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BACK TO THE FUTURE? THE PROSPECTS FOR STATE MONOPOLY IN HYDROCARBONS AND ELECTRIC POWER UNDER ARTICLE 27 OF THE MEXICAN CONSTITUTION

EWELL E. MURPHY, JR.*

I. SEIZING THE INITIATIVE

When Venustiano Carranza summoned municipal council delegates of war-torn Mexico to a constitutional convention in Querétaro, he did not encourage them to innovate. Instead he presented his own modest revision of the 1857 Constitution and allowed the delegates a scant two months to review and improve it.¹

The delegates seized the initiative, however, and transformed Carranza's modest revision into a radical new document, "the first revolutionary state charter of modern times,"² "one of the most significant constitutional documents of the present century,"³ the Mexican Constitution of 1917. "In a real sense this document legalized the Mexican Revolution."⁴

Of all provisions of the 1917 Constitution, Article 27 is its "most distinctive feature . . . , the one that has given form and meaning to the Mexican Revolution."⁵ "More than any other article of the new constitution," one historian concluded, "[Article 27] represented the break with the Porfirian past, embodied the cry for economic independence, proclaimed the destruction of vested interests, and gave hope of a better future to the rural masses. In short, it was the convention's most singular achievement."⁶ Another historian called Article 27 "the most significant legal outcome of the Mexican Revolution."⁷

Article 27 addressed *la propiedad raíz*: the land, waters and subsoil minerals that the Mexican revolutionaries of 1910 believed to be their nation's most precious wealth and the domination of which by foreigners, large real estate holders (*los latifundistas*) and the Church epitomized the social evil they fought to overcome. Article 27 of the 1857 Constitution, on which Carranza based his draft, guaranteed that no private property

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1. The historical context of the convention is described in E.V. NIEMEYER, JR., *REVOLUTION AT QUERÉTARO* chs. 1, 2 (1974).

2. ANITA BRENNER, *THE WIND THAT SWEEPED MEXICO* 55 (1984).

3. FRANK TANNENBAUM, *PEACE BY REVOLUTION: MEXICO AFTER 1910*, at 169 (1966).

4. NIEMEYER, *supra* note 1, at 30.

5. *Id.* at 134.

6. *Id.* at 165.

7. TANNENBAUM, *supra* note 3, at 169.

could be "occupied" (*ocupada*) without prior compensation, due process and the owner's consent; its only land restriction applied to civil and religious corporations, which were forbidden to own real estate except the buildings their purposes "immediately and directly" (*inmediata y directamente*) required.⁸ Carranza's draft embellished those provisions by eliminating owner's consent as a condition to eminent domain, guaranteeing that communal lands (*los ejidos*) would be respected until divided, and adding specifics of the rule that religious, charitable and business entities could own only such land as their activities required.⁹ The delegates replaced that embellishment with an elaborate new Article 27 embodying a stark "new theory of property"¹⁰ that attempted "to reduce all property in Mexico to 'conditional ownership.'" ¹¹ By that theory "[p]roperty in fee simple . . . ceased to exist in law, so far as Mexico is concerned"¹² and "[p]rivate property cease[d] to be an absolute right, in order to be converted to a right limited by the public interest."¹³

The new Article 27 made three fundamental assertions:

First, the Nation has "original title" (*la propiedad . . . corresponde originalmente*) to all land and water in Mexico. Thus, because "at independence the rights to all private real property reverted to the nation as the successor of the Spanish crown,"¹⁴ the Nation could create "private title" (*la propiedad privada*) by conveyance to private persons, but having done so the Nation nevertheless retained the right to impose on that private title such conditions as the public interest requires. "Large properties" (*los latifundios*) would be divested down to small landholdings. For example, communal lands would be restored, respected and eventually divided, and needful communities would be given adjoining land and water, but all expropriations would be conditioned on compensation and public need.¹⁵

Second, the Nation has "direct ownership" (*dominio directo*) of subsoil minerals and territorial waters. Because that ownership is "inalienable and imprescriptible" (*inalienable y imprescriptible*), the federal government could not convey mineral title, but could grant "concessions" (*conce-*

8. References in this article to the 1857 Constitution are based on the copy in Spanish reproduced in *LEYES FUNDAMENTALES DE MÉXICO 1808-1975*, at 607 (6th ed. 1975).

