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INTERNATIONAL

Mexican Toxic-Waste Case Shows Nafta's Limits

Trade Pact Can't Change Laws Below the Border; The Cleanup That Wasn't

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TIJUANA, Mexico—Environmental police here first told Metales & Derivados SA to clean up its act in 1987. Two years later, authorities found that the smelter of old U.S. car and boat batteries had left enough lead and other hazardous waste strewn about to cover nearly two football fields waist-high.

Today, that toxic stew still percolates atop a dusty mesa overlooking the low-income community of Colonia Chilpancingo. Children and the homeless have easy access to the abandoned site, a cityscape of corroded metal drums and plastic battery shells. "It just stinks here," says Andrea Pedro, who says her home, 500 yards below Metales, is flooded with runoff from the mesa during heavy rains.

But beyond a tale of bureaucratic bungling or community outrage, the saga of Metales & Derivados is about the most important way the U.S. and Mexico are not coming together: in their judicial institutions.

By any measure, the case of the People v. Metales should have been resolved ages ago. After years of ineffective warnings, Mexican environmental officials finally closed the plant in 1994. A year later, a Mexican judge convicted Metales' owner, an elderly American still living comfortably in San Diego, of environmental violations. In 1998, with no cleanup in sight, citizens and activists made Metales the most important pending case on border toxic waste brought before an environmental watchdog commission set up under the North American Free Trade Agreement. Nafta is the 1994 accord that reduced or eliminated import tariffs on goods traded between Canada, Mexico and the U.S.

Yet Metales, a unit of a San Diego metals trading company, New Frontier Trading Corp., has found it easy to use the border as a shield against legal liability. José Kahn, Metales' 86-year-old owner, simply stopped going to Mexico. Not only has Mexico failed to seek Mr. Kahn's extradition based on his 1995 criminal conviction, but it hasn't brought a civil suit that, if successful, would probably be enforceable in the U.S.

The reason: While an explosion in trade between the U.S. and Mexico, sparked by Nafta, has sped the evolution of everything from Mexico's popular to its political culture, the country's legal system remains a farrago of arcane codes and inflexible procedures, often spiced by corruption, that discourages plaintiffs and prosecutors.

Mexico takes its legal tradition from Roman law. In contrast to the common-law system of the U.S., which relies on precedents set in past cases, Mexican judges are more like scholars deciding cases on rigid and often centuries-old statutes. Cross-examination and juries are unheard of. All court testimony is written. Mexican law doesn't allow for class-action lawsuits or punitive damages common in environmental cases in the U.S. "Our civil codes really aren't prepared to tackle a problem like Metales," concedes Gabriel Calvillo, top counsel for Mexico's environmental enforcement agency, known as Profepa.

Thus has Metales come to show how a U.S. company can avoid Mexican liability—a

model the U.S. Environmental Protection Agency would rather the burgeoning border-factory community not emulate. "The time is ripe for trying to win a case in Mexico and enforce a money judgment across the border," says EPA attorney John Rothman.

To be sure, cultural differences may also explain Mexico's official complacency in the Metales case. Potential plaintiffs in the U.S. are used to looking years down the road to harm that toxins can cause; in Mexico, the attitude is closer to "Is anybody sick right now?" Despite ample anecdotal evidence of health problems in the Chilpancingo neighborhood, one study found that children living near the Metales site actually had lower levels of lead in their blood than Tijuana's citywide average—though the report also concludes that a "plume effect" may be carrying the lead to other areas not yet tested.

"Given the properties of lead, it's a mat-

then imposed a 14-step cleanup, which never took place. Metales was finally closed in March 1994. Mr. Kahn, residing 20 miles away in San Diego's upscale Point Loma neighborhood, was convicted of several environmental crimes in August 1995.

In 14 years, the only steps taken to protect the surrounding communities from potential harm have been the construction of a concrete retaining wall (since corroded through by acids) and the placement of plastic tarps, now in tatters, atop the slag heaps. The government never sued or paid for a cleanup with the intention of recovering costs later through the courts. Officials say the government can't afford the \$1 million to \$5 million in estimated cleanup costs.

