstrates to the satisfaction of the importing Party that its technical regulation adequately fulfills the importing Party's legitimate objectives." *Id.* art. 906, para. 4. Along with the Article 904(1) provision allowing the parties to prohibit the importation of goods that do not meet their standards, this provision could enable the party with the highest environmental standards to encourage the other parties to set more stringent standards. See *id.* art. 906, para. 2 (stating that standardization shall be achieved without reducing the environmental protections of any party).

30. NAFTA, *supra* note 2, art. 906, para. 2.

31. See NAFTA, *supra* note 2, art. 909, para. 1(a) (requiring a party that intends to adopt or modify a technical regulation to publish notice, and to notify the other parties in writing). See also *id.* art. 909, para. 1(c) (requiring the party to provide a copy of the proposed measures to any party or interested person requesting one).

standards-related measures.<sup>32</sup> Article 914 is a modest dispute resolution provision, enabling the parties to request that the committee facilitate consultations on the matter at issue.<sup>33</sup> The party claiming that another party's standards-related measure is inconsistent with Chapter Nine must establish the inconsistency.<sup>34</sup>

Chapter Eleven addresses the environmental consequences of investment, and contains the last major environmental provisions of NAFTA.<sup>35</sup> Article 1114(1) allows parties to adopt, maintain, and enforce measures that require investments to be undertaken in an environmentally sensitive manner.<sup>36</sup> Article 1114(2) asserts that parties should not waive or derogate from their environmental laws for the purpose of promoting investment.<sup>37</sup> This provision does not appear to create a binding obligation on the parties.<sup>38</sup>

---

32. NAFTA, *supra* note 2, art. 913.

33. See NAFTA, *supra* note 2, art. 914 (explaining how a party may initiate technical consultations).

34. NAFTA, *supra* note 2, art. 914. This provision protects the higher standards of any party by requiring that the complaining party initially carry the burden of proof by showing that a disputed standard is in fact a disguised barrier to trade. *Id.* The technical consultations outlined in this provision have no binding result. *Id.* art. 914, para. 1. However, if the parties so agree, Article 914 consultations may constitute consultations within the broader dispute resolution framework provided for in Chapter Twenty. *Id.* art. 914, para. 2; see also *id.* art. 2006 (creating and delineating the formal consultations procedure). Disputes that are not resolved by consultations could be referred to the NAFTA Free Trade Commission, established under Article 2001. See *id.* art. 2007 (stipulating how consultations may be referred to the trade commission). If the trade commission fails to resolve the issue, one or more of the parties may request the establishment of an arbitral panel. *Id.* art. 2008.

35. See NAFTA, *supra* note 2, art. 1114, para. 2 (disapproving of the practice of promoting investment by lowering environmental standards).

36. NAFTA, *supra* note 2, art. 1114, para. 1.

37. NAFTA, *supra* note 2, art. 1114, para. 2.

38. See NAFTA, *supra* note 2, art. 1114, para. 2 (disapproving of the loosening of environmental standards to promote economic development). This provision states that the "Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety, or environmental measures." *Id.* It also says they *should* not waive or derogate from such measures. *Id.* If the parties had intended this provision to create a binding obligation, it would read "may not" instead of "should not." Cf. *id.* art. 1110, para. 1 (forbidding the expropriation of investments). When a party considers that another party's acts are inconsistent with this provision, the complaining party may request consultations with the other party. See *id.* art. 1114, para. 2 (establishing a consultation procedure). Article 1114(2) consultations cannot be appealed, unlike the consultations envisaged in other parts of NAFTA. *Id.* art. 1114, para. 2; see also *id.* arts. 2007-08 (describing the mediation and arbitration procedures to be



The foregoing summary of NAFTA's environmental provisions demonstrates that the NAFTA draft addresses the environment as a secondary issue. NAFTA does contain some provisions to benefit the environment, but it does not create a means of implementing those provisions. The proposal to create a North American Commission on the Environment is an attempt to remedy this deficiency. Specifically, the proposed NACE addresses the following five concerns: (1) increased environmental degradation as a result of increased trade and economic growth; (2) the potential creation of pollution havens; (3) inadequate funding for increased environmental enforcement; (4) little or no public participation in the resolution of environmental disputes; and (5) the prevention of downward harmonization of environmental standards.<sup>39</sup> NACE should address these concerns to ensure that an organization exists to implement the environmental goals suggested in NAFTA. The balance of this Comment will discuss how the parties could create an effective NACE based on the current proposals, and on the experiences of two existing forums for the resolution of international environmental disputes.

## II. EXISTING COMMISSION PROPOSALS

### A. THE ENVIRONMENTAL COALITION PROPOSAL

The environmental group coalition<sup>40</sup> has generally advocated a NACE with adequate funding, broad monitoring and reporting duties, the power to receive and investigate complaints, and extensive non-governmental organization (NGO) and public participation.<sup>41</sup> Such an organization

---

used if consultation fails to resolve the dispute).

39. ENVIRONMENTAL SAFEGUARDS, *supra* note 7, at 1. See also Justin Ward & Glenn T. Prickett, *Prospects for a Green Trade Agreement*, ENVIRONMENT, May 1992, at 44; H.R. Con. Res. 246, *supra* note 6, at H7701 (statement of Rep. Collins) (arguing that trade agreements may create strong incentives for U.S. firms to relocate to countries where environmental regulations are weaker than in the United States); USTR Hills, *supra* note 5 (reporting an exchange of letters between Sen. Max Baucus and U.S. Trade Representative Carla Hills, in which Sen. Baucus wrote that harmonization of environmental standards should be towards the higher standard; Hills replied that there will be no downward harmonization under NAFTA). But see HIGHLIGHTS, *supra* note 1, Environment (fact sheet) at 2 (maintaining that pollution havens are a myth because environmental compliance costs are relatively small for most industries; that Mexico's environmental laws are similar to U.S. laws; and that Mexico has greatly increased its enforcement efforts).

40. See *supra* note 8 and accompanying text (listing the organizations in the coalition).

41. See generally ENVIRONMENTAL SAFEGUARDS, *supra* note 7, at 1 (discussing

would require sufficient funding to employ a professional staff and carry out the duties assigned to it.<sup>42</sup> Possible sources of funding include public funds or special taxes on the expanded trade and investment resulting from NAFTA.<sup>43</sup> The June 1992 coalition proposal suggested that four members from each NAFTA party be appointed to the Commission.<sup>44</sup>

The proposed Commission would monitor the adoption and enforcement of environmental laws and regulations, as well as industrial compliance.<sup>45</sup> Towards this end, the Commission would issue annual reports detailing its findings.<sup>46</sup> The annual reports would include a broad range of information on all aspects of the parties' environmental programs.<sup>47</sup>

---

potential environmental consequences of NAFTA and proposing the NACE as a partial solution to these problems); *see also* Memorandum on the North American Environmental Commission, from Justin Ward and Lynn Fischer, National Resources Defense Council, to Tim Atleson *et al.*, Environmental Protection Agency (Oct. 20, 1992) [hereinafter Memorandum] [on file with the American University Journal of International Law and Policy] (enumerating the specific concerns of the environmental coalition and proposing a North American Environmental Commission).

42. *See* ENVIRONMENTAL SAFEGUARDS, *supra* note 7, at 2 (providing model language for a treaty establishing a NACE); *see also id.* at 10 (suggesting that, in addition to establishing the NACE, the U.S. and Canada increase their bilateral aid to Mexico for the purpose of funding environmental activities there, and suggesting that the parties tax some of the revenues resulting from increased trade and investment, and earmark funds specifically for environmental purposes). *See also* Ward and Prickett, *supra* note 39, at 44-45 (recommending that a tax on trade be dedicated to environmental protection).

43. ENVIRONMENTAL SAFEGUARDS, *supra* note 7, at 10; Ward and Prickett, *supra* note 39, at 44-45.

44. *See* ENVIRONMENTAL SAFEGUARDS, *supra* note 7, at 2 (stipulating that Commission members should have demonstrated expertise in environmental science and policy and no vested economic interest in trade or investment arising under NAFTA).

45. *See* ENVIRONMENTAL SAFEGUARDS, *supra* note 7, at 2 (outlining the monitoring functions of the proposed NACE).

46. *See* ENVIRONMENTAL SAFEGUARDS, *supra* note 7, at 2-3 (requiring the proposed NACE to publish a regular report on the adoption and enforcement of environmental laws and regulations).

47. *See* ENVIRONMENTAL SAFEGUARDS, *supra* note 7, at 2-3. Among the possible report contents enumerated in the June proposal are: effects of standards harmonization under NAFTA; the parties' participation in, and adherence to, international environmental agreements; status of legislative actions and administrative regulations; changes in the structure and functions of regulatory agencies; detailed discussion of administrative and judicial enforcement, including citizen actions; recommendations regarding areas where the parties need to strengthen their regulatory requirements in order to prevent environmental degradation; programs and means to reduce the use of hazardous and toxic materials; verification that the parties have adequate infrastructure for the handling of hazardous and toxic materials; and poaching and illegal trade in

The parties would provide the Commission with the documents and information required to complete the reports.<sup>48</sup> The Commission, in turn, would disseminate its report to the public.<sup>49</sup>

The Commission would receive complaints from governments, non-governmental organizations, and citizens, alleging the failure of the parties to enforce their environmental laws, or abide by international environmental agreements.<sup>50</sup> The Commission would then investigate the bases for complaints, and conduct independent monitoring and inspections.<sup>51</sup> If an investigation revealed violations, the Commission would file a formal notice with the violating party.<sup>52</sup> A party receiving notice would have sixty days to inform the Commission of corrective steps taken.<sup>53</sup> If the violating party failed to respond, the Commission would fully describe the party's failure in its annual report.<sup>54</sup> The coalition proposal does not envision further action by the Commission.<sup>55</sup> It could

---

wild fauna and flora. *Id.* at 2-4.

48. See ENVIRONMENTAL SAFEGUARDS, *supra* note 7, at 3 (specifying the information the parties should be required to provide for the NACE).

