CANADA – DAIRY TRQ ALLOCATION MEASURES 2023

(CDA-USA-2023-31-01)

REBUTTAL SUBMISSION
OF THE UNITED STATES OF AMERICA

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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

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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
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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

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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
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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)

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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)
USA-38	Government of Canada, Canadian Dairy Information Centre, "Dairy processors and employees in Canada, Overview of the dairy processors in Canada – 2022", modified June 17, 2021 (https://agriculture.canada.ca/en/canadas-agriculture-sectors/animal-industry/canadian-dairy-information-centre/dairy-statistics-and-market-information/dairy-processing-sector/dairy-processors-and-employees-canada)
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)
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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)
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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)

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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)
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USA-51 (**CONFIDENTIAL INFORMATION**)	Alfons Weersink, Mike von Massow, and Brendan McDougall, "Economic thoughts on the potential implications of COVID-19 on the Canadian dairy and poultry sectors", Canadian Journal of Agricultural Economics, Volume 68, Issue 2, April 21, 2020, pp. 195-200 (https://onlinelibrary.wiley.com/doi/10.1111/cjag.12240) **(CONFIDENTIAL IN ITS ENTIRETY – COPYRIGHTED MATERIAL)**
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USA-70	Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, vol. II
USA-71 (**CONFIDENTIAL INFORMATION**)	Kanda, Samuel, "Warehouse Clubs & Supercentres in Canada", IBISWorld Inc., Industry Report 45291CA, December 2020 **(CONFIDENTIAL IN ITS ENTIRETY – COPYRIGHTED MATERIAL)**
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USA-107	Global Affairs Canada, "Cream, Powdered Whey, Butter and Fats & oils from Milk APRMT61C-D-DY Period Start: 1-Aug-21 - Period

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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)
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USA-109	Charlebois, Sylvain, "What's really behind higher milk prices", Food in Canada, August 10, 2022
USA-110	Milke, Mark, "The cause of the Canada-U.S. price gap is obvious – the government", Fraser Institute
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USA-115	Global Affairs Canada, USMCA Dairy TRQs Utilization Rates Data

I. Introduction

1. Canada made market access commitments to the United States in the *United States-Mexico-Canada Agreement* ("USMCA" or "Agreement") concerning dairy products. Canada agreed to partially open its market through the use of tariff-rate quotas ("TRQs"). Since prior to entry into force of the Agreement and continuing to this day, though, Canada has maintained and applied its TRQs in a manner that is inconsistent with Canada's USMCA commitments.

2. Canada characterizes "the United States' claims and arguments" as an attempt to "constrain Canada's ability to design and implement an allocation mechanism".[1] It is not the U.S. claims and arguments that constrain Canada. The terms of the USMCA itself do that.

3. To be perfectly clear, the United States is not seeking to impose on Canada any additional obligation or market access commitment beyond what Canada agreed to undertake in the USMCA. It is inappropriate and impermissible for the findings, determinations, and recommendations of a dispute settlement panel to add to or diminish the rights and obligations of the Parties under the Agreement.[2] The United States asks only that Canada abide by its international obligations.

4. And the United States is not alone in claiming that Canada's dairy TRQ allocation measures breach Canada's international obligations. New Zealand has simultaneously challenged Canada's dairy TRQ allocation measures under the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* ("CPTPP"), advancing of a number of claims under CPTPP provisions that are the same as or similar to the USMCA claims that the United States has raised in this dispute and the prior USMCA dispute.[3] That CPTPP dispute is ongoing.

5. Canada places great emphasis on its purported regulatory discretion to adopt an allocation mechanism of its own choosing. Indeed, the word "discretion" appears 55 times in Canada's initial written submission. And Canada argues that "its interpretations of the provisions at issue result in a harmonious reading of the text that preserves Canada's discretion to administer the dairy TRQs through an allocation mechanism of its choosing".[4]

6. Canada greatly overstates the nature and degree of its discretion. And in doing so, Canada repeatedly errs by reasoning from its preferred conclusion – *i.e.*, that Canada has discretion to do whatever Canada would like to do – when proposing interpretations of the terms of the USMCA. Canada's interpretive approach is precisely backwards. Applying customary rules of interpretation, a treaty interpreter starts with the ordinary meaning of the terms of the

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[1] Initial Written Submission of Canada, May 5, 2023 ("Canada's Initial Written Submission"), para. 8.

[2] *See* USMCA, Article 31.13.2.

[3] *See* https://www.mfat.govt.nz/en/trade/trade-law-and-dispute-settlement/current-wto-disputes/.

[4] Canada's Initial Written Submission, para. 10.

agreement in their context and in light of the object and purpose of the agreement, and reasons from there to discern the function of particular provisions.

7. The United States acknowledges that the USMCA does not prescribe precisely the allocation mechanism that Canada must apply when administering its USMCA TRQs. Canada has a degree of discretion to formulate and apply an allocation mechanism. However, the USMCA does prescribe a host of rules with which Canada must comply when formulating and applying whatever allocation mechanism Canada chooses. The United States initiated this dispute because Canada's dairy TRQ allocation measures fail to comply with a large number of those USMCA rules.

8. That is no accident. Canada's dairy TRQ allocation measures, which the United States challenges in this dispute, heavily favor Canadian dairy processors over other types of applicants in the allocation of Canada's USMCA dairy TRQs. This is intentional. In its initial written submission, Canada expresses the view that "[d]airy processors ... are in a better position to serve the market with TRQs";[5] "[w]hen processors import under the TRQ, predictability is enhanced";[6] and "[a]llocating TRQs to processors is necessary to facilitate predictability and stability".[7] Canadian retailers disagree with Canada's view that processors have a unique ability to monitor the evolution of supply and demand in the Canadian dairy market.[8] But Canada's viewpoint drives Canada's policy choices. And Canada has chosen to favor processors in the allocation of Canada's USMCA dairy TRQs, in a manner that breaches Canada's USMCA obligations.

9. Canada urges that its policy choices are necessary "to ensure a balance between supply and demand and to provide the opportunity for a fair and predictable livelihood to dairy farmers (producers)."[9] Canada says that "[t]he underlying economic characteristics of milk production are not unique to Canada."[10] But Canada's supply management system for dairy and the degree to which Canada's dairy market is closed and distorted may be unique in the world. Indeed, Canadian consumers reportedly pay 30 percent more for milk than the world average.[11]

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

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

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

[8] Non-Governmental Entity Submission of the Retail Council of Canada, May 15, 2023 ("RCC Submission"), p. 2.

[9] Canada's Initial Written Submission, para. 14.

[10] Canada's Initial Written Submission, para. 16.

[11] *See* Charlebois, Sylvain, "What's really behind higher milk prices", Food in Canada, August 10, 2022, p. 4 ("[M]ilk prices in Canada are about 30 per cent higher tha[n] the world average." (Exhibit USA-109); Milke, Mark, "The cause of the Canada-U.S. price gap is obvious – the government", Fraser Institute, p. 2 ("Former Liberal MP Martha Hall Findlay estimated in a research study that Canadian consumers pay one-and-a-half to three times more for milk, cheese and other dairy and poultry products than they should, because of federal 'supply management'

10. Canada compares its supply management system and its dairy TRQ allocation measures to measures in place in the United States.[12] Of course, the U.S. measures to which Canada refers are not at issue in this dispute. They are also, by Canada's own description of them, not measures that attempt to limit or suppress imports. The fact is that Canada's policy choices have resulted in a largely closed and distorted dairy market in Canada.

11. The U.S. initial written submission demonstrated, through proper application of customary rules of interpretation, that Canada's dairy TRQ allocation measures breach numerous USMCA provisions.[13] In addition to being inconsistent with Canada's USMCA commitments, Canada's dairy TRQ allocation measures nullify the additional market access to which the Parties agreed in the USMCA, and harm U.S. suppliers that seek to sell products directly to the Canadian retail market.

12. Canada's initial written submission fails to rebut the U.S. claims.

13. In this rebuttal submission, the United States responds to Canada's arguments concerning the four elements of Canada's dairy TRQ allocation measures about which the United States has advanced claims, and demonstrates that Canada's arguments lack merit. The United States has structured this submission as follows.

14. **Section II** concerns ***the first element of Canada's dairy TRQ allocation measures*** that the United States challenges, which is Canada's exclusion of retailers, food service operators, and other entities from eligibility for Canada's USMCA dairy TRQs. Canada's dairy TRQ allocation measures permit only processors, distributors, and, in some cases, further processors to apply for allocations of Canada's USMCA dairy TRQs.

15. By excluding other entities from eligibility, Canada fails to allocate its TRQs each quota year to "eligible applicants" that are "active in the Canadian food or agriculture sector", as required by Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix. Properly interpreted according to customary rules of interpretation of public international law, the term "eligible applicants" includes retailers, food service operators, and other entities that engage in the very same activities as processors, distributors, and further processors (*e.g.*, manufacturing, processing, handling, buying, selling, reselling, preparing, using, or delivering dairy products or other food or agriculture products (or other relevant activities)). Canada breaches Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix by denying those entities eligibility to apply for and receive USMCA dairy TRQ allocations.

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policies.") (Exhibit USA-110); Yun, Tom, "Why milk, butter and other dairy products just got more expensive", CTV News, February 6, 2022, p. 4 ("Industrial milk in Canada is three times the price of milk that you would find in the U.S. So, it's very expensive to produce cheese and yogurt".) (Exhibit USA-111).

[12] *See* Canada's Initial Written Submission, para. 16.

[13] *See* Initial Written Submission of the United States of America, March 20, 2023 ("U.S. Initial Written Submission").

16. Canada fails to rebut the U.S. claim under Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix. Canada does not even deny that it excludes retailers, food service operators, and other entities from eligibility for its USMCA dairy TRQs. Canada simply contends that it has the right to exclude such entities from eligibility, even though they are "active in the Canadian food or agriculture sector". Canada is incorrect. Canada presents flawed textual and contextual analysis, and overstates the nature and degree of its discretion in applying its USMCA TRQs.

17. Additionally, since Canada conditions access to a dairy TRQ allocation within the quota based on the type of importer seeking to apply for an allocation, Canada has, by excluding retailers, food service operators, and other entities, also "introduce[d] 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", contrary to Article 3.A.2.6(a) of the USMCA. Namely, the impermissible new condition, limit, or eligibility requirement is that one must be a processor, distributor, or, in some cases, further processor to receive an allocation and utilize the TRQ.

18. Canada fails to rebut the U.S. claim under Article 3.A.2.6(a) of the USMCA. Canada's contention that Article 3.A.2.6(a) pertains only to an importer actually using a quota allocation to import a good under the TRQ lacks any support in the text and context of Article 3.A.2.6(a), and Canada's assertion that its proposed interpretation of Article 3.A.2.6(a) supports the object and purpose of the USMCA lacks any foundation. Article 3.A.2.6(a) concerns the "TRQ" itself, not a "quota allocation". The term "TRQ" is defined in Article 3.A.2.1 of the USMCA as "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 of that good that exceed that quantity." Logically, and practically, to utilize the TRQ for importation of an agricultural good, that is, to use the mechanism to import an agricultural good, an importer must be eligible to apply for and receive a quota allocation (*i.e.*, the importer must be eligible to use the mechanism); 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; the importer must then use the import license to effectuate importation of the agricultural good. All of those steps, separately and together, constitute "utilization of a TRQ for importation of an agricultural good". 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 relate to all of the steps that are entailed in "utilization of a TRQ" (*i.e.*, use of the mechanism).

19. **Section III** concerns ***the second element of Canada's dairy TRQ allocation measures*** that the United States challenges, which is 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.[14]

[14] *See infra*, section VI.

20. First, the processor clause of Article 3.A.2.11(b) of the USMCA prohibits Canada from limiting access to an allocation to processors. Canada's dairy TRQ allocation measures breach Article 3.A.2.11(b) because, in substance and in effect, they "ring-fence and limit to processors" a reserved pool of TRQ amounts to which only processors have access.[15] By using a market share basis and applying different criteria to different types of eligible applicants, combined with the exclusion of retailers, food service operators, and other potential TRQ users from eligibility for USMCA dairy TRQ allocations, Canada's measures effectively limit to processors a pool of TRQ amounts to which only processors have access.

21. Canada fails to rebut the U.S. claim under Article 3.A.2.11(b) of the USMCA. Canada offers a flawed interpretive analysis of Article 3.A.2.11(b) of the USMCA, as well as irrelevant and unpersuasive arguments concerning the design of the criteria for determining market share, and Canada ignores evidence that the United States has provided demonstrating that, under Canada's dairy TRQ allocation measures, processors can bypass distributors to capture larger TRQ allocations.

22. Second, Article 3.A.2.4(b) of the USMCA requires Canada to ensure that its procedures for administering its TRQs are "fair and equitable", and Article 3.A.2.11(e) of the USMCA requires Canada to ensure that "if the aggregate TRQ quantity requested by applicants exceeds the quota size, allocation to eligible applicants shall be conducted by equitable and transparent methods". By design, Canada's dairy TRQ allocation measures, in particular the market share approach, are not "fair" or "equitable" because they heavily favor Canadian dairy processors over distributors.

23. Canada fails to rebut the U.S. claims under Articles 3.A.2.4(b) and 3.A.2.11(e) of the USMCA. Canada offers erroneous interpretations of those provisions and then reasons from its flawed interpretations to advance arguments that lack any foundation. Canada's attempt to interpret the provisions of the USMCA in a manner that puts its measures beyond scrutiny is untenable.

24. Third, the first clause of Article 3.A.2.11(c) of the USMCA requires Canada to ensure that "each allocation is made in commercially viable shipping quantities". Canada makes no attempt to do so. Canada's dairy TRQ allocation measures contain no safeguards to ensure that allocations are made in commercially viable shipping quantities. By simply applying a mathematical formula, Canada's market share approach necessarily will result in vanishingly small quantities being allocated to TRQ applicants with a small market share, as calculated according to the rules prescribed in Canada's dairy TRQ allocation measures. Vanishingly small quantities are not commercially viable shipping quantities.

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[15] 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 (Exhibit USA-26).

25. Canada fails to rebut the U.S. claim under the first clause of Article 3.A.2.11(c) of the USMCA. In fact, Canada itself has substantiated the U.S. claim. In Canada's own words, Canada's USMCA dairy TRQ allocation measures would operate to allocate to a TRQ applicant one kilogram of TRQ quantity if "that is the market share calculation for that applicant."[16] That admission is all the evidence that is needed to demonstrate that Canada's USMCA dairy TRQ allocation measures, on their face, are inconsistent with the first clause of Article 3.A.2.11(c) of the USMCA. The United States, though, responds to arguments that Canada presents, demonstrating that they lack merit.

26. Fourth, the second clause of Article 3.A.2.11(c) of the USMCA requires Canada to ensure that each allocation is made, "to the maximum extent possible, in the quantities that the TRQ applicant requests". Canada, however, does not even ask TRQ applicants what quantities they would like to receive. Instead, Canada asks TRQ applicants to report their market activity and then Canada applies a formula relating to market activity, and not relating to any amount requested, to calculate each applicant's resulting percentage of the total TRQ volume. Far from attempting, to the maximum extent possible, to make allocations in the amounts requested, Canada makes no attempt to do so whatsoever.

27. Canada fails to rebut the U.S. claim under the second clause of Article 3.A.2.11(c) of the USMCA. Canada presents an erroneous interpretive analysis of the second clause of Article 3.A.2.11(c) of the USMCA, contending that Canada is required to make "serious efforts" to make each allocation in the quantities that the TRQ applicant requests only when actually allocating TRQ quantities to individual applicants; not when adopting an allocation mechanism. This is another untenable attempt to interpret the USMCA in a manner that would shield Canada's measures from scrutiny. Even under Canada's flawed legal interpretation, though, Canada fails to comply with the second clause of Article 3.A.2.11(c).

28. Fifth, Article 3.A.2.10 of the USMCA 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. However, 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 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", in breach of the second sentence of Article 3.A.2.10. Additionally, Canada's use of a market share basis effectively denies 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. For that

[16] Canada's Comments on the Submission of the International Cheese Council of Canada, May 23, 2023 ("Canada's Comments on the ICCC Submission"), para. 19.

reason, Canada's dairy TRQ allocation measures also breach the first sentence of Article 3.A.2.10.

29. Canada presents a flawed interpretive analysis of Article 3.A.2.10 of the USMCA, and then draws erroneous conclusions about the application of Article 3.A.2.10 to its measures that are premised on its incorrect interpretation.

30. Lastly, Canada's dairy TRQ allocation measures breach Article 3.A.2.6(a) of the USMCA, which prohibits new conditions, limits, or eligibility requirements on the utilization of Canada's USMCA dairy TRQs. First, Canada's measures require that an applicant must demonstrate activity during a prior reference period to be allocated USMCA dairy TRQs. Second, Canada's measures require that an applicant must be a processor to access substantial portions of Canada's USMCA dairy TRQs, which are not accessible to non-processors. The introduction of such new conditions, limits, or eligibility requirements on the utilization of Canada's USMCA dairy TRQs is inconsistent with Article 3.A.2.6(a).

31. Canada fails to rebut the U.S. claim under Article 3.A.2.6(a) of the USMCA. In response to this claim, Canada simply refers to arguments presented earlier in its initial written submission, which the United States demonstrates lack merit. For the same reasons, Canada's arguments also fail in this context.

32. **Section IV** concerns ***the third element of Canada's dairy TRQ allocation measures*** that the United States challenges, which is Canada's imposition of 12-month activity requirements on TRQ applicants and recipients. Canada's dairy TRQ allocation measures require that, to be eligible to apply for and receive USMCA dairy TRQs, TRQ applicants must have been active during all 12 months of a prior 12-month reference period that is used to calculate market share, and TRQ recipients further must be active during all 12 months of the quota year. Canada's imposition of such 12-month activity requirements is inconsistent with Canada's obligation in Section A, Paragraph 3(c), of Canada's USMCA TRQ Appendix to "allocate its TRQs each quota year to eligible applicants", which are defined as applicants "active in the Canadian food or agriculture sector".[17] An applicant that engages in relevant market activities during 11 months of the year, or fewer, meets the proper definition of "active" just like an applicant that engages in such activities during all 12 months of the year.

33. Canada fails to rebut the U.S. claim under Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix. Canada argues that it has discretion to interpret its own TRQ Appendix. This is a deeply flawed interpretive approach that has no support in customary rules of interpretation. To the extent Canada means that it has some discretion and flexibility with respect to how it complies with its USMCA obligations, that would be correct, though Canada's measures are not within the permissible range of options for implementing the USMCA obligation in Paragraph 3(c). Canada argues that "paragraph 3(c) of Canada's TRQ Appendix does not require Canada to issue TRQ allocations to persons that are only active in the Canadian

[17] USMCA, Canada's USMCA TRQ Appendix, Section A, Paragraph 3(c).

food or agriculture sector during the quota application period, or to persons that have insignificant activity in the Canadian food or agriculture sector", but that is not responsive to the U.S. claim. The United States claims that Canada's 12-month activity requirements breach Paragraph 3(c) because, by requiring relevant market activity during all 12 months of a 12-month period, Canada denies eligibility to applicants that were active in fewer months of the reference period but that still could demonstrate "participat[ion] within that sphere in a 'significant' manner or for a 'significant period of time'", such as activity during 11 months, or 10 months, or even fewer. Canada even acknowledges "that there are different degrees of 'activity' that can constitute 'significant activity'" and that "[i]f the CUSMA Parties had wanted to set a specific time period for who is 'active' in the Canadian food or agriculture sector, they would have done so explicitly in paragraph 3(c)." It is not permissible for Canada to define an "eligible applicant" only as an applicant that can demonstrate market activity in all 12 months of a 12-month reference period when an applicant with a comparable "degree" of activity, but in fewer months, also is "active", as that term is properly interpreted.

34. Additionally, since Canada conditions access to a dairy TRQ allocation within the quota based on fulfillment of these 12-month activity requirements, 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. Namely, the new condition, limit, or eligibility requirement is that one must engage in relevant activity during every single month of the 12-month reference period, as well as during every single month of the 12-month quota year.

35. Canada fails to rebut the U.S. claim under Article 3.A.2.6(a) of the USMCA. Canada reiterates its arguments presented earlier in its initial written submission, which the United States demonstrates lack merit. For the same reasons, Canada's arguments continue to fail in this context.

36. Also, the requirement in Canada's dairy TRQ allocation measures that applicants must have been active during all 12 months of a prior 12-month reference period is inconsistent with the obligation in the first sentence of Article 3.A.2.10 of the USMCA, which provides that Canada must allow new importers to be eligible for USMCA dairy TRQs as long as they meet all eligibility criteria other than import performance. Canada's dairy TRQ allocation measures, through the historical 12-month activity requirement, preclude new market entrants, which necessarily would also be new importers, from eligibility for USMCA dairy TRQs. Furthermore, the historical 12-month activity requirement also is inconsistent with the second sentence of Article 3.A.2.10 of the USMCA, which prohibits Canada from discriminating against new importers when allocating the USMCA dairy TRQs. A new entrant to the dairy market that is wrongly denied eligibility for a USMCA dairy TRQ allocation plainly is treated less favorably than other importers when the USMCA dairy TRQ is being allocated, as the new entrant is shut out of the allocation process altogether.

37. Canada fails to rebut the U.S. claim under Article 3.A.2.10 of the USMCA. Canada responds to the U.S. claim by contending that Canada's dairy TRQ allocation measures simply require applicants to demonstrate that they were "active within the Canadian food or agriculture

sector",[18] rather than having to demonstrate activity related to the dairy product subject to the TRQ. Canada's explanation is not supported by the terms of Canada's dairy TRQ allocation measures themselves. On their face, Canada's measures require applicants to demonstrate activity related to the particular product subject to the TRQ, and Canada's allocation applications only provide an opportunity to provide to the Government of Canada information related to such activity, and not information relevant to being active in the Canadian food or agriculture sector generally.

38. **Section V** concerns ***the fourth element of Canada's dairy TRQ allocation measures*** that the United States challenges, which is the mechanism for the return and reallocation of unused USMCA dairy TRQ allocations in Canada's dairy TRQ allocation measures.

39. First, Article 3.A.2.15 of the USMCA 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." Canada's measures are, on their face, inconsistent with Article 3.A.2.15. The return and reallocation mechanism set forth in Canada's dairy TRQ allocation measures is not timely. It sets a return date that is late in the quota year, leaving only a short and uncertain window of time for importers to use reallocated TRQ volume. The mechanism is not transparent. It is unclear what volumes of TRQ allocations will be available for reallocation and what exactly the process and timing is for reallocating returned allocations. And the mechanism does not provide the greatest possible opportunity for the USMCA dairy TRQs to be filled. There are a variety of other options described in the U.S. initial written submission that Canada could adopt and actually has adopted for other quotas, or has considered adopting, which would increase the incentives and the opportunity for the USMCA dairy TRQs to be filled. Canada's mechanism for the return and reallocation of unused allocations is inconsistent with its obligations under 3.A.2.15.

40. Canada fails to rebut the U.S. claim under Article 3.A.2.15 of the USMCA. Canada argues that the United States does not understand Canada's return and reallocation process. However, Canada's own discussion of its return and reallocation mechanism confirms that the U.S. description of the mechanism is correct. Canada contends that the United States fails to adduce evidence to substantiate its claims and asserts numerous times that the United States has failed to make a *prima facie* case. Yet Canada's measures speak for themselves, and they are the evidence that Canada breaches Article 3.A.2.15. Canada's interpretative arguments are flawed, Canada relies on an inapt comparison to U.S. regulations, and Canada exaggerates the amount of time during which importers are able to use reallocated TRQ volumes in a failed attempt to demonstrate its mechanism is "timely". Additionally, that Canada feels the need to clarify how, "in practice", Canada "carrie[s] out" its return and reallocation mechanism by offering additional description confirms the U.S. claim that Canada's return and reallocation mechanism is not

[18] Canada's Initial Written Submission, para. 311 (underline added).

carried out in a transparent manner.[19] And Canada advances unpersuasive arguments against examples provided by the United States of other approaches that Canada has taken, which, on their face, provide a greater opportunity for other Canadian quotas to be filled.

41. Second, the chapeau of Article 3.A.2.6 of the USMCA provides that "[e]ach Party shall administer its TRQs in a manner that allows importers the opportunity to utilize TRQ quantities fully." There are numerous ways in which Canada could administer its USMCA dairy TRQs differently – earlier return date, clearer reallocation procedures, different transfer rules, stricter under-utilization penalties – that would increase the incentives and the opportunity for importers to utilize the USMCA dairy TRQs fully. The return and reallocation mechanism set forth in Canada's dairy TRQ allocation measures fails to allow importers the opportunity to utilize USMCA dairy TRQs fully, in breach of Article 3.A.2.6.

42. Canada fails to rebut the U.S. claim under Article 3.A.2.6 of the USMCA. In response to this claim, Canada simply refers to arguments presented earlier in its initial written submission, which the United States demonstrates lack merit. For the same reasons, Canada's arguments also fail in this context.

II. Canada Fails to Rebut the U.S. Claim that, by Excluding Retailers, Food Service Operators, and Other Entities, from Eligibility for Canada's USMCA Dairy TRQs, Canada Breaches its USMCA Commitments

A. Canada Does Not Deny that Its Dairy TRQ Allocation Measures Exclude from Eligibility for Canada's USMCA Dairy TRQs Retailers, Food Service Operators, and Other Entities that Are Active in the Canadian Food or Agriculture Sector

43. The U.S. initial written submission demonstrates that Canada's USMCA dairy TRQ measures exclude retailers, food service operators, and other entities from eligibility for Canada's dairy TRQs.[20] The U.S. initial written submission further demonstrates that retailers, food service operators, and other entities that engage in the very same market activities as processors, distributors, and further processors – *e.g.*, manufacturing, processing, handling, buying, selling, reselling, preparing, using, or delivering dairy products or other food or agriculture products (or other relevant activities) – meet the definition of "active" just as do processors, distributors, and further processors.[21]

44. Canada does not deny this. On the contrary, Canada confirms it.

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[19] *See* Canada's Initial Written Submission, paras. 323-325.

[20] *See* U.S. Initial Written Submission, section V.A.

[21] *See* U.S. Initial Written Submission, section V.B.

45. Canada identifies "food service and retail" as being among the market segments that demand dairy products, along with "processing" and "further processing".[22] Canada explains that "[p]rocessors … sell their products to further processors, distributors, food service operators, retailers, and, in some cases, directly to consumers."[23] Canada characterizes "retail and food service" as "other segments of the dairy supply chain".[24] Canada appears to accept that retailers, food service operators, and other entities engaged in relevant activities are "active in the Canadian food or agriculture sector".[25]

46. Canada simply contends that it has the right to exclude such entities from eligibility to apply for and receive Canada's USMCA dairy TRQ allocations, even though they are "active in the Canadian food or agriculture sector".[26] In Canada's view, Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix establishes that "Canada must select from a specific category of market actors – namely, persons that are active in the Canadian food or agriculture sector. Canada is not entitled to issue allocations to market actors from outside this category (e.g., a Canadian car manufacturer or a Canadian oil producer). But so long as the market actors chosen by Canada remain within the parameters of paragraph 3(c), nothing prevents Canada from restricting TRQ eligibility to a subset of 'eligible applicants'."[27]

47. Canada's view is incorrect.

48. The U.S. initial written submission demonstrates the proper interpretation of Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix, which follows from a correct application of customary rules of interpretation.[28] Canada's exclusion of retailers, food service operators, and other entities from eligibility is inconsistent with Canada's obligation in Section A, Paragraph 3(c), of Canada's USMCA TRQ Appendix to "allocate its TRQs each quota year to eligible applicants", which are defined as applicants "active in the Canadian food or agriculture sector".[29] Retailers, food service operators, and other entities that engage in the very same market activities as processors, distributors, and further processors – *e.g.*, manufacturing, processing, handling, buying, selling, reselling, preparing, using, or delivering dairy products or other food or agriculture products (or other relevant activities) – meet the definition of "active" just as do processors, distributors, and further processors. Canada is obligated to treat them as

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[22] Canada's Initial Written Submission, para. 14.

[23] Canada's Initial Written Submission, para. 30.

[24] Canada's Initial Written Submission, para. 32. *See also id*., paras. 41-45.

[25] USMCA, Canada's USMCA TRQ Appendix, Section A, Paragraph 3(c).

[26] USMCA, Canada's USMCA TRQ Appendix, Section A, Paragraph 3(c).

[27] Canada's Initial Written Submission, para. 91 (underline in original).

[28] *See* U.S. Initial Written Submission, section V.B.

[29] USMCA, Canada's USMCA TRQ Appendix, Section A, Paragraph 3(c).

"eligible applicants", and Canada is obligated to allocate its USMCA dairy TRQs to "eligible applicants".

49. Below, the United States responds to arguments Canada makes in support of its position and demonstrates that Canada's arguments lack merit.

B. Canada Fails to Rebut the U.S. Claim Under Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix

1. Canada's Proposed Interpretation of Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix Is Incorrect

50. Canada acknowledges that, pursuant to Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix, "Canada must 'allocate its TRQs each quota year to eligible applicants'."[30] Canada, however, notes that "[t]he second sentence of paragraph 3(c) defines the term 'eligible applicant' as 'an applicant active in the Canadian food or agriculture sector'", and Canada contends that "[t]he text of paragraph 3(c) does not provide that 'any' or 'every' person of Canada that is active in the Canadian food or agriculture sector must be eligible to apply for and receive a quota allocation under Canada's CUSMA TRQs." Canada's arguments in support of its position are unavailing.

a. The Word "An" in Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix Means "Any"

51. Canada's argument appears to rely on the use of the word "an" – rather than the word "any" – in the phrase "an applicant active in the Canadian food or agriculture sector".[31] Canada's reliance on the use of the word "an" is misplaced. In the context of Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix, the word "an" means "any".

52. Dictionary definitions of the word "an" use the word "any" to define the word "an". The Oxford English Dictionary defines the word "an" as, *inter alia*, "one, some, <u>any</u>".[32] The Cambridge Dictionary defines "an" as, *inter alia*, "<u>any</u> or <u>every</u> thing or person of the type you are referring to".[33] Based 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. The ordinary meaning of the words indicates that, in certain situations, the words "an" and "any" may be substitutable.

53. The most natural reading of Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix is that Canada is obligated to allocate its TRQs to any and all eligible applicants,

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[30] Canada's Initial Written Submission, para. 92.

[31] USMCA, Canada's USMCA TRQ Appendix, Section A, Paragraph 3(c).

[32] Definition of "an" from Oxford English Dictionary Online (Exhibit USA-112) (underline added).

[33] Definition of "an" from Cambridge Dictionary Online (Exhibit USA-113).

which means any and all applicants active in the Canadian food or agriculture sector. This reading accords with the ordinary meaning of the terms of Paragraph 3(c), specifically the ordinary meaning of the word "an", and it is also supported by the direct context of Paragraph 3(c).

54. The chapeau of Paragraph 3 of Section A of Canada's USMCA TRQ Appendix provides that "Canada shall administer all TRQs provided for in this Agreement and set out in Section B of this Appendix according to the following provisions". In the USMCA, Canada agreed to open up access to its dairy market to imports from the United States only partially, subject to numerous TRQs. Canada's USMCA TRQ Appendix and Chapter 3 of the USMCA set forth the agreed terms governing Canada's use of USMCA TRQs. The chapeau of Paragraph 3 is a binding obligation. Canada must administer its TRQs according to the provisions in the subparagraphs of Paragraph 3.

55. Paragraph 3(a) provides that "Canada shall administer its TRQs through an import licensing system." This is a binding obligation. Canada does not have discretion to not administer its TRQs through an import licensing system.

56. Paragraph 3(b) provides that, "[f]or the purposes of this Appendix, **quota year** means the 12-month period over which a TRQ applies and is allocated",[34] and further specifies the meaning of "Quota year 1". Canada does not have discretion to apply a different meaning to those terms.

57. The first sentence of Paragraph 3(c) provides that "Canada shall allocate its TRQs each quota year to eligible applicants." This is a binding obligation. Canada does not have discretion to allocate its TRQs to applicants that are not eligible applicants, and likewise Canada does not have discretion to refuse to allocate its TRQs to applicants that are eligible applicants.

58. The final sentence of Paragraph 3(c) provides that "[i]n assessing eligibility, Canada shall not discriminate against applicants who have not previously imported the product subject to a TRQ." This is a binding obligation. This sentence recognizes that, while Canada may need to apply some administrative judgment when assessing eligibility, *i.e.*, when assessing whether an applicant is "active", Canada does not have discretion to discriminate against applicants who have not previously imported the product subject to a TRQ when doing so.

59. The second sentence of Paragraph 3(c) sets forth a definition: "An eligible applicant means an applicant active in the Canadian food or agriculture sector."[35] It is counterintuitive that this sentence, placed as it is in the midst of a list of binding obligations, can be read – as Canada proposes – as having the implication that Canada actually has a free hand to exercise nearly limitless discretion in defining for itself which are "eligible applicants" and which are not. The more plausible reading is that Canada both must treat as eligible only applicants active in the Canadian food or agriculture sector, and also must treat as eligible <u>any</u> applicants active in the

[34] Bold in original.

[35] USMCA, Canada's USMCA TRQ Appendix, Section A, Paragraph 3(c), second sentence.

Canadian food or agriculture sector. Canada does not have discretion to unilaterally redefine the term "eligible applicants", which is defined in Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix.

60. To confirm the meaning of the term "an" in Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix, and the implications that flow from its meaning, 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.[36] During the USMCA negotiations, Canada, the United States, and Mexico agreed on and utilized a USMCA Drafting Convention.[37] The Drafting Convention expressly provides 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".[38] 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.[39] The plural may be used only when the singular is excluded.[40] The Drafting Convention provided drafters examples of what to do and what not to do, such as the following:

✓ "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"

61. Applying the rules from the USMCA Drafting Convention, drafters would have understood that they should not use the word "any" in Paragraph 3(c) of Section A of Canada's TRQ Appendix "because there almost certainly will be" applicants active in the Canadian food or agriculture sector. The Drafting Convention confirms that the correct understanding is that the determiners "an" and "any" are interchangeable in Paragraph 3(c) of Section A of Canada's TRQ Appendix. Either word could have been used to achieve the same meaning, namely, that the term "eligible applicant" means <u>any</u> applicant active in the Canadian food or agriculture sector, but using the word "an" was preferable and correct according to the Drafting Convention.

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[36] *See* Vienna Convention, Article 32.

[37] USMCA Drafting Convention (Exhibit USA-114).

[38] USMCA Drafting Convention (Exhibit USA-114), p. 14.

[39] USMCA Drafting Convention (Exhibit USA-114), p. 14.

[40] USMCA Drafting Convention (Exhibit USA-114), p. 14.

b. Article 3.A.2.11(a) of the USMCA Does Not Support Canada's Position

62. Canada attempts to support its position by pointing to Article 3.A.2.11(a) of the USMCA. Article 3.A.2.11(a) provides that a Party administering an allocated TRQ shall ensure that "any person of the other Party that fulfils the importing Party's eligibility requirements is able to apply and be considered for a quota allocation under the TRQ".

63. The use of the word "any" in Article 3.A.2.11(a) weighs against Canada's proposed interpretation of Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix. Per the USMCA Drafting Convention,[41] discussed above, the word "any" – rather than "a" – is appropriately used in Article 3.A.2.11(a) because there may be no "person of the other Party that fulfils the importing Party's eligibility requirements". Indeed, Canada requires that applicants for import permits must be a resident of Canada,[42] and there may not be any person of the United States that also is a resident of Canada active in the Canadian food or agriculture sector.

c. The Terms of the *United States – Korea Free Trade Agreement* Are Not Relevant to the Panel's Interpretive Analysis and Do Not Support Canada's Position

64. Canada also tries to find support for its position in the text of the *United States – Korea Free Trade Agreement* (KORUS).[43] The KORUS is a bilateral free trade agreement between the United States and Korea to which Canada is not a party. Article 31.13.4 of the USMCA provides that USMCA dispute settlement panels "shall interpret the Agreement 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*" (Vienna Convention).

65. Article 31 of the Vienna Convention contemplates that a treaty interpreter might take into account in connection with the interpretive analysis "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty",[44] "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty",[45] "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its

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[41] *See* USMCA Drafting Convention (Exhibit USA-114), p. 14.

[42] *See* Import Permits Regulations (SOR/79-5), article 3 (Exhibit CDA-25). *See also* Canada's Initial Written Submission, para. 62.

[43] *See* Canada's Initial Written Submission, paras. 93-94.

[44] Vienna Convention, Article 31.2(a).

[45] Vienna Convention, Article 31.2(b).

provisions",[46] and "any relevant rules of international law applicable in the relations between the parties".[47]

66. Nothing in Article 31 or Article 32 of the Vienna Convention, though, contemplates that a treaty interpreter, when interpreting an international agreement, would have recourse to the terms of another international agreement to which all Parties are not party. Accordingly, the terms of the KORUS are not at all relevant to the Panel's interpretive analysis of Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix.

67. That said, the terms of the KORUS also do not support Canada's position. Canada observes that Article 3.2.2(b) of the KORUS provides that "[u]nless the Parties otherwise agree, any processor, retailer, restaurant, hotel, food service distributor or institution, or other person is eligible to apply and to be considered to receive a quota allocation."[48] Canada suggests that "[h]ad the Parties wanted to preclude Canada from further limiting TRQ eligibility to specific market actors beyond the parameters of paragraph 3(c), they could have done so expressly as in the examples above. That they did not is strong evidence that they did not intend to do so."[49]

68. The possibility that the drafters of the USMCA might have drafted the terms of the USMCA differently is self-evident, and evidence of nothing. Canada points to nothing in the KORUS that establishes why the drafters of the KORUS chose the language they did for a different trade agreement. Elsewhere in the KORUS, in Korea's TRQ Appendix (2-B-1), paragraph 21(a) provides that, for the TRQ on "Fodder, Other", "[r]egistered mixed feed producers, registered feed ingredients producers, and livestock breeders are eligible to receive a TRQ allocation". Thus, in two different places in the KORUS, there are two different provisions that set forth two different lists of who specifically is eligible to receive a TRQ allocation. What is evident from this is that the KORUS is a different agreement with different language than that which is in the USMCA. This provides no assistance to the Panel as it undertakes an interpretive analysis of Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix in this dispute.

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[46] Vienna Convention, Article 31.3(a).

[47] Vienna Convention, Article 31.3(c).

[48] Canada's Initial Written Submission, para. 93.

