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Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE ON THE APPLICATION OF ANTITRUST LAW TO STATE-OWNED ENTERPRISES

**DISCUSSION ON CORPORATE GOVERNANCE AND THE PRINCIPLE OF COMPETITIVE
NEUTRALITY FOR STATE-OWNED ENTERPRISES**

-- United States --

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1. The commercial activities in which various levels of government in the United States – federal, state, and local – are involved traditionally have been quite limited. Competition among private entities has been and remains the current norm for the U.S. economy. It is through this competitive market-based economy that consumers receive the best, most innovative products at the lowest prices. At the same time, however, there is and has been a limited role in certain circumstances for so-called “state-owned enterprises.”

2. The term “state-owned enterprise” (SOE) is not used in U.S. law or legislation. A range of entities linked to the federal government exists, however, with varying degrees of government ownership, control, and participation in governance and funding. Most of these entities have responsibilities that are nearly indistinguishable from traditional government functions or pursue governmental policies where a market-based approach is not considered appropriate or has failed to achieve governmental objectives. In the U.S., the role of such enterprises is usually specialized and the extent of competition between the government and private sector is at most indirect, and often negligible or non-existent. The applicability of constitutional and statutory rules, including antitrust law, and the availability of sovereign immunity defenses, vary depending on the nature of the entity.

3. Part I of this paper suggests some notional principles for effective management and regulation of SOEs, based on the 2005 *OECD Guidelines on Corporate Governance of State-Owned Enterprises* and our own national experience. Part II describes existing federal government enterprises and the applicability of antitrust rules to them, and Part III provides a brief discussion of sub-federal (state and local) entities, with a description of the “state action” immunity from federal antitrust laws for certain activities of such entities, and the limits on their conduct under the Commerce Clause of the U.S. Constitution. Part IV concludes with a brief discussion of the principle of competitive neutrality.

1. Notional principles for effective management and regulation of state-owned enterprises

4. The 2005 *OECD Guidelines on Corporate Governance of State-Owned Enterprises*¹ are an important source of guidance for government corporations, and are consistent with much of our experience relating to federal government corporations. For purposes of the WP3 discussion of this topic, we suggest the following notional principles, based on the *OECD Guidelines* and the U.S. experience, to guide policymakers in this area.

5. First, an SOE’s legal status, as established by its corporate charter or statutory authorization, should clearly identify its relationship to the government, any exemptions from suit or regulatory frameworks, and any special privileges, for the benefit of other economic actors with which it interacts. In particular, any public service responsibilities assigned to an SOE should be clearly and transparently mandated by laws or regulations. For example, costs related to an SOE’s public service responsibilities should be covered in a transparent manner, enabling a ready determination as to whether public service activities are subsidizing the costs of any operations in markets where the SOE competes with private sector companies.

6. Second, governments should seek to ensure an equitable competitive environment in markets where SOEs compete with private sector companies, so as to avoid unnecessary market distortions and inefficiencies that reduce consumer welfare. In the same way, to the maximum extent consistent with an SOE’s public service responsibilities, governments should minimize favorable financial terms bestowed on the SOE.

¹ The guidelines are available at <http://www.oecd.org/dataoecd/46/51/34803211.pdf>.

7. Third, there should be a clear separation between the state's ownership function and other state functions that influence market conditions, particularly with regard to market regulation. To the maximum extent consistent with an SOE's public service responsibilities, government regulatory authorities should treat SOEs and their private sector competitors equally and the overall business framework (including antitrust laws) should apply equally as well. To that end, the government's ownership rights should be clearly identifiable, separated from any regulatory authority, divorced from day-to-day management of the SOE, and should not intrude on the SOE board's independent exercise of authority. To evaluate compliance with such principles, SOEs should be subject to an annual independent external audit and should be subject to the same accounting and auditing standards as publicly traded companies.²

8. Finally, government investment in private corporations necessitated by exigent circumstances should be transitory in nature and limited to the taking of investment positions that do not compromise the independent direction and management of the company. The United States has pursued these kinds of self-limiting policies during similar crises in the past. "In 1917 and 1918, Congress created, among others, the United States Grain Corporation, the United States Emergency Fleet Corporation, the United States Spruce Production Corporation, and the War Finance Corporation. These entities were dissolved after the war ended."³ Similarly, during World War II, the U.S. Government seized enemy-owned assets by taking controlling interests in the U.S. subsidiaries of German and Japanese corporations such as the predecessors of General Aniline & Film Corporation, Rohm & Haas Company, and Schering-Plough Corporation.⁴ The government's policy and practice was to sell the firms and return them to the private sector as soon as possible.⁵

