

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

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

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

**March 20, 2023**

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF ABBREVIATIONS ..... iv

TABLE OF EXHIBITS ..... v

I. Introduction..... 1

II. Procedural Background..... 9

III. Factual Background ..... 9

IV. Terms of Reference, Rules of Interpretation, and Standard of Review ..... 12

V. By Excluding Retailers, Food Service Operators, and Others Entities from Eligibility for Canada’s USMCA Dairy TRQs, Canada’s Dairy TRQ Allocation Measures Breach Canada’s USMCA Commitments ..... 13

    A. Description of Canada’s Dairy TRQ Allocation Measures’ Exclusion of Retailers, Food Service Operators, and Other Entities from Eligibility for Canada’s USMCA Dairy TRQs..... 14

    B. Excluding Retailers, Food Service Operators, and Other Entities from Eligibility for Canada’s USMCA Dairy TRQs Is Inconsistent with Section A, Paragraph 3(c), of Canada’s USMCA TRQ Appendix..... 15

    C. Excluding Retailers, Food Service Operators, and Other Entities from Eligibility for Canada’s USMCA Dairy TRQs Is Inconsistent with Article 3.A.2.6(a) of the USMCA..... 21

VI. 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 ..... 25

    A. Description of Canada’s Dairy TRQ Allocation Measures’ Use of a Market Share Basis to Allocate Canada’s USMCA Dairy TRQs and Their Application of Different Criteria to Different Types of Eligible Applicants..... 26

    B. Using a Market Share Basis to Allocate Canada’s USMCA Dairy TRQs and Applying Different Criteria to Different Types of Eligible Applicants Is Inconsistent with the Processor Clause of Article 3.A.2.11(b) of the USMCA ..... 29

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1.	The Processor Clause of Article 3.A.2.11(b) of the USMCA Prohibits Reserving a Portion of the TRQ for the Exclusive Use of Processors and Further Processors.....	29
2.	Canada’s Dairy TRQ Allocation Measures Reserve a Portion of the TRQ for the Exclusive Use of Processors and Further Processors.....	33
C.	Using a Market Share Basis to Allocate Canada’s USMCA Dairy TRQs and Applying Different Criteria to Different Types of Eligible Applicants Is Inconsistent with Article 3.A.2.4(b) of the USMCA .....	38
D.	Using a Market Share Basis to Allocate Canada’s USMCA Dairy TRQs and Applying Different Criteria to Different Types of Eligible Applicants Is Inconsistent with Article 3.A.2.11(e) of the USMCA .....	42
E.	Using a Market Share Basis to Allocate Canada’s USMCA Dairy TRQs and Applying Different Criteria to Different Types of Eligible Applicants Is Inconsistent with the First Clause of Article 3.A.2.11(c) of the USMCA (“Ensure that Each Allocation is Made in Commercially Viable Shipping Quantities”).....	43
F.	Using a Market Share Basis to Allocate Canada’s USMCA Dairy TRQs and Applying Different Criteria to Different Types of Eligible Applicants Is Inconsistent with 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”).....	46
G.	Using a Market Share Basis to Allocate Canada’s USMCA Dairy TRQs Is Inconsistent with Article 3.A.2.10 of the USMCA.....	47
H.	Using a Market Share Basis to Allocate Canada’s USMCA Dairy TRQs and Applying Different Criteria to Different Types of Eligible Applicants Is Inconsistent with Article 3.A.2.6(a) of the USMCA .....	52
VII.	By Imposing 12-Month Activity Requirements for USMCA Dairy TRQ Applicants and Recipients, Canada’s Dairy TRQ Allocation Measures Breach Canada’s USMCA Commitments.....	54
A.	Description of Canada’s Dairy TRQ Allocation Measures’ Imposition of 12-Month Activity Requirements on USMCA Dairy TRQ Applicants and Recipients.....	55
B.	Imposing 12-Month Activity Requirements for Dairy TRQ Applicants and Recipients Is Inconsistent with Section A, Paragraph 3(c), of Canada’s USMCA TRQ Appendix.....	56

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C.	Imposing 12-Month Activity Requirements for Dairy TRQ Applicants and Recipients Is Inconsistent with Article 3.A.2.6(a) of the USMCA .....	58
D.	Imposing an Historical 12-Month Activity Requirement for Dairy TRQ Applicants Is Inconsistent with Article 3.A.2.10 of the USMCA .....	60
VIII.	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.....	62
A.	Description of Canada’s Mechanism for the Return and Reallocation of Unused USMCA Dairy TRQ Allocations.....	63
B.	Canada’s Mechanism for the Return and Reallocation of Unused USMCA Dairy TRQ Allocations Is Inconsistent with Article 3.A.2.15 of the USMCA .....	64
C.	Canada’s Mechanism for the Return and Reallocation of Unused USMCA Dairy TRQ Allocations Is Inconsistent with Article 3.A.2.6 of the USMCA .....	72
IX.	Conclusion .....	75

### TABLE OF ABBREVIATIONS

Abbreviation	Definition
Agreement or USMCA or CUSMA	<i>United States-Mexico-Canada Agreement</i>
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)
<i>Canada – Dairy TRQs I</i>	Canada – Dairy TRQ Allocation Measures (CDA-USA-2021-31-01)
<i>Canada – Dairy TRQs I (Panel)</i>	Canada – Dairy TRQ Allocation Measures (CDA-USA-2021-31-01), Final Panel Report, December 20, 2021
CETA	<i>Canada-European Union Comprehensive Economic and Trade Agreement</i>
CPTPP	<i>Comprehensive and Progressive Agreement for Trans-Pacific Partnership</i>
Vienna Convention	<i>Vienna Convention on the Law of Treaties (1969)</i>
WTO	World Trade Organization

**TABLE OF EXHIBITS**

<b>Exhibit No.</b>	<b>Description</b>
USA-1	Notice to Importers, CUSMA: Cream TRQ – Serial No. 1071, dated May 16, 2022
USA-2	Notice to Importers, CUSMA: Butter and Cream Powder TRQ – Serial No. 1073, dated May 16, 2022
USA-3	Notice to Importers, CUSMA: Milk TRQ – Serial No. 1075, dated May 16, 2022
USA-4	Notice to Importers, CUSMA: Milk Powders TRQ – Serial No. 1076, dated May 16, 2022
USA-5	Notice to Importers, CUSMA: Skim Milk Powder TRQ – Serial No. 1077, dated May 16, 2022
USA-6	Notice to Importers, CUSMA: Whey Powder TRQ – Serial No. 1078, dated May 16, 2022
USA-7	Notice to Importers, CUSMA: Cheeses of All Types TRQ – Serial No. 1079, dated May 16, 2022
USA-8	Notice to Importers, CUSMA: Industrial Cheeses TRQ – Serial No. 1080, dated May 16, 2022
USA-9	Notice to Importers, CUSMA: Concentrated or Condensed Milk TRQ – Serial No. 1081, dated May 16, 2022
USA-10	Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022
USA-11	Notice to Importers, CUSMA: Other Dairy TRQ – Serial No. 1083, dated May 16, 2022
USA-12	Notice to Importers, CUSMA: Powdered Buttermilk TRQ – Serial No. 1084, dated May 16, 2022
USA-13	Notice to Importers, CUSMA: Products Consisting of Natural Milk Constituents TRQ – Serial No. 1085, dated May 16, 2022
USA-14	Notice to Importers, CUSMA: Yogurt and Buttermilk TRQ – Serial No. 1086, dated May 16, 2022

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

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



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

Exhibit No.	Description
USA-46	Statistics Canada, “Table 32-10-0113-01 Milk production and utilization”, accessed October 22, 2022 <a href="https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3210011301">https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3210011301</a>
USA-47	Statistics Canada, “Table 32-10-0053-01 Supply and disposition of food in Canada (x 1,000)”, modified February 28, 2023 <a href="https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3210005301">https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3210005301</a>
USA-48	Statistics Canada, “Table 32-10-0112-01 Production of selected dairy products”, release date January 26, 2023 <a href="https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3210011201">https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3210011201</a>
USA-49	Tomson, Bill, “Dairy on edge over Canada TRQ dispute”, Agri-Pulse, February 23, 2022 <a href="https://www.agri-pulse.com/articles/17248-dairy-on-edge-over-canada-trq-dispute">https://www.agri-pulse.com/articles/17248-dairy-on-edge-over-canada-trq-dispute</a>
USA-50	U.S. Department of Agriculture, Foreign Agriculture Service, Global Agricultural Information Network, “Canada, Retail Foods, Retail Sector Overview – 2018”, June 26, 2018 <a href="https://apps.fas.usda.gov/newgainapi/api/report/downloadreportbyfilename?filename=Retail%20Foods_Ottawa_Canada_6-26-2018.pdf">https://apps.fas.usda.gov/newgainapi/api/report/downloadreportbyfilename?filename=Retail%20Foods_Ottawa_Canada_6-26-2018.pdf</a>
USA-51 <b>(CONFIDENTIAL INFORMATION)</b>	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 <a href="https://onlinelibrary.wiley.com/doi/10.1111/cjag.12240">https://onlinelibrary.wiley.com/doi/10.1111/cjag.12240</a> <b>(CONFIDENTIAL IN ITS ENTIRETY – COPYRIGHTED MATERIAL)</b>
USA-52 <b>(CONFIDENTIAL INFORMATION)</b>	McGrath, Shawn, “Grocery Wholesaling in Canada”, IBISWorld Inc., Industry Report 41311CA, September 2021 <b>(CONFIDENTIAL IN ITS ENTIRETY – COPYRIGHTED MATERIAL)</b>
USA-53	Saputo, “Corporate Overview” web page <a href="https://www.saputo.com/en/our-company">https://www.saputo.com/en/our-company</a>
USA-54	Saputo, Annual Report 2022 (available at <a href="https://www.saputo.com/en/investors/shareholder-reports/2022">https://www.saputo.com/en/investors/shareholder-reports/2022</a> )
USA-55	Agropur, “Food and Nutrition Solutions” web page <a href="https://www.agropur.com/en-us/food-and-nutrition-solutions">https://www.agropur.com/en-us/food-and-nutrition-solutions</a> ) and

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

<b>Exhibit No.</b>	<b>Description</b>
USA-69	CPTPP/CUSMA Yogurt and Buttermilk TRQ Allocation, Application for the Period of January 1 to December 31, 2023
USA-70	Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, vol. II
USA-71 <b>(CONFIDENTIAL INFORMATION)</b>	Kanda, Samuel, “Warehouse Clubs & Supercentres in Canada”, IBISWorld Inc., Industry Report 45291CA, December 2020 <b>(CONFIDENTIAL IN ITS ENTIRETY – COPYRIGHTED MATERIAL)</b>
USA-72	Definition of “access” from Oxford English Dictionary Online
USA-73	Definition of “active” from Oxford English Dictionary Online
USA-74	Definition of “administer” from Oxford English Dictionary Online
USA-75	Definition of “agricultural” from Oxford English Dictionary Online
USA-76	Definition of “agriculture” from Oxford English Dictionary Online
USA-77	Definition of “allocate” from Oxford English Dictionary Online
USA-78	Definition of “allocation” from Oxford English Dictionary Online
USA-79	Definition of “allow” from Oxford English Dictionary Online
USA-80	Definition of “condition” from Oxford English Dictionary Online
USA-81	Definition of “criterion” from Oxford English Dictionary Online
USA-82	Definition of “discriminate” from Oxford English Dictionary Online
USA-83	Definition of “eligibility” from Oxford English Dictionary Online
USA-84	Definition of “eligible” from Oxford English Dictionary Online
USA-85	Definition of “equitable” from Oxford English Dictionary Online
USA-86	Definition of “extent” from Oxford English Dictionary Online
USA-87	Definition of “fair” from Oxford English Dictionary Online

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

Exhibit No.	Description
	End: 31-Jul-22”, July 31, 2022 ( <a href="https://www.eics-scei.gc.ca/report-rapport/APRMT61C-D-DY-22.htm">https://www.eics-scei.gc.ca/report-rapport/APRMT61C-D-DY-22.htm</a> )
USA-108	Grocery Business, “Lactalis Canada launches direct-to-consumer e-comm platforms for dairy, cheese”, September 1, 2021 ( <a href="https://www.grocerybusiness.ca/news/lactalics-canada-launches-direct-to-consumer-e-comm-platforms-for-dairy-cheese">https://www.grocerybusiness.ca/news/lactalics-canada-launches-direct-to-consumer-e-comm-platforms-for-dairy-cheese</a> )

## I. Introduction

1. For the second time since the *United States-Mexico-Canada Agreement* (“USMCA” or “Agreement”) entered into force on July 1, 2020, the United States is challenging Canada’s USMCA dairy tariff-rate quota (“TRQ”) allocation measures. As demonstrated in this U.S. initial written submission, numerous elements of Canada’s dairy TRQ allocation measures remain fundamentally inconsistent with Canada’s USMCA obligations.

2. The USMCA permits Canada to maintain TRQs – a preferential tariff rate on a specified quantity of goods – on a variety of products,<sup>1</sup> and Canada does maintain USMCA TRQs on 14 different types of dairy products.<sup>2</sup> While Canada has the right under the USMCA to maintain these TRQs, there are a variety of provisions in the USMCA that impose requirements that Canada’s dairy TRQ allocation measures must meet. Since the USMCA entered into force, though, Canada’s dairy TRQ allocation measures, and Canada’s administration of those measures, have been inconsistent with the terms of the Agreement.

3. The United States first raised concerns about Canada’s dairy TRQ allocation measures prior to the USMCA’s entry into force. Following months of informal discussions with Canada about those concerns, the United States requested dispute settlement consultations with Canada in December 2020. When consultations failed to resolve the matter, the United States established a dispute settlement panel (*Canada – Dairy TRQs I*). The panel in *Canada – Dairy TRQs I* found that Canada’s USMCA dairy TRQ allocation measures were inconsistent with the USMCA.<sup>3</sup>

4. That first USMCA dispute primarily concerned Canada’s use of formal “pools” of dairy TRQ allocation that Canada reserved exclusively for Canadian dairy processors. The *Canada – Dairy TRQs I* panel agreed with the United States that Canada’s use of such processor pools is inconsistent with the processor clause of Article 3.A.2.11(b) of the USMCA, which requires that “[a] Party administering an allocated TRQ shall ensure that ... it does not ... limit access to an allocation to processors”. The panel reasoned that “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.”<sup>4</sup> The panel concluded that, “[i]n Canada’s own official words, in 14 separate Notices to Importers, Canada

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<sup>1</sup> See USMCA, Chapter 2 (National Treatment and Market Access for Goods), Appendix 2: Tariff Schedule of Canada – (Tariff Rate Quotas) (“Canada’s USMCA TRQ Appendix”), Sections A and B.

<sup>2</sup> 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. See USMCA, Canada’s USMCA TRQ Appendix, Paragraphs 5-18(c).

<sup>3</sup> See 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. 167 (Exhibit USA-26).

<sup>4</sup> *Canada – Dairy TRQs I (Panel)*, para. 163 (Exhibit USA-26).

has *allocated* 85% or more of the amounts in each instance to processors. For each TRQ, Canada has limited access to an allocation to processors, which is inconsistent with the [Agreement].”<sup>5</sup>

5. The United States also advanced other claims and arguments in *Canada – Dairy TRQs I*, including that Canada’s dairy TRQ allocation measures were inconsistent with:

- Canada’s commitment in Article 3.A.2.11(c) of the USMCA to ensure that, in administering an allocated TRQ, “each allocation is made . . . to the maximum extent possible, in the quantities that the TRQ applicant requests”;
- Canada’s commitment in Article 3.A.2.4(b) of the USMCA to “ensure that its procedures for administering its TRQs . . . are fair and equitable”;
- Canada’s commitment in Article 3.A.2.11(e) of the USMCA to ensure that, in administering an allocated TRQ, “allocation to eligible applicants shall be conducted by equitable and transparent methods”; and
- Canada’s commitment in Article 3.A.2.6(a) of the USMCA to not “introduce a new or additional condition, limit, or eligibility requirement on the utilization of a TRQ . . . beyond those set out in [Canada’s] Schedule to Annex 2-B”, including Canada’s exclusion of retailers from eligibility to apply for USMCA dairy TRQ allocations.<sup>6</sup>

6. The *Canada – Dairy TRQs I* panel determined that, for reasons of judicial economy, it was not necessary to address those other U.S. claims and arguments, reasoning that, “[f]or purposes of this proceeding, it is enough that Canada’s current practice of reserving TRQ pools for processors is inconsistent with Article 3.A.2.11(b).”<sup>7</sup> While that exercise of judicial economy may have seemed prudent at the time, Canada unfortunately reacted by doing only the bare minimum in response to the panel’s limited adverse findings. Consequently, the United States has been compelled once again to establish a dispute settlement panel, and we are advancing claims under many of the same USMCA provisions concerning Canada’s current USMCA dairy TRQ allocation measures.

7. In the dairy TRQ allocation measures that Canada finalized in May 2022, which are the subject of this dispute settlement proceeding, Canada responded to the adverse panel findings in *Canada – Dairy TRQs I* by eliminating the formal processor pools,<sup>8</sup> but that did not bring

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<sup>5</sup> *Canada – Dairy TRQs I (Panel)*, para. 163 (Exhibit USA-26).

<sup>6</sup> *See Canada – Dairy TRQs I (Panel)*, para. 164 (Exhibit USA-26).

<sup>7</sup> *Canada – Dairy TRQs I (Panel)*, para. 165 (Exhibit USA-26).

<sup>8</sup> *See* 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 (Exhibit USA-17). *See also* Public Consultations: CUSMA Dairy Tariff Rate Quotas (TRQs) Panel Report Implementation - Proposed Allocation and Administration Policy Changes, published on March 1, 2022 (Exhibit USA-16).



Canada’s measures into compliance with its USMCA obligations. Far from it. Canada simultaneously made numerous other changes to its USMCA dairy TRQ allocation measures, and Canada’s measures still are inconsistent with a number of USMCA provisions.

8. In this dispute, the United States challenges four elements of Canada’s dairy TRQ allocation measures, advancing multiple legal claims concerning each of the four elements.

9. ***The first element of Canada’s dairy TRQ allocation measures*** that the United States challenges is Canada’s exclusion of retailers, food service operators, and other entities from eligibility for Canada’s USMCA dairy TRQs.<sup>9</sup> 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. 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.

10. 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.

11. ***The second element of Canada’s dairy TRQ allocation measures*** that the United States challenges 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.<sup>10</sup> While Canada’s approach may have a veneer of objectivity given its mathematical nature, that obscures the reality that Canada’s dairy TRQ allocation measures heavily favor processors over distributors and other potential TRQ applicants. In effect, Canada has recreated the processor “pools” that were found to breach the USMCA in *Canada – Dairy TRQs I*. Ultimately, Canada’s use of a

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<sup>9</sup> See *infra*, section V.

