CANADA – DAIRY TRQ ALLOCATION MEASURES 2023

(CDA-USA-2023-31-01)

OPENING STATEMENT
OF THE UNITED STATES OF AMERICA

July 19, 2023

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

Abbreviation	Definition
Agreement or USMCA or CUSMA	*United States-Mexico-Canada Agreement*
Party	USMCA Party
TRQ	Tariff-rate quota
Canada's USMCA TRQ Appendix	USMCA, Chapter 2 (National Treatment and Market Access for Goods), Appendix 2: Tariff Schedule of Canada – (Tariff Rate Quotas)
Canada – Dairy TRQs I	Canada – Dairy TRQ Allocation Measures (CDA-USA-2021-31-01)
Canada – Dairy TRQs I (Panel)	Canada – Dairy TRQ Allocation Measures (CDA-USA-2021-31-01), Final Panel Report, December 20, 2021
CETA	*Canada-European Union Comprehensive Economic and Trade Agreement*
CPTPP	*Comprehensive and Progressive Agreement for Trans-Pacific Partnership*
Vienna Convention	*Vienna Convention on the Law of Treaties* (1969)
WTO	World Trade Organization

TABLE OF EXHIBITS

Exhibit No.	Description
U.S. Initial Written Submission	
USA-1	Notice to Importers, CUSMA: Cream TRQ – Serial No. 1071, dated May 16, 2022
USA-2	Notice to Importers, CUSMA: Butter and Cream Powder TRQ – Serial No. 1073, dated May 16, 2022
USA-3	Notice to Importers, CUSMA: Milk TRQ – Serial No. 1075, dated May 16, 2022
USA-4	Notice to Importers, CUSMA: Milk Powders TRQ – Serial No. 1076, dated May 16, 2022
USA-5	Notice to Importers, CUSMA: Skim Milk Powder TRQ – Serial No. 1077, dated May 16, 2022
USA-6	Notice to Importers, CUSMA: Whey Powder TRQ – Serial No. 1078, dated May 16, 2022
USA-7	Notice to Importers, CUSMA: Cheeses of All Types TRQ – Serial No. 1079, dated May 16, 2022
USA-8	Notice to Importers, CUSMA: Industrial Cheeses TRQ – Serial No. 1080, dated May 16, 2022
USA-9	Notice to Importers, CUSMA: Concentrated or Condensed Milk TRQ – Serial No. 1081, dated May 16, 2022
USA-10	Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022
USA-11	Notice to Importers, CUSMA: Other Dairy TRQ – Serial No. 1083, dated May 16, 2022
USA-12	Notice to Importers, CUSMA: Powdered Buttermilk TRQ – Serial No. 1084, dated May 16, 2022
USA-13	Notice to Importers, CUSMA: Products Consisting of Natural Milk Constituents TRQ – Serial No. 1085, dated May 16, 2022

Exhibit No.	Description
USA-14	Notice to Importers, CUSMA: Yogurt and Buttermilk TRQ – Serial No. 1086, dated May 16, 2022
USA-15	Export and Import Permits Act (R.S.C., 1985, c. E-19)
USA-16	Public Consultations: CUSMA Dairy Tariff Rate Quotas (TRQs) Panel Report Implementation - Proposed Allocation and Administration Policy Changes, published on March 1, 2022
USA-17	Message to Industry – Opening of the Application Period for the 2022-2023 Dairy Year TRQs and CUSMA Calendar Year 2022 Dairy TRQs (August to December 2022), published on May 16, 2022
USA-18	General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022
USA-19	Key dates and access quantities 2022-2023: TRQs for Supply-Managed Products, modified on February 13, 2023
USA-20	Comprehensive Review of the Allocation and Administration of TRQs for Dairy, Poultry and Egg products – Phase II: Policy Options for the Administration of Supply-Managed TRQs, published on February 14, 2020
USA-21	Notice to Importers, CUSMA: Chicken TRQ – Serial No. 988, dated October 1, 2020
USA-22	Notice to Exporters, Skim Milk Powder and Milk Protein Concentrate Export Thresholds – Serial No. 1055, dated May 1, 2021
USA-23	Key dates and export quantities 2022-2023: BTQs for dairy export thresholds, modified September 7, 2022
USA-24	Text of the Comprehensive Economic and Trade Agreement (CETA) - Annex 2-B: Declaration of the Parties concerning tariff rate quota administration
USA-25	Notice to Importers, CETA: Cheese of All Types TRQ – Serial No. 993, dated October 1, 2020
USA-26	Final Panel Report, Canada-Dairy TRQ Allocation Measures, USMCA, CDA-USA 2021-31-01, December 20, 2021 (*Canada – Dairy TRQs I (Panel)*)

Exhibit No.	Description
USA-27	*Canada – Dairy TRQs I*, Non-Governmental Entity Written Submission of the International Cheese Council of Canada, August 27, 2021
USA-28	U.S. Government, Estimated Allocations under Canada's USMCA Dairy Tariff Rate Quotas Based on Dairy TRQ Allocation Measures Adopted in May 2022 (March 2023)
USA-29	U.S. Government, Excel Spreadsheet Accompanying Estimated Allocations Under Canada's USMCA Dairy Tariff Rate Quotas Based on Allocation Measures Adopted May 2022 (March 2023)
USA-30 (**CONFIDENTIAL INFORMATION**)	Buchko, Matthew, "Ice Cream Production in Canada", IBISWorld Inc., Industry Report 31152CA, April 2022 **(CONFIDENTIAL IN ITS ENTIRETY – COPYRIGHTED MATERIAL)**
USA-31	Dairy Processors Association of Canada (DPAC), "A Grocery Code of Conduct for Canada", accessed February 17, 2023 (https://www.dpac-atlc.ca/grocery-code/)
USA-32	Global Affairs Canada, "CUSMA permits – Dairy Products - Dairy year, Period Start: 1-Aug-21 - Period End: 31-Jul-22", July 31, 2022 (https://www.eics-scei.gc.ca/report-rapport/APRMT61C-D-DY-CUSMA-22.htm)
USA-33	Global Affairs Canada, "CUSMA permits – Dairy Products - Calendar year, Period Start: 1-Jan-21 - Period End: 31-Dec-21", January 6, 2022 (https://www.eics-scei.gc.ca/report-rapport/APRMT61C-D-CY-CUSMA.htm)
USA-34	Global Affairs Canada, "CPTPP permits - Calendar year: Period Start: 1-Jan-21 - Period End: 31-Dec-21", February 1, 2022 (https://www.eics-scei.gc.ca/report-rapport/APRMT61C-D-CY-CPTPP.htm)
USA-35	Global Affairs Canada, "TRQ Imports Summary Calendar Year: 2021", March 28, 2022 (https://www.eics-scei.gc.ca/report-rapport/APRMT61C-D-CY.htm)
USA-36	*Canada – Dairy TRQs I*, Initial Written Submission of Canada, August 20, 2021 (excerpted)