2. Federal government enterprises and the applicability of antitrust rules

9. A series of recent Congressional Research Service (CRS) reports have classified existing federal government enterprises. Different types of federal government enterprises include "federal government corporations," so-called "quasi government" entities such as government-sponsored enterprises and federally funded research and development centers. These structures and the extent to which they are subject to federal antitrust laws are described below.

² Consistent with this principle, Congress enacted the Government Corporation Control Act (GCCA) in 1945. 31 U.S.C. § 9101. The GCCA required that specified corporations, both wholly owned and partially owned by the Government, be audited by the Comptroller General. Additionally, the wholly owned corporations were required to submit budgets that would be included in the budget submitted annually to Congress by the President. The GCCA also ordered the dissolution or liquidation of all government corporations created under state law, except for those that Congress chose to reincorporate, and prohibited creation of new Government corporations without specific congressional authorization.

³ *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 388 (1995) (citations omitted).

⁴ See Stacey R. Kole, *The Government as a Shareholder: A Case from the United States*, 40 J. Law & Econ. 1 (1997), for a study of the performance of firms seized by the U.S. government during World War II.

⁵ The government used business techniques that sped the process. A study of a sample of 17 of these firms found that most "were returned to the private sector via sealed bid auctions. In six cases, the highest bidder in the auction was either the president of the company at the time of vesting or a corporation in the same industry. The disposition of the larger firms, such as American Potash, General Aniline & Film, Rohm & Haas, and Schering, was intermediated by investment banking syndicates that offered the re-privatized shares to the public." *Id.* at 4.

2.1 *Federal government corporations*

10. The CRS defines a “federal government corporation” as “an agency of the federal government, established by Congress to perform a public purpose, which provides a market-oriented product or service and is intended to produce revenue that meets or approximates its expenditures.”⁶

11. The CRS notes that although “[n]o two federal government corporations are completely alike,”⁷ they share certain characteristics. They are agents of the federal government subject to constitutional limitations such as the First Amendment (freedom of speech); they generally are subject to and may initiate civil suits; and they do not enjoy the traditional sovereign immunity from suit that the United States government enjoys.⁸ Although government corporations are exempt from executive branch budgetary regulations, the Government Corporation Control Act of 1945 (GCCA) mandates that each wholly-owned government corporation prepare and submit to the President a “business-type budget;” after review and revision, the President submits these budget programs to Congress for its oversight and approval.⁹

12. The CRS notes that some government corporations are located within executive departments with employees who are actually employees of the parent government agency, while others are federally chartered corporations like Amtrak, the government-controlled national passenger rail service corporation.¹⁰ All but two government corporations have boards of directors; the governance format varies, with full-time boards, part-time boards (in some cases made up of Cabinet-level officials of other agencies; in others, mixed boards of governmental and private appointees), or a single administrator under an executive department secretary.¹¹ Federal corporations can also facilitate privatization of federally-owned assets, as occurred with Consolidated Rail Corporation (Conrail) and the U.S. Enrichment Corporation.¹² Finally, federal corporations can serve as a public utility, such as the Tennessee Valley Authority (TVA).¹³

⁶ Kevin R. Kosar, *Federal Government Corporations: an Overview*, Congressional Research Service Report RL30365 (2009) 2. The 17 federal government corporations included under this definition are: Commodity Credit Corporation, Export-Import Bank, Federal Crop Insurance Corporation, Federal Deposit Insurance Corporation, Federal Financing Bank, Federal Prison Industries, Financing Corporation, Government National Mortgage Corporation, Amtrak, Overseas Private Investment Corporation, Pension Benefit Guaranty Corporation, Presidio Trust of San Francisco, Resolution Funding Corporation, St. Lawrence Seaway Development Corporation, Tennessee Valley Authority, U.S. Postal Service, and Valles Caldera Trust. All but five of these entities are included in the current GCCA enumeration of 28 government corporations.

