

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

**(CDA-USA-2021-31-01)**

**INITIAL WRITTEN SUBMISSION  
OF THE UNITED STATES OF AMERICA**

**July 12, 2021**

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### TABLE OF ABBREVIATIONS

Abbreviation	Definition
Agreement or CUSMA or USMCA	<i>United States-Mexico-Canada Agreement</i>
Party	USMCA Party
TRQ	Tariff-rate quota
WTO	World Trade Organization

### TABLE OF EXHIBITS

<b>Exhibit No.</b>	<b>Description</b>
USA-1	CUSMA: Milk TRQ – Serial No. 1015, dated June 15, 2020
USA-2	CUSMA: Milk TRQ – Serial No. 1049, dated May 1, 2021
USA-3	CUSMA: Cream TRQ – Serial No. 1016, dated June 15, 2020
USA-4	CUSMA: Cream TRQ – Serial No. 1042, dated May 1, 2021
USA-5	CUSMA: Skim Milk Powder TRQ – Serial No. 1017, dated June 15, 2020
USA-6	CUSMA: Skim Milk Powder TRQ – Serial No. 1053, dated May 1, 2021
USA-7	CUSMA: Butter and Cream Powder TRQ – Serial No. 1018, dated June 15, 2020
USA-8	CUSMA: Butter and Cream Powder TRQ – Serial No. 1040, dated May 1, 2021
USA-9	CUSMA: Industrial Cheeses TRQ – Serial No. 1019, dated June 15, 2020
USA-10	CUSMA: Industrial Cheeses TRQ – Serial No. 1031, dated October 1, 2020
USA-11	CUSMA: Cheeses of All Types TRQ – Serial No. 1020, dated June 15, 2020
USA-12	CUSMA: Milk Powders TRQ – Serial No. 1021, dated June 15, 2020
USA-13	CUSMA: Milk Powders TRQ – Serial No. 1051, dated May 1, 2021
USA-14	CUSMA: Concentrated or Condensed Milk TRQ – Serial No. 1022, dated June 15, 2020
USA-15	CUSMA: Yogurt and Buttermilk TRQ – Serial No. 1023, dated June 15, 2020
USA-16	CUSMA: Powdered Buttermilk TRQ – Serial No. 1024, dated June 15, 2020
USA-17	CUSMA: Whey Powder TRQ – Serial No. 1025, dated June 15, 2020
USA-18	CUSMA: Whey Powder TRQ – Serial No. 1045, dated May 1, 2021
USA-19	CUSMA: Products Consisting of Natural Milk Constituents TRQ – Serial No. 1026, dated June 15, 2020

<b>Exhibit No.</b>	<b>Description</b>
USA-20	CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1027, dated June 15, 2020
USA-21	CUSMA: Other Dairy TRQ – Serial No. 1028, dated June 15, 2020
USA-22	General Information on the Administration of TRQs for Supply-Managed Products
USA-23	Export and Import Permits Act (R.S.C., 1985, c. E-19)
USA-24	Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, vol. II
USA-25	Definition of “limit” from Oxford English Dictionary Online
USA-26	Definition of “access” from Oxford English Dictionary Online
USA-27	Definition of “allocation” from Oxford English Dictionary Online
USA-28	Definition of “processor” from Oxford English Dictionary Online
USA-29	Definition of “fair” from Oxford English Dictionary Online
USA-30	Definition of “equitable” from Oxford English Dictionary Online
USA-31	USTR July 2, 2020 Letter to Deputy Prime Minister Freeland
USA-32	Definition of “maximum” from Oxford English Dictionary Online
USA-33	Definition of “extent” from Oxford English Dictionary Online
USA-34	Definition of “possible” from Oxford English Dictionary Online

## I. Introduction

1. The *United States-Mexico-Canada Agreement* (USMCA or Agreement) permits Canada to maintain tariff-rate quotas (TRQs) – a preferential tariff rate on a specified quantity of goods – on a variety of products. The United States does not challenge Canada’s right to maintain TRQs on dairy products. However, the manner in which Canada administers its TRQs for dairy products is inconsistent with the terms of the Agreement, as the United States demonstrates in this initial submission.

2. Canada’s administration of its dairy TRQs breaches the USMCA because Canada “limits access to an allocation to processors” contrary to Article 3.A.2.11(b). For example, when Canada allocates a TRQ for a specific dairy product, it reserves access to an allocation or pool of TRQ volume exclusively for processors or so-called “further processors”. By reserving access to a TRQ allocation to processors, and necessarily excluding other importers (e.g., non-processors and retailers) from that allocation, Canada also breaches a number of other USMCA obligations. Canada fails to ensure that, “to the maximum extent possible”, allocations are made “in the quantities that the TRQ applicant [including a non-processor] requests”, as required by Article 3.A.2.11(c). Canada does not administer its TRQs through “fair” and “equitable” procedures and methods, as required by Articles 3.A.2.4(b) and 3.A.2.11(e), when it discriminates against non-processors. And Canada’s notices to importers “introduce a new or additional condition, limit, or eligibility requirement on the utilization of a TRQ” that are “beyond those set out in [Canada’s] Schedule to Annex 2-B”, contrary to Article 3.A.2.6(a), by excluding non-processors from utilizing some or all of a TRQ.

3. Global Affairs Canada published notices to importers on June 15, 2020, allocating Canada’s TRQs by reserving a portion of the volume for processors.<sup>1</sup> This was well after the conclusion of the USMCA negotiations and just two weeks prior to entry into force of the Agreement. The United States made its concerns about Canada’s approach known to Canada almost immediately,<sup>2</sup> but to date, Canada has been unwilling to take corrective action to resolve the U.S. concerns.

4. On October 1, 2020, and May 1, 2021, Global Affairs Canada published revised notices. In all of its notices for dairy products, Canada reserves a percentage of the quota for processors. For all of Canada’s dairy TRQs, 80 to 85 percent of the total quota is reserved for processors, and for ten of the dairy TRQs,<sup>3</sup> an additional 10 to 20 percent is reserved for so-called “further

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<sup>1</sup> The measures and operation of the notices to importers are explained in section III.

<sup>2</sup> USTR July 2, 2020 Letter to Deputy Prime Minister Freeland (Exhibit USA-31).

<sup>3</sup> Butter and cream powder, ice cream and ice cream mixes, industrial cheese, milk powder, other dairy, powdered buttermilk, products consisting of natural milk constituents, skim milk powder, whey powder, and yogurt and buttermilk.

processors.” This means that Canada will only allocate the reserved shares of the TRQs to processors, including “further processors,” who apply for those TRQs.

5. Limiting allocations to processors eliminates quota that may be utilized by retailers to import higher-value products for retail sale and harms U.S. suppliers that seek to sell products directly to the Canadian retail market. It also could result in significant underutilization of the quotas. Moreover, nearly all of Canada’s notices explicitly provide under “[e]ligibility criteria” that “[r]etailers are **not** eligible to apply for an allocation.”<sup>4</sup>

6. For the reasons given in this initial submission, Canada’s administration of its dairy TRQs is inconsistent with the terms of the USMCA.

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

8. **Section II** discusses the procedural background of this dispute, **section III** presents factual background information relevant to this dispute, **and section IV** sets forth the terms of reference, rules of interpretation, and standard of review applicable in USMCA Chapter 31 dispute settlement proceedings.