[49] Canada's Initial Written Submission, para. 94.

d. Canada's Argument Depends on Impermissibly Reading into the USMCA Text That Has Not Been Agreed by the Parties

69. Canada urges that, "[i]n line with Article 31.13.2 of the CUSMA, the Panel should decline to read into paragraph 3(c) text that has not been agreed to by the Parties."[50] On this point, the United States and Canada are in complete agreement.

70. The United States does not ask the Panel to read into Paragraph 3(c) any words that are not there. Rather, the United States asks the Panel to apply customary rules of interpretation to reach a correct conclusion concerning the meaning of the terms that are present in the provision.

71. It is Canada that appears to invite the Panel to read into Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix text that has not been agreed to by the Parties. To accept Canada's proposed interpretation, one would have to read the word "only" into Paragraph 3(c), as follows:

> Canada shall allocate its TRQs each quota year [only] to eligible applicants. An eligible applicant means [only] an applicant active in the Canadian food or agriculture sector. In assessing eligibility, Canada shall not discriminate against applicants who have not previously imported the product subject to a TRQ.

The word "only", of course, does not appear in Paragraph 3(c). And even if the word "only" were added (as in the above modified version of Paragraph 3(c)), it still is not entirely clear that this would support Canada's position. Retailers, food service operators, and other entities still would be active in the Canadian food or agriculture sector – Canada does not dispute this – and thus still would be among "[only] the eligible applicants" to which Canada is required to allocate its TRQs.

e. Canada Overstates the Nature and Degree of Its Discretion to Set Eligibility Requirements for the Allocation of Its USMCA Dairy TRQs

72. Ultimately, Canada's argument relies not on interpretive considerations concerning the text of Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix, but on assertions Canada makes about the nature and degree of "Canada's discretion to set eligibility requirements for the allocation of its CUSMA dairy TRQs."[51] Canada's assertions are unfounded.

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[50] Canada's Initial Written Submission, para. 94 (noting that "Article 31.13.2 provides that '[t]he findings, determinations and recommendations of the panel shall not add to or diminish the rights and obligations of the Parties under this Agreement.'").

[51] Canada's Initial Written Submission, para. 95.

73. Canada points to Article 3.A.2.1 of the USMCA, which defines the term "allocation mechanism" as "any system in which access to the tariff-rate quota is granted on a basis other than first-come first-served". Canada posits that "[t]his definition recognizes that a Party can adopt a system other than FCFS – subject to the Party's relevant obligations under Article 3.A.2."[52] That proposition is not controversial. Canada goes on to contend that "[i]n deciding how to grant 'access' to a particular TRQ, the Party will necessarily have to decide who has access to the TRQ."[53] Canada's suggestion that the definition of "allocation mechanism" necessarily means that Canada has discretion to decide who is and who is not an "eligible applicant" does not logically follow, and Article 3.A.2.1 does not support Canada's position.

74. As an initial matter, Canada's argument concerns Article 3.A.2.1 of the USMCA, not Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix, so it is a distraction from the primary interpretive task of the Panel.[54] Moreover, logically, it is not necessarily the case that Canada would need to decide for itself which applicants are eligible and which are not eligible when designing and applying an allocation mechanism for granting "access" to a TRQ. The notion of granting access to the TRQ is more plausibly understood as referring to the process of apportioning allocations among eligible applicants and how that process is executed. That is what primarily distinguishes TRQ allocation through an "allocation mechanism" versus allocation on a first-come first-served basis. The "eligible applicants" under each approach – allocation mechanism versus first-come first-served – logically would be the same, and would be determined according to the definition of "eligible applicant" in Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix, which applies to both types of allocation systems.

75. The findings of the panel in *Canada – Dairy TRQs I* to which Canada points also do not support Canada's position, as the panel's findings in that dispute concerned discretion that Canada may have related to "access" (not necessarily eligibility), and nevertheless that discretion is, in all instances, "subject to compliance with the other provisions of the Treaty."[55]

76. Canada's contention that it possesses "discretion to establish additional eligibility requirements for the allocation of its CUSMA dairy TRQs" also is not supported by other context in the USMCA, specifically Article 3.A.2.6(a) of the USMCA. The disputing Parties disagree about the meaning and scope of Article 3.A.2.6(a). However, regardless of the meaning of the term "utilization", it is plain on the face of the provision that Article 3.A.2.6(a) constrains the Parties' discretion to unilaterally modify conditions, limits, and eligibility requirements

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[52] Canada's Initial Written Submission, para. 95.

[53] Canada's Initial Written Submission, para. 95 (underline in original).

[54] While Article 3.A.2.1 of the USMCA possibly could be referenced as context for the interpretation of Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix, it is not apparent that Canada refers to it for that purpose. Canada discusses contextual elements in a subsequent section of its initial written submission.

[55] *See* Canada's Initial Written Submission, para. 95 (quoting *Canada – Dairy TRQs I (Panel)*, para. 39 (Exhibit USA-26)).

related to their USMCA TRQs. Article 3.A.2.6(a) prohibits the introduction of a new or additional condition, limit, or eligibility requirement on the utilization of a TRQ beyond those set out in a Party's Schedule to Annex 2-B (*i.e.*, Canada's USMCA TRQ Appendix) unless the Party seeking to introduce the new or additional condition, limit, or eligibility requirement goes through a notification and consultation process with the other Party, during which the other Party can object, preventing the proposed new or additional condition, limit, or eligibility requirement from taking effect.

77. Thus, contrary to Canada's protestations, the United States does, indeed, have the ability to "veto" certain new or additional conditions, limits, or eligibility requirements that Canada may wish to introduce.[56] That veto power is expressly provided in the Agreement. It is also logical, given that the Parties negotiated the terms of the Agreement, and the final text of the USMCA reflects a balance of rights and obligations that each USMCA Party ultimately concluded was sufficiently in its own interests to justify accepting the Agreement. The possibility that a Party could subsequently unilaterally change the substantive obligations to which it agreed is untenable and, with respect to the introduction of certain new or additional conditions, limits, and eligibility requirements related to TRQ allocations, expressly prohibited.

78. The last sentence of Article 3.A.2.6(a) of the USMCA provides that "[f]or greater certainty, paragraph 6 shall not apply to conditions, limits, or eligibility requirements that apply regardless of whether or not the importer utilizes the TRQ when importing the agricultural good." Thus, Canada could introduce new or additional eligibility requirements beyond those set out in its USMCA TRQ Appendix if the new requirements apply generally to all importers, such as the requirement that to apply for any type of import license, an applicant must be a resident of Canada.[57] In this way, Canada does have a degree of regulatory flexibility to set eligibility requirements, again subject to compliance with other provisions of the USMCA.

79. Article 3.A.2.6(a) of the USMCA is strong contextual support that Canada's discretion to decide who is and who is not an "eligible applicant" for the purposes of its USMCA dairy TRQs, to the extent that Canada has any such discretion specific to its dairy TRQs, is far more limited than Canada suggests.

2. Canada's Contextual Arguments Are Unavailing

a. The Final Sentence of Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix

80. Canada observes that the final sentence of Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix provides that "[i]n assessing eligibility, Canada shall not discriminate

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[56] *See* Canada's Initial Written Submission, paras. 6 and 158.

[57] *See* Import Permits Regulations (SOR/79-5), article 3 (Exhibit CDA-25). *See also* Canada's Initial Written Submission, para. 62.

against applicants who have not previously imported the product subject to a TRQ".[58] Canada argues that "[i]f paragraph 3(c) exhaustively defined who is eligible for an allocation under Canada's TRQs, there would be no need for this final sentence in paragraph 3(c), as Canada would already be prevented from restricting TRQ eligibility only to established importers active in the Canadian food or agriculture sector."[59] Canada's logic is flawed.

81. As the U.S. initial written submission notes, Paragraph 3(c) does not specify what it means to be "active" in the Canadian food or agriculture sector.[60] Necessarily, Canadian government authorities will need to exercise some administrative judgment when determining whether an applicant is or is not "active". The final sentence of Paragraph 3(c) clarifies and constrains Canada's discretion when making such a determination, specifically prohibiting Canada from discriminating against applicants who have not previously imported the product subject to a TRQ. However else Canada may understand "active" and define it for the purposes of the administration of its USMCA TRQs, the final sentence of Paragraph 3(c) provides that Canada cannot define "active" to mean that the applicant necessarily has previously imported the product subject to a TRQ.

82. The interpretation proposed by the United States, namely that "eligible applicant" means any applicant active in the Canadian food or agriculture sector, does not render the final sentence of Paragraph 3(c) inutile, as Canada contends.[61] The final sentence concerns the meaning of the term "active", while the second sentence defines the term "eligible applicant" to include any applicant that is active in the Canadian food or agriculture sector. The interpretation proposed by the United States, which is the correct interpretation that follows from a proper application of customary rules of interpretation, gives meaning to both sentences.

83. Contrary to Canada's assertion, the United States does not take the position that the second sentence of Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix "exhaustively" defines who is eligible for an allocation under Canada's TRQs. Canada retains the right to impose certain general eligibility criteria "that apply regardless of whether or not the importer utilizes the TRQ when importing the agricultural good",[62] such as, for example, requiring that applicants make their applications in a certain manner, using a certain form, and by a certain date, and requiring that applicants be residents of Canada. If an applicant fails to meet these or other general criteria, then the applicant properly would be deemed not eligible for Canada's USMCA dairy TRQs.

84. Nothing in Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix – or any other provision of the USMCA – provides that Canada has unfettered discretion to pick and

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[58] Canada's Initial Written Submission, para. 97.

[59] Canada's Initial Written Submission, para. 98.

[60] *See* U.S. Initial Written Submission, para. 51.

[61] *See* Canada's Initial Written Submission, para. 98.

[62] USMCA, Article 3.A.2.6(a).

choose from among types of applicants (or possibly even from among individual applicants) that are active in the Canadian food or agriculture sector to decide who is and who is not an eligible applicant for Canada's USMCA dairy TRQs.

b. The Nature of Canada's TRQ Appendix

85. Canada responds to contextual arguments in the U.S. initial written submission concerning Canada's USMCA TRQ Appendix by discussing "the nature of TRQ commitments as set out in a Party's Tariff Schedule".[63] Canada's discussion does not support its position.

86. Canada refers to the report of the WTO Appellate Body in *EC – Bananas III*, and Canada asserts that the Appellate Body explained in that report that "a Tariff Schedule is intended to 'yield rights and grant benefits'."[64] In Canada's view, it follows from this that "[i]f a Party's Tariff Schedule does not expressly yield a certain right, that right remains intact and untouched – subject to the Party's other obligations under the Agreement."

87. The full quote from the referenced report is "[t]he ordinary meaning of the term 'concessions' suggests that a Member may yield rights and grant benefits, but cannot diminish its obligations."[65] The Appellate Body was building on the logic of a prior panel report in *United States – Restrictions on Importations of Sugar*, which reasoned that "... Article II permits contracting parties to incorporate into their Schedules acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement."[66] The WTO Appellate Body's discussion of GATT/WTO Tariff Schedules – which ultimately reasons that such Schedules cannot diminish a party's obligations under the agreement – offers no support to Canada's arguments about the interpretation of the terms in Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix, which itself is part of Canada's USMCA Tariff Schedule.

88. Canada goes on to assert that "[i]n the case of Canada's CUSMA TRQ Appendix, Canada did not yield the right to establish eligibility requirements for the allocation of its CUSMA dairy TRQs."[67]

89. With this assertion, though, Canada begs the question.

90. The interpretive question before the Panel is precisely whether, in Paragraph 3(c) of Section A of the USMCA TRQ Appendix, in Canada's USMCA Tariff Schedule, Canada

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[63] Canada's Initial Written Submission, para. 100.

[64] Canada's Initial Written Submission, para. 101 (quoting *EC – Bananas III (AB)*, para. 154).

[65] *EC – Bananas III (AB)*, para. 154 (underline added).

[66] *EC – Bananas III (AB)*, para. 154 (quoting *United States – Restrictions on Importations of Sugar (Panel)*; underline added).

[67] Canada's Initial Written Submission, para. 102.

yielded the right to establish eligibility requirements for the allocation of its USMCA dairy TRQs by agreeing to define the term "eligible applicant" as "an applicant active in the Canadian food or agriculture sector." The United States has demonstrated that a proper application of customary rules of interpretation leads to the conclusion that Canada did yield that right in that provision. Canada's assertions to the contrary are just that, assertions, and those assertions are not contextual arguments that support Canada's preferred interpretation.

c. Article 3.A.2.11(b) of the USMCA

91. The U.S. initial written submission explains[68] that where there are limiting conditions on who has access to the TRQs or for what purpose, such conditions are explicitly written into the Agreement. For example, the "producer clause" of Article 3.A.2.11(b) of the USMCA provides that a Party shall ensure that "it does not allocate any portion of the quota to a producer group". This language renders producers ineligible to receive a USMCA dairy TRQ allocation. There is no similar language making retailers, food service operators, or other entities ineligible to receive an allocation. Had Canada wished to exclude particular importer groups from eligibility, Canada should have sought agreement to incorporate such an exclusion into the USMCA.

92. Canada responds that the producer clause of Article 3.A.2.11(b) of the USMCA "shows that where the Parties did not want Canada to design its eligibility requirements in a manner that results in the issuance of TRQ allocations to a specific class of market actors (i.e., producer groups), they included an express prohibition to this effect in the Agreement."[69] This characterization is not helpful for Canada. Following Canada's own logic, the Parties did not want allocations to be issued to a specific class of market actors (*i.e.*, producer groups), so they stated that expressly. If Canada did not want allocations to flow to other classes of market actors (*i.e.*, retailers, food service operators, and other entities active in the Canadian food or agriculture sector), then Canada, as one of the Parties, should have similarly sought agreement from the other Parties to incorporate such an exclusion in the Agreement. Canada did not do so, and there is no such agreement memorialized in the USMCA.

93. Canada contends that "[a]bsent ... an express prohibition in the Agreement, Canada retains the discretion to set the eligibility requirements that it deems appropriate for the allocation of its CUSMA TRQs – within the parameters set by paragraph 3(c). This is consistent with the understanding that when a right was not expressly yielded by Canada in its TRQ Appendix or elsewhere in the Agreement, Canada remains free to exercise that right."[70]

94. Once again, Canada begs the question.

95. The interpretive issue in dispute is whether Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix constrains Canada's right to decide who is and who is not an "eligible

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[68] *See* U.S. Initial Written Submission, para. 62.

[69] Canada's Initial Written Submission, para. 105.

[70] Canada's Initial Written Submission, para. 105 (underline added).

applicant" for the purposes of Canada's USMCA dairy TRQs. The United States, through a proper application of customary rules of interpretation, has demonstrated that it does. Canada's unsupported assertions to the contrary are insufficient to rebut the U.S. claim.

96. Canada also reaches for support to the processor clause of Article 3.A.2.11(b) of the USMCA. But Canada reaches in vain. Canada contends that "[t]he fact that the Parties included the Processor Clause in Article 3.A.2.11(b) indicates that in the absence of that clause, Canada would have been allowed to limit TRQ eligibility exclusively to processors."[71] Canada once again confuses and conflates the concepts of access to a TRQ allocation and eligibility for the TRQ. Indeed, in *Canada – Dairy TRQs I*, the primary dispute between the parties was that Canada was denying "access to an allocation" to certain types of market actors (*i.e.*, distributors) that were themselves "eligible applicants", and the panel there found Canada's measure breached the processor clause of Article 3.A.2.11(b). Given the distinction between access and eligibility, the processor clause of Article 3.A.2.11(b) simply does not provide any context that is helpful for interpreting Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix.

d. Articles 3.A.2.5 and 3.A.2.10 of the USMCA

97. Canada argues that Articles 3.A.2.5 and 3.A.2.10 of the USMCA "also recognize Canada's discretion to establish eligibility requirements for the allocation of its CUSMA dairy TRQs, within the parameters of paragraph 3(c)."[72] Canada's arguments lack merit.

98. Canada notes that "Article 3.A.2.5 provides that '[t]he Party administering a TRQ shall publish, on its designated website and at least 90 days prior to the beginning of the TRQ year, all information concerning its TRQ administration, including the size of quotas and eligibility requirements'."[73] Canada contends that "[t]his provision supports the view that the Party administering a TRQ maintains the discretion to establish 'eligibility requirements' for the allocation of its CUSMA TRQs."[74] Canada is incorrect.

99. Article 3.A.2.5 of the USMCA establishes notice and transparency obligations, requiring the Party administering a TRQ to publish certain information, including eligibility requirements, sufficiently in advance of the beginning of the TRQ year so that, as Canada puts it, the importer will be able "to plan its affairs accordingly."[75] Article 3.A.2.5 says nothing about the substantive content of the eligibility requirements or how eligibility requirements may be determined, and Article 3.A.2.5 provides no contextual guidance concerning the correct interpretation of

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[71] Canada's Initial Written Submission, para. 107 (underline in original).

[72] Canada's Initial Written Submission, para. 108.

[73] Canada's Initial Written Submission, para. 108 (quoting Article 3.A.2.5 of the USMCA; underline added by Canada).

[74] Canada's Initial Written Submission, para. 108.

[75] Canada's Initial Written Submission, para. 108.

Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix. As the United States observes above, Canada retains the right to impose certain general eligibility criteria "that apply regardless of whether or not the importer utilizes the TRQ when importing the agricultural good",[76] such as, for example, requiring that applicants make their applications in a certain manner, using a certain form, and by a certain date, and requiring that applicants be residents of Canada. Article 3.A.2.5 merely requires Canada to publish the eligibility requirements and other information by a specified point in time.

100. Canada also observes that the first sentence of Article 3.A.2.10 of the USMCA provides that:

> If a TRQ is administered by an allocation mechanism, then the administering Party shall provide that the mechanism allows for importers that have not previously imported the agricultural good subject to the TRQ (new importers), who meet all eligibility criteria other than import performance, to be eligible for a quota allocation.[77]

101. Canada argues that "under the U.S. interpretation of paragraph 3(c), the first sentence of Article 3.A.2.10 would become inutile, as Canada would already be prohibited from limiting TRQ eligibility to established importers that are active in the Canadian food or agriculture sector."[78] Canada is wrong.

102. Importantly, Article 3.A.2.10 of the USMCA is located in Annex 3-B of Chapter 3 of the USMCA. Annex 3-B is entitled "Agricultural Trade Between Canada and the United States", and the provisions in Annex 3-B, including Article 3.A.2.10, apply to both Canada and the United States. Thus, even if the obligation in the first sentence of Article 3.A.2.10 is similar to or possibly repetitive of an obligation in Paragraph 3(c) of Canada's USMCA TRQ Appendix, it is not redundant, nor is it inutile, given that it applies to both Canada and the United States, while Canada's TRQ Appendix applies only to Canada. Additionally, drafters may have any number of reasons for repeating or rephrasing obligations in different provisions of an agreement, with the ultimate aim of being clear about the agreement reached by the Parties. The fact of such repetition does not in itself mean that any provision is redundant or inutile.

103. Furthermore, Canada continues to misunderstand the implication of the obligations in Article 3.A.2.10 of the USMCA and the final sentence of Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix. As explained above,[79] Paragraph 3(c) does not specify what

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[76] USMCA, Article 3.A.2.6(a).

[77] Canada's Initial Written Submission, para. 109 (quoting the first sentence of Article 3.A.2.10 of the USMCA).

[78] Canada's Initial Written Submission, para. 110.

[79] *See supra*, section II.B.2.a.

it means to be "active" in the Canadian food or agriculture sector.[80] Necessarily, Canadian government authorities will need to exercise some administrative judgment when determining whether an applicant is or is not "active". The final sentence of Paragraph 3(c) – and also Article 3.A.2.10 – clarifies and constrains Canada's discretion when making such a determination, specifically prohibiting Canada from discriminating against applicants who have not previously imported the product subject to a TRQ. However else Canada may understand "active" and define it for the purposes of the administration of its USMCA TRQs, the final sentence of Paragraph 3(c) – and Article 3.A.2.10 – provides that Canada cannot define "active" to mean that the applicant necessarily has previously imported the product subject to a TRQ.

104. For these reasons, Articles 3.A.2.5 and 3.A.2.10 of the USMCA do not provide contextual support for Canada's proposed interpretation of Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix. Indeed, Articles 3.A.2.5 and 3.A.2.10 do not appear to be of any assistance at all in the interpretive analysis of Paragraph 3(c).

3. The U.S. Interpretation Would Not Lead to a Manifestly Absurd or Unreasonable Result

105. Canada asserts that "Article 31(1) of the Vienna Convention on the Law of Treaties ('VCLT') requires the treaty interpreter to interpret the treaty 'in good faith'. One of the corollaries of this requirement is that a treaty should not be interpreted in a manner that leads to a result that is manifestly absurd or unreasonable."[81] Canada's characterization of the relevant customary rules of interpretation is not correct.

106. Article 31.13.4 of the USMCA provides that USMCA dispute settlement panels "shall interpret the Agreement in accordance with customary rules of interpretation of public international law, as reflected in Articles 31 and 32" of the Vienna Convention. Article 31 of the Vienna Convention sets forth the "General rule of interpretation", which, in relevant part, establishes 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." Article 32 of the Vienna Convention is entitled "Supplementary means of interpretation", and provides that:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or

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[80] *See* U.S. Initial Written Submission, para. 51.

[81] Canada's Initial Written Submission, para. 111.

(b) leads to a result which is manifestly absurd or unreasonable.

107. Rather than being one of the "corollaries" of the general rule, Article 32 reflects a separate customary rule of interpretation of public international law, which is to be applied by USMCA dispute settlement panels according to its terms. On its face, Article 32 of the Vienna Convention permits a treaty interpreter, *inter alia*, to have recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, to determine the meaning when the interpretation according to Article 31 leads to a result which is manifestly absurd or unreasonable.

108. Put another way, Article 32 becomes relevant, *inter alia*, when the ordinary meaning of the terms of the agreement in their context and in the light of its object and purpose leads to an unambiguous interpretation, but that interpretation leads to a result which is manifestly absurd or unreasonable. In that situation, the treaty interpreter may look to supplementary means of interpretation to ascertain the correct meaning of the agreement; one which would not lead to a result that is manifestly absurd or unreasonable.

109. The International Law Commission ("ILC") Draft Articles on the Law of Treaties with commentaries ("Commentaries") explains that:

> The word "supplementary" emphasizes that article [32] does not provide for alternative, autonomous, means of interpretation but only for means to aid an interpretation governed by the principles contained in article [31]. Subparagraph (a) admits the use of these means for the purpose of deciding the meaning in cases where there is no clear meaning. Sub-paragraph (b) does the same in cases where interpretation according to article [31] gives a meaning which is "manifestly absurd or unreasonable". The Court has recognized this exception to the rule that the ordinary meaning of the terms must prevail. On the other hand, the comparative rarity of the cases in which it has done so suggest that it regards this exception as limited to cases where the absurd or unreasonable character of the "ordinary" meaning is manifest. The Commission considered that the exception must be strictly limited, if it is not to weaken unduly the authority of the ordinary meaning of the terms. Sub-paragraph (6) is accordingly confined to cases where interpretation under article [31] gives a result which is manifestly absurd or unreasonable.[82]

[82] Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, vol. II ("ILC Commentaries"), p. 223 (Exhibit USA-70)

The discussion above suggests that one would expect that recourse to supplementary means of interpretation due to an interpretation leading to a result that is manifestly absurd or unreasonable will be "strictly limited"[83] and occur rarely, only in the clearest cases. This is not one of those cases.

110. As a threshold matter, while Canada asserts that "the U.S. interpretation of paragraph 3(c) would lead to a manifestly absurd or unreasonable result",[84] Canada does not propose any supplementary means of interpretation on which the Panel should rely to ascertain the correct interpretation of Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix. Canada just insists that the U.S. interpretation, which follows from the application of Article 31 of the Vienna Convention, "cannot be the correct one",[85] with the apparent implication that Canada's own proposed interpretation therefore must be correct. On its face, that is not how Article 32 of the Vienna Convention is to be applied.

111. Additionally, it is not clear either that the potential result that Canada suggests may follow from the U.S. interpretation actually would happen, or that such result, if it did happen, would be manifestly absurd or unreasonable. The thrust of Canada's argument is that under the U.S. interpretation, more applicants in Canada would be eligible and would apply for Canada's USMCA dairy TRQs. In Canada's estimation, possibly 25 times more applicants would be eligible, and if all of those additional applicants applied for allocations of Canada's USMCA dairy TRQs, Canada asserts that "it would be extremely difficult for Canada to administer its CUSMA dairy TRQs in a manner compatible with [certain] obligations in Article 3.A.2".[86] Canada's argument is unpersuasive, for two reasons.

112. First, Canada's concern is entirely speculative. There is no certainty that the number of additional applicants would be anywhere near 25 times the number of current applicants. As the Retail Council of Canada explains in its non-governmental entity written submission:

> Paragraphs 114 – 116 of the Canadian submission raise the prospect of tens of thousands of applicants for quota if eligibility were to be expanded. We refute this based on the consideration that the inclusion of eligibility of retailers and distributors for CETA fine cheese has only generated 253 quota holders by its fifth year (2022), of which 206 are retailers and distributors. While that number would undoubtedly be greater if a wider range of dairy products were to be available and from the nearby US market, the

[83] ILC Commentaries, p. 223 (Exhibit USA-70)

[84] Canada's Initial Written Submission, para. 111.

[85] Canada's Initial Written Submission, para. 117.

[86] Canada's Initial Written Submission, para. 116.

> tens of thousands of applicants suggested by the Canadian government is an entirely fanciful number.[87]

113. Canada presents no evidence in support of its assertion that an overwhelming number of additional applicants actually would apply for USMCA dairy TRQ allocations, and the Retail Council of Canada has presented evidence that under a similar trade agreement, the admission of retailers as eligible applicants resulted in only a marginal increase in the actual number of applicants.

114. Second, if complying with the obligations in Article 3.A.2 of the USMCA became "extremely difficult" for Canada using an allocation mechanism, the USMCA also provides Canada the option of administering its USMCA dairy TRQs on a first-come first-served basis. That potential result would not be manifestly absurd or unreasonable. Indeed, the possibility of allocating TRQs on a first-come first-served basis is expressly provided for in the Agreement as an option available to Canada. The suggestion that employing an option expressly provided for under the Agreement would be a manifestly absurd or unreasonable result simply is not tenable.

115. Furthermore, it is actually Canada's proposed interpretation of Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix that would lead to a manifestly absurd or unreasonable result, or, alternatively, under Canada's proposed interpretation, Paragraph 3(c) would have no useful effect.[88] Canada contends that Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix establishes that "Canada must select from a specific category of market actors – namely, persons that are active in the Canadian food or agriculture sector. Canada is not entitled to issue allocations to market actors from <u>outside</u> this category (e.g., a Canadian car manufacturer or a Canadian oil producer). But so long as the market actors chosen by Canada remain <u>within</u> the parameters of paragraph 3(c), nothing prevents Canada from restricting TRQ eligibility to a subset of 'eligible applicants'."[89] Canada's proposed interpretation suggests no limiting principle in Paragraph 3(c) that would discipline Canada's narrowing of the "subset of 'eligible applicants'."[90] It would appear that, under Canada's proposed interpretation, Canada may pick and choose to identify its preferred "subset" of "market actors", possibly favoring particular companies over other companies of the same importer type, or possibly even selecting just one company as the only "market actor" that would constitute an "eligible applicant" for Canada's domestic law purposes. Plainly, that would be a manifestly absurd or unreasonable result, but it appears that nothing in Canada's proposed interpretation would preclude that result. To the extent that Canada's proposed interpretation would permit Canada to identify just one company as the exclusive eligible applicant, such an interpretation would render Paragraph 3(c) without useful effect, contrary to customary rules of interpretation.

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[87] RCC Submission, p. 4 (footnotes omitted).

[88] *See Canada – Dairy TRQs I (Panel)*, para. 119 (Exhibit USA-26).

[89] Canada's Initial Written Submission, para. 91 (underline in original).

[90] Canada's Initial Written Submission, para. 91 (underline in original).

4. Canada's Dairy TRQ Allocation Measures Are Inconsistent with Paragraph 3(c) of Section A of Canada's TRQ Appendix

116. As demonstrated above, Canada has failed to rebut the U.S. claim under Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix. For the reasons given in the U.S. initial written submission, as well as those given above, Canada's dairy TRQ allocation measures, which limit eligibility for TRQ allocations only to processors, distributors, and, in some cases, further processors, and which exclude from eligibility retailers, food service operators, and other entities "active in the Canadian food or agriculture sector", are inconsistent with Section A, Paragraph 3(c), of Canada's USMCA TRQ Appendix.

C. Canada Fails to Rebut the U.S. Claim Under Article 3.A.2.6(a) of the USMCA

117. The U.S. initial written submission demonstrates that an interpretive analysis correctly applying customary rules of interpretation of public international law leads to the conclusion that Article 3.A.2.6(a) of the USMCA – which provides that "no Party shall introduce 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 specification or grade, permissible end-use of the imported product, or package size beyond those set out in its Schedule to Annex 2-B (Tariff Commitments)" – prohibits a Party from introducing anything that "demand[s] or require[s] as a prerequisite", or that "set[s] bounds", or that "is required or needed" for the action of "render[ing] useful" a TRQ for the importation of an agricultural good that is new or additional, in excess of what is already in Annex 2-B of the Party's Tariff Schedule.[91]

118. The U.S. initial written submission further demonstrates that Canada's introduction, through its dairy TRQ allocation measures, of a new or additional condition, limit, or eligibility requirement on the utilization of its USMCA dairy TRQs – namely that a TRQ applicant and recipient must be a processor, distributor, or, in some cases, further processor – is inconsistent with Article 3.A.2.6(a) of the USMCA.[92]

119. Canada's initial written submission fails to rebut the U.S. claim. As demonstrated below, Canada's textual and contextual analysis is flawed, and Canada's assertion that its proposed interpretation supports the object and purpose of the USMCA lacks any foundation.

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[91] *See* U.S. Initial Written Submission, section V.C.

[92] *See* U.S. Initial Written Submission, section V.C.

1. Canada's Interpretive Analysis of the Ordinary Meaning of the Phrase "Utilization of a TRQ for Importation of an Agricultural Good" Is Incorrect

120. Canada begins its discussion by referring to dictionary definitions of the words "utilization" and "utilize".[93] The United States referred to the same definitions in the U.S. initial written submission,[94] and the disputing Parties do not appear to disagree about the most appropriate definitions of those words.

121. Canada, however, reasons that:

> The dictionary definition of the term "utilization" read together with the phrase "of a TRQ for importation of an agricultural good" makes it apparent that there is a distinction between an allocation for potential use of the TRQ and actual use once the TRQ is allocated. The "utilization" of a TRQ "for importation of an agricultural good" is carried out only by an importer, who has received a TRQ quantity and who subsequently uses it to import goods.[95]

Canada focuses on the wrong distinction, and Canada's conclusion is not supported by the text of Article 3.2.6(a).

122. The term "TRQ" is a defined term for purposes of Article 3.A.2 of the USMCA. Article 3.A.2.1 defines "TRQ" as follows:

> **tariff rate quota** (TRQ) means 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 of that good that exceed that quantity.[96]

Accordingly, any time the term "TRQ" is used in Article 3.A.2, it means "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 of that good that exceed that quantity". That full phrasing can be substituted for "TRQ" wherever the term is used. Doing so, of course, would render the text unwieldy and, in places,

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[93] *See* Canada's Initial Written Submission, para. 127.

[94] *See* U.S. Initial Written Submission, para. 69.

[95] Canada's Initial Written Submission, para. 129 (underline in original; footnote omitted).

[96] Bold in original.

possibly unreadable, which may explain the drafters' choice to use the shorthand, defined term "TRQ".

123. Given the definition of the term "TRQ" in Article 3.A.2.1 of the USMCA, Article 3.A.2.6(a) of the USMCA actually must be read as follows:

> Except as provided in subparagraph (b) and (c), no Party shall introduce a new or additional condition, limit, or eligibility requirement on the utilization of 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 of that good that exceed that quantity] for importation of an agricultural good, including in relation to specification or grade, permissible end-use of the imported product, or package size beyond those set out in its Schedule to Annex 2-B (Tariff Commitments). For greater certainty, paragraph 6 shall not apply to conditions, limits, or eligibility requirements that apply regardless of whether or not the importer utilizes the [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 of that good that exceed that quantity] when importing the agricultural good.

124. Taking proper account of the definition of the term "TRQ" supports the conclusion that "utilization of a TRQ" refers to use of the mechanism, rather than use of a particular quota allocation received by an importer. To utilize the TRQ for importation of an agricultural good, that is, to use the mechanism to import an agricultural good, an importer must be eligible to apply for and receive a quota allocation (*i.e.*, the importer must be eligible to use the mechanism); 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; the importer must then use the import license to effectuate importation of the agricultural good. All of those steps, separately and together, constitute "utilization of a TRQ for importation of an agricultural good". 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 relate to all of the steps that are entailed in "utilization of a TRQ" (*i.e.*, use of the mechanism).

125. Canada contends that the United States "erroneously conflates the concepts of allocation and utilization."[97] On the contrary, the more relevant distinction to be drawn is between the concepts of quota allocation (*i.e.*, the portion of the total TRQ volume allocated to a particular

[97] Canada's Initial Written Submission, para. 130.

importer, on which Canada's analysis incorrectly focuses) and the TRQ itself (*i.e.*, the mechanism). It is Canada that erroneously conflates these concepts.

126. Canada complains about the reasoning in the U.S. initial written submission, contending that "[a] condition on the allocation of a TRQ does not become a condition on the utilization of a TRQ simply because receiving an allocation is a prerequisite to using it."[98] The United States stands behind the reasoning articulated in the U.S. initial written submission, which, in our view, is logically sound. If an importer is wrongly denied eligibility for a TRQ, then it is not possible for the importer to utilize the TRQ. A condition, limit, or eligibility requirement governing access to a TRQ (*i.e.*, access to the mechanism) is a condition, limit, or eligibility requirement on the utilization of a TRQ.

127. The U.S. proposed interpretation is supported by more than logic, though. As explained above, the U.S. position accords with – and Canada's position is contrary to – the ordinary meaning of the terms of Article 3.A.2.6(a) of the USMCA. As demonstrated below, contextual elements also weigh against Canada's proposed interpretation and in favor of the interpretation proposed by the United States.

2. Contextual Analysis Does Not Support Canada's Understanding of the Phrase "Utilization of a TRQ for Importation of an Agricultural Good"

a. The Distinctions Between "Allocation" and "Use" and "Quota Allocation" and "TRQ"

128. Canada presents contextual arguments related to the distinction between the terms "allocation" and "use".[99] As noted above, though, and as elaborated below, the distinction between those terms does not support Canada's position, and is far less relevant to the interpretive analysis than the distinction between the terms "quota allocation" and "TRQ".

129. Canada points to the use of the phrase "the allocation and use of the TRQ" in Articles 3.A.2.8 and 3.A.2.9 of the USMCA as support for the proposition that, "[b]y using both terms, [those provisions] distinguish[] obligations pertaining to the allocation of a TRQ from those pertaining to the use of a TRQ."[100] That proposition is correct, as far as it goes, but it does not offer any support for Canada's position with respect to the interpretation of Article 3.A.2.6(a) of the USMCA.

130. Article 3.A.2.8 of the USMCA twice uses the phrase "procedures for the allocation and use of the TRQ". Article 3.A.2.9 of the USMCA also uses the phrase "procedures for the

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[98] Canada's Initial Written Submission, para. 130.

[99] *See* Canada's Initial Written Submission, paras. 151-156.

[100] Canada's Initial Written Submission, para. 152.

allocation and use of the TRQ", as well as the phrase "any condition or requirement applicable on or in connection with the allocation and use of the TRQ".

131. Taking into account the definition of the term "TRQ" in Article 3.A.2.1 of the USMCA and reading the terms "allocation" and "use" in direct context, Articles 3.A.2.8 and 3.A.2.9 simply refer, on the one hand, to the "allocation ... of a TRQ", meaning most logically the process of dividing up the "specified quantity (in-quota quantity)"[101] established for the TRQ in a Party's Schedule[102] into portions, and, on the other hand, to "use of a TRQ", meaning use of the "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 of that good that exceed that quantity".[103]

132. The distinction between "allocation" and "use" of a TRQ does not support Canada's contention that "utilization of a TRQ" means just "use" of a quota allocation. Rather, as demonstrated above, to "utiliz[e] a TRQ for importation of an agricultural good" entails an importer assessing, based on the rules prescribed by the Party administering the TRQ, whether it is eligible to apply for and receive a quota allocation (*i.e.*, the importer must be eligible to use the mechanism); the importer must apply for a quota allocation; if the importer receives a quota allocation, then the importer must apply for and receive an import license; the importer must then use the import license to effectuate importation of the agricultural good. Logically, the phrase "allocation and use of a TRQ" is more synonymous with "utilization of a TRQ", since the phrase "allocation and use of a TRQ" concerns both allocation and use, which together would involve all of the steps identified in the preceding sentence. The phrase "allocation and use of a TRQ" is far less like just the use of a quota allocation by a particular importer, which is only one aspect of utilizing a TRQ.

133. Canada also looks to Article 3.A.2.13 of the USMCA for contextual support, noting that Article 3.A.2.13 provides that "'[a] Party administering a TRQ shall not require the re-export of an agricultural good as a condition for the application for, or utilization of, a quota allocation'."[104] Canada emphasizes that this language "demonstrates that the utilization of a quota allocation and the application for a quota allocation are two separate and distinct concepts".[105] While Canada's observation is correct, it does not support Canada's proposed interpretation of Article 3.A.2.6(a) of the USMCA.

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[101] USMCA, Article 3.A.2.1.

[102] *See* USMCA, Article 3.A.2.2. *See also*, *e.g.*, Canada's USMCA TRQ Appendix, Section B, Paragraph 5.

[103] USMCA, Article 3.A.2.1.

[104] Canada's Initial Written Submission, para. 154 (quoting Article 3.A.2.13 of the USMCA; underline added by Canada).

[105] Canada's Initial Written Submission, para. 154 (underline in original).

