

# COMPETITION LAW AND POLICY IN MEXICO: SUCCESSES AND CHALLENGES

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## I INTRODUCTION

Mexico adopted its first competition law, the Federal Law on Economic Competition (*Ley Federal de Competencia Económica (FLEC)*) in 1992,<sup>1</sup> in preparation for the signing of the North American Free Trade Agreement (NAFTA) which required the three signatory states to have national competition laws.<sup>2</sup> A comprehensive legislation on competition that included prohibitions against cartels, abuses of dominance, and that required merger review, as well as an agency to implement these laws, was a new phenomenon for Mexico. As is frequently the case with legal transplants, at the time, few domestic actors knew what competition law meant and what impact, if any, it would have on them. For the Federal Commission of Competition (*Comisión Federal de Competencia (FCC)*), the early years were a period of trial and error, and the experience proved taxing. Government and private actors criticized the FCC for being weak, court proceedings triggered by companies' complaints slowed down investigations,<sup>3</sup> and a number of the FCC's decisions were reversed by the district courts on procedural grounds.<sup>4</sup>

Fast forward to 2015, and the competition policy scene has changed dramatically in Mexico. Mexican competition law and policy have become more effective thanks to a series of legislative reforms starting in 2006. Reforms in

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1. *Ley Federal de Competencia Económica [LFCE] [Federal Competition Law]*, *Diario Oficial de la Federación [DOF]* 24-12-1992 (Mex.).

2. North American Free Trade Agreement, U.S.–Can.–Mex., art. 1501, ¶ 1, Dec. 17, 1992, 32 I.L.M. 289 (1993).

3. ORG. FOR ECON. CO-OPERATION & DEV. [OECD], *REGULATORY REFORM IN MEXICO: THE ROLE OF COMPETITION POLICY IN REGULATORY REFORM 8* (1998) [hereinafter OECD 1998].

4. ORG. FOR ECON. CO-OPERATION & DEV. [OECD], *COMPETITION LAW AND POLICY IN MEXICO: AN OECD PEER REVIEW 45* (2004) [hereinafter OECD 2004].

2006<sup>5</sup> and 2011<sup>6</sup> increased the investigative powers of the FCC by introducing a leniency program, the power to conduct dawn raids, and higher maximum fines for competition infringements. After a constitutional amendment in 2013, the FCC was reconstituted as an autonomous body, renamed the Federal Commission of Economic Competition (Comisión Federal de Competencia Económica (COFECE)).<sup>7</sup> The 2013 reforms also established specialized antitrust courts, and the Federal Institute for Telecommunications (Instituto Federal de Telecomunicaciones (IFETEL)), an independent regulator responsible for enforcing competition law in the telecommunications and broadcasting sectors.<sup>8</sup> In 2014, the Mexican Congress passed a new competition law, further increasing the COFECE's powers.<sup>9</sup> The Mexican competition regime has also become more effective as a result of a gradual learning process by the FCC and later the COFECE. Over time, the agencies have improved the legal reasoning and the economic analysis in their investigations and decisions, and have become more transparent and better able to communicate with political, economic, and societal actors.

Thanks to these developments, the COFECE has become a well-respected enforcement agency, ranking above some Western European competition agencies with longer histories and much greater resources in the *Global Competition Review's* annual rankings.<sup>10</sup> Mexico has also climbed from a low of 116th place in 2010 to 67th in “effectiveness of anti-monopoly policy” according to the World Economic Forum's competitiveness index in 2015.<sup>11</sup> The COFECE participates actively in international forums such as the International Competition Network (ICN) and the Organization for Economic Cooperation

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5. Decreto por el que se reforman, adicionan, y derogan diversas disposiciones de la Ley Federal de Competencia Económica [LFCE] [Federal Competition Law], Diario Oficial de la Federación [DOF] 28-6-2006 (Mex.).

6. Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley Federal de Competencia Económica [LFCE] [Federal Competition Law], del Código Penal Federal y del Código Fiscal de la Federación, Diario Oficial de la Federación [DOF] 10-5-2011 (Mex.).

7. Decreto por el que se reforman y adicionan diversas disposiciones de los artículos 6o., 7o., 27, 28, 73, 78, 94 y 105 de la Constitución Política de los Estados Unidos Mexicanos, en materia de telecomunicaciones, art. 28, Diario Oficial de la Federación [DOF] 11-6-2013 (Mex.).

8. *Id.*

9. Decreto por el que se expide la Ley Federal de Competencia Económica y se reforman y adicionan diversos artículos del Código Penal Federal, Diario Oficial de la Federación [DO] 23 Mayo de 2014 (Mex.); GLOB. COMPETITION REV., *Mexico's Federal Competition Commission*, in RATING ENFORCEMENT 2015 (2015) [hereinafter GCR 2015].

10. See GLOB. COMPETITION REV., RATING ENFORCEMENT 2015: STAR RATINGS (2015) [hereinafter GCR 2015 STAR RATINGS].

11. *The Global Competitiveness Index Historical Dataset 2005–2016 (XLS)*, WORLD ECON. F. (Effectiveness of Anti-Monopoly Policy, code 6.03), <http://reports.weforum.org/global-competitiveness-report-2015-2016> [<https://perma.cc/9MX9-F7FC>; <https://perma.cc/S5WP-V54F>].

and Development (OECD),<sup>12</sup> and is held up in the Latin American and Caribbean region as a model.<sup>13</sup>

This article explores the factors that have contributed to the transformation of the Mexican competition regime from a relatively ineffective one in a highly concentrated economy to a relative success story. The gradual strengthening of competition law in Mexico is fascinating because political, economic, and social conditions tip the scales in the opposite direction: a history of high state involvement in the economy,<sup>14</sup> high economic concentration,<sup>15</sup> well-organized business interests,<sup>16</sup> weak regulatory institutions,<sup>17</sup> and a general lack of trust in market mechanisms<sup>18</sup> make Mexico an unlikely case for success. An agency relatively well endowed with financial and human resources in an upper-middle-income country, the FCC/COFECE have also had advantages compared to agencies in poorer countries. However, national income or agency resources do not completely explain the trajectory of the Mexican competition regime: An agency with sufficient resources could still be ineffective.<sup>19</sup> The analysis presented here goes beyond a focus on resources and emphasizes instead the politics, both domestic and international, of agency effectiveness.

The gradual strengthening of the Mexican competition regime can be explained by the interplay of domestic and international political factors. Domestically, a constituency in favor of better competition policy enforcement composed of consumers and consumer organizations, think tanks and business associations, firms traditionally excluded from markets, and lawyers and the bar association gradually emerged and gained a voice in Mexico. This domestic constituency has been crucial for the reforms in two ways. First, these domestic

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12. See comments by Michael D. Blechman, Omar Guerrero Rodriguez, & Ali Haddou, *Panel Discussion: Antitrust developments in India and Mexico*, in ANNUAL PROCEEDINGS OF THE FORDHAM COMPETITION LAW INSTITUTE: INTERNATIONAL ANTITRUST LAW AND POLICY 409, 433–34 (Barry E. Hawk ed., 2013).

13. Claudia Schatan & Eugenio Rivera, *Markets in Central America and Mexico: What is Happening with Competition?*, in COMPETITION POLICIES IN EMERGING ECONOMIES 7, 8 (Eugenio Rivera and Claudia Schatan eds., 2008); not for attribution interviews conducted by the author, Washington, D.C. (Mar. 25, 2015) and Chicago (Apr. 17, 2015).

14. Judith A. Teichman, *The Evolution of Public Enterprise in Mexico*, in PRIVATIZATION AND POLITICAL CHANGE IN MEXICO 26, 26 (1995).

15. Alex E. Fernández Jilberto & Barbara Hogenboom, *Latin American Conglomerates in the Neoliberal Era: The Politics of Economic Concentration in Chile and Mexico*, in BIG BUSINESS AND ECONOMIC DEVELOPMENT: CONGLOMERATES AND ECONOMIC GROUPS IN DEVELOPING COUNTRIES AND TRANSITION ECONOMIES UNDER GLOBALISATION 135, 136–37 (Alex E. Fernández Jilberto & Barbara Hogenboom eds., 2007).

16. Ben Ross Schneider, *Why Is Mexican Business So Organized?*, 37 LATIN AM. RES. REV. 77, 78 (2002).

17. WORLD BANK, REPORT NO. 37293-MX, DEMOCRATIC GOVERNANCE IN MEXICO: BEYOND STATE CAPTURE AND SOCIAL POLARIZATION 40 (2007); Jacint Jordana, *Autonomous Regulatory Agencies in Democratic Mexico*, 16 LAW & BUS. REV. AM. 753, 756 (2010).

18. OECD 2004, *supra* note 4, at 12.

19. See generally Umut Aydin & Tim Büthe, *Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits*, 79 LAW & CONTEMP. PROBS., no. 4, 2016 (discussing resource constraints as only one of many obstacles).

actors initiate complaints before the FCC/COFECE, participate in class actions, and demand more transparency and accountability from the FCC/COFECE, thus contributing to strengthening the enforcement of competition law in Mexico. The pro-competition domestic constituency has also indirectly influenced legislative reforms by electorally supporting politicians advocating reforms.

The impact of this domestic constituency is reinforced by international factors, such as pressures from foreign firms trying to break into the Mexican market, as well as support and pressure from international organizations, in particular the OECD, the World Bank, the International Monetary Fund, and the ICN. The recommendations of international organizations were influential in shaping the legislative reforms as well as the gradual improvements in the FCC's performance. These organizations have also helped steer political support for the FCC in its negotiations with domestic political actors. International actors have reinforced the domestic pro-competition constituency by cooperating with and providing support to think tanks and non-governmental organizations.

The rest of the article is organized as follows: Part II explains what is meant by effectiveness of competition law and policy, and describes the changes in the effectiveness of the Mexican regime over time. Part III presents a brief overview of the process that led to the adoption of the first competition law in Mexico in 1992. Part IV reviews the provisions of the law and the organizational makeup of the FCC. Part V discusses the obstacles that the FCC faced in its early years in implementing the Mexican competition law. Part VI explains how reforms have addressed those obstacles, and Part VII discusses the factors that made these reforms possible. Part VIII concludes.

## II

### DEFINING EFFECTIVENESS OF COMPETITION LAW AND POLICY

In defining the “effectiveness” or “success” of competition law and policy, this article focuses on the extent to which a country's competition regime advances the various goals attributed to competition law and policy in developing countries, as discussed in the introductory article to this symposium.<sup>20</sup> Rather than relying on a quantitative metric of effectiveness, though one is offered, this article aims to qualitatively assess how reforms to the competition regime in Mexico have contributed to advancing these goals.

Effectiveness of a competition regime is sometimes measured by the regime's impact on indicators such as aggregate economic growth, inward foreign investment flows, democracy, or corruption; however, it is difficult to link these outcomes directly to the operation of a competition regime in a country.<sup>21</sup> Other typical metrics employed to measure effectiveness of competition laws in quantitative studies such as the World Economic Forum's “effectiveness of antimonopoly law” or “intensity of local competition” are not very helpful

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20. *Id.* at 4–14.

21. *See generally id.*

either.<sup>22</sup> These indicators are based on surveys that might be measuring respondents' general perceptions of the economy and not specifically the effectiveness of competition regimes.<sup>23</sup> Moreover, because these data only go back to 2006—the year that reforms to the Mexican competition regime started—they do not allow for a before and after comparison of the effectiveness of competition law and policy in Mexico.

*Global Competition Review's* annual rating of enforcement agencies is more helpful, because the rankings are based on an in-depth evaluation of both the legislation and the annual enforcement performance of agencies.<sup>24</sup> The rating—ranging from two stars to five, from the least to the most successful—is useful as a measure of how international and national experts evaluate the overall performance of a competition agency, and is accompanied by a narrative explaining the reasons behind the score. Competition agencies included in the annual rating care deeply about it, and many, including the COFECE, use this as one of the benchmarks of their performance in their annual reports.<sup>25</sup> In *Global Competition Review's* rating, Mexico has climbed from two stars in 2002, the first year it was included in the ratings,<sup>26</sup> to three stars since 2014, a ranking it shares with competition agencies of Austria, Finland, New Zealand, and Sweden among others, and above those of Belgium, Denmark, and Ireland.<sup>27</sup>

While useful as a summary measure, *Global Competition Review's* rating by itself is not very informative about the various dimensions of effectiveness that are introduced in this symposium. This article draws on the framework offered in the introductory article to the symposium to offer a more nuanced evaluation of effectiveness. It focuses on the extent to which the competition regime of a country advances the goals attributed to competition law and policy in developing countries: increasing economic efficiency, contributing to economic and human development, unleashing rivalry in the private sector and vis-à-vis the state, fostering a competition culture, and advancing economic and political freedom.<sup>28</sup> These goals not only reflect the debate in the literature on competition law and policy in developing countries, but also have a significant overlap with the objectives of competition policy defined by the Mexican competition law

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22. See WORLD ECON. F., *supra* note 11.

