CANADA – DAIRY TRQ ALLOCATION MEASURES

(CDA-USA-2021-31-01)

REBUTTAL SUBMISSION OF THE UNITED STATES OF AMERICA

September 10, 2021

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TABLE OF ABBREVIATIONS

Abbreviation	Definition
Agreement or CUSMA or USMCA	*United States-Mexico-Canada Agreement*
CPTPP	*Comprehensive and Progressive Agreement for Trans-Pacific Partnership*
ICCC	International Cheese Council of Canada
Party	USMCA Party
TRQ	Tariff-rate quota
WTO	World Trade Organization

TABLE OF EXHIBITS

Exhibit No.	Description
U.S. Initial Written Submission	
USA-1	CUSMA: Milk TRQ – Serial No. 1015, dated June 15, 2020
USA-2	CUSMA: Milk TRQ – Serial No. 1049, dated May 1, 2021
USA-3	CUSMA: Cream TRQ – Serial No. 1016, dated June 15, 2020
USA-4	CUSMA: Cream TRQ – Serial No. 1042, dated May 1, 2021
USA-5	CUSMA: Skim Milk Powder TRQ – Serial No. 1017, dated June 15, 2020
USA-6	CUSMA: Skim Milk Powder TRQ – Serial No. 1053, dated May 1, 2021
USA-7	CUSMA: Butter and Cream Powder TRQ – Serial No. 1018, dated June 15, 2020
USA-8	CUSMA: Butter and Cream Powder TRQ – Serial No. 1040, dated May 1, 2021
USA-9	CUSMA: Industrial Cheeses TRQ – Serial No. 1019, dated June 15, 2020
USA-10	CUSMA: Industrial Cheeses TRQ – Serial No. 1031, dated October 1, 2020
USA-11	CUSMA: Cheeses of All Types TRQ – Serial No. 1020, dated June 15, 2020
USA-12	CUSMA: Milk Powders TRQ – Serial No. 1021, dated June 15, 2020
USA-13	CUSMA: Milk Powders TRQ – Serial No. 1051, dated May 1, 2021
USA-14	CUSMA: Concentrated or Condensed Milk TRQ – Serial No. 1022, dated June 15, 2020
USA-15	CUSMA: Yogurt and Buttermilk TRQ – Serial No. 1023, dated June 15, 2020
USA-16	CUSMA: Powdered Buttermilk TRQ – Serial No. 1024, dated June 15, 2020
USA-17	CUSMA: Whey Powder TRQ – Serial No. 1025, dated June 15, 2020
USA-18	CUSMA: Whey Powder TRQ – Serial No. 1045, dated May 1, 2021

Exhibit No.	Description
USA-19	CUSMA: Products Consisting of Natural Milk Constituents TRQ – Serial No. 1026, dated June 15, 2020
USA-20	CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1027, dated June 15, 2020
USA-21	CUSMA: Other Dairy TRQ – Serial No. 1028, dated June 15, 2020
USA-22	General Information on the Administration of TRQs for Supply-Managed Products
USA-23	Export and Import Permits Act (R.S.C., 1985, c. E-19)
USA-24	Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, vol. II
USA-25	Definition of "limit" from Oxford English Dictionary Online
USA-26	Definition of "access" from Oxford English Dictionary Online
USA-27	Definition of "allocation" from Oxford English Dictionary Online
USA-28	Definition of "processor" from Oxford English Dictionary Online
USA-29	Definition of "fair" from Oxford English Dictionary Online
USA-30	Definition of "equitable" from Oxford English Dictionary Online
USA-31	USTR July 2, 2020 Letter to Deputy Prime Minister Freeland
USA-32	Definition of "maximum" from Oxford English Dictionary Online
USA-33	Definition of "extent" from Oxford English Dictionary Online
USA-34	Definition of "possible" from Oxford English Dictionary Online
U.S. Rebuttal Submission	
USA-35	Utilization Data of Canada's Dairy TRQs
USA-36	Compilation of Public Statements by Canadian Processors on their Intended Use of the TRQs

Exhibit No.	Description
USA-37	USMCA Drafting Convention
USA-38	Definition of "eligibility" from Oxford English Dictionary Online

I. Introduction

1. Despite commitments Canada made when the Parties signed the *United States-Canada-Mexico Agreement* (USMCA or Agreement), on day one of entry into force of the Agreement, Canada began maintaining measures related to the administration of its tariff-rate quotas (TRQs) that are inconsistent with those commitments. Canada's arguments in its initial written submission cast the U.S. claims as an attempt by the United States to obtain what it was unable to obtain during the negotiation. That contention is baseless. The ordinary meaning of the terms of the provisions at issue, read in their context and in light of the Agreement's object and purpose, simply do not support Canada's position. In addition to being inconsistent with Canada's USMCA commitments, Canada's dairy TRQ measures nullify the additional market access to which the Parties agreed, and harm U.S. suppliers that seek to sell products directly to the Canadian retail market.

2. The U.S. initial written submission established that Canada's administration of its dairy TRQs breaches several provisions of the USMCA. The United States will not repeat the arguments made in that initial submission, but will instead discuss Canada's responses to the U.S. claims. The United States explains in this rebuttal submission why Canada's assertions only underscore Canada's failure to comply with its USMCA obligations.

3. The United States has structured this submission as follows.

4. **Section II** addresses Canada's September 3, 2021 preliminary ruling request and explains why it is not necessary for the Panel to make the preliminary ruling that Canada requests. Put simply, there is no dispute between the Parties on the issue of what claims the United States is pursuing. The United States confirms that it has not made and is not pursuing a claim under the first clause of Article 3.A.2.11(c) of the USMCA.

5. **Section III** addresses the policy arguments that Canada has put forward in an attempt to explain the U.S. negotiating intent as it pertains to the obligations in the Agriculture Chapter of the USMCA. Canada's arguments are based on factual errors or are otherwise irrelevant to the issues in this dispute.

6. **Section IV** discusses Canada's failure to rebut the U.S. claims that Canada's administration of its TRQs for dairy products is inconsistent with the processor clause of Article 3.A.2.11(b) of the USMCA. Canada's flawed reasoning leads to an incorrect interpretation of the processor clause. However, even if Canada's proposed interpretation were accepted, and the Panel agrees that an "allocation" is a potential share of the quota that may be granted to an individual applicant, that necessarily leads to the conclusion that the "pools" Canada creates are groups of shares of quota that may be granted to individual applicants. In other words, the pools are filled with allocations, by Canada's own definition of the term "allocation". And access to the allocations in the pool is predetermined by Canada's notices to importers, in that only certain importers have access to a share of the quota in a particular pool. That is, Canada "limit[s] access" to each individual allocation in the pool "to processors", as only processors are allowed to apply for and receive an individual allocation from the pool. Therefore, even if the Panel were

to accept Canada's proposed reading of the terms in the processor clause, the result remains the same: Canada is breaching the processor clause of Article 3.A.2.11(b) of the USMCA, because with respect to each allocation in the pool reserved for processors, Canada "limit[s] access to an allocation to processors".

7. **Section V** refutes Canada's arguments that Canada's administration of its dairy TRQs is consistent with Article 3.A.2.11(c) of the USMCA. All of Canada's notices to importers reserve a substantial portion of quota exclusively for processors prior to applying the procedure for dividing up the quota into portions assigned to particular TRQ applicants. This is inconsistent with the requirement in Article 3.A.2.11(c) of the USMCA that allocations are to be made "to the maximum extent possible, in the quantities that the TRQ applicant requests". Properly interpreted, Article 3.A.2.11(c) requires Canada to make every attempt to give to each applicant the quota volume that is requested, which it fails to do for non-processors by limiting access to an allocation to processors.

