

***CANADA – DAIRY TRQ ALLOCATION MEASURES 2023***

**(CDA-USA-2023-31-01)**

**CLOSING STATEMENT  
OF THE UNITED STATES OF AMERICA**

**July 20, 2023**

1. The United States, in its written submissions, has gone claim by claim, provision by provision, explaining what different provisions of the USMCA require, and why Canada's measures breach each provision. In doing so, we have pointed to particular aspects of Canada's measures that substantiate each U.S. claim. The United States has met its burden to establish breaches of all of the many and different provisions under which the United States has raised claims.
2. Importantly, and to be clear, the United States challenges Canada's measures on their face. Our claims are in the nature of "as such" claims, not "as applied" claims. The United States contends that Canada's measures themselves, as such, breach the USMCA. We are not claiming that Canada's application of its measures in a particular situation in the past breached the USMCA.
3. So, for example, the United States is not claiming – and we do not need to prove – that Canada has actually allocated 1 kg to a particular importer in the past. We are claiming – and Canada has confirmed – that Canada's dairy TRQ allocations measures could and would allocate 1 kg to an importer under certain circumstances. Nothing in Canada's measures prevents that outcome. 1 kg cannot be considered a commercially viable shipping quantity, and under Canada's measures, Canada does not actually ask applicants to confirm that 1 kg is a commercially viable shipping quantity for them. So, Canada's measures, as such, breach Article

3.A.2.11(c), because, with its adoption of those measures, Canada fails to meet its obligation to “ensure” that each allocation is made in commercially viable shipping quantities.

4. Similarly, for the return and reallocation mechanism for Canada’s USMCA dairy TRQs, the United States is not claiming – and we do not need to prove – that particular importers struggled under the current system to use reallocated TRQ quantities. We are claiming – and we have demonstrated – that the design and structure of the return and reallocation mechanism for Canada’s USMCA dairy TRQs differs from the design and structure of other return and reallocation mechanisms that Canada employs, and does so in a way that shows that Canada has failed to ensure that its dairy TRQ allocation measures provide a mechanism for return and reallocation in a timely and transparent manner that provides the greatest possible opportunity for the TRQ to be filled. There is ample support for the Panel to find a breach of Article 3.A.2.15. And the same facts also support a finding of breach of the chapeau of Article 3.A.2.6.

5. There has also been a great deal of discussion of the market-share basis allocation mechanism.

6. We want to reiterate, as we explained yesterday, that the United States does not claim that an abstract market-share basis allocation mechanism necessarily would breach the USMCA. Rather, we claim – and we have demonstrated – that Canada’s specific dairy TRQ allocation measures, which, *inter alia*, entails a particular allocation mechanism that takes a market-share approach, breaches numerous specific provisions of the USMCA, for the reasons that we have given.

7. Could some other market-share basis allocation mechanism pass muster under all of these provisions? The United States could not say, and it is not necessary for the Panel to decide

whether another hypothetical market-share basis allocation mechanism could be consistent with all of the obligations in the USMCA.

8. But Canada's existing allocation mechanism, the market-share basis approach that is provided in Canada's dairy TRQ allocation measures, drives allocation to processors and limits the ability of distributors to receive allocations. It is not the market or commercial activity that determines the allocations. It is not the choices of market players. It is the choices Canada made in designing its allocation mechanism. To recall and emphasize a point we made yesterday regarding the application form: the matrix is not neutral.

9. The United States also would like to be clear that we have not brought four claims of breach. In total, the United States has advanced fourteen independent claims of breach. We organized our discussion of those many claims into four parts, which we have characterized as four "elements" of Canada's dairy TRQ allocation measures. We hope that our doing so has made the aspects of Canada's measures that we are challenging somewhat easier to understand. We also hope that we will have persuaded that Panel that all of the four elements of Canada's measures that the United States challenges breach the specific provisions of the USMCA under which the United States has advanced claims.

10. Ultimately, Canada's dairy TRQ allocation measures, as we put it yesterday, rig the game in favor of Canadian dairy processors and to the detriment of others in the Canadian dairy market. Retailers, food service operators, and others active in the Canadian food or agriculture sector are not even allowed to play the game. Distributors are required to play with one hand tied behind their back. Processors get all the breaks. The United States has shown how that plays out with analysis and explanation of Canada's dairy TRQ allocation measures, and with interpretive analysis of the USMCA provisions under which we have brought claims.

11. Accordingly, we respectfully request that the Panel find that Canada has breached all of the USMCA provisions under which we have brought claims. Such findings will help the United States finally get Canada to abide by the commitments that Canada made in the USMCA.

12. Thank you, Mr. Chairman, and members of the Panel, for your attention to this matter and for your service on the Panel. And thanks to the Secretariat staff that is assisting you and the Parties in this dispute. That concludes the U.S. closing statement.