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Ewell E. Murphy Jr.

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SEEING NAFTA THROUGH THREE LENSES

Ewell E. Murphy, Jr.*

I. THREE LENSES OF PERCEPTION

Knowledge is a rather destructive thing. Our learning curves are littered with the wreckage of invalidated hypotheses, discredited concepts, and failed illusions. The more we come to understand an object, the more we abandon the perspective from which we first glimpsed it. We are like assiduous astronomers, straining to see stars through a telescope of many lenses, discarding each lens, in turn, to observe more clearly through the next.

And yet, those discarded lenses serve a useful purpose. We have to start somewhere. Each of our abandoned perspectives, in turn, enables us to find another. As Ortega wisely noted, "Sin pre-juicios no cabe formarse juicios." Without pre-judgements, judgements cannot be formed. It is discouraging to discard lenses, but with each discarding, we better visualize the object of our concern.

Looking at NAFTA is like that. In our attempts to understand the significance of Mexico's joining the free-trade relationship between Canada and the United States, we lawyers of the United States have used and discarded two different lenses of perception, and now we are peering at NAFTA through a third lens. Let us recall how Mexico appeared in those three perceptions, and let us ponder the lessons those three lenses have taught.

A. The Lens of Economics

The first lens through which U.S. lawyers endeavored to see Mexico's involvement in NAFTA was economics, the preeminent social

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*B.A., LL.B., University of Texas at Austin; D.Phil., Oxford University, England. Mr. Murphy is a retired partner of the law firm of Baker & Botts, L.L.P. in Houston. During the current academic year, he is a Distinguished Lecturer at the University of Houston Law Center and a Visiting Professor at the University of Texas Law School.

1 José Ortega y Gasset, Addín en el Paraíso, 1 OBRAS COMPLETAS 473 (Revista de Occidente, 1966).
science of the Modern Age. Economics describes human activity in numbers. It is "GDP this" and "trade balance that" and per capita quantifications all around. So it was in numbers that the economists forecast NAFTA to us. For those of us who do not comprehend numbers very well, the economists furnished graphs; export lines and import lines, zig-zagging in dramatic peaks and valleys. Those graphs were very effective. They persuaded even the U.S. Congress to back NAFTA. So it was full speed ahead for NAFTA. Numerically speaking, everything was looking great.

As we lawyers gazed at NAFTA through the lens of economics, it was reassuring to see who was running Mexico. It was a bunch of economists. In earlier times, if you wanted to be a President or a cabinet member of a Latin American country, being a general or a lawyer was the way to go. No longer. Now economists lead the top echelons, nowhere more than in Mexico. Not just ordinary economists, either, but Ph.D.s from the most ivoried towers of the Ivy League. So we lawyers sat back, content that skilled numerologists were authenticating not only those dramatic graphs, but the numbers they depicted.

Looking through the lens of economics, at first we thought NAFTA’s objective was trade. That is what the Congress was debating, mostly, and the very name of NAFTA is the “North American Free Trade Agreement.” But once we read beyond the title page, we realized that NAFTA aimed at much more than trade. It aimed at investment, for example. In fact, the most perceptive insight into NAFTA was expressed in two short sentences of The Economist back in 1990, when the NAFTA negotiations had just begun. Those sentences read: “The free-trade agreement . . . is not only, or even primarily, about openness of trade. It has more to do with attracting the foreign investment that Mexico will need.”

That was a very shrewd insight. Its significance rests on Mexico’s historic phobia of foreign investment. In this century that phobia was notably expressed in the land ownership restrictions of the 1917 Constitution, in the oil expropriation of 1938, and in President Avila Camacho’s 1944 decree limiting foreign ownership in specified industrial sectors. It culminated in President Echeverría’s protectionist Foreign

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3 Constitución Política de los Estados Unidos Mexicanos, Art. 27.
4 For an historical context of the expropriation, see 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).
5 See Diario Oficial (hereinafter D.O.) July 4, 1944. See also HARRY K. WRIGHT, FOREIGN
Investment Law of 1973. Theologized by the Calvo Doctrine, that phobia kept Mexico from promising, even for such foreign investment as it deigned to receive, the investment protection commitments of the Convention on the Settlement of Investment Disputes (ICSID), the Convention creating the Multilateral Investment Guarantee Agency, or a Bilateral Investment Treaty with the United States.