9. **Section V** demonstrates that Canada’s administration of its TRQs for dairy products is inconsistent with Article 3.A.2.11(b) of the USMCA. Specifically, Canada is required to ensure that “it *does not* allocate any portion of the quota to a producer group, condition access to an allocation on the purchase of domestic production, or ... *limit access to an allocation to processors*.”<sup>5</sup> Properly interpreted according to customary rules of interpretation of public international law, the terms of the USMCA prohibit Canada from reserving a quota allocation for processors, including further processors. The clause “limit access to an allocation to processors” in Article 3.A.2.11(b) refers to an allocation (portion) of the TRQ being administered, and Canada is limiting access to such allocations through its notices to importers. The commitment

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<sup>4</sup> Bold in original. CUSMA: Milk TRQ – Serial No. 1015, dated June 15, 2020 (Exhibit USA-1); CUSMA: Milk TRQ – Serial No. 1049, dated May 1, 2021 (Exhibit USA-2); CUSMA: Cream TRQ – Serial No. 1016, dated June 15, 2020 (Exhibit USA-3); CUSMA: Cream TRQ – Serial No. 1042, dated May 1, 2021 (Exhibit USA-4); CUSMA: Skim Milk Powder TRQ – Serial No. 1017, dated June 15, 2020 (Exhibit USA-5); CUSMA: Skim Milk Powder TRQ – Serial No. 1053, dated May 1, 2021 (Exhibit USA-6); CUSMA: Butter and Cream Powder TRQ – Serial No. 1018, dated June 15, 2020 (Exhibit USA-7); CUSMA: Butter and Cream Powder TRQ – Serial No. 1040, dated May 1, 2021 (Exhibit USA-8); CUSMA: Cheeses of All Types TRQ – Serial No. 1020, dated June 15, 2020 (Exhibit USA-11); CUSMA: Milk Powders TRQ – Serial No. 1021, dated June 15, 2020 (Exhibit USA-12); CUSMA: Milk Powders TRQ – Serial No. 1051, dated May 1, 2021 (Exhibit USA-13); CUSMA: Concentrated or Condensed Milk TRQ – Serial No. 1022, dated June 15, 2020 (Exhibit USA-14); CUSMA: Yogurt and Buttermilk TRQ – Serial No. 1023, dated June 15, 2020 (Exhibit USA-15); CUSMA: Powdered Buttermilk TRQ – Serial No. 1024, dated June 15, 2020 (Exhibit USA-16); CUSMA: Whey Powder TRQ – Serial No. 1025, dated June 15, 2020 (Exhibit USA-17); CUSMA: Whey Powder TRQ – Serial No. 1045, dated May 1, 2021 (Exhibit USA-18); CUSMA: Products Consisting of Natural Milk Constituents TRQ – Serial No. 1026, dated June 15, 2020 (Exhibit USA-19); CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1027, dated June 15, 2020 (Exhibit USA-20); CUSMA: Other Dairy TRQ – Serial No. 1028, dated June 15, 2020 (Exhibit USA-21).

<sup>5</sup> Italics added.

does not mean that processors are *ineligible* to receive any allocation of the quota (as producer groups are). Rather, “access” to an allocation (portion) simply cannot be “limited” to those processors.

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

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

12. **Section VIII** demonstrates that by reserving portions of the quota to processors, Canada has introduced an “additional condition, limit, or eligibility requirement on the utilization of a TRQ”, inconsistent with Article 3.A.2.6(a) of the USMCA read together with Section A, paragraph 3(c), of Appendix 2 of Canada’s Tariff Schedule. Canada’s set-asides require that one must be a processor to receive an allocation from the reserved pool within the quota and therefore to utilize the TRQ. In doing so, Canada excludes other eligible applicants from having access to the reserved portions of the quota – and therefore imposes an impermissible condition, limit, or eligibility requirement on the utilization of a dairy TRQ.

## **II. Procedural Background**

13. On December 9, 2020, the United States requested consultations with Canada pursuant to Articles 31.2 and 31.4 of the USMCA, with regard to measures of Canada through which Canada allocates its dairy TRQs under the USMCA (“dairy TRQ allocation measures”). Pursuant to this request, the United States held consultations with Canada over videoconference on December 21, 2020. The Parties failed to reach a mutually satisfactory resolution to this dispute.

14. Accordingly, pursuant to Article 31.6.1 of the USMCA, on May 25, 2021, the United States requested the establishment of a panel to examine this matter, which concerns perishable goods, with the terms of reference as set out in Article 31.7 of the USMCA.



15. Per Article 18 of the Rules of Procedure for Chapter 31 (Dispute Settlement), the United States is filing this initial submission on July 12, 2021, seven days after the date on which the last panelist was selected.

### III. Factual Background

16. Under the USMCA, Canada maintains TRQs on 14 different categories of dairy products: milk, cream, skim milk powder, butter and cream powder, industrial cheeses, cheeses of all types, milk powders, concentrated or condensed milk, yogurt and buttermilk, powdered buttermilk, whey powder, products consisting of natural milk constituents, ice cream and ice cream mixes, and other dairy.

17. As defined in the USMCA, a TRQ is “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”.<sup>6</sup> Article 3.A.2 of the USMCA (entitled “Tariff-Rate Quota Administration”) governs the administration of a Party’s TRQs, including if a TRQ is administered through an allocation mechanism.<sup>7</sup> An allocation mechanism means “any system in which access to the tariff-rate quota is granted on a basis other than first-come first-served”.<sup>8</sup>

18. Section A of Appendix 2 of Canada’s Tariff Schedule under the USMCA provides additional rules regarding how Canada is required to administer its TRQs, including through allocation. In particular, it provides that Canada is required to administer its TRQs through an import licensing system<sup>9</sup> and that Canada is required to allocate its TRQs to eligible applicants, which are applicants active in the Canadian food or agriculture sector.<sup>10</sup>

19. On June 15, 2020, Global Affairs Canada published notices to importers concerning the allocation of its TRQs<sup>11</sup> for dairy products subject to USMCA TRQ commitments. On October

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<sup>6</sup> USMCA, Article 3.A.2.1.

<sup>7</sup> USMCA, Article 3.A.2.1.

<sup>8</sup> USMCA, Article 3.A.2.1.

<sup>9</sup> USMCA, Chapter 2 (National Treatment and Market Access), Appendix 2: Tariff Schedule of Canada – (Tariff Rate Quotas), Section A: General Provisions, para. 3(a).

<sup>10</sup> USMCA, Chapter 2 (National Treatment and Market Access), Appendix 2: Tariff Schedule of Canada – (Tariff Rate Quotas), Section A: General Provisions, para. 3(c).

<sup>11</sup> CUSMA: Milk TRQ – Serial No. 1015, dated June 15, 2020 (Exhibit USA-1); CUSMA: Cream TRQ – Serial No. 1016, dated June 15, 2020 (Exhibit USA-3); CUSMA: Skim Milk Powder TRQ – Serial No. 1017, dated June 15, 2020 (Exhibit USA-5); CUSMA: Butter and Cream Powder TRQ – Serial No. 1018, dated June 15, 2020 (Exhibit USA-7); CUSMA: Industrial Cheeses TRQ – Serial No. 1019, dated June 15, 2020 (Exhibit USA-9); CUSMA: Cheeses of All Types TRQ – Serial No. 1020, dated June 15, 2020 (Exhibit USA-11); CUSMA: Milk Powders TRQ – Serial No. 1021, dated June 15, 2020 (Exhibit USA-12); CUSMA: Concentrated or Condensed Milk TRQ – Serial No. 1022, dated June 15, 2020 (Exhibit USA-14); CUSMA: Yogurt and Buttermilk TRQ – Serial No. 1023, dated June 15, 2020 (Exhibit USA-15); CUSMA: Powdered Buttermilk TRQ – Serial No. 1024, dated June 15, 2020

1, 2020, and May 1, 2021, Global Affairs Canada published revised notices.<sup>12</sup> These notices were promulgated pursuant to the Export and Import Permits Act (“EIPA”) and its corresponding regulations, and opened the application period for access to allocations of Canada’s TRQs. Under the authority of the EIPA, a product that is subject to a TRQ can be imported only by someone who has a valid import permit. Specifically, Article 6.2(2) of EIPA provides that:

If the Minister has determined a quantity of goods under subsection (1) or (1.1), the Minister may

(a) by order, establish a method for allocating the quantity to residents of Canada who apply for an allocation; and

(b) issue an import allocation or an export allocation, as the case may be, to any resident of Canada who applies for the allocation, subject to the regulations and any terms and conditions the Minister may specify in the allocation.<sup>13</sup>

20. Canada’s import allocations for dairy products are set out in the following legal instruments:

- a. CUSMA: Milk TRQ – Serial No. 1015, dated June 15, 2020;
- b. CUSMA: Milk TRQ – Serial No. 1049, dated May 1, 2021;
- c. CUSMA: Cream TRQ – Serial No. 1016, dated June 15, 2020;
- d. CUSMA: Cream TRQ – Serial No. 1042, dated May 1, 2021;
- e. CUSMA: Skim Milk Powder TRQ – Serial No. 1017, dated June 15, 2020;
- f. CUSMA: Skim Milk Powder TRQ – Serial No. 1053, dated May 1, 2021;

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(Exhibit USA-16); CUSMA: Whey Powder TRQ – Serial No. 1025, dated June 15, 2020 (Exhibit USA-17); CUSMA: Products Consisting of Natural Milk Constituents TRQ – Serial No. 1026, dated June 15, 2020 (Exhibit USA-19); CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1027, dated June 15, 2020 (Exhibit USA-20); CUSMA: Other Dairy TRQ – Serial No. 1028, dated June 15, 2020 (Exhibit USA-21).

<sup>12</sup> CUSMA: Milk TRQ – Serial No. 1049, dated May 1, 2021 (Exhibit USA-2); CUSMA: Cream TRQ – Serial No. 1042, dated May 1, 2021 (Exhibit USA-4); CUSMA: Skim Milk Powder TRQ – Serial No. 1053, dated May 1, 2021 (Exhibit USA-6); CUSMA: Butter and Cream Powder TRQ – Serial No. 1040, dated May 1, 2021 (Exhibit USA-8); CUSMA: Industrial Cheeses TRQ – Serial No. 1031, dated October 1, 2020 (Exhibit USA-10); CUSMA: Milk Powders TRQ – Serial No. 1051, dated May 1, 2021 (Exhibit USA-13); CUSMA: Whey Powder TRQ – Serial No. 1045, dated May 1, 2021 (Exhibit USA-18).

<sup>13</sup> Export and Import Permits Act (R.S.C., 1985, c. E-19), <https://laws-lois.justice.gc.ca/eng/acts/E-19/page-4.html#h-203129>, pp. 19-20 (Exhibit USA-23) (bold in original).

- g. CUSMA: Butter and Cream Powder TRQ – Serial No. 1018, dated June 15, 2020;
- h. CUSMA: Butter and Cream Powder TRQ – Serial No. 1040, dated May 1, 2021;
- i. CUSMA: Industrial Cheeses TRQ – Serial No. 1019, dated June 15, 2020;
- j. CUSMA: Industrial Cheeses TRQ – Serial No. 1031, dated October 1, 2020;
- k. CUSMA: Cheeses of All Types TRQ – Serial No. 1020, dated June 15, 2020;
- l. CUSMA: Milk Powders TRQ – Serial No. 1021, dated June 15, 2020;
- m. CUSMA: Milk Powders TRQ – Serial No. 1051, dated May 1, 2021;
- n. CUSMA: Concentrated or Condensed Milk TRQ – Serial No. 1022, dated June 15, 2020;
- o. CUSMA: Yogurt and Buttermilk TRQ – Serial No. 1023, dated June 15, 2020;
- p. CUSMA: Powdered Buttermilk TRQ – Serial No. 1024, dated June 15, 2020;
- q. CUSMA: Whey Powder TRQ – Serial No. 1025, dated June 15, 2020;
- r. CUSMA: Whey Powder TRQ – Serial No. 1045, dated May 1, 2021;
- s. CUSMA: Products Consisting of Natural Milk Constituents TRQ – Serial No. 1026, dated June 15, 2020;
- t. CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1027, dated June 15, 2020; and
- u. CUSMA: Other Dairy TRQ – Serial No. 1028, dated June 15, 2020.<sup>14</sup>

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<sup>14</sup> CUSMA: Milk TRQ – Serial No. 1015, dated June 15, 2020 (Exhibit USA-1) (85% is allocated to processors); CUSMA: Milk TRQ – Serial No. 1049, dated May 1, 2021 (Exhibit USA-2) (85% is allocated to processors); CUSMA: Cream TRQ – Serial No. 1016, dated June 15, 2020 (Exhibit USA-3) (85% is allocated to processors); CUSMA: Cream TRQ – Serial No. 1042, dated May 1, 2021 (Exhibit USA-4) (85% is allocated to processors); CUSMA: Skim Milk Powder TRQ – Serial No. 1017, dated June 15, 2020 (Exhibit USA-5) (80% is allocated to processors and 10% is allocated to so-called “further processors”); CUSMA: Skim Milk Powder TRQ – Serial No. 1053, dated May 1, 2021 (Exhibit USA-6) (80% is allocated to processors and 10% is allocated to so-called “further processors”); CUSMA: Butter and Cream Powder TRQ – Serial No. 1018, dated June 15, 2020 (Exhibit USA-7) (80% is allocated to processors and 10% is allocated to so-called “further processors”); CUSMA: Butter and Cream Powder TRQ – Serial No. 1040, dated May 1, 2021 (Exhibit USA-8) (80% is allocated to processors and 10% is allocated to so-called “further processors”); CUSMA: Industrial Cheeses TRQ – Serial No. 1019, dated June 15, 2020 (Exhibit USA-9) (80% is allocated to processors and 20% is allocated to so-called “further processors”); CUSMA: Industrial Cheeses TRQ – Serial No. 1031, dated October 1, 2020 (Exhibit USA-10) (80% is allocated to

21. In each of the notices listed above, Canada reserves a percentage of the quota for processors. Section 4 of each of Canada’s notices to importers provides that a certain percentage “is allocated to processors on a market share basis”. For all of Canada’s dairy TRQs, 80 to 85 percent of the total quota volume is reserved for processors, and for ten of the dairy TRQs,<sup>15</sup> an additional 10 to 20 percent is reserved for so-called “further processors.”

22. Put another way, when allocating TRQ quota volume, before it even considers any applications for TRQ volume submitted by importers, Canada first divides the total quota volume into different portions, or pools. These pools, as explained below, are allocations within the meaning of the processor clause of Article 3.A.2.11(b) of the USMCA. Canada then considers applications for quota volume submitted by importers. Certain allocations or pools of quota volume are accessible only to processors or “further processors”. This means that only

