國立政治大學國際經營與貿易研究所

碩士學位論文

國際競爭法合作協定與經貿協定中競爭規範之研究

－兼談國營事業競爭中立議題

A Study on Antitrust Cooperation Agreements and
The Competition Chapters in Trade Agreements
－ Also on Competitive Neutrality Issues of SOEs

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國際競爭法合作協定與經貿協定中競爭規範之研究
－兼談國營事業競爭中立議題

吳孟洲*

摘要

隨著世界各國開放市場，事業間的競爭已步入國際化，是以競爭法制與政策也必須國際化，然而各國間競爭法規範的調和並未隨著經貿自由化而自然達成。本文點出競爭法與國際接軌的重要性，進一步檢視各國就競爭法案件在單邊、雙邊、複邊等層次將面臨哪些執法上的問題。又因國際反競爭案件越趨頻仍，競爭法主管機關間的合作需求隨之提高，究竟在執法合作上可能面臨哪些困難與限制，未來在合作上發展的趨勢如何，本文將循序漸進加以探討。目前國際間迄未形成一套強勢的競爭法制，世界貿易組織（World Trade Organization, WTO）亦放棄在杜哈談判回合處理競爭議題，然經貿自由化對國際競爭法制仍持續注入新元素。譬如各國簽訂之自由貿易協定與區域經濟整合，多設有競爭相關章節，並開始關注國營事業涉及的反競爭問題（即競爭中立的問題），此等新發展亦屬本文探討之範圍。

關鍵詞：競爭法合作協定、經貿協定、競爭專章、國際執法合作、國際卡特爾、國際反托拉斯、國際結合管制、國營事業、競爭中立

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A Study on Antitrust Cooperation Agreements and the Competition Chapters in Trade Agreements － Also on Competitive Neutrality Issues of SOEs

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Abstract

Along with the trend of trade liberaliztion, the competition among enterprises has gone global. However, the competition rules seem to have no chance to reach international convergence in the near future. This article emphasizes that it's important for a nation to coordinate its own competition law with other countries. Thus, the issues of competiton law enforcement at unilateral level, bilateral level, plurilateral level, regional level, and mutilateral level are also well discussed in this article. Due to the increasing number of anti-competition cases, the need for enforcement cooperation has risen. As a result, this article spends many efforts on recognizing the restraints and obstacles when cooperating with other competition authorities, trying to find the solutions to the problems of cooperation. Despite the fact that WTO failed to deal with international competition issues, there are many ambitious FTAs and reginal trade agreements trying to make common competition rules, which induce new elements into the field of international competition laws and policies. For exaples, TPP and many FTAs are in the negotiation of competitive neutrality requirement in the draft agreements. Such new development will not be excluded when speaking of international competition laws and policies.

Keywords: Antitrust Cooperation Agreement, FTA, Competition Chapter, International Enforcement Cooperation, International Cartel, International Antitrust, International Merger Control, SOEs, Competitive Neutrality

目錄

第一章、緒論

第一節、研究背景

經貿自由化與國際競爭兩者間相輔相成，若說當今是一個經貿自由化的時代，實則亦是國際競爭的時代；若說事業間無不揮舞著國際競爭之旗幟搶攻各國市場，實則亦是站在經貿自由化的基石跨足國際市場。如今各國的關稅貿易壁壘多已隨經貿協定的簽訂而瓦解，特別是世界貿易組織（World Trade Organization, WTO）成立迄今已涵蓋全球大部份貿易[1]，事業有更多機會生產商品出口至各國。因此在洽簽經貿協定的過程中，許多國內廠商擔憂引入的不僅是商品與服務，而是競爭。既然國際間多已開放市場、引入競爭，便需要一套國際化的競爭法制，提供參與國際競爭的事業健全的市場規則，否則跨國事業在 A 國合法的競爭手段到了 B 國卻違法，其營運策略將支離破碎；同時，這也是為了要避免各國積極地將政府之手伸入市場，或消極地放任國營事業及私部門的限制競爭行為、不公平競爭行為，導致經貿利益被侵蝕[2]。

競爭法始於西方資本主義國家為保護市場功能而制定，就我國等亞洲國家而言，多處於法律繼受者的地位，我國借鏡美、德、法、日、韓等國之法令制度，於 1991 年草創公平交易法（下稱公平法），並設主管機關公平交易委員會（下

[1] 至 2014 年 6 月 26 日 WTO 已有 160 個會員。加入 WTO 的資格，不僅國家，亦包括獨立關稅領域（separate customs territory）。馬爾喀什設立世界貿易組織協定第 12.1 條規定：「任一國家或就對外商務關係及本協定與各項多邊貿易協定所規定之其他事務擁有充分自主權之個別關稅領域，得依其與 WTO 同意之條件，加入本協定。其加入應適用本協定與附屬之多邊貿易協定。」

[2] 以 WTO 為例，各國辛苦談判得出的關稅減讓成果，必須配合各種經貿規則以免遭受減損，譬如關稅暨貿易總協定（General Agreement on Tariffs and Trade, GATT）第 3 條規定避免會員國巧立名目，利用內地稅或限制銷售、配送等等的內地措施來阻礙貿易；技術性貿易障礙協定（Agreements on Technical Barriers Trade, TBT）和食品安全檢驗與動植物防疫檢疫措施協定（Agreements on the Application of Sanitary and Phytosanitary Measures, SPS）確保會員國採用的技術性法規與檢驗、防檢疫措施不造成貿易障礙；打破邊境上的障礙後，進一步納入與貿易有關之智慧財產權協定（The Agreement on Trade-Related Aspects of Intellectual Property Rights, TRIPS）要求各會員國訂立保護智慧財產權的法規，否則智慧財產權人的心血結晶一樣難以在國際市場獲利。而競爭規範也是使得經貿談判成果不會受到反競爭行為減損的重要元素。

稱公平會）[3]。我國之競爭法制雖已建立，但仍有需改善之處。此外，企業競爭文化亦應提升，蓋經貿自由化之後，反托拉斯不再只是西方資本主義的烏托邦，我國事業屢屢在國際市場陷入反托拉斯爭端，應思警惕[4]。

承前述，跨國的反競爭行為漸趨頻繁，故公平會積極參與國際組織共商競爭政策與法制議題，並且加強與他國的雙邊交流與執法合作（正式簽訂之競爭相關協定與參與之國際組織整理如表 1）。鑑於我國國際地位特殊，在 WTO 以外的多邊場域、各種政府間組織、區域或複邊經貿協定中，我國能夠加入成為正式會員的領域不多，故公平會於國際場域和各國主管機關共商競爭議題，實屬難得。例如公平會師法經濟合作暨發展組織(Organisation for Economic Co-operation and Development, OECD）已開發國家之法制經驗，更進一步改善公平法。

[3] 為更加強獨立機關之地位，2011 年 11 月 14 日頒布了公平交易委員會組織法，將「行政院公平交易委員會」，正名為「公平交易委員會」。此外，公平法甫於 2015 年 2 月 4 日修正，倘不服公平會之處分，不再經行政院訴願會，逕進入司法程序，此亦為我國二級獨立機關之行政處分不受制於行政院訴願會的首例。

[4] 2006 年媒體報導歐美等國對我國數家 TFT-LCD 面板廠商展開反托拉斯調查（下稱面板案），並陸續廣泛報導事件後續發展，包括華映公司、奇美公司於美國認罪協商，韓國樂金等公司告密，我國業者遭受鉅額罰金，以及高階主管入監服刑等情。而我國事業遭到他國競爭法主管機關調查、開罰，LCD 面板業者並非第一人，先後尚有 DRAM 價格壟斷案、航空業者聯合收取貨運燃油附加費案、CRT 價格壟斷案、汽車零組件業者參與聯合行為等等。面板案當時，業者並不了解聯合行為在各國有極高額的罰款，甚至經理人可能背負刑責。並且，業者亦不懂得在發現聯合行為成員背叛時，須盡速向當地主管機關申請寬恕政策，以躋身減輕處罰的名額內。本文認為，我國面板業者參與國際卡特爾，而其法制觀念落後於目的市場適用之競爭法，不應寄望日、韓國業者信守所謂的商道，此即我國面板業者於國際競爭失利的主要敗筆。有事業抨擊公平法制度不完備，導致其輕忽競爭法之違法成本，進而參與國際卡特爾受重罰，惟此乃推諉之語，公平會若有可議之處，應是必須加強其競爭倡議功能，提升我國競爭文化水準。另，監察院甚至曾立案調查在面板案上，我國主管機關是否失能，調查結果認為外交部、經濟部等部會均無協助不力之情，而經濟部與公平會應加強宣導。參監察院 0990801073 號調查報告，http://www.cy.gov.tw/AP_HOME/Op_Upload/eDoc/%E8%AA%BF%E6%9F%A5%E5%A0%B1%E5%91%8A/100/100000342%E9%9D%A2%E6%9D%BF%E6%A1%88%E8%AA%BF%E6%9F%A5%E6%84%8F%E8%A6%8B-%E5%85%AC%E5%B8%83.pdf，最後瀏覽日期：2015/4/14。

表 1 我國簽訂競爭相關之協定暨參與之國際組織

年份	對象	內容
1995	亞太經濟合作會議（Asia-Pacific Economic Cooperation, APEC）	我國自 1991 年以 Chinese Taipei 名義參與 APEC。APEC 大約於 1995 年起開始共商競爭議題。
1996	澳洲	雙邊競爭法合作協定
1997	紐西蘭	雙邊競爭法合作協定
2002	OECD	成為一般觀察員（每 2 年 1 次同儕檢視）[5]
2002	國際競爭網絡（International Competition Network, ICN）[6]	成為正式會員
2002	澳洲、紐西蘭	三邊競爭法合作協議
2004	法國	雙邊競爭法合作協定[7]
2006	尼加拉瓜	台尼 FTA 訂有競爭專章
2007	蒙古	雙邊競爭法合作協定
2009	加拿大	雙邊競爭法合作協定
2010	匈牙利	雙邊競爭法合作協定
2013	新加坡	台星經濟夥伴協定（含競爭專章）
2013	紐西蘭	台紐經濟合作協定（含競爭專章）
2013	巴拿馬	雙邊競爭法合作協定[8]

資料來源：作者自行整理，參經濟部國際貿易局網站、公平交易委員會網站、外交部網站。

第二節、研究目的

全球化時代需要一套國際競爭規範，已如前述。然而目前國際間仍欠缺多邊的競爭規範，OECD 與 ICN 等國際組織所提出之規範均屬軟法（soft law）性質，故現時多以雙邊、複邊或區域之架構來處理跨國的反競爭問題。或有簽訂競爭法

[5] OECD 自 2013 年起改稱觀察員為參與方（participant），資格已延長。

[6] 國際競爭網絡係在 2001 年 10 月 25 日，由競爭法制發展相對完整的 14 個國家競爭法主管機關發起創立，該 14 個主管機關來自：澳洲、加拿大、歐盟、法國、德國、以色列、義大利、日本、韓國、墨西哥、南非、英國、美國、尚比亞，如今國際競爭網絡的會員橫跨各個大陸，包括北美洲、中南美洲、歐洲、亞洲、非洲、大洋洲，從 ICN 網站上計算共有 128 國主管機關會員。

[7] 2014 年 12 月 18 日，我國與法國簽訂臺法競爭法適用諒解備忘錄，取代 2004 年雙方簽署之合作協定。

[8] 2003 年台灣與巴拿馬簽訂自由貿易協定（Free Trade Agreement, FTA），該 FTA 含競爭專章，台灣與巴拿馬的雙邊競爭法合作協定便是立於該 FTA 之基礎上簽訂。

適用之協定，透過政府部門之間的協定，允諾制訂並維持競爭法規，並且在執法上相互合作；亦有在經貿協定中，處理貿易與投資所可能遭遇的反競爭問題。本文試圖探討國與國間的競爭法合作協定，以及在經貿協定中出現的競爭規範，從中檢討國際之競爭法執法問題，希望本研究有助經貿與競爭相關主管機關掌握競爭法執法合作之趨勢，以及經貿協定中的競爭規範對國內產業、市場秩序潛在的影響。

第三節、研究架構

本文第二章針對國際反競爭行為，探討執法上面臨的挑戰。首先整理常見的反競爭行為（結合、卡特爾、濫用市場力的單方行為），為後續探討建立基礎，其次指出執法上有哪些不足之處，特別是在管制國際反競爭行為的困難之處，以及所面臨的困難是否能由各國競爭法主管機關單邊地解決。

第三章旨在討論在經貿協定中的競爭法規範，透過內容介紹與規範之比較，分析國際間競爭規範之執法合作趨勢，並點出其中新興競爭法、競爭政策問題。本章架構上分雙邊經貿協定、複邊經貿協定進行探討。在雙邊的部分，兼含雙邊 FTAs 中的競爭規範以及競爭法主管機關之間簽署之執法合作協定，透過提出共同的規範內容，比較各國雙邊規範有何差異[9]。至於在複邊的部分，討論範圍包括區域型 FTAs 中的競爭規範、區域經濟整合的競爭規範，以及政府間組織有關競爭之軟法規範。

在國際執法合作議題，本文先整理介紹當今國際間競爭法執法合作的背景。而基於反競爭行為本身之特殊性與主管機關之管制模式，跨國結合審查與查處國

[9] 在雙邊競爭規範的素材，本文選擇美國所有雙邊競爭法合作協定、美國所有 FTAs 含有競爭專章者、我國所有雙邊競爭法合作協定、我國所有 FTAs 含有競爭專章者。鎖定美國的理由在於，美國是國際間最早簽訂競爭法適用與執法協定的國家，除了持續推動雙邊執法合作，也在國際組織提倡簽訂競爭法執法合作。

際卡特爾乃當今在國際執法合作上最頻繁發生的類型，也是最需要合作處理的領域。本文將針對跨國結合申報、審查程序及國際卡特爾的查處，提供加強合作之建議。

常見的三種國際反競爭行為類型當中，卡特爾與結合需要各主管機關之間合力處理。然第三種行為類型，即濫用市場力之單方行為，其執法合作層面問題較小，國際間主要之關注在於如何使國營事業、指定獨占事業（designated monopolist）符合「競爭中立」。第五章分以下三部分討論，首先是競爭中立原則之意義，第二是競爭中立之重點內容，第三是提出符合競爭中立之建議作法。

最後，本文將歸納整理上述研究發現作一結論。

第二章、國際反競爭行為型態、管制困難與解決方法

基於後續討論之需要，本為首先介紹常見之國際反競爭行為。國際間之反競爭行為可細分成眾多類型，本文概分為三種類型討論如下，分別是結合（merger）、卡特爾（cartel）、濫用市場力的單方行為（unilateral conduct）。

第一節、國際反競爭行為的型態

（一）結合

事業之結合，乃直接削減市場上的競爭者數量，因而有導致獨占或限制市場競爭的可能，因此各國對事業結合皆有所管制，亦即事業必須事先通過審查才可以進行結合。對於事業的結合，亦有稱之為經營者集中，象徵資本集中之概念，故有關結合之競爭政策與實務運作相當程度反映國家對於市場結構（資本集中程度）的期望。

因水平的結合（horizontal merger）、垂直的結合（vertical merger）與多角化的結合（conglomerate merger）各自對市場結構造成不同的經濟影響，故在結合審查方式、審查密度不盡相同。一般而言，結合管制的法制必需建立以下幾點判斷原則：定義市場（market definition）、市場結構與集中度（market structure and concentration）、參與結合事業的單方效果（unilateral effects）、共同效果（coordinated effects）、市場進入與擴張（market entry and expansion）、結合後的效能（efficiency）、垂危事業（failing firm）等等[10]。

[10] 單方效果：指在結合後，參與結合事業得以不受市場競爭之拘束，提高商品價格或服務報酬的能力。共同效果：指在結合後，因市場參與者數目減少，便利參與結合事業與其他競爭者達成聯合協議、相互監督，或雖無聯合協議，但因寡占廠商之間相互依存，使市場實際不存在競爭之情形。垂危事業：參與結合事業除與其他事業結合外，是否即無法維持經營而必須退出市場，或

由於目前國際競爭頻繁，加以跨國事業的供應鏈遍及全球，因此在各國競爭法管轄內，常發生域外事業與本國事業結合的情形，也會發生巨型多國籍企業參與結合時，必須向眾多相關競爭法主管機關申報的情形。固然結合管制有其正面意義，可以從結構面來確保市場競爭，但是越來越多國家設立結合管制規範，並藉由效果主義等法則對外適用[11]，使得跨國事業在進行併購與投資等經營決策時面臨更多不確定性。

就我國實務來看，最常處理的跨國競爭法案件即跨國的結合審查。公平會並訂有「公平交易委員會對於域外結合案件之處理原則」以處理參與結合之事業均為域外事業，以及參與結合事業有一方為我國事業的結合案件。茲整理公平會曾進行實質審查的域外結合案件如下表 2。

與其他較不具限制競爭疑慮之事業結合。

[11] 關於域外適用之法則容待後述。

表 2 公平會 91 年迄今進行實質審查之域外結合案件

委員會議	申報內容
103年第01194次	有關日商伊藤忠商事株式會社(ITOCHU Corporation，以下稱ITOCHU)與日商全家便利商店株式會社(Family Mart Co., Ltd., JFM)申報結合案。ITOCHU擬取得JFM之股份達其總股數之37%，雖二事業均為外國事業，但JFM為我國第二大便利商店全家便利商店之控制公司，故依法進行申報。
103年第01163次	Microsoft Corporation 擬受讓Nokia Corporation 之裝置及服務事業部門，依公平法第6條第1項第3款暨同法第11條第1項第2款、第3款規定，申報事業結合案。
102年第01113次	荷蘭商ASML Holding N.V.擬透過其100%間接持股孫公司ASML US Inc.所設立之100%持股子公司Kona Acquisition Company，Inc.與美商Cymer Inc進行合併。
101年第01089次	有關瑞士商Nestle S.A.擬收購美商Pfizer Inc.旗下供應嬰兒、幼兒和產婦營養產品之全球嬰幼兒營養事業。
101年第01071次	日商Tokyo Electron Limited 在域外透過其百分之百持股孫公司與美商NEXX Systems Inc.合併。
100年第01059次	Google Inc.及Motorola Mobility Holdings Inc.於域外進行結合，依公平法第11條規定申報事業結合案。
100年第01041次	美商Microsoft Corporation透過子公司Microsoft International Holding B.V. 收購Skype百分之百股份。
100年第01029次	美商Cargill, Incorporated於澳洲所設立之子公司Cargill Australia Limited擬取得Teys Bros (Holdings)Pty Limited50%股份、原CAL公司於澳洲處理之牛肉業務及股份將轉由合資公司於澳洲新設之子公司Teys Australia Southern Property Pty Ltd承接、合資公司董事長與CEO將由澳商Teys Investments Pty Limite指派。
100年第01022次	有關日商Kabushiki Kaisha Advantest與新加坡商Verigy Ltd.申報事業結合案。
99年第00972次	有關德商 Fresenius Medical Care AG & Co., KGaA 擬透過子公司德商 Fresenius Medical Care Beteiligungsgesellschaft mbH 取得 Asia Renal Care Ltd. (Cayman Islands) 百分之百股權案。
99年第00957次	美商 Microsoft Corporation及美商 Yahoo ! Inc.域外結合申報案。
98年第00930次	關於美商甲骨文股份有限公司擬與昇陽電腦股份有限公司域外結合案。
98年第00921次	有關日商松下電器產業株式會社擬與日商三洋電機株式會社結合案。
97年第00847次	關於Mitsukoshi Ltd.與Isetan Company Limited擬設立Isetan Mitsukoshi Holdings Ltd.之域外結合案。
96年第00812次	有關香港商國泰航空股份有限公司申報與香港商港龍航空股份有限公司結合案。
96年第00803次	有關Japan Tobacco Inc.、JTI(UK) MANAGEMENT Ltd擬與Gallaher Group Plc結合案。
95年第00777次	有關美商Advanced Micro Devices Inc.擬與加拿大商ATI Technologies Inc.域外結合案。
94年第00734次	關於Deutsche Post AG擬取得Exel plc全部股份，依據公平法第11條規定申報事業結合案。
94年第00732次	關於美商寶鹼公司與美商吉列公司進行域外結合，將使寶僑家品公司持有美商金吉列公司全部股權，向公平會提出結合申報案。
94年第00706次	Reuters Group plc擬與Moneyline Telerate Holdings, Inc.域外結合，依據公平法規定向公平會提出申報案。
94年第00700次	Oracle Corporation擬與PeopleSoft, Inc.域外結合案。
93年第00686次	日商Toppan Printing Co., Ltd.擬於域外取得美商DuPont Photomasks, Inc. 100%股權，向公平會申報結合。
93年第00680次	關於荷商 VNU N.V.與英商 WPP Group plc 擬分別與新設合資事業於我國域外結合，向公平會申報。
93年第00676次	有關日商精工愛普生公司擬於域外與日商三洋電機公司結合，向公平會申報事業結合案。
93年第00647次	英商PPM Ventures Limited、澤西島商Triton Managers Ltd.受讓法瑪西亞股份有限公司主要部分之營業，向公平會申報結合案。
93年第00642次	關於日商松下電器股份有限公司擬於域外取得日商松下電工股份有限公司51%股份，向公平會申報事業結合案。
93年第00638次	關於日商Japan Storage Battery Co., Ltd.擬於域外與日商Yuasa Corporation結合，向公平會申報事業結合案。
92年第00612次	有關美商Air Products and Chemicals, Inc.與美商Ashland Inc.向公平會提出域外結合申報案。
92年第00611次	美商United Technologies Corporation申報擬與英商Chubb plc（含其在台子公司）結合案。
92年第00608次	有關Deutsche Post AG擬取得Airborne, Inc.百分之百股份，依據公平法第11條規定申報事業結合案。
92年第00595次	有關美商永備控股公司與美商輝瑞公司、派德股份有限公司申報結合案。
91年第00576次	關於日商日立製作所株式會社與美商國際商業機器股份有限公司之子公司荷蘭商 Mariana硬碟控股公司域外結合案。

資料來源：自行整理自公平會公布之委員會議紀錄。

註：1.表格中所使用的公平法條號均為委員會議作成決定時的條號，非 2015 年修正後的現行法。

2.經公平會認定無須申報者，不列入上表中。3.統計自 2002 年（改為申報異議制）起至 2015/3/26。

由上表發現，進行域外結合申報的事業常有二者均非我國事業的情形，如第1列有關ITOCHU欲取得JFM股份一案，ITOCHU與JFM皆非本國事業，而公平會依經濟實體原則（參後述歐盟法域外適用部分），將JFM與我國市占率第二名的全家便利商店認定是為經濟上一體，因而符合我國公平法結合申報之門檻。此在在顯示，事業如具備跨國經營之規模及一定程度市場占有率，縱然是在同一國家內進行併購，亦必須對於其所參加的各國市場競爭法，進行是否應為結合申報之檢視；另外，就連同集團內子公司的整併，也可能要向域外主管機關進行申報。譬如表中日商松下電器股份有限公司擬於域外取得日商松下電工股份有限公司 51%股份，也向我國公平會申報結合。實際上，必須通知十餘個國家的競爭法主管機關的併購案，亦有所聞。此番評估所費不貲，各國應試圖調和結合申報之門檻規定與程序，以避免不必要的成本浪費與市場參進障礙，及提升事業經營效率[12]。

（二）卡特爾

接著，本文探討國際間常見的另種反競爭行為－卡特爾。簡單來說，卡特爾就是事業間約定互不競爭的限制競爭行為[13]。本文以為國際卡特爾有兩種情形，其一是國內廠商聯合排除來自國外之競爭，其二是國內與國外廠商為了鞏固固有利益結構，而協議不彼此競爭。亦可從其他角度來理解何謂國際卡特爾，若以行為主體來說，國際卡特爾所指涉者，係參與共謀與實施的主體來自不同國家的情形；若以效果發生地來說，則指實施卡特爾限制競爭內容的領域觸及多個國家的情形。值得一提的是，由於卡特爾成員間有背離之誘因[14]，若要鞏固卡特爾結構，必須花費相當高的監督成本，所以隨著經貿自由化及區域經濟整合帶來許多競爭

[12] 楊光華，「競爭法與競爭政策的國際合作」，公平交易季刊，第10卷第3期，168（2002）。

[13] 以我國公平法為例，卡特爾即聯合行為，其成立有四要件，首先是事業間為同一產銷階段的競爭者；其二是事業間存在限制競爭的「合意」，由於合意不限形式，故秘密共謀便是難以查獲不法之癥結；其三是合意的內容旨在排除競爭；其四是該聯合行為足以影響市場功能。

[14] 舉例而言，倘若參與價格卡特爾之成員背離協議，訂定比原卡特爾協議略低的價格，便很可能爭取到全部交易相對人。而另一誘因則是各國紛紛訂定寬恕政策。

者與潛在競爭者，雖然卡特爾等反競爭行為將開始延伸到各國市場，然而鞏固卡特爾結構的困難度也隨之提升。

因為卡特爾合意之秘密性，卡特爾在競爭法之執法上，當屬最困難的類型，因此在國際卡特爾的查處上，務求國與國主管機關間通力合作。原因在於，隨著事業對於競爭法制的瞭解程度提高，便愈來愈懂得掩蓋從事聯合行為的合意，然而合意為成立卡特爾的構成要件，必須掌握合意存在之證據始能打擊違法的卡特爾，這也是先進國家在競爭法執法上多有搜索扣押權及進行拂曉突擊（dawn raids）的原因。鑒於卡特爾合意的秘密性質，有效打擊之方式便是透過各國主管機關之資訊交換。有多種理由解釋競爭法主管機關在卡特爾案件調查進行合作，對於打擊卡特爾甚有助益。例如，某一競爭法主管機關可能不會察覺到有卡特爾犯行正在其管轄權內肆虐，但是卻由另一個競爭法主管機關發現。

若是跨國卡特爾案件，競爭法主管機關在將自己的管轄領域內發現的證據轉移給另一個競爭法主管機關時，為了避免證據滅失，相關的合作有其必要。並且，競爭法主管機關可能也需要取得自己管轄領域外的卡特爾事證。而不同競爭法主管機關之間負責同一卡特爾案件的調查人員，倘能夠更進一步地討論和比對應注意事項，有助於案件順利進行，並且更能反駁當事人的主張。亦可以交換在計算處罰金額時相關的營收資訊。以上舉例屬於執法上的合作（enforcement cooperation），在進行執法合作時，與結合管制一樣會遇到機密資訊的問題。為此，OECD 競爭委員會於 2005 年訂定「競爭法主管機關間在核心卡特爾調查行動中正式交換資訊之最佳典範」（簡稱最佳典範）[15]，顯示資訊交換議題在國際

[15] 最佳典範第 6.I.A.段規定，此典範適用於下列情形：(i)依據請求國競爭法對核心卡特爾調查的目的，某一國競爭法主管機關將其從非公開管道獲得的資訊提供給另一國競爭法主管機關；(ii)依據內國法律，競爭法主管機關通常被禁止將此類資訊揭露給其他競爭法主管機關；且(iii)此類資訊的揭露只能依據國際協定或內國法律在特別許可的狀況下進行。授權進行此類揭露的國際協定與內國法律，以及適用於此類揭露的競爭法主管機關政策與慣例，均應訂有本最佳典範認同的保護機制。See OECD (2005), "Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations," http://www.oecd.org/competition/cartels/35590548.pdf, last visited on date: 2015/4/14.

核心卡特爾執法過程中非常重要。後來，OECD 參考 2005 年最佳典範，制訂 2014 年「競爭調查與程序之國際合作建議書」，其第 VIII 條第 2 項建議，當要求其他國家幫忙辦案時，應考量對方主管機關的權力、權限以及保護機密資訊之法律（The request for assistance should take into consideration the powers, authority and applicable confidentiality rules of the competition authority of the assisting Adherent.）

卡特爾的另一個特色在於許多國家以刑罰作為管制手段，因此在競爭法可對個人施以刑罰的領域之間，引渡程序等司法協助（judicial assistance）亦屬需要合作的範疇[16]。

（三）其他單方行為

接著，本文介紹第三種類型之國際反競爭行為－單方行為（unilateral conduct）。基本上，事業擁有一定的市場力量（不論是相對市場力或絕對市場力），該狀態本身並不違法，蓋競爭法的宗旨在於確保效能競爭，事業具有相當規模，可以達到引領創新、規模經濟、高產能利用率等效果，但是事業若濫用市場力量，反而損及效能競爭時，則有競爭法介入的空間[17]。本文所指涉的單方行為，以我國公平法上的限制競爭行為理解，包含獨占力濫用、相對市場優勢地位濫用兩大類型。

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[16] ICN, "Co-operation between Competition Agencies in Cartel Investigations," *Report to the ICN Annual Conference*, 7-8 (2007).

[17] 單方行為對競爭的負面影響，略有以下類型：其一，因為事業訂價高於邊際成本，產量減少後導致的無謂損失（dead-weight loss）；其二，運用市場力使得消費者福利轉移到生產者福利，所產生公平性的問題；其三，因為缺乏競爭，事業對成本漸漸不再錙銖必較，導致生產成本的膨脹，有稱之 X 無效率（X－inefficiency）；其四，事業為維持市場力量而投入與生產無關的競租行為（Rent Seeking），例如對政府進行遊說、關說等，造成資源浪費。See ICN, *Unilateral Conduct Workbook Chapter 1: The Objectives And Principles Of Unilateral Conduct Laws*, 3-4 (2012) http://www.internationalcompetitionnetwork.org/uploads/library/doc827.pdf, last visited on date: 2015/4/14.

大非即惡（Bigness is not badness.），具市場力之事業並非當然違法，應視各國的競爭法如何決定須受管制的市場地位，以及其是否濫用市場地位、損及競爭。跨國事業不必然較本國事業容易違反單方行為的相關規定，但是鑑於跨國經營者，往往規模相當龐大，事業年度總銷售金額，很容易超過主管機關訂定的管制門檻[18]，是以在國際反競爭的探討上，單方行為亦是重要的一環。本文歸納單方行為的管制重點，分段討論如下。

管制重點之一，乃促進競爭行為（pro-competitive conduct）與排他行為（exclusionary conduct）之區辨。促進競爭行為與排他行為都是對競爭者採取的不合作行為，因此容有模糊地帶。最常見例子就是低價銷售，低價銷售可以促進競爭，但同時也造成掠奪性訂價的問題，在國際間則產生傾銷的問題。又因為不存在可以完整地辨識出排他行為的方法，因此必須先從獨占地位、優勢地位之認定先開始，接著再進一步判斷有無濫用獨占地位、優勢地位進行排他行為。判斷濫用的方式有形式主義（formalism），由主管機關直接明文規範排他行為的類型；另有效果法（effect-based approach），就特定行為對市場造成的影響進行評估；還有綜合法（hybrid approach），明文規定幾種排他行為類型，同時也讓主管機關保有個案判斷的空間[19]。

管制重點之二，乃執法錯誤的風險。執法錯誤的風險在於立法方式選擇當然違法或當然合法的類型，如果選擇當然違法的立法，會有過度執法（over-enforcement）問題，相對地，選擇當然合法的立法，則會有執法不足（under-enforcement）的問題。為了避免這兩種情形，立法上可以採用推定違法

[18] 以我國公平法為例，事業前一會計年度的總銷售金額乃作為負面門檻，事業縱使有一定市占率，若未達新台幣 10 億元銷售金額，原則上排除於獨占管制，此為修正前公平法第 5-1 條第 2 項之規定。2015 年 2 月 4 日公平法修正過後，新法未明文規定為 10 億元，而是容許公平會是整體經濟狀況公告之，目前公平會發布公綜字第 10411601871 號命令，公告上一會計年度事業總銷售金額未達 20 億元者，不列入獨占事業認定範圍。

[19] *Supra* note 17, 11.

（可舉證推翻）的方式，或創造一些安全港（safe harbor）條款[20]。過度執法對整體經濟造成的成本在於，居領導地位的事業將趨於保守，不願意從事促進競爭行為，以免被認定是違法行為；對之，執法不足的成本便是居領導地位的事業可能排除市場上的競爭者及減低競爭壓力。

管制重點之三，乃豁免於競爭法之例外。雖然自由與公平的競爭是市場經濟體制的國家相當崇高甚至近乎憲法地位的原則，但是在一些部門，開放競爭並非最佳政策，通常這些部門有其重大公益考量，或屬於為公眾提供服務的部門，因此這些部門有其管制法，及設立相關目的事業主管機關。此外，智慧財產權領域也可以稱為一種例外。

部門管制亦須立於「回應市場失靈、避免濫用市場地位、確保效能競爭」的基礎之上，一般而言，部門管制常出現在基礎建設的市場（infrastructure markets），例如郵務、電信、能源、鐵路等。這些受管制的部門也隨著解除管制（de-regulation）的風潮，或多或少引入競爭。而應注意的是，部門管制法也屬於管制單邊行為的法制，照理說與競爭法追求相同的最終目的，然而實際上各國政府都有其所欲達成的不同政策目標，此時部門管制法便與競爭法的單邊行為法制產生衝突，譬如在涉及公益的供水、供電等產業，事業必需提供全國居民相同水準的服務，因此將涉及交叉補貼（cross subsidization）[21]，以經營低成本用戶的利潤來補貼高成本用戶（例如住在偏遠山區者），為此，管制者將幫助為高成本用戶提供服務的獨占事業排除潛在競爭者進入市場，特別是幫助鞏固該獨占者在低成本用戶市場的地位，如此作法，即基於所謂的「管制行為原則」（regulated conduct doctrine）[22]。管制行為原則使事業可以豁免於單邊行為的競爭法管制，惟其適用是否妥當，對於市場上私人進入各個逐漸解除管制的市場參與競爭的權

[20] *Supra* note 17, 14.
[21] *Supra* note 17, 18.
[22] *Supra* note 17, 18-19.

利而言，有重大影響，若該產業開放外人投資，甚至可能引發國際經貿法上的爭端。

綜上，各國通常設有豁免競爭法的部門，譬如公用事業或國營事業。對於此些公用事業和國營事業從國家取得的競爭優勢及濫用問題，乃單方行為在國際層次較被關注的部分。

第二節、各國管制國際反競爭行為的困難

在前一節中，本文探討三大類型的國際反競爭行為，包含其意義、管制重點等等，以下更進一步針對前述的三大類型反競爭行為歸納出兩點未來國際競爭法制發展尚待努力的議題，分別是強化國際執法合作機制以及建立競爭中立制度。

（一）跨國結合審查與國際卡特爾－執法合作機制的不足

跨國事業的結合審查往往造成資源的浪費，事業向各國競爭法主管機關重複地申報，各國競爭法主管機關也重複地進行審查，倘若相關資訊可以在競爭法主管機關之間流通，不僅可以避免行政成本的浪費，也讓事業毋庸應付為數眾多的競爭法主管機關。

除了主管機關之間交換資訊以外，理論上透過規範的調和，令各國採行同一套結合管制規範，不僅免除前述跨國事業與競爭法主管機關面臨的眾多麻煩，並且不會發生各國主管機關之間分別決定禁止結合與不禁止結合的矛盾。但是目前各國結合審查規範存在許多歧異之處，各國競爭政策不同，導致結合審查方式、密度不同，故難以期待各國採用同一套結合審查標準，目前較可能達成的是主管機關之間的執法合作。在結合審查上，資料調查與評估是相當重要的步驟，此部

分或可透過主管機關之間的資訊交換來免去重複調查、評估的成本，然而如何保持申報結合的事業的機密便是相當重要的課題。

本文以為，將來各國主管機關除了結合案件的調查程序與評估程序的資訊交換之外，另一項重要的合作項目便是共商「結合矯正措施」（merger remedies）[23]。結合矯正措施意義在於，主管機關藉由課予事業一定的負擔，以確保事業結合後不會濫用市場力量。如此比起禁止結合或單純不禁止結合要彈性許多，也使得主管機關之間有空間共同決定各自希望參與結合事業遵守的條件。雖然目前已有主管機關共商結合矯正措施之實例，但目前還是欠缺明確制度，有待各國競爭法實務運作發展，期待將來可以發展出從調查、審查到結合矯正措施，各部分都完善的合作機制。

國際執法合作機制的需求，同樣反映在國際卡特爾的案件中，譬如透過競爭法主管機關的相互通知，有助發現不法；且透過資訊的交換，可以幫助建立查處涉案事業的相關證據；在順利對事業進行追訴之後，亦有相關的司法協助問題。由於在競爭法的國際執法合作領域，最早開始發展的便是國際卡特爾行為[24]，因

[23] 結合乃事業常用以改變市場結構的商業策略，因此，競爭主管機關若能於結合完成前，有效防免或引導其不致走向不利競爭之途，將可降低後續市場出現聯合或獨占力濫用行為的機率，有效節省執法成本。其中，要求結合事業在符合一定市場或事業規模要件時，須向競爭主管機關申報，並經其表示同意或不異議後，始能完成結合之「結合事前申報」（Pre-Merger Notification）制度，乃各國最常採行之規範機制。至於在審查結果部分，有鑑於近來各國結合案件性質日趨複雜，精確評估結合競爭效果的困難度增加，故除了「許可/不異議」或「禁止」的審理結果外，主管機關以結構或行為面「矯正措施」，作為其不禁止結合的條件或負擔的作法，於各國結合實務也愈來愈常見。詳參陳志民、陳和全，「結合矯正措施制度之一項功能性導向的理解架構」，公平交易季刊，第 22 卷第 1 期，3（2012）。

[24] WTO 在 2001 年的第四屆的杜哈部長會議，便通過了有關處理國際反競爭行為的決議內容，決議文第 25 段稱：「在第五屆部長會議召開前的這段期間，貿易與競爭政策互動工作小組的進一步工作，將著重在澄清：核心原則（包括透明化、不歧視與程序的公平性、及核心卡特爾的規定）；自願性合作的形式；以及透過能力建置，支持開發中國家競爭機制的逐漸強化。就此，開發中國家與低度開發國家參與者的需求及處理此等問題的適當彈性，均應被納入考量。」由於 WTO 是最具代表性的多邊經貿組織，此份決議文將核心卡特爾列為重要的工作目標，彰顯打擊核心卡特爾已成為國際共識。See WTO, “Doha WTO Ministerial 2001: Ministerial Declaration,” ¶25, WT/MIN(01)/DEC/1 (Nov. 14, 2001), https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm, last visited on date: 2015/4/14.

此卡特爾已是合作機制發展相對成熟的反競爭行為類型，惟合作的廣度與深度仍大有進展的空間。

（二）單方行為方面－公私部門的競爭不中立

在前一節中，本文已介紹有關單方行為的管制重點，其中應否管制、如何管制的問題，繫諸各國政府的價值抉擇，並沒有絕對是非的區別。然而本文認為，各國競爭法制於單方行為的議題上，必須再更進一步處理當獨占地位或相對優勢的市場地位是來自政府授予時，國營事業（state-owned enterprises, SOEs）或其他從政府受有利益的企業，應如何和其他私人事業公平競爭的問題。

國營事業與指定獨占的事業（designated monopolist）會造成何種國際反競爭問題，扭曲應有競爭秩序？大致上來說有以下幾種情形：受到政府補貼支持；從政府獲得條件優渥的貸款；在管制上受有較優惠的待遇；不適用一般私部門的公司治理制度。並且國營事業容易發生經濟上不理性的行為，例如傾銷（dumping）、過度的資本投資（excessive capital investment），或其他反競爭商業行為。此等國營事業及指定獨占事業所可能造成的反競爭疑慮，必須透過建立競爭中立的規範解決，但一般來說產業發展的政策才是管制者的重點所在，所以如何在競爭、經貿與產業主管機關之間達成追求競爭中立的共識，應係最優先思考的問題。

第三節、國際反競爭行為的單邊解決途徑及其限制

本節主要探討者，乃面對國際間反競爭行為時，各國競爭法主管機關是否能夠單邊解決？其單邊決定管轄之依據何在？又競爭法主管機關的單邊執法是否能有效打擊反競爭行為？有關對於國際反競爭行為單邊適用競爭法（即所謂「域外適用」）之意義與內容，各國競爭法制有不同之處，本文介紹美國、歐盟及我

國競爭法於域外適用之變革為如下之探討[25]。

（一）美國─以效果主義為主

美國競爭法制主要有三法，一是休曼法（Sherman Act）[26]，二是克萊登法（Clayton Act）[27]，三是聯邦貿易委員會法（Federal Trade Commission Act）[28]。美國是最早提出並多次主動實施反托拉斯法域外管轄權的國家，前開實體規範均將適用範圍涵蓋外國商業行為，譬如休曼法第 1 條便明文規定，任何限制州際間或與「外國」間貿易或商業的契約、以托拉斯形式或其它形式的聯合或共謀，皆屬違法[29]，同法第 7 條對於行為主體的定義也包含任何外國法律下的企業或同業公會[30]。惟前開規範並未具體指出如何為域外管轄，主要是仰賴法院在司法審判過程建立之論理，故美國有關域外管轄法規的規定，實為長期司法實踐的結果。

美國法院本來恪守屬地主義，認為必須行為的一部分在美國境內，才可以建立管轄權，不過經過後來幾則法院的判決打破屬地主義框架，改採以效果主義（effect doctrine）為主，國際禮讓原則為輔的立場[31]。在 *U.S. v. Aluminum Co. of America* 一案，法院認為縱使行為全然在美國境外，但只要有影響美國對外貿易的「意圖」（intent），就有影響造成限制競爭的效果（effect）[32]。此案確立了美國以「效果主義」在反托拉斯法域外案件之適用，並以「意圖」及「效果」作為判斷依據。後來，為免效果主義過度擴張，復在美國聯邦第九巡迴上訴法院 *Timberlane Lumber Co v. Bank of America* 一案，對於競爭法域外適用提出三步驟衡平原則：第一，被控訴之限制競爭行為是否意圖影響美國貿易，或造成影響美

[25] 承註 4 中的面板案，2010 年我國面板廠商派出經理人赴美到案說明，即遭留置美國限制自由，此新聞不僅震驚企業界，國人也納悶為何他國國內立法可以處罰我國廠商，其實這是跨國競爭法案件「域外適用」內國法之具體展現。
[26] 15 U.S.C. §§1-7.
[27] 15 U.S.C. §§ 12-27; 29 U.S.C. §§ 52–53.
[28] 15 U.S.C §§ 41-58.
[29] 15 U.S.C. §1.
[30] 15 U.S.C. §7.
[31] 楊光華，同註 12，163-165。
[32] *U.S. v. Aluminum Co. of America*, 148 F.2d 416, 65 U.S.P.Q. 6 (C.C.A. 2d Cir. 1945).

國貿易之效果；第二，是否對美國貿易造成可辨識的損害；第三，考量國際禮讓原則，域外管轄是否應退讓[33]。

其後，美國國會於 1982 年通過「對外貿易反托拉斯改進法」（Foreign Trade Antitrust Improvement Act, FTAIA）[34]，以釐清美國之反托拉斯管轄。該法明文休曼法適用於下列域外行為：（1）對於美國商業或貿易具有「直接、重大且可合理預期的影響」；（2）此效果依據美國反托拉斯法產生請求權基礎。FTAIA 並將美國反托拉斯法的域外管轄權分為兩類，一是對影響美國國內貿易和商業的境外行為行使管轄權；二是對影響美國產品在外國市場競爭力的境外行為行使管轄權。惟進入 90 年代後，美國法院對於反托拉斯域外管轄權重申效果主義。在 *Hartford Fire Insurance Co v. California* 案，美國聯邦最高法院指出，只要域外行為對於美國商業有直接、合理、可預見的影響，美國法院即有管轄權，除非證明美國法禁止之行為係依據他國法律為之，兩國法律才存在真正的衝突，此時才需要考量禮讓[35]。

（二）歐盟─以實施理論為主

歐盟競爭法起源於 1957 年歐洲六國簽署羅馬條約，成立歐洲經濟共同體 (European Economic Community) [36]，為了維持歐體共同市場內之公平與自由競爭，羅馬條約第 85 條及第 86 條分別針對限制競爭協議、濫用市場地位加以規範。其內容轉化為後來阿姆斯特丹條約的第 81 條與 82 條[37]，又 2009 年里斯本條約生效後，前開條約內容隨之修正，有關競爭規範相關依據改為「歐盟運作條約」（the Treaty on the Functioning of the EU, TFEU）第 101 條及第 102 條[38]，然其條

[33] William C. Holmes and Melissa H. Mangiaracina, *Antitrust Law Handbook*, 2010-2011 ed., 846 (2012).
[34] Codified at 15 U.S.C.A. §6a (Sherman Act) and 15 U.S.C.A. §45(a) (3) (FTC Act).
[35] 509 U.S. 764 (1993).
[36] Treaty Establishing the European Economic Community.
[37] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts.
[38] Treaty on the Functioning of European Union, 2008 OJC 115/47 (09/05/2008).

文內容並無實質重大改變。

承上，歐盟執行競爭法主要法源依據為 TFEU 第 101 條及 TFEU 第 102 條，前者在禁止事業所有可能影響會員國貿易或其目的效果在排除限制或扭曲共同市場競爭之協議或共同行為；後者則是禁止單一或多數在共同市場內享有支配地位事業之濫用行為。由於上開二條文均未明確表示其是否擴張適用於域外行為，歐盟主要是透過執委會[39]決定及法院判決逐步建立其競爭法域外適用原則，其適用原則主要有經濟實體原則、實施理論。

1. 經濟實體原則

1972 年 Dyestuffs 案為歐洲法院採用經濟實體原則（economic entity doctrine）之代表案例[40]，也是歐洲法院就競爭法是否得域外適用進行審理的首宗案件。本案背景為染料製造商涉嫌依據同一標準共同提高商品價格，違反當時羅馬條約第 85 條規定，然因其中有部分公司非屬歐洲共同市場，被處分事業主張執委會應無管轄權。

歐洲法院認為，英國母公司 Imperial Chemical Industries Ltd.（ICI）指示歐洲共同市場境內位於比利時的子公司，與其他八家染料公司進行違法聯合行為，縱使子公司具有獨立法人格，然因其營運決策並未獨立於母公司，仍不得排除向外國母公司追究責任之可能性，其論理乃關係企業的「揭開公司面紗」原則，因為比利時子公司與母公司 ICI 密不可分，可視為同一經濟個體（economic unit），故 ICI 透過子公司遂行之反競爭行為，執委會對 ICI 予以處分，不生無管轄權的問題[41]。

[39] 歐盟主要是由執委會（European Commission）為歐盟理事會及歐洲議會決策之執行單位，其下分設有各總署依法從事其所掌管業務，有關競爭事務係競爭總署之職掌。

[40] Imperial Chemical Industries Ltd. v. Commission of the European Communities ("Dyestuffs"), 1972 E.C.R 619.

[41] 陳榮傳，「涉外反競爭行為的管轄權與準據法」，公平交易季刊，第 22 卷第 2 期，115-116（2014）。

經濟實體原則事實上可視為國籍主義（nationality principle）的延伸，換言之，即將外國母公司與歐洲境內子公司間當作一體加以處理，而使歐盟競爭法得以擴張適用於外國事業，然其並無法使歐盟管轄權及於完全位於歐盟境外之事業，經濟體原則對於執委會在競爭法域外適用上仍有所侷限。

2. 實施理論

歐洲法院在 1988 年的 Wood Pulp 案改採實施理論[42]，該案背景為美國與北歐若干木漿廠聯合哄抬價格，涉及違反當時羅馬條約第 85 條，該條禁止具有限制共同市場競爭效果之協議，而其構成要件有二，一為協議之形成，另一要件則為協議之履行，法院認為倘僅以協議作成地點為適用法律之要件，將使事業得以輕易規避法令限制；法院並認為渠等是否透過在共同市場之子公司、代理商或分公司等與買受人簽訂合約，並不重要，重點在於系爭行為（價格協議）是在共同市場內被履行，故系爭行為屬於共同市場內的行為，執委會得依相關競爭法規定查處本案。

（三）歐美法制小結

美國競爭法域外適用之沿革，從屬地主義跳脫，改採效果主義，接著更考慮國際禮讓的原則，使美國不至於成為競爭法的國際警察，然國際禮讓並非通案適用，較明顯可以看出國際禮讓之處在於行政部門之執法，蓋主管機關通常會考慮外交關係在內的整體利益。

相對於美國所採效果主義，歐盟所採者為「實施理論」。對於在歐盟會員國領域外形成決定、約定或協議，亦有適用空間，重點在於是否於歐盟境內，依該決定、約定或協議而實施行為，透過實務發展，歐盟競爭法域外適用的立場也逐

[42] Judgment of the Court of 27September 1988, Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *A. Åhlström Osakeyhtiö and others v Commission of the European Communities.*

漸確立。雖然名稱不同，也同樣達到適用內國法之效果[43]。本文以為歐美法制從事域外管轄的執法態度，可以給競爭法制後進國家作為參考。

（四）我國公平法域外適用之架構

一般來說，競爭法捍衛市場秩序的途徑有二，其一是「公的執行」，包含行政罰與刑罰，其二則透過「私的執行」（private enforcement）[44]，此二途徑之主動角色不同，法律適用的態度上也有所不同，故本文就公平法於此二途徑之域外適用情形，分別討論。

1. 公的執行：行政罰之域外適用

依據我國公平法第 36 條、第 40 條、第 42 條等，違反我國公平法實體規定者，公平會得命停止或改正違法行為並得處以罰鍰，未停止或改正者得連續處罰，而依第 39 條可對違反結合規範的事業組織進行結構管制，此類行政罰得否適用於域外行為，行政罰法第 6 條第 3 項有所規定。該條項規定：「違反行政法上義務之行為或結果，有一在中華民國領域內者，為在中華民國領域內違反行政法上義務。」據此，無論違反公平法上義務之「行為」或「結果」，皆屬於違反行政法上義務，從而我國行政罰法得以適用，進而公平會對於該違反公平法的域內行為，以及有域內效果的域外行為，均可行使管轄權。

對於事業於域外所從事之限制競爭行為，公平會基本上係持效果主義之執法立場，亦即無論其行為發生於何地，倘其結果對我國市場競爭秩序造成「直接、

[43] 陳榮傳，同註 41，154。

[44] 私的執行，即由違反競爭法之被害人向法院提起民事救濟，其內涵有損害賠償請求權與防衛請求權（不作為請求與除去侵害請求），在我國規定於公平法第 5 章。競爭法制之所以兼含私的執行，乃因部分限制競爭行為與不公平競爭行為成立與否之判準較不複雜，不需仰賴搜索、扣押、調查，亦不需主管機關長年累積之產業資料進行經濟分析，而可以僅透過法院認定事實、適用法律來解決紛爭。透過大量的私人執行，也可以達到維持市場秩序之效果，競爭法上的懲罰性損害賠償制度便蘊含鼓勵私的執行之意涵。參考吳秀明，「公平交易法民事責任基本問題概說」，競爭法研究，1 版，元照出版公司，310-362（2010）。

實質且可合理預期之影響」者，應有我國公平法相關規定之適用，惟適用時仍宜注意國際禮讓原則[45]。

又特別針對域外之事業結合行為，公平會訂有「公平交易委員會對於域外結合案件之處理原則」（本文簡稱域外結合處理原則）[46]。域外結合處理原則第 3 點為公平會決定是否管轄域外結合之考量因素，其包括：「（一）結合行為對本國與外國相關市場影響之相對重要性。（二）結合事業之國籍、所在地及主要營業地。（三）意圖影響我國市場競爭之明確性程度及其預見可能性。（四）與結合事業所屬國法律或政策造成衝突之可能性程度。（五）行政處分強制執行之可能性。（六）對外國事業強制執行之影響。（七）國際條約、協定或國際組織之規範情形。（八）其他經公平會認為重要之因素。」並加以一項負面標準：「域外結合案件，如參與結合事業在我國領域內均無生產或提供服務之設備、經銷商、代理商或其他實質銷售管道者，不予管轄。」。由此可見，在域外結合案件上，公平會採納美國法的國際禮讓與利益衡平考量，限縮直接的效果主義（亦即採修正的效果主義）。

更早於前開行政罰法之施行，公平會即訂有「公平交易委員會對於涉外案件之處理原則」（2012 年有所修正，本文簡稱涉外案件處理原則）[47]。首先就涉外案件的認定，公平會認為含有任何涉外因素的案件均屬之，只要檢舉人、被檢舉人、受調查人、申請人、申報人或請釋人有一為外國事業就滿足。而根據涉外案件處理原則第 3 點，公平會初步係以檢舉書或申請書內容為準，嗣後仍得依職權變更。又涉外案件處理原則第 7 點也指出，外國事業所提出的檢舉，公平會將參

[45] 公平交易委員會，認識公平交易法，第 14 版，公平交易委員會自版，79-80（2012）。
[46] 公法字第 1011560331 號令，公平交易委員會對於域外結合案件之處理原則，參公平會網站，http://www.ftc.gov.tw/law/LawContentDetails.aspx?id=FL011906&KeyWordHL=&StyleType=1，最後瀏覽日期：2015/4/14。
[47] 公法字第 1011560330 號令，公平交易委員會對於涉外案件之處理原則，參公平會網站，http://www.ftc.gov.tw/internet/main/doc/docDetail.aspx?uid=175&docid=299，最後瀏覽日期：2015/4/16。

照公平法第 47 條規定辦理[48]。最後，涉外案件處理原則第 6 點則彰顯出前述公平會執法的效果主義立場，必須確認對我國競爭秩序之影響程度才可以決定是否管轄，其規定：「檢舉人應就被檢舉人在我國域內或域外之限制競爭或不公平競爭之行為或其結果對我國競爭秩序產生影響之程度，提出具體事實及證據，並須釋明被檢舉人有違反公平交易法之虞，公平會方予受理。」[49]

2. 公的執行：刑罰之域外適用

公平法對部分限制競爭行為之罰則有所謂先行政後司法原則，即在第一次行政罰過後，事業仍未停止或改正其行為或再犯者，有自由刑與罰金刑（見公平法第 34 條、第 36 條及第 40 條）。據此原則，必須公平會於行政罰有管轄權，刑罰始可以域外適用。又關於犯罪地之認定，我國刑法第 4 條有規定：「犯罪之行為或結果，有一在中華民國領域內者，為在中華民國領域內犯罪。」此規定如同前述行政罰法之內容，是犯罪行為即便全部在域外，只要有結果在中華民國領域內，便是域內犯罪，而為我國刑罰之所及。

[48] 公平交易法第 47 條：「未經認許之外國法人或團體，就本法規定事項得為告訴、自訴或提起民事訴訟。但以依條約或其本國法令、慣例，中華民國人或團體得在該國享受同等權利者為限；其由團體或機構互訂保護之協議，經主管機關核准者亦同。」

[49] 在註 4 的面板案中，台、日、韓等國涉案事業共商價格的水晶會議（Crystal Meeting）係在我國境內進行，亦即行為地係在美、歐、韓等國市場之領域外。美國採用前述效果主義，適用其休曼法等規定重罰我國廠商，並將經理人繩之以法。而歐盟則認定依照水晶會議之實施地點在歐盟境內，因此據前述實施理論，認定限制競爭行為發生在歐盟境內，歐盟主管機關得以其競爭法處罰涉案事業。奇怪的是，對於我國公平會而言，水晶會議為理所當然之領域內行為，卻在此次如此重大的國際卡特爾爭端中未對涉案事業進行查處，亦未提出系爭行為合法之說法，亦即公平會沒有幫涉案業者說話，也沒有和各國競爭法執法機關站在同一陣線。公平會不因涉案事業是國內廠商而在執法上有所偏護，可以理解就專業與中立的考量。不過，同為涉案事業母國的韓國也對涉案廠商以競爭法相繩，本文以為，在此類國際卡特爾的大案件上，各國競爭法主管機關實應出面齊力捍衛市場秩序才是。關於查辦前述台日韓等面板業者聯合訂價之行為，我國公平會看似無所作為，就本文之觀察，有其苦衷。蓋根據行政罰法第 27 條之規定，行政裁罰之時效只有 3 年，而面板案事涉層面廣泛龐大，公平會無法在水晶會議達成協議的 3 年內完成查案並作成處分。不過，已在 2015 年 2 月 4 日修法中獲得解決，新增的第 41 條特別規定限制競爭行為之裁處時效為 5 年，相信這樣的規範對於將來大規模的限制競爭案件查處，譬如國際卡特爾案件，能帶來很大幫助。

3. 涉外的「私的執行」如何選擇適用之競爭法

談到私的執行，即對於違反競爭法而生的涉外債之關係尋求救濟，在訴訟上屬於涉外民事事件，法院應循國際私法決定如何適用法律，在我國即應依涉外民事法律適用法決定準據法，而不得當然認為適用我國法。2010 年通過之涉外民事法律適用法新增了第 27 條規定：「市場競爭秩序因不公平競爭或限制競爭之行為而受妨害者，其因此所生之債，依該市場之所在地法。但不公平競爭或限制競爭係因法律行為造成，而該法律行為所應適用之法律較有利於被害人者，依該法律行為所應適用之法律。」據此規定，因違反競爭法所生之債，原則上應選擇市場所在地法作為適用法律，因此如果被害人係因我國市場秩序被破壞而受損害，其應適用之法律即我國公平法，至於但書則賦予被害人在較有利的情況下，多一個法律行為準據法的選擇[50]。

（五）單邊解決途徑之不足

以上為本文關於美國、歐盟與我國採取單邊執法行動之立論基礎，惟單邊執法是否真能解決跨境的反競爭問題？本文以為單邊的解決途徑，仍有如下的不足，而不能認為其得以充分解決國際反競爭問題。

1. 未考量全球的福祉（Global Welfare）

經濟分析乃是競爭法領域、經貿法領域最重要的分析工具。因而一件跨國的反競爭行為，對其所為的經濟分析，係立於特定國家的基礎或是世界的基礎，便可能得出不同結果[51]。

舉例而言，消除國際間的反競爭行為，可能增進 A 國的福祉，卻同時傷害 B

[50] 陳榮傳，同註 41，146-154。
[51] Chris Noonan, "The Fundamental Forces Shaping International Competition Law," *The Emerging Principles of International Competition Law*, 27(2008).

國的福祉[52]。設計用以極大化 A 國經濟上福祉的競爭法，不必然同時促進世界的經濟福祉，也不必然促進 B 國的經濟福祉。是以，單邊採取競爭法行動，本質上不能滿足國際間的利益，當有反競爭行為造成跨國境的反競爭效果時，由受影響的國家相互磋商決定應採取的執法行動，將是符合多數利益的作法。

2. 執法資源未有效利用

在反競爭行為的執法上，需先踐行經濟分析，譬如產品市場之界定，而分析之方法、內容，在同一國際反競爭案件所涉的不同國家主管機關之間，自有可以相互參考之處，如此便可以降低執法成本，不需重複進行相同或類似的經濟分析。同時，也讓承辦同一案件之執法人員可以藉互通資訊之機會檢視其分析之正確性。倘存在國與國競爭法主管機關的執法合作機制，便可期待充分且有效的執行競爭法；反之，則有浪費行政執法成本的問題，以及缺少主管機關之間交流執法意見的機會。

3. 單邊執法所遭遇的實務限制

當遇到反競爭行為地跨足數個國家的情形，競爭法主管機關不論是透過屬地主義管轄，或是透過效果主義決定管轄，為發現實情，仍有向其他國家的主管機關請求協助調查的需求。譬如有國際卡特爾的合意係在 X 國透過秘密會議作成，該卡特爾目的藉由聯合各國競爭者固定價格，排除 Y 國和 Z 國的市場競爭，如此當 Y 國或 Z 國決定執行其競爭法，便需要請求 X 國主管機關協助調查是否存在卡特爾之合意，故實務上在國際競爭法案件的單邊執法還是需要請求他國協助。

[52] *Id*., 28. 一國的福祉，在不考量國安問題的假設下，應考量對下述各部分的影響：A. 本國消費者；B. 本國生產者（兼考量開拓國外市場、保護本國市場、促進出口等）C. 非經濟的目標；D. 國家主權與政策自主權；E. 行政成本。A+B+C+D-E，再經過法規與市場的調整，即一國之國家利益或稱國家福祉。一國政府為謀求最大的福祉，最大重點在於調和 A、B、C、D、E 之間的衝突。

第四節、欠缺多邊國際競爭法規範

本文發現，為打擊跨國的反競爭行為，實有必要透過競爭法主管機關之間進行執法合作，以及進行競爭規範的調和。是以透過多邊場域來推動競爭規範之調和與執法合作，打擊國際間的反競爭行為，乃一大理想。惟 WTO 之體制龐大，如欲推動多邊的競爭協定，使其成為其具拘束性的 WTO 架構協定（WTO Covered Agreement）之一部，其實相當不容易。WTO 採單一認諾（Single Undertaking）制度，除少數複邊協定可自由選擇是否簽訂外，會員國必須承擔 WTO 架構協定（WTO Covered Agreements）的所有義務，因此如欲在 WTO 共識決的談判場域上推動多邊競爭規範，可以想見困難重重。

實際上，前述問題早於 1940 年代的哈瓦那憲章草案（the draft 1948 Havana Charter for the ITO）便開始被討論。該草案第 46 條第 1 項要求每一會員國應採行適當措施並應與國際貿易組織合作，以對於生產或貿易的擴張有負面影響，及影響該憲章第 1 條目的達成之私人或公營事業主體所進行的商業行為，防止其有妨礙競爭、限制市場進入、或增加獨占的控制，以影響國際貿易。該草案並將各種限制競爭的行為加以例示規定[53]。惟 ITO 因美國國會不同意而告失敗，該草案未能實行。

ITO 失敗後，GATT（General Agreement on Tariffs and Trade, GATT）借用 ITO 籌備委員會之秘書處，仍維持國際組織一般之運作。時至 GATT 之烏拉圭談判回合（1986-1993），各締約國決議成立 WTO，以德國學者為首的一群專家組成國際反托拉斯法案工作小組（International Antitrust Code Working Group），又稱慕尼黑小組（Munich Group），向 GATT 提出一份「國際反托拉斯法典草案」（Draft International Antitrust Code, DIAC），此草案預計將成為 WTO 附件四下

[53] 羅昌發，「競爭法與競爭政策之國際合作：我國經驗之回顧與前瞻」，公平交易季刊，第 10 卷第 3 期，146-147（2002）。

的複邊貿易協定之一[54]。

DIAC 包含六大目標、五大原則、三大實體規範以及獨立的爭端解決機構（國際反托拉斯小組）與執行機構（國際反托拉斯局）。其六大目標為更進一步開放市場、管制輸出卡特爾、尋求「傾銷」與「掠奪性定價」（predatory pricing）之共同規範、創造共同規範降低商業活動的遵法成本、以全球立場評估反托拉斯案件、擴大國際的競爭法調和。

DIAC 規定其執行機關為國際反托拉斯局，其主要職責包括：監督各成員國之競爭法主管機關、要求各成員國競爭法主管機關採取執法行動、在成員國領域內的法院對私人提反托拉斯訴訟、對於不履行國際反托拉斯法案義務之成員國向國際反托拉斯小組提告。至於 DIAC 規定的獨立爭端解決機構－國際反托拉斯小組，其係一常設組織，當成員國經過互相諮商仍未能解決衝突時，其受理成員國對他成員國不履行國際反托拉斯法案義務之控訴。而國際反托拉斯小組作成之裁定具有法律上拘束力，敗訴國因而必須移除違反措施，例如修改其內國法律。

DIAC 的五大原則如下：第一係適用內國實體法的原則，對於國際反競爭行為可以以會員國內國法直接適用；第二係國民待遇原則（national treatment principle），在各會員國領域內，本國人與外國人承擔相同的競爭法義務；第三係最低標準原則（mimimum standards），DIAC 要求各會員國提供最起碼的競爭法保障；第四係國際程序發動權（international procedural initiatives），指協定本身可以作為私人在會員國領域內訴諸救濟之依據，而國際反托拉斯局亦可根據協定內容要求成員國競爭法主管機關執法，甚至可在國際反托拉斯小組控訴成員國違反國際反托拉斯法案義務；第五係跨國原則，單純國內案件不在 DIAC 討論範圍。

[54] 謝孟珊，國際競爭法的調和，國立政治大學法律研究所碩士論文，120-121（2005）。

DIAC 對於解決國際反競爭行為之理想，並非瞄準各主管機關之執法合作，而是訂立實體規範，其針對三大類反競爭行為類型進行規範：其一是水平與垂直之限制（horizontal and vertical restraints），其內容包含水平及垂直之卡特爾、智慧財產權濫用等；其二是市場力的集中（control of concentration and restructuring），即有關結合管制之規範；其三是支配地位之濫用（abuse of dominant position），相當於本文前述濫用市場力之單方行為。

DIAC 在 WTO 成立時，還是未能成為 WTO 協定之一部分，雖然其優點顯而易見，有助打擊國際反競爭行為，而在歐洲受到支持，但以美國為主的多數國家均認為 DIAC 多數條款不具彈性，影響國家在競爭政策上的主權，在多數國家否定下，DIAC 終告失敗[55]。

1996 年新加坡部長會議設立了貿易與競爭互動工作小組（Working Group on the Interaction between Trade and Competition Policy, WGTCP）；2001 年 11 月 WTO 第四屆杜哈(Doha)部長會議，就有關貿易與競爭政策的互動，通過了以下三段決議文[56]：

[55] 同上註，133-134。

[56] 23. Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations. 24. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs. 25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions

23.基於承認多邊架構對促進競爭政策對國際貿易發展帶來的貢獻，並承認第 24 段所提及在此領域內的更進一步技術協助與能力建置的需要，部長們因此同意，將在第五屆部長會議後，基於在該屆部長會議依照明白的共識所另行作成的決議，就將來談判的形式，展開談判。

24.部長們承認開發中國家與低度開發國家在此領域中獲得進一步技術協助與能力建置的需要(包括政策分析與發展，使其更可以評估更緊密的國際合作對其經濟發展之政策及目標、以及人力與機構發展，可能產生的含意)。為達此目的，吾等應與其他相關政府間組織(包括 UNCTAD)合作，並透過適當的區域性與雙邊管道，對此種需求，提供強化的且足夠資源的協助，以作為回應。

25.在第五屆部長會議召開前的這段期間，貿易與競爭政策互動工作小組的進一步工作，將著重在澄清：核心原則(包括透明化、不歧視與程序的公平性、及核心卡特爾的規定)；自願性合作的形式；以及透過能力建置，支持開發中國家競爭機構的逐漸強化。就此，開發中國家與低度開發國家參與者的需求及處理此等問題的適當彈性，均應被納入考量。

2003 年坎昆部長會議在競爭議題，沒有達成任何共識；進而 2004 年 WTO 總理事會決定，貿易與競爭政策之互動不再構成杜哈部長宣言工作計劃之一部，因此在杜哈回合中將不會再有競爭相關議題之談判[57]。雖競爭議題的談判活動與相關工作計畫嘎然停止，但是 WTO 秘書處對於會員國與有興趣加入 WTO 的國家，仍提供競爭法與競爭政策方面的技術協助。

綜上述，多邊的競爭規範經歷多次挫敗。第一次挫敗是 ITO 哈瓦那憲章，草創 ITO 的哈瓦那憲章曾經納入競爭議題，但是後來 ITO 並未成立；第二次挫

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in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.