Given that phobic tradition, Mexico’s undertakings in the foreign investment provisions of the NAFTA Agreement are remarkable. Besides fixing sectoral boundaries to state monopoly and to limitations on foreign ownership, for investment from other NAFTA nations those undertakings grant access to remaining sectors of the Mexican economy and promise standards of protection that more than match the ICSID Convention and a Bilateral Investment Treaty. In the realm of practicality, it is difficult to imagine a more dramatic about-turn from the protectionism of the Echeverrian years.

B. The Lens of Law

Evaluating NAFTA’s opening of Mexico to foreign investment led U.S. lawyers to examine the legal system foreign investment would encounter in Mexico, if it entered. That acquainted us with the imposing infrastructure for domestic and foreign enterprise the Salinas Administration created: a Foreign Investment Law, a Mining Law, and commercial

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ENTERPRISE IN MEXICO (University of North Carolina Press, 1971) (describing the regulation of foreign investment in Mexico prior to the Echeverria Administration, including President Avila Camacho’s original decree and its proliferating amendments).


8 Convention Establishing the Multilateral Investment Guarantee Agency (MIGA), 24 I.L.M. 1598, Nov. 1985. MIGA was established as the newest member of the World Bank Group. Its purpose is to encourage the flow of foreign direct investment to its developing member countries for economic development. Its primary means of facilitating investment is through the provision of investment guarantees against the risks of currency transfer, expropriation, and war and civil disturbance.

9 For Mexico, the limits are stated principally in annexes to NAFTA Chapter 6 and the Mexican portions of NAFTA Annexes I through VII.

10 See, e.g., NAFTA arts. 1102-1104 (access for investment generally), arts. 1202-1204 (access for cross-border services), and arts. 1405-1406 (access for financial services).

11 Id. at arts. 1102-1104 (standards for investment generally), arts. 1202-1204 (standards for cross-border services), arts. 1405-1406 (standards for financial services).

arbitration legislation, intellectual property laws, and an Economic Competition Law, all brand-new, enhanced with statutory authorizations for private investment in port services and the generation and sale of electric power and topped off, for U.S. investors, with Mexico's first general income tax treaty with the United States. Additionally the Salinas Administration continued the privatization of Mexican banks the de la Madrid Administration had started. As we were studying that infrastructure the Zedillo Administration embellished it with a new administrative mechanism for privatizations and with additional openings in such significant state monopoly sectors as railroad services, telecommunications, airport services, and the transporta-
tion, storage, and distribution of natural gas.\textsuperscript{25} We were quite impressed.

We were so impressed, in fact, that we began to experiment with a second lens with which to look at NAFTA, the lens of law. Admittedly, we lawyers found that lens to be more user-friendly. As the lens of economics describes human activity in numbers, the lens of law describes human activity in words, and we lawyers have always supposed ourselves to be adept at words. But, aside from its user-friendliness, we honestly concluded that the lens of law was more revealing of the NAFTA that we were trying to see, and that when it came to measuring relationships among the NAFTA nations, numbers were less informative than the words of national law that made those numbers flow.

Then, as we scanned Mexico’s foreign investment infrastructure through the legal lens, we were taught a startling lesson about the word “investment” itself. When portfolio investment fled President Zedillo’s bungled devaluation of 1994, we learned that there are investments and then there are investments, and some are more skittish than others. To our consternation, some economists seemed as startled as we. That settled it. By the time the U.S. Congress balked at a rescue package for the peso, and President Clinton dared to devise his own, we had discarded the economic lens completely and we were peering at NAFTA exclusively through our comfortable new lens of law.