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

<sup>15</sup> Butter and cream powder, ice cream and ice cream mixes, industrial cheese, milk powder, other dairy, powdered buttermilk, products consisting of natural milk constituents, skim milk powder, whey powder, and yogurt and buttermilk. CUSMA: Milk TRQ – Serial No. 1015, dated June 15, 2020 (Exhibit USA-1); CUSMA: Milk TRQ – Serial No. 1049, dated May 1, 2021 (Exhibit USA-2); CUSMA: Skim Milk Powder TRQ – Serial No. 1017, dated June 15, 2020 (Exhibit USA-5); CUSMA: Skim Milk Powder TRQ – Serial No. 1053, dated May 1, 2021 (Exhibit USA-6); CUSMA: Butter and Cream Powder TRQ – Serial No. 1018, dated June 15, 2020 (Exhibit USA-7); CUSMA: Butter and Cream Powder TRQ – Serial No. 1040, dated May 1, 2021 (Exhibit USA-8); CUSMA: Industrial Cheeses TRQ – Serial No. 1019, dated June 15, 2020 (Exhibit USA-9); CUSMA: Industrial Cheeses TRQ – Serial No. 1031, dated October 1, 2020 (Exhibit USA-10); CUSMA: Milk Powders TRQ – Serial No. 1021, dated June 15, 2020 (Exhibit USA-12); CUSMA: Milk Powders TRQ – Serial No. 1051, dated May 1, 2021 (Exhibit USA-13); CUSMA: Yogurt and Buttermilk TRQ – Serial No. 1023, dated June 15, 2020 (Exhibit USA-15); CUSMA: Powdered Buttermilk TRQ – Serial No. 1024, dated June 15, 2020 (Exhibit USA-16); CUSMA: Whey Powder TRQ – Serial No. 1025, dated June 15, 2020 (Exhibit USA-17); CUSMA: Whey Powder TRQ – Serial No. 1045, dated May 1, 2021 (Exhibit USA-18); CUSMA: Products Consisting of Natural Milk Constituents TRQ – Serial No. 1026, dated June 15, 2020 (Exhibit USA-19); CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1027, dated June 15, 2020 (Exhibit USA-20); CUSMA: Other Dairy TRQ – Serial No. 1028, dated June 15, 2020 (Exhibit USA-21).

processors or “further processors” can apply for and receive licenses to import quota volume within those pools.

23. By administering its dairy TRQs in this manner, Canada eliminates quota that may be utilized by non-processors, such as retailers, to import higher-value products for retail sale and harms U.S. suppliers that seek to sell products directly to the Canadian retail market. It also could result in significant underutilization of the quotas. Moreover, nearly all of Canada’s notices explicitly provide under “[e]ligibility criteria” that “[r]etailers are **not** eligible to apply for an allocation.”<sup>16</sup>

#### **IV. Terms of Reference, Rules of Interpretation, and Standard of Review**

24. Canada and the United States have not decided on terms of reference for this dispute other than the terms of reference as set out in Article 31.7 of the USMCA. Accordingly, pursuant to Article 31.7, the terms of reference shall be for the Panel to:

- (a) examine, in the light of the relevant provisions of this Agreement, the matter referred to in the request for the establishment of a panel under Article 31.6 (Establishment of a Panel); and
- (b) make findings and determinations, and any jointly requested recommendations, together with its reasons therefor, as provided for in Article 31.17 (Panel Report).<sup>17</sup>

25. Article 31.13 of the USMCA describes the “function of panels” and the standard of review to be applied by panels. A panel’s function is to make an objective assessment of the matter before it. In making that objective assessment whether a measure is inconsistent with the

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<sup>16</sup> Bold in original. CUSMA: Milk TRQ – Serial No. 1015, dated June 15, 2020 (Exhibit USA-1); CUSMA: Milk TRQ – Serial No. 1049, dated May 1, 2021 (Exhibit USA-2); CUSMA: Cream TRQ – Serial No. 1016, dated June 15, 2020 (Exhibit USA-3); CUSMA: Cream TRQ – Serial No. 1042, dated May 1, 2021 (Exhibit USA-4); CUSMA: Skim Milk Powder TRQ – Serial No. 1017, dated June 15, 2020 (Exhibit USA-5); CUSMA: Skim Milk Powder TRQ – Serial No. 1053, dated May 1, 2021 (Exhibit USA-6); CUSMA: Butter and Cream Powder TRQ – Serial No. 1018, dated June 15, 2020 (Exhibit USA-7); CUSMA: Butter and Cream Powder TRQ – Serial No. 1040, dated May 1, 2021 (Exhibit USA-8); CUSMA: Cheeses of All Types TRQ – Serial No. 1020, dated June 15, 2020 (Exhibit USA-11); CUSMA: Milk Powders TRQ – Serial No. 1021, dated June 15, 2020 (Exhibit USA-12); CUSMA: Milk Powders TRQ – Serial No. 1051, dated May 1, 2021 (Exhibit USA-13); CUSMA: Concentrated or Condensed Milk TRQ – Serial No. 1022, dated June 15, 2020 (Exhibit USA-14); CUSMA: Yogurt and Buttermilk TRQ – Serial No. 1023, dated June 15, 2020 (Exhibit USA-15); CUSMA: Powdered Buttermilk TRQ – Serial No. 1024, dated June 15, 2020 (Exhibit USA-16); CUSMA: Whey Powder TRQ – Serial No. 1025, dated June 15, 2020 (Exhibit USA-17); CUSMA: Whey Powder TRQ – Serial No. 1045, dated May 1, 2021 (Exhibit USA-18); CUSMA: Products Consisting of Natural Milk Constituents TRQ – Serial No. 1026, dated June 15, 2020 (Exhibit USA-19); CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1027, dated June 15, 2020 (Exhibit USA-20); CUSMA: Other Dairy TRQ – Serial No. 1028, dated June 15, 2020 (Exhibit USA-21).

<sup>17</sup> USMCA, Article 31.7.1.

USMCA, Article 31.13.4 of the USMCA establishes that a dispute settlement panel shall interpret the USMCA “in accordance with customary rules of interpretation of public international law, as reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*” (“Vienna Convention”).<sup>18</sup> Article 31 of the Vienna Convention provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

26. Furthermore, the findings, determinations, and recommendations of the Panel shall not add to or diminish the rights and obligations of the Parties under the Agreement.<sup>19</sup>

**V. Canada’s Notices to Importers Are Inconsistent with Article 3.A.2.11(b) of the USMCA Because They Limit Access to an Allocation to Processors**

27. Canada administers its dairy TRQs, in part, through the notices to importers setting out who can – and cannot – obtain TRQ amounts under a particular dairy TRQ. These notices breach Canada’s commitment in Article 3.A.2.11(b) of the USMCA not to limit access to a TRQ allocation to processors. Article 3.A.2.11(b) of the USMCA provides, in relevant part:

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

28. Article 3.A.2.11(b) logically can be divided into four clauses: (1) the “agreement clause” (“unless otherwise agreed by the Parties”); (2) the “producer clause” (a Party shall ensure that “it does not allocate any portion of the quota to a producer group”); (3) the “domestic production clause” (a Party shall ensure that “it does not ... condition access to an allocation on the purchase of domestic production”); and (4) the “processor clause” (a Party shall ensure that “it does not ... limit access to an allocation to processors”).

29. Canada’s notices to importers are inconsistent with the processor clause of Article 3.A.2.11(b) because they limit access to TRQ allocations exclusively to processors. Properly interpreted, the processor clause prohibits Canada from reserving (limiting access to) any portion of the tariff rate quota exclusively for processors. This is the correct interpretation that follows from applying customary rules of interpretation of public international law.

30. The subsections that follow address the ordinary meaning of each of the key terms in Article 3.A.2.11(b) of the USMCA and discuss contextual elements relevant to the Panel’s interpretation of that provision.

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<sup>18</sup> USMCA, Article 31.13.4.

<sup>19</sup> USMCA, Article 31.13.2.

**A. The Ordinary Meaning of “Limit Access to an Allocation to Processors” in Article 3.A.2.11(b) of the USMCA**

31. Article 3.A.2.11(b) of the USMCA begins, in relevant part, “A Party administering an allocated TRQ shall ensure that: ... (b) unless otherwise agreed by the Parties, it does not . . . .” Thus, Article 3.A.2.11(b), on its face, establishes a prohibition except in cases in which the Parties otherwise agree that the prohibition does not apply. The nature of the language used, “shall ensure that” indicates a commitment not to do what is described, in the absence of an agreement “otherwise”. The processor clause of Article 3.A.2.11(b) sets out one of the prohibitions of that article.

