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THE INTERNATIONAL SIGNIFICANCE OF AN INSTANCE OF URBAN ENVIRONMENTAL INEQUITY IN TIJUANA, MEXICO

*Tseming Yang**

INTRODUCTION

Much of the literature about the environmental justice movement has focused on the domestic face of environmental equity problems. Yet, issues of environmental equity also appear abroad. The case of Metales y Derivados, an abandoned lead smelter in Tijuana, Mexico, and the impacts it has had on its surrounding community, Colonia Chilpancingo, illustrate environmental inequity vividly. This essay looks at the events that led to the current situation and what implications Metales may have for addressing issues of environmental justice at international and domestic levels.

I. METALES Y DERIVADOS

Metales y Derivados is a former open-air lead smelting operation located in Tijuana, Mexico.¹ It is located only a few miles from the U.S.-Mexico border, and within an easy commute from San Diego.

The primary business of Metales had been recycling used car and boat batteries and other lead scrap for lead and valuable metals. Most of the input materials came from the United States. After years of operation, however, Metales was left to its own devices by its owners in 1995.

Metales had been operated by its San Diego based U.S. parent company, New Frontier Trading, and the shareholders, Jose Kahn and his family, in violation of various Mexican environmental regulations for a number of years. Many surrounding residents attributed respiratory problems, skin rashes, and even birth defects to the pollution emissions of Metales.² Even years after the facility stopped operating, a study of area children found elevated blood

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1. For an official account of some of these events, see Metales y Derivados Final Factual Record (SEM-98-007) [hereinafter Metales Factual Record], available at <http://www.cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=67> (last visited Jan. 26, 2002).

2. See *Petition Before the Commission for Environmental Cooperation, Under Articles 13, 14, and 15 of the North American Agreement for Environmental Cooperation*,

lead levels.³ When Metales had failed to comply with a number of notices of violation, the Mexican government shut down the facility, filed criminal charges, and then issued a criminal arrest warrant for Jose Kahn. Kahn then abandoned the facility and returned, unscathed, to the United States.

What Kahn left behind were several thousand cubic meters of soil contaminated with lead, other heavy metals, thousands of broken plastic battery casings. Much of it was spread out over a several-acre site. In place of the former smelting operation facility, there is now only a building skeleton of steel beams with hundreds of sacks and drums containing lead smelter slag.⁴

For almost a decade, residents from the surrounding community have demonstrated and lobbied government agencies on both sides of the border and the Kahns to clean up Metales. Other than some half-hearted measures, such as fencing and plastic tarps to cover some of the wastes, little has been done. Meanwhile rain and wind have carried lead-laden dust and soil from the site into Colonia Chilpancingo, a community just a few hundred yards downhill.

Solutions to the toxic waste remain elusive. A Mexican government study found that even site stabilization—capping the site with asphalt to prevent more of the heavy metals from being carried off-site by the elements—will cost almost \$1 million. Removal and disposal of the contaminated soils from the site, a more thorough and environmentally responsible clean-up program that would be safer from a long-term perspective, would cost about \$7 million.

Since Mexico has no toxic waste clean-up program equivalent to the U.S. Environmental Protection Agency's ("EPA") Superfund, government officials have never attempted any publicly financed efforts to address the contamination. Instead, they have maintained that clean-up remains the responsibility of New Frontier Trading and Jose Kahn. Unfortunately, Kahn has not set foot back in Mexico, making any efforts of holding him responsible there unlikely.

Despite this bleak picture, the community has been able to achieve some successes. The community's situation is relatively well known among those working on issues dealing with the border environment. It has been the subject of an investigation and a fac-

by Environmental Health Coalition [hereinafter EHC Petition], available at <http://www.environmentalhealth.org/CEC3.html#Petition> (last visited Jan 26, 2003).