9. References in this article to Carranza's draft are based on Niemeyer's description and the English translation contained in NIEMEYER, *supra* note 1, and Appendix D of the version elaborated by Pastor Rouaix and other delegates. References to Section 27 of the 1917 Constitution and its amendments are based on copies in Spanish reproduced in *CONSTITUCIÓN POLÍTICA MEXICANA CON REFORMAS Y ADICIONES AL DÍA* (15th ed. Andrade Edition 1986 & Supp. 1993) [hereinafter *ANDRADE*].

10. FRANK TANNENBAUM, *MEXICO: THE STRUGGLE FOR PEACE AND BREAD* 112 (1950), *quoted in* NIEMEYER, *supra* note 1, at 232.

11. TANNENBAUM, *supra* note 3, at 168.

12. *Id.* at 169.

13. "*La propiedad privada deja de ser un derecho absoluto para convertirse en un derecho limitado por el interés público.*" DIEGO VALADÉS, *CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS COMENTADA* 125 (4th ed. 1993). The delegates' deliberations on Article 27 are described in JORGE CARPIZO, *LA CONSTITUCIÓN MEXICANA DE 1917*, at 110-21 (8th ed. 1990).

14. NIEMEYER, *supra* note 1, at 141.

15. ANDRADE, *supra* note 9, ¶¶ 1-3, 8, 7(VI), at 9-12.

siones) to private persons and Mexican companies on condition that they perform exploitation operations required by statute.¹⁶

Third, the ownership rights of some persons are expressly restricted. Foreigners could not acquire "direct ownership" (*dominio directo*) of land or waters within 100 kilometers of the border or 50 kilometers of the sea, and unless they signed a Calvo Clause¹⁷ could not have "ownership" (*dominio*) of land, water or mineral concessions anywhere in the Republic.¹⁸ Religious associations could not acquire any realty improvement or land; those they held reverted to the Nation, which automatically owned all places of worship.¹⁹ Charitable organizations could own only such land as their operations required;²⁰ the same for private corporations, which could not own agricultural land at all.²¹ Banks were similarly limited, but could make mortgage loans.²²

The delegates believed that those assertions "laid the constitutional basis for the solution of the underlying problem of the revolution."²³ By their new theory of property, "[t]he rights of society were made to prevail over the rights of the individual" and "the State was endowed with special powers to ensure more equitable distribution of the national wealth."²⁴ That was "what they had come to Querétaro to write."²⁵

History, nevertheless, moved on and Article 27 moved with it. Since its promulgation in the 1917 Constitution, Article 27 has been amended fifteen times, almost twice the number of all amendments of the United States Constitution during the same period. Some of those Article 27 amendments were as revolutionary as the original text itself: effectuating the right of needful communities to have land expropriated for their use as communal lands (*ejidos*),²⁶ creating state monopolies in hydrocarbons and electric power;²⁷ and, in the iconoclastic amendments of President Carlos Salinas de Gortari's Administration, allowing religious organiza-

16. *Id.* ¶¶ 4-6.

17. Named for the Argentine diplomat and jurist, Carlos Calvo (1824-1906), this term refers generally to the waivers he advocated of a foreigner's access to foreign tribunals and diplomatic espousal of the foreigner's claim against the local sovereign. Article 27 requires, as a condition to ownership by foreigners of referenced interests, "that they agree before the Ministry of Foreign Relations to consider themselves as nationals with respect to said properties and therefore not to invoke the protection of their governments with respect to them" (*que convengan ante la Secretaría de Relaciones en considerarse como nacionales respecto de dichos bienes y en no invocar por lo mismo la protección de sus gobiernos por lo que se refiere a aquellos*). See ANDRADE, *supra* note 9.

18. *Id.* ¶ 7(I).

19. *Id.* ¶ 7(II).

20. *Id.* ¶ 7(III).

21. *Id.* ¶¶ 7(IV), 7(VII).

22. *Id.* ¶ 7(V).

23. NIEMEYER, *supra* note 1, at 233.

24. *Id.* at 232.

25. *Id.* at 233.

26. Amendments of Feb. 12, 1947 and Feb. 6, 1976. In this article amendments to the Mexican Constitution are identified by reference to their dates of publication in the DIARIO OFICIAL DE LA FEDERACIÓN [OFFICIAL GAZETTE OF THE FEDERATION—hereinafter D.O.] (as reported by Andrade Edition).