32. The processor clause of Article 3.A.2.11(b) provides that “a Party administering an allocated TRQ shall ensure that ... it does not ... limit access to an allocation to processors”. To understand the meaning of this obligation, it is necessary to understand the meaning of the terms “limit”, “access to”, “an allocation”, and “processors”. To discern the ordinary meaning of these terms in their context, we start with dictionary definitions. In *US – Section 301 Trade Act*, the WTO dispute settlement panel commented that “[f]or pragmatic reasons the normal usage ... is to start the interpretation from the ordinary meaning of the ‘raw’ text of the relevant treaty provisions and then seek to construe it in its context and in light of the treaty’s object and purpose.”<sup>20</sup> That is a prudent and appropriate approach to interpreting agreement text, including the terms of the USMCA.

33. The word “limit” is defined, most relevantly, as “[t]o confine within limits, to set bounds to ... to bound, restrict ... ”.<sup>21</sup> The word “access” is defined as “[t]he right or opportunity to benefit from or use a system or service.”<sup>22</sup> Taken together, the term “limit access to” therefore means to “confine” or “restrict” to *someone* – “processors” – “the right or opportunity to benefit from or use” *something* – “an allocation”.

34. Article 3.A.2.1 of the USMCA provides that an “allocation mechanism means any system in which access to the tariff rate quota is granted on a basis other than first-come first-served”.<sup>23</sup> The Oxford English Dictionary offers multiple definitions of the word “allocation”. It is defined as “[t]he action or fact of setting aside or designating something as being the special share or responsibility of a particular person, department, etc., or as having a particular purpose; apportionment, allotment. Also: distribution or disposition of something among several

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<sup>20</sup> See *US – Section 301 Trade Act (Panel)*, WT/DS152/R, para. 7.22. See also Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, vol. II, at 219 (Exhibit USA-24) (noting that the Permanent Court of International Justice “emphasized that to adopt an interpretation which ran counter to the clear meaning of the terms would not be to interpret but to revise the treaty”).

<sup>21</sup> Definition of “limit” from Oxford English Dictionary Online, entry 1.a (Exhibit USA-25).

<sup>22</sup> Definition of “access” from Oxford English Dictionary Online, entry 3.b (Exhibit USA-26).

<sup>23</sup> USMCA, Article 3.A.2.1.

recipients, parties, etc., in this way; the way in which this has been done in a particular instance”.<sup>24</sup> The word “allocation” also is defined as “[t]hat which is allocated to a particular person, purpose, etc.; a portion, a share; a quota.”<sup>25</sup> Therefore, based on these dictionary definitions, the term “allocation” can refer either to a procedure for dividing up a quota into portions or to a portion of the quota. Indeed, the term “allocation” is used in both ways in different places in Annex 3-A of the Agriculture Chapter of the USMCA. Thus, the dictionary definition of the term “allocation” does not resolve the interpretive question concerning the ordinary meaning of that term as it is used in the processor clause of Article 3.A.2.11(b). As such, the United States provides further contextual analysis in section V.B below.

35. Finally, the word “processor” is defined in the dictionary as “[a] person who or thing which performs a process or processes something; spec. . . . (b) a food processor”.<sup>26</sup> While the USMCA Agriculture Chapter does not define the term “processor”, it does define related terms that themselves use the word “processor”. For example, Article 3.A.3.1 of the USMCA indicates that “processor” encompasses those who convert raw milk to milk products, manufacture products using milk and milk components.<sup>27</sup> Further, paragraph 8(b) of Section B of Appendix 2 (Tariff Schedule of Canada – (Tariff Rate Quotas)) provides that, when Canada administers its TRQ on Butter and Cream Powder, a declining portion “shall be for the importation of goods in bulk (not for retail sale) used as ingredients for further food processing (secondary manufacturing).” Taken together, the dictionary definition of the word “processor” and the above USMCA provisions suggest that the ordinary meaning of the term “processor” is any person or entity that converts or manufactures more basic materials into more finished or refined products. There is no distinction in the Agreement between additional stages of manufacturing. Therefore, this same definition also encompasses the term “further processors”, as used by Canada in its notices to importers.

### **B. Context Relevant to the Interpretation of “an Allocation to Processors” in Article 3.A.2.11(b) of the USMCA**

36. Turning to contextual elements relevant to the interpretive analysis, the term “allocation”, as discussed in section V.A, could mean either the procedure for dividing up a quota into portions or a portion of the quota. Indeed, in different places in Annex 3-A of the Agriculture

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<sup>24</sup> Definition of “allocation” from Oxford English Dictionary Online, entry 3.a (Exhibit USA-27).

<sup>25</sup> Definition of “allocation” from Oxford English Dictionary Online, entry 3.b (Exhibit USA-27).

<sup>26</sup> Definition of “processor” from Oxford English Dictionary Online (Exhibit USA-28).

<sup>27</sup> USMCA, Article 3.A.3.1 (“assumed processor margin means the estimated cost to a processor of converting raw milk into a specified manufactured wholesale commodity or milk product, which may then be used in the calculation of a milk class price and may also be referred to as a make allowance”; “eligible goods means goods that a processor may manufacture using the milk or milk components provided at a milk class price”; “milk class means an end use for which processors may utilize milk or milk components provided at milk class prices”; and “milk class price means the price, minimum price, or milk component price at which milk or milk components are billed or provided to processors based on their end use”).



Chapter, the term “allocation” is used to mean either the procedure for dividing up a quota<sup>28</sup> or a portion of the quota.<sup>29</sup> Context reveals that the correct interpretation is that the term “an allocation” in the processor clause means a portion of the quota and does not mean the procedure for dividing up the quota into portions.

37. In contrast to instances where the meaning of the term “allocation” is clear from the immediate context of the provision in which the term is used, Article 3.A.2.11(b) is less clear. Article 3.A.2.11(b) provides that:

A Party administering an allocated TRQ shall ensure that: ... (b) unless otherwise agreed by the Parties, it does not allocate any *portion of the quota* to a producer group, condition access to *an allocation* on the purchase of domestic production, or limit access to *an allocation* to processors....<sup>30</sup>

On its face, as it is used here, the term “allocation” in the domestic purchase clause (second clause) and the processor clause (final clause) could potentially mean either the procedure for dividing up the quota into portions or a portion of the quota. That is, one could substitute in either of those alternative phrases and the sentence would still read correctly and coherently. Further contextual analysis, though, reveals that the correct interpretation is that the term “an allocation” in the processor clause means a portion of the quota and does not mean the procedure for dividing up the quota into portions.

38. ***First***, the structure and immediate context in subparagraph (b) suggests “an allocation” means a portion of the TRQ. The first clause requires that a Party “does not allocate any portion of the quota to a producer group.” Here, the verb “to allocate” means to assign a portion of a TRQ. The next two clauses use different verbs (condition, limit) with “access to an allocation”.

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<sup>28</sup> Article 3.A.2.1 of the USMCA provides that an “allocation mechanism means any system in which access to the tariff rate quota is granted on a basis other than first-come first-served”. In this instance, the allocation mechanism is the system by which the allocation is made. Similarly, Article 3.A.2.11(e) of the USMCA provides that “A Party administering an allocated TRQ shall ensure that: ... (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”. The concept of the allocation being “conducted by equitable and transparent methods” suggests that allocation here means the process. The use of “TRQ quantity” is of note as well here, as that term means portions of the total TRQ quantity.

<sup>29</sup> In other instances, the term “allocation” means portion. For example, Article 3.A.2.13 of the USMCA 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*” (italics added). Similarly, 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” (italics added). The references in Article 3.A.2.13 to the “utilization of[] a quota allocation” and in Article 3.A.2.15 to “unused allocations” both strongly suggest that the term “allocation” in these instances refers to a quantity or portion of the TRQ.