The more we peered through that lens of law, however, the less sanguine we were of the NAFTA we perceived. What most concerned us were those industrial sectors that President Zedillo was privatizing. They are not your ordinary, everyday industries. Virtually every one of them requires vigilant regulation at both ends, to ensure reasonable returns to suppliers and fair prices to consumers. To make it more difficult, many of the privatizations involve the unpopular downsizing of heavily unionized former governmental staff. Of those privatizations, the most problematical are politically explosive carve-outs from such public sector icons as Petróleos Mexicanos (Pemex) and la Comisión Federal de Electricidad (C.F.E.). Overseeing such privatized industrial sectors would be difficult for any nation. For Mexico, which has little governmental experience in impartial and efficient industrial regulation, it will


\textsuperscript{24} Ley de Aeropuertos, D.O. Dec. 22, 1995.
be a very formidable task indeed. 26

As we pondered those concerns, the birth-rate of Mexican privatizations abruptly dropped. President Zedillo had successfully accomplished, without inordinate public criticism, significant privatizing amputations from two sectors of the state energy monopoly: the generation and sale of electric power and the transportation, storage, and distribution of natural gas. Then he inserted the presidential scalpel to amputate a third. By executive decree 27 key petrochemicals were reclassified from "primary" to "secondary," in order to legalize sales to private investors, both Mexican and foreign, of majority ownership of groups of Pemex plants where those petrochemicals are made.

That struck a very sensitive national nerve. Workers demonstrated; the National Assembly of the ruling political party, el Partido Revolucionario Institucional (the PRI), passed heated resolutions; committees of the Mexican Congress fumed. Cuauhtémoc Cárdenas, the once and future candidate for the Mexican presidency, thundered that the proposed plant sale was "a vital part of the plan to re-structure [Mexico's] mechanisms of production, to subordinate them . . . to dominant interests in the government and economy of the United States." 28

For privatization of the production of secondary petrochemicals, the result was a "restructuring" that looked like a retreat. 29

Meanwhile criticism of NAFTA by other outspoken Mexicans was mounting. "The question," Carlos Fuentes muttered, "is how far Mexico can go in honoring an agreement that fatally favors a strong United States over a weak neighbor." 30 From his knitted ski-mask Subcomandante Marcos put it more bluntly: "With the signing of NAFTA, the government of the United States gave its approval for the assassination of millions of Mexicans." 31

Faced with that troubling scenario, we U.S. lawyers began to under-

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26 The sectors to be privatized are analyzed in N.Y. TIMES, Dec. 15, 1995, at C1.
29 George Grayson, Worst of All Outcomes for Mexico's Oil Privatization, HOUS. CHRON., Nov. 17, 1996, at 4C.
30 Carlos Fuentes, Mexico Sees Things Differently, HOUS. CHRON., Feb. 18, 1996, at 1C.
stand what we were taught in high school civics, that the viability of legal rules depends on the cultural will to enforce them. The words of law do not make the numbers of economics flow unless cultural attitudes cause those words of law to be obeyed. Photogenic numbers and upbeat graphs do not happen unless the economy they quantify has order. Trade does not move unless somebody polices the market. Investments do not enter — and portfolio investments do not stay — unless somebody enforces the warranties and supervises the stock exchange. And the viability of that policing and enforcing and supervising depends, ultimately, not on words in a statute book, but on a cultural predisposition to due process and the rule of law. We wondered whether Mexico could meet that test.

That reminded us that, while President Salinas and President Zedillo were putting those impressive new words in the statute book, Mexico appeared to start coming apart at the seams: murdering the archbishop in Guadalajara; assassinating the Presidential candidate in Tijuana, and the chief executive of the PRI in Mexico City; an interminable insurrection in Chiapas; smaller rebellions in Guerrero and other states; killings and kidnappings galore.

C. The Lens of Culture

We wondered: Is Mexico culturally compatible with the other NAFTA nations? Are those gringo idioms, “due process” and “the rule of law,” translatable into the pragmatic vocabulary of Mexican politics? Is the Rio Grande too culturally insurmountable for NAFTA to cross? For answers to those questions, the lens of law seemed as unforthcoming as the lens of economics. And so, to see NAFTA yet more clearly, we U.S. lawyers regretfully discarded our lens of law and turned to a third lens, the lens of culture.