27. Amendments of Nov. 9, 1940, Jan. 20, 1960 and Dec. 29, 1960.

tions to own land,²⁸ permitting the *ejidos* to privatize themselves,²⁹ and abolishing the right of needful communities to acquire new *ejidos* by expropriation.³⁰

II. EXCEPTIONAL EPISODES

From the perspective of Mexico's economic future, no provision of Article 27 is more significant than the amendments that declared hydrocarbons and electric power to be state monopolies. Like the original text of Article 27 itself, those amendments are the product of exceptional episodes of Mexican history. To appreciate the amendments' power and persistence, it is necessary to review those episodes.

A. Hydrocarbons

Foreign enterprise began to develop Mexican oil during the administration of President Porfirio Díaz, when the legal basis for private investment seemed secure. In 1884 Mexico's first Federal Mining Code gave surface owners the right to subsurface oil,³¹ in 1901 the first Petroleum Law authorized the Mexican government to grant oil concessions in public lands,³² and the Mining Law of 1909 reaffirmed the subsoil rights of surface owners.³³ Thus encouraged, private companies (chiefly British and U.S.) increased Mexico's daily oil production prodigiously, from 10 thousand barrels in 1901 to 3.9 million in 1908, 55 million in 1917 and 193.4 million in 1921,³⁴ when Mexico ranked second among oil-producing nations, providing one-fourth of the world's production.³⁵

Nevertheless, one of the objectives of the Mexican Revolution was to reduce the power of foreign investors. In hydrocarbons the delegates at Querétaro threw down the gauntlet with Article 27's assertion that the Nation has "inalienable and imprescriptible" ownership of the subsoil.³⁶ President Plutarco Calles implemented that assertion with the 1925 Petroleum Law, which commanded prior grantees of subsoil titles to apply for "confirmatory concessions" of limited duration.³⁷ Led by Jersey Standard the U.S. companies, in particular, clamored for the U.S. government to intervene against that *ex post facto* diminution of their subsoil rights, but by a vote of seventy-nine to zero the U.S. Senate responded with a conciliatory resolution recommending that the dispute be settled

28. Amendment of Jan. 28, 1992.

29. Amendment of Jan. 6, 1992.

30. *Id.*

31. GEORGE W. GRAYSON, *THE POLITICS OF MEXICAN OIL* 4 (1980); HARRY K. WRIGHT, *FOREIGN ENTERPRISE IN MEXICO* 56 (1971).

32. GRAYSON, *supra* note 31, at 9; WRIGHT, *supra* note 31, at 56.

33. *Id.*

34. GRAYSON, *supra* note 31, at 10.

35. WRIGHT, *supra* note 31, at 62.

36. ANDRADE, *supra* note 9, art. 27.

37. GEORGE PHILIP, *OIL AND POLITICS IN LATIN AMERICA* 37 (1982); WRIGHT, *supra* note 31, at 64.

by international arbitration,³⁸ and in 1928 Mexico compromised by amending the 1925 Petroleum Law to confirm in perpetuity all concessions that antedated the 1917 Constitution.³⁹

During the next ten years the position of foreign oil companies in Mexico was progressively undermined by labor troubles, tax disputes, resistance to retail price increases, and the assertion that faced with deteriorating political prospects the companies were damaging their reservoirs with wasteful drilling and production practices. Those combustible elements of confrontation were ignited by a general strike of oil unions, which the Mexican government referred to a commission of economic nationalists. That commission awarded wage increases which the major companies refused to pay. On March 18, 1938 President Lázaro Cárdenas retaliated by expropriating the strike-bound major companies.⁴⁰

Petróleos Mexicanos (PEMEX), a state enterprise, was formed in 1938 to operate the expropriated properties and, in 1940, Article 27 was amended to prohibit the granting of hydrocarbon "concessions" (*concesiones*).⁴¹ For a time, the smaller unexpropriated companies were allowed to function and the Petroleum Law permitted PEMEX to contract out exploitation operations, but in 1960 a further amendment of Article 27⁴² terminated all existing concessions, declaring that "the Nation will carry out the exploitation" of hydrocarbon "products," and added the rather hyperbolic declaration that neither "concessions nor contracts" (*concesiones ni contratos*) would be granted.⁴³

B. Electric power

In electric power, Mexico's transition to state monopoly was much less acrimonious. The earliest producers were private, but their expansion was impeded in 1933 by the beginning of rate regulation and challenged in 1937 by President Cárdenas' creation of a competing state enterprise, *la Comisión Federal de Electricidad* (C.F.E.). After World War II C.F.E.'s national market share rose rapidly, from 5% in 1945 to 49% in 1960.⁴⁴ Discouraged by their regulated rate returns, the private companies sold their assets to Mexico in 1960, during the administration of President Adolfo López Mateos, and Article 27 was accordingly amended⁴⁵ to declare that "[g]enerating, transmitting, transforming, distributing and supplying