<sup>10</sup> See *infra*, section VI.

simplistic mathematical formula to allocate its USMCA dairy TRQs is wholly insufficient to meet the requirements in numerous provisions of the USMCA.

12. 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.<sup>11</sup> 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. Under Canada’s dairy TRQ allocation measures, Canadian dairy processors can count as market activity every kilogram of volume they produce, while distributors may count as market activity only some of the volume that they sell; and distributors can only sell dairy products that they can first buy. Processors have the ability to bypass distributors, selling for export and selling directly to retailers and other customers that are not eligible for USMCA dairy TRQ allocations, thus limiting the amount of market share available to distributors, and consequently establishing a pool of dairy TRQ allocation that distributors cannot access. While Canada eliminated the formal processor pools following *Canada – Dairy TRQs I*, Canada has effectively deputized processors to create and determine for themselves the size of their own pools of TRQ allocations by choosing to whom they do and do not sell their products.

13. 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. Processors necessarily produce substantially greater volumes of dairy products than distributors sell, since processors have the ability to bypass distributors and sell directly to retailers and other customers. Accordingly, Canada’s simple application of a mathematical market share calculation unavoidably will result in processors receiving far greater volumes of TRQ allocations than distributors. Canada’s dairy TRQ allocation measures further favor processors by requiring distributors to exclude from the market activity calculation sales to other distributors (a common commercial practice), as well as sales to related parties and retail sales to final consumers (transactions that processors, in effect, are not required to exclude, because processors count the total volume of the dairy product that they manufacture, regardless of the purchaser to whom the processor sells the product). Also, processor-to-processor transfers could result in the same volume of a dairy product being counted two or more times by different processors, but such transfers are not excluded from the calculation of processors’ market activity, while distributor-to-distributor sales are excluded from the calculation of distributors’ market activity. The plain lack of even-handedness in the treatment of processors and

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<sup>11</sup> *Canada – Dairy TRQs I (Panel)*, para. 163.

distributors under Canada’s dairy TRQ allocation measures is inconsistent with the requirements of Articles 3.A.2.4(b) and 3.A.2.11(e).

14. 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.

15. 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 any request, 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.

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

17. 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).

18. ***The third element of Canada’s dairy TRQ allocation measures*** that the United States challenges 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”.<sup>12</sup> 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.

19. 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.

20. Also, 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.

21. ***The fourth element of Canada’s dairy TRQ allocation measures*** that the United States challenges is the mechanism for the return and reallocation of unused USMCA dairy TRQ allocations in Canada’s dairy TRQ allocation measures. 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 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

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<sup>12</sup> USMCA, Canada’s USMCA TRQ Appendix, Section A, Paragraph 3(c).

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 – earlier return date, clearer reallocation procedures, different transfer rules, stricter under-utilization penalties – 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.

22. Additionally, 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.

23. The stark reality is that, after losing the first USMCA dispute, Canada modified certain measures but failed to bring its dairy TRQ allocation measures into compliance with the USMCA. The true practical effect of the changes that Canada made to its USMCA dairy TRQ allocation measures in May 2022 is unknown, because Canada does not publicly release data on allocations to different types of TRQ applicants. While this information is not necessary for the U.S. claims, for additional perspective, the United States estimates that Canada’s revised dairy TRQ allocation measures have preserved for processors exclusive access to very large portions of the USMCA dairy TRQs, and it is possible 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.<sup>13</sup> For seven USMCA dairy TRQs for which there is sufficient public information to perform an analysis, the United States estimates that the allocations that would 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;

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<sup>13</sup> 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).

- (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 under Canada’s new measures, 79 percent to 91 percent of the allocations could go to processors.<sup>14</sup>

24. As noted above, Canada does not publicly release data showing the volumes or percentages of its USMCA dairy TRQ allocations that are allocated to different applicant types. Given this lack of transparency, the United States does not know the actual results of Canada’s application of its new USMCA dairy TRQ allocation measures for the USMCA dairy TRQs that were allocated for the dairy year beginning on August 1, 2022, and for the calendar year beginning on January 1, 2023. Canada, of course, is in possession of the data and could provide that information to the panel if Canada does not agree with the U.S. estimates.

25. The effect of Canada’s continuing breach of the USMCA is that the U.S. dairy industry is being denied the full market access to which Canada committed in the Agreement. Canada excludes eligible TRQ applicants, like retailers and food service operators, from applying for and receiving TRQ allocations. Canada uses a market share approach that heavily skews allocations in favor of Canadian processors and to the detriment of distributors. Canada imposes 12-month

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<sup>14</sup> 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).

activity requirements that exclude TRQ applicants that are eligible under the USMCA. And Canada has adopted a return and reallocation policy that does not facilitate the USMCA dairy TRQs being filled. All of these breaches work together to prevent importers from using quota to import higher-value dairy products from the United States for retail sale in Canada, which harms U.S. suppliers that seek to sell products directly to the Canadian retail market, and could result in significant underutilization of the quotas.

26. Accordingly, for the reasons given in this U.S. initial written submission, Canada's dairy TRQ allocation measures are inconsistent with the terms of the USMCA.

## **II. Procedural Background**

27. On May 25, 2022, the United States requested consultations with Canada pursuant to Articles 31.2 and 31.4 of the USMCA, with regard to certain measures of Canada through which Canada allocates its dairy TRQs under the USMCA, which concerns perishable goods. Pursuant to that request, the United States held consultations with Canada over video conference on June 9, 2022. The Parties failed to resolve the matter.

28. On December, 22, 2022, the United States sent to Canada a new request for consultations pursuant to Articles 31.2. and 31.4 of the USMCA, with regard to certain measures of Canada through which Canada allocates its dairy TRQs under the USMCA, which concerns perishable goods. The United States held consultations with Canada in Ottawa on January 17, 2023. The Parties again failed to resolve the matter.

29. Accordingly, on January 31, 2023, the United States requested the establishment of a panel, pursuant to Article 31.6.1(a) of the USMCA, with the terms of reference as set out in Article 31.7 of the USMCA.

30. On February 2, 2023, pursuant to Article 31.9.1(a) of the USMCA, the Parties agreed to a panel comprised of three members. On February 24, 2023, pursuant to Article 31.9.1(b) of the USMCA, the Parties selected Mr. Mateo Diego Fernández, a citizen of Mexico, as the Panel Chair. On March 13, 2023, pursuant to Article 31.9.1(d), Canada selected Ms. Kathleen Claussen, a citizen of the United States, and the United States selected Mr. Serge Fréchette, a citizen of Canada, to serve as the other members of the Panel.

31. Per Article 18.1 of the Rules of Procedure for Chapter 31 (Dispute Settlement), the United States is filing this initial written submission on March 20, 2023, seven days after the date on which the last panelist was selected.

## **III. Factual Background**

32. 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.<sup>15</sup>

33. 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>16</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>17</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>18</sup> As discussed further throughout this U.S. initial written submission, through its dairy TRQ allocation measures, Canada has adopted and applies an “allocation mechanism” through which it grants access to its USMCA dairy TRQs. Canada does not grant access to its USMCA dairy TRQs on the basis of first-come first-served.

34. Section A of Appendix 2 of Canada’s Tariff Schedule under the USMCA (“Canada’s USMCA TRQ Appendix”) provides additional rules regarding how Canada is required to administer its TRQs, including through allocation. In particular, Canada’s USMCA TRQ Appendix provides that Canada is required to administer its TRQs through an import licensing system<sup>19</sup> and that Canada is required to allocate its TRQs to “eligible applicants”, which the USMCA defines as applicants “active in the Canadian food or agriculture sector”.<sup>20</sup>

35. The United States previously brought and prevailed in a USMCA dispute challenging Canada’s prior dairy TRQ allocation measures (*Canada – Dairy TRQs I*).<sup>21</sup> In response to the adverse findings in the *Canada – Dairy TRQs I* panel report, Canada promulgated the dairy TRQ allocation measures that are the subject of this dispute. Specifically, the dairy TRQ allocation measures at issue in this dispute are reflected in the following legal instruments, operating separately or together with the Export and Import Permits Act<sup>22</sup> and any corresponding regulations:

- a. Public Consultations: CUSMA Dairy Tariff Rate Quotas (TRQs) Panel Report Implementation - Proposed Allocation and Administration Policy Changes, published

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<sup>15</sup> USMCA, Canada’s USMCA TRQ Appendix, Section B, Paragraphs 5-18(c).

<sup>16</sup> USMCA, Article 3.A.2.1.

<sup>17</sup> USMCA, Article 3.A.2.1.

<sup>18</sup> USMCA, Article 3.A.2.1.

<sup>19</sup> USMCA, Canada’s USMCA TRQ Appendix, Section A, Paragraph 3(a).

<sup>20</sup> USMCA, Canada’s USMCA TRQ Appendix, Section A, Paragraph 3(c).

<sup>21</sup> See *Canada – Dairy TRQs I (Panel)*, para. 167 (Exhibit USA-26).

<sup>22</sup> Export and Import Permits Act (R.S.C., 1985, c. E-19) (Exhibit USA-15).



- on March 10, 2022 (Exhibit USA-16);
- b. 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 (Exhibit USA-17);
  - c. General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022 (Exhibit USA-18);
  - d. Key dates and access quantities 2022-2023: TRQs for Supply-Managed Products, modified on February 13, 2023 (Exhibit USA-19);
  - e. 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 (Exhibit USA-20); and
  - f. The following Notices to Importers concerning Canada’s USMCA dairy TRQs:
    - i. CUSMA: Cream TRQ – Serial No. 1071, dated May 16, 2022 (Exhibit USA-1);
    - ii. CUSMA: Butter and Cream Powder TRQ – Serial No. 1073, dated May 16, 2022 (Exhibit USA-2);
    - iii. CUSMA: Milk TRQ – Serial No. 1075, dated May 16, 2022 (Exhibit USA-3);
    - iv. CUSMA: Milk Powders TRQ – Serial No. 1076, dated May 16, 2022 (Exhibit USA-4);
    - v. CUSMA: Skim Milk Powder TRQ – Serial No. 1077, dated May 16, 2022 (Exhibit USA-5);
    - vi. CUSMA: Whey Powder TRQ – Serial No. 1078, dated May 16, 2022 (Exhibit USA-6);
    - vii. CUSMA: Cheeses of All Types TRQ – Serial No. 1079, dated May 16, 2022 (Exhibit USA-7);
    - viii. CUSMA: Industrial Cheeses TRQ – Serial No. 1080, dated May 16, 2022 (Exhibit USA-8);
    - ix. CUSMA: Concentrated or Condensed Milk TRQ – Serial No. 1081, dated May 16, 2022 (Exhibit USA-9);
    - x. CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022 (Exhibit USA-10);

- xi. CUSMA: Other Dairy TRQ – Serial No. 1083, dated May 16, 2022 (Exhibit USA-11);
- xii. CUSMA: Powdered Buttermilk TRQ – Serial No. 1084, dated May 16, 2022 (Exhibit USA-12);
- xiii. CUSMA: Products Consisting of Natural Milk Constituents TRQ – Serial No. 1085, dated May 16, 2022 (Exhibit USA-13); and
- xiv. CUSMA: Yogurt and Buttermilk TRQ – Serial No. 1086, dated May 16, 2022 (Exhibit USA-14).

36. As elaborated in sections V-VIII of this U.S. initial written submission, this dispute concerns four elements of Canada’s USMCA dairy TRQ allocation measures:

- (1) the exclusion of retailers, food service operators, and other entities from eligibility for Canada’s USMCA dairy TRQs;
- (2) the use of a “market share basis” to allocate Canada’s USMCA dairy TRQs and the application of different criteria to different types of eligible applicants;
- (3) the imposition of 12-month activity requirements for USMCA dairy TRQ applicants and recipients; and
- (4) the mechanism for return and reallocation of unused USMCA dairy TRQ allocations.

Sections V, VI, VII, and VIII below describe and provide additional factual information relevant to each of the four elements of Canada’s measures that the United States challenges.

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

37. 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>23</sup>

38. 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 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>24</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.”

39. 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>25</sup>

**V. By Excluding Retailers, Food Service Operators, and Others Entities from Eligibility for Canada’s USMCA Dairy TRQs, Canada’s Dairy TRQ Allocation Measures Breach Canada’s USMCA Commitments**

40. As demonstrated in this section, Canada’s dairy TRQ allocations measures exclude all importers except for processors, distributors, and sometimes further processors from eligibility for Canada’s USMCA dairy TRQs. Thus, retailers, food service operators, and other entities are ineligible for USMCA dairy TRQ allocations under Canada’s measures. The exclusion of those 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”.<sup>26</sup> 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.

41. 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 introduced a “new or 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

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<sup>23</sup> USMCA, Article 31.7.1.

<sup>24</sup> USMCA, Article 31.13.4.

<sup>25</sup> USMCA, Article 31.13.2.

<sup>26</sup> USMCA, Canada’s USMCA TRQ Appendix, Section A, Paragraph 3(c).

requirement is that one must be a processor, distributor, or sometimes further processor to receive an allocation and utilize the TRQ.

**A. Description of Canada’s Dairy TRQ Allocation Measures’ Exclusion of Retailers, Food Service Operators, and Other Entities from Eligibility for Canada’s USMCA Dairy TRQs**

42. Canada’s dairy TRQ allocation measures provide that the only “eligible applicants” for Canada’s USMCA dairy TRQs are processors, distributors, and, in some cases, further processors. Canada’s measures exclude retailers, food service operators, and other entities from eligibility for Canada’s dairy TRQs. This is evident on the face of Canada’s measures.

43. The document entitled Public Consultations: CUSMA Dairy Tariff Rate Quotas (TRQs) Panel Report Implementation - Proposed Allocation and Administration Policy Changes, published on March 1, 2022, describes Canada’s “Proposed Policy” for each USMCA dairy TRQ, explaining that the TRQs will be allocated to processors and distributors, and, in some cases, further processors.<sup>27</sup> No mention is made of the possibility that retailers, food service operators, or other entities might also be eligible to receive USMCA dairy TRQ allocations.

44. The proposed policy was finalized on May 16, 2022.<sup>28</sup> On that same day, Canada published Notices to Importers for each of its USMCA dairy TRQs. Each notice communicates the “[e]ligibility criteria” for the particular TRQ, explaining that “[y]ou are eligible for an allocation if you are a” processor, distributor, or, in some cases, further processor. Each notice explicitly provides that “[r]etailers are **not** eligible for an allocation” and further explains that

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<sup>27</sup> See Exhibit USA-16. Further processors are excluded from eligibility for the USMCA TRQs on milk, cream, cheeses of all types, and concentrated or condensed milk. Further processors are eligible for the other USMCA TRQs. See also 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).

<sup>28</sup> See 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 (Exhibit USA-17).

“[a] retailer is an establishment that is primarily engaged in retailing food, and which buys [the TRQ product] and sells it directly to final consumers.”<sup>29</sup>

45. The USMCA dairy TRQ Notices to Importers make no reference to food service operators. Food service operators are implicitly excluded from eligibility to apply for and receive USMCA dairy TRQ allocations, given the specific description of the eligibility requirements in the notices. Also, Canada explicitly makes food service operators eligible for allocations under other USMCA TRQs,<sup>30</sup> which is a further confirmation that food service operators are not eligible for USMCA dairy TRQ allocations.

**B. Excluding Retailers, Food Service Operators, and Other Entities from Eligibility for Canada’s USMCA Dairy TRQs Is Inconsistent with Section A, Paragraph 3(c), of Canada’s USMCA TRQ Appendix**

46. Canada’s dairy TRQ allocation measures exclude from eligibility all types of importers except for processors, distributors, and in some instances, further processors. Thus, under Canada’s measures, retailers, food service operators, and other entities are not eligible for USMCA dairy TRQ allocations. Canada’s dairy TRQ allocation measures are inconsistent with Section A, Paragraph 3(c), of Canada’s USMCA TRQ Appendix.

47. Section A, Paragraph 3, of Canada’s USMCA TRQ Appendix sets out general provisions related 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*

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<sup>29</sup> *E.g.*, CUSMA: Cheeses of All Types TRQ – Serial No. 1079, dated May 16, 2022 (Exhibit USA-7) (bold in original).

<sup>30</sup> *See* Notice to Importers, CUSMA: Chicken TRQ – Serial No. 988, dated October 1, 2020 (Exhibit USA-21).

*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>31</sup>

48. Section A, Paragraph 3(c) of Canada’s USMCA TRQ Appendix defines the universe of potential applicants to which Canada must provide access to its TRQ allocations. It establishes that Canada “shall allocate” its TRQs to “eligible applicants” and specifies that an “eligible applicant” is “an applicant active in the Canadian food or agriculture sector.”

49. To understand Canada’s obligation under Section A, Paragraph 3(c), of Canada’s USMCA TRQ Appendix, it is necessary to consider the ordinary meaning of the terms of Paragraph 3(c) and any relevant contextual elements. To discern the ordinary meaning of the terms, it is appropriate to begin with dictionary definitions. In *US – Section 301 Trade Act*, a 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>32</sup> The panel in *Canada – Dairy TRQs I* took the same approach when it interpreted the terms of the USMCA.<sup>33</sup>

50. Section A, Paragraph 3(c), of Canada’s USMCA TRQ Appendix provides that Canada “shall allocate” its TRQs and describes to whom the TRQs shall be allocated. Here, the term “allocate” is used as a verb. The Oxford English Dictionary defines the verb “allocate” as “[t]o set aside or designate as being the special share or responsibility of a particular person, department, etc., or as being required for a particular purpose; to apportion, allot. Also: to make a distribution or the apportionment of (something) among several recipients, responsible parties, etc.”<sup>34</sup> Therefore the term “allocate” refers to the action of dividing up a quota into portions and distributing the portions, specifically to applicants “active in the Canadian food or agriculture sector”. The use of the term “shall” indicates an obligation, *i.e.*, that Canada is required to distribute portions of its TRQs to “applicants active in the Canadian food or agriculture sector”.

51. Paragraph 3(c) does not specify what it means to be “active in the Canadian food or agriculture sector”. The dictionary defines the word “active” as, *inter alia*, “[i]n operation,

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<sup>31</sup> USMCA, Canada’s USMCA TRQ Appendix, Section A, Paragraph 3 (italics added; bold in original).

<sup>32</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, p. 219 (Exhibit USA-70) (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>33</sup> See, e.g., *Canada – Dairy TRQs I (Panel)*, para. 104.