134. Far more relevant is the use in Article 3.A.2.13 of the term "quota allocation", which contrasts with the use of the term "TRQ" in Article 3.A.2.6(a), and also the reference to "administering a TRQ" earlier in Article 3.A.2.13 itself. The use of these different terms indicates that when the drafters intended to refer to utilization of a particular quota allocation by an importer, they did so expressly, using the phrase "utilization of[] a quota allocation". On the other hand, where the phrase "utilization of a TRQ" is used, it is evident that the meaning of the phrase is different, and what is being referenced is the "mechanism".[106]

135. Articles 3.A.2.10 and 3.A.2.11(a) of the USMCA provide further support for concluding that there is a distinction between "a quota allocation" and a "TRQ". Article 3.A.2.10 provides that:

> If a TRQ [referring to the "mechanism" itself mentioned in Article 3.A.2.1] is administered by an allocation mechanism, then the administering Party shall provide that the mechanism allows for importers that have not previously imported the agricultural good subject to the TRQ [*i.e.*, the whole mechanism imposing a TRQ on a particular product] (new importers), who meet all eligibility criteria other than import performance, to be eligible for a quota allocation [*i.e.*, a portion of the total TRQ quantity]. The Party administering the TRQ allocation mechanism shall not discriminate against new importers when allocating the TRQ [the total "specified quantity (in-quota quantity)" referenced in Article 3.A.2.1].

Article 3.A.2.11(a) provides that:

> A Party administering an allocated TRQ [the mechanism referenced in Article 3.A.2.1] shall ensure that:
>
> (a) any person of the other Party that fulfils the importing Party's eligibility requirements is able to apply and be considered for a quota allocation [*i.e.*, a portion of the total TRQ quantity] under the TRQ [*i.e.*, the whole mechanism imposing a TRQ on a particular product] ....

Throughout Article 3.A.2, the terms "a quota allocation" and "TRQ" are used consistently to refer to different things. On the one hand, "a quota allocation" means a portion of the total quantity of the TRQ, and, on the other hand, a "TRQ" means, by express definition, "a mechanism that provides for the application of a preferential rate of customs duty to imports of a

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[106] USMCA, Article 3.A.2.1.

particular originating good up to a specified quantity (in-quota quantity), and at a different rate to imports of that good that exceed that quantity."[107]

136. Canada's proposal that the phrase "utilization of a TRQ for the importation of an agricultural good" in Article 3.A.2.6(a) of the USMCA means "a subsequent and distinct step that takes place after allocation has been issued, which, temporally, takes place after an application for an allocation is made" is not supported by the context of Article 3.A.2 and the use of the term "TRQ" throughout Article 3.A.2.

137. Canada further contends that the "conspicuous absence of a reference to the allocation of a TRQ in Article 3.A.2.6(a)" means that "Article 3.A.2.6(a) must only cover conditions, limits and eligibility requirements on the utilization (i.e., use) of a TRQ for the importation of an agricultural good by an allocation holder."[108] Canada's reasoning is unsound. While the word "allocation" is not present in Article 3.A.2.6(a), nor is the word "use". Canada attempts to conflate the words "utilization" and "use". However, as explained above, contextual elements support the conclusion that the phrase "utilization of a TRQ" is more akin to the phrase "allocation and use of a TRQ", since both phrases entail all of the steps involved in using "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 of that good that exceed that quantity."[109]

b. The WTO Import Licensing Agreement is Not Germane to the Interpretation of Article 3.A.2.6(a) of the USMCA, and Does Not Support Canada's Position

138. Canada also refers to the WTO *Import Licensing Agreement* ("ILA") as support for its proposed interpretation.[110] Canada's arguments lack merit.

139. As an initial matter, Canada is incorrect in its assertion that the ILA is a "relevant rule[] of international law applicable in relations between the parties"[111] within the meaning of Article 31.3(c) of the Vienna Convention. Canada contends that:

> The ILA is relevant for interpreting Article 3.A.2.6(a) because Article 3.A.2.3 of CUSMA states that "[e]ach Party shall implement and administer its TRQs in accordance with […] the Import Licensing Agreement". This specific reference makes the

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[107] USMCA, Article 3.A.2.1.

[108] Canada's Initial Written Submission, para. 155.

[109] USMCA, Article 3.A.2.1.

[110] Canada's Initial Written Submission, para. 156.

[111] Vienna Convention, Article 31.3(c).

> Agreement "relevant rules of international law applicable in relations between the parties", as referred to in Article 31.3(c) of the VCLT.[112]

140. The reference to the ILA in Article 3.A.2.3 of the USMCA is not determinative of or even germane to the question of whether the ILA constitutes a relevant rule of international law applicable in relations between the parties. Article 3.A.2.3 provides, *inter alia*, that "[e]ach Party shall implement and administer its TRQs in accordance with ... the Import Licensing Agreement". The implication of Article 3.A.2.3 is that if a Party fails to implement and administer its TRQs in accordance with the ILA, that is, if it can be established that a Party's implementation and administration of its USMCA TRQs is in breach of the ILA, then that would constitute a breach of Article 3.A.2.3 of the USMCA. Such a breach of Article 3.A.2.3 of the USMCA would be demonstrated by proving a breach of the ILA.

141. The reference to the ILA in Article 3.A.2.3, however, does not make the ILA a relevant rule of international law applicable in relations between the parties within the meaning of Article 31.3(c) of the Vienna Convention. Both disputing Parties are party to the ILA, which is an international convention, so the ILA is a rule of international law – or it may contain within it rules of international law – applicable in relations between the parties, and that would be the case even if there were no reference to the ILA in Article 3.A.2.3. The pertinent question is whether a given provision of the ILA is "relevant" to the interpretive question at issue. The ILA provision cited by Canada is not relevant to the interpretation of Article 3.A.2.6(a) of the USMCA.

142. Canada observes that "Article 3.5(j) of the ILA states 'in allocating licenses […] consideration should be given to whether licenses issued to applicants in the past have been fully utilized'."[113] Canada argues that "[t]his supports Canada's interpretation that utilization is a subsequent and distinct step that takes place after allocation has been issued, which, temporally, takes place after an application for an allocation is made."[114] Canada's reasoning is unsound.

143. The mere use of the word "utilized" in a particular article of the ILA does not establish a rule of international law relevant to the interpretation of the word "utilization" in Article 3.A.2.6(a) of the USMCA. The ILA does not define the term "utilized". The ILA does not purport to codify the meaning of the term "utilized". The ILA simply uses the word "utilized" in one of its provisions, which is in a different context than the context in which the word "utilization" is used in Article 3.A.2.6(a) of the USMCA. Such passing use of a similar word in a different context does not amount to the establishment in the ILA of a "relevant rule[] of international law applicable in relations between the parties"[115] within the meaning of Article 31.3(c) of the Vienna Convention. The presence of the word "utilized" in Article 3.5(j) of the

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[112] Canada's Initial Written Submission, para. 156.

[113] Canada's Initial Written Submission, para. 156 (quoting Article 3.5(j) of the ILA; underline added by Canada).

[114] Canada's Initial Written Submission, para. 156.

[115] Vienna Convention, Article 31.3(c).

ILA is therefore of no interpretive significance for the Panel's interpretive analysis of Article 3.A.2.6(a) of the USMCA.

144. Furthermore, the use of the phrase "licenses issued to applicants in the past have been fully utilized" in Article 3.5(j) of the ILA would not even support Canada's position anyway. As explained above, Article 3.A.2.6(a) of the USMCA uses the phrase "utilization of a TRQ for the importation of an agricultural good," and the United States has shown that "TRQ" means "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 of that good that exceed that quantity," which is the definition of "TRQ" set forth in Article 3.A.2.1 of the USMCA. A "license" being "utilized", as in Article 3.5(j) of the ILA, refers to an individual license being used by an individual importer, and that is more akin to the "utilization of[] a quota allocation", as in Article 3.A.2.13 of the USMCA, which similarly refers to an individual quota allocation being used by an individual importer. Accordingly, even if it were at all relevant to the interpretive analysis, the use of the word "utilized" in Article 3.5(j) of the ILA does not support Canada's position.

c. The Second Sentence of Article 3.A.2.6(a) of the USMCA

145. Canada also looks to the second sentence of Article 3.A.2.6(a) of the USMCA for contextual support.[116] The second sentence of Article 3.A.2.6(a) provides that:

> For greater certainty, paragraph 6 shall not apply to conditions, limits, or eligibility requirements that apply regardless of whether or not the importer utilizes the TRQ when importing the agricultural good.

146. Canada contends that "the phrase 'regardless of whether or not an importer actually imports a good under a TRQ' makes clear [that] the only way to 'utilize' a TRQ is when an importer actually imports a good under a TRQ into the relevant market."[117] Canada misquotes the second sentence of Article 3.A.2.6(a) of the USMCA, which reads "regardless of whether or not the importer utilizes the TRQ when importing the agricultural good"; not "regardless of whether or not an importer actually imports a good under a TRQ", as in Canada's initial written submission.

147. Additionally, Canada's reasoning is unclear. It is not at all self-evident that Canada's proposition flows from the misquoted phrase. On the contrary, as explained above, "utilization of a TRQ to import an agricultural good" entails an importer assessing, based on the rules prescribed by the Party administering the TRQ, whether it is eligible to apply for and receive a

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[116] *See* Canada's Initial Written Submission, paras. 141-142.

[117] Canada's Initial Written Submission, para. 142.

quota allocation (*i.e.*, the importer must be eligible to use the "mechanism"[118]); the importer must apply for a quota allocation; if the importer receives a quota allocation, then the importer must apply for and receive an import license; the importer must then use the import license to effectuate importation of the agricultural good. Far more steps are involved in the "utilization of a TRQ" than just "actually import[ing] a good under a TRQ into the relevant market."[119]

148. Canada further contends that "[t]he use of the term 'importer' makes clear that the obligation applies only after TRQ quota or an allocation is received, and the 'applicant' becomes an 'importer'. A TRQ can only be utilized by importers, who necessarily must have been successful applicants."[120] The mere use of the word "importer" does not support Canada's proposed interpretation. The second sentence of Article 3.A.2.6(a) of the USMCA contemplates that an "importer" might utilize the TRQ or not utilize the TRQ when importing an agricultural good ("regardless of whether or not the importer utilizes the TRQ when importing the agricultural good"[121]). Thus, this use of the term "importer" communicates nothing unique about utilizing a TRQ, since the term is used in connection with two opposite scenarios (both using and not using the TRQ). The presence of the term "importer" in the second sentence of Article 3.A.2.6(a) is therefore of no contextual relevance to the interpretation of the phrase "utilization of the TRQ to import an agricultural product" in the first sentence of Article 3.A.2.6(a). Additionally, the United States notes that the first sentence of Article 3.A.2.10 of the USMCA provides that "[i]f a TRQ is administered by an allocation mechanism, then the administering Party shall provide that the mechanism allows for importers that have not previously imported the agricultural good subject to the TRQ (new importers), who meet all eligibility criteria other than import performance, to be eligible for a quota allocation."[122] The first sentence of Article 3.A.2.10 concerns eligibility for a quota allocation, and the reference to "importers" there plainly is to applicants that have not received a TRQ allocation and have not previously imported the agricultural good subject to the TRQ. This is further contextual support for understanding that the mere presence of the word "importer" does not convey the meaning that Canada proposes.

d. The Chapeau of Article 3.A.2.6 of the USMCA

149. Canada also looks to the chapeau of Article 3.A.2.6 of the USMCA for contextual support. The chapeau of Article 3.A.2.6 provides that:

> Each Party shall administer its TRQs in a manner that allows importers the opportunity to utilize TRQ quantities fully.

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[118] USMCA, Article 3.A.2.1.

[119] Canada's Initial Written Submission, para. 142.

[120] Canada's Initial Written Submission, para. 142.

[121] USMCA, Article 3.A.2.6(a), second sentence.

[122] Underline added.

150. Canada contends that "Article 3.A.2.6 requires a Party to administer its TRQs in a manner that allows 'importers' the opportunity to use TRQ quantities fully by importing goods. As such, Article 3.A.2.6 imposes no obligation regarding who may apply for a TRQ allocation because the obligation applies to 'importers', who are necessarily only those applicants who have successfully received a TRQ allocation; and consequently, have the opportunity to utilise the TRQ by importing goods."[123] Canada's logic is unclear.

151. As explained above, importers might utilize or not utilize a TRQ when importing an agricultural good. The mere use of the term "importers" in the chapeau of Article 3.A.2.6 has no contextual relevance for the interpretation of the phrase "utilization of the TRQ to import an agricultural product" in the first sentence of Article 3.A.2.6(a).

152. In the same section of its initial written submission in which it discusses the contextual relevance of the chapeau of Article 3.A.2.6 of the USMCA, Canada also again asserts that "the phrase 'for the importation of an agricultural good' in Article 3.A.2.6(a) confirms that the requirements covered therein must relate to the actual use of a TRQ when importing a good."[124] Canada does not explain this assertion in that section of its initial written submission, and the United States has rebutted the assertion above.

3. Canada's Interpretive Analysis of the Ordinary Meaning of the Phrase "Condition, Limit, or Eligibility Requirement" Is Incorrect

153. Canada begins its analysis of the phrase "condition, limit, or eligibility requirement" in Article 3.A.2.6(a) of the USMCA by referencing dictionary definitions of the words in that phrase.[125] The United States agrees that this is an appropriate way to start the interpretive analysis.[126] And the United States does not object to the dictionary definitions on which Canada focuses its attention, some of which are the same definitions on which the United States relies.[127]

154. After quoting the dictionary definitions of the individual words, though, Canada then simply asserts that "[r]eading the phrase 'condition, limit or eligibility requirement on the utilization of a TRQ for importation of an agricultural good' in its entirety, the requirements covered by Article 3.A.2.6(a) must relate to the actual use of a TRQ when importing goods into the relevant market, not requirements related to an applicant's ability to apply and receive an allocation."[128] Canada offers no support whatsoever for this conclusion concerning the ordinary meaning of the words in the phrase "condition, limit, or eligibility requirement". It is not at all

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[123] Canada's Initial Written Submission, para. 148.

[124] Canada's Initial Written Submission, para. 148.

[125] *See* Canada's Initial Written Submission, paras. 131-133.

[126] *See* U.S. Initial Written Submission, para. 49.

[127] *See* U.S. Initial Written Submission, para. 68.

[128] Canada's Initial Written Submission, para. 134 (underline in original).

self-evident that the dictionary definitions of the words, on which the disputing Parties agree,[129] require or even support Canada's interpretive conclusion.

155. As Canada acknowledges, "the dictionary is only the starting point of the analysis under Article 31 of the VCLT."[130] It is necessary to undertake contextual analysis to ascertain the correct interpretation of Article 3.A.2.6(a) of the USMCA. The United States discusses additional contextual elements and further responds to Canada's contextual arguments in the following section.

4. Contextual Analysis Does Not Support Canada's Understanding of the Phrase "Condition, Limit or Eligibility Requirement"

156. Canada argues that "[t]he term 'eligibility requirement' must be interpreted in light of the phrase 'on the utilization of a TRQ for importation of an agricultural good'."[131] Therefore, Canada contends, "the requirements must relate to the eligibility of products to be imported under the TRQ, not to the eligibility of individuals to receive an allocation."[132] Canada's argument lacks merit.

157. As demonstrated above, textual and contextual analysis of the term "TRQ", which is defined in Article 3.A.2.1 of the USMCA, supports the conclusion that the phrase "utilization of a TRQ for the importation of an agricultural good" in Article 3.A.2.6(a) of the USMCA refers to all of the steps entailed in using a TRQ (the "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 of that good that exceed that quantity").[133] Utilization of a TRQ for the importation of an agricultural good necessarily involves an importer assessing, based on the rules prescribed by the Party administering the TRQ, whether it is eligible to apply for and receive a quota allocation (*i.e.*, the importer must be eligible to use the mechanism); the importer must apply for a quota allocation; if the importer receives a quota allocation, then the importer must apply for and receive an import license; the importer must then use the import license to effectuate importation of the agricultural good.

158. Canada also argues that, "[p]ut another way, the requirements [in Article 3.2.6(a)] concern <u>what</u> may be imported under the TRQ, not <u>who</u> may import under the TRQ.[134] As demonstrated below, contextual elements also do not support this interpretive conclusion. The

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[129] To be clear, the United States does not object to the dictionary definition of the term "eligibility" to which Canada refers. *See* Canada's Initial Written Submission, para. 135. Canada's alternative definition of the word "eligibility", though, does not support Canada's argument.

[130] Canada's Initial Written Submission, para. 135.

[131] Canada's Initial Written Submission, para. 135.

[132] Canada's Initial Written Submission, para. 135.

[133] USMCA, Article 3.A.2.1.

[134] Canada's Initial Written Submission, para. 135 (underline in original).

term "eligibility requirement" in Article 3.A.2.6(a) of the USMCA refers, *inter alia*, to the status of the importer and conditions governing the ability of the importer to utilize a TRQ.

a. Uses of "Condition, Limit, or Eligibility Requirement" in Articles 3.A.2.6 and 3.A.2.7 of the USMCA

159. Canada asserts that "[t]he terms 'condition, limit and eligibility requirement' [sic] appear three times in Article 3.A.2, twice in Article 3.A.2.6 and once in Article 3.A.2.7." That is not correct. The phrase "condition, limit, or eligibility requirement" (or the variant "conditions, limits, or eligibility requirements") appears ten times in Articles 3.A.2.6 and 3.A.2.7 of the USMCA. For convenience, the United States reproduces Articles 3.A.2.6 and 3.A.2.7 below, highlighting in bold and counting the instances of the phrase:

> 6. Each Party shall administer its TRQs in a manner that allows importers the opportunity to utilize TRQ quantities fully.
>
> (a) Except as provided in subparagraph (b) and (c), no Party shall introduce a new or additional **condition, limit, or eligibility requirement [1]** on the utilization of a TRQ for importation of an agricultural good, including in relation to specification or grade, permissible end-use of the imported product, or package size beyond those set out in its Schedule to Annex 2-B (Tariff Commitments). For greater certainty, paragraph 6 shall not apply to **conditions, limits, or eligibility requirements [2]** that apply regardless of whether or not the importer utilizes the TRQ when importing the agricultural good.
>
> (b) A Party seeking to introduce a new or additional **condition, limit, or eligibility requirement [3]** on the utilization of a TRQ for importation of an agricultural good shall notify the other Party at least 45 days prior to the proposed effective date of the new or additional **condition, limit, or eligibility requirement [4]**. If the other Party has a demonstrable commercial interest in supplying the agricultural good, that Party may submit a written request for consultations within 30 days of the notification to the Party seeking to introduce the new or additional **condition, limit, or eligibility requirement [5]**. On receipt of such a request for consultations, the Party seeking to introduce the new or additional **condition, limit, or eligibility**

requirement [6] shall promptly undertake consultations with the other Party, in accordance with Article 3.10 (Transparency and Consultations).

(c) The Party seeking to introduce the new or additional **condition, limit, or eligibility requirement [7]** may do so if the other Party with a demonstrable commercial interest in supplying the agricultural good has not submitted a written request for consultations within 30 days of the notification pursuant to subparagraph (b) or, in the case when the other Party has submitted a written request for consultations pursuant to subparagraph (b) if:

(i) the Party has consulted with the other Party, and

(ii) the other Party has not objected, after the consultation, to the introduction of the new or additional **condition, limit, or eligibility requirement [8]**.

(d) A new or additional **condition, limit, or eligibility requirement [9]** that is the outcome of any consultation held pursuant to subparagraph (c) shall be circulated to the other Party prior to its implementation.

7. Notwithstanding paragraph 6, a Party shall not implement a **condition, limit, or eligibility requirement [10]**:

(a) regarding the quota applicant's nationality, or headquarters location; or

(b) requiring the quota applicant's physical presence in the territory of the Party, except that a Party may require that the quota applicant either:

(i) do business and have a business office, or

(ii) have an employee, an agent for service of process, or a legal representative, in the territory of the Party.

160. Canada contends that "the conditions, limits or eligibility requirements covered are different in each context".[135] It is highly unlikely that a single phrase that is used ten times in two consecutive paragraphs has a different meaning each time that it is used. A far more plausible interpretation, and one that is supported by proper contextual analysis, is that the phrase "condition, limit, or eligibility requirement" has the same meaning each time that it is used.

161. The phrase "condition, limit, or eligibility requirement" first appears in the first sentence of Article 3.A.2.6(a) of the USMCA, in reference to "a new or additional condition, limit, or eligibility requirement on the utilization of a TRQ for importation of an agricultural good". The dispute between the Parties comes down to whether "eligibility requirement" in this sentence means just a condition on the good when it is actually imported under the TRQ, as Canada urges, or whether "eligibility requirement" also refers to the status of an applicant seeking to utilize a TRQ, and possibly other eligibility requirements as well, as the United States proposes.

162. Canada contends that "Article 3.A.2.6(a) only applies to conditions, limits or eligibility requirements on the utilization of a TRQ."[136] That is not correct. Article 3.A.2.6(a) has two sentences, and the second sentence expressly concerns "conditions, limits, or eligibility requirements" that are not limited in their application to the utilization of a TRQ. Rather, the second sentence of Article 3.A.2.6(a) provides that "[f]or greater certainty, paragraph 6 shall not apply to conditions, limits, or eligibility requirements that apply regardless of whether or not the importer utilizes the TRQ when importing the agricultural good." Thus, within Article 3.A.2.6(a), there are references to "conditions", "limits", and "eligibility requirements" that both apply to the "utilization of a TRQ for importation of an agricultural good" and that apply generally to all importers and all importations. The more plausible reading is that the nature of the "conditions", "limits", and "eligibility requirements" referenced in both sentences is the same, and is not limited to the status of the good actually being imported under a TRQ, as Canada argues.

163. The phrase "condition, limit, or eligibility requirement" next appears four times in Article 3.A.2.6(b) of the USMCA. The phrase first appears in the first sentence of Article 3.A.2.6(b), where, like in Article 3.A.2.6(a) of the USMCA, reference is made to "a new or additional condition, limit, or eligibility requirement on the utilization of a TRQ for importation of an agricultural good". The use of parallel language makes a clear connection between Article 3.A.2.6(a) and Article 3.A.2.6(b). It is evident that the "conditions", "limits", and "eligibility requirements" referenced in the first sentence of Article 3.A.2.6(b) are the same as those referenced in the first sentence of Article 3.A.2.6(a).

164. The next three uses of the phrase "condition, limit, or eligibility requirement" in Article 3.A.2.6(b) of the USMCA, though, are not followed by the phrase "on the utilization of a TRQ for importation of an agricultural good". It is clear in context, though, that these later instances of "condition, limit, or eligibility requirement" all refer to the same "conditions", "limits", and

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[135] Canada's Initial Written Submission, para. 144.

[136] Canada's Initial Written Submission, para. 146.

"eligibility requirements" "on the utilization of a TRQ for importation of an agricultural good" referenced in the first sentence of Article 3.A.2.6(b). It is not necessary to repeat the modifying phrase to convey this meaning, and doing so likely would have made the text more difficult to read.

165. In Article 3.A.2.6(c) of the USMCA, the phrase "condition, limit, or eligibility requirement" once again appears, in the chapeau and in subparagraph (ii), without being followed by the phrase "on the utilization of a TRQ for importation of an agricultural good". Nevertheless, references to "subparagraph (b)" in the chapeau of Article 3.A.2.6(c) are clear contextual indicators that the "conditions", "limits", and "eligibility requirements" referenced in subparagraph (c) are the same as those referenced earlier in the first sentence of subparagraph (a) and in subparagraph (b), namely "conditions", "limits", and "eligibility requirements" "on the utilization of a TRQ for importation of an agricultural good". It was not necessary to repeat the phrase "on the utilization of a TRQ for importation of an agricultural good" to convey that meaning.

166. Article 3.A.2.6(d) of the USMCA, just like Article 3.A.2.6(c), dispenses with the use of the phrase "on the utilization of a TRQ for importation of an agricultural good" when referring to "[a] new or additional condition, limit, or eligibility requirement". It is nevertheless clear from the context, given the link to "subparagraph (c)" made in Article 3.A.2.6(d), that the "conditions", "limits", and "eligibility requirements" are the same as those referenced earlier in the first sentence of subparagraph (a) and in subparagraphs (b) and (c). The progression of the subparagraphs of Article 3.A.2.6, and the description of the notification, consultation, and objection process therein, also is contextual support that this later reference to "condition, limit, or eligibility requirement", even without the modifying phrase "on the utilization of a TRQ for importation of an agricultural good", likewise refers to "a new or additional condition, limit, or eligibility requirement on the utilization of a TRQ for importation of an agricultural good".

167. Like the latter subparagraphs of Article 3.A.2.6 of the USMCA, the chapeau of Article 3.A.2.7 of the USMCA also uses the phrase "condition, limit, or eligibility requirement" without the modifying phrase "on the utilization of a TRQ for importation of an agricultural good". It is evident from the context, though, that once again reference is being made to "conditions", "limits", and "eligibility requirements" "on the utilization of a TRQ for importation of an agricultural good". Article 3.A.2.7 begins with the phrase "[n]otwithstanding paragraph 6". This prefatory language explicitly links Article 3.A.2.7 to Article 3.A.2.6, and the primary subject of Article 3.A.2.6 is "a new or additional condition, limit, or eligibility requirement on the utilization of a TRQ for importation of an agricultural good". Both of the subparagraphs of Article 3.A.2.7 refer to "the quota applicant", which further indicates that the phrase "condition, limit, or eligibility requirement" relates to "the utilization of a TRQ", rather than being a general "condition, limit, or eligibility requirement", such as that referenced in the second sentence of Article 3.A.2.6(a). This contextual analysis confirms that the phrase "condition, limit, or eligibility requirement" used in the chapeau of Article 3.A.2.7 has the same meaning as the same phrase when it is used in the first sentence of Article 3.A.2.6(a).

168. Article 3.A.2.7 of the USMCA, though, further elaborates the nature and meaning of the phrase "condition, limit, or eligibility requirement". The subparagraphs of Article 3.A.2.7 refer to "a condition, limit, or eligibility requirement" "regarding the quota applicant's nationality, or headquarters location" or "requiring the quota applicant's physical presence in the territory of the Party". Given this language, the phrase "condition, limit, or eligibility requirement" must be understood as relating, *inter alia*, to certain attributes of the status of the quota applicant, and cannot be limited to the status of a good actually imported under the TRQ, as Canada urges.

169. In light of the contextual analysis presented above, Canada's proposed interpretation simply is not tenable.

b. Other Uses of "Eligibility" in Chapter 3 and Chapter 2 of the USMCA Provide Contextual Support for the U.S. Proposed Interpretation

170. Additional contextual analysis provides further support for the conclusion that "eligibility requirement" does not concern only "what may be imported under the TRQ, [and] not who may import under the TRQ", as Canada argues.[137] The word "eligibility", or "eligible", is used numerous times throughout Chapter 3 of the USMCA (Agriculture), as well as in Chapter 2 of the USMCA (National Treatment and Market Access for Goods). It is clear from the various instances of these words that "eligibility" is used in these Chapters in relation to both products and persons.

171. The following are references in Chapter 3 and Chapter 2 to eligibility of a person:[138]

- Article 3.A.2.10: "If a TRQ is administered by an allocation mechanism, then the administering Party shall provide that the mechanism allows for importers that have not previously imported the agricultural good subject to the TRQ (new importers), who meet all eligibility criteria other than import performance, to be eligible for a quota allocation. The Party administering the TRQ allocation mechanism shall not discriminate against new importers when allocating the TRQ."

- Article 3.A.2.11(a): "any person of the other Party that fulfils the importing Party's eligibility requirements is able to apply and be considered for a quota allocation under the TRQ".

[137] Canada's Initial Written Submission, para. 135 (underline in original).

[138] Underline is added in the quotations that follow.

- Article 3.A.11(e): "if the aggregate TRQ quantity requested by applicants exceeds the quota size, allocation to eligible applicants shall be conducted by equitable and transparent methods".

- Footnote 17 to Article 3.C.4.3(b): "For greater certainty, a Party may require the producer, bottler, or importer of the product to establish eligibility for an exemption from the Party's allergen labeling requirement using a scientifically validated testing methodology."[139]

- Article 2.13.4: "Each Party shall respond within 60 days to a reasonable inquiry from another Party concerning its licensing rules and its procedures for the submission of an application for an import license, including the eligibility of persons, firms, and institutions to make an application, any administrative body to be approached, and the list of products subject to the licensing requirement."

- Article 2.14.2(c)(ii): "any criteria an applicant must meet to be eligible to apply for a license, such as possessing an activity license, establishing or maintaining an investment, or operating through a particular form of establishment in a Party's territory".

- Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix: "Canada shall allocate its TRQs each quota year to eligible applicants. An eligible applicant means an applicant active in the Canadian food or agriculture sector. In assessing eligibility, Canada shall not discriminate against applicants who have not previously imported the product subject to a TRQ."

172. The following are references in Chapter 3 and Chapter 2 to eligibility of a product or good:[140]

- Article 3.A.3: "**eligible goods** means goods that a processor may manufacture using the milk or milk components provided at a milk class price".

- Article 3.A.3.11(a)(i): "a list or description of the goods for which processors are eligible to receive milk or milk components at a milk class price, and".

- Article 3.A.3.11(a)(ii): "a list or description of the products that eligible goods can be used to manufacture".

- Footnote 9 to Article 3.A.3.12: "For the purposes of this paragraph an 'adoption, amendment or revision to a milk class' means the creation of a new milk class, the

[139] This provision could also perhaps be read as applying to the eligibility of the product for an exemption, but it is not necessary for the Panel to resolve that question for the purposes of this dispute.

[140] Underline is added in the quotations that follow; bold is in the original.

removal of a milk class, and the amendment of the eligible goods in a milk class or how a milk class price is set. Amendments to how a milk class price is set means changes to the formula used to calculate a milk class price, the source of data used in the formula, the value of the assumed processor margin, or the value of the yield factor. For greater certainty, "adoption, amendment, or revision to a milk class" does not include routine updates to a milk class price due to the input of updated data, and "amendment of the eligible goods" does not include changes that are clerical in nature."

- Article 3.A.6.1: "Canada shall ensure that imports of dairy, poultry, or egg products eligible for Canada's Duties Relief Program (DRP) and Import for Re-export Program (IREP) as of September 1, 2018, continue to be eligible for these programs, as well as any subsequent or successor programs to DRP and IREP, as long as Canada maintains such programs."

- Footnote 5 to Paragraph 7(a) of the General Notes to the Tariff Schedule of the United States: "For the purposes of determining whether originating goods are eligible to enter duty-free as provided for in paragraph 15 of Section B of Appendix 2, paragraph 15(h) shall apply in lieu of this paragraph."

- Paragraph 15(c) of Section B of the U.S. USMCA TRQ Appendix: "In any year for which Canada has provided the United States with a written notification in accordance with the terms of subparagraph (d) of Canada's intent to require export certificates for the exportation of goods for import under this TRQ, the above quantity shall only be eligible for duty-free treatment if the U.S. importer makes a declaration to U.S. Customs and Border Protection (Customs), in the form and manner determined by Customs, that a valid export certificate issued by the Government of Canada is in effect for the goods."

- Paragraph 15(h) of Section B of the U.S. USMCA TRQ Appendix: "Originating goods which last underwent production in Canada shall be considered eligible for this TRQ regardless of whether they qualify to be marked as a good of Canada pursuant to U.S. law."

- Annex 2-C, Paragraph 5(c): "Mexico shall monitor and allocate or otherwise administer quantities of passenger vehicles and auto parts eligible for this treatment under subparagraphs (a) and (b)."

173. These provisions demonstrate that, in Chapter 3 and Chapter 2 of the USMCA, the eligibility of both persons and goods can be relevant for the purposes of different provisions. The immediate context of the provisions quoted above makes it clear whether eligibility is referred to in relation to a person or a good. 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

definitively 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 both eligibility requirements that may be applicable to persons as well as eligibility requirements that may be applicable to goods.

c. Application of the *Ejusdem Generis* Doctrine Is Not Appropriate in this Instance

174. Canada acknowledges that Article 3.2.A.6(a) of the USMCA "sets out an illustrative list of the types of conditions, limits and eligibility requirements covered under this provision".[141] Despite acknowledging that the list of examples is "illustrative", not exhaustive, in light of the use of the word "including", Canada nevertheless argues that the *ejusdem generis* doctrine "provides support for Canada's interpretation that the conditions, limits or eligibility requirements covered by Article 3.A.2.6(a) are product-focused requirements related to the use of a TRQ to import goods, not requirements related to the eligibility of applicants to apply for a TRQ allocation."[142] Canada's argument lacks merit.

175. First, as demonstrated above, there is strong contextual support in Articles 3.A.2.6 and 3.A.2.7 of the USMCA, as well as throughout Chapters 3 and 2 of the USMCA, for the conclusion that the phrase "condition, limit, or eligibility requirement" in the first sentence of Article 3.A.2.6(a) relates to conditions, limits, and eligibility requirements that would apply to both persons and goods, not just to goods actually imported under a TRQ, as Canada contends.

176. Second, Canada's own definition of the *ejusdem generis* doctrine indicates that the doctrine is not an appropriate rule of construction for use in this situation. Referring to a report of the WTO Appellate Body, which cites Black's Law Dictionary, Canada explains that "[t]he *ejusdem generis* doctrine provides that, 'when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed", and Canada further observes that the WTO Appellate Body has reasoned that "the 'doctrine would equally apply to situations where the general word or phrase precedes the specific list'."[143]

177. Here, however, there is not a single "general word or phrase". There are three words – "condition", "limit", and "eligibility requirement" – each of which has a separate but related meaning. And those words appear within a much longer phrase, "a new or additional condition, limit, or eligibility requirement on the utilization of a TRQ for importation of an agricultural good", which is then followed by three different examples, which themselves are distinguishable. The examples are "specification or grade", which would concern the product itself; "permissible end-use of the imported product", which does not concern the product itself, but rather how the

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[141] Canada's Initial Written Submission, para. 137 (underline added).

[142] Canada's Initial Written Submission, para. 140.

[143] Canada's Initial Written Submission, para. 138.

product will be used later; and "package size", which concerns neither the product itself nor how it will be used later, but rather the container in which the product is to be imported. Three different words followed by three different examples is not a situation that fits the definition of the *ejusdem generis* doctrine.

178. Third, even if the *ejusdem generis* doctrine were applied, Article 3.A.2.7 of the USMCA would also need to be taken into account in the interpretive analysis. There, the phrase "condition, limit, or eligibility requirement" is followed by a different set of "specific ... things",[144] which equally would impart meaning to the phrase "condition, limit, or eligibility requirement", under Canada's proposed application of the *ejusdem generis* doctrine.

179. For these reasons, the presence in Article 3.A.2.6(a) of the USMCA of an illustrative list of types of conditions, limits, and eligibility requirements provides no contextual support for Canada's proposed interpretation.

d. The Order of the Obligations in Article 3.A.2 Does Not Support Canada's Position

180. Canada also argues that the Panel should find significance in the order of the obligations in Article 3.A.2, and that the order of the obligations supports Canada's position. Canada's arguments lack merit.

181. Canada contends that "[t]he obligations at the beginning of Article 3.A.2, in paragraphs 1 to 8, are those that apply to all TRQs regardless of whether a Party chooses to use a FCFS system or an allocation mechanism. Subsequent obligations, in paragraphs 9 to 13, for example, are specific to the administration of TRQs through an allocation mechanism.[145] Canada's listing is incomplete. Following paragraph 13, some provisions are specific to a FCFS system,[146] some are specific to a system that uses an allocation mechanism,[147] and some apply to both.[148] Given the dispersal of obligations throughout Article 3.A.2, the position of different obligations does not appear to be of any significance for the interpretation of Article 3.A.2.6(a) of the USMCA.

182. Canada also argues that Article 3.A.2.6(a) of the USMCA "logically" must establish "product-focused requirements, which could apply whether or not a good is imported under a FCFS system or an allocation mechanism. By contrast, and contrary to the U.S. interpretation of Article 3.A.2.6(a), the obligations related to who may apply for an allocation necessarily arise only when an allocation mechanism is being used, and are therefore addressed in subsequent

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[144] Canada's Initial Written Submission, para. 138 (defining the *ejusdem generis* doctrine).

[145] Canada's Initial Written Submission, para. 149.

[146] *See* Articles 3.A.2.19 and 3.A.2.20.

[147] *See* Articles 3.A.2.15, 3.A.2.18, and 3.A.2.21.

[148] *See* Articles 3.A.2.14, 3.A.2.16, 3.A.2.17, and 3.A.2.22.

provisions in Article 3.A.2."[149] Canada's argument is neither logical nor does it comport with the terms of the USMCA. Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix defines the term "eligible applicant", and the definition of that term applies for the purposes of "all TRQs provided for in this Agreement and set out in Section B of this Appendix".[150] It is not at all the case that "the obligations related to who may apply for an allocation necessarily arise only when an allocation mechanism is being used".[151] Under a FCFS system, an importer would apply for an allocation of a TRQ by applying for an import license to import a product under the TRQ, but the importer would still have to meet any relevant eligibility requirements to be granted the import license. Canada's argument concerning the order of the obligations in Article 3.A.2 rests on an utterly flawed premise.

183. Canada's argument concerning Article 3.A.2.11 is likewise flawed. Canada argues that "Article 3.A.2.11 sets out obligations related to the 'eligibility' to apply for an allocation, which are triggered only if a Party uses an allocation mechanism to administer its TRQs."[152] That is correct only because the chapeau of Article 3.A.2.11 provides that "[a] Party administering an allocated TRQ shall ensure that" it complies with numerous obligations, and thus, by its own terms, Article 3.A.2.11 is limited in its application to situations where a Party is using an allocation mechanism. Again, Canada's contextual arguments in this regard are fatally flawed and offer no support for Canada's position.

5. Canada's Arguments Concerning the Object and Purpose of the USMCA Are Unavailing

184. Canada argues that its proposed interpretation "is entirely consistent with the object and purpose of the CUSMA, as the Parties retain their right to regulate and administer their domestic systems, provided the specific rules in the CUSMA are adhered to."[153] Canada's arguments related to the object and purpose of the USMCA are unavailing.

185. Canada asserts that "the object and purpose of CUSMA includes trade liberalization. However, this purpose must be tempered by the recognized rights of the Parties recited in the CUSMA Preamble, including the inherent right to regulate and to preserve the flexibility to set legislative and regulatory priorities."[154]

186. The USMCA does not expressly state what is the object and purpose of the Agreement. The USMCA has a Preamble that includes twenty recitals. Eleven of those twenty recitals refer

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[149] Canada's Initial Written Submission, para. 150.

[150] USMCA, Paragraph 3 of Section A of Canada's TRQ Appendix.

[151] Canada's Initial Written Submission, para. 150.

[152] Canada's Initial Written Submission, para. 150.

[153] Canada's Initial Written Submission, para. 159.

