

Comment

Between the Global North and the Global South: The United States-Mexico-Canada Agreement and Mexico's Paradoxes*

I. Introduction

In his famous 1950 book, the Labyrinth of Solitude (*El Laberinto de la Soledad*), Nobel-Prize winner *Octavio Paz* offered a picture of the contradictions inherent in the Mexican identity. He described a character known as the *pachuco*, a term used to designate persons of Mexican origin living in the United States of America (particularly in Los Angeles), who would form gangs with distinctive clothing and linguistic identity. *Paz* masterfully describes the conflicting duality plaguing the *pachucos*: their denial of both the society from which they originate, as well as the one that they now inhabit. The result is an unrelenting feeling of solitude for a lack of belonging, leading to a defiance of the surroundings driven by what *Paz* deemed a “will-not-to-be”.¹ The singular case of the *pachuco* is then extrapolated to a more general context. Mexico's history, *Paz* states, is constant soul-searching of the origins. Foreign influences by Europe, mainly Spain and France, and by the United States of America, are combined with the indigenous roots of pre-Columbian civilizations.² The outcome is a plural and conflicted identity, as Mexico is part of all of these dimensions but, at the same time, fully belongs to none.

The society of the 1950s portrayed by *Octavio Paz* has obviously evolved, changed its ways, and assumed new forms. But a constant theme throughout Mexican politics has been the cultural duality of being a neighbouring country of the largest economy in the world, yet possessing a Latin American identity with a shared past and common problems. The best legal exemplification of this duality is Mexico's simultaneous membership in two major agreements representing the core identities of the two spaces. First,

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¹ *O. Paz*, *The Labyrinth of Solitude*, 1962, 17.

² *O. Paz* (note 1), 20.

being a party to the North American Free Trade Agreement (NAFTA) and its successor, the United States-Mexico-Canada Agreement (USMCA), which entered into force on 1 July 2020,³ Mexico is a part of the Global North. Second, Mexico's ratification of the American Convention on Human Rights and its subsequent incorporation of the Inter-American Court of Human Rights (IACtHR)'s jurisprudence places it in the realm of Latin American international transformative constitutionalism, a unique legal innovation from the Global South.⁴ Both are the result of Mexico's reforms towards what is known in legal literature as an "open state", mainly in the 1990s, when multiple Latin American countries had a higher degree of reception of international law.⁵ These two legal regimes underscore Mexico's dual but split identity as aspiring to a project of economic, but not political, integration⁶ with its two neighbours to the North, yet sharing many of the social anxieties, plights, and challenges of its Latin American peers to the South. The following lines build upon this duality in light of more recent episodes. While other Latin American countries face similar dualities, the USMCA's timeliness merits a closer look at Mexico.

II. Past Iterations of "Geography Is Destiny"

Mexico's status as the United States' neighbouring country has been a decisive factor shaping its history. The legal system is certainly no exception. After attaining independence from Spain, and ever since its first Constituent Assembly met in 1823, Mexico was torn when choosing between two models: a centralised government as inspired by the French tradition of Continental Europe, or a federal republican system akin to the one in the United States. The latter prevailed, though by a small margin.⁷

Mexico's turbulent bilateral relationship with the United States throughout the XIX Century resonates to this day in the country's public discourse. The enormous relevance of this bilateral relationship for Mexico lends cre-

³ <<https://www.state.gov>>.

⁴ A. von Bogdandy, *Ius Constitutionale Commune en América Latina. Observations on Transformative Constitutionalism*, in: A. von Bogdandy/E. Ferrer/M. Morales/F. Piovesan/X. Soley (eds.), *Transformative Constitutionalism in Latin America*, 2017, 31.

⁵ R. Urueña, *Domestic Application of International Law in Latin America*, in: C. A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law*, 2019, 565 et seq.

⁶ F. Abbott, *North American Free Trade Agreement (1992)*, in: R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. VII, 2012, 777.