8. **Section VI** demonstrates that Canada's arguments defending the consistency of its dairy TRQ administration with Articles 3.A.2.4(b) and 3.A.2.11(e) of the USMCA must fail. These provisions require Canada to administer its TRQs in a "fair" and "equitable" manner that would result in eligible applicants receiving the amount of the TRQ that they request, or a portion pursuant to a fair and equitable procedure or method. Through the processor restrictions, Canada prevents access to the reserved portions by other, non-processor importer groups, such as retailers. Such set-asides conflict with Canada's obligation to provide "fair" and "equitable" treatment in the administration of its TRQs because they favor processors and disadvantage other potential users of the TRQs

9. **Section VII** refutes Canada's counter-arguments that setting aside portions of the quota to processors is not an "additional condition, limit, or eligibility requirement on the utilization of a TRQ". Canada's argument that the conditions in Article 3.A.2.6(a) of the USMCA relate only to how a TRQ may be used once shares of the TRQ have been granted is without merit. A condition on applying for and being granted an allocation of TRQ quota volume necessarily is a condition on the utilization of the TRQ. Prior to shares of the TRQ being granted, Canada sets aside a pool of shares of quota that may be granted to individual applicants. Only a processor is eligible to receive an allocation from the reserved pool and therefore eligible to utilize the TRQ. In administering its TRQ system in this manner, Canada excludes other applicants from having access to the reserved portions of the quota – and therefore imposes an impermissible condition, limit, or eligibility requirement on the utilization of a dairy TRQ.

II. Canada's Preliminary Ruling Request Does Not Require Action by the Panel

10. On September 3, 2021, Canada filed a request for preliminary ruling on whether the Panel's terms of reference include a claim regarding the consistency of Canada's dairy TRQ

allocation measures with the first clause of Article 3.A.2.11(c) of the USMCA.[1] Canada suggests that the United States may be making a claim under the first clause of Article 3.A.2.11(c) even though no such claim is identified in the U.S. request for the establishment of a panel.[2]

11. The Panel does not need to make a preliminary ruling, as there is no dispute between the parties on the issue of what claims the United States is pursuing. The United States confirms that it has not made and is not pursuing a claim under the first clause of Article 3.A.2.11(c) of the USMCA.

12. The U.S. initial written submission observes that reserving up to 90 percent of the quota exclusively for processors and so-called "further processors" "may not allow for quota volume to be granted in quantities that are commercially viable" based on the remaining quantities available to distributors.[3] This "passing"[4] observation does not amount to a claim under the first clause of Article 3.A.2.11(c). Indeed, when summarizing the claims that it is making in the conclusion of the U.S. initial written submission, the United States did not include a request for a finding by the Panel on the first clause of Article 3.A.2.11(c).[5] Rather, the U.S. claim under Article 3.A.2.11(c) is limited to the second clause of that provision. Specifically, the United States claims that Canada's administration of its dairy TRQs is inconsistent with Article 3.A.2.11(c) of the USMCA because it prevents Canada from allocating its TRQs, to the maximum extent possible, in the quantities that the TRQ applicant requests.

13. Accordingly, it is not necessary for the Panel to make the preliminary ruling that Canada has requested, and declining to do so would "sav[e] time and resources", which would be to benefit of the Panel and the Parties.[6]

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[1] Request for a Preliminary Ruling by Canada (September 3, 2021) ("Canada's Preliminary Ruling Request"), paras. 4-5.

[2] Canada's Preliminary Ruling Request, paras. 25-27.

[3] Initial Written Submission of the United States of America (July 12, 2021) ("U.S. IWS"), para. 57.

[4] Canada's Preliminary Ruling Request, para. 1.

[5] U.S. IWS, para. 74.

[6] Canada's Preliminary Ruling Request, para. 18.

III. Canada's Reasoning for the Manner in which it Administers its USMCA TRQs is Illogical, Not Relevant to its Defense of the U.S. Claims, and Misrepresents the Timeline of Events with Respect to the USMCA Negotiations and Implementation

A. The Factual Background Presented by Canada Is Not Relevant to the Application of Customary Rules of Interpretation

14. Canada begins its initial written submission by arguing in support of the necessity of a supply management system to ensure predictability of supply for processors.[7] In particular, Canada asserts that the underlying economic characteristics of milk production are difficult for producers to manage independently, and that the market, if left free to operate on its own, would result in unpredictable raw milk supply for processing activities.[8] Whether or not that truly is the case, Canada's discussion of its supply management system simply is not relevant to the questions of legal interpretation that are before the Panel.

15. As explained in the U.S. initial written submission, Article 31 of the *Vienna Convention on the Law of Treaties* (Vienna Convention) provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[9] Notably, Article 31 of the Vienna Convention does not call upon a treaty interpreter to take into account a party's reasons for its actions when interpreting a treaty provision. Indeed, the reasons for an action cannot change the ordinary meaning of the terms read in their context, nor can they alter the object and purpose of the treaty. Properly interpreted according to customary rules of interpretation of public international law, the terms of the USMCA prohibit Canada from limiting access to a quota allocation to processors, including further processors.[10]

B. Canada Ignores Relevant Data that Demonstrate that the Concern about Underutilization of the Dairy TRQs is Well Founded

16. In an attempt to demonstrate the success of its TRQ administration, Canada provides examples of two dairy categories that have relatively high fill rates.[11] However, Canada does not discuss several of the other dairy categories that have extremely low fill rates.[12]

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[7] Initial Written Submission of Canada (August 20, 2021) ("Canada's IWS"), paras. 16-44, 63-64.

[8] Canada's IWS, para. 17.

[9] U.S. IWS, para. 25.

[10] U.S. IWS, Section V.

[11] Canada's IWS, paras. 82-83.

[12] Utilization Data of Canada's Dairy TRQs (Exhibit USA-35).

17. Canada's reference to utilization data also fails to provide relevant context. Canada's TRQs are allocated on either a calendar-year basis or a dairy-year basis.[13] Canada publishes utilization rates online for all of its USMCA TRQs. Utilization rates in these data represent permits for import quantities that have been applied for and granted. Since entry into force of the USMCA, only one complete dairy year has passed, and no complete (*i.e.*, 12 months) calendar year has passed. Calendar year 1 was from July 1, 2020 to December 31, 2020 (a period of just six months), and the TRQ quantities, and therefore the fill rates as well, were prorated. Canada's examples, which are based on very little data, do not prove that significant underutilization of the quotas is a "mere hypothetical",[14] and do not dispel the U.S. arguments. To the contrary, as a result of the way Canada administers its dairy TRQs, the data as a whole demonstrate that many of Canada's dairy TRQs are far from being fully utilized.[15]

18. In calendar year 1,[16] the utilization rates for TRQs for concentrated or condensed milk, yogurt and buttermilk, and powdered buttermilk were 1.91 percent, 34 percent, and 0 percent, respectively.[17] In dairy year 2,[18] the utilization rates for TRQs for skim milk powder and whey powder were 19 percent and 46 percent, respectively.[19] Thus far in calendar year 2,[20] the utilization rates for TRQs for concentrated or condensed milk, yogurt and buttermilk, powdered buttermilk, products consisting of NMC, ice cream and ice cream mixes, other dairy, industrial cheese, and cheeses of all types are 3 percent, 12 percent, 2 percent, 22 percent, 26 percent, 21 percent, 15 percent, and 60 percent, respectively.[21]

19. These data demonstrate that the concern about underutilization of Canada's dairy TRQs is well founded.

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[13] Section A of Appendix 2 of Canada's Tariff Schedule. A dairy year is defined as August 1 to July 31.

[14] Canada's IWS, para. 83.

[15] *See*, *e.g.*, Submission of the International Cheese Council of Canada (August 27, 2021 ("ICCC Written Submission"), p. 5. The ICCC observes that a number of its members have been forced to abandon efforts to obtain a portion of the dairy TRQs allocated to distributors as a result of not being able to obtain commercially viable quantities, potentially leading to that allocation being unused.

[16] Calendar Year 1 was July 1, 2020 through December 31, 2020.

[17] Utilization Data of Canada's Dairy TRQs (Exhibit USA-35).

[18] Dairy Year 2 was August 1, 2020 through July 31, 2021.

[19] Utilization Data of Canada's Dairy TRQs (Exhibit USA-35).

