

March 24, 2021

Ambassador Katherine Tai  
United States Trade Representative  
600 17th Street NW  
Washington, D.C. 20508

Dear Ambassador Tai:

We write to thank you for your attention in your confirmation hearing to the varied and growing concerns across many American industries — from agriculture to energy to technology and health care — with regard to market access in Mexico. Numerous recent actions by the Government of Mexico call into question its commitment to fulfill its obligations under the United States–Mexico–Canada Agreement (USMCA). We ask for your full support to review potential violations of the agreement and, as you stated following your hearing, to “quickly engage the Mexican government if it violates the agreement and to use all dispute settlement tools to fully enforce USMCA when necessary.”

Over the last year, the Government of Mexico has introduced, and in some cases finalized, many laws, regulations, decrees, and standards that put U.S. companies at a sharp disadvantage vis-à-vis their Mexican competitors. The range of U.S. industries impacted by these actions is vast, and the list of obstacles has grown steadily. This letter highlights several of the more problematic developments, although we are tracking other actions that could also potentially violate Mexico’s USMCA commitments related to procurement of wireless equipment and intellectual property (IP). Taken together, these actions demonstrate significant concerns about USMCA implementation. USMCA has the potential to improve the business environment for U.S. industries operating in Mexico, but only if the provisions of the agreement are effectively implemented and enforced. We strongly encourage you to stress to the Government of Mexico that you intend to fully enforce the commercial provisions of the USMCA, and work with industry and other stakeholders to take action as needed.

### **TELECOMMUNICATIONS, BROADCASTING, AND AUDIOVISUAL SERVICE**

Mexico’s 2013–2014 telecommunications Constitutional Reforms put in place a regulatory framework to promote competition, allowing for foreign direct investment and creating an independent, autonomous and specialized regulatory regime. The USMCA incorporated Mexico’s Constitutional reforms related to telecommunications, including commitments to establish a competitive market in the telecommunications sector and maintain an independent, autonomous, and specialized regulator for the telecommunications and broadcasting markets. These commitments are critical in order to ensure a competitive telecommunications market in Mexico in order to support U.S. exports, including e-commerce.

We are concerned with President Andrés Manuel López Obrador’s public support for eliminating or absorbing into the Executive Branch certain independent and autonomous regulators, including the

telecommunications and broadcasting regulator (IFT) and the antitrust regulator (COFECE). The Secretary of Economy has acknowledged publicly that the USMCA protects the autonomy of IFT and COFECE and said that President López Obrador indicated to her that he would respect the USMCA. Yet President López Obrador on February 25 again called into question the value of these regulators during his morning press conference. We are highly concerned about the possibility of a bill presented in the Mexican Congress regarding autonomous regulators that could include measures that impact IFT's independence or diminish its budget or technical expertise. These new proposals are contrary to Articles 18.6 and 18.17 of the USMCA, as well as the principles in Mexico's Constitutional reforms.

The Government of Mexico is also moving to increase costs for U.S. telecommunications equipment manufacturers. In-country testing requirements proposed by the Government of Mexico in February 2020 (in Technical Provision IFT-012-2019) would increase costs for U.S. companies that sell covered mobile devices and harm companies that provide testing, inspecting, and certification services. They would also be redundant to testing done in the United States and around the world, and without any conceivable benefit to Mexican consumer safety. While the Government of Mexico intended to implement the new requirements in February 2021, it has since delayed their implementation and submitted the proposal to the WTO for review. If implemented, these requirements would likely violate the TBT provisions of the USMCA (Art. 11.6) in which Mexico committed to accept foreign conformity assessment results.