23. On cognitive problems and systematic biases in surveys, see generally Marianne Bertrand & Sendhil Mullainathan, *Do People Mean What They Say? Implications for Subjective Survey Data*, 91 AM. ECON. REV. 67 (2001); Benjamin A. Olken, *Corruption Perceptions vs. Corruption Reality*, 93 J. PUB. ECON. 950, 951 (2009) (finding biases in perceptions of corruption in a survey of Indonesian villagers regarding a road-building project).

24. On this point, see Serdar Dalkir, *A Quantitative Evaluation of Effectiveness and Efficacy of Competition Policies across Countries*, in 2 POLITICS TRUMPS ECONOMICS: POLITICAL ECONOMY AND THE IMPLEMENTATION OF COMPETITION LAW AND REGULATION IN DEVELOPING COUNTRIES 226, 231 n.85 (Pradeep S. Mehta & Simon J. Evenett eds., 2009) (citing Eleanor Fox).

25. Not for attribution interviews conducted by the author, Paris, Fr. (July 7, 2015).

26. GLOB. COMPETITION REV., RATING ENFORCEMENT 2002 11 (2002) [hereinafter GCR 2002].

27. GCR 2015 STAR RATINGS, *supra* note 10.

28. Aydin & Bütthe, *supra* note 19, at 4–14.

(economic efficiency)<sup>29</sup> and the COFECE in its first strategic plan covering the period 2014 through 2017 (advancing economic development, advocacy vis-à-vis the state, and fostering a competition culture).<sup>30</sup> A brief qualitative assessment of how reforms to the Mexican competition regime have advanced effectiveness in terms of each of these goals follows.

### A. Maximizing Efficiency

Efficiency maximization as a goal of competition policy signifies focusing on enforcement against anti-competitive practices that are most likely to cause efficiency losses, such as cartels.<sup>31</sup> Cartel enforcement, which suffered in the initial years of the FCC's life,<sup>32</sup> has become a priority with the introduction of a leniency program in 2006, the ability to conduct dawn raids and to impose criminal sanctions in 2011, and increases in maximum fines in 2011 and 2014. These reforms have had tangible results: a growing number of cartels are being investigated and higher fines have been imposed.<sup>33</sup>

### B. Contributing To Economic And Human Development

Competition agencies in developing countries may contribute to economic and human development in various ways, notably by focusing enforcement efforts on sectors that have a direct impact on the well-being of the poor, as well as aiming to increase market participation from previously excluded segments of the population.<sup>34</sup> While the FCC long realized the importance of targeting enforcement at areas that could have a direct impact on the poor—as evidenced by its early efforts to address anti-competitive activities in staple food products such as tortillas<sup>35</sup>—after the 2014 reforms, this has become one of the priorities

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29. Ley Federal de Competencia Económica [LFCE] [Federal Competition Law] art. 2o, Diario Oficial de la Federación [DOF] 24-12-1992 (Mex.); AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, REPORT OF THE TASK FORCE OF THE ABA SECTION OF ANTITRUST LAW ON THE COMPETITION DIMENSION OF NAFTA 48 (1994).

30. COMISIÓN FEDERAL DE COMPETENCIA ECONÓMICO, PLAN ESTRATÉGICO 2014–2017 18–21 (2015).

31. Aydin & Büthe, *supra* note 19, at 6.

32. Gabriel Castañedo, *Mexico's Competition Regime: Walking the Walk, Slowly*, 6 COMPETITION L. INT'L 37, 39 (2010).

33. Author's calculations from statistics in *Rating Enforcement: Federal Competition Commission of Mexico*, GLOB. COMPETITION REVIEW (2004–2015), <http://globalcompetitionreview.com/surveys/archive> [<https://perma.cc/V6D2-NQUP>]. In the early and mid-2000s, cartel fines averaged under a million euros, whereas after 2008, average fines in most years were over a million euros. While data are not clear cut in terms of number of cartel investigations and decisions, after 2008, there has been a steady stream of leniency applications, dawn raids, and decisions that resulted in fines.

34. Aditya Bhattacharjea, *Who Needs Antitrust? Or, Is Developing-Country Antitrust Different? A Historical-Comparative Analysis*, in COMPETITION LAW AND DEVELOPMENT 52, 53 (Daniel D. Sokol, Thomas K. Cheng, & Ioannis Lianos eds., 2013); Aydin & Büthe, *supra* note 19, at 7–8.

35. See, e.g., COMISIÓN FEDERAL DE COMPETENCIA, INFORME DE COMPETENCIA ECONÓMICA 2003, 15 (2003) (on CFC's investigations on anti-competitive behavior in sectors such as milk, tortillas, soft drinks, among others, with impact on broad intermediate and final consumption); Fernando Sánchez Ugarte, *Diez Años de Política de Competencia*, in LA PRIMERA DÉCADA DE LA COMISIÓN FEDERAL DE COMPETENCIA 25, 93 (2003) (on CFC's emphasis on absolute monopolistic practices in sectors that

of the COFECE.<sup>36</sup> A market study on the agro-food sector completed at the end of 2015, for instance, has the goal of benefiting low-income consumers.<sup>37</sup>

### C. Unleashing Rivalry In The Private Sector

In terms of unleashing rivalry in the private sector, the initial challenge is to build an agency's analytical capacity for identifying impediments to competition in the private sector, followed by efforts to remedy them. Along these lines, the FCC conducted market studies in sectors such as finance, pharmaceuticals, buses, and airlines with varying degrees of success in dismantling barriers.<sup>38</sup> Reforms in 2011 and 2014 increased the FCC/COFECE's capacity by formally granting it the power to conduct market studies.<sup>39</sup> The COFECE cannot take direct measures in the markets based on the conclusions of market studies; however, it can use these as a basis for advocacy efforts vis-à-vis the public and private sectors. Its newly acquired power to conduct market studies gives the COFECE a sound basis for unleashing rivalry in the private sector.

### D. Unleashing Rivalry Vis-à-Vis The State

Closely related is the goal of unleashing rivalry vis-à-vis the state. The FCC has had an important advocacy role vis-à-vis the state since its establishment, with the power to issue non-binding opinions on existing legislation, and upon the invitation of the executive branch, on new legislation. Some of its early advocacy efforts were criticized for not being effective, such as for failing to prevent the government's nationalization of various sugar factories in 2001,<sup>40</sup> but they have gradually begun to have tangible impacts, such as in the reform of the pension system as well as in the privatization of national airlines and the entry of low-cost airlines in the market.<sup>41</sup> The 2006 reform allowed the FCC to give binding

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influence low-income consumers).

36. COMISIÓN FEDERAL DE COMPETENCIA ECONÓMICO, *supra* note 30, at 23 tbl.2.

37. See COMISIÓN FEDERAL DE COMPETENCIA ECONÓMICA, REPORTE SOBRE LAS CONDICIONES DE COMPETENCIA EN EL SECTOR AGROALIMENTARIO 9 (2015) (describing the importance of the agro-food sector for consumers, especially in low-income sectors of society, as a motivation for the market study).

38. For reports resulting from these market studies, see COMISIÓN FEDERAL DE COMPETENCIA & ORG. FOR ECON. COOPERATION & DEV., RECOMENDACIONES PARA PROMOVER UN MARCO REGULADORIO MÁS FAVORABLE A LA COMPETENCIA EN EL MERCADO FARMACÉUTICO (2009); COMISIÓN FEDERAL DE COMPETENCIA & ORG. FOR ECON. COOPERATION & DEV., REGULACIÓN Y COMPETENCIA EN EL AUTOTRANSPORTE FORÁNEO DE PASAJEROS (2009); AGUSTIN J. ROS, A COMPETITION POLICY ASSESSMENT OF THE DOMESTIC AIRLINE SECTOR IN MEXICO AND RECOMMENDATIONS TO IMPROVE COMPETITION (2010). See generally Juan Manuel Espino, México, in PROMOTING MARKET STUDIES IN LATIN AMERICA, Conference organized by United Nations Economic Commission for Latin America and the Caribbean, 18–19 Mar. 2015, Santiago, Chile, 9 (2015) (describing the evolution of the legal framework for market studies in Mexican competition law, and the outcomes of some of the market studies).

39. *Id.* at 6.

40. Gabriel Castañedo Gallardo, *Orígenes, Avances y Dificultades de la Política de Competencia en México (1993–2004)*, in 3 EL NUEVO MILENIO MEXICANO: EL CAMBIO ESTRUCTURAL 337, 369 (Pascual García Alba Iduñate, Lucino Gutiérrez Herrera, & Gabriela Torres Ramírez eds., 2004).

41. Jorge L. Velázquez Roa, *Competition Policy and Regulatory Reform in Mexico*, 4 INT'L J. PUB.

opinions on federal programs and policies—though its opinion can still be vetoed by the President of the Republic.<sup>42</sup>

#### E. Fostering A Competition Culture

Progress in the FCC's advocacy efforts aimed at fostering a competition culture among economic actors and the public at large has been the result of a gradual learning process, rather than due to legislative reforms. Early on, the FCC was criticized for not devoting sufficient attention to its communication with the public.<sup>43</sup> However, it has been able to turn this around not only by focusing enforcement on cases with significant impact on consumers, but also by devoting resources to communicating the benefits of its activities more effectively to the public.<sup>44</sup> As a consequence of their advocacy activities, the FCC and the COFECE have increased references to competition law and policy on the public agenda.<sup>45</sup> Awareness of competition law among businesses has grown, and many more law and economic consultancy firms specializing in competition have sprung.<sup>46</sup>

#### F. Advancing Political And Economic Freedom

The Mexican competition regime has arguably made only a modest contribution to advancing political and economic freedom in the country, and improvements in this area have been slow. One way a competition regime can help advance economic freedom in a country is by tackling economic concentration in national markets. Initially the FCC had few tools to address existing monopolies.<sup>47</sup> In 2006, the FCC was granted the power to restructure monopolies; however, progress on this front has been meager, with few large firms effectively dominating national markets in sectors such as telecommunications, beer, cement, and broadcasting.<sup>48</sup> Dominant firms in the media sector are particularly problematic for political freedom, as these firms

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POL'Y 100, 106 (2009).

42. Decreto por el que se reforman, adicionan, y derogan diversas disposiciones de la Ley Federal de Competencia Económica [LFCE] [Federal Competition Law] art. 24, pfo. 6, Diario Oficial de la Federación [DOF] 28-6-2006 (Mex.).

43. OECD 1998, *supra* note 3, at 29; Julius Cavendish, *Among the Oligopolists*, GLOB. COMPETITION REV. (Feb. 1, 2007), <http://globalcompetitionreview.com/news/article/1215/among-oligopolists/> [<https://perma.cc/SG5V-9GAZ>].

44. Angel López Hoher, *Competition Advocacy in Mexico: Lessons from the Past Decade*, 8 CPI ANTITRUST CHRON., no. 2, 2012, at 2, 3.

45. *Id.* at 3–4.

46. Julius Cavendish, *Tequila Sunrise*, GLOB. COMPETITION REV. (Feb. 1, 2007), <http://globalcompetitionreview.com/features/article/1216/tequila-sunrise/> [<https://perma.cc/8QTP-ASFJ>].

