

RECENT DEVELOPMENTS

NIMBY*: NOT IN MEXICO'S BACK YARD? A CASE FOR RECOGNITION OF A HUMAN RIGHT TO HEALTHY ENVIRONMENT IN THE AMERICAN STATES

"Whether many people realize it yet or not, man . . . has by now proved himself incapable of keeping his own species—and others—alive for very much longer. . . , [yet] [t]rue to [the Earth's] generous . . . spirit, it has been giving us one warning after another of what it will be doing . . . for the sake of human survival."¹

I. INTRODUCTION

Nobody wants to live near a hazardous waste facility, and it is common for a whole community to oppose a plan to build a hazardous waste facility in its' neighborhood. Recently, plans to build three new hazardous waste facilities in Texas² fifteen to twenty miles from the Mexico border have

* NIMBY (not in my backyard) is a phenomenon of environmental law which means that while everybody wants hazardous substances to be safely contained or processed, nobody wants them contained or processed in "their backyard."

¹ BENJAMIN HOFF, *THE TE OF PIGLET* 230-31 (1992).

² The plans call for a low-level radioactive waste site in Sierra Blanca, a radioactive tailings site in Spofford, and a toxic waste facility in Dryden. Telephone Interview with C.D. Rao, Radioactive Waste Permit Inspector, Texas Water Commission (Mar. 4, 1993) [hereinafter Rao Interview]; Telephone Interview with David Murry, Toxic Waste Permit Inspector, Texas Water Commission (Mar. 3, 1993) [hereinafter Murry Interview]. The low-level radioactive waste facility will be built and operated by the State of Texas, whereas the radioactive tailings site and the toxic waste facility will be built and operated by private corporations. Rao Interview, *supra*.

Low-level radioactive wastes are generated in the manufacture of such things as luminous watch dials, smoke alarms, and medical instruments. Radioactive tailings are the by-product of the production of uranium. *Id.* Toxic wastes are generated by the use and manufacture of dangerous chemicals. Toxic and radioactive wastes are both commonly referred to as hazardous wastes. *See, e.g.,* Comprehensive Environmental Response, Compensation, and

generated widespread opposition from those who live on either side of the United States and Mexico border.³ The border region is already so severely polluted by raw sewage, toxic waste, and radioactive material that it is described as a "virtual cesspool,"⁴ a "two-thousand-mile Love Canal,"⁵ a "zone of ecological disaster,"⁶ and a "ticking time bomb ready to explode."⁷

Liability Act of 1980, 42 U.S.C. §9601(14) (1988) [hereinafter CERCLA].

³ A representative with the Texas Water Commission (TWC) confirmed that the construction and operation permits for the Dryden project were heavily contested in the public hearing stage, which activated an adjudicatory type of complex hearing. Murry Interview, *supra* note 2. Similarly, the Spofford site has also entered the complex hearing stage, and it is likely the Sierra Blanca site will also be contested once its application is completed later this year. Rao Interview, *supra* note 2. See, e.g., *Ecology Groups Hope Clinton Will Stop Nuclear Dump, Mexico Will Oppose Toxic Dumps Along Border With U.S.*, Notimex Mexican News Service, Dec. 17, 1992, available in LEXIS, Nexis Library, Notimx File; *Mexico Will Oppose Toxic Waste Dumps Along Border With U.S.*, Reuters, Mar. 17, 1992, AM Cycle, available in LEXIS, Nexis Library, Reuter File; Luis Granovsky, *Planned Nuclear Waste Sites in U.S. Worry Mexicans*, Agence France Presse, March 11, 1992, available in LEXIS, Nexis Library, AFP File; *Telethon Held Against Toxic Waste Dumps*, Notimex Mexican News Service, Aug. 9, 1992; *March Called Against Proposed Toxic Waste Dumps*, Notimex Mexican News Service, Mar. 9, 1992; *10,000 Toxic Waste Protestors Will Block Border Crossings*, Notimex Mexican News Service, Mar. 20, 1992; *Mexican Deputies Protest Construction of Toxic Waste Dumps in Texas*, Notimex Mexican News Service, Apr. 18, 1992.

⁴ Council on Scientific Affairs, *A Permanent U.S.-Mexico Border Environmental Health Commission*, 263 JAMA 3319, 3320 (1990) (discussing environmental health concerns, water pollution, and the border area's high incidence rates for infectious diseases).

⁵ William Greider, *NAFTA and the 'Two-Thousand-Mile Love Canal'*, SAN JOSE MERCURY NEWS, Jan. 10, 1993, at C1 (quoting the National Toxics Campaign). In fact, Stuart Shalat, an environmental epidemiologist who investigated both Love Canal and the Mexican border, stated that the border's environmental problems are "much more severe" than those at Love Canal. Dan Fagin, *Toxic Chemicals Suspected in Texas Fetal Deformities*, TORONTO STAR, July 25, 1992, at D6.

Love Canal was a former hazardous waste disposal site in Niagara Falls, New York, that was filled and developed into a residential district. The area gained national notoriety in 1980, when President Jimmy Carter ordered the evacuation of more than seven hundred households because of high incidence rates of miscarriages, birth defects, and cancers allegedly caused by the presence of unsafe levels of more than eighty toxic chemicals. See generally Valerie J. Stanley, Comment, *Establishing Liability for the Damages from Hazardous Wastes: An Alternative Routes for Love Canal Plaintiffs*, 31 CATH. U. L. REV. 273 (1982).

⁶ *Complaint Filed with Human Rights Group to Halt Construction of Texas Facilities*, Int'l Env't Daily (BNA) (Sept. 17, 1992) (quoting Liliana Flores Benavides, a member of the Mexican House of Representatives and a member of both the Ecology and Border Affairs Committees of the Chamber of Deputies, in a press conference held on Sept. 16, 1992).

This "environmental nightmare"⁸ represents a serious health risk to the almost ten million people who live in the border region.⁹

Richard Gephard, Majority Leader of the U.S. House of Representatives, recently remarked that, "[t]hese health and environmental problems are largely caused by those corporations who rushed to the Mexican side of the border [as part of Mexico's maquiladora law]¹⁰ to take advantage of cheap

⁷ Scott Pendleton, *Points of the Compass*, CHRISTIAN SCI. MONITOR, Jan. 6, 1993, at 10 (quoting Laurance Nickey, director of the EL Paso City-County Health District, discussing toxic and solid waste pollution in the El Paso and Ciudad Juarez border region).

⁸ Jeff Silverstein, *Tax Breaks Poison the Atmosphere for Mexico's Workers*, INDEPENDENT, Apr. 10, 1992, at 17 (discussing health and environmental damages caused by toxic and chemical pollution generated by private United States based companies located in the Mexican border communities).

⁹ Hazardous wastes are linked to a wide assortment of health problems ranging from birth defects and mental retardation to cancer and cardiac arrest. See also Randall Palmer, *U.N. Slams West For Not Ratifying Toxic Waste Pact*, Reuter Bus. Rep., Apr. 14, 1992, available in LEXIS, Nexis Library, Busrpt File; *Joint U.S.-Mexico Research Underway on Border Anencephalic Births*, Nomitex Mexican News Service, Sept. 16, 1992, available in LEXIS, Nexis Library, Notimx File; Dan Fagin, *Toxic Chemical Suspected in Texas Fetal Deformities*, TORONTO STAR, July 25, 1992, at D6.