[57] WTO, "Interaction between Trade and Competition Policy," http://www.wto.org/english/tratop_e/comp_e/comp_e.htm, last visited on date: 2015/4/14.

敗是 DIAC，在籌設 WTO 的準備階段，DIAC 原本將成為 WTO 的複邊貿易協定之一，因未獲多數國家支持而不了了之；第三次挫敗是 WTO 成立後的第一個談判回合─杜哈回合亦未將「貿易與競爭」列入談判；第四次挫敗則指 WTO 的規則談判已動彈不得，鑒於 WTO 會員眾多、採單一認諾制度，且議案之通過採取共識決，就現況來看，難以期待 WTO 在不久的未來能夠推動多邊競爭規範。因為多邊途徑一次次的挫敗，目前各國紛紛投入 FTAs 或區域經濟整合來推動新規則，包括競爭的規則。

第三章、競爭法合作協定與經貿協定之競爭專章

承前述，競爭議題在 WTO 的挫折，與競爭法執法合作與規範調和日益增加的需求背道而馳。事實上，杜哈發展回合時至今日已超過 14 年，僅完成一項多邊協定（貿易便捷化協定），龐大的多邊體制與嚴格的談判模式儼然成為推動規範的障礙。正因「單邊不足、多邊匱乏」之故，目前各國積極藉由經貿協定（不論是雙邊的 FTA 或是區域經貿協定、區域經濟整合），來推動法制之革新，本文亦發現新一代的 FTA 有納入競爭規範之趨勢，故第三章將開始探討經貿協定中的競爭規範，以及各國簽訂的競爭法雙邊執法合作協定。

茲先說明者，關於競爭法合作協定與經貿協定之意涵。就前者而言，本文指競爭法主管機關之間所簽訂的行政協定，而其內容主要關於內國競爭法之制定、維持與落實，以及執法活動之通知等；就後者「經貿協定」而言，乃指自由貿易協定（Free Trade Agreements, FTAs）而言，其規模可以是雙邊、複邊或是區域，本文將對於經貿協定中與競爭相關的章節進行探討。

又本文選擇探討之素材為我國所有雙邊規範與美國所有雙邊規範，至於何以挑選美國為研究對象，有三個理由：第一是因為美國為最早發展出雙邊競爭規範的國家；第二是因為雙邊競爭法合作協定之內容變革，與美國適用競爭法之態度轉變有相當關聯；第三是因為美國在各國際組織（例如 OECD 與 ICN）的競爭政策領域，皆扮演倡議者的角色，且其對於區域經濟整合中的法制推動亦有許多作為（例如 TPP）。

第一節、雙邊之競爭法規範

此部分探討者為在雙邊層次如何應對競爭法與競爭政策之議題。最早在雙邊條約中出現限制營業競爭條款者，為美國與義大利在 1948 年簽訂之「友好通商

航海條約」。其第 18 條第 13 項規定：「二締約國同意，由一個或數個私營或公營之商事企業為之或透過公私營商事企業之結合、協議或其他安排達成之抑制競爭、限制市場進入或助長獨占控制，對於其相關領域間之商務可能帶來損害效果。因此各締約國同意，在他締約國要求時，應與其任何此種行為進行諮商，並採取其所認為適當之行動，以消除此種損害性效果[58]。」隨著貿易自由化，國與國貿易、投資日益頻繁，自然需要雙邊的競爭法規範。

（一）現有的競爭法合作協定與 FTAs 競爭專章

1. 美國所簽訂的雙邊競爭法協定

美國競爭法合作協定簽署的對象計有：歐盟、日本、加拿大、巴西、以色列、德國、澳洲、中國、俄羅斯、智利、墨西哥、印度、哥倫比亞。之所以選擇美國來介紹競爭法合作協定，是因為美國為最早在國際間推動競爭法合作協定的國家，其起源是 OECD 在 1967 年的「關於影響貿易的限制競爭行為建議」（1967 OECD Recommendation on Cooperation bwtween Member Countries on Restrictive Business Practices Affecting International Trade），此份建議書實際上就是美國主導產生，其建議當一國的反托拉斯執行活動影響他國利益時，須通知他國，在反托拉斯執行進行協商時考慮他國重要利益，在執行上進行合作，以及在他國要求下應考慮進行反競爭之調查。本文將介紹美國司法部網站上所呈現所有美方簽訂的競爭法相關協定之內容[59]。

2. 美國所簽訂包含競爭專章之 FTAs

納入競爭規範已被認為是新一代 FTAs 之趨勢。根據聯合國貿易暨發展委員會（UNCTAD）的一份統計資料，在約莫 300 個已生效或談判中的雙邊或區域

[58] 羅昌發，貿易與競爭之法律互動，元照，295-296（1998）。

[59] 美國司法部網站，http://www.justice.gov/atr/public/international/int-arrangements.html，最後瀏覽日期：2015/4/28。

經貿協定中，有超過 100 個都有競爭相關規範，而最常見的論理基礎便是避免貿易自由化的利益被跨境的反競爭行為所減損，及避免由國家主導的貿易障礙，譬如瓜分市場或固定價格之行為[60]。

經本文檢視美國貿易談判代表署網站資料，美國所簽訂的雙邊 FTAs 中，有包含競爭規範者如下：美國與新加坡 FTA、美國與哥倫比亞共和國 FTA、美國與秘魯 FTA、美國與智利 FTA、美國與澳洲 FTA、美國與韓國 FTA。

3. 我國簽訂之雙邊競爭法合作協定 、MoUs

我國目前與若干國家訂有多個正式之雙邊、三邊競爭法合作協定，由近到遠分別是：1. 我國公平交易委員會與法國競爭委員會有關競爭法適用諒解備忘錄（下稱台法競爭法 MoU），在 2014 年 12 月 18 日正式完成簽署，本備忘錄將取代 2004 年雙方簽署之合作協議，以持續拓展彼此合作關係。2. 我國與巴拿馬競爭法適用協定，基於 2003 年與巴拿馬的 FTA 中的競爭規範，於 2013 年 12 月 4 日正式簽署本競爭法適用協定（下稱台巴競爭法適用協定）。3. 2012 年 12 月簽訂臺灣公平交易委員會及蒙古國公平競爭及消費者保護局合作諒解備忘錄(下爭台蒙競爭法 MoU）。4. 2010 年與匈牙利簽訂適用競爭法與公平交易法之合作協定（下稱台匈競爭法合作協定）[61]。5. 於 2009 年簽署駐加拿大臺北經濟文化代表處與加拿大駐臺北貿易辦事處關於競爭法適用瞭解備忘錄（下稱台加競爭法 MoU）。6. 於 2002 年簽署台、澳、紐三邊的適用競爭法合作協定[62]。7. 1997 年 12 月與紐西蘭簽訂競爭法與公平交易法適用之合作與協調協議[63]（下稱台紐協

[60] Philippe Brusick, Ana María Alvarez, Lucian Cernat, *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*, UNCTAD, V (2005).
[61] Co-operation Agreement between the Taiwan Fair Trade Commission and the Hungarian Competition Authority regarding the Application of Competition and Fair Trading laws.
[62] Cooperation Arrangement between the Taiwan Fair Trade Commission, the Australian Competition and Consumer Commission, and the New Zealand Commerce Commission regarding the Application of Competition and Fair Trading Laws.
[63] Co-operation and Co-ordination Arrangement between the Taipei Economic and Cultural Office and the New Zealand Commerce and Industry Office regarding the Application of the Competition and Fair Trading Laws.

定）。8. 1996 年 9 月與澳洲簽訂競爭法與公平交易法適用之合作與協調協議（下稱台澳協定）[64]。

4. 我國簽訂之 FTAs 含競爭專章者

我國簽訂 FTAs 之對象計有：巴拿馬、瓜地馬拉、尼加拉瓜、薩爾瓦多及宏都拉斯、中國大陸、新加坡及紐西蘭，與日本也訂有雙邊的投資保障協議。其中含有競爭專章者有三個，分別是台灣與巴拿馬 FTA（簡稱台巴 FTA）、台灣與紐西蘭 FTA（簡稱台紐 FTA）、台灣與新加坡 FTA(簡稱台星 FTA)。

（二）競爭法合作協定與 FTAs 競爭專章內容－依國家別檢視

1. 美國與德國

在 1976 年 6 月，美國與德國簽署「關於限制營業競爭行為之相互合作協議」（Agreement btween the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation on Restrctive Business Practice），內容共計 9 條，主要要求雙邊的主管機關必須提供他方執行競爭法上的協助，包括提供產業資訊以及競爭法與政策之相關研究，並在涉有與對方重大公益相關之情形，主動通知對方主管機關，而其所謂限制營業競爭行為，則指違反其中一方內國競爭法之行為而言[65]。

2. 美國與歐盟

歐盟與美國於競爭事項之合作始於 1990 年 11 月簽署的「競爭法適用協定」

[64] Cooperation and Coordination Arrangement between the Taipei Economic and Cultural Office and the Australian Commerce and Industry Office regarding the Application of the Competition and Fair Trading Laws. 以下簡稱台澳協定。

[65] Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation on Restrictive Business Practice, art. 1.(d).

（Agreement between the Government of the United States and the Commission of the European Communities regarding the Application of Their Competition Laws）。

此協定第 6 條為傳統禮讓原則，即消極禮讓原則之展現。本文先前關於域外適用的論述提到，禮讓原則係由競爭法主管機關就本國經濟利益與被影響的他國主權等綜合考量後才決定是否管轄。因此此協定第 6 條乃規定，在執行競爭法的任一階段，均須要考慮對方之重要利益，並例示數項有關重大利益的考慮因素，如比較系爭反競爭行為在對方境內之重要程度與在己方領域的重要程度、是否存在影響執法一方境內生產者、消費者、競爭者之意圖等等[66]。

此協定更重要的特點在於其體現「積極禮讓」（positive comity）原則，對當事國作成有拘束力的規範。此協定中的積極禮讓體現於第 5 條，其規定略以：1.雙方認識到反競爭活動可能在一方領域內發生，除了會違反該領域的競爭法外，亦可能對另一方之利益產生負面影響，基於此種本質，雙方同意解決此類問題是出自共同的利益。2.若一方認定在對方的領域內發生的反競爭行為對其重要利益造成負面影響，前者可以通知並且「要求對方主管機關執行其競爭法」。通知應該盡可能描述該反競爭行為之本質，以及描述如何影響其重大利益，通知方並應盡可能提供相關資訊。3.收到前述通知且互為適當之討論後，受通知方應考量是否對系爭行為發動執法行動或是擴大進行中的執法行動。而不論其決定如何均需回報給通知的一方。4.本條不限制受通知方依據其競爭法以及政策裁量是否針對受通知的反競爭行為採取執法行動，或者剝奪通知方針對系爭反競爭行為採取執法行動的權限。

嗣後美國與歐體在 1998 年進一步針對積極禮讓原則之適用簽訂「執行競爭法時適用積極禮讓原則之協定」（Agreement between the European Communties and the Government of the United States of America regarding the Application of

[66] Agreement between the Government of the United States and the Commission of the European Communities regarding the Application of Their Competition Laws, art. 6.

Positive Comity Principles in the Enforcement of Their Competition Laws），此協定係居補充地位，1990 年的協定依舊有效，內容重點介紹如下。其闡明積極禮讓適用的情形為，要求方競爭主管機關可以要求被要求方的競爭主管機關開啟調查，並且得依照被要求方的競爭法進行相關救濟。不論係爭行為是否違反要求方的競爭法，亦不論要求方是否對系爭反競爭行為開始調查或考慮採取執法行動。惟應注意者，雖然不必違反要求方的競爭法，但依照此協定第 1 條規定，「必須違反被要求方的競爭法，才有積極禮讓之適用」。而依照積極禮讓原則要求執法之後，此協定也規定要求方在某些情況下必須信賴被要求方之執法行動，進而停止或延緩己方之調查。

本文以為積極禮讓原則的優點是讓距離系爭反競爭行為最近的主管機關更有機會負責執法，使得執法行動更有效率。同時，積極禮讓原則也緩和單邊域外適用內國競爭法所造成的緊張關係。整體而言，也讓跨國企業經營的法律環境較為穩定，以營業活動當地的競爭法規範為主要顧慮即可。積極禮讓原則有其優點，故可見於美國 1990 年代以降的數個雙邊競爭法協定中。不過吾人亦可料想到積極禮讓原則之功用有其天生的缺陷，畢竟要求一國政府單純為了他國之利益，對自己領域內之事業執行競爭法，乃不切實際之期待，國家對本國企業經常存有保護的心態，除非該反競爭行為確實也影響其領域內之市場秩序。

3. 美國與加拿大

美國和加拿大則在 1995 簽訂「關於競爭與不正當行銷行為規範之適用協定」[67]，其中第 1 條第 1 項指出，本協定目的在於促進兩國主管機關之間的合作與協調，並且避免因適用法規造成的衝突[68]。此協定規範內容較廣，不只有限制競爭

[67] Agreement between the Government of the United States of America and the Government of Canada regarding the Application of Their Competition and Deceptive Marketing Practices Laws.

[68] The purpose of this Agreement is to promote cooperation and coordination between the competition authorities of the parties, to avoid conflicts arising from the application of the parties' competition laws and to minimize the impact of differences on their respective important interests, and, in addition, to establish a framework for cooperation and coordination with respect to enforcement of deceptive

內涵，也包含不公平競爭（unfair competition）內涵。且此協定規範內容較與德、澳簽訂之競爭法協定來得仔細且具體，譬如當認為己方之重大利益受到位於對方境內之限制競爭行為所影響時，可以要求對方主管機關執法，並且進一步提供資訊（第 5 條參照），也更仔細的說明涉及機密之資訊交換應注意之事項。

4. 美國與澳洲

1999 年 4 月年美國與澳洲簽署「共同反托拉斯執法協助協定」（Agreement btween the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistence），從協定名稱便可清楚看出此協定超脫單純的執法合作，更擴及司法協助。其第 2 條便說明協助之目的與範圍，明白指出對於他方主管機關就反托拉斯犯罪證據的發現，應予協助；如發現有反競爭之行為應通知他方主管機關；如果執行反托拉斯法對他方之重大公益造成影響，亦應通知。

由於各國國內法對於機密資料的保護，仍受到法律限制，以致於此種競爭法雙邊協定仍無法超越機密資料保護的規定。導致相互協助執法的效果未如預期。針對此一情形，美國乃於 1994 年通過「國際反托拉斯執行協助法」(International Antitrust Enforcement Assistance Act 1994；簡稱 IAEAA)，授權美國司法部及聯邦交易委員會，與該些允許相互協助執行反托拉斯法之國家簽訂競爭法合作協定，且就案件調查之需要，在確保機密資料安全的情形下，相互協助取得對方境內之機密資料。而第一個依照此一法律訂定的協定為美國與澳洲的「共同反托拉斯執法協助協定」[69]。

美澳 FTA（the United States－Australia Free Trade Agreement）在 2005 年 1 月 1 日生效。其競爭專章設在第 14 章，章名為「競爭相關事務」（Competition-related

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marketing practices laws.

[69] 羅昌發，同註 53，147-148（2002）。

Matters）。雖然章名與美國智利 FTA 和美國秘魯 FTA 之競爭章不同，但同樣也有處理指定獨占事業和國營事業的議題。設置目的在於排除影響雙邊貿易與投資的反競爭行為。除了要求執行競爭法與設置主管機關之外，也有執法合作之規定，並且於 14.2.3 條規定必須在美澳現有的競爭法雙邊協定基礎上，更進一步從事執法合作，包括相互協助、通知、諮商、資訊交換等。

此外美澳 FTA 的競爭相關事務章更進一步規範跨境的消費者保護，本文以為此與澳洲的競爭法主管機關同時執掌競爭與消費者保護事項有些關聯。另一點與其他 FTA 不同者，在於金錢賠償（monetary judgement）的規定，其第 14.7 條規定為了彌補消費者或投資者的經濟上損失，應促進雙邊的主管機關認可及執行已判定之金錢賠償。

5. 美國與日本

1999 年 10 月美日簽署「限制競爭行為合作協定」（Agreement between the Government of the United States of America and the Government of Japan Concerning Cooperation on Anticompetitive Activities），內容計 11 條。其適用範圍為違反美國休曼法、克萊登法、聯邦交易委員會法及日本獨占禁止法與維持公平交易之相關法規[70]。此協定規範內容與其他美國簽訂之競爭法協定類似，兼含限制競爭與不公平競爭領域。此協定訂有通知義務，當認為執法將對對方重大利益（important interest）造成影響時，須先行通知，其更進一步指出重大利益之內涵，包括：與對方執法有關者；執法行動與對方內國法制牴觸者；執法係針對對方依法成立之公司者；係對於併購以外的限制競爭行為的執法，且是關於對方領土中的重要市場者；結合案件，且併購中一方為依對方法律成立之公司；結合案件，且併購交易中居於控制公司地位者為對方依法設立之公司；已被對方主管機

[70] Agreement between the Government of the United States of America and the Government of Japan concerning Cooperation on Anticompetitive Activities, art. 1.2(c)(i),(ii).

關認可或支持的行為；涉及禁止作為或要求作為之法律救濟[71]。

6. 美國與巴西

同在 1999 年 10 月，美國與巴西簽訂競爭主管機關執法合作協定，美巴競爭法合作協定在第 1.2(c)(ii)條關於協定所稱競爭法之範圍，明確指出包含限制競爭與不公平競爭。其規範內容較單純，同樣有通知與合作之規定，旨在促進兩國主管競爭法機關的執行與技術合作，並且確保執法時考量對方之重要利益[72]。而美巴競爭法合作協定第 4 條係關於對方領域內影響本國利益的反競爭行為，當認為對方領域內發生影響本國利益之反競爭行為時，可以要求對方執法，而對方必須審慎考慮，盡速做成決定並回覆，此屬積極禮讓原則之展現。

7.美國與以色列

以色列則係於 1999 年 3 月與美國簽訂競爭法適用協定（Agreement between the Government of the United States of America and the Government of the State of Israel regarding the Application of Their Competition Laws），其所涉競爭法範圍包含限制競爭與不公平競爭法，內容廣泛。美以競爭法合作協定設有通知、諮商、衝突避免等規定以避免管轄衝突與過度執法等問題；亦設有執法合作規定以建立日後合作基礎；第 4 條為執法行動的協調規定，主管機關必須共同考慮如何執法可以同時符合雙方競爭法的目標，為主管機關與涉案事業減低成本，以及對於跨國結合可以採取如何之矯正措施（remedies）；第 5 條標題為積極禮讓（posity comity），內容是指當反競爭行為發生在對方領域而反競爭效果在本國時，可要求對方執法，對方必須審慎考慮並盡速回應。

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[71] Agreement between the Government of the United States of America and the Government of Japan concerning Cooperation on Anticompetitive Activities, art 2.2.

[72] Agreement between the Government of the United States of America and the Government of the Federative Republic of Brazil regarding Cooperation between Their Competition Authorities in the Enforcement of Their Competition Laws, art 1.1.

8. 美國與中國

2011 年 7 月，美國與中國雙方主管機關簽訂「關於反壟斷和反托拉斯合作諒解備忘錄」。中國國家發展和改革委員會、商務部、國家工商行政管理總局（合稱中國反壟斷主管機關）；美利堅合眾國聯邦貿易委員會、司法部（合稱美國反托拉斯主管機關），雙方希望透過此 MoU 之簽署來建立長期的執法合作基礎。雖然此份合作的 MoU 沒有明確指出所稱的競爭法範圍，不過若是指中國反壟斷法而言，其規範範疇屬限制競爭而不及於不公平競爭。

美中反壟斷和反托拉斯合作 MoU 的內容可分為二部分。第一部分是五個主管機關必須共商競爭政策，加強對話：1. 任一方都可以就競爭議題設立工作小組以解決問題，五個主管機關之間應相互及時通報領域內競爭政策及執法方面的重要動態；2. 透過競爭政策和法律方面的活動（如培訓、研討、考察、實習等方式），加強雙方的能力建置；3. 雙方進行反壟斷執法經驗交流；4. 就競爭執法和政策事項相互尋求資訊或建議；5. 就競爭法律、法規、規章和指南的修改提出評論；6. 就多邊競爭法律和政策交換意見；7. 提高企業、其他政府機構以及社會公眾競爭政策和法律意識方面交流經驗；第二部分則是五個主管機關之間可以單獨互相進行執法合作，惟有何需要合作的事項並未具體說明，僅規定：雙方承認當中國反壟斷主管機關和美國反托拉斯主管機關正在調查相關事項，在主管機關執法利益、法律限制和可獲得資源允許範圍內，於案件調查中適當合作係符合雙方共同利益。

美中反壟斷和反托拉斯合作 MoU 加入保密條款，其規定雙方認為辦案所需資訊依法不得交換，或是主管機關認為與機關自身利益衝突時，可以拒絕提供資訊，而接收資訊者必須依本國法律對該資訊保密。本文認為此保密規定可能使得美方難以獲得中方資訊，蓋中國並非完全民主自由的國家，其對於資訊的機密認定與各國不同，並且此保密條款除了可以拒絕提供法律禁止的資訊，主管機關如

果認為「與自身利益不符」，亦可拒絕提供資訊。國際卡特爾的證據蒐集，以及跨國結合的審查評估，皆仰賴其他國家的主管機關在客觀限制內盡可能提供資訊，但是美中反壟斷和反托拉斯合作 MoU 卻容許主管機關主觀上可以專斷地拒絕提供資訊之規定，在美國與他國簽訂之競爭法合作協定中幾未見此種敘述，故本文認為中國反壟斷法主管機關在執法合作上的誠意不足。

9. 美國與俄羅斯

美國與俄羅斯是採取 MoU 形式簽署競爭法合作協定，在 2009 年 11 月雙方完成簽署。依此份 MoU 之記載，負責的主管機關在美國為司法部與聯邦貿易委員會，在俄羅斯則是俄羅斯聯邦反壟斷局。此份文件中並未提及所涉競爭法之範圍，從美方競爭法主管機關之執掌或可認為包含限制競爭法與不公平競爭法，而俄羅斯聯邦反壟斷局之職責在於保護商品市場與金融市場之競爭、保護自然獨占的活動，以及監督事業的廣告[73]，據此可推知美俄 MoU 兼含限制競爭領域與不公平競爭領域。

美俄 MoU 內容簡扼，分為四部分。第一部分是合作，合作的規定相當廣泛，包含執法活動與競爭政策的相互通知，也包含人員相互訪視與訓練，以及對對方的競爭法和競爭政策提出評論等；第二是工作計劃，指可以對於前述合作事項擬定工作計劃；第三部分是溝通，指雙方必須定期會面共商競爭議題，並且可以向對方請求提供建議；第四是機密問題，觀察美中 MoU 和美俄 MoU，可發現美中 MoU 規定多半從美俄 MoU 擷取，美俄 MoU 除了可以拒絕提供依法必須保密的資訊，也容許主管機關可以專斷地拒絕提供資訊。

由於在資訊提供上有所保留，本文以為美俄 MoU 和美中 MoU 在執法合作貢獻較低，在建立競爭政策溝通的管道上貢獻較高，蓋在各部競爭法合作協定

[73] 俄羅斯政府網站，http://government.ru/en/department/89/events/，最後瀏覽日期：2015/4/28。

中，美俄 MoU 和美中 MoU 是少數明文規定可以對他方之競爭法與競爭政策提出評論者。

10. 美國與墨西哥

美國與墨西哥在 2000 年 7 月完成競爭法合作協定之簽訂，立於 NAFTA 競爭專章之基礎之上，並參考若干 OECD 關於競爭法主管機關合作之建議書，美墨競爭法合作協定之規範相對完整。美方主管機關包含司法部與聯邦貿易委員會，墨方主管機關則是聯邦競爭委員會；而競爭法在美方指休曼法、克萊登法、Wilson 關稅法及聯邦貿易委員會法，在墨方則是聯邦經濟競爭法（Federal Law of Economic Competition），根據本文檢視，墨西哥聯邦經濟競爭法僅規範獨占及市場集中（即結合）二大類型限制競爭行為，而美墨競爭法合作協定在第 1.2(c)(ii) 條關於協定所稱競爭法之範圍，明確指出包含限制競爭與不公平競爭。

美墨競爭法合作協定的內容包括執法活動的通知、執法合作、主管機關行動之協調、要求對方執法、衝突避免、技術合作、諮商、定期會議、保護機密資訊等。美墨競爭法合作協定第 3 條宣示主管機關之間應尊重對方之執法並予以協助，第 4 條有關主管機關行動之協調則是根據前條加以更具體指示，至於第 5 條關於行為地在己方而效果地在對方之執法合作，其實正是積極禮讓之規定，第 4 條與第 5 條特別有助於打擊國際卡特爾，原因在於該規定參考了 OECD1998 年打擊核心卡特爾之有效行為建議書（1998 Recommendation of the Council of the OECD Concerning Effective Action Against Hard Core Cartels）。進一步說明，美墨競爭法合作協定第 4 條關於主管機關行動之協調，可以避免不一致的執法行動使涉案事業有所警覺而湮滅證據；而第 5 條則是對於在對方領域內進行謀議之卡特爾，可以依積極禮讓原則，要求對方主管機關加以執法，如此可以解決本國主管機關執法的地域限制。

11. 美國與印度

美國與印度係在 2012 年 9 月訂定競爭法 MoU，觀察其內容應係沿襲美俄 MoU 和美中 MoU 而來。締約的雙方在美方為司法部與聯邦貿易委員會，而印度方則是印度公司事務部與競爭委員會。美印 MoU 中未明文所指涉的競爭法範圍，根據美國司法部與聯邦貿易委員會之職掌應含限制競爭與不公平競爭；然印度方面，其公司事務部於 2002 年依據競爭法（Competition Act）設立競爭委員會，而競爭法之內容僅聯合行為、市場支配地位濫用及結合等三大限制競爭行為，未包括不公平競爭，綜合上述，本文認為美國與印度的競爭法 MoU 只處理限制競爭問題而不及於不公平競爭。

美印 MoU 內容有四部分，包括執法合作、工作計劃、溝通與機密保護。執法合作的部分包括執法通知、提供人員訓練、協助競爭政策之倡議等；工作計畫則是根據執法合作之內容個別擬定；溝通的規定促進雙方主管機關對於競爭法與競爭政策上的交流；最後機密保護方面，同美俄 MoU 和美中 MoU，一樣允許主管機關在認為不符合自身利益時，拒絕提供資訊，而接受資訊一方必須依其內國法保護所獲取之資訊。

最後，本文發現美印 MoU、美中 MoU、美俄 MoU 皆無處理管轄權衝突的執法前諮商規定、消極禮讓規定與積極禮讓規定，此三部 MoU 簽訂時點都係近 6 年內的產物，卻未跟上多數新執法合作協定的潮流，本文認為這是因為印度、中國、俄羅斯等國不願在管轄權上退讓，以及其不願依據積極禮讓原則對本國事業執法之故。

12. 美國與新加坡

美國與新加坡於 2003 年所簽訂之 FTA（United States – Singapore Free Trade Agreement），簡稱美星 FTA，在第 12 章設有競爭相關規範，章名為「反競爭商

業行為、指定獨占與國營事業」。美星 FTA 第 12.2 條規定，雙方均須採行並維持禁止反競爭商業行為之措施，以促進經濟效率與消費者福祉。雙方均需設立專責機構負責執行前述措施，在執法上不能因為國籍而有所歧視，同時也應保障應有的內國救濟程序。此外也如同美國與他國競爭法雙邊競爭法協定，規定應致力於的資訊交流規定與執法合作，但如何從事執法合作完全沒有說明。此外美星 FTA 訂有諮商的規定，當反本章相關問題影響一方之貿易與投資利益時，可要求進入諮商，但諮商並不能達成任何有拘束性的結果，只是令被提出諮商的國家可以更出於同理心考量其立場。

本文以為美星 FTA 係以處理新加坡國內指定獨占事業與國營事業的反競爭議題為最主要目標。從第 12 章規範可以觀察到，其關於處置反競爭行為之合作規定甚少。此外，國際間既有的雙邊競爭法合作協定與 FTA 競爭章中，均在條文中明確定義所指涉的競爭法在締約雙方各指涉何部法律，然而美星 FTA 完全沒有此規定。又，在指定獨占與國營事業相關的條文，有甚多規範都是針對新加坡（Singapore shall…）而非共同的義務（Each party shall…）。綜上述可見美星 FTA 第 12 章乃針對新加坡而定。

13. 美國與智利

美國與智利之 FTA（United States – Chile Free Trade Agreement）於 2003 年簽訂完成。其競爭專章設置於第 16 章，章名為「競爭政策、指定獨占與國營事業」。其內涵與美星 FTA 第 12 章無殊，且更加簡扼，僅表明關於競爭政策，雙邊必需有通知、諮商、資訊交換等方面之合作。同時亦未對於「競爭法」指涉美國與智利之何部法律加以說明。

立於美智 FTA 之基礎，兩國競爭法主管機關於 2011 年 3 月簽署競爭法合作協定，美方主管機關為司法部與聯邦貿易委員會，智利方的主管機關則是國家經

濟部（Fiscalía Nacional Económica of Chile, FNE），在第 1.2(c)(ii)條關於協定所稱競爭法之範圍，其規定包含限制競爭與不公平競爭。觀察各條文之名稱，美智競爭法合作協定之架構與美墨競爭法合作協定之架構相似，惟美智競爭法合作協定規範內涵較簡略。在機密資訊保護方面，依美智競爭法合作協定第 7 條，主管機關可以拒絕提供法律禁止分享的資訊，以及「不符國家利益」之資訊，後者雖然亦屬主觀判斷，但比起美俄 MoU 和美中 MoU 可以因為「不符機關本身利益」拒絕提供資訊，較令人感覺得到主管機關的合作誠意。

14. 美國與秘魯

美國與秘魯 FTA 在 2006 年簽訂，競爭專章設於第 13 章，而其競爭相關內容亦不逸脫美國智利 FTA，不過因為祕魯經濟發展與法制程度較智利低，故可見到條文要求設立與第 13 章相關之工作小組[74]，由雙方派代表組成，負責促進雙邊溝通與合作，並且對於未來相關事項之發展給予建議，本文以為此規定應有幫助暨監督秘魯落實競爭政策之功用。

15.美國與哥倫比亞

美哥 FTA（The United States－Colombia Trade Promotion Agreement）在 2006 年簽訂，其第 13 章為競爭政策、指定獨占與國營事業章。其宗旨在於執行相關政策以解決影響雙邊貿易與投資的反競爭問題。其並要求締約雙方均必須落實其競爭法，並且確保雙邊國民在相關議題的救濟權利。其規定雙方必須在執法活動上相互合作，而在他方的利益可能受有影響時必須進行通知、諮商，以及進行執法所需的資訊交換，但規範仍然沒有進一步說明合作內容。同時亦未對於競爭法指涉美國與智利之何部法律加以說明。同時亦未對於「競爭法」指涉美國與哥倫比亞之何部法律加以說明。

[74] Peru-United State Trade Promotion Agreement, art. 13.4.

立於美哥 FTA 之基礎，美哥競爭法合作協定於 2014 年 9 月簽訂，美國代表主管機關為司法部與聯邦貿易委員會，哥倫比亞主管機關為工商管理局 Superintendence of Industry and Commerce of Colombia，適用之競爭法範圍包含限制競爭與不公平競爭。美哥競爭法合作協定有執法通知、諮商等規定，以解決管轄的問題，也有技術合作與定期會議的規定以加強哥倫比亞的執法，不過較奇怪的是，相較於其他中南美洲國家與美國所簽訂之競爭法合作協定，美哥競爭法合作協定沒有積極禮讓原則的相關規定（即要求對方採取執法行動的規定），而且美哥競爭法合作協定係相對較新的合作協定，本文推論這表示哥倫比亞不願意為美國利益對本國的反競爭行為執法。

16. 美國與韓國

美韓 FTA（the United States－Korea Free Trade Agreement）在 2012 年 3 月 15 日生效。其競爭專章在第 16 章，章名為「競爭相關事務」（Competition-related Matters），其內容幾乎與美澳 FTA 競爭章相同，同樣有跨境消費者保護，但沒有促進金錢賠償執行的規定。另外美韓 FTA 競爭章也對指定獨占與國營事業訂有相關規範。

17. 台灣與澳洲

我國最早簽訂雙邊競爭法合作協定的對象是澳洲，其後是紐西蘭，而紐澳之間也訂有競爭法合作協定，我國與澳洲、紐西蘭隨後也訂立了三邊的合作協定，由於內容與大同小異，故舉我國與澳洲之協定為例簡介其內容如下[75]。

台澳協定第 2.1 條揭諸協定之目的在於「促進兩委員會的合作及協調，以減少兩委員會間由於法律規範差異以外因素致競爭法及公平交易法發生不同施行

[75] Cooperation and Coordination Arrangement between the Taipei Economic and Cultural Office and the Australian Commerce and Industry Office regarding the Application of the Competition and Fair Trading Laws, http://www.ftc.gov.tw/internet/main/doc/docDetail.aspx?uid=534&docid=1148, last visited on date: 2015/4/14.

結果的可能性。透過持續地資訊交流及在某些領域內的合作關係，將可使彼此的執法更迅速且有效[76]。」其涵蓋範圍及具體的合作內容，要點包括：

有關合作範圍，第 3.1 條規定：「本協議牽涉到兩委員會所有下列的活動，包括執法、裁定、宣導教育、研究、人力資源的發展，以及管理[77]。」

有關資訊或協助之要求，第 3.2 條規定：「當一委員會被要求提供資訊或協助時，除法律禁止或受要求方認為此一協助將損害其重要利益外，該委員會（受要求方）應提供所有資訊及允諾協助[78]。」但依照第 4.1 條：「無論本協議其他條款如何規範，在下列情形下，受要求方均無需向要求方提供所需資訊：─相關法律禁止提供，或有違受要求方司法權上的重大利益；─提供的機密性資訊有被揭露之虞[79]。」

有關資訊交換，協定第 5.1.1 條規定：「兩委員會間資訊共享可獲致以下共同利益：─促使兩委員會更有效地施行競爭法及公平交易法；─避免不必要的重複；─促進調查、研究及宣導教育方面的相互協調；─促進雙方對於與各自競爭法及公平交易法的執行及其相關活動有關的經濟與法律的狀況和理論，有進一步的了解；─維持兩委員會彼此間或各該方企業發展情況的訊息暢通[80]。」第 5.1.2

[76] "2.1 The purpose of this Arrangement is to promote cooperation and coordination between the Agencies and to lessen the possibility of differences between the Agencies in the application of the competition and fair trading laws administrated by the Agencies where these differences are not the result of statutory provisions. The ongoing exchange of information and cooperation in a number of areas will enable each agency to be more efficient and effective."

[77] "3.1 This Arrangement relates to all the activities of the Agencies including enforcement, adjudication by the Agencies, compliance education, research, human resource development, and management."

[78] "3.2 The agency to whom a request for information or assistance is made (the Requested Agency) is to provide all information and grant assistance required unless the Requested Agency considers it is prejudicial to important interests or would be prevented from doing so by law. The agency seeking information or assistance (the Requesting Agency) is to seek such information as it is within its power and functions to do so."

[79] "4.1 Notwithstanding other provisions of this Arrangement the Requested Agency is not required to provide information to the Requesting Agency if disclosure of that information to the Requesting Agency: is prohibited by relevant laws, or is incompatible with the important interests of the jurisdiction of the Requested Agency; would require disclosure of information which has been provided to the Requesting Agency on a confidential basis."

[80] "5.1.1 It is in the common interests of the Agencies to share information that will: facilitate effective application of their competition and fair trading laws administrated by the respective Agencies;

條乃進一步規定：「為強化此共同利益，兩委員會將定期交換及提供與下列有關的資訊：─委員會所作的調查與研究；─演講、研究報告及期刊論文等；─宣導教育的計劃；─相關法規的修訂；─人力資源的發展與管理[81]。」

有關執法及相關活動之通知，第 5.2.1 條規定：「就兩委員會所為的調查而言，當一方的調查、執法或其相關活動將影響另一方的重要利益時，該方委員會應告知他方委員會。就兩委員會以外的其他機關所為的調查而言，當瞭解到一方的調查、執法或其相關活動將影響另一方的重要利益時，該方委員會應告知他方委員會。任一方將對他方司法權內的人民進行詢問時，應告知他方[82]。」

有關執法及相關活動之協助：協定第 5.3.1 條規定：「基於本協定，協助應及於：（一）受要求方檔案中的相關資訊，包括本協議第 4 條以外的機密性資料。（二）在關係人自願的基礎上，替要求方準備證詞，進行正式訪談及獲得資訊及文件。當受要求方因其法律規範無法提供該項協助時，受要求方應適當地提供建議。（三）當兩委員會同意執法活動上的協調將對某案件有助益時，則進行執法活動的協調。在決定一特定執法活動是否應被協調時，雙方應考量因素為：─對資源的影響；─執行上的效果；─聯合行動的效率與效果；─對委員會、經濟或國民的影響。在任何協調的安排中，各委員會應迅速完成負責事項，並應儘可能符合他方的目標[83]。」就本文理解，此所謂執法上的協助是指行政協助，而不及

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avoid unnecessary duplication; facilitate coordinated investigations, research and education; promote a better understanding by each Party of economic and legal conditions and theories relevant to their respective competition and fair trading laws enforcement and related activities; keep each other informed of developments in their respective jurisdictions or companies based in that jurisdiction."

[81] "5.1.2 In furtherance of this common interest the Agencies are to, on a regular basis, exchange and provide information in relation to: investigations by the Agencies and research; speeches, research papers, journal articles, etc.; compliance education programs; amendments to relevant legislation; human resources development and management."

[82] "5.2.1 In respect of investigations by the Agencies, each of the Agencies is to notify the other whenever an investigation, enforcement or related activity of an agency may affect important interests of that other. In respect of investigations by agencies other than the Agencies, each of the Agencies is to notify the other whenever it becomes aware that an investigation, enforcement or related activity of an agency may affect important interests of that other. Each of the Agencies is to, in particular, notify the other when they make enquiries of persons located in the other's jurisdiction."

[83] "5.3.1 The assistance available under this Arrangement includes:(a) providing access to information in the files of the Requested Agency, including confidential files, except if provision of such information would breach Clause 4 of this Arrangement. (b) in respect of parties appearing on a

於司法上的協助。

其他合作事項，包括協定第 7.1 條所規定之人員互訪與交換、第 8.1 條所規定的有關人力開發與訓練、資訊科技（包括直接使用電子郵件系統及非屬共同的資料庫）、宣導教育、立法的相互協助、公文書送達的協助等。以及第 9.1 條所規定之避免衝突的緊急協商等。

我國與澳洲、紐西蘭簽訂雙邊協定後，主管機關之間確有更頻繁的來往。例如透過雙邊的諮商及人員互訪，雙方確實進行相當有用的資訊交換；此種資訊交流，對於公平會幫助甚多，得以獲取最新的執法訊息，諸如以遵法守則（compliance program）協助執法的技巧；對電信、石油、電力等特定產業部門的管制革新方式等訊息。如此對於減少公平會投入不必要的人力，重複從頭進行類似的研究，甚有助益[84]。

拜此協定之賜，我國公平會與澳洲競爭與消費者委員會（Australian Competition and Consumer Commission, ACCC）每年進行「人員交換」。我方每年派遣人員至澳洲執法機關工作一定期間；澳洲每年亦派遣其執法人員至公平會工作一定期間。此對訓練我方人員執法專業，應有莫大幫助。而 ACCC 派來我國的專家，公平會亦提供資源進行相關研究，對 ACCC 而言亦可獲致甚大效益[85]。

在實際執法方面，ACCC 亦曾依照協定規定，要求公平會針對某一我國業者在澳洲所進行的不當交易行為，提供公平會以往對該業者的執法情形，並提供相

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voluntary basis, preparing witness statements, conducting formal interviews and obtaining information and documents on behalf of the Requesting Agency. Where that assistance cannot be provided because of the laws governing the Requested Agency, the Requested Agency is to advise accordingly. (c) coordination of enforcement activities when the Agencies agree that would be beneficial in a particular case. In determining whether a particular enforcement activity should be coordinated the parties are to take account of the following: effect on resources; operational effects; efficiency and effectiveness of any joint action; impact on the Agencies, economies or citizens. In any coordination arrangement each agency is to conduct its activities expeditiously and insofar as possible consistent with the objectives of the other agency."

[84] 羅昌發，同註 53，151。

[85] 羅昌發，同註 53，151。

關資訊，協助 ACCC 在法院進行訴訟程序[86]。

另關於台、澳、紐的三邊協議，其具有一點特殊意義，其為亞太地區第二個三邊競爭法合作協議[87]。台灣因為與澳洲、紐西蘭在地緣上尚屬接近，因此此一競爭法合作協議有可能再吸引鄰近國家加入，實際上台、澳、紐三邊協議亦訂有開放其他國家加入競爭法合作協議之空間，也許有機會成為區域型的競爭法合作協議，或成為日後亞太區域經貿協定中競爭相關規範之範本。

18. 台灣與法國

接著介紹我國與法國之競爭法 MoU，於公平會網站上搜尋到 2014 年底所新簽訂之版本[88]，其內容仍不脫執法合作、諮商、召開會議、機密資訊之交換等[89]。其中值得注意的是，台法競爭法 MoU 不處理不公平競爭（unfair competition）問題，雙邊的合作僅於限制競爭法的部分，觀察台法競爭法 MoU 第 1 條關於競爭法之定義即知：「就臺灣公平交易委員會而言，指公平交易法，除第 20 條至第 22 條及第 24 條之外，以及其任何修正。」簽約當時我國公平法第 20 條為仿冒規範、第 21 條為不實廣告規範、第 22 條為營業誹謗規範、第 23 條與第 23 條之 1 為多層次傳銷之管理、第 24 條是其他欺網或顯失公平行為之規範。前述條文除第 24 條兼有限制競爭與不公平競爭之功能，毫無疑問非限制競爭法之範疇，第 20 條、第 21 條與第 22 條屬不公平競爭法之範疇，而第 23 條與第 23 條之 1 則在締約時已被刪除[90]。相較之下，台紐協定、台澳協定與三邊協定所稱之競爭法，其範疇均包含限制競爭法與不公平競爭法，以我國而言即指整部公平交易法。

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[86] 羅昌發，同註 53，151。

[87] 第一個三邊協議為加拿大、澳洲和紐西蘭所簽訂。

[88] 公平會網站，http://www.ftc.gov.tw/internet/main/doc/docDetail.aspx?uid=534&docid=13869，最後瀏覽日期：2015/4/14。

[89] 公平會網站，http://www.ftc.gov.tw/internet/main/doc/docDetail.aspx?uid=126&docid=13838，最後瀏覽日期：2015/4/14。

[90] 我國公平交易法於 2015 年 2 月 4 日修法，修正幅度超過所有條文之二分之一，因此條號多所變動，此所述之公平法條文條號係台法雙邊締約時之條號。多層次傳銷之規定則在此波修正前已刪除，且業於 2014 年 1 月另立多層次傳銷管理法。

19. 台灣與加拿大

而關於台加競爭法 MoU，其內容大抵與我國簽訂之其他雙邊競爭法協定無殊，可以注意到適用範圍亦不包括不公平競爭法：「競爭法由公平交易委員會職掌者：(a)公平交易法，除第 20 條至第 24 條之外。」同前述，簽約當時的公平法第 20 條至第 24 條多半為不公平競爭及多層次傳銷之規定。與美國、加拿大所簽訂之雙邊競爭法協定相較，執法合作範圍明顯較小，美加協定名稱指涉之「不正當行銷行為法」（Deceptive Marketing Practices）即相當於不公平競爭法。

台加競爭法 MoU 規範較粗略，但是在「可能影響他方競爭法適用權益之執法活動」，明確指出以下幾種情形必須通知他方：（1）與他方競爭主管機關執法活動相關者；（2）除合併或收購外，涉及任何全部或部分在他方競爭主管機關領域內實施，而可能由他方競爭主管機關依所職司執行之競爭法處以罰責或課以其他處分之行為或交易，前開行為或交易不具實質重要者不在此限；（3）合併或收購所涉之一個或多個交易當事人在他方競爭主管機關領域內從事事業活動，或該合併或收購係由依據他方競爭主管機關領域內法律成立之法人組織或團體所控制；（4）涉及他方競爭主管機關領域內之罰責或其他明文命令要求或禁止行為之處分或在該領域內針對其他行為之執法活動；（5）所欲蒐集之資訊位於他方競爭主管機關領域時，無論是否係一方之競爭主管機關官員親自來訪或以其他方式為之，均須取得受通知競爭主管機關同意，惟以電話聯繫他方競爭主管機關領域內非受調查客體，且僅徵求其自願性口頭回覆者不在此限。而關於通知之內容，應包含調查活動本質與相關競爭法規定，且須詳盡至足供受通知競爭主管機關初步評估該活動對其競爭法適用權益之影響[91]。

[91] 台加 MoU 第 3 條。

20. 台灣與匈牙利、台灣與蒙古

台匈競爭法合作協定、台蒙競爭法 MoU，二者內容基本相似，範圍兼含限制競爭法與不公平競爭法，並且有關於通知之規定，不僅規定雙方主管機關在認為對方之重要利益受影響應予通知，進一步更規定受通知之主管機關應考量採取執法行動，將積極禮讓原則納入協定之中。此二個競爭法合作協定為較後期訂定，或許可以歸功為主管機關之間在合作觀念上的進步及共識程度的提升，信任締約他方的執法能力，且也願意對本國事業執法，故才納入積極禮讓原則。

21. 台灣與巴拿馬

台巴 FTA 於 2003 年簽署，其第 15 章為競爭政策、獨占與國營事業之規範。此章可分為兩部分，第一部分致力於競爭法的制定、維持與落實，以確保貿易自由化之利益不因反競爭活動而減損，並促進締約國主管機關間之合作與協調。我國與巴拿馬更進一步簽訂台巴競爭法適用協定，以達此目標。第二部分是涉及指定獨占與國營事業，此乃我國對外各個雙邊經貿協定中，最早涉及指定獨占與國營事業者。

台巴 FTA 之規定並不禁止締約國於其法令許可之情形下，指定或維持獨占或國營事業。在締約國法令允許之情形下，如該締約國有意指定獨占或國營事業，且如此一指定可能影響另一締約國人之利益時，此締約國應：（a）盡可能事先以書面文件通知締約國他方此項指定之事實；並（b）於指定獨占之同時，致力於將獨占之營運條件納入，俾將因該指定獨占所造成本協定利益遭剝奪或減損降至最低甚或消除[92]。

台巴 FTA 進一步規範指定獨占事業與國營事業應遵循之原則。如締約國之法律允許其指定或維持獨占或國營事業，則其應確保其所指定或維持之獨占或國

[92] 中華民國與巴拿馬共和國自由貿易協定，第 15.03.2 條。

營事業遵守下列事項：（a）如締約國就獨占之貨品或服務，對獨占或國營事業賦予諸如核發進出口簽証、核准商業交易、採行配額、收取費用等之管制、管理或其他政府權限，則該獨占或國營事業之行為，應符合締約國在本協定中之義務；（b）就獨占貨品或服務在相關市場之購買或銷售，對締約國他方投資者之投資，以及商品及服務供應者，應給予不歧視待遇；且（c）不得利用其獨占地位，直接或間接採行反競爭措施，而不利於締約國他方投資者之投資[93]。

基於台巴 FTA 競爭專章之基礎，台巴競爭法適用協定於 2013 年 12 月 4 日簽署，其範圍兼含限制競爭法與不公平競爭法，並且訂有關於通知之規定，將積極禮讓原則納入協定之中，其第 5 條規定可以通知他方可能影響我方利益之情，以及我方可能影響他方利益之情，他方則必須考慮是否對其領域內事業採取執法行動。惟台巴 FTA 的競爭章有包含國營事業之議題，台巴競爭法適用協定則無。

22. 台灣與紐西蘭

台灣與紐西蘭的競爭法合作協定，內容與台澳協定相仿，請參考前文所述。而台紐 FTA 於 2013 年正式生效，其競爭專章訂於第 8 章，競爭章之設置目的在於，提升貿易與投資、經濟效率及消費者福利，期運用競爭政策以促進開放且競爭的市場[94]。

為了更進一步提升雙邊貿易利益，台紐 FTA 重視競爭之促進。其規定締約雙方支持 APEC 之加強競爭和管制革新原則，同意促進競爭，並尋求於制定貿易和競爭政策及實施內國法時適當考慮對競爭之影響。因此，締約雙方將：（a）提供政策、法律和法規及其實施之透明性；（b）運用競爭政策於經濟活動，包括公共和私人商業活動，其運用方式在各經濟實體處於同類狀況時不會有更歧視的情形；（c）維持政府對促進競爭和提升經濟效率之高度承諾，包括透過管制

[93] 中華民國與巴拿馬共和國自由貿易協定，第 15.03.3 條。
[94] 臺灣、澎湖、金門、馬祖個別關稅領域與紐西蘭經濟合作協定，第 1 條。

影響的評估或其他適當的方法；（d）對政策與法規之發展及其執行，設定行政部門對於推動並確認競爭與效率面向之明確執掌；（e）促進在各自領域的貿易與競爭政策之一致及更效的實施；及（f）鼓勵貿易和競爭事務官員間的適當合作[95]。

台紐 FTA 第 8 章第 6 條標題為消費者保護，觀察其內容可知，其目的主要是避免欺罔行為影響消費者利益，而與我國公平法所切入的角度不同。公平法是藉由禁止使用不正當的商業競爭手段影響交易秩序，間接保護消費者，故保護消費者之用意並不那麼直接明顯。本條更舉例說明「不實及欺罔行為」之意義，其係指造成消費者實質損害或如未經阻止將有立即造成該等損害之虞的商業欺詐行為，例如：（a）對商品或服務之材質、價格、用途、數量或任何其他特性作不實陳述或虛假宣稱；或（b）廣告商品或服務之供給但無意提供；或（c）於消費者付款後，未能交付商品或提供服務；或（d）未獲授權下從消費者之金融、電話或其他帳戶擅自扣款。同時，本條也指出，隨著商業活動有跨國境的情形，損害消費者利益的不實與欺罔行為也跨越國境，可能藉網路等媒體發布不實的廣告。於此情形，締約雙方之消費者保護機構應合作處理。

台紐 FTA 之競爭專章中多數規範和雙邊競爭法協定相同，主要不同點有

[95] 茲簡述其他內容：台紐 FTA 要求制定並維持競爭法，且須設專責行政部門，所稱之競爭法，在中華台北應指公平交易法，而在紐西蘭則指 1986 年紐西蘭商業法。與雙邊的競爭法合作協定不同之處在於，台紐 FTA 競爭章容許「為達其他合法政策目標」設立豁免與除外之規定。並且締約雙方應致力確認和檢視該等豁免及除外情形，以確保每一豁免及除外之範圍不會超過為達合法政策目標所需，且以透明化方式施行，將對公平和自由競爭的扭曲降到最低。本文以為，在各種經貿協定下，各國就協定內容以外之政策仍需保有自主權，故此除外規定之設置應屬合理，惟為避免濫用，仍以「合法的政策目標」及「不超過達成目標之所需」為限。至於何謂合法政策目標，以及如何衡量限制競爭之情形為達成政策目標所需，有待日後實務運作予以闡明。台紐 FTA 競爭章第 5 條規定，須確保雙邊之「私人訴訟權利」，其係指個人之營業或財產在一締約方因競爭法違法行為受到損害而獨立向法院或獨立審判機構請求救濟(包括禁止令、金錢或其他救濟)之權利。私人訴訟權利為締約一方競爭法政府執法的重要補充，各締約方應採取或維持提供私人訴訟權利的法律。締約一方應確保根據第 2 項提供予另一締約方人民之權利，其條件不低於提供予己方人民之條件。又為避免因執法行動產生之衝突，亦設有諮商之規定。締約一方要求時，締約雙方應根據本章之宗旨對不利於雙方貿易及投資之特定反競爭行為進行諮商。諮商得於以下情形時進行：(a)認為執法活動對另一締約方之重要利益產生實質影響；(b)與對競爭之限制更關，且會對締約他方產生直接和實質之影響；或（c）關切主要發生在締約他方之反競爭行為。

四，其一是有所謂的除外與豁免規定；其二是特別重視跨境消費者保護，並明確指出損及消費者利益之欺罔或不實行為；其三則是未訂有通知、要求執行競爭法等規定，此點與台澳雙邊競爭法協定、台紐雙邊競爭法協定及台澳紐三邊協定相同，均僅體現消極禮讓原則，透過諮商程序避免執行競爭法的衝突，而欠缺積極禮讓；其四是特別強調私人透過訴訟的救濟途徑。另外，台紐 FTA 中並沒有關於主管機關執法合作的規定，推測係先前已經訂有雙邊競爭法合作協定之故。

23. 台灣與新加坡

台星 FTA 於 2013 年生效，其競爭專章旨在透過增進公平競爭和消弭反競爭行為，促成 FTA 目標之實現。根據台星 FTA 第 10.1 條，反競爭行為係指對競爭有負面影響的商業行為或交易。例如：市場力濫用；反競爭的合併和收購；及競爭者間限制競爭之水平協議。故究其指涉之競爭法範圍，應不包含不公平競爭法，限於限制競爭法

台星 FTA 之競爭專章訂有若干執法合作之要求。其稱締約雙方將尋求提升其負責執行一般性競爭法之競爭主管機關間，關於涉及本章議題之瞭解、溝通和合作。惟條文並未具體說明如何合作，或許可以期待如同台巴 FTA 競爭章之模式，日後再訂定具體執法合作之雙邊協定。

台星 FTA 競爭章訂有通知規定，惟僅係單純通知執法行動，並未包含要求採取執法行動之積極禮讓內涵。其規定如有下列情形，各締約方應通知締約他方有關反競爭行為的執法活動：（a）如其認為該執法活動會對締約他方貿易利益造成實質影響；（b）與會在締約他方領域內造成直接且實質影響之競爭限制有關；（c）與主要在締約他方領域內發生之反競爭行為有關。通知應於程序之初進行，惟不得違反締約雙方競爭法規定且不影響任何已進行的調查[96]。

[96] 新加坡與臺灣、澎湖、金門及馬祖個別關稅領域經濟夥伴協定，第 10.3 條。

台星 FTA 訂有透明化及資訊請求之規定。在締約他方要求下，各締約方應公開有關執行禁止反競爭商業行為措施之資訊。於受請求時，各締約方應向締約他方公開關於其競爭法豁免規定之資訊。該請求應具體指明特定的貨品及市場，並說明豁免規定是否限制締約雙方間的貿易和投資。又締約雙方依據本章條文進行諮商所交換的資訊和文件應當保密，除遵守其內國法律規定外，如無提供資訊或文件之締約方書面同意，締約方不得向他人提供或揭露該等資訊或文件。為遵守締約方內國法律要求而揭露該等資訊或文件者，該締約方於揭露前應通知締約他方。締約雙方得同意公布其認為非屬機密之資訊[97]。

雖台星 FTA 欠缺處理競爭法管轄問題之積極禮讓原則，但至少諮商之規定尚有助避免競爭法執行上的衝突。其第 10.5 條規定：「為增進締約雙方間的瞭解，或處理因本章規定而生之具體事宜，締約方應於締約他方請求時，就締約他方之陳述進行諮商。締約方如認有相關時應於請求中指出前開事宜如何影響締約雙方間的貿易和投資。締約一方應對締約他方之顧慮事項給予充分之考慮。」

台星 FTA 競爭章也有關於指定獨占及公營事業之規範，惟內容較為簡扼。台星 FTA 不禁止締約方依據其各自法律所指定或維持之公營或私人獨占事業。不過對於公營事業或被授予特別或排他權利的事業，締約雙方應確保在本協定生效後（已於 103 年 4 月 19 生效），不採行或維持會扭曲締約雙方間商品和服務貿易之措施，該等措施違反本協定或締約雙方之利益。如競爭法未於法律上或事實上阻礙該等事業之任務，締約雙方應確保該等事業受競爭法之規範[98]。

[97] 新加坡與臺灣、澎湖、金門及馬祖個別關稅領域經濟夥伴協定，第 10.4 條
[98] 新加坡與臺灣、澎湖、金門及馬祖個別關稅領域經濟夥伴協定，第 10.6 條

表 3 兩國間的競爭規範檢視－以美國與我國為例

內容 國家	通知	資訊交換	消極禮讓	諮商	舉行會議	司法協助	衝突避免	積極禮讓	國營事業	消費者保護	不公平競爭
美歐	○	○	○	○	X	○	○	○	X	X	○
美日	○	○	○	○	X	○	○	○	X	X	○
美加	○	○	○	○	○	○	○	○	○	X	○
美巴	○	○	○	○	○	X	○	○	X	X	○
美以	○	○	○	○	○	X	○	○	X	X	○
美德	○	○	X	○	X	X	X	X	X	X	○
美澳	○	○	○	○	X	○	○	○	○	○	○
美韓	○	○	X	○	X	X	X	X	○	○	○
美哥	○	○	○	○	○	X	○	X	○	X	○
美星	○	○	X	○	X	X	X	X	○	X	X
美墨	○	○	○	○	○	X	○	○	○	X	○
美智	○	○	○	○	○	X	○	○	○	X	○
美秘	○	○	○	○	X	X	X	X	○	X	X
美中	○	○	X	X	○	X	X	X	X	X	X
美俄	○	○	X	X	○	X	X	X	X	X	○
美印	○	○	X	X	○	X	X	X	X	X	X
台澳	○	○	○	○	X	X	○	X	X	X	○
台法	○	○	X	○	○	X	X	X	X	X	X
台加	○	○	○	X	○	X	○	X	X	X	X
台巴	○	○	X	○	X	X	X	○	○	X	○
台紐	○	○	○	○	X	X	○	X	X	○	○
台星	○	○	X	○	X	X	○	X	○	X	X
台匈	○	○	X	○	X	X	○	○	X	X	○
台蒙	○	○	○	○	X	X	X	○	X	X	○

資料來源：作者自行整理，參公平會網站與美國司法部網站。

註：每一列均包含該二國家之間的所有競爭相關規範，包含 FTA 和競爭法合作協定。

（三）競爭法合作協定與 FTAs 競爭專章－合作內容之演進

除了以國家別的方式逐一檢視各個雙邊競爭法執法合作協定或FTAs的競爭專章，本文亦介紹執法合作內容之演進。

表 4 第一代協定的主要內容

協定內容	描述
通知	有限的通知規定。要求競爭法主管機關在開啟競爭法程序前，倘該程序將影響對方之重大利益，應通知他方。
資訊交換	有限的資訊交換的規定。要求競爭法主管機關在他方基於執行競爭法之考量而提出請求時，提供某些資訊，仍受制於機密資訊保護的問題。
合作	消極的合作規定。要求兩方的競爭法主管機關在他方提出某些類型的合作要求時，必需有所回應。
諮商	為了避免管轄的衝突，要求雙方競爭法主管機關在進入反競爭調查階段及執法階段時，均必須與他方進行諮商。

資料來源：作者自行整理。

表 4 是第一代的雙邊競爭法合作協定的主要內容，由於規範內容較少，合作程度也較低，也被稱之為消極合作的協定，亦即當他方有所請求時，才有執法相關的資訊交換和合作，而合作內容亦不明確。第一代雙邊競爭法合作協定大約是指 OECD 在 1967 年公布「關於影響貿易的限制競爭行為建議」之後所簽訂的協定。一般認為第一代競爭法執法合作協定之功用主要在處理各國主管機關向域外行為單邊適用法律的問題，舉例來說，前述美國與德國於 1976 年簽訂的執法合作協定即屬於第一代協定。

表 5 第二代協定的主要內容

協定內容	描述
通知	較嚴格的通知要求。包含第一代協定的通知規定。一方在表明其重大利益受影響之情節後，可能獲得他方授意執行其競爭法。
資訊交換	較嚴格的資訊交換要求。與執行競爭法有關之一般性事務，倘關乎一方之利益，即應提供之。所提供之資訊並應包含涉及私部門的資訊，惟仍以不違反內國關於事業機密保護之規定者為限。
合作	充分的合作義務。在法規允許範圍內及可取得的資源範圍內，提供最大程度的協助。
諮商	要求雙邊競爭法主管機關之人員定期聚會。並且對於雙邊主管機關都涉入管轄的反競爭行為，進行執法上的協調。
消極禮讓	充分的消極禮讓義務。要求雙邊競爭法主管機關在執行競爭法時考量他方之重要利益。當一方執法影響他方利益時，緩和競爭法主管機關過度管制（over-regulation）的情形。
積極禮讓	有限的積極禮讓義務。當認為他方領域內的反競爭行為對己方造成負面影響時，可以要求他方競爭法主管機關開啟適當的執法程序。積極禮讓有助於補強管制不足（under-regulation）的問題。

資料來源：作者自行整理。

隨著競爭法制之開展，國與國之間對於彼此之法規完備程度與執法效率也越來越有信心，因此出現提高執法合作密度的趨勢，此即第二代協定發展的基礎[99]。前文述及美歐之競爭法合作協定、美以競爭法合作協定、美日的競爭法合作協定，及美巴的競爭法合作協定，均屬第二代協定[100]。而我國與巴拿馬、蒙古、匈牙利之競爭法合作協定，兼有消極禮讓與積極禮讓之相關規定，也可劃於第二代協定。至於台澳競爭法協定、台紐競爭法協定，雖然在消極禮讓、諮商與資訊交換之規範都相對詳盡，但因為欠缺積極禮讓原則，應處在第一代與第二代協定之間。至於台法競爭法 MoU 與台加競爭法 MoU 只有消極禮讓原則、欠缺積極禮讓原則。

[99] 第二代協定始於 1988 年，大約是美國與歐盟開始洽談競爭法的執法合作之際。

[100] 美國與澳洲、加拿大，在 1982 年亦分別訂有第一代協定，惟目前已被第三代協定取代。美國與德國之間沒有新簽訂的競爭法相關協定。

美國在 1970 年代開始，其司法部與許多國家簽訂司法互助條約（Mutual Legal Assistance Treaties, MLATs）[101]，此類條約促使美國與他國得以互相協助跨境的刑事程序。而這些 MLATs 的內容應用在國際反托拉斯，即有助調查資訊的分享、跨國取得追訴犯罪之證據等。在 1990 年時，美國和加拿大決定擴張其所簽訂的 MLATs 至競爭法的範疇，用以打擊跨國的卡特爾行為，這項合作使得加拿大在接下來的 10 年內透過對違反競爭法之事業罰款獲得 1 億美金之收入[102]。美國與加拿大 MLATs 在競爭法領域的合作經驗，鼓勵美國更進一步在 1994 年通過國際反托拉斯執法協助法（International Antitrust Enforcement Assistance Act, IAEA Act），其允許美國競爭法主管機關對與其簽訂執法合作協定者提供執法所需之協助，在個案上甚至可以提供私部門之資料。IAEA Act 要求美國政府必須在競爭法執法合作協定中納入積極禮讓原則，在此波趨勢後所簽訂之執法合作協定，亦有稱之為第三代協定。更簡要地定義第三代協定，即立於第二代協定之基礎上，更落實積極禮讓原則，並且建立 MLATs 之機制。美國與澳洲 1999 年的執法合作協定及美國與歐盟 1998 年版本的執法合作協定皆屬第三代協定[103]。

（四）我國雙邊競爭法合作協定及 FTAs 競爭專章之不足

關於我國之雙邊競爭規範，本文認為有兩點需要改進，其一是仍有多個協定未納入積極禮讓原則，本文推測主管機關之心態，寧可他國競爭法主管機關對本國事業採取執法行動，而不願基於他國利益對本國事業究責。舉例說明，我國與 A 國簽訂未引入積極禮讓的雙邊競爭法協定，如果 A 國事業之反競爭行為效果

[101] 根據美國國際毒品與執法事務局網站，美國現與日本、韓國、英國、德國、法國等 60 個國家皆簽有 MLATs，與中國、我國則簽有 Mutual Legal Assistance Agreements (MLAAs)，http://www.state.gov/j/inl/rls/nrcrpt/2012/vol2/184110.htm，最後瀏覽日期：2015/3/25。

[102] Martyn Taylor, "Have Existing Cross-border Initiatives Proved Sufficient?" *International Competition Law: A New Dimension for WTO*, 114 (2005).