3. Metales Factual Record, *supra* note 1, at 8, 38-41.

4. Tseming Yang, *Of Borders, Fences, and Global Environmentalism*, 4 CHI. J. OF INT'L L. 237, 240 (2003).

tual record endorsed by the environment ministers of the three North American Free Trade Agreement (“NAFTA”) nations.⁵ That official factual record, released in 2002, confirmed the community’s claims not only with respect to environmental mismanagement but also governmental failures to respond to the problems. News articles documenting the situation have appeared in the *Wall Street Journal*,⁶ *Los Angeles Times*,⁷ *Washington Post*,⁸ and the *San Diego Union Tribune*,⁹ as well as on National Public Radio.¹⁰ A 1999 EPA Environmental Justice Advisory Council conference on border environmental justice issues focused attention on Metales and introduced both Mexican and U.S. environmental officials to the situation.¹¹ In the summer of 2003, Victor Lichtinger, then head of the Mexican environmental ministry, made promises to act. Unfortunately, not more than a month later, Lichtinger was dismissed from his job by Mexican President Vicente Fox. Nevertheless, the attention Metales has garnered over the years has led members of the Mexican parliament to consider legislation creating a clean-up fund for abandoned hazardous waste sites, similar to the U.S. Superfund.

II. METALES, THE ENVIRONMENT, AND COMMUNITY JUSTICE

Metales y Derivados might be seen as an aberration—a cautionary tale of what happens when the environmental regulatory system fails. Yet, many environmentalists and especially environmental justice activists would find such a view too optimistic.

There can be little doubt that the impacts on the community and the environment were likely exacerbated by Metales’ particular circumstances. It was a relatively small operation that appeared to

5. Metales Factual Record, *supra* note 1.

6. Marc Lifsher, *Groups Use Nafta in Move To Clean Up Border Plant*, WALL ST. J., Oct. 21, 1998, at CA1.

7. Ken Ellingwood, *California and the West: Mexico Accused of Failure to Clean Up Plant Environment: Groups on both sides of border hope NAFTA agreement will lead to removal of lead slag and debris near homes*, L.A. TIMES, Oct. 22, 1998, at 3.

8. Kevin Sullivan, *A Toxic Legacy on the Mexican Border*, WASH. POST, Feb. 16, 2003, at A17.

9. Joe Cantlupe, *Toxic Tijuana Waste Site Corrodes Faith in NAFTA*, SAN DIEGO UNION-TRIB., May 13, 2000, at A1.

10. *All Things Considered* (National Public Radio, radio broadcast, Oct. 21, 1998).

11. Nat’l Env’tl. Justice Advisory Council, *Border Env’tl. Justice Report, Unheard Voices from the Border: A Report on Environmental Justice in the U.S.-Mexico Border Region from the Past to the Future* (Aug. 19-21, 1999), available at <http://www.epa.gov/compliance/resources/publications/ej/nejac-ej-border-report.pdf> (last visited July, 24, 2003).

have been run on a shoe-string budget and with little environmental sophistication. It seems unlikely that large industrial operations would violate Mexican environmental regulations as blatantly as did Metales.

It is the government's response, however, that is most revealing. Rather than vigorously pursuing what might be perceived as a "bad apple," government agency responses were less than aggressive.¹² Unfortunately, environmental justice advocates are all too familiar with such reactions.

A. Metales as a Traditional Environmental Problem

Metales is one of the very scenarios that environmentalists feared when NAFTA¹³ was being negotiated and adopted. Environmentalists objected to NAFTA as potentially allowing not only for the subversion of American environmental standards but also for the exportation of pollution and toxics to the South. The assumption was that ever-present pressure for competitive businesses to lower the cost of production and operation would surely lead them to prefer operating in jurisdictions where environmental regulations were more lenient and standards lower. Reduced regulatory compliance expenses would contribute to lower overall operating costs, thus making it easier to profit.¹⁴

To address some of these concerns, the Mexican government restructured its environmental regulatory system to raise standards to those of its NAFTA partners. Furthermore, the NAFTA parties adopted an environmental side agreement, the North American Agreement for Environmental Cooperation, designed to ensure that the parties would properly enforce and implement their environmental laws as written.¹⁵ To date, assessments of NAFTA's en-

12. For a more general discussion of Metales and the citizen submission process under the North American Commission, see Tseming Yang, *The Effectiveness of the Citizen Submission Process of the North American Environmental Commission: A Case Study of the Metales y Derivados Matter* (Apr. 17, 2004) (unpublished manuscript on file with author).

13. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex. 32 I.L.M. 296 [hereinafter NAFTA].