<sup>34</sup> Definition of “allocate” from Oxford English Dictionary Online (Exhibit USA-77).

working; effective, functional”<sup>35</sup> and “participating or engaging in a specified sphere of activity, esp. to a significant degree”.<sup>36</sup> The word “food” is defined as “[a]ny nutritious substance that people or animals eat or drink in order to maintain life and growth; nourishment, provisions”.<sup>37</sup> The word “agriculture” means “(now chiefly): the practice of growing crops, rearing livestock, and producing animal products (as milk and eggs), regarded as a single sphere of activity; farming, husbandry; (also) the theory of this”.<sup>38</sup> And the word “sector” means, most relevantly, “[a] part or branch of an economy, or of a particular industry or activity”.<sup>39</sup>

52. Read together, in light of the preceding definitions, the phrase “applicants active in the Canadian food or agriculture sector” means applicants that “operat[e]”, “work[ ]”, “participat[e]”, or “engag[e] in”,<sup>40</sup> the “part or branch of [the Canadian] economy”, or the “industry or activity”,<sup>41</sup> related to “[a]ny nutritious substance that people or animals eat or drink in order to maintain life and growth; nourishment, provisions”<sup>42</sup> or “the practice of growing crops, rearing livestock, and producing animal products (such as milk and eggs)”.<sup>43</sup>

53. The above interpretation supports the conclusion that entities that are “active in the Canadian food or agriculture sector” might engage in a wide range of activities – for example manufacturing, processing, handling, buying, selling, reselling, preparing, using or delivering dairy products or other food or agriculture products (or other relevant activities).

54. Canada has determined that processors, distributors, and in some instances, further processors, are “active in the Canadian food or agriculture sector”. This is evident because Canada includes such entities as “eligible applicants” in its USMCA dairy TRQ Notices to Importers.<sup>44</sup> It is plain that such entities “operat[e]”, “work[ ]”, “participat[e]”, or “engag[e] in” the “part or branch of [the Canadian] economy”, or the “industry or activity”, related to “[a]ny nutritious substance that people or animals eat or drink in order to maintain life and growth;

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<sup>35</sup> Definition of “active” from Oxford English Dictionary Online (Exhibit USA-73).

<sup>36</sup> Definition of “active” from Oxford English Dictionary Online (Exhibit USA-73).

<sup>37</sup> Definition of “food” from Oxford English Dictionary Online (Exhibit USA-88).

<sup>38</sup> Definition of “agriculture” from Oxford English Dictionary Online (Exhibit USA-76).

<sup>39</sup> Definition of “sector” from Oxford English Dictionary Online (Exhibit USA-101).

<sup>40</sup> Definition of “active” from Oxford English Dictionary Online (Exhibit USA-73).

<sup>41</sup> Definition of “sector” from Oxford English Dictionary Online (Exhibit USA-101).

<sup>42</sup> Definition of “food” from Oxford English Dictionary Online (Exhibit USA-88).

<sup>43</sup> Definition of “agriculture” from Oxford English Dictionary Online (Exhibit USA-76).

<sup>44</sup> See, e.g., Notice to Importers, CUSMA: Butter and Cream Powder TRQ – Serial No. 1073, dated May 16, 2022, section 3 (Exhibit USA-2) (stating that an applicant is only eligible for an allocation if the applicant is (i) a processor that manufactures butter and/or cream powder in the applicant’s own provincially-licensed or federally-registered facility; (ii) a further processor that uses butter and/or cream powder in the applicant’s manufacturing operations and product formulation; or (iii) a distributor, that buys butter and/or cream powder and re-sells it to other businesses).

nourishment, provisions” or “the practice of growing crops, rearing livestock, and producing animal products (as milk and eggs)” by, *inter alia*, manufacturing, processing, handling, buying, selling, reselling, preparing, using or delivering dairy products that are within the scope of the dairy TRQs.

55. Logically, retailers and food service operators equally meet the definition of “eligible applicants” that are “active in the Canadian food or agriculture sector”, as that phrase is properly interpreted. They, too, “operat[e]”, “work[]”, “participat[e]”, or “engag[e] in” the “part or branch of [the Canadian] economy”, or the “industry or activity”, related to “[a]ny nutritious substance that people or animals eat or drink in order to maintain life and growth; nourishment, provisions” or “the practice of growing crops, rearing livestock, and producing animal products (as milk and eggs)” by buying the very same dairy products and reselling them to final consumers, or by buying and using dairy products to prepare food to sell to consumers.

56. Canada itself has characterized retailers and food service operators as being among the “main actors” in Canada’s dairy market.<sup>45</sup> In *Canada – Dairy TRQs I*, Canada identified the “six main actors in Canada’s dairy market” as: “(i) producers (dairy farmers), (ii) processors, (iii) further processors, (iv) distributors, (v) *food service*, and (vi) *retailers*”.<sup>46</sup> Canada explained that “[p]rocessors *purchase* raw milk from a provincial milk marketing board and then *use* it to manufacture different dairy products such as butter, cheese, yogurt, ice cream, etc. Processors then *sell* their products to further processors, distributors, *food service*, and *retailers*.”<sup>47</sup> “Distributors *purchase* food products, including dairy products, from the food manufacturing sector (e.g., processors and further processors), for *resale* to a third party.”<sup>48</sup> Canada describes the “food service” industry as “*purchas[ing]* dairy products from processors or distributors and therefore constitut[ing] part of the demand for dairy products that requires supply from producers and processors.”<sup>49</sup> “Retailers are divided into two major categories: (1) supermarkets and grocery stores, and (2) warehouse clubs and supercenters. The Canadian supermarket/grocery store industry primarily *sells* food products, while the warehouse club/supercenter industry is made up of large stores that primarily *retail* both grocery products and merchandise items (e.g., apparel, home goods, and furniture).”<sup>50</sup> Canada further explained that “large retailers often own

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<sup>45</sup> *Canada – Dairy TRQs I (Panel)*, para. 44 (summarizing Canada’s initial written submission) (Exhibit USA-26).

<sup>46</sup> *Canada – Dairy TRQs I (Panel)*, para. 44 (summarizing Canada’s initial written submission) (Exhibit USA-26) (italics added).

<sup>47</sup> *Canada – Dairy TRQs I (Panel)*, para. 44 (summarizing Canada’s initial written submission) (Exhibit USA-26) (italics added).

<sup>48</sup> *Canada – Dairy TRQs I (Panel)*, para. 44 (summarizing Canada’s initial written submission) (Exhibit USA-26) (italics added).

<sup>49</sup> *Canada – Dairy TRQs I (Panel)*, para. 44 (summarizing Canada’s initial written submission) (Exhibit USA-26) (italics added).

<sup>50</sup> *Canada – Dairy TRQs I (Panel)*, para. 44 (summarizing Canada’s initial written submission) (Exhibit USA-26) (italics added).



their wholesale and distribution centers, in addition to their retail stores. A combination of integrated distribution networks and concentrated purchasing power gives large supermarkets and grocery retailers significant influence throughout the supply chain.”<sup>51</sup>

57. Canada’s TRQ Notices to Importers provide further evidence, in Canada’s own official words, that retailers and food service operators engage in the very same activities as entities that Canada deems “eligible for an allocation” of Canada’s USMCA dairy TRQs.<sup>52</sup> Canada’s USMCA dairy TRQ Notices to Importers state that a distributor is an entity “that *buys* [the TRQ product] and *resells* it to other businesses”, and a further processor is an entity “that *uses* [the TRQ product] in [its] manufacturing operations and product formulation”.<sup>53</sup> The same Notices to Importers state that “[a] retailer is an establishment that is primarily engaged in *retailing* food, and which *buys* [the TRQ product] and *sells* it directly to final consumers”.<sup>54</sup>

58. While food service operators are not eligible for any of Canada’s USMCA dairy TRQs and are not mentioned in the USMCA dairy TRQ Notices to Importers, Canada does deem food service operators eligible for other Canadian USMCA TRQs, which are governed by the rules in Article 3.A.2 of the USMCA (Tariff-Rate Quota Administration), just like the USMCA dairy TRQs, including the USMCA definition of the term “eligible applicants”. In Canada’s Notice to Importers for its chicken TRQ, food service operators are identified as eligible applicants, and that notice states that “[f]ood service operator means a restaurant or food service company that is *active in the Canadian food service sector* in the chicken industry”,<sup>55</sup> and which “*bought* and subsequently *sold* at least 220,000 kg of chicken in the reference period”.<sup>56</sup>

59. Canada’s TRQ Notice to Importers for cheeses of all types under the Comprehensive Economic and Trade Agreement (“CETA”), a trade agreement between Canada and the European Union, states that retailers are eligible for allocations under that TRQ. As in the USMCA dairy TRQ Notices to Importers, the CETA notice describes a retailer as an entity “primarily engaged in retailing food, and which buys cheese and sells it directly to final

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<sup>51</sup> *Canada – Dairy TRQs I*, Initial Written Submission of Canada, August 20, 2021 (excerpted), para. 33 (Exhibit USA-36).

<sup>52</sup> *E.g.*, Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 3 (Exhibit USA-10).

<sup>53</sup> *E.g.*, Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 3 (Exhibit USA-10) (italics added).

<sup>54</sup> *E.g.*, Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 3 (Exhibit USA-10) (italics added).

<sup>55</sup> Notice to Importers, CUSMA: Chicken TRQ – Serial No. 988, dated October 1, 2020, section 1 (Exhibit USA-21) (italics added).

<sup>56</sup> Notice to Importers, CUSMA: Chicken TRQ – Serial No. 988, dated October 1, 2020, section 3 (Exhibit USA-21) (italics added).

consumers”.<sup>57</sup> The CETA contains eligibility language similar to that in Canada’s USMCA TRQ Appendix.<sup>58</sup> Specifically, Annex 2-B, Section B, Paragraph 7, of the CETA provides that for Canada’s cheese TRQs under CETA, “[t]o be eligible, an applicant shall be, at a minimum, a resident of Canada and be *active in the Canadian cheese sector* regularly during the year.”<sup>59</sup> The eligibility requirement under CETA is narrower than under the USMCA, as a prospective applicant for the CETA TRQ needs to be active in the specific sector of the TRQ product rather than the broader Canadian food or agriculture sector. Nonetheless, even under those stricter requirements in CETA, Canada deems retailers eligible for allocations of the CETA TRQ for cheeses of all types.<sup>60</sup>

60. In Canada’s own words, retailers and food service operators are among the “main actors”<sup>61</sup> in Canada’s dairy market, which is part of the Canadian food or agriculture sector, and retailers and food service operators engage in the very same activities – buying, selling, and using dairy, food, and other agriculture products – as processors, distributors, and further processors. There is no logical or legal basis for Canada’s disparate treatment of entities that all engage in the same activities, and who, based on the ordinary meaning of the terms of the USMCA, are all “active in the Canadian food or agriculture sector”.<sup>62</sup>

61. Section A, Paragraph 3(c), of Canada’s USMCA TRQ Appendix obligates Canada to allocate – Canada “shall allocate” – its TRQs to “eligible applicants”, which are applicants “active in the Canadian food or agriculture sector”. Nothing in Paragraph 3(c) or any other provision of the USMCA permits Canada to arbitrarily and categorically exclude types of entities other than processors, distributors, and further processors when those other types of entities meet the definition of “eligible applicants” in the Agreement.

62. Had Canada wished to exclude particular importer groups from eligibility, provision for such an exclusion should have been incorporated into the Agreement. 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.

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<sup>57</sup> Notice to Importers, CETA: Cheese of All Types TRQ – Serial No. 993, dated October 1, 2020 (Exhibit USA-25).

<sup>58</sup> See Text of the Comprehensive Economic and Trade Agreement (CETA) - Annex 2-B: Declaration of the Parties concerning tariff rate quota administration (Exhibit USA-24).

<sup>59</sup> CETA, Annex 2-B, Section B, Paragraph 7 (Exhibit USA-24) (italics added).

<sup>60</sup> Notice to Importers, CETA: Cheese of All Types TRQ – Serial No. 993, dated October 1, 2020 (Exhibit USA-25).

<sup>61</sup> *Canada – Dairy TRQs I (Panel)*, para. 44 (Exhibit USA-26) (italics added).

<sup>62</sup> USMCA, Chapter 2, Appendix 2, Section A, Paragraph 3(c).

63. Elsewhere in the Agreement, Section B of Canada’s USMCA TRQ Appendix contains certain carve-outs relating to the “end-use” of a product imported under an allocation. These carve-outs provide that, in some cases, a prospective applicant may only apply for and receive an allocation if it commits to using the imported product for processing into dairy products used as ingredients for further food processing.<sup>63</sup> But nothing in these carve-outs permits Canada to discriminate among eligible applicants that commit to abide by the end-use commitments, or to deny eligibility to certain categories of eligible applicants, like retailers and food service operators. Furthermore, there are no similar conditions in the Agreement related to sales by retailers and food service operators to final consumers, so there is no justification for Canada to deny retailers and food service operators eligibility for the USMCA dairy TRQs on that basis.

64. The presence of these types of conditions in other USMCA provisions, and their absence from Section A, Paragraph 3(c), of Canada’s USMCA TRQ Appendix (and anywhere else in the Agreement), is contextual support for interpreting Paragraph 3(c) as prohibiting Canada from excluding from eligibility entities that are, through their actions, “active in the Canadian food or agriculture sector”, such as retailers, food service operators, and any other entity that engages in manufacturing, processing, handling, buying, selling, reselling, preparing, using, or delivering dairy products or other food or agriculture products (or other relevant activities).

65. For the reasons 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.<sup>64</sup>

**C. Excluding Retailers, Food Service Operators, and Other Entities from Eligibility for Canada’s USMCA Dairy TRQs Is Inconsistent with Article 3.A.2.6(a) of the USMCA**

66. As explained above, Canada’s dairy TRQ allocation measures deny eligibility for TRQ allocations to all types of importers except processors, distributors, and, in some cases, further processors. By limiting or conditioning eligibility for USMCA dairy TRQ allocations based on the type of importer seeking an allocation, Canada’s dairy TRQ allocation measures introduce a new condition, limit, or eligibility requirement on who may apply for, receive, and ultimately utilize a dairy TRQ allocation. The introduction of such a new condition, limit, or eligibility requirement on the utilization of Canada’s USMCA dairy TRQs is impermissible under Article 3.A.2.6(a) of the USMCA.

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<sup>63</sup> See USMCA, Chapter 2, Appendix 2, Section B, Paragraphs 5(b)(i), 6(b)(i), 8(b)(i), and 9(b).

<sup>64</sup> For greater clarity, Canada’s exclusion of further processors from eligibility for allocations of its USMCA TRQs on milk, cream, cheeses of all types, and concentrated or condensed milk is inconsistent with Section A, Paragraph 3(c) of Canada’s USMCA TRQ Appendix, for the reasons given.

67. 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.

Subparagraphs (b) and (c) of Article 3.A.2.6 describe the process to be followed if a Party “seek[s] to introduce a new or additional condition, limit, or eligibility requirement on the utilization of a TRQ for importation of an agricultural good”. That process requires notice to, consultation with, and agreement by the other Party. Canada did not follow the prescribed process when it introduced the new or additional condition, limit, or eligibility requirement that mandates that, to be eligible for a USMCA dairy TRQ allocation, an applicant must be a processor, distributor, or, in some cases, further processor.

68. Beginning the interpretive analysis with consideration of the ordinary meaning of relevant terms, the dictionary defines “condition” as, *inter alia*, “something demanded or required as a prerequisite to the granting or performance of something else”.<sup>65</sup> “Limit” is defined, most relevantly, as “[t]o confine within limits, to set bounds to ... to bound, restrict ...”.<sup>66</sup> “Eligibility” means “fitness to be chosen”,<sup>67</sup> and “requirement” is defined as, *inter alia*, “something which is required or needed”.<sup>68</sup> Therefore, “eligibility requirement” can be understood to mean something that is required, which demonstrates a fitness to be chosen.

69. The word “utilization” means, *inter alia*, “the action of utilizing”,<sup>69</sup> or the action of “mak[ing] or render[ing] useful”.<sup>70</sup> It is self-evident that to utilize a TRQ for importation, an importer first must be granted an allocation of TRQ volume. Logically, a condition, limit, or *eligibility requirement* that governs applying for and being granted an allocation of TRQ volume is a condition, limit, or eligibility requirement on the utilization of the TRQ. It is not possible to

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<sup>65</sup> Definition of “condition” from Oxford English Dictionary Online (Exhibit USA-80).

<sup>66</sup> Definition of “limit” from Oxford English Dictionary Online (Exhibit USA-92).

<sup>67</sup> Definition of “eligibility” from Oxford English Dictionary Online (Exhibit USA-83).

<sup>68</sup> Definition of “requirement” from Oxford English Dictionary Online (Exhibit USA-100).

<sup>69</sup> Definition of “utilization” from Oxford English Dictionary Online (Exhibit USA-104).

<sup>70</sup> Definition of “utilize” from Oxford English Dictionary Online (Exhibit USA-105).

utilize a TRQ if you can never receive a TRQ allocation because you are wrongly denied eligibility for the TRQ.

70. Article 3.A.2.7 of the USMCA provides contextual support for understanding that the type of “condition, limit, or eligibility requirement” on “utilization” of the TRQ referenced in Article 3.A.2.6(a) of the USMCA includes requirements related to the status of the TRQ applicant and the applicant’s eligibility for a TRQ allocation. Article 3.A.2.7 provides that, “[n]otwithstanding paragraph 6, a Party shall not implement a condition, limit, or eligibility requirement...”, followed by further conditions, limits, or eligibility requirements that can never be implemented.

71. The kinds of conditions, limits, and eligibility requirements that are strictly prohibited by Article 3.A.2.7 of the USMCA include those “regarding the quota applicant’s nationality, or headquarters location”. These are requirements related to the status of the applicant. The “[n]otwithstanding” language links Article 3.A.2.7 to Article 3.A.2.6 and is contextual support for interpreting the phrase “condition, limit, or eligibility requirement on the utilization of a TRQ” as relating, *inter alia*, to the status of the applicant (*e.g.*, as a processor, distributor, or further processor) and the applicant’s eligibility for a TRQ allocation.

72. The phrase “new or additional” is related to and must be read together with the phrase “beyond those set out in its Schedule to Annex 2-B (Tariff Commitments)”. Thus, the prohibition in Article 3.A.2.6(a) of the USMCA is against introducing a condition, limit, or eligibility requirement that is novel, adds to, or exceeds the conditions, limits, or eligibility requirements that were incorporated into the text of the Party’s Schedule to Annex 2-B (Tariff Commitments) when the Agreement was concluded.

73. The above textual and contextual analysis leads to the following conclusion. Article 3.A.2.6(a) of the USMCA 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.