49. See ENVIRONMENTAL SAFEGUARDS, *supra* note 7, at 4 (proposing a process by which the public would be informed of NACE findings). The annual reports would be disseminated with the aid of local citizens committees. *Id.* at 2; see also *id.* (requiring the parties to foster such committees and stating that the role of the committees is: 1) to make and to implement recommendations on local environmental issues; 2) to assist the Commission in the collection of data; and 3) to act as liaison between the Commission and local communities affected by NAFTA). To the extent that this committee proposal is practicable, it would be an effective way of giving the Commission a direct connection with the general public. See Memorandum, *supra* note 41 (suggesting that citizen's groups would provide the Commission with investigative evidence in addition to disseminating Commission findings). However, the June 1992 proposal contains no suggestion as to how the committees would be constituted, how or whether they would be funded, or how they would interact with governmental entities. ENVIRONMENTAL SAFEGUARDS, *supra* note 7, at 2. Also, the suggestion that the national governments foster the development of the committees implies some element of governmental control over their composition and activities. *Id.*

50. See ENVIRONMENTAL SAFEGUARDS, *supra* note 7, at 4 (specifying that a complainant's identity may remain confidential at their request). See also *id.* (requiring the parties to agree not to take any retaliatory actions against complainants).

51. ENVIRONMENTAL SAFEGUARDS, *supra* note 7, at 2-4. The parties would also be required to provide documents and information for the purpose of furthering the investigation. *Id.* at 4.

52. See ENVIRONMENTAL SAFEGUARDS, *supra* note 7, at 4 (obliging the parties to provide notice that would specify the nature of the violation, as well as the remedial steps the violating party would be required to take).

53. ENVIRONMENTAL SAFEGUARDS, *supra* note 7, at 4.

54. ENVIRONMENTAL SAFEGUARDS, *supra* note 7, at 4.

55. ENVIRONMENTAL SAFEGUARDS, *supra* note 7, at 4. But see *id.* at 1 (suggest-

hear complaints, but its only effective sanction would be its ability to publicize a failure to act.

#### B. THE UNITED STATES GOVERNMENT PROPOSAL

The coalition proposal embodies a NACE with a limited ability to address complaints from the public. The NACE proposed by the United States government would not have this function.<sup>55</sup> Instead, the NACE proposed by the United States government would be almost exclusively an advisory body.<sup>57</sup> The outline of the proposal does not identify a funding source.<sup>58</sup> The Commission would be composed of the United States EPA Administrator and the analogous Mexican and Canadian ministers.<sup>59</sup> The draft outline does not specify that the Commission will have any professional staff, other than the staffs of the three national environmental agencies.<sup>60</sup>

The Commission would have some monitoring functions, and a general duty to facilitate implementation of the environmental provisions of NAFTA.<sup>61</sup> It would answer inquiries concerning NAFTA environmental

---

ing that the Commission is empowered to arbitrate disputes where a NAFTA party establishes that it is losing industry because of another party's weak environmental laws or enforcement). *See also id.* (proposing that if no steps are taken to correct the enforcement problem, the complainant could impose compensating duties on the relevant products of the other party). The proceeds from these duties would then be used to correct the problem at issue. *Id.*; *cf. id.* at 2-4 (failing to mention such an arbitration function in the draft agreement which follows the introductory text of the coalition proposal).

56. *See DRAFT OUTLINE, supra* note 16 (providing no mechanism by which the NACE would address or resolve environmental complaints or disputes).

57. *See DRAFT OUTLINE, supra* note 16, art. I (limiting the purposes of the Commission as envisaged by the United States). The United States envisages NACE as providing: "[a] forum for the discussion of environmental issues; . . . [a] means of encouraging and supporting cooperation on environmental matters and solutions to environmental problems; and . . . [a] mechanism for coordinating environmental expertise and information." *Id.*

58. *See DRAFT OUTLINE, supra* note 16 (omitting any information as to how the NACE would be funded).

59. Letter from Carla A. Hills, United States Trade Representative, to Jay Hair, President, National Wildlife Federation (Sept. 29, 1992) (on file with the National Wildlife Federation).

60. *See DRAFT OUTLINE, supra* note 16 (excluding discussion of NACE staffing needs).

61. *See DRAFT OUTLINE, supra* note 16, art. II (limiting monitoring activities to reviewing the extent to which the NAFTA parties have implemented the environmental provisions of the agreement). *See also supra* notes 19-39 and accompanying text

disputes, and would lend its expertise to NAFTA dispute resolution panels.<sup>62</sup> As in the coalition proposal, the Commission would issue an annual report as a means of disseminating information about environmental protection activities.<sup>63</sup> The Commission would also serve as a forum for identifying and discussing means of enhancing environmental cooperation among the parties.<sup>64</sup> Lastly, the United States government proposal would provide some limited means of public participation in the activities of the Commission.<sup>65</sup>

---

(summarizing the environmental provisions of NAFTA). *But see* Memorandum, *supra* note 41 (criticizing this proposal as placing too narrow a limit on the scope of the Commission's work). Increased trade and economic integration could affect many environmental issues that are not within the purview of the environmental provisions in NAFTA. ENVIRONMENTAL SAFEGUARDS, *supra* note 7, at i-ii.

62. DRAFT OUTLINE, *supra* note 16, art. II(B). *See* NAFTA, *supra* note 2, art. 2008 (providing for the formation of NAFTA dispute panels when parties are unable to resolve a dispute through consultation or the good offices of the NAFTA Trade Commission); *see also supra* note 34 and accompanying text (explaining how an environmental dispute among the NAFTA parties might result in formal consultations and the eventual use of an arbitral panel).

63. *See* DRAFT OUTLINE, *supra* note 16, art. II(B) (listing possible appropriate contents of the annual report as: information on the parties' progress in strengthening and enforcing their environmental laws; review of enforcement actions taken; environmental recommendations; a summary of the implementation of international environmental agreements by the parties; and other relevant information). With regard to the annual report contents, there is a striking difference in tone between proposals of the United States and that of the environmental coalition. Unsurprisingly, the government proposal implies an annual report that would focus on the parties' environmental achievements. *Id.* The coalition proposal emphasizes the Commission's role as an environmental guardian. ENVIRONMENTAL SAFEGUARDS, *supra* note 7, at 2-4. Thus, in the coalition proposal, the Commission reports on the adoption and enforcement of environmental laws, rather than reviewing progress. *Id.* at 3. More importantly, the coalition proposal requires reports on industrial compliance, regulatory delay, changes in administrative structure, and progress towards achieving adequate funding of environmental programs. *Id.* at 3-4. Under the coalition proposal, the report would also be issued in draft form and be subject to public notice and comment. *Id.* *See also supra* notes 46-49 and accompanying text (describing the contents of the Commission's annual report under the environmental coalition proposal).

64. *See* DRAFT OUTLINE, *supra* note 16, art. II(C) (suggesting that the Commission identify trans-boundary environmental problems, formulate cooperative responses, and coordinate environmental expertise and information).

65. *See* DRAFT OUTLINE, *supra* note 16, art. II(D) (allowing some sessions of the Commission's annual meetings to be open to the public and entitling the public to make written submissions to the Commission). The parties could also establish "public advisory committees" to advise their Commission representatives. *Id.* Such committees would include representatives from citizen groups, environmental organizations, state

If the NACE that ultimately emerges resembles the current United States government proposal, it will perhaps facilitate closer environmental cooperation among the NAFTA parties. The Commission would be composed of officials who already have the task of carrying out the environmental policies of their governments.<sup>66</sup> It would be advised by a public committee composed of individuals whose voices, for the most part, are already influential in the debate on environmental issues.<sup>67</sup> The Commission would issue an annual report that would highlight actions taken, although the report would limit or omit discussion of problems remaining to be solved.<sup>68</sup> In contrast, the environmental coalition proposal clearly embodies a stronger and more activist Commission. In order to understand what the elements of a successful NACE might be, and possibly to improve upon the existing NACE proposals, it is useful to examine functioning models of international environmental cooperation.

### III. POSSIBLE MODELS FOR THE COMMISSION

#### A. THE INTERNATIONAL JOINT COMMISSION

Many commentators regard the International Joint Commission as a highly successful forum for managing international environmental issues.<sup>69</sup> The I.J.C. was established pursuant to the Boundary Waters

---

and local governments, industry, labor, and academia; but, they would not be as broadly based as the local citizens committees outlined in the environmental coalition proposal, nor would they have the same monitoring functions. *Id.*; *cf. supra* note 48 and accompanying text (detailing the role of local citizens committees in the coalition proposal).

66. *See supra* note 57 and accompanying text (describing the U.S. government proposal for the composition of the NACE).

67. *See supra* note 65 and accompanying text (specifying the makeup of the proposed public advisory committees).

68. *See supra* note 63 and accompanying text (summarizing the contents and weaknesses of the annual report envisioned in the U.S. government proposal).

69. *See, e.g.,* ALLEN L. SPRINGER, *THE INTERNATIONAL LAW OF POLLUTION* 162 (1983) (noting that the role of the I.J.C. has expanded and suggesting that it has been given more responsibilities because the governments of Canada and the United States are satisfied with the way it has performed its duties); Timothy M. Gulden, Comment, *Transfrontier Pollution and the International Joint Commission: A Superior Means of Dispute Resolution*, 17 SW. U. L. REV. 43, 58 (1987) (arguing that the I.J.C. can be credited with successfully resolving environmental disputes between the United States and Canada); Keith A. Henry, *Transboundary Pollution and the International Joint Commission*, in *COMMON BOUNDARY/COMMON PROBLEMS: THE ENVIRONMENTAL CON-*

Treaty of 1909.<sup>70</sup> Its primary purpose is to prevent and resolve environmental disputes between the United States and Canada.<sup>71</sup> The I.J.C. is composed of three commissioners from each country. One commissioner from each country is a co-chair.<sup>72</sup> A professional staff and a number of advisory boards assist the I.J.C. in its work.<sup>73</sup> As of 1988, the I.J.C. had addressed 110 issues and disputes, the vast majority related to water diversions and water pollution.<sup>74</sup>

The I.J.C. carries out duties resulting from two different procedures: applications and references.<sup>75</sup> Under articles III, IV, and VIII of the Boundary Waters Treaty, the I.J.C. has mandatory jurisdiction over applications.<sup>76</sup> An entity planning to construct a dam that would raise

SEQUENCES OF ENERGY PRODUCTION 47 (1982) (explaining why the I.J.C. has been successful in resolving environmental disputes between the United States and Canada).

70. Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, art. VII, 36 Stat. 2448, 2451 [hereinafter Boundary Waters Treaty].

71. See generally INTERNATIONAL JOINT COMMISSION, THE INTERNATIONAL JOINT COMMISSION: WHAT IT IS, HOW IT WORKS (summarizing the purposes of the I.J.C.).

72. See INTERNATIONAL JOINT COMMISSION, INTERNATIONAL JOINT COMMISSION ACTIVITIES 1987-1988 4 (1988) [hereinafter I.J.C. ACTIVITIES] (describing the appointment and functions of I.J.C. Commissioners). The Commissioners are appointed by their respective governments, but they are not supposed to represent the governments. Instead, their task is to seek a common, non-partisan solution in the interest of both the United States and Canada. *Id.*; see also Boundary Waters Treaty, *supra* note 70, art. XI (requiring the Commissioners to make a solemn declaration that they will faithfully and impartially carry out their duties); Jennifer Woodward, Note, *International Pollution Control: The United States and Canada - The International Joint Commission*, 9 N.Y.L. SCH. J. INT'L & COMP. L. 325, 344 n.167 (1988) (citing INTERNATIONAL JOINT COMMISSION, SIXTH ANNUAL REPORT ON WATER QUALITY 11 (1978)) (noting that the I.J.C. has been generally very impartial in its decisions). By 1978, the I.J.C. had dealt with more than 100 cases and divided its opinions along national lines only three times. *Id.*

73. See I.J.C. ACTIVITIES, *supra* note 72, at 5, 8 (stating that the I.J.C. has headquarters in Ottawa and Washington, D.C., and a regional office in Windsor, Ontario); see also *id.* at 19-31, 43 (listing and summarizing the activities of more than 20 existing advisory boards, of which the most important are the Great Lakes Water Quality Board and the Great Lakes Scientific Advisory Board).

74. See I.J.C. ACTIVITIES, *supra* note 72, at 32-42 (listing I.J.C. dockets since the inception of the Commission in 1912). The I.J.C. has also considered trans-boundary air pollution issues in Docket Nos. 61R (air pollution in the Windsor-Detroit area from vessels in 1949), 85R (study of air pollution in the Detroit-St. Clair River area in 1966), and 99R (air quality - Michigan and Ontario in 1975). *Id.* at 37-41.

75. See I.J.C. ACTIVITIES, *supra* note 72, at 4 (explaining the application and reference procedures).

76. See Boundary Waters Treaty, *supra* note 70, arts. III, IV, and VII (defining

the level of waters on the other side of the international boundary must apply for and receive permission from the I.J.C.<sup>77</sup> The same restriction applies to an entity planning a water diversion that would raise or reduce a flow on the other side of the boundary.<sup>78</sup> The I.J.C., however, has rarely disapproved an application.<sup>79</sup>

Article IX of the Boundary Waters Treaty is the basis for the I.J.C. reference procedure.<sup>80</sup> Using this procedure, one or both parties may refer a matter to the I.J.C. for resolution.<sup>81</sup> The I.J.C. then investigates

---

the powers of the I.J.C.). Article III requires I.J.C. approval for any new uses, obstructions, or diversions of boundary waters that would affect the natural level or flow on either side of the boundary. *Id.* at art. III. However, the governments may supersede I.J.C. authority by special agreement, and certain types of governmental projects are exempt (ie. dredging, improvements of harbors). *Id.* Article IV requires I.J.C. approval for the construction and maintenance of dams and remedial or protective works on one side of the boundary that would raise the level of waters on the other side. *Id.* at art. IV. Again, the governments may circumvent the I.J.C. by special agreement. *Id.* Article IV further provides 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." *Id.* Article VIII specifies that: "[t]his International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction of waters with respect to which under Articles III and IV of this Treaty the approval of this Commission is required . . . " *Id.* art. VIII. Article VIII then delineates the principles governing the I.J.C.'s decisions. *Id.* Article VIII describes a hierarchy of uses for boundary waters with domestic and sanitary uses having priority over navigation, and navigation having priority over power and irrigation uses. The principle states that both parties have equal rights in the use of the boundary waters. *Id.*

77. Boundary Waters Treaty, *supra* note 70, art. III.

78. Boundary Waters Treaty, *supra* note 70, art. IV.

79. See I.J.C. ACTIVITIES, *supra* note 72, at 32-42 (noting the dispositions of all I.J.C. dockets). In fact, out of 60 applications received between 1912 and 1986, only one was not approved (Docket No. 31A, Madawaska Company - Grand Falls Dam on Saint John River), and this may have been disapproved only because a competing application for the same project had already been approved (Docket No. 22A, Saint John River and Power Company - Grand Falls Dam on Saint John River). *Id.* In eight other cases, consideration was postponed, no action was taken, or the application was withdrawn. *Id.*

80. See Boundary Waters Treaty, *supra* note 70, art. IX (agreeing that the parties may refer disputes to the I.J.C. for resolution).

81. See Boundary Waters Treaty, *supra* note 70, art. IX (stipulating that when the parties have a dispute regarding conditions along the international border, they may refer the matter to I.J.C. for examination and report). An I.J.C. staff member commented that, although the Boundary Waters Treaty provides for unilateral references, it would be very difficult for the I.J.C. to make a full inquiry without the active cooperation of both parties. Interview with Frank Bevacqua, Public Information



the matter at issue, and reports its conclusions and recommendations.<sup>82</sup> The I.J.C. recommendations are not decisions, and have no binding authority over the governments.<sup>83</sup> Yet, the American and Canadian governments frequently implement the I.J.C. recommendations.<sup>84</sup>

The Boundary Waters Treaty also grants arbitration powers to the I.J.C., but only when both parties consent to referring a matter for arbitration.<sup>85</sup> The parties, however, have never done so.<sup>86</sup> On one important occasion where Canada and the United States submitted an environmental dispute to arbitration, they created a separate arbitration tribunal, rather than refer the matter to the I.J.C.<sup>87</sup> Although the tribunal in that

Officer, I.J.C., in Washington, D.C. (Oct. 30, 1992). To date, all references to the I.J.C. have been jointly referred to the I.J.C. by both governments. *Id.*

82. See Boundary Waters Treaty, *supra* note 70, art. IX (describing steps that I.J.C. must take under the reference procedure).

83. See Boundary Waters Treaty, *supra* note 70, art. IX.

84. See Woodward, *supra* note 72, at 339 (citing AMERICAN BAR ASSOCIATION, SETTLEMENT OF INTERNATIONAL DISPUTES BETWEEN CANADA AND THE UNITED STATES 10 (1979)) (asserting that the two governments have accepted the I.J.C.'s recommendations in eighty percent of the referred disputes).

85. See Boundary Waters Treaty, *supra* note 70, art. X (specifying the arbitration procedure and granting the I.J.C. powers of decision if both parties agree to submit an issue for a binding decision). The article states:

Any questions or matters of difference arising between the High Contracting Parties . . . may be referred for decision to the International Joint Commission by consent of the two Parties . . . . A majority of the said Commission shall have the power to render a decision or finding as to any questions or matters so referred.

*Id.*

86. I.J.C. ACTIVITIES, *supra* note 72, at 5.

87. See Gulden, *supra* note 69, at 50, 50 n.68 (citing Trail Smelter Arbitration (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905 (1941), employing a special arbitration panel to resolve an environmental dispute between the United States and Canada). In *Trail Smelter*, sulfur dioxide fumes from a smelter in British Columbia were damaging agricultural and timber land in the State of Washington. *Id.* at 51. Canada and the United States engaged in diplomatic negotiations for two years before agreeing to establish an arbitration tribunal. *Id.* The tribunal resolved the dispute by setting a strict limit on the permissible output of sulfur dioxide from the smelter. *Id.* More importantly, the tribunal decision announced that:

[N]o state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

*Id.* (citing Trail Smelter Arbitration, 3 R. Int'l Arb. Awards at 1966). Because of this declaration, *Trail Smelter* is one of the few cases that can be cited for the proposition that states may be held liable for environmental damage which they cause in the

case supposedly had binding powers of decision, it did not have real enforcement powers.<sup>88</sup> Similarly, even if a matter were referred to the I.J.C. for arbitration, its decisional and enforcement powers would be limited.<sup>89</sup>

In addition to responding to an application or reference, the I.J.C. must also discharge other ongoing responsibilities.<sup>90</sup> When the I.J.C. approves an application, the approval may be subject to terms and conditions set by the I.J.C. The I.J.C. must monitor compliance with these conditions.<sup>91</sup> When the I.J.C. responds to a reference, it will eventually report its recommendations to the United States and Canadian governments.<sup>92</sup> If the governments accept the recommendations, they may assign the I.J.C. a monitoring or coordinating role in implementing the recommendations.<sup>93</sup>

The I.J.C. generally lacks implementation and enforcement powers.<sup>94</sup> Furthermore, the I.J.C. cannot initiate its own investigations; it can only respond to references and applications.<sup>95</sup> An organization with more comprehensive legal powers might prove a more effective guardian of environmental values. One such organization is the Commission of the European Community.

---

territory of other states. *Id.* at 50-51.

88. See George Alexandrowicz, *A Proposal to Assist the Resolution of Environmental Disputes Between Canada and the United States*, in COMMON BOUNDARY/Common Problems: The Environmental Consequences of Energy Production 58 (1982) (arguing that the voluntary compliance of the smelter company obviated the problem of enforcing the *Trail Smelter* decision).