In 1986, the United States and Mexico jointly recognized that "health and environmental damage may result from improper activities associated with hazardous wastes." La Paz Agreement for Cooperation on Environmental Programs and Transboundary Problems, Aug. 14, 1983, U.S.-Mex. T.I.A.S. 10827, as annexed by Annex III, Agreement of Cooperation Between the United States of America and the United Mexican States Regarding the Transboundary Shipments of Hazardous Wastes and Hazardous Substances, Preamble, Nov. 12, 1986, 26 I.L.M. 25 (1987) [hereinafter the Hazardous Wastes Agreement]. The Basel Convention states that the parties to the Convention are "[a]ware of the risk of damage to human health and the environment caused by hazardous wastes." Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Preamble, Mar. 22, 1989, U.N. Doc. UNEP/WG.190/4, UNEP/IG.80/3, reprinted in 28 I.L.M. 657 (entered into force May 5, 1992).

¹⁰ Initiated in 1965, Mexico's maquiladora program permits foreign owned companies to import components and raw materials duty free, provided the final product is exported. See Review of U.S.-Mexico Environmental Issues, Feb. 25, 1992, at 75 (study conducted by an interagency task force which included representatives from President Bush's Department of State, Treasury, Commerce, Transportation, Agriculture, Justice, Interior, Health and Human Services, Energy, and Labor, the Environmental Protection Agency, the Council of Economic Advisors, and the Office of Management and Budget). Today, there are some 2,064 registered border assembly plants which are mostly owned by United States interests. *Over 2,000 New Mexican Border Plants Registered*, Reuters, Jan. 20, 1993, BC Cycle, available in LEXIS, Nexis Library, Reuter File (citing statistics for the first nine months of 1992 as reported by the National Institute of Geography and Information).

labor and [a] more liberal [labor and environmental] regulatory climate than exists in the United States."¹¹ The problems continue despite the Hazardous Waste Agreement between the United States and Mexico providing that all hazardous wastes are to be returned to their country of origin,¹² the effected ecosystem returned to its *status quo ante*, and compensatory damages paid to the impacted nation¹³ for any damages to persons, property, or the environment.¹⁴ Despite this Agreement, the border region is plagued by lax enforcement and poor tracking procedures.¹⁵ Further compounding the problem are an unknown number of clandestine hazardous

¹¹ Remarks of House Majority Leader Representative Dick Gephard (D-Mo) and Gary Edson, General Counsel for the Office of the U.S. Trade Representative to the Institute for International Economics, Fed'l News Service, July 27, 1992 (transcript from a discussion of the North American Free Trade Agreement).

¹² It is alleged by Alfonso Cipres Villareal, President of the Mexican Ecologist Movement, that more than a million tons of toxic waste enter Mexico through the U.S. border every year. *One Million Tons Toxic Waste Cross Border to Mexico, Ecologists Say*, Notimex Mexican News Service, July 30, 1992, available in LEXIS, Nexis Library, Notimx File.

¹³ International law provides that the action lies in the State itself when one of its' citizens is injured or significantly exposed to the risk thereof by pollution that originated in another State. Any obligation on the part of complainant State to repartate those actually injured is a matter of that State's domestic law. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 602(2) (1987).

¹⁴ Hazardous Wastes Agreement, *supra* note 9, art. 14.

¹⁵ See Greider, *supra* note 5, at C1. Researchers from the General Accounting Office (GAO) found that nobody on either side of the border knows who all the toxic waste generators are, how much toxic waste is generated, nor where the waste goes when it leaves the border factories. *GAO Official Says No Data Available on Toxic Chemical from Maquiladoras*, Int'l Env't Daily (BNA) (Feb. 26, 1992). On August 11, 1992, the GAO released another report that found that none of the new factories studied had prepared an environmental impact statement as required by Mexican law. *North American Free Trade Agreement Greeted with Suspicion by Environmental Groups*, Int'l Env't Daily (BNA) (Sept. 10, 1992).

Despite the GAO's recent findings, Mexico's Secretariat of Social Development (SEDESOL) claims enforcement has improved, and that between 1990 and 1991, the number of border facilities declaring hazardous waste production rose from 6 to 55 percent, while those returning waste to its source rose from 14.5 to 31 percent. *Mexico's Less Restrictive Environmental Laws Seen Attracting Few Industries*, Int'l Env't Daily (BNA) (Dec. 21, 1992). Enforcement will be further enhanced by a joint effort between the EPA and SEDUE to develop a computerized tracking system as part of the Integrated Border Environmental Plan. See Review of U.S.-Mexico Environmental Issues, *supra* note 10, at 125.

waste dumps that operate just inside Mexico¹⁶ receiving illegal wastes smuggled across the border from the United States in order to avoid the high cost of incineration.¹⁷

In light of the past environmental impact foreign industries have had on the border region, the border residents' concern about the future environmental impact of increased industrialization is understandable, especially in consideration of the soon to be completed North American Free Trade Agreement (NAFTA).¹⁸ These concerns are further enhanced by the fact that NAFTA neither addresses substantive environmental issues,¹⁹ nor

¹⁶ See, e.g., *Binational Investigation Underway of Border Toxic Waste Dump*, Notimex Mexican News Service, July 30, 1992, available in LEXIS, Nexis Library, Notimx File (thousands of containers of toxic waste discovered in a Mexicali warehouse); *Joint Mexico-U.S. Team to Study Clandestine Toxic Waste Dump*, Notimex Mexican News Service, Apr. 21, 1992 (320 metal boxes full of toxic chemicals found in Ciudad Juarez); *One Million Tons Toxic Waste Cross Border to Mexico, Ecologists Say*, Notimex Mexican News Service, July 30, 1992 (600 drums of toxic waste discovered in Ciudad Juarez).

¹⁷ In shutting down two illegal dumps, Mexico's Social Development Ministry stated that the cost for legal waste treatment averaged \$500 per drum, whereas the illegal dumpsites only charged around \$70 per drum. *6,500 Drums of Toxic Waste Smuggled into Mexico from U.S.*, Reuters Bus. Rep., Jul. 29, 1992, available in LEXIS, Nexis Library, Busrpt File.

¹⁸ North American Free Trade Agreement, Dec. 17, 1992, U.S.-Mex.-Can., available in LEXIS, Genfed Library, Extra File (Oct. 7, 1992 Draft); See *NAFTA-Related Development Will Demand More Action on Environment, Mexico Says*, Int'l Env't Daily (BNA) (Jan. 8, 1993). NAFTA is a free trade pact for the North American continent that was signed by United States' President Bush, Mexico's President Salinas, and Canada's Prime Minister Mulroney on December 17, 1992. *President Bush Signs NAFTA at Ceremony; Clinton to Meet With Salinas in January*, Int'l Trade Rep. (BNA) (Dec. 23, 1992). Upon ratification by the respective legislatures, NAFTA will create the world's largest and wealthiest single market with a combined gross national product of six trillion dollars and 360 million consumers. Scott Pendleton, *Clinton, Mexican President Endorse Trade Agreement in First Foreign Summit*, CHRISTIAN SCI. MONITOR, Jan. 11, 1993, at 9. With the removal of trade barriers, the concern is that industries will increasingly migrate to Mexico to take advantage of its more lenient environmental regulations. *Id.* at 9; *contra* Arrondale, *Environmental Concerns that Won't Go Away*, GAZETTE (Montreal), May 20, 1992 (arguing that free trade could ultimately improve environmental conditions, because prosperous nations can better afford more aggressive regulation). For a general discussion of the effects of the NAFTA, see Dedra L. Wilburn, *The North American Free Trade Agreement: Sending U.S. Jobs South of the Border*, 17 N.C. J. INT'L & COM. REG. 489 (1992).