74. The condition, limit, or eligibility requirement that the applicant for and recipient of a USMCA dairy TRQ allocation must be a processor, distributor, or, in some cases, further processor goes beyond what is in Annex 2-B of Canada’s Tariff Schedule. Canada’s Tariff Schedule in Annex 2-B of Chapter 2 of the USMCA includes Appendix 2: Tariff Schedule of Canada – (Tariff Rate Quotas), which the United States refers to as Canada’s USMCA TRQ Appendix. Canada’s USMCA TRQ Appendix, as demonstrated above, specifies in Section A, Paragraph 3(c), the general eligibility requirement that Canada is to apply when allocating its USMCA TRQs (that is, an applicant must be “active in the Canadian food or agriculture sector”). Section B of Canada’s USMCA TRQ Appendix sets forth other conditions for receiving and using allocations, including that, for certain TRQs, specified percentages of the product imported

must be used for “further food processing (secondary manufacturing)”.<sup>71</sup> Nothing in Annex 2-B of Canada’s Tariff Schedule memorializes any agreement by the Parties that Canada may impose a condition, limit, or eligibility requirement on the utilization of its USMCA dairy TRQs that the applicant for and recipient of the TRQ allocation must be a processor, distributor, or, in some cases, further processor.

75. Canada’s Notices to Importers explicitly provide that an applicant is “eligible for an allocation” if they are a processor, distributor, or in some instances, a further processor.<sup>72</sup> Canada’s exclusion of importers other than processors, further processors, and distributors from its dairy TRQ allocations “introduce[s] a new or additional condition, limit, or eligibility requirement on the utilization of a TRQ” – namely, an applicant *must* be a processor, further processor, or distributor to be eligible to receive an allocation and utilize the TRQ. In addition, all of Canada’s notices explicitly state that “[r]etailers are **not** eligible to apply for an allocation.”<sup>73</sup> In effect, Canada has imposed a “not retailer” condition, limit, or eligibility requirement. These additional conditions, limits, or eligibility requirements go “beyond those set out in [Canada’s] Schedule to Annex 2-B.”<sup>74</sup>

76. For these reasons, 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.

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<sup>71</sup> *E.g.*, USMCA, Chapter 2, Annex 2-B, Appendix 2, Section B, Paragraphs 5(b)(i), 6(b)(i), 8(b)(i), and 9(b).

<sup>72</sup> *See* Notice to Importers, CUSMA: Butter and Cream Powder TRQ – Serial No. 1073, dated May 16, 2022 (Exhibit USA-2); 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: Industrial Cheeses TRQ – Serial No. 1080, dated May 16, 2022 (Exhibit USA-8); 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); Notice to Importers, CUSMA: Yogurt and Buttermilk TRQ – Serial No. 1086, dated May 16, 2022 (Exhibit USA-14) (conditioning an applicant’s eligibility on being a processor, further processor, or distributor for an allocation of these TRQs); *see also* Notice to Importers, CUSMA: Cream TRQ – Serial No. 1071, dated May 16, 2022 (Exhibit USA-1); Notice to Importers, CUSMA: Milk TRQ – Serial No. 1075, dated May 16, 2022 (Exhibit USA-3); Notice to Importers, CUSMA: Cheeses of All Types TRQ – Serial No. 1079, dated May 16, 2022 (Exhibit USA-7); Notice to Importers, CUSMA: Concentrated or Condensed Milk TRQ – Serial No. 1081, dated May 16, 2022 (Exhibit USA-9) (limiting eligibility only to processors and distributors).

<sup>73</sup> *E.g.*, Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022 (Exhibit USA-10) (bold in original).

<sup>74</sup> USMCA, Article 3.A.2.6(a).

**VI. 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**

77. As demonstrated in this section, Canada’s dairy TRQ allocation measures use a “market share basis” to allocate Canada’s USMCA dairy TRQs and apply different criteria to different types of eligible applicants. Canada’s measures are inconsistent with numerous provisions of the USMCA.

78. First, by making allocations on a “market share basis” and giving disparate treatment to different types of 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, in effect, recreate the “processor pools” that were found to breach the USMCA in *Canada – Dairy TRQs I*. Under Canada’s dairy TRQ allocation measures, Canadian dairy processors can count as market activity every kilogram of volume they produce, while distributors may count as market activity only some of the volume that they sell; and distributors can only sell dairy products that they can first buy. Processors have the ability to bypass distributors, selling for export and selling directly to retailers and other customers that are not eligible for USMCA dairy TRQ allocations, thus limiting the amount of market share available to distributors, and consequently establishing a pool of dairy TRQ allocation that distributors cannot access. In this regard, Canada’s dairy TRQ allocation measures are inconsistent with the processor clause of Article 3.A.2.11(b) of the USMCA, which requires Canada to “ensure that ... it does not ... limit access to an allocation to processors”.

79. Second, allocating USMCA dairy TRQs on a “market share basis” and applying different criteria to different types of eligible applicants heavily favors processors and disadvantages non-processor TRQ applicants, which is inconsistent with Article 3.A.2.4(b) of the USMCA. Article 3.A.2.4(b) requires Canada to “ensure that its procedures for administering its TRQs ... are fair and equitable”.

80. Third, for the same reasons that support finding that Canada’s dairy TRQ allocation measures breach Article 3.A.2.4.(b) of the USMCA, Canada’s measures also are inconsistent with Article 3.A.2.11(e) of the USMCA. Article 3.A.2.11(e) 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”.

81. Fourth, 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’s dairy TRQ allocation measures, which use a “market share basis” to allocate USMCA dairy TRQs, include no safeguards to ensure that allocations are made in commercially viable shipping quantities.

82. Fifth, 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 does not even give applicants the opportunity to specify the

quantities that they request. Instead, Canada asks applicants to report their market activity and indicate the minimum volume that they are willing to accept. Canada then applies a formula relating to market activity, and not any request, to calculate each applicant’s resulting percentage of the total TRQ volume. Far from ensuring, *to the maximum extent possible*, that it makes allocations in the quantities requested, Canada makes no effort whatsoever to ensure that each allocation is made in the quantities that the TRQ applicant requests.

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

84. Finally, 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).

**A. Description of Canada’s Dairy TRQ Allocation Measures’ Use of a Market Share Basis to Allocate Canada’s USMCA Dairy TRQs and Their Application of Different Criteria to Different Types of Eligible Applicants**

85. Through its dairy TRQ allocation measures, Canada allocates its USMCA dairy TRQs on a “market share basis”.<sup>75</sup> Canada’s 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

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<sup>75</sup> Public Consultations: CUSMA Dairy Tariff Rate Quotas (TRQs) Panel Report Implementation - Proposed Allocation and Administration Policy Changes, published on March 1, 2022, p. 6 (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).



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.”<sup>76</sup> “Market share means an allocation method that apportions a TRQ on the basis of an applicant’s level of activity in the reference period in proportion to the activity levels of other alike eligible applicants.”<sup>77</sup> For the USMCA TRQ on ice cream and ice cream mixes, for example, “100% is allocated to processors, further processors and distributors on a market share basis (using one market share for all applicants).”<sup>78</sup>

86. The United States understands the above to mean that each USMCA dairy TRQ applicant reports its individual market activity, by volume, in its application for a TRQ allocation;<sup>79</sup> all of the individual applicants’ reported market activity volumes are summed to determine the total volume of market activity for all applicants; each applicant’s share of the total volume of market activity is calculated as a percentage (this is the applicant’s market share); each applicant’s percentage (market share) is applied to the total available TRQ volume to calculate the volume of the applicant’s allocation of the TRQ; each applicant is then informed of the volume of its TRQ allocation.<sup>80</sup>

87. Under Canada’s dairy TRQ allocation measures, applicants are not given the opportunity to specify the volume of TRQ that they request. 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 allocation, as explained above. 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

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<sup>76</sup> General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022, section 3.2 (Exhibit USA-18).

<sup>77</sup> General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022, section 3.3 (Exhibit USA-18).

<sup>78</sup> Public Consultations: CUSMA Dairy Tariff Rate Quotas (TRQs) Panel Report Implementation - Proposed Allocation and Administration Policy Changes, published on March 1, 2022, p. 6 (Exhibit USA-16); *see also* Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 4 (“The Minister will allocate 100% of the TRQ to processors, further processors and distributors on a market share basis”) (Exhibit USA-10).

<sup>79</sup> *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). The applications for all of Canada’s USMCA dairy TRQs are substantially the same. *See* Exhibits USA-56 to USA-69.

<sup>80</sup> *See* General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022, section 2.4 (Exhibit USA-18).

lesser amount based on your market share calculation”.<sup>81</sup> And applicants are asked to specify “[w]hat is the minimum volume you would be willing to accept”.<sup>82</sup>

88. Canada administers each of its USMCA dairy TRQs independently. It is permissible for applicants to apply for an allocation under multiple TRQs, but applicants must submit a separate application for each TRQ to demonstrate that they “meet the applicable eligibility criteria and activity tests”.<sup>83</sup>

89. 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”.<sup>84</sup>

90. In the final dairy TRQ allocation measures that Canada adopted in May 2022, Canada modified the policy that was originally proposed. Under the dairy TRQ allocation measures that Canada currently maintains, market activity is determined differently for processors, distributors, and further processors.

91. Processors’ market activity is “based on the kilograms of [the TRQ product] *manufactured* by the processor during the reference period.”<sup>85</sup> Further processors’ market activity is “based on the kilograms of [the TRQ product] *used* by the further processor in the manufacturing of further processed food products during the reference period.”<sup>86</sup>

92. In contrast, while processors base their market activity on the total volume of the TRQ product that they manufacture, and further processors base their market activity on the total volume of the TRQ product that they use, distributors’ market activity is “based on the kilograms of [the TRQ product] *sold* by the distributor during the reference period”, but distributors “must exclude” from their market activity calculation “products sold to other distributors”, “products

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<sup>81</sup> CPTPP/CUSMA Ice Cream and Mixes TRQ Allocation Application for the Period of January 1 to December 31, 2023, question 15 (Exhibit USA-65).

<sup>82</sup> 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).

<sup>83</sup> General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022, section 2.1 (Exhibit USA-18).

<sup>84</sup> 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).

<sup>85</sup> Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 4 (Exhibit USA-10) (italics added).

<sup>86</sup> Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 4 (Exhibit USA-10) (italics added).

sold to related persons”, and “products sold at the retail level to consumers.”<sup>87</sup> No similar exclusions are specified for processors or further processors in Canada’s dairy TRQ allocation measures.

93. As demonstrated below, by using a market share basis to allocate USMCA dairy TRQs and applying different criteria for different types of eligible applicants, Canada’s dairy TRQ allocation measures breach numerous provisions of the USMCA.

**B. Using a Market Share Basis to Allocate Canada’s USMCA Dairy TRQs and Applying Different Criteria to Different Types of Eligible Applicants Is Inconsistent with the Processor Clause of Article 3.A.2.11(b) of the USMCA**

94. 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, 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 amounts to which only processors have access.

95. Under Canada’s dairy TRQ allocation measures, Canadian dairy processors can count as market activity every kilogram of volume they produce, while distributors may count as market activity only some of the volume of dairy products that they sell; and distributors can only sell dairy products that they can first buy. Processors have the ability to bypass distributors, selling for export and selling directly to retailers and other customers that are not eligible for TRQ allocations under Canada’s dairy TRQ allocation measures. Because processors determine what volume of products, if any, they sell to distributors, processors effectively limit the amount of market share available to distributors, and have the ability to establish a pool of TRQ allocation that distributors cannot access. While Canada eliminated the formal processor pools that were found to breach the USMCA in *Canada – Dairy TRQs I*, Canada’s new dairy TRQ allocation measures in essence deputize processors to create and determine for themselves the size of their own pools of TRQ allocations by choosing to whom they do and do not sell their products.

**1. The Processor Clause of Article 3.A.2.11(b) of the USMCA Prohibits Reserving a Portion of the TRQ for the Exclusive Use of Processors and Further Processors**

96. Article 3.A.2.11(b) of the USMCA provides, in relevant part:

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<sup>87</sup> Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 4 (Exhibit USA-10) (italics added).

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 . . . .

97. 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 purchase 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”). The focus of the U.S. claim under Article 3.A.2.11(b) is on the “processor clause”.

98. On its face, Article 3.A.2.11(b) of the USMCA 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.

99. 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”. As above, we begin with dictionary definitions of these terms.<sup>88</sup>

100. The word “limit” is defined, most relevantly, as “[t]o confine within limits, to set bounds to ... to bound, restrict ... ”.<sup>89</sup> The word “access” is defined as “[t]he right or opportunity to benefit from or use a system or service.”<sup>90</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”.

101. 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>91</sup> The Oxford English Dictionary offers multiple definitions of the word “allocation”. It is defined

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<sup>88</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, p. 219 (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”) (Exhibit USA-70).

<sup>89</sup> Definition of “limit” from Oxford English Dictionary Online (Exhibit USA-92).

<sup>90</sup> Definition of “access” from Oxford English Dictionary Online (Exhibit USA-72).

<sup>91</sup> USMCA, Article 3.A.2.1.

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 recipients, parties, etc., in this way; the way in which this has been done in a particular instance”.<sup>92</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>93</sup>

102. Based on these dictionary definitions, the term “allocation” appears as though it could 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. 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.

103. First, the structure and immediate context in Article 3.A.2.11(b) of the USMCA suggests that “an allocation” means a portion of the TRQ. The first clause of Article 3.A.2.11(b) 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”. 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.”

104. Second, reading the term “an 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, exclusive access to a portion of the TRQ.

105. 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>94</sup> (free from bias)<sup>95</sup> and “equitable”<sup>96</sup> (fair, just, reasonable).<sup>97</sup>

106. Any interpretation of the term “an 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

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<sup>92</sup> Definition of “allocation” from Oxford English Dictionary Online (Exhibit USA-78).

<sup>93</sup> Definition of “allocation” from Oxford English Dictionary Online (Exhibit USA-78).

<sup>94</sup> USMCA, Article 3.A.2.4(b).

<sup>95</sup> Definition of “fair” from Oxford English Dictionary Online (Exhibit USA-87).

<sup>96</sup> USMCA, Articles 3.A.2.4(b) and 3.A.2.11(e).

<sup>97</sup> Definition of “equitable” from Oxford English Dictionary Online (Exhibit USA-85).

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 plainly is biased and unduly favorable to processors and against other potential users of the quota.<sup>98</sup>

107. 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>99</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 the term “processor” encompasses those who convert raw milk to milk products, manufacture products using milk and milk components.<sup>100</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.<sup>101</sup>

108. In sum, as demonstrated above, 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

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<sup>98</sup> In *Canada – Dairy TRQs I*, the panel agreed with the interpretation proposed by the United States for the term “an allocation” in the processor clause. The panel reasoned 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” and further that “if Canada cannot limit access to ‘one allocation,’ that can be read to mean that it cannot limit access, period.” *Canada – Dairy TRQs I (Panel)*, paras. 107, 108 (Exhibit USA-26).

<sup>99</sup> Definition of “processor” from Oxford English Dictionary Online. (Exhibit USA-98).

<sup>100</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”).

<sup>101</sup> In *Canada – Dairy TRQs I*, the panel agreed with the argument of the United States that Article 3.A.2.11(b) of the USMCA makes no distinction between or among processors and further processors. See *Canada – Dairy TRQs I (Panel)*, para. 126 (Exhibit USA-26).

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.”<sup>102</sup>

109. However, Canada’s dairy TRQ allocation measures do just that.

## 2. Canada’s Dairy TRQ Allocation Measures Reserve a Portion of the TRQ for the Exclusive Use of Processors and Further Processors

110. As explained above, Canada’s dairy TRQ allocation measures specifically define how market share is calculated for each type of eligible TRQ applicant, and impermissibly exclude certain potential TRQ applicants from eligibility for USMCA dairy TRQ allocations. Processors manufacture dairy products and are permitted to count as market activity every kilogram of the dairy products that they manufacture.<sup>103</sup> Further processors use dairy products to manufacture other products and are permitted to count as market activity every kilogram of dairy products that they use.<sup>104</sup> Distributors buy and sell dairy products and are permitted to count as market activity only part of the volume that they sell, and must exclude from their calculation of market activity sales to other distributors, related parties, and final consumers.<sup>105</sup> Retailers and food service operators – and any other applicant that is active in the Canadian food or agriculture sector but is not a processor, distributor, or, for some TRQs, a further processor – are ineligible to receive USMCA dairy TRQ allocations.<sup>106</sup>

111. 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”. To use the phrasing of the panel in *Canada – Dairy TRQs I*, with its dairy TRQ allocation measures, Canada

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<sup>102</sup> *Canada – Dairy TRQs I (Panel)*, para. 163 (Exhibit USA-26).

<sup>103</sup> See, 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).

<sup>104</sup> See, 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).

<sup>105</sup> See, 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).

<sup>106</sup> See, 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).

has, “in substance, ring-fence[ed] and limit[ed] to processors ... a reserved ‘pool’ of TRQ amounts to which only processors have access.”<sup>107</sup>

112. Due to the design and operation of Canada’s dairy TRQ allocation measures, processors have 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. As Canada explained in *Canada – Dairy TRQs I*, “[p]rocessors ... sell their products to further processors, distributors, food service, and retailers.”<sup>108</sup> To the extent that processors bypass distributors and sell directly to further processors, retailers, food service operators, other customers, or even final consumers, processors can 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.

113. This concern is not theoretical. It is evident that processors have significant discretion in deciding to whom they sell their dairy products – choosing which distributors to sell to, or choosing to bypass outside distributors and distributing the product through their own distribution channels, or selling directly to retailers or food service operators.

114. An analysis of dairy wholesaling in Canada explains that “[m]any traditional manufacturers are electronically integrating their systems with retailers to exchange information on products, availability and prices, facilitating direct communication and delivery *and bypassing third-party wholesalers* ... . In addition, many supermarkets have integrated wholesale functions into their retail operations, placing more pressure on industry operators to maintain a reliable customer base.”<sup>109</sup>

115. For example, Saputo, one of the largest dairy processors in Canada<sup>110</sup> and “one of the top ten dairy processors in the world”, states on its website that it “produces, markets, *and distributes*

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<sup>107</sup> *Canada – Dairy TRQs I (Panel)*, para. 163 (Exhibit USA-26).

<sup>108</sup> *Canada – Dairy TRQs I (Panel)*, para. 44 (Exhibit USA-26).

<sup>109</sup> McGrath, Shawn, “Dairy Wholesaling in Canada”, IBISWorld, Inc., Industry Report 41312CA, June 2022, p. 13 (Exhibit USA-43) (**CONFIDENTIAL INFORMATION**) (italics added). Note that Exhibit USA-43, as well as Exhibits USA-30, USA-44, USA-51, USA-52, and USA-71, contains copyrighted material that is not in the public domain. It is permissible to quote from the material in these exhibits with proper attribution and without redaction, but the complete documents may neither be posted in the public docket of this dispute settlement proceeding nor otherwise publicly released without the copyright holder's express written permission.