[154] Canada's Initial Written Submission, para. 157.

variously to "economic cooperation",[155] the "economic relationship",[156] "freer, fairer markets, and [] robust economic growth",[157] "preserv[ing] and expand[ing] regional trade and production",[158] "enhanc[ing] and promot[ing] the competitiveness of regional exports",[159] "contribut[ing] significantly to economic growth",[160] "further expansion of trade and investment",[161] "facilitat[ing] trade between the Parties",[162] "facilitat[ing] trade in goods and services between the Parties",[163] "eliminat[ing] obstacles to international trade",[164] and facilitat[ing] international trade, investment, and economic growth".[165]

187. Ultimately, of course, the Parties to the USMCA agreed to "establish a free trade area".[166]

188. Other recitals in the USMCA Preamble refer to other resolutions of the USMCA Parties, including the ninth recital, in which the Parties

> RECOGNIZE their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, and protect legitimate public welfare objectives, such as health, safety, environmental protection, conservation of living or non-living exhaustible natural resources, integrity and stability of the financial system, and public morals, in accordance with the rights and obligations provided in this Agreement[.]

189. Canada appears to take the position that the recognition of the "inherent right to regulate" in the ninth recital of the USMCA Preamble should be given equal weight when balanced with the far more numerous references to "trade liberalization" in other recitals.[167] The United States

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[155] USMCA, Preamble, first recital.

[156] USMCA, Preamble, second recital.

[157] USMCA, Preamble, third recital.

[158] USMCA, Preamble, fourth recital.

[159] USMCA, Preamble, fifth recital.

[160] USMCA, Preamble, sixth recital.

[161] USMCA, Preamble, seventh recital.

[162] USMCA, Preamble, eighth recital.

[163] USMCA, Preamble, tenth recital.

[164] USMCA, Preamble, twelfth recital.

[165] USMCA, Preamble, fifteenth recital.

[166] USMCA, Article 1.1.

[167] Canada's Initial Written Submission, para. 157.

does not agree that Canada's weighing of the balance of interests is supported by the USMCA Preamble, read as a whole.

190. Additionally, the ninth recital of the Preamble, on which Canada relies, is far more specific than Canada suggests. Far from being a general recognition of a "right to regulate", the ninth recital is quite focused in its list of examples of "legitimate public welfare objectives" for which the Parties "recognize their inherent right to regulate" and "resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities".[168] Those objectives are identified as "health, safety, environmental protection, conservation of living or non-living exhaustible natural resources, integrity and stability of the financial system, and public morals".[169] Notably, the list does not include the objective of achieving supply management of a particular industry, nor anything similar to that.

191. Moreover, the ninth recital of the USMCA Preamble concludes with the phrase "in accordance with the rights and obligations provided in this Agreement", signaling that the Parties did not intend that their recognition and resolution in that recital would override the express terms of Agreement itself.

192. That signal at the end of the ninth recital of the USMCA Preamble is consistent with the view of the "majority" of jurists, who, as noted in the ILC Commentaries, "emphasize[] the primacy of the text as the basis for the interpretation of a treaty".[170] The ILC Commentaries explains that:

> (2) Jurists also differ to some extent in their basic approach to the interpretation of treaties according to the relative weight which they give to:
>
> (a) The text of the treaty as the authentic expression of the intentions of the parties;
>
> (b) The intentions of the parties as a subjective element distinct from the text; and
>
> (c) The declared or apparent objects and purposes of the treaty.
>
> Some place the main emphasis on the intentions of the parties and in consequence admit a liberal recourse to the *travaux preparatoires* and to other evidence of the intentions of the contracting States as means of interpretation. Some give great

[168] USMCA, Preamble, ninth recital.

[169] USMCA, Preamble, ninth recital.

[170] ILC Commentaries, p. 218 (Exhibit USA-70).

> weight to the object and purpose of the treaty and are in consequence more ready, especially in the case of general multilateral treaties, to admit teleological interpretations of the text which go beyond, or even diverge from, the original intentions of the parties as expressed in the text. The majority, however, emphasizes the primacy of the text as the basis for the interpretation of a treaty, while at the same time giving a certain place to extrinsic evidence of the intentions of the parties and to the objects and purposes of the treaty as means of interpretation. It is this view which is reflected in the 1956 resolution of the Institute of International Law mentioned in the previous paragraph.[171]

193. The "1956 resolution" to which the last sentence refers is the adoption of the rules of interpretation that became Articles 31 and 32 of the Vienna Convention, which, per Article 31.13.4 of the USMCA, are the rules of interpretation to be applied by USMCA dispute settlement panels. The general rule of interpretation, again, is that the USMCA "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."[172] The United States has demonstrated that the ordinary meaning to be given to the terms of Article 3.A.2.6(a) of the USMCA in their context does not support Canada's position. It would not be a "good faith" interpretation to override the terms of the Agreement to accommodate Canada's flawed understanding of the object and purpose of the Agreement.

194. Canada further reveals the flaws in its understanding of the obligations in the USMCA and the Agreement's object and purpose when Canada complains about what it characterizes as "absurd result[s]" flowing from the U.S. interpretation. Canada complains that:

> (1) The U.S. interpretation, taken to its logical conclusion, would have required the Parties to include in their respective Schedules all conditions, limits or eligibility requirements that they could possibly anticipate, should they ever decide to administer TRQs through a FCFS system or an allocation mechanism. It would have required each Party to determine – before the conclusion of the CUSMA negotiations – both what its allocation mechanism, if any, would be, as well as any conditions, limits or eligibility requirements that would apply to the administration of its TRQs.[173]
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> (2) [T]he U.S. interpretation, taken to its logical conclusion, would produce the absurd result of both Parties being prohibited from imposing any conditions,

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[171] ILC Commentaries, p. 218 (Exhibit USA-70) (underline added).

[172] Vienna Convention, Article 31.1.

[173] Canada's Initial Written Submission, para. 158.

> limits or eligibility requirements in the administration of their TRQs without the consent of the other Party.[174]
>
> (3) [N]either Canada nor the United States would be permitted under Article 3.A.2.6(a) to impose any requirements on applicants, for example, to have a business presence or agent in the territory of the importing Party to be eligible to apply for a licence or permit under a FCFS system or an allocation mechanism because this requirement is not specified in either Party's Schedule.[175]

195. The first two results about which Canada complains are expressly provided for in the Agreement, and the Agreement expressly protects against the third result.

196. Article 3.A.2.8 of the USMCA provides that:

> On entry into force of this Agreement, if either Party maintains a TRQ in its Schedule to Annex 2-B (Tariff Commitments) that is administered through issuance of permits by either Party, then the Party maintaining the TRQ shall have:
>
> (a) consulted with the other Party with respect to all procedures for the allocation and use of the TRQ, and any condition or requirement applicable on or in connection with the allocation or use of the TRQ; and
>
> (b) adopted and implemented regulations or policies containing all of its procedures for the allocation and use of the TRQ and any condition or requirement of that Party applicable on or in connection with the allocation or use of the TRQ.

To paraphrase Canada, Article 3.A.2.8 of the USMCA explicitly required the Parties "to determine – before the [entry into force of the USMCA] – both what its allocation mechanism, if any, would be, as well as any conditions, limits or eligibility requirements that would apply to the administration of its TRQs."[176] That was necessary to meet the consultation obligations in Article 3.A.2.8, and to ensure that "regulations or policies containing all of its procedures for the allocation and use of the TRQ and any condition or requirement of that Party applicable on or in connection with the allocation or use of the TRQ" were "adopted and implemented" on or before "entry into force of this Agreement".

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[174] Canada's Initial Written Submission, para. 159.

[175] Canada's Initial Written Submission, para. 159.

[176] Canada's Initial Written Submission, para. 158.

197. Article 3.A.2.6 of the USMCA, on its face, explicitly establishes that "[a] Party seeking to introduce a new or additional condition, limit, or eligibility requirement on the utilization of a TRQ for importation of an agricultural good shall notify the other Party at least 45 days prior to the proposed effective date of the new or additional condition, limit, or eligibility requirement."[177] The "other Party" may then request consultations, which "the Party seeking to introduce the new or additional condition, limit, or eligibility requirement shall promptly undertake".[178] "The Party seeking to introduce the new or additional condition, limit, or eligibility requirement may do so" only if the other Party either does not request consultations or, if the other Party does request consultations, then only if "the other Party has not objected, after the consultation, to the introduction of the new or additional condition, limit, or eligibility requirement."[179] As Canada puts it, both Parties are "prohibited from imposing any conditions, limits or eligibility requirements in the administration of their TRQs without the consent of the other Party."[180] Far from being an absurd result, that is the obligation to which the Parties agreed, which is plain on the face of the text of the Agreement.

198. Article 3.A.2.7 of the USMCA protects against the third result about which Canada complains by "except[ing]" from the prohibitions on certain types of conditions, limits, and eligibility requirements a "require[ment] that the quota applicant either: (i) do business and have a business office, or (ii) have an employee, an agent for service of process, or a legal representative in the territory of the Party." Thus, the Parties expressly have the right to establish "requirements on applicants, for example, to have a business presence or agent in the territory of the importing Party to be eligible to apply for a licence or permit under a FCFS system or an allocation mechanism".[181] The second sentence of Article 3.A.2.6(a) of the USMCA also reflects the agreement of the Parties that they retain the ability to introduce new or additional general conditions, limits, or eligibility requirements "that apply regardless of whether or not the importer utilizes the TRQ when importing the agricultural good."

199. As demonstrated above, Canada's mistaken view of the object and purpose of the USMCA simply provides no support for Canada's erroneous interpretation of Article 3.A.2.6(a) of the USMCA.

200. To the extent that part of the object and purpose of the USMCA is to establish effective obligations, Canada's proposed interpretation would thwart that aspect of the Agreement's object and purpose. Interpreting Article 3.A.2.6(a) as only prohibiting the introduction of new or additional conditions, limits, or eligibility requirements relating to how an allocation can be used after it is granted would render the prohibition largely meaningless in practice. All a Party would have to do is make sure that any new conditions, limits, or eligibility requirements that it

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[177] USMCA, Article 3.A.2.6(b).

[178] USMCA, Article 3.A.2.6(b).

[179] USMCA, Article 3.A.2.6(c).

[180] Canada's Initial Written Submission, para. 159.

[181] Canada's Initial Written Submission, para. 159.

introduces apply prior to the allocation stage. For example, if a Party wished to impose a new restriction on the specification or grade of products imported under the TRQ (one of the examples listed in Article 3.A.2.6(a)), it could do so by simply requiring importers to hold advance import contracts for goods of a certain specification as a condition to access quota. Similarly, if a Party wanted to impose a new end-use restriction (another example listed in Article 3.2.6(a)), it could do so by conditioning access to an allocation on importers undertaking to only import product for a particular purpose.

201. The ability to craft almost any restriction into a measure applicable prior to allocation of the TRQ – and thus, in Canada's view, outside the scope of the obligation in Article 3.A.2.6(a) – demonstrates the artificial nature of the division that Canada attempts to draw (at multiple places in its initial written submission) between allocation and other aspects of a Party's TRQ administration. There is no sound reason why USMCA Parties would have sought to prevent the introduction of restrictive measures affecting the use of TRQs for the actual importation of goods, while permitting new restrictions that would have the same effect to be imposed at an earlier stage. Indeed, doing so would undermine the ability of Article 3.A.2.6(a) to provide meaningful protection for the TRQ market access agreed in the USMCA.

6. Canada's Dairy TRQ Allocation Measures Are Inconsistent with Article 3.A.2.6(a) of the USMCA

202. As demonstrated above, Canada has failed to rebut the U.S. claim under Article 3.A.2.6(a) of the USMCA. For the reasons given in the U.S. initial written submission, as well as those given above, Canada's introduction, through its dairy TRQ allocation measures, of a new or additional condition, limit, or eligibility requirement on the utilization of its USMCA dairy TRQs – namely that a TRQ applicant and recipient must be a processor, distributor, or, in some cases, further processor – is inconsistent with Article 3.A.2.6(a) of the USMCA.

III. Canada Fails to Rebut the U.S. Claim that By Using a Market Share Basis to Allocate Canada's USMCA Dairy TRQs and Applying Different Criteria to Different Types of Eligible Applicants, Canada's Dairy TRQ Allocation Measures Breach Canada's USMCA Commitments

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

203. As demonstrated in the U.S. initial written submission,[182] Canada's dairy TRQ allocation measures breach the processor clause of Article 3.A.2.11(b) of the USMCA, which obligates Canada to "not ... limit access to an allocation to processors".

204. The U.S. initial written submission explains that a proper interpretive analysis of the processor clause of Article 3.A.2.11(b) leads to the conclusion that the phrase "not … limit

[182] *See* U.S. Initial Written Submission, section VI.B.

access to an allocation to processors" 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". Thus, this provision is a prohibition on reserving a portion of quota for the exclusive use of processors or so-called "further processors", who are themselves also processors. Processors are eligible to apply for and receive portions of the quota on the same terms as other quota applicants, but cannot have exclusive access to a portion of the quota. As the panel in *Canada – Dairy TRQs I* put it, "Canada cannot, in substance, ring-fence and limit to processors (and 'further processors,' which are processors for purposes of the Processor Clause) a reserved 'pool' of TRQ amounts to which only processors have access."[183]

205. By using a market share basis and applying different criteria to different types of eligible applicants, combined with the exclusion of retailers, food service operators, and other potential TRQ users from eligibility for USMCA dairy TRQ allocations, Canada's dairy TRQ allocation measures, in substance and in effect, "confine" or "restrict" to *someone* – "processors" – "the right or opportunity to benefit from or use" *something* – "a portion, a share; a quota". In effect, Canada's measures delegate to processors the ability to set their own market share and TRQ volume, as well as that of distributors; in substance and in effect, Canada's measures limit to processors a pool of TRQ amounts to which only processors have access.

206. Canada fails to rebut the U.S. claim. Canada offers a flawed interpretive analysis of Article 3.A.2.11(b) of the USMCA, as well as irrelevant and unpersuasive arguments concerning the design of the criteria for determining market share, and Canada ignores evidence that the United States has provided demonstrating that, under Canada's dairy TRQ allocation measures, processors can bypass distributors to capture larger TRQ allocations.

1. Canada's Interpretive Analysis of Article 3.A.2.11(b) of the USMCA Is Flawed

a. Canada's Textual and Contextual Analysis of the Terms "Allocation" and "Access" Is Incorrect

207. Canada's brief textual and contextual analysis of the processor clause of Article 3.A.2.11(b) of the USMCA focuses on the terms "allocation" and "access".[184]

208. While Canada agrees with the United States on the appropriate dictionary definition of the word "allocation",[185] Canada complains that "the United States reduces the meaning of an 'allocation' to an indefinite 'portion of the quota', effectively reading out 'allocated to a

[183] *Canada – Dairy TRQs I (Panel)*, para. 163 (Exhibit USA-26).

[184] *See* Canada's Initial Written Submission, paras. 167-170

[185] *See* Canada's Initial Written Submission, para. 167.

particular person' from the dictionary definition it advances."[186] Canada argues that "the term 'allocation' does not refer to an indeterminate 'portion' of the TRQ; an 'allocation' means a 'share of a TRQ that may be 'allocated to a particular' applicant'."[187]

209. This is the same argument that Canada made in *Canada – Dairy TRQs I*.[188] The panel in that dispute correctly rejected Canada's proposed interpretation.[189] The Panel should do so again here.

210. Canada's argument concerning the ordinary meaning of the term "allocation" is flawed. While Canada suggests that the United States "effectively read[s] out 'allocated to a particular person' from the dictionary definition it advances",[190] that is not correct. An "allocation" is a share or portion of the total TRQ quantity, and that is true both before the allocation has been assigned to a particular recipient and after the allocation has been assigned to a particular recipient. As Canada itself reasons "an 'allocation' means a 'share of a TRQ that may be 'allocated to a particular' applicant'."[191] Where there is some share or portion of the total TRQ quantity that has the potential to be assigned to a particular recipient or recipients, but it is only possible for processors to apply for and receive that share or portion of the total TRQ quantity, then access to that allocation (that "'share of a TRQ that may be 'allocated to a particular' applicant'"[192]) is "limited to processors",[193] in breach of the processor clause of Article 3.A.2.11(b) of the USMCA.

211. The contextual arguments that Canada advances also are not availing. Canada points to Articles 3.A.2, 3.A.2.11(a), and 3.A.2.18 of the USMCA to support the proposition that "an 'allocation' of the quota is the share that may be awarded to a person who applies for such an allocation."[194] Canada's contextual arguments do not support its proposed interpretation of the term "allocation". As explained above, and as Canada repeatedly agrees, an "allocation" is a

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[186] Canada's Initial Written Submission, para. 167.

[187] Canada's Initial Written Submission, para. 168.

[188] *See Canada – Dairy TRQs I (Panel)*, para. 103 ("Canada rejoins that the plain and ordinary meaning of 'an allocation' is 'a share of an in-quota quantity that may be granted to an individual applicant' or in substance 'one allocation,' such that it may not limit access to one allocation to processors.") (Exhibit USA-26). *See also id*., paras. 77-97 (summarizing Canada's arguments).

[189] *See Canada – Dairy TRQs I (Panel)*, para. 107 ("The Panel believes, however, that the most natural reading of the words comports with the interpretation that the clause is intended to prevent limitation of access generally to processors, and not merely to a single allocation.") (Exhibit USA-26).

[190] Canada's Initial Written Submission, para. 167.

[191] Canada's Initial Written Submission, para. 168 (underline added).

[192] Canada's Initial Written Submission, para. 168 (underline added).

[193] USMCA, Article 3.A.2.11(b).

[194] Canada's Initial Written Submission, para. 168.

share of the total TRQ quantity that "may be"[195] assigned to an individual recipient, and that is true before it has been assigned. The contextual elements that Canada references are not at odds with the interpretation proposed by the United States, namely that the term "an allocation" in the processor clause means a share or portion of the quota.

212. With respect to the term "access", Canada appears to disagree with the dictionary definition on which the United States relies, and argues that instead "[t]he term 'access' is defined, in relevant part, as '[t]o obtain, acquire; to get hold of [something]'."[196] Canada, though, cites the dictionary entry for the verb "access".[197] The word "access" in the processor clause of Article 3.A.2.11(b) of the USMCA is used in the noun form: "limit access to an allocation to processors". So, the dictionary entry for the verb "access" is not the entry that is most directly relevant to the interpretation of the term.

213. That said, the United States does not object to Canada's suggestion that the term "access" "refers to the ability to obtain or acquire something (an allocation)",[198] as this is not much different than the position of the United States, which is that the term "access" means "the right or opportunity to benefit from or use" *something* – "a portion, a share; a quota".[199] The United States agrees that the term "access", in the context of the processor clause, means "[t]he right or opportunity to benefit from or use"[200] or "obtain or acquire something (an allocation)".[201]

214. Immediately following its discussion of the dictionary definition of the term "access", Canada asserts that "[o]ther provisions of Article 3.A.2 clearly distinguish between the application for and the grant of allocations, on the one hand, and utilization of allocated volumes on the other."[202] This is a *non sequitur*. While Canada points to other provisions of Article 3.A.2 that purportedly support this proposition, Canada does not explain how its proposition supports Canada's argument in favor of its proposed interpretation of the term "access" in the processor clause of Article 3.A.2.11(b) of the USMCA.

215. The United States does not suggest that the processor clause of Article 3.A.2.11(b) "impose[s] limits on the use or utilization of TRQ allocations".[203] Rather, the United States has

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[195] Canada's Initial Written Submission, paras. 168 and 170 (underline added).

[196] Canada's Initial Written Submission, para. 169.

[197] *See* Canada's Initial Written Submission, footnote 130, and Exhibit CDA-32.

[198] Canada's Initial Written Submission, para. 169 (underline added).

[199] See, *e.g.*, U.S. Initial Written Submission, paras. 100 (quoting the definition of "access" from Oxford English Dictionary Online (Exhibit USA-72)) and 108.

[200] Definition of "access" from Oxford English Dictionary Online (Exhibit USA-72).

[201] Canada's Initial Written Submission, para. 169.

[202] Canada's Initial Written Submission, para. 169.

[203] Canada's Initial Written Submission, para. 169.

demonstrated that the processor clause establishes a prohibition on reserving a portion of quota for the exclusive use of processors or so-called "further processors", who are themselves also processors. As the panel in *Canada – Dairy TRQs I* put it, "Canada cannot, in substance, ring-fence and limit to processors (and 'further processors,' which are processors for purposes of the Processor Clause) a reserved 'pool' of TRQ amounts to which only processors have access."[204] This is equally true whether Canada uses formal "pools" with defined percentages of the total TRQ quantity that are established expressly in published measures, or informal "pools" that processors can create for themselves through their own selling behavior as a function of the application and effect of Canada's dairy TRQ allocation measures.

216. Canada also argues that "the Processor Clause contains no requirements with regard to the size or volume of allocations that must be awarded to non-processors and the United States' efforts to read such requirements into the text must be rejected."[205] The United States does not understand Canada's argument. The United States has not suggested that the processor clause of Article 3.A.2.11(b) of the USMCA imposes obligations regarding the size or volume of allocations that must be awarded to non-processors, and Canada does not refer to any passage of the U.S. initial written submission that advances any such argument. The U.S. argument focuses on the manner in which Canada's dairy TRQ allocation measures give processors the opportunity to create and determine for themselves the size of pools of TRQ volume that only processors have the ability to access.

217. Canada concludes its textual and contextual analysis by reiterating its argument that "if a Party permits non-processors to apply for and obtain allocations of in-quota volumes calculated from the total TRQ quantity, it will have complied with its obligations under the Processor Clause."[206] Again, this is precisely the argument that the panel rejected in *Canada – Dairy TRQs I*.[207] There, the panel noted that "Canada conceded at the Oral Hearing that its interpretation would mean that Canada could allocate 1,000 TRQ amounts, reserving access to 999 such allocations for processors only."[208] The panel reasoned that "Canada's candid concession as to its interpretation established that the Processor Clause would have no useful effect if that interpretation were accepted. Preserving access for .1% of a TRQ amount does not rise to the level of useful effect."[209]

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[204] *Canada – Dairy TRQs I (Panel)*, para. 163 (Exhibit USA-26).

[205] Canada's Initial Written Submission, para. 170.

[206] Canada's Initial Written Submission, para. 170.

[207] *See, e.g., Canada – Dairy TRQs I (Panel)*, paras. 118-121 (Exhibit USA-26).

[208] *Canada – Dairy TRQs I (Panel)*, para. 119 (Exhibit USA-26).

[209] *Canada – Dairy TRQs I (Panel)*, para. 119 (Exhibit USA-26).

b. Canada's Proposed Interpretation Is Not Supported by the Object and Purpose of the USMCA or the Function of Article 3.A.2.11 of the USMCA

218. Canada again argues that its proposed interpretation is "in conformity with the object and purpose of the CUSMA",[210] which Canada contends "includes trade liberalization while also preserving the Parties' 'inherent right to regulate' and 'flexibility […] to set legislative and regulatory priorities'."[211] As demonstrated above, Canada overstates the nature and degree of its discretion,[212] and Canada misunderstands the object and purpose of the USMCA, which does not support Canada's position.[213]

219. Canada also argues that its proposed interpretation is "in conformity with ... the function of Article 3.A.2.11."[214] Canada asserts that "Article 3.A.2.11 is premised upon the Parties' retaining discretion to administer TRQs by an allocation mechanism of their choosing",[215] and "the function of Article 3.A.2.11(b) is to preserve a Party's discretion to administer TRQs while establishing specific constraints on the exercise of that discretion."[216] Canada points to nothing in the text of Article 3.A.2.11 to support these assertions. To the extent that Canada has discretion is choosing an allocation mechanism, that is because Article 3.A.2 of the USMCA does not prescribe the particular allocation mechanism that a Party is to apply. However, Article 3.A.2 is replete with specific rules and obligations that constrain a Party's discretion in choosing and crafting an allocation mechanism. On its face, Article 3.A.2.11 establishes such rules and obligations; it does not serve to preserve a Party's regulatory discretion. Indeed, Article 3.A.2.11 begins "[a] Party administering an allocated TRQ shall ensure that", and then it sets forth seven subparagraphs of binding obligations that constrain a Party's discretion in the choice of an allocation mechanism.

220. Accordingly, Canada is incorrect about the purported "function" of Article 3.A.2.11(b) of the USMCA, and Canada's arguments offer no support for its proposed interpretation.

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[210] Canada's Initial Written Submission, para. 171.

[211] Canada's Initial Written Submission, para. 172.

[212] *See supra*, section II.B.1.e.

[213] *See supra*, section II.C.5.

[214] Canada's Initial Written Submission, para. 171.

[215] Canada's Initial Written Submission, para. 172.

[216] Canada's Initial Written Submission, para. 172.

2. Canada's Allocation Mechanism Does "Limit Access to an Allocation" to Processors

a. Canada's Discussion of the Reasons for the Design of Its Criteria for Calculating Market Share is Irrelevant and Unavailing

221. Canada offers several reasons for the design of its criteria for calculating market share. The reasons Canada gives, though, are not credible, nor are they responsive to the evidence that the United States has presented demonstrating the practical effect of Canada's dairy TRQ allocation measures.

222. Canada contends that, "[c]ontrary to what the United States argues, Canada's selected criteria for calculating market share (including the types of activity that cannot be included) are designed to ... permit verification; ... calculate market share based on an applicant's primary activity in the dairy market[;] ... and ... reduce opportunities for 'cycling' (i.e., sales designed to artificially inflate an applicant's market share in order to capture greater TRQ quantity) and exclude certain sales that do not constitute part of the applicant's core market activity."[217]

223. While Canada protests that "[i]n essence, the United States suggests that Canada's criteria are designed to inflate processors' market share at the expense of distributors",[218] earlier in its own initial written submission, Canada offers reasons to believe that this is precisely the purpose for which Canada's criteria are designed. In Canada's view:

> Dairy processors, given their unique position in the dairy supply chain, generally have a high level of knowledge regarding the full scope of dairy ingredients and products desired by consumers (by both final consumers and other processors and further processors) and the supply of ingredients and products domestically available in Canada. They are in a better position to serve the market with TRQs as they continually monitor the evolution of Canadian dairy supply and demand (throughout the year) to ensure that the right dairy ingredients and products are produced and imported to meet overall demand in the Canadian economy (not limited to specific products or consumers).[219]
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> ...

[217] Canada's Initial Written Submission, para. 178.

[218] Canada's Initial Written Submission, para. 177.

[219] Canada's Initial Written Submission, para. 31 (underline added).

> When processors import under the TRQ, predictability is enhanced because imports by processors will tend to follow the more stable import patterns of processors as they take into account domestic production and seasonality in milk supply.[220]
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> ...
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> Allocating TRQs to processors is necessary to facilitate predictability and stability in the purchase of domestic raw milk and the supply of dairy products downstream, given processors' limited ability to negotiate prices for their inputs as well as the prices for their products ultimately sold to consumers.[221]

Given Canada's elevated view of the importance of allocating TRQs to processors and the role that Canada contends processors play in importing dairy products under the TRQs, it would be surprising if Canada had not designed the criteria for calculating market share with the aim of increasing processors' market share at the expense of distributors.

224. Canada asserts that, "[i]n order to achieve the most accurate calculation of an applicant's market share relative to all other eligible applicants, Canada assesses applicants based on their primary activity in the dairy supply chain."[222] This explanation, which Canada offers now in the context of this dispute settlement proceeding, is not presented anywhere in Canada's dairy TRQ allocation measures. Nor is the logic of it self-evident. Indeed, when it published the document entitled Public Consultations: CUSMA Dairy Tariff Rate Quotas (TRQs) Panel Report Implementation - Proposed Allocation and Administration Policy Changes, on March 1, 2022, Canada proposed that the market activity for all USMCA dairy TRQ applicants would be based on applicants' sales. The proposed policy further provided that the calculation of market activity would exclude "[p]rocessor-to-processor sales, distributor-to-distributor sales, [and] sales to related parties and sales to final consumers".[223] In the final dairy TRQ allocation measures that Canada adopted in May 2022, after the public consultation period, Canada modified the policy that was originally proposed, and decided that market activity would be determined differently for processors, distributors, and further processors.

225. Canada further asserts that:

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[220] Canada's Initial Written Submission, para. 33 (underline added).

[221] Canada's Initial Written Submission, para. 36 (underline added).

[222] Canada's Initial Written Submission, para. 179.

[223] Public Consultations: CUSMA Dairy Tariff Rate Quotas (TRQs) Panel Report Implementation - Proposed Allocation and Administration Policy Changes, published on March 1, 2022, p. 7 (Exhibit USA-16).

> The choice of metric for processors (volume of covered goods manufactured) and further processors (volume of covered goods used in further processing) reduces the ability of these entities to cycle goods to capture greater TRQ quantity. For instance, by calculating market activity using volume manufactured, processors are unable to include sales between related entities or sales between processors ("at level sales").[224]

226. The U.S. initial written submission, though, demonstrates that Canada's assertion is not correct.[225] On their face, Canada's dairy TRQ allocation measures do not exclude processor-to-processor transfers from the calculation of processors' market activity. Thus, for example, one processor might manufacture skim milk powder and count that volume for the purpose of a USMCA dairy TRQ, and then sell that skim milk powder to another processor that uses it to manufacture yogurt, with that second processor also counting the same volume of skim milk powder again for its own market activity (now incorporated into the yogurt). Another processor might produce cream, which it sells to a different processor that makes ice cream, and then both processors could count the same volume of dairy product (the kilograms of the cream) for the purposes of the market activity calculation. Another example could be that a processor manufactures shredded mozzarella cheese and counts that volume as market activity, and then sells the cheese to a further processor that manufactures frozen pizza, who counts the same volume of cheese used in its production process. As demonstrated in the U.S. initial written submission, and as the panel in *Canada – Dairy TRQs I* found,[226] Article 3.A.2.11(b) of the USMCA makes no distinction between or among processors and further processors. Thus, under Canada's dairy TRQ allocation measures, the same volume of dairy product can be used by multiple processors to qualify for an allocation, while distributors are prohibited from doing the same thing.

227. Canada has not responded to the examples that the United States has presented, and Canada fails to rebut the U.S. argument.

228. Elsewhere in its initial written submission, Canada offers the example of one processor (Processor A) that produces 5 kg of cheese and sells it to another processor (Processor B) that shreds that cheese and combines it with 5 kg of cheese manufactured in its own facility. Canada asserts that Processor A can count the 5 kg of cheese that it manufactured toward its own market activity, but Processor B cannot also count that same volume of cheese toward its market activity.[227] Canada's example is not responsive to the examples that the United States offers. Nor is it clear on the face of Canada's dairy TRQ allocation measures that the scenario Canada

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[224] Canada's Initial Written Submission, para. 180.

[225] *See*, *e.g.*, U.S. Initial Written Submission, para. 129.

[226] *See Canada – Dairy TRQs I (Panel)*, para. 126 (Exhibit USA-26).

[227] *See* Canada's Initial Written Submission, footnote 64.

describes is actually impermissible under Canada's measures. The measures simply do not state such a prohibition, while, in contrast, distributor-to-distributor sales are expressly excluded from distributors' market share calculation.

229. Canada further reasons that the "choice of metric for processors" was necessary because "[s]ales between related entities and reciprocal at-level sales would otherwise be an easy method for artificially increasing market activity with the objective of acquiring increased TRQ volume. Accordingly, the choice of metric reduces opportunities for distortion."[228] Canada's reasoning, though, is irreconcilable with its argument later that "[t]o suggest that processors now act, or will act, as a group to squeeze distributors (that they rely on) from the market for the sole purpose of increasing processors' share of TRQ volumes is absurd because it ignores commercial realities."[229] Canada undermines its credibility by simultaneously advancing opposite propositions, namely that processors would readily have recourse to "an easy method for artificially increasing market activity with the objective of acquiring increased TRQ volume" if not purportedly prohibited from doing so, while at the same time insisting that it is "absurd" to suggest that processors would engage in particular market activity "for the sole purpose of increasing processors' share of TRQ volumes". Canada's contradictory positions are not sustainable.

230. Canada further asserts that "[d]istributors are also required to exclude direct sales to consumers because those sales do not represent the primary market activity of distributors. Once again, similar exclusions are not required for other applicants because the criteria applied inherently excludes activity that does not reflect processors' or further processor's primary activity."[230]

231. The U.S. initial written submission,[231] though, demonstrates that while Canada's dairy TRQ allocation measures preclude distributors from counting as market activity "products sold at the retail level to consumers",[232] processors can count the total volume of dairy products that they manufacture even if the processor itself sells the dairy product at the retail level to consumers. Nothing in Canada's dairy TRQ allocation measures prevents this. And Saputo, for example, explained in its 2022 annual statement that "[o]ur products are also sold directly to consumers through our e-commerce channels."[233] Lactalis, another "major player" in the

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[228] Canada's Initial Written Submission, para. 180.

[229] Canada's Initial Written Submission, para. 186.

[230] Canada's Initial Written Submission, para. 182.

[231] *See* U.S. Initial Written Submission, para. 131.

[232] Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 4 (Exhibit USA-10).

[233] Saputo, Annual Report 2022, p. V (Exhibit USA-54).

Canadian dairy market,[234] also "has launched two direct-to-consumer e-commerce platforms for cheese and for dairy."[235] It is likely that other processors also sell directly to final consumers, or they could do so.

232. Canada simply does not respond to – and does not rebut – the U.S. argument. And despite Canada's professed reasons, the disparate treatment is not a necessary feature of an allocation mechanism. Again, the policy changes Canada initially proposed in March 2022 based market activity for all USMCA dairy TRQ applicants on applicants' sales, and would have excluded "[p]rocessor-to-processor sales, distributor-to-distributor sales, [and] sales to related parties and sales to final consumers".[236] Processors would not have been able to count the volume of their manufactured products that they sold directly to consumers under the initial proposal. In the final measures Canada adopted, though, processors are able to count that volume when it is sold directly to consumers (it is counted as manufactured volume), while distributors still cannot count the volume of product sold directly to consumers. There is no logical reason for this.

233. Canada also asserts that "using volume manufactured to calculate processors' market share inherently excludes the volume of goods processors import and resell, as they do not manufacture these goods. If processors' market share was calculated using sales, processors could include sales of imported goods, potentially increasing their market share."[237] Again, though, the reason Canada offers for the criteria it designed does not make sense. Under the initial policy proposal, processors' sales of imported goods directly to consumers would have been excluded. Alternatively, Canada could just specifically exclude processors' sales of imported goods from the market share calculation, in the same way that Canada specifically excludes distributors' sales to final consumers.

234. Ultimately, the reasons Canada gives for its design of the criteria it has chosen simply do not have any basis in logic. Nor does Canada's proffer of illogical reasons rebut the evidence the United States has presented that Canada's dairy TRQ allocation measures breach the processor clause of Article 3.A.2.11(b) of the USMCA.

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[234] *See* Ristoff, Jared, "Dairy Product Production in Canada", IBISWorld, Inc., Industry Report 31151CA, September 2022, pp. 31-32 (Exhibit USA-44) (**CONFIDENTIAL INFORMATION**) (explaining that Parmalat, which is controlled by the Lactalis Group, a French dairy conglomerate, participates in Canada's dairy product production industry through its operations in Canada).

[235] Grocery Business, "Lactalis Canada launches direct-to-consumer e-comm platforms for dairy, cheese", September 1, 2021 (Exhibit USA-108).

[236] Public Consultations: CUSMA Dairy Tariff Rate Quotas (TRQs) Panel Report Implementation - Proposed Allocation and Administration Policy Changes, published on March 1, 2022, p. 7 (Exhibit USA-16).

[237] Canada's Initial Written Submission, para. 182.

b. Canada Fails to Rebut the U.S. Evidence that, under Canada's Dairy TRQ Allocation Measures, Processors Can Bypass Distributors to Capture Larger TRQ Allocations

235. Canada asserts that its "measures demonstrably do not restrict 'access to an allocation' exclusively for processors, and no allocation is reserved exclusively for processors."[238] Canada offers no support for this assertion. Canada discusses certain market trends and the "competitive environment", but does not engage with the arguments and evidence presented in the U.S. initial written submission concerning Canada's dairy TRQ allocation measures themselves.[239]

236. On their face, Canada's dairy TRQ allocation measures give processors the ability to create and determine for themselves the size of pools of TRQ volume to which only processors have access. Processors do this by choosing to whom they will sell and to whom they will not sell their dairy products. To the extent that processors bypass distributors and sell directly to further processors, retailers, food service operators, other customers, or even final consumers, Canada's dairy TRQ allocation measures operate to permit processors to significantly curtail or even eliminate the potential volume of market activity available to distributors, while counting every kilogram they produce as market activity for themselves. Since Canada's dairy TRQ allocation measures use market activity to determine applicants' quota allocation amounts, processors are able to prevent distributors from accessing substantial volumes of USMCA dairy TRQ allocations, which are thus limited exclusively to processors.

237. Put another way, every kilogram of a dairy product that a processor sells to a distributor can be counted by the processor as market activity, and some of the kilograms can be counted by the distributor.[240] Thus, that market activity and the allocation of the total TRQ quantity into which that market activity translates is accessible to both processors and distributors; access is not limited to processors.

238. On the other hand, every kilogram of a dairy product that a processor sells to anyone other than a distributor can only be counted by the processor. The allocation of the total TRQ quantity determined as a function of that market activity by operation of Canada's dairy TRQ allocation measures is accessible only by the processor.

239. The United States has demonstrated that Canada's dairy TRQ allocation measures, on their face, provide for this result. Canada has not responded to the U.S. arguments, and Canada has not rebutted them.

240. Canada suggests that "distributors are entitled to apply for and receive an allocation in proportion to their market activity, and could conceivably be allocated the majority of any

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[238] Canada's Initial Written Submission, para. 184.

[239] *See* Canada's Initial Written Submission, paras. 185-186.

[240] As discussed elsewhere, distributors are not permitted to count as market activity every sale they make.

TRQ."[241] Again, Canada fails to respond to the evidence and arguments that the United States has advanced.