38. PHILIP, *supra* note 37, at 38.

39. WRIGHT, *supra* note 31, at 64.

40. *Id.* at 68-70. See also JOHN MASON HART, *REVOLUTIONARY MEXICO*, at 141-46, 330-31, 342-43 (1987). The effect of the Mexican expropriation on Latin American hydrocarbon history generally is described in Ewell E. Murphy, Jr., *State Entities and Private Oil Companies: The Contest for Leadership in the Development of Latin American Oil and Gas*, INT'L ENERGY L. 79 (1984).

41. Amendment of Nov. 9, 1940. See WRIGHT, *supra* note 31, at 126-28.

42. Amendment of Jan. 20, 1960.

43. "Tratándose del petróleo y de los carburos de hidrógeno sólidos, líquidos o gaseosos, no se otorgaran concesiones ni contratos, ni subsistirán los que se hayan otorgado y la Nación llevará a cabo la explotación de esos productos, en los términos que señale la ley reglamentaria respectiva." *Id.*

44. WRIGHT, *supra* note 31, at 66, 80-83.

45. Amendment of Jan. 20, 1960.

electric power for the purpose of providing public service corresponds exclusively to the Nation" and that related "concessions will not be granted to private parties."⁴⁶

III. PERIMETERS AND PENUMBRAS

Mexico has articulated the scope of its state monopolies in hydrocarbons and electric power by four means: first, reglamentary laws and other legislation empowering PEMEX and C.F.E.; second, prohibitions in foreign investment laws against competition by foreign enterprise; third, similar prohibitions in regulations issued under the foreign investment laws; and fourth, Mexican reservations in the North American Free Trade Agreement (NAFTA).⁴⁷ In the case of PEMEX, of those three means the first, second and third have established perimeters of monopolistic exclusivity broader than necessitated by the literal mandate of the corresponding Article 27 amendment. For both PEMEX and C.F.E., the second, third and fourth means have added ancillary penumbras of protection against foreign investors, contractors and suppliers. The result is two autonomous leviathans of very considerable economic clout.

A. Hydrocarbons

The reglamentary law that implements the hydrocarbons monopoly⁴⁸ defines the "petroleum industry" as covering everything from exploration through refining, manufacture, transportation, storage, distribution and initial sale of oil, gas, and all petroleum derivatives "that may be used as basic industrial raw materials;" and provides that only the Nation, acting through PEMEX, may conduct it.⁴⁹ Although that statute allows PEMEX to employ private service contractors, it requires them to be

46. "Corresponde exclusivamente a la Nación generar, conducir, transformar, distribuir y abastecer energía eléctrica que tenga por objeto la prestación de servicio público. En esta materia no se otorgaran concesiones a los particulares y la Nación aprovechará los bienes y recursos naturales que se requieran para dichos fines." *Id.*

47. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., H.R. Doc. No. 103-159 (effective Jan. 1, 1994) [hereinafter NAFTA]. The significance of the Mexican hydrocarbons monopoly to the NAFTA negotiations is discussed in Ewell E. Murphy, Jr., *The Dilemma of Hydrocarbon Investment in Mexico's Accession to the North American Free Trade Agreement*, 9 J. ENERGY NAT. RESOURCES & ENVTL. L. 261 (1991).

The results of the NAFTA negotiations in the hydrocarbons and electric power sectors are summarized in GARY C. HUFBAUER & JEFFREY J. SCHOTT, NAFTA: AN ASSESSMENT, at 33-36, 120-21 (1993) [hereinafter HUFBAUER & SCHOTT]. See also Gary C. Hufbauer et al., *What the North American Free Trade Agreement Means to Business: An Industry-by-Industry Analysis of Effects and Opportunities*, 9 CORP. COUNS. Q. 52, 53-56 (1993). Hufbauer & Schott conclude: "By our standards, the NAFTA thus receives a low score for its failure to liberalize investment in the petroleum sector," HUFBAUER & SCHOTT at 32. They also rank NAFTA results in the energy sector at a C+ on a scale of A to C. *Id.* at 10.