<sup>110</sup> See Ristoff, Jared, “Dairy Product Production in Canada”, IBISWorld, Inc., Industry Report 31151CA, September 2022, p. 30 (Exhibit USA-44) (**CONFIDENTIAL INFORMATION**).



a wide array of dairy products”.<sup>111</sup> In its 2022 annual statement, Saputo reports that 50 percent of its sales are to retail (“Sales are made to supermarket chains, mass-merchandisers, convenience stores, independent retailers, warehouse clubs, and specialty cheese boutiques under Saputo-owned or customer brand names. Our products are also sold directly to consumers through our e-commerce channels.”), 30 percent are to foodservice (“Sales are made to broadline distributors, restaurants, hotels, and institutions under Saputo-owned or customer brand names.”), and 20 percent are to industrial (“Sales are made to manufacturers who use our dairy ingredients, cheeses, and other dairy products for further processing. Our products are used in the preparation of food items, nutritional products for all stages of life, and for various other applications.”).<sup>112</sup> Thus, per Saputo’s own public reporting, more than 70 percent of its production does not go to independent distributors (only a portion of the 30 percent of sales to foodservice are indicated as possibly going to “broadline distributors”). And Saputo, of course, has complete control over whether it sells to distributors at all.

116. Agropur, another major Canadian dairy processor<sup>113</sup> that describes itself as “Canada’s leading manufacturer, importer *and distributor* of fine cheese”,<sup>114</sup> indicates that it serves a wide range of clients, including “restaurant chain”, “restaurant independent”, “business and industry”, “catering”, “distributor”, “institutional”, “healthcare facilities”, “hotel industry”, and “other”.<sup>115</sup> Like Saputo, Agropur, in the normal course of its business, bypasses distributors to sell directly to other types of customers (who themselves are not eligible for Canada’s USMCA dairy TRQ allocations), thereby increasing the size of its own market share to the detriment of distributors (for purposes of USMCA dairy TRQ allocations), and expanding the pool of USMCA dairy TRQ volume to which only processors have access.

117. Other analyses of the Canadian market indicate that “[r]etail chains with their own *distribution facilities* are projected to increase in number and size over the five years to 2026, indelibly shaping the future of the industry. Known as *self-distributing retailers*, they can shift more products per hour in their own warehouses than the average third-party wholesaler.”<sup>116</sup> In the case of warehouse clubs and supercenters in Canada, which are retailers of dairy products, “[d]ue to the large-scale nature of this industry, *most merchandise is sourced directly from*

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<sup>111</sup> Saputo, “Corporate Overview” web page (<https://www.saputo.com/en/our-company>) (Exhibit USA-53) (italics added).

<sup>112</sup> Saputo, Annual Report 2022, p. V (available at <https://www.saputo.com/en/investors/shareholder-reports/2022>) (Exhibit USA-54).

<sup>113</sup> See Ristoff, Jared, “Dairy Product Production in Canada”, IBISWorld, Inc., Industry Report 31151CA, September 2022, p. 31 (Exhibit USA-44) (**CONFIDENTIAL INFORMATION**).

<sup>114</sup> Agropur, “Food and Nutrition Solutions” web page (<https://www.agropur.com/en-us/food-and-nutrition-solutions>) (Exhibit USA-55) (italics added).

<sup>115</sup> Agropur, “Foodservice Solutions” web page (<https://www.agropursolutions.ca/en/expertise>) (Exhibit USA-55).

<sup>116</sup> McGrath, Shawn, “Grocery Wholesaling in Canada”, IBISWorld Inc., Industry Report 41311CA, September 2021, p. 15 (Exhibit USA-52) (**CONFIDENTIAL INFORMATION**) (italics added).

*manufacturers* and then shipped to selling warehouses or to a depot. *Purchasing from manufacturers instead of distributors* enables players in this industry to eliminate many of the costs associated with multiple-step distribution channels, which keeps purchase costs relatively low compared with the sector average.”<sup>117</sup> “Over the five years to 2027, IBISWorld expects that *downstream retailers will increasingly bypass wholesalers* in an attempt to secure lower prices”.<sup>118</sup>

118. Since Canada’s dairy TRQ allocation measures exclude retailers from eligibility for Canada’s USMCA dairy TRQs, the more that processors sell directly to retailers, the lower the amount of market activity for non-processors will be, and the smaller the pool of TRQ volume accessible to non-processors will be.

119. The pool of USMCA dairy TRQ volume available to distributors is further reduced due to the restrictions in Canada’s dairy TRQ allocation measures on what distributors can count as market activity. Distributors are prohibited from counting as market activity sales to other distributors, products sold to related persons, and products sold at the retail level to consumers. As explained below, no similar restrictions are applied to the calculation of processors’ market activity.<sup>119</sup>

120. Canada does not publicly release data showing the volumes or percentages of its USMCA dairy TRQ allocations that are allocated to different applicant types. Given this lack of transparency, the United States does not know the actual results of Canada’s application of its new USMCA dairy TRQ allocation measures for the USMCA dairy TRQs that were allocated for the dairy year beginning on August 1, 2022, and for calendar year 2023. Public information, though, does permit an estimation of the outcome of the application of Canada’s measures. For seven USMCA dairy TRQs for which there is sufficient public information to perform an analysis, the United States 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;

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<sup>117</sup> Kanda, Samuel, “Warehouse Clubs & Supercentres in Canada”, IBISWorld Inc., Industry Report 45291CA, December 2020, p. 25 (Exhibit USA-71) (**CONFIDENTIAL INFORMATION**) (italics added).

<sup>118</sup> Buchko, Matthew, “Ice Cream Production in Canada”, IBISWorld Inc., Industry Report 31152CA, April 2022, p. 18 (Exhibit USA-30) (**CONFIDENTIAL INFORMATION**) (italics added).

<sup>119</sup> See *infra*, section VI.C.

- (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 under Canada’s new measures, 79 percent to 91 percent of the allocations could go to processors.<sup>120</sup>

121. While this information is not necessary for the U.S. claims, it does provide additional perspective on Canada’s dairy TRQ allocation measures. 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.<sup>121</sup> 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.

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<sup>120</sup> 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).

<sup>121</sup> 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).

122. For these reasons, 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.

**C. Using a Market Share Basis to Allocate Canada’s USMCA Dairy TRQs and Applying Different Criteria to Different Types of Eligible Applicants Is Inconsistent with Article 3.A.2.4(b) of the USMCA**

123. Article 3.A.2.4(b) of the USMCA requires Canada to “ensure that its procedures for administering its TRQs ... are fair and equitable”. Canada’s dairy TRQ allocation measures, which heavily favor processors over other types of USMCA dairy TRQ applicants, are inconsistent with Article 3.A.2.4(b).

124. The word “procedure” is defined, most relevantly, as “the established or prescribed way of doing something”, “A particular course or mode of action”, “*Computing*. A set of instructions for performing a specific task, which may be invoked in the course of a program; a subroutine”.<sup>122</sup> Canada’s dairy TRQ allocation measures are Canada’s “procedures for administering its TRQs”.<sup>123</sup> The dairy TRQ allocation measures prescribe the way that Canada’s USMCA dairy TRQs are to be allocated, and provide instructions for performing the task of allocating the TRQs.

125. Article 3.A.2.4(b) of the USMCA requires Canada to ensure that its dairy TRQ allocation measures are “fair” and “equitable”. The word “fair” is defined as “[o]f conduct, actions, methods, arguments, etc.: free from bias, fraud, or injustice; equitable; legitimate, valid, sound ... [o]f conditions, circumstances, etc.: providing an equal chance of success to all; not unduly favourable or adverse to anyone”.<sup>124</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>125</sup>

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<sup>122</sup> Definition of “procedure” from Oxford English Dictionary Online (Exhibit USA-97).

<sup>123</sup> USMCA, Article 3.A.2.4(b).

<sup>124</sup> Definition of “fair” from Oxford English Dictionary Online (Exhibit USA-87).

<sup>125</sup> Definition of “equitable” from Oxford English Dictionary Online (Exhibit USA-85).

126. Thus, Canada is required 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.

127. As explained above, Canada’s dairy TRQ allocation measures provide that Canada’s USMCA dairy TRQs are allocated on a “market share basis”.<sup>126</sup> Processors’ market activity is based on the total kilograms of the TRQ product manufactured by the processor during the reference period.<sup>127</sup> 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.<sup>128</sup> Distributors’ market activity is based on just a fraction of the kilograms of the TRQ product sold by the distributor during the reference period.<sup>129</sup>

128. Distributors must exclude from their calculation of market activity products sold to other distributors.<sup>130</sup> Canada’s measures assert that “[t]his ensures that these sales are not used by multiple distributors to qualify for an allocation.”<sup>131</sup> 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

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<sup>126</sup> 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).

<sup>127</sup> Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 4 (Exhibit USA-10).

<sup>128</sup> Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 4 (Exhibit USA-10).

<sup>129</sup> Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 4 (Exhibit USA-10).

<sup>130</sup> Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 4 (Exhibit USA-10).

<sup>131</sup> General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022, section 2.5 (Exhibit USA-18).

their retail stores.”<sup>132</sup> If a large retailer has an “integrated distribution network[.]”<sup>133</sup> that is a 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.

129. 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,<sup>134</sup> 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.

130. Distributors are also required to exclude from their market activity calculation “products sold to related persons”.<sup>135</sup> 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.

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<sup>132</sup> *Canada – Dairy TRQs I*, Initial Written Submission of Canada, August 20, 2021 (excerpted), para. 33 (Exhibit USA-36).

<sup>133</sup> *Canada – Dairy TRQs I*, Initial Written Submission of Canada, August 20, 2021 (excerpted), para. 33 (Exhibit USA-36).

<sup>134</sup> See *Canada – Dairy TRQs I (Panel)*, para. 126 (Exhibit USA-26).

<sup>135</sup> Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 4 (Exhibit USA-10).

131. Canada’s dairy TRQ allocation measures also preclude distributors from counting as market activity “products sold at the retail level to consumers”.<sup>136</sup> 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 “[o]ur products are also sold directly to consumers through our e-commerce channels.”<sup>137</sup> Lactalis, another “major player” in the Canadian dairy market,<sup>138</sup> also “has launched two direct-to-consumer e-commerce platforms for cheese and for dairy.”<sup>139</sup> It is likely that other processors also sell directly to final consumers, or they could do so.

132. 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.

133. 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.

134. 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

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<sup>136</sup> Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 4 (Exhibit USA-10).

<sup>137</sup> Saputo, Annual Report 2022, p. V (Exhibit USA-54).

<sup>138</sup> 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).

<sup>139</sup> Grocery Business, “Lactalis Canada launches direct-to-consumer e-comm platforms for dairy, cheese”, September 1, 2021 (Exhibit USA-108).

related parties and sales to final consumers”.<sup>140</sup> 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.<sup>141</sup> But in the final dairy TRQ allocation measures that Canada adopted in May 2022, Canada modified the policy that was originally proposed, deciding that market activity would be determined differently for processors, distributors, and further processors.

135. 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 demonstrated above, 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, it is biased in favor of processors and unduly adverse to other potential users of the quota.

136. For these reasons, Canada’s dairy TRQ allocation measures are inconsistent with Article 3.A.2.4(b) of the USMCA.

**D. Using a Market Share Basis to Allocate Canada’s USMCA Dairy TRQs and Applying Different Criteria to Different Types of Eligible Applicants Is Inconsistent with Article 3.A.2.11(e) of the USMCA**

137. 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”. Canada’s dairy TRQ allocation measures, which heavily favor processors over other types of USMCA dairy TRQ applicants, are inconsistent with Article 3.A.2.11(e).

138. As explained above, Canada’s dairy TRQ allocation measures set forth the procedures for allocating Canada’s USMCA dairy TRQs, and Canada applies those measures when it “conduct[s]” the allocation of its TRQs.<sup>142</sup>

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<sup>140</sup> 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).

<sup>141</sup> Of course, the problem of processor pools-in-effect, discussed above in section VI.B, 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.

<sup>142</sup> USMCA, Article 3.A.2.11(e).



139. Again, 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>143</sup> Since the dictionary definition of “equitable” includes the word “fair”, it is appropriate to note again 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”.<sup>144</sup>

140. 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. For the same reasons given in the preceding subsection, Canada’s measures fail to meet this standard. Canada’s methods for conducting the allocation of its USMCA dairy TRQs, which are so “unduly favorable”<sup>145</sup> to processors and so “unduly ... adverse”<sup>146</sup> to the interests of non-processors, are not “[c]haracterized by equity or fairness”,<sup>147</sup> “free from bias”,<sup>148</sup> and do not “provid[e] an equal chance of success to all”.<sup>149</sup>

141. Accordingly, Canada’s dairy TRQ allocation measures are inconsistent with Article 3.A.2.11(e) of the USMCA.

**E. Using a Market Share Basis to Allocate Canada’s USMCA Dairy TRQs and Applying Different Criteria to Different Types of Eligible Applicants Is Inconsistent with the First Clause of Article 3.A.2.11(c) of the USMCA (“Ensure that Each Allocation is Made in Commercially Viable Shipping Quantities”)**

142. 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’s dairy TRQ allocation measures are inconsistent with the first clause of Article 3.A.2.11(c) because Canada’s measures contain no safeguards to ensure that each allocation is made in commercially viable shipping quantities.

143. Article 3.A.2.11(c) of the USMCA provides that:

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<sup>143</sup> Definition of “equitable” from Oxford English Dictionary Online (Exhibit USA-85).

<sup>144</sup> Definition of “fair” from Oxford English Dictionary Online (Exhibit USA-87).

<sup>145</sup> Definition of “fair” from Oxford English Dictionary Online (Exhibit USA-87).

<sup>146</sup> Definition of “fair” from Oxford English Dictionary Online (Exhibit USA-87).

<sup>147</sup> Definition of “equitable” from Oxford English Dictionary Online (Exhibit USA-85).

<sup>148</sup> Definition of “fair” from Oxford English Dictionary Online (Exhibit USA-87).

<sup>149</sup> Definition of “fair” from Oxford English Dictionary Online (Exhibit USA-87).

A Party administering an allocated TRQ shall ensure that:

...

(c) each allocation is made in commercially viable shipping quantities and, to the maximum extent possible, in the quantities that the TRQ applicant requests;

144. In contrast to the language in the second clause of Article 3.A.2.11(c) of the USMCA (“to the maximum extent possible”), which is discussed below and which requires Canada to put in a high degree of effort to achieve the aim of granting to TRQ applicants quota volume in the quantities requested, the first clause of Article 3.A.2.11(c) imposes an absolute requirement: Canada is obligated to *ensure that each and every allocation is made in commercially viable shipping quantities*. If any allocation is made in quantities that are not commercially viable shipping quantities, that constitutes a breach of the Agreement.

145. 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.

146. Canada’s applications for its USMCA dairy TRQs, though, suggest that Canada itself may have a sense of what would be a commercially viable shipping quantity. The applications ask 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”.<sup>150</sup>

147. The reference in the application to 20,000 kilograms is not explained. However, during *Canada – Dairy TRQs I*, the International Cheese Council of Canada (“ICCC”) made a submission to the panel stating that:

[I]t is the ICCC’s position (based on decades of experience) that a commercially viable shipping allocation equates to a shipping container size of approximately 20,000 kgs, or 20 tons, which is the ideal weight to ensure quality of cheese throughout transit. Anything substantially lower is commercially non-viable given that the costs of transportation, marketing and development are divided over a smaller quantity of product, which drives up the per kg cost – and all too often, this reality results in the allocations

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<sup>150</sup> CPTPP/CUSMA Ice Cream and Mixes TRQ Allocation Application for the Period of January 1 to December 31, 2023, question 15 (Exhibit USA-65).

going unused. Basing allocations on container sizes facilitates shipping and commerce as well as keeps transaction costs down.<sup>151</sup>

148. Based on this information from the ICCC, it appears that, by asking applicants to expressly confirm that they will accept an allocation of less than 20,000 kilograms, Canada is asking the applicants to confirm that they will accept an allocation in an amount that does not constitute a commercially viable shipping quantity. Of course, an applicant’s acquiescence to this condition, under pressure and penalty of not receiving any allocation at all, does not in any way relieve Canada of its obligation under the first clause of Article 3.A.2.11(c) of the USMCA to “ensure that ... each allocation is made in commercially viable shipping quantities”.

149. For its part, Canada argued in *Canada – Dairy TRQs I* that “shipping quantities as small as 100 kilogram were commercially viable.”<sup>152</sup> As noted above, though, applicants are asked to specify “[w]hat is the minimum volume you would be willing to accept”.<sup>153</sup> Nothing in Canada’s dairy TRQ allocation measures prevents an applicant from indicating in response to that question that it would be willing to accept an allocation of less than 100 kilograms. It is possible that an applicant might even indicate that it would accept an allocation as small as, for example, 1 kilogram. An applicant might do this 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 through transfers or reallocation. Canada’s dairy TRQ allocation measures provide that “you may transfer any portion of your allocation to *other allocation holders within the same TRQ*”.<sup>154</sup> It is not possible to receive a transfer of TRQ allocation if you are not already an allocation holder. Similarly, reallocations are made available only to “eligible allocation holders”, with no possibility that non-allocation holders can receive TRQ volume through the reallocation process.<sup>155</sup>

150. Thus, under Canada’s dairy TRQ allocation measures, there is an incentive for applicants to accept, and nothing in Canada’s measures prevents applicants from accepting – nor Canada from making – TRQ allocations in amounts that do not constitute commercially viable shipping quantities.

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<sup>151</sup> *Canada – Dairy TRQs I*, Non-Governmental Entity Written Submission of the International Cheese Council of Canada, August 27, 2021, p. 5 (footnote omitted; citing <https://www.icontainers.com/help/20-foot-container/>; <https://www.hapag-lloyd.com/en/services-information/cargo-fleet/container/40-reefer-high-cube.html>) (Exhibit USA-27).

<sup>152</sup> *Canada – Dairy TRQs I (Panel)*, para. 122, footnote 111 (Exhibit USA-26).

<sup>153</sup> 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).

<sup>154</sup> General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022, section 5.1 (Exhibit USA-18) (italics added).

<sup>155</sup> *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).

151. For these reasons, Canada’s dairy TRQ allocation measures are inconsistent with the first clause of Article 3.A.2.11(c) of the USMCA.

**F. Using a Market Share Basis to Allocate Canada’s USMCA Dairy TRQs and Applying Different Criteria to Different Types of Eligible Applicants Is Inconsistent with 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”)**

152. The second clause of Article 3.A.2.11(c) of the USMCA provides that Canada “shall ensure that ... each allocation is made ..., to the maximum extent possible, in the quantities that the TRQ applicant requests”. 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.