Mexico is a significant and growing market for U.S. film and television creators, who are on track in 2021 to launch new digital platforms and ramp up theatrical releases. However, Senator Ricardo Monreal's new cinematographic and audiovisual bill contains protectionist proposals that would 1) impose a local content quota of 15% in movie theaters; 2) install a range of theatrical restrictions intended to limit U.S. film exports and grant market-distorting preferences to local films; and 3) force a 15% local content quota for over-the-top (OTT) or online platforms. This bill, if implemented, would unfairly restrict U.S. exports that support hundreds of thousands of U.S. jobs, in violation of USMCA provisions (such as Articles 14.4, 14.10, 15.3 and 19.4) that prohibit performance requirements and require Mexico to accord non-discriminatory treatment. Instead, Mexican policymakers should encourage open markets, investments, and collaborations, as U.S. and Mexican industries work together to overcome the COVID-19 pandemic.

Moreover, Mexico's 2020 enactment of many key copyright reforms is now vulnerable to Constitutional challenges. The Mexican Congress adopted protections for technological protection measures (TPM) and rights management information (RMI) and carefully defined "safe harbor" (including notice and takedown) provisions into the Copyright Law, along with other USMCA-obligated changes in Chapter 20 (Sections H (Copyrights) and J (Enforcement)). While these provisions remain in force, specific provisions on the protection of TPMs and the notice and takedown procedures are currently the subject of constitutional challenges, which if successful would seriously undermine Mexico's USMCA obligations. AFTE hopes the Government of Mexico will actively defend against these challenges so that Mexico can finally and properly implement the WIPO Internet Treaties.

## **BIOPHARMACEUTICALS AND AGRICULTURE BIOTECHNOLOGY**

We are concerned with the growing trend of policies in Mexico that lack the transparency and stability necessary for the biopharmaceutical and biotechnology industries to continue to export U.S. products to Mexico. Outside of emergency use authorizations for certain COVID-19 vaccines, since 2018 Mexico's

regulatory authority, Comisión Federal para la Protección contra Riesgos Sanitarios (Cofepris), has delayed approvals of new clinical trials and of new biotherapeutic and biotech agricultural products, and has not been transparent in its regulatory approval processes. These actions do not appear consistent with key language in USMCA, including provisions on regulatory approvals for biopharmaceutical products (Annex 12-F) on agricultural biotech products (Chapter 3).

Delayed regulatory approvals have stalled the use of dozens of innovative medicines in Mexico, leaving Mexican patients without access to the latest lifesaving medicines and limiting U.S. company access to the Mexican market. These actions also are slowing the introduction of new agricultural innovations within North America. Customers are reluctant to accept new technology before regulators in major trading markets approve biotech traits, for fear of trade disruption. While technology developers seek to align approvals among trading partners, Mexico's actions make this impossible. This undermines advances in science to improve crops to reduce emissions and be more resilient to climate change, foster worker safety, and sustainably increase farm productivity.

In addition, Mexico has yet to implement regulations to bring its IP regime into full compliance with USMCA obligations under Chapter 20. On February 19, 2021, the Mexican Institute of Industrial Property (IMPI) issued, in the first Gazette of Medicines published after entry into force of the USMCA, a rejection of the inclusion of patents covering biologics and methods of use. Mexican regulations that follow from its IP laws must be fully compliant with the USMCA, including commitments made related to patent linkage and the Bolar Clause. Furthermore, current draft legislation to reform the Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público (LAASSP) appears to be inconsistent with multiple provisions in USMCA's Chapter 13 (Government Procurement). Mexico should ensure that any revisions to LAASSP are consistent with USMCA obligations.

Finally, we are closely monitoring developments concerning the contract that Mexico signed with the United Nations Office of Services (UNOPS) for the public procurement of medicines that do not align with Mexico's obligations under Chapter 13. Actions by Mexico and UNOPS raise concerns regarding transparency, patient safety, and consistency with international best practices and Mexico's trade obligations, including provisions in USMCA Chapters 11 (TBT) and 20 (IP). Although some of these issues have been mitigated, it is important to continue close vigilance of the tender process to ensure full compliance with the USMCA.