47. OECD 1998, *supra* note 3 at 12–13.

48. *Busting the Cartels: Mexico's Competition Policy*, ECONOMIST (Mar. 4, 2010), <http://www.economist.com/node/15610165> [<https://perma.cc/4TT7-F7KH>].



may—and have been known to—control access to political campaigning in Mexico.<sup>49</sup>

To summarize, Mexican competition law and policy cannot be characterized as an unqualified success with respect to all the objectives that are attributed to competition law and policy in developing countries. Legislative and constitutional reforms, as well as gradual institutional learning, improved the effectiveness of the system on many fronts, but on others such as advancing political and economic freedom, progress has been meager. The trajectory of the Mexican competition regime resembles a gradual upward slope among the trajectories of competition regimes identified by Kovacic and Lopez-Galdos in this symposium.<sup>50</sup>

### III

#### MEXICO'S ROCKY ROAD TO THE FEDERAL LAW ON ECONOMIC COMPETITION IN 1992

After nearly fifty years of developmental policies aimed at protecting and fostering its domestic market, in the 1980s Mexico embarked on a route towards free trade and domestic liberalization following the debt crisis of 1982.<sup>51</sup> High inflation and a sharp fall in real wages—over seven percent, on average, annually from 1983 through 1988<sup>52</sup>—led the Mexican government under President Miguel de la Madrid (1982 through 1988) to embark on an ambitious program of economic reforms, which continued to deepen under the presidency of Carlos Salinas (1988 through 1994).<sup>53</sup> The first phase of Mexican reforms focused mostly on structural adjustment. The administration slashed the government budget, radically devalued the peso, eliminated subsidies, and reduced public employees' wages.<sup>54</sup> By the mid-1980s, it launched deeper institutional reforms such as privatization, deregulation and regulatory reform, and trade liberalization. Mexico entered the General Agreement on Tariffs and Trade in 1986.<sup>55</sup> In 1991, the Mexican administration announced that it would start negotiations with the United States and Canada for NAFTA.<sup>56</sup> The negotiations started in 1991 and were concluded in 1993, and the agreement came into force in 1994.<sup>57</sup>

This is the context in which the first modern Mexican competition law was

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49. Gustavo Flores-Macías, *Mexico's 2012 Elections: The Return of the PRI*, 24 J. DEMOCRACY 128, 136 (2013).

50. William E. Kovacic & Marianela Lopez-Galdos, *Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes*, 79 LAW & CONTEMP. PROBS., no. 4., 2016, at 116–17.

51. NORA LUSTIG, MEXICO: THE REMAKING OF AN ECONOMY 28 (1998).

52. Nora Lustig, *The 1982 Debt Crisis, Chiapas, NAFTA, and Mexico's Poor*, CHALLENGE, Mar.–Apr. 1995, at 45, 46.

53. LUSTIG, *supra* note 51, at 29.

54. SARAH BABB, MANAGING MEXICO: ECONOMISTS FROM NATIONALISM TO NEOLIBERALISM 179 (2001).

55. *Id.* at 181.

56. FREDERICK W. MAYER, INTERPRETING NAFTA: THE SCIENCE AND ART OF POLITICAL ANALYSIS 49–50 (1998).

57. MAXWELL A. CAMERON & BRIAN W. TOMLIN, THE MAKING OF NAFTA xi-xiv (2000).

adopted in December of 1992.<sup>58</sup> The history of competition legislation in Mexico goes back to the prohibition of monopolies in the constitution of 1857.<sup>59</sup> The Mexican Constitution of 1917 likewise included a ban on monopolies in addition to provisions against cartels and abuses of dominance, but these provisions were not enforced due to the absence of implementing regulations.<sup>60</sup> The 1934 Organic Law of Monopolies was likewise ineffective.<sup>61</sup> In practice, until the end of the 1980s, many businesses were shielded from competition through the chambers of commerce, industry, or by some level of government.<sup>62</sup> The degree of economic concentration in the economy was high. In 1992, twenty-five companies accounted for 47.1% of Mexican GDP.<sup>63</sup>

A number of officials from the Economic Deregulation Unit at the Secretary of Commerce and Industrial Development became convinced of the necessity of adopting a competition law during the broad institutional reform agenda of the 1980s.<sup>64</sup> These officials perceived competition law as an antidote to collusion among large firms, as a counterweight to state-owned monopolies, and as a defense of consumers and firms in the regulated sectors of the economy in which regulators had become unduly close to regulated interests.<sup>65</sup> The expectation was that the law would not only promote competition in the marketplace, but could also reduce state intervention in the economy.

In the meantime, progress in negotiations with the United States and Canada gave an external impetus for the adoption of a competition law, as NAFTA committed the signing parties to the adoption of national measures proscribing anti-competitive business conduct.<sup>66</sup> The biggest objections to the law came from different parts of the government,<sup>67</sup> but the level of interest and support from the public and the business community was also low.<sup>68</sup> Potential opposition from business was muted by the fact that business associations were supportive of NAFTA in general.<sup>69</sup> Likewise, businesses were much more preoccupied with negotiations about tariffs and quotas than they were focused on competition

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58. Ley Federal de Competencia Económica [LFCE] [Federal Competition Law], Diario Oficial de la Federación [DOF] 24-12-1992 (Mex.).

59. Omar Guerrero Rodríguez & Alan Ramírez, *Pursuit of Effective Antitrust Enforcement: Mexico's Case*, in ANNUAL PROCEEDINGS OF THE FORDHAM COMPETITION LAW INSTITUTE: INTERNATIONAL ANTITRUST LAW AND POLICY 387, 389 (Barry E. Hawk ed., 2013).

60. Rafael del Villar & Javier Soto Alvarez, *Logros y dificultades de la Política de Competencia Económica en México*, 821 INFORMACIÓN COMERCIAL ESPAÑOLA 107, 108 (2005).

61. Joshua A. Newberg, *Mexico's New Economic Competition Law: Toward the Development of a Mexican Law of Antitrust*, 31 COLUM. J. TRANSNAT'L L. 587, 587 (1993).

62. Marcos Avalos, *Condiciones Generales de Competencia: El Caso de Mexico*, 48 CEPAL SERIE ESTUDIOS Y PERSPECTIVAS 1, 10 (2006).

63. Newberg, *supra* note 61, at 603.

64. Avalos, *supra* note 62, at 10.

65. *Id.*

66. Gabriel Castañeda Gallardo, *Antitrust Enforcement in Mexico 1993–1995 and its Prospects*, 4 U.S.–MEX. L.J. 19, 21 n.8 (1996).

67. Avalos, *supra* note 62, at 11.

68. OECD 1998, *supra* note 3, at 5; Castañeda Gallardo, *supra* note 40, at 344.

69. Schneider, *supra* note 16, at 102.

law.<sup>70</sup> The process resulted in the adoption of the FLEC in December 1992, and the establishment of the FCC in June 1993.

#### IV

##### THE FEDERAL LAW ON ECONOMIC COMPETITION (1992)

The FLEC<sup>71</sup> includes provisions against cartels and abuses of dominant positions, and allows for merger review and competition advocacy. The FLEC classifies potentially anti-competitive practices as either absolute or relative. Absolute monopolistic practices are what are referred to in most other jurisdictions as “hard-core cartels,” or agreements between competitors on price, output, market division, and bid rigging. These practices are prohibited *per se*.<sup>72</sup> Relative monopolistic practices are what would be treated under monopoly or abuse of dominance provisions in other jurisdictions. Some of these were specified in the law, such as resale price maintenance, tied sales, exclusive dealing, and refusals to deal, whereas others could be reached by an open-ended provision that defined “any conduct that unduly damages, or impairs the competitive process and free access to production, processing, distribution and marketing of goods and services” as anti-competitive.<sup>73</sup> The explicit list of relative monopolistic practices has been extended in subsequent reforms of the FLEC as a reaction to a Supreme Court decision in 2005 that declared the provision unconstitutional for failing to establish the parameters that the FCC must observe to sanction the relative monopolistic practices involved.<sup>74</sup>

Under the 1992 FLEC, the FCC did not have the power to restructure a monopolized industry.<sup>75</sup> Similarly, the FLEC did not address monopolistic pricing.<sup>76</sup> Regulators could have used sector-specific regulations to control abusive pricing practices by dominant firms, but the FCC first had to identify the firm as having market power in a sector before the regulator could step in to address the conduct in question.

The FLEC prohibits any merger whose objective or effect is to reduce, distort, or hinder competition.<sup>77</sup> All mergers that go beyond a certain threshold in terms of sales or assets require notification to the FCC/COFECE.<sup>78</sup> In assessing mergers, the FLEC requires the FCC/COFECE to consider whether the merging

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70. Castañeda Gallardo, *supra* note 40, at 346.

71. Ley Federal de Competencia Económica [LFCE] [Federal Competition Law], Diario Oficial de la Federación [DOF] 24-12-1992 (Mex.).

72. *Id.* at arts. 8, 9.

73. *Id.* at art. 10, pfo. 7.

74. Eduardo Pérez Motta & Heidi Sada Correa, *Competition Policy in Mexico*, in BUILDING NEW COMPETITION LAW REGIMES 3, 11 (David Lewis ed., 2013); Ana Elena Fierro & Adriana Garcia, *Guía de las decisiones del P/JF en materia de competencia económica: Cómo generar una cultura de competencia* 17 (Centro de Investigación y Docencia Económica, Documentos de Trabajo 31, 2008).

75. OECD 1998, *supra* note 3, at 12.

76. *Id.*

77. Ley Federal de Competencia Económica [LFCE] [Federal Competition Law] art. 16, Diario Oficial de la Federación [DOF] 24-12-1992 (Mex.).

78. *Id.* at art. 20.

parties would be able to fix prices unilaterally, substantially restrict competitors' access to the market, or engage in unlawful monopolistic conduct.<sup>79</sup> The FCC/COFECE must identify the relevant market and determine market power to analyze the mergers.<sup>80</sup>

The FLEC recognizes the possibility that the state itself or state-owned enterprises can commit anti-competitive actions. State-owned enterprises are subject to the FLEC's provisions on relative and absolute monopolistic practices, except in areas of "strategic concern" as defined by Article 28 of the Mexican Constitution.<sup>81</sup> Other than these exceptions, the FLEC applies to all economic actors, public or private. The FLEC empowers the FCC to give its opinion—which until the 2006 reforms was non-binding—on the effects that existing legislation, regulations, and administrative acts of state organs may have on competition.<sup>82</sup> Upon request by the Federal Executive, the FCC may also give its opinion on the effects of competition on new laws and regulations proposed to the Congress.<sup>83</sup> The FCC/COFECE participate in inter-ministerial committees in order to inject competition policy principles into regulatory decisions, and therefore have been involved in policymaking about privatization, licensing, standards, sector regulation, and foreign trade.<sup>84</sup>

The FLEC empowered the FCC, which became operational in 1993, to enforce its provisions.<sup>85</sup> The FCC was attached in budgetary terms to the Secretary of Commerce and Industrial Development,<sup>86</sup> but otherwise was technically and administratively independent.<sup>87</sup> Moreover, the Secretary could not intervene in the decisions of the FCC, unlike sector regulators such as the Federal Commission for Telecommunications (COFETEL) whose decisions had to be approved by the Ministry of Telecommunications and Transport.<sup>88</sup> The decisionmaking body in the FCC was a plenum of five commissioners appointed by the President for staggered ten-year terms, which made decisions by a majority

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79. *Id.* at art. 17.

80. *Id.* at art. 18.

81. Article 28 of the Mexican Constitution lists the following as sectors of strategic concern: the postal system, telegraphs, and radiotelegraphy; radioactive minerals and generation of nuclear energy; the planning and control of the national electric system, as well as the public service of transmission and distribution of electric energy; and the exploration and extraction of oil and other hydrocarbons. Constitución Política de los Estados Unidos Mexicanos, CP, art. 28, Diario Oficial de la Federación [DO] 03-2-1983 (Mex.), últimas reformas DOF 20-12-2013 (Mex.).

82. Ley Federal de Competencia Económica [LFCE] [Federal Competition Law] art. 24, Diario Oficial de la Federación [DOF] 24-12-1992 (Mex.).

83. *Id.*

84. OECD 1998, *supra* note 3, at 25.

85. Ley Federal de Competencia Económica [LFCE] [Federal Competition Law] arts. 23, 24, Diario Oficial de la Federación [DOF] 24-12-1992 (Mex.).

86. OECD 2004, *supra* note 4, at 36.

87. Ley Federal de Competencia Económica [LFCE] [Federal Competition Law] art. 23, Diario Oficial de la Federación [DOF] 24-12-1992 (Mex.).