[20] Calendar Year 2 is January 1, 2021 through December 31, 2021.

[21] Utilization Data of Canada's Dairy TRQs (Exhibit USA-35).

C. Canada's Argument that the United States Should Have Been Aware of Canada's Practice of Reserving Pools of In-Quota Quantities for Processors Is Without Merit and Based on a Misrepresentation of the Facts

20. Canada argues that the United States should have been aware of Canada's practice, both under USMCA and other free trade agreements, of setting aside and reserving pools of quota for processors.[22] Canada's assertions concerning what the United States should have been aware of are of no relevance to the Panel's interpretive analysis, and Canada's assertions are also contrary to the facts.

21. Article 31.13.4 of the USMCA establishes that a dispute settlement panel shall interpret the USMCA "in accordance with customary rules of interpretation of public international law, as reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*".[23] Article 31 of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." As such, Canada's view about what the United States "should have been aware of" is not relevant to the Panel's interpretation of the USMCA provisions at issue in this dispute.

22. Canada's arguments also are not supported by the facts. Canada argues that because the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP) entered into force prior to entry into force of the USMCA, given the similarities between the obligations regarding TRQ administration in the CPTPP and the USMCA, the United States should have been aware of Canada's practice of reserving pools of the quota for processors.[24] Canada's position, though, is contrary to the timeline of events leading up to entry into force of the USMCA.

23. The CPTPP, to which the United States is not a party, was signed on March 8, 2018, and did not enter into force until December 30, 2018.[25] The United States, Mexico, and Canada concluded negotiations of the USMCA on September 30, 2018. Canada did not issue publicly its policies for the allocation of its CPTPP TRQs until November 2018, after USMCA negotiations concluded. While the USMCA was not signed until November 30, 2018, following the conclusion of a legal review by the Parties, substantive issues were not within the scope of the legal review, and therefore the United States did not have an opportunity to try to rectify any supposed misunderstanding.

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[22] Canada's IWS, paras. 47-58.

[23] USMCA, Art. 31.13.4.

[24] Canada's IWS, para. 49.

[25] *See* "About the Comprehensive and Progressive Agreement for Trans-Pacific Partnership", accessed 18 August 2021, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/backgrounder-document_information.aspx?lang=eng (Exhibit CDA-33).

24. Additionally, further renegotiation of the USMCA prior to signing the amended USMCA on December 10, 2019, was limited in scope. Changes to the Agriculture Chapter were not tabled. The United States raised its concerns with Canada once Canada issued its notices to importers for the USMCA dairy TRQs, just a few weeks prior to entry into force of the Agreement, and after the President of the United States had certified to the U.S. Congress, pursuant to U.S. domestic processes, that Canada had taken steps necessary for entry into force of the USMCA.

25. An accurate framing of the timeline therefore demonstrates that the United States did not, in fact, agree to the text in Article 3.A.2.11(b) of the USMCA with knowledge of Canada's implementation of the text in CPTPP. The United States had no part in the implementation of the CPTPP.

26. Canada also argues that the United States should have been aware of Canada's intentions as to how it would allocate its TRQs based on the USMCA negotiations. Canada argues that during those negotiations, Canada made clear that "it could only agree to grant significant TRQ quantities provided that Canada could mitigate the impact of increased imports and maintain predictability within its supply management system through the way in which it administers the TRQs."[26] However, Canada offers no support for the assertion that it purportedly made its intent clear in negotiating these provisions.

27. Furthermore, Canada's arguments appear to indicate that underlying the U.S. legal challenges is an attack on the use of a supply management system to administer a party's TRQs. However, the United States has expressly stated in this dispute that it is not challenging Canada's right to maintain its supply management system.[27] Article 3.A.2 of the USMCA (entitled "Tariff-Rate Quota Administration") governs the administration of a Party's TRQs, including if a TRQ is administered through an allocation mechanism.[28] An allocation mechanism means "any system in which access to the tariff-rate quota is granted on a basis other than first-come first-served".[29] Article 3.A.2 therefore provides Canada with the discretion to administer the dairy TRQs through a system other than one in which access is granted on a first-come first-served basis.[30]

28. However, Canada's discretion in administering its TRQs is not unfettered. As explained in the U.S. initial written submission, the manner in which Canada administers its TRQs for dairy products is inconsistent with the terms of the Agreement, primarily because it "limits

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[26] Canada's IWS, para. 52.

[27] U.S. IWS, para. 1.

[28] USMCA, Art. 3.A.2.1.

[29] USMCA, Art. 3.A.2.1.

[30] USMCA, Art. 3.A.2.

access to an allocation to processors".[31] And as Canada states plainly in its initial written submission, the manner in which Canada administers its supply management system – by establishing "pools" – "reflects Canada's intent to mitigate the significant market access that it conceded in USMCA."[32] Such "mitigat[ion]" is, in reality, a deviation from the terms of the Agreement, as the United States has established.

IV. Canada Fails to Rebut the U.S. Claims Under Article 3.A.2.11(b) of the USMCA

A. Canada's Flawed Reasoning Leads to an Incorrect Interpretation of the Processor Clause of Article 3.A.2.11(b) of the USMCA

29. Canada argues in its initial written submission that the obligation not to "limit access to an allocation to processors" in Article 3.A.2.11(b) of the USMCA prohibits a Party from restricting "exclusively to processors the opportunity to receive *a share of an in-quota quantity that may be granted to an individual applicant* ('an allocation')."[33] In many respects, this proposed interpretation does not differ from the interpretation proposed by the United States. In the U.S. initial written submission, the United States applied customary rules of interpretation and concluded that the processor clause "means to *not* 'confine' or 'restrict' to *someone* – 'processors' – 'the right or opportunity to benefit from or use' *something* – 'a portion, a share; a quota'."[34] Canada, however, reasons incorrectly from its proposed interpretation, and Canada's flawed reasoning leads to an erroneous conclusion concerning the meaning of the processor clause.

30. Canada argues that the United States errs in contending that a pool reserved for processors is, in and of itself, an "allocation" within the meaning of the processor clause of Article 3.A.2.11(b).[35] In Canada's view, the United States reads out of the definition of the terms "allocation" and "allocation mechanism" the fact that an allocation is a specific share that may be granted to a particular recipient.[36] Canada argues that "an allocation" must mean a share of the in-quota quantity that may be granted to individual applicants.[37] Canada's position is based on its observation that the word "portion", which the United States uses in discussing the meaning of the term "allocation", only appears once in the Agriculture Chapter, specifically, in the producer clause of Article 3.A.2.11(b). Canada contends that, had the Parties wanted to

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[31] USMCA, Art. 3.A.2.11(b). *See*, *e.g.*, U.S. IWS, paras. 27-51.

[32] Canada's IWS, para. 63 ("Establishing pools reflects Canada's intent to mitigate the significant market access that it conceded in USMCA.").

[33] Canada's IWS, para. 107.

[34] U.S. IWS, para. 50 (underline added).

[35] Canada's IWS, para. 108.

[36] Canada's IWS, paras. 108-109, 121.

[37] *See* Canada's IWS, para. 124.

prohibit limiting access to a portion of the TRQ to processors, they would have used the same language that is used in the producer clause. Canada sees no reason why, given the presence of appropriate language in producer clause, the drafters would have resorted to completely different phrasing in the processor clause.[38]

31. Canada's argument concerning the word "portion" is beside the point.

32. The United States does not object to Canada's preference for using the word "share" as opposed to the word "portion" when discussing the definition of "an allocation". As the United States has observed, the word "allocation" is defined in the dictionary as, *inter alia*, "[t]hat which is allocated to a particular person, purpose, etc.; a portion, a share; a quota."[39] Both the word "portion" and the word "share" are used in the dictionary definition of the term "allocation", and the United States uses both words interchangeably throughout the U.S. initial written submission.[40] Importantly, the words "portion" and "share" are not Agreement terms that are present in the processor clause, which is the particular subject of the interpretive analysis at issue. The aim is not to ascertain the meaning of the word "portion" or the word "share", but the term "allocation" as that term is used in the processor clause. And whether "an allocation" is referred to as a "share" or a "portion" does not answer the interpretive questions concerning the obligation in Article 3.A.2.11(b). In other words, the ordinary meaning of the term "allocation", on which Canada and the United States actually appear to agree, does not resolve the meaning of the terms used in the processor clause. Proper contextual analysis and reasoning are needed.