<sup>30</sup> Italics added.

In these clauses, the TRQ has been “allocated” – that is, assigned into portions – and the commitment relates to providing “access” to those portions. The most natural reading of the provision is that “an allocation” is the result of “allocat[ing] any portion of the quota.”

39. ***Second***, reading the term “allocation” in the processor clause of Article 3.A.2.11(b) as meaning “portion” would logically reflect an agreement by the Parties that processors may apply for and receive a portion of the TRQ, but may not be granted special access to a portion of the TRQ that has been set aside for them prior to administering the procedure for dividing up the quota into portions assigned to particular quota applicants.

40. Such a reading accords with the Parties’ agreement elsewhere that TRQs be administered in a manner that is “fair” and “equitable”. As a general matter, Article 3.A.2 of the USMCA (Tariff-Rate Quota Administration) provides that TRQs are to be administered in a manner that is “fair”<sup>31</sup> (free from bias)<sup>32</sup> and “equitable”<sup>33</sup> (fair, just, reasonable).<sup>34</sup>

41. Any interpretation of the term “allocation”, as used in the processor clause of Article 3.A.2.11(b), other than the interpretation put forth by the United States would have the effect of allowing Canada to set aside all or almost all of the total quota for processors. A proper interpretation must adopt some limiting principle beyond that the total quota volume not be reserved exclusively for processors. It is not logical, nor fair or equitable, to reach the conclusion that the processor clause allows Canada to reserve up to 99 percent of the total TRQ quantity through a process open only to processors, with just the remaining one percent available to other users. Reserving any portion of the quota, no matter how large, for processors before the procedure for dividing up the quota into portions based on applications is even administered plainly is biased and unduly favorable to processors and against other potential users of the quota.

42. ***Third***, the notion that Canada may set aside a portion of quota exclusively for processors prior to applying the procedure for dividing up the quota into portions based on applications is at odds with the requirement in Article 3.A.2.11(c) that allocations are to be made “to the *maximum* extent possible, in the quantities that the TRQ applicant requests”.<sup>35</sup> A system that, prior to any requests, designates that 85 percent of the allocation will go to one importer group – processors – can hardly be said to ensure that, “to the maximum extent possible”, the allocation is made “in the quantities that the TRQ applicant requests.” It is likely that many TRQ applicants would be denied the quantities requested under such a system. However, if the term “allocation” in the processor clause of Article 3.A.2.11(b) is understood to mean a portion of the quota, then the

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<sup>31</sup> USMCA, Article 3.A.2.4(b).

<sup>32</sup> Definition of “fair” from Oxford English Dictionary Online, entries 14.a and 14.b (Exhibit USA-29).

<sup>33</sup> USMCA, Articles 3.A.2.4(b) and 3.A.2.11(e).

<sup>34</sup> Definition of “equitable” from Oxford English Dictionary Online, entries 1.a and 1.b (Exhibit USA-30).

<sup>35</sup> Italics added.

obligation is to refrain from reserving any portion exclusively for processors. Thus, when the procedure for dividing up the quota into portions is administered based on applications, it would be possible to assign portions of the quota “to the *maximum* extent possible, in the quantities that the TRQ applicant requests”.<sup>36</sup>

43. ***Finally***, Appendix 2 of Canada’s Tariff Schedule in Chapter 2 of the USMCA (National Treatment and Market Access) provides additional contextual support for the U.S. interpretation. Canada’s Tariff Schedule provides that, for certain dairy TRQs, a portion of the quota “shall be” for further food processing. For example, TRQ-CA1 for milk and TRQ-CA2 for cream provide that up to 85 percent of the annual TRQ quantities provided for those TRQs shall be for importation in bulk (not for retail sale) to be processed into dairy products used as ingredients for further food processing.<sup>37</sup> For butter and cream powder, TRQ-CA4 provides that up to 85 percent of the year 1 TRQ quantities shall be for importation in bulk used as ingredients for further food processing, reducing to 50 percent over five years.<sup>38</sup> Many of Canada’s other TRQs contain no similar provision specifying any permissible level of quota that may be designated for specific end uses. These “end use” restrictions provide highly relevant context for the interpretation of the term “an allocation” in the processor clause of Article 3.A.2.11(b).

44. Section A of Appendix 2 of Canada’s Tariff Schedule sets out, as the title suggests, general provisions with respect to Canada’s administration of its TRQs under the USMCA. Paragraph 3 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:

. . . .

(c) 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.<sup>39</sup>

45. Notably, there is *no* mention of end-use restrictions as a part of Canada’s administration of its TRQs. Rather, as subparagraph (c) explains, there is a general rule that Canada shall

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<sup>36</sup> Italics added.

<sup>37</sup> USMCA, Appendix 2: Tariff Schedule of Canada - (Tariff Rate Quotas), Section B (TRQs), paras. 5(b)(i) and 6(b)(i).

<sup>38</sup> USMCA, Appendix 2: Tariff Schedule of Canada - (Tariff Rate Quotas), Section B (TRQs), para. 8(b)(i).

<sup>39</sup> USMCA, Appendix 2: Tariff Schedule of Canada - (Tariff Rate Quotas), Section A (General Provisions), para. 3 (italics added).

allocate its TRQs to “eligible applicants”, which is qualified only by the requirement that such applicants be “active in the Canadian food or agriculture sector”.

46. Article 3.A.2.6(a) of the USMCA further provides that:

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 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 that apply regardless of whether or not the importer utilizes the TRQ when importing the agricultural good.<sup>40</sup>

47. The provisions in Section B in Canada’s Tariff Schedule that permit Canada to apply certain, specified “end-use” restrictions for particular TRQs reflect the agreement of the Parties on the extent to which Canada may deviate from this general prohibition on the introduction of “a new or additional condition, limit, or eligibility requirement on the utilization of a TRQ for importation of an agricultural good, including in relation to ... *permissible end-use of the imported product*”. To the extent there is no carve-out in Section B, Canada is prohibited from imposing an additional condition, limit, or eligibility requirement on its TRQs, either on the end-use or on the eligibility of who can access an allocation.

48. It would be illogical (and contrary to customary rules of interpretation) to read Article 3.A.2.11(b) as permitting a TRQ to be administered in a manner that is not specified in Canada’s Tariff Schedule when doing so would render the carve-outs specified in Canada’s Schedule inutile.<sup>41</sup> That is, nothing would prevent Canada from administering its TRQs for which the Parties have agreed to specified end-use carve-outs in the same manner as those TRQs for which the Parties did not agree to such carve-outs. Canada could always designate portions of any TRQ specifically for processors or processing at its own discretion.

49. Under the correct interpretation of the term “allocation” in the processor clause of Article 3.A.2.11(b), however, the serious problems discussed above could be avoided. Accordingly, the contextual elements above all support the interpretation proposed by the United States, *i.e.*, that

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<sup>40</sup> Italics added.

<sup>41</sup> WTO adjudicators have often noted commentary of the International Law Commission that interpretation should give meaning and effect to the terms employed by the parties, and ought not to reduce phrases or clauses to inutility. *See, e.g., United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, at 23 (adopted 20 May 1996) (*US – Gasoline (AB)*).

the term “an allocation” in the processor clause of Article 3.A.2.11(b) must mean a portion of the quota.

**C. Conclusion: Canada Breaches Article 3.A.2.11(b) of the USMCA, as Properly Interpreted, Because Its Notices to Importers Limit Access to an Allocation to Processors**

50. As discussed above, the processor clause of Article 3.A.2.11(b) of the USMCA provides that “a Party administering an allocated TRQ shall ensure that ... it does not ... limit access to an allocation to processors”. As demonstrated, reading the text in its context reveals that the phrase “not ... limit 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.