48. *Ley Reglamentaria del Artículo 27 Constitucional en el Ramo del Petróleo [Regulatory Law of Constitutional Article 27 in the Field of Petroleum]*, D.O. (Nov. 29, 1958, as amended, D.O. Dec. 30, 1977) (Mex.).

Editor's Note: Citations to the D.O. relating to the 1989 Regulations do not cite to specific articles because the 1989 Regulations are not arranged as "articles," but, instead, are included in one Schedule at the end [hereinafter *Schedule*].

49. *Id.* arts. 3-4.

paid in cash and prohibits compensating them by means of a percentage of production or participation in exploitation results. PEMEX's domination of the Mexican hydrocarbons industry is further assured by legislation that details the exclusive position of state enterprise in oil⁵⁰ and basic petrochemicals.⁵¹

As against foreign investors the PEMEX monopoly is succinctly shielded by the foreign investment law, which lists "Petroleum and other hydrocarbons" (*Petróleo y demás hidrocarburos*) and "Basic petrochemicals" (*Petroquímica básica*) as "strategic areas" in which functions may be reserved exclusively to the state, and limits "Retail sale of gasoline and distribution of liquid petroleum gas" (*Comercio al por menor de gasolina y distribución de gas licuado de petróleo*) to Mexicans.⁵² The current foreign investment regulations detail those exclusivities and add exclusions of foreigners from other services outside the PEMEX monopoly.⁵³

In the NAFTA negotiations, the hydrocarbons monopoly presented two obstacles to the general objective of allowing nationals of Canada and the United States to perform services, or to sell and invest in Mexico. The first obstacle was the monopoly itself: if the exploitation of hydrocarbons, or any included activity, falls within the monopoly granted to PEMEX, PEMEX has the exclusive right to perform it. The second obstacle resulted from Article 27's directive that neither concessions nor contracts regarding oil exploitation may be granted. That directive suggests

50. *Reglamento de la Ley Reglamentaria del Artículo 27 Constitucional en el Ramo del Petróleo* [Regulation of Regulatory Law of Constitutional Article 27 in the Field of Petroleum], D.O. (Aug. 25, 1959, as amended, D.O. Feb. 9, 1971 and D.O. Jan. 8, 1990) (Mex.). The functions of PEMEX are also listed in Article 3 of its Organic Law, *Ley Orgánica de Petróleos Mexicanos y Organismos Subsidiarios* [Organic Law of Petróleos Mexicanos and Subsidiary Organisms], D.O. (July 16, 1992, as amended, D.O. Dec. 22, 1993) (Mex.).

51. *Reglamento de la Ley Reglamentaria del Artículo 27 Constitucional en el ramo del petróleo, en materia de petroquímica* [Regulation of Regulatory Law of Constitutional Article 27 in the field of petroleum, in the matter of petrochemicals], D.O. (Feb. 9, 1971, as amended, D.O. Nov. 25, 1993.) (Mex.). The current classification by the Secretario de Energía, Minas y Industria Paraestatal [Secretary of Energy, Mines, and State Industry] of petrochemicals as "basic" or "secondary" appears in D.O. (Aug. 17, 1992) (Mex.). The legislative basis for PEMEX is discussed in Rogelio López-Velarde, *Mexico's New Petroleum Law: The Internal Reforms at PEMEX and the North American Free Trade Agreement*, 28 INT'L LAW. 1 (1994) [hereinafter López-Velarde].

52. *Ley de Inversión Extranjera* [Law of Foreign Investment], arts. 5-6, D.O. (Dec. 27, 1993) (Mex.).

53. *Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera* [Regulation of the Law to Promote Mexican Investment and Regulate Foreign Investment], D.O. (May 19, 1989) (Mex.), was issued under the previous foreign investment statute but by Transitory Article 4 of the present Foreign Investment Law remains effective until amended. The Schedule lists the extraction of petroleum and natural gas (*extracción de petróleo y gas natural*), the manufacture of basic petrochemical products (*fabricación de productos petroquímicos básicos*) and petroleum refining (*refinación de petróleo*) as activities reserved exclusively to the state; the retail sale of combustible liquid natural gas (*comercio al por menor de gas licuado combustible*) as an activity reserved to Mexicans; the manufacture of secondary petrochemical products (*fabricación de productos petroquímicos secundarios*) as an activity in which foreign investors can have up to 40% share ownership; and the drilling of oil and gas wells (*perforación de pozos petroleros y de gas*) and construction for the transmission of petroleum and derivatives (*construcción para la conducción de petróleo y derivados*) as activities in which foreigners may not have majority share ownership without authorization by the Foreign Investment Commission. See *Schedule*, *supra* note 48.

that, even if PEMEX prefers to discharge its monopoly by hiring out a hydrocarbon exploitation activity rather than performing the activity itself, PEMEX may not do so by means of what Article 27 calls "concessions" or "contracts."