33. Canada further argues that the definition of "an allocation" means that the relevant "share" in question is one "that may be granted to an individual applicant" and that, contrary to the U.S. view, "an allocation" does not encompass the pool that is set aside for a particular importer group. The United States maintains that the pools Canada sets aside are themselves allocations within the meaning of the processor clause of Article 3.A.2.11(b), for the reasons given in the U.S. initial written submission.[41]

34. And the United States further observes that Canada's proposed interpretation contradicts its own notices to importers, which state, "[80 percent] [of the quota] is allocated to processors".[42] Thus, in Canada's own words, the "pool" is itself an "allocation". Moreover,

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[38] Canada's IWS, para. 123.

[39] Definition of "allocation" from Oxford English Dictionary Online, entry 3.b (Exhibit USA-27) (underline added).

[40] *See*, *e.g.*, U.S. IWS, paras. 3, 4, 9-12, 22, 29, 34-39, 41-43, 48-52, 58, 60-61, 64-65, 67, 69, and 73.

[41] U.S. IWS, paras. 39-41.

[42] CUSMA: Milk TRQ – Serial No. 1015, dated June 15, 2020 (Exhibit USA-1) (85% is allocated to processors); CUSMA: Milk TRQ – Serial No. 1049, dated May 1, 2021 (Exhibit USA-2) (85% is allocated to processors); CUSMA: Cream TRQ – Serial No. 1016, dated June 15, 2020 (Exhibit USA-3) (85% is allocated to processors); CUSMA: Cream TRQ – Serial No. 1042, dated May 1, 2021 (Exhibit USA-4) (85% is allocated to processors); CUSMA: Skim Milk Powder TRQ – Serial No. 1017, dated June 15, 2020 (Exhibit USA-5) (80% is allocated to processors and 10% is allocated to so-called "further processors"); CUSMA: Skim Milk Powder TRQ – Serial No.

Canada's interpretation of "an allocation" is contradicted by its own laws. The Export and Import Permits Act ("EIPA"), the law pursuant to which Canada's notices to importers are promulgated, makes reference to "import access quantities" in the context of describing how the Minister allocates the quota to different importer groups.[43]

35. However, even if Canada's proposed interpretation were accepted, and the Panel agrees that an "allocation" is a potential share of the quota that may be granted to an individual applicant, that necessarily leads to the conclusion that the "pools" Canada creates are groups of shares of quota that may be granted to individual applicants. In other words, the pools are filled with allocations, by Canada's own definition of the term "allocation". And access to the allocations in the pool is predetermined by Canada's notices to importers, in that only certain importers have access to a share of the quota in a particular pool. That is, Canada "limit[s] access" to each individual allocation in the pool "to processors", as only processors are allowed to apply for and receive an individual allocation from the pool. Therefore, even if the Panel were to accept Canada's proposed reading of the terms in the processor clause, the result remains the same: Canada is breaching the processor clause of Article 3.A.2.11(b) of the USMCA, because

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1053, dated May 1, 2021 (Exhibit USA-6) (80% is allocated to processors and 10% is allocated to so-called "further processors"); CUSMA: Butter and Cream Powder TRQ – Serial No. 1018, dated June 15, 2020 (Exhibit USA-7) (80% is allocated to processors and 10% is allocated to so-called "further processors"); CUSMA: Butter and Cream Powder TRQ – Serial No. 1040, dated May 1, 2021 (Exhibit USA-8) (80% is allocated to processors and 10% is allocated to so-called "further processors"); CUSMA: Industrial Cheeses TRQ – Serial No. 1019, dated June 15, 2020 (Exhibit USA-9) (80% is allocated to processors and 20% is allocated to so-called "further processors"); CUSMA: Industrial Cheeses TRQ – Serial No. 1031, dated October 1, 2020 (Exhibit USA-10) (80% is allocated to processors and 20% is allocated to so-called "further processors"); CUSMA: Cheeses of All Types TRQ – Serial No. 1020, dated June 15, 2020 (Exhibit USA-11) (85% is allocated to processors); CUSMA: Milk Powders TRQ – Serial No. 1021, dated June 15, 2020 (Exhibit USA-12) (80% is allocated to processors and 10% is allocated to so-called "further processors"); CUSMA: Milk Powders TRQ – Serial No. 1051, dated May 1, 2021 (Exhibit USA-13) (80% is allocated to processors and 10% is allocated to so-called "further processors"); CUSMA: Concentrated or Condensed Milk TRQ – Serial No. 1022, dated June 15, 2020 (Exhibit USA-14) (85% is allocated to processors); CUSMA: Yogurt and Buttermilk TRQ – Serial No. 1023, dated June 15, 2020 (Exhibit USA-15) (80% is allocated to processors and 10% is allocated to so-called "further processors"); CUSMA: Powdered Buttermilk TRQ – Serial No. 1024, dated June 15, 2020 (Exhibit USA-16) (80% is allocated to processors and 10% is allocated to so-called "further processors"); CUSMA: Whey Powder TRQ – Serial No. 1025, dated June 15, 2020 (Exhibit USA-17) (80% is allocated to processors and 10% is allocated to so-called "further processors"); CUSMA: Whey Powder TRQ – Serial No. 1045, dated May 1, 2021 (Exhibit USA-18) (80% is allocated to processors and 10% is allocated to so-called "further processors"); CUSMA: Products Consisting of Natural Milk Constituents TRQ – Serial No. 1026, dated June 15, 2020 (Exhibit USA-19) (80% is allocated to processors and 10% is allocated to so-called "further processors"); CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1027, dated June 15, 2020 (Exhibit USA-20) (80% is allocated to processors and 10% is allocated to so-called "further processors"); CUSMA: Other Dairy TRQ – Serial No. 1028, dated June 15, 2020 (Exhibit USA-21) (80% is allocated to processors and 10% is allocated to so-called "further processors") (underline added).

[43] Export and Import Permits Act (R.S.C., 1985, c. E-19), https://laws-lois.justice.gc.ca/eng/acts/E-19/page-4.html#h-203129, p. 19 (Exhibit USA-23) ("6.2 (1) …the Minister may determine import access quantities, or the basis for calculating them, for the purposes of subsection (2) and section 8.3 of this Act…" (underline added)).

with respect to each allocation in the pool reserved for processors, Canada "limit[s] access to an allocation to processors".[44]

36. Canada also relies on the definition of the determiner "an" to argue that the phrase "an allocation" must refer to a single, but no specifically identified thing of a class. This, Canada contends, is distinguished from the word "any", which is used in the producer clause of Article 3.A.2.11(b) of the USMCA.[45] Canada objects to the U.S. contention that the processor clause means a Party may not limit access to even a single share of the quota to processors. Canada asserts that, when talking about every member of a class, the drafters used the term "any".[46] Canada's arguments are unavailing.

37. The dictionary definitions of the word "an" to which Canada refers use the word "any" to define the word "an". The Oxford English Dictionary defines the word "an" as, *inter alia*, "one, some, any".[47] The Cambridge Dictionary defines "an" as, *inter alia*, "any or every thing or person of the type you are referring to".[48] Canada acknowledges that, "[b]ased on these dictionary definitions, the word 'an' can mean a *single* but not specifically identified thing of a class, or *any* in the sense of every thing of the type referred to in a given sentence."[49] The ordinary meaning of the words indicates that, in certain situations, the words may be substitutable.