We discovered that culture is a rather tricky lens to look through. For one thing, culture does not describe human activity in numbers or even in words; it describes human activity in feelings — in inarticulate intuitions about the way people should behave. For another thing, culture is interactive. When you look at NAFTA through the lens of culture, you do not see just the other fellow’s culture. You see the cultures of all three NAFTA nations impinging on each other. That impinging is very dynamic. Actions from one side of a national border precipitate reactions — sometimes overreactions — from the other side. In that sense, to a U.S. observer of NAFTA, the lens of culture is like a mirror in which you see your own culture flashing back at you. Looking in that mirror, the U.S. observer soon realizes that the mirror-image of
one's own culture is not always beautiful.

Look at the frictions between Canada and the United States, for example. The United States has arraigned Canada before the World Trade Organization, charging that a Canadian tax on advertisements in Canadian editions of U.S. magazines is unlawfully discriminatory. So far, WTO panels have sustained that charge, but the issue cannot be evaluated without appreciating the annoyance of Canadians at the enormous tides of trash and trivia that come sloshing over their southern border every day from the U.S. media. That is parallel to the irritation of Mexicans at the rather blatant non-performance by the United States of its NAFTA obligation to open border states to Mexican trucks. Or consider the accusations brought before NAFTA and the Organization of American States and recently raised by the European Union at the World Trade Organization, that the Helms-Burton Act violates international obligations of the United States. To weigh those complaints, one must understand the anger of Canada, Mexico, and other nations at secondary boycotts imposed by an economically intrusive Uncle Sam. And what is the measure of pompous U.S. "decertification" of Mexican efforts at drug control but the festering, in the United States, of the largest and most vicious drug market in the world?

II. THE LENSES RECONSIDERED

Mirror-images like that make U.S. lawyers downright gloomy — so gloomy that now, to tell the truth, we would like to discard our cultural lens and look at Mexico and NAFTA through a fourth and happier lens. The trouble is, we cannot find a fourth lens that pictures things as clearly as the three lenses we have already used. Perhaps we should try putting those three lenses together, and consider contemporary Mexico as the combined projection of the three separate perspectives the three lenses reveal.

When we try that combined approach, the lens of economics still comes up with encouraging numbers. Certainly 1995 was a disaster:

34 BNA, 13 ITR 43, 102 (1966).
Mexico’s sharpest recession in sixty years, the peso forfeiting half its dollar value;36 2,000,000 Mexicans lost their jobs, leaving forty-four percent of them below the poverty level.37 But in 1996 things picked up: compared to 1995, inflation dropped by nearly half;38 industrial production increased more than ten percent;39 the Mexican stock exchange regained its 1994 level;40 helped by the devalued peso, Mexico’s trade balance surged;41 and GDP growth reversed, from minus 6.2% in 1995 to plus 4% in 1996.42 And to symbolize it all, in January 1997 Mexico paid off the entire remaining U.S. portion of its peso-bailout debt.43

To a considerable degree, the legal lens endorses those optimistic numbers. The impressive new statutes are still on the books, and a 1996 amendment of the Foreign Investment Law further increased access for foreign enterprise.44 In net private capital inflows during 1996, Mexico led all Latin American countries and, among developing countries, ranked second to the P.R.C.45 Although the failed sale of majority interests in secondary petrochemical plants may well have marked the end of really innovative privatizations, now it appears that Mexico will offer forty-nine-percent interests in the plants for sale in August of 1997.46