¹⁹ See *No Direct Sanctions Allowed if Mexico is Lax in Environmental Enforcement*, Reilly Says, Int'l Trade Rep. (BNA) (Sept. 16, 1992). William Reilly, former President Bush's EPA director, said that "[t]he question of the environment is vital within the framework of the treaty, but last year we decided to handle it outside of the main scope of the talks, and it will

requires new NAFTA industries to export hazardous wastes produced in Mexico back to the country of origin.²⁰ Contemporaneous with the negotiations of the NAFTA, the U.S. Environmental Protection Agency (EPA), along with its Mexican counterpart, the Secretaria de Desarrollo Urbano Y Ecologia (SEDUE), prepared the Integrated Border Environmental Plan (IBEP)²¹ as part of the La Paz Agreement²² to better control the border pollution.²³ Provided the plan is properly enforced, it will help alleviate future border pollution problems. Nonetheless, it is not currently

stay there." *Environment to Remain Outside Free Trade Talks*, Notimex Mexican News Service, June 11, 1992, available in LEXIS, Nexis Library, Notimx File.

President Clinton has stated that he supports NAFTA, although his conviction is that there are still some issues which need to be addressed—including environmental issues. Mary Lenz, *Clinton says Issues Remain on Free Trade Meeting with Salinas Called 'Great for Texas'*, HOUSTON POST, Jan. 9, 1993, at A4; see also, Dan Balz, *Clinton Pledges to Move on Free Trade Agreement: President-Elect Meets President of Mexico*, WASH. POST, Jan. 9, 1993, at A18. In a letter to President Clinton, Scott Hajost, international counsel for the Environmental Defense Fund, an organization with over 200,000 members, said that a U.S.-Mexico environmental treaty is needed to deal with border issues, citizens' lawsuits, and right-to-know laws. *Environmental Defense Fund Contacts President-Elect Clinton on NAFTA*, Bus. Wire, Jan. 7, 1993. President Clinton, however, has refused to say whether he would await the completion of the supplemental agreements before submitting NAFTA to Congress. Balz, *supra*, at A18.

²⁰ See Review of U.S.-Mexico Environmental Issues, *supra* note 10, at 122-23.

²¹ Integrated Environmental Plan for the Mexican-U.S. Border Area [First Stage, 1992-94], 57 Fed Reg. 8453 (1992).

²² La Paz Agreement for Cooperation on Environmental Programs and Transboundary Problems, Aug. 14, 1983, U.S.-Mex., T.I.A.S. 10827, [hereinafter La Paz Agreement]. The La Paz Agreement defines a one hundred kilometer (approximately sixty-two mile) zone on either side of the border that is to be monitored by a joint commission that requires environmental impact statements for any new project within the zone. See *NAFTA-Related Development will Demand more Action on Environment, Mexico Says*, Int'l Env't Daily (BNA) (Jan. 8, 1993).

²³ See Review of U.S.-Mexico Environmental Issues, *supra* note 10, at 31. Richard Kiy, special assistant on U.S.-Mexico border affairs at the Environmental Protection Agency, says that the IBEP will develop a system similar to NEPA whereby toxics will be monitored from "cradle to grave." Scott Pendleton, *Points of the Compass: El Paso*, CHRISTIAN SCI. MONITOR, Jan. 6, 1993, at 10. However, Glenn Harrison, Professor of Economics at the University of South Carolina, declared that the much-touted environmental "border plan" agreed to by Washington and Mexico City was "pure political rhetoric" put into place "to shut up environmentalists." *Mexico's Less Restrictive Environmental Laws Seen Attracting Few Industries*, Int'l Env't Daily (BNA) (Dec. 21, 1992).

funded to clean up the existing pollution problems.²⁴

With the threat that the "environmental nightmare" may get worse, it is understandable that border residents view the three new hazardous waste facilities as further aggravation to an already desperate situation.²⁵ Thus, to prevent the new sources of pollution, Liliana Flores Benavides, a Mexican congresswoman, filed a petition on September 16, 1992 with the Organization of American States' (OAS)²⁶ Inter-American Commission on Human Rights (Commission)²⁷ to block the construction and operation of the three

²⁴ Dianna Solis & Sonia L. Nazario, *U.S., Mexico Take on Border Pollution*, WALL ST. J., Feb. 25, 1992, at B1, B10. Roberto Sanchez, a professor at Colegio de la Frontera Norte in Tijuana, said that the IBEP lacks a long-term approach as well as financial resources. *NAFTA-Related Development Will Demand More Action on Environment, Mexico Says*, Int'l Env't Daily (BNA) (Jan. 8, 1993). The IBEP is funded to attain the following goals: 1) enforcement of existing laws; 2) initiatives for pollution reduction including construction of water and wastewater treatment facilities; 3) education; and 4) creation of a data collection system. See Review of U.S.-Mexico Environmental Issues, *supra* note 10, at 31-34.

²⁵ Mary Benanti, *Hazardous Waste Dumps Subject of Complaint*, Gannett News Service (Sept. 16, 1992).

²⁶ Charter for the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361 as amended by Protocol of Buenos Aires of February 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847. The current members of the OAS are: Antigua and Barbuda, Argentina, The Bahamas, Barbados, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, the United States, Uruguay, and Venezuela.

²⁷ Composed of seven elected non-governmental members who serve four year terms, the Commission was established to promote, protect, and supervise human rights in all OAS member states. See generally Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, 12 HUM. RTS. Q. 439, 445-447 (1990). The Commission is empowered—upon petition or by its own motion—to request information from the government being investigated and, with that government's consent, to visit the site of the alleged violation. *Id.* at 445. Complaints may be lodged with the Commission on behalf of third persons by individuals or groups legally recognized in member states, thus it is not necessary for the complainant to have standing in her own right. See Regulations of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/11.50 doc. 6 (1983), art. 26 [hereinafter Regulations]. In addition, precautionary measures such as injunctive relief can be taken "[i]n urgent cases, when it becomes necessary to avoid irreparable damage to persons." *Id.* art. 29.

Once an investigation is concluded, the Commission drafts an unpublished report which sets forth the facts and the Commission's opinion and conclusions regarding the case, along with recommended measures and a time limit for the state to comply with the measures. See Medina, *supra* at 446. A state's failure to take adequate measures within the allotted time

hazardous waste facilities.²⁸ The petition charges the governments of the United States and Mexico with negligence and indifference to human life in approving the hazardous waste disposal facilities.²⁹ In this regard, the petition is somewhat premature since none of the projects have received final approval from the Texas Water Commission³⁰ or the EPA.³¹ This article, however, presumes that approval is forthcoming.

Purportedly, this is the first human rights petition ever filed with the OAS Commission based on an alleged violation of a human right to a healthy environment.³² And if the petition is successful, those living in the border

limit may lead to publication of the report or even formal charges brought under the jurisdiction of the Inter-American Court on Human Rights. *Id.* at 446. However, since neither the United States nor Mexico recognizes the Court's contentious jurisdiction, they are only subject to its' advisory jurisdiction. *Id.* at 446-47.

The Inter-American Court of Human Rights is an autonomous judicial institution created to interpret and apply the American Convention on Human Rights and other treaties concerning human rights in the Americas. As of October 19, 1992, the fourteen States who have accepted the Court's contentious jurisdiction are: Argentina, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, Panama, Peru, Suriname, Trinidad and Tobago, Uruguay, and Venezuela. *See Press Release, CDH-CP5/92 (Inter-American Court of Human Rights, San José, Costa Rica), Oct. 19, 1992.*

²⁸ Petitions filed with the OAS Inter-American Commission on Human Rights are kept confidential while a case is pending. Benanti, *supra* note 25 (confirmed in several telephone interviews with the OAS Commission's legal and document departments).