38. Canada contends, though, that in the processor clause the words "an" and "any" are not substitutable, and the instance of "an" in the processor clause cannot mean that a Party is prohibited "from limiting access to even a single 'allocation' (i.e., an allocation to an individual applicant) of a TRQ to processors".[50] Rather, Canada argues that "[t]he obligation is that access to *an* allocation must not be limited to processors. If it is at all possible for a non-processor to receive 'an allocation', then the U.S. arguments must fail."[51] The stark implication of Canada's view is that if there were 1,000 allocations, then Canada could, from the outset, reserve 999 of them for processors, leaving only one allocation available for a non-processor. Canada reaches this result by looking to the producer clause as context. But Canada fails to take account of the domestic production clause of Article 3.A.2.11(b).

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[44] USMCA, Art. 3.A.2.11(b).

[45] Canada's IWS, paras. 114-117.

[46] Canada's IWS, paras. 125-128.

[47] Definition of "an" from Oxford English Dictionary Online (Exhibit CDA-48) (underline added).

[48] Definition of "an" from Cambridge Dictionary Online (Exhibit CDA-49).

[49] Canada's IWS, para. 116 (italics in original).

[50] Canada's IWS, para. 132.

[51] Canada's IWS, para. 133 (italics in original; underline added).

39. The domestic production clause, like the processor clause, uses the word "an", and it provides that:

> A Party administering an allocated TRQ shall ensure that: … (b) unless otherwise agreed by the Parties, it does not allocate any portion of the quota to a producer group, condition access to an allocation on the purchase of domestic production, or limit access to an allocation to processors [underline added] . . . .

The "condition access to an allocation" phrasing in the domestic production clause is nearly identical to the "limit access to an allocation" phrasing in the processor clause. By Canada's reading, then, if there were 1,000 allocations, Canada could require the purchase of domestic production as a condition for accessing (*i.e.*, being granted) 999 of them, as long as access to one allocation was not so conditioned. If that were the case, the prohibition of the domestic purchase condition would really be no prohibition at all. Such an interpretation risks reducing the terms of the domestic purchase clause – and the processor clause – to inutility, contrary to customary rules of interpretation.[52] The term "an" in the domestic production clause is far more relevant context for understanding the meaning of the term "an" in the processor clause than is the term "any" in the producer clause.

40. To confirm the meaning of the term "an" in the processor clause, or if the Panel finds that the application of Article 31 of the Vienna Convention leaves the meaning of the term "an" ambiguous or obscure, the Panel may have recourse to supplementary means of interpretation, including the preparatory work of the USMCA.[53] During the USMCA negotiations, Canada, the United States, and Mexico agreed on and utilized a USMCA Drafting Convention.[54] The Drafting Convention confirms that the determiner "a" (or "an") was to be used "to refer to one or more of something", while the term "any" was to be used "to refer to an item where there is doubt that there may be any".[55] Moreover, the Drafting Convention indicates a preference among the Parties to use the singular over the plural form of a word, noting that the singular includes the plural.[56] The plural may be used only when the singular is excluded.[57] The Drafting Convention provided drafters examples of what to do and what not to do, such as the following:

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[52] WTO adjudicators have often noted commentary of the International Law Commission that interpretation should give meaning and effect to the terms employed by the parties, and ought not to reduce phrases or clauses to inutility. *See, e.g., United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, at 23 (adopted 20 May 1996) (US – Gasoline (AB).

[53] *See* Vienna Convention, Art. 32.

[54] USMCA Drafting Convention (Exhibit USA-37).

[55] USMCA Drafting Convention (Exhibit USA-37), p. 14.

[56] USMCA Drafting Convention (Exhibit USA-37), p. 14.

[57] USMCA Drafting Convention (Exhibit USA-37), p. 14.

✓ "Each Party shall ensure that a person of a Party…" ✓ "A Party shall notify any objections" (because there may be none)	X "Each Party shall ensure that any persons of a Party…" (because there almost certainly will be persons of a Party"

Applying the rules from the USMCA Drafting Convention, drafters would not have used the word "any" in the processor clause, "because there almost certainly will be" allocations. The Drafting Convention confirms that the correct understanding is that the determiners "an" and "any" are interchangeable in the processor clause. Either word could have been used to achieve the same meaning, namely, that a Party administering its TRQs shall not limit access to a single share or multiple shares of the TRQ to processors.

41. The example Canada presents in its initial written submission of gate-keepers and fishing permits begs the question, and does not contribute to a better understanding of the grammatical construction of the processor clause.[58] It is far simpler and more illuminating to just consider the terms actually used in the processor clause. Per the processor clause, Canada must not "limit access to an allocation to processors". Canada's view is that this means Canada must not restrict "exclusively to processors the opportunity to receive *a share of an in-quota quantity that may be granted to an individual applicant* ('an allocation')."[59] If there is a pool of multiple allocations and only processors may apply for and receive the allocations in the pool, and we refer to one of the allocations that is in the processor pool, it is true for that allocation (and all the others) that Canada has "limit[ed] access to an allocation" (that particular allocation) to processors. Only processors may apply for and be granted (*i.e.*, "access") that allocation. Canada has no answer to this, and it is a plain breach of the terms of the processor clause of Article 3.A.2.11(b) of the USMCA.

42. Finally, Canada argues that the United States construes the processor clause as a non-discrimination obligation, but Canada contends that the processor clause should have been phrased like Article 3.A.2.10 of the USMCA if the Parties had intended such an obligation.[60] The United States does not argue that the obligation in the processor clause is akin to more general non-discrimination provisions in the Agreement.[61] Nevertheless, a proper interpretation of Article 3.A.2.11(b) makes clear that, read together with the obligations in Articles 3.A.2.11(e) and 3.A.2.4(b), the processor clause contains a prohibition on a particular type of discrimination

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[58] *See* Canada's IWS, paras. 130-131.

[59] Canada's IWS, para. 107.

[60] Canada's IWS, para. 135.

[61] *See, e.g.*, USMCA, Art. 2.3 ("Each Party shall accord national treatment to the goods of another Party in accordance with Article III of the GATT 1994, including its interpretative notes, and to this end, Article III of the GATT 1994 and its interpretative notes are incorporated into and made part of this Agreement, *mutatis mutandis*.").

in favor of processors when it comes to the administration of Canada's dairy TRQs, *i.e.*, exclusive access to an allocation for processors. In contrast, while Canada lists the same overarching eligibility requirements for processors and non-processors, non-processors are not eligible to apply for any single allocation from the pool of allocations reserved for processors. Canada's favorable treatment of processors to the detriment of non-processors as it relates to Canada's administration of its TRQs therefore impermissibly discriminates against non-processors that otherwise would seek access to additional shares of quota volume. That is the clear implication of the terms of the processor clause and of Canada's measures. But it is not necessary for the processor clause to be interpreted as or understood to be a general non-discrimination obligation to establish, as the United States has done, that Canada has breached the terms of the processor clause of Article 3.A.2.11(b) of the USMCA.

B. Canada Misunderstands the Relationship Between the U.S. Claims Under Article 3.A.2.11(b) and Articles 3.A.2.11(e) and 3.A.2.4(b)

43. Canada contends that by identifying how other articles in the Agriculture Chapter provide context for the interpretation of the "processor clause" obligation, the United States attempts to impute notions of substantive "fairness" and "equity" into an analysis of the ordinary meaning of the term "allocation". Canada notes that Article 3.A.2.11(e) provides simply that if requested TRQ quantities exceed the quota, allocation to eligible applicants shall be conducted by "equitable and transparent methods". As the Canadian TRQ reservations for processors do not relate to a contingency where TRQ quantities exceed the available quota, Canada argues that Article 3.A.2.11(e) has no bearing on the issue at hand.[62] Canada's arguments lack merit.

44. Article 3.A.2.11(e) requires that a Party conduct the administration of its TRQs by "equitable" methods.[63] In this context, the term "equitable" is used to mean that the methods for allocation to eligible applicants must be "fair, just, reasonable". Given that the definition for the word "equitable" contains the word "fair", it follows that the dictionary definition of "fair" may be understood to be part of the definition of "equitable". The word "fair" is defined as "[o]f conduct, actions, methods, arguments, etc.: free from bias, fraud, or injustice; equitable; legitimate, valid, sound … [o]f conditions, circumstances, etc.: providing an equal chance of success to all; not unduly favourable or adverse to anyone".[64] Accordingly, Article 3.A.2.11(e) requires that the methods for administering a Party's TRQs must be "free from bias", "provide an equal chance of success to all", and not be "unduly favourable or adverse to anyone".[65]

45. Article 3.A.2.4(b) uses both the terms "fair" and "equitable". As explained in the U.S. initial written submission, in the context of Article 3.A.2.4(b), it is the "procedures for

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[62] Canada's IWS, paras. 136-137.