89. See Boundary Waters Treaty, *supra* note 70, Art. X (permitting parties to impose restrictions and exceptions in the terms of a reference for I.J.C. arbitration). In addition, the treaty does not grant the I.J.C. any independent enforcement powers. *Id.* Thus, an I.J.C. arbitration decision could only be enforced to the extent that the losing party (or the losing party's court) is willing to be bound by it. See *supra* note 81 (reporting an I.J.C. staff member's comment that the I.J.C. would find it difficult to resolve any reference without cooperation of both parties).

90. See I.J.C. ACTIVITIES, *supra* note 72, at 4 (noting that references and applications may lead to ongoing responsibilities).

91. I.J.C. ACTIVITIES, *supra* note 72, at 4.

92. I.J.C. ACTIVITIES, *supra* note 72, at 4.

93. I.J.C. ACTIVITIES, *supra* note 72, at 4.

94. See Woodward, *supra* note 72, at 344 (noting that the I.J.C. must rely on the governments of the United States and Canada to implement I.J.C. recommendations).

95. See Woodward, *supra* note 72, at 343-44. But see *supra* notes 76-84 and accompanying text (recognizing that the I.J.C. rarely uses its mandatory authority to disapprove an application, while the Canadian and United States governments usually accept the I.J.C. recommendations resulting from their voluntary references).

## B. THE ARTICLE 169 COMPLAINT PROCEDURE OF THE EUROPEAN COMMUNITY

The European Community (EC) is a supranational organization, to which the member states have ceded certain aspects of their sovereignty.<sup>96</sup> In matters where the EC has jurisdiction, EC law takes precedence over member state laws when the two conflict.<sup>97</sup> The Single European Act of 1987<sup>98</sup> (SEA) formally granted the EC the power to enact environmental legislation.<sup>99</sup> Even prior to the SEA, however, the EC had passed environmental acts under the authority of two general provisions of the EEC Treaty.<sup>100</sup>

96. See KLAUS-DIETER BORCHARDT, *THE ABC OF COMMUNITY LAW* 9 (1991) (describing the legal status of the European Community). The EC is actually comprised of three communities, founded under three separate treaties: The European Coal and Steel Community (ECSC), the European Atomic Energy Community (Euratom), and the European Economic Community (EEC). *Id.* at 5. Although the three communities have never formally merged, they are now generally regarded as part of a single entity called the European Community. *Id.* at 6. The EC currently has twelve member states: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. *Id.* at 5.

97. See *id.* at 42 (delineating the extent of EC authority relative to member states). Areas of EC competence include free movement of goods, workers and capital, freedom of establishment, freedom to provide services, and co-ordinated regulation of agriculture, transport policy, social policy, and competition. *Id.* at 5-6.

98. Single European Act, Feb. 17, 1986, O.J. L169/1 (1987) [hereinafter SEA]. The SEA was a set of amendments to the EEC Treaty. Owen Lomas, *Environmental Protection, Economic Conflict and the European Community*, 33 MCGILL L.J. 506, 512 (1988).

99. See generally Christian Zacker, *Environmental Law of the European Economic Community: New Powers Under the Single European Act*, 14 B.C. INT'L & COMP. L. REV. 249, 267 (1991) (analyzing how the Single European Act strengthens the basis for EC environmental legislation and regulation). See also EEC Treaty, *supra* note 18, arts. 130(r) and 130(s) (defining the permissible objectives and scope of EC environmental legislation, as well as the procedural requirements for enactment).

100. See Lomas, *supra* note 98, at 510 (depicting the weak legal foundation of EC environmental legislation prior to passage of the Single European Act). Articles 100 and 235 of the EEC Treaty were read to imply EC authority to enact environmental measures. *Id.* Article 100 provides, in part:

The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.

EEC Treaty, *supra* note 18, art. 100.

Article 235 provides:

The basic institutions of the EC are the Council, the Commission (EC Commission), the European Parliament, and the European Court of Justice.<sup>101</sup> The EC Commission and Council, in consultation with the Parliament, enact three different types of binding legislation:<sup>102</sup> 1) regula-

---

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

*Id.* art. 235.

Although the original EEC Treaty did not explicitly contain environmental objectives, the EC Commission asserted that the economic goals of the Treaty encompassed environmental issues, and that environmental policies had a direct impact on the establishment and function of the EC. *See* Lomas, *supra* note 98, at 511 (discussing the impact of environmental issues on the EC); *see also* Fredrick C. Eisenstein, Comment, *Economic Implications of European Transfrontier Pollution: National Prerogative and Attribution of Responsibility*, 11 GA. J. INT'L & COMP. L. 519, 528 (1981) (contending that inconsistent national environmental standards threatened the goal of EC economic integration). *Cf.* ENVIRONMENTAL SAFEGUARDS, *supra* note 7 (arguing that the linkage between increased trade under NAFTA and a potential increase in environmental degradation, requires the creation of a North American Commission on Trade and the Environment).

101. *See* BORCHARDT, *supra* note 96, at 7-9 (describing the legal organization of the EC). The Council is the primary legislative body of the EC, and exercises some executive authority over the coordination of member state economic policies. Zacker, *supra* note 99, at 253. Council members are usually the member state ministers whose portfolios include the issue under discussion, and they serve as advocates for their government's positions. *Id.* The Commission is a quasi-executive body with some power to initiate legislation. *Id.* Its seventeen members are appointed, and are required to defend the interests of the Community relative to the interests of the individual member states. *Id.* Thus, the Commission is required to ensure that the provisions of the EEC Treaty and EC legislation are implemented. EMILE NOËL, *WORKING TOGETHER — THE INSTITUTIONS OF THE EUROPEAN COMMUNITY* 11 (1991).

The European Parliament does not have the legislative powers of most national parliaments, although it must be consulted when the EC Commission and the Council are considering major legislation. *Id.* at 29. It also controls some portions of the EC budget. *Id.* at 27. These include the costs of operating EC institutions and certain special EC funds (i.e. Social Fund, Regional Fund, research and energy, industrial policy). *Id.* The European Court of Justice is the interpreter of Community law, as opposed to the law of member states. *Id.* at 32. It has jurisdiction over cases in which member states are accused of infringing or failing to implement Community law, and cases challenging some action of the other EC institutions. *Id.* The European Court may also give preliminary rulings on questions referred by the national courts of member states, when the latter are dealing with cases requiring interpretations of Community law. *Id.*

102. *See* BORCHARDT, *supra* note 96, at 26 (describing the process by which EC

tions; 2) directives; and 3) decisions.<sup>103</sup> The EC Commission has the duty of ensuring that EC legislation is implemented in the member states.<sup>104</sup>

The EC Commission fulfills this duty in many ways, and the Article 169 complaint procedure is one of its most powerful tools.<sup>105</sup> Under Article 169 of the EEC Treaty, any member of the public may bring a complaint before the EC Commission, alleging an infringement of Community law.<sup>106</sup> The EC Commission also has authority to initiate Arti-

institutions make Community laws). All legislation enacted by EC institutions is known as secondary legislation. *Id.* at 25. The term "primary legislation" refers to the founding treaties of the three original communities. *See id.* at 5-6 (describing the formation of the EC from the EEC, ECSC, and Euratom).

103. *See BORCHARDT, supra* note 96, at 26 (examining the different types of EC legislation). Regulations apply uniformly throughout the EC, and they apply directly, without the need for member states to pass implementing legislation. *Id.* at 26. Directives apply to some or all member states, and they set general goals that the states must achieve through the means of their choice. *Id.* at 27. Decisions apply in individual cases, and they order a member state, a firm, or an individual to do or refrain from a particular act. *Id.* at 32. Decisions may also grant rights or impose duties on the addressee. *Id.* There are also two non-binding types of actions, known as recommendations and opinions. *Id.* Technically, actions under the authority of the European Coal and Steel Community do not have the same names as actions by the EEC and Euratom. *Id.* at 26. The names and effects of ECSC actions are very similar to those of the EEC and Euratom. *Id.* For the purposes of this comment, these distinctions are immaterial.

104. *See NOËL, supra* note 101, at 11 (discussing the functions of the EC Commission); *see also* BRIAN MORRIS ET AL., *THE EUROPEAN COMMUNITY: A GUIDE FOR BUSINESS AND GOVERNMENT* 65 (1981) (noting that Directorate-General XI [Environment, Consumer Protection, and Nuclear Safety] is the subdivision of the EC Commission that addresses environmental issues).

105. *See* Richard Macrory, *The Enforcement of Community Environmental Laws: Some Critical Issues*, 29 *COMMON MKT. L. REV.* 347, 348 (1992) (asserting that the Article 169 procedure is a key means of enforcing EC environmental laws).

106. EEC Treaty, *supra* note 18, art. 169. Article 169 reads:

If the Commission considers that a member state has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter, after giving the States concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

*Id.*

Notably, Article 169 does not address specific procedures. The EC Commission's own internal rules of administration enable the general public, including individuals, environmental groups and industries, to bring complaints before the Commission. Macrory, *supra* note 105, at 363.

cle 169 actions on its own, unlike the I.J.C.<sup>107</sup> Although Article 169 provisions cover all types of EC law, environmental matters are the subject of a significant percentage of the Article 169 actions taken in a given year.<sup>108</sup>

After receiving a complaint or otherwise detecting an infringement of Community law, the EC Commission investigates the matter to determine if Commission action is necessary.<sup>109</sup> If an infringement exists, the EC Commission sends a formal letter of notice to the infringing state.<sup>110</sup> The state must respond with comments within two months.<sup>111</sup> If the state does not eliminate the offending practice, the EC Commission issues a "reasoned" opinion and the infringing state must comply within a specified deadline.<sup>112</sup> If the infringing state remains recalcitrant, the EC Commission may bring the case to the European Court of Justice.<sup>113</sup>

The EC Commission may settle the case during the first two stages of an Article 169 proceeding.<sup>114</sup> Because of this alternative, there are

---

107. See EEC Treaty, *supra* note 18, art. 169 (providing for Commission action when a member state is not fulfilling its treaty obligations).

