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from Mexico****- Session II -****5 December 2019**

This contribution is submitted by Mexico (COFECE & IFT) under Session II of the Global Forum on Competition to be held on 5-6 December 2019.

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Competition Provisions in Trade Agreements

- Contribution from Mexico –

Contribution by Mexico's Federal Economic Competition Commission (COFECE)

1. Background

1. Since the opening of the Mexican economy in the 1990s, the Mexican government has signed several trade agreements. Today, ten of the 20 free trade agreements in force, have incorporated competition provisions or specific chapters dedicated to competition policy. The United States-Mexico-Canada Agreement (USMCA) is one of the earliest treaties negotiated. This new generation agreement, which will replace the North American Free Trade Agreement (NAFTA) and is still to be ratified, will provide a stronger framework to ensure due process when enforcing competition laws.

Table 1. Current FTAs signed by Mexico with competition provisions

Legal instrument	Year of entry into force	Chapter or articles
United States-Mexico-Canada Agreement (USMCA)	Pending	Chapter 21 (Competition Policy)
Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)	2019	Chapter 16 (Competition Policy) and Chapter 17 (State-owned Enterprises and Designated Monopolies)
Free Trade Agreement between the United Mexican States and the Republic of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua	2013	Art. 16.5 (Control of Abusive or contrary to competition practices and conditions)
Agreement Between Japan and the United Mexican States for the Strengthening of the Economic Partnership	2005	Chapter 12 (Competition)
Free Trade Agreement between the Government of the Oriental Republic of Uruguay and the Government of the United Mexican States (ACE N° 60)	2004	Chapter XIV (Competition Policy, Monopolies and State-owned Enterprises)
Free Trade Agreement between the EFTA States and the United Mexican States	2001	Section IV (Competition)
Free Trade Agreement Between the State of Israel and the United Mexican States	2001	Chapter VIII (Competition Policy, Monopolies and State Enterprises)
Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and the United Mexican States	2000	Article 11 (Competition) and Annex XV
Free Trade Agreement between the Government of the Republic of Chile and the Government of the United Mexican States Free Trade Agreement (ACE N° 41)	1999	Chapter 14 (Competition Policy, Monopolies and State-owned Enterprises)
Free Trade Agreement between the United Mexican States and the Republic of Colombia (ACE N° 33)	1995	Chapter XVI (State-owned enterprises)
North American Free Trade Agreement (NAFTA)	1994	Chapter 15 (Competition Policy, Monopolies and State Enterprises)

2. Competition provisions in these instruments, although having different scopes and reach, have led to the creation of conditions that favor and protect competition, and have laid the foundations for antitrust agencies' commitment to cooperate and coordinate with the ultimate aim of promoting a competitive environment in their respective countries.

3. The NAFTA stands out among trade agreements not only because of the size of the market and its relevance to the global economy, but for its critical role in driving the establishment of a competition regime in Mexico. Accession to NAFTA represented a milestone in the adoption of a competition regime in Mexico. Basic commitments for Mexico under NAFTA included adopting national competition laws proscribing anticompetitive business conducts; and cooperation and coordination in competition enforcement between Canada, Mexico and the United States.

2. Competition provisions in trade agreements

4. Trade agreements have had a significant influence in the establishment and improvement of legal competition frameworks in Mexico. The first competition law was established under the commitments of a trade agreement. In 1992, to comply with NAFTA's obligations and to establish a common ground to cooperate and coordinate in competition matters with the signatory parties, Mexico published its first Federal Economic Competition Law (LFCE for its acronym in Spanish) and created a competition authority, the Federal Competition Commission, to enforce it.

5. NAFTA included a chapter devoted to competition. NAFTA's chapter 15: "Competition Policy, Monopolies and State Enterprises" was the first effort to provide a legal framework for the region's competition policy and regulation of designated monopolies and state-owned enterprises (SOEs). As such, article 1501 focused on ensuring that all the three countries had laws in place to address anticompetitive conducts – and really enforce it – aiming at guaranteeing a level playing field between the nations' companies and providing for legal certainty in this regard. Article 1501 also laid down the framework under which the nations could cooperate and coordinate, including mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free trade area. Furthermore, articles 1502 and 1503 regulated designated monopolies and state enterprises. These articles were the first that included disciplines on SOEs in FTAs. Its aim was to ensure that competition was not affected or hindered by their conducts whether a monopoly authorized by the State or a commercial company operated by the State. Exclusion from dispute settlement mechanisms are included in article 1501.3.