51. Canada’s notices to importers provide, for all of its dairy TRQs, that portions of Canada’s TRQs are set aside and reserved for the exclusive use of processors or so-called “further processors”. By administering its dairy TRQs in this manner, Canada has limited access to an allocation to processors, inconsistent with the processor clause of Article 3.A.2.11(b) of the USMCA.

**VI. Canada’s Administration of its Dairy TRQs Is Inconsistent with Article 3.A.2.11(c) of the USMCA Because Canada Does Not Allocate its TRQs, to the Maximum Extent Possible, in the Quantities that the TRQ Applicant Requests**

52. As explained above, all of Canada’s notices to importers reserve a substantial portion of quota exclusively for processors prior to applying the procedure for dividing up the quota into portions assigned to particular TRQ applicants. This is inconsistent with the requirement in Article 3.A.2.11(c) of the USMCA that allocations are to be made “to the *maximum* extent possible, in the quantities that the TRQ applicant requests”.<sup>42</sup>

53. Properly interpreted, Article 3.A.2.11(c) requires Canada to make every attempt to give to each applicant the quota volume that is requested, in a way that is “fair” and “equitable”.<sup>43</sup> This is the correct interpretation that follows from applying customary rules of interpretation of

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<sup>42</sup> Italics added.

<sup>43</sup> See USMCA, Articles 3.A.2.4(b) and 3.A.2.11(e). Article 3.A.2.11(c) of the USMCA should be read in the context of Articles 3.A.2.4(b) and 3.A.2.11(e), which, as discussed in the following section, require a Party to administer its TRQs in a manner that is “fair and equitable”. It is critical to administer the TRQ in a manner that is “fair” and “equitable”, in particular, “if the aggregate TRQ quantity requested by applicants exceeds the quota size”, which is the very situation in which it would be necessary to make an effort to allocate quota volume, “to the maximum extent possible, in the quantities that the TRQ applicant requests” (USMCA, Article 3.A.2.11(c)).

public international law. As explained above, to discern the ordinary meaning of the terms of Article 3.A.2.11(c) in their context, it is appropriate to start with dictionary definitions.<sup>44</sup>

54. The word “maximum” is defined, most relevantly, as “[t]he highest possible magnitude or quantity of something which is attained, attainable, or customary; an upper limit of magnitude or quantity.”<sup>45</sup> The word “extent” as used in the phrase “to a certain, great, etc., extent” is defined as “the limit to which anything extends”.<sup>46</sup> The word “possible” is defined as “[t]hat is capable of being; that may or can exist, be done, or happen (in general, or in given or assumed conditions or circumstances); that is in a person’s power, that a person can do, exert, use, etc.”<sup>47</sup> Taken together, the term “maximum extent possible” therefore 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.

55. It is possible that, for a given period, TRQ applicants will make requests for quota volume that, taken together, exceed the total TRQ volume available. Indeed, this possibility is expressly contemplated by Article 3.A.2.11(e) of the USMCA, which provides 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”. When administering an “allocation mechanism”, as opposed to administering the TRQ on a first-come-first-served basis,<sup>48</sup> it is then necessary to divide up the total quota volume among the TRQ applicants, and all or some TRQ applicants necessarily will not get the quantity of quota that was requested. Canada’s obligation under 3.A.2.11(c) is to divide up the total TRQ volume amongst quota applicants in a manner that is “fair” and “equitable” (as discussed in the following section) and that, “to the maximum extent possible”, grants to TRQ applicants quota volume “in the quantities that the TRQ applicant requests”. The dictionary definitions above and the superlative nature of the terms used – “maximum extent possible” – indicate 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.

56. Canada, however, fails to put in the “maximum” amount of effort “possible” to achieve this aim. Rather, Canada’s notices to importers create a system that, prior to any requests, designates that 85 or 90 percent of the allocation will go to one segment of TRQ applicants alone, processors (including so-called “further processors”). All remaining TRQ applicants – distributors – are left to apply for quota volume from just the remaining 10 to 15 percent of quota volume that is made available to them. This creates the possibility that processors will have ample quota volume available to them and their requests for quota volume will be granted in the quantities requested, while other TRQ applicants likely will not be granted quota volume in the

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<sup>44</sup> See, e.g., *US – Section 301 Trade Act (Panel)*, WT/DS152/R, para. 7.22.

<sup>45</sup> Definition of “maximum” from Oxford English Dictionary Online, entry 3 (Exhibit USA-32).

<sup>46</sup> Definition of “extent” from Oxford English Dictionary Online, entry 4.c (Exhibit USA-33).

<sup>47</sup> Definition of “possible” from Oxford English Dictionary Online, entry 1 (Exhibit USA-34).

<sup>48</sup> USMCA, Article 3.A.2.1.

quantities requested. In this way, Canada fails to ensure that, “to the maximum extent possible”, the allocation is made “in the quantities that the TRQ applicant requests.”

57. Reserving such a large pool of the quota for just processors and “further processors” would dissuade requests and potentially deny access to TRQ applicants that might otherwise request higher amounts of quota volume. Furthermore, the remaining quota volumes set aside for distributors may not allow for quota volume to be granted in quantities that are commercially viable. Moreover, Canada’s set-asides to two importer groups deny any opportunity for any other potential TRQ applicants to access quota volume. Certainly, these outcomes do not reflect a system that is designed to ensure that, “to the maximum extent possible”, allocations are made “in the quantities that the TRQ applicant requests.”

58. Canada could do far more to achieve the aim of making allocations in the quantities requested, in particular, by not setting aside and reserving a portion of the total quota volume for the exclusive use of processors.

59. For these reasons, Canada’s administration of its dairy TRQs is inconsistent with Article 3.A.2.11(c) of the USMCA because it prevents Canada from allocating its TRQs, to the maximum extent possible, in the quantities that the TRQ applicant requests.

## **VII. Canada’s Administration of its Dairy TRQs Is Inconsistent with Articles 3.A.2.4(b) and 3.A.2.11(e) of the USMCA Because it is Not “Fair” and “Equitable”**

60. As explained above, Canada’s notices to importers provide that up to 90 percent of the quota for all dairy products is reserved exclusively for processors and so-called “further processors”. Through the processor restrictions, Canada prevents access to the reserved portions by other importer groups, such as retailers. Such set-asides conflict with Canada’s obligation to provide “fair” and “equitable” treatment in the administration of its TRQs.

61. Article 3.A.2.4(b) of the USMCA provides: “Each Party shall ensure that its procedures for administering its TRQs: ... (b) are fair and equitable”. Article 3.A.2.11(e) of the USMCA further provides that “A Party administering an allocated TRQ shall ensure that: ... (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[]”.<sup>49</sup> Read together, these provisions require Canada to administer its TRQs in a “fair” and “equitable” manner that would result in eligible applicants receiving the amount of the TRQ that they request,<sup>50</sup> or a portion pursuant to a fair and equitable procedure or method.

62. The ordinary meanings of the terms “fair” and “equitable” read individually and in the context of the above provisions make clear that Canada’s dairy TRQ administration, which

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<sup>49</sup> Italics added.

<sup>50</sup> See USMCA, Article 3.A.2.11(c). See also, *supra*, section VI.

heavily favors processors and further processors, is not consistent with Articles 3.A.2.4(b) and 3.A.2.11(e) of the USMCA.

63. 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”.<sup>51</sup> 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”.<sup>52</sup>

64. Accordingly, in the context of Article 3.A.2.4(b), it is the “procedures for administering” Canada’s TRQs that must be “fair and equitable”, *i.e.*, “free from bias” and not “unduly favourable or adverse to anyone”. By creating a system where, prior to any applications, Canada sets aside a substantial portion of the total quota exclusively for processors, thereby restricting the eligibility of other potential users of the quota to even apply for an allocation, Canada has not created procedures that align with Article 3.A.2.4(b). Nor would it be fair or equitable for Canada’s administration of the TRQ to be formally open to all, but in practice quota volume is assigned exclusively to processors.