88. Roger G. Noll, *Priorities for Telecommunications Reform in Mexico, in NO GROWTH WITHOUT EQUITY? INEQUALITY, INTERESTS AND COMPETITION IN MEXICO* 365, 380 (Santiago Levy & Michael Walton eds., 2009).

vote.<sup>89</sup> The general impression is that the FCC was for the most part able to protect its independence from the Executive and other state agencies even before the 2013 constitutional amendments that reconstituted it as an independent agency.<sup>90</sup> It was also able to remain relatively free from the influence of big business compared to sector regulators such as the COFETEL.<sup>91</sup>

## V

### IMPEDIMENTS TO EFFECTIVE ENFORCEMENT IN THE INITIAL YEARS (1993–2006)

The framing article of this symposium describes how various conditions in developing countries may prevent competition agencies in those countries from effectively implementing competition laws and engaging in competition advocacy.<sup>92</sup> Some of those conditions have been less of an issue in Mexico than in poorer countries. For instance, recruiting staff with technical expertise has mostly not been a significant obstacle,<sup>93</sup> except in some areas such as mergers that require complex economic analysis.<sup>94</sup> Budgetary resources were a more serious concern in the initial years, especially after the tightening of government spending due to the financial crisis—the agency budget fell about thirty percent in real terms between 1994 and 1997.<sup>95</sup> Concerns with the budget continued into the mid-2000s.<sup>96</sup> An inadequate budget can be an important obstacle to the effectiveness of any agency, but a generous budget allocation is not a sufficient condition for agency success. In fact, there is evidence that in its initial years the FCC punched below its weight in terms of efficiency for the level of budgetary resources it had.<sup>97</sup> The following factors have impeded the effectiveness of the Mexican competition regime.

#### A. Legislation

Some obstacles to the effectiveness of competition policy in the early years were due to the provisions of the FLEC itself and the powers it granted to the FCC. The FLEC did not allow the FCC to restructure monopolies. It quickly became clear, however, that lacking the power to address structural monopolies could be problematic in a country like Mexico with a highly concentrated

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89. Ley Federal de Competencia Económica [LFCE] [Federal Competition Law] arts. 25, 26, Diario Oficial de la Federación [DOF] 24-12-1992 (Mex.).

90. GCR 2002, *supra* note 26, at 34; OECD 1998, *supra* note 3, at 18.

91. Isabel Guerrero, Luis F. López-Calva & Michael Walton, *The Inequality Trap and Its Links to Low Growth in Mexico*, in NO GROWTH WITHOUT EQUITY? INEQUALITY, INTERESTS AND COMPETITION IN MEXICO, *supra* note 88, at 111, 126, 153.

92. Aydin & Büthe, *supra* note 19, at 15–26.

93. COMISIÓN FEDERAL DE COMPETENCIA, INFORME DE COMPETENCIA ECONÓMICA 2003, 20 (2003); OECD 2004, *supra* note 4, at 53–54.

94. OECD 2004, *supra* note 4, at 54.

95. OECD 1998, *supra* note 3, at 21.

96. OECD 2004, *supra* note 4, at 64–65.

97. Dalkir, *supra* note 24, at 239–40.

economic structure. Moreover, early privatization programs did not have the intended effect of breaking up structural monopolies; they sometimes merely transformed a public monopoly into a private one,<sup>98</sup> the notable example being the telecommunications giant *Teléfonos de México* (Telmex). The public monopoly Telmex was sold as a package to a single investor, rather than being broken up, in order to maximize state revenues.<sup>99</sup> Furthermore, the government offered significant tax reductions and an effective monopoly for five years after the privatization to sweeten the deal.<sup>100</sup> Neither the FCC nor the sector regulator had been established at the time of the privatization of Telmex, and once established they had few powers to deal with it.

The division of responsibilities between sector regulators and the FCC in terms of dealing with relative monopolistic practices in regulated sectors also proved problematic. Under the FLEC, the FCC was responsible for identifying whether a firm had market power in a sector, but it was the sector regulator that had the responsibility to address this behavior, without the FCC's participation in the negotiations or the preparation of regulations to deal with the anti-competitive conduct.<sup>101</sup> This division of responsibilities became problematic if the FCC found the firm to have significant market power, but the sector regulator was too weak or had been captured by the actors whose behavior it was supposed to regulate.<sup>102</sup>

The investigative powers granted to the FCC were also widely perceived to be inadequate.<sup>103</sup> The FCC did not have the power to conduct dawn raids—unannounced searches in company headquarters to gather information and evidence—before 2011, a power which would have improved its chances of collecting meaningful evidence in cartel cases. Nor could the FCC initially count on a leniency program to help its efforts to combat cartels. Moreover, the fines it could impose—and effectively collect—were not adequate to deter firms from engaging in anti-competitive conduct.<sup>104</sup> Prior to the 2011 reforms, *The Economist* commented that it was profitable for firms to cheat even if caught.<sup>105</sup>

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98. Noll, *supra* note 88, at 369.

99. Rafael del Villar, *Competition and Equity in Telecommunications, in NO GROWTH WITHOUT EQUITY? INEQUALITY, INTERESTS AND COMPETITION IN MEXICO*, *supra* note 88, at 321, 323.

100. *See id.* at 323–25 (noting that “[t]he government’s actions and omissions turned [Telmex] into an extremely profitable quasi-monopoly and its owners into economically powerful people virtually overnight.”).

101. OECD 1998, *supra* note 3, at 32; OECD 2004, *supra* note 4, at 34.

102. OECD 1998, *supra* note 3, at 32.

103. OECD 2004, *supra* note 4, at 65.

104. Clare Bolton, *An Interview with Eduardo Perez Motta*, GLOB. COMPETITION REV. (Feb. 1, 2007), <http://globalcompetitionreview.com/features/article/1220/an-interview-eduardo-perez-motta/> [https://perma.cc/U22P-UGMH].

105. ECONOMIST, *supra* note 48.

## B. The Judicial System

In addition to the provisions of the FLEC itself, significant obstacles to the effective implementation of the competition law arose from various aspects of the judicial system in Mexico. Under the 1992 FLEC, the parties to a competition case had ample opportunity for judicial review if they were dissatisfied with the FCC's decisions.<sup>106</sup> The first of these is the “amparo”—injunction—action, established in Articles 103 to 107 of the Mexican Constitution.<sup>107</sup> An amparo can be claimed by anyone in the federal district courts on the grounds that he is being subjected to an unconstitutional statute or that his due process rights are being infringed.<sup>108</sup> Firms could claim amparos challenging the FCC's investigation, its procedures, or its final decisions.<sup>109</sup> If the courts decided an interlocutory procedural amparo in favor of a firm, the FCC typically commenced a new proceeding, against which the firm could file a new amparo.<sup>110</sup> If a final FCC decision was at issue, parties could request, and frequently obtained, a motion to stay until the amparo review was complete.<sup>111</sup> Amparo decisions could be appealed to higher courts, and if the amparo request addressed the constitutionality of a provision of the FLEC, then the appeal went straight to the Supreme Court.<sup>112</sup> While the FCC generally won in the Supreme Court with respect to the constitutionality of its actions and of the law itself (with some exceptions), the district courts were liberal in granting amparos.<sup>113</sup>

Designed to protect individuals' due process rights, amparo claims came to be used aggressively and in increasing numbers by private actors against the FCC, which complicated competition law enforcement in various ways. They delayed the FCC's proceedings, because firms frequently filed multiple claims in different districts or filed subsequent amparos throughout the proceedings.<sup>114</sup> For instance, after the FCC declared Telmex a dominant carrier in 1998—a necessary step for the sector regulator COFETEL to step in and impose remedies—its decision was stayed by a series of amparos, changes to its declaration, and further amparos, until finally a court annulled the FCC's decision in 2006 because the evidentiary basis was outdated.<sup>115</sup> Dealing with the amparos filed against it imposed significant strains on the agency's resources. According to the FCC, until 2003, one out of eight of its investigations was subject to an amparo, and more than half of the merger investigations were subject to amparos.<sup>116</sup> The OECD reported in

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106. OECD 2004, *supra* note 4, at 44.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 45.

112. *Id.* at 44–45.

113. COMISIÓN FEDERAL DE COMPETENCIA, *supra* note 93, at 17; OECD 2004, *supra* note 4, at 45.

114. Sánchez Ugarte, *supra* note 35, at 120.

115. Noll, *supra* note 88, at 382.

116. Sánchez Ugarte, *supra* note 35, at 118.

2004 that the lawyers in the Legal Affairs Directorate of the FCC devoted forty percent of their time to dealing with amparo cases.<sup>117</sup>

In addition to amparos, if an FCC decision imposed a fine, a company could seek judicial relief through an appeal to the Federal Court of Fiscal and Administrative Justice (Tribunal Federal de Justicia Fiscal y Administrativa). This court normally reviews tax cases, but it asserts jurisdiction to review any agency action that involves the imposition of a monetary payment obligation on a private party, and thus has reviewed a growing number of cases in which the FCC imposed fines.<sup>118</sup> The FCC lost a number of these cases on the grounds that its orders imposing fines were not adequately justified.<sup>119</sup>

Even if an FCC decision imposing fines was confirmed after amparos and at the Federal Court of Fiscal and Administrative Justice, collection still proved difficult. Until the 2006 reforms, the fines imposed by the FCC were collected by the treasuries of municipal authorities, but this system was ineffective because the municipalities had few incentives to collect.<sup>120</sup> Due to judicial and procedural intricacies, the FCC was able to collect only 9.5 percent of all the fines it imposed between 1997 through 2002, with 18.5 percent revoked or lost on judicial review, and seventy-two percent remaining uncollected.<sup>121</sup> The inability to collect fines, or collection after years of delay while fines were decimated by inflation, significantly reduced the deterrent effect of FCC's decisions.

In addition to the judicial review procedures that became powerful tools in the hands of companies to prevent or delay enforcement, some broader concerns about the functioning of the Mexican judicial system impeded successful competition law enforcement in its first decade. The unfamiliarity of the district courts with substantive antitrust issues was one of them. In its early years, the FCC saw many of its decisions reversed at the district courts, mostly on procedural grounds.<sup>122</sup> In addition to being unfamiliar with competition policy issues, judges were inexperienced in applying a statute as short and non-specific as the FLEC, because the civil law model in Mexico has historically involved detailed legislation.<sup>123</sup> Thus, by ruling adversely against the FCC on procedural grounds, "the court can send the case back to the [FCC] and avoids resolving the antitrust question."<sup>124</sup> Judges' lack of specialized knowledge in antitrust has been a problem in many developing countries with young competition regimes,<sup>125</sup> and

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117. OECD 2004, *supra* note 4, at 54

118. *Id.* at 46.

119. *Id.*

120. Bolton, *supra* note 104.

121. OECD 2004, *supra* note 4, at 47; see also Sánchez Ugarte, *supra* note 35, at 121–22 (on the difficulty of collecting fines imposed by the FCC).