[103] 美韓 FTA 競爭專章與美星 FTA 競爭專章，其焦點均在於國營事業的競爭問題，雖有諮商、交換資訊、透明化等規定，但沒有積極禮讓的規定在其中，在美韓與美星之間未另簽訂競爭法相關雙邊協定的情形下，應可認為其合作程度屬於第二代協定。另外，亦有認為，於美國，第二代協定指的是根據 IAEA Act 授權所簽訂的協定，See American Bar Association, *International Antitrust Cooperation Handbook*, 47 (2008).

是發生於我國，而未對 A 國造成影響，則我國可以請求協助追查案情，但不能要求 A 國對本國事業執法。我國與澳洲及紐西蘭的雙邊、三邊協定，以及台加、台法 MoUs、台星 FTA 等均欠缺積極禮讓的規範。

第二點待改進之處是有些競爭法協定適用範圍僅於限制競爭法領域而不及於不公平競爭法。譬如台法競爭法 MoU、台加競爭法 MoU 皆不處理不公平競爭問題。限制競爭法貴在確保「競爭之存在」，創造並維持事業自由進出市場之環境；至於不公平競爭法則貴在確保「競爭之品質」，市場上的競爭必須是正常且合理的競爭，不使用不公平、違背商業倫理之手段，方能發揮競爭的效果，而若能在限制競爭與不公平競爭領域都進行執法合作，相信更能達成競爭法雙邊協定締約時的目標。再者，以我國與加拿大而言，皆屬在一部法律同時處理限制競爭與不公平競爭的立法例，我國公平法兼處理限制競爭與不公平競爭問題，而加拿大的競爭法亦同，因此本文期待我國與加拿大的競爭法主管機關可以把合作範圍更擴大到不公平競爭的範疇。

我國目前與其他國家簽訂的雙邊協定及包含競爭專章之 FTAs 雖不多。但在國際競爭主管機關而言，仍具有指標意義。蓋絕大多數的競爭法合作協定，均係存在於工業先進國家（或地區）之間。我國在某些領域（如參與 WTO）雖被歸類為已開發國家，然實際情形，則甚多指標仍與已開發國家有某程度差距[104]；若由此觀點而言，我國與其他國家簽訂競爭法合作協定，應屬開發中國家的首例。正式的雙邊協定對於建立正式而定期的諮商與協助管道，以及對公平會開啟國際視窗，扮演極為重要的功能。公平會應持續推動與他國競爭法主管機關簽訂合作協定[105]。

惟鑒於我國在國際政治上的主權地位較為特殊，故我國與其他國家簽訂雙邊協定的工作，推動較為困難，亦可預見。而依照以往經驗，在未簽訂合作協定的

[104] 羅昌發，同註 53，152。
[105] 羅昌發，同註 53，152。

情形下，顯有不便。例如前述因無雙邊協定，導致我國無法協助其他國家在我國進行反托拉斯行為調查的情形，此非雙方利益所在[106]。又例如我國對於在其他國家發現的國際卡特爾組織，欲透過雙邊管道獲取資訊，以確定該組織究竟是否在我國亦有相關的卡特爾活動，或對我國市場是否造成影響，然該國以其法令上不允許對我國提供相關資訊，拒絕我國的請求，此對打擊國際卡特爾，亦屬一種挫敗[107]。

（五）小結

比起多邊條約，雙邊條約的推動容易許多，也因此簽訂競爭法執法合作之雙邊協定、MoU，以及在雙邊 FTAs 中納入競爭規範，為目前常見處理跨國競爭議題的方式。從前揭雙邊規範中，吾人可以歸納出「通知」、「提供協助」、「交換資訊」、「諮商」、「避免衝突」、「機密保護」、「跨境消費者保護」等內涵。關於其中「通知」的規定，有些只是單純通知締約他方其執法活動，有些則是體現積極禮讓原則，具體指出在他締約國發生的反競爭行為，及為何影響其重要利益，被通知國進而必須考量是否執行其競爭法，並將執法與否決定回報給通知方，倘決定執法，則必須考量通知方的重要利益。而「諮商」、「避免衝突」等規定則是展現消極禮讓原則，要求考量締約當事國之利益與其執法狀況，以避免發生競爭法本身之外的衝突。

至於消費者保護是否應納入雙邊競爭規範中，本文未持特定立場，不過其確實是一種選項。從我國法體例上來說，消費者保護法似民法的特別法，而與競爭法無直接相關，不過從市場的角度來看，又可為不同的理解：市場由兩方面構成，即供給方與需求方，簡單地把事業歸為供給方，而消費者歸為需求方，如此限制競爭法與不公平競爭法主要功用就是在於維持供給方之秩序，而消費者保護之規

[106] 羅昌發，同註 53，152。
[107] 羅昌發，同註 53，152。

範便是在保護需求方之利益[108]。又，對市場經濟造成威脅的市場失靈可分為兩種，一種是「Occur in the market」，即在市場上發生、圍繞在消費者周遭的市場失靈，造成這類市場失靈的原因可能是競爭條件被事業的限制競爭行為所影響，譬如事業結合或事業從事價格壟斷。另一類的市場失靈則是「Occur inside-the-head」即發生在消費者的腦中，造成此種市場失靈的原因是事業隱匿資訊或從事欺詐的商業行為。綜上，競爭法旨在保護市場之健全，故將保護消費者的規範納入廣義的競爭法中，即能兼保護市場上的供給與需求，維持市場機制[109]。

在跨國競爭法案件的執法活動上，從基於效果主義進行內國法的域外適用，演進到考量禮讓原則以及國家利益、執法效率等所謂的管轄合理原則。現今在雙邊競爭法執法合作上，常強調禮讓原則，然而不論是積極禮讓原則或消極禮讓原則，實則皆不屬於限縮管轄權的法律原則。禮讓原則本身不課予強制性義務，卻也不是單純基於禮貌或善意。禮讓原則是融合眾多法律原則的綜合體，是以，吾人在前述雙邊、三邊規範中，較少直接見到禮讓（comity）等字眼，而是將其內涵展現在要求締約國之具體作為上。禮讓原則可以包含利益衡平（interest balancing）、國家行為原則（the act of state doctrine）、對國外判決的承認與執行，甚至是不便利法庭原則（*forum non conveniens*）、公共秩序（*ordre public*）等等[110]，其內涵相當廣泛，因此本文以為，禮讓原則實際上讓締約當事國可以更有彈性地決定是否執行競爭法，以及如何有效率地執行，如此當有助於達到兩國共同的競爭政策目標。

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[108] Neil W. Averitt, "Protecting Consumer Choice: Competition and Consumer Protection Law Together," in *More Common Ground for International Competition Law*, 39 (2011).

[109] 保護消費者的手段可採取市場基礎法（market-based approaches），透過行政機關執法，禁止事業從事影響競爭條件之不公平競爭，創造良好交易環境；亦有藉由契約法或其他特別法使事業就自身之商業行為對消費者負私法上的責任。前者乃在交易之前，創造交易友善環境；後者則在交易之後，確保消費者權益得以維護。以我國公平法為例，對消費者權益之保護，乃採取市場基礎法。

[110] Chris Noonan, "The proper scope of Transnational Competition Law," in *The Emerging Principles of International Competition Law*, 372-373 (2008).

（六）雙邊解決途徑之不足

雖然雙邊的競爭法合作協定與 FTA 之競爭章，乃是欠缺多邊規範的現狀下，能夠建立執法合作基礎的有效方式，然而雙邊之執法合作於解決國際反競爭問題上，仍有略嫌不足之處，歸納如下。

1. 結合管制的雙邊合作尚待加強

本文認為未來雙邊的競爭法規範在結合管制的領域還有進步的空間。國際間興起的跨國事業越來越多，為達資源的有效配置，事業的供應鏈分布遍及全球，職是之故，跨國事業如欲進行結合，勢必會影響眾多國家於該相關市場之結構。姑且不論申報作業之繁複，一個事業進行結合可能要向數十甚至數百個國家的競爭法主管機關進行申報，更難解的問題在於，倘若部分國家決定不禁止結合，部分國家決定禁止結合，則該事業應如何舉措。由於各國市場狀況各有不同，要求各國競爭法主管機關就結合審查之結果做出一致之決定，將難以期待，不過本文認為此番努力至少應在雙邊的競爭法合作中開始嘗試。或許主管機關之間原則上不禁止事業結合，而共同以附負擔的方式（即結合矯正措施）來確保事業不會濫用結合後的市場力量，係一較可能達成的方式。

此外，在結合審查實務上，我國制度有特別之處。由於我國結合審查時效較之各國規定而言非常緊縮，原公平法第 10 條規定僅 30 天審查期限，倘案件複雜則可再延長 30 日[111]。正因如此，在跨國事業進行結合申報時，我國公平會可望成為事業最早遞交申請文件的主管機關之一，倘若公平會有能力提供他國作成決

[111] 2015 年 2 月 4 日公平法剛通過修正，其第 11 條第 5 項將延長時限改為 60 天，亦即最多僅 90 天審查期限，惟與各國相比仍然非常短，過去實務上如果時間不夠，只能用要求補正程式的手段來拖延。經查中國為 30 個工作天，可再延長 90 至 150 個工作天；歐盟為 25 或 35 個工作天，可再延長 90 至 125 個工作天；日本第一階段為 30 天，如需補正程式則第二階段從補正後起再延長 90 天；美國第一階段為 15 天或 30 天，第二階段則未有明確期限，規定為達成美國主管機關實質要求後再起算 10 天或 30 天，實務上第二階段最多曾達到 6 個月；德國第一階段 1 個月，第二階段可延長 3 個月；新加坡為第一階段 30 天，可再延長 120 天；西班牙第一階段為 1 個月，可再延長審理 7 個月；印度為第一階段 30 天，可再延長 180 天審查期限。

定之論理，則在國際間競爭法合作的涉入程度將大大提升，也會提高我國在國際上的能見度。相對的，倘若公平會沒有能力在短時間完成結合審查，而又面臨制度上審查時效壓力時，便有對其他國家競爭法主管機關尋求協助之需求，而尋求協助之基礎，即建立在更多的執法合作平台、管道之上。

2. 私部門的機密資訊問題

關於執法合作上的資訊交換，由於涉及事業之機密與產業機密，前開雙邊規範雖鼓勵競爭法主管機關之間提供執法所需資料，但仍受限於國內相關資訊保護之規範，可以提供的資料相當有限。根據 OECD 所作的調查資料顯示，不同國家對於競爭法案件所涉及的機密資訊應如何與其他國家進行交換有著相當不同的規範，有些國家需要有相關業者所出具的拋棄權利聲明（Confidentiality Waiver）、有些國家則認為需要有雙邊對等的資訊保密措施才能交換、也有國家則是簽訂雙邊或多邊合作協議時才能交換。至於如何提高事業簽署拋棄權利聲明之誘因，或可利用寬恕政策要求涉案事業配合執法之機會。

先前我國曾審理光碟機卡特爾案件，為我國首次適用寬恕政策之競爭法案件，公平會於該案件調查過程中，首次取得業者自願提供之拋棄權利聲明，進而能與加拿大及歐盟等競爭法主管機關就該案舉行電話會議，進行案件內容的討論與交流。此外，由於不同國家對於何謂機密資訊的定義也有所不同，因此目前在國際合作實務操作上，多是先以一些非正式的管道與方式進行[112]。以我國而言，與歐盟、美國等主要貿易對手國尚未簽訂機密資訊如何交換的協定，因此交換資訊僅能透過電話會議，並且不能作成紀錄，也不能提供調查案件過程所得之證據。

[112] 王性淵，「OECD-韓國政策中心『10 週年紀念』暨『跨境競爭案件國際合作研討會』出國報告」，公務出國報告，9-10（2014）。

3. FTAs 的競爭專章 v. 競爭法合作協定

本節最末提出「FTAs 的競爭專章」與「競爭法協定」相對照之下發現的問題。在執法合作上，FTA 的競爭專章規範較不足，譬如雖有通知的規定，但其僅係單純的通知，沒有進一步授權進行通知的一方執法的規定，也沒有依據積極禮讓原則，請求執行競爭法的規定。

在競爭法合作協定的部分，其雖然有較具體的執法合作規定，然而在國營事業與指定獨占事業的競爭問題卻不若 FTAs 規範詳細。可能原因在於 FTAs 之談判主要為經貿部門，而非競爭部門，因此如果一國國營事業與指定獨占事業涉及之部門眾多，便容易受到談判對手之關切，要求解除相關管制並且維持私部門參與競爭之公平性。

本文以為，在雙邊 FTAs 中納入競爭議題，為一良好之發展趨勢，吾人從中看到國營事業與跨境消費者保護等議題逐漸於 FTAs 架構中浮現，可見 FTAs 在競爭政策之發展有相當貢獻。惟其內容倘若可以綜合競爭法合作協定中發展出來的各種合作機制，譬如消極禮讓與積極禮讓等原則，將更臻完善。

第二節、複邊或區域的競爭規範

就國際反競爭問題之處理，本文已檢討過單邊解決途徑、雙邊解決途徑，以下將再針對複邊或區域經貿協定中的競爭規範加以闡述，分析其對於解決國際反競爭問題有何助益。

（一） APEC

從 1993 年到 1995 年間，APEC 的名人小組會議（Eminent Persons Group, EPG）開始提出 APEC 區域的競爭法與競爭政策合作架構。1995 年 EPG 提出願

景，即透過大阪行動議程（Osaka Action Agenda）[113]，促使 APEC 成員國推展其競爭政策與競爭法。1996 年，APEC 針對個別成員國與集體成員國在競爭政策上的計畫，更具體的提出馬尼拉行動計畫（Manila Action Plan for APEC）[114]。3 年後在紐西蘭奧克蘭，APEC 通過競爭政策的共通原則綱要（APEC Competition Principles），從此競爭相關議題在 APEC 逐漸具有重要性。

APEC 在競爭議題之努力不在於規範調和，而是希望各國競爭政策盡量具有一致性（policy convergence）。為達此目標，APEC 在競爭議題立有四項重要的核心原則，分別是不歧視（non-discrimination）、全面性（comprehensiveness）、透明化（transparency）、問責機制（accountability）。此四項核心原則的達成，則有賴 APEC 訂定的 10 個最佳執行程序（best efforts implementation procedures），其重點如下。首先，必須透過競爭政策來保護競爭的過程（competitive process），並藉以打擊反競爭行為；其次，為了培養適用競爭政策之能力與信心，必須設置相關主管機關，以建立專業，並給予充足的資源；為確保競爭主管機關可以充分獲得所需資源，APEC 成員間需發展合作之機制[115]。

綜上述，APEC 在過去十餘年，其作為一個與競爭議題相關的複邊組織，主要的貢獻是在於促使更廣泛、更深入的雙邊合作，以及整合各國的競爭政策。針對打擊跨境的反競爭行為，本文認為 APEC 作為各主管機關之間溝通平台，有其貢獻。然 APEC 所提出競爭相關之建議，多係競爭政策上的整合，較少關於競爭法執法合作。

（二） NAFTA

NAFTA 全稱為北美自由貿易協定（North American Free Trade Agreement），締約國為美國、加拿大與墨西哥，其性質屬於區域型的自由貿易協定，而非對外

[113] APEC, “The Osaka Action Agenda: APEC Leaders’ Declaration,” 15-16 (1995).
[114] APEC, “The Manila Action Plan: APEC Leaders’ Declaration,” Volume III, B.8 (1996).
[115] *Supra* note 102, 123-125.

貿易政策一致的共同市場。NAFTA 的競爭規範訂於協定之第 15 章，所處理的競爭議題有三，分別是競爭政策、獨占與國營事業。

於競爭政策方面，NAFTA 要求締約國採取競爭政策以打擊反競爭的商業活動，並應時常檢討其所採取的競爭政策是否有效率。NAFTA 並要求締約國在競爭法執行上互相合作協調，包括相互的司法協助、通知、諮商以及關於執行競爭法和競爭政策的資訊交換[116]。

在獨占方面，NAFTA 並不禁止締約國境內有獨占事業，但要求締約國必須對於獨占力的濫用加以管制。此獨占兼指私部門的獨占以及政府指定或法律明定的獨占地位[117]。締約國並應確保獨占事業：依據經濟理性從事市場活動；就其具有獨占力之商品或服務之交易或投資，於締約國間不會有差別待遇行為；不利用其獨占力及其從屬公司從事反競爭行為，包括於其產品或服務上使用歧視性條款、交叉補貼、掠奪性行為等[118]。締約國並應保證領域內的獨占事業不會影響其在 NFTA 下應盡的義務。此外，倘若於締約國境內形成的獨占地位有影響他國國民之利益時，應給予書面之通知。

在國營事業方面，NAFTA 不禁止締約國境內的國營事業形成。而同樣地，必須確保國營事業的營運不致影響 NAFTA 下的義務，此外締約國必須確保國營事業不會對於來自其他締約國的投資人造成差別待遇[119]。NAFTA 第 20 章設有爭端解決程序，按 NAFTA 規定，除了競爭政策部分，獨占、國營事業的爭端可以尋求 NAFTA 爭端解決。

綜合上述，本文發現 NAFTA 訂定競爭規範，實屬締約國共商競爭政策以保護經貿利益之作法，對於主管機關之間之執法合作較少直接幫助。因此在打擊國

116 NAFTA, art. 1501.
117 NAFTA, art. 1502.
118 *Id.*
119 NAFTA, art. 1503.

際間的反競爭行為上，NAFTA 的貢獻應是指出主管機關如何處理獨占事業與國營事業在會員國之間的反競爭議題，不過在國營事業是否與私人企業公平競爭的議題上，NAFTA 其實並沒有把關得很嚴格（相較於歐盟 EEC 條約第 90 條而言要弱得多）[120]，NAFTA 成員仍有權設立國營事業，只要該國營事業的獨占狀態不影響到 NAFTA 義務之履行，以及其設立並非作保護本國產業之用即可。

事實上，NAFTA 的競爭專章與其他章節不同，其內容多是沿襲先前美國和加拿大進行自由貿易協定（CUSFTA）談判時所擬的競爭相關規範。在 CUSFTA 的談判過程中，加拿大試圖藉由引入雙邊的競爭法規範，緩和美國對加拿大課徵平衡稅與反傾銷稅，不過徒勞無功[121]，在 NAFTA 的談判中加拿大也未達到目標。故在 NAFTA 的競爭專章，吾人未見較新穎的雙邊競爭法實體規範。

（三） 歐盟

在競爭法制的推動與落實，有些 FTAs 只要求締約國盡力而為（best endeavor），而稍有強制力的條約文字，至多也只要求會員國確保救濟途徑、程序透明化、對本國與締約國之事業間不歧視。國際之執法合作，也常在經貿協定中競爭規範之列，不論是基於積極的國際禮讓原則或消極的國際禮讓原則。而更高層次的規範，便是設有獨立的競爭爭端解決機制，抑或是設有超國家主權的主

[120] There are three paragraphs in EEC Treaty art. 90: "1. Member States shall, in respect of public enterprises and enterprises to which they grant special or exclusive rights, neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular, to those rules provided for in Article 7 and in Articles 85 to 94 inclusive. 2. Any enterprise charged with the management of services of general economic interest or having the character of a fiscal monopoly shall be subject to the rules contained in this Treaty, in particular to those governing competition, to the extent that the application of such rules does not obstruct the de jure or de facto fulfilment of the specific tasks entrusted to such enterprise. The development of trade may not be affected to such a degree as would be contrary to the interests of the Community. 3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, issue appropriate directives or decisions to Member States." See Stephen Woolcock, "International Competition Policy and the World Trade Organization," paper for the LSE Commonwealth Business Counsil Trade Forum in South Africa, 21-23 (2007), http://www.lse.ac.uk/internationalrelations/centresandunits/itpu/docs/woolcockintcomppolicy.pdf, last visited on date: 2015/4/15.

[121] *Id*.

管機關，得對於締約國或經濟整合區域內的私人直接適用法律，最常見的例子就是歐盟。

歐洲統一的競爭法在歐盟成立以前便存在。在歐洲煤鋼共同體的巴黎條約第 65 條與第 66 條係競爭法之規定，分別處理結合與濫用經濟力的問題。在歐洲共同體成立後，於 1957 年的羅馬條約中亦設有競爭法規範，進一步納入聯合行為的管制於條約第 81 條，而第 82 條則處理濫用優勢市場地位之行為。隨著歐洲逐漸建立單一的市場，甚至使用單一貨幣，整合成為一個大經濟體，前開規定仍然是歐盟政策中的重要元素，嗣後歐洲理事會與執委會也繼續制定更詳細的競爭規則，補充既有的競爭規範，譬如 1989 年的歐體結合規則（EC Merger Regulation）。由於羅馬條約的競爭法內容已由各會員國轉化為內國法，也因此直接由會員國內國之法院執行，以此角度觀之，羅馬條約實際上創造了超國家競爭法，凌駕於其他國家之法律之上，並且對各會員國之人民產生法律上義務[122]，並且隨著其他新的會員國加入歐盟，羅馬條約創造的超國家主權競爭法亦隨之擴張。

歐盟設有超國家主權之競爭法，並且有超國家主權的主管機關[123]，就打擊跨境的反競爭行為而言，歐盟的體制確實有所幫助，然而歐盟組織模式有其歷史上與政經上特殊性，並非其他國家之間可以仿效。

（四） TPP

近來跨太平洋夥伴關係協議（Trans-Pacific Partnership Agreement, TPPA）之談判對於環太平洋地區的經濟整合邁出相當重要的一步。TPPA 係採單一認諾的方式進行談判，範圍涵蓋傳統與新興貿易議題，根據歷次談判消息，目前 TPPA 有以下 29 章：基本規定及定義、貨品及市場進入、農業、紡織品與成衣、醫藥品與醫療器材、原產地規則、關務、食品安全檢驗與動植物防疫檢疫措施、技術

[122] *Supra* note 102, 126-128.

[123] 歐盟執委會與各會員國主管機關共同執行歐盟競爭法（現行歐洲聯盟運作條約第 101 至第 109 條）。在執委會內負責競爭事務的是歐盟競爭總署（Directorate-General for Competition）。

性貿易障礙、貿易救濟、投資、跨境服務貿易、金融服務、電信、電子商務、商務人士暫准進入、競爭、政府採購、智慧財產權、勞工、環境、透明化、法規一致性（coherence）、發展、中小企業、貿易便捷化、合作與能力建置、爭端解決、行政及制度條款等章節。

由於 TPP 採取秘密談判之故，吾人無從得知現時談判中的競爭專章條文為何，不過從美國貿易代表署網站上對於 TPP 競爭專章設置目的之描述，可以推出以下可能的幾點內容[124]：第一，會員須維持或採行排除反競爭行為之競爭法；第二，會員有責維持其內國之競爭主管機關；第三，會員須確保執行競爭法之正當程序；第四，關於境內之國有企業、公營事業及法律規定之獨占事業，會員應確保競爭之中立[125]；第五，會員應體認執法程序透明之價值，公開其競爭法之豁免規定，以及揭露國營事業應公開資料[126]；第六，與消費者保護之法令相調和；第七，提供競爭法私的執行途徑；第七，會員間的技術合作。

上述內容多可在美韓或美星 FTA 中找到相應之處。值得注意者，美國總商會（U.S. Chamber of Commerce）亦主張在 TPP 之競爭專章中，必須納入 OECD 對於公營事業之治理及競爭中立之相關準則[127]。而紐西蘭外交與貿易部所公布 2014 年的 TPP 部長報告（Trade Ministers' Report to Leaders'）提到：部長們在提倡公平競爭的工作上有所進展，包括建立公私部門公平競爭之規則，TPP 這項開

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[124] The competition text will promote a competitive business environment, protect consumers, and ensure a level playing field for TPP companies. Negotiators have made significant progress on the text, which includes commitments on the establishment and maintenance of competition laws and authorities, procedural fairness in competition law enforcement, transparency, consumer protection, private rights of action and technical cooperation. See USTR, "Outlines of the Trans-Pacific Partnership Agreement," http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement, last visited on date: 2014/10/13.

[125] 從 USTR 所稱「ensure a level playing field for TPP companies」進一步衍伸出 TPP 可能將競爭中立納入規範，參考 Alice Pham, CUTS Hanoi, "The TPP Agreement: Chapter on Competition Policy," Consumers International, 2-3 (2013), http://a2knetwork.org/sites/default/files/tpp_competition_chapter.pdf, last visited on date: 2015/4/14.

[126] *Id*.

[127] US Chamber of Commerce, "Priorities for TPP Competition Chapter," https://www.uschamber.com/sites/default/files/legacy/grc/TPP%20-%20Competition%20WG%20-%205-27-10.PDF, last visited on date: 2015/4/15.

創性工作將會強化現有關於促進效率與競爭的努力[128]。據此可以推知，TPP 關於競爭規則的談判尚稱順利，並且對於目前已有相關競爭規範的 TPP 談判國而言，TPP 將成形的競爭專章有進一步強化之效，可見競爭專章規範仍維持 TPP 所宣稱的高標準。另可以推知國營事業的競爭中立議題係被納於競爭相關規範之中。

（五） 複邊/區域協定處理國際反競爭問題之限制

之所以複邊與區域的經貿協定可以在 WTO 的框架中存在，其理由在於區域協定的開放與改革成果可以作為國際貿易進一步自由化之基石。若從此角度出發，則區域經貿協定中的競爭規則，未來也可能在多邊的經貿架構中成為範本，而且可以作為支撐多邊談判的動力。前述論理稱作「砌塊理論」（Building Block Theory），小的共識可以逐漸合併為大的共識，在多邊共識形成上幾乎是必經的過程，可以想見，當一宗跨國反競爭案件涉及的國家越多，則一套愈多主管機關參與的合作機制，愈能在執法過程發揮作用。但相對地，在共識逐漸整合堆砌的過程中，會有越來越多意見與特殊考量不能被含括其中，是以較廣泛的共識，其內容也將相對基本、簡單，則所能處理的競爭議題自然就會受到限制。

第三節、政府間組織

在國際反競爭議題上，除了各國片面進行查處、簽訂雙邊執法合作之條款、尋求複邊或區域經貿協定的解決途徑，各個大型的政府間組織（intergovernmental organization）、經貿組織亦對於國際反競爭議題有許多關注，介紹如下。

[128] "We also have advanced our work to promote fair competition among us, including by establishing rules to ensure that State-owned enterprises and private-sector businesses are able to compete on a level playing field. This pioneering work on TPP will reinforce efforts by many of our governments to promote efficiency and the competitiveness of our economies." TPP, "Trade Ministers' Report to Leaders," http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/1-TPP-Talk/0-TPP-talk-10a-Nov-2014.php, last visited on date: 2015/4/15.

（一）OECD

OECD 為全球 34 個市場經濟國家組成的政府間組織，總部設在法國巴黎。OECD 旨在共同應對全球化帶來的經濟、社會和政府治理等方面的挑戰，並掌握全球化帶來的機遇[129]。OECD 提供了一個框架，在此框架內成員國可以交流經濟發展經驗，為共同的問題尋找答案，協調在國內外政策中合作實踐。在這個論壇里，各國政府可以達成沒有拘束力的建議（軟法律）或是有拘束力的條約，是故 OECD 對國際經濟和貿易環境的改善具有強大的推動力[130]。

接著，從 OECD 條約的第 1、2 條，可見 OECD 有潛力作為推展國際化的競爭政策、解決國際間競爭法問題的場域。OECD 公約（Convention on the Organization for Economic Co-operation and Development）規定，OECD 旨在促進如下政策目標之推行：（a）達成最穩定的經濟成長與就業，及提高在會員國內的生活水準，同時維持財政穩定，以促進世界經濟發展。（b）在會員國以及非會員國經濟健全的經濟擴張過程中給予幫助。（c）在多邊與不歧視的基礎上，促成世界貿易的擴展，並且必須與國際義務同調[131]。

OECD 公約亦要求會員國應個別或協同採取以下行動：（a）促進對其經濟資源的有效利用。（b）在科學與技術領域促進其資源的發展，鼓勵研究並促進就業訓練。（c）尋求達成經濟成長及內部與外部財務穩定，並避免危及其經濟或其他國家經濟發展的政策。（d）致力於減少或消除貨物及服務交換與現金支付的障礙，並維持與擴展資本的自由移動。（e）以適當方法幫助會員國以及開發中非會員國之經濟發展，尤其在資本流入該些國家時，考量接受技術援助、確

[129] OECD 中文官方網站 ，http://www.oecdchina.org，最後瀏覽日期：2015/4/15。
[130] 有關組織如何運作達成目標，OECD 公約第 5 條有規定：「為達成其目標，組織得：(a) 除另有規定外，作成對所有會員國有拘束力的決議；(b) 對各會員國作出建議；(c) 與各會員國、非會員國及國際組織作成協定。」
[131] OECD 公約第 1 條。

保擴展中的出口市場，對其經濟的重要性[132]。

從以上二條文可知，OECD 公約未明白表示「確保市場競爭秩序」為會員國所應共同努力的目標，惟實際上競爭法與競爭政策實際上與拓展貿易、促進經濟發展等目標有深切關連。競爭法的目標是確保市場秩序的健全，創造公平競爭的環境，讓市場機能來決定資源的配置，如此配置也會是較有效率的結果，因此本文以為，「確保市場競爭秩序」之所以不列在 OECD 的宗旨，係因為其乃追求真實的經濟成長的前提，也是全體 OECD 成員國同屬「市場經濟」的體制核心。

OECD 透過大大小小的專業委員會（specialized committees）和工作小組（working parties）來準備與執行其任務。就特殊領域設置專門委員會，例如：教育、環境、貿易及投資等，係由各會員國派專業代表籌組而成。委員會及其附屬小組經常集會，提供場所讓專家與各國行政機關之高級官員提案、討論、審查如何改善政策，而這些討論可能更進一步形成研究，其研究成果經擬定為具體建議，有不少付諸實行的例子。

OECD 設有眾多與競爭政策相關的組織與活動，例如：（a）OECD 競爭委員會（OECD's Competition Committee）、（b）貿易與競爭共同工作小組（Joint Group on Trade and Competition）、（c）競爭與管制第二工作小組（Working Party No.2 on Competition and Regulation）、（d）影響國際貿易之限制性商業行為的會員國國際合作第三工作小組（Working Party No.3 on International Co-operation between Member Countries on Restrictive Business Practice affecting International Trade）、（e）OECD 全球競爭論壇（OECD Global Forum on Competition）。

其中，OECD 競爭委員會從事競爭政策的分析並向政府提供建議。OECD 最早於 1961 年成立「限制性商業行為專家委員會」（Committee of Experts on

[132] OECD 公約第 2 條。

Restrictive Business Practice），後於 1991 年更名為「競爭法暨政策委員會」（Committee on Competition Law and Policy），再於 2001 年改稱為「競爭委員會」（Competition Committee）[133]。委員會成員來自各國競爭法主管機關。於 2001 年，台灣成為 OECD 競爭委員會之觀察員。競爭委員會針對競爭相關的各式議題，研討競爭政策及競爭法之制定及執行技巧，包括打擊聯合行為、寬恕政策的設計、結合審查的改革等等，已作成眾多建議書，並由理事會通過公布，不過這些建議書並沒有拘束力，屬於模範法、軟法的性質，主要是給各國競爭法主管機關參考，以及協助開發中國家建立相關制度。同時因為 OECD 為主要已開發國家之論壇，由此亦可窺探已開發國家在國際場域上對相關競爭議題的立場。

貿易與競爭共同工作小組乃臨時性、任務型之組織，業於 1998 年部長會議時中止，旨在調和貿易與競爭之互動，其工作計畫包含與市場進入相關的競爭政策、強化貿易與競爭政策之相互協調、貿易措施對於競爭的影響、規範市場進入與競爭過程的影響。

競爭與管制第二工作小組成立於 1994 年，是常設性組織，此工作小組的慣常任務為就涉及行業別或整體經濟的管制體系的創制、運作、改革與解除的競爭議題，從事審查、分析及建議[134]。舉例而言，2013 年 OECD 競爭與管制第二工作小組便針對希臘進行競爭審查，針對其若干行業別，如觀光業、食品加工業、零售業等進行管制審查，並分析希臘的管制障礙與移除障礙的利益，據以給予競爭政策之建議[135]。此外，影響國際貿易之限制性商業行為的會員國國際合作第三工作小組亦為常設性組織，主要研究競爭法之調和與各國競爭主管機關之合作事

[133] 外交部網站，http://www.mofa.gov.tw/igo/News_Content.aspx?n=F29A02A9D36C47F0&sms=22C3B697A101DF19&s=AAAE571211176F30，最後瀏覽日期：2015/4/15。

[134] 黃立、楊光華、司維瑄、吳宜平， OECD 對競爭政策的處理及其對多邊體制之影響，公平交易委員會合作研究計劃，1-10（1999）。

[135] OECD, "OECD Competition Assessment Reviews: Greece," 7 (2013), http://www.oecd.org/daf/competition/Greece-Competition-Assessment-2013.pdf, last visited on date: 2015/4/15.

項，並作成具體建議。而 OECD 全球競爭論壇則提供機會供各國分享執法經驗、提出問題加以檢討，並致力於促進各國競爭主管機關之共識與自願性的規範調和。

OECD 網站目前可搜尋到與競爭相關的建議書有 9 個。分別是 1979 年關於競爭政策或管制與除外管制部門之建議書[136]、1998 年打擊核心卡特爾之有效行為建議書[137]、2005 年的結合審查建議書[138]、資訊交換建議最佳實務書[139]、管制品質與績效之指導原則[140]、2009 年競爭評估建議書[141]、2011 年管制型產業結構分離之建議書[142]、2012 年打擊公部門採購圍標之建議書[143]、2014 年競爭調查與程序之國際合作建議書[144]。由此些建議書或可推知，除了執法合作與解除管制等議題，在限制競爭之行為類型上，以結合與聯合行為二者最為 OECD 所重視，可能是為此二行為在跨國案件中最為常見，而另一項 OECD 關注之重點則在於管制產業（regulated industries）與公部門之競爭問題。

除了以上建議書之外，OECD 在競爭政策上有所謂同儕檢視（peer review）制度，全稱是「管制革新國家檢視計畫」（OECD Regulatory Reform Country Review Programme）。斯制起於 1998 年，旨在藉由檢視一國之競爭法制，檢討其制度面上是否有所缺失，並提出改善的建議，通常是透過競爭委員會，或是透過 OECD 全球競爭論壇來進行審查。

舉例而言，我國在 2006 年 2 月透過全球競爭論壇接受同儕檢視，其內容包含我國競爭法之範圍、主管機關介紹，以及其他部門法律涉及競爭問題時如何處

136 Recommendation on Competition Policy and Exempted or Regulated Sectors.
137 Recommendation concerning Effective Action against Hard Core Cartels.
138 Recommendation concerning Merger Review.
139 Best practices on Information Exchange.
140 Guiding principles for Regulatory Quality and Performance.
141 Recommendation on Competition Assessment.
142 Recommendation concerning Structural Separation in Regulated Industries.
143 Recommendation on Fighting Bid Rigging in Public Procurement.
144 Recommendation concerning International Co-operation on Competition Investigations and Proceedings.

理，最後 OECD 會員國提出數點建議，包括：建議實施寬恕政策；建議提高處罰，以達嚇阻違法之效果；建議刪除公平法中小企業的價格聯合有例外許可之可能；建議刪除市場占有率作為結合申報之門檻；為提升公平會之獨立性，建議移除行政權之監督；建議進一步強化競爭法的「私的執行」[145]。

（二）ICN

國際競爭網絡（ICN）是源自 2000 年美國司法部（Department of Justice）反托拉斯署（Antitrust Division）所成立之「國際競爭政策諮詢委員會」（International Competition Policy Advisory Committee, ICPAC）成果報告中所提出的「全球競爭倡議」（Global Competition Initiative）概念[146]。國際競爭網路提供一個論壇給全球競爭法主管機關，雖然一開始是美國所主導，但同時也獲得墨西哥、加拿大與歐盟的大力支持。而 ICN 所討論者為純粹的競爭議題，並不限於貿易過程中牽涉的競爭問題，似乎有意與其他經貿組織相區隔。

成立的前十年，ICN 主要致力於建立運作制度，以及廣納年輕的競爭法主管機關。接著便是蒐集在競爭議題上的共識以提出執法建議及指導方針，並樂見基於這些執法建議，可以增加主管機關彼此的互信，進而促使合作。而如今在 ICN 成立的第二個十年，其致力於「傳布執法經驗與最佳實務」、「程序與實體規範的調和」、「競爭之倡議」，及「促進有效的國際合作」[147]。根據現任 ICN 主席 Andreas Mundt（德國聯邦卡特爾署署長）之宣示，ICN 當前的目標，在於成為「推動競爭法全球調和之主要角色」[148]。

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[145] OECD, "Competition Law and Policy in Chinese Taipei," Policy Brief, 2-7 (2006).
[146] 楊光華，同註 12，179-180；See ICPAC, "International Competition Advisory Committee Delivers Final Report to Attorney General Reno and Assistant Attorney General Klein," http://www.justice.gov/atr/icpac/4272.htm, last visited on date: 2015/4/15.
[147] ICN, "Vision Statement by Steering Group Chair Andreas Mundt," 2, http://www.internationalcompetitionnetwork.org/uploads/library/doc924.pdf, last visited on date: 2015/3/24.
[148] *Id*.

ICN 目前有 5 個工作小組，分別是競爭倡議小組（Advocacy Working Group, AWG）、主管機關執法效率小組（Agency Effectiveness Working Group, AEWG）、卡特爾工作小組（Cartel Working Group,CWG）、結合工作小組（Merger Working Group, MWG）、單邊行為工作小組（Unilateral Conduct Working Group, UCWG）。

ICN 具備執法經驗分享、提供公開資訊、幫助能力建置等功能，本文認同其對於國際間各主管機關打擊反競爭行為而言相當重要。尤其對於欲推展競爭政策與法制的開發中國家而言，其建議經過專家檢視及其他主管機關之實務驗證，相當具有參考價值。

（三）政府間組織處理競爭議題之限制

OECD 與 ICN 為目前各國政府間在競爭政策與法制方面進行溝通最常用的平台，因為競爭法主管機關的成員定期參加 OECD 和 ICN 例會，自然成為主管機關相互交流最佳時機，譬如我國與法國簽訂雙邊競爭法 MoU，即多次利用 OECD 開會的機會接洽。

然而此政府間組織並不足以直接作為競爭法執法合作的管道，蓋各國與對其他主管機關提供執法上的協助，在欠缺雙邊協定等法源的情形，仍受許多國內法的限制，例如關於事業的隱私權保障等。並且，OECD、ICN 所提出之執法建議報告、最佳實務範本等等，均屬對於會員無拘束力之軟法性質，而對於競爭法制開展腳步較慢的國家而言，亦難以一步到位地達到先進國家之法律水準。在競爭法程序規範或實體規範上，OECD、ICN 會員間都還存在或多或少的差異，故如何提升相互調和之誘因，實乃政府間組織欲進一步推動國際執法合作之最大挑戰。

第四節、競爭法合作協定與 FTAs 競爭專章之比較分析

本章一開始介紹我國與美國的各部競爭法合作協定與 FTAs 競爭專章內容，乃基於對於執法之機制加以整理之用意，未對於競爭法合作協定與 FTAs 競爭章有何差異進行深入分析，而 FTAs 競爭專章通常也包含若干促進國際合作的規定。惟本文既然名為競爭法合作協定與經貿協定競爭規範之研究，對於此兩類競爭規範之異同，當提供比較分析，並且此分析將作為後續二章之導引。

（一）不同的背景淵源

競爭法合作協定的形成的背景係在二戰後，美國運用效果主義而將本國的反托拉斯法適用於域外事業，當時引發許多國際爭端。美國大法官 Lord Wilberforce 曾言道：「一國的競爭政策可能只是為了抵禦另一國競爭政策的攻擊。」舉例來說，美國的鈾礦需求者根據反托拉斯法，對鈾礦的國際卡特爾行為提出民事訴訟要求三倍懲罰性賠償（treble damages），該國際卡特爾有加拿大事業涉入其中，加拿大政府否決美國法院的管轄權，認為美國的管轄侵害加拿大主權，違背國際公法原則，並且干預加拿大鈾礦產業發展。但相對地，對美國而言，該國際卡特爾使得鈾礦進口價格提高，損及美國消費者的福祉。就如此紛爭，有些國家選擇與美國法院對抗；有些國家則選擇制訂競爭法，掀起域外適用大戰；有些則與美國簽訂競爭法合作協定，以解決管轄的問題[149]。在上述的背景中，競爭法合作協定逐漸成形，主要要求在發動單邊執法時，必需通知他方，並且先行諮商，以解決過度地單邊執法，從本文提供之附錄可發現，每一部競爭法合作協定都有通知的規定。

至於 FTAs 競爭專章成形的背景，首先必須探討 FTAs 大量發生的原因。一

[149] Chris Noonan, "The International Competition Law System," in *The Emerging Principles of International Competition Law*, 5 (2008).

來是因在貿易自由化的過程，許多國家選擇從點線面漸進的方式，即便已經作好開放市場的準備，大部分國家不會毫無保留地對 WTO 會員國將所有貿易障礙歸零，而會先以雙邊、區域 FTAs 等方式，先對一部份國家開放市場，除了讓國內產業有調整的過渡期，也讓國家手中得以持有要求他國開放市場的籌碼。再來，FTAs 的大量發生係肇因於 WTO 杜哈回合的延宕，WTO 龐大的會員組成與共識決機制使得無法順利推動多邊談判，不論是更進一步的市場開放或是新規則的推動，都動彈不得，各國於是紛紛與貿易對手國簽訂 FTA，以求進一步消除貿易障礙，及推動高於 WTO 標準（WTO Plus）的規則。

有關競爭與貿易的互動，本文在緒論一開始便提到，競爭規則的建立避免經貿談判成果被不公平的競爭行為所侵蝕；經貿規則的建立打破貿易壁壘，引入更多市場參與者，而能夠活化市場競爭機制。鑒於競爭與貿易相輔相成的性質，經貿協定中自然會將競爭事項納入，雖 WTO 因顧慮對會員國自主權有所影響，未採納 DIAC，但是在雙邊或區域 FTAs，欲進行競爭事項的談判，相對容易許多，此為本文觀察 FTAs 競爭章形成之背景。

（二）生效、效力之差異

國際條約的形式與名稱等，可能對內國的法律效力以及國際法上效力有所影響，茲分析如下。

以美國而言，其選擇締約之形式為「政府間形式」（inter-governmental form），以政府名義締結，此通常適用在技術性或非政治性條約，例如美國與德國簽署之「關於限制營業競爭行為之相互合作協議」（Agreement btween the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation on Restrctive Business Practice）；至於我國，則多採用政府部門間形式（inter-departmental form）簽訂競爭法合作協定，

譬如我國與紐澳的三方競爭法合作協定（Cooperation Arrangement between the Taiwan Fair Trade Commission, the Australian Competition and Consumer Commission, and the New Zealand Commerce Commission regarding the Application of Competition and Fair Trading Laws）。另外，就條約名稱而言，美國均選用「協定」（Agreement）作為競爭法合作協定之名稱；至於我國則有用協定、辦法或補充協定（Arrangement），及諒解備忘錄（MoU）。

關於 FTAs，以美國而言，其名稱均為協定，簽訂方式則是國家間形式（inter-state form）；以我國而言，名稱亦為協定，簽訂方式類似國家間形式（inter-state form），僅我國國名改以台澎金馬獨立關稅領域替代，而僅與邦交國的 FTAs 如中華民國與巴拿馬共合國自由貿易協定，使用完整國名。

一般來說，協定比條約（treaty）和公約（convention）不正式，不需要國家元首出面洽簽，通常用在行政或技術方面且締約國範圍小的情況；Arrangement 用法與協定相似，但多用在暫時性事項；至於 MoU，以往常被視為沒有法律拘束力的文件，但是在二戰後開始被用作條約名稱，因此不可斷然認為 MoU 不具條約效力[150]，而本文認為，我國簽訂之台法競爭法 MoU 及台加競爭法 MoU 等，應屬於條約性質，僅係以 MoU 為名以避免主權爭議而已。

條約由何形式簽訂，對於國際法上效力而言，並無不同[151]。至於條約名稱可能造成之影響，依據維也納條約法公約第 2.2 條規定，公約的用語「不妨礙此等用語在任何國家國內法上之使用或所具有的意義」，故應該視各國憲法如何對待不同名稱的條約。以美國而言，其憲法第 2.2.2 條規定，總統「有權，經出席參議院三分之二贊成的勸告與同意後，締結條約（treaty）。」在實踐上，美國憲法於此所的謂條約包含其他正式的國際協定、公約或專約等。而我國憲法第 63 條則規定，立法院有議決「條約案」之權，所以如果以條約作為名稱，必須送立

[150] 丘宏達，現代國際法，第 3 版，三民書局，181-182（2012）。
[151] *Id*., 186-187.

法院審議通過後，才能由行政院咨請總統批准[152]。綜上，當使用不同的條約名稱，依據美國與我國憲法，可能必需先經過國會這道關卡，才可以由總統正式簽訂。

此外，「批准」也將與條約生效有關，根據維也納條約法公約第 2 條，批准乃是「一國據以在國際上確定其同意承受條約拘束之國際行為」，但是維也納條約法公約並未要求條約一定要經過批准程序，就各國實踐上，是否需經批准可以在個別條約中訂定相關條款[153]，例如美國與德國之競爭法合作協定，即開宗明義指出本協定必須在各自國內獲批准。

由於競爭法合作事項並非政治問題，多是技術性內容，因此美國與我國由政府間形式或政府部門間形式簽訂之競爭法合作協定，多以「行政協定」方式簽訂[154]，如此可避免國會審查之不便，同時又能保有拘束簽約國的法律效力。我國實務見解認為，行政協定不論我國與有無邦交國家所簽訂，若內容涉及人民權利義務、國家各機關組織、或其他重要事項應以法律定之者，則協定締結之作用，並非單純之行政行為，宜視為一種立法行為，參照中央法規標準法第五條之精神，上開協定宜經立法院之同意程序，俾使該協定與我國內法具有同等地位，並以「特別法」之型態，優先於國內法而予適用。如此方能符合前揭憲法法條並重條約 (協定) 之精神及法院判例(決) 之意旨，與遵守國際信義之國際慣例[155]。

然關於 FTAs，其涉及重大之產業政策，影響舉國各產業人民之生計，因此依我國前述實務見解，應將協定之締結視為立法行為，不能單由行政機關決定內容，而必由國會審查；就美國而言，其在經貿相關條約的對外談判，亦規定應由國會事前授權及事後審查，對條約內容加以監督。而一旦 FTA 通過國會審查，

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[152] *Id*., 189.
[153] *Id*., 197.
[154] 法務部 79 年法律字第 10900 號函釋對於行政協定有以下說明：「查我國相關法令，似無就「行政協定」乙詞予以界定者。惟「行政協定」之一般涵意係指一國行政機關，為使其有較大之處理事務能力，以符合其現代社會之功能，於其職權範圍內就特定事項與他國 (行政部門) 所締結之國際行政協定。」
[155] 同上註。

其條文的位階至少為法律，較之於只拘束行政機關之行政協定，效力較強、範圍較廣，是以假設 FTA 競爭章和競爭法合作協定之規範有所矛盾，應以 FTA 競爭章之條款為優先。

競爭法合作協定和 FTAs 的競爭專章從名稱、生效到效力的差異，可以料想到其對於規範內容的影響。在國會中，立法者基於其代表之民意，對於 FTA 內容造成的影響將審慎評估，而可能否決其通過。故 FTA 談判時，必定考量過各個簽約國國內意見，有共識才會成為 FTA 內容。相對地，倘競爭法合作協定係行政協定性質，則內容應均為締約主管機關之執掌，且多屬行政、技術性事項。

（三）處理競爭問題的切入角度不同

由於主導談判及執行條約內容之主管機關不同，也會導致競爭法合作協定和 FTA 競爭專章處理競爭問題的面向不同。執法合作協定係反競爭行為已然發生，而透過此協定建立的合作機制，協助進行有效率的執法活動，因此就打擊國際反競爭行為而言，競爭法合作協定可以看作是執法者的工具，其對於競爭秩序之維持乃以事後矯正的角度切入。

FTAs 為貿易部門主導，其所關注者乃消除各種法律上與事實上的貿易障礙。在 FTAs 競爭章中，其宗旨是確保貿易談判成果不被反競爭行為減損，因此可以發現 FTA 競爭專章多會要求訂定競爭法、維持競爭法及設立專責主管機關。以我國與巴拿馬之 FTA 競爭章為例，台巴 FTA 競爭章訂定時（2003 年），巴拿馬未有競爭法，為滿足 FTA 競爭章要求，巴拿馬嗣於 2007 年完成競爭法之制訂，並且於隔年成立消費者保護際競爭防衛署。由此看來，FTAs 競爭章有透過建立制度消弭反競爭行為的功能，屬於事前預防的切入角度。

（四）關心的議題不同

1.競爭法合作協定關注管轄衝突與執法合作

承前述競爭法合作協定發展淵源，其很大一部分內容在於處理管轄權問題，例如域外適用本國法前必須進行通知、諮商，有些競爭法合作協定的名稱便命作「適用競爭法之協定」（agreement between the Government of A and B regarding the application of their competition laws），例如美加競爭法合作協定、美國以色列競爭法合作協定。此外也有調查案件時必須相互合作、執法時必須考量他方利益，必須運用禮讓原則分配管轄等等規定。而這些都是競爭法主管機關執法的範圍，也是主管機關在處理國際反競爭案件時，實際面臨限制之所在，「國際執法合作」自然成為競爭法合作協定主要關心的議題。甚至可以發現，競爭法合作協定通常不干預締約國的實體規範，亦即並不會具體描述哪些反競爭行為必須受到競爭法規範，而是直接以違反締約國競爭法的行為代稱反競爭行為，例如美德競爭法合作協定第 1 條第（d）款。

2.FTAs 競爭章關注造成貿易障礙之反競爭行為

至於 FTAs 的競爭專章，其關心的是本國事業在締約國的市場上能不能立於公平競爭的基礎。要求締約國制定、維持與落實競爭法是一種作法，但是有時候各國競爭法也有其限制，譬如公用事業可能就是不受競爭法管制的產業，因此 FTAs 競爭專章多會特別提出其認為影響貿易的反競爭行為、不公平競爭行為，要求締約國設法解決。此類條款通常會直接影響到締約國實體規範，而必須配合 FTA 競爭章要求者，並不一定是競爭法主管機關，可能是公用事業或國營事業的主管機關，舉例來說美國所有有競爭專章的 FTA，都有要求國營事業不能濫用市場力造成貿易障礙的規定，如美澳 FTA 競爭章、NAFTA 競爭章、美星 FTA 競爭章、美秘 FTA 競爭章、美智 FTA 競爭章、美哥 FTA 競爭章、美韓 FTA 競

爭章等。美韓 FTA 競爭章第 16.4 條更具體指明國營事業與指定獨占事業不得從事差別取價行為，其訂價必需基於通常商業考量，如市場供需狀況[156]。

3.實例：台紐競爭法協定和台紐 FTA 競爭章

以我國與紐西蘭之競爭法合作協定和 FTA 競爭章為例。台紐競爭法合作協定第 3 條列舉協定主要項目，包括主管機關之間的執法合作、遵法教育、人力發展、提供資訊，並未特別指出需要主管機關解決的反競爭行為。

至於台紐 FTA 競爭章，其內容觸及我國實體規範，譬如，台紐 FTA 競爭章第 5 條規定雙方政府必須確保因違反競爭法行為受損之私人訴訟權利。如此便涉及如何根據我國民法、競爭法規範，對於違反競爭法的行為主張相關請求權（包括禁制令、金錢或其他救濟）的問題。又，台紐 FTA 競爭章第 6.3 條確切指出何謂不實及欺罔行為，第 6.2 條要求雙方必須採取或維持相關法律，以禁止該等不實及欺罔行為，此等規定亦對我國實體法律規範發生影響，包括刑法詐欺規定、民法債務不履行規定、消費者保護法規定、公平法不實廣告規定、金融管制法規等。台紐 FTA 競爭章僅 1 條文要求對反競爭行為執法前必須先行諮商，惟實際上此屬緩和管轄權衝突之規定，與主管機關之間的執法合作無關。

（五）小結

關於競爭法合作協定和 FTAs 競爭章的差異，吾人必需從「務實」的角度來觀察，由於競爭法合作協定是行政機關洽簽，屬行政協定而不須經國會審查，其內容自然多限於主管機關所負責的執掌範圍，同時也是主管機關在處理國際反競爭行為上最需要的「執法合作」，以下將為文第四章加以探討。至於 FTAs，談判者乃從維持經貿利益的觀點出發，在競爭專章中指出可能減損經貿利益的反競

[156] Articles 16.2 and 16.3 shall not be construed to prevent a monopoly or state enterprise from charging different prices in different markets, or within the same market, where such differences are based on normal commercial considerations, such as taking account of supply and demand conditions.

爭行為與不公平競爭行為，要求締約國必須加以因應。例如在美國的所有 FTA 競爭章中，均針對國營事業造成的反競爭疑慮，要求會員國必須確保國營事業不能以反競爭行為減損貿易，關於國營事業造成的競爭中立問題，以下亦將為文第五章探討。

此外，本文亦觀察到，「執法合作」為各國主管機關之間在打擊國際反競爭行為上，最可能作出的貢獻，所以多數競爭法主管機關簽訂的行政協訂係以此為內容；而 FTAs 談判過程必須不斷相互妥協，談判完成後尚須經國會審查，因此其內容多半是各國能夠接受的共識，而不可能廣納各種競爭問題。國營事業容易限制競爭，此已屬國際間常見的問題，因此 FTAs 競爭章將國營事業納入規範的情況頗為常見。

第四章、國際執法合作機制之挑戰

第一節、背景

根據先前探討之內容，本文以為在欠缺多邊競爭規範之現況下，片面執法、透過雙邊、複邊或區域 FTAs 或競爭法合作協定建立執法合作機制，此等因應國際反競爭行為之作法可兼採之。惟本文認為仍有必要針對合作機制進行更深入之檢討與析辨，方能針對各種執法上的困難對症下藥。

1996 年左右出現兩股促進國際間合作處理競爭議題的力量，其一是 WTO 成立 WGTCP 以研究貿易與競爭間的互動，探討可以促進貿易的競爭規範[157]；另一股力量則是美國 ICPAC 提出的國際反托拉斯計畫。在如今欠缺 WTO 多邊規範的情形下，事實上已逐漸在美國所倡議的方向上逐步建立國際合作的框架。ICPAC 提出的內容包含多國結合審查管制、貿易與競爭之互動、各國主管機關在反托拉斯（特別是卡特爾）的執法合作，其所提出的最終成果主要對現今的競爭法合作有二貢獻。其一是建立 ICN，使得各國競爭法主管機關得以交換執法經驗，雖然 ICN 無法直接作為合作平台，但是對於執法合作有相當貢獻，譬如許多雙邊的競爭法合作協議均將 ICN 之建議報告納入參考。貢獻之二則是促使更多國家開始投入競爭法的雙邊合作，以及基於積極禮讓原則加深既有合作。由美國率先與歐盟、加拿大等國深化在競爭法方面的執法合作，引發許多國家跟進，也因此在 1990 年代後期到 2000 年初之後訂定、增修的競爭法合作協定被稱作「第二代協定」。

競爭法設置的目的在於保護市場不受反競爭行為扭曲，而這樣的價值也逐漸在各國受到重視，有愈來愈多國家制定競爭法。於此同時，各國的競爭法案件也開始不再是單純內國執法，譬如近年美國有 90%以上關於卡特爾案件的罰款是來

[157] 惟前已述及，後來在 2003 年的部長會議未能達成共識列入杜哈議程，見第二章第四節。

自於國際卡特爾；1990 年起，歐盟所調查的卡特爾案件中，歐盟境外的參與者數量也增加了 4.5 倍[158]。

第二節、國際合作機制之需求

由於競爭法制快速擴張，且跨國案件屢見不鮮，故各國執法機關應加速合作。舉例來說，在國際卡特爾案件中，涉案事業可能面臨複數執法機關的平行調查（parallel investigations），由於制度本身的不同，可能在某國成立價格的聯合行為，而在另一國該產業卻豁免於競爭法，導致執法的差異；也可能因為部分涉案事業將總部設在他處，造成「共犯中有的被罰，有的沒被罰」此種不調和的執法結果。而在跨國結合案件，越大型的國際企業在進行企業併購時，須面臨越多調查，曠日廢時的審查很可能導致併購案的失敗，而企業在相關作業所付出的高額成本也將無從回收。

從結構面來看，競爭法國際合作的主要誘因有兩個面向，其一，經濟活動開始匯流連結，自然會開始有跨境的反競爭問題。經濟活動的連結，包括國際貿易、外人投資以及跨國的企業併購等，鼓勵此些經濟活動的發展是世界趨勢，但是涉及反競爭行為者，仍有管制的必要；其二，訂有競爭法的國家漸多，出現新的主管機關主導的執法行動，故在有權管轄機關之間便有禮讓與否、各自管轄、互相合作等可能。前述說明可以簡單表示如圖 1。

圖 1 結構面上導致合作需求之主因

資料來源：作者自行繪製。

[158] OECD, *Challenges of International Co-operation in Competition Law Enforcement*, 5 (2014).

因國際合作不力所造成的損害可能是相當嚴重的。譬如同一宗結合案，一些國家的主管機關不禁止結合，而一些國家禁止結合時，將會因為這樣的差異，使事業決定中止結合，對不造成經濟上不利影響的市場而言，該事業無法透過結合來達到組織重整的效益；或者事業仍進行結合，因為市場力集中而對部分市場造成不利的影響。又，更直接的例子如拒絕他國競爭法主管機合作請求，即令該國競爭法無法落實。雖然已有部分競爭法主管機關之間簽訂執法合作協定，但多限於東亞、北美、紐澳和歐洲等已開發國家。競爭法國際合作至今已逾 20 年，但合作的發展仍不能慢下來。因為事業仍持續全球化，並且經濟整合的範圍也越來越大，而競爭法主管機關的數目也越來越多，因此合作需求也將增加。

第三節、國際合作機制之困難與挑戰

從當今競爭法合作之現況，本文整理出國際合作機制所面臨的困難與挑戰，分為結合、卡特爾二部分進行探討，分述如下[159]。

（一）易生分歧的跨國結合管制

多國籍事業進行結合，或參與結合之事業來自不同國家時，將有複數競爭法主管機關涉入結合審查，而平行開展的審查如果在結果上發生分歧，實不能解決該結合案對市場造成的影響。在調和與合作機制未健全的情形下，導致結合審查結果分歧的因素包括：不同的實體規範、不同的競爭影響、不同的評估。

1. 不同的實體規範

在若干案例中，實體規範的差異直接顯示在法律上，譬如審查評估的標準明文訂在法條中，要求考慮結合對於就業的影響、考慮有市場力的買方對賣方的單

[159] 本章未探討濫用市場力的單方行為之執法合作，因為此類反競爭行為涉及多個競爭法主管機關管轄而需要執法合作之例子較少。

方效果等，如此即可能導致主管機關間對同一跨國結合案作出不同審查結果。

在實體規範的不同中，有部分係因為定義不夠精確，進而基於各自的實務運作發展成不同的實體規範，而非法律標準上絕對的差異。譬如，A 主管機關可能較注重結合後市場占有率不能太高，B 主管機關較注重上下游垂直整合對市場的效果。有研究指出[160]，比較美國與歐盟的結合管制，整體而言歐盟較為嚴格，而美國則傾向在具「共同效果」[161]的案件中較嚴格。又例如中國傾向保護國內企業與老字號品牌，因此在外資併購中國企業的案件，結果幾乎都是禁止結合。

在實體規範的不同中，亦有部分係指競爭法本身的目標不同。譬如美國競爭法的目的在於促進競爭，以及避免事業透過反競爭的手段取得獨占地位；歐盟競爭法旨在確保市場的健全（market integrity）；然而，即便各國的競爭法是基於相同的宗旨，尚不能確保主管機關就同一結合案件會作出相同決定。

2. 不同的競爭影響

事業結合對不同國家的市場競爭發生不同的效果，自會導致各主管機關根據自己國內市場狀況作成不同的審查結果，譬如各國生產替代性產品的廠商家數有所不同，所受到的影響自然不同。又如在一國相互競爭的事業，在另一國不一定是相互競爭；而各國消費者的行為、偏好等，也都有所不同，此等不同狀況可能對於競爭造成不同影響，參與結合的事業甚至在不同國家可能被界定在不同的相關市場。

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[160] Mats A. Bergman, Malcolm B. Coate, Maria Jakobsson, and Shawn W. Ulrick, "Comparing merger policies in the European Union and the United States," *36 Review of Industrial Organization*, 305-331, (2010).

[161] 共同效果（co-ordinated effects）：結合後，參與結合事業與其競爭者相互約束事業活動、或雖未相互約束，但採取一致性之行為，使市場實際上不存在競爭之情形。前揭情形可依事業家數、市場集中度、參進障礙、產品同質性、事業間規模與成本之對稱性、市場透明度、交易模式、產能利用率、是否存在擁有獨特競爭誘因且可影響市場競爭程度之事業，及該事業是否為參與結合事業等加以評估。

3. 不同的審查評估

在具有裁量空間的情況下，各競爭法主管機關對一件結合案所造成的效果會有不同的意見，即便面臨相同實體規範標準，以及相同市場競爭環境，仍可能作出不同審查結果，這是人類做決定時經常發生的情形。舉例而言，我國公平會作成行政決定是透過委員會議採多數決行之，公平會網站上公開之行政決定如處分書，吾人並無從得知有幾個委員同意、有幾個委員反對，然而部分同意部分不同意，應是在會議上時常發生的情形，之所以仍可以作成決定，乃因為參與決策的人數通常是單數之故，故即便是勢均力敵、難以衡量的情形，仍然可以產生決定。再換句話說，公平會委員們面臨同一個案件、同樣的事實，卻作出不同的評估；場景換到各個競爭法主管機關，一樣會發生主管機關之間作出不同評估的結果。

為了避免百餘個實行競爭法的國家，發生前述審查結果不一致的情形，或許各國尊重最大的經濟體的競爭法主管機關所作決定，能夠較接近全球福祉。然而根據 OECD 之資料[162]，事實上並沒有一個經濟體可以代表全球 GDP 的 20%以上，因此倘僅交由大經濟體之主管機關進行跨國結合審查，其外部性將會影響到80%以上的全球經濟。一般而言，對大經濟體產生影響的跨國結合，亦對小經濟體造成相似影響，不過這並不代表小經濟體沒有做成不一致決定的空間[163]，例如當大經濟體允許結合，而小經濟體認為其市場競爭受影響時，尚可以使用「矯正措施」（remedies），使參與結合事業負擔一定義務，確保市場參與者與消費者之利益不受影響。

[162] *Supra* note 158, 43.
[163] *Supra* note 158, 43.