²⁹ *Complaint Filed with Human Rights Group to Halt Construction of Texas Facilities, Int'l Env't Daily (BNA) (Sept. 17, 1992); PRD Deputy Denounces Toxic Waste Dumps in OAS, Notimex Mexican News Service, Sept. 23, 1992, available in LEXIS, Nexis Library, Notimx File.* Charged in the petition are the U.S. Environmental Protection Agency, Governor Ann Richards of Texas, the Mexican Foreign Affairs Ministry, and the Mexican Social Development Ministry. *Id.*

³⁰ Rao Interview, *supra* note 2; Murry Interview, *supra* note 2.

³¹ The environmental impact statements (EISs) for the projects were still being prepared when this recent development went to press. Telephone Interview with Lidia Boda-Clista, Mexican Border Siting Coordinator, Environmental Protection Agency (Dallas) (Mar. 11, 1993).

³² *Complaint Filed with Human Rights Group to Halt Construction of Texas Facilities, Int'l Env't Daily (BNA) (Sept. 17, 1992).* The petitioner alleges that geological and hydrological data suggest that the three disposal sites are not appropriate places for disposal of toxic wastes or radioactive material, and that their operation will add to existing health threats to the public on both sides of the border. *Id.* Officials on both sides of the border have expressed concern about the potential for leakage from the sites based on statements made by an American geologist, Paul Bolden, who claims that the proposed waste sites lie above an earthquake fault which could create a radioactive explosion. Luis Granovsky,

region may have finally found a way to compel the governments of the United States and Mexico to take responsibility for the hazardous material dumped in "Mexico's backyard."

II. LEGAL BACKGROUND

A. *General Principles of International Environmental Law*

International awareness of environmental issues has grown at exponential rates in the last twenty-five years.³³ This awareness led to the Stockholm Declaration on the Human Environment in 1972, "which marked the emergence of environmental law as a separate branch of international law."³⁴ The Stockholm Conference also established the United Nations Environment Programme (UNEP),³⁵ and set forth a series of general

Planned Nuclear Waste Sites in United States Worry Mexicans, Agence France Presse, Mar. 11, 1992, available in LEXIS, Nexis Library, AFP File. Furthermore, according to Alert Citizens for Environmental Security "[t]hree out of six commercial waste deposits in the United States have had to close because pollution has been registered in adjacent areas." *Joint Mexico-U.S. Team to Study Clandestine Toxic Waste Dump*, Notimex Mexican News Service, Apr. 21, 1992, available in LEXIS, Nexis Library, Notimx File.

³³ THOMAS J. SCHOENBAUM & RONALD H. ROSENBERG, ENVIRONMENTAL POLICY LAW: PROBLEMS, CASES, AND READINGS 1049 (2d ed. 1991). Professors Schoenbaum and Rosenberg explain that there are several reasons for this increased awareness. It is now realized that the earth is a fragile, interdependent biosphere, which has already been affected to some extent by mankind's technological activities. *Id.* at 1049-50. For instance, it is now quite evident that the use of chlorfluorocarbons (CFCs) as refrigerants and aerosol propellants has caused some destruction of the stratospheric ozone layer, a thin layer of gasses that protect the planet from ultraviolet radiation. Thomas E. Graedel & Paul J. Crutzen, *The Changing Atmosphere*, 261 SCI. AM. 58, 61-64 (1989) in SCHOENBAUM & ROSENBERG, *supra* at 1113-14.

³⁴ *Stockholm Declaration of the United Nations Conference on the Human Environment*, Jun. 16, 1972, U.N. Doc. A/CONF.48/14/Rev.1 (1973) reprinted in EDITH BROWN WEISS ET AL., INTERNATIONAL ENVIRONMENTAL LAW: BASIC INSTRUMENTS AND REFERENCES, 171 (1992) [hereinafter *Stockholm Declaration*]. For a comprehensive discussion of the Stockholm Declaration see, Louis B. Sohn, *The Stockholm Declaration on the Human Environment*, 14 HARV. INT'L L. J. 423 (1973).

³⁵ UNEP is a semi-autonomous special body of the United Nations General Assembly that is mandated to assess, monitor, and protect the human environment by seeking solutions to pollution and promoting sound economic and social development in the nations of the world. See 16th Annual Report of the Council on Environmental Quality, 322-52 in SCHOENBAUM & ROSENBERG, *supra* note 33, at 1055.

principles to inspire and guide states in enacting national environmental laws.³⁶ These general principles address such issues as human rights,³⁷ natural resource management and pollution prevention,³⁸ the relationship between economic development and the environment,³⁹ national planning and demographic policies,⁴⁰ education and scientific research,⁴¹ state sovereignty rights and duties in respect to other states,⁴² and the elimination of nuclear weapons.⁴³

In the aftermath of the Stockholm Conference, several additional principles were added to the international catalog of environmental principles. Since the principles are intended to inspire states to enact national legislation,⁴⁴ an action for an alleged violation of a principle must be based in a nation whose domestic laws incorporate that principle and grant its courts the jurisdiction to adjudicate the action.

Perhaps the most widely recognized principle of international environmental law is the "polluter pays principle," which requires individual polluters to internalize the cost of their pollution to ensure that the market reflects the true cost of the polluter's product.⁴⁵ For instance, U.S. environmental law

³⁶ The Stockholm Declaration is not intended to be legally binding, even though it often uses normative, rather than precatory language. Weiss, *supra* note 34, at 172.

³⁷ Stockholm Declaration, *supra* note 34, principle 1 (condemning policies that promote or perpetuate apartheid, racial segregation, discrimination and oppression, and pronouncing that environmental quality is fundamental to human dignity).

³⁸ *Id.* princs. 2-7 (suggesting that nations affirmatively plan exploitation and conservation of natural resources, and develop strategies to deal with pollution).

³⁹ *Id.* princs. 8-12 (recognizing that a less developed nation will not sacrifice its economic and social development for global environmental protection without technological and monetary incentives).

⁴⁰ *Id.* princs. 13-18 (promoting rational planning of natural resources, development, and population growth).

⁴¹ *Id.* princs. 18-20 (encouraging the free transfer of education and technology to solve environmental problems).

⁴² *Id.* princs. 21-24 (declaring that a state has the sovereign right to exploit its own resources, provided it does not cause environmental damage in other states).

⁴³ *Id.* princs. 25-26 (calling for cooperation to reduce weapons and other technology that has the capacity to destroy the world).

⁴⁴ See WEISS, *supra* note 34, at 171.

⁴⁵ See *United Nations Rio De Janerio Conference on Environment & Development*, June 14, 1992, U.N. Doc. A/CONF.151/5, principle 16 [hereinafter Earth Summit]; see also *Organisation for Economic Co-Operation and Development Council Recommendation on the implementation of the Polluter-Pays-Principle*, Nov. 14, 1974, 14 I.L.M. 234 (1975), as amended by *Organisation for Economic Co-Operation and Development Council Recommen-*

places liability for any reasonable response costs incurred by a plaintiff as a result of a release or a threatened release of a hazardous substance on the generator, arranger, or transporter of the hazardous substance, as well as on the owner or operator of the recipient hazardous waste facility.⁴⁶

One of the most significant principles of international environmental law to emerge in recent years is the concept of "sustainable development," which recognizes that the twin goals of environmental protection and economic development are mutually supportive and interdependent, rather than contradictory.⁴⁷ Widescale recognition of sustainable development lowered what was once a substantial barrier to international environmental cooperation between the developed and developing nations.⁴⁸ Such increased levels of cooperation helped garner worldwide acceptance of the 1992 United Nations Rio De Janeiro Conference on Environment and Development (Earth Summit),⁴⁹ which based its general principles on sustainable development.⁵⁰

Even though sustainable development has increased international environmental cooperation, national sovereignty remains a formidable barrier to cooperation as states adamantly demand the right "to exploit their own resources pursuant to their own environmental and development policies."⁵¹ The sovereignty argument is based on the principle that every nation has a

dation on the implementation of the Polluter-Pays-Principle to Accidental Pollution, Jul. 7, 1989, 28 I.L.M. 1321 (1989).