122. OECD 2004, *supra* note 4, at 45.

123. *Id.*

124. *Id.*

125. See INT'L COMPETITION NETWORK, COMPETITION AND THE JUDICIARY: 2ND. PHASE – CASE STUDIES 17 (2007) (reporting that for the surveyed countries "lack of specialized knowledge on competition issues by the judiciary is an important issue affecting competition policy implementation").



establishing specialized courts—like Mexico did in 2013—can be a way to alleviate this problem.<sup>126</sup>

Questions have also been raised about the capacity of Mexico's judicial system to resist outside pressures, such as those coming from big business.<sup>127</sup> An empirical analysis of amparos requested in competition cases reveals that companies directly or indirectly controlled by billionaires were more likely to secure an amparo from courts compared to other firms.<sup>128</sup> These results support the claim that concentrated business interests have undue influence in the Mexican judicial system. This does not necessarily mean that the judicial system is corrupt—though it may be—as big business also commands significant resources to hire the best law firms to defend itself. The OECD has stated, “[t]here is some belief in the private sector that the Commission is simply outgunned in amparo cases and cannot match the legal resources arrayed against it.”<sup>129</sup> The FCC's annual budget was equal to two days' worth of profits by Telmex and RadioMóvil Dipsa or Telcel,<sup>130</sup> the two big companies that dominate the landline and cellular phone markets in Mexico, both controlled by Carlos Slim.<sup>131</sup>

Proceedings delayed by series of amparos, decisions frequently overturned by district courts, and failure to impose or collect fines not only diluted the impact of the FCC's enforcement efforts, but may have also weakened the image of the FCC in the eyes of the Mexican public. The OECD observed in 1998 that the FCC had started acting cautiously as a reaction to the aggressive court cases filed by private actors, and that this had led to a perception that the FCC was weak.<sup>132</sup>

### C. Weak Competition Culture

Another one of the key impediments to the effectiveness of competition policy in Mexico—and in other developing countries—is the lack of genuine support for competition policy among companies, state organs, and the public, or more broadly the lack of a competition culture.<sup>133</sup> Lack of awareness of and support for competition law lowers compliance by economic actors, and thus detracts from efforts to establish an effective competition policy. It is more costly to elicit compliance with a law for which public acceptance is low. Awareness of and support for the law could trigger more and better complaints about anti-competitive conduct, less tolerance for abuses of the law, and overall greater political support or pressure for its enforcement. For these reasons, some experts

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126. ELEANOR FOX & DANIEL CRANE, *GLOBAL ISSUES IN ANTITRUST AND COMPETITION LAW* 423–24 (2010).

127. Guerrero, López-Calva & Walton, *supra* note 91, at 126–27.

128. *Id.* at 129.

129. OECD 2004, *supra* note 4, at 54.

130. del Villar, *supra* note 99, at 334.

131. Dolia Estevez, *Mexico Cracks Down On Billionaires Carlos Slim's And Emilio Azcarraga's Telecom Monopolies*, FORBES (Dec. 9, 2013), <http://www.forbes.com/sites/doliaestevez/2013/12/09/mexicos-two-telecom-giants-under-threat-of-being-declared-monopolies/#643f391642a4>.

132. OECD 1998, *supra* note 3, at 30.

133. Velázquez Roa, *supra* note 41, at 108.

suggest an emphasis on educating the public and state actors about competition policy rather than traditional competition enforcement in developing country contexts.<sup>134</sup>

In Mexico, in the initial years after the adoption of the competition law, many private, state, and municipal actors continued to operate according to the pre-reform formal and informal rules of the game.<sup>135</sup> For example, the National Road Transport Chamber continued to set minimum prices in transport,<sup>136</sup> and municipal authorities sanctioned market-sharing agreements among tortilla producers in the municipality of Carillo Puerto.<sup>137</sup> They may have done so not only because they benefited from the existing system, but perhaps also because they did not know enough about competition law or had not internalized it. Similarly, the broader public was unaware of the law and its potential benefits; it was not generally supportive of the idea of competition as an organizing principle of the economy even after ten years of competition enforcement.<sup>138</sup> Few among the public knew much about the FCC and what it did: a survey commissioned by the FCC in 2009 showed that only one percent of Mexicans knew which state authority promoted competition among firms.<sup>139</sup> Moreover, the competition law was perceived as being a product of the Salinas presidency, or a requirement imposed by NAFTA, which further reduced the support for the law and the FCC in the early years.<sup>140</sup>

Notwithstanding these impediments to effective enforcement, the FCC also had some early successes that helped raise its profile among the economic actors and the public at large, which contributed to its later success. The FCC's challenges to state-sanctioned anti-competitive barriers "provided immense publicity and quantifiable results for the agency"; for instance, when it sided with the foreign competitors' interests in penetrating the Mexican long-distance telecommunications market, or when it challenged Pemex, the national oil company, on its control of service station concessions.<sup>141</sup> Moreover, the FCC's investigations in the initial years focused on sectors such as milk, tortillas, soft drinks, credit cards, and transport services, with a tangible and potentially large impact on consumers, though it was not always successful in these efforts.<sup>142</sup>

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134. Armando E. Rodriguez, *The Lessons of Mexico's Antitrust Initiative*, in COMPETITION POLICY, DEREGULATION, AND MODERNIZATION IN LATIN AMERICA 117, 133 (Moisés Naim & Joseph S. Tulchin eds., 1999).

135. OECD 1998, *supra* note 3, at 30; Julius Cavendish, *Among the Oligopolists*. GLOB. COMPETITION REVIEW (Feb. 2007).

136. *Id.* at 10.

137. COMISIÓN FEDERAL DE COMPETENCIA, INFORME ANUAL 53 (1997).

138. OECD 2004, *supra* note 4, at 12.

139. COMISIÓN FEDERAL DE COMPETENCIA ECONÓMICO, WORKING TOGETHER FOR A COMPETITION CULTURE 9 (2015).

140. OECD 2004, *supra* note 4, at 12.

141. Rodriguez, *supra* note 134, at 135.

142. COMISIÓN FEDERAL DE COMPETENCIA, *supra* note 93, at 15.

## VI REFORMS TO THE MEXICAN COMPETITION REGIME

Reforms to the competition law in 2006 and 2011, constitutional amendments in 2013, as well as the competition law that replaced the FLEC in 2014 all addressed some of the problems that impeded the effectiveness of the Mexican competition regime.

### A. Legislative Changes

The loopholes or weaknesses in the FLEC were addressed through a number of reforms starting in 2006. With respect to abuses of dominance, the 2006 reform allowed the FCC to impose structural remedies such as divestitures in monopoly cases,<sup>143</sup> and expanded the list of relative monopolistic conditions listed in the Article 10 of the 1992 FLEC.<sup>144</sup> These changes allow the FCC/COFECE to better deal with abuses of dominance.

The 2006 and 2011 reforms considerably strengthened the FCC's investigative powers, especially against cartels. The 2006 reform introduced a leniency program, which reduced penalties for firms that provided evidence in cartel cases, in the hopes of increasing the likelihood that cartel members would cooperate with the authorities.<sup>145</sup> The 2011 reform gave the FCC the power to conduct dawn raids, which are particularly useful tools for collecting evidence in cartel cases.<sup>146</sup> Before the 2011 reform, the FCC could visit companies to gather evidence, but these visits had to be announced beforehand, which gave the investigated firms the opportunity to hide or destroy evidence. The FCC's fight against cartels was further reinforced by expanding the scope for criminal prosecution against individuals in cartel cases. The reforms also strengthened the FCC's deterrent power by increasing maximum fines from \$7 million to ten percent of the firm's annual revenues in Mexico. The 2006 reform made the federal tax authorities, rather than municipal authorities, responsible for collecting the fines imposed by the FCC, and the collected fines are used for a program to promote small and medium sized enterprises.<sup>147</sup> This was expected to increase the efficiency of collection of the fines, though problems still remain on this front.<sup>148</sup>

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143. Decreto por el que se reforman, adicionan, y derogan diversas disposiciones de la Ley Federal de Competencia Económica [LFCE] [Federal Competition Law] art. 37, Diario Oficial de la Federación [DOF] 28-6-2006 (Mex.).

144. *Id.* at art. 10, pfo. VII–XI.

145. *Id.* at art. 33 bis 3.

146. Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley Federal de Competencia Económica [LFCE] [Federal Competition Law], del Código Penal Federal y del Código Fiscal de la Federación, art. 31, Diario Oficial de la Federación [DOF] 10-5-2011 (Mex.); ORG. FOR ECON. CO-OPERATION & DEV. [OECD], ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN MEXICO: 2011 4 (2012) [hereinafter OECD 2011].

147. Bolton, *supra* note 120.

148. Verónica Gascón, *Sancionan, pero no cobran*, REFORMA: NEGOCIOS (Nov. 28, 2014), <http://www.reforma.com/aplicacioneslibre/articulo/default.aspx?id=404897&md5=923d2ec0ffb2c71d96e151078b4f49bd&ta=0dfdbac11765226904c16cb9ad1b2efe&po=4> [<https://perma.cc/QH7Q-YCMS>].

The 2011 reform granted the FCC the power to settle with parties while the investigation is ongoing, whereas before it could only come to a settlement after it concluded its investigation.<sup>149</sup> This allows the FCC/COFECE more flexibility in settling cases, and helps avoid lengthy investigations and potential court proceedings. The FCC was also granted the power to issue interim measures, by which it can oblige firms to cease alleged anti-competitive conduct while an investigation is carried out.<sup>150</sup> Finally, class actions for damages in competition cases were allowed.<sup>151</sup> President Calderón's initial reform proposal also included political autonomy for the FCC and even higher fines, but these provisions were eliminated or watered down in the congressional committees.<sup>152</sup>

The competition regime in Mexico saw its most fundamental reforms in 2013 and 2014. Constitutional amendments in 2013 changed the legal status of the FCC, reconstituting it as a legally independent entity under the Mexican Constitution.<sup>153</sup> The amendments increased the number of commissioners in the plenum from five to seven, and made their selection process more transparent and independent of the Executive.<sup>154</sup> They created an evaluation committee that is responsible for presenting the candidates, who then must be approved by the Senate.<sup>155</sup> The 2013 amendments also created IFETEL to replace the telecommunications sector regulator COFETEL, along with reforms that removed the limits on foreign ownership in telecommunications.<sup>156</sup> IFETEL is constitutionally independent, like the COFECE, and is responsible for competition matters in telecommunications and broadcasting.<sup>157</sup> The commissioners of IFETEL are selected by the same method as the COFECE commissioners.<sup>158</sup> The new FLEC adopted in 2014 creates an investigation unit within the COFECE in order to separate investigative authority from decisionmaking authority, a change that had been demanded by practitioners for

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149. OECD 2011, *supra* note 146, at 4.

150. *Id.*

151. Decreto por el que se reforman y adicionan el Código Federal de Procedimientos Civiles, el Código Civil Federal, la Ley Federal de Competencia Económica, la Ley Federal de Protección al Consumidor, la Ley Orgánica del Poder Judicial de la Federación, la Ley General del Equilibrio Ecológico y la Protección al Ambiente y la Ley de Protección y Defensa al Usuario de Servicios Financieros, arts. 578–625, Diario Oficial de la Federación [DOF] 30-8-2011 (Mex.).

152. *Aprueban en comisiones ley de competencia*, EL ECONOMISTA (Apr. 28, 2010), <http://eleconomista.com.mx/sociedad/2010/04/28/aprueban-comisiones-ley-competencia> [<https://perma.cc/3FGU-Z5ZV>].

153. Decreto por el que se reforman y adicionan diversas disposiciones de los artículos 6o., 7o., 27, 28, 73, 78, 94 y 105 de la Constitución Política de los Estados Unidos Mexicanos, en materia de telecomunicaciones, art. 28, Diario Oficial de la Federación [DOF] 11-6-2013 (Mex.).

154. *Id.*

155. *Id.*

156. Decreto por el que se reforman y adicionan diversas disposiciones de los artículos 6o., 7o., 27, 28, 73, 78, 94 y 105 de la Constitución Política de los Estados Unidos Mexicanos, en materia de telecomunicaciones, art. 28, transitorio quinto, Diario Oficial de la Federación [DOF] 11-6-2013 (Mex.).

157. Decreto por el que se reforman y adicionan diversas disposiciones de los artículos 6o., 7o., 27, 28, 73, 78, 94 y 105 de la Constitución Política de los Estados Unidos Mexicanos, en materia de telecomunicaciones, art. 28, Diario Oficial de la Federación [DOF] 11-6-2013 (Mex.).

158. *Id.*

some time.<sup>159</sup> This separation increases the procedural fairness of competition proceedings.