⁷ *Id.* at 5.

⁸ *Id.* at 7.

⁹ *Id.* Government corporations must also submit annual management reports to Congress.

¹⁰ *Id.*

¹¹ *Id.* at 8-9.

¹² Conrail, a government corporation established in 1976 from bankrupt northeastern railroads, created a viable freight rail system that was eventually sold to private investors; the U.S. Enrichment Corporation (USEC) operated two Department of Energy uranium enrichment plants that were divested in an initial public offering in 1998. *Id.* at 12-13.

¹³ The TVA provides wholesale power to 158 municipal and cooperative power distributors and directly serves 58 large industries and government installations, thereby supplying the electricity needs of about nine million people. TVA no longer receives federal appropriations, and finances its operations through revenues of \$9 billion from energy sales and bond sales. TVA website, <http://www/tva.gov/abouttva/keufacts.htm#howfunded>. The United States also maintains the Bonneville, Southeastern, Southwestern, and Western Area Power Administrations within the Department of Energy

2.2 *Applicability of federal antitrust laws to federal government entities and corporations*

13. As a general matter, agencies and instrumentalities of the U.S. government (*e.g.*, National Science Foundation, Small Business Administration) are not subject to liability under the federal antitrust laws, even when engaging in commercial activity.¹⁴ But the situation with respect to federal government corporations depends heavily on the facts and circumstances of the case. In 2004, for example, the U.S. Supreme Court held that the federal antitrust laws did not apply to the U.S. Postal Service (USPS).¹⁵ The Court's opinion in *Flamingo* noted that the USPS by statute was "an independent establishment of the executive branch of the Government of the United States."¹⁶ It discussed the USPS's monopoly over carriage of certain letters and its "significant governmental powers," along with Congress's explicit waiver of the USPS's immunity from suit, giving it the power to sue and be sued in its own name. Although the USPS did not benefit from sovereign immunity from suit, the Court held that for purposes of the federal antitrust laws, the USPS was no different from the United States, which has long been held not to be a "person" subject to federal antitrust laws.

*The [Postal Reorganization Act of 1971] gives the Postal Service a high degree of independence from other offices of the Government, but it remains part of the Government. The Sherman Act defines "person" to include corporations, and had the Congress chosen to create the Postal Service as a federal corporation, we would have to ask whether the Sherman Act's definition extends to the federal entity under this part of the definitional text. Congress, however, declined to create the Postal Service as a Government corporation, opting instead for an independent establishment.*¹⁷

14. The Court observed that its decision was consistent with "the nationwide, public responsibility" of the USPS, which differs from private enterprise in not seeking profits, in its universal service and recent national security responsibilities, and in its possession of Government powers (state-conferred monopoly, eminent domain, power to conclude international postal agreements). The USPS also lacked certain powers available to private business, such as the power to set prices (a separate Postal Rate Commission was involved in setting prices, and price decisions were not governed by profitability, but rather subject to a long-run breakeven requirement).^{18 19}

(DOE). These Power Marketing Administrations (PMAs) market wholesale electricity generated at hydroelectric dams owned and managed by the U.S. Army Corps of Engineers and the U.S. Bureau of Reclamation, which also provide or manage water for such multiple purposes as irrigation, flood control, navigation, recreation, municipal water supply, and environmental enhancement. Bonneville is self-financed, while the other PMAs are funded primarily by DOE. World Trade Organization, Working Party on State Trading Enterprises, New and Full Notification Pursuant to Article XVII:4(a) of the GATT and Paragraph 1 of the Understanding on the Interpretation of Article XVII, United States, 23 June 2008 (G/STR/12/USA).

¹⁴ IB Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 252a (3rd ed. 2006).

¹⁵ *United States Postal Service v. Flamingo Industries (USA), Ltd.*, 540 U.S. 736 (2004).

¹⁶ 39 U.S.C. § 201.

¹⁷ *Flamingo*, *supra* n. 15, at 746.

¹⁸ *Id.* at 747.