Exhibit No.	Description
USA-37	Government of Canada, Canadian Dairy Information Centre, "Canada's dairy industry at a glance", modified June 6, 2022 (https://agriculture.canada.ca/en/canadas-agriculture-sectors/animal-industry/canadian-dairy-information-centre/canadas-dairy-industry-glance)
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USA-39	Government of Canada, Canadian Dairy Information Centre, "2022 - CUSMA Cheeses of All Types Quota Holders List", modified October 18, 2022 (https://www.international.gc.ca/trade-commerce/controls-controles/dairy-laitiers/notices-avis/2022_cusma_cheeses_all-2022_aceum_fromages_tous.aspx?lang=eng)
USA-40	Notice to Importers, WTO: Ice Cream and Ice Cream Novelties TRQ – Serial No. 1002, dated October 1, 2020
USA-41	Government of Canada, Canadian Dairy Information Centre, "Primary Global Milk Processors by Milk Intake - 2019" (https://agriculture.canada.ca/sites/default/files/legacy/resources/prod/dairy/pdf/list_glo20_e.pdf)
USA-42	Notice to Importers, CPTPP: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1001, dated October 1, 2020
USA-43 (**CONFIDENTIAL INFORMATION**)	McGrath, Shawn, "Dairy Wholesaling in Canada", IBISWorld, Inc., Industry Report 41312CA, June 2022 **(CONFIDENTIAL IN ITS ENTIRETY – COPYRIGHTED MATERIAL)**
USA-44 (**CONFIDENTIAL INFORMATION**)	Ristoff, Jared, "Dairy Product Production in Canada", IBISWorld, Inc., Industry Report 31151CA, September 2022 **(CONFIDENTIAL IN ITS ENTIRETY – COPYRIGHTED MATERIAL)**
USA-45	Saputo, Annual Report 2021 (available at https://www.saputo.com/en/investors/shareholder-reports/2021)

Exhibit No.	Description
USA-46	Statistics Canada, "Table 32-10-0113-01 Milk production and utilization", accessed October 22, 2022 (https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3210011301)
USA-47	Statistics Canada, "Table 32-10-0053-01 Supply and disposition of food in Canada (x 1,000)", modified February 28, 2023 (https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3210005301)
USA-48	Statistics Canada, "Table 32-10-0112-01 Production of selected dairy products", release date January 26, 2023 (https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3210011201)
USA-49	Tomson, Bill, "Dairy on edge over Canada TRQ dispute", Agri-Pulse, February 23, 2022 (https://www.agri-pulse.com/articles/17248-dairy-on-edge-over-canada-trq-dispute)
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USA-52 (**CONFIDENTIAL INFORMATION**)	McGrath, Shawn, "Grocery Wholesaling in Canada", IBISWorld Inc., Industry Report 41311CA, September 2021**(CONFIDENTIAL IN ITS ENTIRETY – COPYRIGHTED MATERIAL)**
USA-53	Saputo, "Corporate Overview" web page (https://www.saputo.com/en/our-company)
USA-54	Saputo, Annual Report 2022 (available at https://www.saputo.com/en/investors/shareholder-reports/2022)
USA-55	Agropur, "Food and Nutrition Solutions" web page (https://www.agropur.com/en-us/food-and-nutrition-solutions) and

Exhibit No.	Description
	"Dairy Foodservice Solutions" web page (https://www.agropursolutions.ca/en/expertise)
USA-56	Cream TRQ Allocation, Application for the Period of August 1, 2022 to July 31, 2023
USA-57	CUSMA Butter and Cream Powder TRQ Allocation, Allocation Application for the Period of August 1, 2022 to July 31, 2023
USA-58	Milk TRQ Allocation, Application for the Period of August 1, 2022 to July 31, 2023
USA-59	Milk Powders TRQ Allocation, Allocation Application for the Period of August 1, 2022 to July 31, 2023
USA-60	Skim Milk Powders TRQ Allocation, Application for the Period of August 1, 2022 to July 31, 2023
USA-61	Whey Powder TRQ Allocation, Application for the Period of August 1, 2022 to July 31, 2023
USA-62	CPTPP/CUSMA Cheeses of All Types TRQ Allocation, Application for the Period of January 1 to December 31, 2023
USA-63	CPTPP/CUSMA Industrial Cheese(s) TRQ Allocation, Application for the Period of January 1 to December 31, 2023
USA-64	CPTPP/CUSMA Concentrated or Condensed Milk TRQ Allocation, Application for the Period of January 1 to December 31, 2023
USA-65	CPTPP/CUSMA Ice Cream and Mixes TRQ Allocation, Application for the Period of January 1 to December 31, 2023
USA-66	CPTPP/CUSMA Other Dairy TRQ Allocation, Application for the Period of January 1 to December 31, 2023
USA-67	CPTPP/CUSMA Powdered Buttermilk TRQ Allocation, Application for the Period of January 1 to December 31, 2023
USA-68	CPTPP/CUSMA Products Consisting of Natural Milk Constituents TRQ Allocation, Application for the Period of January 1 to December 31, 2023

Exhibit No.	Description
USA-69	CPTPP/CUSMA Yogurt and Buttermilk TRQ Allocation, Application for the Period of January 1 to December 31, 2023
USA-70	Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, vol. II
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USA-72	Definition of "access" from Oxford English Dictionary Online
USA-73	Definition of "active" from Oxford English Dictionary Online
USA-74	Definition of "administer" from Oxford English Dictionary Online
USA-75	Definition of "agricultural" from Oxford English Dictionary Online
USA-76	Definition of "agriculture" from Oxford English Dictionary Online
USA-77	Definition of "allocate" from Oxford English Dictionary Online
USA-78	Definition of "allocation" from Oxford English Dictionary Online
USA-79	Definition of "allow" from Oxford English Dictionary Online
USA-80	Definition of "condition" from Oxford English Dictionary Online
USA-81	Definition of "criterion" from Oxford English Dictionary Online
USA-82	Definition of "discriminate" from Oxford English Dictionary Online
USA-83	Definition of "eligibility" from Oxford English Dictionary Online
USA-84	Definition of "eligible" from Oxford English Dictionary Online
USA-85	Definition of "equitable" from Oxford English Dictionary Online
USA-86	Definition of "extent" from Oxford English Dictionary Online
USA-87	Definition of "fair" from Oxford English Dictionary Online

Exhibit No.	Description
USA-88	Definition of "food" from Oxford English Dictionary Online
USA-89	Definition of "fully" from Oxford English Dictionary Online
USA-90	Definition of "good" from Oxford English Dictionary Online
USA-91	Definition of "greatest" from Oxford English Dictionary Online
USA-92	Definition of "limit" from Oxford English Dictionary Online
USA-93	Definition of "manner" from Oxford English Dictionary Online
USA-94	Definition of "maximum" from Oxford English Dictionary Online
USA-95	Definition of "opportunity" from Oxford English Dictionary Online
USA-96	Definition of "possible" from Oxford English Dictionary Online
USA-97	Definition of "procedure" from Oxford English Dictionary Online
USA-98	Definition of "processor" from Oxford English Dictionary Online
USA-99	Definition of "provide" from Oxford English Dictionary Online
USA-100	Definition of "requirement" from Oxford English Dictionary Online
USA-101	Definition of "sector" from Oxford English Dictionary Online
USA-102	Definition of "timely" from Oxford English Dictionary Online
USA-103	Definition of "transparent" from Oxford English Dictionary Online
USA-104	Definition of "utilization" from Oxford English Dictionary Online
USA-105	Definition of "utilize" from Oxford English Dictionary Online
USA-106	Global Affairs Canada, "CPTPP permits - Dairy year, Period Start: 1-Aug-21 - Period End: 31-Jul-22", July 31, 2022 (https://www.eics-scei.gc.ca/report-rapport/APRMT61C-D-DY-CPTPP-22.htm)
USA-107	Global Affairs Canada, "Cream, Powdered Whey, Butter and Fats & oils from Milk APRMT61C-D-DY Period Start: 1-Aug-21 - Period