6. After NAFTA, the subsequent negotiated treaties followed its design and reach in competition matters. For example, the Chile-Mexico agreement, also known as Economic Complementarity Agreement (ACE) N° 41, contemplated the promotion of competition in the free trade area and the commitment of the parties to adopt or maintain measures to prohibit anticompetitive conducts and enforce competition laws. ACE N° 41 included provisions to regulate state-owned enterprises, provisions on cooperation and coordination, as well as for the exclusion of competition matters from dispute settlement. This is the same case for the agreement between Israel and Mexico, which draws its inspiration from NAFTA concerning designated monopolies and SOEs, cooperation and coordination, and principles governing dispute settlement, although it does not contain clauses for adopting or maintaining competition laws.

7. Treaties signed with the European Union and with the European Free Trade Area (EFTA), as well as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Agreement Between Japan and the United Mexican States for the Strengthening of the Economic Partnership (Japan-Mexico FTA) have gone further and have incorporated additional obligations. The Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and the United Mexican States (EC-MX FTA) introduced principles of transparency and confidentiality of information.

8. CPTPP has a broader approach on incorporating obligations on procedural fairness in competition law enforcement, and on private rights of action. In both CPTPP's chapters, 16. Competition policy and 17. State-owned enterprises and designated monopolies, COFECE actively participated in drafting the final texts which aim at promoting a level playing field between SOEs and private companies, and to include state-of-the-art provisions to better enforce competition laws and cooperate in this field between the member-States.

9. Cooperation under trade agreements have provided for better enforcement actions in cases where more than one jurisdiction is involved. For example, as set out in NAFTA and the EC-MX FTA, notifications of relevant enforcement activities have been made.

3. Recent agreements

10. On 30 November 2018, Mexico signed a new treaty with its main trade partners, the United States and Canada. The new treaty, USMCA was negotiated with the aim of updating and replacing the NAFTA. In addition to NAFTA's Chapter 15 on Competition Policy, Monopolies and State Enterprises, USMCA's Chapter 21 on Competition Policy specifically provides for procedural fairness in competition law enforcement, consumer protection and transparency.

11. As has been case in the (re)negotiations of trade agreements that incorporate competition provisions, COFECE was invited by the Ministry of Economy to be actively involved in the drafting of the USMCA's competition chapter. COFECE's main contribution was providing technical advice and ensuring alignment and consistency of the USMCA provisions with the LFCE and best international practices.

12. The USMCA has not come into force yet: Mexico ratified it on June 19, 2019, with no set date for discussion by the American Senate and by the Canadian Parliament. One of the most significant contributions of the USMCA was the recognition of the treatment to the client-attorney principle that each party gives. Since the negotiations, there has been progress in this topic. Most notably, on September 30, 2019, the Federal Economic Competition Commission (COFECE) published in the Federal Official Gazette the Regulatory Provisions for the qualification of information derived from legal counsel provided to economic agents, which set rules for the handling of attorney client communications. These rules for the handling of attorney-client communications correspond to competition enforcement principles contained in Article 21.2 Procedural Fairness in Competition Law Enforcement of USMCA.

13. According to this new soft law, this type of communications must be protected and lack evidentiary value for competition law enforcement procedures. Regulatory provisions – which were subject to public consultation – establish measures to be adopted by COFECE to protect attorney-client communications, in order to safeguard the rights of economic agents, to carry out impartial probes and to respect due process. The publication of the Regulatory provisions aimed at giving legal certainty to economic agents and COFECE.

Federal Telecommunications Institute (IFT)

1. Introduction

1. Article 89 of the Mexican Constitution establishes that one of the powers and obligations of the President is to direct foreign policy, sign international treaties, terminate, denounce, suspend, modify, amend, withdraw from and make interpretative declarations on them, if approved by the Senate. To this end, the President shall instruct its executive branch, specifically, the Ministry of Economy (*Secretaría de Economía* or SE) to coordinate trade agreement's negotiations, and the Ministry of Foreign Affairs (*Secretaría de Relaciones Exteriores* or SRE) to implement foreign policy.

2. Federal laws set IFT's role and obligations to provide technical opinions to the executive branch regarding the negotiations of trade agreements. According to section XXXIV of Article 15 of the Federal Telecommunications and Broadcasting Law (LFTR), IFT shall collaborate with the Federal Executive in the negotiation of international treaties and agreements, on matters of telecommunications and broadcasting, and shall oversee its compliance with respect to IFT's general attributions. According to section XVIII of Article 12 of the Federal Economic Competition Law (LFCE), IFT shall issue an opinion, when it deems pertinent or by request of the Federal Executive, through the Ministry of Economy, or through the Senate, on matters of free concurrence and economic competition in the negotiations of international treaties, observing the applicable laws.