14. See, e.g., John H. Knox & David L. Markell, *The Innovative North American Commission for Environmental Cooperation*, in GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION at 3-4 (David L. Markell & John H. Knox, eds. 2003); Ignacia S. Moreno, James W. Rubin, Russell F. Smith III, & Tseming Yang, *Free Trade and the Environment: The NAFTA, the NAAEC, and Implications for the Future*, 12 TUL. ENVTL. L.J. 405, 410-413 (1999).

15. North American Agreement on Environmental Cooperation, Sept. 14, 1993, 32 I.L.M. 1480 (1993) (entered into force Jan. 1, 1994) [hereinafter NAAEC].

vironmental consequences have yet to provide a clear picture. Many of the most dire predictions about NAFTA's potential large scale impact on the U.S. and Mexican environmental and regulatory systems appear to have been wrong. Metales, however, is a glimpse of the other side.

From a traditional environmental perspective, the regulatory and enforcement failures of Metales could be the consequence of the regulatory capture of Mexico's environmental ministries by industrial development interests. Even if the owners of Metales were not powerful political players who could influence the Mexican bureaucracy, industrial development issues have generally had much greater weight in affecting regulatory policy and enforcement priorities than advocates for environmental protection, public health, and marginalized communities. Thus, the regulatory enforcement system might have failed the residents of Colonia Chilpancingo because of the undue influence on and consideration by regulators of industrial development interests.

The other way of explaining the Mexican government's enforcement decisions is not as a failure of regulatory decision-making but as the expression of current regulatory priorities. Even absent influence by special interests, it has been widely known that one of the top governmental priorities has been economic development.¹⁶ If government policies are primarily focused on promoting industrial development and job creation, the deterrent effects and long-term consequences of tough enforcement actions on foreign investors might be undesirable. Tougher enforcement can suggest not only greater government attention to regulatory compliance, but also presents the possibility of an improper assertion of prosecutorial powers. Either way, the additional cost to the bottom line may significantly affect the cost of operation and thus the profitability of a business.

The unfortunate consequence of such priorities could certainly lead to the neglected welfare of communities such as Colonia Chilpancingo. If rapid industrial development, job creation, and poverty alleviation are the flip side to pollution and environmental degradation, then pollution and environmental degradation can seem not only acceptable but even necessary. The interests of small communities must simply give way to the achievement of the greater good. Disfavoring regulatory policies and actions that stifle economic development goals might then result from the subversion

16. See, e.g., BARBARA HOGENBOOM, MEXICO AND THE NAFTA ENVIRONMENT DEBATE 61-109 (1998).

of proper environmental regulatory processes by agency capture, over-emphasis of economic development goals in policy-making, or both.

B. Metales: A Problem of Community and Environmental Justice

Much of what happened at Metales has followed a pattern quite familiar to community and environmental justice activists.¹⁷ Rather than being exceptional, it can be seen as an example of environmental injustice encountered in many communities of color and the poor.

Like communities protesting issues of environmental injustice in the United States, the population living around Metales is poor, of color, and socially marginalized. The lead wastes and used batteries that Metales was recycling came primarily from the wealthy neighbor to the North—the United States. Environmental regulators in Mexico have been slow or failed completely to respond to the complaints and needs of the community. U.S. environmental regulators have disclaimed most responsibility, instead pointing to the Mexican government as the primary regulator. More effort has been spent on governmental finger-pointing as to who should clean up the mess than on concrete remedial action.

Colonia Chilpancingo is certainly not the only community that has needs worthy of governmental attention. Delaying responses in favor of more pressing priorities or other communities may be unavoidable. Likewise, the possibility of regulatory failures remains present regardless of how diligent and committed regulatory officials appear. With respect to communities of color, the poor, and other marginalized populations, however, the events at Metales acquire a different meaning.

Considering the marginalized status of communities such as Colonia Chilpancingo, the regulatory and enforcement failures at Metales seem consistent with the overall treatment of this community by the governments. Neglect of such communities to pollution and public health concerns is no less surprising than neglect in other respects. The reality of Colonia Chilpancingo and many other U.S.–Mexico border cities is that it is marginal not only from a geographical perspective, but also a social and political one. Neg-

17. See, e.g., LUKE COLE & SHEILA FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (2000); CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS (Robert D. Bullard ed., 1993).

lect of the community's needs is a manifestation of the community's lack of political influence and significance within the Mexican political system. Such communities are not only at the geographical margins of the state, they are also at the margins of society itself.