153. By using the phrase “to the maximum extent possible”, the second clause of Article 3.A.2.11(c) of the USMCA requires Canada to make every attempt to give to each applicant the quota volume that the applicant requests. 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>156</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>157</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>158</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.

154. 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.

155. But Canada does not make any effort whatsoever to achieve this aim.

156. Canada does not even 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

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<sup>156</sup> Definition of “maximum” from Oxford English Dictionary Online (Exhibit USA-94).

<sup>157</sup> Definition of “extent” from Oxford English Dictionary Online (Exhibit USA-86).

<sup>158</sup> Definition of “possible” from Oxford English Dictionary Online (Exhibit USA-96).

applicant requests.<sup>159</sup> Rather, each USMCA dairy TRQ application only asks the applicant to report the volume of its market activity, which, as explained above, is used to determine the applicant’s volume of TRQ 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.<sup>160</sup>

157. 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”.<sup>161</sup> And applicants are asked to specify “[w]hat is the minimum volume you would be willing to accept”.<sup>162</sup> 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. As discussed above, 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, an applicant might indicate that it 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.

158. By failing to even ask applicants to specify the amount of quota volume 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”.<sup>163</sup>

159. For these reasons, Canada’s dairy TRQ allocation measures are inconsistent with the second clause of Article 3.A.2.11(c) of the USMCA.

### **G. Using a Market Share Basis to Allocate Canada’s USMCA Dairy TRQs Is Inconsistent with Article 3.A.2.10 of the USMCA**

160. Article 3.A.2.10 of the USMCA 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

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<sup>159</sup> 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.

<sup>160</sup> 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).

<sup>161</sup> 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).

<sup>162</sup> 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).

<sup>163</sup> Italics added.

prohibits Canada from “discriminat[ing] against new importers when allocating the TRQ”. 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.

161. 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. The Party administering the TRQ allocation mechanism shall not discriminate against new importers when allocating the TRQ.

162. Article 3.A.2.10 contains two sentences, which set forth different but related obligations. The first sentence of Article 3.A.2.10 begins with a condition: “If a TRQ is administered by an allocation mechanism...”. As explained above,<sup>164</sup> through its dairy TRQ allocation measures, Canada has adopted and applies an “allocation mechanism” through which it grants access to its USMCA dairy TRQs. Where, as here, the condition in the first sentence of Article 3.A.2.10 is met, the first sentence further provides that Canada “shall” take the action described in the remainder of the sentence. The second sentence of Article 3.A.2.10 likewise provides that Canada “shall” take the action described in that sentence. The use of the term “shall” indicates an obligation, *i.e.*, since Canada administers its USMCA dairy TRQs using an allocation mechanism, Canada must maintain and apply its allocation mechanism in a manner that accords with the requirements of the two sentences of Article 3.A.2.10 of the USMCA.

163. The first sentence of Article 3.A.2.10 of the USMCA states, in relevant part, that an “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.”

164. The dictionary defines the word “provide” as “equip[ping] or fit[ting] out with what is necessary for a certain purpose; to supply with something implied.”<sup>165</sup> The word “mechanism”, read in its proper context, refers to the term “allocation mechanism”, which is used earlier in the first sentence of Article 3.A.2.10. As noted above, the term “allocation mechanism” is defined in the USMCA as “any system in which access to the tariff-rate quota is granted on a basis other

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<sup>164</sup> *See supra*, section III.

<sup>165</sup> Definition of “provide” from Oxford English Dictionary Online (Exhibit USA-99).

than first-come first-served”.<sup>166</sup> The term “new importers” is defined within the first sentence of Article 3.A.2.10 as “importers that have not previously imported the agricultural good subject to the TRQ”.<sup>167</sup> The dictionary definition of “agricultural” is “[o]f, relating to, or used in agriculture”,<sup>168</sup> and the word “agriculture” means “(now chiefly): the practice of growing crops, rearing livestock, and producing animal products (as milk and eggs), regarded as a single sphere of activity; farming, husbandry; (also) the theory of this”.<sup>169</sup> The word “good” is defined, most relevantly, as “[t]hings that are produced for sale; commodities and manufactured items to be bought and sold; merchandise, wares . . . economic assets which have a tangible, physical form (contrasted with services).”<sup>170</sup> In the context of Article 3.A.2.10 of the USMCA, and for the purposes of the present dispute, the phrase “the agricultural good subject to the TRQ” plainly refers to the particular category of dairy product subject to a given Canadian USMCA dairy TRQ. The word “eligible” means “[f]it or deserving to be chosen”.<sup>171</sup> The word “eligibility” means “fitness to be chosen”.<sup>172</sup> And finally, “criteria” is the plural of “criterion”, which means “[a] test, principle, rule, canon, or standard, by which anything is judged or estimated.”<sup>173</sup>

165. In light of the preceding definitions, and read in their proper context, the terms of the first sentence of Article 3.A.2.10 of the USMCA obligate Canada to “equip or fit out with what is necessary for a certain purpose”<sup>174</sup> a “system in which access to the [USMCA dairy TRQs] is granted on a basis other than first-come first-served”<sup>175</sup> that allows for importers that have not previously imported the particular category of dairy product subject to a given Canadian USMCA dairy TRQ, who meet all “test[s], principle[s], rule[s], canon[s], or standard[s]”<sup>176</sup> by

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<sup>166</sup> USMCA, Article 3.A.2.1.

<sup>167</sup> Article 3.A.2.10.1 of the USMCA defines a “TRQ” 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[.]”

<sup>168</sup> Definition of “agricultural” from Oxford English Dictionary Online (Exhibit USA-75).

<sup>169</sup> Definition of “agriculture” from Oxford English Dictionary Online (Exhibit USA-76).

<sup>170</sup> Definition of “good” from Oxford English Dictionary Online (Exhibit USA-90).

<sup>171</sup> Definition of “eligible” from Oxford English Dictionary Online (Exhibit USA-84).

<sup>172</sup> Definition of “eligibility” from Oxford English Dictionary Online (Exhibit USA-83).

<sup>173</sup> Definition of “criterion” from Oxford English Dictionary Online (Exhibit USA-81).

<sup>174</sup> Definition of “provide” from Oxford English Dictionary Online (Exhibit USA-99).

<sup>175</sup> USMCA, Article 3.A.2.1.

<sup>176</sup> Definition of “criterion” from Oxford English Dictionary Online (Exhibit USA-81).

which “fitness to be chosen”<sup>177</sup> is “judged or estimated”<sup>178</sup> other than import performance, to be “fit or deserving to be chosen”<sup>179</sup> for an allocation of the USMCA dairy TRQ.

166. The second sentence of Article 3.A.2.10 of USMCA provides that Canada, as “[t]he Party administering the TRQ allocation mechanism”, “shall not discriminate against new importers when allocating the TRQ.” This sentence, on its face, establishes a prohibition. The use of the phrase “shall not” indicates a commitment not to do what is described. The word “discriminate” is defined, most relevantly given that it is used together with the word “against”, as “[t]o treat goods, trading partners, etc., ... less favourably according to circumstances.”<sup>180</sup>

167. Thus, the ordinary meaning of the prohibition in the second sentence of Article 3.A.2.10 of the USMCA is that Canada shall not, when allocating its USMCA dairy TRQs, “treat [importers that have not previously imported the particular category of dairy product subject to a given Canadian USMCA dairy TRQ] . . . less favourably”<sup>181</sup> than other importers.

168. Canada’s dairy TRQ allocation measures, which allocate Canada’s USMCA dairy TRQs on a “market share basis”, breach both sentences of Article 3.A.2.10 of the USMCA.

169. Taking the second sentence of Article 3.A.2.10 first, 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.”<sup>182</sup> 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”<sup>183</sup> – than other applicants that have a prior history of manufacturing, using, or selling, and importing the dairy product.

170. One can conceive of a hypothetical “eligible applicant”, such as a distributor of fine meats from the United States, which has been operating in the Canadian food sector for many

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<sup>177</sup> Definition of “eligibility” from Oxford English Dictionary Online (Exhibit USA-83).

<sup>178</sup> Definition of “criterion” from Oxford English Dictionary Online (Exhibit USA-81).

<sup>179</sup> Definition of “eligible” from Oxford English Dictionary Online (Exhibit USA-84).

<sup>180</sup> Definition of “discriminate” from Oxford English Dictionary Online (Exhibit USA-82).

<sup>181</sup> Definition of “discriminate” from Oxford English Dictionary Online (Exhibit USA-82).

<sup>182</sup> General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022, section 3.2 (Exhibit USA-18).

<sup>183</sup> Definition of “discriminate” from Oxford English Dictionary Online (Exhibit USA-82).



years, including by importing fine meats from the United States and selling them to retailers. Recall that Paragraph 3(c) of Section A of Canada’s TRQ Appendix defines an “eligible applicant” to mean an applicant “active in the Canadian food or agriculture sector”. Such a distributor of fine meats from the United States meets the USMCA definition of an “eligible applicant”. Suppose that this hypothetical distributor seeks to enter into the Canadian dairy market to sell fine cheeses from the United States. As described, this distributor has a long history of activity in the Canadian food sector, has equipment and experience necessary to store and distribute refrigerated foods, such as fine cheeses, and has experience importing goods from the United States into Canada. Yet, if such a distributor applied for an allocation of the Canadian USMCA TRQ on cheeses of all types, the distributor would receive an allocation of zero kilograms, because it had never sold any cheese of any type. This example demonstrates how Canada’s dairy TRQ allocation measures, in particular the use of a “market share basis” when allocating Canada’s USMCA dairy TRQs, discriminates against new entrants to the Canadian dairy market, which necessarily also are new importers, by treating them less favorably than other eligible applicants that have previously manufactured or sold the agricultural product that is subject to a TRQ during the reference period.

171. Turning to the first sentence of Article 3.A.2.10 of the USMCA, it follows that, if Canada’s dairy TRQ allocation measures, through the use of a “market share basis”, operate as designed and allocate zero kilograms to new market entrants that are also new importers, then Canada’s measures do not “allow” such entities “to be eligible for a [USMCA dairy TRQ] quota allocation”, as the first sentence of Article 3.A.2.10 requires.<sup>184</sup> While Canada’s dairy TRQ allocation measures do not explicitly impose any eligibility criteria related to “import performance”, 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.

172. For these reasons, 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.

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<sup>184</sup> USMCA, Article 3.A.2.10, first sentence. Below, the United States separately demonstrates that the requirement that an applicant for a USMCA dairy TRQ allocation must show market activity during all 12 months of a 12-month reference period also breaches the first sentence of Article 3.A.2.10 of the USMCA, because the requirement does not allow otherwise eligible applicants to be eligible for allocations of the USMCA dairy TRQs. *See infra* section VII.D.

## **H. Using a Market Share Basis to Allocate Canada’s USMCA Dairy TRQs and Applying Different Criteria to Different Types of Eligible Applicants Is Inconsistent with Article 3.A.2.6(a) of the USMCA**

173. Canada’s dairy TRQ allocation measures, through the use of a “market share basis” to allocate Canada’s USMCA dairy TRQs and applying different criteria to different types of eligible applicants, breach Article 3.A.2.6(a) of the USMCA. There are two separate bases for this U.S. contention.

174. Firstly, as explained above, Canada’s dairy TRQ allocation measures provide 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.”<sup>185</sup> 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. Logically, it follows that if an applicant cannot be allocated any amount of USMCA dairy TRQ volume, that applicant is not eligible for the TRQ and cannot utilize the TRQ.

175. By limiting or conditioning eligibility for USMCA dairy TRQ allocations based on a demonstration of activity during a prior reference period, Canada’s dairy TRQ allocation measures introduce a new condition, limit, or eligibility requirement on who may receive and ultimately utilize a dairy TRQ allocation. The introduction of such a new condition, limit, or eligibility requirement on the utilization of Canada’s USMCA dairy TRQs is impermissible under Article 3.A.2.6(a) of the USMCA.

176. Secondly, as demonstrated above,<sup>186</sup> by using a market share basis to allocate Canada’s USMCA dairy TRQs, combined with the exclusion of retailers, food service operators, and other potential TRQ users from eligibility for USMCA dairy TRQ allocations and the disparate treatment of different types of eligible applicants, Canada’s dairy TRQ allocation measures, in substance and in effect, limit to processors pools of TRQ allocations to which only processors have access.

177. By limiting or conditioning eligibility for these processor pools of USMCA dairy TRQ allocations based on the requirement that the applicant be a processor, Canada’s dairy TRQ allocation measures introduce a new condition, limit, or eligibility requirement on who may receive and ultimately utilize a dairy TRQ allocation. The introduction of such a new condition,

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<sup>185</sup> General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022, section 3.2 (Exhibit USA-18).

<sup>186</sup> *See supra*, section VI.B.

limit, or eligibility requirement on the utilization of Canada’s USMCA dairy TRQs is impermissible under Article 3.A.2.6(a) of the USMCA.

178. This submission demonstrates above<sup>187</sup> that Article 3.A.2.6(a) of the USMCA prohibits a Party from introducing anything new or additional in excess of what is already in Annex 2-B of the Party’s Tariff Schedule 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.

179. Canada’s Tariff Schedule in Annex 2-B of Chapter 2 of the USMCA includes Canada’s USMCA TRQ Appendix. Canada’s USMCA TRQ Appendix, as demonstrated above,<sup>188</sup> specifies in Section A, Paragraph 3(c), the general eligibility requirement that Canada is to apply when allocating its USMCA TRQs (that is, an applicant must be “active in the Canadian food or agriculture sector”). Section B of Canada’s USMCA TRQ Appendix sets forth other conditions for receiving and using allocations, including that, for certain TRQs, specified percentages of the product imported must be used for “further food processing (secondary manufacturing)”.<sup>189</sup>

180. Nothing in Annex 2-B of Canada’s Tariff Schedule memorializes any agreement by the Parties that Canada may impose a condition, limit, or eligibility requirement on the utilization of its USMCA dairy TRQs that the recipient of the TRQ allocation must demonstrate activity during a prior reference period, or that an applicant must be a processor to be eligible to access certain pools of USMCA dairy TRQ allocations.

181. These additional conditions, limits, or eligibility requirements go “beyond those set out in [Canada’s] Schedule to Annex 2-B.” The requirement to demonstrate activity during a prior reference period, and the requirement that an applicant must be a processor to access substantial portions of Canada’s USMCA dairy TRQs, which are not accessible to non-processors, constitute new “demand[s]” or “requirement[s]” that are “prerequisite[s]” necessary for “render[ing] useful” a TRQ. If a particular entity is not eligible to receive a TRQ allocation, there is no way that entity could render useful a TRQ allocation.

182. Accordingly, 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.

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<sup>187</sup> See *supra*, section V.C.

<sup>188</sup> See *supra*, section V.B.

<sup>189</sup> E.g., USMCA, Chapter 2, Annex 2-B, Appendix 2, Section B, Paragraphs 5(b)(i), 6(b)(i), 8(b)(i), and 9(b).

## **VII. By Imposing 12-Month Activity Requirements for USMCA Dairy TRQ Applicants and Recipients, Canada’s Dairy TRQ Allocation Measures Breach Canada’s USMCA Commitments**

183. As demonstrated in this section, 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. 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”.<sup>190</sup> 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.

184. 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.

185. Finally, 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.

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<sup>190</sup> USMCA, Canada’s USMCA TRQ Appendix, Section A, Paragraph 3(c).

**A. Description of Canada’s Dairy TRQ Allocation Measures’ Imposition of 12-Month Activity Requirements on USMCA Dairy TRQ Applicants and Recipients**

186. Canada appears to have first proposed a 12-month eligibility requirement in a February 2020 “Policy Options” document.<sup>191</sup> The “Policy Options” document describes two options for the definition of the term “[n]ormally active”. “Option 1” is to “[r]equire applicants be active in all 12 months during the reference period in order to demonstrate activity.”<sup>192</sup> “Option 2” is to “[r]equire applicants be active at least 9 months during the reference period in order to demonstrate activity.”<sup>193</sup>

187. It is evident that, in its current dairy TRQ allocation measures, Canada has adopted and applies the first option. Canada’s dairy TRQ allocation measures provide that “you must be able to demonstrate that you were active in the applicable Canadian sector, as stated in the relevant Notice to Importers, in a defined 12-month reference period.”<sup>194</sup> Canada’s measures explain that “[a]ctivity tests add further definition to eligibility criteria and help to measure an applicant’s level of activity in the industry.”<sup>195</sup> Canada’s USMCA dairy TRQ Notices to Importers, published on May 16, 2022, state that “[t]o 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.”<sup>196</sup>

188. The term “active regularly” is not defined in Canada’s Notices to Importers. However, Canada’s dairy TRQ allocation measures further state that, with respect to “[d]emonstrating activity regularly during the reference period and throughout / during the TRQ year”, “[t]his is *normally understood to mean* that you are able to demonstrate activity in the relevant Canadian sector *on a monthly basis*.”<sup>197</sup> This suggests that, under the 12-month activity requirements, to

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<sup>191</sup> 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. 1 (Exhibit USA-20).

<sup>192</sup> 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. 1 (Exhibit USA-20).

<sup>193</sup> 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. 1 (Exhibit USA-20).

<sup>194</sup> See General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022, section 3.2 (Exhibit USA-18).

<sup>195</sup> See General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022, section 3.2 (Exhibit USA-18).

<sup>196</sup> E.g., Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 2 (Exhibit USA-10) (italics added).

<sup>197</sup> General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022, section 2.2 (Exhibit USA-18) (italics added).

be considered “normally active” or “active regularly”, and thus eligible for a USMCA dairy TRQ allocation, Canada’s dairy TRQ allocation measures require that the applicant 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. It follows that applicants that engage in relevant activity during 11 months or fewer would *not* be eligible for a TRQ allocation.

189. In addition to not explicitly defining the degree of activity that is required to be “active regularly”, Canada’s dairy TRQ allocation measures also do not explicitly define the *type* of activity in which an applicant must engage regularly. The USMCA dairy TRQ Notices to Importers explain that “[t]o 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”.<sup>198</sup> While the notices refer to “the Canadian food or agriculture sector”, which is the same language used in Section A, Paragraph 3(c), of Canada’s USMCA TRQ Appendix, Canada’s dairy TRQ allocation measures apply that language for the USMCA dairy TRQs to limit eligibility to applicants that manufacture, use, or sell the particular dairy product subject to the relevant USMCA dairy TRQ.<sup>199</sup> Additionally, the applications for USMCA dairy TRQ allocations demand that applicants “provide ... the required information on the company’s activity, during the reference period”, and effectuate that demand by soliciting information about the volume of the particular dairy product subject to the relevant USMCA dairy TRQ that the applicant “produced”, “used”, “purchased”, or “sold”.<sup>200</sup> Taken together, this all suggests that “active regularly” means “regularly” manufacturing, using, or selling the particular dairy product subject to the relevant USMCA dairy TRQ.