241. With the U.S. initial written submission, the United States provided to the Panel an analysis that estimates that the allocations that could result under Canada's new measures are as follows:

(1) for the USMCA TRQ on fluid milk, Canada's prior measures reserved 85 percent of the TRQ allocations for processors, and our estimates show that under Canada's new measures, 90 percent to 97 percent of the allocations could go to processors;

(2) for the USMCA TRQ on cream, Canada's prior measures reserved 85 percent of the TRQ allocations for processors, and our estimates show that under Canada's new measures, 78 percent to 91 percent of the allocations could go to processors;

(3) for the USMCA TRQ on butter and cream powder, Canada's prior measures reserved 90 percent of the TRQ allocations for processors (80 percent for processors and 10 percent for further processors), and our estimates show that under Canada's new measures, 81 percent to 91 percent of the allocations could go to processors;

(4) for the USMCA TRQ on industrial cheese, Canada's prior measures reserved 100 percent of the TRQ allocations for processors (80 percent for processors and 20 percent for further processors), and our estimates show that under Canada's new measures, 96 percent to 99 percent of the allocations could go to processors;

(5) for the USMCA TRQ on cheeses of all types, Canada's prior measures reserved 90 percent of the TRQ allocations for processors (80 percent for processors and 10 percent for further processors), and our estimates show that under Canada's new measures, 76 percent to 91 percent of the allocations could go to processors;

(6) for the USMCA TRQ on yogurt and buttermilk, Canada's prior measures reserved 90 percent of the TRQ allocations for processors (80 percent for processors and 10 percent for further processors), and our estimates show that under Canada's new measures, 79 percent to 91 percent of the allocations could go to processors; and

(7) for the USMCA TRQ on ice cream and ice cream mixes, Canada's prior measures reserved 90 percent of the TRQ allocations for processors (80 percent for processors and 10 percent for further processors), and our estimates show that

[241] Canada's Initial Written Submission, para. 184.

> under Canada's new measures, 79 percent to 91 percent of the allocations could go to processors.[242]

242. As the above estimations make clear, the practical effect of the changes that Canada made to its USMCA dairy TRQ allocation measures in May 2022 is that Canada has preserved for processors exclusive access to very large portions of the USMCA dairy TRQs, with the possibility that, for some TRQs, the portion allocated to processors may even have increased as compared to Canada's prior dairy TRQ allocation measures, which had formal processor pools.[243] Canada has, in effect, recreated the processor pools with its new dairy TRQ allocation measures, achieving the same result in a different, and still-USMCA-inconsistent manner.

243. In its initial written submission, Canada offers no response to the U.S. estimates. Canada has in its possession information on the percentages of its USMCA dairy TRQs allocated to different types of applicants. As Canada explains, "[t]he administration of import controls provides Canada with detailed information regarding the quantities and types of dairy products entering Canada."[244] But Canada does not make this information public, and Canada has opted not to provide this information to the Panel.

244. Accordingly, the U.S. estimates of the allocations that could result under Canada's dairy TRQ allocation measures remain unrebutted.

3. Canada's Dairy TRQ Allocation Measures Are Inconsistent with the Processor Clause of Article 3.A.2.11(b) of the USMCA

245. As demonstrated above, Canada has failed to rebut the U.S. claim under the processor clause of Article 3.A.2.11(b) of the USMCA. For the reasons given in the U.S. initial written submission, as well as those given above, Canada's dairy TRQ allocation measures are inconsistent with the processor clause of Article 3.A.2.11(b) of the USMCA because, by using a market share basis and applying different criteria to different types of eligible applicants, combined with the exclusion of retailers, food service operators, and other potential TRQ users from eligibility for USMCA dairy TRQ allocations, Canada's measures effectively delegate to processors the ability to set their own market share and TRQ volume, as well as that of distributors; in substance and in effect, Canada's measures limit to processors a pool of TRQ allocation to which only processors have access.

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[242] *See* U.S. Government, Estimated Allocations under Canada's USMCA Dairy Tariff Rate Quotas Based on Allocation Measures Adopted in May 2022 (March 2023) (Exhibit USA-28).

[243] *See* U.S. Government, Estimated Allocations under Canada's USMCA Dairy Tariff Rate Quotas Based on Allocation Measures Adopted in May 2022 (March 2023) (Exhibit USA-28).

[244] Canada's Initial Written Submission, para. 36. *See also* Exhibit CDA-16 (WTO Cheese Imports by Quarter **(Confidential Information)**).

B. Canada Fails to Rebut the U.S. Claim Under Article 3.A.2.4(b) of the USMCA

246. As demonstrated in the U.S. initial written submission,[245] Canada's dairy TRQ allocation measures breach Article 3.A.2.4(b) of the USMCA, which obligates Canada to "ensure that its procedures for administering its TRQs … are fair and equitable".

247. The U.S. initial written submission explains that a proper interpretive analysis leads to the conclusion that Article 3.A.2.4(b) requires Canada to ensure that its dairy TRQ allocation measures, which are among its "procedures for administering its TRQs", are free from bias, providing an equal chance of success to all, and not unduly favorable or adverse to anyone. Canada's measures fail to meet this standard.

248. The U.S. initial written submission demonstrates a lack of evenhandedness in the disparate treatment of distributors and processors that is plain on the face of Canada's dairy TRQ allocation measures. And that is compounded by the use of the market share basis itself, which, as the United States has demonstrated, also heavily favors processors and, together with the exclusion of retailers, food service operators, and other potential dairy TRQ users from eligibility for USMCA dairy TRQ allocations, in effect, has recreated the processor pools found to breach the USMCA in *Canada – Dairy TRQs I*. Procedures for administering TRQs that, by design and prior to any requests, predetermine that a large portion of the allocation will go to one segment – processors – do not provide an equal chance of success to all. Rather, such procedures are biased in favor of processors and unduly adverse to other potential users of the quota.

249. Canada fails to rebut the U.S. claim. In its initial written submission, Canada offers an erroneous interpretation of Article 3.A.2.4(b) of the USMCA, and then reasons from that flawed interpretation to advance arguments that lack any foundation.

1. Canada's Interpretive Analysis of Article 3.A.2.4(b) of the USMCA is Flawed

a. Canada's Textual Analysis of the Phrase "Procedures for Administering Its TRQs" in Article 3.A.2.4(b) of the USMCA Is Incorrect

250. Canada's textual analysis of Article 3.A.2.4(b) of the USMCA focuses on the phrase "procedures for administering its TRQs".[246] Canada begins its analysis by referring to dictionary definitions that are the same as or similar to the dictionary definitions on which the United States relies. Canada reasons, based on the cited definitions, that "by the ordinary meaning of Article 3.A.2.4, a Party must ensure that its 'established or prescribed way of doing something' 'in order

[245] *See* U.S. Initial Written Submission, section VI.C.

[246] *See* Canada's Initial Written Submission, paras. 190-196.

to' 'manage […] the […] use […] of' or 'to control the operation […] of' its TRQs satisfies the six listed requirements" in Article 3.A.2.4.[247]

251. Canada then observes that "Article 3.A.2.4 applies regardless of whether a Party is managing the use of or controlling the operation of its TRQs on a FCFS basis or through an allocation mechanism."[248]

252. Up to this point, Canada's analysis is not objectionable.

253. However, Canada goes on to contend that because "Canada administers its CUSMA dairy TRQs through an allocation mechanism", then "as applied to Canada's measures, the phrase 'procedures for administering its TRQs' refers to Canada's established way of doing something in order to operate its allocation mechanism."[249] Canada is mistaken.

254. The text of Article 3.A.2.4 of the USMCA does not support Canada's position. Canada errs in conflating the term "TRQs", which appears in Article 3.A.2.4, with the term "allocation mechanism", which does not. Both of these terms are defined for the purposes of Article 3.A.2 of the USMCA. The term "TRQ" means "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 of that good that exceed that quantity", and the term "allocation mechanism" means "any system in which access to the tariff rate quota is granted on a basis other than first-come first-served".[250] Article 3.A.2.4 concerns "procedures for administering [a Party's] TRQs". Such procedures include, along with other types of procedures, a Party's "allocation mechanism", which itself necessarily comprises procedures for granting access to the TRQ on a basis other than first-come first served. This is plain on the face of Article 3.A.2.4 itself, given the dictionary definition of the word "procedures", on which the Parties agree, and definitions of the terms "TRQ" and "allocation mechanism", which are set forth in the Agreement.

255. Canada contends that "[t]he U.S. interpretation of Article 3.A.2.4(b) is incorrect because it fails to give meaning and effect to the term 'procedures' in the phrase 'procedures for administering its TRQs'".[251] This argument does not make sense. The United States and Canada agree on the definition of the term "procedures". The interpretive analysis here turns on the meaning of the term "TRQs", which Canada misinterprets.

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[247] Canada's Initial Written Submission, para. 193.

[248] Canada's Initial Written Submission, para. 194.

[249] Canada's Initial Written Submission, para. 195 (underline added).

[250] USMCA, Article 3.A.2.1.

[251] Canada's Initial Written Submission, para. 196.

256. Canada asserts that "[t]he U.S. allegations[] relate to the design or the rules of Canada's allocation mechanism."[252] That is correct. Canada argues that, "[w]hile this 'design' or these 'rules' are an aspect of Canada's TRQ administration, they are distinct from, and their adoption precede, the 'procedures' for administering Canada's TRQs."[253] That is not correct.

257. Canada's own definition of "procedures for administering its TRQs" is the "'established or prescribed way of doing something' 'in order to' 'manage […] the […] use […] of' or 'to control the operation […] of' its TRQs".[254] Canada's "allocation mechanism" contains and constitutes rules, instructions, and processes, *i.e.*, "procedures", related to administering Canada's TRQs (specifically the allocation of TRQ quantities to recipients). Canada's suggestion that Article 3.A.2.4(b) of the USMCA does not apply to those procedures but instead those procedures are somehow distinct from and precede the "procedures for administering [Canada's] TRQs" simply is not at all supported by the text of Article 3.A.2.4(b).

258. Canada further argues that "[i]n alleging that Canada's market share approach and criteria violate Article 3.A.2.4(b), the United States misinterprets Article 3.A.2.4(b) as imposing a broader requirement on a Party to ensure that all aspects of its administration of its TRQs – not only its 'procedures' for administering its TRQs – are 'fair and equitable'."[255] Canada misunderstands the U.S. claim under Article 3.A.2.4(b). The U.S. claim under Article 3.A.2.4(b) concerns Canada's procedures themselves, not "all aspects of its administration of its TRQs".[256] The United States advances a separate claim under Article 3.A.2.11(e) of the USMCA that concerns Canada's administration or execution of its TRQs when Canada actually conducts the "allocation to eligible applicants".[257] It is Canada that appears to conflate or confuse these two different Agreement provisions and the concepts that underlie them.

b. Canada's Contextual Arguments Do Not Support Canada's Proposed Interpretation of Article 3.A.2.4(b) of the USMCA

259. As demonstrated above, Canada's proposed interpretation of Article 3.A.2.4(b) of the USMCA is erroneous, as is clear from the text of Article 3.A.2.4(b) itself. Canada attempts to support its flawed textual analysis with contextual analysis, but Canada's contextual analysis is equally flawed.

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[252] Canada's Initial Written Submission, para. 196.

[253] Canada's Initial Written Submission, para. 196.

[254] Canada's Initial Written Submission, para. 193.

[255] Canada's Initial Written Submission, para. 196.

[256] Canada's Initial Written Submission, para. 196.

[257] *See* U.S. Initial Written Submission, section VI.D. *See also infra*, section III.C.

260. Canada argues that all of the obligations set forth in the subparagraphs of Article 3.A.2.4 of the USMCA are, "by their nature, procedural".[258] Canada is incorrect.

261. Article 3.A.2.4(e), for example, which sets forth one of the obligations under Article 3.A.2.4, requires that "[e]ach Party shall ensure that its procedures for administering its TRQs ... are responsive to market conditions".

262. Canada paraphrases this provision, suggesting that it "establish[es] deadlines or time periods – for returning unused TRQ quantities, for example – that take into account market conditions".[259] Canada's characterization of Article 3.A.2.4(e) is not supported by the text of that provision.

263. Nothing in the text of Article 3.A.2.4(e) suggests that it concerns the establishment of deadlines or time periods. Another subparagraph of Article 3.A.2.4, subparagraph (c), explicitly refers to and sets forth an obligation related to "clearly specified timeframes".

264. Nothing in the text of Article 3.A.2.4(e) suggests that it concerns the return of unused TRQ quantities. Article 3.A.2.15 of the USMCA explicitly concerns return of unused TRQ allocations, including requiring that the mechanism for return be "timely". There is no cross-reference to Article 3.A.2.15 in Article 3.A.2.4(e).

265. Article 3.A.2.4(e) of the USMCA simply requires that a Party's procedures for administering its TRQs be "responsive to market conditions". On its face, this appears to impose a positive, substantive obligation related to the procedures for administering a Party's TRQs, which requires the procedures that a Party adopts to account for and provide administrators sufficient flexibility to respond to changes in market conditions. This is not a procedural obligation. Article 3.A.2.4(e) weighs against Canada's argument that the requirement in Article 3.A.2.4(b) – that a Party's "procedures for administering its TRQs" be "fair and equitable" – relates only to the procedural fairness of the procedures, and not to the substantive fairness and equity of the procedures and the outcomes that flow from those procedures. The context of Article 3.A.2.4(e) does not support Canada's position.

266. Canada also refers to Articles 3.A.2.3 and 3.A.2.5 of the USMCA to support Canada's contention that "where the Parties intended the obligation to apply more broadly to a Party's administration of its TRQs and not just to the procedures for operating its TRQ mechanism, the Parties referred to TRQ administration generally without any qualifiers."[260] As explained above, though, Canada's characterization of the U.S. argument is incorrect. Canada's contextual analysis of Articles 3.A.2.3 and 3.A.2.5 is not germane, because it attempts to rebut an argument that the United States has not made.

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[258] Canada's Initial Written Submission, para. 198.

[259] Canada's Initial Written Submission, para. 197.

[260] Canada's Initial Written Submission, para. 199.

c. Canada's Proposed Interpretation Is Not Supported by the Object and Purpose of the USMCA or the Function of Article 3.A.2.4(b) of the USMCA

267. Canada again asserts that its proposed interpretation is consistent with the object and purpose of the USMCA, which Canada suggests "includes 'establish[ing] a clear, transparent, and predictable legal and commercial framework for business planning' and 'promot[ing] transparency, good governance and the rule of law'."[261] As demonstrated above, Canada misunderstands the object and purpose of the USMCA, as well as the role of object and purpose in the interpretive analysis.[262] The object and purpose of the USMCA does not support Canada's position.

268. Here, Canada refers to two recitals in the USMCA Preamble, which are different recitals than the recitals to which Canada refers earlier in its initial written submission. Canada appears to pick and choose recitals in the Preamble that support whatever interpretation Canada is proposing at the time, without taking account of the Preamble as a whole and what all of the recitals, taken together, indicate about the object and purpose of the USMCA.

269. As explained above, the USMCA does not expressly state what is the object and purpose of the Agreement. The USMCA Preamble includes twenty recitals, the majority of which refer to economic expansion and growing trade between the Parties. One of the earliest recitals refers to the Parties' resolve to establish a "high standard new agreement to support mutually beneficial trade leading to freer, fairer markets, and to robust economic growth in the region".[263] Interpreting Article 3.A.2.4(b) of the USMCA as permitting Canada to heavily favor Canadian dairy processors over other potential importers – in a way that puts Canada's actions beyond scrutiny under the Agreement – does not serve the purpose of making the dairy market fairer.

270. Also in the USMCA Preamble, the Parties recognize "that small and medium-sized enterprises (SMEs), including micro-sized enterprises, contribute significantly to economic growth, employment, community development, youth engagement and innovation, and seek to support their growth and development by enhancing their ability to participate in and benefit from the opportunities created by this Agreement".[264] Again, interpreting Article 3.A.2.4(b) of the USMCA in a way that permits Canada to significantly favor the largest Canadian dairy processors over much smaller distributors would not serve this purpose of the USMCA.

271. As these examples demonstrate, it is likely possible to select certain recitals from the USMCA Preamble to support any proposed interpretation of the USMCA. The relevant question, though, is not whether particular aspects of the purported object and purpose of the

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[261] Canada's Initial Written Submission, para. 203.

[262] *See supra*, section II.C.5.

[263] USMCA, Preamble, third recital (underline added).

[264] USMCA, Preamble, sixth recital.

Agreement support a proposed interpretation, but rather whether a proposed interpretation accords with the overall object and purpose of the Agreement. Given the breadth of aims reflected in the USMCA Preamble, Canada's narrow, selective, and shifting view of the object and purpose of the USMCA is unfounded and unhelpful for resolving the interpretive questions in this dispute.

272. Canada also presents arguments concerning the purported function of Article 3.A.2.4(b) of the USMCA, which Canada contends is "to ensure procedural fairness for applicants seeking a TRQ quantity."[265] As demonstrated above, proper textual and contextual analysis reveals that there is no support for Canada's argument that Article 3.A.2.4(b) concerns merely "procedural fairness". Canada's assertion concerning the function of Article 3.A.2.4(b) is based on its erroneous textual and contextual analysis, and thus rests on a false premise.

273. Canada's arguments about procedural fairness also lack any basis in logic. Canada asserts that "[p]rocedural fairness is concerned with ensuring the fairness and equity of the procedures by which a decision is made."[266] Canada further contends that "[i]n a TRQ administration context, procedural fairness requires officials operating an allocation mechanism to provide applicants seeking a TRQ quantity with an opportunity to submit relevant information (hearing rule) and an assessment of their application free from bias – whether actual or apparent – in accordance with the established rules (bias rule)."[267]

274. Under Canada's dairy TRQ measures, though, the officials operating Canada's dairy TRQs allocation mechanism effectively have no decision to make. The biased decision favoring processors was already made and incorporated into the design of the allocation mechanism. By the time that Canadian officials are "provid[ing] applicants seeking a TRQ quantity with an opportunity to submit relevant information (hearing rule)",[268] there is no substantive "assessment of their application"[269] to make, since the allocation mechanism operates to apportion the total TRQ quantity based on market activity, which is just the mechanical application of a mathematical formula. While the officials' application of the allocation mechanism may, in that sense, be "free from bias"[270] – that is, the United States does not allege that officials are doing the math incorrectly (intentionally or otherwise) – the resulting allocations, which are preordained, are far from being free of bias. Canada's procedures for administering its TRQs are themselves biased in favor of processors and against other types of TRQ applicants.

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[265] Canada's Initial Written Submission, para. 204.

[266] Canada's Initial Written Submission, para. 205.

[267] Canada's Initial Written Submission, para. 207.

[268] Canada's Initial Written Submission, para. 207.

[269] Canada's Initial Written Submission, para. 207.

[270] Canada's Initial Written Submission, para. 207.

275. Canada's reliance on the findings of the WTO panel in *China – TRQs* also is misplaced.[271] The findings to which Canada refers weigh against Canada's position. First, Canada points to the finding in paragraph 7.84 of the *China – TRQs* panel report.[272] There, the panel found that "[a] system that allows entities with conflicting interests to comment on the information provided by applicants but does not clarify whether those applicants or other interested parties have an opportunity to learn about such comments and to rebut them, cannot, in our view, be considered impartial and equitable. Thus, we find that the public comment process violates China's obligation to administer its TRQs on a fair basis."[273] The panel's findings do not concern "procedural fairness"; they concern the fairness of the procedures. That is precisely the issue with Canada's dairy TRQ allocation measures that the United States challenges here under Article 3.A.2.4(b) of the USMCA.

276. Second, Canada points to findings in paragraphs 7.46, 7.70, 7.110, and footnote 138 of the panel report in *China – TRQs*.[274] As Canada describes it, "[i]n essence, China had failed to comply with the 'bias rule' as its authorities did not follow established rules, giving rise to an appearance of bias. One of the definitions of the term 'fair' that the panel relied on in making this finding was 'in accordance with the rules or standards.'"[275] That finding is not germane, though, to the interpretation of Article 3.A.2.4.(b) of the USMCA, nor to the U.S. claim under that provision. Article 3.A.2.4(b) concerns the procedures themselves, as does the U.S. claim, not a failure by officials to follow and abide by the procedures.

277. Accordingly, the findings of the panel in *China – TRQs* are of no help to Canada, and actually weigh against Canada's position.

2. Canada's Arguments about Procedural Fairness Are Irrelevant as They Rest on Canada's Flawed Interpretation of Article 3.A.2.4(b) of the USMCA

278. Canada argues that "[t]he United States has not provided any argument or evidence to establish that Canada's procedures for administering its TRQs fail to provide procedural fairness."[276]

279. As demonstrated above, Canada's proposed interpretation – that Article 3.A.2.4(b) of the USMCA concerns only "procedural fairness" – is not supported by proper analysis of the text,

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[271] *See* Canada's Initial Written Submission, para. 208 and footnote 173.

[272] *See* Canada's Initial Written Submission, footnote 173.

[273] *China – TRQs (WTO Panel)*, para. 7.84 (underline added).

[274] *See* Canada's Initial Written Submission, footnote 173.

[275] Canada's Initial Written Submission, footnote 173 (underline added).

[276] Canada's Initial Written Submission, para. 211 (underline added).

context, and object and purpose of the USMCA. Canada's arguments concerning procedural fairness are beside the point.

280. Canada further contends that "[t]he procedures for administering Canada's TRQs provide applicants with an opportunity to submit relevant information through their applications, seek clarifications, and submit any additional information, as appropriate. In addition, these procedures ensure that decisions on individual applications are free from bias and predetermination by requiring them to be made in accordance with the established rules."[277]

281. As the United States has demonstrated, Canada's procedures themselves do not ensure that decisions on individual applications are free from bias and predetermination. They do the opposite. As we have explained, for each of the categories of sales that distributors must exclude from their calculation of market activity, Canada's dairy TRQ allocation measures permit processors to count as market activity the volume of products sold through the very same sales channels that are foreclosed to distributors when calculating their market activity – because processors can count the total volume manufactured.

282. The difference in treatment regarding how market activity may be calculated for different types of TRQ applicants plainly is not a fair and equitable procedure for allocating quota to applicants. It artificially undercuts the market share that distributors are able to claim by excluding legitimate business practices. This has the effect of increasing the market share of processors and further processors, providing that those segments will have access to additional USMCA dairy TRQ volume. Maintaining procedures that purport to calculate allocations based on activity in the dairy sector, only to exclude legitimate activity of one group – to its detriment – does not provide an equal chance of success to all applicants.

283. And it is evident that Canada's procedures are designed to achieve that unfair and inequitable result. In Canada's own words, Canada believes that "[d]airy processors ... are in a better position to serve the market with TRQs";[278] "[w]hen processors import under the TRQ, predictability is enhanced";[279] and "[a]llocating TRQs to processors is necessary to facilitate predictability and stability".[280] Given these views that Canada has expressed, it is hardly a surprise, then, that Canada's procedures for administering its TRQs, reflected in Canada's dairy TRQ allocation measures that the United States challenges in this dispute, unfairly and inequitably favor processors over distributors and other potential recipients of Canada's dairy TRQ allocations.

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[277] Canada's Initial Written Submission, para. 212 (underline added).

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

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

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

3. Canada's Dairy TRQ Allocation Measures Are Inconsistent with Article 3.A.2.4(b) of the USMCA

284. As demonstrated above, Canada has failed to rebut the U.S. claim under Article 3.A.2.4(b) of the USMCA. For the reasons given in the U.S. initial written submission, as well as those given above, Canada's dairy TRQ allocation measures are inconsistent with Article 3.A.2.4(b) of the USMCA.

C. Canada Fails to Rebut the U.S. Claim Under Article 3.A.2.11(e) of the USMCA

285. As demonstrated in the U.S. initial written submission,[281] Canada's dairy TRQ allocation measures breach Article 3.A.2.11(e) of the USMCA, which obligates Canada to "ensure that … if the aggregate TRQ quantity requested by applicants exceeds the quota size, allocation to eligible applicants shall be conducted by equitable and transparent methods".

286. The U.S. initial written submission explains that a proper interpretive analysis leads to the conclusion that Article 3.A.2.11(e) requires Canada to ensure that its dairy TRQ allocation measures are free from bias, providing an equal chance of success to all, not unduly favorable or adverse to anyone. Canada's measures fail to meet this standard.

287. Canada fails to rebut the U.S. claim. In its initial written submission, Canada offers an erroneous interpretation of Article 3.A.2.11(e) of the USMCA, and then reasons from that flawed interpretation to advance arguments that lack any foundation.

1. Canada's Interpretive Analysis of Article 3.A.2.11(e) of the USMCA Is Flawed

a. Article 3.A.2.11(e) of the USMCA Is Not a "Specific Application" of Article 3.A.2.4(b) of the USMCA

288. Canada argues that Article 3.A.2.11(e) of the USMCA "is a specific application of the obligation in Article 3.A.2.4(b)."[282] Canada's position is not supported by the text of these two provisions. On their faces, the two provisions establish different, though related obligations.

289. Article 3.A.2.4(b) of the USMCA provides that:

> Each Party shall ensure that its procedures for administering its TRQs:
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> ...

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[281] *See* U.S. Initial Written Submission, section VI.D.

[282] Canada's Initial Written Submission, para. 219.

> (b) are fair and equitable;

290. Article 3.A.2.11(e) of the USMCA provides that:

> A Party administering an allocated TRQ shall ensure that:
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> ...
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> (e) if the aggregate TRQ quantity requested by applicants exceeds the quota size, allocation to eligible applicants shall be conducted by equitable and transparent methods;

291. On the one hand, Article 3.A.2.4(b) establishes obligations related to the procedures for administering TRQs generally. These obligations apply to a Party whether it uses an "allocation mechanism" or whether it allocates TRQ quantities on a first-come first-served basis. The obligations concern the "procedures" for administering a Party's TRQs. Under Article 3.A.2.4(b), the "procedures" themselves must be "fair and equitable".

292. On the other hand, Article 3.A.2.11(e) establishes obligations related to administering an allocated TRQ, which means using an "allocation mechanism" to apportion the total TRQ quantity to recipients. The obligations in Article 3.A.2.11(e) are not applicable when a Party allocates TRQ quantities on a first-come first-served basis. Article 3.A.2.11(e) concerns, in particular, the "conduct[]" (*i.e.*, the execution or action) of "allocation to eligible applicants" when using an allocation mechanism. In the situation where "the aggregate TRQ quantity requested by applicants exceeds the quota size", then "allocation to eligible applicants" must be undertaken ("conducted") "by equitable ... methods". It follows that both the prescribed "methods" themselves as well as the administering authority's application of those methods must be "equitable" to meet the requirement that "allocation to eligible applicants shall be conducted by equitable ... methods".

293. Thus, while the provisions concern related concepts – *i.e.*, equity and fairness – it is inaccurate to posit, as Canada does, that Article 3.A.2.11(e) is "a specific application of the obligation in Article 3.A.2.4(b)."[283]

294. Canada contends that "[t]he way that the United States has structured its claim under Article 3.A.2.11(e) – immediately following its claim under Article 3.A.2.4(b) and referring back to it – appears to acknowledge that Article 3.A.2.11(e) is a specific application of Article 3.A.2.4(b)."[284] Canada misunderstands the U.S. argument. As explained above, the United States does not agree, and the text of the provisions does not support, the proposition that Article 3.A.2.11(e) is a specific application of Article 3.A.2.4(b). The two provisions do concern related

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[283] Canada's Initial Written Submission, para. 219.

[284] Canada's Initial Written Submission, para. 219.

obligations – *i.e.*, equity and fairness – and, in this instance, the same set of facts – Canada's USMCA dairy TRQ allocation measures, on their face – supports findings of breach under both provisions, as the United States has demonstrated.[285]

b. The "Condition Precedent" in Article 3.A.2.11(e) of the USMCA Is Not Relevant in this Situation

295. Canada also complains that the United States "ignores the obligation's condition precedent", which is that Article 3.A.2.11(e) "applies in the particular circumstances where a Party's TRQs are oversubscribed".[286] However, it is not clear why Canada raises this concern. As Canada itself explains, "[w]here its TRQs are oversubscribed, Canada would continue to apply the same criteria to calculating allocations that it normally applies to its CUSMA dairy TRQs."[287] So, it does not matter whether the TRQs are "oversubscribed" or not; Canada's "conduct[]" of "allocation to eligible applicants" remains the same. And, as the United States has demonstrated, and further discusses below, Canada's "conduct[]" of "allocation to eligible applicants" is, in all cases, not done by "equitable ... methods". Furthermore, Canada cannot ever know whether its TRQs are oversubscribed, because Canada does not provide TRQ applicants any opportunity to communicate to Canada what volume of TRQ the applicants would like to receive.[288]

c. Article 3.A.2.11(e) of the USMCA Does Not Require Only "Procedural Fairness"

296. Canada's interpretive analysis initially focuses on the interpretation of the term "methods", which Canada argues is "[k]ey to understanding Article 3.A.2.11(e)".[289] Canada contends that the meaning of the term "method" "makes clear that Article 3.A.2.11(e) imposes an obligation of procedural fairness."[290] This is the same argument that Canada makes with respect to the interpretation of Article 3.A.2.4(b) of the USMCA, and Canada's argument here fails for reasons similar to those given above.

297. Referring to the dictionary definition of the word "method", Canada proposes that "[t]he relevant meaning of 'method' is 'a way of doing anything, esp. according to a defined and regular plan; a mode of procedure in any activity, business, etc.'"[291] The United States does not

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[285] *See* U.S. Initial Written Submission, section VI.D.

[286] Canada's Initial Written Submission, para. 215.

[287] Canada's Initial Written Submission, para. 227.

[288] *See* U.S. Initial Written Submission, para. 156.

[289] Canada's Initial Written Submission, para. 217.

[290] Canada's Initial Written Submission, para. 217.

[291] Canada's Initial Written Submission, para. 217.

object to this proposal for the ordinary meaning of the term "methods" in Article 3.A.2.11(e) of the USMCA.

298. Canada goes on to assert, however, that "[l]ike Article 3.A.2.4(b), Article 3.A.2.11(e) requires procedural fairness."[292] Canada's conclusion is not supported by the context of Article 3.A.2.11(e).

299. As explained above, Article 3.A.2.11(e) concerns the action of "allocati[ng] to eligible applicants". Article 3.A.2.11(e) requires that "allocation to eligible applicants" (that action) must be "conducted" or undertaken or executed "by equitable and transparent methods". Accordingly, the "methods" themselves must be both "equitable" and "transparent", but also the administering authority's application of the "methods" must be both "equitable" and "transparent". Only then would the Party "administering an allocated TRQ" "ensure that" "allocation to eligible applicants" (the action) is "conducted by equitable and transparent methods", as Article 3.A.2.11(e) requires.

300. Canada argues that its proposed interpretation "is supported by the immediate context provided by the transparency obligation in Article 3.A.2.11(e)."[293] In Canada's view, "[t]ransparency is another element of procedural fairness".[294] Canada's contextual argument is unavailing. On its face, Article 3.A.2.11(e) establishes multiple, separate obligations. The "methods" must be "equitable". The "methods" also must be "transparent". The "allocation to eligible applicants" must be "conducted" in a manner that is "equitable". And the "allocation to eligible applicants" must be "conducted" in a manner that is "transparent".

301. As the Parties agree, the word "equitable" means, *inter alia*, "[o]f actions, arrangements, decisions, etc.: That is in accordance with equity; fair, just, reasonable."[295] And the word "transparent" means, *inter alia*, "[e]asily seen" and "understood".[296] These words mean different things, and the inclusion of both terms in Article 3.A.2.11(e) signifies that Article 3.A.2.11(e) imposes multiple obligations. The two terms cannot be collapsed into an obligation to provide just "procedural fairness". Canada's reading of Article 3.A.2.11(e) is not supported by the text and context of Article 3.A.2.11(e).

302. The obligation in Article 3.A.2.11(e) of the USMCA is not limited, as Canada contends, merely to "procedural fairness". And the U.S. claim under Article 3.A.2.11(e) does not "fall[]

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[292] Canada's Initial Written Submission, para. 219.

[293] Canada's Initial Written Submission, para. 220.

[294] Canada's Initial Written Submission, para. 220.

[295] Canada's Initial Written Submission, footnote 168 (quoting the definition of "equitable" and citing Exhibit USA-85).

[296] Canada's Initial Written Submission, para. 197 (quoting the definition of "transparent" and citing Exhibit USA-103).

outside the scope of the obligations in that Article", as Canada asserts.[297] Canada's interpretive analysis is flawed and lacks merit.

d. Article 3.A.2.11(e) of the USMCA Does Not Require that Canada's Methods for Allocation to Eligible Applicants Only Be "Valid", "Well-Founded", and "Appropriate"

303. As the U.S. initial written submission demonstrates,[298] the word "equitable" is defined as "[c]haracterized by equity or fairness … [o]f actions, arrangements, decisions, etc.: That is in accordance with equity; fair, just, reasonable".[299] Since the dictionary definition of "equitable" includes the word "fair", it is appropriate to note that 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".[300] Thus, Canada is required, when it conducts the allocation of its USMCA dairy TRQs to eligible applicants, to ensure that its dairy TRQ allocation measures are free from bias, providing an equal chance of success to all, not unduly favorable or adverse to anyone.

304. Canada relies on the same dictionary definitions of the words "equitable" and "fair" as the United States, but Canada reasons from those definitions that "[t]he meaning of 'equitable' includes 'fair' ('legitimate, valid, sound'), 'just' ('well-founded') and 'reasonable' ('[s]ufficient, adequate, or appropriate for the circumstances')."[301] Canada further distills the meaning of the term "equitable", contending that "'equitable' criteria for calculating allocations are those that are 'valid', 'well-founded' or 'appropriate' in the given circumstances."[302] Canada's definition of "equitable" is incomplete.

305. The same dictionary entry for the word "fair" on which Canada relies defines the "word" "fair" as "free from bias", in addition to "legitimate, valid, sound". There is no justification to omit "free from bias" from the meaning of "equitable", as Canada does. The phrase "free from bias" is synonymous with Canada's preferred terminology ("valid", "well-founded", or "appropriate"). Therefore, a method can only be "equitable", in the sense of being "valid", "well-founded", or "appropriate", if it also is "free from bias". As the United States has

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[297] Canada's Initial Written Submission, para. 221.

[298] *See* U.S. Initial Written Submission, section VI.D.

[299] Definition of "equitable" from Oxford English Dictionary Online (Exhibit USA-85).

[300] Definition of "fair" from Oxford English Dictionary Online (Exhibit USA-87).

[301] Canada's Initial Written Submission, para. 222 (footnotes omitted).

[302] Canada's Initial Written Submission, para. 223.

demonstrated, and as discussed further below, Canada's "methods" for the conduct of allocation to eligible applicants are not free from bias.[303]

306. Canada suggests that the United States takes the position that "Article 3.A.2.11(e) requires Canada's criteria for calculating allocations to treat all applicants the same."[304] That is not the position of the United States. The United States argues that Canada's dairy TRQ allocation measures must be free from bias, providing an equal chance of success to all, and not unduly favorable or adverse to anyone. Canada's contextual arguments concerning the use of the term "same" are inapposite and do not support Canada's position.

2. Canada Fails to Conduct Allocation to Eligible Applicants by Equitable Methods

307. Canada attempts to demonstrate that its use of a market share approach – including the "metrics adopted by Canada to calculate the market share of applicants from different segments of the industry" and "the exclusions that apply to the calculation of market activities of distributors" – is "equitable" within the meaning of Article 3.A.2.11(e) of the USMCA by presenting reasons that, in Canada's view, establish that the approach is "is a 'valid', 'well-founded' and 'appropriate' approach to calculating allocations when the TRQs are oversubscribed."[305] Canada contends that "the United States essentially seeks to substitute its view of what is equitable in the circumstances of this provision and severely limit Canada's discretion to determine for itself its methods for conducting allocations."[306] Canada's arguments lack merit.

308. As an initial matter, as discussed above, Canada omits from its interpretation of the term "equitable" a critical part of the definition of the word "fair": "free from bias".[307] The United States has demonstrated that Canada's use of a market share approach is not free from bias. The U.S. initial written submission, in connection with the U.S. claim under Article 3.A.2.4(b), describes Canada's use of a market share approach and explains how Canada's use of that approach means that Canada's procedures for administering its TRQs are not "fair" and "equitable".[308] The U.S. initial written submission further states that "[f]or the same reasons",[309] Canada's dairy TRQ allocation measures fail to ensure that allocation to eligible applicants is conducted by equitable methods, as required by Article 3.A.2.11(e) of the USMCA. For the

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[303] *See* U.S. Initial Written Submission, section VI.D.

[304] Canada's Initial Written Submission, para. 224.

[305] Canada's Initial Written Submission, paras. 228-231.

[306] Canada's Initial Written Submission, para. 232.

[307] Definition of "fair" from Oxford English Dictionary Online (Exhibit USA-87).

[308] *See* U.S. Initial Written Submission, section VI.C.

[309] U.S. Initial Written Submission, para. 140.

avoidance of any confusion or doubt, the United States reiterates below the factual arguments that substantiate the U.S. claim under Article 3.A.2.11(e).

309. Canada's dairy TRQ allocation measures provide that Canada's USMCA dairy TRQs are allocated on a "market share basis".[310] Processors' market activity is based on the total kilograms of the TRQ product manufactured by the processor during the reference period.[311] Further processors' market activity is based on the total kilograms of the TRQ product used by the further processor in the manufacturing of further processed food products during the reference period.[312] Distributors' market activity is based on just a fraction of the kilograms of the TRQ product sold by the distributor during the reference period.[313]

310. Distributors must exclude from their calculation of market activity products sold to other distributors.[314] Canada's measures assert that "[t]his ensures that these sales are not used by multiple distributors to qualify for an allocation."[315] As a matter of commercial logic, however, one would expect that distributors would routinely sell to other distributors in the ordinary course of business, in arms-length, market transactions. Numerous examples are conceivable. A large, national distributor might sell dairy products to a smaller regional or local distributor that would then resell the product to retailers, restaurants, hotels, hospitals, or other purchasers in the area. Distributors likely buy and sell products from other distributors as needed to fulfill orders of their customers. A distributor focused on importing products might sell to numerous other distributors focused on domestic sales of those products. Or, as Canada explained in *Canada – Dairy TRQs I*, "large retailers often own their wholesale and distribution centers, in addition to their retail stores."[316] If a large retailer has an "integrated distribution network[]"[317] that is a

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[310] Public Consultations: CUSMA Dairy Tariff Rate Quotas (TRQs) Panel Report Implementation - Proposed Allocation and Administration Policy Changes, published on March 1, 2022, pp. 6-7 (Exhibit USA-16). *See also*, *e.g.*, Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 4 (Exhibit USA-10).

[311] Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 4 (Exhibit USA-10).

[312] Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 4 (Exhibit USA-10).

[313] Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 4 (Exhibit USA-10).

[314] Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 4 (Exhibit USA-10).

[315] General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022, section 2.5 (Exhibit USA-18).

[316] *Canada – Dairy TRQs I*, Initial Written Submission of Canada, August 20, 2021 (excerpted), para. 33 (Exhibit USA-36).