[63] USMCA, Art. 3.A.2.11(e).

[64] Definition of "fair" from Oxford English Dictionary Online, entries 14.a and 14.b (Exhibit USA-29).

[65] Definition of "fair" from Oxford English Dictionary Online, entries 14.a and 14.b (Exhibit USA-29).

administering" Canada's TRQs that must be "fair and equitable".[66] In order for the procedures to be considered "fair and equitable", they must be "free from bias" and not "unduly favourable or adverse to anyone".[67]

46. By creating a system where, prior to any applications, Canada sets aside a substantial share (or a substantial number of potential individual shares) of the total quota exclusively for processors, thereby restricting the eligibility of other potential users of the quota to even apply for an allocation, Canada is not operating its TRQ system in a way that is "equitable" or "fair". Canada's notices to importers provide that up to 90 percent of the quota for dairy products is reserved exclusively for processors and so-called "further processors". Reserving a substantial collection of shares of the total quota for the exclusive use of processors prevents access to the reserved shares by other importer groups, such as retailers. This cannot be reconciled with the requirements in Articles 3.A.2.11(e) and 3.A.2.4(b) to conduct the administration of Canada's TRQs "by equitable and transparent methods" and to apply procedures that are "fair and equitable". That is, the methods and procedures Canada employ for administering its dairy TRQs are not equitable because they are not "free from bias", do not "provide an equal chance of success to all" importers seeking to gain access to a share of the quota, are "unduly favourable" toward processors and "adverse to" non-processors, and are not "fair, just, [and] reasonable".

C. Canada Misconstrues the U.S. Argument To Be That Canada's Set-Asides for Processors Are Impermissible End-Use Restrictions

47. Canada also argues that the United States equates a set-aside for processors with an end-use restriction.[68] Canada argues that its notices to importers do not have end-use restrictions, and therefore the U.S. argument that retail products will not be imported is without merit.[69] Canada misunderstands the U.S. argument.

48. The United States simply points out the obvious – that different importer groups are likely to mainly import products that complement their primary business (*i.e.*, retailers import retail-ready products, processors import products to be transformed into downstream products). Canada's letters from three processors stating that those processors imported some retail products are unavailing, and do not rebut any of the U.S. legal arguments. Nor do the letters prove that there is no practical issue with reserving a majority of the quota for processors and so-called further processors.

49. To clarify, the U.S. argument is that limiting allocations to processors eliminates quota that may be utilized by retailers to import higher-value products for retail sale. Retailers do not

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[66] U.S. IWS, para. 64.

[67] Definition of "fair" from Oxford English Dictionary Online, entries 14.a and 14.b (Exhibit USA-29).

[68] Canada's IWS, para. 142.

[69] Canada's IWS, para. 84.

have access to any quota, which certainly reduces the amount of high-value, retail-ready products that are imported. While processors may import some retail-ready products, they have no incentive to import products that would compete with products of their own. This is confirmed by public statements made by a number of large Canadian processors, including in testimony before Canada's Standing Committee on International Trade, discussing Canada's USMCA implementing bill.[70] In these statements, Canadian processors note that if the vast majority Canada's dairy TRQs are allocated to dairy processors, it will have the effect of supporting imports of products that complement, rather than compete with Canadian dairy products.[71]

50. This harms U.S. suppliers that seek to sell products directly to the Canadian retail market. It also could result in significant underutilization of the quotas. Moreover, nearly all of Canada's notices explicitly provide under "[e]ligibility criteria" that "[r]etailers are not eligible to apply for an allocation."

51. As explained in the U.S. initial written submission, the set-asides for processors that Canada has provided render the end-use requirements specified in Canada's Schedule inutile.[72] The United States recognizes that end-use requirements are on how imports are used, not by whom the products are imported.[73] However, the inutility concern identified by the United States reflects that there would be no point in creating carveouts of any kind if Canada has unfettered discretion to impose additional conditions on eligibility for access to the quota.

D. Canada's Argument that the Term "Processors" Does Not Encompass Further Processors Is Without Merit

52. In its initial written submission, Canada argues that the importer group of "processors" does not encompass "further processors". Canada asserts that the unique role of so-called "further processors" as part of the supply chain for dairy products exclude it from the definition.[74] In support of this contention, Canada cites to the dictionary definition of a processor, which is defined, in relevant part, as "[a] person who or thing which performs a process or processes something; spec. . . . (b) a food processor".[75]

53. Notably, this dictionary definition does not make any indication that a processor may only perform a process on a food product a finite number of times. In the U.S. initial written submission, the United States offered examples of the use of the term "processor" throughout the Agriculture Chapter as relevant context showing that, taken together with the dictionary

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[70] Compilation of Public Statements by Canadian Processors on their Intended Use of the TRQs (Exhibit USA-36).

[71] Compilation of Public Statements by Canadian Processors on their Intended Use of the TRQs (Exhibit USA-36).

[72] U.S. IWS, para. 48.

[73] Canada's IWS, para. 143.

[74] Canada's IWS, paras. 24-29, 119, 145.

[75] Definition of "processor" from Oxford English Dictionary Online (Exhibit USA-28).

definition, the ordinary meaning of "processor" is any person or entity that converts or manufactures more basic materials into more finished or refined products. This would include so-called "further processors" that also engage in converting or manufacturing relatively more basic materials into relatively more finished or refined products. As such, Canada's attempt to draw a distinction between secondary and tertiary processors is unsupported by the ordinary meaning of the term "processor".

V. Canada Fails to Rebut the U.S. Claim that Canada's Administration of its Dairy TRQs Is Inconsistent with Articles 3.A.2.4(b) and 3.A.2.11(e) of the USMCA

54. Canada asserts that the United States makes the incorrect assumption that Canada's decision to reserve a portion of the TRQ for processors is a "procedure" or a "method" for administering the TRQs.[76] Canada contends that, to the contrary, the decision to reserve a pool of potential shares of the TRQ for processors is a policy decision establishing a "rule" underlying the administration of the TRQs. In Canada's view, such policy decisions are substantive content, distinct from the "procedures" or "methods" for administering TRQs.[77] As such, Canada argues that the set-asides for processors are not governed by Articles 3.A.2.4(b) and 3.A.2.11(e) of the USMCA. Canada's arguments lack merit.

55. The United States does not disagree with Canada's presentation of the dictionary definitions of "procedures" and "methods". Indeed, these terms reflect "a way of doing anything" or "a series of actions that you take in order to achieve a result".[78] However, the Parties do disagree as to the result such actions are geared toward achieving. Canada argues that these actions describe the process for making decisions on individual requests for an import license within an allocation.[79] However, Canada has made abundantly clear that the actions taken by the Minister, setting aside and reserving percentages of the quota for exclusive access of particular importer groups, are part of the operation of Canada's supply management system.

56. Canada argues that the term "procedure" in Article 3.A.2.4(b) is related to administering the TRQs.[80] The term "methods" as used in Article 3.A.2.11(e), in Canada's view, is related to "conduct[ing]" allocations, which is a specific way of administering the TRQs.[81] Canada therefore comes to the conclusion that these terms refer to a "prescribed way of doing something", a "set of actions", or a "process" for the purpose of administering the TRQs.[82]

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[76] Canada's IWS, para. 155.

[77] Canada's IWS, para. 155.

[78] Definition of "process" from Oxford English Dictionary Online (Exhibit CDA-69); Definition of "method" from Oxford English Dictionary Online (Exhibit CDA-70); Definition of "method" from Merriam-Webster Dictionary (Exhibit CDA-71).