⁷ F. Tena, *Leyes Fundamentales de México 1808-1983*, 12th ed. 1983, 152 et seq.; J. M. Serna, *Derecho Constitucional Mexicano en su Contexto*, 2018, 16 et seq.

dence to the adage “geography is destiny”. Here, one of the first paradoxes emerges from opposing readings of historical events of the period. These set the stage simultaneously for both nationalist rallies promoting aversion to the United States, as well as for a closer bilateral cooperation between the two countries. Each dimension is deployed as the situation so requires. This has also translated into international law.

The war between the United States and Mexico in 1846-1848, and its disastrous outcome for the latter, has been a source of constant resentment. Mexico’s loss of more than half of its territory was enshrined in a subsequent international treaty, known as the Treaty of Guadalupe Hidalgo.⁸ The traumatising experience has often been invoked as a political tool since then. Notably, its memory figures amongst the series of events arguably accelerating the United States’ entry into the First World War in 1917. The text of a communication sent by the Foreign Minister of the *Kaiserreich* Arthur Zimmermann to Mexican officials, popularly known as the “Zimmermann telegram”, included a promise to reverse the outcome of the 1846-1848 war by returning Texas, New Mexico and Arizona to Mexico.⁹ In turn, Mexico would join the Central Powers in a military alliance against the United States. The telegram was intercepted by British intelligence, sparked outrage after being published in U.S. media and drew otherwise isolationist politicians from that country to support joining the war. Whether the telegram itself was ever more than a “half-baked scheme”¹⁰ is a contested matter. Regardless, it was a testament to open political wounds between these two North American neighbours. One century later, the event elicits rallying cries by Mexican politicians with a left-wing nationalist (i.e. anti-U.S.) orientation. The outcome of the 1846-1848 war was quoted as recently as in 2016 by a Mexican legislator, who protested against *Trump* in his tower in New York after he was elected President.¹¹

A diametrically opposed view of historical events during the XIX Century emerges when they are quoted for fostering closer ties between the two countries. Yet another shift between Europe and the United States took place during the invasion and eventual occupation of Mexico by French forces from 1861 to 1867, leading to the crowning of *Maximilian I* of Habsburg as Emperor. Vital aid provided by the United States government to then-President of Mexico *Benito Juárez* aided in the eventual restoration of

⁸ Treaty of Peace, Friendship, Limits and Settlement between the United States of America and the Mexican Republic, 1848.

⁹ T. Boghardt, *The Zimmermann Telegram. Intelligence, Diplomacy, and America’s Entry into World War I*, 2012, 1.

¹⁰ T. Boghardt (note 9), 246.

¹¹ <<https://www.washingtonpost.com>>.

the Republic. Public statements by the U.S. Secretary of State at the time, *William Seward*, point towards a vindication of the *Monroe Doctrine* – which considered the meddling of European powers in the American continent as an unfriendly intrusion into what was seen as the United States’ “sphere of influence” – more than fraternal solidarity as reasons for support.¹² This collaboration is still quoted as a hallmark of closer cooperation between both countries.

III. Betting on the Virtues of Vicinity: NAFTA and the USMCA

In the late XX Century, major changes in the economic policies of Mexico would strengthen its ties to the United States. Severe crises in the late 1970s and early 1980s were followed by the rise of neoliberalism as an alternative.¹³ The North American Free Trade Agreement’s entry into force in 1994 was seen as the culmination of a gradual move towards open market policies, as fostered in the Washington Consensus. The direct consequence for Mexico was an exponential increase in trade with the United States.¹⁴ Mexico’s proximity to the world’s largest market is deemed to be correlated to the country’s gross domestic product per capita.¹⁵

Mexico’s entry into the North American free trade area was mired with controversy within and beyond its borders. A memorable talking point during the U.S. presidential elections of 1992 was expressed by *Ross Perot*, a businessman running an independent campaign. Concerned about Mexico’s entry into NAFTA, he warned of the “giant sucking sound” of jobs moving south of the border.¹⁶ Mexico’s subpar regulatory standards, he claimed, would lead U.S. companies to reduce costs by transferring production to the south. Thus began a decades-long quest, both in North America and beyond, to confront the distorting power of asymmetrical socioeconomic

¹² *J. M. Callahan*, Statements, Interpretations and Applications of the Monroe Doctrine and of More or Less Allied Doctrines from 1845 to 1870, in Proceedings of the American Society of International Law at Its Annual Meeting, 1914, 104 et seq.