Exhibit No.	Description
	End: 31-Jul-22", July 31, 2022 (https://www.eics-scei.gc.ca/report-rapport/APRMT61C-D-DY-22.htm)
USA-108	Grocery Business, "Lactalis Canada launches direct-to-consumer e-comm platforms for dairy, cheese", September 1, 2021 (https://www.grocerybusiness.ca/news/lactalics-canada-launches-direct-to-consumer-e-comm-platforms-for-dairy-cheese)
U.S. Rebuttal Submission	
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USA-110	Milke, Mark, "The cause of the Canada-U.S. price gap is obvious – the government", Fraser Institute
USA-111	Yun, Tom, "Why milk, butter and other dairy products just got more expensive", CTV News, February 6, 2022
USA-112	Definition of "an" from Oxford English Dictionary Online
USA-113	Definition of "an" from Cambridge Dictionary Online
USA-114	USMCA Drafting Convention
USA-115	Global Affairs Canada, USMCA Dairy TRQs Utilization Rates Data
U.S. Opening Statement	
USA-116	Global Affairs Canada, 2023 - CUSMA Cheeses of All Types Quota Holders List
USA-117	Global Affairs Canada, 2023 - CUSMA Industrial Cheeses Quota Holders List
USA-118	Global Affairs Canada, 2023 - CETA Cheese of All Types Quota Holders List
USA-119	Global Affairs Canada, 2023 - CETA Industrial Cheese Quota Holders List

1. Good morning, Mr. Chairman and members of the Panel. On behalf of the United States, I would like to begin by thanking the Panel and the staff assisting you for your work on this dispute.

I. Introduction

2. In the *United States-Mexico-Canada Agreement* ("USMCA" or "Agreement"), Canada, in its own words, "agreed to provide unprecedented new access to its supply-managed dairy market for imports from the United States."[1] But the United States has yet to receive the full benefit of that new market access.

3. Since prior to the USMCA's entry into force, the United States has pressed Canada about our serious concerns with Canada's dairy tariff-rate quota ("TRQ") allocation measures. One USMCA dispute settlement panel (*Canada – Dairy TRQs I*) has already found that Canada breached the commitments it made in the USMCA. Canada changed its measures following that first panel report. But Canada still has not fulfilled the commitments it made in the Agreement.

4. So, the United States finds itself here, in front of a second USMCA dispute settlement panel, continuing to seek Canada's compliance with its USMCA obligations.

5. Canada argues that the interpretations proposed by the United States are overly broad, and that they impinge on the regulatory discretion that Canada retained when it agreed to provide new market access in the USMCA.

6. Canada does have a degree of discretion to formulate and apply an allocation mechanism. The USMCA does not prescribe precisely the allocation mechanism that Canada must apply.

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[1] Rebuttal Submission of Canada, June 30, 2023 ("Canada's Rebuttal Submission"), para. 1.

However, the USMCA does prescribe a host of rules with which Canada must comply when formulating and applying whatever allocation mechanism it chooses.

7. Canada's allocation mechanism, Canada's procedures for administering its TRQs, and Canada's administration of its TRQs must be consistent with the specific rules to which Canada agreed. Among other things:

- Canada has committed to allocate its TRQs to eligible applicants, and any applicant active in the Canadian food or agriculture sector must be eligible under whatever rules Canada adopts.[2]
- Canada has committed to ensure that it does not limit access to a TRQ allocation to processors, including in effect, as a result of the rules that Canada has adopted.[3]
- Canada has committed to ensure that whatever procedures it adopts for administering its TRQs, those procedures must be fair and equitable, and Canada has committed to ensure that allocation to eligible applicants is conducted by equitable and transparent methods.[4]
- Canada has committed to ensure that each allocation is made in commercially viable shipping quantities.[5]
- Canada has committed to ensure that each allocation is made, to the maximum extent possible, in the quantities that the TRQ applicant requests.[6]

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[2] *See* Section A, Paragraph 3(c), of Canada's USMCA TRQ Appendix.

[3] *See* the processor clause of Article 3.A.2.11(b) of the USMCA.

[4] *See* Articles 3.A.2.4(b) and 3.A.2.11(e) of the USMCA.

[5] *See* the first clause of Article 3.A.2.11(c) of the USMCA.

[6] *See* the second clause of Article 3.A.2.11(c) of the USMCA.

- Canada has committed to allow importers that have not previously imported a dairy product subject to a TRQ (*i.e.*, new importers) to be eligible for Canada's USMCA dairy TRQs, and Canada has committed not to discriminate against new importers when allocating its USMCA dairy TRQs.[7]
- Canada has committed to ensure that there is a mechanism for the return and reallocation of unused allocations in a timely and transparent manner that provides the greatest possible opportunity for the TRQ to be filled.[8]
- Canada has committed to administer its TRQs in a manner that allows importers the opportunity to utilize TRQ quantities fully.[9]
- And, if Canada wants to introduce a new or additional condition, limit, or eligibility requirement on the utilization of a TRQ for the importation of an agricultural good, Canada has committed to notify the United States, engage in consultations, if requested to do so, and only implement any such new or additional condition, limit, or eligibility requirement if the United States does not object.[10]

8. Complying with all of these commitments requires careful and thoughtful design of an allocation mechanism. Canada must take care, for example, to ensure that each allocation is made in commercially viable shipping quantities, while at the same time ensuring that each allocation is made, to the maximum extent possible, in the quantities that the TRQ applicant

[7] *See* Article 3.A.2.10 of the USMCA.

[8] *See* Article 3.A.2.15 of the USMCA.

[9] *See* Article 3.A.2.6 of the USMCA.

[10] *See* Article 3.A.2.6(a) of the USMCA.

requests, all while ensuring that, if the TRQ is oversubscribed, allocation to eligible applicants is conducted by equitable methods. Canada must do the work that is necessary to honor all of the commitments it made in the USMCA. Compliance with those commitments is not discretionary.

9. And the commitments are not unclear.

10. In our written submissions, the United States has demonstrated, through proper application of customary rules of interpretation, what the USMCA provisions at issue mean, and that Canada's dairy TRQ allocation measures breach those provisions.

11. Canada's interpretive arguments in response are unavailing. The United States has carefully explained, in detail, how there simply is no support for Canada's textual and contextual arguments and Canada's arguments about regulatory discretion and the object and purpose of the USMCA. Contrary to the text, context, and the object and purpose of the Agreement, and contrary to all logic and reason, Canada asks the Panel to find, in effect, that any substantive policy decision that Canada makes about how to administer its USMCA dairy TRQs – anything that would actually influence the outcome of the allocation – somehow all of that precedes the application of the rules of the Agreement, is not subject to those rules, is a matter of unbounded regulatory discretion for Canada, and is beyond scrutiny by the Panel in this dispute settlement proceeding.

12. Canada's approach is untenable. The USMCA rules apply to Canada. And Canada is in breach of the USMCA rules, as the United States has demonstrated.

13. In the remainder of our opening statement, we will briefly touch on some of the main issues in dispute concerning each of the four elements of Canada's dairy TRQ allocation measures, which the United States is challenging. Omission of a response to any argument

Canada raised in its rebuttal submission should not be construed as agreement with such argument.

II. Element One: Canada's Exclusion of Retailers, Food Service Operators, and Other Entities from Eligibility for Canada's USMCA Dairy TRQs

A. Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix (Eligible Applicants)

14. The United States has demonstrated that the term "eligible applicant" in Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix, properly interpreted according to customary rules of interpretation, means any applicant active in the Canadian food or agriculture sector. That includes retailers, food service operators, and other entities that engage in the very same activities as processors, distributors, and further processors.[11]

15. In its rebuttal submission, Canada does not object to the U.S. argument that the second sentence of Paragraph 3(c) defines "eligible applicant" as any applicant active in the Canadian food or agriculture sector. Instead, Canada argues that the first sentence of Paragraph 3(c) does not require Canada to allocate its TRQs to any and every eligible applicant.[12]

16. But Canada's textual and contextual arguments do not work. Because the term "eligible applicant" is defined in the second sentence of Paragraph 3(c), that definition of "eligible applicant" can and must be substituted in the first sentence where the term "eligible applicants" appears. Thus, the first sentence of Paragraph 3(c) correctly reads as follows: "Canada shall allocate its TRQs each quota year to [{any} applicant active in the Canadian food or agriculture sector]".