With the U.S. government's lack of accountability to these communities, the communities' disenfranchisement is complete. Even though Metales is owned by a U.S. parent company and U.S. citizens, the U.S. government has taken no direct responsibility or accountability to the community just across the border. Colonia Chilpancingo has had little political influence over the actions of U.S. government agencies.

Like many inner-city communities in the United States, lack of political influence of the poor and disenfranchised border community makes it difficult to obtain remedial assistance with environmental problems. Marginalized communities do not have effective tools to hold their governmental representatives in Mexico City and Washington, D.C. accountable.

III. THE INTERNATIONAL RELATIONSHIP

Metales makes the transnational aspects of environmental injustice visible. Unlike the externalization of environmental problems from developed countries to developing nations, for example through the export of wastes or the relocation of polluting industries to continents thousands of miles away, Metales is located within a stones throw from the United States and thus easily discoverable to those living here.

The most obvious link is the origin of the raw materials themselves. Much of the lead wastes, including the used car and boat batteries, came from the United States. Laxer environmental regulation and enforcement made it profitable for the Metales owners to operate the smelter in Tijuana, Mexico. The effect was to export the pollution externalities of reprocessing the lead wastes through outdated, dirtier, and more polluting methods, to Mexico. The profits of such dirty lead reclamation operations were repatriated to the United States.

Another link is the program of trade liberalization that directly enabled operations such as Metales. Metales was set up under the Mexican maquiladora plant program. Maquiladora status has allowed companies from the United States and elsewhere to set up operations and import raw materials to the Mexican side of the border area under special tax treatment. For the United States,

this has meant cheaper consumer goods. For the Mexican economy, such operation has brought jobs and economic development. For foreign businesses it has created access to a pool of labor within close proximity to the U.S. market, but at much lower costs.¹⁸ For Colonia Chilpancingo, it has meant an industrial neighbor that violated environmental regulations, imposed serious pollution burdens on them, and arguably created a significant public health risk.

Even the aftermath of the Metales problem continues to have transnational reverberations. The owner of Metales, Jose Kahn, abandoned the facility and retreated across the border to his San Diego home. Using the border as a shield from Mexican enforcement actions and from the criminal arrest warrant the Mexican government filed against him, Kahn has lived in San Diego largely undisturbed by the consequences of the Metales mess. Occasional demonstrations by community activists were the only exceptions.

On the U.S. side, U.S. EPA officials have had relatively little direct involvement with Metales despite numerous requests by community activists. Because the facility itself was physically located in Mexico, U.S. environmental laws generally do not apply to the operations there. Moreover, without an extradition request from the Mexican government, there seems to be little that the U.S. government can do on its side of the borders to assist the Mexican officials in their enforcement efforts.¹⁹

Finally, Metales exposes the deficiencies of supra-national organizations in filling the gaps left by national failures. Organizations such as the North American Commission for Environmental Cooperation ("CEC"), which is tasked with supervising the NAFTA environmental side agreement, and institutions operating at the U.S.-Mexico border, such as the North American Development Bank ("NADBank") and the Border Environment Cooperation Commission ("BECC"),²⁰ have provided little substantive assistance in spite of their interest in transnational environmental problems. With the exception of approximately \$85,000 allocated by the EPA

18. See generally LESLIE SKLAIR, *ASSEMBLING FOR DEVELOPMENT: THE MAQUILA INDUSTRY OF MEXICO AND THE UNITED STATES* (1993).

19. Kahn was prosecuted by the Los Angeles County District Attorney for exporting lead wastes to Tijuana in violation of California environmental laws in 1992. Although he paid a \$50,000 fine, Kahn's sentence was suspended. See generally YANG, *supra* note 12.

20. Agreement Concerning the Establishment of a Border Environmental Cooperative Commission and North American Development Bank, Nov. 16-18, 1993, U.S.-Mex., T.I.A.S. No 12516.

as seed money toward a study on future cleanup, funding or other substantive assistance to remediate the contamination at Metales remains outstanding.²¹

IV. JUSTICE FOR ALL COMMUNITIES—AT HOME AND ABROAD

Metales is not an isolated example of the difficulties that marginalized international communities face in achieving environmental justice. Communities elsewhere, in the United States and abroad, face similar challenges. Understanding what happened at Metales not only provides a better understanding of the causes of environmental inequity and injustice but also points out pathways toward solutions.