Legislative reforms have been coupled with greater political backing for the COFECE, which is evidenced by increases in its budget and staff numbers. It has enjoyed a boost to its budget of thirty-two percent for 2014 and sixty percent for 2015.<sup>160</sup> It has also grown impressively in terms of staff numbers compared to a decade earlier: In September 2015, its personnel totalled 359, more than double the staff number than in September 2003, addressing the issue of understaffing that had been a problem in the earlier years.<sup>161</sup>

## B. The Judiciary

The 2013 reform established specialized courts to oversee appeals of COFECE and IFETEL decisions; that is, competition law, telecommunications, and broadcasting decisions.<sup>162</sup> The amparo requests in these areas are also resolved by these specialized courts. These developments mean that appeals and amparos in competition cases are now considered by judges specialized and experienced in competition matters, and also that judicial proceedings may take less time to conclude due to their separation from the rest of the judicial system and delay in the dockets, both of which have the potential to ameliorate some of the earlier problems. Another important change is that COFECE resolutions are not subject to a judicial stay pending the outcome of litigation.<sup>163</sup>

In addition to the legislative changes that addressed some of the problems arising from amparos, judicial inexperience, and backlog, both the FCC and the judiciary have experienced a learning process that has led to significant improvements in the relationship between the two. The FCC learned from its procedural mistakes of earlier years, began to hire more lawyers, and improved its legal reasoning.<sup>164</sup> The judiciary participated in a training program jointly organized by the Federal Trade Commission and the Institute of the Federal Judiciary (Instituto de Judicatura Federal), in which U.S. judges experienced in antitrust matters held workshops to train Mexican judges.<sup>165</sup>

The legislative changes and the training programs have borne fruit: the FCC and COFECE have gradually improved their success rate at the courts, and

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159. Guerrero Rodriguez & Ramírez, *supra* note 59, at 403–404.

160. GLOB. COMPETITION REV., *Mexico's Federal Economic Competition Commission*, in RATING ENFORCEMENT 2014 (2014) [hereinafter GCR 2014]; GCR 2015, *supra* note 9.

161. COMISIÓN FEDERAL DE COMPETENCIA, *supra* note 93, at 20; COMISIÓN FEDERAL DE COMPETENCIA ECONÓMICA, TERCER INFORME TRIMESTRAL 2015 70 (2015).

162. Decreto por el que se reforman y adicionan diversas disposiciones de los artículos 6o., 7o., 27, 28, 73, 78, 94 y 105 de la Constitución Política de los Estados Unidos Mexicanos, en materia de telecomunicaciones, art. 28 pfo. VII, Diario Oficial de la Federación [DOF] 11-6-2013 (Mex.).

163. *Id.*

164. Not for attribution interviews, Washington, D.C (Mar. 25, 2015).

165. Eduardo Pérez Motta, *International Antitrust: Recent Developments and Trends*, in ANNUAL PROCEEDINGS OF THE FORDHAM COMPETITION LAW INSTITUTE, *supra* note 59, at 319–20; not-for-attribution interviews, Wash., D.C (Mar. 25, 2015).

boasted a success rate of eighty one percent in 2013<sup>166</sup> and ninety one percent in 2014,<sup>167</sup> compared with about twenty five percent earlier in the 2000s.<sup>168</sup> As a former FCC official highlighted with respect to the FCC's earlier dismal success rate, improvements in the FCC/COFECE's record in court is important not only in strengthening enforcement efforts by making decisions that stick rather than get overturned, but also in improving their credibility in the eyes of companies who might be more willing to bring complaints.<sup>169</sup>

### C. Competition Culture

The FCC/COFECE improved their efforts to foster a competition culture in Mexico as a result of a gradual learning process rather than legislative reforms. The OECD's evaluation in 1998 and 2004 pointed to the lack of competition culture as an important impediment to the effective enforcement of competition law, and recommended that the FCC increase its advocacy efforts vis-à-vis the public.<sup>170</sup> The FCC and later the COFECE responded to these recommendations by increasing their efforts to foster knowledge of and public support for the competition law. They have established dialogues with the legal community and business associations, developed a program aimed at small and medium-sized businesses to increase awareness of competition law, and become more active in promoting their work through public meetings and seminars.<sup>171</sup> Realizing the weakness of teaching and research on competition law, and economic laws in general in Mexico,<sup>172</sup> the FCC/COFECE have established alliances with prestigious academic institutions such as Center for Research and Teaching in Economics (Centro de Investigación y Docencia Económica) to offer a diploma in "Economic Competition."<sup>173</sup> Also, the Commissioners and other public officials from COFECE participate in teaching a course on competition in the economics department of Universidad Nacional Autónoma de México, in addition to giving seminars at various other universities.<sup>174</sup>

One of the central axes of the FCC's and the COFECE's communications with the public has been framing competition policy issues in terms of their effects on consumers. In 2008, for example, the FCC published a commissioned report—frequently cited not only in its communications with the public, but also by

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166. GCR 2014, *supra* note 160.

167. GCR 2015, *supra* note 9.

168. GLOB. COMPETITION REV., *Mexico's Federal Competition Commission*, in RATING ENFORCEMENT 2010 (2010).

169. Castañeda Gallardo, *supra* note 40, at 372.

170. OECD 1998, *supra* note 3, at 29–30, 33; OECD 2004, *supra* note 4, at 71–72.

171. ORG. FOR ECON. CO-OPERATION & DEV., PEER REVIEWS OF COMPETITION LAW AND POLICY IN LATIN AMERICA: A FOLLOW-UP 34 (2007) [hereinafter OECD 2007].

172. Ricardo García de la Rosa, *New challenges for international Economic Law teaching and research in Mexico: Mexico's outstanding waves of reforms* 14–16 (São Paulo Law School Fundação Getulio Vargas—FGV DIREITO SP, Research Paper Series—Legal Studies, Paper No. 108, 2014).

173. COMISIÓN FEDERAL DE COMPETENCIA ECONÓMICA, CUARTO INFORME TRIMESTRAL 2015 46–49.

174. *Id.*

politicians and international organizations such as the OECD and the World Bank—that quantified the impact of anti-competitive practices on consumers in Mexico.<sup>175</sup>

Some influential cartel and abuse of dominance cases have also been important in demonstrating how the FCC’s and COFECE’s work benefits consumers. In 2012, the FCC busted cartels involving tortillas (both at the municipal and national levels), eggs, and poultry, all key products for Mexican consumers, which put the FCC in the spotlight.<sup>176</sup> Another headline-grabbing decision involved abuse of dominance by Telcel, the dominant mobile carrier owned by Carlos Slim, which was fined a record of \$1 billion in 2011.<sup>177</sup> The FCC reversed this fine in 2012 upon commitments by the company to reduce its mobile termination rates.<sup>178</sup> While the decision to reverse the fine was seen as a setback by some,<sup>179</sup> the deal was expected to generate \$6 billion a year in savings for consumers.<sup>180</sup> The FCC made sure that these benefits were communicated to consumers.<sup>181</sup>

International observers have praised the recent reforms for modernizing and bringing Mexican competition law and policy to international standards. Nonetheless, some aspects of the reform—such as the new FLEC prohibition of “barriers to competition,” or the power it granted to COFECE to regulate “essential inputs”—were criticized for departing from international best practices.<sup>182</sup> Additionally, a number of practical issues in competition enforcement arose in the aftermath of the reforms. The COFECE saw some significant staff turnover. In the first year after the reforms, seven new commissioners replaced the previous commission of five, and almost forty percent of competition enforcers left, with a significant number moving to the

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175. CARLOS M. URZÚA, EVALUACIÓN DE LOS EFECTOS DISTRIBUTIVOS Y ESPACIALES DE LAS EMPRESAS CON PODER DE MERCADO EN MÉXICO (2008), [http://189.206.114.205/images/stories/transparencia/matriz\\_estudios\\_opiniones/carlos-urzua-efectos-sobre-el-bienestar-social-parte1.pdf](http://189.206.114.205/images/stories/transparencia/matriz_estudios_opiniones/carlos-urzua-efectos-sobre-el-bienestar-social-parte1.pdf) [<https://perma.cc/MDX4-5DB2>].

176. COMISIÓN FEDERAL DE COMPETENCIA, ANNUAL REPORT 2012 60 (2012).

177. *Id.* at 42; GLOB. COMPETITION REVIEW, *Mexico’s Federal Competition Commission*, in RATING ENFORCEMENT 2012 (2012).

178. Stefano Berra, *Mexico Cancels Record América Móvil Fine*, GLOB. COMPETITION REV. (May 3, 2012), <http://globalcompetitionreview.com/news/article/31749/mexico-cancels-record-america-movil-fine/> [<https://perma.cc/5FLE-E3FZ>].

179. *Id.*

180. GLOB. COMPETITION REV., *Mexico’s Federal Competition Commission*, in RATING ENFORCEMENT 2013 (2013).

181. Claudia Juárez Escalona, *CFC le impone condiciones a Telcel*, EL ECONOMISTA (May 3, 2012), <http://eleconomista.com.mx/industrias/2012/05/03/telcel-debera-cumplir-pacto-cfc> [<https://perma.cc/K5K4-87D6>].

182. For critiques, see generally Anne Perrot & Assimakis Komninos, *Mexico’s Proposed Reform of Competition Law: A Critique from Europe*, 3 CPI ANTITRUST CHRON., Mar. 2014, at 1; Harry Phillips, *Barriers to Good Law*, GLOB. COMPETITION REV. (Apr. 15, 2014), <http://globalcompetitionreview.com/features/article/35764/barriers-good-law/> [<https://perma.cc/CR2C-K5BJ>].

newly established IFETEL.<sup>183</sup> Another twenty-four percent left in 2014.<sup>184</sup> The COFECE was able to replace its staff; nonetheless, training the newly recruited personnel has consumed the agency's resources and left the agency with a rather inexperienced enforcement team.<sup>185</sup> This staff turnover and efforts at institution building resulted in modest enforcement in 2014, and a slowing down of investigations during this time of transition.<sup>186</sup>

## VII

### EXPLAINING THE RELATIVE SUCCESS OF THE MEXICAN COMPETITION REGIME

Given the various impediments to the effective implementation of the Mexican competition regime in the early years, the gradual strengthening of Mexican competition law and policy, and the FCC and COFECE, is impressive.

The interplay of domestic and international factors has enabled the adoption of a series of legislative and constitutional reforms starting in 2006, and also motivated a series of internal improvements in the FCC. On the domestic front, the pressure for legislative changes and internal reforms came from three sets of actors: (1) consumers and consumer organizations; (2) think tanks, business associations, and the bar association; and (3) domestic firms trying to break into traditionally concentrated markets. Internationally, foreign firms trying to break into the Mexican market and international organizations influenced the reform process.

#### A. Domestic Factors

##### 1. Consumers and Consumer Organizations

Consumers' interest in more effective competition policy arises from its potential to lower prices. The high costs of services provided by dominant firms operating in network industries—such as telecommunications and broadcasting—were one of the more visible signs of the concentrated economic structure of Mexico.<sup>187</sup> Mexican consumers pay more for telephone and broadband internet services than consumers in other Latin American countries, and the services they receive are of lower quality.<sup>188</sup> While the example of telecommunications is highly publicized, in reality many more sectors suffer from low levels of competition, generating significant costs for consumers. For instance, in 2010 the FCC busted a bid-rigging agreement between firms providing insulin and other supplies to the healthcare system, which, according

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183. GCR 2014, *supra* note 160.

184. GCR 2015, *supra* note 9.

185. GCR 2014, *supra* note 160.

186. GCR 2015, *supra* note 9.

187. *ECONOMIST*, *supra* note 48.

188. *Slim's Chances*, *ECONOMIST* (Mar. 1, 2014), <http://www.economist.com/news/business/21597894-carlos-slim-faces-biggest-challenge-yet-his-dominance-telecoms-and-golden> [<https://perma.cc/B45H-VL8Y>].



to some calculations, cost consumers \$46 million between 2003 and 2006.<sup>189</sup> Moreover, welfare losses from overcharging by firms with market power tend to affect the poorest Mexican citizens and those in the rural sectors the most seriously, contributing to the already high levels of inequality in the country.<sup>190</sup>

Former Chairman of the FCC Eduardo Perez Motta, who served from 2004 through 2013, says that reforms in telecommunications were possible because “the Mexican people had become fed up with paying so much in phone charges.”<sup>191</sup> Such intense interests, however, do not necessarily result in collective action that can push for change.<sup>192</sup> Consumer interests are diffuse and hard to mobilize. Moreover, they are frequently up against well-organized business interests that have a stake in “weak and passive” competition policy enforcement.<sup>193</sup>

Until recently, Mexico has had no national, private-sector consumer organization.<sup>194</sup> That is changing with the emergence of non-governmental organizations focused on consumer issues such as Observatel, a watchdog of reforms in the telecommunications sector,<sup>195</sup> the consumer organization group Al Consumidor A.C.,<sup>196</sup> and Contraloría Ciudadana, which monitors public policies—including competition—and the fight against corruption.<sup>197</sup> These organizations push vocally for legislative changes and help keep competition and its effects on consumers on the public agenda. Another way in which the consumers’ interests are represented is through Mexico’s Office of the Federal Prosecutor for the Consumer (PROFECO). In 2005—on the recommendation of the OECD’s 2004 *Peer Review* of Mexico—the FCC entered into an agreement with PROFECO to allow for more communication and coordination between the agencies.<sup>198</sup> PROFECO has been a potential source of information for the FCC and the COFECE, as it monitors some sectors such as tortillas for signs of price-

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189. ECONOMIST, *supra* note 48.