（二）跨國結合面臨的困境

1.通過結合審查越來越困難

一個競爭法主管機關禁止事業進行結合，便可能終止該交易，但是單憑一個主管機關同意結合，不代表該跨國結合即被全球競爭法主管機關所同意。因此，越多競爭法主管機關存在，就可能會有越多跨國結合案被禁止，依循如此脈絡，通過結合審查將越來越困難。

各國競爭法主管機關平行、獨立審查結合案件，使得結合事業容易得到不一致的審查結果，導致可以促進效率的結合案被禁止。以下舉一個極簡化的假設來說明跨國結合與單純境內結合的難度差別：事業從事單純境內的結合，假設需要75%的把握，才會投入這樁交易並且向主管機關提出申報；且假設一樁跨國結合案需要五個主要的競爭法主管機關同意，才可能順利進行；綜合前面兩個假設，就國際性的結合案而言，則事業必須在該五個國家都有 94%的信心通過審查[164]，如此才有可能投入跨國的結合[165]，對於大型國際企業而言，更是如此。

2.主管機關執法合作的困難：合作意願

在某些情形下，主管機關之間特別適合進行合作。譬如參與結合之事業已布局全球的供應鏈（global supply chain），此時在判斷對市場競爭之影響時，各國主管機關即需要進行產業資訊等的交換等。又如參與結合事業已提交拋棄隱私權聲明，且在正式申請（filing）之前便已使主管機關知悉併購動態者，亦為主管機關間合作審查之適例[166]。主管機關取得事業拋棄隱私權之聲明，固然方便進行執法合作，但主管機關間的合作意願若夠高，其實不必等到取得拋棄隱私權聲明

[164] 因為 $(0.944)^5 = 0.75$。
[165] *Supra* note 158, 44-45.
[166] ICN, "Practical Aspect of International Cooperation in Merger Cases: investigation," ICN MWG Teleseminar, 4-5 (2013).

就可以開始合作，例如可以先提供本國法規資訊包括審查的時效與程序、市場調查與第三方意見、受結合影響的經濟分析等等。

事實上，即便競爭法主管機關之間未透過雙邊的行政協定建立正式合作管道，尚能保有提供資訊與執法經驗之空間，是以「合作意願」恐怕是競爭法主管機關之間能不能充分合作的關鍵。吾人可進一步想見，倘若某國的競爭法主管機關持有否決該結合案的預設立場（可能因為國內有許多第三方的反彈聲浪等等），則以拖待變、不與他國競爭法主管機關合作，便有可能因為審查的延宕使得該併購交易破局（例如超出結合契約之期限）。另外，常見合作意願不高的理由尚包括：主管機關設立不久，仍在能力建置（capacity building）的階段；透過區域性的經貿協定等管道處理即足夠;完全視案件對於主管機關本身的重要性與關聯性，以決定是否合作[167]。

3. 主管機關執法合作的困難：本國視野看待跨國結合

各競爭法主管機關在結合審查上的合作雖然可以提供程序上的協助以及經濟分析所需資料，但是各主管機關對於結合案會作成如何的評估，一般而言多受制於其本國市場的狀況。即便早已透過雙邊、區域 FTAs 或 WTO 開放市場，在各國競爭法執法上，仍只重視該跨國結合案對本國市場的影響，而不會考慮結合事業在全球布局上是否達到更有效率的資源配置云云。因為主管機關受制於前述的「本國視野」，在執法合作上未能確保得到一致的結果。

4.主管機關執法合作的困難：其他類型

OECD 競爭委員會與 ICN 合作於 2013 年 3 月曾公布一份有關國際執法合作的問卷報告，參與該問卷受試者包含 55 個 OECD 與非 OECD 國家[168]。 本文擷

[167] OECD, "OECD/ICN Questionnaire on International Cooperation," 6 (2013), http://www.oecd.org/competition/globalforum/GFC2013InternationalCooperationOECD.pdf, last visited on date: 2015/4/15.

[168] OECD, *Report On the OECD/ICN Survey on International Enforcement Co-Operation*, 21-23

取其中關於國際合作的前五大困難之處如下表 6，茲簡單說明表中國際合作之限制。

首先是在重要性上與發生頻率上皆居首位的「法律上限制」（legal limits），此指在法的本質上有所差異造成的限制，例如法體系的不同、欠缺進行合作的相關國內立法等，由於欠缺法源基礎，在執法的合作上即受有限制。

另一類型的困難是實務操作上面臨的限制，譬如欠缺可以提供的資源（未建立相關產業資料庫或是依據主管機關現有的公權力無法取得相關資料等）、查處的時效限制（timimg）、語言與文化上的差異等等，而此類合作上的限制，只要主管機關之間主觀上願意相配合，並非無法解決，可是這類的合作限制在發生頻率上，仍高居第二。

第三類型限制係主管機關間資訊交換的問題。主管機關的資訊交換可以分為機密資訊和非機密資訊。一般而言，提供主管機關內部資料，例如分析方法，即對執法合作有莫大幫助，惟若是涉及事業本身的機密，則必須建立更正式的合作基礎。原因在於，一個主管機關如果可以充分的保護事業的機密，便可以取得事業的信賴，進而可能在未來說服事業配合相關執法、提供資訊。所以主管機關不能輕易將事業的機密資訊提供給第三方，而且通常不能單憑國內立法或國與國間的條約作基礎，就將事業機密提供予他國主管機關。前述 57 個國家中，有 30 個國家表示得透過事業出具隱私權拋棄聲明（confidentiality waiver）的方式，進行機密資訊的交換。且資訊之提供亦非無條件，有些主管機關會要求保護資訊後續之流向、限定資訊之用途、必須在雙邊相關條約中訂有授權條款等等[169]。

(2013).
[169] *Supra* note 167, 22.

表 6 國際合作面臨的困難排行

名次	重要性而言	發生頻率而言
1	存在法律上的限制	存在法律上的限制
2	合作意願低	缺乏資源或時效問題
3	未能取得事業拋棄隱私權之聲明	法律上的標準不同
4	缺乏資源或時效問題	程序上已進入不同的階段
5	法律上的標準不同	合作意願低

資料來源：整理自註 160 之 OECD/ICN 問卷報告。

（三）國際卡特爾執法合作面臨的挑戰

1.執法合作的挑戰：卡特爾合意的證據

國際卡特爾執法合作最大的挑戰便是找出事業間合意的證據。由於合意不限任何形式，因此難以察覺，往往必須搜查事業內部之機密始能發現不法。而當合意發生在域外時，除非有他主管機關提供協助，或有寬恕政策之申請者提供犯罪證據，否則根本無從查處。主管機關欲獲取事業之機密，甚至進一步與國際上其他主管機關分享資訊，實存在許多限制。舉美國而言，法律層次上禁止分享以下內容：主管機關藉強制力取得之事業資訊、規定主管機關得藉強制力取得之資訊（即便是私人主動提供）、主管機關於結合申報取得之事業資訊、事業提出結合申請之舉動、大陪審團相關消息。而在行政規則層次上則禁止分享：主管機關開啟調查之舉動、司法部得藉強制力取得之資訊（即便是私人主動提供）[170]。

目前查察卡特爾合意的困難在於取得相關資訊，惟現有的競爭法合作協定、

[170] 參美國 FTC 國際事務辦公室副座在 OECD 研討會所發表。Russel W. Damtoft, “Key Obstacles and Challenges: the Confidentiality Issue,” OECD Workshop on Cooperation, 4-5 (2014).

MoUs 幾無處理機密資訊交換的問題，因此如果需要主管機關之間執法上的協助，必須掌握以下方法，以免侵害事業對機密資訊的權利：簽訂司法互助協議（MLATs）、簽訂共同反托拉斯執法協助協定（AMAAs）[171]、取得事業放棄隱私權之聲明（Confidentiality Waiver）、盡量不交換受法律保護的資訊（如提供產業資料、市場資訊等一般性資訊）、即時提供協助以免主管機關罹於調查裁處之時效。

2.可進行執法合作的範圍

對主管機關而言，查處國際卡特爾在若干方面經常需要執法合作。其一是協調發動突襲調查（raids），以確保證據不會被湮滅。由於涉及國際卡特爾者常是多國籍企業，因此其參與卡特爾之證據不一定存在全球總部，也可能存在其區域總部及分支機構。此時為避免有任何一國的主管機關打草驚蛇，最好主管機關之間能夠彼此協調同步發動突襲調查[172]。

其二，在事證散落他國，且未得到事業拋棄隱私之聲明及無人申請寬恕政策的情形，便需要主管機關分享相關資訊。偶爾也會因為其他主管機關要求提供資訊，才意外得知事業可能涉案之消息[173]。

其三，協助他主管機關向事業取得拋棄隱私之聲明，這經常是主管機關開啟調查合作程序之第一步驟[174]。

其四，對其他有管轄權國家所判刑責的承認，亦屬查處國際卡特爾重要的合

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[171] 共同反托拉斯執法協助協定（Antitrust Mutual Assistance Agreements, AMAAs）係源於 IAEA Act 授權，令美國反托拉斯主管機關得與他國簽訂執法互助之條約。本文以為，在美國司法部多簽訂 MLATs 的情況下，AMAAs 主要貢獻在於「民事程序」上的司法互助，各國可仿效相關內容簽訂司法互助條約以利合作。美國目前唯一一個 AMAA 是和澳洲所簽訂的 US-Australia AMAA，但不常使用。See American Bar Association, *International Antitrust Cooperation Handbook*, 47-53 (2004). 國際間另存在類似功能之執法協助，見於歐盟競爭總署和各成員國競爭法主管機關組成的 ECN（European Competition Network）、北歐五國之間、澳洲與紐西蘭之間。

[172] *Supra note* 158, 45-46.

[173] *Supra note* 158, 45-46.

[174] *Supra* note 158, 45-46.

作項目。涉及卡特爾者在許多國家都將被處以鉅額罰款，而其決策者亦有相關刑事責任，包括自由刑。在罰款的部分，其額度通常是涉案事業在某產品或全部產品的銷售額取一定比例，故在國際卡特爾便有被多重計算的可能，若主管機關間在處罰上能相互承認與合作，便可避免過度處罰的問題；而在自由刑的部分，以英國與美國為例，如果美國司法機關所判刑度較英國為重，則美國將承認受刑人在英國所服之刑期，只要再回到美國服完剩餘刑期即可[175]。惟此部分合作並非專門針對國際卡特爾之處罰，亦屬國與國間各類司法互助之範疇。

3.合作不力的後果

如果國際間無法合作而導致查處國際卡特爾失敗，該違法行為將損及全球經濟、減損市場機制與消費者利益。OECD 之研究指出數項欠缺查處國際卡特爾的合作機制將明顯衝擊市場秩序的例子[176]。第一種情形，部分國家之內國競爭法欠缺域外適用之制度，因而跨境的卡特爾便有空間徹底從該國家之競爭法逃脫。舉例而言，曾發生啤酒大廠在非洲瓜分地理市場，使得各區啤酒業者均有獨占地位，如此獨占地位將不利市場參進，也使得消費者利益容易被生產者搾取。而該等啤酒大廠亦坦承其行為，但其認為非洲僅在內國層次有反托拉斯法制約，在洲的層次不會有反托拉斯的問題[177]。

第二種情形是部分國家的立法例不處罰輸出卡特爾[178]，或者僅處罰對本國市場造成不利影響的卡特爾。有的說法將輸出卡特爾視為行銷的策略，但事業從事聯合行為，即具有將市場力集中的效果，該效果對於市場的衝擊不應小覷[179]。

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[175] *Supra* note 158, 45-46.
[176] *Supra* note 158, 46.
[177] *Supra* note 158, 46.
[178] 以昔日美國為例，其 1918 年以韋伯波門法（Webb-Pomenerene Act）允許輸出卡特爾的成立。1982 年的出口貿易公司法（the Export Trading Company Act）更擴大輸出卡特爾於反托拉斯法的豁免。另 1982 年的 FTAIA 更是明白宣示對美國商業無影響的出口限制競爭行為，可豁免於反托拉斯法的非難，詳參楊佳政，國際貿易上限制競爭問題研究，私立東吳大學法律研究所碩士論文，8-11（1995）。
[179] *Supra* note 158, 46.

對同一件國際卡特爾案件，若主管機關間欠缺合作，則將使得涉案事業必須接受重複的調查，亦使得主管機關之間必須重複進行類似的調查，凡此均是不必要的成本浪費。而在欠缺合作的情形，也會使得主管機關無法對於設總部於域外的涉案事業進行調查，以及無法對於域外的證人進行約談，因而無法取得關鍵的辦案資訊。如同在前述結合管制的國際合作部分所提及，在國際卡特爾的執法合作上，一樣面臨資訊交換時的機密保護問題。至於資訊交換合作的形式則可能受到各有管轄權的國家其內國法體例影響，比方對於卡特爾之刑事程序規定、行政程序規定，以及私人對涉案事業可主張之民事救濟制度。當欠缺打擊國際卡特爾所需資訊時，除了消費者與市場參與者須承受利益的減損，甚至有可能無法察知進行中的卡特爾，而卡特爾之形成對交易相對人的榨取（cartel overcharges）效果之大，相當驚人[180]。

4.合作的風險

國際卡特爾的執法合作並非百利而無一害。OECD 之研究報告指出，最常見的執法合作風險係過度執法（excessive enforcement），譬如複數的主管機關皆基於全球的基礎對該事業課予罰鍰[181]。另外則是在辦案的過程中，有洩漏涉案事業營業秘密之風險[182]。縱然當初取得該營業秘密係透過合法途徑，但不代表主管機關就該秘密之使用毫無限制。主管機關必須避免執法過程或合作過程中不慎洩漏事業之秘密，造成對涉案事業的侵害[183]，否則將損及私人對主管機關的信賴。

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[180] 學者 John 和 Robert 研究發現，以美國為例，卡特爾對交易相對人的榨取率（Cartel Overcharges Rate），即因卡特爾造成的價格漲幅占涉案產品售價比例，平均高達 31%至 49%。John M. Connor and Robert H. Lande, "Cartel Overcharges and Optimal Cartel Fines," *Issues in Competition Law and Policy*, 2203 (2008).

[181] 舉我國公平法為例，現行公平法第 40 條第 2 項：「事業違反第 9 條、第 15 條，經主管機關認定有情節重大者，得處該事業上一會計年度銷售金額 10%以下罰鍰，不受前項罰鍰金額限制。」條文所稱該事業上一會計年度銷售金額，並不限於涉案產品，亦不限於本國市場，即以全球銷售金額計算之。

[182] 此所謂營業秘密並非限於營業秘密法之定義。在反托拉斯案件中，主管機關通常需要取得的機密資訊包括事業之投資策略、行銷策略、銷售數據、廣宣素材、事業所為之市場分析、產能、訂價策略等等。

[183] *Supra* note 158, 47.

第四節、執法合作之強化與未來展望

在前一節中，本文闡述在跨國結合案件與國際卡特爾案件所面臨的執法困難，亦針對合作機制之利與弊進行分析。接著在本節中，將續對跨國結合與國際卡特爾之合作機制如何改善、強化予以說明。

（一）減少跨國結合不必要的成本支出

根據 ICN 研究，在必需向多國申報的跨國結合案中，將產生許多不必要的成本支出，其可歸納為四項：查明各國主管機關的通知與申報要件；向與結合交易本身無重大連結的主管機關進行申報；不正當的申報要求；於申請過程及主管機關審查過程中不必要的遲延[184]。本文以為，各主管機關對結合案進行實質審查後能否作出一致之決定，較難透過建立合作機制促成，但前述不必要的成本支出，其實可以透過主管機關間的合作來避免。進一步言之，應係各國競爭法在結合管制上判斷是否禁止結合之「實體規範」，較之申報標準、審查時程等「程序規範」更容易相互調和，通常只要主管機關願意合作便無太大困難，也因此程序上的不調和所造成的成本支出，便被視為「不必要的成本支出」而亟需各國主管機關積極應對。舉例來說，美墨競爭法合作協定第 4 條第 d 款也指出競爭法主管機關之間的執法行動必須相互協調，以減少主管機關本身與受管制者的成本支出，而第 e 款也指出主管機關應考量協調彼此採取之結合矯正措施，對結合事業和受管制者可以帶來的好處[185]，此等規定值得作為跨國結合管制之合作參考。

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[184] ICN, “Report on the Costs and Burdens of Multijurisdictional Merger Review,” 2 (2004), http://www.internationalcompetitionnetwork.org/uploads/library/doc332.pdf, last visited on date: 2015/4/15.

[185] Agreement between the Government of the United States of America and the Government of the United Mexican States regarding the Application of Their Competition Laws, art. 4.2: “... d. the possible reduction of cost to the Parties and to the persons subject to enforcement activities; and e. the potential advantages of coordinated remedies to the Parties and to the persons subject to the enforcement activities.”

1.建立管轄連結

首先，ICN 建議，要避免事業重複申請、主管機關平行審查的種種後遺症，最直接的方法就是減少問題的數量。而減少問題的數量最直接的方法，就是使有管轄權的主管機關越少越好。因此如何「建立管轄連結」（jurisdictional nexus）便是關鍵所在[186]。由於欠缺決定管轄權的精確標準，ICN 建議各主管機關，在申報門檻的規定中，須建立最小當地關聯（minimum local nexus）。此所謂最小程度的當地關聯，乃視結合事業在該主管機關領域內的銷售額與資產而定[187]。主管機關管轄連結的建立，亦應考慮參與結合事業在其領域內所進行的活動，ICN 建議至少必須考慮結合案中的兩個參與者在其領域內的活動，或者被併購者在其領域內的活動。

2.申報門檻的明確性

其次，申報標準的明確性與透明化向來被認為有助於避免結合審查不必要的成本。就法令遵循的一般通念，主管機關主觀的判斷標準以及語意不清的規定，皆係造成遵循成本提高的主因。各競爭法先進國家一直以來均強調不應以市場占有率作為結合申報門檻，原因即在於，市場占有率看似係客觀的標準，實際上「相關市場（relevant market）的界定」可是大有學問。如果將相關市場劃定得大些，則事業的市占率就小些，因而便不會有結合申報之義務；反之，相關市場劃定得小些，則事業市占率就會大些，事業便較容易負有結合申報之義。倘若事業自認未達申報門檻而不申報，便存在嗣後受到主管機關處罰的風險，蓋違反結合管制之規範者，主管機關除了得罰款及令事業禁止結合，更可以進一步命事業另設事業，或處分一部或全部股份，或讓與其一部或營業，或解除主要職務。一言以蔽

[186] ICN, “Recommended Practices for Merger Notification Procedures,” 1-2, http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf, last visited on date: 2015/4/15.

[187] 原則上所有參與該結合案的事業或個人都應該符合最小當地關聯。被併購的一方僅「被併購的部分」必需受當地關聯的檢視。例如子公司被併購，則僅子公司需要符合當地關聯，母公司雖然是該結合案的參與者，但不需要符合當地關聯。

之，主管機關的罰則能夠將原交易的成果歸零。

2002 年起，ICN 陸續發布「結合申報與審查程序的八大指導原則」、「結合申報與審查程序的建議實務作法」，至今仍持續改善及推動這兩份建議書，以落實有效率之「結合申報與審查程序」（merger notification and review procedures, N&P）[188]。2005 年 ICN 做了一份履行 ICN 建議的評估報告[189]，其問卷結果顯示在 53 個 ICN 成員中，仍有 27 個國家承認使用主觀的結合申報門檻，當中有 18 個國家使用市場占有率作為申報與否的標準。據此，可發現跨國結合案件的效率在 N&P 仍有很大的進步空間。

3.時機的掌握（Timing）

時機的掌握在事業結合的過程中相當重要，對參與結合事業而言尤其如此，必需協調法律規範與商業策略以求順利通過審查。時機的問題並非始於審查，而是從申報開始。觸發事件（trigger events）[190]、申報的時點、程序上反覆的補正、以及每次文件往返的時限等各種繁文縟節，在涉及多個競爭法主管機關管轄時，各項時機掌握將更加複雜，對結合案的負擔相當沉重。ICN 的結合申報建議實務指出，主管機關應容許事業基於誠信，在未符合申報門檻前即先行申報，如果事業能夠提出證明其將參與結合，則主管機關必須接受，且不應有程序上的延宕[191]。本文以為此有助於事業在多國進行結合申報之時機安排。

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[188] ICN current work, http://www.internationalcompetitionnetwork.org/working-groups/current/merger/notification-procedures.aspx, last visited on date: 2015/4/15.

[189] ICN, "Implementation of the ICN Recommened Practice," Annex B (2005), http://www.internationalcompetitionnetwork.org/uploads/library/doc324.pdf, last visited on date: 2015/4/15.

[190] 部分國家的競爭法在結合管制上訂有所謂觸發事件（trigger events），其規定當滿足特定條件之時起，一定時間內必須向主管機關提出結合申報。舉例而言，當 A 公司對 B 公司的持股持續增加，即將滿足某國競爭法上結合申報的門檻，為便利主管機關及早進行審查，因此規定當持股到一定比例時起的一定時間內要進行申報。而為了避免強加不必要的法律義務於事業，觸發事件及申報時限之定義務求明確。若觸發規定太過彈性，可能導致尚在磋商階段的結合交易即需申報，然磋商後交易卻因商業考量破局，如此即有浪費主管機關資源之虞。

[191] The ICN report suggests that: "parties should be permitted to notify proposed mergers upon

4.申報的必要事項

有關申報的必要事項，即申報時必需提供多少資料、哪些種類的資料，倘能在各國競爭法規範中加以調和，對事業而言，可減省許多遵法成本，準備一份資料就可以向各國進行申報。而調和申報事項的建議在國際間一直有所倡議，1994年首度有正式探討[192]，英國、法國與德國則在 1997 年曾經自願性的使用共同申報表格（common filing form），用於發生於兩國或三國間的結合案件[193]。OECD競爭委員會也在 1999 年採納一份關於跨國結合申報之報告，其提供共同申報格式範本[194]。

然而在實踐上，多數的 OECD 會員國並未採納共同申報表格。有學者指出，在結合審查之實體法律標準未能調和以前，先推動共同申報格式，非常容易失敗[195]。原因在於，各國審查標準與所需資料皆有所不同，為了最嚴格的主管機關的需求，通常需要越多、越完整的資料始可，如此一來共同申報格式便不會受到參與結合事業的青睞。此外，制訂了共通表格後，往往為了特定主管機關所需，使得繳交個別的補充資料變成常態。總的來說，欠缺實體規範調和為基礎的共同申報表格，只是為各國分歧的結合管制制度戴上整合的面具罷了[196]。話雖如此，於結合審查實體規範較相近的主管機關之間，本文認為仍有推動使用共同申報表格的必要，可望能減少事業重複準備申報資料的遵法成本。

5.我國可改進之處

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certification of a good faith intent to consummate the proposed transaction." *Supra* note 186, III A.

192 Richard Whish, *Merger Cases in the Real World - A Study of Merger Control Procedures* (1994).

193 然，有學者認為三國的共同申報表格讓審查快的主管機關還要和審查慢的主管機關相互協調，實際上並不能減省時間與金錢成本。J. William Rowley QC and A. Neil Campbell, " Multi-Jurisdictional Merger Review – Is It Time for a Common Form Filing Treaty?" 17-18 (1999), http://www.mcmillan.ca/Files/Multi-Jurisdictional%20Merger%20Review_with%20attach_April%201999.pdf, last visited on date: 2015/4/15.

194 OECD, " Report on the Notification of Transnational Mergers," http://www.oecd.org/competition/mergers/2752153.pdf, last visited on date: 2015/4/15.

195 Jonathan Galloway, "Convergence in International Merger Control," *5(2) the Competition Law Review*, 186 (2009).

196 *Id*.

呈前有關跨國結合在執法合作上得如何強化之論述，本文茲提出兩項我國可片面加強之處。其一，為了減省事業不必要的成本支出，本文認為公平會關於域外結合案件的行政規則可有所修正。在建立管轄連結方面，依據「公平交易委員會對於域外結合案件之處理原則」，公平會採修正的效果主義，對我國市場有直接、實質且可合理預見之影響者，始予以管轄。而再進一步檢視該處理原則之內容，可發現有關「建立當地關聯」的判斷標準，該處理原則第 3 點第 2 項提到：「域外結合案件，如參與結合事業在我國領域內均無生產或提供服務之設備、經銷商、代理商或其他實質銷售管道者，不予管轄。」此排除管轄的規定似指所有參與結合者都與我國無當地關聯時，我國才不予管轄，可見我國主管機關對於域外結合發生的限制競爭效果非常關注。但是，倘只有一個參與結合事業有當地關聯，且於我國之商業活動並不活躍，卻仍要對我國主管機關進行申報，如此便有浪費行政資源與事業遵法成本的問題，故本文建議在「公平交易委員會對於域外結合案件之處理原則」中使用正面敘述，規定一定比例以上的結合參與者有當地關聯時，公平會始予管轄。

其二，關於結合申報門檻，我國制度仍存在規範明確性的疑慮，同時對境內及域外事業結合造成遵法成本的浪費。我國公平法在 2015 年初的修法幅度之大，堪稱公平法的「現代化」，然而在屢受學界質疑的市占率結合申報門檻上，卻未見修正[197,198]。過往 OECD 對我國競爭法與競爭政策進行同儕檢視時，曾建議我國刪除以市占率作為申報門檻的規定，此次未能有所修正，本文深感遺憾，

[197] 公平交易法第 11 條第 1 項：「事業結合時，有下列情形之一者，應先向主管機關提出申報：一、事業因結合而使其市場占有率達三分之一。二、參與結合之一事業，其市場占有率達四分之一。三、參與結合之事業，其上一會計年度銷售金額，超過主管機關所公告之金額。」

[198] 以市場占有率作為結合申報之門檻，在垂直結合的案例可能會發生該管制的不必申報，不該管制的卻需要申報的弔詭現象。舉例來說，上游廠商家數固定，下游廠商家數越多（市占率越小），此時上下游的結合可能使產品價格上漲，然而卻因為下游廠商市占率太小，不需要進行結合申報；反之，上游廠商家數固定，下游廠商家數越少（市占率越大），此時上下游的結合可能使得產品價格下降，然而卻因為下游廠商市占率太大，需要進行結合申報。參考劉孔中，公平交易法，初版，元照出版公司，102（2003）。

但仍期待未來推動相關修法[199]。

（二）強化查處國際卡特爾的合作

1.關於調查程序

在國際卡特爾調查程序上，國際間必需持續努力的方向有二，其一是加強資訊交換的機制。ICN 目前正在研擬促進國際卡特爾非機密資訊分享的架構（ICN framework for promotion of sharing non-condential information for cartel enforcement），藉由此架構將可提供各種合作所需的基礎，包括聯繫窗口的設置、應提供之資訊清單、尋求資訊的程序、保密方法等[200]。

另外一項國際卡特爾需要國際間持續努力的重點，係一致的查處行動與決定時點。有關如何達到查處行動與決定時點的協調，OECD 於 2014 年發布的競爭調查程序國際合作建議書指出若干重點[201]，本文歸納如下：其一，主管機關之間應個案性地進行協調（coordination on a case-by-case basis）；其二，協調中仍應尊重各主管機關獨立決定的權利；其三，避免相互矛盾的調查方法；其四，避免重複執行的成本；其五，提供彼此決策流程與裁處時限等資訊；其六，相互調和使處於相同的程序階段；其七，向另主管機關請求提供被調查者或第三方所提供的拋棄隱私聲明；其八，主管機關間就各自所進行之分析進行討論；其九，在結合案件中主管機關可討論所欲施加的結合矯正措施（remedies），而在卡特爾案件上，亦可討論寬恕政策中希望事業配合的事項；其十，研討其他可合作事項。

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[199] 行政院版的修法草案其實已刪除市占率門檻，但後來又在政黨協商後復活。草案中的修正理由如下：「考量主管機關與申報結合之事業在相關市場之認定上多有認知歧異，並參酌外國立法例如美國及歐盟等均僅以銷售金額作為結合申報門檻，為減少事業投資之不確定性及節省事業之遵法成本，故改採事業銷售金額作為結合單一申報門檻，爰修正第一項，刪除現行條文第一項第一款及第二款以市場占有率為結合申報門檻之規定。」

[200] 參考 2014 年 3 月 OECD 韓國政策中心於首爾舉辦的跨境競爭案件國際合作研討會，日本公正取引委員會國際事務副祕書長 Toshiyuki NUMBU 之演講－About the work that the ICN is planning to do。

[201] OECD, “Recommendation of the OECD Council concerning International Co-operation on Competition Investigations and Proceedings,” 5-6 (2014)

2.關於技術協助

對於年輕的主管機關而言，若能獲得成熟主管機關傳授執法經驗，以及協助建立相關制度，在未來面臨跨境反競爭案件時，該年輕的主管機關將較有能力與其他主管機關合作執法。為此 ICN 也發布了相關研究報告，指出貢獻者應具備之資格和年輕主管機關所應配合事項，並且建議可指定短期或長期的專家顧問進駐年輕主管機關施以協助[202]。此外，鑑於卡特爾的祕密性，其偵辦上需要更高的執法技巧，因此相關的技術協助制度對年輕主管機關而言將是一大幫助，而在發生國際卡特爾案件時，主管機關間也更易於協調查處。

（三）擴充雙邊、區域之競爭法合作協定與 FTAs 的競爭規範

從 OECD 與 ICN 進行的問卷調查報告，本文發現事業簽訂雙邊競爭法合作協定，為國際執法合作最常見的法源基礎之一。茲將競爭法國際合作所使用的法源基礎整理如圖 2，最常見的前五種分別為雙邊競爭法協定（64%受試者表示此為合作之法源）、事業拋棄隱私權聲明（64%）、國內法相關規定（58%）、FTA 中競爭相關條款（44%）、多國的競爭法協定（33%）。

[202] ICN, “Findings Related to Technical Assistance for Newer Competition Agencies,” 1-8 (2007), http://www.internationalcompetitionnetwork.org/uploads/library/doc366.pdf, last visited on date: 2015/4/15.

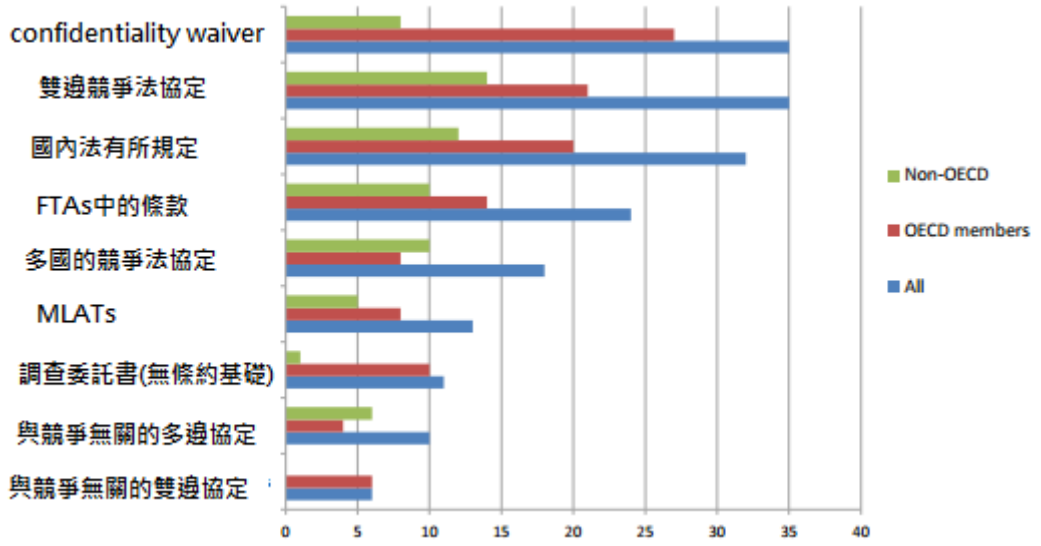

圖 2 國際合作所使用的法源基礎

資料來源：OECD/ICN Questionnaire on International Cooperation，同前註 159，5。

註：問卷受試者包含 55 個 OECD 與非 OECD 國家。

在第一節中，吾人瞭解到在欠缺國際執法合作的情形下，跨國結合將對跨國事業併購策略帶來不確定性，且主管機關之間屢屢進行平行審查，不但耗費行政資源，事業重複申請結合之作業亦造成無謂的成本浪費；至於國際卡特爾之查處，倘未建立合作機制，便難以發現境外卡特爾合意之存在，且主管機關之間的執法行動如果沒有相互協調，將使涉案事業掌握湮滅事證的機會，無疑是打草驚蛇。而在跨國結合與國際卡特爾的案件中，也都存在執法錯誤之風險，譬如主管機關讓對市場秩序造成負面影響的結合案通過審查，以及對卡特爾涉案業者重複處罰等。本文認為各國應仿效圖 2 中多數國家作法，更積極地洽簽競爭法合作協定，或盡量在 FTAs 中納入競爭規範及建立合作機制，避免前述因合作不力以及執法錯誤所帶來的負面影響。

承圖 2 數據，目前國際間如欲建立執法合作之機制，透過簽訂雙邊的競爭法協定、於 FTAs 中納入競爭規範，及加入多國參與的競爭法協定，應屬最容易達成之方式。是以，展望未來，本文認為多邊的競爭法國際合作機制，可能依循國際經貿法上的「砌塊理論」（Building Block Approach）達成。申言之，當今雙

邊或多國的競爭法執法合作協定數目逐漸增多，待長期發展下，個別競爭法協定可能逐漸整合成具有多邊性質的國際競爭法合作協定，而無論國際競爭法合作協定是否成形，愈多競爭法主管機關簽訂執法合作協定，對於解決跨境的反競爭問題也將愈具助益。

此外值得一提的是，東南亞國家協會（Association of Southeast Asian Nations，中文簡稱東協，英文簡稱 ASEAN）在 2015 年底前將轉型成為貨品、服務、投資、技術人才、金流可相互流通的共同市場，而有鑑於東協各國在競爭政策與競爭法的發展程度有落差，東協訂定「東協區域競爭政策指導原則」（ASEAN Regional Guidelines on Competition Policy）以資因應，該指導原則的目標在於：提倡區域內競爭文化；促進合作與區域內相當程度的執法一致性；提供競爭法管制機關相互溝通之管道，俾建立區域內健全的競爭政策原則；對於區域內跨境的限制競爭行為建立有效率的執法框架；透過交換非機密資訊、知識與資源，改進各國主管機關執法效率及有效性；訂定區域內各國競爭政策的基本要素[203]。本文樂見東協國家間建立執法合作管道以及進行實質的政策、法規之調和，且目前東協與中、日、韓等共 16 國持續進行區域全面經濟夥伴協定（Regional Comprehensive Economic Partnership, RCEP）之談判，這份指導原則可藉以推估東協在 RCEP 談判，將採取推動法制與政策整合的合作立場，鑒於東協 10 國在 RCEP 談判之影響力高，這份指導原則的內容或許將反映到將來 RCEP 競爭章的規則[204]。

[203] ASEAN, *Regional Guidelines on Competition Policy*, 1(2010) http://www.asean.org/archive/publications/ASEANRegionalGudelinesonCompetitionPolicy.pdf, last visited on date: 2015/4/15.

[204] RCEP 以東協為整合軸心，GDP 占全球 29%（21 兆美元），人口占全球 49%（35 億人），此區域經濟整合協定之重要性可見一斑。

（四）善用主管機關之間的非正式合作

聯合國貿易暨發展會議（United Nations Conference on Trade and Development, UNCTAD）為了促進競爭議題上的國際合作，設有競爭法與競爭政策政府間專家團（Intergovernmental Group of Experts on Competition Law and Policy），在其第 14 期的會議後發布「競爭主管機關就特定案件的非正式合作報告」（Informal Cooperation among Competition Agencies in Specific Cases）。該報告點出非正式合作管道的重要性。非正式合作管道對於競爭主管機關而言是執法上相當有效的工具，尤其在各國紛紛制定「寬恕政策」之後，事業配合辦案的誘因提高，主管機關間可以相互提供的執法資源也變得較豐富[205]。並且倘採用非正式途徑加以合作，各主管機關便有機會避免前述表 6 中的各類型限制，例如非正式合作在資訊提供上更即時，主管機關的調查裁處權限較不會罹於時效問題；又如，合作上較不會遭遇各國家法體系的不同造成的法律上限制。

首先，吾人必須定義在競爭法國際執法合作的框架中，何謂「非正式合作」。合作指的是競爭法主管機關之間合力、成為夥伴、相互幫忙，或以互惠方式執行各自的競爭法。而「非正式」合作所指涉者，包含主管機關之間非官方名義、不要式、慣常、出於友善，及無拘束性的合作，且非正式合作不落入既有雙邊或區域的經貿協定、競爭法合作協定已建立的合作機制。而當主管機關不願對於合作程序之開啟和進行賦予法律義務時，敦促性質的非正式合作和軟法即成為談判者在 FTAs 中偏好的合作模式。所謂法律義務即代表 FTAs 的合作機制建立後，將約束主管機關，使其有義務配合他主管機關辦案。採用非正式合作亦係為避免相關合作義務之違反將開啟 FTAs 中的爭端解決機制，以及違反後在貿易上必須提出補償。

其次應注意的是，非正式合作並非能超越所有正式合作所遭遇的困難與限

[205] UNCTAD, “Informal Cooperation among Competition Agencies in Specific Cases,” 2 (2014).

制。比方在機密資訊的交換上，不論透過正式管道抑非正式管道，都不能剝奪私人對於私密資訊之權利。非正式合作在資訊交換上的功能，主要是透過主管機關之間的溝通提供彼此一般性資訊（例如法規、產業資訊、經濟分析等資料），減少進行相關研究、調查的成本，在已建立雙邊或區域合作管道的主管機關之間，此已屬最常見的合作類型。

除了一般性資訊之分享，非正式合作的內容可分為兩類型。第一種是在能力建置（capacity building）與技術協助（technical assistance）的場合，年輕主管機關可以向執法經驗成熟的主管機關學習，建立共同的執法目標，俾未來相互合作，UNCTAD、OECD 和 ICN 等組織業提供許多此類非正式合作之機會。

第二種非正式合作係針對特定案件在調查程序上的合作，本文以為此係目前尚不常見但能夠有效進行執法合作的方式。有關調查程序上的合作，在察覺特定案件時，主管機關可以先討論調查策略，接著協調進行調查的時機。對成熟主管機關而言，其必須願意分享辦案經驗以及相關資訊；對年輕主管機關而言，其必須能夠接納建議。如此對於個別跨國反競爭案件的辦案流程，可收提升效率之效果。

第五節、結論

在本章中，吾人發現隨著競爭法主管機關數目的增長以及經濟活動全球化，各國競爭法主管機關有必要就其執法活動相互協調合作，以免發生執法不足、執法過度等等問題，導致各國市場秩序不能維持以及各國消費者的福利遭受減損。在各類型的跨國反競爭案件中，跨國結合與國際卡特爾特別常見，也特別需要主管機關之間相互合作。跨國結合案的合作重點在於減少主管機關與參與結合事業在申報與審查上發生不必要的成本浪費；至於國際卡特爾的合作重點則在於查獲不法，故必須充分在調查過程中相互協調，以免證據滅失，並且可利用事業申請寬恕政策的機會，要求提供拋棄隱私權之聲明，以解決機密資訊交換的問題。

當今各主管機關從事國際合作所面臨的限制有許多類型，例如欠缺交換機密資訊之機制、欠缺合作意願等，各國須透過各種正式、非正式管道加以解決。透過簽立競爭法合作協定或在 FTAs 中納入競爭規範均是現實可行的方式，然而不論是正式的合作或是非正式的合作都存在相當程度限制，因此本文建議各種可以促進合作的管道皆應嘗試。且法制較成熟完善的主管機關必須基於善意提供技術協助，並倡議共同打擊跨國反競爭之目標，此有利年輕主管機關未來面臨國際反競爭案件時，可以順利投入合作，而非拒絕合作或是拖累調查程序。

第五章、FTAs 之競爭規範－兼談競爭中立

本文探討競爭中立有三個理由，理由之一在於分析完整性。本文先前將國際反競爭行為分類為結合、卡特爾與濫用市場力之單方行為，在執法合作之探討上，多著墨在前二者。競爭中立的核心係確保政府涉入商業行為時，不會利用國家資源取得競爭優勢，藉以打擊市場上之私人企業，故競爭中立議題屬於濫用市場力之單方行為，而落入本文所欲探討的範圍。又就本文之命題而言，兼含對競爭法合作協定之研究，及對經貿協定中的競爭規範研究，承本文先前對於二者的比較分析，競爭法合作協定的重點在執法合作機制；經貿協定中競爭規範的重點則是國營事業的競爭中立問題。

其次是受時勢影響。目前最受關注的區域經濟整合協定 TPPA，其所談判的內容便含括國營事業的競爭中立（competitive neutrality）。再舉美國為例，美國所有 FTA 競爭章中，均納入對國營事業之競爭規範，可見國營事業的競爭中立問題，受到國際間重視。

理由之三，在經貿自由化的今日，事業從事國際經營與貿易時，所面臨的障礙不只是邊境上的關稅障礙或數量限制，尚可能面臨與當地國營事業競爭的壓力。各國國營事業在法律上可能享有較有利的競爭條件，抑或某些國家的競爭法並未將國營事業視同一般市場參與者加以規範。凡此競爭不中立的現象，屬於本文問題意識「打擊國際反競爭行為」的射程範圍。

第一節、FTAs 競爭專章考察

於前一章，本文主要探討執法合作協定，在本節中，則選定若干國家之 FTAs，對其競爭專章進行考察，而考察的對象限於有關競爭之實體規範，不再討論執法合作規定。

（一）消費者保護在 FTAs 競爭章的規範

消費者保護，乃澳洲主管機關所重視之競爭相關議題。在澳洲，消費者保護與競爭之主管機關為同一機關 ACCC，ACCC 對於市場上終端需求者之權益係積極予以直接保護，而不只是透過維持市場秩序間接提升消費者福祉，也因此在澳洲所簽訂之 FTA 競爭章，吾人可以看見消費者保護議題也被納入，消費者保護也會是澳洲在其他經貿談判上所欲捍衛之價值。實際上美國與澳洲已經在 2000 年簽訂處理兩國間消費者保護的協定（the Agreement between the Federal Trade Commission of the United States of America and the Australian Competition and Consumer Commission on the Mutual Enforcement Assistance in Consumer Protection Matters of 2000），作用近似於本文所探討的競爭法合作協定；並且也加入超過 50 個消費者保護主管機關組成之國際消費者保護執行網絡（International Consumer Protection andEnforcement Network, ICPEN），ICPEN 之組成與作用近似於本文所探討的 ICN；在 OECD 也已經對跨境消費者保護與跨境詐欺議題頒布指導原則（OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders of 2003），綜合前述發展，可以發現國與國在消費者保護之合作，與國際競爭法合作之發展軌跡大約相同，本文也樂見由澳洲等國為首，逐漸推動消費者保護等實體規範被納入 FTA 競爭章或 FTA 之其他章節。

美澳雙方處理消費欺詐之主管機關分別為 FTAC 和 ACCC，美澳 FTA 第

14.6.3 條要求主管機關之間深化合作，例如建立適當的案件處理程序、即時偵查對兩國市場與消費者利益造成減損的違法行為、將本國域內發生違反消費者保護法規而影響對方國家消費者之情形通知對方、交換關於法令之資訊、提供執法與調查上的幫助、跨境消保案件執法行動之諮商與協調等。美澳 FTA 第 14.6.3 條亦要求主管機關共同發展打擊跨境消費詐欺之策略以及進行相關研究。本文以為此等內容除了在保護消費者有長足貢獻之外，亦有助於發展當今非常熱門的「電子商務產業」，蓋反對電子商務的理由之一在於擔心本國消費者受到域外電子商務事業之欺詐，若能建立消費者保護的執法框架，相信各國在推動電子商務時較為會順暢，實際上電子商務亦為當前 TPP 談判的章節之一。

最後，關於金錢賠償的承認與執行（recognition and enforcement of monetary judgement）規定，是附加於消費者保護後的規定，為求消費者受損的權益可以被彌補，當一方消費者因他方事業違反消費者保護法規而受損，經本國法院判定金錢賠償，他方應對該法院判決予以承認並執行。

在台紐 FTA 競爭章中，消費者保護亦為促進競爭法合作之外，唯一的實體規範。其第 6.1 條規定，締約雙方咸認消費者保護政策及其執行對於達到第 1 條之宗旨，及促進消費者和企業經營者得有信心且公平參與交易環境之重要性。因此，締約雙方肯認其保護消費者不受造成或可能造成損害之不實及欺罔行為之承諾。

（二）指定獨占事業與國營事業在 FTAs 競爭章的規範

在美星 FTA 競爭章，觸及實體競爭規範者為第 12.3 條關於指定獨占與國營事業之規定。第 12.3 條不妨礙締約國指定獨占或成立國營事業，但是必須將獨占與國營事業之情形通知締約國。第 12.3.1.c(i)條規定，如果締約國政府實施某產品或服務之獨占，或進出口許可、交易許可、進口配額，而有指定獨占之情，仍必須符合締約國於本協定下的義務。第 12.3.1.c(ii)條則規定指定獨占者之在相關市場中的行為必須基於純粹商業考量（acts solely in accordance with commercial considerations ）。第 12.3.1.c(iii)條規定，指定獨占者必須以不歧視之方式對於來自締約他方之人提供或購買商品或服務。第 12.3.1.c(iv)條規定，在尚未獨占化的市場中，指定獨占者不得運用其市場力量直接或間接從事反競爭行為，亦不得藉由其母公司或分支機構或其持股之公司為反競爭行為，以免影響到締約他方在領域內的投資[206]。至於國營事業部分，大多要求如同指定獨占之規範，但是訂定許多針對新加坡之片面義務，例如第 12.3.2.e 條要求新加坡不得以任何形式直接或間接影響或主導其國營事業之決策（Singapore shall take no action or attempt in any way, directly or indirectly, to influence or direct decisions of its government enterprises…）。

在台星 FTA 競爭章中，對國營事業和指定獨占之規範即不若美星 FTA 強

[206] US-Singapore FTA, art. 12.3.1.c: "Each Party shall ensure that any privately-owned monopoly that it designates after the date of entry into force of this Agreement and any government monopoly that it designates or has designated: (i) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions, or impose quotas, fees or other charges; (ii) acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, except to comply with any terms of its designation that are not inconsistent with subparagraph (iii) or (iv); (iii) provides non-discriminatory treatment to covered investments, to goods of the other Party, and to service suppliers of the other Party in its purchase or sale of the monopoly good or service in the relevant market; and (iv) does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, subsidiaries, or other enterprises with common ownership, in anticompetitive practices in a non- monopolized market in its territory that adversely affect covered investments."

烈，其第 10.6 條規定：「1.本章不禁止締約方依據其各自法律所指定或維持之公營或私人獨占事業。2.對於公營事業或被授予特別或排他權利的事業，締約雙方應確保在本協定生效後，不採行或維持會扭曲締約雙方間商品和服務貿易之措施，該等措施違反本協定或締約雙方之利益。如競爭規則未於法律上或事實上阻礙該等事業之任務， 締約雙方應確保該等事業受競爭規則之規範。」

就這兩部 FTA 之競爭章來看，其實體規範只有指定獨占事業和國營事業，可見指定獨占事業和國營事業為新加坡在國際上較受貿易對手國關切的競爭議題。

美澳 FTA 競爭章涉及實體規範者為指定獨占事業之規範（第 14.3 條）、獨占事業之規範（第 14.4 條）、跨境消費者保護（第 14.6 條）、對於金錢賠償的承認與執行（第 14.7 條）。

美澳 FTA 競爭章第 14.3 條和第 14.4 條規定和美星 FTA 的指定獨占與國營事業規定幾乎相同，任何被指定獨占之公私部門均不得以造成貿易與投資障礙的方式運作，包括不得濫用進出口許可之權力、濫用商業交易許可之權力、濫用進口配額之權力、濫用收取費用之權力等；指定獨占者之在相關市場中的行為必須基於純粹商業考量；指定獨占者必須以不歧視之方式對於來自締約他方之人提供或購買商品或服務；在尚未獨占化的市場中，指定獨占者不得運用其市場力量直接或間接從事反競爭行為，亦不得藉由其母公司或分支機構或其持股之公司為反競爭行為，以免影響到締約他方在領域內的投資。

（三）小結

美國所簽訂的各部 FTAs 有競爭章者，大部分所涉及之實體規範僅「指定獨占與國營事業」一項，例如美哥 FTA、美智 FTA、美秘 FTA、NAFTA、美星 FTA，有關指定獨占與國營事業在 FTA 下所應受之規範，以美星 FTA 競爭章最為詳盡。台星與台巴 FTA 也是僅「指定獨占與國營事業」一項實體規範。另外，美韓 FTA、美澳 FTA 之競爭章是涉及「指定獨占與國營事業」和「消費者保護」二項實體規範。台紐 FTA 競爭章涉及之實體規範，僅消費者保護一項。

表 7 FTAs 競爭章之實體規範

	美國	我國
FTA 含競爭章者	7	3
消費者保護	2	1
指定獨占與國營事業	7	2
競爭章含消保規範比率	29%	33%
競爭章含指定獨占與國營事業規範比率	100%	67%

資料來源：本文自行整理

本文考察美國與我國各部 FTAs 製表 7，發現競爭章中所涉實體規範只有消費者保護，及指定獨占與國營事業二種（不討論要求締約國制定競爭法與成立主管機關等最基本的實體要求）。本文也發現 FTAs 競爭章規範指定獨占與國營事業之比率相當高，而美國特別注重指定獨占與國營事業問題。如果未來我國欲加入 TPP，可以想見我國對指定獨占與國營事業之規範亦將受到美國等國挑戰。以下將聚焦國營事業或其他公部門參與商業行為的競爭中立議題進行探討。

第二節、競爭中立與國營事業之概念

（一）競爭中立與國營事業之定義

競爭中立的一般性定義可見於 OECD 在 2012 年出版的專書，其謂：「競爭中立表示在經濟市場上沒有任何個體係以不正當的優勢或劣勢營運[207]。」但如此定義仍可以有不同的解釋，例如何謂「正當」優勢或劣勢，即容有不同解讀。舉例來說，對受有補貼的產品課徵平衡稅後，將稅收分給受影響的事業，對收受平衡稅利益的事業而言，此屬於正當的優勢。又關於在「經濟市場上的營運」（operating in an economic market），解釋上必須盡可能廣泛，把潛在的營運行為也含括在內，譬如當某市場原則上必須開放，但實際上卻以法令限制進入時，受不利益者未有實際的營運行為，但危害市場的自由參進乃普遍認為不符合競爭中立之情形。

經貿協定架構中的競爭中立則尤其注重公部門與私部門間在「混合市場」（mixed market）的競爭條件[208]。混合市場係指在事實上或法律上，公部門與私部門同是市場參與者（商品或服務的供給者或需求者）的情形，而當一國以法律明定某個產業由公部門獨占，例如公用事業，此時在經貿協定中便無探討競爭中立的餘地，而是應該討論市場開放的問題。

既然經貿協定重視公部門與私部門從事商業行為、參與市場競爭是否站在公平的基礎之上，進一步則需要檢視哪些公部門會有競爭中立的問題。有些國家只對於傳統的國營事業要求競爭中立性；而有些國家則對所有公部門涉及之商業行為（提供商品或服務為交易之行為）要求競爭中立，不論其組織型態如何。雖然目前國際間並未清楚定義必須符合競爭中立的國營事業型態，但是本文認為競爭

[207] "Competitive neutrality occurs where no entity operating in an economic market is subject to undue advantages or disadvantages." See OECD, *Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business*, OECD Publishing, 17 (2012).
[208] *Id*., 17-18.

中立的應用必須是廣泛的，所有與公部門從事的商業行為以及從公部門受有競爭上優勢的事業，均應符合競爭中立性，故在探討競爭中立時，嚴格定義國營事業範圍實無必要，亦即本文以為競爭中立應落實於各層級中央與地方行政機關（general government）、各中央與地方行政機關以資金或人事介入的非公司型態事業、各中央與地方行政機關介入且為公司型態之事業，而 OECD（2012）報告亦採相同見解[209]。

我國公平會就政府機關之私法行為是否須受公平法規範一事，曾為以下解釋：「（一）關於行政機關以私法行為提供具市場經濟價值之商品或服務為業務或目的，所引起之需求行為，不論在需求時是否已為該項商品或服務之提供，均應受公平交易法之規範。其因提供商品或服務而收取使用規費，所引起之需求行為，不論在需求時是否已為該項商品或服務之提供，亦均應受公平交易法之規範。（二）關於行政機關委託民間或其他機構辦理以私法行為提供具市場經濟價值之商品或服務為業務或目的，所引起之需求行為，不論在需求時是否已為該項商品或服務之提供，均應受公平交易法之規範。其因提供商品或服務而收取使用規費，所引起之需求行為，不論在需求時是否已為該項商品或服務之提供，亦均應受公平交易法之規範。[210]」（公研釋字第 090 號解釋參照）本文認為前述公平會認定行政機關私法行為是否須受公平法規範之判斷標準，符合 OECD（2012）對於商業行為的廣義認定，亦即受公平法規範的行政機關私法行為，可認為屬於必須符合競爭中立的商業行為，惟尚必須考慮當行政機關的私法行為同時負有公共目的時，競爭中立原則可能有所退讓。

又以歐盟為例，其競爭中立之規範主要在歐盟運作條約第 106 條，該條規定

[209] *Id*., 18.

[210] 茲進一步闡釋此解釋文內容，公平交易法所欲規範的行政機關，除了形式上的行政機關也包含委託行使公權力之私人。其次該行政機關之私法行為必須提供具有市場經濟價值的商品或服務。復舉例說明何謂「需求時未為商品或服務之提供」，比如台北市政府欲進行捷運工程，日後將提供大眾運輸服務。雖然台北市政府尚未提供運輸服務，但是關於捷運工程的招標等事項即屬公平交易法所欲規範的行政機關私法行為。公平會即曾處罰台北市政府捷運局在招標時排除中南部業者投標。

受託經營具有一般經濟利益之服務事業或具營利獨占性之事業，均適用競爭規範，惟考量到其他重大公共利益之追求，此條款之適用以不阻礙受託任務的履行為限，並且不應妨礙貿易與發展。從此規定可知，歐盟規範必須符合競爭中立之經濟體應包含國營事業與其他由會員國授予特別或專屬權利之事業。

綜上述，本文不認為需要對國營事業有嚴格的定義（本文以下探討亦不嚴格區分國營事業及以他型態從事商業行為之政府單位），但是哪些行為屬於必須符合競爭中立的商業行為，仍必須劃定標準。蓋行政機關的行為不一定是純粹基於公共任務，而國營事業的行為也不全然係提供商品或服務賺取對價的商業行為。

（二）追求競爭中立之論理

確保競爭中立的優點在於促進經濟體內的資源有效率地分配，試想如果有事業（不論國營或私有）運用其影響力使得其他生產更有效率之事業遭受競爭上的劣勢，如此便會使得最適合生產的事業不事生產，對整體經濟而言將會降低實際收入，且對稀少資源也無法達到最佳的使用[211]。然而在公共利益的追求上，政府偶爾會讓國營事業處於競爭不中立的優勢，常見理由如下：（一）國營事業提供民生必須的基礎建設服務；（二）國營事業是執行產業政策的工具；（三）國營事業的收入可以支持國家財政；（四）國營事業的政治經濟問題[212]。

部分競爭不中立的問題並非由公司化的公部門所造成，而是政府提供某項服務時，對市場上提供類似服務的私人事業造成競爭上的不利。詳言之，政府為了追求某些公共利益，可能在追求競爭中立上會有所妥協，此時政府便可以選擇以個別行為達成公共目的，或是設立組織以執行公共目的，如果以個別行為或是以非公司化的組織來執行公共目的，則在競爭中立的要求上較低；而如果是公司化

[211] *Supra* note 207, 22-26.

[212] 指國營事業涉及的利益團體對於政府造成的壓力。譬如在藍領階層，國營事業雇用人口眾多，且國營事業常被認為可以給予較高的薪水。而國營事業如果無法維持薪資水準或無法承擔企業社會責任，政府將背負相關課責。

組織，則必須滿足國營事業的相關規範及競爭中立要求[213]。

第三節、達成競爭中立的重點事項

OECD（2012）報告指出，就目前各國執行競爭中立的經驗，其內涵主要可分為三大類：（一）檢視公部門相關營運模式，盡可能促其在市場上公平競爭；（二）充分揭露公部門從事的私經濟行為（三）就已偏離競爭中立之事項予以指明，就個別事項應思考如何改善，以及就整體觀之，各種競爭中立的偏離將導致如何效果[214]。以下本文舉出 OECD 認為各國在競爭中立議題上必須努力的幾項重點，而這些重點都是促進競爭中立的基石（building blocks），能夠拼湊愈多，則市場上公私部門間的公平競爭便愈可期待。

（一）改善政府參與商業行為的營運型態

公部門在參與商業行為時，其營運的型態對於競爭中立有莫大有影響。當商業行為是由獨立的經濟個體所施行，與各級中央、地方政府機關都保持距離，此時其競爭中立狀態較不會受質疑[215]。相對地，已公司化的國營事業在競爭中立上便有許多努力空間，例如國營事業無可避免地受到政治干預而偏離競爭中立。是以政府參與商業行為時，應考慮如何從組織上改造國營事業，將專營商業行為與肩負公共任務的部門加以分離，抑或在執行公共任務上不透過國營事業，以杜偏離競爭中立之疑慮。

（二）就政府的商業行為必須辨明其直接成本

當政府的商業行為是透過未公司化（unincorporated）的組織進行，其在競爭中立上的疑慮便是該商業行為享用公部門的資源因而負擔較低的成本（相較市場

[213] *Supra* note 207, 24.
[214] *Supra* note 207, 26-30.
[215] *Supra* note 207, 26-27.

上的私人競爭者），因此解決之道應是建立合理的成本分攤機制。至於公司化的國營事業，在課責性（accountability）和透明化的要求應採取並維持高標準，更重要的是，辨明這些商業行為的成本後，在對非商業行為（如執行公共任務的行為）進行補貼時，便可以避免補貼之利益移轉至商業性競爭的行為。

（三）合理的商業報酬機制

在競爭中立成立的情形下，政府從事商業行為被認為可以就其投入商業行為之資產獲得與市場一致的報酬（rate of return, ROR）。所謂與市場一致的 ROR 即相同產業中相似私人事業可以達到的 ROR[216]。實際上，要求政府從事商業行為必須達成與市場一致的 ROR 非常重要，以國營事業為例，倘若未對 ROR 設有標準，國營事業便可以一方面從公部門得到支持，一方面又從事低價競爭，如此便會減損市場上的競爭（其他競爭者因低價競爭虧損而退出、潛在的市場參與者參進障礙提高）。然而競爭中立性並非剝奪國營事業決定獲利空間的自主性，亦非要求國營事業在一段預算期間或在任一筆交易都比須達成一定的 ROR。於此，競爭中立的要求毋寧是避免國營事業將政府預算的支持，用以彌補自己從事低價競爭所減少的收入，所造成的不當交叉補貼。

（四）公用事業的競爭中立要求

從事公用事業之國營事業或私人亦常涉及競爭不中立的疑慮[217]。誠如本文先前討論單方行為（unilateral conducts）時提到，從事公用事業者經常被政府要求實行公共任務（如供水給偏鄉用戶），因為所付出成本高過可以收取之報酬，所以政府將給予補貼，如果沒有此類補貼，則該等事業即居於劣勢，而這樣的做法

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[216] *Supra* note 207, 27.

[217] 公用事業是指負責維持公共基礎設施服務的體系或機構，包括電力、供水、廢物處理、污水處理、燃氣供應、交通、通訊、郵務等。一般情形下，公用事業是由政府機關、國營事業、或政府特許的公司機構經營，但也有開放民營的例子。

也獲 OECD 支持，惟必須清楚揭露收受政府利益之相關資訊[218]。但如果從事公用事業者獲得過多補貼，便會發生競爭不中立的情形[219]。

（五）租稅中立性（tax neutrality）

租稅中立指政府參與商業行為與一般市場參與者承擔相同的稅賦。而租稅中立程度與政府從事商業行為的組織型態有關，如果是完全獨立的國營事業，則達成租稅中立的方式就比較單純，令國營事業與一般市場參與者承擔相同的稅賦即可。困難之處在於政府從事商業行為但未透過公司化的組織時，便難以要求政府部門直接承擔稅賦。

（六）管制中立性（regulatory neutrality）

為了維持競爭中立性，公部門涉入的事業必須盡可能與一般事業同受法規管制[220]。OECD 報告指出若干私人事業比國營事業受到更多管制的情形：其一，必須事先取得營業許可、建造許可等情；其二，對公家金融機構融資的擔保、利息等條件。當政府能夠以不歧視的方式管制私人與國營事業，便可以達成管制中立，但在現行體制下，無法期待可以估算國營事業所受的財務上利益並要求提出補償金（compensatory payment），進一步應考慮的是應該讓國營事業同受競爭法的規範[221]。

（七）債務中立性及直接補貼（debt neutrality & outright subsidies）

債務中立性指的是國營事業舉債所付出的利息，不應低於一般私人事業在金融市場以相同條件融資需付出的利息，而政府本身不對國營事業進行融資上的補

[218] OECD, *SOE Guidelines*, 41-46 (2005), http://www.oecd.org/daf/ca/34803211.pdf, last visited on date: 2015/4/15.
[219] *Supra* note 207, 27.
[220] *Supra* note 207, 28.
[221] *Supra* note 207, 28.

貼或其他直接補貼，係達到債務中立性最直接的方式。

（八）政府採購上的競爭中立

於政府採購方面達成競爭中立有二點基本原則：其一，採購必須開放競爭，且辦理程序必須基於不歧視的原則；其二，參與投標之公部門或國營事業必須符合前述第（一）至第（七）項中立性的要求。然而，無可避免地國營事業通常因在相關業務上發展許久，而有先驅者的優勢，譬如已經滿足競標資格、在相關營業的申請上已留有可沿用的紀錄，同時先驅者也具有較豐富的產業資訊[222]。

（九）小結

以上八項達成競爭中立的要素應該一併適用、相互參照，而揭露資訊與釐清成本的要求乃國營事業在公司治理上非常重要的一環，於世界各國皆然。國營事業與其他非公司化的政府組織在從事非商業行為（執行公共任務）時，可能導致許多競爭中立的問題，蓋政府對其受到之不利益將給予各種型態的補償，除了直接補貼之外，也包括前述第（五）到（八）項提及的各種租稅上、融資上、管制上的優惠，如何確認補償不會反而導致私部門在競爭上的不利，乃確保競爭中立之重點，較理想的補償方式是針對執行公共任務的行為，而非將利益授予執行公共任務者，否則國營事業取得補償利益後便難以監督是否對市場上的私人事業造成競爭上的劣勢。

[222] *Supra* note 207, 28.

第四節、達成競爭中立之建議作法

根據 OECD 出版之競爭中立建議、準則與最佳作業手冊（Competitive Neutrality: A Compendium of OECD Recommendations, Guidelines and Best Practices ），本文針對前一節提到的八項重點提出達成競爭中立建議之作法。

（一）改善政府參與商業行為的營運型態

OECD 素來提倡成員國將國營事業公司化，所謂公司化除了組織型態必須與一般概念的公司相同，亦包含必須遵守良好的公司治理制度，而為了更完整地改善政府參與商業行為的營運型態，以下方向可資參考。

1. 依據公司法成立獨立法人格、設立獨立的章程。
2. 辨明與政府之間的關係，例如所有權歸屬。
3. 瞭解國營事業成為一般市場參與者應遵守的規則。
4. 明確區分出影響市場競爭狀態的政府行為。
5. 國營事業或其他從事商業活動的政府部門之所有權必須獨立於管制機關。
6. 不侵入、干預國營事業董事會之決定[223]。

回顧過去，OECD 在 2001 年曾通過一份關於解構管制產業之建議書（Recommendation of the Council Concerning Structural Separation in Regulated Industries），其問題意識在於解除管制（deregulation）的過程中，許多垂直整合的國營事業（於此包含曾經是國營事業的民營事業）仍一面把持著瓶頸設施（bottleneck）或關鍵設施（essential facility），而一面與剛投入其上游或下游的新參與者競爭，如此國營事業很容易挾瓶頸設施或關鍵設施的優勢，訂定較嚴苛的交易條件，以排除上游或下游的競爭。職是，解構管制產業之建議書提出，在

[223] OECD, *Competitive Neutrality: A Compendium of OECD Recommendations, Guidelines and Best Practices*, 17 (2012), http://www.oecd.org/daf/ca/50250955.pdf, last visited on date: 2015/4/15.