¹³ See the thorough analysis by *F. Escalante*, *Historia mínima del neoliberalismo*, 2015.

¹⁴ *P. Smith*, Mexico since 1946, in: *L. Bethell* (ed.), *The Cambridge History of Latin America*, 1990, 151; *R. Pastor*, Beyond NAFTA: The Emergence and Future of North America, in: *Y. Abu-Laban/R. Jhappa/F. Rocher* (eds.), *Politics in North America. Redefining Continental Relations*, 2008, 461 et seq.

¹⁵ *J. L. Gallup/A. Gaviria/E. Lora*, Is Geography Destiny? Lessons from Latin America, 2003, 71 et seq.

¹⁶ *G. C. Hufbauer/J. Schott*, NAFTA Revisited. Achievements and Challenges, 2005, 6.

conditions in free trade agreements. The underlying concern is that transnational companies' search for lower costs of production fuels a race to the bottom in countries hoping to attract foreign investors.¹⁷ But the empirical validation of this phenomenon is contested.¹⁸

Controversies regarding how to face Mexico's deep developmental asymmetries¹⁹ with the U.S. and Canada led to innovations which would later be reproduced in the broader field of free trade agreements. Additional provisions were designed in the form of two side agreements: the North American Agreement on Labor Cooperation (NAALC) and the North American Agreement on Environmental Cooperation (NAAEC). NAFTA's immediate predecessor, the Canada-United States Free Trade Agreement, had no such arrangements.

The free trade angst of the early 1990's would resonate again in then presidential candidate *Donald Trump's* electoral campaign of 2016. Deeming NAFTA to be "the worst deal ever",²⁰ he believed that the problem was, mostly though not exclusively, Mexico. Then-candidate *Trump* considered withdrawing from NAFTA altogether as a feasible option. As witnessed in the USMCA's recent entry into force, the threat did not materialise. It is unclear whether this was ever a serious claim, part of a political discourse aimed at appealing to a specific constituency, or a negotiating tool for extracting concessions from the agreement's other two states parties – or even a combination of them. Regardless, after three years of negotiations, the new agreement saw the light of day.

IV. Mexico's Common Approaches with the Global South

At the same time as NAFTA entered into force in 1994, an indigenous uprising in the Mexican state of Chiapas, led by the *Ejército Zapatista de Liberación Nacional*, which was composed mostly of persons of Mayan origin, constituted a clear reminder of the country's historical roots. The set of grievances listed by the insurgent group underscored the purpose of rescuing the other side of Mexico's duality. Closer economic integration with the Global North was seen by them as putting this side of its identity at risk.

¹⁷ G. Shaffer, *Retooling Trade Agreements for Social Inclusion*, U. Ill. L. Rev. (2019), 34.

¹⁸ On how EU-based companies are prevented from searching lower regulatory standards in third countries, see A. Bradford, *The Brussels Effect*, Nw. U.L. Rev. 107 (2012), 62.

¹⁹ P. Calderón, *NAFTA and Democracy in Mexico. A Successful Failure?*, 2019, 18.

²⁰ <<http://money.cnn.com>>.