⁴⁶ CERCLA § 9607.

⁴⁷ LYNTON K. CALDWELL, *INTERNATIONAL ENVIRONMENTAL POLICY: EMERGENCE AND DIMENSIONS*, 208 (2d ed. 1990) (quoting UNEP Executive Director Mostafa K. Tolba, *Sustainable Development: Constraints and Opportunities* (London: Butterworth 1987)).

⁴⁸ *Id.* at 311. Prior to the 1980s, a widely held belief was that socioeconomic development and environmental protection were contrary goals and that to attain one the other had to be sacrificed. Thus, the developed and developing nations were divided over the importance of environmental regulation. Now, most countries realize that socioeconomic development and environmental quality are convergent goals and that failure to control pollution will have both global socioeconomic and global environmental repercussions. As a result, industrialized and developing nations now understand that economic and technological aid must be combined with environmental regulation to sustain development. See SCHOENBAUM & ROSENBERG, *supra* note 33, at 1200.

⁴⁹ Earth Summit, *supra* note 45.

⁵⁰ *Id.* For instance, Principle 4 states that, "[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." *Id.* princ. 4.

⁵¹ *Id.* princ. 2 (reaffirming Principle 21 of the Stockholm Conference).

different perspective of the social costs and benefits that go with pollution control.⁵² Nevertheless, the sovereignty barrier has been weakened to the extent that nations now realize, as a result of sustainable development, that nationalism must occasionally yield to protect the world's *shared* global resources.⁵³

B. International Conventions and the Right to a Healthy Environment

One of the staunchest principles of international environmental law is the fundamental right to an environment adequate to support human health and dignity. The United Nations General Assembly acknowledged the existence of this right as early as 1968 in a resolution. This resolution stated a concern that profound environmental changes in the wake of technological development could affect the enjoyment of basic human rights.⁵⁴ This same resolution led to the Stockholm Conference in 1972, where Principle 1 explicitly proclaimed the existence of a fundamental right to live life with dignity in an environment of adequate quality.⁵⁵

⁵² When choosing between a cleaner environment and less poverty, many poorer nations choose more pollution in the belief that they will enjoy greater economic growth. *The Freedom to be Dirtier than the Rest; Why Differing Environmental Priorities Cause Problems for Trade*, ECONOMIST, May 30, 1992, at 7. For these countries it may make more sense to persuade them to take reasonable precautions against pollution, rather than to attain pollution controls equal to those in the industrialized nations. *Id.*

Even two countries at the same level of development place different social value on pollution control due to differences in the two nations' environments and in the perceived need to control pollution. *Id.* For instance, an oil spill in the turbulent North Sea has less of an environmental impact than an oil spill in the calm waters off the coast of Alaska. *Id.* Therefore, since the impact of an oil spill off the Alaska coast will be greater than an oil spill off the North Sea coast, the Alaskans will place a higher value on oil spill prevention than the people who live in the North Sea area.

⁵³ See SCHOENBAUM & ROSENBERG, *supra* note 33, at 1200; see also Earth Summit, *supra* note 45, princ. 12 (proclaiming that "[E]nvironmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus").

⁵⁴ *Problems of the Human Environment*, 1968 U.N.Y.B. 473, 476, U.N. Doc. A/L.533 (adopted without objection on Dec. 3, 1968).

⁵⁵ Stockholm Conference, *supra* note 34, princ. 1 ("Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being, and he bears a solemn responsibility to protect and improve the environment for present and future generations").

Although a right to a healthy environment exists in principle, it has yet to be legally recognized by international law. The Experts Group on Environmental Law of the United Nation's World Commission on Environment and Development (WCED) did suggest legal recognition in its global agenda to support environmental protection and sustainable development.⁵⁶ In addition, the Declaration of the Hague took preliminary steps toward legal recognition in its attempt to establish an international regulatory authority empowered to seek remedies to protect the earth's atmosphere, preserve the ecosystem, and protect "the right to live in dignity in a viable global environment."⁵⁷ Moreover, Principle I of the 1992 Earth Summit, proclaims that the human right to a healthy environment is central to the concept of sustainable development.⁵⁸ Despite these attempts, the right to a supportive environment is not yet protected by international law.

C. Regional Conventions and the Right to a Healthy Environment

The right to a healthy environment is recognized in several regional agreements, although most of these agreements either simply recommend recognition of the right or limit the right to collective, rather than individual recognition. An example of an individual recognition type of agreement was adopted by the European Parliamentary Assembly in its recommendation that Member States provide every person with the fundamental right to an environment conducive to good health and accept the duty to preserve and protect the environment.⁵⁹

⁵⁶ EXPERTS GROUP ON ENVIRONMENTAL LAW OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, LEGAL PRINCIPLES FOR ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT, U.N. Doc. WCED/86/23/Add.1 (16), A/42/427, Annex I (1986), reprinted in WEISS, *supra* note 34, at 187. The WCED was established by the United Nations in 1984, and one of its duties was to appoint a small group of international legal experts to develop legal principles to support environmental protection and sustainable development. See *id.* at 188 (editors' comment to WCED's report).

⁵⁷ Declaration of The Hague, March 11, 1989, U.N. Doc. A/44/340, E/1989/120, 28 I.L.M. 1308, 1309 (1989), reprinted in WEISS, *supra* note 34, at 247, 248 (neither the United States nor Mexico signed the Declaration of the Hague).

⁵⁸ Earth Summit, *supra* note 45, princ. 1.

⁵⁹ Recommendation to the Parliamentary Assembly of the Council of Europe on the Formation of European Charter and a European Convention on Environmental Protection, EUR. PARLE. ASS., 42nd Sess., Recommendation No. 1130 (1990).

An agreement advocating collective recognition is exemplified by the African Charter on Human Rights, which provides that all people have the right to a general satisfactory environment favorable to their development.⁶⁰ The language "all people" is applied literally to mean the collective state, leaving individuals powerless to enforce the right.⁶¹ Similarly, the Declaration on the Basic Duties of Asian Peoples and Governments recognizes a collective right to prevent environmental degradation and to preserve, manage, and use natural resources in a manner that will make resources available for future generations.⁶²

Unlike the other regional agreements, the OAS's Protocol of San Salvador⁶³ explicitly provides individuals with the right to a healthy environment⁶⁴ and places responsibility for environmental protection, preservation, and improvement on the signatory states.⁶⁵ This protocol supports the right to a healthy environment through the legal mechanisms of the Inter-American human rights system,⁶⁶ which includes the power to

⁶⁰ African [Banjul] Charter on Human and Peoples' Rights, art. 24, *adopted* June 27, 1981, Organization of African Unity Doc. CAB/LEG/67/3/Rev. 5, 21 I.L.M. 58, 63, *reprinted in* INTERNATIONAL HUMAN RIGHTS INSTRUMENTS (R. Lillich 2d ed. 1990) [hereinafter African Charter].

⁶¹ Janusz Symonides, *The Human Right to a Clean, Balanced and Protected Environment*, 20 INT'L J. LEGAL INFO. 24, 26 (1992).

⁶² Declaration on the Basic Duties of Asian Peoples and Governments, art. 3, *adopted* Dec. 9, 1983, *reprinted in* WEISS, *supra* note 34, at 242.

⁶³ San Salvador Additional Protocol [to the American Convention on Human Rights] On Economic, Social and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. No. 69, *reprinted in* 28 I.L.M. 161 (1989) [hereinafter Protocol of San Salvador or Protocol].

⁶⁴ *Id.* at 165 (article 11 provides that "[e]veryone shall have the right to live in a healthy environment").