**B. Imposing 12-Month Activity Requirements for Dairy TRQ Applicants and Recipients Is Inconsistent with Section A, Paragraph 3(c), of Canada’s USMCA TRQ Appendix**

190. As demonstrated above,<sup>201</sup> a proper interpretive analysis pursuant to customary rules of interpretation reveals that Section A, Paragraph 3(c), of Canada’s USMCA TRQ Appendix requires Canada to allocate its USMCA dairy TRQs to applicants “active in the Canadian food or agriculture sector”, which means applicants that “operat[e]”, “work[ ]”, “participat[e]”, or “engag[e] in”, “esp. to a significant degree”,<sup>202</sup> the “part or branch of [the Canadian] economy”,

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<sup>198</sup> *E.g.*, Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 2 (Exhibit USA-10) (italics added).

<sup>199</sup> *See, e.g.*, Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 3 (Exhibit USA-10).

<sup>200</sup> *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).

<sup>201</sup> *See supra*, section V.B.

<sup>202</sup> Definition of “active” from Oxford English Dictionary Online (Exhibit USA-73).

or the “industry or activity”,<sup>203</sup> related to “[a]ny nutritious substance that people or animals eat or drink in order to maintain life and growth; nourishment, provisions”<sup>204</sup> or “the practice of growing crops, rearing livestock, and producing animal products (as milk and eggs)”.<sup>205</sup>

191. Notably, the terms that Canada uses – *i.e.*, “normally active”,<sup>206</sup> “active regularly”,<sup>207</sup> and “activity regularly”<sup>208</sup> – do not appear in the definition of “eligible applicant” in Paragraph 3(c) of Section A of Canada’s USMCA TRQ Appendix. The word “active” in Paragraph 3(c) is unmodified, and all that is required under the USMCA for an applicant to be eligible for TRQ allocations is that the applicant is “active” in the Canadian food or agriculture sector.

192. The interpretive considerations set forth above support the conclusion that an applicant that engages in relevant activity during fewer than 12 months out of the year properly would be considered “active in the Canadian food or agriculture sector”, so long as that level of activity represents “participat[ion]” especially to a “significant degree.”<sup>209</sup> Canada’s dairy TRQ allocation measures deem entities engaged in activity for 12 consecutive months (or, as Canada states it, “on a monthly basis”<sup>210</sup>) “active in the Canadian food or agriculture sector”. Such entities “operat[e]”, “work[ ]”, “participat[e]”, or “engag[e] in”<sup>211</sup> the “part or branch of [the Canadian] economy”, or the “industry or activity”,<sup>212</sup> related to “[a]ny nutritious substance that people or animals eat or drink in order to maintain life and growth; nourishment, provisions”<sup>213</sup> or “the practice of growing crops, rearing livestock, and producing animal products (as milk and eggs)”<sup>214</sup> by, *inter alia*, manufacturing, processing, handling, buying, selling, reselling, preparing, using or delivering dairy products that are within the scope of the dairy TRQs.

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<sup>203</sup> Definition of “sector” from Oxford English Dictionary Online (Exhibit USA-101).

<sup>204</sup> Definition of “food” from Oxford English Dictionary Online (Exhibit USA-88).

<sup>205</sup> Definition of “agriculture” from Oxford English Dictionary Online (Exhibit USA-76).

<sup>206</sup> 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. 1 (Exhibit USA-20).

<sup>207</sup> *E.g.*, Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 2 (Exhibit USA-10).

<sup>208</sup> General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022, section 2.2 (Exhibit USA-18).

<sup>209</sup> Definition of “active” from Oxford English Dictionary Online (Exhibit USA-73).

<sup>210</sup> General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022, section 2.2 (Exhibit USA-18) (*italics added*).

<sup>211</sup> Definition of “active” from Oxford English Dictionary Online (Exhibit USA-73).

<sup>212</sup> Definition of “sector” from Oxford English Dictionary Online (Exhibit USA-101).

<sup>213</sup> Definition of “food” from Oxford English Dictionary Online (Exhibit USA-88).

<sup>214</sup> Definition of “agriculture” from Oxford English Dictionary Online (Exhibit USA-76).

193. This would be equally true for an entity that engages in such activities during 11 months out of the year, or possibly even fewer months. Business cycles and seasonality may vary for different enterprises, or for different products, or in different regions. The relevant question under the Agreement is whether applicants “operat[e]”, “work[]”, “participat[e]”, or “engag[e] in”, “esp. to a significant degree”,<sup>215</sup> the “part or branch of [the Canadian] economy”, or the “industry or activity”,<sup>216</sup> related to “[a]ny nutritious substance that people or animals eat or drink in order to maintain life and growth; nourishment, provisions”<sup>217</sup> or “the practice of growing crops, rearing livestock, and producing animal products (as milk and eggs)”,<sup>218</sup> even if not during every month of a reference period.

194. Had Canada wished to exclude from eligibility particular entities that are active in the market only for certain months because of their specific level of activity, it would have needed to incorporate such an exclusion into the Agreement. As discussed above, where there are limiting conditions on who has access to the TRQs or for what purpose, such conditions are explicitly written in the Agreement. There is no language in the Agreement specifying that entities that engage in relevant activity during fewer than 12 months of the year are ineligible to receive an allocation.

195. The requirements in Canada’s dairy TRQ allocation measures 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, is overly restrictive and arbitrary when compared to the possibility of an applicant that engages in the very same activities in 11 of 12 months, or 10 of 12 months, or even fewer months out of the year. The proper interpretation of “active in the Canadian food or agriculture sector” does not permit Canada to apply such 12-month activity requirements when determining whether an applicant is eligible to apply for Canada’s USMCA dairy TRQs.

196. For these reasons, 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.

### **C. Imposing 12-Month Activity Requirements for Dairy TRQ Applicants and Recipients Is Inconsistent with Article 3.A.2.6(a) of the USMCA**

197. As explained above, Canada’s dairy TRQ allocation measures deny eligibility for TRQ allocations to applicants that fail to meet the prescribed 12-month activity requirements. By

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<sup>215</sup> Definition of “active” from Oxford English Dictionary Online (Exhibit USA-73).

<sup>216</sup> Definition of “sector” from Oxford English Dictionary Online (Exhibit USA-101).

<sup>217</sup> Definition of “food” from Oxford English Dictionary Online (Exhibit USA-88).

<sup>218</sup> Definition of “agriculture” from Oxford English Dictionary Online (Exhibit USA-76).



limiting or conditioning eligibility for USMCA dairy TRQ allocations based on these 12-month activity requirements, Canada’s dairy TRQ allocation measures introduce a new condition, limit, or eligibility requirement on who may apply for, receive, and ultimately utilize a dairy TRQ allocation. The introduction of such a new condition, limit, or eligibility requirement on the utilization of Canada’s USMCA dairy TRQs is impermissible under Article 3.A.2.6(a) of the USMCA.

198. As demonstrated above,<sup>219</sup> a proper application of customary rules of interpretation reveals that Article 3.A.2.6(a) of the USMCA prohibits a Party from introducing anything new or additional in excess of what is already in Annex 2-B of the Party’s Tariff Schedule 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.

199. Canada’s Tariff Schedule in Annex 2-B of Chapter 2 of the USMCA includes Canada’s USMCA TRQ Appendix. Canada’s USMCA TRQ Appendix, as demonstrated above,<sup>220</sup> specifies in Section A, Paragraph 3(c), the general eligibility requirement that Canada is to apply when allocating its USMCA TRQs (that is, an applicant must be “active in the Canadian food or agriculture sector”). Section B of Canada’s USMCA TRQ Appendix sets forth other conditions for receiving and using allocations, including that, for certain TRQs, specified percentages of the product imported must be used for “further food processing (secondary manufacturing)”.<sup>221</sup> Nothing in Annex 2-B of Canada’s Tariff Schedule memorializes any agreement by the Parties that Canada may impose a condition, limit, or eligibility requirement on the utilization of its USMCA dairy TRQs that the applicant for and recipient of the TRQ allocation 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.

200. These additional conditions, limits, or eligibility requirements go “beyond those set out in [Canada’s] Schedule to Annex 2-B.” Canada’s imposition of the 12-month activity requirements constitutes a new “demand” or “requirement” that is a “prerequisite” necessary for “render[ing] useful” a TRQ. If a particular entity is not eligible to apply for, let alone receive, a TRQ allocation, there is no way that entity could render useful a TRQ allocation, since they could never receive it in the first place.

201. Additionally, the second 12-month activity requirement, that “[t]o be eligible, you ... *must remain active regularly during the quota year*”,<sup>222</sup> imposes a condition directly on the use of the TRQ during the quota year. Again, nothing in Annex 2-B of Canada’s Tariff Schedule

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<sup>219</sup> See *supra*, section V.C.

<sup>220</sup> See *supra*, section V.B.

<sup>221</sup> E.g., USMCA, Chapter 2, Annex 2-B, Appendix 2, Section B, Paragraphs 5(b)(i), 6(b)(i), 8(b)(i), and 9(b).

<sup>222</sup> E.g., Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 2 (Exhibit USA-10) (italics added).

memorializes any agreement by the Parties that Canada may impose such a condition, limit, or eligibility requirement on the utilization of its USMCA dairy TRQs.

202. Accordingly, 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 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 – is inconsistent with Article 3.A.2.6(a) of the USMCA.

**D. Imposing an Historical 12-Month Activity Requirement for Dairy TRQ Applicants Is Inconsistent with Article 3.A.2.10 of the USMCA**

203. As discussed earlier,<sup>223</sup> Article 3.A.2.10 of the USMCA 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”. 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. That is inconsistent with Article 3.A.2.10.

204. As demonstrated above,<sup>224</sup> properly interpreted according to customary rules of interpretation of public international law, the first sentence of Article 3.A.2.10 of the USMCA obligates Canada to “equip or fit out with what is necessary for a certain purpose”<sup>225</sup> a “system in which access to the [USMCA dairy TRQs] is granted on a basis other than first-come first-served”<sup>226</sup> that allows for importers that have not previously imported the particular category of dairy product subject to a given Canadian USMCA dairy TRQ, who meet all “test[s], principle[s], rule[s], canon[s], or standard[s]”<sup>227</sup> by which “fitness to be chosen”<sup>228</sup> is “judged or

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<sup>223</sup> See *supra*, section VI.G.

<sup>224</sup> See *supra*, section VI.G.

<sup>225</sup> Definition of “provide” from Oxford English Dictionary Online (Exhibit USA-99).

<sup>226</sup> USMCA, Article 3.A.2.1.

<sup>227</sup> Definition of “criterion” from Oxford English Dictionary Online (Exhibit USA-81).

<sup>228</sup> Definition of “eligibility” from Oxford English Dictionary Online (Exhibit USA-83).

estimated”<sup>229</sup> other than import performance, to be “fit or deserving to be chosen”<sup>230</sup> for an allocation of the USMCA dairy TRQs.

205. 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.<sup>231</sup> 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”,<sup>232</sup> as the first sentence of Article 3.A.2.10 requires.

206. We recall the hypothetical distributor of fine meats from the United States described above,<sup>233</sup> which has been active for years in the Canadian food sector and now wishes to enter the dairy market to sell fine cheeses imported from the United States. Despite being an “eligible applicant”, as that USMCA term is properly interpreted, Canada’s dairy TRQ allocation measures would not “allow[ ]” such a distributor, which “[has] not previously imported the [particular dairy product subject to the USMCA TRQ on cheeses of all types]”, “to be eligible for a quota allocation” under the USMCA TRQ on cheeses of all types.

207. Canada has failed to “equip or fit out with what is necessary for a certain purpose”<sup>234</sup> a “system in which access to the [USMCA dairy TRQs] is granted on a basis other than first-come first-served”<sup>235</sup> that allows for importers that have not previously imported the particular category of dairy product subject to a given Canadian USMCA dairy TRQ, who meet all “test[s], principle[s], rule[s], canon[s], or standard[s]”<sup>236</sup> by which “fitness to be chosen”<sup>237</sup> is “judged or

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<sup>229</sup> Definition of “criterion” from Oxford English Dictionary Online (Exhibit USA-81).

<sup>230</sup> Definition of “eligible” from Oxford English Dictionary Online (Exhibit USA-84).

<sup>231</sup> *See supra*, section VII.A.

<sup>232</sup> USMCA, Article 3.A.2.10, first sentence.

<sup>233</sup> *See supra*, section VI.G.

<sup>234</sup> Definition of “provide” from Oxford English Dictionary Online (Exhibit USA-99).

<sup>235</sup> USMCA, Article 3.A.2.1.

<sup>236</sup> Definition of “criterion” from Oxford English Dictionary Online (Exhibit USA-81).

<sup>237</sup> Definition of “eligibility” from Oxford English Dictionary Online (Exhibit USA-83).

estimated”<sup>238</sup> other than import performance, to be “fit or deserving to be chosen”<sup>239</sup> for an allocation of the USMCA dairy TRQ. Accordingly, Canada’s dairy TRQ measures breach the first sentence of Article 3.A.2.10 of the USMCA.

208. 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 above,<sup>240</sup> 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 given Canadian USMCA dairy TRQ] . . . less favourably”<sup>241</sup> 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.

209. For these reasons, 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.

### **VIII. 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**

210. 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.” 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.” As demonstrated in this section, Canada’s dairy TRQ allocation measures are inconsistent with these provisions. While Canada’s USMCA dairy TRQs are administered by an allocation mechanism and Canada’s dairy TRQ allocation measures include a mechanism for the return and reallocation of unused allocations, Canada fails to ensure that return and reallocation is accomplished in a timely and transparent manner that provides the greatest possible opportunity for the USMCA dairy TRQs to be filled, and Canada fails to administer its USMCA dairy TRQs in a manner that allows importers the opportunity to utilize TRQ quantities fully.

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<sup>238</sup> Definition of “criterion” from Oxford English Dictionary Online (Exhibit USA-81).

<sup>239</sup> Definition of “eligible” from Oxford English Dictionary Online (Exhibit USA-84).

<sup>240</sup> *See supra*, section VI.G.

<sup>241</sup> Definition of “discriminate” from Oxford English Dictionary Online (Exhibit USA-82).

### A. Description of Canada’s Mechanism for the Return and Reallocation of Unused USMCA Dairy TRQ Allocations

211. Canada’s dairy TRQ allocation measures provide an opportunity for unused USMCA dairy TRQ allocations to be returned and reallocated. Canada’s measures explain that, “[u]nder many TRQs, you may return a portion of your unused allocation without penalty as long as you notify the Department in writing no later than the applicable return date.”<sup>242</sup> Canada’s USMCA dairy TRQ Notices to Importers provide that, “[y]ou may return any portion of your allocation to the Department in writing by the prescribed return date.”<sup>243</sup>

212. For all of Canada’s USMCA dairy TRQs, the “Return Deadline” is the first day of the ninth month of the quota year.<sup>244</sup> So, for the TRQs that are administered on a calendar year, the return date is September 1, and for the TRQs that are administered on a quota year running from August 1 to July 31, the return date is April 1.<sup>245</sup> This leaves just four months at the end of the quota year for importers to use any returned and reallocated TRQ volume.

213. In reality, the period of time for importers to use reallocated TRQ volume may be considerably shorter than four months, because the reallocation process itself takes time, though the precise timing is not clear from Canada’s dairy TRQ allocation measures. The USMCA dairy TRQ Notices to Importers explain that “[r]eturned quantities will *normally* be made available seven days after the return date to eligible allocation holders, who have not returned any portion of their allocation, in proportion to their initial allocation, *or on demand if quantities still remain after the first offer.*”<sup>246</sup> The use of the word “normally” leaves it unclear exactly what the timing of reallocation is. Also, the reference to a “first offer” suggests the possibility of an iterative process of multiple offers and decisions about whether to accept offers. Each step of such a process could take days or weeks, as reallocation offers are made and then considered or rejected, and new offers are made. This reduces the time available for importers to use any reallocated TRQ volume, and throughout the process, importers do not have a clear understanding of the process, the timing, or the volume of TRQ allocations that might potentially be available for reallocation.

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<sup>242</sup> General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022, section 5.2 (Exhibit USA-10).

<sup>243</sup> *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).

<sup>244</sup> *See* Key dates and access quantities 2022-2023: TRQs for Supply-Managed Products, modified on February 13, 2023 (Exhibit USA-19).

<sup>245</sup> *See* Key dates and access quantities 2022-2023: TRQs for Supply-Managed Products, modified on February 13, 2023 (Exhibit USA-19).

<sup>246</sup> *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) (italics added).

214. In the same sections of its measures that set forth information about return and reallocation, Canada’s dairy TRQ allocations measures also prescribe minimum utilization rates for the TRQs. Canada’s measures explain that “[t]he minimum utilization rate is a mechanism to encourage maximum use of a TRQ. If you do not reach the predetermined minimum level of utilization, you may be subject to an under-utilization penalty if you apply for an allocation the following year. The applicable minimum utilization rate for each TRQ is set out in the Notice to Importers. You will be advised of any under-utilization penalty that applies to you before the allocations are finalized for the new allocation year.”<sup>247</sup>

215. Canada’s USMCA dairy TRQ Notices to Importers effectuate the minimum utilization rates, providing that, “[i]f you use less than 90% of your allocation in one year, you may have your allocation adjusted downward by an under-utilization penalty in the following year.”<sup>248</sup> However, the notices further provide that “[a]ny portion of your allocation that you transfer or return in accordance with the present policy is considered to have been used. This applies to the administration of the under-utilization policy only.”<sup>249</sup> Thus, allocations that are returned by the return date are not subject to any under-utilization penalty.

216. However, the under-utilization penalty creates a disincentive for importers to accept reallocated TRQ volume if an importer is not confident that it will be able to use the reallocated TRQ volume in the short period of time before the end of the TRQ year. While the under-utilization penalty does not apply to allocations returned by the return date, the penalty does apply to reallocated TRQ volume that is not used before the end of the quota year.

**B. Canada’s Mechanism for the Return and Reallocation of Unused USMCA Dairy TRQ Allocations Is Inconsistent with Article 3.A.2.15 of the USMCA**

217. Article 3.A.2.15 of the USMCA requires Canada to “ensure that there is a mechanism for the return and reallocation of unused allocations in a timely and transparent manner that provides the greatest possible opportunity for the TRQ to be filled”.