108. See Ninth Annual Report to the European Parliament on Commission Monitoring of the Application of Community Law, EC Commission, 1992 O.J. (C 250) 47 [hereinafter EC Commission] (tabulating the origin and status of Article 169 proceedings in the last decade). In 1991, 136 out of 877 Article 169 proceedings (15.5%) were related to environmental and consumer protection matters. *Id.* at 47. The equivalent figures for 1990 were 168 out of 960 (17.4%). *Id.* Environmental grounds formed the basis of 480 of the 1252 public complaints submitted in 1990 (38.3%). Macrory, *supra* note 105, at 364. Equivalent data for 1991 are not available due to a change in the methods of counting complaints. EC Commission, *supra* at 150 n.1.

The EC Commission received a total of 1,052 complaints from the public in 1991, and EC Commission staff itself initiated 381 Article 169 proceedings. *Id.* at 7. Thus, the EC took no action with regard to 556 (1,052 + 381 - 877) of the public complaints (assuming action was taken in all the cases initiated by the EC Commission). Public complaints were nevertheless the basis of the majority of the Article 169 actions taken (496 of 877). *Id.* The EC Commission reported that of the 381 actions taken on its own initiative, 125 actually resulted from Parliamentary questions and 17 resulted from petitions sent to the Parliament. *Id.*

109. NOËL, *supra* note 101, at 11.

110. See Macrory, *supra* note 105, at 352 (analyzing the stages of an Article 169 procedure).

111. NOËL, *supra* note 101, at 11.

112. NOËL, *supra* note 101, at 11.

113. NOËL, *supra* note 101, at 11.

114. See Macrory, *supra* note 105, at 352 (characterizing the Article 169 procedure as one designed to encourage settlement between the EC Commission and the offending member state).

more letters of notice than there are opinions. Since the infringing state may rectify its deficient enforcement of EC law after the issuance of an opinion, even fewer cases are brought before the European Court.<sup>115</sup> An effective settlement is possible at each stage, and the environment can benefit each time the EC Commission persuades a member state to enforce EC environmental laws. When a case does reach the Court of Justice, however, the ultimate outcome remains uncertain because the Court cannot apply any effective sanctions to enforce its decisions.<sup>116</sup>

#### IV. ANALYSIS

The preceding section outlined the basic structure and workings of the I.J.C. and the EC Article 169 procedure. The following analysis discusses how the models function in practice, and examines how the experiences of the models are relevant in the process of forming a North American Commission on the Environment. This exercise seeks to compare the existing NACE proposals to the models, and to determine if and how the current NACE proposals should be modified.

##### A. I.J.C. ACTIVITIES IN PRACTICE

In recent years, the I.J.C. has focused much of its efforts on the Great Lakes.<sup>117</sup> These activities have resulted primarily from the Great Lakes Water Quality Agreement<sup>118</sup> and the Great Lakes Levels Reference of 1986.<sup>119</sup> The Great Lakes Water Quality Agreement was originally

---

115. EC Commission, *supra* note 108, at 47. In 1991, the EC Commission issued 877 letters of formal notice, 412 reasoned opinions, and 64 references to the Court of Justice. *Id.* The respective figures for 1990 are 960, 251, and 77. *Id.* In this two year period, more than 90% of the cases were resolved or settled without the Commission referring the matter to the Court of Justice. *Id.*

116. See Zacker, *supra* note 99, at 255 (describing the limits of European Court of Justice jurisdiction). The judgments of the Court are binding upon member states, under Article 171 of the EEC Treaty. *Id.* The only sanctions for failure to comply, however, are additional procedures under Articles 169 and 170 of the EEC Treaty. *Id.* But see Macrory, *supra* note 105, at 368 n.44 (reporting that a pending proposal would amend Article 171 of the Treaty to enable the European Court to impose financial sanctions on member states that ignore its judgments).

117. *Focus on International Joint Commission Activities*, International Joint Commission [hereinafter *Focus*] (Jul./Aug. 1992). See also I.J.C. ACTIVITIES, *supra* note 72 (describing the Commission's works in alleviating the adverse consequences of fluctuating water levels in the Great Lakes).

118. *Revised Great Lakes Water Quality Agreement of 1978, as amended by Protocol signed November 18, 1987*, International Joint Commission (Sept. 1989).

119. See I.J.C. ACTIVITIES, *supra* note 72, at 42 (discussing this reference). The

signed in 1972;<sup>120</sup> a second version was signed in 1978<sup>121</sup> and amended in 1987.<sup>122</sup> The Great Lakes Water Quality Board and the Great Lakes Science Advisory Board assist the I.J.C. in its work under the agreement.<sup>123</sup> The work performed under the Great Lakes Water Quality Agreement offers a good example of how the I.J.C. functions in practice.

The original 1972 Agreement resulted from a 1964 reference asking the I.J.C. to examine the problem of pollution in the lower Great Lakes.<sup>124</sup> Under the reference, the I.J.C. formed the International Lake Erie Water Pollution Board and the International Lake Ontario-St. Lawrence River Water Pollution Board, both comprised of government officials, scientists, and engineers.<sup>125</sup> The boards investigated the pollution problem in the lakes and submitted ten semi-annual progress reports to the I.J.C.<sup>126</sup> The I.J.C., in turn, submitted three interim reports to the Canadian and American governments, determining that the primary cause of deteriorating water quality in the lakes was enrichment by nutrients, especially phosphorus.<sup>127</sup> The investigatory boards sent a summary report to the I.J.C. in September 1969, and the I.J.C. released the report to the public the following month.<sup>128</sup>

Following release of the report, the I.J.C. held a series of public hearings on pollution in the lakes.<sup>129</sup> Next, the I.J.C. released a final

---

docket number for the 1986 Great Lakes Reference is 111R. *Id.*

120. Agreement Between the United States of America and Canada on Great Lakes Water Quality, Apr. 15, 1972, United States-Canada, 23 U.S.T. 301, T.I.A.S. No. 7312 [hereinafter 1972 Agreement].

121. Agreement Between the United States of America and Canada on Great Lakes Water Quality, Nov. 22, 1978, United States-Canada, 30 U.S.T. 1383, T.I.A.S. No. 9257 [hereinafter 1978 Agreement].

122. See Barry G. Rabe and Janet B. Zimmerman, *Integrated Pollution Control: A Symposium: Article: Cross-Media Environmental Integration in the Great Lakes Basin*, 22 ENVTL. L. 253, 262 n.27 (1992) (discussing how amendments in 1987 supplemented the 1978 Great Lakes Water Quality Agreement by calling on the I.J.C. to take the dominant role in such areas as airborne deposits of toxic substances).

123. I.J.C. ACTIVITIES, *supra* note 72, at 19, 21.

124. I.J.C. ACTIVITIES, *supra* note 72, at 39.

125. Woodward, *supra* note 72, at 332.

126. Woodward, *supra* note 72, at 332.

127. Woodward, *supra* note 72, at 333.

128. Woodward, *supra* note 72, at 333.

129. Woodward, *supra* note 72, at 332. The hearings were held in several Great Lakes Basin cities: Toronto, Ontario; Cleveland, Ohio; Toledo, Ohio; Hamilton, Ontario; Brockville, Ontario; and Rochester, New York. *Id.* They provided an opportunity for the I.J.C. to hear the testimony of approximately 180 witnesses. *Id.* Public hear-



report in late 1970 on pollution in Lake Erie, Lake Ontario, and the St. Lawrence River.<sup>130</sup> The report contained comprehensive recommendations, including water quality objectives, and requested that the governments give the I.J.C. expanded powers to coordinate, monitor, implement, and report on programs to preserve and improve the Great Lakes water quality.<sup>131</sup> The 1972 Great Lakes Water Quality Agreement responded directly to these recommendations.<sup>132</sup> The 1972 Agreement contained provisions reinforcing the mandates of I.J.C. under the Boundary Waters Treaty and subsequent legislation, and implementing many of the recommendations in the 1970 I.J.C. report.<sup>133</sup>

The Great Lakes Water Quality Agreement of 1978 addressed shortcomings in the 1972 Agreement.<sup>134</sup> Since the 1978 Agreement, the

---

ings and meetings are often a part of I.J.C. operation. In the period from November 30, 1992 to February 25, 1993, eight public forums were held in eight cities, to facilitate public comment on the draft recommendations resulting from the 1986 Great Lakes Water Levels reference. *Focus*, *supra* note 117, at 14. The I.J.C. is "committed to receiving input from a widening range of sources." *Sixth Biennial Report on Great Lakes Water Quality* 54, International Joint Commission (1992) [hereinafter *Sixth Biennial Report*]. Pursuant to this commitment, the I.J.C. has: 1) implemented a public information program; 2) held round table discussions on discharge of toxic substances; 3) integrated non-governmental members onto its boards and committees; 4) required the boards and committees to hold public meetings; 5) enhanced its public education programs. *Id.* Further, in any proceeding or inquiry under I.J.C. jurisdiction, the Boundary Waters Treaty requires that all interested parties be given convenient opportunity to be heard. Boundary Waters Treaty, *supra* note 70, art. XII. The Great Lakes Water Quality Agreement of 1978 required the I.J.C. to establish the public information service for its programs, including public hearings. 1978 Agreement, *supra* note 121, art. VIII, para. 3.

130. Woodward, *supra* note 72, at 333.

131. Woodward, *supra* note 72, at 333.

132. Woodward, *supra* note 72, at 335.

133. See Woodward, *supra* note 72, at 336 (summarizing the provisions of the 1972 Agreement). The 1972 Agreement required the I.J.C. to serve as a clearinghouse for water quality data collected by the national, state, and provincial governments. *Id.* In addition, the Agreement directed the I.J.C. to provide governmental entities with advice regarding water quality issues, to coordinate research, and to investigate water quality matters referred by the parties. *Id.* In order to facilitate this expanded role, the I.J.C. was to submit annual budgets of anticipated expenses. *Id.* at 337.