The uprising's concerns were a reflection of longstanding structural problems for both Mexico and the rest of Latin America, particularly the generalised social neglect and exclusion of indigenous peoples. Through NAFTA and the USMCA, Mexico has been part of a Global North project based on international economic law for almost three decades. At the same time,²¹ it has also been part of a Global South project based on the concept of *Latin American international transformative constitutionalism*.²² It is a normative approach that sets "the effective transformation of deeply entrenched structures toward a more egalitarian or democratic society" as a core goal of legal interpretation.²³ The concept focuses on the transformative role played by the Inter-American regime of human rights, an element in which Latin America sets itself apart from other instances of transformative constitutionalism such as South Africa and India.²⁴

Since its acceptance of the contentious jurisdiction of the Inter-American Court of Human Rights (IACtHR) in 1998, Mexico has been at the helm of landmark human rights rulings. The case *González et al. v. Mexico* ("Cotton Fields"), showcased to what extent systemic gender violence is an ingrained phenomenon in the country.²⁵ By appraising the wider context, the Court's reparations issued in that case followed the promotion of structural remedies that range beyond the individual case.²⁶ The dark legacy of forced disappearances during the decades-long regime of a single hegemonic party came to the fore in *Rosendo Radilla Pacheco*, leading to the incorporation of the Court's structural rulings in the national legal system.²⁷ The country's dire human rights situation was in full display in the kidnapping and disappearance of 43 students in a rural school in Ayotzinapa, Guerrero, where the collusion of public authorities from different levels of government has been documented.²⁸ The pressure exerted on the government by civil society and the international community resulted in a novel system of multilevel

²¹ M. Keck/K. Sikkink, *Activist beyond Borders. Advocacy Networks in International Politics*, 1998, 111 et seq.

²² A. von Bogdandy/R. Urueña, *International Transformative Constitutionalism in Latin America*, AJIL 114 (2020), 403 et seq.

²³ A. von Bogdandy/R. Urueña (note 22), 405.

²⁴ A. von Bogdandy/R. Urueña (note 22), 406 et seq.

²⁵ IACtHR, *Case of González et al. ("Cotton Field") v. Mexico*, Judgment of 16.11.2009, Preliminary Objection, Merits, Reparations, and Costs, Series C, No. 205.

²⁶ X. Soley, *The Transformative Dimension of Inter-American Jurisprudence*, in: A. von Bogdandy/E. Ferrer/M. Morales/F. Piovesan/X. Soley (note 4), 346 et seq.

²⁷ IACtHR, *Caso Radilla Pacheco v. Mexico*, Judgment of 23.11.2009, Preliminary Objection, Merits, Reparations and Costs, Series C, No. 209.

²⁸ H. Fix-Fierro/J. Martínez, *Derechos humanos. Cien años de evolución de los derechos en la Constitución mexicana*, 2018, 213.

collaboration in criminal investigations with the Inter-American Commission on Human Rights, known as the Interdisciplinary Group of Independent Experts (GIEI).²⁹ And the protection from ordinary jurisdiction was removed due to a ruling on compliance by the IACtHR in *Cabrera García y Montiel Flores v. Mexico*.³⁰

After a seminal reform in 2011,³¹ the constitutional status of international human rights treaties was consolidated in Mexico. Afterwards, the Supreme Court of Justice held that the interpretative criteria in the IACtHR's jurisprudence were binding not just in those cases where the country is a respondent, but rather have a broader scope of application.³² It thus paved the way to the wider array of human rights case law, where ample and innovative judicial decisions have been issued in fields that directly hinge upon Mexico's historical debts. One notable example is visible in the IACtHR's trailblazing interpretations regarding indigenous peoples' rights.³³ Similarly, recent Inter-American jurisprudence in economic, social and cultural rights offers tools for facing a generalised context of gross economic inequality and social exclusion.³⁴

The adherence of Mexican public institutions, particularly its Supreme Court, to the tenets of Latin American international transformative constitutionalism clearly places the country in the space of the Global South. Through its unique features, the legal approach aims at tackling longstanding grievances by continuously marginalised persons. As these ailments are structural, they require going beyond individual cases. A novel strategy of legal, and particularly judicial, interpretation becomes necessary. Here, Mexico shares this approach with other Latin American countries.

²⁹ <<https://www.gob.mx>>.

³⁰ IACtHR, *Caso Cabrera García y Montiel Flores v. México*, Judgment of 2.11.2010, Preliminary Objection, Merits, Reparations, and Costs, Series C, No. 197.