[79] Canada's IWS, para. 159.

[80] Canada's IWS, para. 160.

[81] Canada's IWS, para. 160.

[82] Canada's IWS, para. 160.

Thus, the question before the Panel is whether Canada's creation of pools and the setting aside of allocations into the pools is a "substantive" "rule" that is not addressed by these provisions, or whether Canada has breached these provisions in its "procedures" and "methods" for allocating TRQs. As demonstrated below, the latter reflects a correct understanding of the context in which the terms "procedure" and "methods" are used in Articles 3.A.2.4(b) and 3.A.2.11(e), respectively, in particular as they relate to the obligation in the processor clause.

57. Canada cites to the WTO Appellate Body report in *EC – Selected Customs Matters* to support the proposition that the procedures and methods referenced in Articles 3.A.2.4(b) and 3.A.2.11(e) are distinct from Canada's policy decisions establishing a "rule" underlying the administration of the TRQs. In particular, Canada highlights the Appellate Body's observation that an "administrative process" means "a series of steps, actions, or events that are taken or occur in relation to the making of an administrative decision".[83]

58. However, the United States observes that the Appellate Body made additional findings, to which Canada does not refer, that are relevant to the Panel's consideration of Canada's argument. In the *EC – Selected Customs Matters* dispute, the Appellate Body was tasked with determining whether the term "administer" in Article X:3(a) of the GATT 1994 "may include administrative processes and whether it requires uniformity of administrative processes."[84] Notably, Article X:3(a) of the GATT 1994 provides that:

> Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.[85]

That provision envisions a level of impartiality, or fairness, in the application of substantive commitments. The Appellate Body determined that the term "administer" refers to "*putting into practical effect*, or *applying*, a legal instrument".[86] The Appellate Body therefore determined that "under Article X:3(a), it is the application of a legal instrument of the kind described in Article X:1 that is required to be uniform, but not the processes leading to administrative decisions, or the tools that might be used in the exercise of administration."[87]

59. Applying that logic to this dispute, the "methods" and "procedures" for administering Canada's TRQs reflect the manner in which Canada sets aside and creates pools of potential quota shares. These ultimately determine the application or administration of Canada's TRQs, *i.e.*, how Canada grants individual shares of quota when requested by applicants. Articles 3.A.2.11(e) and 3.A.2.4(b) require Canada to conduct the administration of Canada's TRQs "by

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[83] Canada's IWS, para. 160 (citing *EC – Selected Customs Matters (AB)*, para. 224).

[84] *EC – Selected Customs Matters (AB)*, para. 224.

[85] GATT 1994, Art. X:3(a) (Bold and underline added).

[86] *EC – Selected Customs Matters (AB)*, para. 224 (italics in original).

[87] *EC – Selected Customs Matters (AB)*, para. 224.

equitable and transparent methods" and to apply procedures that are "fair and equitable". However, as the United States has demonstrated, the methods and procedures Canada employ for administering its dairy TRQs are not equitable because they are not "free from bias", do not "provide an equal chance of success to all" importers seeking to gain access to a share of the quota, are "unduly favourable" toward processors and "adverse to" non-processors, and are not "fair, just, [and] reasonable".

60. Ultimately, Canada misunderstands the context in which the terms "procedures" and "methods" are used. Canada's methods and procedures for allocating its TRQs are not merely administrative decisions – rather, by Canada's own admission, they reflect an elaborate system that is necessary to balance supply and demand in the Canadian dairy market.[88] Applying procedures to reserve large potential shares of the quota for processors before applying the procedures for dividing up the quota between applicants does not allow any room for Canada to apply the procedures of its TRQs in a manner that is "free from bias", "equitable", and provid[es] an equal chance of success to all".[89] Under Canada's logic, Canada could eliminate eligibility for access to the quota for any group it sees fit, and yet still deem its procedures "fair" and "equitable". Such an interpretation would be untenable.

61. Next, Canada argues that the "rules" or the "substantive content" for administering TRQs reflect the government's policy decision to distribute or share the in-quota quantity in a certain manner.[90] In this section of Canada's initial written submission, Canada argues that these rules are the outcomes of a policy decision made at a Ministerial level, to take a certain approach in distributing the in-quota quantity, in contrast with the "procedures" and "methods" referred to in Articles 3.A.2.4(b) and 3.A.2.11(e).[91] Canada argues that these terms refer to procedural steps or actions. For example, Canada references issuing notices to importers to the public as one of these actions. Furthermore, Canada argues that a broad interpretation of these terms would "have the effect of creating a redundancy or reducing the utility of other provisions in CUSMA".[92] In support of this assertion, Canada cites to the principles of harmonious and effective interpretation, meaning that provisions in a free trade agreement should be interpreted in a coherent and consistent manner.[93]

62. The United States agrees that a proper interpretation of these obligations in the Agreement must account for the ordinary meaning of the terms in their context and in light the object and purpose of the Agreement. However, Canada's concerns that the U.S. interpretation will render these provisions inutile are misplaced. As the United States has explained, the

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[88] Canada's IWS, paras. 160-161, 179.

[89] U.S. IWS, para. 65.

[90] Canada's IWS, para. 165.

[91] Canada's IWS, paras. 165-178.

[92] Canada's IWS, para. 172.

[93] Canada's IWS, para. 170 (citing *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 570).

procedures and methods are, *inter alia*, those that set aside pools of potential quota shares, and ultimately determine the application or administration of Canada's TRQs, *i.e.*, how Canada grants individual shares of quota when requested by applicants.

63. For these reasons, Canada has failed to rebut the U.S. claims that Canada's measures are inconsistent with Articles 3.A.2.4(b) and 3.A.2.11(e) of the USMCA.

VI. Canada Fails To Rebut the U.S. Claim that Canada's Administration of its Dairy TRQs Is Inconsistent with Article 3.A.2.11(c) of the USMCA

64. Canada argues that the United States misinterprets Article 3.A.2.11(c), as, in Canada's view, that provision only applies after Canada has chosen its allocation mechanism. Similar to its arguments related to Articles 3.A.2.4(b) and 3.A.2.11(e), Canada seeks to have the Panel relieve Canada of its obligations under the Agriculture Chapter by arguing that the obligations raised by the United States only apply to the licensing procedures for individual applicants.[94] Canada's position is untenable, as it would permit Canada to administer its TRQ system in any manner it pleases, prejudicing the outcome before even reaching the licensing phase of the administration of the TRQ. Contrary to Canada's arguments, there are rules in the USMCA governing Canada's operation of its TRQ system.

65. Canada also criticizes the United States for not putting before the Panel any evidence in support of the U.S. argument that the small amount of quota volume set aside for distributors may not allow for quantities to be granted in commercially viable quantities. As an initial matter, and as explained above in section II of this submission, the United States does not claim that Canada has breached the first clause of Article 3.A.2.11(c) of the USMCA by failing to grant quota volume in quantities that are commercially viable. The United States has not even mounted an argument in this regard; the U.S. initial written submission merely makes a "passing"[95] observation.

66. However, the ICCC's written submission does present information that confirms what the United States points out as an obvious and seemingly inescapable outcome of reserving a substantial majority of the TRQ to one importer group, *i.e.*, processors. By setting aside 80 to 90 percent of the quota for processors, Canada leaves only a small portion for non-processor importers. Non-processor importers must share the remaining portion on an equal share basis, resulting in allocations that are, according to the ICCC, too small and therefore not commercially viable shipping quantities.[96]

67. This is relevant to the U.S. claim under Article 3.A.2.11(c) of the USMCA that Canada has failed to ensure, "to the maximum extent possible", that the allocation is made "in the quantities that the TRQ applicant requests." Basic logic suggests and the information presented

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[94] *See* Canada's IWS, paras. 188, 191-192, 204.

[95] Canada's Preliminary Ruling Request, para. 1.