190. Carlos M. Urzúa, *Distributive and Regional Effects of Monopoly Power*, 22 ECONOMÍA MEXICANA 279, 290 (2013).

191. Eleanor M. Fox, *Competition Law and Policy in Africa*, Presentation at the Duke University Law School Seminar (Apr. 10, 2015).

192. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 2 (1965).

193. BEN ROSS SCHNEIDER, *HIERARCHICAL CAPITALISM IN LATIN AMERICA: BUSINESS, LABOR, AND THE CHALLENGES OF EQUITABLE DEVELOPMENT* 152 (2013).

194. OECD 2004, *supra* note 4, at 71.

195. Elisabeth Malkin, *New Rules to Reshape Telecom in Mexico*, N.Y. TIMES (Mar. 7, 2014), [http://www.nytimes.com/2014/03/08/business/international/new-rules-to-reshape-telecom-in-mexico.html?\\_r=0](http://www.nytimes.com/2014/03/08/business/international/new-rules-to-reshape-telecom-in-mexico.html?_r=0) [<https://perma.cc/6YVN-N3B8>] (LAW & CONTEMP. PROBS. archive only).

196. See, e.g., Crayton Harrison, *Mexican Antitrust Regulator Puts Pressure on Billionaires*, BLOOMBERG (June 12, 2012, 4:27 PM), <http://www.bloomberg.com/news/articles/2012-06-12/mexican-antitrust-regulator-puts-pressure-on-billionaires> (describing Al Consumidor’s criticism of the FCC’s settlement with America Movil SAB, owned by billionaire Carlos Slim).

197. *Observatorio Ciudadano de Competencia Económica*, CONTRALORÍA CIUDADANA, <http://www.contraloriaciudadana.org.mx/respaldo/?p=pj> [<https://perma.cc/AA6L-CR27>] (last visited May 22, 2016).

198. OECD 2007, *supra* note 171, at 34.

fixing.<sup>199</sup> The FCC opened investigations in the poultry cartel case, for instance, based on information provided by PROFECO.<sup>200</sup> Moreover, PROFECO has had the right to introduce the equivalent of class action suits in competition cases since 2011, which could add to the deterrent effect of competition law in Mexico. It recently brought two such cases against dominant landline and cellular phone companies Telmex and Telcel to attempt to recover money on behalf of millions of consumers.<sup>201</sup>

Consumers' roles in strengthening competition law and policy in Mexico have been multiple. First, consumer organizations and PROFECO have raised awareness about the lack of competition in Mexican markets and its effects on consumers, thus contributing to the competition culture in Mexico. They have also aided enforcement efforts by being sources of information for the FCC and COFECE, as well as putting pressure on these organizations to be transparent and accountable. Finally, consumers as voters may have helped elect presidents with reform platforms aimed at increasing economic competition since the elections in 2000, which for the first time in seventy-one years brought a party other than the Institutional Revolutionary Party (Partido Institucional Revolucionario) to power.<sup>202</sup> President Vicente Fox (2000 through 2006) included reforming the telecommunications and electricity industries and increasing the autonomy of regulatory agencies in his campaign agenda.<sup>203</sup> President Felipe Calderón (2006 through 2012) promised to dismantle monopolies and increase competition.<sup>204</sup> And finally, in 2012, Enrique Peña Nieto's reform agenda resulted, after his election, in the Pact for Mexico (Pacto por México), an agreement between the three main parties of Mexico on a broad package of reforms, including competition law. It is difficult to know the extent to which economic reform issues play a role on voters' choices in Mexico, but the growing publicity around consumers' concerns has gone hand in hand with the election of presidents with reform agendas aimed at increasing competition in Mexican markets.

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199. *Mexico's Economy: Monopolies and Tortillas*, ECONOMIST (Jan. 19, 2007), <http://www.economist.com/node/8575130> [<https://perma.cc/2NJV-7KDN>].

200. COMISIÓN FEDERAL DE COMPETENCIA, *supra* note 176, at 37.

201. García de la Rosa, *supra* note 172, at 11 n.15.

202. Carlos Elizondo, *After the Second of July: Challenges and Opportunities for the Fox Administration*, in MEXICO'S POLITICS AND SOCIETY IN TRANSITION 29 (Joseph S. Tulchin & Andrew D. Selee eds., 2003).

203. MARIA VICTORIA MURILLO, POLITICAL COMPETITION, PARTISANSHIP, AND POLICY MAKING IN LATIN AMERICAN PUBLIC UTILITIES 210 (2009).

204. *Mexico's President Moves Against Monopolies*, BLOOMBERG (Oct. 12, 2009, 10:03 PM), <http://www.bloomberg.com/news/articles/2009-10-12/mexicos-president-moves-against-monopolies> [<https://perma.cc/9JBG-KXN4>]; Shannon K. O'Neill, *Taking on Mexico's Monopolies*, COUNCIL ON FOREIGN REL.: LATIN AM.'S MOMENT (Apr. 18, 2011), <http://blogs.cfr.org/oneil/2011/04/18/taking-on-mexico-s-monopolies> [<https://perma.cc/3WLR-SD9A>].

## 2. Think Tanks and Business Associations

Societal actors such as the influential think tank Mexican Institute for Competitiveness (Instituto Mexicano para la Competitividad)—whose projects are funded in part by international organizations such as the World Bank, OECD and bilateral donors such as the United States, Britain, and Germany—have contributed to this debate by emphasizing the importance of competitive domestic markets to increase Mexico’s international competitiveness.<sup>205</sup> It is indicative of the Institute’s influence that its former director, Alejandra Palacios Prieto, is now the head of the COFECE. The Research Centre for Development (Centro de Investigación para el Desarrollo) has also conducted research on competition law and policy<sup>206</sup> and offered opinions on reform proposals.<sup>207</sup> These two think tanks, along with IFETEL, COFECE, the Institute of the Federal Judiciary, and the Center for Research and Teaching in Economics now form the Alliance for Competition (Alianza por la Competencia), which supports public activities and research on competition law and policy, and is supported by bilateral donors and international organizations.<sup>208</sup> The impact of these organizations has been to raise awareness about competition law and policy among firms and society, as well as political actors.

Private sector representatives, such as the Business Coordinating Council (Consejo Coordinador Empresarial) have also highlighted the importance of economic competition to promote more inclusive and healthier markets and called for reforming the FCC to achieve these ends.<sup>209</sup> The related Center for Economic Studies of the Private Sector (Centro de Estudios Económicos del Sector Privado) published a survey of business people in 2005, which pointed to public and private monopolies as the most important obstacles in the markets for business development.<sup>210</sup> Some business interests, such as the Mexican Council for Businessmen (Consejo Mexicano de Hombres de Negocios), are also represented through their support of think tanks such as the Mexican Institute for Competitiveness.

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205. See, e.g., INSTITUTO MEXICANO PARA LA COMPETITIVIDAD, NOS CAMBIARON EL MAPA: MÉXICO ANTE LA REVOLUCIÓN ENERGÉTICA DEL SIGLO XXI (2013); INSTITUTO MEXICANO PARA LA COMPETITIVIDAD, UN PUNTO DE INFLEXIÓN (2006) (reporting the competitiveness index, elaborated and published by the Mexican Institute for Competitiveness, which includes the government’s promotion of competition as a variable).

206. See, e.g., CENTRO DE INVESTIGACIÓN PARA EL DESARROLLO, ESTUDIO SOBRE EL COMBATE A LA COLUSIÓN EN COMPRAS PÚBLICAS EN AMÉRICA LATINA (2014) (analyzing public procurement laws in fourteen Latin American countries, and identifying best practices to prevent bid rigging in public procurement).

207. VÍCTOR M. FRÍAS, REFORMAS A LA LEY FEDERAL DE COMPETENCIA ECONÓMICA (2013), [http://reddecompetencia.cidac.org/es/uploads/1/REFORMAS\\_A\\_LA\\_LEY\\_FEDERAL\\_DE\\_COMPETENCIA\\_ECON\\_MICA.pdf](http://reddecompetencia.cidac.org/es/uploads/1/REFORMAS_A_LA_LEY_FEDERAL_DE_COMPETENCIA_ECON_MICA.pdf) [<https://perma.cc/K3DX-MNK4>].

208. *Acerca de*, ALIANZA POR LA COMPETENCIA, <http://www.alianzaxcompetencia.mx/acerca-de/> (last visited July 1, 2016).

209. CONSEJO COORDINADOR EMPRESARIAL, AGENDA DE COMPETITIVIDAD 2010–2011 195 (2011).

210. CENTRO DE ESTUDIOS ECONÓMICOS DEL SECTOR PRIVADO, ENCUESTA SOBRE GOBERNABILIDAD Y DESARROLLO EMPRESARIAL 2005 5 (2005).

Finally, competition law practitioners as well as the Mexican Bar Association (Barra Mexicana Colegio de Abogados) have had input in the reform process. As frequent users of the system, individual lawyers and the bar association have voiced their concerns about the deficiencies and possible biases of the system, and questioned its effectiveness.<sup>211</sup> The Bar Association also contributes to training programs for judges and regulators on competition issues.<sup>212</sup>

These domestic actors—with significant international ties through funding and joint projects—have played a meaningful role in the reform process in multiple ways. First, they help generate a competition culture among firms and the public through their research, publications, conferences, seminars, and trainings. Second, especially as users of the system, lawyers and the Bar Association have been vocal critics of the FCC's procedures and functioning,<sup>213</sup> and thus have contributed to its internal reform process. Finally, their opinions on the reform proposals have been inputs for legislative reforms.

### 3. Domestic Firms

Individual firms that have difficulty entering markets dominated by large players have been another source of support for the FCC/COFECE. Such firms typically bring complaints to the agency and challenge dominant firms' anti-competitive conduct in the courts. For instance, Avantel, a Mexican cellular provider,<sup>214</sup> sued Telmex nine times for abuse of dominance.<sup>215</sup> The same company used the Freedom of Information Act to force COFETEL to provide it with a copy of the concession title granted to Telmex by the government in 2007, thus helping to increase the transparency of the sector regulator.<sup>216</sup> As the competition regime in Mexico strengthens and judicial uncertainty abates, domestic firms will be increasingly motivated to bring complaints about competition infringements. This has the potential to reduce the burden on COFECE in identifying and sanctioning infringements.

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211. Guerrero Rodríguez & Ramírez, *supra* note 59, at 403–06; Omar Guerrero Rodríguez, *¿Por qué México necesita una ley de competencia?*, FORBES MÉXICO (Dec. 23, 2014), <http://www.forbes.com.mx/por-que-mexico-necesita-una-ley-de-competencia> [https://perma.cc/8GSF-3RCU]; Javier Tejado Dondé, *Los juzgados cooptados por el regulador*, EL UNIVERSAL (Sept. 8, 2015, 1:55 AM), <http://www.eluniversal.com.mx/entrada-de-opinion/columna/javier-tejado-donde/cartera/2015/09/8/los-juzgados-cooptados-por-el> [https://perma.cc/X5XP-YLBT].

212. Elsa González, *Clausura del Primer Encuentro Nacional en Competencia Económica*, CANAL JUDICIAL (Feb. 5, 2014), <https://canaljudicial.wordpress.com/tag/barra-mexicana-colegio-de-abogados> [https://perma.cc/E3F4-QK6J].

213. See *supra* note 91.

214. Avantel had forty-five percent foreign ownership until it was acquired by Axtel in 2006. MURILLO, *supra* note 203, at 216 n.46 (2009); El Universal, *CIERRA AXTEL COMPRA DE AVANTEL* (Dec. 4, 2006), <http://archivo.eluniversal.com.mx/notas/391987.html> [https://perma.cc/5RWD-BCHQ].