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[11] *See* U.S. Initial Written Submission, section V.B; U.S. Rebuttal Submission, section II.B.

[12] *See* Canada' Rebuttal Submission, paras. 15-17.

17. Nothing in the text or context of Paragraph 3(c) permits Canada to vary from the definition of "eligible applicant" when implementing its obligations in Paragraph 3(c). Canada has a positive obligation to treat as eligible any applicant active in the Canadian food or agriculture sector, and Canada does not have discretion to exclude whole categories of applicants, such as retailers and food service operators.

18. Will correctly interpreting and implementing the definition of "eligible applicant" mean that more applicants will be eligible to apply for quota allocations? Of course. Despite Canada's assertions, though, it is far from certain that Canada will actually be overwhelmed with applications for TRQ allocations. Not all applicants who are eligible necessarily will apply. Canada suggests that there are 6,900 eligible applicants for its USMCA dairy TRQs at present.[13] But, in 2023, there are only 86 quota holders for the USMCA TRQ on Cheeses of All Types, and only 15 quota holders for the USMCA TRQ on Industrial Cheeses.[14] That is far fewer than the total population of eligible applicants.

19. The CETA TRQs for those same products permit retailers to apply for and receive allocations. So, there are far more eligible applicants for the CETA TRQs. But, in 2023, there are 244 quota holders for the CETA TRQ on Cheeses of All Types, and only 8 quota holders for the CETA TRQ on Industrial Cheeses.[15] There are actually fewer quota holders for the CETA TRQ on Industrial Cheeses than there are for the USMCA TRQ on Industrial Cheeses. These

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[13] *See* Canada's Rebuttal Submission, para. 59.

[14] *See* Global Affairs Canada, 2023 - CUSMA Cheeses of All Types Quota Holders List, p. 12 (Exhibit USA-116); Global Affairs Canada, 2023 - CUSMA Industrial Cheeses Quota Holders List, p. 3 (Exhibit USA-117).

[15] *See* Global Affairs Canada, 2023 - CETA Cheese of All Types Quota Holders List, p. 31 (Exhibit USA-118); Global Affairs Canada, 2023 - CETA Industrial Cheese Quota Holders List, p. 2 (Exhibit USA-119).

data suggest that it is far from a foregone conclusion that Canada will be inundated with applications and unable to administer an allocation mechanism if Canada defines and applies the term "eligible applicant" in its dairy TRQ allocation measures in accordance with the proper interpretation of that term.

B. Article 3.A.2.6(a) of the USMCA (New or Additional Condition, Limit, or Eligibility Requirement)

20. The United States has also demonstrated that Canada's exclusion of retailers, food service operators, and other entities from eligibility amounts to the introduction of a new or additional condition, limit, or eligibility requirement on the utilization of a TRQ" that is "beyond those set out in [Canada's] Schedule to Annex 2-B". This is contrary to Article 3.A.2.6(a) of the USMCA.[16]

21. Again, Canada's textual and contextual arguments concerning Article 3.A.2.6(a) just do not work. The term "TRQ" is defined in the agreement.[17] Canada suggests that the United States wrongly uses "mechanism" as a short-hand for "TRQ", but then Canada itself explicitly uses the phrase "an in-quota quantity set out in a Party's Appendix 2 to Annex 2-B" as a short-hand for "TRQ".[18] The actual argument of the United States is that the complete definition of the term "TRQ" must be substituted wherever the term "TRQ" appears. Doing so weighs heavily against Canada's proposed interpretation. This is because utilizing "a mechanism that provides for the application of a preferential rate of customs duty to imports of a particular originating good up to a specified quantity (in-quota quantity), and at a different rate to imports

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[16] *See* U.S. Initial Written Submission, section V.C; U.S. Rebuttal Submission, section II.C.

[17] *See* Article 3.A.2.1 of the USMCA.

[18] *See* Canada's Rebuttal Submission, paras. 90-91.

of that good that exceed that quantity" logically, and practically, entails numerous steps. An importer must be eligible to apply for and receive a quota allocation; the importer must actually apply for a quota allocation; if the importer receives a quota allocation, then the importer must apply for and receive an import license; and the importer must then use the import license to effectuate importation of the agricultural good that results in "the application of a [specified] rate of customs duty to [those] imports". All of those steps, separately and together, constitute "utilization of a TRQ for importation of an agricultural good" where an allocation mechanism is employed. When Article 3.A.2.6(a) refers to "new or additional condition[s], limit[s], or eligibility requirement[s]", the referenced conditions, limits, or eligibility requirements can relate to any of the steps that are entailed in "utilization of a TRQ".

22. Article 3.A.2.2 of the USMCA does not provide contextual support for Canada's position. Where the term "TRQ" or "TRQs" is used in Article 3.A.2.2, again, the full definition of "TRQ" in Article 3.A.2.1 must be substituted, and doing so aligns with each Party's Schedule to Annex 2-B. Those schedules do not just set out TRQ quantities. Sections A and B of Appendix 2 to the schedules set out all the relevant details of the mechanism, including the preferential tariff rate to be applied, the particular goods within the scope of the TRQ, the use of an import licensing system, who is eligible to apply, as well as the in-quota quantity, all of which are features of any TRQ.

23. Canada also insists that Article 3.A.2.6(a) relates only to conditions, limits, or eligibility requirements on the good itself that is being imported, not who is importing the good.[19] But this

[19] *See* Canada's Rebuttal Submission, para. 79.

does not make sense. While Article 3.A.2.6(a) is written in the passive voice, referring to "a new or additional condition, limit, or eligibility requirement on the utilization of a TRQ", it is obvious that it is importers who utilize the TRQ. Goods do not import themselves. Ultimately, any condition, limit, or eligibility requirement applies to importers, whether it relates to the goods being imported or to the importers themselves.

24. And the United States has shown that anywhere else that the words "eligibility" or "eligible" are used in Chapters 2 and 3 of the USMCA, the immediate context makes it clear whether eligibility is referred to in relation to a person or a good.[20] By contrast, the first sentence of Article 3.A.2.6(a) of the USMCA does not contain similar immediate contextual clues indicating that the term "eligibility requirement" there refers only to either persons or goods. Given that throughout the Chapters, eligibility can be in relation to both persons and goods, the absence of anything limiting the nature and scope of the term "eligibility requirement" in Article 3.A.2.6(a) to just one or the other – either persons or goods – weighs in favor of concluding that the term as used in Article 3.A.2.6(a) relates to eligibility requirements that may be applicable to both persons as well as goods.

25. The definition of "eligible applicant" in Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix is an "eligibility requirement ... set out in [Canada's] Schedule to Annex 2-B". That eligibility requirement applies to all of Canada's USMCA dairy TRQs. Canada has introduced a new or additional condition, limit, or eligibility requirement beyond what is set out in its Schedule to Annex 2-B, namely that one must be a processor, distributor, or,

[20] *See* Rebuttal Submission of the United States of America, June 2, 2023 ("U.S. Rebuttal Submission"), paras. 170-173.

in some cases, further processor to receive an allocation and utilize the TRQ. In doing so, Canada has breached Article 3.A.2.6(a) of the USMCA.