3. In order to comply with these obligations, IFT establishes in article 70 of its Statutory Charter that the Bureau of International Affairs shall implement and follow up on the projects of international legal instruments and co-operation agreements, in coordination with IFT's Legal Affairs Unit, and shall liaise with the corresponding authorities to analyze, evaluate, follow up and execute projects regarding international legal instruments and agreements.

2. Mexican Free Trade Agreements (FTA) with competition chapters

4. Since the creation of IFT in 2013 up to this date, three international trade agreements have been negotiated by Mexico, in which IFT has actively collaborated with the SE in the review of draft texts and in negotiation processes, regarding competition.

Table 1. FTA with Competition Chapters Negotiated by Mexico since 2013

	Trade Agreement	Date of Signature	Date of Ratification	Competition Provisions
1	Mexico-United States-Canada Treaty (TMEC/USMCA) ¹	Signed on 30 November 2018	Ratified on 19 June 2019. Pending by the U.S. and Canada.	Chapter 21 on Competition Policy ²
2	Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) ³	Signed on 8 March 2018.	Ratified on 30 December 2018.	Chapter 16 on Competition Policy ⁴
3	Mexico - European Union Free Trade Agreement (TLCUEM) ⁵	Signed on 1997, the negotiation for its modernization concluded on 21 April 2018.	Ratified on 20 March 2000. Pending ratification of the new agreement.	Chapter 23 on Competition Policy ⁶

Source: IFT.

5. Additionally, the IFT has collaborated with the SE in the in the review of the drafts and the negotiation processes of five FTA, as follows.

¹ Available at: <https://www.gob.mx/t-mec/acciones-y-programas/textos-finales-del-tratado-entre-mexico-estados-unidos-y-canada-t-mec-202730?state=published>.

² Available at: <https://www.gob.mx/cms/uploads/attachment/file/465843/21CompetitionPolicy.pdf>.

³ Available at: https://www.gob.mx/cms/uploads/attachment/file/120133/Capitulado_completo_del_Tratado_de_Asociacion_Transpac_fico_en_ingl_s_03082016.pdf.

⁴ Available at: https://www.gob.mx/cms/uploads/attachment/file/113238/16_Compition_Policy.pdf.

⁵ Available at: <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1833>.

⁶ Available at: https://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156818.pdf.

Table 2. FTA with Competition Chapters in Negotiations by Mexico since 2013

	Agreement	Observations	Competition Provisions
1	Mexico - European Free Trade Agreement Association Free Trade Agreement ⁷ (Republic of Iceland, Principality of Liechtenstein, Kingdom of Norway and Swiss Confederation)	In negotiations. Signed on 27 November 2000 and ratified on 30 April 2001. In 2016, negotiations started in order to update this legal instrument, with the objective to provide certainty to economic agents, to expand its scope and to improve access to markets.	Chapter 4 on Competition Policy.
2	Pacific Alliance Framework Agreement ⁸ (Chile, Colombia, Mexico, Peru)	In negotiations. Signed on 6 June 2012 and ratified on 27 January 2013. In 2017, negotiations started in order to adhere Australia, Canada, New Zealand and Singapore as Associated Members.	A proposed chapter on Competition Policy with the candidates to become Associated Members is under review.
3	Mexico – Argentina Economic Complementation Agreement ⁹	In negotiations. Signed on 24 August 2006. In 2016, negotiations started for the expansion and deepening of the agreement according to the current economic environment.	There are plans to include a chapter on Competition Policy.
4	México – Brazil Economic Complementation Agreement ¹⁰	In negotiations. Signed in 2 July 2002. In 2015, negotiations started to increase the economic and trade exchange through a Joint Vision Report that could be transformed into a Free Trade Agreement.	Negotiations of the chapter on Competition Policy Chapter have concluded but the text has not been published.
5	Mexico – Ecuador Free Trade Agreement	In negotiations. As part of its goal to join the Pacific Alliance, Ecuador has to fulfill several requirements, including the signing of trade agreements with each of the members. In this context, it has already signed agreements with Chile, Colombia and Peru. Its agreement with Mexico is still under review.	Negotiations of the chapter on Competition Policy began on August 2019.

Source: IFT.

6. Out of the eight aforementioned agreements that include or plan to include competition policy provisions, five of them are multilateral agreements and the others are bilateral agreements.