¹⁹ In a post-*Flamingo* case, a federal Court of Appeals held that the TVA, because it was a federal corporation (unlike the USPS, an "independent establishment of the executive branch"), could not use its "public characteristics" to claim immunity from antitrust liability. *McCarthy v. Middle Tennessee Electric Membership Corp.*, 466 F.3d 399 (6th Cir. 2006). The TVA's conduct in that case enjoyed an implied exemption from the antitrust laws, however, "because the TVA's primary concern is to provide services,

15. Following the *Flamingo* decision, in an effort to promote “competitive neutrality” in postal markets open to competition and to clarify the status of the USPS with respect to the federal antitrust laws, Congress enacted the Postal Accountability and Enhancement Act (PAEA).²⁰ A new Postal Regulatory Commission (PRC) was established as the regulator of USPS’s rates for “market-dominant” services; USPS was empowered to set its own prices for “competitive” products, subject to publication and filing requirements.²¹ The PRC was also mandated to issue and enforce regulations to prohibit subsidization of competitive products by market-dominant products, ensure that each competitive product covers its attributable costs, and ensure that all competitive products collectively cover what the PRC determines to be an appropriate share of the USPS’s institutional costs.²² For competitive products, as well as market dominant products outside the scope of the letter monopoly, the PAEA explicitly provides that the USPS will be subject to the federal antitrust laws.²³

2.2.1 *FTC Study of the U.S. postal service and the effects of its governmental status*

16. The PAEA also required the Federal Trade Commission (FTC) to prepare “a comprehensive report identifying the Federal and state laws that apply differently to the [USPS] with respect to the competitive category of mail and to private companies providing similar products.”²⁴ The FTC’s report²⁵ concluded that “from the USPS’s perspective, its unique legal status likely provides it with a net competitive disadvantage versus private carriers” stemming largely from federally-imposed restraints regarding labor costs and constraints related to its operations network caused by the universal service and other requirements that increase USPS’s costs in providing competitive products.²⁶ At the same time, “because the USPS is a federal government entity, the USPS’s competitive products operations enjoy an estimated implicit subsidy [avoidance of costs associated with various federal, state, and local legal requirements, preferential interest rates, eminent domain powers, and limits on the extent to which it can be sued].”²⁷ Though the estimated costs associated with the restraints exceeded the implicit subsidy, the FTC report made a number of recommendations concerning options for eliminating some of the inefficiencies and market distortions resulting from the postal monopoly and the economic advantages and disadvantages discussed in the report.

and concerns about competition would conflict with the fulfillment of TVA’s purpose.” The Court noted that “[t]he TVA is authorized to enter into contracts for the purpose of ‘promot[ing] the wider and better use of electric power for agricultural and domestic use, or for small or local industries.’ 16 U.S.C. § 831i.” *Id.* at 414.

²⁰ Pub. L. 109-435, 120 Stat. 3189 (Dec. 20, 2006), *codified* at 39 U.S.C. §§ 101 *et seq.*

²¹ The PAEA defines “market-dominant” products as those for which the USPS exercises sufficient market power to raise price or decrease output without significant loss of business; “competitive” products, which accounted for 9% of USPS total revenue in FY2006, are defined as “all other products.” 39 U.S.C. § 3642(b)(1).

²² 39 U.S.C. § 3633(a).

²³ 39 U.S.C. § 409(e)(1)(A)-(B).

²⁴ PAEA § 703(a).

²⁵ Accounting for Laws that Apply Differently to the United States Postal Service and its Private Competitors, FTC Report, December 2007.

²⁶ *Id.* at 8.

²⁷ *Id.*

2.3 *Quasi government entities*

17. The CRS reports refer to another category of “federally related entities that possess legal characteristics of both the governmental and private sectors” as “quasi government” entities.²⁸ These entities can vary widely in their structure, ranging from government-sponsored enterprises (GSEs) (*e.g.*, Fannie Mae, Freddie Mac) to the federally funded research and development centers (*e.g.*, Los Alamos National Laboratory). Within the quasi government category, GSEs have the greatest impact on the domestic economy.²⁹ The CRS identifies “four readily observable characteristics of GSEs: (1) private sector ownership, (2) limited competition, (3) activities limited by congressional charter, and (4) chartered privileges that create an inferred federal guarantee of obligations.”³⁰ Of the seven existing GSEs, the best-known are the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), two of the largest financial institutions in the U.S.³¹ The theory behind the creation of such bodies is that the government “should use some of its sovereign powers (*e.g.*, full faith and credit of the U.S. Treasury) to encourage the development of private financial intermediaries to serve selected markets.”³² Notably, GSEs are not agencies of the Government, and thus are exempt from general federal management laws and regulations (*e.g.*, personnel, budgetary, procurement rules). Nonetheless, they may enjoy, according to their charters, some benefits associated with sovereign authority, such as immunity from state taxes.