[317] *Canada – Dairy TRQs I*, Initial Written Submission of Canada, August 20, 2021 (excerpted), para. 33 (Exhibit USA-36).

legally distinct corporate entity that focuses its business on distribution and thus constitutes a distributor for the purposes of Canadian law, then products sold by other distributors to the retailer's related-entity distributor, which would then be further distributed to the retailer's stores, could not be counted as market activity because they would be deemed distributor-to-distributor sales. There is no justification for excluding all of this typical commercial activity by distributors.

311. Further, Canada's dairy TRQ allocation measures do not similarly exclude processor-to-processor transfers from the calculation of processors' market activity. Thus, for example, one processor might manufacture skim milk powder and count that volume for the purpose of a USMCA dairy TRQ, and then sell that skim milk powder to another processor that uses it to manufacture yogurt, with that second processor also counting the same volume of skim milk powder again for its own market activity (now incorporated into the yogurt). Another example could be that a processor manufactures shredded mozzarella cheese and counts that volume as market activity, and then sells the cheese to a further processor that manufactures frozen pizza, who counts the same volume of cheese used in its production process. As demonstrated above, and as the panel in *Canada – Dairy TRQs I* found,[318] Article 3.A.2.11(b) of the USMCA makes no distinction between or among processors and further processors, and there is no basis for drawing a distinction between them for the purpose of Article 3.A.2.4(b) of the USMCA either. Thus, under Canada's dairy TRQ allocation measures, the same volume of dairy product can be used by multiple processors to qualify for an allocation, while distributors are prohibited from doing the same thing.

312. Distributors are also required to exclude from their market activity calculation "products sold to related persons".[319] Again, Canada's dairy TRQ allocation measures impose no similar requirement on processors. The same processor-to-processor or processor-to-further processor transfers described in the preceding paragraph could involve related parties, with both related parties counting the volume of the dairy product as market activity. Nothing in Canada's dairy TRQ allocation measures would prevent this, because processors and further processors do not measure market activity based on sales, but on manufacturing and use of dairy products.

313. Canada's dairy TRQ allocation measures also preclude distributors from counting as market activity "products sold at the retail level to consumers".[320] Processors, however, can count the total volume of dairy products that they manufacture even if the processor itself sells the dairy product at the retail level to consumers. Nothing in Canada's dairy TRQ allocation measures prevents this. And Saputo, for example, explained in its 2022 annual statement that

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[318] *See Canada – Dairy TRQs I (Panel)*, para. 126 (Exhibit USA-26).

[319] Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 4 (Exhibit USA-10).

[320] Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 4 (Exhibit USA-10).

"[o]ur products are also sold directly to consumers through our e-commerce channels."[321] Lactalis, another "major player" in the Canadian dairy market,[322] also "has launched two direct-to-consumer e-commerce platforms for cheese and for dairy."[323] It is likely that other processors also sell directly to final consumers, or they could do so.

314. For each of the categories of sales that distributors must exclude from their calculation of market activity, Canada's dairy TRQ allocation measures permit processors to count as market activity – by virtue of counting the total volume manufactured – products sold through the very same sales channels that are foreclosed to distributors when calculating their market activity.

315. The difference in treatment regarding how market activity may be calculated for different types of TRQ applicants plainly is not an equitable method for allocating quota to applicants. It artificially undercuts the market share that distributors are able to claim by excluding legitimate business practices. This has the effect of increasing the market share of processors and further processors, providing that those segments will have access to additional USMCA dairy TRQ volume. Maintaining and applying methods that purport to calculate allocations based on activity in the dairy sector, only to exclude legitimate activity of one group – to its detriment – does not provide an equal chance of success to all applicants.

316. Even more troubling, Canada changed the policy adopted in the final dairy TRQ allocation measures from the policy that was originally proposed. When it published the document entitled Public Consultations: CUSMA Dairy Tariff Rate Quotas (TRQs) Panel Report Implementation - Proposed Allocation and Administration Policy Changes, on March 1, 2022, Canada proposed that the market activity for all USMCA dairy TRQ applicants would be based on applicants' sales. And the proposed policy further provided that the calculation of market activity would exclude "[p]rocessor-to-processor sales, distributor-to-distributor sales, sales to related parties and sales to final consumers".[324] Thus, the policy originally proposed would have put distributors and processors on less uneven footing, excluding both distributor-to-distributor and processor-to-processor transfers, and applying the same rules to each group concerning sales to related parties and sales at the retail level to final consumers.[325] But in the final dairy TRQ allocation measures that Canada adopted in May 2022, Canada modified the policy that was

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[321] Saputo, Annual Report 2022, p. V (Exhibit USA-54).

[322] *See* Ristoff, Jared, "Dairy Product Production in Canada", IBISWorld, Inc., Industry Report 31151CA, September 2022, pp. 31-32 (Exhibit USA-44) (**CONFIDENTIAL INFORMATION**) (explaining that Parmalat, which is controlled by the Lactalis Group, a French dairy conglomerate, participates in Canada's dairy product production industry through its operations in Canada).

[323] Grocery Business, "Lactalis Canada launches direct-to-consumer e-comm platforms for dairy, cheese", September 1, 2021 (Exhibit USA-108).

[324] Public Consultations: CUSMA Dairy Tariff Rate Quotas (TRQs) Panel Report Implementation - Proposed Allocation and Administration Policy Changes, published on March 1, 2022, p. 7 (Exhibit USA-16).

[325] Of course, the problem of processor pools-in-effect, discussed in section VI.B of the U.S. initial written submission, still was a feature of the original proposal, since processors could always bypass distributors and sell to retailers and food service operators, which are excluded from eligibility for USMCA dairy TRQ allocations.

originally proposed, deciding that market activity would be determined differently for processors, distributors, and further processors.

317. The lack of evenhandedness in this disparate treatment of distributors and processors is plain on the face of Canada's dairy TRQ allocation measures. And it is compounded by the use of the market share basis itself, which, as the United States has demonstrated, also heavily favors processors and, together with the exclusion of retailers, food service operators, and other potential dairy TRQ users from eligibility for USMCA dairy TRQ allocations, in effect, has recreated the processor pools found to breach the USMCA in *Canada – Dairy TRQs I*. Methods for allocating TRQs to eligible applicants that, by design and prior to any requests, predetermine that a large portion of the allocation will go to one segment – processors – do not provide an equal chance of success to all. Rather, such methods are biased in favor of processors and unduly adverse to other potential users of the quota.

318. For these reasons, Canada's dairy TRQ allocation measures are inconsistent with Article 3.A.2.11(e) of the USMCA.

3. Canada's Dairy TRQ Allocation Measures Are Inconsistent with Article 3.A.2.11(e) of the USMCA

319. As demonstrated above, Canada has failed to rebut the U.S. claim under Article 3.A.2.11(e) of the USMCA. For the reasons given in the U.S. initial written submission, as well as those given above, Canada's dairy TRQ allocation measures are inconsistent with Article 3.A.2.11(e) of the USMCA.

D. Canada Fails to Rebut the U.S. Claim Under the First Clause of Article 3.A.2.11(c) of the USMCA ("Ensure that Each Allocation is Made in Commercially Viable Shipping Quantities")

320. As demonstrated in the U.S. initial written submission,[326] Canada's dairy TRQ allocation measures breach the first clause of Article 3.A.2.11(c) of the USMCA, which obligates Canada to "ensure that … each allocation is made in commercially viable shipping quantities". The U.S. initial written submission further demonstrates that Canada's USMCA dairy TRQ allocation measures contain no safeguards to ensure that each allocation is made in commercially viable shipping quantities.

321. Canada fails to rebut the U.S. claim. On the contrary, Canada itself has substantiated the U.S. claim. In its comments on the non-governmental entity submission of the International Cheese Council of Canada ("ICCC"), Canada confirms that "even if an applicant indicates that they are willing to accept one kilogram of cheese, an applicant will never receive an allocation of

[326] *See* U.S. Initial Written Submission, section VI.D.

one kilogram unless that is the market share calculation for that applicant."[327] In Canada's own words, Canada's USMCA dairy TRQ allocation measures would operate to allocate to a TRQ applicant 1 kilogram of TRQ quantity if "that is the market share calculation for that applicant."[328] That admission is all the evidence that is needed to demonstrate that Canada's USMCA dairy TRQ allocation measures, on their face, are inconsistent with the first clause of Article 3.A.2.11(c) of the USMCA.

322. Nevertheless, the United States responds below to other arguments and statements made in Canada's initial written submission.

323. Relying on dictionary definitions, some of which are the same as those on which the United States relies, Canada reasons that "the first clause of Article 3.A.2.11(c) is primarily concerned with the financial sustainability of TRQ quantities."[329] Canada further reasons that "the fundamental purpose of the first clause of Article 3.A.2.11(c) is to prevent the Party administering an allocated TRQ from providing individual allocations in quantities that are so small that the costs associated with shipping the product from the United States to Canada (or vice-versa) would necessarily exceed any possible revenue derived from the use or sale of the product, thus discouraging the allocation holder from importing the product subject to the TRQ."[330]

324. The United States does not disagree with Canada's interpretive reasoning.

325. It follows from Canada's reasoning, though, that an allocation of 1 kilogram would not constitute a "commercially viable" shipping quantity, because such an allocation is "so small that the costs associated with shipping the product from the United States to Canada (or vice-versa) would necessarily exceed any possible revenue derived from the use or sale of the product, thus discouraging the allocation holder from importing the product subject to the TRQ."[331] Yet, Canada's USMCA dairy TRQ allocation measures, as Canada has explained, would allocate to a TRQ applicant 1 kilogram of TRQ quantity if "that is the market share calculation for that applicant."[332]

326. Canada suggests that the United States has made the "assertion that any allocation below 20,000 kg is not made in 'commercially viable shipping quantities'".[333] The United States has

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[327] Canada's Comments on the ICCC Submission, para. 19 (underline added).

[328] Canada's Comments on the ICCC Submission, para. 19.

[329] Canada's Initial Written Submission, para. 236.

[330] Canada's Initial Written Submission, para. 237.

[331] Canada's Initial Written Submission, para. 237.

[332] Canada's Comments on the ICCC Submission, para. 19.

[333] Canada's Initial Written Submission, para. 243.

made no such assertion. Rather, the U.S. initial written submission explains that the USMCA does not define the term "commercially viable shipping quantities", and it is self-evident as a matter of commercial logic that the quantity that is commercially viable for shipping, *i.e.*, that would be profitable or otherwise make business sense, may vary from importer to importer and transaction to transaction.[334] Canada argues that "a quantity below 20,000 kg may still be 'commercially viable'".[335] That argument, though, does not prove anything, since it is not responsive to the position of the United States.

327. Canada further contends that "the United States must ... demonstrate that Canada's market-share allocation mechanism has resulted in the issuance of specific allocations to individual TRQ applicants that are too small to justify the cost of shipping the product from the United States to Canada",[336] but Canada asserts that "[t]he United States has not put forward any evidence showing that specific allocation holders have not imported products under some of Canada's CUSMA dairy TRQs because their allocation was too small to justify the cost of shipping the products from the United States to Canada."[337]

328. Canada mischaracterizes the United States' burden. The United States claims that Canada's dairy TRQ allocation measures, on their face, are inconsistent with the first clause of Article 3.A.2.11(c) of the USMCA. That is so because Canada's measures necessarily operate to make allocations as small as 1 kilogram if "that is the market share calculation for that applicant."[338] Canada acknowledges this. Canada has not suggested that an allocation of 1 kilogram is an allocation made "in commercially viable quantities". The United States considers that it is self-evident that an allocation of 1 kilogram is not made "in commercially viable quantities". It is, in Canada's words, "so small that the costs associated with shipping the product from the United States to Canada (or vice-versa) would necessarily exceed any possible revenue derived from the use or sale of the product, thus discouraging the allocation holder from importing the product subject to the TRQ."[339]

329. If Canada now contends that an allocation of 1 kilogram could constitute a "commercially viable" shipping quantity, then that raises questions about whether such an interpretation of the term "commercially viable shipping quantities" gives the first clause of Article 3.A.2.11(c) of the USMCA any useful effect. As the panel in *Canada – Dairy TRQs I* reasoned, an interpretation that would give the clause no useful effect "violates [Vienna

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[334] *See* U.S. Initial Written Submission, para. 145.

[335] *See* Canada's Initial Written Submission, paras. 242-245.

[336] Canada's Initial Written Submission, para. 246.

[337] Canada's Initial Written Submission, para. 247.

[338] Canada's Comments on the ICCC Submission, para. 19.

[339] Canada's Initial Written Submission, para. 237.

Convention] Article 31 interpretative principles".[340] If the first clause of Article 3.A.2.11(c) were interpreted as permitting Parties to make allocations in any amount whatsoever (*e.g.*, 1 kilogram, or even half a kilogram, or a quarter of a kilogram), because the meaning of "commercially viable shipping quantities" is totally subjective depending on the particular situation of the individual importer, then the clause would have no useful effect. Such an interpretation cannot be correct under customary rules of interpretation.

330. In addition, Canada's suggestion that the U.S. claim must fail because "the United States has not demonstrated that specific allocation holders did not receive allocations in 'commercially viable shipping quantities'" is untenable.[341] Canada is in possession of the data concerning all of the individual allocations made under Canada's USMCA dairy TRQs. Canada does not make that data public. If the United States were required to demonstrate that "specific allocation holders" did not receive allocations in "commercially viable shipping quantities", that would potentially be an impossible burden that would put Canada beyond scrutiny under the first clause of Article 3.A.2.11(c) of the USMCA.

331. The United States has demonstrated that Canada's USMCA dairy TRQ allocation measures, on their face, do nothing to prevent the possibility that an allocation of 1 kilogram could be made to a TRQ applicant if "that is the market share calculation for that applicant."[342] If Canada wishes to assert that no allocation has ever been made in the amount of 1 kilogram (or 100 kilograms or any other comparably small amount), then Canada would be obligated to produce evidence proving that factual assertion. Only Canada has that evidence, but Canada has, as of yet, not made the evidence available to the Panel. Instead, Canada, in its comments on the ICCC submission, provides limited data concerning ICCC members only; not a comprehensive data set that could be reviewed by the United States and the Panel.

332. Accordingly, Canada has failed to rebut the U.S. claim under the first clause of Article 3.A.2.11(c) of the USMCA. For the reasons given in the U.S. initial written submission, as well as those given above, Canada's dairy TRQ allocation measures are inconsistent with the first clause of Article 3.A.2.11(c) of the USMCA.

E. Canada Fails to Rebut the U.S. Claim Under the Second Clause of Article 3.A.2.11(c) of the USMCA ("Ensure that Each Allocation Is Made …, to the Maximum Extent Possible, in the Quantities that the TRQ Applicant Requests")

333. As demonstrated in the U.S. initial written submission,[343] Canada's dairy TRQ allocation measures breach the second clause of Article 3.A.2.11(c) of the USMCA, which obligates

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[340] *Canada – Dairy TRQs I (Panel)*, para. 118 (Exhibit USA-26).

[341] Canada's Initial Written Submission, para. 250.

[342] Canada's Comments on the ICCC Submission, para. 19.

[343] *See* U.S. Initial Written Submission, section VI.E.

Canada to "ensure that … each allocation is made …, to the maximum extent possible, in the quantities that the TRQ applicant requests". The U.S. initial written submission further demonstrates that Canada's dairy TRQ allocation measures are inconsistent with the second clause of Article 3.A.2.11(c) because Canada's measures make no effort whatsoever to ensure that each allocation is made in the quantities that the TRQ applicant requests.

334. Canada fails to rebut the U.S. claim. Canada presents an erroneous interpretive analysis of the second clause of Article 3.A.2.11(c) of the USMCA, contending that Canada is required to make "serious efforts" to make each allocation in the quantities that the TRQ applicant requests only when actually allocating TRQ quantities to individual applicants; not when adopting an allocation mechanism. Even under Canada's flawed legal interpretation, though, Canada fails to comply with the second clause Article 3.A.2.11(c).

1. Canada's Interpretive Analysis of the Second Clause of Article 3.A.2.11(c) of the USMCA Is Flawed

335. The U.S. initial written submission sets forth the correct conclusions that result from a proper interpretive analysis of the second clause of Article 3.A.2.11(c) of the USMCA, applying customary rules of interpretation. Based on that analysis, the term "maximum extent possible" means that Canada is required to make "the highest possible magnitude" of effort that it is "capable" of or "that may or can … be done" to grant to TRQ applicants the amount of quota that is requested. The superlative nature of the terms used – "maximum extent possible" – indicates that, when administering its dairy TRQs, Canada is obligated to put in a high degree of effort to achieve the aim of granting to TRQ applicants quota volume in the quantities requested.

336. Canada's initial written submission also sets forth an interpretive analysis of the second clause of Article 3.A.2.11(c) of the USMCA, and Canada relies on the same or similar dictionary definitions as the United States when interpreting the phrase "maximum extent possible". Based on its analysis, Canada concludes that "the second clause of Article 3.A.2.11(c) requires the Party administering an allocated TRQ to make serious efforts to provide each allocation 'in the quantities that the TRQ applicant requests'. Importantly, however, the second clause of Article 3.A.2.11(c) does not require the Party administering an allocated TRQ to achieve the result of providing each TRQ applicant with its preferred quantity of the quota."[344]

337. Canada's interpretive conclusion is, in this sense, not much different from that of the United States. To the extent that putting in "a high degree of effort to achieve the aim of granting to TRQ applicants quota volume in the quantities requested", as the United States has characterized the requirement, is the same as "mak[ing] serious efforts to provide each allocation 'in the quantities that the TRQ applicant requests'", as Canada proposes, then the United States does not disagree with Canada's interpretive conclusion concerning the phrase "maximum extent possible" in the second clause of Article 3.A.2.11(c).

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[344] Canada's Initial Written Submission, para. 256.

338. Canada further contends, though, that the phrase "each allocation is made" "indicates that this provision was not intended to create obligations with respect to the administration of the TRQ as a whole."[345] Canada's proposed interpretation is not sustainable given the context of Article 3.A.2.11 itself.

339. The chapeau of Article 3.A.2.11 provides that "[a] Party administering an allocated TRQ shall ensure that", and then the subparagraphs of Article 3.A.2.11 set forth numerous obligations with which a Party is required to comply in connection with administering an allocated TRQ. The terms of the chapeau of Article 3.A.2.11, on their face, refer to "administering an allocated TRQ". While this may not encompass "administering the TRQ as a whole", as Canada contends it does not,[346] the scope of the obligations in Article 3.A.2.11, collectively, relate to more than just "the issuance of individual allocations to specific TRQ applicants."[347]

340. The reference in Article 3.A.2.11(e) of the USMCA to "each allocation" does not change the scope of application of Article 3.A.2.11, and does not limit the application of Article 3.A.2.11(e) as Canada contends. The better reading of Article 3.A.2.11(e), which again provides that "[a] Party administering an allocated TRQ shall ensure that … each allocation is made …, to the maximum extent possible, in the quantities that the TRQ applicant requests", is that Canada, whenever administering its allocated TRQ mechanism, which Canada does both when choosing an allocation mechanism as well as when applying the allocation mechanism that it has chosen, is required to "make serious efforts" to achieve the result of giving to TRQ applicants allocations in the quantities that they request.

341. Canada further argues that "in the situation where Canada has decided to administer its CUSMA TRQs through a market share allocation mechanism, Canada's choice of a market share allocation mechanism is a 'condition or circumstance' that must necessarily be taken into consideration in deciding what is 'possible' for Canada under Article 3.A.2.11(c)."[348] In Canada's view, "the correct way to interpret the second clause of Article 3.A.2.11(c) is that it requires Canada to make serious efforts to ensure that, in the process of issuing individual TRQ allocations to specific TRQ applicants in accordance with its market share allocation mechanism, each allocation is made in the quantities requested by the TRQ applicant – within the limits of what is 'possible' for Canada."[349]

342. Canada's argument is untenable.

343. Canada cannot constrain what is "possible" for Canada through its own choice to adopt an allocation mechanism that prevents the government officials administering Canada's allocated

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[345] Canada's Initial Written Submission, para. 259.

[346] Canada's Initial Written Submission, para. 259.

[347] Canada's Initial Written Submission, para. 259.

[348] Canada's Initial Written Submission, para. 263.

[349] Canada's Initial Written Submission, para. 264.

TRQ from making any efforts at all – and certainly not "serious efforts" – to make allocations in the quantities that the TRQ applicant requests.

344. And again, the context of Article 3.A.2.11 of the USMCA does not support Canada's position. Each subparagraph of Article 3.A.2.11 of the USMCA sets forth obligations that constrain Canada's choice of allocation mechanism, including the first clause of subparagraph (e) (Even Canada itself does not argue that it can make allocations not in commercially viable quantities if the allocation mechanism it has chosen requires that result). The notion that the obligation in the second clause of subparagraph (e), uniquely among all the other obligations in all the other subparagraphs of Article 3.A.2.11, does not also constrain Canada's choice of allocation mechanism, but instead applies only after and subject to that choice, is not plausible.

2. In Carrying Out Its Market-Share Allocation Mechanism, Canada Fails to Make "Serious Efforts" to Provide Each Specific Allocation in the Quantities Requested by the TRQ Applicant

345. Canada argues that it does make "serious efforts" to ensure that allocations are made in the quantities that TRQ applicants request. Canada's arguments are unpersuasive.

346. Canada explains that, "[a]s part of Global Affairs Canada's TRQ application form, TRQ applicants are required to indicate the minimum quantity they would be willing to accept",[350] and they are also asked whether they would accept a quantity of less than 20,000 kg.[351] Canada contends that asking these questions "prevents the issuance of allocations of less than 20,000 kilograms to TRQ applicants who would not want or be able to import or use a quantity below that volume."[352]

347. Notably, Canada's explanation of the application form does not identify any question on the form that asks a TRQ applicant what quantities the applicant requests. This is because Canada does not actually ask TRQ applicants what quantity of quota volume they are seeking. The application does not contain a question about the amount of TRQ volume that the applicant requests.[353] Rather, each USMCA dairy TRQ application only asks the applicant to report the volume of its market activity, which is used to determine the applicant's volume of TRQ

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[350] Canada's Initial Written Submission, para. 265.

[351] *See* Canada's Initial Written Submission, para. 266.

[352] Canada's Initial Written Submission, para. 267.

[353] *See*, *e.g.*, CPTPP/CUSMA Ice Cream and Mixes TRQ Allocation Application for the Period of January 1 to December 31, 2023 (Exhibit USA-65). The applications for all of Canada's USMCA dairy TRQs are substantially the same. *See* Exhibits USA-56 to USA-69.

allocation through the mechanical operation of a mathematical formula and without regard for any request by the applicant for a particular volume of TRQ allocation.[354]

348. The application also asks the applicant to confirm whether, "[i]f the market share calculation based on your application does not result in an allocation of 20,000 kg or greater," the applicant would be willing to "accept a lesser amount based on your market share calculation".[355] And applicants are asked to specify "[w]hat is the minimum volume you would be willing to accept".[356] The minimum amount that the applicant would be willing to accept is not the same as the amount that the applicant would like to have.

349. As the ICCC explains in its non-governmental entity submission, to ensure that the applicant at least gets some volume of TRQ allocation, which would permit the applicant to try to get more TRQ volume later through transfers or reallocation, some applicants indicate that they would be willing to accept an allocation as small as 1 kilogram, even though the applicant would request more than that, if they were asked what they would like to receive.[357] The ICCC submits that "[t]his does not mean that distributors desire or accept an allocation of one kilogram. Rather, they *settle* for a minimum allocation of such size to ensure that they will be able to get access to transfers."[358]

350. By failing to even ask applicants to specify the amount of quota volume that they are seeking, and by making allocations without any regard for the wishes of TRQ applicants, Canada's dairy TRQ measures necessarily fall far short of satisfying the obligation in the second clause of Article 3.A.2.11(c) of the USMCA that Canada ensure that each allocation is made "to the maximum extent possible, in the quantities that the TRQ applicant requests".[359] To use Canada's phrasing, rather than make "serious efforts" to achieve that aim, Canada, by not even asking the question of what quantities applicants request, makes no effort at all.

351. Canada further argues that it "makes serious efforts to ensure that, beyond their initial allocation, successful TRQ applicants have an opportunity to receive a greater quantity of the quota than the one initially allocated to them" through the transfer mechanism, return and reallocation mechanism, and under-utilization policy.[360] This argument does not help Canada. Article 3.A.2.11(c) of the USMCA relates to "each allocation". If the "initial allocation" does

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[354] *See*, *e.g.*, CPTPP/CUSMA Ice Cream and Mixes TRQ Allocation Application for the Period of January 1 to December 31, 2023, question 14, Table 1 (Exhibit USA-65).

[355] *E.g.*, CPTPP/CUSMA Ice Cream and Mixes TRQ Allocation Application for the Period of January 1 to December 31, 2023, question 15 (Exhibit USA-65).

[356] *E.g.*, CPTPP/CUSMA Ice Cream and Mixes TRQ Allocation Application for the Period of January 1 to December 31, 2023, question 15.1 (Exhibit USA-65).

[357] *See* ICCC Submission, pp. 4-5, and Appendix (affidavit of Giuseppe (Joe) Dal Ferro).

[358] ICCC Submission, p. 5 (italics in original). *See also id*., Appendix (affidavit of Giuseppe (Joe) Dal Ferro).

[359] Underline added.

[360] Canada's Initial Written Submission, para. 268 (underline added).

not meet the requirements of Article 3.A.2.11(c), Canada would not be saved by the possibility of transfers between allocation holders, later reallocations, or the potential that allocations might be made in a greater quantity during a subsequent quota year. That Canada suggests that these other features of its TRQ system also reflect its "serious efforts" under the second clause of Article 3.A.2.11(c) undermines Canada's argument that its measures are consistent with that provision.

3. Canada's Dairy TRQ Allocation Measures Are Inconsistent with the Second Clause of Article 3.A.2.11(c) of the USMCA

352. As demonstrated above, Canada has failed to rebut the U.S. claim under the second clause of Article 3.A.2.11(c) of the USMCA. For the reasons given in the U.S. initial written submission, as well as those given above, Canada's dairy TRQ allocation measures are inconsistent with the second clause of Article 3.A.2.11(c) of the USMCA.

F. Canada Fails to Rebut the U.S. Claim Under Article 3.A.2.10 of the USMCA

353. As demonstrated in the U.S. initial written submission,[361] Canada's dairy TRQ allocation measures breach Article 3.A.2.10 of the USMCA, which requires Canada to provide that the allocation mechanism it uses to allocate its USMCA dairy TRQs "allows for importers that have not previously imported the agricultural good subject to the TRQ (new importers), who meet all eligibility criteria other than import performance, to be eligible for a quota allocation", and prohibits Canada from "discriminat[ing] against new importers when allocating the TRQ". The U.S. initial written submission further demonstrates that Canada's dairy TRQ allocation measures, which Canada uses to allocate its USMCA dairy TRQs based on applicants' market activity during a prior 12-month reference period, prevent new market entrants, who necessarily are also new importers, from receiving any allocations under the TRQs. That is inconsistent with Article 3.A.2.10.

354. Canada fails to rebut the U.S. claim. Canada presents a flawed interpretive analysis of Article 3.A.2.10 of the USMCA, and then draws erroneous conclusions about the application of Article 3.A.2.10 to its measures, but those conclusions are premised on Canada's incorrect interpretation.

1. Canada's Interpretive Analysis of Article 3.A.2.10 of the USMCA Is Flawed

355. After considering the terms of the first sentence of Article 3.A.2.10 of the USMCA, Canada reasons that "the first sentence of Article 3.A.2.10 prohibits the Party from designing an allocation mechanism under which TRQ eligibility is exclusively limited to applicants that have

[361] *See* U.S. Initial Written Submission, section VI.G.

a history of importing the product subject to the TRQ."[362] On its face, the text of the first sentence of Article 3.A.2.10 does not support Canada's proposed interpretation.

356. The first sentence of Article 3.A.2.10 provides that "the administering Party shall provide that the mechanism allows for importers that have not previously imported the agricultural good subject to the TRQ (new importers), who meet all eligibility criteria other than import performance, to be eligible for a quota allocation." The obligation in the first sentence of Article 3.A.2.10 relates to all importers. If any importer meets "all eligibility criteria" (*i.e.*, the importer is "active in the Canadian food or agriculture sector"[363]) but that importer has never sold the particular product subject to the TRQ, and therefore has never imported the product subject to the TRQ, and Canada denies that importer eligibility for the TRQ, then that constitutes a breach of Article 3.A.2.10 of the USMCA. As the U.S. initial written submission demonstrates, Canada's dairy TRQ allocation measures do precisely that.[364]

357. With respect to the second sentence of Article 3.A.2.10 of the USMCA, Canada reasons that "the effect of the second sentence in Article 3.A.2.10 is to prohibit a Party from designing and operating an allocation mechanism that provides less favourable treatment to 'new importers' (i.e., TRQ applicants that have no history of importing the product subject to the TRQ) as compared to established importers."[365] Canada offers, as an example, that "it would be a violation of Article 3.A.2.10 to allow 'new importers' to apply for a TRQ allocation, but then design an allocation mechanism whereby the entire TRQ is allocated in proportion to the TRQ applicant's share of imports during the previous calendar year (i.e., an import-share allocation mechanism). Clearly, if a Party were to allocate its TRQs through such a mechanism, the Party would be providing less favourable treatment to new importers as compared to established importers."[366]

358. This is equally true, however, where an allocation mechanism is designed such that the entire TRQ is allocated in proportion to the TRQ applicant's share of sales of the product subject to the TRQ during the previous calendar year (i.e., Canada's market-share allocation mechanism). As the United States has shown, Canada's dairy TRQ allocation measures explain that, "[i]f the TRQ for which you are applying is allocated on a market share basis, your level of activity in the industry, as compared with the level of activity of other alike eligible applicants in the [12-month] reference period, will be used to determine the size of your allocation."[367] It

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[362] Canada's Initial Written Submission, para. 273 (underline added).

[363] USMCA, Canada's USMCA TRQ Appendix, Section A, Paragraph 3(c).

[364] *See* U.S. Initial Written Submission, para. 171.

[365] Canada's Initial Written Submission, para. 275.

[366] Canada's Initial Written Submission, para. 276.

[367] General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022, section 3.2 (Exhibit USA-18).

necessarily follows that, if an applicant has no prior history of "market activity", *e.g.*, no history of selling the dairy product subject to the TRQ, then the operation of Canada's dairy TRQ measures, by design, will result in that applicant being allocated zero kilograms of TRQ volume. Thus, a new entrant to the dairy market, which necessarily also is a "new importer" within the meaning of Article 3.A.2.10 – *i.e.*, an importer that has not previously imported the particular category of dairy product subject to a given USMCA dairy TRQ – would be discriminated against – "treat[ed] … less favourably"[368] – than other applicants that have a prior history of manufacturing, using, or selling, and importing the dairy product.

359. Canada argues that its interpretation of Article 3.A.2.10 is supported by the context of Article 3.A.2.1, which defines the term "allocation mechanism" as "any system in which access to the tariff rate quota is granted on a basis other than first-come first-served".[369] In Canada's view, "[t]his definition recognizes Canada's right to choose its preferred allocation mechanism for the administration of its CUSMA TRQs – subject to Canada's obligations under Article 3.A.2."[370] As demonstrated above,[371] Canada's "right" and "discretion" to choose its preferred allocation mechanism is not unfettered. Canada itself recognizes that its choice of an allocation mechanism is "subject to Canada's obligations under Article 3.A.2."[372] Among the obligations under Article 3.A.2 are the obligations set forth in Article 3.A.2.10, which is the issue in dispute. Canada's logic is circular.

360. Canada also complains that "[t]aken to its logical conclusion, the U.S. interpretation of Article 3.A.2.10 would transform this provision into a formal prohibition on the use of a market-share allocation mechanism by a Party."[373] The United States has demonstrated that Canada's "market-share allocation mechanism" breaches numerous provisions of the USMCA. Article 3.A.2.10 is not unique in prohibiting Canada's approach.

2. Canada's Market-Share Allocation Mechanism Is Inconsistent with Article 3.A.2.10 of the USMCA

361. Canada argues that "eligibility to receive an allocation under Canada's CUSMA dairy TRQs is not in any way tied to import performance – as the United States recognizes in its initial written submission.[374]

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[368] Definition of "discriminate" from Oxford English Dictionary Online (Exhibit USA-82).

[369] Canada's Initial Written Submission, para. 278.

[370] Canada's Initial Written Submission, para. 278.

[371] *See supra*, sections II.B.1.e, II.C.5.

[372] Canada's Initial Written Submission, para. 278.

[373] Canada's Initial Written Submission, para. 270. *See also id*., paras. 281-283.

[374] Canada's Initial Written Submission, para. 285.

362. The United States does recognize that Canada's dairy TRQ allocation measures do not explicitly impose any eligibility criteria related to "import performance". However, the United States has also demonstrated that a new entrant to the dairy market that has not previously imported the category of dairy product subject to the relevant USMCA dairy TRQ is barred from receiving an allocation under the TRQ, regardless of whether the applicant meets all other eligibility criteria to be eligible for a quota allocation.

363. Canada's argument appears to be premised on Canada's incorrect interpretive conclusion that Article 3.A.2.10 "prohibits the Party from designing an allocation mechanism under which TRQ eligibility is exclusively limited to applicants that have a history of importing the product subject to the TRQ."[375] As demonstrated above, that conclusion is not supported by the text of Article 3.A.2.10.

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

365. Canada further contends that its dairy TRQ allocation measures do not breach "the non-discrimination obligation under the second sentence of Article 3.A.2.10" because, in Canada's view, "Canada's market share allocation mechanism does not in any way provide less favourable treatment to new importers as compared to established importers."[376] Canada's argument rests on the proposition that "'the term 'discrimination' only extends to situations in which differential treatment, whether justified or not, is accorded to entities that are similarly situated'".[377] Canada argues that "the United States errs when it compares (through its hypothetical example of a fine meats distributor) two categories of importers that are not similarly situated – namely: (1) importers with qualifying market activity within the Canadian dairy sector; and (2) importers with no qualifying market activity within the Canadian dairy sector."[378]

366. Canada's argument begs the question.

367. As a factual matter, the two importers compared in the U.S. hypothetical are similarly situated. They both are "eligible applicants" in that they are both "active in the Canadian food or agriculture sector". Thus, they are both equally eligible to apply for and receive allocations under Canada's USMCA dairy TRQs, and there is no justification to discriminate in favor of one importer over the other when allocating the TRQs.

368. As a legal matter, the issue before the Panel is whether Canada's dairy TRQ allocation measures breach the second sentence of Article 3.A.2.10 of the USMCA by treating these two similarly situated importers differently, and by disadvantaging the importer that has not

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[375] Canada's Initial Written Submission, para. 273 (underline added).

[376] Canada's Initial Written Submission, para. 288.

[377] Canada's Initial Written Submission, para. 288 (quoting the WTO panel in *EC – Poultry*).

[378] Canada's Initial Written Submission, para. 289.

previously sold the particular product subject to the TRQ, and thus also has not imported that product previously. The U.S. initial written submission demonstrates how Canada's measures breach the second sentence of Article 3.A.2.10.

369. Again, Canada's dairy TRQ allocation measures explain that, "[i]f the TRQ for which you are applying is allocated on a market share basis, your level of activity in the industry, as compared with the level of activity of other alike eligible applicants in the [12-month] reference period, will be used to determine the size of your allocation."[379] It necessarily follows that, if an applicant has no prior history of "market activity", *e.g.*, no history of selling the dairy product subject to the TRQ, then the operation of Canada's dairy TRQ measures, by design, will result in that applicant being allocated zero kilograms of TRQ volume. Thus, a new entrant to the dairy market, which necessarily also is a "new importer" within the meaning of Article 3.A.2.10 – *i.e.*, an importer that has not previously imported the particular category of dairy product subject to a given USMCA dairy TRQ – would be discriminated against – "treat[ed] … less favourably"[380] – than other applicants that have a prior history of manufacturing, using, or selling, and importing the dairy product.

3. Canada's Dairy TRQ Allocation Measures Are Inconsistent with Article 3.A.2.10 of the USMCA

370. As demonstrated above, Canada has failed to rebut the U.S. claim under Article 3.A.2.10 of the USMCA. For the reasons given in the U.S. initial written submission, as well as those given above, Canada's dairy TRQ allocation measures – in particular because they use a "market share basis" to allocate Canada's USMCA dairy TRQs – are inconsistent with Article 3.A.2.10 of the USMCA.

G. Canada Fails to Rebut the U.S. Claim Under Article 3.A.2.6(a) of the USMCA

371. The U.S. initial written submission demonstrates that Canada's introduction, through its dairy TRQ allocation measures, of new or additional conditions, limits, or eligibility requirements on the utilization of its USMCA dairy TRQs – namely that an applicant must demonstrate activity during a prior reference period to be allocated any USMCA dairy TRQ volume, and that an applicant must be a processor to access substantial portions of Canada's USMCA dairy TRQs, which are not accessible to non-processors – is inconsistent with Article 3.A.2.6(a) of the USMCA.[381]

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[379] General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022, section 3.2 (Exhibit USA-18).

[380] Definition of "discriminate" from Oxford English Dictionary Online (Exhibit USA-82).

[381] *See* U.S. Initial Written Submission, section VI.H.

372. In response to this claim, Canada simply refers to arguments presented earlier in its initial written submission, specifically the argument that "Canada's measures relating to who receives a TRQ allocation are simply not the type of measures covered by Article 3.A.2.6(a)", and the only conditions, limits or eligibility requirements covered by Article 3.A.2.6(a) are those on the "utilization of a TRQ for importation of a good."[382]

373. As demonstrated above,[383] Canada's arguments concerning the interpretation of Article 3.A.2.6(a) of the USMCA lack merit. Accordingly, for the same reasons already given, Canada fails to rebut the U.S. claim under Article 3.A.2.6(a).

IV. Canada Fails to Rebut the U.S. Claim that By Imposing 12-Month Activity Requirements for USMCA Dairy TRQ Applicants and Recipients, Canada's Dairy TRQ Allocation Measures Breach Canada's USMCA Commitments

374. The U.S. initial written submission demonstrates that, through its dairy TRQ allocation measures, Canada requires that, to be eligible for a USMCA dairy TRQ allocation, an applicant must have been active during all 12 months of a 12-month reference period, and must remain active during all 12 months of the quota year.[384] Canada's imposition of such 12-month activity requirements is inconsistent with Canada's obligations in Section A, Paragraph 3(c), of Canada's USMCA TRQ Appendix to "allocate its TRQs each quota year to eligible applicants", which are defined as applicants "active in the Canadian food or agriculture sector".[385] An applicant that engages in relevant market activities during 11 months of the year, or fewer, meets the proper definition of "active" just like an applicant that engages in such activities during all 12 months of the year.