³¹ Namely, of Article 1 of the Political Constitution of the United Mexican States. On this, see *H. Fix-Fierro/J. Martínez* (note 28), 158 et seq.

³² Supreme Court of Justice of the Nation, Contradiction of Rulings No. 293/2011.

³³ *C. Binder/M. Dobrić*, Die Rechte indigener Völker: Entwicklungen und aktuelle Herausforderungen mit besonderer Bezugnahme auf Lateinamerika, *Zeitschrift für Menschenrechte* 11 (2017), 149 et seq.

³⁴ Starting with *Caso Lagos del Campo v. Perú*, Judgment of 31.8.2017, Preliminary Objection, Merits, Reparations and Costs, Series C, No. 340.

V. The Paradoxical “Post-Neoliberal” Era in Mexico

Octavio Paz had already warned of how even after cataclysmic historical events, such as its early-XX Century revolution that brought about the 1917 Constitution, Mexico had not settled its existential contradictions.³⁵ But paradoxes are not necessarily negative. To the contrary, a closer look at the Global North-Global South overlap may yield insights on how to navigate multiple worlds whilst trying to get the best of each – and at the end getting a very different set of policies than originally expected.

Indeed, Mexico’s paradoxes are in full display in the current administration of President *Andrés Manuel López Obrador*. Campaigning on a left-wing platform based on broad promises to herald a “post-neoliberal era”, he chastised the unpopular policies of privatisation and economic deregulation that began in the 1980s.³⁶ Instead, he nostalgically proposed a return to the golden age of the “Mexican miracle” (*el milagro mexicano*), a period of industrialisation and sustained growth based mostly on import-substitution through protectionism and subsidisation in the years between 1940 and 1970.³⁷ Economic nationalism seemed to be headed towards a revival.

López Obrador’s landslide victory in the Presidential elections of 2018 led to bewilderment regarding how Mexico’s relationship with the United States would evolve. His nationalist discourses were foreboding a clash with President *Donald Trump*. A looming question was related to the ratification of the USMCA, as the newly-elected legislature of Mexico – where *López Obrador’s* political party, *Morena*, enjoys a legislative majority through an informal coalition with smaller parties – needed to ratify it. The final stage of the USMCA’s negotiations took place amidst an apparently adverse context.

Instead, in 2020, after the negotiations of the USMCA came to a successful end, Mexico became the United States’ main trading partner in terms of volume.³⁸ It is also the indirect result of the *Trump* administration’s constant clashes with China. That is, President *Trump’s* policies in the area of foreign trade have brought it even closer to Mexico, a country targeted often during his 2016 Presidential campaign. Furthermore, on this clash with China, by ratifying the USMCA Mexico (and Canada) openly agreed – at least formally – to remain within the geoeconomic orbit of the United States. There is a notable clause conditioning the approval of free trade

³⁵ *O. Paz*. (note 1), 173.

³⁶ <<https://www.telesurenglish.net>>.

³⁷ <<https://www.proceso.com.mx>>.

³⁸ <<https://www.forbes.com>>.

agreements with “non-market economies”³⁹ upon previous notification and review of the negotiated text by the other states parties. In case one party enters such an agreement, the USMCA may be unilaterally terminated. The provision has been labelled an “anti-China clause”.⁴⁰ Beyond its questionable practical relevance, it does send a loud political message.⁴¹

President *López Obrador*’s administration also moved the country closer to its northern neighbour, both economically and politically. Not only did his party ratify the USMCA through overwhelming majority.⁴² It even doubled-down by accepting a protocol in December, 2019, that goes further in terms of commitments by Mexico in the field of workers’ rights.⁴³ Moreover, Mexico’s economic dependence on the U.S. market has been bluntly used as leverage by the *Trump* administration. In June 2019, President *Trump* threatened to impose 5 % tariffs on all Mexican imports to the U.S. unless migrant “caravans” entering through the former’s southern border with Guatemala were halted.⁴⁴ The threat convinced President *López Obrador* to order the deployment of 5,000 officers of the newly-created National Guard to its southern border. The *Trump* administration’s policies would lead to the creation of the so-called “stay in Mexico” program.⁴⁵ Migrants from Central American countries entering the United States illegally through its southern border are sent back to Mexico while they await the dates for the court hearings of their asylum applications. This policy is based mostly on official declarations,⁴⁶ and is far less structured and detailed than the agreement between the European Union and Turkey on migration. But public authorities from Mexico have tacitly accepted the return of Central American migrants. President *López Obrador* condoned the policy publicly by espousing the benefits of free trade.⁴⁷