考量產業之特殊性與成本利益考量之後，不排除可以採取結構面的處理方式（例如將瓶頸設施或關鍵設施由國營事業獨立出來），如此國營事業便不會有濫用其優勢的問題[224]。

（二）就政府的商業行為必須辨明其直接成本

呈先前討論，成本分攤的機制不完善，將使得國營事業或其他從事商業行為的政府部門相對於私部門有競爭上的優勢或劣勢。為了達到競爭中立，政府部門從事商業行為，必需辨明下述。

1. 從受指派的公共任務衍生之額外成本。
2. 估算從租稅、融資上得到的優惠以及對適用法規的衝擊。
3. 估算以國家預算投入公共任務之開銷及給予融資等優惠後應回收的利益[225]。

政府從事商業行為如果是以國營事業之型態，則必須仰賴會計稽查制度以及資訊透明化之要求，辨別達成公共任務之成本如何，又其營利的商業行為成本如何；而如果是一般各級中央或地方政府中的單位從事商業行為，便難以如公司化的國營事業計算成本。查 OECD 架構中有若干指導原則有助未公司化的政府單位辨明其從事商業活動之成本，或避免相關的競爭不中立情形，例如「預算透明化最佳實務」（Best Practices in Budget Transparency）建議當非商業行為未獨立執行時，便須把共用資產與成本使用的比例加以公開；OECD 之國營事業指導原則（SOE Guidelines）、課責與透明化指導原則（Accountability and Transparency Guide）、政府服務使用者付費指導原則（Guidelines for User Charging for Government Services）均指出必須揭露國家補貼的程度；另有其他 OECD 指導原則指出必須革除政府的所有權導致成本上的優勢或劣勢，例如政府服務外包指導

[224] 相對於結構面的處理方式乃行為面的處理方式。舉例來說，行為面的處理方式即對擁有瓶頸設施、關鍵設施之狀態不予處理，而在發生濫用行為時加以控制。See OECD, "Recommendation of the Council concerning Structural Separation in Regulated Industries," 2-3 (2001).
[225] *Supra* note 223, 20.

原則（Guidelines for Contracting Out Government Services）[226]。

（三）合理的商業報酬機制

根據所有權的權能（政府對國營事業的所有權），OECD 的國營事業指導原則強調政府有必要定義國營事業之整體目標，該目標應是國營事業從事商業行為之績效，包括 ROR 或特定任務之達成，藉由該績效吾人可以檢視國營事業之體質是否良善以及其市場取向程度[227]。至於如何決定適當的 ROR 目標，OECD 出版品「管制公部門的市場行為」（Regulating Market Activities by the Public Sector）指出，必須相當於私部門在市場上可以賺取的 ROR[228]。

上一節中，本文提到在未訂定商業上合理的 ROR 時，國營事業有從事低價競爭之誘因，因為國營事業有政府各種面向的支持，且不需擔心低價競爭造成股價下跌等問題。在剛解除管制的產業中，國營事業或民營化不久的事業通常會是產業中的獨占或寡占事業，具壓倒性的市場力，而於此情形，甚至會發生掠奪性訂價（predatory pricing），本文以為此時便應適用內國競爭法處理獨占力濫用的相關規定（如我國公平法第 9 條第 1 項）[229]。至於難以對國營事業適用競爭法者，仍可參考 OECD 競爭委員會通過的掠奪性訂價報告（Report on Predatory Pricing），如發生此類偏離競爭中立之情形，當須嚴格要求 ROR 等績效，以避免發生濫用市場力排除競爭的情形。

此外，在美星 FTA 的競爭專章中，本文觀察到類似要求合理的商業報酬規定，例如第 12.3.1(c)條(ii)(iii)(iv)規定及第 12.3.2(d)條，指定獨占事業和國營事業在相關市場中販賣或購買其所獨占的商品或服務時，必須純粹基於商業考量，而

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[226] *Supra* note 223, 25-26.
[227] *Supra* note 223, 26-27.
[228] 本文不討論 ROR 之計算方式，詳參 OECD 出版品 Regulating Market Activities by the Public Sector。
[229] 公平交易法第 9 條第 1 項：「獨占之事業，不得有下列行為：一、以不公平之方法，直接或間接阻礙他事業參與競爭。」

不能有反競爭行為。根據此等規定，指定獨占事業和國營事業便不能從事排除競爭者的低價競爭行為。而在美澳 FTA 競爭專章中，其第 14.5 條提到，指定獨占事業與國營事業基於正常商業考量從事的差別取價（differences in pricing）係被允許的，反面解釋便是指定獨占事業和國營事業，不能基於非正常商業考量在上下游產業從事差別取價[230]，而所謂非正常商業考量通常即指限制競爭。

（四）公用事業的競爭中立要求

當市場上有私部門提供相同服務，然而國營事業卻被要求基於公共任務提供服務時，便會有競爭不中立的疑慮，而此所謂基於公共任務提供之服務通常屬公用事業，從 OECD 架構中可以發現如下作法供政策參考。

首先，公營事業指導原則指出，以國家預算補償基於公共任務的公用事業服務時，必須有充分透明化與資訊揭露，對公有資源的使用因而必須受到相關監督。其次，國營事業指導原則與預算透明化最佳實務（Best Practices for Budget Transparency）均建議必須對公用事業非商業性的提供服務給予充分補償，然而補償必須以可獨立計算的方式發放[231]。最後，公營事業指導原則、課責與透明化指導原則也建議必須建立可靠的成本計算方法，以盡可能避免發生交叉補貼導致競爭中立的偏離。

（五）租稅中立性

公部門、私部門與第三部門的營運可能因為其所受法律規範不同、組織型態不同而有不同租稅待遇，包括公司所得稅、加值型營業稅（value added tax, VAT）、財產稅、登記稅等。私部門對於不同的租稅待遇有所不滿，因為優惠租

[230] US-Australia FTA, art. 14.5: "Articles 14.3 and 14.4 shall not be construed as preventing a monopoly or state enterprise from charging different prices in different markets, or within the same market, where such differences are based on normal commercial considerations, such as taking account of supply and demand conditions."
[231] *Supra* note 223, 37-38.

稅待遇實際上等同對國營事業的補貼。公部門的商業營運減免部分稅賦之後，可能影響其訂價策略，並且也會影響政府支出與投資決定，比如政府部門考慮到必須付出加值營業稅，於生產上，可能投入商業行為時傾向不採用公司型態；於需求上，則可能由公部門內相關服務替代而不外包（因為免稅使得價格較低）。而為達成租稅中立，OECD 建議各國：對於公司，不論其經營權或所有權屬公、私部門，皆基於不歧視的原則課稅；政府部門以非公司型態從事商業活動而受到租稅優惠者，應支付補償金（compensatory payment）；調漲政府提供之服務訂價，以反映租稅增加。此些作法均有助提升租稅中立性，視各國就可行範圍內如何綜合應用[232]。

又，當享有租稅等各方面直接、間接補貼的國營事業（或未公司化的政府部門）投入外國市場時，將產生許多跨境爭議，在許多經貿協定中已禁止此情形，例如 WTO 之補貼暨平衡措施協定第 1.1(a)(ii)條規定，當政府拋棄或未催繳原已屆期應繳納之稅收（例如租稅抵減之財務獎勵）即認為存在補貼，進而可能違反規定而需被移除。在 OECD 架構中，就確保跨境之租稅中立，乃要求對於處於同類情況從事同類交易的事業，不論屬公屬私，均應以同樣標準課稅；此外當外國事業同樣必須負擔加值型營業稅時，其課徵方式不得增加不必要之遵法成本。詳可參 OECD 之國際加值營業稅/商品服務稅指導原則（International VAT/GST Guidelines）、中立之國際指導原則（International Guidelines on Neutrality）[233]。此外本文以為，欲確保租稅之減免不會造成競爭中立之偏離，應透明化所有對公、私部門租稅減免之決定與相關程序。

[232] *Supra* note 223, 38.
[233] *Supra* note 223, 42.

（六）管制中立性

在內國層次，常見欠缺管制中立的情形包括：（一）免除揭露之義務與新法規之要求（如環保規定）；（二）免於恪守公司法；（三）免於遵守破產法；（四）免於遵守建造許可規定、都市計劃規定；（五）容易取得土地；（六）公、私部門不平等的管制負擔。有關追求管制之中立性，本文提供 OECD 的國營事業指導原則中若干參考作法，例如第 I.B.段提到，政府必須致力於簡化及調整其參與商業行為的營運型態（如法律地位），使債權人得以對其提起訴訟或開啟清算程序[234]；又其第 I.D.段提到，國營事業不應豁免於一般性的法令，包含市場上競爭者在內的利害關係人認為國營事業違反法令侵害其權利時，應建立有效救濟之途徑[235]。而本文以為，秉持管制中立之前提，國營事業最起碼必須遵守的法律便是一般性的公司法，如此對股東與債權人等才有所保障，對市場上競爭者而言也不會遭遇不理性的競爭手段（例如無懼破產的高風險行為）。

至於在受管制的產業中，OECD 仍建議必須定期檢視從事商業行為之政府單位其體質及運作模式，尤其在該管制產業中，國營事業（或其他特許經營之事業）具有獨占地位者。相關論述可見於 OECD 競爭政策建議書（Recommendation on Competition Policy）、政府法規品質改善建議書（Recommendation on Improving Quality of Government Regulation）、管制革新建議書（Recommendation on Regulatory Reform）、管制品質與績效指導原則（Guiding Principles on Regulatory Quality and Performance）等等[236]。而 OECD 也指出在財金法規上，其設計不應因所有權歸屬公或私有差別待遇，亦不應單純因不同組織型態、產業、部門或市

[234] "Governments should strive to simplify and streamline the operational practices and the legal form under which SOEs operate. Their legal form should allow creditors to press their claims and to initiate insolvency procedures." See OECD, *supra* note 218, 12.
[235] "SOEs should not be exempt from the application of general laws and regulations. Stakeholders, including competitors, should have access to efficient redress and an even-handed ruling when they consider that their rights have been violated." See OECD, *supra* note 218, 12.
[236] *Supra* note 223, 52.

場而有差別待遇，而是因功能性出發，令金融機構對於同樣風險採取相同態度[237]。

（七）債務中立性

OECD 的國營事業指導原則第 1.F.段提到國營事業於取得融資上應比照競爭市場上的條件，且國營事業與國營銀行、國營金融機構及其他國營事業之關係均應立於純粹商業之基礎[238]。該指導原則進一步提供建議作法，包括：國營事業與政府、其債權人之間必須劃分清楚；政府不應該無條件為國營事業之負債提供擔保；而關於政府提供之擔保，必須建立公平之機制揭露國營事業反饋之報酬；國營事業應尋求政府以外的融資方式，譬如股權融資（equity financing）；建立機制避免國營事業與國營銀行之間的矛盾；對國營事業提供的優惠以同等條件提供給私部門[239]。

（八）政府採購上的競爭中立

透過提升政府採購之公正性，有助達成政府採購上的競爭中立。OECD 於 2008 年通過提升政府採購公正性建議書（Recommendations for Enhancing Integrity in Public Procurement），其提出幾項重要原則，包括避免各種貪腐（賄賂、收受回扣、利用裙帶關係、未利益迴避等）、嚴防從交付過程竊取資源、避免曾任職公部門者與公部門間的利益掛勾、嚴防官商勾結、避免資訊之濫用或人為操作、避免採購程序中各種歧視性規定等[240]。

此外，OECD 亦訂有打擊核心卡特爾之有效行動建議書，其所定義之核心卡

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[237] OECD, *Policy Framework for Effective and Efficient Financial Regulation: General Guidance and High-level Checklist*, 34 (2010), http://www.oecd.org/finance/financial-markets/44362818.pdf, last visited on date: 2015/4/15.

[238] " SOEs should face competitive conditions regarding access to finance. Their relations with state-owned banks, state-owned financial institutions and other state-owned companies should be based on purely commercial grounds." *Supra* note 218.

[239] *Supra* note 218, 22-23.

[240] OECD, "Recommendations for Enhancing Integrity in Public Procurement," 4 (2008), http://www.oecd.org/governance/ethics/41549036.pdf, last visited on date: 2015/4/15.

特爾包括競爭者彼此協議之出口設限、出口配額、價格固定、瓜分市場（透過分配供給者、消費者、營業地理範圍等），以及圍標（bid rigging）[241]，尤其圍標有害政府採購程序中的競爭中立，而此建議書於各種公、私型態之事業組織皆適用之。打擊圍標適用於政府採購市場中的供給者，至於國營事業或其他公部門作為需求者時，則回歸前述，必須嚴格要求採購程序之公正。

為了避免各種採購程序中的違法情事以及歧視性規定，本文以為最佳處理方式乃「預先透明化投標資格與評選程序」，以確保各事業在政府採購市場之競爭係公平、公正。

（九）小結

本節針對 OECD（2012）出版之競爭中立專論所整理之八項競爭中立重點事項，進一步提出具體的建議作為，主要仍係參考 OECD 架構中的各種建議書與研究報告，蓋 OECD 素為推動解除管制與產業自由化之搖籃，對於管制部門與國營事業應遵循之行為準則已醞釀許多蘊含競爭中立概念之軟法規範，例如文中多次引用 2005 年通過的國營事業指導原則，殊值各國推動競爭中立政策時參考。

第五節、TPP 中的競爭中立

「競爭中立」簡單來說便是讓公私部門遵守同一套市場規則，沒有任何市場參與者可以平白地取得競爭上的優勢。而競爭中立之規範不只存在競爭法，亦存在於各個管制產業的法規，例如金融管制法規、政府採購法規等等，而此在經貿協定中亦然。因 TPP 採取秘密談判模式而難以得知協定內容，惟吾人可想見在 TPP 架構中，競爭中立要求多數將落在國營事業專章，要求 TPP 成員不得給予

[241] OECD, “Recommendation concerning Action against Hard Core Cartel,” http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=193&InstrumentPID=189&Lang=en&Book=False, last visited on date: 2015/4/15.

公部門及國營事業優於私部門之競爭優勢，但競爭中立要求也將同時存在於其他章節，如競爭政策專章、政府採購專章、金融專章、電信專章、投資專章等。

就 TPP 而言，最基本的競爭中立規範即要求國營事業及其他公部門從事商業行為者一概必須符合競爭法規範，不過成員國仍得保留二類型的自主空間，其一是於特定公共目標之追求可以豁免於競爭法（可稱之為一般性的豁免），另外一類的保留則是直接明定特定產業(甚至特定國營事業)不需完全達成競爭中立(可稱之為正面表列的豁免清單），至於保留的程度以及是否逐步開放（過渡期之安排）等情則視談判狀況而定。國營事業競爭中立政策非但屬於 OECD 及美歐等國所關注之國際性經貿議題，同時對於提升我國經濟效率，降低對競爭之扭曲亦有所助益。我國雖然在公平法之適用上已將公、私事業一體納入，但競爭中立並不是單純競爭法問題，在個產業管制法(例如金融與電信等)也有競爭中立問題，故整體的競爭中立架構仍有進一步改善之空間，有必要開始思考調整改革之道，以作為與國際接軌及加入 TPP 之準備[242]。

[242] 李淳，「公營事業之競爭中立問題及對我國經貿政策之意涵」，中華經濟研究院台灣 WTO 中心 WTO 電子報，第 341 期，7（2012）。

第六章、全文總結

本文一開始將國際反競爭行為分為三大類型：結合、卡特爾與濫用市場力的單方行為，並論及管制上應注意之重點。此分類相當程度上呼應了第四章、第五章之內容。第四章國際執法合作主要在探討多國的結合審查與國際卡特爾如何運用主管機關之間的正式、非正式合作機制有效率地執法，而第五章探討公私部門間之競爭中立議題，其與濫用市場力之單方行為相關，蓋受有競爭優勢的國營事業有本錢從事低價競爭，藉以排除競爭者，此即屬典型濫用市場力之掠奪性訂價行為。

在第三章中，本文則試圖從單邊、雙邊、複邊至政府間組織，一層層探討國際競爭法制與執法合作機制如何因應國際反競爭問題。在單邊層次上，各國對於域外（或涉外）的反競爭行為，皆有一定的管轄權，例如美國採取輔以禮讓原則之效果主義，及歐盟採取實施理論，然而此等單邊解決途徑在執法上仍不夠有效率，譬如在域外謀議的卡特爾案件，便難以取得合意之證據。

在雙邊層次上，各國間訂有許多競爭法合作協定與經貿協定（含競爭規範），本文以我國與美國為例，逐一介紹曾簽訂之競爭法合作協定、MoUs、設有競爭章之 FTAs，並對其內容加以考察。而本文發現，年代較晚的競爭法合作協定有深化合作之進展，例如 1990 年代之後的競爭法合作協定開始加入相互的司法協助規定。此外簽訂對象的不同亦會對具體條款有所影響，例如對於競爭法制後進國家多訂有技術協助規定；而因為新加坡的國營事業發達，美星 FTA 便針對新加坡課予許多確保競爭中立之片面義務。在各個雙邊規範內容不一的現況下，單憑雙邊競爭法合作協定、MoUs 與 FTAs，仍難以解決涉及多國之反競爭案件，譬如辦案所需之機密資訊在複數主管機關之間難以流暢的進行交換。

在複邊（或區域）層次，本文介紹 APEC、NAFTA、歐盟、TPP 等經貿協

定（或組織）之競爭相關規範，其關於國際反競爭案件之處理仍不夠全面，例如 NAFTA 較重視國營事業問題而非執法合作；APEC 著重成員國競爭政策之一致性；而歐盟乃一超國家主權之經濟整合體，其境內的競爭規範調和與執法合作機制雖然發展相對完善，但其經驗並非其他複邊或區域組織可以輕易複製；TPP 之競爭規則尚在醞釀當中。另方面，政府間國際組織如 OECD 與 ICN，其對於跨國的反競爭議題固有諸多研究與探討，卻因為其做成之建議書與研究報告均屬軟法性質，對成員國不具拘束力，在個案無法直接做為執法合作之基礎，但其對於促成主管機關之間後續的合作及技術援助仍有相當貢獻。

在以上各層次的解決途徑都存在限制，並且已無法期待由 WTO 多邊架構處理國際反競爭問題的狀況下，本文將注意力轉移到如何強化現有的各種執法合作機制。第四章首先點出國際執法合作機制的重要性，瞭解主管機關之間倘未能充分合作所產生之執法風險與成本浪費，分別由跨國結合和國際卡特爾二方面為深入探討，接著並提出強化執法合作機制之重點。在跨國結合案，重點乃減少不必要的申報、審查成本浪費，具體方式包括管轄連結之建立、申報門檻之明確化、申報時機之掌握以及申報必要事項之調和等。至於國際卡特爾之合作重點則在於協調主管機關間之執法行動以及建立資訊交換機制，如此便能有效查察卡特爾之合意，打擊不法。而根據 OECD/ICN 之調查，目前國際間最常使用的合作法源基礎為雙邊的競爭法合作協定與 FTAs，是以本文認為各國仍應更加速建立此類合作機制，以因應經濟活動全球化後紛紛出現的國際反競爭案件。此外，主管機關間利用技術援助、參與國際事務等機會商討非正式的合作，亦不失為暫時補充合作機制不足之可行途徑，而在各國陸續引入寬恕政策之際，主管機關有權要求申請寬恕之事業配合辦案，如此又更加擴張主管機關間從事非正式合作之空間。

國營事業的競爭中立議題在國際間漸趨受重視，現行談判中的巨型區域經濟整合協定中（如 RCEP、TPP、TTIP），均有相關章節，許多國家簽訂的 FTAs

競爭章中，也同時處理競爭政策與國營事業之競爭中立問題。本文第五章便係以競爭中立為題，主要宗旨係公部門從事商業行為不能因為受有國家給予的競爭優勢，而損及市場上的私部門競爭者。競爭中立議題在 TPP 中受到眾多關注，惟吾人無法得知競爭中立之要求將如何具體呈現在 TPP 相關章節條款中，故本文乃闡述 OECD 關於競爭中立之各種一般性概念，包括改善政府從事商業行為之組織型態、辨明政府從事商業行為之成本、合理的商業報酬機制、公用事業的競爭中立要求、租稅中立性、管制中立性、債務中立性及政府採購方面的中立性等，進而提供在 OECD 架構中各種促進競爭中立的指導原則、建議書與良好實務。而我國各產業部門如欲提升競爭中立程度，當可參考前述 OECD 之建議，尤其如我國未來欲加入 TPP，即應符合 TPP 談判國就整部協定（暫 29 章）已達成之各種共識[243]，而競爭中立之要求雖可預料多屬於國營事業專章之相關規範，但仍可能散落於競爭專章、政府採購專章、金融專章、電信專章等等，是以我國競爭部門、貿易部門、產業部門都應該探討競爭中立問題，並共同規劃競爭中立的藍圖，使所有市場參與者立於公平之基礎從事競爭。

[243] 新成員國欲加入 TPP 應同時具備「形式要件」與「實質要件」。TPP 前身－泛太平洋戰略經濟夥伴協定第 20.6 條訂有加入規定，其謂「本協定依據締約方同意之條件，開放給任何 APEC 經濟體或其他國家加入。加入的條件應考量 APEC 經濟體或其他國家的情況，特別是自由化的時程表。」呈前規定再參酌目前墨、加、日加入 TPP 之經驗觀察，加入 TPP 的形式要件包括：（一）APEC 會員；（二）TPP 全體成員共識同意；（三）提出自由化的時程表；（四）申請加入時點符合 TPP 回合談判時程。至於實體要件則包含：新成員準備程度與企圖心、接受當下所有談判成果、其加入不減損 TPP 宣示之高品質、符合美方所列關鍵議題之確認。參考史惠慈、顏慧欣、葉長城、胡聚男，加入 TPP 臺灣準備好了嗎，由 ECFA 到 TPP：台灣區域經濟整合之路，遠景基金會出版，149-150（2014）。

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附錄 1

U. S. - Germany Antitrust Accord

Subject to ratification by both countries, the United States and West Germany agreed to the following on June 23, 1976.

Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices

The Government of the United States of America and the Government of the Federal Republic of Germany, considering that restrictive business practices affecting their domestic or international trade are prejudicial to the economic and commercial interests of their countries,

Convinced that action against these practices can be made more effective by the regularization of cooperation between their antitrust authorities, and

Having regard, in this respect, to their Treaty of Friendship, Commerce, and Navigation and to the Recommendations of the Council of the Organization for Economic Cooperation and Development Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade adopted on October 5, 1967, and on July 3, 1973,

Have agreed as follows:

Article 1

For the purpose of this Agreement, the following terms shall have the meanings indicated:

(a) ”Antitrust laws” shall mean, in the United States of America, the Sherman Act (15

(b) U.S.C. §§ 1-11), the Clayton Act (15 U.S.C. § 12 et seq.), and the Federal Trade Commission Act (15 U.S.C. § 41 et seq.), and in the Federal Republic of Germany, the Act Against Restraints on Competition (”Gesetz gegen Wettbewerbsbeschrankungen”) (BGB1. I 1974, 869) as those Acts have been and may from time to time be amended.

(c) ”Antitrust authorities” shall mean, in the United States of America, the Antitrust Division of the United States Department of Justice and the Federal Trade Commission, and, in the Federal Republic of Germany, the Federal Minister of Economics (”Bundesminister fur Wirtschaft”) and the Federal Cartel Office (”Bundeskartellamt”)

and successors in each country.

(d) ”Information” shall include reports, documents, memoranda, expert opinions, legal briefs and pleadings, decisions of administrative or judicial bodies, and other written or computerized records.

(e) ”Restrictive business practices” shall include all practices which may violate, or are regulated under, the antitrust laws of either party.

(f) ”Antitrust investigation or proceeding” shall mean any investigation or proceeding related to restrictive business practices and conducted by an antitrust authority under its antitrust laws.

Article 2

(1) Each party agrees that its antitrust authorities will cooperate and render assistance to the antitrust authorities of the other party, to the extent set forth in this Agreement, in connection with:

(a) antitrust investigations or proceedings,

(b) studies related to competition policy and possible changes in antitrust laws, and

(c) activities related to the restrictive business practice work of international organizations of which both parties are members.

(2) Each party agrees that it will provide the other party with any significant information which comes to the attention of its antitrust authorities and which involves restrictive business practices which, regardless of origin, have a substantial effect on the domestic or international trade of such other party.

(3) Each party agrees that, upon request of the other party, its antitrust authorities will obtain for and furnish such other party with such information as such other party may request in connection with a matter referred to in Article 2, paragraph 1, and will otherwise provide advice and assistance in connection therewith. Such advice and assistance shall include, but not necessarily be limited to, the exchange of information and a summary of experience relating to particular practices where either of the antitrust authorities of the requested party has dealt with or has information relating to a practice involved in the request. Such assistance shall also include the attendance of public officials of the requested party to give information, views or testimony in regard to any antitrust investigation or proceeding, legislation or policy, and the transmittal or the making available of documents and legal briefs and pleadings of the antitrust authorities of the requested party (or duly authenticated or certified copies thereof).

(4) An antitrust authority of a party, in seeking to obtain information or interviews on a

voluntary basis from a person or enterprise within the jurisdiction of the other party, may request such other party to transmit a communication seeking such information or interviews to such person or enterprise. In that event, the other party will transmit such communication and, if so requested, will (if such is the case) notify such person or enterprise that the requested party has no objection to voluntary compliance with the request.

(5) Each party agrees that, upon the request of an antitrust authority of the other party, its antitrust authorities will consult with the requesting party concerning possible coordination of concurrent antitrust investigations or proceedings in the two countries which are related or affect each other.

Article 3

(1) Either party may decline, in whole or in part, to render assistance under Article 2 of this Agreement, or may comply with any request for such assistance subject to such terms and conditions as the complying party may establish, if such party determines that:

(a) compliance would be prohibited by legal protections of confidentiality or by other domestic law of the complying party; or

(b) compliance would be inconsistent with its security, public policy or other important national interests;

(c) the requesting party is unable or unwilling to comply with terms or conditions established by the complying party, including conditions designed to protect the confidentiality of information requested; or

(d) the requesting party would not be obligated to comply with such request, by reason of any grounds set forth in items (a), (b) or (c) above, if such request had been made by the requested party.

(2) Neither party shall be obligated to employ compulsory powers in order to obtain information for, or otherwise provide advice and assistance to, the other party pursuant to this Agreement.

(3) Neither party shall be obligated to undertake efforts in connection with this Agreement which are likely to require such substantial utilization of personnel or resources as to burden unreasonably its own enforcement duties.

Article 4

(1) Each party agrees that it will act, to the extent compatible with its domestic law, security, public policy or other important national interests, so as not to inhibit or interfere with any antitrust investigation or proceeding of the other party.

(2) Where the application of the antitrust laws of one party, including antitrust investigations or proceedings, will be likely to affect important interests of the other party, such party will notify such other party and will consult and coordinate with such other party to the extent appropriate under the circumstances.

Article5

The confidentiality of information transmitted shall be maintained in accordance with the law of the party receiving such information, subject to such terms and conditions as may be established by the complying party furnishing such information. Each party agrees that it will use information received under this Agreement only for purposes of its antitrust authorities as set forth in Article 2, paragraph 1.

Article6

(1) The terms of this Agreement shall be implemented, and obligations under this Agreement shall be discharged, in accordance with the laws of the respective parties, by their respective ntitrust authorities which shall develop appropriate procedures in connection therewith.

(2) Requests for assistance pursuant to this Agreement shall be made or confirmed in writing, shall be reasonably specific and shall include the following information as appropriate:

(a) the antitrust authority or authorities to whom the request is directed;

(b) the antitrust authority or authorities making the request;

(c) the nature of the antitrust investigation or proceeding, study or other activity involved;

(d) the object of and reason for the request; and

(e) the names and addresses of relevant persons or enterprises, if known.

Such requests may specify that particular procedures be followed or that a representative of the requesting party be present at requested proceedings or in connection with other requested actions.

(2) The requesting party shall be advised, to the extent feasible, of the time, place and type of action to be taken by the requested party in response to any request for assistance under this Agreement.

(3) If any such request cannot be fully complied with, the requested party shall promptly notify the requesting party of its refusal or inability to so comply, stating the grounds for such refusal, any terms or conditions which it may establish in connection therewith and any other information which it considers relevant to the subject of the request.

Article 7

All direct expenses incurred by the requested party in complying with a request for assistance under this Agreement shall, upon request, be paid or reimbursed by the requesting party. Such direct expenses may include fees of experts, costs of interpreters, travel and maintenance expenses of experts, interpreters and employees of antitrust authorities, transcript and reproduction costs, and other incidental expenses, but shall not include any part of the salaries of employees of antitrust authorities.

Article 8

This Agreement shall also apply to Land Berlin provided that the Government of the Federal Republic of Germany does not make a contrary declaration to the Government of the United States of America within three months of the date of entry into force of this Agreement.

Article 9

(1) This Agreement shall enter into force one month from the date on which the parties shall have informed each other in an exchange of diplomatic notes that all the domestic legal requirements for such entry into force have been fulfilled.

(2) This Agreement shall remain in force until terminated upon six months' notice given in writing by one of the parties to the other.

Done at Bonn, in duplicate, in the English and German languages, both texts being equally authentic, this twenty-third day of June, 1976.

附錄2

Agreement between
The Government of the United States of America
And
The Commission of the European Communities
Regarding the Application of Their Competition Laws

The Government of the United States of America and the Commission of the European Communities:

Recognizing that the world's economies are becoming increasingly interrelated, and in particular that this is true of the economies of the United States of America and the European Communities;

Noting that the Government of the United States of America and the Commission of the European Communities share the view that the sound and effective enforcement of competition law is a matter of importance to the efficient operation of their respective markets and to trade between them;

Noting that the sound and effective enforcement of the Parties' competition laws would be enhanced by cooperation and, in appropriate cases, coordination between them in the application of those laws;

Noting further that from time to time differences may arise between the Parties concerning the application of their competition laws to conduct or transactions that implicate significant interests of both Parties;

Having regard to the Recommendation of the Council of the Organization for Economic Cooperation and Development Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade, adopted on June 5, 1986; and

Having regard to the Declaration on US-EC Relations adopted on November 23, 1990;

Have agreed as follows:

Article I
PURPOSE AND DEFINITIONS

1. The purpose of this Agreement is to promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws.

2. For the purposes of this Agreement, the following terms shall have the following definitions:

a) "Competition law(s)" shall mean

(i) for the European Communities, Articles 85, 86, 89 and 90 of the Treaty establishing the European Economic Community, Regulation (EEC) no. 4064/89 on the control of concentrations between undertakings, Articles 65 and 66 of the Treaty establishing the

European Coal and Steel Community (ECSC), and their implementing Regulations including High Authority Decision no. 24-54, and

(ii) for the United States of America, the Sherman Act (15 U.S.C. §§1-7), the Clayton Act (15 U.S.C. §§12-27), the Wilson Tariff Act (15 U.S.C. §§8-11), and the Federal Trade Commission Act (15U.S.C. §§41-68, except as these sections relate to consumer protection functions), as well as such other laws or regulations as the Parties shall jointly agree in writing to be a "competition law" for purposes of this Agreement;

b) "Competition authorities" shall mean (i) for the European Communities, the Commission of the European Communities, as to its responsibilities pursuant to the competition laws of the European Communities, and (ii) for the United States, the Antitrust Division of the United States Department of Justice and the Federal Trade Commission;

c) "Enforcement activities" shall mean any application of competition law by way of investigation or proceeding conducted by the competition authorities of a Party; and

d) "Anticompetitive activities" shall mean any conduct or transaction that is impermissible under the competition laws of a Party.

Article II
NOTIFICATION

1. Each Party shall notify the other whenever its competition authorities become aware that their enforcement activities may affect important interests of the other Party.

2. Enforcement activities as to which notification ordinarily will be appropriate include those that:

a) Are relevant to enforcement activities of the other Party;

b) Involve anticompetitive activities (other than a merger or acquisition) carried out in significant part in the other Party's territory;>

c) Involve a merger or acquisition in which one or more of the parties to the transaction, or a company controlling one or more of the parties to the transaction, is a company incorporated or organized under the laws of the other Party or one of its states or member states;

d) Involve conduct believed to have been required, encouraged or approved by the other Party; or

e) Involve remedies that would, in significant respects, require or prohibit conduct in the other Party's territory.

3. With respect to mergers or acquisitions required by law to be reported to the competition authorities, notification under this Article shall be made:

a) In the case of the Government of the United States of America,

(i) not later than the time its competition authorities request, pursuant to 15 U.S.C. §18a(e), additional information or documentary material concerning the proposed transaction,

(ii) when its competition authorities decide to file a complaint challenging the transaction, and

(iii) where this is possible, far enough in advance of the entry of a consent decree to enable the other Party's views to be taken into account; and

b) In the case of the Commission of the European Communities,

(i) when notice of the transaction is published in the Official Journal, pursuant to Article 4(3) of Council Regulation no. 4064/89, or when notice of the transaction is received under Article 66 of the ECSC Treaty and a prior authorization from the Commission is required under that provision,

(ii) when its competition authorities decide to initiate proceedings with respect to the proposed transaction, pursuant to Article 6(1)(c) of Council Regulation no. 4064/89, and

(iii) far enough in advance of the adoption of a decision in the case to enable the other Party's views to be taken into account.

4. With respect to other matters, notification shall ordinarily be provided at the stage in an investigation when it becomes evident that notifiable circumstances are present, and in any event far enough in advance of

a) the issuance of a statement of objections in the case of the Commission of the European Communities, or a complaint or indictment in the case of the Government of the United States of America, and

b) the adoption of a decision or settlement in the case of the Commission of the European Communities, or the entry of a consent decree in the case of the Government of the United States of America, to enable the other Party's views to be taken into account.

5. Each Party shall also notify the other whenever its competition authorities intervene or otherwise participate in a regulatory or judicial proceeding that does not arise from its enforcement activities, if the issues addressed in the intervention or participation may affect the other Party's important interests. Notification under this paragraph shall apply only to

a) regulatory or judicial proceedings that are public,

b) intervention or participation that is public and pursuant to formal procedures, and

c) in the case of regulatory proceedings in the United States, only proceedings before federal agencies.

Notification shall be made at the time of the intervention or participation or as soon thereafter as possible.

6. Notifications under this Article shall include sufficient information to permit an initial evaluation by the recipient Party of any effects on its interests.

Article III
EXCHANGE OF INFORMATION

1. The Parties agree that it is in their common interest to share information that will (a) facilitate effective application of their respective competition laws, or (b) promote better understanding by them of economic conditions and theories relevant to their competition authorities' enforcement activities and interventions or participation of the kind described in Article II, paragraph 5.

2. In furtherance of this common interest, appropriate officials from the competition authorities of each Party shall meet at least twice each year, unless otherwise agreed, to (a) exchange information on their current enforcement activities and priorities, (b) exchange information on economic sectors of common interest, (c) discuss policy changes which they are considering, and (d) discuss other matters of mutual interest relating to the application of competition laws.

3. Each Party will provide the other Party with any significant information that comes to the attention of its competition authorities about anticompetitive activities that its competition authorities believe is relevant to, or may warrant, enforcement activity by the other Party's competition authorities.

4. Upon receiving a request from the other Party, and within the limits of Articles VIII and IX, a Party will provide to the requesting Party such information within its possession as the requesting Party may describe that is relevant to an enforcement activity being considered or conducted by the requesting Party's competition authorities.

Article IV
COOPERATION AND COORDINATION IN ENFORCEMENT ACTIVITIES

1. The competition authorities of each Party will render assistance to the competition authorities of the other Party in their enforcement activities, to the extent compatible with the assisting Party's laws and important interests, and within its reasonably available resources.

2. In cases where both Parties have an interest in pursuing enforcement activities with regard to related situations, they may agree that it is in their mutual interest to coordinate their enforcement activities. In considering whether particular enforcement activities should be coordinated, the Parties shall take account of the following factors, among others:

a) the opportunity to make more efficient use of their resources devoted to the enforcement activities;

b) the relative abilities of the Parties' competition authorities to obtain information necessary to conduct the enforcement activities;

c) the effect of such coordination on the ability of both Parties to achieve the objectives of their

enforcement activities; and

d) the possibility of reducing costs incurred by persons subject to the enforcement activities.

3. In any coordination arrangement, each Party shall conduct its enforcement activities expeditiously and**,** insofar as possible**,** consistently with the enforcement objectives of the other Party.

4. Subject to appropriate notice to the other Party, the competition authorities of either Party may limit or terminate their participation in a coordination arrangement and pursue their enforcement activities independently.

Article V
COOPERATION REGARDING ANTICOMPETITIVE ACTIVITIES IN THE TERRITORY OF ONE PARTY THAT ADVERSELY AFFECT THE INTERESTS OF THE OTHER PARTY

1. The Parties note that anticompetitive activities may occur within the territory of one Party that, in addition to violating that Party's competition laws, adversely affect important interests of the other Party. The Parties agree that it is in both their interests to address anticompetitive activities of this nature.

2. If a Party believes that anticompetitive activities carried out on the territory of the other Party are adversely affecting its important interests, the first Party may notify the other Party and may request that the other Party's competition authorities initiate appropriate enforcement activities. The notification shall be as specific as possible about the nature of the anticompetitive activities and their effects on the interests of the notifying Party, and shall include an offer of such further information and other cooperation as the notifying Party is able to provide.

3. Upon receipt of a notification under paragraph 2, and after such other discussion between the Parties as may be appropriate and useful in the circumstances, the competition authorities of the notified Party will consider whether or not to initiate enforcement activities, or to expand ongoing enforcement activities, with respect to the anticompetitive activities identified in the notification. The notified Party will advise the notifying Party of its decision. If enforcement activities are initiated, the notified Party will advise the notifying Party of their outcome and, to the extent possible, of significant interim developments.

4. Nothing in this Article limits the discretion of the notified Party under its competition laws and enforcement policies as to whether or not to undertake enforcement activities with respect to the notified anticompetitive activities, or precludes the notifying Party from undertaking enforcement activities with respect to such anticompetitive activities.

Article VI
AVOIDANCE OF CONFLICTS OVER ENFORCEMENT ACTIVITIES

Within the framework of its own laws and to the extent compatible with its important interests, each Party will seek, at all stages in its enforcement activities, to take into account the important interests of the other Party. Each Party shall consider important interests of the other Party in

decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding, the nature of the remedies or penalties sought, and in other ways, as appropriate. In considering one another's important interests in the course of their enforcement activities, the Parties will take account of, but will not be limited to, the following principles:

1. While an important interest of a Party may exist in the absence of official involvement by the Party with the activity in question, it is recognized that such interests would normally be reflected in antecedent laws, decisions or statements of policy by its competent authorities.

2. A Party's important interests may be affected at any stage of enforcement activity by the other Party. The Parties recognize, however, that as a general matter the potential for adverse impact on one Party's important interests arising from enforcement activity by the other Party is less at the investigative stage and greater at the stage at which conduct is prohibited or penalized, or at which other forms of remedial orders are imposed.

3. Where it appears that one Party's enforcement activities may adversely affect important interests of the other Party, the Parties will consider the following factors, in addition to any other factors that appear relevant in the circumstances, in seeking an appropriate accommodation of the competing interests:

a) the relative significance to the anticompetitive activities involved of conduct within the enforcingParty's territory as compared to conduct within the other Party's territory;

b) the presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers, or competitors within the enforcing Party's territory;

c) the relative significance of the effects of the anticompetitive activities on the enforcing Party's interests as compared to the effects on the other Party's interests;

d) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;

e) the degree of conflict or consistency between the enforcement activities and the other Party's laws or articulated economic policies; and

f) the extent to which enforcement activities of the other Party with respect to the same persons, including judgments or undertakings resulting from such activities, may be affected.

Article VII
CONSULTATION

1. Each Party agrees to consult promptly with the other Party in response to a request by the other Party for consultations regarding any matter related to this Agreement and to attempt to conclude consultations expeditiously with a view to reaching mutually satisfactory conclusions. Any request for consultations shall include the reasons therefor and shall state whether procedural time limits or other considerations require the consultations to be expedited.

These consultations shall take place at the appropriate level, which may include consultations between the heads of the competition authorities concerned.

2. In each consultation under paragraph 1, each Party shall take into account the principles of cooperation set forth in this Agreement and shall be prepared to explain to the other Party the specific results of its application of those principles to the issue that is the subject of consultation.

Article VIII
CONFIDENTIALITY OF INFORMATION

1. Notwithstanding any other provision of this Agreement, neither Party is required to provide information to the other Party if disclosure of that information to the requesting Party (a) is prohibited by the law of the Party possessing the information, or (b) would be incompatible with important interests of the Party possessing the information.

2. Each Party agrees to maintain, to the fullest extent possible, the confidentiality of any information provided to it in confidence by the other Party under this Agreement and to oppose, to the fullest extent possible, any application for disclosure of such information by a third party that is not authorized by the Party that supplied the information.

Article IX
EXISTING LAW

Nothing in this Agreement shall be interpreted in a manner inconsistent with the existing laws, or as requiring any change in the laws, of the United States of America or the European Communities or of their respective states or member states.

Article X
COMMUNICATIONS UNDER THIS AGREEMENT

Communications under this Agreement, including notifications under Articles II and V, may be carried out by direct oral, telephonic, written or facsimile communication from one Party's competition authority to the other Party's authority. Notifications under Articles II, V and XI, and requests under Article VII, shall be confirmed promptly in writing through diplomatic channels.

Article XI
ENTRY INTO FORCE, TERMINATION AND REVIEW

1. This Agreement shall enter into force upon signature.

2. This Agreement shall remain in force until 60 days after the date on which either Party notifies the other Party in writing that it wishes to terminate the Agreement.

3. The Parties shall review the operation of this Agreement not more than 24 months from the date of its entry into force, with a view to assessing their cooperative activities, identifying additional areas in which they could usefully cooperate and identifying any other ways in which the Agreement could be improved. The Parties agree that this review will include, among other things, an analysis of actual or potential cases to determine whether their interests could be better served through closer cooperation.

附錄 3

Agreement between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws

The Government of the United States of America of the one part, and the European Community and the European Coal and Steel Community of the other part (hereinafter "the European Communities"):

Having regard to the 23 September 1991 Agreement between the Government of the United States of America and the European Communities Regarding the Application of Their Competition Laws, and the exchange of interpretative letters dated 31 May and 31 July 1995 in relation to that Agreement (together hereinafter "the 1991 Agreement");

Recognizing that the 1991 Agreement has contributed to coordination, cooperation, and avoidance of conflicts in competition law enforcement;

Noting in particular Article V of the 1991 Agreement, commonly referred to as the "Positive Comity" article, which calls for cooperation regarding anticompetitive activities occurring in the territory of one Party that adversely affect the interests of the other Party;

Believing that further elaboration of the principles of positive comity and of the implementation of those principles would enhance the 1991 Agreement's effectiveness in relation to such conduct; and

Noting that nothing in this Agreement or its implementation shall be construed as prejudicing either Party's position on issues of competition law jurisdiction in the international context,

Have agreed as follows:

Article I
Scope and Purpose of this Agreement

1. This Agreement applies where a Party satisfies the other that there is reason to believe that the following circumstances are present:

   (a) Anticompetitive activities are occurring in whole or in substantial part in the territory of one of the Parties and are adversely affecting the interests of the other Party; and

   (b) The activities in question are impermissible under the competition laws of the Party in the territory of which the activities are occurring.

2. The purposes of this Agreement are to:

   (a) Help ensure that trade and investment flows between the Parties and competition

and consumer welfare within the territories of the Parties are not impeded by anticompetitive activities for which the competition laws of one or both Parties can provide a remedy, and

(b) Establish cooperative procedures to achieve the most effective and efficient enforcement of competition law, whereby the competition authorities of each Party will normally avoid allocating enforcement resources to dealing with anticompetitive activities that occur principally in and are directed principally towards the other Party's territory, where the competition authorities of the other Party are able and prepared to examine and take effective sanctions under their law to deal with those activities.

Article II
Definitions

As used in this Agreement:

1. "Adverse effects" and "adversely affected" mean harm caused by anticompetitive activities to:

   (a) the ability of firms in the territory of a Party to export to, invest in, or otherwise compete in the territory of the other Party, or

   (b) competition in a Party's domestic or import markets.

2. "Requesting Party" means a Party that is adversely affected by anticompetitive activities occurring in whole or in substantial part in the territory of the other Party.

3. "Requested Party" means a Party in the territory of which such anticompetitive activities appear to be occurring.

4. "Competition law(s)" means:

   (a) for the European Communities, Articles 85, 86, and 89 of the Treaty establishing the European Community (EC), Articles 65 and 66(7) of the Treaty establishing the European Coal and Steel Community (ECSC), and their implementing instruments, to the exclusion of Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, and

   (b) for the United States of America, the Sherman Act (15 U.S.C. §§1-7), the Clayton Act (15 U.S.C. §§12-27, except as it relates to investigations pursuant to Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §18a), the Wilson Tariff Act (15 U.S.C. §§8-11), and the Federal Trade Commission Act (15 U.S.C. §§41-58, except as these sections relate to consumer protection functions),as well as such other laws or regulations as the Parties shall jointly agree in writing to be a "competition law" for the purposes of this Agreement.

5. "Competition authorities" means:

(a) for the European Communities, the Commission of the European Communities, as to its responsibilities pursuant to the competition laws of the European Communities, and

(b) for the United States, the Antitrust Division of the United States Department of Justice and the Federal Trade Commission.

6. "Enforcement activities" means any application of competition law by way of investigation or proceeding conducted by the competition authorities of a Party.

7. "Anticompetitive activities" means any conduct or transaction that is impermissible under the competition laws of a Party.

Article III
Positive Comity

The competition authorities of a Requesting Party may request the competition authorities of a Requested Party to investigate and, if warranted, to remedy anticompetitive activities in accordance with the Requested Party's competition laws. Such a request may be made regardless of whether the activities also violate the Requesting Party's competition laws, and regardless of whether the competition authorities of the Requesting Party have commenced or contemplate taking enforcement activities under their own competition laws.

Article IV
Deferral or Suspension of Investigations in Reliance On Enforcement Activity by the Requested Party

1. The competition authorities of the Parties may agree that the competition authorities of the Requesting Party will defer or suspend pending or contemplated enforcement activities during the pendency of enforcement activities of the Requested Party.

2. The competition authorities of a Requesting Party will normally defer or suspend their own enforcement activities in favor of enforcement activities by the competition authorities of the Requested Party when the following conditions are satisfied:

(a) The anticompetitive activities at issue:

(i) do not have a direct, substantial and reasonably foreseeable impact on consumers in the Requesting Party’s territory, or

(ii) where the anticompetitive activities do have such an impact on the Requesting Party’s consumers, they occur principally in and are directed principally towards the other Party’s territory;

(b) The adverse effects on the interests of the Requesting Party can be and are likely to be fully and adequately investigated and, as appropriate, eliminated or adequately remedied pursuant to the laws, procedures, and available remedies of

the Requested Party. The Parties recognize that it may be appropriate to pursue separate enforcement activities where anticompetitive activities affecting both territories justify the imposition of penalties within both jurisdictions; and

(c) The competition authorities of the Requested Party agree that in conducting their own enforcement activities, they will:

(i) devote adequate resources to investigate the anticompetitive activities and, where appropriate, promptly pursue adequate enforcement activities;

(ii) use their best efforts to pursue all reasonably available sources of information, including such sources of information as may be suggested by the competition authorities of the Requesting Party;

(iii) inform the competition authorities of the Requesting Party, on request or at reasonable intervals, of the status of their enforcement activities and intentions, and where appropriate provide to the competition. authorities of the Requesting Party relevant confidential information if consent has been obtained from the source concerned. The use and disclosure of such information shall be governed by Article V;

(iv) promptly notify the competition authorities of the Requesting Party of any change in their intentions with respect to investigation or enforcement;

(v) use their best efforts to complete their investigation and to obtain a remedy or initiate proceedings within six months, or such other time as agreed to by the competition authorities of the Parties, of the deferral or suspension of enforcement activities by the competition authorities of the Requesting Party;

(vi) fully inform the competition authorities of the Requesting Party of the results of their investigation, and take into account the views of the competition authorities of the Requesting Party, prior to any settlement, initiation of proceedings, adoption of remedies, or termination of the investigation; and

(vii) comply with any reasonable request that may be made by the competition authorities of the Requesting Party.

When the above conditions are satisfied, a Requesting Party which chooses not to defer or suspend its enforcement activities shall inform the competition authorities of the Requested Party of its reasons.

3. The competition authorities of the Requesting Party may defer or suspend their own enforcement activities if fewer than all of the conditions set out in paragraph 2 are satisfied.

4. Nothing in this Agreement precludes the competition authorities of a Requesting Party that choose to defer or suspend independent enforcement activities from later initiating or reinstituting such activities. In such circumstances, the competition authorities of the Requesting Party will promptly inform the competition authorities of the Requested Party of their intentions and reasons. If the competition authorities of the Requested Party continue with their own investigation, the competition authorities of the two Parties shall, where appropriate, coordinate their respective investigations under the criteria and procedures of Article IV of the 1991 Agreement.

Article V
Confidentiality and Use of Information

Where pursuant to this Agreement the competition authorities of one Party provide information to the competition authorities of the other Party for the purpose of implementing this Agreement, that information shall be used by the latter competition authorities only for that purpose. However, the competition authorities that provided the information may consent to another use, on condition that where confidential information has been provided pursuant to Article IV.2 (c) (iii) on the basis of the consent of the source concerned, that source also agrees to the other use . Disclosure of such information shall be governed by the provisions of Article VIII of the 1991 Agreement and the exchange of interpretative letters dated 31 May and 31 July 1995.

Article VI
Relationship to the 1991 Agreement

This Agreement shall supplement and be interpreted consistently with the 1991 Agreement, which remains fully in force.

Article VII
Existing Law

Nothing in this Agreement shall be interpreted in a manner inconsistent with the existing laws, or as requiring any change in the laws, of the United States of America or the European Communities or of their respective states or Member States.

Article VIII
Entry Into Force and Termination

1. This Agreement shall enter into force upon signature.

2. This Agreement shall remain in force until 60 days after the date on which either Party notifies the other Party in writing that it wishes to terminate the Agreement.

附錄 4

Agreement between the Government of the United States of America and the Government of Canada regarding the Application of Their Competition and Deceptive Marketing Practices Laws

The Government of the United States of America and the government of Canada (hereinafter referred to as "Parties");

Having regard to their close economic relations and cooperation within the framework of the North American Free Trade Agreement ("NAFTA");

Noting that the sound and effective enforcement of their competition laws is a matter of importance to the efficient operation of markets within the free trade area and to the economic welfare of the Parties' citizens;

Having regard to their commitment in Chapter 15 of NAFTA to the importance of cooperation and coordination among their competition authorities to further effective competition law enforcement in the free trade area;

Recognizing that coordination of enforcement activities may, in appropriate cases, result in a more effective resolution of the Parties' respective concerns than would be attained through independent action;

Having regard to the fact that the effective enforcement of their laws relating to deceptive marketing practices is also a matter of importance to the efficient operation of markets within the free trade area, and having regard to the potential benefits of increased cooperation between the Parties in the enforcement of those laws;

Noting that from time to time differences may arise between the Parties concerning the application of their competition laws to conduct or transactions that implicate the important interests of both Parties;

Noting further their commitment to give careful consideration to each other's important interests in the application of their competition laws; and

Having regard to the long history of cooperation between the parties in matters relating to competition law, including the bilateral Understandings of 1959, 1969 and 1984, as well as the1986 Recommendation of the Council of the OECD Concerning cooperation Between Member Countries on Restrictive Business practices Affecting International Trade;

Have agreed as follows:

Article I
Purpose and Definitons

1. The purpose of this Agreement is to promote cooperation and coordination between the competition authorities of the parties, to avoid conflicts arising from the application of the

parties' competition laws and to minimize the impact of differences on their respective important interests, and, in addition, to establish a framework for cooperation and coordination with respect to enforcement of deceptive marketing practices laws.

2. For the purposes of this Agreement, the following terms shall have the following definitions:

(a) "Anticompetitive activity(ies)" means any conduct or transaction that may be subject to penalties or other relief under the competition laws of a Party;

(b) "Competition authority(ies)" means

(i) for Canada, the Director of Investigation and research;

(ii) for the United States of America, the United states Department of Justice and the Federal Trade Commission;

(c) "Competition law(s)" means

(i) for Canada, the Competition Act, R.S.C. 1985, C.C-34, except sections 52 through 60 of that Act;

(ii) for the United States of America, the Sherman Act(15 U.S.C. §§ 1-7), the Clayton Act (15 U.S.C. §§ 12-27), the Wilson Tariff Act (15 U.S.C.§§ 8-11) and the Federal Trade commission Act (15 U.S.C. §§ 41-58), to the extent that it applies to unfair methods of competition, as well as any amendments thereto, and such other laws or regulations as the parties may from time to time agree in writing to be a"competition law" for the purposes of this Agreement; and

(d) "Enforcement activity(ies)" means any investigation or proceeding conducted by a Party in relation to its competition laws.

3. Any reference in this Agreement to a specific provision in either Party's competition law shall be interpreted as referring to that provision as amended from time to time and to any successor provision thereof. Each Party shall promptly notify the other of any amendments to its competition laws.

Article II
Notification

1. Each Party shall, subject to Article X(1), notify tether Party in the manner provided by this Article and Article XII with respect to its enforcement activities that may affect important interests of the other Party.

2. Enforcement activities that may affect the important interests of the other Party and therefore ordinarily require notification include those that:

(a) are relevant to enforcement activities of the other party;

(b) involve anticompetitive activities, other than mergers or acquisitions, carried out in whole or in part in the territory of the other Party, except where the activities occurring in the territory of the other Party are insubstantial;

(c) involve mergers or acquisitions in which

- one or more of the parties to the transaction, or

- a company controlling one or more of the parties to the transaction, is a company incorporated or organized under the laws of the other Party or of one of its provinces or states;

(d) involve conduct believed to have been required, encouraged or approved by the other Party;

(e) involve remedies that expressly require or prohibit conduct in the territory of the other Party or are otherwise directed at conduct in the territory of the other Party; or

(f) involve the seeking of information located in the territory of the other Party, whether by personal visit by officials of a Party to the territory of the other Party or otherwise.

3. Notification pursuant to this Article shall ordinarily be given as soon as a Party's competition authorities become aware that notifiable circumstances are present, and in any event in accordance with paragraphs 4 through 7 of this article.

4. Where notifiable circumstances are present with respect to mergers or acquisitions, notification shall be given not later than

(a) in the case of the United States of America, the time its competition authorities seek information or documentary material concerning the proposed transaction pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15U.S.C. 18a(e)), the Federal Trade Commission Act (15 U.S.C. 49,57b-1) or the Antitrust Civil Process Act (15 U.S.C. 1312); and

(b) in the case of Canada, the time its competition authorities issue a written request for information under oath or affirmation, or obtain an order under section 11 of the Competition Act, with respect to the transaction.

5. When the competition authorities of a Party request that a person provide information, documents or other records located in the territory of the other Party, or request oral testimony in a proceeding or participation in a personal interview by a person located in the territory of the other Party, notification shall be given:

(a) if compliance with a request for written information, documents or other records is voluntary, at or before the time that the request is made;

(b) if compliance with a request for written information, documents or other records is compulsory, at least seven (7) days prior to the request, (or, when seven (7) days' notice cannot be given, as promptly as circumstances permit); and

(c) in the case of oral testimony or personal interviews, at or before the time arrangements for the interview or testimony are made.

Notification is not required with respect to telephone contacts with a person in the territory of the other Party where(i) that person is not the subject of an investigation, (ii) the contact seeks only an oral response on a voluntary basis(although the availability and possible voluntary provision of documents may be discussed) and (iii) the other Party's important interests do not appear to be otherwise implicated, unless the other Party requests otherwise in relation to a particular matter.

Notification is not required for each subsequent request for information in relation to the same matter unless the Party seeking information becomes aware of new issues bearing on the important interests of the other Party, or the other Party requests otherwise in relation to a particular matter.

6. The Parties acknowledge that officials of either Party may visit the territory of the other Party in the course of conducting investigations pursuant to their respective competition laws. Such visits shall be subject to notification pursuant to this Article and the consent of the notified Party.

7. Notification shall also be given at least seven (7)days in advance of each of the following where notifiable circumstances are present:

(a) (i) in the case of the United States of America, the issuance of a complaint, the filing of a civil action seeking a temporary restraining order or preliminary injunction or the initiation of criminal proceedings;

(ii) in the case of Canada, the filing of an application with the Competition Tribunal, an application under Part IV of the Competition Act or the initiation of criminal proceedings;

(b) the settlement of a matter by way of an undertaking, an application for a consent order or the filing or issuance of a proposed consent order or decree; and

(c) the issuance of a business review or advisory opinion that will ultimately be made public by the competition authorities.

When seven (7) days' notice cannot be given, notice shall be given as promptly as circumstances permit.

8. Each Party shall also notify the other whenever its competition authorities intervene or otherwise publicly participate in a regulatory or judicial proceeding that is not initiated by the competition authorities if the issue addressed in the intervention or participation may affect the other Party's important interests. Such notification shall be made at the time of the intervention or participation or as soon thereafter as possible.

9. Notifications shall be sufficiently detailed to enable the notified Party to make an initial evaluation of the effect of the enforcement activity on its own important interests, and shall include the nature of the activities under investigation and the legal provisions concerned.

Where possible, notifications shall include the names and locations of the persons involved. Notifications concerning a proposed undertaking, consent order or decree shall either include or, as soon as practicable be followed by, copies of the proposed undertaking, order or decree and any competitive impact statement or agreed statement of facts relating to the matter.

Article III
Enforcement Cooperation

1.

(a) The Parties acknowledge that it is in their common interest to cooperate in the detection of anticompetitive activities and the enforcement of their competition laws to the extent compatible with their respective laws and important interests, and within their reasonably available resources.

(b) The Parties further acknowledge that it is in their common interest to share information which will facilitate the effective application of their competition laws and promote better understanding of each other's enforcement policies and activities.

(c)

The Parties will consider adopting such further arrangements as may be feasible and desirable to enhance cooperation in the enforcement of their competition laws.

2. Each Party's competition authorities will, to the extent compatible with that Party's laws, enforcement policies and other important interests,

(a) assist the other Party's competition authorities, upon request, in locating and securing evidence and witnesses, and in securing voluntary compliance with requests for information, in the requested Party's territory;

(b) inform the other Party's competition authorities with respect to enforcement activities involving conduct that may also have an adverse effect on competition within the territory of tether Party;

(c) provide to the other Party's competition authorities, upon request, such information within its possession as the requesting Party's competition authorities may specify that is relevant to the requesting Party's enforcement activities; and

(d) provide the other Party's competition authorities with any significant information that comes to their attention about anticompetitive activities that may be relevant to, or may warrant, enforcement activity by the other Party's competition authorities.

3. Nothing in this Agreement shall prevent the Parties from seeking or providing assistance to one another pursuant to other Agreements, treaties, arrangements or practices between them.

Article IV
Coordination with Regard to Related Matters

1. Where both Parties' competition authorities are pursuing enforcement activities with regard to related matters, they will consider coordination of their enforcement activities. In such matters, the Parties may invoke such mutual assistance arrangements as may be in force from time to time.

2. In considering whether particular enforcement activities should be coordinated, either in whole or in part, the Parties' competition authorities shall take into account the following factors, among others:

(a) the effect of such coordination on the ability of both Parties to achieve their respective enforcement objectives;

(b) the relative abilities of the Parties' competition authorities to obtain information necessary to conduct the enforcement activities;

(c) the extent to which either Party's competition authorities can secure effective relief against the anticompetitive activities involved;

(d) the possible reduction of cost to the Parties and to the persons subject to enforcement activities; and

(e) the potential advantages of coordinated remedies to the parties and to the persons subject to the enforcement activities.

3. In any coordination arrangement, each Party's competition authorities shall seek to conduct their enforcement activities consistently with the enforcement objectives of theother Party's competition authorities.

4. In the case of concurrent or coordinated enforcement activities, the competition authorities of each Party shall consider, upon request by the competition authorities of tether Party and where consistent with the requested Party's enforcement interests, ascertaining whether persons that have provided confidential information in connection with those enforcement activities will consent to the sharing of such information between the Parties' competition authorities.

5. Either Party's competition authorities may at any time notify the other Party's competition authorities that they intend to limit or terminate coordinated enforcement and pursue their enforcement activities independently and subject to the other provisions of this Agreement.

Article V
Cooperation Regarding Anticompetitive Activities in the Territory of One Party that Adversely Affect the Interests of the Other Party

1. The Parties note that anticompetitive activities may occur within the territory of one Party that, in addition to violating that Party's competition laws, adversely affect important interests of the other Party. The Parties agree that it is in their common interest to seek relief against anticompetitive activities of this nature.

2. If a Party believes that anticompetitive activities carried out in the territory of the other Party adversely affect its important interests, the first Party may request that tether Party's competition authorities initiate appropriate enforcement activities. The request shall be as specific as possible about the nature of the anticompetitive activities and their effects on the interests of the Party, and shall include an offer of such further information and other cooperation as the requesting Party's competition authorities are able to provide.

3. The requested Party's competition authorities shall carefully consider whether to initiate enforcement activities, or to expand ongoing enforcement activities, with respect to the anticompetitive activities identified in the request. The requested Party's competition authorities shall promptly inform the requesting Party of its decision. If enforcement activities are initiated, the requested Party's competition authorities shall advise the requesting Party of their outcome and, to the extent possible, of significant interim developments.

4. Nothing in this Article limits the discretion of The requested Party's competition authorities under its competition laws and enforcement policies as to whether to undertake enforcement activities with respect to the anticompetitive activities identified in a request, or precludes the requesting Party's competition authorities from undertaking enforcement activities with respect to such anticompetitive activities.

Article VI
Avoidance of Conflcts

1. Within the framework of its own laws and to the extent compatible with its important interests, each Party shall, having regard to the purpose of this Agreement as set out in Article I, give careful consideration to the other Party's important interests throughout all phases of its enforcement activities, including decisions regarding the initiation of an investigation or proceeding, the scope of an investigation or proceeding and the nature of the remedies or penalties sought in each case.

2. When a Party informs the other that a specific enforcement activity may affect the first Party's important interests, the second Party shall provide timely notice of developments of significance to those interests.

3. While an important interest of a Party may exist in the absence of official involvement by the Party with the activity in question, it is recognized that such interest would normally be reflected in antecedent laws, decisions or statements of policy by its competent authorities.

4. A Party's important interests may be affected at any stage of enforcement activity by the other Party. The Parties recognize the desirability of minimizing any adverse effects of their enforcement activities on each other's important interests, particularly in the choice of remedies. Typically, the potential for adverse impact on one Party's important interests arising from enforcement activity by the other Party is less at the investigative stage and greater at the stage at which conduct is prohibited or penalized, or at which other forms of remedial orders are imposed.

Where it appears that one Party's enforcement activities may adversely affect the important interests of the other Party, each Party shall, in assessing what measures it will take, consider all appropriate factors, which may include but are not limited to:

(i) the relative significance to the anticompetitive activities involved of conduct occurring within one Party's territory as compared to conduct occurring within that of the other;

(ii) the relative significance and foreseeability of the effects of the anticompetitive activities on one Party's important interests as compared to the effects on the other Party's important interests;

(iii) the presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers or competitors within the enforcing Party's territory;

(iv) the degree of conflict or consistency between the first Party's enforcement activities (including remedies) and tether Party's laws or other important interests;

(v) whether private persons, either natural or legal, will be placed under conflicting requirements by both Parties;

(vi) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;

(vii) the location of relevant assets;

(viii) the degree to which a remedy, in order to be effective, must be carried out within the other Party's territory; and

(ix) the extent to which enforcement activities of tether Party with respect to the same persons, including judgments or undertakings resulting from such activities, would be affected.

Article VII
Cooperation and Coordination with Respect to Enforcement of Deceptive Marketing Practices Laws

1. For the purposes of this Agreement, "deceptive marketing practices law(s)"means:

(a) for Canada, sections 52 through 60 of the competition Act;
(b) for the United States of America, the Federal Trade commission Act (15 U.S.C. §§ 41-58), to the extent that it applies to unfair or deceptive acts or practices;
as well as any amendments thereto, and such other laws or regulations as the Parties may from time to time agree in writing to be a "deceptive marketing practices law" for purposes of this Agreement. Each Party shall promptly notify the other of any amendments to its deceptive marketing practices laws.

2. The Parties note that conduct occurring in the territory of one Party may contribute to violations of the deceptive marketing practices laws of the other Party and that it is in their common interest for the Director of Investigation and research and the Federal Trade Commission to cooperate in the enforcement of those laws. The Parties further note that the Director of Investigation and Research and the Federal TradeCommission have in the past cooperated with each other and coordinated their activities with respect to deceptive marketing practices matters on an informal basis. The Parties wish to establish a more formal framework for continuing and broadening such cooperation and coordination.

3. The Director of Investigation and Research and the Federal Trade Commission shall, to the extent compatible with their laws, enforcement policies and other important interests:

(a) use their best efforts to cooperate in the detection of deceptive marketing practices;

(b) inform each other as soon as practicable of investigations and proceedings involving deceptive marketing practices occurring or originating in the territory of the other party, or that affect consumers or markets in the territory of the other Party;

(c) share information relating to the enforcement of their deceptive marketing practices laws; and

(d) in appropriate cases, coordinate their enforcement against deceptive marketing practices with a transborder dimension.