In its express reservations to NAFTA, Mexico dealt with the first obstacle by exempting a broad range of "strategic activities" in hydrocarbons, from exploration through "first hand sales" of basic petrochemicals;⁵⁴ reserving to the Mexican State "investment and . . . the provision of services in such activities;"⁵⁵ and declaring that the cross-border access of Canadian and U.S. enterprise will apply to such activities only "when Mexico permits a contract to be granted in respect of such activities and only to the extent of that contract."⁵⁶ Dealing with the second obstacle was more difficult because it required an oracular explanation of Article 27's hyperbolic prohibition of exploitation "contracts." Mexico bit that bullet by agreeing that, although "[r]isk-sharing contracts are prohibited,"⁵⁷ "[e]ach Party shall allow its state enterprises to negotiate performance clauses in their service contracts."⁵⁸ The morning after that opaque distinction was announced, the in-box of PEMEX's procurement office was brimming, no doubt, with ingenious exploitation proposals, each self-guaranteed to involve merely "performance clauses" and not "risk-sharing contracts."⁵⁹

Those reservations are augmented by Mexican exceptions to NAFTA which incorporate various legislative restrictions on hydrocarbon operations by foreigners. Those exceptions declare that foreigners may have no interest in a Mexican enterprise that stores, transports or sells liquefied petroleum gas or installs "fixed deposits,"⁶⁰ or sells at retail gasoline, diesel, lubricants, oils or additives;⁶¹ and that authorization by the Foreign Investment Commission is required for foreign ownership of more than 49% of a Mexican enterprise "involved in 'non-risk sharing' contracts for the exploration and drilling works of petroleum and gas wells" or in "construction of means for the transportation of petroleum and its derivatives."⁶²

54. NAFTA, *supra* note 47, art. 602(3) (incorporating annex 602.3, ¶¶ 1(a), 1(b)); *Id.* annex III - Mexico, Section A (1). *See also id.* art. 601 (Principles).

55. *Id.* annex 602.3, ¶ 1.

56. *Id.* ¶ 2.

57. *Id.* annex I - Mexico, at I-M-23.

58. *Id.* annex 602.3, ¶ 4.

59. Hufbauer and Schott conclude that contractors under "performance" contracts "can be paid a bonus for exceeding contract targets." HUFBAUER & SCHOTT, *supra* note 47, at 34. This suggests that the intended distinction is between a permitted cash bonus (performance clause) and a forbidden assignment of an interest in production (risk-sharing contract). López-Velarde draws a finer line: "The only thing clearly forbidden is that PEMEX and its subsidiaries make a payment in kind by taking a percentage of the hydrocarbon production, or by granting as an incentive for the work performed a participation in drilling even if the end payment is made in cash." López-Velarde, *supra* note 51, at 11.

60. NAFTA, *supra* note 47, annex I - Mexico, at I-M-27.

61. *Id.* at I-M-28.

62. *Id.* at I-M-23.

NAFTA's broader penumbra of protection for PEMEX also extends to government procurement. Under NAFTA generally, Canadian and U.S. enterprises are granted the same access as Mexicans to every award by an "entity" of the Mexican federal government of a construction contract of U.S. \$6.5 million or more and every other goods or services award of U.S. \$50,000 or more.⁶³ For PEMEX that burden was eased by (1) raising those levels to U.S. \$8.0 million and U.S. \$250,000, respectively, for awards by a Mexican government "enterprise;"⁶⁴ (2) granting "threshold" exemptions to PEMEX awards in aggregate percentages that decline annually from 50% in 1994 to zero in 2003;⁶⁵ and (3) allowing, in each subsequent year, a permanent exemption for U.S. \$300 million in PEMEX and C.F.E. awards combined.⁶⁶

The aggregate result of those perimeters and penumbras is to expand, by definition, the Mexican state monopoly from the bare "exploitation" of hydrocarbons products mentioned in its Article 27 amendment to a grander "petroleum industry" and "strategic area" with exclusive authority over refining and basic petrochemicals and complete or partial insulation from foreign contractors and suppliers in a broad zone of related transportation, services and retail sales.