36 See Nick Anderson, Mexico Experiences Economic Paradox: Exports Rise, But Other Sectors Stagnant, HOUS. CHRON., May 18, 1996, at 4C.
37 See José María Imaz & Michael Shellenberger, Mexico’s Troubles in One Word? “El Barzon,” HOUS. CHRON., May 6, 1996, at 19A.
38 See Mexico Drastically Cut Inflation in 1996, HOUS. CHRON., Jan. 10, 1997, at 3C.
40 See Anthony DePalma, Mexico’s Economy Shrinks, But Not As Fast As Before, N.Y. TIMES, May 18, 1996, at 1A.
44 Among its innovations are: (1) permitting “pyramidization” by excluding minority foreign equity in Mexican holding companies from the calculation of aggregate percentages of foreign ownership in Mexican companies (Art. 4); (2) increasing from 30% to 49% permitted foreign ownership in various financial sectors, and allowing, with approval of the Foreign Investment Commission, more than 49% foreigner ownership in railroad services (Art. 8); and (3) allowing foreigners to acquire directly land outside the “restricted zone” adjacent to Mexico’s land and sea borders (Art. 10A). (Article references are to the 1993 Foreign Investment Law (D.O. Dec. 27, 1993) as amended by the 1996 enactment (D.O. Dec. 24, 1996).)
46 Charles Boisseau, Cross-Border Trade Conference Opens, Mexican Officials Talk of An
And the maquiladoras\textsuperscript{47} are still flourishing. Toward the end of 1995 there were more than 2,900 of them, hiring more than 742,000 people.\textsuperscript{48} And while in 1986 nearly all maquiladoras were in the border zone, by 1996 some thirty percent of them were in the interior.\textsuperscript{49}

The cultural lens does not contradict those two optimistic images, but it colors them darkly with its own. "Sure, the numbers are up and good laws are on the books," it says, "but how does that help the average Mexican?" The United Nations and the World Bank tell us that, outside of Africa, Mexico has the biggest gap between rich and poor of all but six countries in the world. The richest ten percent of Mexicans control forty-one percent of Mexico's wealth and the poorest fifty percent receive only sixteen percent of national income.\textsuperscript{50} Mexico's recovery from the 1994 collapse cut the living standard of most Mexicans by twenty percent;\textsuperscript{51} real wages are less than they were in 1981;\textsuperscript{52} real GNP has collapsed, per capita, to the level of 1973; and real minimum wages are seventy percent less than they were then.\textsuperscript{53} And, counting political as well as economic factors, during the third and fourth quarters of 1996, one respected evaluation ranked Mexico as the riskiest of major Latin American countries and second only to Russia among rated countries generally.\textsuperscript{54}

The significance of those disparities was cogently expressed by James R. Jones, Ambassador of the United States to Mexico during the Salinas and Zedillo years. "I think we are living on limited time," he said. "This generation of adults will probably survive on hope, but I think over the next five to ten years, if that isn't translated into benefits and real opportunities, you're going to have demagogues rise up who will want to turn the clock back."\textsuperscript{55}

\begin{footnotesize}
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\item \textsuperscript{47} Maquiladoras are industries which are allowed, under certain arrangements in the United States and Mexico, to import intermediate input, process them in Mexico, and re-export them back to the United States. See Alejandro Nadal, The Mexican Economic Recovery, 23 CAN.-U.S. LJ. 59 (1997).
\item \textsuperscript{48} See Luis Pazos, PROBLEMAS SOCIOECONÓMICOS DE MÉXICO 58 (Editorial Diana, 1996).
\item \textsuperscript{49} See Andrew Downie, New Maquiladoras Not Border-Based, HOUS. CHRON., May 9, 1996, at 1C.
\item \textsuperscript{50} See Anthony DePalma, Income Gap Grows in Mexico, and So Do Protests, N.Y. TIMES, July 20, 1996, at 3.
\item \textsuperscript{51} See N.Y. TIMES, Sept. 25, 1995, at A19.
\item \textsuperscript{52} See supra note 50.
\item \textsuperscript{53} See Juan Enriquez, Mexico's Cycle of Failure, N.Y. TIMES, Mar. 11, 1997, at A15.
\item \textsuperscript{55} Sam Dillon, Have-Not's Need Stake in Mexico, Envoy Says, N.Y. TIMES, Dec. 4, 1996, at
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In short, when we lawyers of the United States peer at Mexico's relationship to the NAFTA through a combination of our three lenses, we see the numerical optimism of the lens of economics and the verbal assurance of the lens of law, but also the emotional foreboding of the lens of culture. Of those three images, none, by itself, captures the full picture; perhaps, somehow, all three images are correct; conceivably the three images prefigure a Mexico of strength and stability, but we cannot be sure. We are only astronomers, not prophets. We have only a telescope to peer through, not a crystal ball. And, when we look at contemporary Mexico through our telescope of three lenses, those are the three thought-provoking images that we see.