## **FOOD AND FOOD LABELING REGULATIONS**

We are concerned with the Government of Mexico's use of regulatory actions that are not grounded in science and are not aligned with work underway at the Codex Alimentarius Commission (Codex) to develop clear global guidelines. These actions range from food labeling regulations based on non-evidence based science to some direct bans on certain foods. These actions do not align with Mexican commitments under Chapter 11 (Technical Barriers to Trade), nor with the broader WTO-TBT principle under Article 2.2 of the WTO TBT Agreement that good regulation can simultaneously protect public health without being more trade-restrictive than necessary.

Last June, Mexico rushed to finalize new front-of-package nutritional labeling standards (NOM-051 and now NOM-086) that will fully take effect at the end of this month. These new standards threaten the market access guaranteed by the USMCA and could violate Mexico's USMCA commitments by making it

harder for American manufacturers to export U.S.-made food and beverages to Mexico. Product relabeling on an enterprise-wide scale, such as those required under Mexico's new rules, is an onerous, costly, and time-consuming process, taking over 12 months. Food reformulation can take multiple years. The states of Oaxaca and Tabasco went further and outright banned pre-packaged foods and beverages to minors, treating such products in the same way as alcohol and cigarettes, but not to similar foods sold by a retailer who prepared them. We urge USTR to raise continued concerns with these and other regulations related to food and nutritional labelling that do not align with Mexico's USMCA commitments through USMCA consultation and other channels.

## **ENERGY AND POWER GENERATION**

The U.S. energy and power sector is facing an increasing array of market access obstacles that are contrary to Mexico's USMCA commitments (Article 2.3) as they relate to the national treatment investment protection in Mexico and exports of related U.S. energy equipment and resources. These actions also appear to violate Mexico's commitments to non-discriminatory treatment in the USMCA's chapter on state-owned enterprises and designated monopolies (Articles 22.4.1 and 22.4.2). We urge that USTR begin consultations with the Mexican government to roll back these regulatory and legislative actions and honor the commitments made under the USMCA.

For the past year, President López Obrador has issued a series of regulatory and administrative measures that restrict competition from private, foreign, and national investment with Mexican state companies (such as Petróleos Mexicanos (Pemex)) and government agencies such as the Federal Electricity Commission (CFE), entrenching their dominant role in Mexico and reversing energy market reforms that had been memorialized in the USMCA. This push began with a June 22, 2020 memorandum from President López Obrador that directs Mexican energy regulatory agencies to expressly favor Pemex and CFE over private investment in all energy production and generation and apply a new rescue policy to the struggling state-owned enterprises, but has elevated sharply in recent months with a highly concerning legislative effort to rush reforms to the Power Industry Law (Ley de la Industria Eléctrica) that will directly disadvantage U.S. energy and power companies in the Mexican market.

U.S. energy and power investors now face increasing difficulties getting permits for a range of activities including new or re-branded stations, third-party storage facilities, imported fuels, liquid terminals, and LNG terminals. Additionally, the change in export and import permitting for hydrocarbons and petroleum products from 20 years to 1 year directly discriminates against hydrocarbon investment in Mexico to the benefit of Pemex.

This purposeful effort by the Mexican administration to prioritize Pemex and CFE over private energy and power investment culminated this month in rushed reforms to the Power Industry Law (Ley de la Industria Eléctrica) in order to provide preferences to CFE in the domestic power market and disadvantage private power companies. These legislative changes were submitted by the Government of Mexico to the Lower House on February 1, and then approved by the Lower House on February 23 and the Senate on March 2. Following this rushed legislative approval process, the reforms took legal effect on March 10, despite the fact they are currently being challenged in Mexican courts. These reforms discriminate against U.S. and other private investors in Mexico's power market and curtail existing opportunities for U.S. exporters of energy resources and equipment.

Additionally, Mexico has already committed to upwards of a 35 percent reduction in greenhouse gas emissions and a 70 percent reduction in black carbon emissions by 2030. Any actions to prioritize Pemex and CFE over private energy investment and existing power purchasing agreements will slow Mexico's adoption of clean energy technologies and progress towards reaching its emissions reduction goals.