B. Electric power

Mexico's constitutional monopoly in electric power is implemented by legislation that defines C.F.E.'s functions and insulates them from foreign investment. Considerably less effusive than its hydrocarbons counterpart, the C.F.E. empowering statute⁶⁷ reiterates the exclusivity language of Article 27⁶⁸ and honors the "public service" qualification of that language by specifying significant industrial sectors to which the state monopoly does not extend.⁶⁹ The foreign investment law speaks more broadly of "electricity" as a "strategic area" in which functions may be reserved exclusively to the state.⁷⁰ Similarly, the foreign investment regulations reserve extensive functions of generation and supply exclusively to the state, without limitation as to "public service," and make foreign control of several ancillary construction services subject to authorization by the Foreign Investment Commission.⁷¹

63. *Id.* art. 1001.1(c)(i). As between Canada and the United States, NAFTA annex 1001.2c (the more generous Article 1304 of their bilateral Free Trade Agreement, providing access for most federal procurements above U.S. \$25,000) remains effective.

64. *Id.* art. 1001.1(c)(ii).

65. *Id.* art. 1001.2(a); *id.* annex 1001.2a, ¶¶ 1-5.

66. *Id.* art. 1001.2(b); *id.* annex 1001.2b, Schedule of Mexico, ¶ 3(c).

67. *Ley del Servicio Público de Energía Eléctrica [Law of Electrical Energy Public Service]*, D.O. (Dec. 22, 1975, as amended, D.O. Dec. 27, 1983, D.O. Dec. 31, 1986, D.O. Dec. 27, 1989, D.O. Dec. 23, 1992, and D.O. Dec. 22, 1993) (Mex.).

68. *Id.* art. 1.

69. *Id.* art. 3, which describes generation for self-supply, co-generation and small production; generation for sale to C.F.E.; generation for export; importation for self-supply; and generation for emergency public use.

70. *Id.* art. 5.

71. The Schedule to the Foreign Investment Regulations lists the generation and transmission

In the access they grant to Canadian and U.S. investors, Mexico's NAFTA reservations track the Electric Service Law. Essentially, they reiterate the corresponding Article 27 amendment⁷² and, to elucidate its qualification that the monopoly covers electric power used "for the purpose of providing public service," carve out three electric power operations—"Production for Own Use," "Co-generation" and "Independent Power Production"⁷³—that a private enterprise of Canada or the United States will be allowed to conduct in Mexico. In related construction operations the reservations for electric power are less stringent than those for hydrocarbons. As noted above, NAFTA nationals are prohibited from owning any interest in a Mexican company that installs "fixed deposits" of hydrocarbons⁷⁴ and (absent Foreign Investment Commission authorization) from owning more than 49% of a Mexican contract drilling company,⁷⁵ but in the case of Mexican companies that construct electric installations there is only the latter authorization requirement, and it will expire in 1999.⁷⁶ Nevertheless, NAFTA allows C.F.E. procurement exemptions, both transitional and permanent, identical to those it grants to PEMEX.⁷⁷

The result, particularly for Canadian and U.S. enterprise, is greater foreign access to the Mexican electric power industry than to the Mexican hydrocarbon industry.

IV. AN IMPRESSIONISTIC IMAGE

A giant among the historians of Mexico, Frank Tannenbaum, expressed a profound wisdom concerning the futility of reducing the intricacies of human experience to simple rules. "No history has a unitary principle," he wrote. "The influences that shape human destiny are too subtle, and the threads out of which history is woven are too numerous to be expressed by a formula."⁷⁸

Nothing proves Professor Tannenbaum's wisdom more dramatically than the complexities of Mexican history, which, as he knew, cannot be

of electric energy (*generación y transmisión de energía eléctrica*) and the supply of electric energy (*suministro de energía eléctrica*) as activities reserved exclusively to the State; and electrical installations in buildings (*instalaciones eléctricas en edificios*) and the construction of electricity generation plants (*construcción de plantas de generación de electricidad*) and construction and maintenance of electricity lines and networks (*construcción y tendido de líneas y redes de conducción eléctrica*) as activities in which foreign investors may not have majority ownership without authorization by the Foreign Investment Commission. *Schedule*, *supra* note 48.

72. NAFTA, *supra* note 47, art. 602(3) (incorporating annex 602.3, ¶ 1(c)); *id.* annex III - Mexico, Section A(2). See also *id.* art. 601 (Principles).

73. *Id.* annex 602.3, ¶ 5.