Consequently, bilateral trade amongst both countries in the purview of NAFTA/USMCA was effectively weaponised by President *Trump* for the achievement of concrete goals in the field of migration, one of his core campaign pledges. Mexico had to effectively tighten its southern border and de-

³⁹ Understood as a country determined to be a non-market economy by any of the three USMCA parties. Article 32.10 USMCA.

⁴⁰ <<https://voxeu.org>>.

⁴¹ G. Vidigal, A Really Big Button That Doesn’t Do Anything? The Anti-NME Clause in US Trade Agreements Between Law and Geoeconomics, JIEL 23 (2020), 45 et seq.

⁴² <<http://comunicacion.senado.gob.mx>>.

⁴³ <<https://www.ft.com>>.

⁴⁴ <<https://www.nytimes.com>>.

⁴⁵ <<https://www.dhs.gov>>.

⁴⁶ U.S. – Mexico Joint Declaration, Media Note, 7.6.2019, available at <<https://www.state.gov>>.

⁴⁷ <<https://www.elfinanciero.com.mx>>.

fend the interests of the Big Brother in the North over those of its Latin American peers. By doing so, President *López Obrador* followed an agenda of realpolitik, promoted Mexico's own interests and, at the same time, contributed to the management of irregular migration in tune with President *Trump*.

In the most recent display of a paradox bordering on irony, President *López Obrador* made an official visit to the United States of America on 8 July 2020 to celebrate the USMCA's entry into force. It was his first trip abroad as a head of government. During the visit, he took the opportunity to symbolically visit the statue of *Abraham Lincoln*, reminiscing the support he offered to Mexican President *Juárez* during the French invasion of 1861-1867. He even lavished praise on President *Trump's* treatment of Mexico, touting it as a relationship based on "respect" and "understanding".⁴⁸ That is, despite the blatant imposition of an anti-migration agenda, both countries are currently on most amicable terms.

VI. Concluding Remarks

So far, in a short period of time, Mexico's economic policies under President *López Obrador* have arguably brought it closer to the Global North than to the Global South. Indeed, as President *Trump's* tariffs threat hinted, tampering with the economic links to the United States would likely have adverse effects. Therefore, the benefits of free trade have effectively prevailed over both left-wing economic nostalgia as well as over more *laissez-faire* views towards migration from the south.

Still, the developmental gap between Mexico and its neighbour remains.⁴⁹ As illustrated by *Daron Acemoglu* and *James Robinson's* opening of their book, *Why Nations Fail*, all it takes to get a grasp of the contrast is a visit to each side of the border city of Nogales, located both in the U.S. state of Arizona and the Mexican state of Sonora.⁵⁰ *Acemoglu* and *Robinson* explain this asymmetry by resorting to historical institutionalism, avoiding "culture" as a simplistic explanation for developmental divergences.⁵¹ Though their explanatory tenets may be open to debate, their insights on the Global North-Global South divide are nevertheless appealing. Mexico's road ahead

⁴⁸ <<https://www.theguardian.com>>.

⁴⁹ *R. Pastor* (note 14), 462.

⁵⁰ *D. Acemoglu/J. Robinson*, *Why Nations Fail. The Origins of Power, Prosperity and Poverty*, 2013, 7 et seq.

⁵¹ *D. Acemoglu/J. Robinson* (note 50), 9.

should incorporate tools from both worlds, be they international economic agreements or Latin American international transformative constitutionalism. After all, whether they are a blessing or a curse, paradoxes are what we make of them.

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