375. The U.S. initial written submission also demonstrates that, since Canada conditions access to a dairy TRQ allocation within the quota based on fulfillment of these 12-month activity requirements, 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.[386] Namely, the new condition, limit, or eligibility requirement is that one must engage in relevant activity during every single month of the 12-month reference period, as well as during every single month of the 12-month quota year.[387]

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[382] Canada's Initial Written Submission, para. 294 (underline in original).

[383] *See supra*, section II.C.

[384] *See* U.S. Initial Written Submission, section VII.B.

[385] USMCA, Canada's USMCA TRQ Appendix, Section A, Paragraph 3(c).

[386] *See* U.S. Initial Written Submission, section VII.C.

[387] *See* U.S. Initial Written Submission, section VII.C.

376. Finally, the U.S. initial written submission demonstrates[388] that the requirement that applicants must have been active during all 12 months of a prior 12-month reference period is inconsistent with the obligation in the first sentence of Article 3.A.2.10 of the USMCA, which provides that Canada must allow new importers to be eligible for USMCA dairy TRQs as long as they meet all eligibility criteria other than import performance. Canada's dairy TRQ allocation measures, through the historical 12-month activity requirement, preclude new market entrants, which necessarily would also be new importers, from eligibility for USMCA dairy TRQs. The historical 12-month activity requirement also is inconsistent with the second sentence of Article 3.A.2.10 of the USMCA, which prohibits Canada from discriminating against new importers when allocating the USMCA dairy TRQs. A new entrant to the dairy market that is wrongly denied eligibility for a USMCA dairy TRQ allocation plainly is treated less favorably than other importers when the USMCA dairy TRQ is being allocated, as the new entrant is shut out of the allocation process altogether.

377. In its initial written submission, Canada responds to the U.S. arguments by presenting flawed interpretive analyses of the USMCA provisions under which the United States has brought claims, and factual assertions relating to its dairy TRQ allocation measures that are not supported by the measures themselves. Canada's arguments are premised on its erroneous interpretations and factual contentions, and therefore lack merit.

A. Canada Fails to Rebut the U.S. Claim Under Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix

1. Canada Does Not Have Discretion in How to Interpret the Terms in Its USMCA TRQ Appendix

378. Canada argues that it "has discretion in how to interpret and apply the terms in its TRQ Appendix",[389] and that "Canada – as the Party charged with administering the 16 TRQs established under its TRQ Appendix – is best placed to interpret and apply the provisions in its TRQ Appendix."[390] Canada is incorrect.

379. The interpretation of Canada's USMCA TRQ Appendix is not a matter that is left to Canada's discretion. Certainly, in the context of this dispute settlement proceeding, Article 31.13.4 of the USMCA provides that the Panel "shall interpret the Agreement in accordance with customary rules of interpretation of public international law, as reflected in Articles 31 and 32" of the Vienna Convention. Neither Article 31 nor Article 32 of the Vienna Convention provides that a treaty interpreter is to accord deference to the discretion of a party to an international agreement to interpret the terms of the agreement itself.

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[388] *See* U.S. Initial Written Submission, section VII.D.

[389] Canada's Initial Written Submission, para. 297.

[390] Canada's Initial Written Submission, para. 299.

380. Canada's references to its discretion to "interpret" its own USMCA TRQ Appendix are thus confusing. As Canada itself recognizes, any discretion Canada may have is limited such that "Canada's interpretation and application of a particular provision in its TRQ Appendix [must] not violate a specific commitment in the CUSMA and [must be] consonant with the rules of interpretation set out in the VCLT".[391]

381. As discussed above, Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix sets forth binding obligations that constrain Canada's discretion in administering its TRQs.[392] Under Paragraph 3(c), Canada does not have discretion to allocate its TRQs to applicants that are not eligible applicants, and likewise Canada does not have discretion to refuse to allocate its TRQs to applicants that are eligible applicants. Based on a proper interpretive analysis, the correct reading of the second sentence of Paragraph 3(c) is that Canada both must treat as eligible only applicants active in the Canadian food or agriculture sector, and also must treat as eligible any applicants active in the Canadian food or agriculture sector.

382. Canada also refers again to the USMCA Preamble to support the proposition that "the Parties' CUSMA commitments should not be interpreted and applied in a manner that hinders their right to regulate and to set legislative and regulatory priorities."[393] The United States has demonstrated above that Canada's arguments concerning the USMCA Preamble and the object and purpose of the USMCA lack merit.[394]

383. Ultimately, it appears that Canada may not actually be arguing that it has discretion to "interpret" its USMCA obligations, but rather that it has some discretion and flexibility with respect to how it complies with its USMCA obligations. Canada contends that "so long as the regulatory objectives pursued by a CUSMA Party fall within a range of permissible interpretations, the Party should maintain the 'flexibility' to pursue and achieve those objectives."[395] In the view of the United States, this contention by Canada is closer to being correct. In many circumstances, with respect to many USMCA obligations, it is likely possible that a Party might adopt a range of different measures that would be consistent with the Party's USMCA obligations.

384. The correct analysis would first ascertain the meaning of the obligation in the USMCA, and then assess whether the measure at issue meets the requirements of the USMCA provision under which a claim has been advanced. In such an analysis, the responding Party does not have "discretion" concerning the interpretation of the USMCA provision, though it may be the case that the responding Party's measure exists within the permissible range of options for

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[391] Canada's Initial Written Submission, para. 299.

[392] *See supra*, section II.B.1.a.

[393] Canada's Initial Written Submission, para. 300.

[394] *See supra*, section II.C.5.

[395] Canada's Initial Written Submission, para. 300.

implementing the USMCA obligation, such that the measure is not inconsistent with the USMCA obligation.

385. As demonstrated in the U.S. initial written submission, and as further discussed below, that is not the case with respect to Canada's 12-month activity requirements.

2. Canada's 12-Month Activity Requirements Are Inconsistent with Section A, Paragraph 3(c), of Canada's USMCA TRQ Appendix

386. Canada begins its interpretive analysis by agreeing with the United States that the word active' is defined as 'participating or engaging in a specified sphere of activity, esp. to a significant degree'."[396]

387. Canada reasons that "this definition makes clear that in order for a particular entity to be considered 'active' within a particular sphere, the entity normally has to participate within that sphere in a 'significant' manner or for a 'significant period of time'."[397] Canada further reasons "that in order for a person to be 'active' in the Canadian food or agriculture sector within the meaning of paragraph 3(c), the person must demonstrate more than minimal or passing activity."[398] In Canada's view, "paragraph 3(c) of Canada's TRQ Appendix does not require Canada to issue TRQ allocations to persons that are only active in the Canadian food or agriculture sector during the quota application period, or to persons that have insignificant activity in the Canadian food or agriculture sector."[399]

388. Up to this point, Canada's reasoning is not objectionable, and the United States does not disagree with it.

389. However, Canada's reasoning is not responsive to the U.S. claim. The United States does not argue that Canada breaches Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix because Canada does not consider "active" applicants that demonstrate "minimal or passing activity",[400] or that "are only active in the Canadian food or agriculture sector during the quota application period", or "that have insignificant activity in the Canadian food or agriculture sector."[401]

390. The United States claims that Canada's 12-month activity requirements breach Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix because, by requiring relevant market

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[396] Canada's Initial Written Submission, para. 301.

[397] Canada's Initial Written Submission, para. 301.

[398] Canada's Initial Written Submission, para. 302.

[399] Canada's Initial Written Submission, para. 302.

[400] Canada's Initial Written Submission, para. 302.

[401] Canada's Initial Written Submission, para. 302.

activity during all 12 months of a 12-month period, Canada denies eligibility to applicants that were active in fewer months of the reference period but that still could demonstrate "participat[ion] within that sphere in a 'significant' manner or for a 'significant period of time'",[402] such as activity during 11 months, or 10 months, or even fewer.

391. For example, a new entrant to the dairy market that sold cheese during the last 9 months of the reference period for "quota year 1" (and continues to sell cheese each month) would not be eligible for an allocation under the TRQ on Cheeses of All Types pursuant to Canada's dairy TRQ measures, and would have to wait until "quota year 2" to receive a TRQ allocation. Under Canada's measures, that new market entrant ultimately would have to remain active for 23 months (9 months during the reference period for "quota year 1", 2 months of the application period for "quota year 1", and 12 months of "quota year 1") before it could finally receive any TRQ allocation, at the beginning of "quota year 2". Canada's 12-month activity requirement potentially could require 23 months of activity, or more.

392. Canada itself argues that "it must be recognized that there are different degrees of 'activity' that can constitute 'significant activity.'"[403] Canada also recognizes that, "[i]f the CUSMA Parties had wanted to set a specific time period for who is 'active' in the Canadian food or agriculture sector, they would have done so explicitly in paragraph 3(c)."[404]

393. The United States agrees with Canada. But Canada's reasoning does not support Canada's position. The "different degrees of 'activity'"[405] inherent in the term "active", as that term is correctly interpreted, and the absence of any agreement by the Parties in the USMCA on "a specific time period for who is 'active'",[406] indicates that Canada's measures implementing its USMCA obligations in Paragraph 3(c), to comport with a proper understanding of the term "active", must themselves allow for the possibility that applicants demonstrating "different degrees of 'activity'"[407] can meet the requirement to be "active". It is not permissible for Canada to define an "eligible applicant" only as an applicant that can demonstrate market activity in all 12 months of a 12-month reference period when an applicant with a comparable "degree" of activity, but in fewer months, also is "active", as that term is properly interpreted.

394. Canada submits as "evidence of the reasonableness" of its imposition of a 12-month activity requirement that "the United States' own regulations relating to TRQ administration use

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[402] Canada's Initial Written Submission, para. 301.

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

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

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

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

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

a 12-month activity requirement for the allocation of historical import licences."[408] Canada's reliance on the U.S. regulations to which it refers is misplaced for two reasons.

395. First, at issue in this dispute is whether Canada's imposition of 12-month activity requirements for applicants to be "eligible" is consistent with Canada's obligations in Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix. The U.S. regulations are not being challenged, and the United States is not subject to obligations in Canada's USMCA TRQ Appendix.

396. Second, the U.S. regulations to which Canada refers do not support Canada's position. Canada explains that "§6.23(b)(1) provides that '[a] person issued a historical license for an article for the current quota year may apply for a historical license […] for the next quota year for the same article from the same country' if the person can demonstrate a certain level of activity 'during the 12-month period ending August 31 prior to the quota year'."[409] Canada's own characterization of the U.S. regulation does not even suggest that the U.S. regulation requires activity during all 12 months of a 12-month reference period. Because the U.S. regulation does not impose any such requirement.

397. On the contrary, the U.S. regulation permits applicants to demonstrate activity in various ways, none of which approaches requiring activity during all 12 months of the year. 7 CFR §6.23(b)(1), to which Canada refers, provides that:

> (1) Historical licenses (Appendix 1). A person issued a historical license for an article for the current quota year may apply for a historical license (Appendix 1) for the next quota year for the same article from the same country, if such person was, during the 12-month period ending August 31 prior to the quota year, either:
>
> (i) Where the article is cheese or cheese product,
>
> (A) The owner of and importer of record for at least three separate commercial entries of cheese or cheese products totaling not less than 57,000 kilograms net weight, each of the three entries not less than 2,000 kilograms net weight;
>
> (B) The owner of and importer of record for at least eight separate commercial entries of cheese or cheese products, from at least eight separate shipments, totaling not less than 19,000 kilograms net weight, each of the eight entries not less than

[408] Canada's Initial Written Submission, para. 305.

[409] Canada's Initial Written Submission, para. 305 (underline added).

> 450 kilograms net weight, with a minimum of two entries in each of at least three quarters during that period; or
>
> (C) The owner or operator of a plant listed in Section II or listed in Section I as a processor of cheese of the most current issue of "Dairy Plants Surveyed and Approved for USDA Grading Service" and had processed or packaged at least 450,000 kilograms of cheese or cheese products in its own plant in the United States ....[410]

398. As is evident from the text of §6.23(b)(1), the U.S. Dairy TRQ Import Licensing Program eligibility requirements, and the 12-month period that Canada highlights, are substantively much different than Canada's TRQ eligibility requirements and Canada's 12-month activity requirements. Unlike Canada's 12-month activity requirements, where eligibility is based on applicants' "regular" or "normal" activity during all 12 months of the 12-month reference period prior to the quota year, in addition to the requirement that TRQ recipients be active during all 12 months of the quota year, the U.S. Dairy TRQ Import Licensing Program only looks at an applicant's activity during a single 12-month period prior to the quota year for which license is being sought.

399. Also, in contrast to Canada's TRQ eligibility requirements, the U.S. program specifies options for the degree and type of activity in which an applicant must have engaged during the reference period to be eligible for a license, such as product quantities and number of commercial entries required based on the type of product. Rather than requiring activity during all 12 months of a 12-month reference period, like Canada's measures, the U.S. regulation to which Canada refers would permit an applicant to establish eligibility by demonstrating as few as three separate commercial entries of relevant dairy products totaling not less than 57,000 kilograms net weight, with each of the three entries not less than 2,000 kilograms net weight.[411] It is also possible to demonstrate activity with more entries at lower volumes.[412] Nothing in the U.S. regulation requires a demonstration of activity during every month of a 12-month reference period.

400. In sum, Canada's reference to the U.S. regulation is of no support to Canada, and actually the U.S. regulation serves as an example of a considerably different approach to assessing whether TRQ applicants are "active".

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[410] 7 CFR §§ 6.23(b)(1) (Exhibit CDA-1) (underline added).

[411] *See* 7 CFR §§ 6.23(b)(1)(i)(A), 6.23(b)(1)(ii)(A) (Exhibit CDA-1).

[412] *See* 7 CFR §§ 6.23(b)(1)(i)(B), 6.23(b)(1)(ii)(B) (Exhibit CDA-1).

401. Finally, the United States observes that Canada's initial written submission does not respond to the U.S. contention that Canada's separate 12-month activity requirement that applies during the quota year also breaches Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix.[413] That aspect of the U.S. claim remains wholly unrebutted.

3. Canada's Dairy TRQ Allocation Measures Are Inconsistent with Section A, Paragraph 3(c), of Canada's USMCA TRQ Appendix

402. As demonstrated above, Canada has failed to rebut the U.S. claim under Section A, Paragraph 3(c), of Canada's USMCA TRQ Appendix. For the reasons given in the U.S. initial written submission, as well as those given above, Canada's imposition, through its dairy TRQ allocation measures, of requirements that, to be eligible for a USMCA dairy TRQ allocation, an applicant must have been active during all 12 months of a 12-month reference period, and must remain active during all 12 months of the quota year, are inconsistent with Section A, Paragraph 3(c), of Canada's USMCA TRQ Appendix.

B. Canada Fails to Rebut the U.S. Claim Under Article 3.A.2.6(a) of the USMCA

403. As demonstrated in the U.S. initial written submission, Canada's introduction, through its dairy TRQ allocation measures, of a new or additional condition, limit, or eligibility requirement on the utilization of its USMCA dairy TRQs – namely that a TRQ applicant and recipient must be "normal[ly]" or "regular[ly]" active during all 12 months of a 12-month reference period, and must remain active during all 12 months of the quota year to be allocated any USMCA dairy TRQ – is inconsistent with Article 3.A.2.6(a) of the USMCA.[414]

404. In response to this claim, Canada merely refers to arguments presented earlier in its initial written submission, specifically the argument that its "measures relating to <u>who receives</u> a TRQ allocation are simply not the type of measures covered by Article 3.A.2.6(a)", and the only conditions, limits or eligibility requirements covered by Article 3.A.2.6(a) are those on the "utilization of a TRQ for importation of a good."[415]

405. As demonstrated above,[416] Canada's arguments concerning the interpretation of Article 3.A.2.6(a) of the USMCA lack merit. Accordingly, for the same reasons already given, Canada fails to rebut the U.S. claim under Article 3.A.2.6(a).

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[413] *See* U.S. Initial Written Submission, paras. 183, 187, 188, 189, 195, and 196.

[414] *See* U.S. Initial Written Submission, section V.C.

[415] Canada's Initial Written Submission, para. 307 (underline in original).

[416] *See supra*, section II.C.

C. Canada Fails to Rebut the U.S. Claim Under Article 3.A.2.10 of the USMCA

406. The U.S. initial written submission demonstrates that Canada's dairy TRQ allocation measures, which require a TRQ applicant to show that it engaged in relevant market activity during every single month of a prior 12-month reference period, denies new entrants to the dairy market, which necessarily are also new importers, eligibility for Canada's USMCA dairy TRQs, and also discriminates against such new importers when allocating the USMCA dairy TRQs, in breach of Article 3.A.2.10 of the USMCA.[417] Article 3.A.2.10 requires Canada to provide that the allocation mechanism it uses to grant its USMCA dairy TRQs "allows for importers that have not previously imported the agricultural good subject to the TRQ (new importers), who meet all eligibility criteria other than import performance, to be eligible for a quota allocation", and prohibits Canada from "discriminat[ing] against new importers when allocating the TRQ".

407. The U.S. initial written submission further demonstrates that under the historical 12-month activity requirement set forth in Canada's dairy TRQ allocation measures, to be considered "normally active" or "active regularly", and thus eligible for a USMCA dairy TRQ allocation, an applicant must engage in relevant activity during every single month of a prior 12-month reference period.[418] It necessarily follows that, if an applicant has no prior history of "market activity", *e.g.*, no history of selling the dairy product subject to the TRQ, then Canada's dairy TRQ measures deny such an applicant eligibility for Canada's USMCA dairy TRQs. Thus, a new entrant to the dairy market, which necessarily also is a "new importer" within the meaning of Article 3.A.2.10 – *i.e.*, an importer that has not previously imported the particular category of dairy product subject to a given USMCA dairy TRQ – would not be "allow[ed] … to be eligible for a [USMCA dairy TRQ] quota allocation",[419] as the first sentence of Article 3.A.2.10 requires.

408. Canada responds to the U.S. claim under Article 3.A.2.10 of the USMCA by referring to and repeating a number of arguments presented earlier in Canada's initial written submission concerning the interpretation of Article 3.A.2.10 of the USMCA and Paragraph 3(c) of Section A of Canada's USMCA TRQ Appendix.[420] Above, the United States has responded to Canada's interpretive arguments and demonstrated that they lack merit.[421]

409. Canada further contends that its "Notices to Importers do not in any way provide that in order for a TRQ applicant to be eligible to receive a TRQ allocation, the applicant must have previously imported the product subject to a TRQ. Instead, Canada's Notices to Importers

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[417] *See* U.S. Initial Written Submission, section VII.D.

[418] *See supra*, section VII.A.

[419] USMCA, Article 3.A.2.10, first sentence.

[420] *See* Canada's Initial Written Submission, paras. 311-315.

[421] *See supra*, sections II.B, III.F, and IV.A.

simply require TRQ applicants to demonstrate that they were active within the Canadian food or agriculture sector during every month of the 12-month reference period."[422]

410. Canada's explanation of its eligibility requirement is not supported by Canada's dairy TRQ allocation measures themselves.

411. Earlier in Canada's initial written submission, Canada points to the document "General Information on the Administration of the TRQs for Supply-Managed Products" to support its contention that applicants need only demonstrate that they "were active in the applicable Canadian sector, as stated in the relevant Notice to Importers, in a defined 12-month reference period."[423] Canada emphasizes "in the applicable Canadian sector" by underlining that phrase. The United States draws the Panel's attention to the phrase that follows: "as stated in the relevant Notices to Importers". The General Information document explains, under the heading "2.2 Demonstrating activity regularly during the reference period and throughout / during the TRQ year", that "[t]he type of activity that you must demonstrate depends on the TRQ under which you are applying. ... To see the activity tests that apply to the TRQ under which you wish to apply, please review the relevant Notice to importers."[424] Similarly, in section 3 of the General Information document, entitled "Eligibility criteria and activity tests", the "Purpose of eligibility criteria" is described as "to determine who is eligible to obtain an allocation under a TRQ.... Eligibility criteria are further defined by activity tests. ... Information regarding which sales should be included in your total sales can be found in the relevant Notices to Importers or associated application forms."[425] Thus, according to the General Information document, it is necessary to refer to the Notices to Importers and associated applications to understand completely the eligibility requirements for Canada's USMCA dairy TRQs.

412. Canada observes that section 2 of its Notices to Importers provides that:

> To be eligible, you must be active in the Canadian food or agriculture sector at the time of the application and must remain active regularly during the quota year. […] You must, in addition, have been active regularly in the Canadian food or agriculture sector during the reference period.[426]

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[422] Canada's Initial Written Submission, para. 311 (underline in original).

[423] Canada's Initial Written Submission, para. 286 (quoting Exhibit USA-18; underline added by Canada).

[424] General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022, section 2.2 (Exhibit USA-18).

[425] General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022, section 3.1 (Exhibit USA-18).

[426] Canada's Initial Written Submission, para. 286 (underline added by Canada) (noting in footnote 224 that "This is a standard statement contained in all of Canada's CUSMA Notices to Importers. See, for example: Exhibit USA-7, Section 2 (emphasis added).").

413. However, taking the "Notice to Importers for CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082" as an example, section 3 of Canada's notices further provides that:

> You are eligible for an allocation if you are a:
>
> **Processor**:
>
> • that manufactures ice cream and ice cream mixes in your own provincially-licensed or federally-registered facility.
>
> **Further Processor:**
>
> • that uses ice cream and ice cream mixes in your manufacturing operations and product formulation.
>
> **Distributor:**
>
> • that buys products of ice cream and ice cream mixes and resells it to other businesses.[427]

On their face, Canada's Notices to Importers require that, for an applicant to be eligible for an allocation of a TRQ, the applicant must have engaged in activity related to the particular good subject to the TRQ, not simply have been active in the Canadian food or agriculture sector generally.

414. This is further confirmed by the USMCA dairy TRQ allocation applications. The applications do not ask whether applicants were active generally within the Canadian food or agriculture sector. Rather, the applications ask applicants to report specific information about "activity" related to the product subject to the TRQ during the 12 months of the reference period.[428] That is the only information that applicants may provide, and that is the only information that Canadian government officials would have in their possession when assessing whether the applicant was active within the Canadian food or agriculture sector.

415. If an applicant is otherwise active in the Canadian food or agriculture sector, but that applicant has never sold the particular product subject to the TRQ, and thus also has never imported the product subject to the TRQ, then that applicant will have no information to report in

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[427] *E.g.*, Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 5 (Exhibit USA-10) (underline added). The Notices to Importers for all of Canada's USMCA dairy TRQs are substantially the same. *See* Exhibits USA-1 to USA-14.

[428] *See*, *e.g.*, CPTPP/CUSMA Ice Cream and Mixes TRQ Allocation Application for the Period of January 1 to December 31, 2023, question 14 and Table 1 (Exhibit USA-65). The applications for all of Canada's USMCA dairy TRQs are substantially the same. *See* Exhibits USA-56 to USA-69.

the boxes for each month on the application form, and thus no information to communicate to the Government of Canada to establish that the applicant is eligible for a TRQ allocation.

416. An applicant that submits an incomplete USMCA dairy TRQ allocation application form, with empty boxes where monthly activity should be reported, will be denied eligibility for an allocation by any Canadian government official reviewing the application (or a computer system that may review electronically-submitted applications). The application form admonishes that "[i]ncomplete applications and applications that do not adhere to these instructions will be returned without action."[429] Given that outcome, which would necessarily result from an incomplete application, an applicant that knows that it has no information to report in all 12 of the monthly boxes concerning sales of the particular product subject to the TRQ would sensibly not even apply for an allocation, reasonably believing itself to be not eligible for an allocation under Canada's dairy TRQ allocation measures. In that way, Canada's dairy TRQ allocation measures further deny eligibility to eligible applicants by suppressing applications for allocations.

417. As it does earlier in its submission, Canada attempts to avoid the U.S. argument by describing a hypothetical distributor of cheese, which Canada contends would be "eligible to apply for a TRQ allocation under the CUSMA Cheeses of All Types TRQ (TRQ-CA6), because Distributor A has been distributing cheese for over 15 years in the Canadian market".[430] The point that the United States makes with its hypothetical distributor of fine meats[431] is that a distributor of some food other than cheese is equally "active" in the Canadian food or agriculture sector, and thus is equally "eligible" under the USMCA to apply for and receive allocations of Canada's USMCA dairy TRQs. But Canada's dairy TRQ allocation measures deny eligibility to the distributor of some food other than cheese because that distributor has no information to report on the application form concerning 12 months of sales of cheese subject to the TRQ, given that the applicant has never sold or imported cheese before.

418. For that reason, Canada's dairy TRQ allocation measures breach the first sentence of Article 3.A.2.10 of the USMCA.

419. It logically follows that the historical 12-month activity requirement also is inconsistent with the second sentence of Article 3.A.2.10 of the USMCA. As demonstrated in the U.S. initial written submission,[432] the second sentence of Article 3.A.2.10 prohibits Canada from "treat[ing] [importers that have not previously imported the particular category of dairy product subject to a

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[429] *E.g.*, CPTPP/CUSMA Ice Cream and Mixes TRQ Allocation Application for the Period of January 1 to December 31, 2023, p. 1 (Exhibit USA-65).

[430] Canada's Initial Written Submission, para. 312.

[431] *See* U.S. Initial Written Submission, paras. 170 and 206.

[432] *See* U.S. Initial Written Submission, section VI.G.

given Canadian USMCA dairy TRQ] . . . less favourably"[433] than other importers. A new entrant to the dairy market, which necessarily is a new importer, that is wrongly denied eligibility for a USMCA dairy TRQ allocation plainly is treated less favorably than other importers when the USMCA dairy TRQ is being allocated, as the new entrant is shut out of the allocation process altogether.

420. Canada's response to the U.S. argument concerning the second sentence of Article 3.A.2.10 of the USMCA refers to and relies upon Canada's response to the U.S. argument concerning the first sentence of Article 3.A.2.10.[434] As demonstrated above, Canada's arguments lack merit.

421. Accordingly, Canada has failed to rebut the U.S. claim under Article 3.A.2.10 of the USMCA. For the reasons given in the U.S. initial written submission, as well as those given above, Canada's dairy TRQ allocation measures – in particular because they require that applicants show market activity during all 12 months of a prior 12-month reference period – are inconsistent with Article 3.A.2.10 of the USMCA.

V. Canada Fails to Rebut the U.S. Claim that the Mechanism for the Return and Reallocation of Unused USMCA Dairy TRQ Allocations in Canada's Dairy TRQ Allocation Measures Breaches Canada's USMCA Commitments

422. The U.S. initial written submission demonstrates that Canada's mechanism for the return and reallocation of unused USMCA dairy TRQ allocations fails to ensure that returns and reallocations are carried out in a timely and transparent manner that provides the greatest possible opportunity for the TRQs to be filled, in breach of Article 3.A.2.15 of the USMCA.[435] The U.S. initial written submission further demonstrates that Canada fails to administer its USMCA dairy TRQs in a manner that allows importers the opportunity to utilize TRQs fully, in breach of Article 3.A.2.6 of the USMCA.[436]

423. In its initial written submission, Canada contends that "the United States misunderstands Canada's return and reallocation mechanism and fails to adduce any evidence to substantiate its claims".[437] Canada's arguments lack merit.

424. The United States will first demonstrate that Canada's own explanation of its return and reallocation mechanism confirms that the description of the mechanism in the U.S. initial written submission is correct. The United States then will respond to Canada's flawed argument concerning the interpretation and application of Article 3.A.2.15 of the USMCA. As

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[433] Definition of "discriminate" from Oxford English Dictionary Online (Exhibit USA-82).

[434] *See* Canada's Initial Written Submission, para. 317.

[435] *See* U.S. Initial Written Submission, section VIII.

[436] *See* U.S. Initial Written Submission, section VIII.C.

[437] Canada's Initial Written Submission, para, 319. *See also id*., section VII.

demonstrated in the U.S. initial written submission, and as further discussed below, Canada's USMCA dairy TRQ allocation measures are, on their face, inconsistent with Canada's USMCA obligations related return and reallocation of unused dairy TRQ allocations. Finally, as Canada provides only a limited response to the U.S. claim under Article 3.A.2.6 of the USMCA, the United States will briefly rebut Canada's discussion of that claim.

A. Canada's Own Discussion of Its Return and Reallocation Mechanism Confirms that the U.S. Description of the Mechanism is Correct

425. Canada asserts that the description of Canada's return and reallocation mechanism in the U.S. initial written submission is "factually inaccurate".[438] However, Canada fails to identify how the description of the mechanism in the U.S. initial written submission is incorrect. Rather, Canada's own narrative discussion of the return and reallocation mechanism confirms the U.S. description.

426. As explained in the U.S. initial written submission, Canada has established its return and reallocation mechanism through its USMCA dairy TRQ Notices to Importers, as well as certain other published documents. Canada confirms that these are the relevant measures.[439] Accordingly, one must rely on the USMCA dairy TRQ Notices to Importers to understand the mechanism.

427. In its initial written submission, however, Canada describes additional processes and procedures entailed in its return and reallocation mechanism, which are not set forth in Canada's TRQ Notices to Importers or otherwise publicly notified through Canada's dairy TRQ allocation measures.[440] That Canada feels the need to describe the "steps" through which "the return and reallocation mechanism is carried out" "[i]n practice"[441] confirms that Canada has failed, with its dairy TRQ allocation measures, to "ensure that there is a mechanism for the return and reallocation of unused allocations in a ... transparent manner", as required by Article 3.A.2.15 of the USMCA.[442]

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[438] Canada's Initial Written Submission, section VII.A (subheading title).

[439] *See* Canada's Initial Written Submission, section III.A and paras. 321-322.

[440] *See* Canada's Initial Written Submission, paras. 321-323. The United States has not raised a claim under Article 3.A.2.5 of the USMCA, which provides that "[t]he Party administering a TRQ shall publish, on its designated website and at least 90 days prior to the beginning of the TRQ year, all information concerning its TRQ administration, including the size of quotas and eligibility requirements." However, it is unclear how Canada has complied with Article 3.A.2.5, given Canada's presentation in its initial written submission of significant additional "information concerning its TRQ administration" that was not published on Canada's designated website at least 90 days prior to the beginning of the TRQ year, or ever.

[441] *See* Canada's Initial Written Submission, para. 322.

[442] Underline added.

428. Additionally, Canada's elaboration of the steps involved in its return and reallocation mechanism actually confirms that the description of the mechanism in the U.S. initial written submission is correct. Canada contends that, contrary to the U.S description, its return and reallocation mechanism does not involve an "iterative process of multiple offers and decisions".[443] However, Canada's own description of the mechanism supports the U.S. understanding.

429. In explaining the steps involved in its return and reallocation mechanism, Canada states that, "[o]nly one initial offer is sent to eligible application holders", but then continues to describe the process by which remaining quantities are made available – *i.e.*, offered – for reallocation after the "initial offer".[444] The subsequent offer is, as Canada explains in its initial written submission, "published on the Key Dates webpage and made available on demand to any eligible applicant".[445] Canada reiterates later in its initial written submission that "[a]ny quantities remaining after this initial reallocation are published online, accessible to any eligible applicant, and will be reallocated on demand."[446]

430. Rather than rebut the U.S. description, Canada has, with its explanation, confirmed the U.S. explanation that there is a first, "initial offer" (made "within seven days upon the expiry of the return date"), and then a subsequent offer of the quantities that remain after that initial offer.[447] The process Canada describes confirms that there is a first offer to individual applicants by email and then a second offer of allocations for applicants posted online, which validates the U.S. description of the return and reallocation mechanism as an "iterative process of multiple offers and decisions".

431. Canada also takes issue with the U.S. characterization of the timing of Canada's return and reallocation process, in particular the U.S. description of the process as taking "weeks to complete".[448] However, Canada's own explanation confirms that this is precisely the case. At one point, Canada describes the return and reallocation process as taking "typically" 14 days to complete.[449] Fourteen days is, of course, two weeks. At another point, Canada states that "[w]ithin seven days upon the expiry of the return date, allocation holders who have not returned any quantities receive a notice by email with the total available quantities for the reallocation, and are provided five to seven days to indicate their interest in receiving a reallocation."[450]

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[443] Canada's Initial Written Submission, para. 324.

[444] Canada's Initial Written Submission, para. 324 (underline in original).

[445] Canada's Initial Written Submission, para. 324.

[446] Canada's Initial Written Submission, para. 339. *See also id.* paras. 343 and 344.

[447] Canada's Initial Written Submission, para. 324 (underline added). *See also id*., para. 339.

[448] Canada's Initial Written Submission, para. 324.

[449] Canada's Initial Written Submission, para. 324.

[450] Canada's Initial Written Submission, para. 339.

Under this description, rather than the process "typically" taking 14 days to complete, as Canada first asserted, the described timeline simply identifies when applicants will have indicated their initial interest in receiving returned allocations. Canada's explanation does not appear to account for the time needed for Canada to i) distribute the returned allocations, ii) "publish online" any quantities remaining after that initial distribution, and iii) reallocate "on demand" those remaining quantities.[451]

432. Additionally, while Canada suggests that "[w]ithin seven days upon the expiry of the return date, allocation holders who have not returned any quantities receive a notice by email with the total available quantities for the reallocation, and are provided five to seven days to indicate their interest in receiving a reallocation",[452] that does not appear to be an opportunity for importers to request whatever quantity of reallocation they would like to receive. Rather, as Canada further explains, "[t]he amount reallocated to each eligible allocation holder is calculated in proportion to its initial allocation. A lesser amount may be reallocated if an eligible allocation holder requests an amount less than their proportional share."[453] Thus, any importer that would like an amount of reallocated TRQ that is greater than the amount calculated in proportion to its initial allocation will have to complete an iterative process that necessarily would take longer than 14 days.

433. The United States' characterization of Canada's USMCA dairy TRQs return and reallocation mechanism as an iterative process taking "weeks to complete" is therefore accurate.

434. Canada also asserts throughout its first written submission that eligible applicants have "almost four months" to apply for and use reallocated quantities.[454] In fact, even if the process does only take 14 days, as Canada asserts, applicants would have, at most, three and a half months to receive and utilize the reallocated quantities. Yet, as described above, the entire operation of the mechanism likely takes more than 14 days, leaving even less time for importers to utilize reallocated quantities. Canada's multiple references throughout its submission to applicants having "almost four months" to apply for and use reallocated quantities is not supported by Canada's own description of the steps involved in its return and reallocation mechanism.[455]

435. The United States and Canada rely on the same measures to explain the operation of Canada's return and reallocation mechanism, which are the same measures relied upon by interested applicants and importers. Those measures are Canada's General Information on the

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[451] Canada's Initial Written Submission, para. 339.

[452] Canada's Initial Written Submission, para. 339.

[453] Canada's Initial Written Submission, para. 323.

[454] *See* Canada's Initial Written Submission, para. 324.

[455] *See* Canada's Initial Written Submission, paras. 324, 334, 336, and 349.

Administration of TRQs for Supply-Managed Products,[456] Canada's TRQ Notices to Importers,[457] and Canada's Key dates and access quantities 2022-2023: TRQs for Supplied Managed Products.[458] These measures, however, do not provide complete information concerning what is required of importers or the process for return and reallocation. Canada confirms this with the presentation in its initial written submission of supplemental information that is necessary to understand the process – *i.e.*, Canada's description of how "in practice" "the mechanism is carried out".[459] Canada's additional information, though, only proves that the U.S. description of the mechanism is correct.

B. The United States Has Not Failed to Meet Its Burden of Proof, Nor Has the United States Failed to Make a *Prima Facie* Case that Canada's Return and Reallocation Mechanism Breaches Canada's USMCA Obligations

436. Canada asserts that the "United States has the burden to adduce evidence sufficient to raise a presumption that what it claims is true."[460] That is correct. Article 14.1 of the Rules of Procedure for Chapter 31 (Dispute Settlement) provides that:

> A complaining Party asserting that a measure of another Party is inconsistent with this Agreement, that another Party has failed to carry out its obligations under this Agreement, that a benefit the complaining Party could reasonably have expected to accrue to it is being nullified or impaired in the sense of Article 31.2(b) (Scope),

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[456] General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022 (Exhibit USA-18).

[457] Notice to Importers, CUSMA: Cream TRQ – Serial No. 1071, dated May 16, 2022 (Exhibit USA-1); Notice to Importers, CUSMA: Butter and Cream Powder TRQ – Serial No. 1073, dated May 16, 2022 (Exhibit USA-2); Notice to Importers, CUSMA: Milk TRQ – Serial No. 1075, dated May 16, 2022 (Exhibit USA-3); Notice to Importers, CUSMA: Milk Powders TRQ – Serial No. 1076, dated May 16, 2022 (Exhibit USA-4); Notice to Importers, CUSMA: Skim Milk Powder TRQ – Serial No. 1077, dated May 16, 2022 (Exhibit USA-5); Notice to Importers, CUSMA: Whey Powder TRQ – Serial No. 1078, dated May 16, 2022 (Exhibit USA-6); Notice to Importers, CUSMA: Cheeses of All Types TRQ – Serial No. 1079, dated May 16, 2022 (Exhibit USA-7); Notice to Importers, CUSMA: Industrial Cheeses TRQ – Serial No. 1080, dated May 16, 2022 (Exhibit USA-8); Notice to Importers, CUSMA: Concentrated or Condensed Milk TRQ – Serial No. 1081, dated May 16, 2022 (Exhibit USA-9); Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022 (Exhibit USA-10); Notice to Importers, CUSMA: Other Dairy TRQ – Serial No. 1083, dated May 16, 2022 (Exhibit USA-11); Notice to Importers, CUSMA: Powdered Buttermilk TRQ – Serial No. 1084, dated May 16, 2022 (Exhibit USA-12); Notice to Importers, CUSMA: Products Consisting of Natural Milk Constituents TRQ – Serial No. 1085, dated May 16, 2022 (Exhibit USA-13); and Notice to Importers, CUSMA: Yogurt and Buttermilk TRQ – Serial No. 1086, dated May 16, 2022 (Exhibit USA-14).

[458] Key dates and access quantities 2022-2023: TRQs for Supply-Managed Products, modified on February 13, 2023 (Exhibit USA-19).

[459] Canada's Initial Written Submission, para. 322.

[460] Canada's Initial Written Submission, para. 319.

> or that there has been a denial of rights under Article 31-A.2 (Denial of Rights) or Article 31-B.2 (Denial of Rights), has the burden of establishing that inconsistency, failure, nullification or impairment, or denial of rights. In cases where the responding Party declines to participate in the panel proceeding, the panel shall only find that the complaining Party has satisfied its burden if the complaining Party establishes a *prima facie* case of such inconsistency, failure to carry out obligations, nullification or impairment, or denial of rights.