⁶⁵ Article 11 provides that "[t]he States Parties shall promote the protection, preservation and improvement of the environment." *Id.* at 165. As of July 1991, the following fifteen States have signed the Protocol of San Salvador: Argentina, Bolivia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Mexico, Nicaragua, Panama, Peru, Suriname, Uruguay, and Venezuela. *See* Recent Actions Regarding Treaties to Which the United States is Not a Party, San Salvador Additional Protocol [to the American Convention on Human Rights] On Economic, Social and Cultural Rights, 30 I.L.M. 1148 (1991).

⁶⁶ Protocol of San Salvador, *supra* note 63, at 168. Article 19, paragraph 7 provides that the Inter-American Commission on Human Rights may formulate observations and recommendations as it deems pertinent concerning the status of the economic, social, and cultural rights established in the [San Salvador] Protocol. *Id.* at 168. However, article 19, paragraph 8 urges the Commission to take into account the progressive nature of the rights observed by the Protocol in the discharge of its duties. *Id.* at 169.

respond to individual and third party complaints, to conduct on-site investigations, and, in some cases, to take precautionary measures to enjoin anticipated violations.⁶⁷

D. Human Rights Policy

The international recognition of fundamental human rights predates the international environmental movement by approximately twenty-five years, and thus, the events that gave rise to its birth in the 1940s are particularly helpful in gaining an understanding of human rights law. Before the 1940s, human rights were based on natural law and were national in scope, but the atrocities of World War II and the Holocaust changed the international human rights perspective and revealed the need to protect fundamental individual rights from uncontrolled state sovereignty.⁶⁸ The changed attitude helped lead to the establishment of the United Nations,⁶⁹ and subsequently to the United Nations' adoption of the Universal Declaration of Human Rights, which still protects international human rights today.⁷⁰

The new attitude toward international human rights also inspired the European and American regional organizations to establish legal mechanisms to promote and protect fundamental rights among Member States.⁷¹ The cornerstone of U.S. human rights law is set out in the American Declaration

⁶⁷ See *supra* note 27.

⁶⁸ FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS; LAW, POLICY, AND PROCESS* 1 (1990). During the 1930s and 1940s, Germany tortured and killed approximately 12 million of its own citizens and nationals of neighboring countries with little interference from other nations. *Id.*

⁶⁹ See U.N. CHARTER art. 1.

⁷⁰ Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G.A. Res. 217A (III), 3 U.N. Doc. A/810 (1948), 43 AM. J. INT'L L. SUPP. 127 (1949), *reprinted in* INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 440.1 (R. Lillich 2d ed. 1990).

⁷¹ See American Declaration of the Rights and Duties of Man, May 2, 1948, Res. XXX, O.A.S. Off. Rec. OEA/Ser.L/V/II.23/Doc. 21/Rev. 6 (English 1979), 43 AM. J. INT'L L. SUPP. 133 (1949), *reprinted in* INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 430.1 (R. Lillich 2d ed. 1990), [hereinafter American Declaration]; European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221 *reprinted in* INTERNATIONAL HUMAN RIGHTS INSTRUMENTS, *supra* at 500.1.

of the Rights and Duties of Man,⁷² which acknowledges the dignity of the individual, and recognizes that, "the essential rights of man are not derived from the fact that he is a national of a certain State, but are based upon attributes of his human personality."⁷³ In other words, consistent with international human rights policy, this declaration recognizes that the protection of essential individual rights is independent of nationality, and as such, protects the individual from uncontrolled state sovereignty.⁷⁴

E. The Merger of Human Rights and Environmental Protection

When the right to a healthy environment was first suggested, human rights activists refused to acknowledge a connection between human rights and environmental protection due to the concern that a new human right would

⁷² American Declaration, *supra* note 71. Representative of the thirty-eight enumerated rights proclaimed by the Declaration are: the right to life, liberty and personal security; the right to due process and equality before the law; the freedom of opinion and expression; and the right to the preservation of health and well-being. *Id.* at 1, princs. 1, 2, 4, 11, 26.

⁷³ *Id.* at 430.1; *see also* Protocol of San Salvador, *supra* note 63, at 168 (stating that domestic laws should be enacted to compliment and reinforce the rights).

⁷⁴ *See* William A. Shutkin, Note, *International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment*, 31 VA. J. INT'L L. 479, 485-86 (1991); *see also* Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103, 107 (1991) ("even a representative democracy may not produce legislation that limits or abolishes the individual right to be free from cruel, inhuman, or degrading treatment or punishment"); *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities in its Fortieth Session*, Commission on Human Rights, Subcommission on Prevention of Discrimination and Protection of Minorities, U.N. ESCOR, 44th Sess., U.N. Doc. E/CN.4/Sub.2/1988/45, at 117-18 (1988) [hereinafter *Report on Protection of Minorities*]. *But cf.*, David Forsythe, *Human Rights, The United States and The Organization of American States*, 13 HUM. RTS. Q. 66 (1991) (arguing that the Inter-American system of human rights is a paradox in that the member states recognize moral and cultural rights to protect humans, yet resist efforts to give the OAS sufficient enforcement power because of overriding concerns for national sovereignty). This argument is mistaken, however, since law depends upon whether those affected by the law honor it as binding law, not by its enforceability. *See generally*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §101 introductory note. For instance, most nations honor adverse judgments in citizen suits, even though a private citizen is powerless to enforce a favorable judgment against the nation.

devalue the previously recognized human rights.⁷⁵ Environmentalists, on the other hand, openly embraced the concept, since the legal mechanisms of international human rights law afford far greater protection than those of international environmental laws.⁷⁶ This greater protection derives from the ability of human rights laws to bypass state sovereignty to protect individuals,⁷⁷ whereas environmental laws generally yield to such concerns.⁷⁸ Nevertheless, the current trend in international law and policy is to treat human rights and environmental protection as two separate but overlapping social interests that share a common core of objectives.⁷⁹ The overlap of interests provides the basis for a limited merger of human rights law and environmental law to create a human right to a healthy environment.⁸⁰

III. DISCUSSION

A. *The Petition*

The petition to enjoin the construction and operation of the three Texas hazardous waste facilities is purportedly the first complaint filed with the OAS Inter-American Human Rights Commission that alleges a violation of the right to a healthy environment.⁸¹ However, for the petition to succeed against the governments of both the United States and Mexico, the Commission must find that each acted negligently and indifferently in

⁷⁵ See Iveta Hodkova, *Is There a Right to a Healthy Environment in the International Legal Order?*, 7 CONN. J. INT'L L. 65, 71 (1991) (citing the Proposal to Add a Protocol to European Convention on Human Rights to Guarantee Individuals the Right to a Pure Environment).

⁷⁶ *Id.* at 71. The link between the environment and human rights is increasingly being recognized by legal commentators and authorities. Shelton, *supra* note 74, at 133; see, e.g., Symonides, *supra* note 61; Hodkova, *supra* note 75; Shutkin, *supra* note 74.

⁷⁷ See *supra* part II.D for discussion of international human rights policy.

⁷⁸ See *supra* notes 51-53 and accompanying text for discussion of national sovereignty as a barrier to international cooperation.

⁷⁹ Shelton, *supra* note 74, at 105. Although the two fields share common interests, neither field fits snugly within the framework of the other, and any attempt to force all environmental issues into a human rights rubric will fundamentally distort the concept of human rights. *Id.* at 105.

⁸⁰ *Id.* at 106.