3. **State enterprises related to states and their political subdivisions**

18. Beyond the federal level, U.S. states, counties, municipalities, and other sub-divisions of the states own, control, or participate in the management of entities that might be defined as SOEs. These entities play a significant role in the following sectors: transportation (including rail, urban transportation, airports and ports), energy (including electricity production and distribution), sports facilities, universities, hospitals, concessions in state-owned parks, buildings, and facilities, and distribution of alcoholic beverages. In some cases these entities compete with private firms offering the same or similar products or services, but in most cases the public offerings are differentiated and provided with a view to achieving a governmental, public service objective.

3.1 *The state action doctrine*

19. Under the state action doctrine, first set forth by the Supreme Court in *Parker v. Brown*,³³ the federal antitrust laws do not apply to “anticompetitive restraints imposed by the States ‘as an act of

²⁸ Kevin R. Kosar, *The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics*, Congressional Research Service Report RL30533 (2008).

²⁹ Each GSE is created *sui generis* by Congress, which defines a GSE for budgetary purposes as a corporate entity created by a law of the U.S. that: has a federal charter; is privately owned; is under the direction of a board of directors, a majority of which is elected by private owners; is a financial institution with power to make loans or loan guarantees for limited purposes such as to provide credit for specific borrowers, and raise funds by borrowing; does not have certain sovereign Government powers; cannot commit the Government financially; and has employees paid by the enterprise who are not Federal employees subject to federal employee rules. 2 U.S.C. § 622(8).

³⁰ Kevin R. Kosar, *Government-Sponsored Enterprises (GSEs): An Institutional Overview*, Congressional Research Service Report RS21663 (2009) 2.

³¹ In September 2008, the U.S. Treasury placed Fannie Mae and Freddie Mac into government receivership.

³² Kosar, *supra* n. 30.

³³ 317 U.S. 341 (1943).

government.”³⁴ The state action doctrine immunizes acts of the highest levels of the state government itself, acting as sovereign; this includes actions of a state legislature and probably of the governor.³⁵ Application of the doctrine to subordinate instrumentalities of the state, on the other hand, such as political sub-divisions, agencies, and business enterprises, depends on whether the challenged restraint is undertaken pursuant to a “clearly articulated and affirmatively expressed” state policy to displace competition, and a clear delegation of that power to the subordinate entity.³⁶

20. The Supreme Court therefore held that the state action doctrine did not immunize a municipal electric utility from federal antitrust law in *City of Lafayette v. Louisiana Power & Light Co.*³⁷ The U.S. Department of Justice (DOJ) and FTC subsequently have challenged several mergers involving locally managed hospitals, and the DOJ successfully challenged a tying arrangement involving a city and its development authority that provided both electricity and water/sewer service.³⁸ The DOJ and FTC have also filed amicus briefs opposing application of the state action doctrine in cases involving state-level enterprises.³⁹

21. A 2003 FTC Staff Report⁴⁰ recommended that litigation, *amicus curiae* briefs, and competition advocacy be used to further clarify the state action doctrine and preclude it from being misapplied to grant overly broad antitrust immunity. In particular, the FTC State Action Report urged that quasi-governmental entities be subject to a requirement of active supervision by the state, in addition to requiring clear articulation of their powers. A supervision requirement will help ensure that any anticompetitive actions taken by such entities are truly in furtherance of state policy. Specifically, according to the Report, “[t]he category of entities subject to the active supervision requirement [sh]ould include either: (a) any market participant, or (b) any situation with an appreciable risk that the challenged conduct results from private actors’ pursuing private interests, rather than from state policy.”⁴¹

3.2 *The Commerce Clause*

22. The conduct of state government businesses is also governed by the Commerce Clause of the U.S. Constitution. “[B]y reading the Commerce Clause as a general charter for a free internal trade system, the Supreme Court decided very early that it implicitly forbade the states from enacting any legislation that either discriminated against interstate commerce or that placed an undue burden on interstate commerce. ... One would think, based on this theory, that a state would also be forbidden to use a

³⁴ *City of Columbia v. Omni Outdoor Adver.*, 499 U.S. 365, 370 (1991).