## **CUSTOMS AND TRADE FACILITATION**

The Government of Mexico has not complied fully with the letter or spirit of its USMCA customs obligations, and instead is moving to erect new customs barriers that harm the ability of American small businesses to benefit from the agreement. Mexico has yet to implement fully key USMCA commitments such as:

- Reducing customs formalities and simplifying processing to shipments valued up to US\$2,500 (Articles 7.1.2, 7.7, 7.8, and 7.8.2);
- Allowing periodic assessment and payment of duties (Article 7.8.1);
- Permitting the ability to self-file without a broker and removing the “local” broker rule (Article 7.20) by amending or providing guidance on Reglas de Comercio Exterior (Section 1.4 – Agentes y Apoderados Aduanales); and
- Publishing or otherwise communicating customs regulations that it proposes to adopt, violating the spirit of Article 7.3, as well as the USMCA chapter on good regulatory practices.

We are also concerned is Mexico's June 2020 increase to 17–19 percent of its “Tasa Global,” a combination duty and charge on all shipments entering under simplified clearance (de minimis and informal entry) methods, including on shipments from the United States and Canada. The duty and charge applies to shipments under the de minimis thresholds, set in USMCA at US\$117 for custom duties and US\$50 for taxes. Given that the Tasa Global includes a component for customs duties, the new charges on imports valued between US\$50 and US\$117 appear to violate the agreement. We urge USTR to request that Mexico reverse this increase.

## **ELECTRONIC PAYMENT SERVICES**

Under USMCA Chapter 17 (Annex 17-A), Mexico committed to provide market access and national treatment to foreign suppliers of electronic payments services (EPS). However, U.S. EPS firms face significant barriers to entry and discrimination in the domestic processing of card payments. First, the current regulatory framework in Mexico requires new suppliers to be certified by domestic incumbent suppliers—that is, their direct competitors—in order to be able to operate in the market, effectively giving the local incumbents a veto over whether, and which, foreign companies can enter the market. Second, Mexico requires that services suppliers process all domestic transactions under a single set of technical standards and rules that are set by direct domestic competitors, instead of those suppliers' own standards and rules, that are in turn based on internationally accepted standards.

Allowing a new EPS supplier to apply its own standards and rules is critical for that supplier to be able to differentiate its business offerings, including by using its own intellectual property, and thereby demonstrate its competitive advantage vis-à-vis local firms. These elements of Mexico's domestic payments regime, individually and collectively, impede fair competition among EPS services suppliers and do so in a manner that favors domestic players. Indeed, the Mexican competition authority (COFECE) recently released preliminary results of an investigation confirming the existence of major entry barriers in the country's payments market, with a focus on processing services in particular.

We encourage Mexico to bring its domestic payments regime into compliance with its EPS market access and national treatment commitments under the USMCA, in particular, by providing a fair, transparent and level playing field market structure so as to allow full competition among suppliers' service offerings.

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We look forward to working with you and the USTR team to fully enforce commercial aspects of the USMCA, defend U.S. exports to Mexico, restore Mexico's compliance with its USMCA obligations, and monitor for potential violations moving forward.

Sincerely,

- Alliance for Trade Enforcement
- ACT | The App Association
- American Bakers Association
- American Petroleum Institute (API)
- Biotechnology Innovation Organization (BIO)
- Coalition of Services Industries
- Global Innovation Policy Center (GIPC)
- Motion Picture Association (MPA)
- National Association of Manufacturers (NAM)
- National Confectioners Association
- Pharmaceutical Research and Manufacturers of America (PhRMA)
- The National Foreign Trade Council (NFTC)
- The Recording Industry Association of America (RIAA)
- United States Council for International Business (USCIB)
- The Software and Information Industry Association (SIIA)
- Small Business & Entrepreneurship Council
- Small Business Roundtable
- The Sugar Association
- The Telecommunications Industry Association (TIA)