⁸¹ See *supra* note 32 and accompanying text for a discussion of the elements of the petition.

approving the hazardous waste facilities.⁸²

Although the Commission keeps pending petitions confidential, the petitioner has stated that the claim stems from the joint disregard of the geological and hydrological data in the areas around the planned facilities.⁸³ Provided the allegations are true, seismic disturbances and ordinary groundwater migration could seriously contaminate the Rio Grande aquifer,⁸⁴ which serves as the major source of water for the entire Texas and Mexico border zone.⁸⁵ Contamination of the water supply would cause great hardship, disease, and death for the millions of people who live in the border zone and depend upon the Rio Grande aquifer for their water supply.

B. The Incorporation of International Environmental Law Principles in United States Domestic Law

Since legal recognition of a general principle of international environmental law depends upon its incorporation into national environmental law,⁸⁶ an action based on environmental law to enjoin the construction and operation of the three waste facilities will be brought in either a federal or state court applying either United States or Texas law.⁸⁷

Under U.S. federal law, an injunction can be issued if a court determines that the responsible government agency failed to follow the procedures of the National Environmental Policy Act (NEPA) to assess whether the particular project required a detailed environmental impact statement (EIS).⁸⁸

⁸² See *supra* notes 29-31 and accompanying text for a discussion of the charges.

⁸³ See *supra* note 28.

⁸⁴ See *supra* note 32 for a discussion of the potential leakage from the sites.

⁸⁵ This aquifer provides the various border communities with potable water, irrigation water, and a source for fresh fish. See Peter Lennon, *Mexico: Environment - Profits of Doom on the Border of Blight with the USA*, *GUARDIAN*, Aug. 21, 1992.

⁸⁶ See *supra* note 36 and accompanying text.

⁸⁷ The federal district courts have original jurisdiction of all civil actions arising under the laws of the United States. 28 U.S.C. §1331 (1991). In Texas, a person who is affected by a final decision of the Texas Radiation Control Agency (Agency) and who has exhausted all the administrative remedies of the Agency is entitled to judicial review. *TEX. HEALTH & SAFETY CODE ANN.* § 401.341 (West 1992). A Texas district court has the jurisdiction to enjoin a violation or threat of a violation of the Texas toxic waste laws. *TEX. HEALTH & SAFETY CODE ANN.* § 361.273 (West 1992).

⁸⁸ National Environmental Policy Act of 1969, 42 U.S.C. § 4331 (1969) [hereinafter NEPA]. Normally, an environmental impact statement must be prepared if the proposed project involves a major federal action that significantly affects the human environment. *Id.*

Nevertheless, before any new project within the one hundred kilometer border zone can begin, an EIS must be prepared and approved by a joint United States and Mexico commission of environmental officials in accordance with the La Paz Agreement.⁸⁹ And provided the EIS is properly prepared,⁹⁰ a federal court will not question the substantive decision of the relevant government agency.⁹¹ Presumably, the approval of the joint commission will be given the same deference as a United States governmental agency.

In addition to an attack on the adequacy of the EISs, the petitioner may also bring an action directly against the private developer of the waste facilities. In bringing an action against the private developers, the petitioner must prove that the facilities create a particular, imminent threat of personal harm.⁹² Given that the area is already so severely polluted by so many different sources, it will be very difficult to prove, to any degree of certainty, that the new facilities create an additional, immediate health risk to the border residents.

The cumulative effect of the different pollution sources makes a mockery out of the sustainable development principle⁹³ since there is ample evidence

at § 4332(2)(C); see M. Diane Barber, Note, *Bridging the Environmental Gap: The Application of NEPA to the Mexico-United States Bilateral Trade Agreement*, 5 TUL. ENV'T L. L. J. 429 (1992) (discussing the transboundary application of NEPA).

⁸⁹ See *supra* note 22 for a discussion of the environmental impact statement requirements of the La Paz Agreement.

⁹⁰ An adequate EIS must make impact predictions, describe mitigation measures, list alternatives, and be consistent with other programs, policies, and actions. See *Environmental Impact Assessment, Proceedings of a Conference on the Preparation and Review of Environmental Impact Statements* 56 (West Point, New York 1987), reprinted in SCHOENBAUM & ROSENBERG, *supra* note 33, at 121-22.

⁹¹ See *Marsh v. Oregon Nat. Resources Couns.*, 490 U.S. 360, 377 (1989) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)). NEPA merely establishes rigid procedures to ensure that government agencies take a "hard look" at environmental consequences, but it does not mandate particular results. *Id.* at 371-74; see also *Robertson v. Methow Valley Citizens Couns.*, 490 U.S. 332, 351 (1989) ("NEPA merely prohibits uninformed—rather than unwise—agency action").

⁹² *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992) (to have standing to sue, a plaintiff must have suffered an actual or imminent concrete harm, causally connected to the defendant's conduct, and redressible by a favorable decision). A plaintiff can bring an action for an organization provided at least one member of that organization has suffered a personal harm. See *Sierra Club v. Morton*, 405 U.S. 727, 739 (1971).

⁹³ See *supra* notes 47-50 and accompanying text for discussion of the sustainable development principle.

that the border environment has often been sacrificed, rather than enhanced by socioeconomic development.⁹⁴ Unfortunately, the sustainable development principle is not presently codified in any substantive United States environmental law, and without legal recognition the principle is unenforceable, even though it may be voluntarily honored by the United States.

Legal recognition of sustainable development may eventually be achieved by the Integrated Environmental Border Plan,⁹⁵ however, it is still too early to make that determination.⁹⁶ Nevertheless, since the principle of sustainable development is so widely recognized by the international community,⁹⁷ it should serve as a factor in the issue of whether the governments of the United States and Mexico have indeed acted indifferently toward the people living in the border zone.

State sovereignty is another factor that should be considered by the Commission, since international environmental rights generally yield to sovereignty rights.⁹⁸ Due to this overriding concern with sovereignty rights, the sovereignty factor will usually outweigh the other factors in most actions for a right to a healthy environment,⁹⁹ although uncontrolled sovereignty should have its limits. Sovereignty's limits are reached if, as is alleged in this case, it is found that the governments of the United States and Mexico systematically disregarded human life, health, and dignity in the border area to promote state domestic and bilateral policies.

⁹⁴ See *supra* notes 4-15 and accompanying text for a discussion of the current environmental problems in the United States-Mexican border region.

⁹⁵ Integrated Environmental Plan for the Mexican-U.S. Border Area, *supra* note 21.

⁹⁶ See *supra* note 23 and accompanying text for a discussion of the predicted effects of the Border Plan. Before leaving office, President Bush increased the budget for the border region to \$330 million, a 49% increase. *Bush Budget Reflects 24 Percent Increase on Environmental Programs*, Int'l Env't Daily (BNA) (Jan. 8, 1993). Mexico has already provided its pledge of \$125 million for 1993. However, according to a study by the Texas Department of Commerce, the estimated costs for the construction of water and waste water treatment facilities in Texas alone exceeds \$2 billion. And it is estimated that the total border cleanup will exceed \$5 billion. *Id.*

⁹⁷ See *supra* notes 48-50 and accompanying text for a discussion of sustainable development as the base principle at the Earth Summit.

⁹⁸ See *supra* notes 51-53 and accompanying text for a discussion of national sovereignty as a formidable barrier to international environmental cooperation.

⁹⁹ See *supra* note 52 for a discussion of the justification in allowing the sovereignty factor to carry the most weight in environmental actions.