74. *Id.* annex I - Mexico, at I-M-27.

75. *Id.* at I-M-23.

76. *Id.* at I-M-21, concerning *Construction of Industrial Plants, Construction of Electricity Generation Plants, Construction and Maintenance of Electricity Conduction Lines and Networks and Electrical Installations in Buildings*.

77. NAFTA, *supra* note 47, arts. 1001.1(c)(ii), 1001.2(a) and (b); *id.* annex 1001.2a, ¶¶ 1-5; *id.* annex 1001.2b, ¶ 3(c).

78. TANNENBAUM, *supra* note 3, at 3.

reduced to formula. There is value, nonetheless, in addressing those complexities with quick sketches of impression, not to subsume their intricacies but to draw the perceiver closer to their essential force. José Clemente Orozco's canvases and Diego Rivera's murals do not exhaustively recapitulate the Mexican Revolution, but they immerse us in it more effectively than a hundred history books. I offer such an impressionistic image of Article 27 and its amendments. It is an oversimplification, of course, but it may bring us nearer to that famous edict's dynamic core.

That image is the challenged time-warp of Article 27's two attempts to withdraw Mexico from the Modern Age.

For three long Spanish centuries Mexico was secluded from the Modern Age. She spent her protracted colonial childhood in pre-Modern isolation, moated from the Renaissance, interdicted from the Reformation, shielded from the Industrial Revolution in cloisters fashioned by Castilian *hidalgos*, guarded by Hapsburg and Bourbon kings. When Independence burst open the cloister doors Mexico was unprepared to depart her pre-Modern sanctuary and brave the capitalistic, middle-class, Modern world outside. She had no capital, because she had no capitalism. She had no middle-class institutions, because she had no middle class. The North American Wars, the French Intervention, the Porfiriato and the Mexican Revolution were measures of her unpreparedness. The original Article 27 and its state monopoly amendments are calibrations of Mexico's fearful recourse of seeking refuge in imaginary time-worlds less demanding than the Modern Age.

Realizing that foreigners, *latifundistas* and the Church had come to dominate Mexican land because Mexicans failed to develop a competitive capitalism of their own, the delegates at Querétaro abjured the fee simple title of the Modern Age and relegated that land to a time-world of pre-Modern feudalism in which a sovereign could condition or rescind, at any time, its prior grants. Later, when Mexican Presidents realized that foreigners had come to dominate Mexico's hydrocarbon and electric power industries because Mexicans, again, had failed to develop a competitive capitalism of their own, the Presidents nationalized those industries and, to protect them from the foreign capitalism of the Modern Age, encased them in a time-world of post-Modern socialism in which the principal means of production were monopolies of the state.

But now the Berlin Wall has fallen. Free enterprise is the economic icon of industrial mankind; the world sees earlier auguries of Marxist productivity as a discredited Potemkin village. Formerly socialist nations scurry to privatize their inefficient, money-gorging state monopolies, hydrocarbons and electric power included. The post-Modern time-world in which Mexican Presidents insulated PEMEX and C.F.E. has proved to be as illusory as the pre-Modern time-world to which the delegates at Querétaro relegated Mexican land. Today, Mexicans realize that the authentic future is not post-Modern socialism, but Modern capitalism *déjà vu*.

The question, therefore, is whether Mexicans now have sufficient confidence in the competitiveness of their capitalism to reject both of their

illusory time-worlds and enter, at last, the Modern Age of free enterprise. In most business sectors, the legislative reforms of the Salinas Administration and the investment assurances of NAFTA have placed Mexico firmly on that path,⁷⁹ but what of hydrocarbons and electric power? Anointed by the amendments of Article 27 and shielded by the protective penumbras of foreign investment legislation and Mexico's reservations to NAFTA, those state monopolies seemingly still stand secure. The world wonders whether Mexico's newly elected President, Ernesto Zedillo, will dare propose, and his newly independent Congress will dare approve, a sixteenth amendment of Article 27 to lead Mexico, in those industries as well, back to the future.

79. The sectors are described in Ewell E. Murphy, Jr., *Opportunities for U.S. Business in Mexico under NAFTA*, 10 CORP. CONS. Q. 55 (1994). Privatizations effected from 1989 to 1992 are analyzed in Carlos Bazdresch and Carlos Elizondo, *Privatization: The Mexican Case* (1992) (Unpublished Paper No. 93-05, on file with the Texas Papers on Mexico, Institute of Latin American Studies, University of Texas (Austin)).