4. In furtherance of these objectives, the Director of investigation and Research and the Federal Trade Commission shall jointly study further measures to enhance the scope and effectiveness of information sharing, cooperation and coordination in the enforcement of deceptive marketing practices laws.

5. Nothing in this Article shall prevent the Parties from seeking or providing assistance to one another with respect to the enforcement of their deceptive marketing practices laws pursuant to other agreements, treaties, arrangements or practices between them.

6. Articles II, III, IV, V and VI shall not apply to deceptive marketing practices.

Article VIII
Consultations

1. Either Party may request consultations regarding any matter relating to this Agreement. The request for consultations shall indicate the reasons for the request and whether any procedural time limits or other constraints require that consultations be expedited. Each Party shall consult promptly when so requested with the view to reaching a conclusion that is consistent with the principles set forth in this Agreement.

2. Consultations under this Article shall take place at the appropriate level as determined by each Party.

3. During consultations under this Article, each Party shall provide to the other as much information as it is able in order to facilitate the broadest possible discussion regarding the relevant aspects of the matter that is the subject of consultations. Each Party shall carefully consider the representations of the other Party in light of the principles set out in this Agreement and shall be prepared to explain the specific results of its application of those principles to the matter that is the subject of consultations.

Article IX
Semi-Annual Meetings

Officials of the Parties' competition authorities shall meet at least twice a year to:

(a) exchange information on their current enforcement efforts and priorities in relation to their competition and deceptive marketing practices laws;

(b) exchange information on economic sectors of common interest;

(c) discuss policy changes that they are considering; and

(d) discuss other matters of mutual interest relating to the application of their competition and deceptive marketing practices laws and the operation of this Agreement.

Article X
Confidentiality of Information

Notwithstanding any other provision of this Agreement, neither Party is required to communicate information to the other Party if such communication is prohibited by the laws of the Party

possessing the information or would be incompatible with that Party's important interests.

1. Unless otherwise agreed by the Parties, each Party shall, to the fullest extent possible, maintain the confidentiality of any information communicated to it in confidence by the other Party under this Agreement. Each Party shall oppose, to the fullest extent possible consistent with that Party's laws, any application by a third party for disclosure of such confidential information.

2. The degree to which either Party communicates information to the other pursuant to this Agreement may be subject to and dependent upon the acceptability of the assurances given by the other Party with respect to confidentiality and with respect to the purposes for which the information will be used.

3. (a) Notifications and consultations pursuant to Articles II and VIII of this Agreement and other communications between the Parties in relation thereto shall be deemed to be confidential.

(b) Party may not, without the consent of tether Party, communicate to its state or provincial authorities information received from the other Party pursuant to notifications or consultations under this Agreement. The Party providing the information shall consider requests for consent sympathetically, taking into account the other Party's reasons for seeking disclosure, the risk, if any, that disclosure would pose for its enforcement activities, and any other relevant considerations.

(c) The notified Party may, after the notifying Party's competition authorities have advised a person who is the subject of a notification of the enforcement activities referred to in the notification, communicate the fact of the notification to, and consult with that person concerning the subject of the notification. The notifying Party shall, upon request, promptly inform the notified Party of the time at which the person has, or will be, advised of the enforcement activities in question.

4. Subject to paragraph 2, information communicated in confidence by a Party's competition authorities to the competition authorities of the other Party in the context of enforcement cooperation or coordination pursuant to Articles III, IV or V of this Agreement shall not be communicated to third parties or to other agencies of the receiving competition authorities' government, without the consent of the competition authorities that provided the information. A Party's competition authorities may, however, communicate such information to the Party's law enforcement officials for the purpose of competition law enforcement.

5. Information communicated in confidence by a Party's competition authorities to the competition authorities of theother Party in the context of enforcement cooperation or coordination pursuant to Articles III, IV or V of this Agreement shall not be used for purposes other than competition law enforcement, without the consent of the competition authorities that provided the information.

6. Subject to paragraph 2, information communicated in confidence between the Director of Investigation and Research and the Federal Trade Commission in the context of enforcement cooperation or coordination pursuant to Article VII of this Agreement shall not be communicated to third parties or to other agencies of the receiving agency's government, without the consent of the agency that provided the information. The receiving agency of a Party may, however, communicate such information to the Party's law enforcement officials for the purpose of enforcement of deceptive marketing practices laws.

7. Information communicated in confidence between the Director of Investigation and Research and the Federal TradeCommission in the context of enforcement cooperation orcoordination pursuant to Article VII of this Agreement shall not be used for purposes other than enforcement of deceptive marketing practices laws, without the consent of the agency that provided the information.

Article XI
Existing Laws

Nothing in this Agreement shall require a Party to take any action, or to refrain from acting, in a manner that is inconsistent with its existing laws, or require any change in the laws of the Parties or of their respective provinces or states.

Article XII
Communications under this Agreement

Communications under this Agreement may be carried out by direct communication between the competition authorities of the Parties. Notifications under Article II and requests under Articles V(2) and VIII(1) shall, however, be confirmed promptly in writing through customary diplomatic channels and shall refer to the initial communication between the competition authorities and repeat the information supplied therein.

Article XIII
Entry into Force and Termination

1. This Agreement shall enter into force upon signature.

2. This Agreement shall remain in force until 60 days after the date on which either Party notifies the other Party in writing that it wishes to terminate the Agreement.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

DONE at Washington, in duplicate, this day of August, 1995, and at Ottawa, this day of August, 1995, in the English and French languages, each text being equally authentic.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA: FOR THE GOVERNMENT OF CANADA:

附錄 5

Agreement between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance

The Government of the United States of America and the Government of Australia (individually a "Party" or collectively the "Parties"), desiring to improve the effectiveness of the enforcement of the antitrust laws of both countries through cooperation and mutual legal assistance on a reciprocal basis, hereby agree as follows:

Article I
Defintions

Antitrust Authority - refers, in the case of the United States, to the United States Department of Justice or the United States Federal Trade Commission. In the case of Australia, the term refers to the Australian Competition and Consumer Commission.

Antitrust Evidence - refers to information, testimony, statements, documents or copies thereof, or other things that are obtained, in anticipation of, or during the course of, an investigation or proceeding under the Parties' respective antitrust laws, or pursuant to the Parties' Mutual Assistance Legislation.

Antitrust Laws - refers, in the case of the United States, to the laws enumerated in subsection (a) of the first section of the Clayton Act, 15 U.S.C. 12(a), and to Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, to the extent that such Section 5 applies to unfair methods of competition. In the case of Australia, the term refers to Part IV of the Trade Practices Act 1974; other provisions of that Act except Part X in so far as they relate to Part IV; Regulations made under that Act in so far as they relate to Part IV, except Regulations to the extent that they relate to Part X; and the Competition Code of the Australian States and Territories.

Central Authority - refers, in the case of the United States, to the Attorney General (or a person designated by the Attorney General), in consultation with the U.S. Federal Trade Commission. In the case of Australia, the term refers to the Australian Competition and Consumer Commission, in consultation with the Attorney General's Department.

Executing Authority - refers, in the case of the United States, to the Antitrust Authority designated to execute a particular request on behalf of a Party. In the case of Australia, the term includes the Australian Competition and Consumer Commission and the Attorney General's Department.

Mutual Assistance Legislation - refers, in the case of the United States, to the International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. 6201-6212, Public Law No. 103-438, 108 Stat. 4597. In the case of Australia, the term refers to the Mutual Assistance in Business Regulation Act 1992 and the Mutual Assistance in Criminal Matters Act 1987, and Regulations made pursuant to those Acts.

Person or Persons - refers to any natural person or legal entity, including corporations, unincorporated associations, partnerships, or bodies corporate existing under or authorized by the laws of either the United States, its States, or its Territories, the laws of Australia, its States, or its Territories, or the laws of other sovereign states.

Request - refers to a request for assistance under this Agreement.

Requested Party - refers to the Party from which assistance is sought under this Agreement, or which has provided such assistance.

Requesting Party - refers to the Party seeking or receiving assistance under this Agreement.

Article II
Object and Scope of Assistance

A. The Parties intend to assist one another and to cooperate on a reciprocal basis in providing or obtaining antitrust evidence that may assist in determining whether a person has violated, or is about to violate, their respective antitrust laws, or in facilitating the administration or enforcement of such antitrust laws.

B. Each Party's Antitrust Authorities shall, to the extent compatible with that Party's laws, enforcement policies, and other important interests, inform the other Party's Antitrust Authorities about activities that appear to be anticompetitive and that may be relevant to, or may warrant, enforcement activity by the other Party's Antitrust Authorities.

C. Each Party's Antitrust Authorities shall, to the extent compatible with that Party's laws, enforcement policies, and other important interests, inform the other Party's Antitrust Authorities about investigative or enforcement activities taken
pursuant to assistance provided under this Agreement that may affect the important interests of the other Party.

D. Nothing in this Agreement shall require the Parties or their respective Antitrust Authorities to take any action inconsistent with their respective Mutual Assistance Legislation.

E. Assistance contemplated by this Agreement includes but is not limited to:

1. disclosing, providing, exchanging, or discussing antitrust evidence in the possession of an Antitrust Authority;

2. obtaining antitrust evidence at the request of an Antitrust Authority of the other Party, including

(a) taking the testimony or statements of persons or otherwise obtaining information from persons,

(b) obtaining documents, records, or other forms of documentary evidence,

(c) locating or identifying persons or things, and

(d) executing searches and seizures, and disclosing, providing, exchanging, or discussing such evidence; and

3.providing copies of publicly available records, including documents or information in any

form, in the possession of government departments and agencies of the national government of the Requested Party.

F. Assistance may be provided whether or not the conduct underlying a request would constitute a violation of the antitrust laws of the Requested Party.

G. Nothing in this Agreement shall prevent a Party from seeking assistance from or providing assistance to the other pursuant to other agreements, treaties, arrangements, or practices, including the Agreement Between the Government of Australia and the Government of the United States of America Relating to Cooperation on Antitrust Matters of June 29, 1982, either in place of or in conjunction with assistance provided pursuant to this Agreement.

H. Except as provided by paragraphs C and D of Article VII, this Agreement shall be used solely for the purpose of mutual antitrust enforcement assistance between the Parties. The provisions of this Agreement shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request made pursuant to this Agreement.

I. Nothing in this Agreement compels a person to provide antitrust evidence in violation of any legally applicable right or privilege.

J. Nothing in this Agreement affects the right of an Antitrust Authority of one Party to seek antitrust evidence on a voluntary basis from a person located in the territory of the other Party, nor does anything in this Agreement preclude any such person from voluntarily providing antitrust evidence to an Antitrust Authority.

Article III
Requests for Assistance

A. Requests for assistance under this Agreement shall be made by an Antitrust Authority of the Requesting Party. Such requests shall be made in writing and directed to the Central Authority of the Requested Party. With respect to the United States, the Attorney General, acting as the Central Authority, will upon receipt forward a copy of each request to the Federal Trade Commission.

B. Requests shall include, without limitation:

1. A general description of the subject matter and nature of the investigation or proceeding to which the request relates, including identification of the persons subject to the investigation or proceeding and citations to the specific antitrust laws involved giving rise to the investigation or proceeding; such description shall include information sufficient to explain how the subject matter of the request concerns a possible violation of the antitrust laws in question;

2. The purpose for which the antitrust evidence, information, or other assistance is sought and its relevance to the investigation or proceeding to which the request relates. A request by the United States shall state either that the request is not made for the purpose of any criminal proceedings or that the request is made for a purpose that includes possible criminal proceedings. In the former case, the request shall contain a written assurance that antitrust evidence obtained pursuant to the request shall not be used for the purposes of criminal proceedings, unless such use is subsequently

authorized pursuant to Article VII. In the latter case, the request shall indicate the relevant provisions of law under which criminal proceedings may be brought;

3. A description of the antitrust evidence, information, or other assistance sought, including, where applicable and to the extent necessary and possible:

(a) the identity and location of any person from whom evidence is sought, and a description of that person's relationship to the investigation or proceeding which is the subject of the request;

(b) a list of questions to be asked of a witness;

(c) a description of documentary evidence requested; and

(d) with respect to searches and seizures, a precise description of the place or person to be searched and of the antitrust evidence to be seized, and information justifying such search and seizure under the laws of the Requested Party;

4. Where applicable, a description of procedural or evidentiary requirements bearing on the manner in which the Requesting Party desires the request to be executed, which may include requirements relating to:

(a) the manner in which any testimony or statement is to be taken or recorded, including the participation of counsel;
(b) the administration of oaths;

(c) any legal privileges that may be invoked under the law of the Requesting Party that the Requesting Party wishes the Executing Authority to respect in executing the request, together with an explanation of the desired method of taking the testimony or provision of evidence to which such privileges may apply; and

(d) the authentication of public records;

5. The desired time period for a response to the request;

6. Requirements, if any, for confidential treatment of the request or its contents; and

7. A statement disclosing whether the Requesting Party holds any proprietary interest that could benefit or otherwise be affected by assistance provided in response to the request; and

8. Any other information that may facilitate review or execution of a request.

C. Requests shall be accompanied by written assurances of the relevant Antitrust Authority that there have been no significant modifications to the confidentiality laws and procedures described in Annex A hereto.

D. An Antitrust Authority may modify or supplement a request prior to its execution if the Requested Party agrees.

Article IV
Limitations on Assistance

A. The Requested Party may deny assistance in whole or in part if that Party's Central Authority or Executing Authority, as appropriate, determine that:

1. a request is not made in accordance with the provisions of this Agreement;

2. execution of a request would exceed the Executing Authority's reasonably available resources;

3. execution of a request would not be authorized by the domestic law of the Requested Party;

4. execution of a request would be contrary to the public interest of the Requested Party.

B. Before denying a request, the Central Authority or the Executing Authority of the Requested Party, as appropriate, shall consult with the Central Authority of the Requesting Party and the Antitrust Authority that made the request to determine whether assistance may be given in whole or in part, subject to specified terms and conditions.

C. If a request is denied in whole or in part, the Central Authority or the Executing Authority of the Requested Party, as appropriate, shall promptly inform the Central Authority of the Requesting Party and the Antitrust Authority that made the request and provide an explanation of the basis for denial.

Article V
Execution of Requests

A. After receiving a request, the Central Authority shall promptly provide the Requesting Party an initial response that includes, when applicable, an identification of the Executing Authority (Authorities) for the Request.

B. The Central Authority of the United States, the Attorney General of Australia, or, once designated, the Executing Authority of either Party may request additional information concerning the request or may determine that the request will be executed only subject to specified terms and conditions. Without limitation, such terms and conditions may relate to (1) the manner or timing of the execution of the request, or (2) the use or disclosure of any antitrust evidence provided. If the Requesting Party accepts assistance subject to such terms and conditions, it shall comply with them.

C. A request shall be executed in accordance with the laws of the Requested Party. The method of execution specified in the request shall be followed, unless it is prohibited by the law of the Requested Party or unless the Executing Authority otherwise concludes, after consultation with the Authority that made the request, that a different method of execution is appropriate.

D. The Executing Authority shall, to the extent permitted by the laws and other important interests of the Requested Party, facilitate the participation in the execution of a request of such officials of the Requesting Party as are specified in the request.

Article VI
Confidentiality

A. Except as otherwise provided by this paragraph and Article VII, each Party shall, to the fullest extent possible consistent with that Party's laws, maintain the confidentiality of any request and of any information communicated to it in confidence by the other Party under this Agreement. In particular:

1. The Requesting Party may ask that assistance be provided in a manner that maintains the confidentiality of a request and/or its contents. If a request cannot be executed in that manner, the Requested Party shall so inform the Requesting Party, which shall then determine the extent to which it wishes the request to be executed; and

2. Antitrust evidence obtained pursuant to this Agreement shall be kept confidential by both the Requesting Party and the Requested Party, except as provided in paragraph E of this Article and Article VII.

Each Party shall oppose, to the fullest extent possible consistent with that Party's laws, any application by a third party for disclosure of such confidential information.

B. By entering into this Agreement, each Party confirms that:

1. The confidentiality of antitrust evidence obtained under this Agreement is ensured by its national laws and procedures pertaining to the confidential treatment of such evidence, and that such laws and procedures as are set forth in Annex A to this Agreement are sufficient to provide protection that is adequate to maintain securely the confidentiality of antitrust evidence provided under this Agreement; and

2. The Antitrust Authorities designated herein are themselves subject to the confidentiality restrictions imposed by such laws and procedures.

C. Unauthorized or illegal disclosure or use of information communicated in confidence to a Party pursuant to this Agreement shall be reported immediately to the Central Authority and the Executing Authority of the Party that provided the information; the Central Authorities of both Parties, together with the Executing Authority that provided the information, shall promptly consult on steps to minimize any harm resulting from the disclosure and to ensure that unauthorized or illegal disclosure or use of confidential information does not recur. The Executing Authority that provided the information shall give notice of such unauthorized or illegal disclosure or use to the person, if any, that provided such information to the Executing Authority.

D. Unauthorized or illegal disclosure or use of information communicated in confidence under this Agreement is a ground for termination of the Agreement by the affected Party, in accordance with the procedures set out in Article XIII.C.

E. Nothing in this Agreement shall prevent disclosure, in an action or proceeding brought by an Antitrust Authority of the Requesting Party for a violation of the antitrust laws of the Requesting Party, of antitrust evidence provided hereunder to a defendant or respondent in that action or proceeding, if such disclosure is required by the law of the Requesting Party. The Requesting Party shall notify the Central Authority of the Requested Party and the Executing Authority that provided the information at least ten days in advance of any such proposed disclosure, or, if such

notice cannot be given because of a court order, then as promptly as possible.

Article VII
Limitations on Use

A. Except as provided in paragraphs C and D of this Article, antitrust evidence obtained pursuant to this Agreement shall be used or disclosed by the Requesting Party solely for the purpose of administering or enforcing the antitrust laws of the Requesting Party.

B. Antitrust evidence obtained pursuant to this Agreement may be used or disclosed by a Requesting Party to administer or enforce its antitrust laws only (1) in the investigation or proceeding specified in the request in question and (2) for the purpose stated in the request, unless the Executing Authority that provided such antitrust evidence has given its prior written consent to a different use or disclosure; when the Requested Party is Australia, such consent shall not be given until the Executing Authority has obtained any necessary approval from the Attorney General.

C. Antitrust evidence obtained pursuant to this Agreement may be used or disclosed by a Requesting Party with respect to the administration or enforcement of laws other than its antitrust laws only if (1) such use or disclosure is essential to a significant law enforcement objective and (2) the Executing Authority that provided such antitrust evidence has given its prior written consent to the proposed use or disclosure. In the case of the United States, the Executing Authority shall provide such consent only after it has made the determinations required for such consent by its mutual assistance legislation.

D. Antitrust evidence obtained pursuant to this Agreement that has been made public consistently with the terms of this Article may thereafter be used by the Requesting Party for any purpose consistent with the Parties' mutual assistance legislation.

Article VIII
Changes in Applicable Law

A. The Parties shall provide to each other prompt written notice of actions within their respective States having the effect of significantly modifying their antitrust laws or the confidentiality laws and procedures set out in Annex A to this Agreement.

B. In the event of a significant modification to a Party's antitrust laws or confidentiality laws and procedures set out in Annex A to this Agreement, the Parties shall promptly consult to determine whether this Agreement or Annex A to this Agreement should be amended.

Article IX
Taking of Testimony and Production of Documents

A. A person requested to testify and produce documents, records, or other articles pursuant to this Agreement may be compelled to appear and testify and produce such documents, records, and other articles, in accordance with the requirements of the laws of the Requested Party. Every person whose attendance is required for the purpose of giving testimony pursuant to this Agreement is entitled to such fees and allowances as may be provided for by the law of the

Requested Party.

B. Upon request by the Requesting Party, the Executing Authority shall furnish information in advance about the date and place of the taking of testimony or the production of evidence pursuant to this Agreement.

C. The Executing Authority shall, to the extent permitted by the laws and other important interests of the Requested Party, permit the presence during the execution of the request of persons specified in the request, and shall, to the extent permitted by the laws and other important interests of the Requested Party, allow such persons to question the person giving the testimony or providing the evidence.

D. The Executing Authority shall, to the extent permitted by the laws of the Requested Party, comply with any instructions of the Requesting Party with respect to any claims of legal privilege, immunity, or incapacity under the laws of the Requesting Party.

E. The Executing Authority shall, to the extent permitted by the laws of the Requested Party, permit a person whose testimony is to be taken pursuant to this Article to have counsel present during the testimony.

F. A Requesting Party may ask the Requested Party to facilitate the appearance in the Requesting Party's territory of a person located in the territory of the Requested Party, for the purpose of being interviewed or giving testimony. The Requesting Party shall indicate the extent to which the person's expenses will be paid. Upon receiving such a request, the Executing Authority shall invite the person to appear before the appropriate authority in the territory of the Requesting Party. The Executing Authority shall promptly inform the Requesting Party of the person's response.

G. Antitrust evidence consisting of testimony or documentary evidence provided by the Requested Party pursuant to this Agreement shall be authenticated in accordance with the requirements of the law of the Requesting Party, in so far as such requirements would not violate the laws of the Requested Party.

Article X
Search and Seizure

A. Where a request is to be executed by means of the search and seizure of antitrust evidence, the request shall include such information as is necessary to justify such action under the laws of the Requested Party. The Central Authorities shall confer, as needed, on alternative, equally effective procedures for compelling or obtaining the antitrust evidence that is the subject of a request.

B. Upon request, every official of a Requested Party who has custody of antitrust evidence seized pursuant to this Agreement shall certify the continuity of custody, the identity of the antitrust evidence, and the integrity of its condition; the Requested Party shall furnish such certifications in the form specified by the Requesting Party.

Article XI
Retuen of Antitrust Evidence

At the conclusion of the investigation or proceeding specified in a request, the Central Authority or the Antitrust Authority of the Requesting Party shall return to the Central Authority or the Antitrust Authority of the Requested Party from which it obtained antitrust evidence all such evidence obtained pursuant to the execution of a request under this Agreement, along with all copies thereof, in the possession or control of the Central Authority or Antitrust Authority of the Requesting Party; provided, however, that antitrust evidence that has become evidence in the course of judicial or administrative proceedings or that has properly entered the public domain is not subject to this requirement.

Article XII
Costs

Unless otherwise agreed, the Requested Party shall pay all costs of executing a request, except for the fees of expert witnesses, the costs of translation, interpretation, and transcription, and the allowances and expenses related to travel to the territory of the Requested Party, pursuant to Articles IX and X, by officials of the Requesting Party.

Article XIII
Entry into Force and Termination

A. This Agreement shall enter into force upon notification by each Party to the other through diplomatic channels that it has completed its necessary internal procedures.

B. Assistance under this Agreement shall be available in investigations or proceedings under the Parties' antitrust laws concerning conduct or transactions occurring before as well as after this Agreement enters into force.

C. As stated in Article VI.D of this Agreement, a Party may unilaterally elect to terminate this Agreement upon the unauthorized or illegal disclosure or use of confidential antitrust evidence provided hereunder; provided, however, that neither Party shall make such an election until after it has consulted with the other Party, pursuant to Article VI.C, regarding steps to minimize any harm resulting from the unauthorized or illegal disclosure or use of information communicated in confidence under this Agreement, and steps to ensure that such disclosure or use does not recur. Termination shall take effect immediately upon notice or at such future date as may be determined by the terminating Party.

D. On termination of this Agreement, the Parties agree, subject to Article VI.E and Article VII, to maintain the confidentiality of any request and information communicated to them in confidence by the other Party under this Agreement prior to its termination; and to return, in accordance with the terms of Article XI, any antitrust evidence obtained from the other Party under this Agreement; provided, however, that any such request or information that has become public in the course of public judicial or administrative proceedings is not subject to this requirement.

E. In addition to the procedure set forth in paragraph C of this Article, either Party may terminate this Agreement by means of written notice through diplomatic channels. Termination shall take effect 30 days after the date of receipt of such notification.

附錄 6

United States-Australia Free Trade Agreement Chapter Fourteen Competition-Related Matters

ARTICLE 14.1 : OBJECTIVES

Recognizing that the conduct subject to this Chapter has the potential to restrict bilateral trade and investment, the Parties believe that proscribing such conduct, implementing policies that promote economic efficiency and consumer welfare, and cooperating on matters covered by this Chapter will help secure the benefits of this Agreement.

ARTICLE 14.2 : COMPETITION LAW AND ANTICOMPETITIVE BUSINESS CONDUCT

1. Each Party shall maintain or adopt measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto, recognizing that such measures will help realise the objectives of this Agreement. To this end, the Parties shall consult from time to time about the effectiveness of measures that a Party has undertaken. Each Party shall ensure that a person subject to the imposition of a sanction or remedy for violation of such measures is provided with the opportunity to be heard and to present evidence, and to seek review of such sanction or remedy in a court or independent tribunal of that Party.

2. Each Party shall maintain an authority or authorities responsible for the enforcement of its national competition laws. The enforcement policy of each Party's central government authorities responsible for the enforcement of such laws includes treating non-nationals no less favourably than nationals in like circumstances, and each Party's authorities intend to maintain this policy, in that regard.

3. The Parties recognize the importance of cooperation and coordination between their respective authorities to further effective competition law enforcement in the free trade area. The Parties shall cooperate in relation to the enforcement of competition laws and policy, including through mutual assistance, notification, consultation, and exchange of information.

(a) The Parties recognize their existing mechanisms for cooperation in relation to competition law enforcement, specifically:

(i) The Agreement between the Government of Australia and the Government of the United States of America relating to Cooperation on Antitrust Matters of 1982; and

(ii) The Agreement between the Government of Australia and the Government of the United States of America on Mutual Antitrust Enforcement Assistance of 1999.

(b) The Parties shall work to further strengthen their cooperation in these areas. Such cooperation shall include consideration by a Party's central government authorities responsible for the enforcement of its

competition laws, where feasible and appropriate, of a request by the other Party's central government authorities responsible for the enforcement of its competition laws to initiate or expand enforcement activities.

4. To further advance their cooperation, the Parties shall examine the scope for strengthening support for, and minimizing legal impediments to, the effective enforcement of each other's competition laws and policies. The Parties shall establish a joint working group with the goal of seeking to reach a common view, by the first meeting of the Joint Committee established pursuant to Chapter 21 (Institutional Arrangements and Dispute Settlement), of appropriate steps to enhance their respective legal and regulatory regimes in that regard.

ARTICLE 14.3 : DESIGNATED MONOPOLIES

1. Recognizing that designated monopolies should not operate in a manner that creates obstacles to trade and investment, each Party shall ensure that any privately-owned monopoly that it designates after the date of entry into force of this Agreement and any government monopoly that it designates or has designated:

(a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions, or impose quotas, fees, or other charges;

(b) acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, except to comply with any terms of its designation that are not inconsistent with subparagraph (c) or (d);

(c) provides non-discriminatory treatment to covered investments, to goods of the other Party, and to service suppliers of the other Party in its purchase or sale of the monopoly good or service in the relevant market; and

(d) does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, subsidiaries, or other enterprises with common ownership, in anticompetitive practices in a non-monopolized market in its territory, where such practices adversely affect covered investments.

2. Nothing in this Chapter shall be construed as preventing a Party from designating a monopoly.

3. This Article does not apply to government procurement.

ARTICLE 14.4 : STATE ENTERPRISES AND RELATED MATTERS

1. The Parties recognize that state enterprises should not operate in a manner that creates obstacles to trade and investment. In that light, each Party shall ensure that any state enterprise that it establishes or maintains:

(a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such enterprise exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges; and

(b) accords non-discriminatory treatment in the sale of its goods or services.

2. The United States shall ensure that anticompetitive activities by sub-federal state enterprises are not excluded from the reach of its national antitrust laws solely by reason of their status as sub-federal state enterprises, to the extent that their activities are not protected by the State Action Doctrine.

3. Australia shall take reasonable measures, including through its policy of competitive neutrality, to ensure that its governments at all levels do not provide any competitive advantage to any government businesses simply because they are government-owned. This paragraph applies to the business activities of government businesses and not to their non-business, non-commercial activities. Australia shall ensure that its competitive neutrality complaints offices treat complaints lodged by the United States, or persons of the United States, no less favourably than complaints lodged by persons or government bodies of Australia.

ARTICLE 14.5 : DIFFERENCES IN PRICING

Articles 14.3 and 14.4 shall not be construed as preventing a monopoly or state enterprise from charging different prices in different markets, or within the same market, where such differences are based on normal commercial considerations, such as taking account of supply and demand conditions.

ARTICLE 14.6 : CROSS BORDER CONSUMER PROTECTION

1. The Parties recognize the importance of cooperation and coordination on matters related to their consumer protection laws in order to enhance consumer welfare in the free trade area. Accordingly, the Parties shall cooperate in the enforcement of their consumer protection laws.

2. The Parties recognize the existing mechanisms for cooperation in relation to consumer protection, including:

(a) the Agreement between the Federal Trade Commission of the United States of America and the Australian Competition and Consumer Commission on

Mutual Enforcement Assistance in Consumer Protection Matters of 2000;

(b) the OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders of 2003; and

(c) the International Consumer Protection and Enforcement Network (ICPEN).

3. The Parties shall further strengthen cooperation and coordination among their respective agencies, including the U.S. Federal Trade Commission (FTC) and the Australian Competition and Consumer Commission (ACCC) in areas of mutual concern, in particular fraudulent and deceptive commercial practices against consumers:

(a) in the development of appropriate procedures for

(i) cooperating in the prompt detection of consumer protection law violations affecting consumers or markets in both Parties' territories,

(ii) notifying each other of significant investigations and proceedings involving consumer protection law violations occurring or originating in the territory of the other Party or significantly affecting consumers or markets in the territory of the other Party,

(iii) exchanging information related to the administration of their consumer protection laws,

(iv) providing enforcement and investigative assistance to each other to the extent compatible with each Party's laws, in appropriate consumer protection law cases, and

(v) consulting and coordinating on enforcement actions against consumer protection law violations that have a significant cross-border dimension;

(b) in the development of coordinated strategies to combat fraudulent and deceptive commercial practices against consumers, both bilaterally and multilaterally; and

(c) through joint study of additional measures to enhance the scope and effectiveness of information sharing, investigative assistance, and cooperation and coordination in the enforcement of the Parties' respective consumer protection laws, including the use of investigative powers and participation in appropriate court proceedings.

4. Nothing in this Article shall limit the discretion of the FTC or ACCC to decide whether to take action on particular requests by the other agency, or shall preclude either agency from taking action with respect to particular cases.

5. In addition, the Parties shall identify, in areas of mutual concern and consistent with their important interests, obstacles to effective cross-border cooperation in the enforcement of consumer protection laws, and shall consider changing their domestic frameworks to overcome

such obstacles and enhance the ability of the Parties to cooperate, share information, and assist in the enforcement of each other's consumer protection laws, including, if appropriate, adopting or amending national legislation to overcome such obstacles.

ARTICLE 14.7 : RECOGNITION AND ENFORCEMENT OF MONETARY JUDGMENTS

1. The Parties recognize the importance of civil proceedings by the FTC, U.S. Securities and Exchange Commission, U.S. Commodity Futures Trading Commission, Australian Securities and Investments Commission, and the ACCC to provide monetary restitution to consumers, investors, or customers who have suffered economic harm as a result of being deceived, defrauded, or misled. The Parties further recognize the importance of facilitating cross-border recognition and enforcement of monetary judgments obtained for such purposes.

2. When an agency listed in paragraph 1 obtains a civil monetary judgment from a judicial authority of a Party for the purpose of providing monetary restitution to consumers, investors, or customers who have suffered economic harm as a result of being deceived, defrauded, or misled, a judicial authority of the other Party generally should not disqualify such a monetary judgment from recognition or enforcement on the ground that it is penal or revenue in nature or based on other foreign public law, including where such judgment contains provisions for recovery of monies or other disposition in the event that restitution is impractical or for payment of expenses related to the collection or distribution of such a monetary judgment.

3. The judicial authorities of a Party should consider the recognition or enforcement of provisions for monetary judgments described in paragraph 2 separately from other provisions of the judgment, to the extent such other provisions are deemed to be penal or revenue in nature or based on other foreign public law for the purposes of recognition or enforcement.

4. Nothing in this Article is intended to affect whether any other category of law or judgment is appropriately viewed as penal or revenue in nature or based on other foreign public law for the purposes of the recognition or enforcement of foreign judgments.

5. Each Party's agencies listed in paragraph 1 should cooperate with the relevant agencies of the other Party, where feasible and appropriate, in facilitating the identification of consumers, investors, and customers described in paragraph 2 and on other matters relating to payment of monetary judgments.

6. The Parties shall work together to examine the scope for establishing greater bilateral recognition of foreign judgments of their respective judicial authorities obtained for the benefit of consumers, investors, or customers who have suffered economic harm as a result of being deceived, defrauded, or misled; and shall report on the feasibility and appropriateness of, and progress toward, greater recognition of such foreign judgments at the first meeting of the Joint Committee.

ARTICLE 14.8 : TRANSPARENCY

1. The Parties recognize the value of transparency in their competition policies.

2. On request of a Party, each Party shall make available to the other Party public information concerning:

(a) the enforcement of its measures proscribing anticompetitive business conduct;

(b) its state enterprises, government businesses, and public or private designated monopolies, provided that requests for such information shall indicate the entities involved, specify the particular products and markets concerned, and include indicia that these entities may be engaging in practices that may hinder trade or investment between the Parties; and

(c) exemptions and immunities to its measures proscribing anticompetitive business conduct, provided that requests shall specify the particular goods and markets of concern and include indicia that the exemptions and immunities may hinder trade or investment between the Parties.

ARTICLE 14.9 : COOPERATION

The Parties recognize that policies related to matters covered by this Chapter can be a force for open and competitive markets domestically and internationally. They also recognize that such policies can have an effect on investment and on the extent to which enterprises of a Party can compete with, sell goods and services to, and purchase good and services from enterprises of the other Party. Accordingly, the Parties shall cooperate, including in the manner provided for in Articles 14.2.3 and 14.6, to promote policies related to matters covered by this Chapter that foster free trade and investment and competitive markets.

ARTICLE 14.10 : CONSULTATIONS

1. To foster understanding between the Parties, or to address specific matters that arise under this Chapter, each Party shall, on request of the other Party, enter into consultations regarding representations made by the other Party. In its request, the Party shall indicate, if relevant, how the matter affects trade or investment between the Parties.

2. The Party to which a request for consultations has been addressed shall accord full and sympathetic consideration to the concerns raised by the Party having made the request.

ARTICLE 14.11 : DISPUTE SETTLEMENT

Neither Party may have recourse to dispute settlement under this Agreement for any matter arising under Articles 14.2, 14.4.2, 14.4.3, 14.6, 14.7, 14.9, or 14.10.2.

ARTICLE 14.12 : DEFINITIONS

For the purposes of this Chapter:

1. **consumer protection laws** means:

(a) in the case of the United States, laws and regulations prohibiting "unfair or deceptive acts or practices" within the meaning of Section 5 of the Federal Trade Commission Act; and

(b) in the case of Australia, Parts IVA, V, and VC of the Trade Practices Act 1974;

as well as any amendments thereto, and such other laws or regulations as the Parties may agree in writing;

2. **designate** means, whether formally or in effect, to establish, designate, or authorize a monopoly or to expand the scope of a monopoly to cover an additional good or service;

3. **government businesses** means Australian government businesses within the meaning of Australia's Competition Principles Agreement of 1995;

4. **government monopoly** means a monopoly that is owned, or controlled through ownership interests, by the central government of a Party or by another such monopoly;

5. **in accordance with commercial considerations** means consistent with normal business practices of privately-held enterprises in the relevant business or industry;

6. **market** means the geographical and commercial market for a good or service;

7. **monopoly** means an entity, including a consortium or government agency, that in any relevant market in the territory of a Party is designated as the sole provider or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant;

8. **non-discriminatory treatment** means the better of national treatment and most-favoured-nation treatment, as set out in the relevant provisions of this Agreement, including the terms and conditions set out in the relevant Annexes thereto; and

9. **state enterprise** means an enterprise owned, or controlled through ownership interests, by any level of government of a Party.

附錄 7

Agreement between the Government of the United States of America and the Government of Japan Concerning Cooperation on Anticompetitive Activities

The Government of the United States of America and the Government of Japan (hereinafter referred to as "Parties"):

Recognizing that the world's economies are becoming increasingly interrelated, in particular the economies of the United States of America and Japan;

Noting that the sound and effective enforcement of competition laws of each country is a matter of importance to the efficient functioning of their respective markets and to trade between them;

Noting that the sound and effective enforcement of competition laws of each country would be enhanced by cooperation and, where appropriate, coordination between the Parties in the application of those laws;

Noting that from time to time differences may arise between the Parties concerning the application of the competition laws of each country;

Noting their commitment to give careful consideration to the important interests of each Party in the application of the competition laws of each country; and

Having regard to Article XVIII of the Treaty of Friendship, Commerce and Navigation between the United States of America and Japan signed on April 2, 1953, to the Recommendation of the Council of the Organization for Economic Co-operation and Development Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade, as revised July 27 and 28, 1995, and to the Recommendation of the Council of the Organization for Economic Co-operation and Development Concerning Effective Action Against Hard Core Cartels adopted on March 25, 1998;

Have agreed as follows:

Article I

1. The purpose of this Agreement is to contribute to the effective enforcement of the competition laws of each country through the development of cooperative relationships between the competition authorities of each Party. The competition authorities of the Parties shall, in accordance with the provisions of this Agreement, cooperate with and provide assistance to each other in their enforcement activities, to the extent compatible with their respective Party's important interests.

2. For the purposes of this Agreement,

(a) the term "anticompetitive activity(ies)" means any conduct or transaction that may be subject to penalties or relief under the competition laws of either country;

(b) the term "competition authority(ies)" means:

(i) for the United States of America, the United States Department of Justice and the Federal Trade Commission; and

(ii) for Japan, the Fair Trade Commission;

(c) the term "competition law(s)" means:

(i) for the United States of America, the Sherman Act (15 U.S.C. 1-7), the Clayton Act (15 U.S.C. 12-27), the Wilson Tariff Act (15
U.S.C. 8-11), and the Federal Trade Commission Act (15 U.S.C. 41-58) to the extent that it applies to unfair methods of competition, and their implementing regulations; and

(ii) for Japan, the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54 of April 14, 1947) (hereinafter referred to as "the Antimonopoly Law") and its implementing regulations.

(d) the term "enforcement activity (ies)" means any investigation or proceeding conducted by a Party in relation to the competition laws of its country. However, (i) the review of business conduct or routine filings and (ii) research, studies or surveys with the objective of examining the general economic situation or general conditions in specific industries are not included.

Article II

1. The competition authority of each Party shall notify the competition authority of the other Party with respect to the enforcement activities of the notifying Party that the notifying competition authority considers may affect the important interests of the other Party.

2. Enforcement activities that may affect the important interests of the other Party include those that:

(a) are relevant to enforcement activities of the other Party;

(b) are against a national or nationals of the other country, or against a company or companies incorporated or organized under the applicable laws and regulations within the territory of the other country;

(c) involve anticompetitive activities, other than mergers or acquisitions, carried out in any substantial part in the territory of the other country;

(d) involve mergers or acquisitions in which

-- one or more of the parties to the transaction, or

-- a company controlling one or more of the parties to the transaction,

is a company incorporated or organized under the applicable laws and regulations within the territory of the other country;

(e) involve conduct considered by the notifying competition authority to have been required, encouraged or approved by the other Party; or

(f) involve relief that requires or prohibits conduct in the territory of the other country.

3. Notification pursuant to paragraph 1 of this Article shall be given as promptly as possible when the competition authority of a Party becomes aware that enforcement activities of its Party may affect the important interests of the other Party, and in any event in accordance with paragraphs 4 and 5 of this Article.

4. Where notification is required pursuant to paragraph 1 of this Article with respect to mergers or acquisitions, such notification shall be given not later than:

(a) for the competition authorities of the United States of America, the time either one seeks information or documentary material concerning the proposed transaction pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. 18a(e)), the Federal Trade Commission Act (15 U.S.C. 49, 57b-1) or the Antitrust Civil Process Act (15 U.S.C. 1312).

(b) for the competition authority of Japan, the earlier of

(i) the time it seeks production of documents, reports or other information concerning the proposed transaction pursuant to the Antimonopoly Law; or

(ii) the time it advises a party to the transaction that the transaction as originally proposed raises serious questions under the Antimonopoly Law; provided, however, that if at the time of such advice the transaction has not been publicly disclosed by a party to the transaction, notification shall be made as soon as possible after the time at which the transaction or proposed transaction is publicly disclosed by a party to the transaction.

5. Where notification is required pursuant to paragraph 1 of this Article with respect to matters other than mergers or acquisitions, notification shall be given as far in advance of the following actions as is practically possible:

(a) for the Government of the United States of America,

(i) the initiation of criminal proceedings;

(ii) the initiation of a civil or administrative action, including the seeking of a temporary restraining order or preliminary injunction;

(iii) the entry of a proposed consent decree or a proposed cease and desist order; and

(iv) the issuance of a business review or advisory opinion that will ultimately be made public by the competition authority.

(b) for the Government of Japan,

(i) the filing of a criminal accusation;

(ii) the filing of a complaint seeking an urgent injunction;

(iii) the issuance of a recommendation or the decision to initiate a hearing;

(iv) the issuance of a surcharge payment order when no prior recommendation with respect to the payer has been issued;

(v) the issuance of a reply to a prior consultation that will ultimately be made public by the competition authority; and

(vi) the issuance of a warning.

6. The competition authority of each Party shall also notify the competition authority of the other Party if it initiates a survey which the notifying competition authority considers may affect the important interests of the other Party.

7. The competition authority of each Party shall also notify the competition authority of the other Party whenever the notifying competition authority publicly participates, in connection with the competition laws or policy issues, in an administrative, regulatory or judicial proceeding in its country that is not initiated by the competition authority, if the notifying competition authority considers that the issue addressed may affect the important interests of the other Party. Such notification shall be made at the time of the participation or as soon thereafter as possible.

8. Each Party shall notify the other Party if it initiates a civil action in the courts of the other country against a private party for monetary damages or other relief based on a violation of the competition laws of the other country.

9. Notifications shall be sufficiently detailed to enable the notified competition authority to make an initial evaluation of the effect on its Party's important interests.

10. (a) The competition authority of each Party shall promptly notify the competition authority of the other Party of any amendment to the competition laws of its country.

(b) The competition authority of each Party shall provide the competition authority of the other Party with copies of its publicly-released guidelines, regulations or policy statements that it issues in relation to the competition laws of its country.

(c) The competition authority of each Party shall provide the competition authority of the other Party with copies of its proposed guidelines, regulations or policy statements in relation to the competition laws of its country that are made generally available to the public, and, when it provides the general public with opportunities to submit comments on such guidelines, regulations or policy statements, receive and pay due consideration to the comments submitted by the other Party prior to finalizing such guidelines, regulations or policy statements.

Article III

1. The competition authority of each Party shall render assistance to the competition authority of the other Party in its enforcement activities to the extent consistent with the laws and regulations of the country of the assisting Party and the important interests of the assisting Party, and within its reasonably available resources.

2. The competition authority of each Party shall, to the extent consistent with the laws and regulations of its country and the important interests of its Party:

(a) inform the competition authority of the other Party with respect to its enforcement activities involving anticompetitive activities that the informing competition authority considers may also have an adverse effect on competition within the territory of the other country;

(b) provide the competition authority of the other Party with any significant information, within its possession and that comes to its attention, about anticompetitive activities that the providing competition authority considers may be relevant to, or may warrant, enforcement activities by the competition authority of the other Party; and

(c) provide the competition authority of the other Party, upon request and in accordance with the provisions of this Agreement, with information within its possession that is relevant to the enforcement activities of the competition authority of the other Party.

Article IV

1. Where the competition authorities of both Parties are pursuing enforcement activities with regard to related matters, they shall consider coordination of their enforcement activities.

2. In considering whether particular enforcement activities should be coordinated, the competition authorities of the Parties should take into account the following factors, among others:

(a) the effect of such coordination on their ability to achieve the objectives of their enforcement activities;

(b) the relative abilities of the competition authorities of the Parties to obtain information necessary to conduct the enforcement activities;

(c) the extent to which the competition authority of either Party can secure effective relief against the anticompetitive activities involved;

(d) the possible reduction of cost to the Parties and to the persons subject to the enforcement activities; and

(e) the potential advantages of coordinated relief to the Parties and to the persons subject to the enforcement activities.

3. In any coordinated enforcement activity, the competition authority of each Party shall seek to conduct its enforcement activities with careful consideration to the objectives of the enforcement activities by the competition authority of the other Party.

4. Where the competition authorities of both Parties are pursuing enforcement activities with regard to related matters, the competition authority of each Party shall consider, upon request by the competition authority of the other Party and where consistent with the important interests of the requested Party, inquiring whether persons who have provided confidential information in connection with those enforcement activities will consent to the sharing of such information with the competition authority of the other Party.

5. Subject to appropriate notification to the competition authority of the other Party, the competition authority of either Party may, at any time, limit or terminate the coordination of enforcement activities and pursue their enforcement activities independently.

Article V

1. If the competition authority of a Party believes that anticompetitive activities carried out in the territory of the other country adversely affect the important interests of the former Party, such competition authority, taking into account the importance of avoiding conflicts regarding jurisdiction and taking into account that the competition authority of the other Party may be in a position to conduct more effective enforcement activities with regard to such anticompetitive activities, may request that the competition authority of the other Party initiate appropriate enforcement activities. The request shall be as specific as possible about the nature of the anticompetitive activities and their effect on the important interests of the Party of the requesting competition authority, and shall include an offer of such further information and other cooperation as the requesting competition authority is able to provide.

2. The requested competition authority shall carefully consider whether to initiate enforcement activities, or whether to expand ongoing enforcement activities, with respect to the anticompetitive activities identified in the request. The requested competition authority shall inform the requesting competition authority of its decision as soon as practically possible. If enforcement activities are initiated, the requested competition authority shall inform the requesting competition authority of their outcome and, to the extent possible, of significant interim developments.

Article VI

1. Each Party shall give careful consideration to the important interests of the other Party throughout all phases of its enforcement activities, including decisions regarding the initiation of enforcement activities, the scope of enforcement activities and the nature of penalties or relief sought in each case.

2. When either Party informs the other Party that specific enforcement activities by the latter Party may affect the former's important interests, the latter Party shall endeavor to provide timely notice of significant developments of such enforcement activities.

3. Where either Party considers that enforcement activities by a Party may adversely affect the important interests of the other Party, the Parties should consider the following factors, in addition to any other factor that may be relevant in the circumstances in seeking an appropriate accommodation of the competing interests:

(a) the relative significance to the anticompetitive activities of conduct or transactions occurring within the territory of the country of the enforcing Party as compared to conduct or transactions occurring within the territory of the other country;

(b) the relative impact of the anticompetitive activities on the important interests of the respective Parties;

(c) the presence or absence of evidence of an intention on the part of those engaged in the anticompetitive activities to affect consumers, suppliers, or competitors within the territory of the country of the Party conducting the enforcement activities;

(d) the extent to which the anticompetitive activities substantially lessen competition in the market of each country;

(e) the degree of conflict or consistency between the enforcement activities by a Party and the laws of the other country, or the policies or important interests of the other Party;

(f) whether private persons, either natural or legal, will be placed under conflicting requirements by both Parties;

(g) the location of relevant assets and parties to the transaction;

(h) the degree to which effective penalties or relief can be secured by the enforcement activities of the Party against the anticompetitive activities; and

(i) the extent to which enforcement activities by the other Party with respect to the same persons, either natural or legal, would be affected.

Article VII

1. The Parties may hold, as necessary, consultations through the diplomatic channel on any matter which may arise in the implementation of this Agreement.

2. A request for consultations under this Article shall be communicated through the diplomatic channel.

Article VIII

1. The competition authorities of the Parties shall consult with each other, upon request of either Party's competition authority, on any matter which may arise in connection with this Agreement.

2. The competition authorities of the Parties shall meet at least once a year to:

(a) exchange information on their current enforcement efforts and priorities in relation to the competition laws of each country;

(b) exchange information on economic sectors of common interest;

(c) discuss policy changes that they are considering; and

(d) discuss other matters of mutual interest relating to the application of the competition laws of each country.

Article IX

1.

(a) Information, other than publicly available information, communicated by a Party to the other Party pursuant to this Agreement shall only be used by the receiving Party for the purpose specified in Article 1, paragraph 1 of this Agreement, unless the Party providing the information has approved otherwise.

(b) Information, other than publicly available information, provided by a competition authority or a relevant law enforcement authority pursuant to this Agreement shall not be communicated to a third party or other authorities, unless the competition authority or the relevant law enforcement authority providing the information has approved otherwise.

2. Notwithstanding paragraph 1(b) of this Article, unless otherwise notified by the competition authority providing the information, the competition authority receiving the information communicated pursuant to this Agreement may provide the information to its Party's relevant law enforcement authorities, for the purpose of competition law enforcement, which may use such information under the conditions stipulated in Article X of this Agreement.

3. Each Party shall, consistent with the laws and regulations of its country, maintain the confidentiality of any information communicated to it in confidence by the other Party pursuant to this Agreement, unless the latter Party consents to the disclosure of such information.

4. Each Party may limit the information it communicates to the other Party when the latter Party is unable to give the assurance requested by the Party with respect to confidentiality or with respect to the limitations of purposes for which the information will be used.

5. Notwithstanding any other provision of this Agreement, neither Party is required to communicate information to the other Party if such communication is prohibited by the laws or regulations of the country of the Party possessing the information or such communication would be incompatible with its important interests.

6. This Article shall not preclude the use or disclosure of information to the extent that there is an obligation to do so under the laws and regulations of the country of the Party receiving the information. Such Party shall, wherever possible, give advance notice of any such use or disclosure to the Party which provided the information.

Article X

1. Information communicated by a Party to the other Party pursuant to this Agreement, except publicly available information, shall not be presented to a grand jury

or to a court or a judge in criminal proceedings.

2. In the event that information communicated by a Party to the other Party pursuant to this Agreement, except publicly available information, is needed for presentation to a grand jury or to a court or a judge in criminal proceedings, that Party shall submit a request for such information to the other Party through the diplomatic channel or other channel established in accordance with the law of the requested Party. The requested Party will make, upon request, its best efforts to respond promptly to meet any legitimate deadlines indicated by the requesting Party.

Article XI

1. This Agreement shall be implemented by the Parties in accordance with the laws and regulations in force in each country and within the available resources of their respective competition authorities.

2. Detailed arrangements to implement this Agreement may be made between the competition authorities of the Parties.

3. Nothing in this Agreement shall prevent the Parties from seeking or providing assistance to one another pursuant to other bilateral or multilateral agreements or arrangements between the Parties.

4. Nothing in this Agreement shall be construed to prejudice the policy or legal position of either Party regarding any issue related to jurisdiction.

5. Nothing in this Agreement shall be construed to affect the rights and obligations of either Party under other international agreements or under its laws.

Article XII

Unless otherwise provided in this Agreement, communications under this Agreement may be directly carried out between the competition authorities of the Parties. Notifications under Article II (except paragraph 8) and requests under Article V, paragraph 1 of this Agreement, however, shall be confirmed in writing through the diplomatic channel. The confirmation shall be made as promptly as practically possible after the communication concerned between the competition authorities of the Parties.

Article XIII

1. This Agreement shall enter into force upon signature.

2. Either Party may terminate this Agreement by giving two months written notice to the other Party through diplomatic channel.

3. The Parties shall review the operation of this Agreement not more than five years from the date of its entry into force.

附錄 8

Agreement between the Government of the United States of America and the Government of the Federative Republic of Brazil Regarding Cooperation between their Competition Authorities in the Enforcement of their Competition Laws

The Government of the United States of America and the Government of the Federative Republic of Brazil (hereinafter referred to as "Parties"),

Desiring to enhance the effective enforcement of their competition laws through cooperation between their competition authorities;

Having regard to their close economic relations and noting that the sound and effective enforcement of their competition laws is a matter of crucial importance to the efficient operation of markets and to the economic welfare of the citizens of their respective countries;

Recognizing that cooperation and coordination in competition law enforcement activities may result in a more effective resolution of the Parties' respective concerns than would be attained through independent action;

Further recognizing that technical cooperation between the Parties' competition authorities will contribute to improving and strengthening their relationship; and

Noting the Parties' commitment to give careful consideration to each other's important interests in the application of their competition laws,

Have agreed as follows:

Article I
Purpose and Definitions

1. The purpose of this Agreement is to promote cooperation, including both enforcement and technical cooperation, between the competition authorities of the Parties, and to ensure that the Parties give careful consideration to each other's important interests in the application of their competition laws.

2. For the purposes of this Agreement, the following terms shall have the following definitions:

(a) "Anticompetitive practice(s)" means any conduct or transaction that may be subject to penalties or other relief under the competition laws of a Party;

(b) "Competition authority(ies)" means

(i) for Brazil, the Administrative Council for Economic Defense (CADE) and the Secretariat for Economic Law Enforcement (SDE) in the Ministry of Justice; the Secretariat for Economic Monitoring (SEAE) in the Ministry of Finance;

(ii) for the United States of America, the United States Department of Justice and the Federal Trade Commission;

(c) "Competition law(s)" means

(i) for Brazil, Federal Laws 8884/94 and 9021/95; and Provisional Measure 1.567/97;

(ii) for the United States of America, the Sherman Act (15 U.S.C. §§ 1-7), the Clayton Act (15 U.S.C.§§ 12-27), the Wilson Tariff Act (15 U.S.C. §§ 8-11), and the Federal Trade Commission Act (15 U.S.C. §§ 41-58), to the extent that it applies to unfair methods of competition,

as well as any amendments thereto;

(d) "Enforcement activity(ies)" means any investigation or proceeding conducted by a Party in relation to its competition laws;

3. Each Party shall promptly notify the other of any amendments to its competition laws and of such other new laws or regulations that the Party considers to be part of its competition legislation.

Article II
Notification

1. Each Party shall, subject to Article IX, notify the other party in the manner provided by this Article and Article XI with respect to enforcement activities specified in this Article. Notifications shall identify the nature of the practices under investigation and the legal provisions concerned, and shall ordinarily be given as promptly as possible after a Party's competition authorities become aware that notifiable circumstances are present.

2. Enforcement activities to be notified pursuant to this Article are those that: (a) are relevant to enforcement activities of the other Party; (b) involve anticompetitive practices, other than mergers or acquisitions, carried out in whole or in substantial part in the territory of the other Party; (c) involve mergers or acquisitions in which one or more of the parties to the transaction, or a company controlling one or more of the parties to a transaction, is a company incorporated or organized under the laws of the other Party or of one of its states; (d) involve conduct believed to have been required, encouraged, or approved by the other Party; (e) involve remedies that expressly require or prohibit conduct in the territory of the other Party or are otherwise directed at conduct in the territory of the other Party; or (f) involve the seeking of information located in the territory of the other Party.

3. The Parties acknowledge that officials of either Party may visit the territory of the other Party in the course of conducting investigations pursuant to their respective competition laws.

Such visits shall be subject to notification pursuant to this Article and the consent of the notified Party.

Article III
Enforcement Cooperation

1. The Parties agree that it is in their common interest to cooperate in the detection of anticompetitive practices and the enforcement of their competition laws, and to share information that will facilitate the effective application of those laws and promote better understanding of each other's competition enforcement policies and activities, to the extent compatible with their respective laws and important interests, and within their reasonably available resources.

2. Nothing in this Agreement shall prevent the Parties from seeking or providing assistance to one another pursuant to other agreements, treaties, arrangements or practices between them.

Article IV
Cooperation Regarding Anticompetitive Practices in the Territory of One Party that May Adversely Affect the Interests of the Other Party

1. The Parties agree that it is in their common interest to secure the efficient operation of their markets by enforcing their respective competition laws in order to protect their markets from anticompetitive practices. The Parties further agree that it is in their common interest to seek relief against anticompetitive practices that may occur in the territory of one Party that, in addition to violating that Party's competition laws, adversely affect the interest of the other Party in securing the efficient operation of the other Party's markets.

2. If a Party believes that anticompetitive practices carried out in the territory of the other Party adversely affect its important interests, the first Party may, after prior consultation with the other Party, request that the other Party's competition authorities initiate appropriate enforcement activities. The request shall be as specific as possible about the nature of the anticompetitive practices and their effects on the important interests of the requesting Party, and shall include an offer of such further information and other cooperation as the requesting Party's competition authorities are able to provide.

3. The requested Party's competition authorities shall carefully consider whether to initiate or to expand enforcement activities with respect to the anticompetitive practices identified in the request, and shall promptly inform the requesting Party of its decision. If enforcement activities are initiated or expanded, the requested Party's competition authorities shall advise the requesting Party of their outcome and, to the extent possible, of significant interim developments.

4. Nothing in this Article limits the discretion of the requested Party's competition authorities under its competition laws and enforcement policies as to whether to undertake enforcement activities with respect to the anticompetitive practices identified in a request, nor precludes the requesting Party's competition authorities from undertaking enforcement activities with respect to such anticompetitive practices.

Article V
Coordination with Regard to Related Matters

1. Where both Parties' competition authorities are pursuing enforcement activities with regard to related matters, they will consider coordination of their enforcement activities.

2. In any coordination arrangement, each Party's competition authorities will seek to conduct their enforcement activities consistently with the enforcement objectives of the other Party's competition authorities.

Article VI
Avoidance of Conflicts; Consultations

1. Each Party shall, within the framework of its own laws and to the extent compatible with its important interests, give careful consideration to the other Party's important interests throughout all phases of its enforcement activities, including decisions regarding the initiation of an investigation or proceeding, the scope of an investigation or proceeding, and the nature of the remedies or penalties sought in each case.

2. Either Party may request consultations regarding any matter relating to this Agreement. The request for consultations shall indicate the reasons for the request and whether any procedural time limits or other constraints require that consultations be expedited. Each Party shall consult promptly when so requested with a view to reaching a conclusion that is consistent with the purpose of this Agreement.

Article VII
Technical Cooperation Activities

The Parties agree that it is in their common interest for their competition authorities to work together in technical cooperation activities related to competition law enforcement and policy. These activities will include, within their competition agencies' reasonably available resources: exchanges of information pursuant to Article III of this Agreement; exchanges of competition agency personnel for training purposes at each other's competition agencies; participation of competition agency personnel as lecturers or consultants at training courses on competition law and policy organized or sponsored by each other's competition authorities; and such other forms of technical cooperation as the Parties' competition authorities agree are appropriate for purposes of this Agreement.

Article VIII
Meetings of Competition Authorities

Officials of the Parties' competition authorities shall meet periodically to exchange information on their current enforcement efforts and priorities in relation to their competition laws.

Article IX
Confidentiality

1. Notwithstanding any other provision of this Agreement, neither Party is required to communicate information to the other Party if such communication is prohibited by the laws of the Party possessing the information or would be incompatible with that Party's important interests.

2. Unless otherwise agreed by the Parties, each Party shall, to the fullest extent possible,

maintain the confidentiality of any information communicated to it in confidence by the other Party under this Agreement. Each Party shall oppose, to the fullest extent possible consistent with that Party's laws, any application by a third party for disclosure of such confidential information.

Article X
Existing Laws

Nothing in this Agreement shall require a Party to take any action, or to refrain from acting, in a manner that is inconsistent with its existing laws, or require any change in the laws of the Parties or of their respective states.

Article XI
Communications under this Agreement

Communications under this Agreement may be carried out by direct communication between the competition authorities of the Parties. Notifications under Article II and requests under Articles IV.2 and VI.2 shall, however, be confirmed promptly in writing through customary diplomatic channels and shall refer to the initial communication between the competition authorities and repeat the information supplied therein.

Article XII
Entry into Force and Termination

1. This Agreement shall enter into force on the date on which the Parties exchange diplomatic notes informing each other that they have completed all applicable requirements for its entry into force.

2. This Agreement may be amended by the mutual agreement of the Parties. An amendment shall enter into force in the manner set forth in paragraph 1 for entry into force of this Agreement.

3. This Agreement shall remain in force for an indefinite period of time, unless one Party notifies the other Party in writing that it wishes to terminate the Agreement. In that case, the Agreement shall terminate 60 days after such written notice is given.

附錄 9

Agreement between the Government of the United States of America and the Government of the State of Israel Regarding the Application of Their Competition Laws

The Government of the United States of America and the Government of the State of Israel (hereinafter referred to as "Parties");

Desiring to promote mutual relations and further the historic friendship between them;

Determined to strengthen and develop the economic relations between them for their mutual benefit;

Having regard to their close economic relations and cooperation within the framework of the Agreement on the Establishment of a Free Trade Area Between the Government of the United States of America and the Government of the State of Israel;

Noting that the sound and effective enforcement of their competition laws is a matter of importance to the efficient operation of markets within the free trade area and to the economic welfare of the Parties' citizens;

Recognizing that coordination of enforcement activities may, in appropriate cases, result in a more effective resolution of the Parties' respective concerns than would be attained through independent action;

Noting that from time to time differences may arise between the Parties concerning the application of their competition laws to conduct or transactions that implicate the important interests of both Parties;

Noting further their commitment to give careful consideration to each other's important interests in the application of their competition laws; and

Wishing to promote cooperation in areas which are of mutual interest.
Have agreed as follows:

Article I
Purpose and Definitions

1. The purpose of this Agreement is to promote cooperation and coordination between the competition authorities of the Parties, to avoid conflicts arising from the application of the Parties' competition laws and to minimize the impact of differences on their respective important interests.

2. For the purposes of this Agreement, the following terms shall have the following definitions:

(a) "Anticompetitive activity(ies)" means any conduct or transaction that may be subject to penalties or other relief under the competition laws of a Party;

(b) "Competition authority(ies)" means

(i) for Israel, the Controller of Restrictive Trade Practices;

(ii) for the United States of America, the United States Department of Justice and the Federal Trade Commission;

(c) "Competition law(s)" means

(i) for Israel, the Restrictive Trade Practices Law 5748-1988;

(ii) for the United States of America, the Sherman Act (15 U.S.C. §§ 1-7), the Clayton Act (15 U.S.C. §§ 12-27), the Wilson Tariff Act (15 U.S.C. §§ 8-11) and the Federal Trade Commission Act (15 U.S.C. §§ 41-58), to the extent that it applies to unfair methods of competition, as well as any amendments thereto, and such other laws or regulations as the Parties may from time to time agree in writing to be a "competition law" for the purposes of this Agreement; and

(d) "Enforcement activity(ies)" means any investigation or proceeding conducted by a Party in relation to its competition laws.

3. Any reference in this Agreement to a specific provision in either Party's competition law shall be interpreted as referring to that provision as amended from time to time and to any successor provision thereof. Each Party shall promptly notify the other of any amendments to its competition laws.

Article II
Notification

1. Each Party shall, subject to Article IX(1), notify the other Party in the manner provided by this Article and Article XI with respect to its enforcement activities that may affect important interests of the other Party.

2. Enforcement activities to be notified pursuant to this Article are those that:

(a) are relevant to enforcement activities of the other Party;

(b) involve anticompetitive practices, other than mergers or acquisitions, carried out in whole or in substantial part in the other State;

(c) involve mergers or acquisitions in which one or more of the parties to the transaction, or a company controlling one or more of the parties to a transaction, is a company incorporated or organized under the laws of the other Party or of one of its states;

(d) involve conduct believed to have been required, encouraged, or approved by the other Party;

(e) involve remedies that expressly require or prohibit conduct in the other State or are otherwise directed at such conduct; or

(f) involve the seeking of information located in the other State.

3. Notification pursuant to this Article shall ordinarily be given as soon as a Party's competition authorities become aware that notifiable circumstances are present, and in any event in sufficient time to permit the views of the other Party to be taken into account.

4. When the competition authorities of a Party request that a person provide information, documents or other records located in the notified State, or request oral testimony in a proceeding or participation in a personal interview by a person located in the notified State, notification shall be given:

(a) if compliance with a request for written information, documents or other records is voluntary, at or before the time that the request is made;

(b) if compliance with a request for written information, documents or other records is compulsory, at least seven (7) days prior to the request, (or, when seven (7) days' notice cannot be given, as promptly as circumstances permit); and

(c) in the case of oral testimony or personal interviews, at or before the time arrangements for the interview or testimony are made.

Notification that would otherwise be required by this Article is not required with respect to telephone contacts with a person where (i) that person is not the subject of an investigation, (ii) the contact seeks only an oral response on a voluntary basis (although the availability and possible voluntary provision of documents may be discussed) and (iii) the other Party's important interests do not appear to be otherwise implicated, unless the other Party requests otherwise in relation to a particular matter.