First, even though the problems at Metales may appear in a different context and are located in another country, they are fundamentally similar to those faced by minorities and the poor in the United States. The dynamic of political and economic powerlessness are the root of both, and the degradation of environmental quality and public health are the same.

Metales also suggests that urban environmental justice in developing countries constitutes a set of equity issues apart from concerns of intergovernmental environmental inequity between developing and developed countries—so-called North-South equity issues. Assertions by developing country governments that economic development is a national priority that supplants needs for environmental protections should be considered with caution. Poverty alleviation, jobs, and raising the standard of living are clearly important goals. Most nations, including developing countries, however, are not monolithic in the interests that their citizens hold. Likewise, the benefits of economic development are usually not evenly distributed throughout a society. In fact, societal groups that may be least benefited by industrial development, the poor and other marginalized groups, often also bear the greatest burden of pollution and environmental degradation. National priorities cannot be set in isolation from community interests in public health and environmental protection, nor can they be claimed as mutually exclusive.

In countries that are not fully democratic, however, where racial or ethnic minorities are granted few special protections, or where corruption and graft are pervasive and the rule of law must still be

21. Sandra Dibble, *EPA Grant to Help Otay Revive Abandoned Smelting Operation*, SAN DIEGO UNION-TRIB., Feb. 27, 2004, at B3.

strived towards, government accountability for considering distributional equity issues becomes an even greater issue. The need for democratization and the implementation of human rights must go hand in hand with economic development and efforts to protect the environment. In other words, community justice issues cannot be cordoned off from international concern and left solely within the discretion of a national government.

International environmental institutions have accomplished little in this regard. *Metales* suggests how poorly the design of international environmental institutions address issues of community justice. Their inability to provide substantive solutions to the contamination suggests that organizations operating at the inter-governmental level are not suited to address equity and justice issues at the community level. The fact that their structure makes them accountable to states alone, and not to communities directly, makes it likely that they will act only when and to the extent that member governments are interested in allowing it.

There is also another lesson that *Metales* teaches—process alone cannot protect marginalized communities. The contamination at *Metales* has existed for almost a decade since it was abandoned. Community activists have sought to utilize the political process and lobbied government agencies; yet no substantive government remedy has come forth. They filed a petition with the CEC, which resulted in a factual record that demonstrates not only the serious environmental problems of the site but also Mexico's enforcement failures. Nevertheless, no governmental agency has come forward with a substantive remedy for the Colonia Chilpancingo residents. *Metales* has been an open secret for years. Hence, regulatory failures cannot be attributed to inadvertence or lack of information. Instead, it is more likely the result of a lack of willingness to act.

The effectiveness of political and other public processes designed to shame and pressure government agencies into acting is limited. Without substantive environmental rights there is no legal right and obligation that can be asserted or enforced on behalf of communities. Their position and claims are accordingly weakened.

Finally, *Metales* also shows the need for cross-border coalition-building. Just as businesses and governments may act across borders as transnational corporations, or by using international governmental organizations, so must community activists and organizers do the same. Only through cross-border organizing and activism can communities provide a counterweight to globalization trends. In the *Metales* case, activists from the San Diego-based

Environmental Health Coalition (“EHC”) were instrumental in assisting residents from Colonia Chilpancingo in bringing their concerns to the attention of the U.S. EPA and also to the CEC. While a substantive remedy for Metales remains elusive, such cross-border work has been invaluable in moving toward such a goal.

The EHC’s work confirms something else for the border region. Just as the environment may be interconnected, so are the communities on both sides through family, ethnic, economic, political, and cultural ties that cannot be artificially severed by a political border. Cross-border coalition-building is a way not just of strengthening community power but also affirming their shared interests and ties to each other.

CONCLUSION

Even though many of the events leading up to the environmental calamity at Metales took place in Mexico, Metales is not a self-contained, local instance of environmental injustice. A closer look at what happened there exposes many links to the United States. They demonstrate both how instances of urban environmental injustice are connected to larger patterns of inequity, trade, and pollution transfers that cross international boundaries. They also demonstrate how these patterns resemble the market and political dynamics that have led to instances of urban environmental inequity in the United States. Addressing problems of urban environmental equity not just in the United States but also in other parts of the world will require consideration of these associations and patterns.