[96] *See* ICCC Written Submission, p. 5; U.S. IWS, paras. 56-58.

by the ICCC confirms that reserving such a large pool of the quota for only processors and "further processors" means that the remaining small fraction of quota available for non-processors, when divided equally, cannot possibly be granted in the quantities that the TRQ applicant requests. Canada could do far more to ensure that allocations are made in the quantities requested, and plainly is not acting, "to the maximum extent possible", to achieve that result, as Article 3.A.2.11(c) requires.

68. For these reasons, Canada's argument fails to effectively rebut the U.S. claims that Canada's administration of its dairy TRQs is inconsistent with Article 3.A.2.11(c) of the USMCA because it prevents Canada from allocating its TRQs, to the maximum extent possible, in the quantities that the TRQ applicant requests.

VII. Canada Fails To Rebut the U.S. Claim that by Reserving Pools of Individual Potential Shares of the Quota to Processors, Canada Has Introduced an "Additional Condition, Limit, or Eligibility Requirement on the Utilization of a TRQ", Inconsistent with Article 3.A.2.6(a) of the USMCA Read Together with Section A, Paragraph 3(c), of Appendix 2 of Canada's Tariff Schedule

69. The U.S. initial written submission demonstrates that Canada conditions access to a quota allocation based on the type of importer that is applying for an allocation, and that such a condition on access to an allocation of the quota is impermissible under Article 3.A.2.6(a) of the USMCA read together with Section A, paragraph 3(c) of Canada's Tariff Schedule.[97]

70. In response to the U.S. claim, Canada argues that setting aside and reserving exclusively for processors multiple individual potential shares of Canada's TRQs does not constitute the type of condition or eligibility requirement addressed by Article 3.A.2.6(a) of the USMCA.[98] Rather, Canada contends that such conditions relate only to how a TRQ may be used once shares of the TRQ have been granted.[99] Canada's arguments lack merit.

71. Canada argues that the ordinary meaning of the phrase "on the utilization" in Article 3.A.2.6(a) indicates that the provision is aimed at conditions relating to the actual use of an individual import license granted under the TRQ, based on the dictionary definitions of the terms "on", "utilization", "utilize", and "use".[100] However, to utilize the TRQ, an importer first must be granted TRQ quota volume. A condition on applying for and being granted an allocation of TRQ quota volume necessarily is a condition on the utilization of the TRQ.

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[97] *See* U.S. IWS, paras. 67-73.

[98] Canada's IWS, para. 245.

[99] Canada's IWS, para. 245.

[100] Canada's IWS, paras. 249-251.

72. Canada looks for contextual support for its position in Articles 3.A.2.8 and 3.A.2.9 of the USMCA, which use both the terms "allocation" and "use".[101] Canada argues that there is a "clear distinction … between conditions or requirements pertaining to the *allocation* of a TRQ and those pertaining to the *use* (or utilization) of a TRQ".[102] With this argument, though, Canada conflates the words "utilization" and "use". As Canada itself argues earlier in its initial written submission, "it makes no sense whatsoever for the drafters to have resorted to completely different phrasing" to mean "the very same thing".[103] The use of the terms "allocation" and "use" together in certain provisions, taken together with the use of the term "utilization" in Article 3.2.A.6(a), suggests that the term "utilization" means something other than "use". It is logical to conclude that "utilization" is a combination of both "allocation" and use".

73. This conclusion can be confirmed by additional consideration of contextual elements in Article 3.A.2.6(a), such as the reference to "eligibility requirement". The notion of "eligibility" to "utilize" a TRQ suggests a relationship to the ability to access the TRQ at all, *i.e.*, the ability to be granted an allocation.[104] That is consistent with the U.S. argument that the condition Canada imposes on being granted an allocation from the processor pool is inconsistent with Article 3.A.2.6(a) because it is a condition on the utilization of the TRQ.

74. Canada also discusses the doctrine of *ejusdem generis*, suggesting that the items in the illustrative list of certain types of conditions and eligibility requirements have a purported commonality in that they focus on characteristics of the product itself, "rather than the prospective eligibility of an applicant to be granted an allocation that may be used to import the products in question."[105] This is unavailing. As explained above, the reference to "eligibility requirement" in conjunction with "condition" and "limit" in Article 3.A.2.6(a) reflects a connection to the possibility of accessing or being granted an allocation. And if it is not possible for an importer to receive an allocation at all because of a new condition that Canada has imposed, namely that the importer must be a processor, then it follows that the condition applies to and limits the ability to utilize the TRQ.

75. Canada also argues, with regard to the U.S. contention that this requirement (*i.e.*, the condition that a TRQ applicant be a processor) is "beyond those set out in its Schedule to Annex 2-B", that a Party is not required to spell out the specific design of an allocation mechanism, including any condition, in a Party's Schedule to Annex 2-B.[106] Canada also states in passing

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[101] Canada's IWS, paras. 257-258.

[102] Canada's IWS, para. 258 (italics added by Canada).

[103] Canada's IWS, para. 123.

[104] *See* Definition of "eligibility" from Oxford English Dictionary Online, entry 2.a ("The condition of being eligible for an office or position; entitlement to be considered or chosen for a position, award, or other benefit, usually through the fulfilment of specified criteria.") (Exhibit USA-38).

[105] Canada's IWS, paras. 252-254.

[106] Canada's IWS, para. 263.

that "several provisions in Article 3.A.2 are written in a manner that reflects" this understanding.[107] Canada does not expand on this assertion. The United States notes that Canada underlines references to a Party's eligibility requirements in the provisions cited by Canada. The provisions in Section B in Canada's Tariff Schedule that permit Canada to apply certain, specified "end-use" restrictions for particular TRQs reflect the agreement of the Parties on the extent to which Canada may deviate from the general prohibition on the introduction of "a new or additional condition, limit, or eligibility requirement on the utilization of a TRQ for importation of an agricultural good, including in relation to … *permissible end-use of the imported product*".[108] To the extent there is no carve-out in Section B, Canada is prohibited from imposing an additional condition, limit, or eligibility requirement on its TRQs, either on the end-use or on the eligibility of who can access (or "utilize") an allocation. Accordingly, Canada is prohibited under Article 3.A.2.6(a) from imposing a "new or additional condition, limit, or eligibility requirement on the utilization" of its TRQs through limiting access to TRQ allocations to processors (including further processors).

76. For these reasons, Canada has failed to rebut the U.S. claim that by issuing the notices reserving pools of individual potential shares of the TRQs for processors, and by prohibiting a specific group – retailers – from accessing the quota, Canada has acted inconsistently with Article 3.A.2.6(a) of the USMCA, read together with Canada's Schedule to Annex 2-B, Appendix 2, Section A, paragraph 3(c).

VIII. Conclusion

77. For the reasons set out above and in the U.S. initial written submission, Canada's notices to importers reserving a quota allocation for processors, including further processors, and prohibiting retailers from accessing the quotas, are inconsistent with several provisions of the USMCA. Therefore, the United States again respectfully asks the Panel to find that through its notices: (1) Canada is breaching its commitment in Article 3.A.2.11(b) not to "limit access to an allocation [of a TRQ] to processors"; (2) Canada is breaching its commitment in 3.A.2.11(c) to ensure that in the administration of an allocated TRQ, "each allocation is made … to the maximum extent possible, in the quantities that the TRQ applicant requests"; (3) Canada is breaching its commitment in Articles 3.A.2.4(b) to "ensure that its procedures for administering its TRQs … are fair and equitable"; (4) Canada is breaching its commitment in 3.A.2.11(e) to ensure that in the administration of an allocated TRQ, "allocation to eligible applicants shall be conducted by equitable and transparent methods"; and (5) Canada is breaching its commitment in 3.A.2.6(a) (read together with Canada's Schedule to Annex 2-B, Appendix 2, Section A, paragraph 3(c)) to not "introduce a new or additional condition, limit, or eligibility requirement on the utilization of a TRQ" that are "beyond those set out in [Canada's] Schedule to Annex 2-B".

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[107] Canada's IWS, para. 263 (citing USMCA Arts. 3.A.2.10, 3.A.2.11(a), and 3.A.2.11(g)).

[108] USMCA, Art. 3.A.2.6(a) (italics added).