134. See Woodward, *supra* note 72 (recounting how the Canadian and American governments were unable to fully implement the 1972 Agreement). The governments encountered the problem of the agreement's failure to grant the I.J.C. any enforcement powers. *Id.* at 337-39. The 1978 Agreement, however, did not remedy this shortcoming. *Id.* at 338. The 1978 Agreement differed from the 1972 Agreement in that it was more comprehensive, and required the permanent establishment of the Great

I.J.C. has made significant contributions to rehabilitating the Great Lakes.<sup>135</sup> The problem of persistent toxic substances is the current focus of I.J.C. efforts in the Great Lakes Basin.<sup>136</sup>

The I.J.C. also continues its activities with regard to other environmental issues along the United States-Canada border.<sup>137</sup> Among these other issues, the Skagit-High Ross controversy offers an unusual example of how the I.J.C. can force resolution of a dispute, even in the absence of legal enforcement powers.<sup>138</sup> The Skagit-High Ross controversy developed when the City of Seattle planned to raise the height of the High Ross Dam on the Skagit River, near the border between the State of Washington and the Province of British Columbia.<sup>139</sup> Although

---

Lakes Regional Office, the Great Lakes Science Advisory Board, and the Great Lakes Water Quality Board, to assist the I.J.C. in carrying out its duties. *Id.* at 337-38. Additional provisions in the 1978 Agreement deal with the discharge of toxic and hazardous substances, airborne pollution, and the implementation of a coordinated surveillance and monitoring program in the Great Lakes Basin. *Id.* The monitoring program is expected to "assess compliance with the pollution control requirements and achievement of the Objectives, to provide information for measuring whole lake response to control measures and to identify emerging problems." 1978 Agreement, *supra* note 121, art. VI, ¶ 1(m). As in the 1972 Agreement, the I.J.C. was directed to submit yearly budgets of expenses anticipated as a result of its additional responsibilities. *Id.* art. VIII, ¶ 4. The Agreement required each party to "seek funds" to pay one-half of the annual I.J.C. budget requirements, but neither party is required to pay more than the other. *Id.*

135. See Woodward, *supra* note 72, at 343, 344 (arguing that the I.J.C.'s primary contributions have been fact-finding, alerting the governments and public to potential problems, and coordinating government efforts).

136. See *Sixth Biennial Report*, *supra* note 129, at 2 (discussing the complex problems associated with the Great Lakes Ecosystem).

137. See *Focus*, *supra* note 117, at 14 (describing ongoing activities in the St. Croix River area). See also I.J.C. ACTIVITIES, *supra* note 72, at 24-31 (summarizing I.J.C. activities in other parts of the border area); Jackie Krollop Kim and Marion E. Marts, *The Skagit-High Ross Controversy: Negotiation and Settlement*, 26 NAT. RESOURCES J. 261 (1986) (detailing the I.J.C.'s role in resolving a conflict over raising the height of a dam near the border between Washington State and British Columbia).

138. See generally Kim and Marts, *supra* note 137 (providing a detailed account of how the I.J.C. resolved the controversy).

139. See *Swinomish Tribal Community v. Federal Energy Regulatory Comm'n*, 627 F.2d 499, 503-05 (D.C. Cir. 1980) (relating the history of plans for the High Ross Dam). The original dam and the plans for its ultimate expansion dated back to 1927. *Id.* The primary function of the dam was to provide hydroelectric power for the City of Seattle. *Id.* The I.J.C. initially approved raising the height of the dam in 1942, contingent upon a satisfactory plan to compensate British Columbia for the inundation of additional land. *Id.* Seattle and British Columbia signed a compensation agreement

the I.J.C. had approved the dam expansion in 1942, public attitudes towards the environment had changed on both sides of the border by the time Seattle was ready to go forward with the plan.<sup>140</sup> The I.J.C. reviewed the dam proposal from 1973 to 1977, and British Columbia and Seattle negotiated throughout the 1970's with little success.<sup>141</sup> Although the I.J.C. eventually upheld its earlier order, British Columbia remained unwilling to let the project go forward, and appealed a second time.<sup>142</sup> In the face of the developing impasse, new Commissioners at the I.J.C. took a forceful approach towards resolving the dispute.<sup>143</sup>

First, the I.J.C. Commissioners consciously chose to engage in a dispute resolution process, rather than simply to approve or disapprove the project at issue.<sup>144</sup> They next appointed advisors to study Seattle's ener-

---

in 1967, but British Columbia reneged in 1974, because of public opposition to expanding the reservoir. Kim and Marts, *supra* note 137, at 261-67.

140. See *High Ross Dam Agreement Announced*, UPI, Mar. 30, 1983, available in LEXIS, Nexis Library, UPI File (reporting that strong, environmentally-based opposition to the dam expansion developed in both British Columbia and Washington State). In 1974, as a result of this opposition, British Columbia asked the I.J.C. to reconsider its earlier approval of the project. *Id.* British Columbia expressed concern that the higher dam would have caused the inundation of nearly 5,000 acres in British Columbia, loss of free-flowing river, and loss of hiking access to scenic mountain areas. *Id.* at 265-66. Kim and Marts, *supra* note 137, at 266.

141. See Kim and Marts, *supra* note 137, at 266-67 (explaining why the 1970's settlement negotiations did not succeed). See also *Swinomish Tribal Community*, 627 F.2d at 504-505 (summarizing I.J.C. review of the dam proposal during the period from April 1974 to July 1977). As indicated by the name of this case, a Native American community was also a major intervener in the case. *Id.* The tribe argued that raising the dam height would impair the downstream fishery, in violation of their treaty with the United States. *Id.* at 506.

142. See Kim and Marts, *supra* note 137, at 268 (delineating the positions of British Columbia and Seattle after the negotiations broke down). British Columbia made its second appeal to the I.J.C. in August of 1980. *Regional News*, UPI, Apr. 28, 1982, available in LEXIS, Nexis Library, UPI File. The provincial government believed that either this appeal would succeed, or the national governments would intervene and force a settlement in its favor. Kim and Marts, *supra* note 137, at 268. Seattle took the position that it was legally entitled to expand the dam, by virtue of I.J.C. and Federal Energy Regulatory Commission approvals, as well as its 1967 agreement with British Columbia. *Id.* Thus, by 1980, both parties had reason to believe they would prevail, and both were unwilling to settle. *Id.*

143. See Kim and Marts, *supra* note 137, at 268-73 (describing how the I.J.C. changed its approach to resolving the controversy).

144. See Kim and Marts, *supra* note 137, at 269 (asserting that the new Commission found authority for this role in the general dispute resolution intent expressed in the opening paragraph of the Boundary Waters Treaty). Previously, the I.J.C. had

gy requirements, compensation issues, and the technical and monetary alternatives.<sup>145</sup> While its advisors studied the issue, the I.J.C. pointedly informed both parties that there was no guarantee of prevailing on the merits, and that they would be expected to reach an agreement.<sup>146</sup> Next, the I.J.C. issued a supplemental order,<sup>147</sup> and appointed a special board to oversee and report on the progress of negotiations.<sup>148</sup> The intense pressure from the I.J.C. eventually forced the parties to arrive at a settlement.<sup>149</sup>

---

limited its role to examining the issue within the context of its formal application procedure. *Id.*

145. See Kim and Marts, *supra* note 137, at 269-70 (discussing how the special advisors arbitrated the complex technical issues of cost and output of High Ross and the most likely alternatives for providing power to Seattle).

146. See Kim and Marts, *supra* note 137, at 270 (maintaining that the I.J.C. deliberately attempted to make the parties uncertain as to whether their position would prevail, if the I.J.C. were forced to reach a final decision). The I.J.C. Commissioners visited both Seattle and British Columbia to deliver their messages, and then had the parties meet at the I.J.C. Washington, D.C. offices. *Id.* At the meeting, the I.J.C. Commissioners presented the parties with a supplementary order that would be issued shortly and informed the parties that the Commission would postpone a final decision. *Id.* The supplementary order included a declaration that the I.J.C. had no obligation to arrive at a final resolution, but intended to retain jurisdiction. *Id.* at 272. The Commissioners then made it clear that the I.J.C. would not assume responsibility for the ultimate outcome, and the parties would have to arrive at a settlement. *Id.* at 270.

147. See Kim and Marts, *supra* note 137, at 269-73 (explaining the content and purpose of the supplemental order). See also *Regional News*, *supra* note 142 (quoting Seattle City and British Columbia officials' descriptions of their respective negotiating positions).

148. *Regional News*, *supra* note 142. The special board consisted of two non-governmental experts, two I.J.C. Commissioners, representatives of the national governments, and representatives of the City of Seattle and the Province of British Columbia. *Id.* The I.J.C. required the Board to report on the progress of negotiations every four months. *Id.* Specifically, the I.J.C. directed the board to "co-ordinate, facilitate, and review on a continuing basis activities directed to achieving and implementing a negotiated, mutually acceptable agreement between the city and the province." *Id.*

149. See *Seattle Muni Resolves 15-Year Dispute with Canada Over Hiking Dam Capacity*, *ELECTRIC UTILITY WEEK*, Apr. 25, 1983, at 1, available in LEXIS, Nexis Library, Omni File (detailing the terms of the settlement agreement). The settlement required agreements between British Columbia and Seattle, and British Columbia and the Canadian Federal Government, as well as a treaty between the United States and Canada. *Id.* British Columbia and Seattle agreed that Seattle would pay British Columbia the amount it would have cost to expand the dam. *Id.* In turn, British Columbia would supply Seattle with the electricity it could have generated from the dam, over a period of eighty years. *Id.* The parties also agreed to create an environmental endowment fund for the area around the existing reservoir. Kims and Marts,

## B. THE I.J.C. AS A MODEL

Despite its forceful actions in the Skagit River-High Ross controversy, the I.J.C. remains an organization of limited powers and limited effectiveness.<sup>150</sup> Nevertheless, the I.J.C.'s role in the controversy and in the Great Lakes Basin suggests solutions to several deficiencies in the existing NACE proposals. Further, the I.J.C. experience illustrates possible ways to alleviate some of the concerns that prompted the original NACE proposal.<sup>151</sup> In organizational terms, the I.J.C. offers a strong structural model for the NACE. On a functional level, the I.J.C. experience demonstrates how an international commission, with few formal enforcement powers, can have a highly significant and positive effect on the resolution of environmental problems. In addition, the I.J.C.'s experience also suggests the importance of governmental funding and adequate resources,<sup>152</sup> governmental cooperation,<sup>153</sup> and public participation.