C. *The International Right to a Healthy Environment*

For twenty-five years international environmental law has promoted the principle that a healthy environment is necessary to enjoy human life and dignity.¹⁰⁰ This principle has served to inspire and guide state legislation, but it has never been formally recognized as an international legal principle, although it is part of the United Nations General Assembly's agenda to promote environmental protection and sustainable development.¹⁰¹

Without legal recognition of the right to a healthy environment, international tribunals will not have the jurisdiction to hear claims that allege infringement of the right. As it now stands, the international recognition of a right to a healthy environment is not binding and the states decide whether, when, and to what extent they will honor the right. It follows that even though the right to a healthy environment is stated in several international declarations,¹⁰² an action cannot be brought in an international human rights court because of the court's lack of jurisdiction to hear the claim. Nevertheless, the declaration of the principle should carry some weight with the Commission since it manifests the longterm theoretical acceptance of the right by the international community.¹⁰³

D. *The Regional Right to a Healthy Environment*

In contrast, the Protocol of San Salvador explicitly declares the right to a healthy environment as a legal right,¹⁰⁴ and since it is given legal recognition, the Commission should apply the right to the Protocol's signatory states.¹⁰⁵ However, since Article 19 of the Protocol urges the Commission to take into account the progressive nature of the Protocol's rights,¹⁰⁶ and in recognition of a state's sovereign right to exploit its natural resources,¹⁰⁷

¹⁰⁰ See *supra* text accompanying notes 54-55.

¹⁰¹ See *supra* notes 56-57 and accompanying text.

¹⁰² See, e.g., the Stockholm Declaration, *supra* note 34; Earth Summit, *supra* note 45.

¹⁰³ See *supra* part II.B. for a discussion of the right to a healthy environment as accepted in international conventions.

¹⁰⁴ See *supra* notes 63-65 and accompanying text for a more specific discussion of this right as granted in the Protocol of San Salvador.

¹⁰⁵ See *supra* note 65 for relevant language binding the signatory states to protect the environment.

¹⁰⁶ Protocol of San Salvador, *supra* note 63, art. 19, para. 8, at 169.

¹⁰⁷ See *supra* note 51.

the application of the right to a healthy environment should be limited to situations where a nation knowingly permits dangerous levels of pollution to be systematically deposited within its territories to such a degree that there exists a substantial threat to human life, health, and dignity.

It is undisputable that the past and present environmental damage along the United States and Mexico border is systematic and widescale,¹⁰⁸ and it is argued by some that the extent of the degradation suggests the existence of a tacit agreement between the governments of the United States and Mexico not to enforce environmental laws in the region in order to promote economic growth.¹⁰⁹ Notwithstanding the existence of such a tacit agreement, the failure to strictly enforce pollution laws has certainly encouraged non-compliance by some companies located in the border zone.¹¹⁰

Since the pollution along the border is so widescale and systematic, the issue in this dispute reduces to whether the governments of the United States and Mexico will expose border residents to a substantial threat of life, health, and dignity by approving new hazardous waste facilities. The extent of this threat will depend on the Commission's factfinding investigation. If the Commission agrees with the petitioner's allegations that because of the region's geology and hydrology, the waste facilities will create a good probability of contamination of the Rio Grande aquifer, the Commission should determine that the border residents will be exposed to a substantial threat of harm.

Nevertheless, since the United States failed to sign the Protocol of San Salvador, it will not be directly bound by the Commission's decision.¹¹¹ However, the United States remains subject to the advisory jurisdiction of the Commission,¹¹² which may be sufficient to compel the United States to honor the Commission's decision. Mexico, on the other hand, is a signatory state to the Protocol of San Salvador, and as a signatory state is obligated to honor the Commission's contentious jurisdiction.¹¹³

¹⁰⁸ See *supra* notes 4-17 and accompanying text.

¹⁰⁹ See Lennon, *supra* note 85.

¹¹⁰ See *supra* notes 15-17.

¹¹¹ See *supra* note 65 for a list of states that have signed the Protocol.

¹¹² See *supra* note 27.

¹¹³ See *supra* note 65.

E. Human Rights Law

It is important to realize that human rights law protects individuals from a government's political processes.¹¹⁴ This protection is what makes human rights law such a unique and powerful body of international law, but the power to protect can be undermined by the broad application or recognition of too many fundamental rights.¹¹⁵ Nevertheless, where uncontrolled state action amounts to oppression over the individual, the individual should have a legal mechanism available to limit the state's power.

The border zone has certainly been subjected to the political process as evidenced by the maquiladora laws,¹¹⁶ NAFTA,¹¹⁷ and IBEP.¹¹⁸ Whether such political actions amount to oppression will depend upon the Commission's factfinding investigation. Wide deference should be given to the political decisions. However, if these decisions are oppressive to the health of border individuals, a human rights organization, such as the Commission, must intervene to protect the individual's fundamental right to a healthy environment.

F. The Merger of Human Rights Law and Environmental Protection

Human rights law is concerned with the protection of the individual,¹¹⁹ whereas environmental law is concerned with the protection of nature for the ultimate benefit of mankind.¹²⁰ However, since all life forms that exist within a given ecosystem are interdependent, it is impossible to separate the interests of mankind from those of nature.¹²¹ It follows that a harm to nature is a harm to mankind, and, since mankind is the aggregate of individuals, a harm to nature is a harm to the individual. Therefore, where a government sanctions a harm to nature, it effectively sanctions a harm to

¹¹⁴ See Shelton, *supra* note 74, at 107.

¹¹⁵ *Id.* at 121.

¹¹⁶ See *supra* notes 10-11 and accompanying text.

¹¹⁷ See *supra* note 18.

¹¹⁸ See *supra* note 21 and accompanying text.

¹¹⁹ *Report on Protection of Minorities, supra* note 74, at 117-18.

¹²⁰ ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 17-18 (1991).

¹²¹ *Id.* at 11.

the individual resulting in state sanctioned oppression.¹²²

This is not to say that all harms to nature should be recognized as harms to individuals, nor that individuals should have a fundamental right to an ideal environment, since in today's world a certain degree of pollution is inevitable.¹²³ Rather, the right to a healthy environment is the right to exist in an environment free of dangerous pollution that does not exceed the possibility of self-purification nor endanger the region's ecological balance.¹²⁴ In other words, the right to a healthy environment should be limited to harms or threatened harms that significantly affect the ecological balance so as to deny the possibility of self-purification.

Provided the hazardous waste sites are approved by the governments of the United States and Mexico, and the Commission determines that the approval disregards the health of the individuals who live close to the facilities due to the effect of the sites on the ecological balance of the border zone, the Commission should rule that both the governments of the United States and Mexico have violated the human right to a healthy environment.

IV. CONCLUSION

Today, it is widely realized that our global environment is rapidly deteriorating and that mankind's failure to alleviate this deterioration is a serious threat to the world's ecological balance as well as to the eventual survival of humans.¹²⁵ This deterioration is quite evident along the United States and Mexico border where, in some areas, the pollution poses a significant threat to human life, health, and dignity.

Countering the pollution threat are human rights law and environmental protection law, which form the basis of a human right to a healthy environment. This right is explicitly expressed in Principle 11 of the Organization of American States' Protocol of San Salvador, which grants the OAS Commission the power to enforce the right against signatory states. However, the Protocol does recommend that the OAS Commission apply the right cautiously to avoid unnecessary impaction of state sovereignty rights. Regardless, a fundamental human right to a healthy environment should be recognized when the protection of the environment is neglected by a state to

¹²² See *Report on Protection of Minorities*, *supra* note 74, at 117-118.

¹²³ Symonides, *supra* note 61, at 28 n.11.

¹²⁴ *Id.*

¹²⁵ Shelton, *supra* note 74, at 104.

such an extent that the individuals who live in the affected region are oppressed.

The protection of the environment along the United States and Mexico border has systematically been sacrificed for economic growth. The petition does not attack the environmental degradation of the entire border zone, but instead focuses on three hazardous waste facilities that have not yet received final approval. If the sites are approved and the petitioner's allegations prove to be accurate, the Commission will have a good case for the first application of the human right to a healthy environment in the American States.

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