Notification is not required for each subsequent request for information in relation to the same matter unless the Party seeking information becomes aware of new issues bearing on the

important interests of the other Party, or the other Party requests such notification in relation to a particular matter.

5. The Parties acknowledge that officials of either Party may visit the other State in the course of conducting investigations pursuant to their respective competition laws. Such visits shall be subject to notification pursuant to this Article and the consent of the notified Party.

6. Notifications shall be sufficiently detailed to enable the notified Party to make an initial evaluation of the effect of the enforcement activity on its own important interests, and shall include the nature of the activities under investigation and the legal provisions concerned. Where possible, notifications shall include the names and locations of the persons involved.

Article III
Enforcement Cooperation

1. The Parties acknowledge that it is in their common interest to cooperate in the detection of anticompetitive activities and the enforcement of their competition laws to the extent compatible with their respective laws and important interests, and within their reasonably available resources. The Parties further acknowledge that it is in their common interest to share information which will facilitate the effective application of their competition laws and promote better understanding of each other's enforcement policies and activities.

2. The Parties will consider adopting such further arrangements as may be feasible and desirable to enhance cooperation in the enforcement of their competition laws.

3. Each Party's competition authorities will, to the extent compatible with that Party's laws, enforcement policies and other important interests,

(a) assist the other Party's competition authorities, upon request, in locating and securing evidence and witnesses, and in securing voluntary compliance with requests for information, in the requested State;

(b) inform the other Party's competition authorities with respect to enforcement activities involving conduct that may also have an adverse effect on competition within the other State;

(c) provide to the other Party's competition authorities, upon request, such information within its possession as the requesting Party's competition authorities may specify that is relevant to the requesting Party's enforcement activities; and

(d) provide the other Party's competition authorities with any significant information that comes to their attention about anticompetitive activities that may be relevant to, or may warrant, enforcement activity by the other Party's competition authorities.

4. Nothing in this Agreement shall prevent the Parties from seeking or providing assistance to one another pursuant to other agreements, treaties, arrangements or practices between them.

Article IV
Coordination with Regard to Related Matters

1. Where both Parties' competition authorities are pursuing enforcement activities with regard to related matters, they will consider coordination of their enforcement activities. In such matters, the Parties may invoke such mutual assistance arrangements as may be in force from time to time.

2. In considering whether particular enforcement activities should be coordinated, either in whole or in part, the Parties' competition authorities shall take into account the following factors, among others:

(a) the effect of such coordination on the ability of both Parties to achieve their respective enforcement objectives;

(b) the relative abilities of the Parties' competition authorities to obtain information necessary to conduct the enforcement activities;

(c) the extent to which either Party's competition authorities can secure effective relief against the anticompetitive activities involved;

(d) the possible reduction of costs to the Parties and to the persons subject to enforcement activities; and

(e) the potential advantage of coordinated remedies to the Parties and to the persons subject to the enforcement activities.

3. In any coordination arrangement, each Party's competition authorities shall seek to conduct their enforcement activities consistently with the enforcement objectives of the other Party's competition authorities.

4. In the case of concurrent or coordinated enforcement activities, the competition authorities of each Party shall consider, upon request by the competition authorities of the other Party and where consistent with the requested Party's enforcement interests, ascertaining whether persons

that have provided confidential information in connection with those enforcement activities will consent to the sharing of such information between the Parties' competition authorities.

5. Either Party's competition authorities may at any time notify the other Party's competition authorities that they intend to limit or terminate coordinated enforcement and pursue their enforcement activities independently and subject to the other provisions of this Agreement.

Article V
Positive Comity

1. The Parties note that anticompetitive activities may occur within one State that, in addition to violating that State's competition laws, adversely affect important interests of the other Party. The Parties agree that it is in their common interest, consistent with the principle of positive comity, to seek relief against anticompetitive activities of this nature.

2. A Party may request that the other Party's competition authorities initiate enforcement activities against anticompetitive activities carried out in the requested State, if the requesting Party believes that such activities adversely affect its important interests. The request shall be as specific as possible about the nature of the anticompetitive activities and their effects on the interests of the requesting Party, and shall include an offer of such further information and other cooperation as the requesting Party's competition authorities are able to provide.

3. The requested Party's competition authorities shall carefully consider whether to initiate enforcement activities with respect to the anticompetitive activities identified in the request. The requested Party's competition authorities shall promptly inform the requesting Party of its decision. If enforcement activities are initiated, the requested Party's competition authorities shall advise the requesting Party of their outcome and, to the extent possible, of significant interim developments.

4. Nothing in this Article limits the discretion of the requested Party's competition authorities under its competition laws and enforcement policies as to whether to undertake enforcement activities with respect to the anticompetitive activities identified in a request, or precludes the requesting Party's competition authorities from undertaking enforcement activities with respect to such anticompetitive activities.

Article VI
Avoidance of Conflicts

1. Within the framework of its own laws and to the extent compatible with its important interests, each Party shall, having regard to the purpose of this Agreement as set out in Article I,

give careful consideration to the other Party's important interests throughout all phases of its enforcement activities, including decisions regarding the initiation of an investigation or proceeding, the scope of an investigation or proceeding and the nature of the remedies or penalties sought in each case.

2. When a Party informs the other that a specific enforcement activity may affect the first Party's important interests, the second Party shall provide timely notice of developments of significance to those interests.

3. While an important interest of a Party may exist in the absence of official involvement by the Party with the activity in question, it is recognized that such interest would normally be reflected in antecedent laws, decisions or statements of policy by its competent authorities.

4. A Party's important interests may be affected at any stage of enforcement activity by the other Party. The Parties recognize the desirability of minimizing any adverse effects of their enforcement activities on each other's important interests, particularly in the choice of remedies. Typically the potential for adverse impact on one Party's important interests arising from enforcement activity by the other Party is less at the investigative stage and greater at the stage at which conduct is prohibited or penalized, or at which other forms of remedial orders are imposed.

5. Where it appears that one Party's enforcement activities may adversely affect the important interests of the other Party, each Party shall, in assessing what measures it will take, consider all appropriate factors, which may include but are not limited to:

(a) the relative significance to the anticompetitive activities involved of conduct occurring within one State as compared to conduct occurring within that of the other;

(b) the relative significance and foreseeability of the effects of the anticompetitive activities on one Party's important interests as compared to the effects on the other Party's important interests;

(c) the presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers or competitors within the enforcing State;

(d) the degree of conflict or consistency between the first Party's enforcement activities (including remedies) and the other Party's laws or other important interests;

(e) whether private persons, either natural or legal, will be placed under conflicting requirements by both Parties;

(f) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;

(g) the location of relevant assets;

(h) the degree to which a remedy, in order to be effective, must be carried out within the other State; and

(i) the extent to which enforcement activities of the other Party with respect to the same persons, including judgments or undertakings resulting from such activities, would be affected.

Article VII
Consultations

1. Either Party may request consultations regarding any matter relating to this Agreement. The request for consultations shall indicate the reasons for the request and whether any procedural time limits or other constraints require that consultations be expedited. Each Party shall consult promptly when so requested with the view to reaching a conclusion that is consistent with the principles set forth in this Agreement.

2. Consultations under this Article shall take place at the appropriate level as determined by each Party.

3. During consultations under this Article, each Party shall provide to the other as much information as it is able in order to facilitate the broadest possible discussion regarding the relevant aspects of the matter that is the subject of consultations. Each Party shall carefully consider the representations of the other Party in light of the principles set out in this Agreement and shall be prepared to explain the specific results of its application of those principles to the matter that is the subject of consultations.

Article VIII
Interagency Meetings

Officials of the Parties' competition authorities shall meet periodically, in the United States and Israel, to:

(a) exchange information on their current enforcement efforts and priorities in relation to their competition laws;

(b) exchange information on economic sectors of common interest;

(c) discuss policy changes that they are considering; and

(d) discuss other matters of mutual interest relating to the application of their competition laws and the operation of this Agreement.

Article IX
Confidentiality of Information

1. Notwithstanding any other provision of this Agreement, neither Party is required to communicate information to the other Party if such communication is prohibited by the laws of the Party possessing the information or would be incompatible with that Party's important interests.

2. Unless otherwise agreed by the Parties, each Party shall, to the fullest extent possible, maintain the confidentiality of any information communicated to it in confidence by the other Party under this Agreement. Each Party shall oppose, to the fullest extent possible consistent with that Party's laws, any application by a third party for disclosure of such confidential information.

3. The degree to which either Party communicates information to the other pursuant to this Agreement may be subject to and dependent upon the acceptability of the assurances given by the other Party with respect to confidentiality and with respect to the purposes for which the information will be used.

4. Notifications and consultations pursuant to Articles II and VII of this Agreement and other communications between the Parties in relation thereto shall be deemed to be confidential. The notified Party may, after the notifying Party's competition authorities have advised a person who is the subject of a notification of the enforcement activities referred to in the notification, communicate the fact of the notification to, and consult with that person concerning the subject of the notification. The notifying Party shall, upon request, promptly inform the notified Party of the time at which the person has, or will be, advised of the enforcement activities in question.

5. Subject to paragraph 2, information communicated in confidence by a Party's competition authorities to the competition authorities of the other Party in the context of enforcement cooperation or coordination pursuant to Articles III, IV or V of this Agreement shall not be communicated to third parties or to other agencies of the receiving competition authorities' government, without the consent of the competition authorities that provided the information. A Party's competition authorities may, however, communicate such information to the Party's law enforcement officials for the purpose of competition law enforcement.

6. Information communicated in confidence by a Party's competition authorities to the competition authorities of the other Party in the context of enforcement cooperation or coordination pursuant to Articles III, IV or V of this Agreement shall not be used for

purposes other than competition law enforcement, without the consent of the competition authorities that provided the information.

Article X
Existing Laws

Nothing in this Agreement shall require a Party to take any action or to refrain from any action, if to do so would be inconsistent with its existing laws, or require any change in the laws of the Parties or, in the case of the United States, of its states.

Article XI
Communications under this Agreement

Communications under this Agreement may be carried out by direct communication between the competition authorities of the Parties. Notifications under Article II and requests under Articles V(2) and VII(1) shall, however, be confirmed promptly in writing through customary diplomatic channels and shall refer to the initial communication between the competition authorities and repeat the information supplied therein.

Article XII
Entry into Force and Termination

1. This Agreement shall enter into force on the date of the latter notification confirming the fulfillment by the Parties of their relevant internal procedures for the entry into force of this Agreement.

2. This Agreement shall remain in force until 60 days after the date on which either Party notifies the other Party in writing that it wishes to terminate the Agreement.

附錄 10

United States– Singapore Free Trade Agreement
Chapter 12 : Anticompetitive Business Conduct, Designated Monopolies, and Government Enterprises

Article I
Objectives

Recognizing that the conduct subject to this Chapter has the potential to restrict bilateral trade and investment, the Parties believe proscribing such conduct, implementing economically sound competition policies, and engaging in cooperation will help secure the benefits of this Agreement.

Article II
Anticompetitive Business Conduct

1. Each Party shall adopt or maintain measures to proscribe anticompetitive business conduct[12-1] with the objective of promoting economic efficiency and consumer welfare, and shall take appropriate action with respect to such conduct.

2. Each Party shall establish or maintain an authority responsible for the enforcement of its measures to proscribe anticompetitive business conduct. The enforcement policy of the Parties' national authorities responsible for the enforcement of such measures includes not discriminating on the basis of the nationality of the subjects of their proceedings. Each Party shall ensure that a person subject to the imposition of a sanction or remedy for violation of such measures is provided with the opportunity to be heard and to present evidence, and to seek review of such sanction or remedy in a domestic court or independent tribunal.

Article III
Designated Monopolies and Government Enterprises

1. Designated Monopolies

   (a) Nothing in this Chapter shall be construed to prevent a Party from designating a monopoly.

   (b) Where a Party designates a monopoly and the designation may affect the interests of persons of the other Party, the Party shall:

      (i) at the time of the designation endeavor to introduce such conditions on the operation of the monopoly as will minimize or eliminate any nullification or impairment of benefits in the sense of Article 20.4.1(c) (Additional Dispute Settlement Procedures); and

      (ii) provide written notification, in advance wherever possible, to the other Party of the designation and any such conditions.

      (iii) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative, or other governmental authority that the

Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions, or impose quotas, fees or other charges;

(iv) acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, except to comply with any terms of its designation that are not inconsistent with subparagraph (iii) or (iv);

(v) provides non-discriminatory treatment to covered investments, to goods of the other Party, and to service suppliers of the other Party in its purchase or sale of the monopoly good or service in the relevant market; and

(vi) does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, subsidiaries, or other enterprises with common ownership, in anticompetitive practices in a non- monopolized market in its territory that adversely affect covered investments.

2. Government Enterprises

(a) Nothing in this Agreement shall be construed to prevent a Party from establishing or maintaining a government enterprise.

(b) Each Party shall ensure that any government enterprise that it establishes or maintains acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such enterprise exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.

(c) The United States shall ensure that any government enterprise that it establishes or maintains accords non-discriminatory treatment in the sale of its goods or services to covered investments.

(d) Singapore shall ensure that any government enterprise:

(i) acts solely in accordance with commercial considerations in its purchase or sale of goods or services, such as with regard to price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, and provides non-discriminatory treatment to covered investments, to goods of the United States, and to service suppliers of the United States, including with respect to its purchases or sales;[12-2] and

(ii) does not, either directly or indirectly, including through its dealings with its parent, subsidiaries, or other enterprises with common ownership:

(A) enter into agreements among competitors that restrain competition on price or output or allocate customers for which there is no plausible efficiency justification, or

(B) engage in exclusionary practices that substantially lessen competition in a market in Singapore to the detriment of consumers.

(e) Singapore shall take no action or attempt in any way, directly or indirectly, to influence or direct decisions of its government enterprises, including through the exercise of any rights or interests conferring effective influence over such enterprises, except in a manner consistent with this Agreement. However, Singapore may exercise its voting rights in government enterprises in a manner that is not inconsistent with this Agreement.

(f) Singapore shall continue reducing, with a goal of substantially eliminating, its aggregate ownership and other interests that confer effective influence in entities organized under the laws of Singapore, taking into account, in the timing of individual divestments, the state of relevant capital markets.

(g) Singapore shall:

(h) at least annually, make public a consolidated report that details for each covered entity:

(A) the percentage of shares and the percentage of voting rights that Singapore and its government enterprises cumulatively own;

The Parties recognize that shareholders do not oversee the day-to-day operations of enterprises. Nothing in this provision is intended to require or encourage action that would be inconsistent with applicable U.S. or Singapore law.

(B) a description of any special shares or special voting or other rights that Singapore or its government enterprises hold, to the extent different from the rights attached to the general common shares of such entity;

(C) the name and government title(s) of any government official serving as an officer or member of the board of directors; and

(D) its annual revenue or total assets, or both, depending on the basis on which the enterprise qualifies as a covered entity.

(ii) on receipt from the United States of a request regarding a specific enterprise, provide to the United States the information listed in clause (i), for any enterprise that is not a covered entity or an enterprise excluded under Article 12.8.1 (d) and 12.8.1(e), with the understanding that the information may be made public.

3. The charging of different prices in different markets, or within the same market, where such differences are based on normal commercial considerations, such as taking account of supply and demand conditions, is not in itself inconsistent with this Article.

4. This Article does not apply to government procurement.

Article IV
Cooperation

The Parties recognize the importance of cooperation and coordination to further effective competition law and policy development in the free trade area and agree to cooperate on these matters.

Article V
Transparency and Information Requests

1. The Parties recognize the value of transparency of their competition policies.

2. Each Party, at the request of the other Party, shall make available public information concerning the enforcement of its measures proscribing anticompetitive business conduct.

3. Each Party, at the request of the other Party, shall make available public information concerning government enterprises, and designated monopolies, public or private. Requests for such information shall indicate the entities involved, specify the particular products and markets concerned, and include some indicia that these entities may be engaging in practices that may hinder trade or investment between the Parties.

4. Each Party, at the request of the other Party, shall make available public information concerning exemptions to its measures proscribing anticompetitive business conduct. Requests for such information shall specify the particular products and markets of concern and include some indicia that the exemption might hinder trade or investment between the Parties.

Article VI
Consultations

1. To foster understanding between the Parties, or to address specific matters that arise under this Chapter, each Party shall, at the request of the other Party, enter into consultations regarding representations made by the other Party. In its request, the Party shall indicate, if relevant, how the matter affects trade or investment between the Parties. The Party addressed shall accord full and sympathetic consideration to the concerns of the other Party.

2. Where consultations under paragraph 1 concern conduct covered by Article 12.3.2(d)(ii), Singapore shall inform the United States of the steps it has taken or plans to take to examine the conduct at issue, shall apprise the United States when Singapore's responsible authorities decide to initiate or not to initiate enforcement proceedings regarding the conduct, and shall keep the United States regularly apprised of developments in, and the results of, any enforcement proceedings it initiates.

Article VII
Disputes

A Party shall not have recourse to dispute settlement under this Agreement for any matter arising under Article 12.2, 12.4, or 12.6.

Article VIII
Definitions

For purposes of this Chapter:

1. **covered entity** means:

   (a) an enterprise organized under the laws of Singapore in which effective influence exists, or is rebuttably presumed to exist, whose annual revenue is greater than SGD 50 million;

   (b) an enterprise organized under the laws of Singapore in which effective influence exists, or is rebuttably presumed to exist, whose total assets are greater than SGD 50 million; and

   (c) any entity organized under the laws of Singapore in which the Government of Singapore owns a special voting share with veto rights relating to such matters as the disposal of the undertaking, the acquisition by any person of a specified percentage of the enterprise's share capital, appointments to the board of directors or of management, winding up or dissolution of the enterprise, or any change to the constituent documents concerning the aforementioned matters;

   but excludes:

(d) government enterprises organized and operating solely for the purpose of:

(i) investing the reserves of the Government of Singapore in foreign markets; or

(ii) holding investments referred to in clause (i); and

(e) Temasek Holdings (Pte) Ltd.

The revenue and total asset thresholds above shall be adjusted for inflation (or deflation) every five years. The Parties may otherwise revise the thresholds by mutual agreement;

2. **covered investment** means, with respect to a Party, an investment in its territory of an investor of the other Party. Covered investments shall include those existing at the date of entry into force of this Agreement as well as those established, acquired, or expanded thereafter;

3. **a delegation** includes a legislative grant, and a government order, directive, or other act, transferring to the monopoly or government enterprise, or authorizing the exercise by the monopoly or government enterprise of, government authority;

4. **designate** means to establish, designate, or authorize a monopoly, or to expand the scope of a monopoly, to cover an additional good or service, whether formally or in effect;

5. **effective influence** exists where the government and its government enterprises, alone or in combination:

(a) own more that 50 percent of the voting rights of an entity; or

(b) have the ability to exercise substantial influence over the composition of the board of directors or any other managing body of an entity, to determine the outcome of decisions on the strategic, financial, or operating policies or plans of an entity, or otherwise to exercise substantial influence over the management or operation of an entity. Where the government and its government enterprises, alone or in combination, own 50 percent or less, but more than 20 percent, of the voting securities of the entity and own the largest block of voting rights of such entity, there is a rebuttable presumption that effective influence exists. Annex 12A provides an illustration of how the analysis of effective influence should proceed;

6. **government enterprise** means:

(a) for the United States, an enterprise owned, or controlled through ownership interests, by that Party; and

(b) for Singapore, an enterprise in which that Party has effective influence;

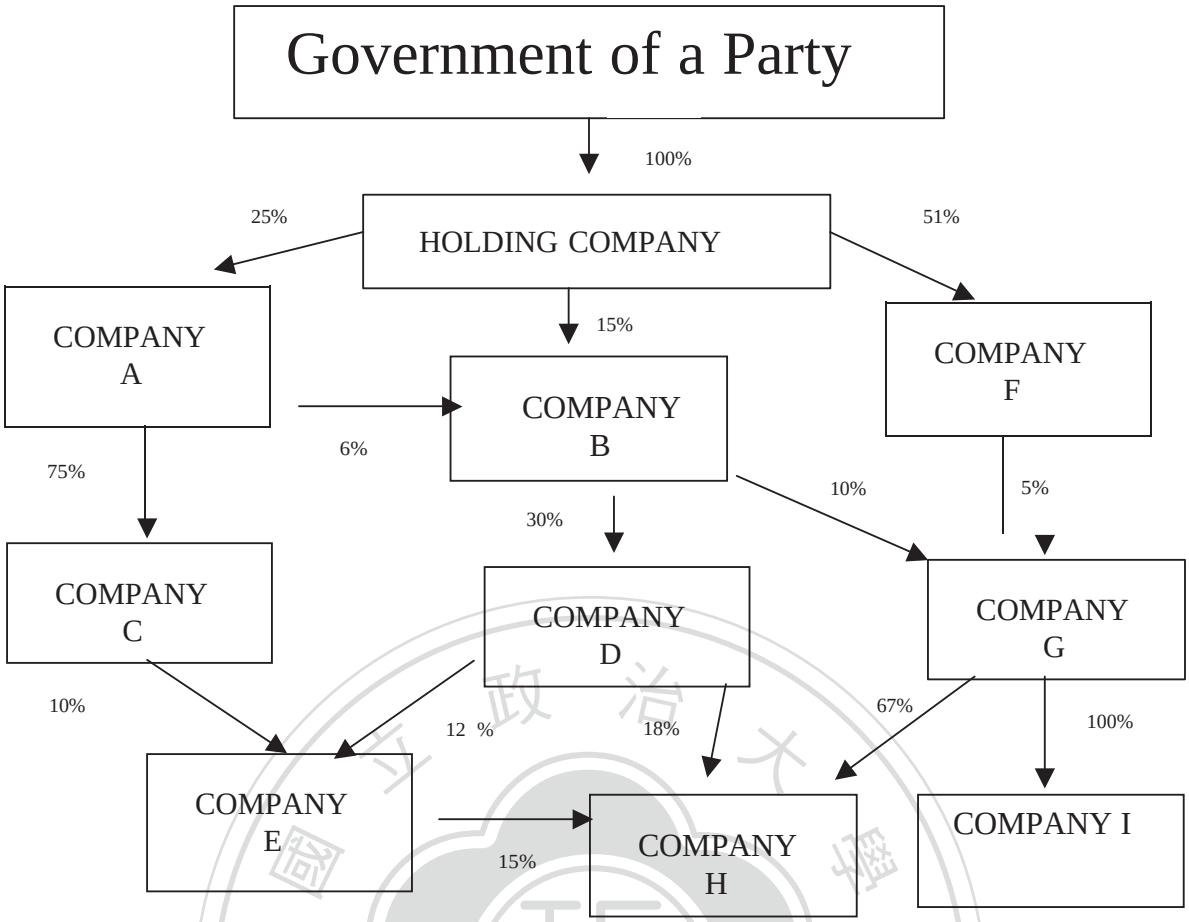
7. **government monopoly** means a monopoly that is owned, or controlled through ownership interests, by the national government of a Party or by another such monopoly;

8. **in accordance with commercial considerations** means consistent with normal business practices of privately-held enterprises in the relevant business or industry;

9. **market** means the geographical and commercial market for a good or service;

10. **monopoly** means an entity, including a consortium or government agency, that in any relevant market in the territory of a Party is designated as the sole provider or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant; and

11. **non-discriminatory treatment** means the better of national treatment and most-favored- nation treatment, as set out in the relevant provisions of this Agreement and subject to the terms and conditions set out in the relevant Annexes thereto.



Holding Company: A government enterprise, since the Government owns more than 50% of it (100%).

Company A: Presumed to be a government enterprise, since Holding Company, a government enterprise, owns more than 20% of its shares (assuming Holding Company is largest shareholder).

Company B: Presumed to be a government enterprise, since Holding Company and Company A, a government enterprise, together own more than 20% of its shares (21%) (assuming that the block of 21% owned by Holding Company and Company A is the largest block of shares).

Company C: Presumed to be a government enterprise, since Company A, a government enterprise, owns more than 50% of its shares (75%).

Company D: Presumed to be a government enterprise, since Company B, a government enterprise, owns more than 20% of its shares (30%) (assuming Company B owns the largest block of shares).

Company E: Presumed to be a government enterprise, since Company C, a government enterprise, and Company D, a government enterprise, together own more than 20% of its shares (22%) (assuming the block of 22% owned by Companies C and D constitutes the largest block of shares).

Company F: A government enterprise, since Holding Company owns more than 50% of its shares.

Company G: Not a government enterprise, since Company B, a government enterprise, and Company F, a government enterprise, together do not own more than 20% of its shares (15%).

Company H: Not a government enterprise, although Company D, a government enterprise, and Company E, together owns more than 20% of its shares (33%), Companies D and E do not, together, own the largest block of shares, since Company G, not a government enterprise, owns 67% of its shares.

Company I: Not a government enterprise, since Company G is not a government enterprise.

附錄 11

United States – Chile Free Trade Agreement

Chapter Sixteen
Competition Policy, Designated Monopolies, and State Enterprises

Article I
Anticompetitive Business Conduct

1. Each Party shall adopt or maintain competition laws that proscribe anticompetitive business conduct, with the objective of promoting economic efficiency and consumer welfare, and shall take appropriate action with respect to such conduct.

2. Each Party shall maintain an authority responsible for the enforcement of its national competition laws. The enforcement policy of each Party's national competition authorities is not to discriminate on the basis of the nationality of the subjects of their proceedings. Each Party shall ensure that:

(a) before it imposes a sanction or remedy against any person for violating its competition law, it affords the person the right to be heard and to present evidence, except that it may provide for the person to be heard and present evidence within a reasonable time after it imposes an interim sanction or remedy; and

(b) an independent court or tribunal imposes or, at the person's request, reviews any such sanction or remedy.

3. Nothing in this Chapter shall be construed to infringe each Party's autonomy in developing its competition policies or in deciding how to enforce its competition laws.

Article II
Cooperation

The Parties agree to cooperate in the area of competition policy. The Parties recognize the importance of cooperation and coordination between their respective authorities to further effective competition law enforcement in the free trade area. Accordingly, the Parties shall cooperate on issues of competition law enforcement, including notification, consultation, and exchange of information relating to the enforcement of the Parties' competition laws and policies.

Article III
Designated Monopolies

1. Nothing in this Chapter shall be construed to prevent a Party from designating a monopoly.

2. Where a Party designates a monopoly and the designation may affect the interests of persons of the other Party, the Party shall:

(a) at the time of the designation endeavor to introduce such conditions on the operation of the monopoly as will minimize or eliminate any nullification or impairment of benefits in the sense of Annex 22.2 (Nullification or Impairment); and

(b) provide written notification, in advance wherever possible, to the other Party of the designation and any such conditions.

3. Each Party shall ensure that any privately-owned monopoly that it designates after the date of entry into force of this Agreement and any government monopoly that it designates or has designated:

(a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions, or impose quotas, fees, or other charges;

(b) acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, except to comply with any terms of its designation that are not inconsistent with subparagraph (c) or (d);

(c) provides non-discriminatory treatment to covered investments, to goods of the other Party, and to service suppliers of the other Party in its purchase or sale of the monopoly good or service in the relevant market; and

(d) does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, subsidiaries, or other enterprises with common ownership, in anticompetitive practices in a non-monopolized market in its territory that adversely affect covered investments.

4. This Article does not apply to procurement.

Article IV
State Enterprises

1. Nothing in this Agreement shall be construed to prevent a Party from establishing or maintaining a state enterprise.

2. Each Party shall ensure that any state enterprise that it establishes or maintains acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such enterprise exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.

3. Each Party shall ensure that any state enterprise that it establishes or maintains accords non-discriminatory treatment in the sale of its goods or services to covered

investments.

Article V
Differences in Pricing

The charging of different prices in different markets, or within the same market, where such differences are based on normal commercial considerations, such as taking account of supply and demand conditions, is not in itself inconsistent with Articles 16.3 and 16.4.

Article VI
Transparency and Information Requests

1. The Parties recognize the value of transparency of government competition policies.

2. On request, each Party shall make available to the other Party public information concerning its:

   (a) competition law enforcement activities; and

   (b) state enterprises and designated monopolies, public or private, at any level of government.

Requests under subparagraph (b) shall indicate the entities or localities involved, specify the particular products and markets concerned, and include indicia of practices that may restrict trade or investment between the Parties.

3. On request, each Party shall make available to the other Party public information concerning exemptions provided under its competition laws. Requests shall specify the particular goods and markets of interest and include indicia that the exemption may restrict trade or investment between the Parties.

Article VII
Consultations

To foster understanding between the Parties, or to address specific matters that arise under this Chapter, each Party shall, on request of the other Party, enter into consultations regarding representations made by the other Party. In its request, the Party shall indicate, if relevant, how the matter affects trade or investment between the Parties. The Party addressed shall accord full and sympathetic consideration to the concerns of the other Party.

Article VIII
Disputes

Neither Party may have recourse to dispute settlement under this Agreement for any matter arising under Article 16.1, 16.2, or 16.7.

Article IX
Definitions

For purposes of this Chapter:

a **delegation** includes a legislative grant, and a government order, directive, or other act, transferring to the monopoly or state enterprise, or authorizing the exercise by the monopoly or state enterprise of, governmental authority;

designate means to establish, designate, or authorize, formally or in effect, a monopoly or to expand the scope of a monopoly to cover an additional good or service;

government monopoly means a monopoly that is owned, or controlled through ownership interests, by the national government of a Party or by another such monopoly;

in accordance with commercial considerations means consistent with normal business practices of privately-held enterprises in the relevant business or industry;

market means the geographic and commercial market for a good or service;

monopoly means an entity, including a consortium or government agency, that in any relevant market in the territory of a Party is designated as the sole provider or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant; and

non-discriminatory treatment means the better of national treatment and most-favored-nation treatment, as set out in the relevant provisions of this Agreement.

附錄 12

Agreement on Antitrust Cooperation between the United States Department of Justice and the United States Federal Trade Commission, of the One Part, and the Fiscalía Nacional Económica of Chile, of the Other Part

The United States Federal Trade Commission and the United States Department of Justice (together the "U.S. antitrust agencies"), of the one part, and the Fiscalía Nacional Económica of Chile ("FNE"), of the other part,

Having regard for the close economic relations and cooperation between the Government of the United States of America and the Government of the Republic of Chile within the framework of the United States-Chile Free Trade Agreement, signed on June 6, 2003, and in particular to the commitment of the United States and Chile in Chapter 16 of that Agreement to cooperate in the area of competition policy,

Recognizing that cooperation and coordination in competition law enforcement activities between the U.S. antitrust agencies and the FNE may, in appropriate cases, result in a more effective resolution of their respective concerns than would be attained through independent action, and

Noting the commitment of the U.S. antitrust agencies and the FNE to give careful consideration to each other's important interests in the application of their competition laws,

Have agreed as follows:

ARTICLE I
PURPOSE AND DEFINITIONS

1. The purpose of this Agreement is to promote cooperation, including enforcement cooperation, and to ensure that the U.S. antitrust agencies and the FNE give careful consideration to each other's important interests in the application of their competition laws.

2. For the purposes of this Agreement, the following terms shall have the following definitions:

(a) "Anticompetitive practice(s)" means any conduct or transaction that may be subject to penalties or other relief under the competition laws enforced by the U.S. antitrust agencies or the FNE;

(b) "Competition authority(ies)" means the U.S. antitrust agencies and the FNE;

(c) "Competition law(s)" means

(i) for the FNE, Decree Law N° 211 of 1973, and specific legislation directly associated with this legal instrument as well as any amendments thereto;

(ii) for the U.S. antitrust agencies, the Sherman Act (15 U.S.C. §§ 1-7), the Clayton Act (15 U.S.C. §§ 12-27), the Wilson Tariff Act (15 U.S.C. §§ 8-11), and the Federal Trade Commission Act (15 U.S.C. §§ 41-58), to the extent that it applies to unfair methods of competition, as well as any amendments thereto; and

(d) "Enforcement activity(ies)" means any investigation or proceeding conducted by the U.S. antitrust agencies or the FNE in relation to the competition laws they enforce.

ARTICLE II
ENFORCEMENT COOPERATION

1. The U.S. antitrust agencies and the FNE agree that it is in their common interest to cooperate in the detection of anticompetitive practices and the enforcement of their competition laws, and to share information that will facilitate the effective application of those laws and promote better understanding of each other's competition enforcement policies and activities, to the extent compatible with their respective laws and important interests, and within their reasonably available resources.

2. Nothing in this Agreement shall prevent the U.S. antitrust agencies or the FNE from seeking or providing assistance to one another pursuant to other agreements, treaties, arrangements, or practices applicable to them.

ARTICLE III
COORDINATION WITH REGARD TO RELATED MATTERS

1. Where one of the U.S. antitrust agencies and the FNE are both pursuing enforcement activities with regard to related matters, they shall consider coordination of their enforcement activities.

2. In any coordination arrangement, each competition authority shall seek to conduct its enforcement activities consistently with the enforcement objectives of the other country.

ARTICLE IV
AVOIDANCE OF CONFLICTS; CONSULTATIONS

1. The U.S. antitrust agencies and the FNE shall, within the framework of their own laws and to the extent compatible with their important interests, give careful consideration to the other country's competition authority's important interests throughout all phases of their enforcement activities, including decisions regarding the initiation of an investigation or proceeding, the scope of an investigation or proceeding, and the nature of the remedies or penalties sought in each case.

2. A competition authority of either country may request consultations with its counterpart in the other country regarding any matter relating to this Agreement. The request for consultations shall

indicate the reasons for the request and whether any procedural time limits or other constraints require that consultations be expedited. Each competition authority shall consult promptly when so requested, with a view to reaching a conclusion that is consistent with the purpose of this Agreement.

ARTICLE V
TECHNICAL COOPERATION

The U.S. antitrust agencies and the FNE agree that it is in their common interest to work together on technical assistance initiatives related to competition law enforcement and policy. Subject to the competition authorities' reasonably available resources, these initiatives may include such forms of technical cooperation as the competition authorities decide are appropriate for purposes of this Agreement.

ARTICLE VI
MEETINGS OF COMPETITION AUTHORITIES

Officials of each country's competition authorities shall meet periodically to exchange information with the other country's competition authorities on their current enforcement efforts and priorities in relation to their competition laws.

ARTICLE VII
CONFIDENTIALITY

1. Notwithstanding any other provision of this Agreement, no country's competition authority is required to communicate information to the other country's competition authority or authorities if such communication is prohibited by the laws of the country of the competition authority possessing the information or if that country deems that it would be incompatible with that country's important interests.

2. Insofar as information is communicated between competition authorities under this Agreement, the recipient shall, to the extent consistent with any applicable domestic laws, maintain the confidentiality of any such information communicated to it in confidence. Each competition authority shall oppose, to the fullest extent possible consistent with applicable domestic laws, any application by a third party for disclosure of such confidential information.

ARTICLE VIII
EXISTING LAWS

Nothing in this Agreement shall require a competition authority to take any action, or to refrain from acting, in a manner that is inconsistent with the existing laws it enforces, or require any change in the laws it enforces.

ARTICLE IX
COMMUNICATIONS UNDER THIS AGREEMENT

Communications under this Agreement may be carried out by direct communication between the competition authorities of each country.

ARTICLE X
ENTRY INTO FORCE

This Agreement shall enter into force upon signature.

Signed at Washington, this 31st day of March, 2011, in the English and Spanish languages, both texts being equally authentic.

FOR THE UNITED STATES
FEDERAL TRADE COMMISSION
_____/s/____Jon Leibowitz

FOR THE UNITED STATES
DEPARTMENT OF JUSTICE:
_____/s/____Christine A. Varney

FOR THE FISCALÍA NACIONAL
ECONÓMICA OF CHILE:
_____/s/____Felipe Irarrázabal

附錄 13

United States – Peru Free Trade Agreement
Chapter Thirteen
Competition Policy, Designated Monopolies, and State Enterprises

Article I
Objectives

Recognizing that the conduct subject to this Chapter has the potential to restrict bilateral trade and investment, the Parties believe that proscribing such conduct, implementing economically sound competition policies, and cooperating on matters covered by this Chapter will help secure the benefits of this Agreement.

Article II
Competition Law and Anticompetitive Business Conduct

1. Each Party shall adopt or maintain national competition laws that proscribe anticompetitive business conduct and promote economic efficiency and consumer welfare, and shall take appropriate action with respect to such conduct.

2. Each Party shall maintain an authority responsible for the enforcement of its national competition laws. The enforcement policy of each Party's central government competition authorities is not to discriminate on the basis of the nationality of the subjects of their proceedings.

3. Each Party shall ensure that:

   (a) before it imposes a sanction or remedy against any person for violating its competition law, it affords the person the right to be heard and to present evidence, except that it may provide for the person to be heard and present evidence within a reasonable time after it imposes an interim sanction or remedy; and

   (b) a court or other independent tribunal established under that Party's laws imposes or, at the person's request, reviews any such sanction or remedy.

4. Each Party other than the United States may implement its obligations under this Article through Andean Community competition laws or an Andean Community enforcement authority.

Article III
Cooperation

1. The Parties agree to cooperate in the area of competition policy. The Parties recognize the importance of cooperation and coordination between their respective authorities to further effective competition law enforcement in the free trade area.

2. Accordingly, the Parties shall cooperate on issues of competition law enforcement, including notification of cases that affect the important interests of another Party, consultation, and exchange of information relating to the enforcement of each Party's competition laws and policies.

Article IV
Working Group

The Parties shall establish a working group comprising representatives of each Party. The working group shall endeavor to promote greater understanding, communication, and cooperation between the Parties with respect to matters covered by this Chapter. The working group shall report on the status of its efforts to the Commission within three years of entry into force of this Agreement and may make any appropriate recommendations for future action that may further promote the achievement of the objectives of this Article.

Article V
Designated Monopolies

1. Recognizing that designated monopolies should not operate in a manner that creates obstacles to trade and investment, each Party shall ensure that any privately-owned monopoly that it designates after the date of entry into force of this Agreement and any government monopoly that it designates or has designated:

(a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions, or impose quotas, fees, or other charges;

(b) acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, except to comply with any terms of its designation that are not inconsistent with subparagraph (c) or (d);

(c) provides non-discriminatory treatment to covered investments, to goods of another Party, and to service suppliers of another Party in its purchase or sale of

the monopoly good or service in the relevant market; and

(d) does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, subsidiaries, or other enterprises with common ownership, in anticompetitive practices in a non-monopolized market in its territory that adversely affect covered investments.

2. Nothing in this Chapter shall be construed to prevent a Party from designating a monopoly.

3. This Article does not apply to procurement, as defined in Article 1.3 (Definitions of General Application).

Article VI
State Enterprises

1. The Parties recognize that state enterprises should not operate in a manner that creates obstacles to trade and investment. In that light, each Party shall ensure that any state enterprise that it establishes or maintains:

(a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such enterprise exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges; and

(b) accords non-discriminatory treatment in the sale of its goods or services to covered investments.

2. Nothing in this Chapter shall be construed to prevent a Party from establishing or maintaining a state enterprise.

Article VII
Differences in Pricing

The charging of different prices in different markets, or within the same market, where such differences are based on normal commercial considerations, such as taking account of supply and demand conditions, is not in itself inconsistent with Articles 13.5 and 13.6.

Article VIII
Transparency and Information Requests

1. The Parties recognize the value of transparency of government competition policies.

2. On request, each Party shall make available to another Party public information concerning its:

(a) competition law enforcement activities;

(b) state enterprises and designated monopolies, public or private, at any level of government; and

(c) export associations registered or certified as such to the central government, including any conditions the Party imposes on them.

In a request under subparagraph (b), a Party shall indicate the entities or localities involved, specify the particular goods or services and markets concerned, and include indicia of practices that may restrict trade or investment between the Parties.

In a request under subparagraph (c), a Party shall specify the particular goods or services concerned.

1. On request, each Party shall make available to the other Party public information concerning exemptions provided under its competition laws. The requesting Party shall specify the particular goods or services and markets of interest and include indicia that the exemption may restrict trade or investment between the Parties.

Article IX
Consultations

To foster understanding between the Parties, or to address specific matters that arise under this Chapter, each Party shall, on request of another Party, enter into consultations. In its request, the Party shall indicate, if relevant, how the matter affects trade or investment between the Parties. The Party addressed shall accord full and sympathetic consideration to the concerns of the other Party.

Article X
Dispute Settlement

No Party may have recourse to dispute settlement under this Agreement for any matter arising under Article 13.2, 13.3, 13.4, or 13.9.

Article XI
Definitions

For purposes of this Chapter:

a **delegation** includes a legislative grant, and a government order, directive, or other act, transferring to the monopoly or state enterprise, or authorizing the exercise by the monopoly or state enterprise of, governmental authority;

designate means to establish, designate, or authorize a monopoly or to expand the scope of a monopoly to cover an additional good or service, whether formally or in effect;
government monopoly means a monopoly that is owned, or controlled through ownership interests, by the central government of a Party or by another such monopoly;

in accordance with commercial considerations means consistent with normal business practices of privately-held enterprises in the relevant business or industry;

market means the geographic and commercial market for a good or service;

monopoly means an entity, including a consortium or government agency, that in any relevant market in the territory of a Party is designated as the sole provider or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant; and

non-discriminatory treatment means the better of national treatment and most-favored- nation treatment, as set out in the relevant provisions of this Agreement.

附錄 14

United States-Colombia Trade Promotion Agreement
Chapter Thirteen
Competition Policy, Designated Monopolies, and State Enterprises

Article I
Objectives

Recognizing that the conduct subject to this Chapter has the potential to restrict bilateral trade and investment, the Parties believe that proscribing such conduct, implementing economically sound competition policies, and cooperating on matters covered by this Chapter will help secure the benefits of this Agreement.

Article II
Competition Law and Anticompetitive Business Conduct

1. Each Party shall adopt or maintain national competition laws that proscribe anticompetitive business conduct and promote economic efficiency and consumer welfare, and shall take appropriate action with respect to such conduct.

2. Each Party shall maintain an authority responsible for the enforcement of its national competition laws. The enforcement policy of each Party's central government competition authorities is not to discriminate on the basis of the nationality of the subjects of their proceedings.

3. Each Party shall ensure that:

   (a) before it imposes a sanction or remedy against any person for violating its competition law, it affords the person the right to be heard and to present evidence, except that it may provide for the person to be heard and present evidence within a reasonable time after it imposes an interim sanction or remedy; and

   (b) a court or other independent tribunal established under that Party's laws imposes or, at the person's request, reviews any such sanction or remedy.

4. Each Party other than the United States may implement its obligations under this Article through Andean Community competition laws or an Andean Community enforcement authority.

Article III
Cooperation

1. The Parties agree to cooperate in the area of competition policy. The Parties recognize

the importance of cooperation and coordination between their respective authorities to further effective competition law enforcement in the free trade area.

2. Accordingly, the Parties shall cooperate on issues of competition law enforcement, including notification of cases that affect the important interests of another Party, consultation,and exchange of information relating to the enforcement of each Party's competition laws and policies.

Article 13.4: Working Group

The Parties shall establish a working group comprising representatives of each Party. The working group shall endeavor to promote greater understanding, communication, and cooperation between the Parties with respect to matters covered by this Chapter. The working group shall report on the status of its efforts to the Commission within three years of entry into force of this Agreement and may make any appropriate recommendations for future action that may further promote the achievement of the objectives of this Article.

Article 13.5: Designated Monopolies

1. Recognizing that designated monopolies should not operate in a manner that creates obstacles to trade and investment, each Party shall ensure that any privately-owned monopoly that it designates after the date of entry into force of this Agreement and any government monopoly that it designates or has designated:

(a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions, or impose quotas, fees, or other charges;

(b) acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, except to comply with any terms of its designation that are not inconsistent with subparagraph (c) or (d);

(c) provides non-discriminatory treatment to covered investments, to goods of another Party, and to service suppliers of another Party in its purchase or sale of the monopoly good or service in the relevant market; and

(d) does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, subsidiaries, or other enterprises with common ownership, in anticompetitive practices in a non-monopolized market in its territory that adversely affect covered

investments.

2. Nothing in this Chapter shall be construed to prevent a Party from designating a monopoly.

3. This Article does not apply to procurement, as defined in Article 1.3 (Definitions of General Application).

Article 13.6: State Enterprises

1. The Parties recognize that state enterprises should not operate in a manner that creates obstacles to trade and investment. In that light, each Party shall ensure that any state enterprise that it establishes or maintains:

(a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such enterprise exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges; and

(b) accords non-discriminatory treatment in the sale of its goods or services to covered investments.

2. Nothing in this Chapter shall be construed to prevent a Party from establishing or maintaining a state enterprise.

Article 13.7: Differences in Pricing

The charging of different prices in different markets, or within the same market, where such differences are based on normal commercial considerations, such as taking account of supply and demand conditions, is not in itself inconsistent with Articles 13.5 and 13.6.

Article 13.8: Transparency and Information Requests

1. The Parties recognize the value of transparency of government competition policies.

2. On request, each Party shall make available to another Party public information concerning its:

(a) competition law enforcement activities;

(b) state enterprises and designated monopolies, public or private, at any level of government; and

(c) export associations registered or certified as such to the central

government, including any conditions the Party imposes on them.

In a request under subparagraph (b), a Party shall indicate the entities or localities involved, specify the particular goods or services and markets concerned, and include indicia of practices that may restrict trade or investment between the Parties.

In a request under subparagraph (c), a Party shall specify the particular goods or services concerned.

1. On request, each Party shall make available to the other Party public information concerning exemptions provided under its competition laws. The requesting Party shall specify the particular goods or services and markets of interest and include indicia that the exemption may restrict trade or investment between the Parties.

Article 13.9: Consultations

To foster understanding between the Parties, or to address specific matters that arise under this Chapter, each Party shall, on request of another Party, enter into consultations. In its request, the Party shall indicate, if relevant, how the matter affects trade or investment between the Parties. The Party addressed shall accord full and sympathetic consideration to the concerns of the other Party.

Article 13.10: Dispute Settlement

No Party may have recourse to dispute settlement under this Agreement for any matter arising under Article 13.2, 13.3, 13.4, or 13.9.

Article 13.11: Definitions

For purposes of this Chapter:

a **delegation** includes a legislative grant, and a government order, directive, or other act, transferring to the monopoly or state enterprise, or authorizing the exercise by the monopoly or state enterprise of, governmental authority;

designate means to establish, designate, or authorize a monopoly or to expand the scope of a monopoly to cover an additional good or service, whether formally or in effect;
government monopoly means a monopoly that is owned, or controlled through ownership interests, by the central government of a Party or by another such monopoly;

in accordance with commercial considerations means consistent with normal business practices of privately-held enterprises in the relevant business or industry;

market means the geographic and commercial market for a good or service;

monopoly means an entity, including a consortium or government agency, that in any relevant market in the territory of a Party is designated as the sole provider or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant; and

non-discriminatory treatment means the better of national treatment and most-favored- nation treatment, as set out in the relevant provisions of this Agreement.

附錄 15

United States-Korea Trade Agreement
Chapter Sixteen Competition-Related Matters

Article 16.1: Competition Law and Anticompetitive Business Conduct

1. Each Party shall maintain or adopt competition laws that promote and protect the competitive process in its market by proscribing anticompetitive business conduct. Each Party shall take appropriate action with respect to anticompetitive business conduct with the objective of promoting economic efficiency and consumer welfare.

2. Each Party shall maintain an authority or authorities responsible for the enforcement of its national competition laws. The enforcement policy of each Party's authorities responsible for the enforcement of such laws is to treat persons who are not persons of the Party no less favorably than persons of the Party in like circumstances, and each Party's authorities intend to maintain this policy.

3. Each Party shall ensure that a respondent in an administrative hearing convened to determine whether conduct violates its competition laws or what administrative sanctions or remedies should be ordered for violation of such laws is afforded the opportunity to present evidence in its defense and to be heard in the hearing. In particular, each Party shall ensure that the respondent has a reasonable opportunity to cross-examine any witnesses or other persons who testify in the hearing and to review and rebut the evidence and any other collected information on which the determination may be based.

4. Each Party shall provide persons subject to the imposition of a sanction or remedy for violation of its competition laws with the opportunity to seek review of the sanction or remedy in a court of that Party.

5. Each Party shall provide its authorities responsible for the enforcement of its national competition laws with the authority to resolve their administrative or civil enforcement actions by mutual agreement with the subject of the enforcement action. A Party may provide for such agreements to be subject to judicial approval.

6. Each Party shall publish rules of procedure for administrative hearings convened to determine whether conduct violates its competition laws or what administrative sanctions or remedies should be ordered for violation of such laws. These rules shall include procedures for introducing evidence in such proceedings, which shall apply equally to all parties to the proceeding.

7. The Parties recognize the importance of cooperation and coordination between their respective authorities to promote effective competition law enforcement. Accordingly, the Parties shall cooperate in relation to their enforcement policies and in the enforcement of their respective competition laws, including through mutual assistance, notification, consultation, and exchange of information.

ARTICLE 16.2: DESIGNATED MONOPOLIES

1. Each Party shall ensure that any privately-owned monopoly that it designates after the date this Agreement enters into force and any government monopoly that it designates or has designated:

(a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions, or impose quotas, fees, or other charges;

(b) acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market,[1] including with regard to price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, except to comply with any terms of its designation[2] that are not inconsistent with subparagraph (c) or (d);[3]

(c) provides non-discriminatory treatment to covered investments, to goods of the other Party, and to service suppliers of the other Party in its purchase or sale of the monopoly good or service in the relevant market; and

(d) does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, subsidiaries, or other enterprises with common ownership, in anticompetitive practices in a non-monopolized market in its territory that adversely affect covered investments.

2. Nothing in this Chapter shall be construed to prevent a Party from designating a monopoly or maintaining a designated monopoly.

3. This Article does not apply to government procurement.

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[1] For greater certainty, "purchase or sale of the monopoly good or service in the relevant market" in Article 16.2 refers to the sale of the designated monopoly good or service in the case of a designated monopoly supplier and to the purchase of the designated monopoly good or service in the case of a designated monopoly buyer.

[2] For greater certainty, nothing in this Chapter shall be construed to prevent a Party from amending the terms of a monopoly's designation.

[3] Subparagraph (b) shall not be construed to prevent a designated monopoly from supplying the monopoly good or service in accordance with specific rates approved, or other terms or conditions established, by a regulatory authority of a Party, provided that those rates or other terms or conditions are not inconsistent with subparagraph (c) or (d).

ARTICLE 16.3: STATE ENTERPRISES

1. Each Party shall ensure that any state enterprise that it establishes or maintains:

(a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such enterprise exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges; and

(b) accords non-discriminatory treatment in the sale of its goods or services to covered investments.

2. Nothing in this Chapter shall be construed to prevent a Party from establishing or maintaining a state enterprise.

ARTICLE 16.4: DIFFERENCES IN PRICING

Articles 16.2 and 16.3 shall not be construed to prevent a monopoly or state enterprise from charging different prices in different markets, or within the same market, where such differences are based on normal commercial considerations, such as taking account of supply and demand conditions.

ARTICLE 16.5: TRANSPARENCY

1. The Parties recognize the value of transparency in their competition enforcement policies.

2. On request of a Party, each Party shall make available to the other Party public information concerning its:

(a) competition law enforcement activities;

(b) state enterprises and designated monopolies, public or private, at any level of government, provided that the request indicates the entities involved, specifies the particular goods or services and markets concerned, and includes some indicia that these entities may be engaging in practices that may hinder trade or investment between the Parties; and

(c) exemptions and immunities to its competition laws, provided that the request specifies the particular goods or services and markets of concern, and includes indicia that the exemption or immunity may hinder trade or investment between the Parties.

3. Each Party shall ensure that all final administrative decisions finding a violation of its competition laws are in writing and set out any relevant findings of fact and the reasoning and legal analysis on which the decision is based. Each Party shall further ensure that the

decisions and any orders implementing them are published or, where publication is not practicable, otherwise made available to the public in such a manner as to enable interested persons and the other Party to become acquainted with them. The version of the decisions or orders that the Party makes available to the public may omit business confidential information or other information that is protected by its law from public disclosure.

ARTICLE 16.6: CROSS-BORDER CONSUMER PROTECTION

1. The Parties recognize the importance of cooperation on matters related to their consumer protection laws in order to enhance the welfare of their consumers. Accordingly, the Parties shall cooperate, in appropriate cases of mutual concern, in the enforcement of their consumer protection laws.

2. The Parties shall endeavor to strengthen cooperation between the United States Federal Trade Commission, on the one hand, and the Ministry of Finance and Economy of Korea and the Korea Fair Trade Commission, on the other, in areas of mutual concern relating to their respective consumer protection laws, including by:

(a) consulting on consumer protection policies and exchanging information related to the enactment and administration of their consumer protection laws;

(b) strengthening cooperation in detecting and preventing fraudulent and deceptive commercial practices against consumers;

(c) consulting on ways to reduce consumer protection law violations that have significant cross-border dimensions; and

(d) supporting implementation of the *OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders* (2003).

3. Nothing in this Article shall limit the discretion of an agency referred to in paragraph 2 to decide whether to take action in response to a request by a counterpart agency of the other Party, nor shall it preclude any of those agencies from taking action with respect to any particular matter.

4. Each Party shall endeavor to identify, in areas of mutual concern and consistent with its own important interests, obstacles to effective cooperation with the other Party in the enforcement of its consumer protection laws, and shall consider modifying its domestic legal framework to reduce such obstacles.

ARTICLE 16.7: CONSULTATIONS

1. To foster understanding between the Parties, or to address specific matters that arise under this Chapter, each Party shall, on request of the other Party, enter into consultations

regarding representations made by the other Party. In its request, the Party shall indicate, if relevant, how the matter affects trade or investment between the Parties.

2. The Party to which a request for consultations has been addressed shall accord full and sympathetic consideration to the concerns raised by the other Party.

3. To facilitate discussion of the matter that is the subject of the consultations, each Party shall endeavor to provide relevant non-confidential information to the other Party.

ARTICLE 16.8: DISPUTE SETTLEMENT

Neither Party may have recourse to dispute settlement under this Agreement for any matter arising under Article 16.1, 16.6, or 16.7.

ARTICLE 16.9: DEFINITIONS

For purposes of this Chapter:

consumer protection laws means:

(a) in the case of Korea, Chapters III, IV.3, IX, and X of the *Framework Act on Consumer*, and the *Fair Labeling and Advertising Act* and its implementing regulations; and

(b) in the case of the United States, laws and regulations prohibiting "unfair or deceptive acts or practices" within the meaning of Section 5 of the *Federal Trade Commission Act*;

a **delegation** includes a legislative grant, and a government order, directive, or other act, transferring to the monopoly or state enterprise, or authorizing the exercise by the monopoly or state enterprise of, governmental authority;

designate means, whether formally or in effect, to establish, designate, or authorize a monopoly or to expand the scope of a monopoly to cover an additional good or service;

government monopoly means a monopoly that is owned, or controlled through ownership interests, by the central government of a Party;[4]

in accordance with commercial considerations means consistent with normal business practices of privately-held enterprises in the relevant business or industry;

market means the geographical and commercial market for a good or service;

monopoly means an entity, including a consortium or government agency, that in any

[4] For greater certainty, ownership, or control through ownership interests, may be direct or indirect.

relevant market in the territory of a Party is designated as the sole provider or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant; and

non-discriminatory treatment means national treatment and most-favored-nation treatment, as set out in the relevant provisions of this Agreement, including the terms and conditions set out in the relevant Annexes thereto.

附錄 16

Memorandum of Understanding on Antitrust and Antimonopoly Cooperation between the United States Department of Justice and Federal Trade Commission, on the One Hand and the People's Republic of China National Development and Reform Commission, Ministry of Commerce, Ministry of Commerce, and State Administration for Industry and Commerce, on the Other Hand

OBJECTIVES

The United States Federal Trade Commission, the United States Department of Justice (together the "U.S. antitrust agencies"); and the People's Republic of China National Development and Reform Commission, Ministry of Commerce, and State Administration for Industry and Commerce (together the "PRC antimonopoly agencies"),

Desiring to enhance the effective enforcement of their competition laws and policies by creating a framework for long-term cooperation between the U.S. antitrust agencies and the PRC antimonopoly agencies,

Recognizing the benefit of technical cooperation between the U.S. antitrust agencies and the PRC antimonopoly agencies in order to enhance an environment in which the sound and effective enforcement of competition law and policy supports the efficient operation of markets and economic welfare of the citizens of their respective nations,

Recognizing that the development of a well-functioning system for effectively implementing competition law and policy involves the respective antitrust or antimonopoly agencies, and also other government agencies, the judiciary, and the legal, business, and academic sectors, and

Recognizing that establishing good communications between U.S. and PRC government agencies on competition law and policy, including establishing this framework for cooperation between the U.S. antitrust agencies and the PRC antimonopoly agencies, will contribute to improving and strengthening the relationship between the United States and China,

intend to cooperate as follows:

STRUCTURE

The U.S. antitrust agencies and the PRC antimonopoly agencies are the counterparts of this Memorandum of Understanding ("Memorandum"), which sets out a framework for cooperation.

The framework for cooperation between the U.S. antitrust agencies and the PRC antimonopoly agencies is composed of two parts: the first is the joint dialogue among all parties to this Memorandum on competition policy at the senior official level (the "joint dialogue") and the second is communication and cooperation on competition law enforcement and policy between individual U.S. antitrust agencies and PRC antimonopoly agencies.

With regard to the first part, unless otherwise agreed, the location of the joint dialogue should alternate between China and the United States, and the host should alternate among the relevant antitrust or antimonopoly agencies. The U.S. antitrust agencies and the PRC antimonopoly agencies intend to convene the joint dialogue periodically, in principle once a year. Based upon the initiative of either side, the parties to this Memorandum may establish ad hoc working groups under the joint dialogue to facilitate discussions on particular issues regarding competition policy and laws. The ad hoc working groups could be conducted in tandem with the joint dialogue or separately as agreed by the individual antitrust or antimonopoly agencies to satisfy their particular needs.

With regard to the second part, the U.S. antitrust agencies and each of the PRC antimonopoly agencies, individually, may also engage in communication and cooperation, separate from the joint dialogue, at the senior or working level.

No agency leads the cooperation under this Memorandum on behalf of each side. Each agency plans to appoint a liaison for the purpose of facilitating contact in furtherance of this Memorandum.

Communications between the agencies may be carried out by telephone, electronic mail, videoconference, meeting, or other means, as appropriate.

The U.S. antitrust agencies and the PRC antimonopoly agencies intend to notify the other promptly of significant changes regarding their authorities responsible for competition policy and law enforcement.

CONTENT

The U.S. antitrust agencies and the PRC antimonopoly agencies recognize that it is in their common interest to work together, including in the following areas, subject to reasonably available resources: (a) keeping each other informed of significant competition policy and enforcement developments in their respective jurisdictions; (b) enhancing each agency's capabilities with appropriate activities related to competition policy and law such as training programs, workshops, study missions and internships; (c) exchanging experiences on competition law enforcement, when appropriate; (d) seeking information or advice from one another regarding matters of competition law enforcement and policy; (e) providing comments on proposed changes to competition laws, regulations, rules and guidelines; (f) exchanging views with respect to multilateral competition law and policy; and (g) exchanging experiences in raising companies', other government agencies' and the public's awareness of competition policy and law.

Each agency recognizes that, when a U.S. antitrust and a PRC antimonopoly agency are investigating related matters, it may be in those agencies' common interest to cooperate in appropriate cases, consistent with those agencies' enforcement interests, legal constraints, and available resources.

The U.S. antitrust agencies and the PRC antimonopoly agencies plan to evaluate the effectiveness of the above-mentioned activities under this Memorandum on a regular basis to ensure that their expectations and needs are being met.

WORK PLANS

The U.S. antitrust agencies and each individual PRC antimonopoly agency intend to

develop detailed work plans of cooperative activities under this Memorandum, which may include law enforcement capacity building and other activities, and to revise and update such work plans as necessary.

CONFIDENTIALITY

It is understood that the U.S. antitrust agencies and the PRC antimonopoly agencies do not intend to communicate information to the other if such communication is prohibited by the laws governing the agency possessing the information or would be incompatible with that agency's interests. Insofar as information is communicated, the recipient should, to the extent consistent with its laws, maintain the confidentiality of any such information communicated to it in confidence.

EFFECTIVE DATE

Cooperation under this Memorandum is effective as of the date of signature.

This Memorandum is intended to set forth an advisory framework. Nothing in this Memorandum is intended to create legally binding rights or obligations, to change existing law, contracts or treaties, to prevent the parties to this Memorandum from seeking or providing assistance to one another pursuant to other bilateral or multilateral agreements or arrangements, or to exclude other technical cooperation projects.

The parties to this Memorandum intend to consult regarding any questions concerning the understanding or implementation of this Memorandum.

Signed in Beijing on July 27, 2011, in five copies, in the Chinese and English languages, with both versions being equally official.

附錄 17

Memorandum of Understanding on Antitrust Cooperation Between The United States Department of Justice and The United States Federal Trade Comission, on the One Hand, and The Russian Federal Anti-Monopoly Service, on the Other Hand

The United States Federal Trade Commission ("FTC"), the United States Department of Justice ("DOJ") (together the "U.S. antitrust agencies"), and the Russian Federal Anti-monopoly Service ("FAS Russia"),

Desiring to enhance the effective enforcement of their competition laws by creating a framework for cooperation between the U.S. antitrust agencies and FAS Russia,

Recognizing the benefit of technical cooperation between the U.S. antitrust agencies and FAS Russia in order to enhance an environment in which the sound and effective enforcement of competition law and policy supports the efficient operation of markets and economic welfare of the citizens of their respective nations,

Recognizing that a well-functioning system for implementing competition law and policy includes not only competition agencies but also effective supporting institutions such as the judiciary, regulatory institutions, and the legal, business, and academic sectors, and

Recognizing that establishing a framework for regular communication between the U.S. antitrust agencies and FAS Russia will contribute to improving and strengthening their relationship, intend to cooperate as follows:

COOPERATION

The U.S. antitrust agencies and FAS Russia intend to keep each other informed of significant competition policy and enforcement developments in their respective jurisdictions, including proposed legislative and policy changes.

The U.S. antitrust agencies and FAS Russia recognize that it is in their common interest to work together in technical cooperation activities related to competition law enforcement and policy. Subject to reasonably available resources, the parties may jointly engage in appropriate activities in furtherance of that interest, such as, *inter alia*: (a) participating in training courses on competition law and policy organized or sponsored by one another; (b) providing comments on proposed changes to competition laws, regulations, guidelines or other policies; and (c) assistance, where appropriate, in promoting understanding of sound competition policy among important supporting institutions, such as the judiciary, other government agencies, the business community, bar associations, and academic institutions.

The U.S. antitrust agencies and FAS Russia plan to evaluate the effectiveness of the technical cooperation under this MOU on a regular basis to ensure that their expectations and needs are being met.

WORKPLAN

The U.S. antitrust agencies and FAS Russia intend to agree on a workplan of cooperative activities, which may be revised by mutual agreement.

COMMUNICATIONS

The U.S. antitrust agencies and FAS Russia may request advice from one another regarding matters of competition law enforcement and policy.

DOJ, FTC, and FAS Russia each plan to appoint a liaison for the purpose of facilitating contact in furtherance of this Memorandum. Communications may be carried out by telephone, electronic mail, videoconference, or in person, as appropriate.

Officials of the U.S. antitrust agencies and FAS Russia should meet, as appropriate, to exchange information on their current and contemplated policy and enforcement efforts and priorities.

CONFIDENTIALITY

It is understood that the U.S. antitrust agencies and FAS Russia do not intend to communicate information to the other if such communication is prohibited by the laws governing the agency possessing the information or would be incompatible with that agency's interests.

Insofar as information is communicated, the recipient should, to the extent consistent with its laws, maintain the confidentiality of any such information communicated to it in confidence.

EFFECTIVE DATE

Cooperation under this Memorandum is effective as of the date of its signature.

This Memorandum is intended to set forth an advisory framework for cooperation. The U.S. antitrust agencies and FAS Russia reserve their full discretion in implementing the Memorandum, and nothing in it is intended to change existing law, agreements, or treaties, or create enforceable rights.

Signed in Washington, DC on November 10, 2009 in three copies, in the Russian and English languages, with both languages being equally authentic.