³⁵ ABA Section of Antitrust Law, *Antitrust Law Developments* (6th ed. 2007) 1279.

³⁶ *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Antitrust Law Developments*, *supra* n. 35, at 1273-83.

³⁷ 435 U.S. 389 (1978).

³⁸ *United States v. City of Stilwell, Oklahoma, and Stilwell Area Development Authority*, No. CIV 96-196-B (E.D. Okla., filed April 26, 1996), *see* <http://www.usdoj.gov/atr/cases/stilwe0.htm>.

³⁹ *See, e.g.*, *Surgical Care Center of Hammond, L.C. v. Hospital Service District No. 1 of Tangipahoa Parish*, 171 F.3d 231 (5th Cir. 1999)(en banc); *Jackson, Tennessee Hosp. Co. LLC v. West Tennessee Healthcare, Inc.*, 414 F.3d 608 (6th Cir. 2005) for antitrust cases involving state-affiliated hospitals where DOJ and FTC filed joint amicus briefs.

⁴⁰ Office of Policy Planning, Federal Trade Commission, *Report of the State Action Task Force* (Sept. 2003) (“FTC State Action Report”) *available at* <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>.

⁴¹ *Id.* at 3.

state-owned company to hamper interstate commerce.”⁴² Where Congress has not directly controlled the state through positive legislation, however, a “market participant” exception to the Commerce Clause allows a state in some cases to favor its own citizens through the conduct of its state-owned businesses,⁴³ though there are limits to how far it can extend substantial regulatory effects outside its own territory.⁴⁴

4. Competitive neutrality

23. As noted in the notional principles in Part I above, governments should seek to ensure an equitable environment in markets where SOEs compete with private sector companies, so as to avoid unnecessary market distortions and inefficiencies that reduce consumer welfare. The 2005 *OECD Guidelines on Corporate Governance of State-Owned Enterprises* state that “[t]he legal and regulatory framework for state-owned enterprises should ensure a level-playing field in markets where state-owned enterprises and private sector companies compete in order to avoid market distortions.”

24. The International Competition Network (“ICN”) has also done work in this area related to state-created monopolies. In this regard, the ICN issued a set of Recommended Practices on State-Created Monopolies Analysis Pursuant to Unilateral Conduct Laws.⁴⁵ Those Recommended Practices specifically urge that competition authorities should, to the extent there are no exemptions: (1) protect and promote competition by taking appropriate enforcement action against anticompetitive unilateral conduct by state-created monopolies; (2) treat state-created monopolies like private undertakings by using standard antitrust analysis to assess dominance/substantial market power, regardless of state ownership or legal status of the firm; (3) possess effective investigative tools and remedies to carry out successful enforcement of unilateral conduct rules regarding state-created monopolies; and (4) apply sound antitrust analysis and remedies when investigating potentially anticompetitive unilateral conduct of state-created monopolies and deciding whether enforcement action is appropriate.

5. Conclusion

25. The notional principles in Part I of this submission provide important guidance to governments in managing their SOEs. As detailed in Parts II and III, the rather limited U.S. experience with SOEs illustrates the broad range of issues related to the exercise of government control over these entities, managing them effectively, and ensuring that the public policies that justify governmental participation in the economy are properly focused to avoid distorting adjacent markets benefiting from competition among private firms. Antitrust agencies should be vigilant in their advocacy and law enforcement roles in monitoring the creation and conduct of SOEs.

⁴² Diane P. Wood, State Trading in the United States, in *State Trading in the Twenty-First Century* 211, 225 (Thomas Cottier and Petros Mavroidis eds., 1999).

⁴³ *Reeves v. Stake*, 447 U.S. 429 (1980).

⁴⁴ *See Wood, supra* n. 42, at 225-226.

⁴⁵ ICN Recommended Practices on State-Created Monopolies Analysis Pursuant to Unilateral Conduct Laws, available at http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Unilateral_WG_2.pdf.