437. A *prima facie* case is one that "will prevail until contradicted and overcome by other evidence."[461]

438. Canada contends that the United States "misunderstands Canada's return and reallocation mechanism and fails to adduce any evidence to substantiate its claims that Canada's return and reallocation mechanism is inconsistent with Canada's obligations".[462] Canada further asserts numerous times that the United States has failed to make a *prima facie* case.[463] Canada is incorrect.

439. In the U.S. initial written submission, the United States advances arguments that Canada's USMCA dairy TRQ allocation measures, in particular the return and reallocation mechanism, are, on their face, inconsistent with Canada's obligations under the USMCA. The United States has put before the Panel the evidence of Canada's dairy TRQ allocation measures, of which Canada's USMCA dairy TRQ return and reallocation mechanism is a part. Canada's measures speak for themselves. Nevertheless, the United States has accurately described the contents of the measures, as demonstrated above, and has explained how the measures are inconsistent with Canada's USMCA obligations. In the absence of a response from Canada, the information and argument in the U.S. initial written submission would be sufficient on its own to establish that Canada has breached its USMCA obligations. In other words, the United States has, with the U.S. initial written submission, made a *prima facie* case.

440. It was not necessary for the United States to provide evidence beyond the measures themselves, such as evidence of particular trade effects or importer reactions to Canada's return and reallocation mechanism, to demonstrate that the mechanism is inconsistent with Canada's USMCA obligations. The United States asks the Panel to determine whether Canada's return and reallocation mechanism itself is consistent with the terms of the USMCA, which are to be interpreted "in accordance with customary rules of interpretation of public international law, as reflected in Articles 31 and 32" of the Vienna Convention.[464] The U.S. initial written

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[461] Black's Law Dictionary, Sixth Edition, p. 1189.

[462] Canada's Initial Written Submission, para. 319.

[463] *See* Canada's Initial Written Submission, paras. 337, 338, 345, 350, 360, 362, and 364.

[464] USMCA, Article 31.13.4.

submission, in addition to presenting evidence of Canada's measures, also presents interpretive analysis of the USMCA provisions under which the United States has raised claims, and sets forth the correct interpretive conclusions concerning those provisions that follow from a proper application of customary rules of interpretation.

441. Canada has responded to the U.S. initial written submission by presenting to the Panel its own initial written submission, which contains certain evidence and arguments. The mere fact that Canada has made arguments in response to the arguments presented by the United States does not mean that the United States has failed to make a *prima facie* case in the U.S. first written submission. Canada itself, as the Party asserting that the United States has failed to make a *prima facie* case, has the burden of establishing its contention by demonstrating to the Panel how the U.S. initial written submission fails to present evidence and argument sufficient, in the absence of any response by Canada, to establish the U.S. claims. Canada does not attempt to do that. Rather, Canada attempts to demonstrate with evidentiary arguments and interpretive arguments that the U.S. contentions lack merit. However, such arguments fail to demonstrate that the United States has not made a *prima facie* case, including because Canada's arguments concerning the evidence before the Panel – namely, Canada's dairy TRQ allocation measures themselves – and Canada's interpretive arguments are flawed, as the United States demonstrates in this rebuttal submission.

442. Accordingly, Canada is incorrect when it contends that the United States has failed to meet its burden of proof and has failed to make a *prima facie* case.

C. Canada Fails to Rebut the U.S. Claim Under Article 3.A.2.15 of the USMCA

1. Canada's Interpretive Analysis of Article 3.A.2.15 of the USMCA Is Flawed

443. Canada begins its analysis of the terms of Article 3.A.2.15 of the USMCA by referring to dictionary definitions of "timely", "transparent", "greatest", "possible", and "opportunity".[465] The United States agrees that this is an appropriate way to start the interpretive analysis.[466] Indeed, Canada and the United States rely on the same or similar definitions.

444. Canada reasons from the dictionary definitions of the terms of Article 3.A.2.15 to the conclusion that "Canada has an obligation under Article 3.A.2.15 to provide a return and reallocation mechanism that occurs 'sufficiently early or in good time'; that is 'open' and '[e]asily seen […], understood', 'manifest, evident, obvious, clear'; and that provides the 'the

[465] *See* Canada's Initial Written Submission, paras. 326-329.

[466] *See* U.S. Initial Written Submission, para. 218.

most significant' set of 'conditions, or […] circumstances permitting or favourable to' ensuring that unused allocations are filled 'that can exist […] given the circumstances'."[467]

445. Canada's conclusion following its ordinary meaning analysis is not much different than that of the United States.[468] The U.S. initial written submission posits that the referenced definitions, taken together, indicate that the ordinary meaning of the phrase "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"[469] is that Canada is required to adopt and apply a mechanism for return and reallocation of unused allocations that makes certain that return and reallocation "[o]ccur[s] … early in the … year" and is "done … sufficiently early or in good time";[470] that is "open" and "[e]asily seen … understood", "manifest, evident, obvious, clear";[471] and that provides "the most significant effects", or "maximiz[es]"[472] what is "capable of being; that may or can exist, be done, or happen", "that is in [Canada's] power, that [Canada] can do"[473] to promote the "condition, or set of circumstances permitting or favourable to"[474] the USMCA dairy TRQs being filled.[475]

446. Canada goes on to suggest that the obligation in Article 3.A.2.15 of the USMCA "must be read harmoniously with Canada's obligation under the chapeau of Article 3.A.2.6 to 'administer[] TRQs in a manner that allows importers the opportunity to utilize TRQ quantities fully', which, as will be explained, requires a careful balancing of competing objectives."[476] On the face of the provisions, the objectives of Articles 3.A.2.15 and 3.A.2.6 do not appear to be "competing"; rather, they appear to be supportive of the same goal. Article 3.A.2.15 requires a return and reallocation mechanism "that provides the greatest possible opportunity for the TRQ to be filled." While the provision uses the passive voice, it is evident from the context of Article 3.A.2 of the USMCA as a whole that it is importers that fill a TRQ by importing goods under the TRQ. So, the implication of Article 3.A.2.15 is that the return and reallocation mechanism must be designed so that importers are provided the greatest opportunity to fill the TRQ. The chapeau of Article 3.A.2.6 likewise establishes a similar, more general obligation that "[e]ach Party shall administer its TRQs in a manner that allows importers the opportunity to utilize TRQ quantities

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[467] Canada's Initial Written Submission, para. 329.

[468] *See* U.S. Initial Written Submission, para. 219.

[469] USMCA, Article 3.A.2.15.

[470] Definition of "timely" from Oxford English Dictionary Online (Exhibit USA-102).

[471] Definition of "transparent" from Oxford English Dictionary Online (Exhibit USA-103).

[472] Definition of "greatest" from Oxford English Dictionary Online (Exhibit USA-91).

[473] Definition of "possible" from Oxford English Dictionary Online (Exhibit USA-96).

[474] Definition of "opportunity" from Oxford English Dictionary Online (Exhibit USA-95).

[475] Underline added to highlight the overlap between the U.S. and Canadian interpretations.

[476] Canada's Initial Written Submission, para. 329.

fully". The fullest utilization of TRQ quantities would be filling the TRQ. The obligations in these provisions thus are not in tension or competition. They are mutually supportive of the same goal. While it may be necessary to calibrate a return and reallocation mechanism, in terms of the timing of its operation and how the mechanism operates, including in relation to other aspects of Canada's dairy TRQ allocation measures, to achieve the aim of importers fully filling the TRQs, Article 3.A.2.6 is not contextual support for interpreting Article 3.A.2.15 as establishing obligations that are somehow less constraining on Canada than the ordinary meaning of the terms of Article 3.A.2.15 suggests.

447. Canada also asserts, without explanation, that "[a] harmonious reading of these obligations must also be considered in context of Canada's dairy market and Canadian allocation holders' ability to import dairy products from the United States."[477] Canada's assertion is not clear. Nothing in Articles 31 and 32 of the Vienna Convention contemplates that "Canada's dairy market and Canadian allocation holders' ability to import dairy products from the United States" is "context" for the purpose of interpreting an international agreement.

448. Canada further contends that "the obligations under Article 3.A.2.15 applies only to Canada's 'mechanism for the return and reallocation of unused allocations', and not to any transfer policies that Canada may enact".[478] The United States does not argue that Article 3.A.2.15 of the USMCA establishes obligations directly related to transfer of TRQ allocations. However, Canada's mechanism for the return and reallocation of unused TRQ allocations does not exist in a vacuum. The policies Canada has adopted related to transfer and underutilization, which Canada itself associates with return and reallocation by setting forth all of those policies in the very same sections of Canada's USMCA dairy TRQ Notices to Importers,[479] indisputably have an effect on how importers make use of the return and reallocation mechanism, and thus cannot be ignored when applying the law to the facts to assess whether Canada's return and reallocation mechanism is consistent with the obligations in Article 3.A.2.15.

2. Canada's Dairy TRQ Allocation Measures Do Not Ensure that there Is a Mechanism for the Return and Reallocation of Unused Dairy TRQ allocations in a Timely Manner

449. Canada argues that its "return and reallocation mechanism is carried out sufficiently early and in good time."[480] To assess whether the timing of Canada's return and reallocation mechanism is "sufficiently early" and "good", Canada contends that the "the term 'timely' must be interpreted based on its ordinary meaning and read in context of Canada's dairy market and

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[477] Canada's Initial Written Submission, para. 329.

[478] Canada's Initial Written Submission, para. 330.

[479] *See*, *e.g.*, Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 5 (Exhibit USA-10).

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

Canadian allocation holders' ability to import products from the United States."[481] As noted above, "Canada's dairy market and Canadian allocation holders' ability to import products from the United States" is not "context" for the interpretation of the terms of Article 3.A.2.15 of the USMCA, including the term "timely".

450. More direct and, under the Vienna Convention, relevant context is the phrase in Article 3.A.2.15 "that provides the greatest possible opportunity for the TRQ to be filled." Given this immediate context, it is necessary to assess the timeliness of the "manner" in which Canada's return and reallocation mechanism operates against the standard of "the greatest possible opportunity for the TRQ to be filled." If there is any possibility that different timing for the operation of the return and reallocation mechanism could provide a greater possibility for the TRQ to be filled, then Canada's return and reallocation mechanism is not consistent with the obligations in Article 3.A.2.15.

451. Following its own erroneous interpretive analysis, Canada further reasons that "a 'timely' return and reallocation mechanism must therefore 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."[482]

452. Canada's reasoning does not withstand scrutiny.

453. First, the "balance" that Canada proposes is not the balance required by Article 3.A.2.15 of the USMCA. Under Article 3.A.2.15, the question is whether the timing of the mechanism for return and reallocation could be improved to increase the possibility for the TRQ to be filled, so as to achieve the goal of providing "the greatest possible opportunity for the TRQ to be filled"; not the balance that Canada proposes.

454. Second, the "balance" that Canada suggests its return and reallocation mechanism strikes – between "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"[483] – is not logically sound under Canada's own mechanism.

455. As Canada explains, "[q]uantities that remain after [the] initial offer, or quantities that may be returned after the return date, are subsequently published on the Key Dates webpage and made available on demand to any eligible applicant, including those that may have returned quantities previously or new applicants that meet the eligibility criteria of the TRQ."[484] Thus, even if the return date were made earlier in the year, "initial allocation holders" could, if they

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

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

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

[484] Canada's Initial Written Submission, para. 324 (footnote omitted).

had not yet "determine[d] import needs until the end of the quota year", return allocations that are unused to that point, and then request additional allocations later, "on demand" and as needed, depending on their actual needs through the quota year. That would provide more time for eligible applicants to use returned quantities without impairing the ability of initial allocation holders to use their initial allocations as well. It would also encourage initial allocation holders to establish plans earlier in the quota year for using their initial quota allocations throughout the quota year, which would further contribute to the return and reallocation mechanism providing the greatest possible opportunity for the TRQ to be filled.

456. The U.S. initial written submission demonstrates that Canada's mechanism for return and reallocation provides for returning and reallocating unused quota allocations late in the quota year, both objectively and as compared to mechanisms Canada has adopted in other situations. For other TRQs, such as the CETA import TRQ on cheeses of all types and the CETA import TRQ on industrial cheeses, as well as the USMCA export quotas on skim milk powder ("SMP") and milk protein concentrate ("MPC"), Canada has adopted return and reallocation mechanisms that provide for return dates that are earlier in the quota year.[485] Self-evidently, an earlier return date provides a greater opportunity for the TRQs to be filled, because it encourages initial allocation holders to firm up plans for utilizing their initial TRQ allocations earlier or return the allocations, and it provides other eligible applicants more time to request, receive, and utilize reallocated TRQ allocations before the end of the quota year. The evidence of this is the return and reallocation mechanism set forth in Canada's USMCA dairy TRQ allocation measures itself, as compared to other mechanisms for return and reallocation that Canada has adopted and proposed.

457. Canada further argues that "when considered in the context of Canadian allocation holders' ability to import products from the United States, Canada's return dates allow eligible applicants sufficient time to request and utilize fully any additional quantities they may receive through reallocation."[486] Canada notes that "six of the top ten dairy-producing states in the United States share borders with Canada, allowing for the possibility of same day deliveries."[487] With this observation, Canada omits numerous relevant considerations. The fact that the proximity of certain top U.S. dairy-producing states may allow for the possibility of same day delivery does not speak to what TRQ-covered products would be available same day, what types of eligible applicants in Canada's dairy market could utilize same-day delivery, where in Canada products could be delivered same day, how long it would take to secure orders after reallocated TRQ quantities are received, how long it would take to arrange shipment for orders in commercially viable quantities, and potentially other factors. Canada's observation also necessarily relates only to specific U.S. states.

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[485] *See* U.S. Initial Written Submission, paras. 227-237.

[486] Canada's Initial Written Submission, para. 334.

[487] Canada's Initial Written Submission, para. 334.

458. Moreover, Canada's argument continues to rest on what Canada contends is "sufficient"[488] time for eligible applicants to utilize any reallocations. As demonstrated above, though, it is not sufficient for Canada's return and reallocation mechanism to merely provide "sufficient time". Article 3.A.2.15 requires Canada to ensure that there is a mechanism for return and reallocation in a timely manner "that provides the greatest possible opportunity for the TRQ to be filled."[489] Contrary to Canada's position, "sufficient time" is not enough when there are other options that would provide a greater opportunity for the TRQ to be filled, as the United States has shown there are.

459. Canada also compares its return and reallocation mechanism for USMCA dairy TRQs to U.S. licensing terms for the import of dairy products into the United States, citing a U.S. regulation. [490] Canada's comparison is inapposite. The cited U.S. regulation is not at issue in this dispute. It is not germane to the interpretation of Article 3.A.2.15 of the USMCA. And the U.S. regulation is irrelevant to the question of whether Canada's return and reallocation mechanism is timely such that the mechanism provides the greatest possible opportunity for the TRQ to be filled.

460. Canada also asserts again that eligible allocation holders have "almost four months to seek and use reallocated quantities", and Canada contends that the U.S. argument consists of a "supposition" that the process "could take weeks to complete".[491] As confirmed above, the United States' description of Canada's return and reallocation mechanism for USMCA dairy TRQs is correct and accurately reflects Canada's USMCA dairy TRQ allocation measures. Further, as described in the U.S. initial written submission[492] and confirmed above in the discussion of the Canada's return and reallocation mechanism, Canada's mechanism sets a return date that is unnecessarily late in the quota year, and provides an uncertain timeline for applicants wishing to receive and use reallocations, leaving only a short and uncertain window of time for importers to use reallocated TRQ volume. Canada repeatedly exaggerates the actual amount of time importers have to use reallocations, overstating that period as four months when, in practice, it is at a maximum three and a half months, and likely less than that.

461. For these reasons, the United States has demonstrated that Canada's mechanism for the return and reallocation of dairy TRQs, on the face of Canada's dairy TRQ allocation measures, is not "timely", as required by Article 3.A.2.15 of the USMCA.

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[488] Canada's Initial Written Submission, para. 334.

[489] Underline added.

[490] Canada's Initial Written Submission, para. 335.

[491] Canada's Initial Written Submission, paras. 336, 337.

[492] *See* U.S. Initial Written Submission, paras. 212-213.

3. Canada's Dairy TRQ Allocation Measures Do Not Ensure that There Is a Mechanism for the Return and Reallocation of Unused Dairy TRQ Allocations in a Transparent Manner

462. As demonstrated in the U.S. initial written submission, on their face, Canada's dairy TRQ allocation measures, which set forth Canada's mechanism for return and reallocation of its USMCA dairy TRQs, are not "open" and "[e]asily seen … understood", "manifest, evident, obvious, clear", neither in terms of the timing or specifics of the reallocation process nor in terms of the amount of TRQ volume that is available for reallocation.[493]

463. In its initial written submission, Canada describes how, "[i]n practice", the return and reallocation mechanism is "carried out".[494] Canada's explanation includes a description of what happens after the "initial offer", whereby quantities that remain "are subsequently published on the Key Dates webpage and made available on demand to any eligible applicant",[495] which could include "potentially new applicants that meet the eligibility criteria of the TRQ."[496] Policies and procedures of Canada's return and reallocation mechanism that are not otherwise reflected in Canada's publicly available dairy TRQ allocation measures, on their face, include, *inter alia*, that "within seven days after the return date, allocation holders who have not returned any portion of their allocation receive an email notifying them of total available quantities", that allocation holders must respond by a reply deadline to indicate their interest in receiving allocations (although that deadline is not precisely defined; it could be "five to seven days"[497]), that eligible applicants may be reallocated lesser amounts than their proportional share if requested, that after the initial offer, remaining quantities may be published on the Key Dates webpage, and that new applicants may be eligible to apply for those remaining quantities.[498]

464. Canada's need to clarify its return and reallocation mechanism through this description presented in its initial written submission in this dispute, which for the first time publicly elucidates critical elements of the process, confirms the U.S. argument that Canada's return and reallocation mechanism is <u>not</u> carried out in a transparent manner. If the mechanism were transparent, we would not be learning the details of the process through Canada's initial written submission, as Canada's dairy TRQ allocation measures would have spoken completely for themselves.

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[493] *See* U.S. Initial Written Submission, para. 223 *et seq.*; definition of "transparent" from Oxford English Dictionary Online (Exhibit USA-103).

[494] Canada's Initial Written Submission, para. 322.

[495] Canada's Initial Written Submission, para. 324.

[496] Canada's Initial Written Submission, para. 343.

[497] Canada's Initial Written Submission, para. 339.

[498] *See* Canada's Initial Written Submission, paras. 323-324.

465. Additionally, Canada attempts to counter the U.S. argument that allocation holders "cannot know whether and how much additional TRQ reallocation volume might be offered later" and "cannot know the timing of any such potential offer".[499] Canada contends that it "can only provide as much information to allocation holders as is available to it at a given time."[500] This is no defense. Canada has an obligation under Article 3.A.2.16 of the USMCA to regularly publish information on the utilization rates of its USMCA dairy TRQs and to "publish, on the website designated to provide TRQ information, the quantities available for reallocation and the application deadline, at least two weeks prior to the date on which the Party will begin accepting applications for reallocations."[501] While the United States has not raised a claim of breach under Article 3.A.2.16 of the USMCA, that provision is context for understanding the transparency obligation in Article 3.A.2.15. Given the requirement in Article 3.A.2.16, it necessarily must be possible for Canada to publish "the quantities available for reallocation and the application deadline, at least two weeks prior to the date on which the Party will begin accepting applications for reallocations." Canada just needs to design a return and reallocation mechanism that actually meets that USMCA requirement. And Canada's published measures, on their face, must set and describe a timeframe for publication, application, reallocation, and further reallocation that is actually fully described in the measures, such that the mechanism itself operates in a transparent manner, providing to importers all necessary and relevant information about the process and the TRQ reallocation quantities that will be available prior to the date on which applications are to be accepted.

466. As the United States has demonstrated, Canada confirms the U.S. claim that Canada's reallocation mechanism is an iterative process consisting of multiple offers with unclear deadlines, timelines, procedures, and information about available reallocation quantities, which is not transparent, as required by Article 3.A.2.15 of the USMCA.

4. Canada's Dairy TRQ Allocation Measures Do Not Ensure that There Is a Mechanism for the Return and Reallocation of Unused Dairy TRQ Allocations that Provides the Greatest Possible Opportunity for the TRQs to Be Filled

467. Canada contends that its "return and reallocation mechanism is designed to incentivize the return of unused dairy TRQ allocations, and to reallocate them in a manner that provides the greatest possible opportunity for their utilization."[502] The United States has demonstrated that it is not.

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[499] U.S. Initial Written Submission, para. 224. *See also* Canada's Initial Written Submission, para. 340.

[500] Canada's Initial Written Submission, para. 342.

[501] Underline added.

[502] Canada's Initial Written Submission, para. 345.

468. Canada contends that the United States relies on "mere conjecture and contradictory assumptions".[503] This is untrue. The United States has put before the Panel the evidence of Canada's USMCA dairy TRQ allocation measures, which set forth Canada's mechanism for return and reallocation of USMCA dairy TRQs. The United States has also put before the Panel evidence of other mechanisms for return and reallocation that Canada has adopted or contemplated. Using logic and reason, the United States has demonstrated that Canada's USMCA dairy return and reallocation mechanism does less than other possible options to provide an opportunity for the TRQ to be filled, and thus fails to provide the "greatest possible opportunity" for the TRQ to be filled, as Article 3.A.2.15 requires.[504]

469. Canada complains that while the United States has argued that Canada could do more to ensure that the USMCA dairy TRQs are filled, "the United States does not offer any specific set of changes to this end".[505] It is not necessary for the United States to offer specific changes to Canada's measures to sustain the U.S. claim that Canada's measures are inconsistent with Article 3.A.2.15 of the USMCA. Nevertheless, the U.S. initial written submission discusses at length other mechanisms that Canada has adopted or proposed, which could serve as models for Canada that do more to provide an opportunity for the TRQs to be filled, including the mechanisms for Canada's CETA import TRQs and Canada's SMP and MPC export TRQs.[506]

470. Canada argues that the return dates under CETA and those under the USMCA are "not directly comparable, as they reflect different negotiated outcomes, and consider different market dynamics."[507] Canada explains that:

> [T]he CETA return date sought to strike a different balance when similar competing interests are considered in the context of importing dairy products from the European Union into Canada. 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". This shows that while the parties in CETA also had to delicately

[503] Canada's Initial Written Submission, para. 345.

[504] *See* U.S. Initial Written Submission, paras. 227-238.

[505] Canada's Initial Written Submission, para. 346.

[506] *See* U.S. Initial Written Submission, paras. 227-238.

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

> balance competing objectives, a more precise consideration on the timing of returns was negotiated.[508]

Canada further observes that "CUSMA, on the other hand, is silent on the exact timing of returns, reflecting the outcome of the CUSMA negotiations."[509]

471. Canada is correct that the USMCA does not specify the exact timing of returns like CETA does. Article 3.A.2.15 of the USMCA is not silent, however, and it does reflect the outcome of the USMCA negotiations. Article 3.A.2.15, rather than specify the exact timing in the way that CETA does, requires Canada to design the timing of its return and reallocation mechanism in a manner that ensures that the mechanism "provides the greatest possible opportunity for the TRQ to be filled." To the extent that the exact timing specified in the CETA does more to provide an opportunity for the TRQ to be filled, then Canada is obligated by Article 3.A.2.15 of the USMCA to use that timing, or better timing that provides an even greater possibility for the TRQs to be filled, for its USMCA return and reallocation mechanism.

472. Canada also disputes the U.S. arguments that an earlier return date, combined with a return period that includes the application of an underutilization penalty, would encourage the earlier return of unused quotas, and that having a stricter under-utilization penalty and transfer policy would provide greater incentives for allocation holders to use their quotas, and minimize the potential for rent-seeking behaviors by allocation holders. Canada contends that "these assumptions are unsupported by any evidence".[510] As the U.S. initial written submission explains, the U.S. arguments are premised on logic and reason.[511] In addition, as discussed, below, the U.S. arguments are supported by evidence of the utilization rates of Canada's USMCA SMP and MPC export quotas[512] compared to the utilization rates of Canada's USMCA dairy TRQs.

473. Canada argues that "a direct comparison of the return and reallocation policies" under Canada's USMCA dairy TRQs and Canada's SMP and MPC export quotas is "inapposite".[513]

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[508] Canada's Initial Written Submission, para. 348 (underline added by Canada).

[509] Canada's Initial Written Submission, para. 349.

[510] Canada's Initial Written Submission, para. 350.

[511] *See* U.S. Initial Written Submission, paras. 228-236.

[512] Canada protests the U.S. characterization of Canada's export duty measures for SMP and MPC as export quotas. *See* Canada's Initial Written Submission, para. 351. Canada explains that it "maintains an export duty measure that applies an export charge to any quantities exceeding the established thresholds pursuant to its obligation under Article 3.A.3.8." Canada's Initial Written Submission, para. 351. Canada's own description of the measures as applying an export charge (which is comparable to an import tariff) on quantities of goods that exceed the established export threshold (which is comparable to quantities of goods that exceed the established import quota) confirms that the U.S. characterization of these measures as export quotas is not inaccurate.

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

Canada attempts to support this argument by noting that "there is no corresponding obligation under Article 3.A.3 that obligates Canada to administer its allocations of below-threshold quantities ('BTQ') in a manner that 'allows [exporters] the opportunity to utilize the [BTQs] fully', or '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 [BTQ] to be filled'."[514] Canada suggests that "[t]his reflects the difficult negotiating dynamics where Canada ultimately agreed 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."[515]

474. Canada's argument is revealing. Canada's SMP and MPC export quotas are not "unilateral". They are the result of a bilateral agreement between Canada and the United States, made, as Canada notes, "at the United States' insistence, precisely to discourage the Canadian export of these products".[516] It therefore is logical that the United States would not have asked for language comparable to that in Article 3.A.2.15 of the USMCA obligating Canada "to administer its allocations of below-threshold quantities ('BTQ') in a manner that 'allows [exporters] the opportunity to utilize the [BTQs] fully', or '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 [BTQ] to be filled'."[517] And Canada likewise would not have requested the inclusion of such language, since Canada has every incentive to see the export quotas filled. Thus, the absence of a "corresponding obligation"[518] is not surprising.

475. Canada's characterization of the SMP and MPC export quotas as being intended "precisely to discourage the Canadian export of these products globally and to benefit U.S. export interests"[519] appears to be indicative of Canada's view of the USMCA dairy TRQs. By Canada's logic, the reverse would also be true. That is, in Canada's apparent view, the USMCA dairy TRQs are intended precisely to discourage the U.S. export of dairy products to Canada and to benefit Canadian domestic interests. As the United States has demonstrated, Canada certainly appears to have designed its USMCA dairy TRQ allocation measures with that goal in mind.

476. Canada further contends that "in all the years since the implementation of the [SMP and MPC export quota] measures, considerable amounts of the BTQs remain unused. The United States' assumptions that the return and reallocation mechanism for the SMP and MPC export thresholds does 'considerably more to incentivize filling the export quota' is not borne out by

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

[515] Canada's Initial Written Submission, para. 352 (underline in original).

[516] Canada's Initial Written Submission, para. 352 (underline in original).

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

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

[519] Canada's Initial Written Submission, para. 352 (underline in original).

facts.[520] Actually, the U.S. argument is borne out by facts, including facts concerning the utilization rates of the USMCA SMP and MPC export quotas as compared to the USMCA dairy TRQs.

477. As Canada's exhibit shows, the utilization rates for the USMCA SMP and MPC export quotas are as follows: Year 4 (partial year): 60.25 percent; Year 3: 83.30 percent; Year 2: 84.50 percent; and for Year 1, the utilization rate effectively was 142.06 percent when considering that "Year 1" was, in reality, just one month – July 2020 – and so the annual BTQ volume should be pro-rated for comparability.[521] The utilization rates for a number of USMCA dairy TRQs have been considerably lower.[522] For example, the utilization rates for the USMCA dairy TRQ on skim milk powder, which logically is the TRQ most comparable to the export quotas on skim milk powder and milk protein concentrate, showed the following utilization rates: FY2021-FY2022: 8.06 percent; FY2020-2021: 18.84 percent. It is evident from these widely different utilization rates that the return and reallocation mechanism for Canada's SMP and MPC export quotas is doing far more to incentivize utilization than the mechanism that Canada has adopted for its USMCA dairy TRQs.

478. Canada also suggests that the United States "contradict[s] its own position" concerning the implications of different under-utilization penalties that apply in connection with Canada's SMP and MPC export quotas and Canada's USMCA dairy TRQs.[523] There is no contradiction in the U.S. position. For Canada's SMP and MPC export quotas, Canada applies an escalating under-utilization penalty that is first imposed earlier in the quota year. Under the rules for return and reallocation for the export quota on SMP and MPC, the initial return date is 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 policy (*i.e.*, no penalty will be assessed). It is possible to return allocations of the export quota 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."[524] Thus, there is a greater incentive to return allocation earlier in the quota year to avoid the imposition of an under-utilization penalty, and such returned allocations could be reallocated earlier in the quota year.[525] While an under-utilization penalty also applies

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

[521] *See* USMCA Dairy Export Thresholds - Global Exports of Certain Dairy Products 2020-2023 (Exhibit CDA-57).

[522] *See* Global Affairs Canada, USMCA Dairy TRQs Utilization Rates Data (Exhibit USA-115).

[523] Canada's Initial Written Submission, para. 354.

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

[525] *See* U.S. Initial Written Submission, paras. 228-231.

to reallocated SMP and MPC export quota quantities, exporters have more time during the quota year to use the export quota quantities.

479. Canada contests the U.S. arguments concerning transfer rules, suggesting that "Canada's transfer policies are outside the scope of Article 3.A.2.15."[526] The United States does not claim that Canada's transfer policies breach Article 3.A.2.15. However, it is impossible to understand completely the operation of Canada's USMCA dairy TRQ return and reallocation mechanism without taking into account the transfer mechanism and the implications that operation of the transfer mechanism has on the return and reallocation mechanism. As explained in the U.S. initial written submission, the mechanism for return and reallocation and the transfer rules for Canada's dairy TRQs (operating together) provide a great opportunity for rent-seeking behavior and a robust market for TRQ allocation transfers, but the return and reallocation mechanism for SMP and MPC provides a greater incentive and opportunity for the export quota to be filled.[527]

480. Canada responds to the U.S. "contention that setting a minimum use threshold to determine eligibility for initial reallocations would increase the chances of quota being filled" by arguing that "the United States fails to consider that imposing a minimum use threshold potentially reduces the number of allocation holders who can receive an initial reallocation."[528] As the United States has explained, for the SMP and MPC export quota, returned allocations are made available "to eligible allocation holders who have used 80% or more of their allocation and not returned any unused quantity of their allocation".[529] This contrasts with the mechanism for USMCA dairy TRQs, which, in the first instance, reallocates returned allocations to all allocation holders that have not returned any portion of their allocations, in proportion to their initial allocation, regardless of how much of their initial allocation they have used.[530] On its face, the mechanism for SMP and MPC is more oriented toward putting reallocated quota into the hands of exporters who have already demonstrated that they have been exporting during the current quota year.[531] Even if there were somewhat fewer allocation holders eligible for initial reallocation, those that are eligible likely would be eager and able to export more, thus increasing the chance that the export quota will be filled. Additionally, as it does with the USMCA dairy TRQs, following the initial reallocation, Canada could reallocate on demand any quantities still available for reallocation. Canada's criticism of the U.S. argument is unavailing.

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[526] Canada's Initial Written Submission, para. 357.

[527] *See* U.S. Initial Written Submission, paras. 233-234.

[528] Canada's Initial Written Submission, para. 358.

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

[530] *See*, *e.g.*, Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 5 (Exhibit USA-10).

[531] *See* U.S. Initial Written Submission, para. 235.

481. Finally, Canada argues that "while the United States suggests that imposing a 'Chronic Return Penalty' would, 'on [its] face', provide a greater opportunity for the CUSMA dairy TRQs to be filled, there is simply no evidence to support that assertion."[532] Once again, the U.S. argument is supported by logic and reason. A "Chronic Return Penalty", under which "[a]llocation holders who return 20% or more of their initial allocation for two consecutive years will normally have their allocation reduced in the following year by the average of the returned quantities over the two years",[533] a policy that Canada itself has considered adopting, would further incentivize allocation holders to use their allocations to import dairy products to avoid having them reduced in the following year, or would, over time, shift allocations to other allocation holders that would use them that way. This would provide a greater opportunity for the USMCA dairy TRQs to be filled.

5. Canada's USMCA Dairy TRQ Return and Reallocation Mechanism Is Inconsistent with Article 3.A.2.15 of the USMCA

482. As demonstrated above, Canada has failed to rebut the U.S. claim under Article 3.A.2.15 of the USMCA. For the reasons given in the U.S. initial written submission, as well as those given above, Canada fails to ensure that there is a mechanism for return and reallocation of its USMCA dairy TRQs in a timely and transparent manner that provides the greatest possible opportunity for the USMCA dairy TRQs to be filled, as required by Article 3.A.2.15.

D. Canada Fails to Rebut the U.S. Claim Under Article 3.A.2.6 of the USMCA

483. The U.S. initial written submission sets forth the arguments and evidence that substantiate the U.S. claim 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".[534]

484. After setting forth the interpretive conclusions that follow from a proper application of customary rules of interpretation, the U.S. initial written submission demonstrates that Canada is failing to undertake efforts to make certain that it "carr[ies] out", "runs", and "oversees"[535] its USMCA dairy TRQs in a "way"[536] that "permit[s], enable[s]", and "make[s] … possible"[537] the

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[532] Canada's Initial Written Submission, para. 359.

[533] Comprehensive Review of the Allocation and Administration of Tariff Rate Quotas for Dairy, Poultry and Egg Products – Phase II: Policy Options for the Administration of Supply-Managed TRQs, p. 3 (Exhibit USA-20).

[534] *See* U.S. Initial Written Submission, paras. 240-245.

[535] Definition of "administer" from Oxford English Dictionary Online (Exhibit USA-74).

[536] Definition of "manner" from Oxford English Dictionary Online (Exhibit USA-93).

[537] Definition of "allow" from Oxford English Dictionary Online (Exhibit USA-79).

"condition, or set of circumstances permitting or favourable to"[538] importers "render[ing] useful", "convert[ing] to use", or "turn[ing] to account"[539] the USMCA dairy TRQs "[i]n a full manner or degree; to the full; in (its) entirety or totality; completely, entirely".[540] On the contrary, the "manner" in which Canada "administers" its USMCA dairy TRQs, in particular Canada's administration of the return and reallocation mechanism for USMCA dairy TRQs, inhibits importers from utilizing the USMCA dairy TRQ quantities fully.[541]

485. In response, Canada simply asserts that "[t]he United States argues that 'for the same reasons' that Canada's return and reallocation mechanism is inconsistent with Article 3.A.2.15, it also does not 'allow[] importers the opportunity to utilize TRQ quantities fully' pursuant to Article 3.A.2.6."[542] In light of this oversimplification of the argument presented in the U.S. initial written submission, Canada therefore provides a limited discussion of its position, omitting any interpretive analysis of the chapeau of Article 3.A.2.6 of the USMCA and just asserting that "[f]or the same reasons demonstrated in the above sections", the U.S. claim of inconsistency under Article 3.A.2.6 must also fail."[543] Canada briefly references its prior arguments related to "*prima facie* case", "harmonious reading", and the features of Canada's return and reallocation mechanism that Canada contends "incentivize[] the return and reallocation of unused dairy TRQ allocations [and] reallocate them in a manner that provides the greatest possible opportunity for their utilization."[544]

486. Above, the United States has rebutted each of the arguments to which Canada refers. The United States does not repeat those arguments here.

487. Canada has failed to rebut the U.S. claim under Article 3.A.2.6 of the USMCA. For the reasons given in the U.S. initial written submission, as well as those given above, the return and reallocation mechanism for USMCA dairy TRQs that Canada has adopted and applies, through its dairy TRQ allocation measures, is inconsistent with Article 3.A.2.6 of the USMCA.

VI. CONCLUSION

488. For the reasons set out above and in the U.S. initial written submission, Canada's dairy TRQ allocation measures are inconsistent with the commitments that Canada made in the USMCA. The United States respectfully requests that the Panel make findings of breach with

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[538] Definition of "opportunity" from Oxford English Dictionary Online (Exhibit USA-95).

[539] Definition of "utilize" from Oxford English Dictionary Online (Exhibit USA-105).

[540] Definition of "fully" from Oxford English Dictionary Online (Exhibit USA-89).

[541] USMCA, Article 3.A.2.6.

[542] Canada's Initial Written Submission, para. 362.

[543] Canada's Initial Written Submission, para. 362.

[544] Canada's Initial Written Submission, paras. 362-364.

respect to each of the four elements of Canada's dairy TRQ allocation measures that the United States challenges in this dispute. Specifically, the United States requests that the Panel find that:

(1) By excluding retailers, food service operators, and other entities from eligibility for Canada's USMCA dairy TRQs, Canada's dairy TRQ allocation measures are inconsistent with:

a. Section A, Paragraph 3(c), of Canada's USMCA TRQ Appendix; and

b. Article 3.A.2.6(a) of the USMCA;

(2) By using a market share basis to allocate Canada's USMCA dairy TRQs and applying different criteria to different types of eligible applicants, Canada's dairy TRQ allocation measures are inconsistent with:

a. The processor clause of Article 3.A.2.11(b) of the USMCA;

b. Article 3.A.2.4(b) of the USMCA;

c. Article 3.A.2.11(e) of the USMCA;

d. The first clause of Article 3.A.2.11(c) of the USMCA ("ensure that … each allocation is made in commercially viable shipping quantities");

e. The second clause of Article 3.A.2.11(c) of the USMCA ("ensure that … each allocation is made …, to the maximum extent possible, in the quantities that the TRQ applicant requests");

f. Article 3.A.2.10 of the USMCA; and

g. Article 3.A.2.6(a) of the USMCA;

(3) By imposing 12-month activity requirements for USMCA dairy TRQ applicants and recipients, Canada's dairy TRQ allocation measures are inconsistent with:

a. Section A, Paragraph 3(c), of Canada's USMCA TRQ Appendix;

b. Article 3.A.2.6(a) of the USMCA; and

c. Article 3.A.2.10 of the USMCA; and

(4) The mechanism for the return and reallocation of unused USMCA dairy TRQ allocations in Canada's dairy TRQ allocation measures is inconsistent with:

a. Article 3.A.2.15 of the USMCA; and

b. The chapeau of Article 3.A.2.6 of the USMCA.