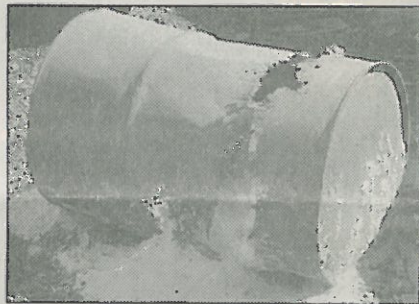
"It's bad precedent for Mexico to pay to clean it up, since we are so unsure of ever getting paid back in the courts," says former Profepa attorney Miguel Angel Cancino.

That uncertainty derives from a num-

Toxic Tale

The peculiarities of Mexican law can make the pursuit of environmental causes near the U.S. border a tortuous affair, Nafta notwithstanding. One such story:

- **1972** José Kahn, a Chilean who won U.S. citizenship in 1971, opens Metales & Derivados in Tijuana, Mexico.
- **1987, 1989** Mexican environmental police twice order cleanup of Metales site.
- **1992** Los Angeles County files 26-count felony complaint against Mr. Kahn, alleging improper transportation of hazardous waste. Mr. Kahn pleads guilty to two counts and pays \$50,000 fine.
- **1994** Mexican environmental officials order Metales plant closed. Waste remains behind.
- **1995** Mr. Kahn convicted in Mexico of environmental crimes and becomes fugitive from Mexican justice, living 20 miles away in San Diego.



At Metales & Derivados, just above the residential community of Colonia Chilpancingo, a corroded barrel has sprung a leak.

- **1998** Citizens and activists in Tijuana and San Diego bring Metales case before Nafta's trilateral Commission for Environmental Cooperation.
- **1999** Mexico responds to CEC complaint saying, in part, that December 1996 reform of Mexican environmental laws renumbered the laws and thus voided Mr. Kahn's indictment.
- **2001** CEC issues its report on Metales, which is not yet public and may not be made public, pending vote of commission members. Waste remains.

ter of time before a cluster of very sick people linked to Metales appears," says an EPA official.

U.S. authorities, aware of the Mexican legal system's shortcomings, first tried to haul Metales into U.S. courts. In 1992, Los Angeles County filed a 26-count felony complaint against Mr. Kahn and New Frontier, alleging he had transported hazardous waste to Mexico without the proper manifests.

Mr. Kahn pleaded guilty to two counts and paid a \$50,000 fine. He also promised to clean up the Metales site. But that pledge was never part of a formal settlement. That result left Mr. Kahn entirely in the hands of Mexican justice.

Mr. Kahn and New Frontier didn't return calls seeking comment.

Metales opened for business in 1972. At first, the company shipped slag to Europe for further processing. "But new environmental laws ... in the '80s made it economically impossible to continue shipping slags to Europe," according to a statement issued by Mr. Kahn last year.

So Metales began dumping its slag out back. Mexican authorities ordered their first cleanup in September 1987. Nothing happened until mid-1993, when Metales received its first fine: \$10,000. Authorities

then imposed a 14-step cleanup, which never took place. Metales was finally closed in March 1994. Mr. Kahn, residing 20 miles away in San Diego's upscale Point Loma neighborhood, was convicted of several environmental crimes in August 1995.

About the only clear legal weapon available to Mexico in the Metales case is Mr. Kahn's extradition, which U.S. officials have indicated they would view favorably. In a 1999 report to the Nafta commission investigating the government's handling of Metales, the Mexican government says a December 1996 reform to Mexico's environmental laws renumbered the articles under which Mr. Kahn was convicted 16 months earlier. Those changes voided his indictment.

Mr. Cancino, the former Profepa attorney, says that's legal mumbo jumbo. "The attorney general's office just looked the other way," he says. Rubén Martín Olvera, the deputy attorney general who was responsible for the case, declined to comment. Environment Minister Victor Lichtinger says that beyond Metales, there are more than 2,000 alleged environmental crimes that haven't been acted upon by the attorney general.