7. Moreover, the IFT, following its dual mandate as competition authority and sectorial regulator has sought to include competition provisions in telecommunication chapters. This is the case in the TLCUEM (chapter 14)¹¹, CPTPP (chapter 13)¹²,

⁷ Available at: <https://www.efta.int/media/documents/legal-texts/free-trade-relations/mexico/EFTA-Mexico%20Free%20Trade%20Agreement.pdf>.

⁸ Available in Spanish at: http://www.sice.oas.org/Trade/PAC_ALL/Index_PDF_s.asp.

⁹ Available in Spanish at: http://www.sice.oas.org/Trade/ARG_MEX/ARGMEX_ind_s.asp.

¹⁰ Available in Spanish at: http://www.sice.oas.org/Trade/MexBraACE53/SPA/mexbra_s.asp.

¹¹ See articles TS.10, TS.11, TS.13 and TS.17. Available at: https://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156809.pdf

¹² See article 13.8. Available at: https://www.gob.mx/cms/uploads/attachment/file/113235/13._Telecommunications.pdf

TMEC/USMCA (chapter 18)¹³ and Pacific Alliance (chapter 14)¹⁴. This provisions specifically state that the parties shall take measures to prevent that suppliers of public telecommunications services engage in anticompetitive practices, including cross-subsidisation; using information obtained from competitors with anti-competitive results; and not making available, on a timely manner, technical information about essential facilities and commercially relevant information to provide services to suppliers of public telecommunications services; among other considerations regarding the safeguarding of effective competition.

3. Other Agreements with Competition Provisions

8. Additionally to FTA's provisions, IFT has signed bilateral Memoranda of Understanding with two national authorities that have both regulatory and competition mandates in the telecommunications sector. On 2016, a Memorandum of Understanding (MOU) between IFT-Mexico and OSIPTEL-Peru¹⁵ and on 2017 a MOU between IFT-Mexico and INDOTEL-Dominican Republic¹⁶ were signed, with the purpose of establishing a framework that support the actions between both entities to face regulatory and competition challenges on telecommunications, ICT and broadcasting markets. At this time, IFT is in the process of drafting a MOU with INDECOPI-Peru and SUTEL-Costa Rica.

4. Classification of Competition Provisions

9. Mexican FTA pursue most of the objectives established in Lapr votte's *et al.* classification¹⁷ of competition provisions as follows.

¹³ See article 18.6. Available at: <https://www.gob.mx/cms/uploads/attachment/file/465841/18Telecommunications.pdf>

¹⁴ See article 14.7. Available in Spanish at: http://www.sice.oas.org/Trade/PAC_ALL/telecomunicaciones_capII.pdf

¹⁵ Available in Spanish at: <http://www.ift.org.mx/sites/default/files/contenidogeneral/asuntos-internacionales/organismosupervisordeinversionprivadaentelecomunicacionesosiptel.pdf>

¹⁶ Available in Spanish at: <http://www.ift.org.mx/sites/default/files/contenidogeneral/asuntos-internacionales/institutodominicanodetelecomunicacionesindotel.pdf>

¹⁷ Lapr votte, F.-C., Frisch, S. and B. Can (2015), "Competition Policy within the Context of Free Trade Agreements", E15 Initiative, <http://e15initiative.org/wp-content/uploads/2015/07/E15-Competition-Laprevotte-Frisch-Can-FINAL.pdf>.

Table 3. Types of Competition Provisions included in Mexican FTA since 2013

	T-MEC	CPTPP	TLCUEM
Promote Competition	X	X	X
Adopt or maintain competition laws	X	X	X
Regulate designated monopolies, SOEs and enterprises entrusted with special or exclusive rights	X	X	X
Regulate State Aids and subsidies	X	X	X
Lay down competition- specific exemptions	X	X	X
Abolish trade defences	X	X	X
Set forth competition enforcement principles	X	X	X
Co-operation and co-ordination mechanisms between the signatory jurisdictions	X	X	X
Set out principles on the settlement of competition- related disputes between the signatory jurisdictions			

Source: IFT

10. The IFT continuously provides its technical expertise on regulatory and competition policy to the Federal Executive power, complying with its mandate to collaborate in the negotiation and implementation of international agreements and to follow up on the commitments acquired by Mexico in the telecommunications and broadcasting sectors, within its legal scope. These actions strengthen the parties involved in order to promote competition through bilateral and multilateral means, while stimulating cooperation and setting shared goals.