附錄 18

Agreement between
The Government of the United States of America
And
The Government of the United Mexican States
Regarding the Application of Their Competition Laws

The Government of the United States of America and the Government of the United Mexican States (hereinafter referred to as "Parties");

Having regard to their close economic relations and cooperation within the framework of the North American Free Trade Agreement ("NAFTA");

Noting that the sound and effective enforcement of their competition laws is a matter of importance to the efficient operation of markets within the free trade area and to the economic welfare of the Parties' citizens;

Having regard to their commitment in Chapter 15 of NAFTA to the importance of cooperation and coordination among their competition authorities to further effective competition law enforcement in the free trade area;

Recognizing that coordination of enforcement activities under the Parties' competition laws may, in appropriate cases, result in a more effective resolution of the Parties' respective concerns than would be attained through independent action;

Further recognizing that technical cooperation between the Parties' competition authorities will contribute to improving and strengthening their relationship;

Noting that from time to time differences may arise between the Parties concerning the application of their competition laws to conduct or transactions that implicate the important interests of both Parties;

Noting further their commitment to give careful consideration to each other's important interests in the application of their competition laws; and

Having regard to the growing cooperation between the Parties in matters relating to competition law, including the 1995 Recommendation of the Council of the OECD Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade, the 1998 Recommendation of the Council of the OECD Concerning Effective Action Against Hard Core Cartels, and the Communiqué issued at the Panama Antitrust Summit Meeting in October 1998;

Have agreed as follows:

Article I

PURPOSE AND DEFINITIONS

1. The purposes of this Agreement are to promote cooperation, including both enforcement and technical cooperation, and coordination between the competition authorities of the Parties, to avoid conflicts arising from the application of the Parties' competition laws, and to minimize the impact on their respective important interests of any differences that may arise.

2. For the purposes of this Agreement, the following terms shall have the following definitions:

a. "Anticompetitive activity(ies)" means any conduct or transaction that may be subject to penalties or relief under the competition laws of a Party;
b. "Competition authority(ies)" means

i. for the United Mexican States, the Federal Competition Commission;
ii. for the United States of America, the United States Department of Justice and the Federal Trade Commission;

c. "Competition law(s)" means
i. for the United Mexican States, the Federal Law of Economic Competition of December 24, 1992, except for Articles 14 and 15, and the Regulations of the Federal Law of Economic Competition of March 4, 1998, except for article 8;
ii. for the United States of America, the Sherman Act (15 U.S.C. §§ 1-7), the Clayton Act (15 U.S.C. §§ 12-27), the Wilson Tariff Act (15 U.S.C. §§ 8-11) and the Federal Trade Commission Act (15 U.S.C. §§ 41-58), to the extent that it applies to unfair methods of competition,

as well as any amendments thereto, and such other laws or regulations as the Parties may from time to time agree in writing to be a "competition law" for the purposes of this Agreement; and

d. "Enforcement activity(ies)" means any investigation or proceeding conducted by a Party in relation to its competition laws.

3. Any reference in this Agreement to a specific provision in either Party's competition law shall be interpreted as referring to that provision as amended from time to time and to any successor provision thereof. Each Party shall promptly notify the other of any amendments to its competition laws.

Article II
NOTIFICATION

1. Each Party shall, subject to Article X(1), notify the other Party in the manner provided by this Article and Article XII with respect to its enforcement activities that may affect important interests of the other Party.

2. Enforcement activities that may affect the important interests of the other Party and therefore ordinarily require notification include those that:

a. are relevant to enforcement activities of the other Party;
b. involve anticompetitive activities, other than mergers or acquisitions, carried out in whole or in substantial part in the territory of the other Party;
c. involve mergers or acquisitions in which
- one or more of the parties to the transaction, or
- a company controlling one or more of the parties to the transaction,

is a company incorporated or organized under the laws of the other Party or of one of its States;

d. involve conduct believed to have been required, encouraged or approved by the other Party;
e. involve remedies that expressly require or prohibit conduct in the territory of the other Party or are otherwise directed at conduct in the territory of the other Party; or
f. involve the seeking of information located in the territory of the other Party.

3. Notification pursuant to this Article shall ordinarily be given as soon as a Party's competition authorities become aware that notifiable circumstances are present, and in any event in sufficient time to permit the views of the other Party to be taken into account.

4. When the competition authorities of a Party request that a person provide information, documents or other records located in the territory of the notified Party, or request oral testimony in a proceeding or participation in a personal interview by a person located in the territory of the notified Party, notification shall be given:

a. if compliance with a request for written information, documents or other records is voluntary, at or before the time that the request is made;
b. if compliance with a request for written information, documents or other records is compulsory, at least seven (7) days prior to the request, (or, when seven (7) days' notice cannot be given, as promptly as circumstances permit); and
c. in the case of oral testimony or personal interviews, at or before the time arrangements for the interview or testimony are made.

5. Notification that would otherwise be required by this Article is not required with respect to telephone contacts with a person where:

a. that person is not the subject of an investigation,
b. the contact seeks only an oral response on a voluntary basis (although the availability and possible voluntary provision of documents may be discussed), and
c. the other Party's important interests do not appear to be otherwise implicated, unless the other Party requests such notification in relation to a particular matter.

6. Notification is not required for each subsequent request for information in relation to the same matter unless the Party seeking information becomes aware of new issues bearing on the important interests of the other Party, or the other Party requests otherwise in relation to a particular matter.

7. The Parties acknowledge that officials of either Party may visit the territory of the other Party in the course of conducting investigations pursuant to their respective competition laws. Such visits shall be subject to notification pursuant to this Article and the consent of the notified Party.

8. Notifications shall be sufficiently detailed to enable the notified Party to make an initial evaluation of the effect of the enforcement activity on its own important interests, and shall include the nature of the activities under investigation and the legal provisions concerned. Where possible, notifications shall include the names and locations of the persons involved. Notifications concerning a proposed conditioned approval, consent order or decree shall either include or, as soon as practicable be followed by, copies of the proposed conditioned approval, order or decree and any competitive impact statement relating to the matter.

9. Each Party shall also notify the other whenever its competition authorities intervene or otherwise publicly participate in a regulatory or judicial proceeding that is not an enforcement activity if the issue addressed in the intervention or participation may affect the other Party's important interests. Such notification shall be made at the time of the intervention or participation or as soon thereafter as possible.

Article III
ENFORCEMENT COOPERATION

1.

a. The Parties acknowledge that it is in their common interest to cooperate in the detection of anticompetitive activities and the enforcement of their competition laws to the extent compatible with their respective laws and important interests, and within their reasonably available resources.
b. The Parties further acknowledge that it is in their common interest to share information which will facilitate the effective application of their competition laws and promote better understanding of each other's enforcement policies and activities.

2. The Parties will consider adopting such further arrangements as may be feasible and desirable to enhance cooperation in the enforcement of their competition laws.

3. Each Party's competition authorities will, to the extent compatible with that Party's laws, enforcement policies and other important interests:

a. assist the other Party's competition authorities, upon request, in locating and obtaining evidence and witnesses, and in obtaining voluntary compliance with requests for information, in the requested Party's territory;
b. inform the other Party's competition authorities with respect to enforcement activities involving conduct that may also have an adverse effect on competition within the territory of the other Party;
c. provide to the other Party's competition authorities, upon request, such information within its possession as the requesting Party's competition authorities may specify that is relevant to the requesting Party's enforcement activities; and
d. provide the other Party's competition authorities with any significant information that comes to their attention about anticompetitive activities that may be relevant to, or may warrant, enforcement activity by the other Party's competition authorities.

4. Nothing in this Agreement shall prevent the Parties from seeking or providing assistance to one another pursuant to other agreements, treaties, arrangements or practices between them.

Article IV
COORDINATION WITH REGARD TO RELATED MATTERS

1. Where both Parties' competition authorities are pursuing enforcement activities with regard to related matters, they will consider coordination of their enforcement activities. In such matters, the Parties may invoke such mutual assistance arrangements as may be in force from time to time.

2. In considering whether particular enforcement activities should be coordinated, either in whole or in part, the Parties' competition authorities shall take into account the following factors, among others:

a. the effect of such coordination on the ability of both Parties to achieve their respective enforcement objectives;
b. the relative abilities of the Parties' competition authorities to obtain information necessary to conduct the enforcement activities;
c. the extent to which either Party's competition authorities can secure effective relief against the anticompetitive activities involved;
d. the possible reduction of cost to the Parties and to the persons subject to enforcement activities; and
e. the potential advantages of coordinated remedies to the Parties and to the persons subject to the enforcement activities.

3. In any coordination arrangement, each Party's competition authorities shall seek to conduct their enforcement activities consistently with the enforcement objectives of the other Party's competition authorities.

4. In the case of concurrent or coordinated enforcement activities, the competition authorities of each Party shall consider, upon request by the competition authorities of the other Party and where consistent with the requested Party's enforcement interests, ascertaining whether persons that have provided confidential information in connection with those enforcement activities will consent to the sharing of such information between the Parties' competition authorities.

5. Either Party's competition authorities may at any time notify the other Party's competition authorities that they intend to limit or terminate coordinated enforcement and pursue their enforcement activities independently and subject to the other provisions of this Agreement.

Article V
COOPERATION REGARDING ANTICOMPETITIVE ACTIVITIES IN THE TERRITORY OF ONE PARTY THAT ADVERSELY AFFECT THE INTERESTS OF THE OTHER PARTY

1. The Parties note that anticompetitive activities may occur within the territory of one Party that, in addition to violating that Party's competition laws, adversely affect important interests of the other Party. The Parties agree that it is in their common interest to seek relief against anticompetitive activities of this nature.

2. If a Party believes that anticompetitive activities carried out in the territory of the other Party adversely affect its important interests, the first Party may request that the other Party's competition authorities initiate appropriate enforcement activities. The request shall be as specific as possible about the nature of the anticompetitive activities and their effects on the interests of the Party, and shall include an offer of such further information and other cooperation as the requesting Party's competition authorities are able to provide.

3. The requested Party's competition authorities shall carefully consider whether to initiate enforcement activities, or to expand ongoing enforcement activities, with respect to the anticompetitive activities identified in the request. The requested Party's competition authorities shall promptly inform the requesting Party of its decision. If enforcement activities are initiated, the requested Party's competition authorities shall advise the requesting Party of their outcome and, to the extent possible, of significant interim developments.

4. Nothing in this Article limits the discretion of the requested Party's competition authorities under its competition laws and enforcement policies as to whether to undertake enforcement activities with respect to the anticompetitive activities identified in a request, or precludes the requesting Party's competition authorities from undertaking enforcement activities with respect to such anticompetitive activities.

Article VI
AVOIDANCE OF CONFLICTS

1. Within the framework of its own laws and to the extent compatible with its important interests, each Party shall, having regard to the purpose of this Agreement as set out in Article I, give careful consideration to the other Party's important interests throughout all phases of its enforcement activities, including decisions regarding the initiation of an investigation or proceeding, the scope of an investigation or proceeding and the nature of the remedies or penalties sought in each case.

2. When a Party informs the other that a specific enforcement activity may affect the first Party's important interests, the second Party shall provide timely notice of developments of significance to those interests.

3. While an important interest of a Party may exist in the absence of official involvement by the Party with the activity in question, it is recognized that such interest would normally be reflected in antecedent laws, decisions or statements of policy by its competent authorities.

4. A Party's important interests may be affected at any stage of enforcement activity by the other Party. The Parties recognize the desirability of minimizing any adverse effects of their enforcement activities on each other's important interests, particularly in the choice of remedies. Typically, the potential for adverse impact on one Party's important interests arising from enforcement activity by the other Party is less at the investigative stage and greater at the stage at which conduct is prohibited or penalized, or at which other forms of remedial orders are imposed.

5. Where it appears that one Party's enforcement activities may adversely affect the important interests of the other Party, each Party shall, in assessing what measures it will take, consider all appropriate factors, which may include but are not limited to:

a. the relative significance to the anticompetitive activities involved of conduct occurring within one Party's territory as compared to conduct occurring within that of the other;

b. the relative significance and foreseeability of the effects of the anticompetitive activities on one Party's important interests as compared to the effects on the other Party's important interests;
c. the presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers or competitors within the enforcing Party's territory;
d. the degree of conflict or consistency between the first Party's enforcement activities (including remedies) and the other Party's laws or other important interests;
e. whether private persons, either natural or legal, will be placed under conflicting requirements by both Parties;
f. the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;
g. the location of relevant assets;
h. the degree to which a remedy, in order to be effective, must be carried out within the other Party's territory; and
i. the extent to which enforcement activities of the other Party with respect to the same persons, including judgments or conditioned approvals resulting from such activities, would be affected.

Article VII
TECHNICAL COOPERATION

The Parties agree that it is in their common interest for their competition authorities to work together in technical cooperation activities related to competition law enforcement and policy. These activities may include, within their competition agencies' reasonably available resources and to the extent authorized by their respective laws: exchanges of information pursuant to Article III of this Agreement; exchanges of competition agency personnel for training purposes at each other's competition agencies; participation of competition agency personnel as lecturers or consultants at training courses on competition law and policy organized or sponsored by each other's competition authorities; and such other forms of technical cooperation as the Parties' competition authorities agree are appropriate for purposes of this Agreement.

Article VIII
CONSULTATIONS

1. Either Party may request consultations regarding any matter relating to this Agreement. The request for consultations shall indicate the reasons for the request and whether any procedural time limits or other constraints require that consultations be expedited. Each Party shall consult promptly when so requested with the view to reaching a conclusion that is consistent with the principles set forth in this Agreement.

2. Consultations under this Article shall take place at the appropriate level as determined by each Party.

3. During consultations under this Article, each Party shall provide to the other as much information as it is able in order to facilitate the broadest possible discussion regarding the relevant aspects of the matter that is the subject of consultations. Each Party shall carefully consider the representations of the other Party in light of the principles set out in this Agreement and shall be prepared to explain the specific results of its application of those principles to the matter that is the subject of consultations.

Article IX
PERIODIC MEETINGS

Officials of the Parties' competition authorities shall meet periodically to:

a. exchange information on their current enforcement efforts and priorities in relation to their competition laws;
b. exchange information on economic sectors of common interest;

c. discuss policy changes that they are considering; and
d. discuss other matters of mutual interest relating to the application of their competition laws and the operation of this Agreement.

Article X
CONFIDENTIALITY OF INFORMATION

1. Notwithstanding any other provision of this Agreement, neither Party is required to communicate information to the other Party if such communication is prohibited by the laws of the Party possessing the information or would be incompatible with that Party's important interests.

2. Unless otherwise agreed by the Parties, each Party shall, to the fullest extent possible consistent with that Party's laws, (i) maintain the confidentiality of any information communicated to it in confidence by the other Party under this Agreement, and (ii) oppose any application by a third party for disclosure of such confidential information.

Article XI
EXISTING LAWS

Nothing in this Agreement shall require a Party to take any action, or to refrain from acting, in a manner that is inconsistent with its existing laws, or require any change in the laws of the Parties or of their respective States.

Article XII
COMMUNICATIONS UNDER THIS AGREEMENT

Communications under this Agreement may be carried out directly between the competition authorities of the Parties. Requests under Articles V(2) and VIII(1) shall, however, be confirmed in writing through customary diplomatic channels.

Article XIII
ENTRY INTO FORCE AND TERMINATION

1. This Agreement shall enter into force upon signature.

2. This Agreement shall remain in force until 60 days after the date on which either Party notifies the other Party in writing that it wishes to terminate the Agreement.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

DONE at Mexico City, in duplicate, this eleventh day of July, 2000, in the English and Spanish languages, each text being equally authentic.

FOR THE GOVERNMENT OF
THE UNITED STATES OF AMERICA:

FOR THE GOVERNMENT OF THE
UNITED MEXICAN STATES:

附錄19

Memorandum of Understanding on Antitrust Cooperation between the United States Department of Justice and the United States Federal Trade Commission, and the Ministry of Corporate Affairs (Government of India) and the Competition Commission of India

The United States Federal Trade Commission and the United States Department of Justice, on the one hand, and the Ministry of Corporate Affairs (Government oflndia) and the Competition Commission oflndia, on the other hand (collectively referred to as the "U.S. and Indian competition authorities"),

Desiring to enhance the effective enforcement of their competition laws by creating a framework that provides for enforcement cooperation between the U.S. and Indian competition authorities,

Recognizing the benefit of technical cooperation between the U.S. and Indian competition authorities in order to enhance an environment in which the sound and effective enforcement of competition law and policy supports the efficient operation of markets and economic welfare of the citizens of their respective nations,

Recognizing that the development of a well-functioning system for effectively implementing competition law and policy involves the U.S. and Indian competition authorities, and also other government agencies, and the legal, business, and academic sectors, and

Recognizing that establishing good communications between the U.S. and Indian competition authorities on competition law and policy will contribute to improving and strengthening the relationship between the United States and India, have reached the following understanding:

I. COOPERATION

The U.S. and Indian competition authorities intend to share and to keep each other informed of significant competition policy and enforcement developments in their respective jurisdictions, with an opportunity to comment on these developments.

The U.S. and Indian competition authorities recognize that it is in their common interest to work together in technical cooperation activities related to competition law enforcement and policy. Subject to reasonably available resources, they may jointly engage in appropriate activities in furtherance of that interest, such as, ***inter alia:*** (a) participating in training courses on competition law and policy organized or sponsored by one another; and (b) providing assistance, where appropriate, in promoting understanding ofsound competition policy among important supporting institutions, government agencies, the business community, bar associations, academic institutions, etc.

The U.S. and Indian competition authorities recognize that, when they are investigating related competition matters, it may be in their common interest to cooperate in appropriate cases, consistent with their respective enforcement interests, legal constraints, and available resources.

The U.S. and Indian competition authorities plan to evaluate the effectiveness of the cooperation under this Memorandum on a regular basis to ensure that their expectations and needs are being met.

II. WORKPLAN

The U.S. and Indian competition authorities intend to develop a work plan of cooperative activities, which may be revised by mutual consent.

III. COMMUNICATIONS

The U.S. and Indian competition authorities may request advice and communications from one another regarding matters of competition law enforcement and policy; provided, however, communications relating to case investigations shall be limited to the relevant U.S. and Indian competition authorities investigating the matter.

The U.S. and Indian competition authorities plan to appoint a liaison officer for the purpose of facilitating contact in furtherance of this Memorandum. Communications may be carried out by telephone, electronic mail, videoconference, or in person, as appropriate.

Officials of the U.S. and Indian competition authorities may meet, as appropriate, to exchange information on their current and contemplated policy and enforcement efforts and priorities.

IV. CONFIDENTIALITY

It is understood that the U.S. and Indian competition authorities do not intend to communicate information to the other if such communication is prohibited by the laws governing the agency possessing the information or would be incompatible with that agency's interest.

In so far as information is communicated, the recipient should, to the extent consistent with its laws, maintain the confidentiality of any such information communicated to it in confidence.

V. EFFECTIVE DATE

The present Memorandum of Understanding comes into effect from the date of its signature and cooperation under this Memorandum is intended to continue until either the

U.S. or Indian competition authorities wish to discontinue such cooperation in which case the U.S. or Indian competition authorities should endeavor to provide three months notice of its intention to discontinue cooperation to the other participant. Discontinuation of the present Memorandum of Understanding is not intended to affect the implementation of the projects that are already in process under the present Memorandum.

This Memorandum is intended to set forth an advisory framework for cooperation. The U.S. and Indian competition authorities reserve their full discretion in implementing the Memorandum, and nothing in it is intended to change existing law, agreements, or treaties, or create legally binding or enforceable rights or obligations.

Dated at Washington, D.C., on September 27, 2012, in four originals, each in the English and Hindi languages, both texts being official.

附錄20

Agreement on Antitrust Cooperation between The United States Department of Justice and The United States Federal Trade Commission, of the One Part, and The Superintendence of Industry and Commerce of Colombia, of the Other Part

The United States Federal Trade Commission and the United States Department of Justice (together the "U.S. antitrust agencies"), of the one part, and the Superintendence of Industry and Commerce of Colombia ("SIC"), of the other part,

Having regard for the close economic relations and cooperation between the Government of the United States of America and the Government of the Republic of Colombia within the framework of the United States-Colombia Trade Promotion Agreement, signed on November 22, 2006, and in particular to the commitment of the United States and Colombia in Chapter 13 of that Agreement to cooperate in the area of competition policy,

Recognizing that cooperation and coordination in competition law enforcement activities between the U.S. antitrust agencies and the SIC may, in appropriate cases, result in a more effective resolution of their respective concerns than would be attained through independent action, and

Noting the commitment of the U.S. antitrust agencies and the SIC to give careful consideration to each other's important interests in the application of their competition laws,

Have agreed as follows:

ARTICLE I
PURPOSE AND DEFINITIONS

1. The purpose of this Agreement is to promote cooperation, including cooperation in the enforcement of competition laws, and to ensure that the U.S. antitrust agencies and the SIC give careful consideration to each other's important interests in the application of their competition laws.

2. For the purposes of this Agreement, the following terms shall have the following definitions:

(a) "Anticompetitive practice(s)" means any conduct or transaction that may be subject to penalties or other relief under the competition laws enforced by the U.S. antitrust agencies or the SIC;

(b) "Competition authority(ies)" means the U.S. antitrust agencies and the SIC;

(c) "Competition law(s)" means

(i) For the SIC, Laws 155 of 1959, 256 of 1996, and 1340 of 2009; Decrees 2153 of 1992 and 4886 of 2011, and specific legislation directly associated with these legal instruments, as well as any amendments thereto;

(ii) For the U.S. antitrust agencies, the Sherman Act (15 U.S.C. §§ 1-7), the Clayton Act (15 U.S.C. §§ 12-27), the Wilson Tariff Act (15 U.S.C. §§ 8-11), and the Federal Trade Commission Act (15 U.S.C. §§ 41-58), to the extent that it applies to unfair methods of competition, as well as any amendments thereto; and

(d) "Enforcement activity(ies)" means any investigation or proceeding conducted by the U.S. antitrust agencies or the SIC in relation to the competition laws they enforce.

ARTICLE II
ENFORCEMENT COOPERATION

1. The U.S. antitrust agencies and the SIC agree that it is in their common interest to cooperate in the detection of anticompetitive practices and the enforcement of their competition laws, and to share information that will facilitate the effective application of those laws and promote better understanding of each other's competition enforcement policies and activities, to the extent compatible with their respective laws and important interests, and within their reasonably available resources.

2. Nothing in this Agreement shall prevent the U.S. antitrust agencies or the SIC from seeking or providing assistance to one another pursuant to other agreements, treaties, arrangements, or practices applicable to them.

ARTICLE III
COORDINATION WITH REGARD TO RELATED MATTERS

1. Where one of the U.S. antitrust agencies and the SIC are both pursuing enforcement activities with regard to related matters, they shall consider coordination of their enforcement activities.

2. In any coordination arrangement, each competition authority shall seek to conduct its enforcement activities consistently with the enforcement objectives of the other competition authority.

ARTICLE IV
AVOIDANCE OF CONFLICTS; CONSULTATIONS

1. The U.S. antitrust agencies and the SIC shall, within the framework of their own laws and to the extent compatible with their important interests, give careful consideration to the other country's competition authority's important interests throughout all phases of their enforcement activities, including decisions regarding the initiation of an investigation or proceeding, the scope of an investigation or proceeding, and the nature of the remedies or penalties sought in each case.

A competition authority of either country may request consultations with its counterpart in the other country regarding any matter relating to this Agreement. The request for consultations shall indicate the reasons for the request and whether any procedural time limits or other constraints require that consultations be expedited. Each competition authority shall consult promptly when so requested, with a view to reaching a conclusion that is consistent with the purpose of this Agreement.

ARTICLE V
TECHNICAL COOPERATION

The U.S. antitrust agencies and the SIC agree that it is in their common interest to work together on technical assistance initiatives related to competition law enforcement and policy. Subject to the competition authorities' reasonably available resources, these initiatives may include such forms of technical cooperation as the competition authorities decide are appropriate for purposes of this Agreement.

ARTICLE VI
MEETINGS OF COMPETITION AUTHORITIES

Officials of each country's competition authorities shall meet periodically to exchange information with the other country's competition authorities on their current enforcement efforts and priorities in relation to their competition laws.

ARTICLE VII
CONFIDENTIALITY

1. Notwithstanding any other provision of this Agreement, no country's competition authority is required to communicate information to the other country's competition authority or authorities if such communication is prohibited by the laws of the country of the competition authority possessing the information or if that country deems that it would be incompatible with that country's important interests.

2. Insofar as information is communicated between competition authorities under this Agreement, the recipient shall, to the extent consistent with any applicable domestic laws, maintain the confidentiality of any such information communicated to it in confidence. Each competition authority shall oppose, to the fullest extent possible consistent with applicable domestic laws, any application by a third party for disclosure of such confidential information.

ARTICLE VIII
EXISTING LAWS

Nothing in this Agreement shall require a competition authority to take any action, or to refrain from acting, in a manner that is inconsistent with the existing laws it enforces, or require any change in the laws it enforces.

ARTICLE IX
COMMUNICATIONS UNDER THIS AGREEMENT

Communications under this Agreement may be carried out by direct communication between the competition authorities of each country.

ARTICLE X
ENTRY INTO FORCE AND TERMINATION

1. This Agreement shall enter into force upon signature.

2. This Agreement shall remain in force for an indefinite period of time, unless one Party notifies the other Party in writing that it wishes to terminate the Agreement. In that case, the Agreement shall terminate 60 days after such written notice is given.

Signed at Washington, this _____ day of September, 2014, and at Montevideo, this _____ day of September, 2014, in the English and Spanish languages, both texts being equally authentic.

附錄 21

Cooperation and Coordination Arrangement between the Taipei Economic and Cultural Office and the Australian Commerce and Industry Office Regarding the Application of the Competition and Fair Trading Laws

Chinese Taipei

1. BACKGROUND

1.1 The Taipei Economic and Cultural Office (TECO) and the Australian Commerce and Industry Office (ACIO) (the Parties) note that cooperation and coordination between the Fair Trade Commission, Taipei (FTC) and the Australian Competition and Consumer Commission (ACCC) (hereinafter referred to collectively as "the Agencies") will enhance the sound and effective application of the competition and fair trading laws administrated by the Agencies.

1.2 However, the Agencies note that from time to time differences may arise between them concerning the application of the competition and fair trading laws administrated by the Agencies to conduct or transactions that implicate a significant interest of either of the Agencies or the territories in which their relevant laws are administrated. They further note that in this regard, there are some material differences between the competition and fair trading laws administrated by the Agencies.

1.3 The Agencies note the existence of the Mutual Assistance in Business Regulation and Mutual Assistance in Criminal Matters legislation in Australia. This Arrangement is to operate concurrently with that legislation.

1.4 The Agencies note the existence of the Osaka Action Agenda of the Asia-Pacific Economic Cooperation Forum Concerning the Competitive Environment in the Asia-Pacific Region which was adopted on 16 November 1995 which encourages the establishment of cooperation arrangements, such as this, among the competition authorities in that region, including the FTC and the ACCC. This Arrangement is to operate concurrently with that Action Agenda.

2. PURPOSE

2.1 The purpose of this Arrangement is to promote cooperation and coordination between the Agencies and to lessen the possibility of differences between the Agencies in the application of the competition and fair trading laws administrated by the Agencies where these differences are not the result of statutory provisions. The ongoing exchange of information and cooperation in a number of areas will enable each agency to be more efficient and effective.

3. SUBJECT MATTER

3.1 This Arrangement relates to all the activities of the Agencies including enforcement, adjudication by the Agencies, compliance education, research, human resource development, and management.

3.2 The agency to whom a request for information or assistance is made (the Requested Agency) is to provide all information and grant assistance required unless the Requested Agency considers it is prejudicial to important interests or would be prevented from doing so by law. The agency seeking information or assistance (the Requesting Agency) is to seek such information as it is within its power and functions to do so.

4. CONFIDENTIALITY

4.1 Notwithstanding other provisions of this Arrangement the Requested Agency is not required to provide information to the Requesting Agency if disclosure of that information to the Requesting Agency:

- is prohibited by relevant laws, or is incompatible with the important interests of the jurisdiction of the Requested Agency;
- would require disclosure of information which has been provided to the Requesting Agency on a confidential basis.

4.2 The Requesting Agency is to maintain to the fullest extent possible the confidentiality of any information provided in accordance with this Arrangement. The Requesting Agency is to protect to the fullest extent possible confidential information provided in accordance with this Arrangement, including requests made pursuant to the Freedom of Information Act 1982 (Australia). The Requesting Agency is not to release to any other authority any confidential information provided in accordance with this Arrangement without the prior written permission of the Requested Agency.

4.3 The Requesting Agency is to maintain confidential files to which access is limited for the purpose of storing and handling of confidential information provided in accordance with this Arrangement.

4.4 Where the Requested Agency requires specific measures for protection of confidential information it is to notify the Requesting Agency prior to the transfer of that information. The Requesting Agency is to confirm it is willing and able to comply prior to accepting the transfer of information.

5. SCOPE OF COOPERATION

5.1 Exchange of Information

5.1.1 It is in the common interests of the Agencies to share information that will:

- facilitate effective application of their competition and fair trading laws
- administrated by the respective Agencies;
- avoid unnecessary duplication;
- facilitate coordinated investigations, research and education;
- promote a better understanding by each Party of economic and legal conditions and theories relevant to their respective competition and fair trading laws enforcement and related activities;
- keep each other informed of developments in their respective jurisdictions or companies based in that jurisdiction.

5.1.2 In furtherance of this common interest the Agencies are to, on a regular basis, exchange and provide information in relation to:

- investigations by the Agencies and research;
- speeches, research papers, journal articles, etc.;
- compliance education programs;
- amendments to relevant legislation;
- human resources development and management.

5.2 Notification of enforcement and related activities

5.2.1 In respect of investigations by the Agencies, each of the Agencies is to notify the other whenever an investigation, enforcement or related activity of an agency may affect important interests of that other. In respect of investigations by agencies other than the Agencies, each of the Agencies is to notify the other whenever it becomes aware that an investigation, enforcement or related activity of an agency may affect important interests of that other. Each of the Agencies is to, in particular, notify the other when they make enquiries of persons located in the other's jurisdiction.

5.2.2 Notifications are to include sufficient information to facilitate a proper evaluation by the recipient agency of any effect of such interest and the other agency is free to follow up with the notifying agency for any further information.

5.2.3 A notification in respect of any investigation is to be made to the Chairperson of the respective party.

5.3 Assistance in enforcement and related activities

5.3.1 The assistance available under this Arrangement includes:

(a) providing access to information in the files of the Requested Agency, including confidential files, except if provision of such information would breach Clause 4 of this Arrangement.

(b) in respect of parties appearing on a voluntary basis, preparing witness statements, conducting formal interviews and obtaining information and documents on behalf of the Requesting Agency. Where that assistance cannot be provided because of the laws governing the Requested Agency, the Requested Agency is to advise accordingly.

(c) coordination of enforcement activities when the Agencies agree that would be beneficial in a particular case. In determining whether a particular enforcement activity should be coordinated the parties are to take account of the following:

- effect on resources;
- operational effects;
- efficiency and effectiveness of any joint action;
- impact on the Agencies, economies or citizens.

In any coordination arrangement each agency is to conduct its activities expeditiously and insofar as possible consistent with the objectives of the other agency.

6. PROCEDURE FOR ASSISTANCE

6.1 Requests for administrative assistance are to be made by the Requesting Agency through the Chairperson of the Requested Agency.

6.2 A request for administrative assistance is to include:

- a description of the parties involved in the conduct;
- an outline of the industry characteristics;
- the alleged breach;
- a description of the information sought and the purpose for which it is sought;
- a description of the type of assistance required;
- a suggested time period for reply;

- requirements for confidentiality

6.3 The Requested Agency is to acknowledge the request for administrative assistance, and expeditiously provide that assistance in accordance with its procedures.

7. EXCHANGE OF STAFF

7.1 The Agencies will arrange visits and/or the exchange of staff as appropriate.

8. AGENCY SUPPORT ACTIVITIES

8.1 The Agencies are to develop cooperative arrangements in relation to:

- staff development and training;
- Information technology, including direct access to E-mail systems and non-corporate data base;
- compliance education;
- mutual assistance in legislation;
- assistance in the delivery of documents

9. AVOIDANCE OF CONFLICT

9.1 Within the framework of its own laws, and to the extent compatible with its own interests, each agency is to seek at all stages in its activities to take into account the important interests of the other. Where there are any instances where the other's interests may be impinged, urgent and immediate consultation should take place.

10. REVIEW OF ARRANGEMENT

10.1 This Arrangement is to be reviewed annually and an agreed report prepared on the cooperation and coordination between the Agencies for each 12 month period. Such a review is to be undertaken on the anniversary of the signature of this Arrangement.

10.2 Each agency can terminate this Arrangement with 30 days written notice.

附錄 22

臺灣公平交易委員會與法國競爭委員會
關於競爭法適用瞭解備忘錄

臺灣公平交易委員會，為一方，與法國競爭委員會，為另一方，以下同稱「雙方」，咸認全球經濟，包括雙方管轄權範圍內之領域，日益逐漸整合， 鑒於雙方同認競爭法執行，對於雙方個別管轄範圍內市場之有效運作係屬重要議題，基於平等與互利原則，針對雙邊合作的發展創造有利的條件，爰經協議如下:

第 1 條　瞭解備忘錄的目的和定義

本瞭解備忘錄（以下稱「備忘錄」）的目的係為促進雙方間在競爭法執行與競爭倡議領域之合作與相互瞭解。

就本備忘錄適用而言：

－“競爭法”意謂：

就臺灣公平交易委員會而言，指公平交易法，除第 20 條至第 22 條及第 24 條之外，以及其任何修正。

就法國競爭委員會而言，指商業法第四冊 L.410-1 條及其後續相關條款、R420-10 條及其後續相關條款，及歐盟運作條約第 101 條和第 102 條。

－“執法活動”意謂由一方從事任何與其執行競爭法有關之調查或程序。

第 2 條　一般事項之合作

有關競爭政策合作之一般性議題，應基於雙方同意進行，尤其須取決於雙方可合理使用之資源，此類合作包含下列各項：

1. 舉辦研討會、論壇、課程及其他類似活動；

2. 歡迎代表團進行考察訪問；

3. 接受完全精通接受方工作語言之實習人員；

4. 提供彼此有關立法、決定、案例法、程序通知、年報與其他公開可使用之相關資料等資訊；

5. 依據雙方個別法律及程序，一方應通知另一方可能影響其重大權益之執法活動。

第 3 條　諮商

當任一方的執法活動可能影響另一方時，雙方可相互諮商。

當一方通知另一方後者的執法活動將可能對其競爭法之適用有影響時，通知方可要求被通知方舉行與這些活動有關諮商。

一方表達舉辦此項諮商之意願時，另一方將盡最大努力對此進行安排。

第 4 條　會議

雙方將盡力視需要召開會議，以：

- 討論在競爭法、執法、倡議等方面攸關雙邊利益之現行議題、經驗與最新進展，及本備忘錄架構內之其他議題；

- 交換關於競爭政策一般議題之非機密資訊；

- 交換有關競爭政策領域內多邊活動之意見；

雙方將藉機會在雙方共同參與的國際活動架構內會面。

第 5 條　機密性

任一方依據其國家法律，咸認必須確保與另一方於本備忘錄架構內從事交流資訊之機密性。

任一方承諾遵守所有適用的法律規定，包含但不限於，商業機密、職業秘密與個人資料保護規定。

第 6 條　最終規定

本備忘錄簽署後，在不延遲的情況下，任一方應指定聯絡窗口負責監督本備忘錄之執行。

本備忘錄自簽署之日起生效，為期 1 年，並於之後每年自動更新。

本備忘錄於任一方以書面通知另一方 1 個月後終止。

雙方在本備忘錄架構內對資訊保密之義務，本備忘錄終止後仍受拘束。

本備忘錄將不影響雙方其他合作備忘錄之權利與義務。

本備忘錄可依雙方書面同意修正，並由雙方以議定書簽署執行。

本備忘錄將取代 2004 年 1 月 5 日簽署之“臺灣公平交易委員會及法國競爭審議委員會關於適用公平競爭法令施行合作協議”(以下簡稱“協議”)。因此，協議將於本備忘錄生效之日起終止。

2014年 11 月 3 日在臺北以及2014年 12 月 18 日在巴黎簽署一式二份，分別以中文、法文和英文製作，所有文字約本同一作準。

附錄 23

駐加拿大臺北經濟文化代表處與加拿大駐臺北貿易辦事處關於競爭法適用瞭解備忘錄

駐加拿大臺北經濟文化代表處(TECO)與**加拿大駐臺北貿易辦事處(CTOT)**，以下均稱雙方， 達成下列瞭解：

1. 競爭主管機關

(a)加拿大臺北經濟文化代表處指定行政院公平交易委員會（公平會） 以其自身名義執行本瞭解備忘錄（下稱本備忘錄）。

(b)加拿大駐臺北貿易辦事處指定加拿大競爭局競爭局長（競爭局長）以其自身名義執行本備忘錄。

公平會和競爭局長以下均稱為「競爭主管機關」。關於競爭主管機關間合作協調對於促進其管轄領域內有效執行競爭法之重要性；咸認在某些個案上，執法活動之合作與協調，較競爭主管機關分別行動更 有效解決其各自競爭法疑慮之結果；又考量在經濟合作暨發展組織(Organisation for Economic Co-operation and Development)與國際競爭網絡(International Competition Network)完成之重要工 作成果，以及競爭主管機關在前開論壇密切之共事關係；瞭解如次：

2. 目的和定義

(a)本備忘錄目的係為促進競爭主管機關間之合作協調。

(b)本備忘錄所列名詞定義如下：

(i)競爭法意謂：

(A) 由競爭主管機關職掌實施執行之競爭法法令、管制規定及其任何修正，及其他經競爭主管機關不定期以書面納入本備忘錄之競爭法法令或管制規定。

(B) 為符(b)項(i)(A)之目的，明列競爭局長職掌法令及管制規定於本備忘錄附錄 A；公平會職掌法令和管制規定於本備忘錄附錄 B。

(ii)執法活動意謂由一競爭主管機關從事任一與其實施及執行競爭法有關之調查或訴訟程序；又

(iii)「領域」意謂一競爭主管機關之管轄範圍。

(c)每一競爭主管機關應即於可行之際通知他方其競爭法之修正。

3. 通知

(a)依據第 7 條，每一競爭主管機關應通知他方競爭主管機關可能影響其競爭法適用權益之執法活動，包括：

(i) 與他方競爭主管機關執法活動相關者；

(ii) 除合併或收購外，涉及任何全部或部分在他方競爭主管機關領域內實施，而可能由他方競爭主管機關依所職司執行之競爭法 處以罰責或課以其他處分之行為或交易，前開行為或交易不具實質重要者不在此限；

(iii) 合併或收購所涉之一個或多個交易當事人在他方競爭主管機關領域內從事事業活動，或該合併或收購係由依據他方競爭主管機關領域內法律成立之法人組織或團體所控制；

(iv) 涉及他方競爭主管機關領域內之罰責或其他明文命令要求或禁止行為之處分或在該領域內針對其他行為之執法活動。

(v) 所欲蒐集之資訊位於他方競爭主管機關領域時，無論是否係一方之競爭主管機關官員親自來訪或以其他方式為之，均須取得受通知競爭主管機關同意，惟以電話聯繫他方競爭主管機關領 域內非受調查客體，且僅徵求其自願性口頭回覆者不在此限。

(b)通知通常於應通知情事明顯可見時即應為之。

(c) 後續事件之通知尚非必要，除非通知之競爭主管機關察覺攸關他方競爭主管機關競爭法適用權益之新議題，或基於受通知競爭主管機關之 要求。

(d)通知應包含調查活動本質與相關競爭法規定，且須詳盡至足供受通知競爭主管機關得以初步評估該活動對其競爭法適用權益之影響。

4. 合作與協調

(a)競爭主管機關承認在適切可行之情形下進行合作並分享資訊是符合其共同利益。

(b)競爭主管機關從事相同或相關事件之執法活動時，將於適切可行之情形下致力於協調執法活動，並應尊重各自競爭主管機關決定之獨立性。

(c)競爭主管機關同意雙方協力從事與競爭法執行及政策相關之技術援助倡議，符合其共同利益。取決於競爭主管機關可合理使用之資源，此類倡議可包含競爭主管機關決定並合於本備忘錄目的之技術合作形式。

5. 衝突迴避

(a)競爭主管機關認同將一方競爭主管機關執法活動對於他方競爭法適用權益之潛在負面效果極小化，符合其共同利益。

(b)當一競爭主管機關通知他方之特定執法活動可能影響通知機關就其競爭法適用權益之際，他方競爭主管機關應力求及時通知與此權益相關 之重大事態發展，並提供對於研議中之處罰或補救措施表示意見之機會。

(c)本備忘錄所生任何疑義，包含本備忘錄之解釋或適用，將視情勢容許，以適時可行之方式處理。

6. 會議

競爭主管機關官員將視需要定期會面，以；

(a)交換競爭法執法成果及競爭法相關重要事項等資訊；

(b)交換共同關注之經濟產業資訊；

(c)討論尚在考量中的競爭法變革；及

(d)討論其他攸關雙邊利益之競爭法適用議題或本備忘錄之運作。

7. 現行法律和資訊機密

(a)備忘錄未要求競爭主管機關採取或不採取某一程度將牴觸現行法律之行動，亦未要求變更競爭主管機關領域內之任一法律。

(b)儘管本備忘錄其他條款有所規定，但擁有資訊之競爭主管機關倘受法律禁止其交流，或其交流與該競爭主管機關競爭法適用權益不相符時，任一競爭主管機關均無需與他方進行交流。

(c)競爭主管機關依據本備忘錄進行資訊交流之程度，將繫諸於他方競爭主管機關就有關保密和資訊使用目的所提供保證之可接受度。

(d)除非競爭主管機關另行決定，每一競爭主管機關應盡可能完整維護與他方競爭主管機關秘密從事交流資訊之機密性。每一競爭主管機關應 竭力反對第三人就此機密資訊交流之要求，除非提供機密資訊之競爭主管機關以書面同意交流。

8. 基於本備忘錄之溝通

依據本備忘錄所為之各項溝通，將直接由競爭主管機關為之。各競爭主管機關可指定聯絡窗口，並以書面通知他方。

(a)本備忘錄於最後簽署日生效。

(b)本備忘錄可依雙方書面同意修正。

(c)本備忘錄在任一方以書面通知他方終止備忘錄之意願後 60 日內仍有效。

2009 年 6 月 22 日在臺北以及 7 月 14 日在　Gatineau　簽署乙式 2 份，分別以中　文、英文、法文製作，各約本具有同等效力。

附錄 24

Co-operation Agreement between the Taiwan Fair Trade Commission and the Hungarian Competition Authority regarding the application of competition and fair trading laws

The Taiwan Fair Trade Commission (TFTC) and the Gazdasági Versenyhivatal (GVH – the Hungarian Competition Authority), hereinafter referred to as "the Parties",

Noting that the Parties share the view that the enforcement of competition and fair trading laws is an issue of great importance to the efficient operation of the markets falling under the respective jurisdictions of the Parties,

Considering that cooperation between the Parties would lead to the fairer and more efficient enforcement of competition and fair trading laws which they have the duty to enforce and to encourage the process of international cooperation in these areas,

Aiming at the creation of favourable conditions for the development of bilateral relations,

Based on the principles of equality and mutual benefit,

HAVE AGREED AS FOLLOWS:

Article 1. Objective of this Agreement

The goal of this Agreement is to strengthen co-operation between the Parties in the field of competition and fair trading laws and policies both on the level of general policy matters and individual cases, equally covering enforcement, advocacy and competition culture issues.

Article 2. Definitions

For the application of this Agreement:

1."competition and fair trading laws" mean:

(i) for the TFTC, *the Fair Trade Act*;
(ii) for the GVH, *the Act 'on the Prohibition of Unfair and Restrictive Market Practices' (the Competition Act)*.

2. "enforcement activity(ies)" means any application of competition and fair trading laws by way of investigation or proceeding conducted by a Party.

3. “territory” means the territory in respect of which the competition and fair trading laws are enforced by the Parties.

Article3. Areas for cooperation in the field of competition law and policy

1. In order to secure legal and organisational mechanism for interaction focused on prevention and termination of actions that may negatively affect competition in Taiwan and in Hungary, the Parties indicate areas as follows for cooperation:
   - investigations of behaviours which violate competition and fair trading laws in the respective legislation of the Parties,
   - enforcement of competition legislation which cover both antitrust and unfair competition issues,
   - determination of strategic and tactical aspects of the competition policy if requested.
2. The Parties will share their experience concerning projects in the field of raising awareness of competition law and policy (competition advocacy).

Article4. Forms of cooperation

The Parties agree to:

- exchange experience in enforcement activities,
- make available annual reports, case descriptions, studies on competition policy and other relevant materials on the development of enforcement activities,
- make information available about professional forums organized by each Party and ensure participation if requested,
- provide assistance in the determination of strategic and tactical aspects of competition policy and the fight against deceptive or unfair trade practices if requested,
- notify each other about infringements affecting competition in the territory of the other Party,
- exchange information concerning infringements affecting competition in the territory of the other Party.

Article 5. Areas for cooperation in matters common for competition law and policy, and deceptive or unfair trade practices

Considering that the Parties share similar institutional design by housing the two functions (competition and the fight against deceptive or unfair trade practices) in a single agency, hence it is a common goal to identify and explore the common overarching goals of the two fields. Accordingly, the Parties agree to share experiences on

- synergies between competition and the fight against deceptive or unfair trade practices,
- the awareness of issues,

– possible cross-border cases.

Article 6. Notification

1. If one of the Parties establishes that actions of undertakings in its own territory, which can have a negative impact on competition in the territory of the other Party, the former shall notify the latter about that.
2. If one of the Parties establishes that competition in its own territory, which can be negatively affected by the actions of undertakings taken place in the territory of the other Party, the former shall notify the latter about that.
3. Notification shall be sent in written form and shall contain a brief account of the essence of the case, references to the relevant legal norms, and other related information in which the sending Party considers to be necessary for submission.
4. The Party, who receives notification, shall consider the possibility of taking the appropriate measures pursuant to requirements of laws enforced by the Parties and shall inform the other Party of the results.

Article 7. Request of information

1. In the course of consideration of actions affecting competition, each Party shall have the right to send a request for information on activities of undertakings to the other Party. The other (requested) Party shall have the right to refuse to provide the requested information if such information was or could be submitted by the undertaking in question pursuant to the legislation of the requested Party.
2. The requesting Party shall state the purpose of its request and the basic circumstances of the case.
3. After receiving a request from the requesting Party the requested Party shall provide the requested information when appropriate and practicable.

Article 8. Consultations

1. If a consultation is requested by one of the Parties, the Parties shall hold consultations on matters covered by this Agreement in order to avoid conflicting decisions in the case of the same infringement.
2. Request on holding the consultation should contain grounds of its necessity.
3. In the case of disagreement the result of the consultations does not preclude the Parties to adopt final decisions.
4. Consultation may be held also in any other essential issues requested by one Party and accepted by the other Party (like more general questions of competition policy or experience of sector inquiries, etc.).

Article 9. Protection of information

1. Information received as a result of application of this Agreement shall not be

disclosed unless the Parties agree otherwise.

2. The Parties may refuse co-operation within the framework of this Agreement on the grounds of the interests of their states or on the grounds concerning the safeguard of commercial and other secrets according to the laws enforced by the Parties.

Article 10. Concluding provisions

1. Unless special funds are dedicated to it or otherwise are agreed by the Parties, the co-operation under this Agreement shall be financed by the requesting Party.
2. This Agreement enters into force on the date of the last signature and is valid for an unlimited period of time. This Agreement may be terminable by either Party upon written notification and in such a case it will be terminated after one month from the notification date.
3. The implementation of the provisions of this Agreement shall not affect the rights and duties, which are ensued from other international agreements of the Parties.

附錄 25

臺灣公平交易委員會及蒙古國公平競爭及消費者保護局合作瞭解備忘錄

臺灣公平交易委員會（TFTC）與蒙古國公平競爭及消費者保護局（AFCCP），以下稱「雙方」，咸認關於各自管轄領域內有效執行競爭法以利市場運作之重要性；又雙方技術合作將可促進並加強其雙邊關係；瞭解如次：

第一條　目的和定義

1. 本瞭解備忘錄目的係為促進雙方之合作協調。
2. 本瞭解備忘錄所列名詞定義如下：
   (a) 「競爭法」意謂：
      (i) 就臺灣公平交易委員會而言，指公平交易法。
      (ii) 就蒙古國公平競爭及消費者保護局而言，指蒙古國競爭法，但不包含第9條、第13條及第27.1.6條。
   (b)「執法活動」意謂由一方從事任一與其執行競爭法有關之調查或訴訟程序。
   (c)「領域」意謂雙方之管轄範圍。

第二條　　合作與協調

1. 雙方承認在適切可行之情形下進行合作並分享資訊是符合其共同利益。
2. 雙方從事相同或相關事件之執法活動時，將於適切可行之情形下致力於協調執法活動，並應尊重對方決定之獨立性。

第三條　　技術援助

雙方同意協力從事與競爭法執行及政策相關之技術援助倡議，符合其共同利益。取決於雙方可合理使用之資源，此類倡議可包含雙方決定並合於本瞭解備忘錄目的之技術合作形式。

第四條　　通知

5. 當一方執法行動對另一方管轄範圍內之競爭有負面影響時，前者將通知後者。
6. 當一方競爭活動受到另一方管轄範圍內執法行動之負面影響時，前者將通知後者。
7. 通知方認為該項通知是必要時，將以書面方式送達，並包含涉案主體之簡要說明、論及相關法律規範及其他相關資訊。
8. 被通知之一方，將考量依據雙方執法要求採取適當措施之可能性，並將結果通知另一方。

第五條　　資訊請求

4. 在考量影響競爭行為過程中，任一方有權請求對方提供執法活動之資訊。如果該項資訊依據被請求方的法令來提出有疑慮，被請求方有權拒絕提供被請求之資訊。
5. 請求方將陳述請求目的，及案件之基本事實。
6. 被請求方將於接受請求方請求後在適切可行之情形下提供資訊。

第六條　　諮商

5. 任一方進行案件調查可能影響另一方利益時，雙方可請求諮商。
6. 請求舉行諮商會議將在必要之基礎上。
7. 對諮商結果不同意，並不會阻礙雙方採取最後之決定。
8. 諮商會議舉行也可依任一方對其他實質競爭議題之要求，並由另一方接受，諸如競爭政策之一般性問題或是部門調查之經驗等。

第七條　　資訊保護

3. 依本瞭解備忘錄之適用所取得之資訊，除雙方同意之外，不得揭露。
4. 雙方可以基於國家利益之理由或商業保護及其他依據雙方執行法令保密之理由，拒絕在本瞭解備忘錄架構下合作。

第八條　　最終規定

4. 本瞭解備忘錄自最後簽署日起生效。
5. 本瞭解備忘錄可依雙方書面同意修正。
6. 本瞭解備忘錄得經任一方以書面通知終止，並於通知日後1個月終止效力。
7. 本瞭解備忘錄條款之執行將不影響雙方其他國際協定之權利及義務。

本瞭解備忘錄以英文繕製兩份，於2012年12月3日在臺北及2012年11月26日在烏蘭巴托簽署。

附錄 26

中華民國與巴拿馬共和國自由貿易協定
第十五章　　競爭政策、獨占與國營企業

第一節　　競爭政策

第15.01 條　　目的

本章目的在確保貿易自由化之利益不因反競爭活動而減損，並在促進締約國主管機關間之合作與協調。

第 15.02 條　合作

1. 締約國同認採行執法機制時，合作與協調之重要性；其合作與協調，包括通知、諮商，以及在不違反機密性之法律義務下，相互交流自由貿易區內執行競爭法與競爭政策之相關資訊。

2. 為達此一目的，締約國應採行或維持禁止反競爭貿易行為；並在確認此等措施有助於達成本協定所設定目標之情形下，依據該措施採行適當之執行機制。

第二節　　獨占與國營企業

第 15.03 條 獨占與國營企業

1.本協定之規定並不禁止締約國於其法令許可之情形下，指定或維 持獨占或國營企業。

2. 在締約國法令允許之情形下，如該締約國有意指定獨占或國營企 業，且如此一指定可能影響另一締約國人之利益時，此締約國應：

(a) 盡可能事先以書面文件通知締約國他方此項指定之事實；

(b) 並於指定獨占之同時，致力於將獨占之營運條件納入，俾將因 該指定獨占所造成本協定利益遭剝奪或減損降至最低甚或消除。

3. 如締約國之法律允許其指定或維持獨占或國營企業，則其應確保 其所指定或維持之獨占或國營企業遵守下列事項：

(a) 如締約國就獨占之貨品或服務,對獨占或國營企業賦予諸如 核發進出口簽証、核准商業交易、採行配額、收取費用等之 管制、管理或其他政府權限，則該獨占或國營企業之行為，應符合締約國在本協定中之義務；

(b) 就獨占貨品或服務在相關市場之購買或銷售，對締約國他方投資者之投資，以及商品及服務供應者，應給予不歧視待遇； 且

(c) 不得利用其獨占地位，直接或間接採行反競爭措施，而不利 於締約國他方投資者之投資。

4. 第 3 項之規定不適用於政府部門為施政目的而採購商品或服務， 其目的非為商業性轉售或為使用於為商業性銷售目的之商品之生產 或服務之供應之情形

附錄 27

中華民國公平交易委員會與巴拿馬共和國消費者保護暨競爭防衛署有關競爭法適用協定

中華民國公平交易委員會與巴拿馬共和國消費者保護暨競爭防衛署，以下簡稱「雙方」:

I. 考量有效之競爭法執行係對市場有效運作及對雙方消費者福祉之基本要項；

II. 咸認雙方間之合作協調對進一步有效適用各自競爭法之重要性；

III. 咸認雙方在各自管轄領域中倡議競爭對其經濟之重要性；及

IV. 鑒於 2003 年 8 月 21 日「中華民國與巴拿馬共和國自由貿易協定」第五篇「競爭政策」第十五章「競爭政策、獨占與國營企業」之簽訂。

同意下列協定條款:

第 1 條: 共同及特定目的

本協定之目的係為雙方合作機制建立制度性協調之共同基礎，其中包括：

a) 促進雙方就其職掌事項之合作及協調;

b）開展有關競爭倡議事項之活動;

c）有關競爭法立法、相關處理原則之擬定與執法等資訊及經驗之交流。

第 2 條: 定義

本協定相關用語定義如下:

（a）適用法律

（1）中華民國:公平交易法，及

（2）巴拿馬共和國：2007 年 10 月 31 日公布之第 45 號法，2008 年 6 月 2 日第 29 號法修正。

上開任一法律之修正或變更應於最短時間內通知另一方。

（b）權責機關：

（1）中華民國:依「公平交易法」第 25 條及「公平交易委員會組織法」所成立之「公平交易委員會」。

（2）巴拿馬共和國:依 2007 年 10 月 31 日公布之第 45 號法，2008 年 6 月 2 日第 29 號法修正所成立之「消費者保護暨競爭防衛署」。

第 3 條:一般原則

1. 雙方瞭解本協定所稱反競爭行為應包括，但不限於以下行為：

a）依據雙方各自國家立法所稱之經濟集中;

b）依據雙方各自國家立法所稱之限制競爭行為。

各自競爭法欲排除之事項應予透明化，並允許雙方透過任一公開途徑取得該資訊。

2. 雙方各自應確保競爭法之適用程序遵循不歧視、透明，並保證符合正當程序之原則。

3. 雙方各自應確保他方可獲得立法相關資訊，包括執法機制以及禁止和制裁反競爭行為之處理原則。

第 4 條　諮商

締約任一方可就本協定有關任何事項請求進行諮商。諮商請求應說明諮商原因，以及程序是否有時效或其他限制存在須立即諮商解決。被請求方應儘速參與諮商。

第 5 條　通知

9. 當締約一方確定其管轄領域內企業活動可能對另一方管轄領域內之競爭有負面影響時，前者應就該事項通知後者。

10. 當締約一方確定其管轄領域內之競爭可能受到發生於另一方管轄領域內發生之企業行為負面影響時，前者應就該事項通知後者。

11. 通知應以書面為之，且應包含案件之簡要說明、依據之法律規範，及通知方認為必要提交之其他相關資訊。

12. 收到通知之一方應考量雙方依據其法律規定採取適當措施之可能性，並應將結果通知另一方。

第6條 透明化及資訊交換

1. 雙方咸認競爭政策透明化之價值。

2. 在不違背其立法或影響現行任何調查下，對任一方的要求，另一方應提供其法律適用活動相關資訊。

3. 因適用本協定所取得之資訊，除雙方同意之外，不得對外揭露。

第 7 條　技術援助

1. 雙方同意分享技術援助以從其經驗中受益，並加強其在競爭法之適用。

2. 所有依據本協定發展技術援助相關之經驗交流活動，須在雙方各自編列可使用之資金內進行：

   (1) 技術援助受惠方須承擔執行技術援助之必要支出，例如提供技術援助專家之機票及旅費，執行該計畫之資料和必要的設備及其他成本。

   （2）提供技術援助之一方須負責該專家在其所屬國之薪資及福利。

第 8 條　本協定之效期及終止

1. 本協定將於雙方最後簽署日開始生效。

2. 雙方可在任何時間終止本協定，並在希望終止本協定之日期前60日以書面通知另一方。

2013年12月4日在臺北簽署乙式2份，分別以中文、西班牙文、英文製作，各約本同一作準。本協定文義解釋有歧異時，應以英文本為準。

附錄 28

台澎金馬個別關稅領域與紐西蘭經濟合作協定
第八章

第一條 宗旨

締約雙方成認，為提升貿易與投資、經濟效率及消費者福利之目的，有效運用競爭政策以促進開放且競爭的市場其有策略上之重要性。

第二條 促進競爭

1.締約雙方支持亞太經合會之加強競爭和管制革新原則。締約雙方同意促進競爭，並尋求於制定貿易和競爭政策及實施內國法時適當考慮對競爭之影響。因此，締約雙方將：

(a) 提供政策、法律和法規及其實施之透明性；

(b) 運用競爭政策於經濟活動，包括公共和私人商業活動，其運用方式在各經濟實體處於同類狀況時不會有歧視的情況；

(c) 維持政府對促進競爭和提升經濟效率之高度承諾，包括透過管制影響的評估或其他適當的方法；

(d) 就政策與法規之發展及其執行，設定行政部門對於推動並確認競爭與效率面向之明確執掌；

(e) 促進在各自領域的貿易與競爭政策之一致及有效的實施；及

(f) 鼓勵貿易和競爭事務官員間的適當合作。

2.締約雙方成認第 1 項之執行可能會受制於各締約方不同之情況和為因應各情況所採取之不同政策。

第三條 競爭法和主管機關

1.咸認第 1 條之宗旨和第 2 條之原則，締約雙方應採取或維持禁止反競爭商業行為之競爭法，以促進經濟效率及消費者福利為目標，並應就此種行為採取適當行動。

2.本協定生效時，履行此義務者為： (a)1986 年紐西蘭商業法 (b)中華臺北公平交易法

3.締約雙方應設有負責執行其競爭法之機關。

4.締約雙方應致力將其競爭法適用於各自管轄範圍內之商業活動，執法時不得因國籍而有所歧視。

第四條 豁免與除外

締約雙方咸認，為達其他合法政策目標，各自競爭法規之某些豁免及除外情況仍屬必要。締約雙方應致力確認和檢視該等豁免及除外情況，以確保每一豁免及除外之範圍不會超過為達合法政策目標所需，且以透明化方式施行，將對公平和自由競爭的扭曲降到最低。

第五條 私人訴訟權利

1.就本條而言，「私人訴訟權利」係指個人之營業或財產在一締約方因競爭法違法行為受到損害而獨立向法院或獨立審判機構請求救濟(包括禁止令、金錢或其他救濟)之權利。

2.締約雙方成認私人訴訟權利為締約一方競爭法政府執法的重要補充，各締約方應採取或維持提供私人訴訟權利的法律。

3.締約一方應確保根據第 2 項提供予另一締約方人民之權利之條件不低於提供予己方人民之條件。

第六條 消費者保護

1.締約雙方成認消費者保護政策及其執行對於達到第 1 條之宗旨，及促進消費者和企業經營者得有信心且公平參與交易環境之重要性。因此，締約雙方肯認其保護消費者不受造成或可能造成損害之不實及欺罔行為之承諾。

2.各締約方應採取或維持其法律，以禁止對消費者造成損害或可能造成損害之不實及欺罔之行為。

3.就本章而言，「不實及欺罔行為」係指造成消費者實質損害或如未經阻止將有立即造成該等損害之虞的商業欺詐活動。例如：

(a) 對商品或服務之材質、價格、用途、數量或任何其他特性作不實陳述或虛假宣稱；或

(b) 廣告商品或服務之供給但無意提供；或

(c) 於消費者付款後，未能交付商品或提供服務；或

(d) 未獲授權下從消費者之金融、電話或其他帳戶擅自扣款。

4.締約雙方成認損害或可能損害消費者之不實及欺罔行為已漸次超越國界。該等行為包括國際詐騙，以不實及欺罔之包裝或相關廣告進行商品交易，及藉由媒體或網際網路做出虛偽或不實的宣稱。於此種情形，締約雙方之消費者保護機關間之合作及協調有助於有效處理該等活動。

5.因此，締約雙方應就共同關心之事務，適當地推展合作及協調。

第七條 合作及資訊交換

1.締約雙方同意藉由競爭政策發展之資訊交換，進行競爭政策領域的合作及協調。

2.締約雙方應鼓勵其各自之競爭法主管機關於競爭法領域之合作，包括適切之技術協助、各締約方內國法和整體政策允許於各自競爭法機關的執掌範圍內之諮商及資訊交換。

第八條 諮商

締約一方要求時，締約雙方應根據本章之宗旨就不利於雙方貿易及投資之特定反競爭行為進行諮商。諮商得於締約一方有以下情形時進行：

(a) 認為執法活動對另一締約方之重要利益產生實質影響；

(b) 與對競爭之限制有關，且會對締約他方產生直接和實質之影響；或

(c) 關切主要發生在締約他方之反競爭行為。

第九條 不適用爭端解決

締約方不得將因本章而發生或與本章有關之議題訴諸第 21 章(爭端解決)。

附錄 29

臺星經濟夥伴協定
第 10 章 競爭

第10.1 條 宗旨與定義

1. 本章之宗旨為透過增進公平競爭和消弭反競爭行為，促成本協定目標之實現。

2. 就本章而言，反競爭行為係指對競爭有負面影響的商業行為或交易。例如：

(a) 市場力濫用；

(b) 反競爭的合併和收購；及

(c) 競爭者間反競爭之水平協議。

第10.2 條 合作

1. 締約雙方咸認合作和協調對於促進有效競爭法及政策發展之重要性，並同意對根據本章條款就該等事項進行合作。

2. 締約雙方將尋求提升其負責執行一般性競爭法之競爭主管機關間，關於涉及本章議題之瞭解、溝通和合作。

第10.3 條 通知

1. 如有下列情形，各締約方應通知締約他方有關反競爭行為的執法活動：

(a) 如其認為該執法活動會對締約他方貿易利益造成實質影響；

(b) 與會在締約他方領域內造成直接且實質影響之競爭限制有關；

(c) 與主要在締約他方領域內發生之反競爭行為有關。

2. 通知應於程序之初進行，惟不得違反締約雙方競爭法規定且不影響任何已進行的調查。

第10.4 條 透明及資訊請求

1. 締約雙方咸認競爭政策透明化之重要性。

2. 在締約他方要求下，各締約方應公開有關執行禁止反競爭商業行為措施之資訊。

3. 於受請求時，各締約方應向締約他方公開關於其競爭法豁免規定之資訊。該請求應具體指明特定的貨品及市場，並說明豁免規定是否限制締約雙方間的貿易和投資。

4. 締約雙方依據本章條文進行諮商所交換的資訊和文件應當保密，除遵守其內國法律規定外，如無提供資訊或文件之締約方書面同意，締約方不得向他人提供或揭露該等資訊或文件。為遵守締約方內國法律要求而揭露該等資訊或文件者，該締約方於揭露前應通知締約他方。締約雙方得同意公布其認為非屬機密之資訊。

第10.5 條 諮商

為增進締約雙方間的瞭解，或處理因本章規定而生之具體事宜，締約方應於締約他方請求時，就締約他方之陳述進行諮商。締約方如認有相關時應於請求中指出前開事宜如何影響締約雙方間的貿易和投資。締約方應對締約他方之顧慮給予充分之考慮。

第10.6 條 公營事業和指定獨占事業

1. 本章不禁止締約方依據其各自法律所指定或維持之公營或私人獨占事業。

2. 對於公營事業或被授予特別或排他權利的事業，締約雙方應確保在本協定生效後，不採行或維持會扭曲締約雙方間商品和服務貿易之措施，該等措施違反本協定或締約雙方之利益。如競爭規則未於法律上或事實上阻礙該等事業之任務， 締約雙方應確保該等事業受競爭規則之規範。

第10.7 條 爭端解決

1. 本章並未准締約方對締約他方競爭主管機關執行競爭法規所作成之任何決議提出異議。

2. 締約方不得就因本章而生或有關本章的任何爭議，訴諸本協定之爭端解決程序。