---

*supra* note 173, at 275. The treaty between the United States and Canada enabled the national governments to serve as guarantors of the agreement between the City of Seattle and British Columbia, ensuring that each party meets its obligations under the settlement agreement. *Id.* at 277. See also *Skagit River Pact Signed*, Facts on File World News Digest, Apr. 13, 1984, available in LEXIS, Nexis Library, Omni File (reporting signature of the agreement by the Canadian Secretary of State for External Affairs and the United States Secretary of State); *International News*, UPI, Dec. 14, 1984, available in LEXIS, Nexis Library, UPI File (recording the exchange of ratification instruments for the international treaty which resolved the controversy); Treaty with Canada Relating to the Skagit River and Ross Lake in the State of Washington, and the Seven Mile Reservoir on the Pend d'Oreille River in the Province of British Columbia, Apr. 2, 1984, U.S.-Canada, T.I.A.S. No. 11088.

150. See Woodward, *supra* note 72, at 343 (concluding that the I.J.C. has made important contributions to the improvement of water quality despite its weakness as a formal power in the area of pollution control).

151. See ENVIRONMENTAL SAFEGUARDS, *supra* note 7, and accompanying text (discussing the concerns that led a coalition of environmental groups to propose the creation of the NACE).

152. See Boundary Waters Treaty, *supra* note 70, art. XII (providing that the United States and Canadian governments shall pay the staff expenses of the I.J.C. sections in their respective countries, and that joint expenses of the entire I.J.C. must be paid by both states, in equal proportions). See also 1978 Agreement, *supra* note 121, art. VIII (requiring the I.J.C. to submit annual budgets of anticipated expenses); *Sixth Biennial Report*, *supra* note 129, at 5-13 (reporting that national, state, and provincial governments have spent billions of dollars in support of programs developed pursuant to the 1972 and 1978 Great Lakes Water Quality Agreements).

153. See e.g., Kim and Marts, *supra* note 137, at 277 (describing the national governments' roles as guarantors of the settlement agreement in the Skagit-High Ross

The NACE outlined in the environmental coalition proposal is similar in structure to the I.J.C., but slightly less elaborate.<sup>154</sup> The I.J.C. is comprised of three commissioners each from Canada and the United States,<sup>155</sup> while the environmental coalition proposed four NACE commissioners from each NAFTA party.<sup>156</sup> The coalition proposal also advocates a NACE that employs a professional staff similar to the staff of the I.J.C.,<sup>157</sup> while the United States government outline does not specify any staff at all.<sup>158</sup> Both existing NACE proposals include elements approximating the permanent and semi-permanent advisory boards that assist the I.J.C. in its work.<sup>159</sup> The coalition proposal provides for local citizen committees, and the government proposal provides for the op-

---

controversy). *See also* Interview with Frank Bevacqua, *supra* note 81 (noting that the I.J.C. could not investigate a matter referred unilaterally by one government, in the absence of cooperation from the other government).

154. *See generally* ENVIRONMENTAL SAFEGUARDS, *supra* note 7 (proposing the environmental coalition version of how the NACE should be structured). *See also supra* notes 42-55 and accompanying text (summarizing the coalition proposal).

155. I.J.C. ACTIVITIES, *supra* note 72, at 4. The I.J.C. Commissioners have diverse backgrounds. *See id.* at 6-7 (reporting that among the six Commissioners sitting in 1987-88, members had experience in state legislatures, the United States Congress, the Canadian Parliament, government ministerial posts, United Nations delegations, a judgeship, private law firms, and engineering work).

156. *See* ENVIRONMENTAL SAFEGUARDS, *supra* note 7, at 2 (proposing four representatives from each party, including some from non-governmental organizations). The coalition proposal would also require that all NACE commissioners have expertise in environmental affairs, and no vested interests in trade resulting from the NAFTA. *Id.* at 2. *Cf.* Boundary Waters Treaty, *supra* note 70, art. XII (requiring I.J.C. Commissioners to make a solemn declaration that they will carry out their duties in an impartial manner). *See also* I.J.C. ACTIVITIES, *supra* note 72, and accompanying text (discussing the actual record of I.J.C. impartiality). *But see* Letter from Carla A. Hills, *supra* note 59 (stating that the NACE Commissioners will be the U.S. EPA Administrator and his Mexican and Canadian counterparts). If a NACE with the structure proposed by the U.S. government were implemented, it follows that it could never truly claim impartiality, since its commissioners would be individuals whose duty it is to carry out the environmental policies of their respective governments.

157. *See* I.J.C. ACTIVITIES, *supra* note 72, at 5-9 and accompanying text (discussing I.J.C. staff, headquarters, and advisory boards).

158. *See supra* note 60 and accompanying text (noting the failure to mention a NACE staff in the U.S. Government's outline proposal).

159. *See supra* note 73 and accompanying text (delineating generally the functions of the advisory boards). *See also* 1978 Agreement, *supra* note 121, art. VIII (mandating the establishment, and specifying the functions, of the Great Lakes Water Quality Board and Great Lakes Science Advisory Board). *See also* I.J.C. ACTIVITIES, *supra* note 72, at 43-57 (listing and describing the role of each of the advisory boards).

tional public advisory committees.<sup>160</sup>

In both the coalition and government proposals, the suggested committees represent attempts to provide for some form of public participation in NACE activities. The I.J.C. approach of having permanent, expert advisory boards, along with frequent public hearings, offers a practical compromise.<sup>161</sup> While the I.J.C. employs these mechanisms to facilitate public participation in its deliberations, the Boundary Water Treaty requires only that parties with interests in a matter before the I.J.C. must be heard.<sup>162</sup> The coalition NACE proposal would require broad dissemination of a draft annual report, subject to public notice and comment, and refined through a process of taking testimony at public hearings.<sup>163</sup> Any eventual treaty establishing a NACE could require public participation of the sort the I.J.C. employs voluntarily.

I.J.C. activities also offer models for the NACE. The I.J.C. reference procedure is adaptable to almost any issue,<sup>164</sup> and issues related to the linkage between trade and environmental degradation would be amenable to resolution by an analogous procedure. The data collection, processing and dissemination functions of the I.J.C. are, in essence, already incorporated in both existing NACE proposals.<sup>165</sup> With regard to this func-

---

160. See ENVIRONMENTAL SAFEGUARDS, *supra* note 7, at 2 (requiring the parties to foster the development of local citizen committees to advise and aid the NACE in monitoring and resolving local environmental issues). Cf. DRAFT OUTLINE, *supra* note 16, at 2 (allowing each NAFTA party the option of creating public advisory committees, possibly composed of representatives from citizen groups, environmental organizations, state and local governments, academia, industry, and labor).

161. See *supra* note 129 and accompanying text (considering the I.J.C. commitment to frequent public hearings and broad dissemination of information regarding its activities).

162. See Boundary Waters Treaty, *supra* note 70, art. XII (providing that parties interested in a dispute before the I.J.C. must be given convenient opportunity to be heard). See also *Sixth Biennial Report*, *supra* note 129, at 54 (reiterating the I.J.C. commitment to broad public contribution, but acknowledging criticism that I.J.C. procedures have not always been sufficiently open).

163. See ENVIRONMENTAL SAFEGUARDS, *supra* note 7, art. 2 (describing the contents of the NACE annual report and providing suggestions on how the report should be drafted and modified).

164. See *supra* notes 80-84 and accompanying text (summarizing the I.J.C. reference procedure).

165. See ENVIRONMENTAL SAFEGUARDS, *supra* note 7, arts. 1-2 (proposing an annual reporting process involving extensive data collection and broad dissemination of information). See also DRAFT OUTLINE, *supra* note 16 (incorporating environmental problem identification, technology sharing, and information collection and dissemination functions for the proposed NACE).

tion, a NACE mechanism similar to the I.J.C. advisory boards might also be useful as a coordinating and investigating body. Both existing NACE proposals are deficient in giving the NACE an adjudicatory role in NAFTA related environmental disputes.<sup>166</sup> The I.J.C. model is also of limited use in this context, since in practice, the I.J.C. has no adjudicatory functions.<sup>167</sup> In contrast, the EC Article 169 procedure offers a viable model for an international commission adjudicating a limited type of complaint.<sup>168</sup>

### C. THE ARTICLE 169 PROCEDURE IN PRACTICE

The Article 169 procedure is limited to the extent that the EC Commission will only investigate a complaint alleging that an EC member state is infringing, or failing to implement, EC law.<sup>169</sup> The procedure suffers from other limitations as well.<sup>170</sup> The EC Commission possesses relatively few resources to investigate environmental matters and therefore must rely on member state governments and the public for much of

---

166. See *supra* notes 50-55 and accompanying text (delineating the limited form of complaint resolution embodied in the environmental coalition NACE proposal). Under the coalition proposal, the NACE would be able to hear and investigate complaints, but if a party in violation of environmental requirements chose not to act on NACE recommendations, the only remedy proposed is publication in the NACE annual report. ENVIRONMENTAL SAFEGUARDS, *supra* note 7, art. 3, ¶ 4.