III. Element Two: Canada's Allocation of its USMCA Dairy TRQs on a Market Share Basis, and Canada's Application of Different Criteria for Different Types of Applicants

26. The United States has demonstrated that, while Canada's approach to TRQ allocation may have a veneer of objectivity, given its mathematical nature, that obscures the reality that Canada's dairy TRQ allocation measures heavily favor processors over distributors and other potential TRQ applicants. In effect, Canada has recreated the processor "pools" that were found to breach the USMCA in *Canada – Dairy TRQs I*. Ultimately, Canada's use of a simplistic mathematical formula to allocate its USMCA dairy TRQs is wholly insufficient to meet the requirements in numerous provisions of the USMCA.[21]

A. The Processor Clause of Article 3.A.2.11(b) of the USMCA

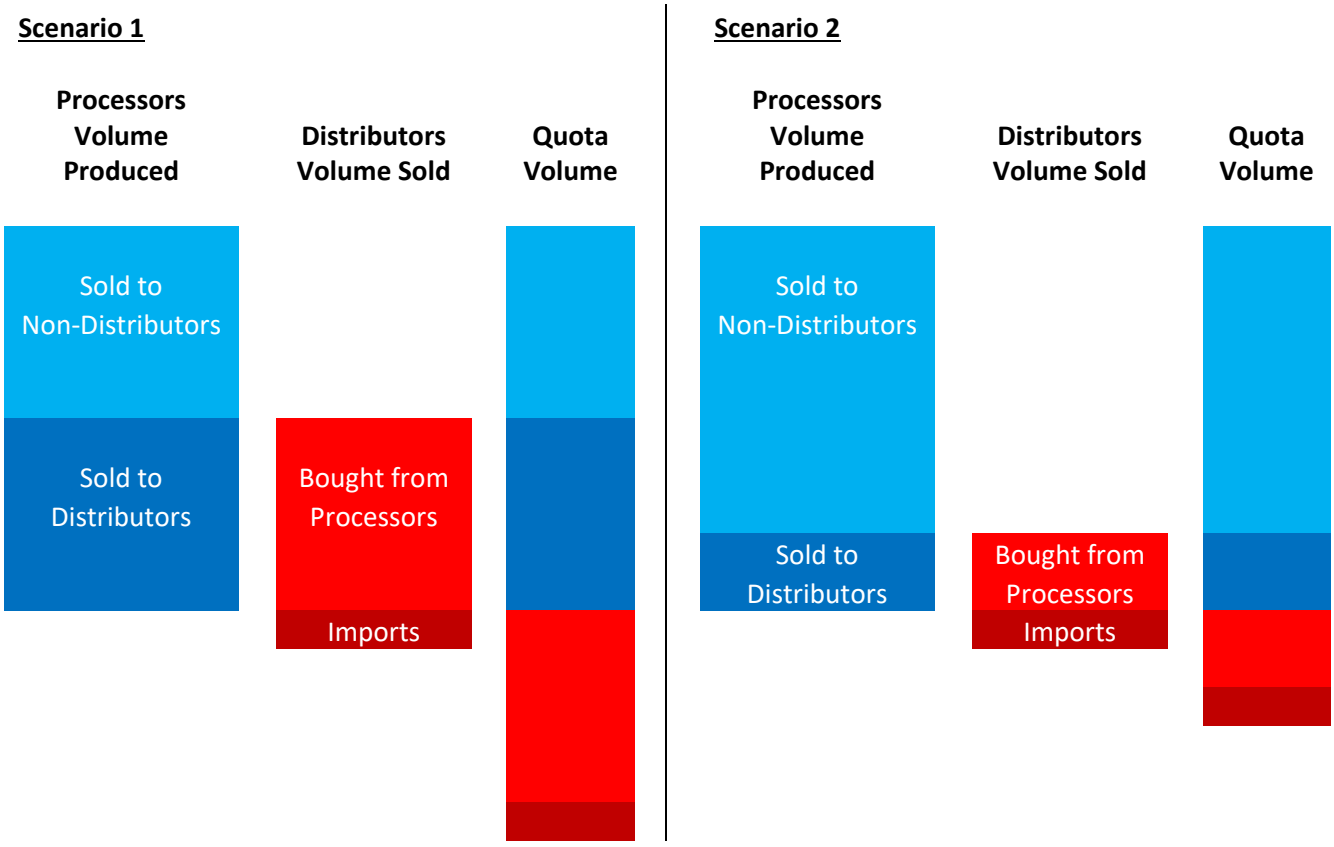
27. In *Canada – Dairy TRQs I*, the United States successfully challenged Canada's use of formal "pools" of TRQ allocations, which were defined in published measures and which set aside and reserved 85 percent or more of the total TRQ quantity for the exclusive use of processors. The panel in that dispute agreed that "access" to TRQ allocations in those pools was limited to processors, in breach of the processor clause of Article 3.A.2.11(b) of the USMCA.

28. Canada responded to the panel's findings by publishing revised dairy TRQ allocation measures that no longer provide formal pools for processors. But, as the United States has shown, the pools did not go away.[22] The existence and the size of the pools is not explicitly set

[21] *See* U.S. Initial Written Submission, section VI; U.S. Rebuttal Submission, section III.

[22] *See* U.S. Initial Written Submission, section VI.B; U.S. Rebuttal Submission, section III.A.

forth in the measures anymore; rather, Canada's allocation mechanism allows processors themselves to effectively establish their pools and to determine the size of those pools. In effect, any volume of dairy products that processors manufacture and sell to anyone other than a distributor results in a TRQ allocation for which access is limited to processors. The more volume of dairy products that processors sell past distributors (directly to retailers or food service operators or further processors or even to final consumers), the larger the pool of TRQ allocation that distributors have no chance to access. The following graphical representations illustrate the problem.



29. In the images above, in the first column of each scenario, the area shaded in light blue represents volume manufactured by processors that is sold to non-distributors. The area shaded in dark blue represents volume manufactured by processors that is sold to distributors. In the

second column, the area shaded in red represents volume that distributors purchase from processors and resell to non-distributors. The area shaded in crimson represents imports sold by distributors. The meaning of the shading is the same in the third column.

30. It is immediately apparent that there is a direct correlation between the volume that processors sell to non-distributors and the size of the light blue "pool" of quota allocation that is accessible only to processors. When processors sell less to non-distributors, the light blue pool is smaller. When processors sell more to non-distributors, the light blue pool is larger.

31. The dark blue-shaded areas and the red-shaded areas also correspond to one another. Every kilogram that processors sell to and through distributors can be counted by both processors and distributors as market activity, and that translates into TRQ allocations for both processors and distributors. Conversely, every kilogram that processors sell to a non-distributor can be counted only by processors, and that translates into a TRQ allocation that is accessible only to processors.

32. If we assume that, in scenario 1, processors sell 50 units to non-distributors, and 50 units to distributors, and the distributors sell the 50 units they purchased from processors as well as 10 units of imports, then the total volume of market activity is 160 units (the 50 units sold by processors to distributors gets counted twice in the total market activity). So, by manufacturing 100 units, processors would get 62.5 percent of the TRQ volume, with distributors getting the remaining 37.5 percent.

33. In scenario 2, if we assume that processors sell 80 units to non-distributors, and 20 units to distributors, and the distributors sell the 20 units they purchased from processors as well as 10 units of imports, then the total volume of market activity is only 130 units. In this scenario, by

manufacturing the same 100 units while selling more volume to non-distributors, processors would get 77 percent of the TRQ volume, with distributors getting the remaining 23 percent.

34. And these hypothetical scenarios understate what we estimate the actual allocations would be under Canada's dairy TRQ allocation measures. As shown in Exhibit USA-28, the United States estimates that allocations for processors could range from 79 percent up to 99 percent of the total TRQ quantities under Canada's dairy TRQ allocation measures.

