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April 11, 2003

By Hand Delivery

Mr. Jeffrey May
Director of Policy
Central Records Unit, Room B-099
Import Administration
U.S. Department of Commerce
14th and Constitution Avenue, N.W.
Washington, D.C. 20230

Attention: Privatization Methodology

Re: Proposed Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act

Dear Mr. May:

On behalf of the Government of Canada, we hereby submit four written copies and an electronic copy in Word Perfect format of the Government of Canada response to the Proposed Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act.

If you have any questions regarding this submission, please do not hesitate to contact

the undersigned.

Respectfully submitted,

Paul R. Bailey
Counsellor (Trade Policy)

PUBLIC DOCUMENT

Government of Canada
Comments

Proposed Modification of Agency Practice
Under Section 123 of the Uruguay Round Agreements Act
Department of Commerce
International Trade Administration
U.S. Federal Register
68 FR13897

Embassy of Canada
April 11, 2003

Introduction

The purpose of the following comments by the Government of Canada is to provide its views on the methodology proposed by the Department in determining whether and to what extent subsidies provided to government-owned assets survive the privatization of those assets. As the Department will know, Canada has struggled with the issue of pre-privatization subsidies for over a decade and acknowledges that its own thinking on the matter has evolved, as findings in the context of both the dispute settlement proceedings under the World Trade Organization (WTO) and domestic court proceedings in the United States precipitated a reconsideration of previously held views on the issue. In fact, as the Department itself notes, the proposed modification of the Department's practice with respect to pre-privatization subsidies was prompted by the adoption by the Dispute Settlement Body (DSB) of the WTO of an Appellate Body report which found U.S. administrative practice in this regard deficient in several areas.

Canadian Position

Canada has specifically indicated its view on pre-privatization subsidies in its submission to a 1994 GATT Panel in which the European Commission challenged several aspects of the imposition by the United States of countervailing duties on imports of certain steel products as well as its comments regarding the U.S. Department of Commerce proposed countervailing duty regulations of February 26, 1997. In those submissions, Canada took the position that while investigating authorities should presume that privatization, at arm's length and in a competitive market situation, extinguishes previously bestowed subsidies, subsidies might nevertheless survive such a transaction. In fact, in its submission to the Department of May 23, 1997, Canada noted that both the Uruguay Round Agreements Act (URAA) and the Statement of Administrative Action (SAA) indicated that the Department has the discretion to make determinations on a case-by-case basis, clearly contemplating that, in appropriate circumstances, the Department may find that privatization has extinguished prior subsidies. At that time, Canadian authorities urged the Department, in contemplating a regulation on privatization, to consider as a rebuttable presumption that privatization of any state-owned enterprise at arm's-length and reflecting the current market value of its assets extinguishes any previously received subsidies.

Proposed Modification to the Department Practice

Canada is pleased that the Department has recognized the inevitability of that position. The issue then becomes, as it has been, and continues to be for Canada, what standards should be used to determine whether subsidies survive privatization and what evidence should be presented to prove it. Beyond that, there also remains questions regarding the methodology to be used to measure any remaining benefits. In that context, the change in methodology proposed by the Department is a welcome contribution to consideration of both those questions.

It may be premature, without practical experience in the context of an actual countervailing duty investigation, to take any final position on the Department's proposals regarding the analysis to be performed to determine whether the sale of government-owned assets have been made at arm's length and at a price reflecting the current market value of the assets. Canada therefore offers no further

suggestions to the proposals outlined in the Department's Notice of March 21, 2003. Further, barring some unforeseen variant of the types of transaction by which ownership of government assets can be or are transferred to private buyers, Canada is satisfied that the Department's proposals in this context are reasonable and reasonably comprehensive.

However, we have noted the Department's call for suggestions regarding issues for which further elaboration may be necessary. Regarding these issues, Canada offers the following brief observations:

Continuing Benefit Amount: In cases where there is a determination that privatization of government-owned assets did not extinguish previously received subsidies, the quantification of the amount of continuing benefit should, at the very least, take into account both the normal allocation period for the original assets and the price paid for the assets. While Canada does not advocate a specific formula or methodology for arriving at that determination in all cases, it believes that all such calculations should reflect consideration of those two elements.

Concurrent subsidies: Canada believes that any subsidy that may have been provided to encourage or facilitate privatization should be assessed very carefully. While Canada takes no position on whether such a subsidy is pre or post-privatization, it believes that an analysis should be undertaken to determine the role that subsidization in such circumstances played in the transaction. This kind of analysis would likely require an assessment of the circumstances of each case, the nature and type of the subsidy, the conditions under which it was granted, and the ultimate recipient of the subsidy.

Private Sales: While Canada believes that a private-to-private sale can extinguish pre-sale subsidy benefits, it also believes that an analysis to determine whether the price paid for the private assets reflects the current market conditions would be appropriate.

Partial or Gradual Sales: Canada does not believe that a specific benchmark or other such mathematical calculation should be applied to determine whether application of the proposed privatization methodology should be triggered. Canada believes that each transaction should be assessed on its own merits and the appropriate methodology applied if it can be shown that the partial sale of assets does not meet the arms-length and market principles criteria.

Effective Control: Canada recognizes that there is a need to establish mechanisms to determine whether and to what extent the government has retained or relinquished control over assets sold by government to a private party. However, it has no specific proposals to make aside from the possibility raised by the Department to employ a "use or direct" standard in determining whether control is retained. Like some of other issues surrounding the privatization issue, the practical application of some of these concepts may precipitate further analysis and comment.

Holding or parent companies: Not unlike possible proposals on determining effective control, Canada has no practical experience with another complication of a change in ownership, that of holding or parent companies. Canada therefore has no specific comments to make.