215. Guerrero, López-Calva & Walton, *supra* note 91, at 129.

216. *Deberá Cofetel entregar información a Avantel*, EL UNIVERSAL (June 17, 2007, 10:43 AM), <http://archivo.eluniversal.com.mx/notas/431655.html> [https://perma.cc/FN8D-WH4N].

## B. International Factors

In interaction with these domestic actors, a number of international actors have been sources of pressure or support for the improvement of the Mexican competition regime.

### 1. Foreign Firms Trying to Access the Mexican Market

Foreign firms have been a source of pressure on the Mexican government to improve the effectiveness of competition law and sector regulations. For instance, in 2000 the U.S. government brought a dispute against Mexico in the World Trade Organization—principally on behalf of AT&T and MCI<sup>217</sup>—claiming that Mexican telecommunications regulator breached its obligations under the General Agreement on Trade in Services.<sup>218</sup> COFETEL had granted Telmex, as the firm with the largest share of the outgoing calls, the power to fix the termination rate to be paid by all foreign carriers—for example, AT&T and MCI—for calls terminating in Mexico.<sup>219</sup> The GATS ruled against Mexico in 2004, a decision that the Mexican government did not appeal,<sup>220</sup> and forced COFETEL to change the regulations. This has had a significant downward impact on international settlement rates—they fell from approximately \$0.40 per minute in 1997 to approximately \$0.02 in 2007 in areas open to long distance competition—and on the price of international calls.<sup>221</sup> Mexico's greater economic openness, and its bilateral, regional, and multilateral trade agreements mean that foreign firms will increasingly seek access to domestic markets and generate pressure for better enforcement of competition laws. As a result of recent reforms allowing for greater foreign ownership in telecommunications companies, AT&T acquired the third and fourth large players in the mobile phone market in Mexico, generating pressures for better services and lower prices.<sup>222</sup>

### 2. International Organizations and Regulatory Networks

The International Monetary Fund, the World Bank, and the World Economic Forum have long emphasized the lack of competition as a significant impediment to the growth of the Mexican economy.<sup>223</sup> The recommendations of these

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217. Eleanor M. Fox, *The WTO's First Antitrust Case—Mexican Telecom: A Sleeping Victory for Trade and Competition*, 9 J. INT'L ECON. L. 271, 278 (2006).

218. *Mexico - Measures Affecting Telecommunications Services*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds204\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds204_e.htm) [https://perma.cc/WK8M-3AEK] (last visited June 10, 2016).

219. Fox, *supra* note 217, at 276.

220. *United States-Mexico Telecommunications WTO Dispute*, ICT REGULATION TOOLKIT, <http://www.ictregulationtoolkit.org/en/toolkit/notes/PracticeNote/2592> [https://perma.cc/5D5F-UW2U] (last visited Apr. 9, 2016).

221. del Villar, *supra* note 99, at 340.

222. *Mexico Telecom Prices Fall After Reform Aimed at Curbing Slim*, REUTERS (Mar. 8, 2015, 4:01 PM), <http://www.reuters.com/article/mexico-telecommunications-prices-idUSL5N0WA0R220150308> [https://perma.cc/3LKK-9EM3].

223. INTERNATIONAL MONETARY FUND, STAFF COUNTRY REPORTS, MEXICO NO. 06/351 17

organizations are frequently reported in the national media and become part of the public debate, and have thus been important inputs for reform.<sup>224</sup> For instance, presenting his proposal for reform of the competition law in 2010 (eventually passed in 2011), President Felipe Calderón explained that the proposal was meant to address lack of competition in the Mexican economy, which he saw as an impediment to investment, growth, and efforts to address inequality and poverty, citing an OECD report on the impact of uncompetitive markets on vulnerable sections of the society.<sup>225</sup> In the process leading to the adoption of the reforms, Pérez Motta, the chairman of the FCC at the time, similarly cited the country's ranking in the World Economic Forum's annual competitiveness index—number sixty that year—to draw attention to the lack of competition in the Mexican economy.<sup>226</sup>

Organizations such as the OECD and the ICN have had an even more direct impact on the reform process in Mexico.<sup>227</sup> The OECD Competition Division worked closely with the FCC. Many of the recommendations of the 1998 OECD Report on *Regulatory Reform in Mexico*<sup>228</sup> and the 2004 *Peer Review* of Mexican competition law and policy<sup>229</sup> found their way into the legislative reform proposals. These documents were also crucially important in the FCC's efforts to convince the legislators of the need for reform in competition law in 2006. The FCC commented in its submission to the OECD that

The OECD's peer review provided a neutral voice to the discussion by presenting a non-partisan analysis of the state of competition policy in Mexico and simply outlining best practices based on its experience in the area with OECD member countries. The Report was used and cited in communications with the legislature and federal public administration.<sup>230</sup>

The OECD also provided lengthy comments on the draft of the reforms, and a letter summarizing OECD's opinion on the reforms written by the head of the OECD Competition Division was shared with the Mexican legislators in the process leading up to the adoption of the reforms. The 2011 reform likewise drew

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(2006); WORLD BANK, *supra* note 17, at 47; Guerrero Rodríguez & Ramírez, *supra* note 59, at 396.

224. On the influence of foreign models in public reform debates, see generally KATERINA LINOS, *THE DEMOCRATIC FOUNDATIONS OF POLICY DIFFUSION: HOW HEALTH, FAMILY AND EMPLOYMENT LAWS SPREAD ACROSS COUNTRIES* (2013).

225. Lilia González, *Firma Calderón Ley de Competencia Económica*, EL ECONOMISTA (May 9, 2011, 4:59 PM), <http://eleconomista.com.mx/industrias/2011/05/09/firma-calderon-ley-competencia-economica> [<https://perma.cc/5WBX-MUVH>]; Lizbeth Padilla, *Castigar con cárcel monopolios: FCH*, EL ECONOMISTA (Apr. 6, 2010, 12:46 AM), <http://eleconomista.com.mx/industrias/2010/04/06/castigar-carcel-monopolios-fch> [<https://perma.cc/BS3N-U49T>].

226. Lilia González Velázquez, *Acercaría al país a las mejores prácticas*, EL ECONOMISTA (Apr. 6, 2010, 12:34 AM), <http://eleconomista.com.mx/industrias/2010/04/06/acercaria-pais-las-mejores-practicas> [<https://perma.cc/8S3Y-67Y4>].

227. On OECD's influence as a transnational diffuser of ideas and policies, see FABRIZIO DE FRANCESCO, *TRANSNATIONAL POLICY INNOVATION: THE OECD AND THE DIFFUSION OF REGULATORY IMPACT ANALYSIS* (2013).

228. OECD 1998, *supra* note 3.

229. OECD 2004, *supra* note 4.

230. OECD 2007, *supra* note 171, at 34.

significantly on OECD peer review and follow-ups.<sup>231</sup>

Finally, the ICN, a virtual network of competition agencies established in 2001,<sup>232</sup> has been an important source of expertise and influence on the Mexican competition regime. The ICN was launched with the aim of contributing to cooperation and convergence among national competition regimes. Mexico is an active participant in the ICN. It led the Agency Effectiveness Working Group of the ICN for some years,<sup>233</sup> and Pérez Motta acted as the chairman of the ICN from 2012 to 2013.<sup>234</sup> Interactions among competition agency officials in the ICN, who are relatively isolated from political pressures and are focused exclusively on competition law, help foster socialization and mutual learning among the participants.<sup>235</sup> This has been an important promoter of internal reforms of the FCC/COFECE.<sup>236</sup>

To summarize, international actors have been influential in strengthening the Mexican competition regime in multiple ways. Foreign firms seeking access to domestic markets have forced the Mexican government to change regulations that impede competition as in the area of telecommunications, and increasingly their presence in Mexican markets will signify greater competition. International organizations and transnational networks such as the OECD and the ICN have motivated many of the internal reforms at the FCC, and have been influential as neutral external actors in the domestic debates as well as in FCC's negotiations with the legislature.

These international pressures facilitated reforms by strengthening the hand of competition policy reformers in Mexico, though their impact was in no way guaranteed. Despite all the support of the OECD, the 2006 reform took nine months of analysis and negotiations between the FCC and the legislature.<sup>237</sup> The 2011 reform took a year to pass the Congress.<sup>238</sup> In communicating and negotiating closely with the lawmakers, the FCC comprehended the importance of political maneuvering and negotiations,<sup>239</sup> and excelled at this under the

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231. OECD, FOLLOW-UP TO THE NINE PEER REVIEWS OF COMPETITION LAW AND POLICY OF LATIN AMERICAN COUNTRIES 35 (2012).

232. Maria Coppola, *ICN Best Practices: Soft Law, Concrete Results*, 7 CPI ANTITRUST CHRON., July 2011, at 1, 2; Eleanor M. Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, 43 INT'L LAW. 151, 160 (2009).

233. INT'L COMPETITION NETWORK, ICN AGENCY EFFECTIVENESS WORKING GROUP 2013-2016 WORK PLAN 1 (2013), <http://www.internationalcompetitionnetwork.org/uploads/library/doc914.pdf> [<https://perma.cc/5VWB-XAMD>].

234. Eduardo Pérez Motta, *Chair's Report: 2012-2013 ICN Achievements*, COMPETITION POL'Y INT'L, (Sept. 6, 2013), <https://www.competitionpolicyinternational.com/chair-s-report-2012-2013-icn-accomplishments/> [<https://perma.cc/YL5L-V5DE>] (last visited Jun. 10, 2016).

235. On socialization in international organizations, see Jeffrey T. Checkel, *International Institutions and Socialization in Europe: Introduction and Framework*, 59 INT'L ORG. 801 (2005).

236. Ali Haddou, *Panel Discussion: Antitrust Developments in India and Mexico*, in ANNUAL PROCEEDINGS OF THE FORDHAM COMPETITION LAW INSTITUTE, *supra* note 59, at 409, 434.

237. Pérez Motta & Sada Correa, *supra* note 74, at 21.

238. Hoher, *supra* note 44, at 5.

239. Pérez Motta & Sada Correa, *supra* note 74, at 21.

chairmanship of Pérez Motta.<sup>240</sup> Thus although a competition agency's independence from the executive branch is of utmost importance in the effectiveness of competition policy, Mexico's experience demonstrates that the agency also has to be able to maneuver through the political process and have sufficient political backing to carry out its mandate—that is, it must have “embedded autonomy.”<sup>241</sup>

## VIII

### CONCLUSION

The Mexican competition regime is hailed as one of the success stories among emerging economies today, but it was not always so. In the first fifteen years after its establishment, the FCC ran into many problems in its enforcement of competition law, such as insufficient financial resources, legislative loopholes, delays and defeats at the district courts, and a lack of support for competition law and policy among the general public and economic actors.

A series of reforms, starting in 2006 and culminating in a fundamental revamp of the law and the FCC in 2013 through 2014, have addressed many of these problems, and placed the FCC and COFECE among well-respected competition authorities in the world. The reforms were possible thanks to a combination of domestic and international factors that reinforced one another. Domestically, a constituency for stronger competition policy arose, which include consumer associations, think tanks, and firms that have been kept out of markets by dominant firms. And external pressures aided and reinforced these domestic actors. Foreign firms seeking access to the Mexican markets used bilateral and international trade agreements to which Mexico was a party in order to push the Mexican government to end anti-competitive practices. International organizations and transnational networks also gently pressured and guided the Mexican policymakers with their expert evaluations, and helped move the domestic debate towards concrete legislative action, both directly and indirectly through their support for think tanks and nongovernmental organizations in Mexico.

Some broader conclusions can be drawn from the Mexican experience for countries with recently adopted competition laws. Most importantly, international pressures—in the form of financial and technical assistance, and conditionality—alone will not lead to effective enforcement of competition laws in developing countries. Domestic ownership of the law by companies, consumer organizations, think tanks, and business associations is needed to raise awareness of competition law, and to assist in competition agencies' enforcement efforts. International support in the form of expert opinions, reports, and technical assistance will be much more effective in promoting reforms if it can rely on the existence of a domestic constituency in favor of competition law and policy.

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240. Not for attribution interview, Washington, D.C. (Mar. 25, 2015).

241. Aydin & Bütke, *supra* note 19, at 30–31.