35. Canada has not responded to the U.S. estimations, and asserts that the size of allocations granted is not relevant to the processor clause.[23] While not necessary to substantiate the U.S. claim under the processor clause, nor dispositive of that claim, it is telling that the portion of the total TRQ quantities allocated to processors under Canada's revised dairy TRQ allocation measures likely is as high as or higher than it was under Canada's prior measures that had formally-defined pools, which the first panel found in breach of the USMCA.

36. Ultimately, under Canada's new measures, processors can control the size of their pool of TRQ allocation, while distributors are limited by what they can purchase from processors or sell via limited imports. This is a feature of Canada's dairy TRQ allocation measures, in which Canada has, in effect, recreated the processor pools using the market share basis approach. And it breaches the processor clause of Article 3.A.2.11(b) of the USMCA.

[23] *See* Canada's Rebuttal Submission, para. 174.

37. As the panel in *Canada – Dairy TRQs I* put it, Canada's dairy TRQ allocation measures continue to "ring-fence and limit to processors" a reserved pool of TRQ amounts to which only processors have access.[24]

38. Canada now contends that the panel in that first dispute got the interpretation of the processor clause wrong.[25] We will not repeat here our arguments concerning the proper interpretation of the processor clause and the reasons why this Panel should consider the findings of the first panel persuasive. The United States agrees with Canada that this Panel is not bound by the findings of the earlier panel, and this Panel is obligated to undertake its own interpretive analysis applying relevant customary rules of interpretation. But, as we have explained, we do not agree with Canada that the first panel erred in its interpretation of the processor clause.

B. Articles 3.A.2.4(b) and 3.A.2.11(e) of the USMCA (Fair and Equitable)

39. The United States has also demonstrated that Canada's dairy TRQ allocation measures, in particular the market share approach, are, by design, not "fair" or "equitable", and thus are inconsistent with Articles 3.A.2.4(b) and 3.A.2.11(e) of the USMCA.[26]

40. Canada's measures heavily favor Canadian dairy processors over distributors. The "procedures" and "methods" themselves, which Canada adopted and which the United States challenges, preordain the outcome of the allocation process in a manner that is biased and unduly favorable to processors, and unduly disadvantageous to distributors.

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[24] Canada – Dairy TRQ Allocation Measures (CDA-USA-2021-31-01) ("*Canada – Dairy TRQs I*"), Final Panel Report, December 20, 2021 ("*Canada – Dairy TRQs I (Panel)*"), para. 163.

[25] *See* Canada's Rebuttal Submission, paras. 148-152.

[26] *See* U.S. Initial Written Submission, sections VI.C and VI.D; U.S. Rebuttal Submission, sections III.B and III.C.

41. Canada again attempts to escape the Panel's scrutiny by arguing that the policy decisions it made in adopting its allocation mechanism are not "procedures" or "methods", and so are not subject to Articles 3.A.2.4(b) and 3.A.2.11(e). Canada's position is untenable.

42. The mathematical calculations inherent in Canada's market share approach are among the "procedures" and "methods" that Canadian government officials apply when they administer Canada's TRQs and when they make allocations, along with other "procedures" and "methods", including those related to receiving and processing applications. And all of those "procedures" and "methods" are set forth in Canada's dairy TRQ allocation measures that the United States has challenged in this dispute. Ultimately, Canadian government officials apply "procedures" and "methods" that require them to make determinations the substance of which was decided before any application was filed. Because Canada's "procedures" and "methods" themselves so heavily favor processors, Canada's dairy TRQ allocation measures breach Articles 3.A.2.4(b) and 3.A.2.11(e) of the USMCA.

C. The First Clause of Article 3.A.2.11(c) of the USMCA (Commercially Viable Shipping Quantities)

43. The United States has demonstrated that Canada's dairy TRQ allocation measures breach the first clause of Article 3.A.2.11(c) of the USMCA, which requires Canada to ensure that "each allocation is made in commercially viable shipping quantities".[27]

44. Canada acknowledges that "[t]he United States is correct that under Canada's TRQ system, a TRQ applicant could theoretically receive an allocation of 1kg if that is the result of

[27] *See* U.S. Initial Written Submission, section VI.E; U.S. Rebuttal Submission, section III.D.

Canada's market-share calculation."[28] Canada argues, though, that this would not "automatically" constitute a breach of the first clause of Article 3.A.2.11(c), because "this situation will only occur if the TRQ applicant itself has indicated that it would be willing to accept an allocation as low as 1kg."[29]

45. The United States has explained why an applicant might indicate that it is "willing to accept" an allocation as low as 1kg, even if that applicant would not consider such an allocation to be a commercially viable shipping quantity. The applicant would do so to ensure that it gets at least some allocation, which is necessary for the applicant to later seek a transfer from another allocation holder. Willingness to accept 1kg is not the same as agreement that 1kg is a commercially viable shipping quantity. Notably, Canada does not actually ask applicants whether the minimum amount they would be willing to accept is a volume that the applicant would consider a commercially viable shipping quantity.

46. Canada protests that "[i]t is not for the Government of Canada and its officials to try to determine what is 'commercially viable' for each and every applicant under a particular TRQ."[30] But it is. That is precisely the obligation that the first clause of Article 3.A.2.11(c) imposes on Canada; not on the applicant. Canada must ensure that each allocation it makes is in commercially viable shipping quantities.

47. Furthermore, if, as Canada suggests, "commercially viable shipping quantities" is a subjective concept that depends on what an applicant is willing to accept, then there would be no

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[28] Canada's Rebuttal Submission, para. 219.

[29] Canada's Rebuttal Submission, para. 219.

[30] Canada's Rebuttal Submission, para. 218.

reason for the Parties to have agreed to the obligation in the first place. Under Canada's proposed interpretation, any allocation that an applicant is willing to accept necessarily is made in commercially viable shipping quantities, as evidenced by the willingness of the applicant to accept it. Canada's reasoning is circular and would reduce the first clause of Article 3.A.2.11(c) to inutility, contrary to customary rules of interpretation.

48. Canada's dairy TRQ allocation measures, which Canada acknowledges could allocate 1kg of TRQ volume, and which provide no opportunity at all for applicants to request what they actually consider commercially viable quantities, fail to ensure that each allocation is made in commercially viable shipping quantities.

D. The Second Clause of Article 3.A.2.11(c) of the USMCA (Quantities Requested)

49. The United States has demonstrated that Canada's dairy TRQ allocation measures also breach the second clause of Article 3.A.2.11(c) of the USMCA, which requires Canada to ensure that each allocation is made, "to the maximum extent possible, in the quantities that the TRQ applicant requests".[31]

50. Canada does not even ask TRQ applicants what quantities they would like to receive. And if Canada did ask, it would not matter, because Canada makes allocations based on reported market activity, and not based on any request for a particular amount. Far from ensuring, to the maximum extent possible, that it makes allocations in the amounts requested, Canada makes no attempt to do so whatsoever.

[31] *See* U.S. Initial Written Submission, section VI.F; U.S. Rebuttal Submission, section III.E.

51. Yet again, Canada tries to avoid the Panel's scrutiny by arguing that what is possible is dictated by the allocation mechanism that Canada itself chose. Canada's position is untenable.

52. Under the second clause of Article 3.A.2.11(c), Canada is obligated to "ensure" that "each allocation is made ... to the maximum extent possible, in the quantities that the TRQ applicant requests". For Canada, making an allocation consists of several related steps: setting out the allocation mechanism, soliciting and accepting allocation requests, and granting TRQ amounts. Canada cannot evade that obligation at the last step by creating conditions at the first step that do not allow Canada to comply. Canada must have the obligation in the second clause of Article 3.A.2.11(c) in mind when formulating and adopting an allocation mechanism, and Canada must "ensure" that its chosen allocation mechanism enables Canada to also "ensure" that it complies with the second clause of Article 3.A.2.11(c).