167. But see *supra* notes 76-79 and accompanying text (explaining the I.J.C. application procedure). The application procedure is essentially a permitting process, and as such, it may be likened to an administrative rulemaking. The arbitration provision in the Boundary Waters Treaty could be called an adjudicatory process, but the two governments have never referred a matter to the I.J.C. for arbitration. See *supra* note 86 and accompanying text (noting that the I.J.C. has never arbitrated a dispute). Cf. *supra* notes 138-149 (summarizing the I.J.C. role in the Skagit-High Ross controversy). Although the I.J.C. does not have formal arbitration powers in the absence of a binational reference, I.J.C. action in the Skagit-High Ross certainly resembled arbitration or mediation. Kim and Marts, *supra* note 137, at 272.

168. See *supra* notes 105-116 and accompanying text (outlining the workings and subject matter of the Article 169 procedure).

169. STANLEY P. JOHNSON AND GUY CORCELLE, *THE ENVIRONMENTAL POLICY OF THE EUROPEAN COMMUNITIES* 341 (1989). Although the type of complaint is limited, EC law takes precedence over member state national laws in many fields of environmental law. See *supra* note 98 and accompanying text (listing the areas of law where the EC is competent). Thus, the Article 169 procedure is a single type of complaint that is used to address problems in many legal fields. See EC Commission, *supra* note 108 (categorizing the Article 169 proceedings during the 1980's by area of EC law addressed).

170. Macrory, *supra* note 105, at 362-369.



its information.<sup>171</sup> The number and types of environmental complaints filed vary greatly between the member states, arguably a consequence of differing political and environmental traditions among their inhabitants.<sup>172</sup> This could result in the uneven use of the Article 169 procedure, although there is evidence that the EC Commission is aware of the problem and attempts to compensate for it.<sup>173</sup> Ultimately though, EC environmental law is only enforceable to the extent that the member states and their inhabitants are willing to enforce it.<sup>174</sup>

#### D. THE ARTICLE 169 PROCEDURE AS A MODEL

Despite, or even because of, its limitations, the Article 169 procedure could be adapted to fit the North American context. The NAFTA parties do not intend to cede any sovereign rights, at least not with regard to environmental matters.<sup>175</sup> NAFTA does create a trade commission to resolve disputes arising under the Agreement, but like the I.J.C., the trade commission cannot act unless one of the parties requests it to do so.<sup>176</sup> The NAFTA parties have agreed to the parallel establishment of a North American Commission on the Environment, but as it is currently envisioned by the United States government, the Commission is purely an advisory body.<sup>177</sup> The Article 169 procedure represents a partial cession of sovereignty from the EC member states to the EC Commission. In contrast, the NAFTA parties have agreed that the NACE will not be allowed to impinge seriously on their national sovereignty.<sup>178</sup>

---

171. Macrory, *supra* note 105, at 362-369. When the EC Commission itself initiates an Article 169 procedure, it is most often the result of the failure of member states to provide the EC Commission with the texts of legislation implementing EC directives. *Id.* at 353. See also Interview with Frank Bevacqua, *supra* note 81 (suggesting that the I.J.C. would also have difficulty pursuing its investigations without the active cooperation of the Canadian and United States governments).

172. Macrory, *supra* note 105, at 364.

173. Macrory, *supra* note 105, at 364.

174. Macrory, *supra* note 105, at 368-69.

175. See Press Release, *supra* note 9, at 1 (stating that any environmental cooperation among the NAFTA parties must not encroach upon their sovereignty).

176. NAFTA, *supra* note 2, art. 2004. Further, the NAFTA draft limits the type of environmental dispute referable to the NAFTA Trade Commission. See *supra* note 34 and accompanying text (explaining that where one NAFTA party asserts that an environmental standard of another party is a disguised barrier to trade, the dispute may ultimately be referred to the NAFTA Trade Commission for resolution).

177. See *supra* notes 56-68 and accompanying text (describing the characteristics and weaknesses of the United States government's NACE proposal).

178. See Press Release, *supra* note 9 (declaring that environmental cooperation

Given this limitation and the lack of a North American equivalent to the European Court of Justice, how can the NACE adapt the Article 169 procedure?

The answer lies in NAFTA itself. In addition to the form of environmental dispute already subject to explicit provisions in NAFTA,<sup>179</sup> two types of environmental claims arise implicitly from the more general environmental language of the Agreement. One is a claim based on the Preamble resolutions to foster free trade "in a manner consistent with environmental protection and conservation."<sup>180</sup> The second implicit claim arises under NAFTA Article 1114, establishing a non-binding obligation to avoid the creation of pollution havens.<sup>181</sup>

These provisions of NAFTA, as currently drafted, do not impose any binding legal obligations upon the NAFTA parties.<sup>182</sup> The eventual agreement creating the NACE could explicitly transmute these non-binding commitments into binding legal duties. The parties could then give the NACE jurisdiction over the two newly created types of environmental legal claims: 1) that a NAFTA party is pursuing development in a manner which is environmentally unsustainable; and 2) that a NAFTA party or political subdivision is waiving, derogating from, or otherwise failing to enforce its own environmental laws, for the purpose of encouraging investment.

The EC Article 169 procedure provides an excellent model of how the NACE could adjudicate these claims.<sup>183</sup> Private parties, governmental entities, and non-governmental organizations would file a complaint with the NACE. The NACE would investigate the matter and, if warranted, send a formal notice of infringement to the alleged violating party. If that party did not resolve the problem within a specified time period, the NACE would issue a reasoned opinion delineating the extent

---

among the NAFTA parties must be within a context of respect for national sovereignty).

179. See *supra* note 34 (describing the type of environmental claim the NAFTA Trade Commission will be permitted to adjudicate).

180. NAFTA, *supra* note 2, Preamble.

181. See *supra* notes 35-38 and accompanying text (describing the non-binding character of the existing language).

182. See NAFTA, *supra* note 2, Preamble (resolving to promote sustainable investment and to undertake other NAFTA obligations in ways that are consistent with environmental protection). See *id.* at art. 1114 (stating that the parties should not encourage investment by lowering environmental standards).

183. See *supra* notes 105-116 and accompanying text (outlining the workings of the EC Article 169 procedure).

of the problem, and would specify acceptable remedies. Finally, if no action by the violating party is forthcoming, the NACE should have authority to pursue the case in court. The NACE parties could neatly sidestep the sovereignty problem by giving the NACE standing to litigate these two types of claims in the national courts of the violating party. This solution would minimize the NACE's infringement on national sovereignty, because it would require national courts to resolve the claims on the basis of national laws.

## V. RECOMMENDATIONS

The proposed North American Commission on the Environment should structurally resemble the I.J.C. It should have an equal number of commissioners from each NACE member. The commissioners should be independent of their national governments, subject to a requirement of impartiality, and have a high level of credibility and expertise regarding environmental matters. The NACE should have offices in the national capitals, and in the border regions, with permanent staffs in each office. The NACE would receive funding from annual budgetary allocations from the national governments, or possibly, from dedicated taxes on the additional trade resulting from NAFTA.<sup>184</sup>

In addition to the permanent staff, the NACE could have one or more advisory boards, with members from diverse backgrounds. In particular, the advisory boards must include members from environmental organizations, as well as representatives of the regions whose environments are most affected by increased trade. The organic treaty creating the NACE should require that it maximize public participation in all aspects of its work.

On a functional level, the existing NACE proposals are more or less adequate with regard to data collection and dissemination functions. The I.J.C. reference procedure should be adapted to enable the NACE to study linkages between trade and environmental degradation, at the request of one or more NACE member states. Just as Canada and the United States can now voluntarily refer certain types of disputes to the I.J.C., the NACE agreement should include a provision that allows the three NAFTA parties to refer transboundary environmental disputes to

---

184. See e.g., Ward and Prickett, *supra* note 39, at 44 (proposing that an existing United States value added duty on products assembled in Mexico be dedicated to environmental uses). More generally, the article suggests that "green" taxes would allow some of the economic benefits of increased trade to be dedicated for environmental purposes. *Id.*

the NACE for investigation and recommended solutions.

Finally, the NACE should have at least some authority to oversee and enforce the environmental provisions of NAFTA. NAFTA contemplates one type of international environmental dispute in which one NAFTA party asserts that an environmental regulation or standard of another party constitutes a disguised barrier to trade.<sup>185</sup> In this type of dispute, absent an early settlement, ultimate resolution would be under the auspices of the NAFTA Trade Commission.<sup>186</sup> One obvious role for the NACE is as a participant and advisor in this type of environmental dispute. Specifically, NAFTA should incorporate a provision requiring the concurrence of the NACE before an environmental standard or regulation could be declared a disguised trade barrier by an arbitral panel of the NAFTA Trade Commission.

The Article 169 procedure of the EC Commission suggests that the NACE could have a second type of adjudicatory function. The NACE treaty could create two causes of action. Under these causes of action, an individual or organization would allege that a NAFTA party is promoting development in a generally unsustainable manner, or by failing to enforce or derogating from its environmental laws. The NACE would investigate the complaint to determine whether it is valid, and would issue a reasoned opinion. The NACE would also have standing to pursue the matter in national courts if no remedial action were taken.

### CONCLUSION

The current NAFTA draft includes some positive environmental language, but creates no binding environmental duties for the NAFTA parties. Responding to criticism from environmental organizations, the United States, Canada, and Mexico have agreed, in principle, to create a North American Commission on the Environment. As currently envisioned in separate proposals from the United States Government and a coalition of environmental organizations, the NACE would be primarily an advisory body.

Based on the existing models of the International Joint Commission and the European Community Article 169 procedure, this comment proposes alterations to the existing conceptions of a NACE. These alter-

---

185. See *supra* notes 32-34 and accompanying text (summarizing the only existing NAFTA provisions for the resolution of international environmental disputes).

186. See *supra* note 34 and accompanying text (explaining how a dispute on environmental standards could be resolved under the jurisdiction of the NAFTA Trade Commission).

ations would enhance the advisory role of the NACE and give the NACE greater ability to resolve international environmental disputes. It would also have authority to adjudicate and litigate two newly created types of environmental claims. The NACE outlined in this comment would be an effective, respected, and non-partisan guardian of environmental norms throughout the North American free trade area.