65. Article 3.A.2.11(e) also uses the term “equitable”. In this context, the term is used to qualify that the methods for allocation to eligible applicants be “fair, just, reasonable”. Given that the definition of “equitable” uses the term “fair”, those methods must also be “free from bias” and not “unduly favourable or adverse to anyone”. Canada’s reserving of a substantial portion of the total quota for the exclusive use of processors, to the detriment of other potential quota users, such as retailers, is not compatible with the requirement in Article 3.A.2.11(e) that the methods for administering the TRQ be in a manner that is “free from bias”, “equitable”, “provid[es] an equal chance of success to all”, is not “unduly favourable or adverse to anyone”, and is “fair, just, [and] reasonable”. Article 3.A.2.11(e) indicates that the “allocation” of a TRQ is part of “administering” the TRQ. Reserving a large portion of the quota for processors before applying the procedures for dividing up the quota between applicants is, by design, not providing an equal chance to all. Rather, it is biased towards processors and unduly adverse to other potential users of the quota.

66. For these reasons, Canada has acted inconsistently with Articles 3.A.2.4(b) and 3.A.2.11(e) of the USMCA.

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<sup>51</sup> Definition of “fair” from Oxford English Dictionary Online, entries 14.a and 14.b (Exhibit USA-29).

<sup>52</sup> Definition of “equitable” from Oxford English Dictionary Online, entries 1.a and 1.b (Exhibit USA-30).



**VIII. By Reserving Portions of the Quota for Processors, Canada Has Introduced an “Additional Condition, Limit or Eligibility Requirement on the Utilization of a TRQ”, Inconsistent with Article 3.A.2.6(a) of the USMCA Read Together with Section A, Paragraph 3(c), of Canada’s Tariff Schedule**

67. Canada’s administration of its TRQs for dairy products conditions access to a quota allocation based on the type of importer that is applying for an allocation.<sup>53</sup> In doing so, Canada excludes other eligible applicants from having access to the reserved portions of the quota. However, such a condition on access to an allocation of the quota is impermissible under Article 3.A.2.6(a) of the USMCA read together with Section A, paragraph 3(c) of Canada’s Tariff Schedule.

68. Article 3.A.2.6(a) of the USMCA provides that:

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 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 that apply regardless of whether or not the importer utilizes the TRQ when importing the agricultural good.

69. Canada’s allocation of portions of TRQs to processors (including further processors) “introduce[s] a new or additional condition, limit, or eligibility requirement on the utilization of a TRQ” – namely, one *must be* a processor to receive an allocation from the reserved pool within the quota and therefore to utilize the TRQ. Further, this requirement is “beyond those set out in its Schedule to Annex 2-B.” While Annex 2-B, Section B, contains certain carve-outs relating to the “end-use” of a product imported under an allocation, it contains no condition, limit, or eligibility requirement relating to status as a “processor”. Accordingly, Canada is prohibited under Article 3.A.2.6(a) from imposing a “new or additional condition, limit, or eligibility requirement on the utilization” of its TRQs through limiting access to TRQ allocations to processors (including further processors).

70. Furthermore, Canada is prohibited from imposing a new or additional condition, limit, or eligibility requirement on the utilization of its TRQs through prohibiting access to the TRQs by a specific applicant group. Nearly all of Canada’s notices explicitly provide that “[r]etailers are

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<sup>53</sup> In all of its notices, Canada allocates 100 percent of each of its TRQs to some combination of the following groups: processors, “further processors”, and distributors.

**not** eligible to apply for an allocation.”<sup>54</sup> Thus, Canada has imposed a “not retailer” condition, limit, or eligibility requirement contrary to Article 3.A.2.6(a).

71. This conclusion is further confirmed by Section A of Appendix 2 of Canada’s Tariff Schedule, which sets out general provisions with respect to Canada’s administration of its TRQs under the USMCA. Specifically, paragraph 3 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:

(a) Canada shall administer its TRQs through an import licensing system.

(b) For the purposes of this Appendix, **quota year** means the 12-month period over which a TRQ applies and is allocated. “Quota year 1” has the meaning assigned to “year 1” in paragraph 6 of the Tariff Schedule of Canada - General Notes.

(c) 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.<sup>55</sup>

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<sup>54</sup> Bold in original. CUSMA: Milk TRQ – Serial No. 1015, dated June 15, 2020 (Exhibit USA-1); CUSMA: Milk TRQ – Serial No. 1049, dated May 1, 2021 (Exhibit USA-2); CUSMA: Cream TRQ – Serial No. 1016, dated June 15, 2020 (Exhibit USA-3); CUSMA: Cream TRQ – Serial No. 1042, dated May 1, 2021 (Exhibit USA-4); CUSMA: Skim Milk Powder TRQ – Serial No. 1017, dated June 15, 2020 (Exhibit USA-5); CUSMA: Skim Milk Powder TRQ – Serial No. 1053, dated May 1, 2021 (Exhibit USA-6); CUSMA: Butter and Cream Powder TRQ – Serial No. 1018, dated June 15, 2020 (Exhibit USA-7); CUSMA: Butter and Cream Powder TRQ – Serial No. 1040, dated May 1, 2021 (Exhibit USA-8); CUSMA: Cheeses of All Types TRQ – Serial No. 1020, dated June 15, 2020 (Exhibit USA-11); CUSMA: Milk Powders TRQ – Serial No. 1021, dated June 15, 2020 (Exhibit USA-12); CUSMA: Milk Powders TRQ – Serial No. 1051, dated May 1, 2021 (Exhibit USA-13); CUSMA: Concentrated or Condensed Milk TRQ – Serial No. 1022, dated June 15, 2020 (Exhibit USA-14); CUSMA: Yogurt and Buttermilk TRQ – Serial No. 1023, dated June 15, 2020 (Exhibit USA-15); CUSMA: Powdered Buttermilk TRQ – Serial No. 1024, dated June 15, 2020 (Exhibit USA-16); CUSMA: Whey Powder TRQ – Serial No. 1025, dated June 15, 2020 (Exhibit USA-17); CUSMA: Whey Powder TRQ – Serial No. 1045, dated May 1, 2021 (Exhibit USA-18); CUSMA: Products Consisting of Natural Milk Constituents TRQ – Serial No. 1026, dated June 15, 2020 (Exhibit USA-19); CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1027, dated June 15, 2020 (Exhibit USA-20); CUSMA: Other Dairy TRQ – Serial No. 1028, dated June 15, 2020 (Exhibit USA-21).

<sup>55</sup> USMCA, Chapter 2, Appendix 2: Tariff Schedule of Canada - (Tariff Rate Quotas), Section A (General Provisions), para. 3 (bold in original; italics added).

72. Subparagraph (c) establishes that Canada “shall allocate” its TRQs to “eligible applicants”, and an eligible applicant is “an applicant active in the Canadian food or agriculture sector”. Consistent with the prohibition in Article 3.A.2.6(a) on eligibility requirements, subparagraph (c) does not permit a limitation on an allocation only to processors because this excludes “eligible applicants” to whom Canada “shall allocate” its TRQs.

73. For these reasons, by issuing the notices reserving portions of the TRQs for processors, and by prohibiting a specific group – retailers – from accessing the quota, Canada has acted inconsistently with Article 3.A.2.6(a) of the USMCA, read together with Canada’s Schedule to Annex 2-B, Appendix 2, Section A, paragraph 3(c).

## **IX. Conclusion**

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