E. Article 3.A.2.10 of the USMCA (New Importers)

53. The United States has demonstrated that Canada's dairy TRQ allocation measures breach Article 3.A.2.10 of the USMCA, which requires Canada to allow importers that have not previously imported a dairy product subject to a TRQ (*i.e.*, new importers) to be eligible for Canada's USMCA dairy TRQs, and prohibits Canada from discriminating against new importers when allocating its USMCA dairy TRQs.[32]

54. Canada is in breach of Article 3.A.2.10 because the market share approach embodied in Canada's dairy TRQ allocation measures guarantees that new entrants to the dairy market, who necessarily have not previously imported a dairy product subject to a TRQ, would be allocated

[32] *See* U.S. Initial Written Submission, section VI.G; U.S. Rebuttal Submission, section III.F.

zero kilograms of TRQ volume due to the absence of any market activity during the historical reference period. This plainly discriminates against such importers, even though they meet the USMCA definition of "eligible applicants". Additionally, Canada's use of a market share basis effectively denies these new importers eligibility for the USMCA dairy TRQs. As a matter of logic, it necessarily follows that if an applicant cannot be allocated any TRQ volume, then the applicant is not eligible for the TRQ.

55. Canada responds that "[t]he United States errs in this claim because not receiving an allocation has nothing to do with the applicant's import performance."[33] But this argument suggests an intent standard that is not supported by the terms of Article 3.A.2.10.[34] It is not necessary for the United States to prove that Canada's measures discriminate against new importers because they are new importers. It is only necessary to establish that Canada's measures discriminate against new importers, which the United States has done.

56. In the U.S. first written submission, the United States discusses a hypothetical distributor of fine meats from the United States, which has been operating in the Canadian food sector for many years, including by importing fine meats from the United States and selling them to retailers. Such a distributor meets the USMCA definition of an "eligible applicant". However, if such a distributor applied for an allocation of the Canadian USMCA TRQ on cheeses of all types, the distributor would receive an allocation of zero kilograms, because it had never sold any cheese of any type. Canada's dairy TRQ allocation measures, in particular the use of a "market share basis" when allocating Canada's USMCA dairy TRQs, discriminates against new

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[33] Canada's Rebuttal Submission, para. 233.

[34] *See also* Canada's Rebuttal Submission, para. 252.

entrants to the Canadian dairy market, which necessarily also are new importers, by treating them less favorably than other eligible applicants that have previously manufactured or sold the agricultural product that is subject to a TRQ during the reference period. Canada's dairy TRQ measures also do not "allow" such a new market entrant and new importer to be eligible for a quota allocation.

57. Accordingly, Canada's dairy TRQ allocation measures breach Article 3.A.2.10 of the USMCA.

F. Article 3.A.2.6(a) of the USMCA (New or Additional Condition, Limit, or Eligibility Requirement)

58. The United States has also demonstrated that Canada's dairy TRQ allocation measures breach Article 3.A.2.6(a) of the USMCA by requiring that an applicant must demonstrate activity during a prior reference period to be allocated USMCA dairy TRQs, and by requiring that an applicant must be a processor to access substantial portions of Canada's USMCA dairy TRQs, which are not accessible to non-processors.[35] In the interest of time, we will not further discuss the interpretive issues related to Article 3.A.2.6(a) here.

IV. Element Three: Canada's Imposition of 12-Month Activity Requirements on TRQ Applicants and Recipients

A. Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix (Eligible Applicants)

59. The United States has demonstrated that Canada's requirements that TRQ applicants must have been active during all 12 months of a prior 12-month reference period and TRQ

[35] *See* U.S. Initial Written Submission, section VI.H; U.S. Rebuttal Submission, section III.G.

recipients further must be active during all 12 months of the quota year is inconsistent with Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix.[36]

60. The dispute between the Parties turns on the interpretation and application of the term "active" in Paragraph 3(c), and what it means for an applicant to be "active in the Canadian food or agriculture sector".

61. The United States and Canada agree that the word "active" is properly defined as "'participating or engaging in a specified sphere of activity, esp. to a significant degree'."[37] And the United States further agrees with Canada that "there are different degrees of 'activity' that can constitute 'significant activity.'"[38]

62. The problem is that Canada's dairy TRQ allocation measures do not allow applicants to demonstrate that they are "active in the Canadian food or agriculture sector" by showing different degrees of activity. Canada's bright line rule – activity during 12 out of 12 months – fails to account for the possibility that an applicant might be able to show a significant degree of activity even if that activity took place in fewer than 12 months.

63. For example, one applicant might sell 10kg of cheese each month for 12 months – a total of 120kg of cheese sold during the year. Under Canada's dairy TRQ allocation measures, that applicant is "active" and thus eligible for Canada's USMCA dairy TRQs. Another applicant might sell 120,000kg of cheese during the year, but the sales take place during only 9 of 12 months. Under Canada's dairy TRQ allocation measures, that second applicant that engaged in

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[36] *See* U.S. Initial Written Submission, section VII.B; U.S. Rebuttal Submission, section IV.A.

[37] Initial Written Submission of Canada, May 5, 2023 ("Canada's Initial Written Submission"), para. 301 (underline added by Canada).

[38] Canada's Initial Written Submission, para. 303.

1,000 times as much activity during the reference period as the first applicant would not be eligible for Canada's USMCA dairy TRQs. That makes no sense, and it is not consistent with a proper interpretation of the term "active".

64. Whatever standard Canada adopts for determining whether applicants are "active in the Canadian food or agriculture sector", that standard must comport with the terms of Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix, as properly interpreted under customary rules of interpretation. Canada's bright line 12-month activity requirements fail to do so.

B. Article 3.A.2.6(a) of the USMCA (New or Additional Condition, Limit, or Eligibility Requirement)

65. Again, the United States has demonstrated that Canada's dairy TRQ allocation measures also breach Article 3.A.2.6(a) of the USMCA by requiring that an applicant must engage in relevant activity during every single month of a 12-month reference period, as well as during every single month of the 12-month quota year.[39] In the interest of time, we will not further discuss the interpretive issues related to Article 3.A.2.6(a) here.

C. Article 3.A.2.10 of the USMCA (New Importers)

66. The United States has also demonstrated that Canada's 12-month activity requirements breach Article 3.A.2.10 of the USMCA because they do not allow new importers to be eligible for a quota allocation and discriminate against new market entrants and new importers in quota allocation.[40] We addressed relevant interpretive considerations earlier, so we will not repeat those here.

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[39] *See* U.S. Initial Written Submission, section VII.C; U.S. Rebuttal Submission, section IV.B.

[40] *See* U.S. Initial Written Submission, section VII.D; U.S. Rebuttal Submission, section IV.C.

V. Element Four: Canada's Mechanism for the Return and Reallocation of Unused USMCA Dairy TRQ Allocations

A. Article 3.A.2.15 of the USMCA (Return and Reallocation)

67. The United States has demonstrated that Canada's dairy TRQ allocation measures breach Article 3.A.2.15 of the USMCA, which provides that, "[i]f a TRQ is administered by an allocation mechanism, then the administering Party shall ensure that there is a mechanism for the return and reallocation of unused allocations in a timely and transparent manner that provides the greatest possible opportunity for the TRQ to be filled."[41]

68. This morning, we would like to focus on our argument that Canada's return and reallocation mechanism for its USMCA dairy TRQs is not "timely" and it does not provide the "greatest possible opportunity for the TRQ to be filled."

69. Canada argues that "[w]hen interpreted correctly, a 'timely' return and reallocation mechanism must ... balance a return date that is sufficiently early to grant eligible applicants enough time to use returned quantities, while permitting initial allocation holders adequate time to determine import needs until the end of the quota year."[42] That is Canada's rationale for its proposed interpretation of "timely" in Article 3.A.2.15 of the USMCA.

70. Canada also explains, though, that "CETA Annex 2-B, Section B paragraph 22 stipulates that '[t]he return deadline will be set at a date that is early enough to give sufficient time for use of the returned quantities while being late enough to allow allocation holders to establish import needs until the end of the year, possibly near the middle of the quota year'."[43]

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[41] *See* U.S. Initial Written Submission, section VIII.B; U.S. Rebuttal Submission, section V.C.

[42] Canada's Initial Written Submission, para. 333.

[43] Canada's Initial Written Submission, para. 348.

71. So, Canada's rationale for the interpretation of "timely" in the USMCA closely tracks the language used in the CETA. Why, then, is the return date for Canada's USMCA dairy TRQs not near the middle of the quota year, consistent with Canada's rationale, which corresponds to the language of the CETA?

72. Canada argues that the terms of the CETA are different from the terms of the USMCA.[44] That is correct. The USMCA requires Canada to set the return date so that the return and reallocation mechanism is "timely" such that it provides the "greatest possible opportunity for the TRQs to be filled". Accordingly, if setting the return date a month earlier in CETA is good, then the return date for Canada's USMCA dairy TRQs must be as good or better to provide the "greatest" possible opportunity for the TRQs to be filled.

73. But there is actually a return and reallocation mechanism that is even better than that which Canada provides in the CETA. There is a mechanism that sets the return date at the middle of the quota year and, on its face, does more to incentivize filling the quota, thus providing a greater opportunity for the quota to be filled.

74. The return and reallocation mechanism for Canada's export threshold measures on skim milk powder ("SMP") and milk protein concentrate ("MPC") provides for an initial return date in the middle of the quota year, on the last day of the sixth month of the quota year. That is two months earlier than the return date for the USMCA dairy TRQs. Further, only if an exporter returns allocation by this early date will the allocation be considered used for the purposes of administering the under-utilization penalty. It is possible to return allocations of the export quota

[44] *See* Canada's Rebuttal Submission, para. 290.

for SMP and MPC during the seventh, eighth, and ninth months of the quota year, but if an exporter does so, its "allocation in the following year may be reduced by an amount equivalent to 50% of the quantities … returned."[45] Thus, there is a greater incentive to formulate plans earlier in the quota year for using allocations, or return the allocations to avoid the imposition of an under-utilization penalty in the next year, and such returned allocations can be reallocated earlier in the quota year, giving recipients more time to use them.

75. Canada does not explain why it has established such different return and reallocation mechanisms for its USMCA dairy import TRQs and its USMCA export measures on SMP and MPC.

76. Canada simply asserts that it "maintains its export threshold measures for SMP and MPC in a vastly different context and for a different object and purpose than its CUSMA dairy TRQs."[46] Canada explains that "the export threshold measures are put in place specifically to limit the export of SMP and MPC that would otherwise occur in absence of these measures", and "[t]his object and purpose is fundamentally different from the TRQs subject to this dispute, which is to provide greater access to imports of dairy products from the United States than was previously available."[47]

77. Taken at face value, Canada's explanations appear to suggest that Canada considers that its return and reallocation mechanism for its USMCA export measures on SMP and MPC provides less opportunity for the export thresholds to be filled than the mechanism for its

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[45] Notice to Exporters, Skim Milk Powder and Milk Protein Concentrate Export Thresholds – Serial No. 1055, dated May 1, 2021, section 4 (Exhibit USA-22).

[46] Canada's Rebuttal Submission, para. 292.

[47] Canada's Rebuttal Submission, para. 292.

USMCA dairy import TRQs provides for those import TRQs to be filled. But that is contrary to all logic and reason.

78. Beyond the U.S. arguments about the implications of the different designs and structures of Canada's two mechanisms for return and reallocation, there are also the incentives that the Canadian government logically and naturally would have in relation to export thresholds and import quotas.

79. As Canada itself explains of the export measures on SMP and MPC, "difficult negotiating dynamics" led to "Canada ultimately agree[ing] to maintain such unilateral, economically regressive and trade restrictive measures at the United States' insistence, precisely to discourage the Canadian export of these products globally and to benefit U.S. export interests."[48] So, Canada would have the Panel believe that, after begrudgingly agreeing to the export thresholds memorialized in the Agreement, on which the United States insisted, Canada has taken additional action that it is not obligated to take to further suppress its own producers' exports by establishing a return and reallocation mechanism that does not provide the greatest possible opportunity for the export thresholds on SMP and MPC to be filled.

80. And, despite the structural and design differences to which the United States has pointed, Canada, after agreeing to grant "unprecedented" market access, again at the insistence of the United States, has established a return and reallocation mechanism for its USMCA dairy import TRQs that does more to incentivize the filling of those import TRQs for U.S. dairy products than the mechanism Canada has in place for its own exports of Canadian dairy products.

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[48] Canada's Initial Written Submission, para. 352.

81. Canada's argument simply is not credible.

82. As the United States has shown, analysis of the design and structure of Canada's return and reallocation mechanism for its USMCA dairy TRQs, as compared to other options that Canada itself employs, together with the application of logic and reason, leads to the conclusion that Canada's dairy TRQ allocation measures are inconsistent with Article 3.A.2.15 of the USMCA.

B. Article 3.A.2.6 of the USMCA (Fully Utilize TRQ Quantities)

83. The United States has also demonstrated that Canada's dairy TRQ allocation measures are inconsistent with Article 3.A.2.6 of the USMCA, the chapeau of which provides that "[e]ach Party shall administer its TRQs in a manner that allows importers the opportunity to utilize TRQ quantities fully", and we have responded to Canada's counter-arguments.[49] Given the similarity of the arguments supporting the U.S. claims of breach under Articles 3.A.2.15 and 3.A.2.6, and in the interest of time, we will refrain from further discussion of our claim under Article 3.A.2.6 here.

VI. Conclusion

84. Dairy processors are an important political stakeholder group in Canada, and Canada has adopted dairy TRQ allocation measures that heavily favor Canadian dairy processors over other types of applicants in the allocation of Canada's USMCA dairy TRQs. Canada does not deny this. Rather, Canada has explained during the course of this dispute that, in Canada's view,

[49] *See* U.S. Initial Written Submission, section VIII.C; U.S. Rebuttal Submission, section V.D.

"[d]airy processors ... are in a better position to serve the market with TRQs";[50] "[w]hen processors import under the TRQ, predictability is enhanced";[51] and "[a]llocating TRQs to processors is necessary to facilitate predictability and stability".[52] Canada's viewpoint drives Canada's policy choices. Canada has chosen to favor processors in the allocation of Canada's USMCA dairy TRQs, but in a manner that breaches Canada's USMCA obligations. Canada has been doing that since entry into force of the Agreement, and it is long past time for it to stop.

85. That is why the United States respectfully requests that the Panel find that Canada is breaching its USMCA obligations. We urge the Panel to make findings with respect to each of the elements of Canada's dairy TRQ allocation measures that the United States has challenged and as many of the independent U.S. claims as possible. Such a robust set of findings would be of greatest assistance to the Parties in finally resolving this dispute.

86. Mr. Chairman, members of the Panel, this concludes our opening statement. We thank you for your attention and we look forward to responding to your questions.

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[50] Canada's Initial Written Submission, para. 31.

[51] Canada's Initial Written Submission, para. 33.

[52] Canada's Initial Written Submission, para. 36.