218. Beginning the interpretive analysis with consideration of the ordinary meaning of relevant terms, the dictionary defines “timely” as “[o]ccurring, done, or made at a fitting, suitable, or favourable time; opportune, well-timed, seasonable”, “[o]ccurring or appearing early in the day, season, year, etc.”, “Of an action or circumstance: done or occurring sufficiently early or in good time; prompt”.<sup>250</sup> The word “transparent” is defined, most aptly in the figurative

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<sup>247</sup> General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022, section 5.3 (Exhibit USA-18).

<sup>248</sup> *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).

<sup>249</sup> *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).

<sup>250</sup> Definition of “timely” from Oxford English Dictionary Online (Exhibit USA-102).

sense, as “[f]rank, open, candid, ingenuous”, or “[e]asily seen through, recognized, understood, or detected; manifest, evident, obvious, clear”.<sup>251</sup> The dictionary defines the word “greatest” as “[t]he superlative of great”, “having the most significant effects, importance, distinction, etc.”, “primarily relating to quantity or degree”, and offers the example of “the principle (also †rule) of the greatest happiness: (esp. in utilitarianism) the principle that the aim of morality is the maximization of happiness”.<sup>252</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>253</sup> And the word “opportunity” is defined, *inter alia*, as “a time, condition, or set of circumstances permitting or favourable to a particular action or purpose”.<sup>254</sup>

219. The above 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”<sup>255</sup> 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”;<sup>256</sup> that is “open” and “[e]asily seen ... understood”, “manifest, evident, obvious, clear”;<sup>257</sup> and that provides “the most significant effects”, or “maximiz[es]”<sup>258</sup> what is “capable of being; that may or can exist, be done, or happen”, “that is in [Canada’s] power, that [Canada] can do”<sup>259</sup> to promote the “condition, or set of circumstances permitting or favourable to”<sup>260</sup> the USMCA dairy TRQs being filled.

220. The superlative nature of the terms used – “in a timely and transparent manner that provides the *greatest possible opportunity* for the TRQ to be filled”<sup>261</sup> – indicates that, in adopting and implementing a mechanism for return and reallocation of unused allocations, Canada is obligated to put in a high degree of effort to achieve the aim of the USMCA dairy TRQs being filled.

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<sup>251</sup> Definition of “transparent” from Oxford English Dictionary Online (Exhibit USA-103).

<sup>252</sup> Definition of “greatest” from Oxford English Dictionary Online (Exhibit USA-91).

<sup>253</sup> Definition of “possible” from Oxford English Dictionary Online (Exhibit USA-96).

<sup>254</sup> Definition of “opportunity” from Oxford English Dictionary Online (Exhibit USA-95).

<sup>255</sup> USMCA, Article 3.A.2.15 (italics added).

<sup>256</sup> Definition of “timely” from Oxford English Dictionary Online (Exhibit USA-102).

<sup>257</sup> Definition of “transparent” from Oxford English Dictionary Online (Exhibit USA-103).

<sup>258</sup> Definition of “greatest” from Oxford English Dictionary Online (Exhibit USA-91).

<sup>259</sup> Definition of “possible” from Oxford English Dictionary Online (Exhibit USA-96).

<sup>260</sup> Definition of “opportunity” from Oxford English Dictionary Online (Exhibit USA-95).

<sup>261</sup> USMCA, Article 3.A.2.15 (italics added).

221. Canada’s mechanism for the return and reallocation of its USMCA dairy TRQs falls far short of what is required by Article 3.A.2.15 of the USMCA.

222. As explained above, the return date for all of Canada’s USMCA dairy TRQs is just four months prior to the end of the quota year.<sup>262</sup> Given the reality that the reallocation process could take weeks to complete, following numerous exchanges between the Government of Canada and importers in which multiple “offer[s]”<sup>263</sup> of reallocated quota volume are made, considered, and then accepted or rejected, the mechanism for return and reallocation set forth in Canada’s dairy TRQ allocation measures plainly is not “timely”, as required by Article 3.A.2.15 of the USMCA. Return and reallocation commencing at the beginning of the ninth month of the quota year and potentially extending throughout that month or even into the next does not “[o]ccur[] ... early in the ... year” and is not “done ... sufficiently early or in good time”.<sup>264</sup>

223. Canada’s mechanism for return and reallocation, as set forth in Canada’s dairy TRQ measures, also is not “transparent”, as Article 3.A.2.15 of the USMCA requires. On their face, Canada’s dairy TRQ measures are not “open” and “[e]asily seen ... understood”, “manifest, evident, obvious, clear”,<sup>265</sup> neither in terms of the amount of TRQ volume that is available for reallocation nor in terms of the timing of the reallocation process.

224. While Canada regularly publishes information on the utilization rates of its USMCA dairy TRQs,<sup>266</sup> that information is insufficient to communicate to importers how much unused TRQ volume will be returned and available for reallocation. And when unused TRQ volume has been returned, Canada’s dairy TRQ allocation measures explain that “[r]eturned quantities will *normally* be made available seven days after the return date to eligible allocation holders, who

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<sup>262</sup> See Key dates and access quantities 2022-2023: TRQs for Supply-Managed Products, modified on February 13, 2023 (Exhibit USA-19).

<sup>263</sup> 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) (italics added).

<sup>264</sup> Definition of “timely” from Oxford English Dictionary Online (Exhibit USA-102).

<sup>265</sup> Definition of “transparent” from Oxford English Dictionary Online (Exhibit USA-103).

<sup>266</sup> See Government of Canada, “Supply-managed tariff rate quotas (TRQs)” web page, available at [https://www.international.gc.ca/trade-commerce/controls-controles/supply\\_managed-gestion\\_offre.aspx?lang=eng&type=Utilization%20Tables#dataset-filter](https://www.international.gc.ca/trade-commerce/controls-controles/supply_managed-gestion_offre.aspx?lang=eng&type=Utilization%20Tables#dataset-filter) (accessed March 17, 2023; last modified February 10, 2023). See also USMCA, Article 3.A.2.16 (“Each Party shall publish, on a regular basis and on its designated publicly available website, information concerning quantities allocated, quantities returned, and, if available, quota utilization rates. In addition, each Party shall 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.”). The United States has not raised in this dispute a claim that Canada’s dairy TRQ allocation measures are inconsistent with Article 3.A.2.16 of the USMCA – in particular, the requirement in the second sentence that “each Party shall 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.” It is, however, unclear on the face of Canada’s dairy TRQ allocation measures how Canada complies with this provision.



have not returned any portion of their allocation, in proportion to their initial allocation, *or on demand if quantities still remain after the first offer*.<sup>267</sup> This explanation indicates that, in the first instance, each importer that has not returned any portion of its allocation is informed, not of the total volume of returned TRQ allocations that is available for reallocation and that may be requested, but only of the volume of reallocated TRQ that is being offered to the individual importer, which is in proportion to its own initial allocation. While there may be the possibility that more reallocated TRQ volume might be offered later, “after the first offer”<sup>268</sup> (the “first offer” suggests the potential for additional offers), the importer cannot know whether and how much additional TRQ reallocation volume might later become available. And the importer cannot know the timing of any such potential offer, which may never be made. While an importer might be willing to accept a reallocation if it were of a sufficiently high volume, the importer might decline a first, low offer, considering it not to be commercially viable, and then miss an opportunity to receive more TRQ volume if other importers make the same choice, and if the importers’ rejection of the first offer is taken to mean that they are not interested in receiving any reallocated TRQ allocations. But importers cannot possibly know the true situation because Canada’s return and reallocation mechanism, on its face, is not transparent, as required by Article 3.A.2.15 of the USMCA.

225. In light of the failings described above, it is evident that Canada’s dairy TRQ allocation measures do not “ensure that there is a mechanism for the return and reallocation of unused allocations ... *that provides the greatest possible opportunity* for the TRQ to be filled”.<sup>269</sup> Canada’s measures do not afford “the most significant effects”, or “maximiz[e]”<sup>270</sup> what is “capable of being; that may or can exist, be done, or happen”, “that is in [Canada’s] power, that [Canada] can do”<sup>271</sup> to promote the “condition, or set of circumstances permitting or favourable to”<sup>272</sup> the USMCA dairy TRQs being filled.

226. Canada could do more, and Article 3.A.2.15 of the USMCA obligates Canada to do more. Indeed, Canada does do more for other TRQs, and Canada has proposed doing more in a published policy options document.

227. For example, for the CETA import TRQ on cheeses of all types and the CETA import TRQ on industrial cheese, the return date is August 1. Those TRQs are administered on a calendar year, like a number of the USMCA dairy TRQs, for which the return date is September

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<sup>267</sup> *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) (italics added).

<sup>268</sup> *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).

<sup>269</sup> USMCA, Article 3.A.2.15 (italics added).

<sup>270</sup> Definition of “greatest” from Oxford English Dictionary Online (Exhibit USA-91).

<sup>271</sup> Definition of “possible” from Oxford English Dictionary Online (Exhibit USA-96).

<sup>272</sup> Definition of “opportunity” from Oxford English Dictionary Online (Exhibit USA-95).

1.<sup>273</sup> Thus, for these CETA TRQs, importers have five months to use any returned and reallocated TRQ volume, which is one month more than importers have for the USMCA dairy TRQs.

228. Canada also maintains export quotas on certain dairy products, as required by the USMCA, for example skim milk powder (“SMP”) and milk protein concentrate (“MPC”).<sup>274</sup> Pursuant to these export quotas, eligible applicants may be allocated “below-threshold quantity (BTQ)”,<sup>275</sup> *i.e.*, export quota volume, on a “market share basis”,<sup>276</sup> which entitles them to export SMP and MPC without being required to pay an export charge.<sup>277</sup> Exporters who wish to export “product in excess of the threshold and/or their allocation or those who have not received an allocation must pay” an export charge.<sup>278</sup> Like it does for its USMCA dairy import TRQs, Canada maintains a return and reallocation mechanism for the export quota on SMP and MPC.<sup>279</sup> The return and reallocation mechanism for SMP and MPC, however, does considerably more to incentivize filling the export quota than the mechanism Canada has adopted through its dairy TRQ allocation measures does to incentivize filling the USMCA dairy import TRQs.

229. The Notice to Exporters on SMP and MPC provides that:

- The transfer of allocations is normally prohibited. Transfers to distributors who act as the exporter of record for the transferred quantity may be considered.
  - If you are an allocation holder, you may submit a written request for a transfer to Global Affairs Canada for consideration.
- You may return any portion of your allocation by **January 31 or April 30**.

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<sup>273</sup> See Key dates and access quantities 2022-2023: TRQs for Supply-Managed Products, modified on February 13, 2023 (Exhibit USA-19).

<sup>274</sup> See USMCA, Articles 3.A.3.8 and 3.A.3.9.

<sup>275</sup> Notice to Exporters, Skim Milk Powder and Milk Protein Concentrate Export Thresholds – Serial No. 1055, dated May 1, 2021, section 2 (Exhibit USA-22).

<sup>276</sup> Notice to Exporters, Skim Milk Powder and Milk Protein Concentrate Export Thresholds – Serial No. 1055, dated May 1, 2021, section 3 (Exhibit USA-22).

<sup>277</sup> See Notice to Exporters, Skim Milk Powder and Milk Protein Concentrate Export Thresholds – Serial No. 1055, dated May 1, 2021, section 7 (Exhibit USA-22).

<sup>278</sup> Notice to Exporters, Skim Milk Powder and Milk Protein Concentrate Export Thresholds – Serial No. 1055, dated May 1, 2021, section 7 (Exhibit USA-22).

<sup>279</sup> See Notice to Exporters, Skim Milk Powder and Milk Protein Concentrate Export Thresholds – Serial No. 1055, dated May 1, 2021, section 4 (Exhibit USA-22).

- Any portion returned by **January 31** will be considered used for the purposes of administering the under-utilization policy.
- If you return quantities between **February 1 and April 30**, your allocation in the following year may be reduced by an amount equivalent to 50% of the quantities that you returned.
- You may not return quantities after April 30.
- Returned quantities will normally be made available seven days after the return deadline to eligible allocation holders who have used 80% or more of their allocation and not returned any unused quantity of their allocation
- If you use less than 95% of your allocation in one year, you may have your allocation adjusted downward by 100% of the unused quantity in the following year.
  - Any portion of your allocation that you transfer out, and that is not subsequently exported by the transferee, is considered as not having been utilized and will be factored into the under-utilization penalty to be applied against your BTQ allocation for the following dairy year.
  - You will be advised of the applicable penalty before the allocation is finalized.<sup>280</sup>

The allocation year for the export quota on SMP and MPC is August 1 to July 31.<sup>281</sup>

230. As indicated above, 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

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<sup>280</sup> Notice to Exporters, Skim Milk Powder and Milk Protein Concentrate Export Thresholds – Serial No. 1055, dated May 1, 2021, section 4 (Exhibit USA-22) (bold in original).

<sup>281</sup> Key dates and export quantities 2022-2023: BTQs for dairy export thresholds, dated September 7, 2022 (Exhibit USA-23).

reduced by an amount equivalent to 50% of the quantities ... returned.”<sup>282</sup> 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.

231. Additionally, the under-utilization penalty for the SMP and MPC export quota is stricter than the penalty for USMCA dairy TRQs. For SMP and MPC, “[i]f you use less than 95% of your allocation in one year, you may have your allocation adjusted downward by 100% of the unused quantity in the following year.”<sup>283</sup> Canada’s USMCA dairy TRQ Notices to Importers specify that, “[i]f you use less than 90% of your allocation in one year, you may have your allocation adjusted downward by an under-utilization penalty in the following year.”<sup>284</sup> The higher threshold and defined penalty of the SMP and MPC export quota creates a greater incentive to use and thus to fill the export quota than the lower threshold and undefined penalty that Canada’s dairy TRQ allocation measures apply for Canada’s USMCA dairy TRQs.

232. Furthermore, for Canada’s export quota on SMP and MPC, “[t]he transfer of allocations is normally prohibited.”<sup>285</sup> If an exporter’s “written request” for permission to transfer an allocation is, in an exceptional circumstance, granted, the notice for SMP and MPC provides that “[a]ny portion of your allocation that you transfer out, and that is not subsequently exported by the transferee, is considered as not having been utilized and will be factored into the under-utilization penalty to be applied against your BTQ allocation for the following dairy year.”<sup>286</sup>

233. The transfer rules for Canada’s USMCA dairy import TRQs are much different than those for the export quota on SMP and MPC. The general rule for import quotas is that transfers are allowed. “Under many TRQs, you may transfer any portion of your allocation to other allocation holders within the same TRQ, but there may be some restrictions depending on the TRQ. As each TRQ is administered independently, quota is not transferable between different TRQs. All quota transfers must be referred to the Department for consideration by way of a Transfer Request Form.”<sup>287</sup> The Notices to Importers for Canada’s USMCA dairy TRQs

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<sup>282</sup> Notice to Exporters, Skim Milk Powder and Milk Protein Concentrate Export Thresholds – Serial No. 1055, dated May 1, 2021, section 4 (Exhibit USA-22).

<sup>283</sup> Notice to Exporters, Skim Milk Powder and Milk Protein Concentrate Export Thresholds – Serial No. 1055, dated May 1, 2021, section 4 (Exhibit USA-22).

<sup>284</sup> *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).

<sup>285</sup> Notice to Exporters, Skim Milk Powder and Milk Protein Concentrate Export Thresholds – Serial No. 1055, dated May 1, 2021, section 4 (Exhibit USA-22).

<sup>286</sup> Notice to Exporters, Skim Milk Powder and Milk Protein Concentrate Export Thresholds – Serial No. 1055, dated May 1, 2021, section 4 (Exhibit USA-22).

<sup>287</sup> General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022, section 5.1 (Exhibit USA-18).

confirm that transfers are permitted for the dairy TRQs.<sup>288</sup> The United States understands that requests to transfer allocation to eligible allocation holders are, in the ordinary course, granted automatically.

234. The rules on transfer are set forth in Canada’s dairy TRQ allocation measures in the same sections that set forth the rules on return and reallocation,<sup>289</sup> and the transfer rules have a significant effect on return and reallocation and on whether the quotas fill. Self-evidently, as a matter of commercial logic, quota allocations have economic value. The quota allocations permit the allocation holder to move goods across the border without paying an import tariff or an export charge. Where it is permissible – and easy – to transfer quota allocations, the allocations also have monetary value as something that can be sold. Thus, there is an incentive for eligible entities to apply for TRQ allocations even if they have no intention of using the allocation to import dairy products. Under Canada’s USMCA dairy TRQ allocation measures, an entity eligible for USMCA dairy TRQ allocations can get an allocation, wait throughout the TRQ year for opportunities to transfer portions of the allocation for payment, seeing what the market will bear. If there is any allocation left unsold, the allocation holder can return the unused allocation by the return date late in the quota year, incur no penalty, and then start over again in a few months with a new allocation when the next quota year begins. The mechanism for return and reallocation and the transfer rules for Canada’s dairy TRQs 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.

235. Finally, 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”.<sup>290</sup> Again, 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.<sup>291</sup> The mechanism for SMP and MPC is, on its face, 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, which is an indication that they are likely eager and able to export more, thus increasing the chance that the export quota will be filled.

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<sup>288</sup> 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).

<sup>289</sup> See, e.g., General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022, section 5.1 (Exhibit USA-18); Notice to Importers, CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022, section 5 (Exhibit USA-10).

<sup>290</sup> Notice to Exporters, Skim Milk Powder and Milk Protein Concentrate Export Thresholds – Serial No. 1055, dated May 1, 2021, section 4 (Exhibit USA-22).

<sup>291</sup> 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).

236. As demonstrated above, the return and reallocation mechanism that Canada maintains for its export quota on SMP and MPC provides a far greater opportunity for the export quota to be filled than the return and reallocation mechanism that Canada maintains for its USMCA dairy TRQs. This is further indication that Canada’s dairy TRQ allocation measures fail to ensure that the return and reallocation mechanism for the USMCA dairy TRQs “provides the greatest possible opportunity for the TRQ to be filled”, as Article 3.A.2.15 of the USMCA requires.

237. Additionally, there is evidence that Canada has considered still more options for the return and reallocation mechanism, which, on their face, would provide a greater opportunity for the USMCA dairy TRQs to be filled. For example, the February 2020 “Policy Options” document proposes the imposition of 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.”<sup>292</sup> Such a policy would further incentivize allocation holders to use their allocations to import dairy products, or would, over time, shift allocations to other allocation holders that would use them that way. This, too, would provide a greater opportunity for the USMCA dairy TRQs to be filled.

238. In sum, 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 – earlier return date, clearer reallocation procedures, different transfer rules, stricter under-utilization penalties – 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.

239. For these reasons, the return and reallocation mechanism for USMCA dairy TRQs that Canada has adopted and applies, through its dairy TRQ allocations measures, is inconsistent with Article 3.A.2.15 of the USMCA.

### **C. Canada’s Mechanism for the Return and Reallocation of Unused USMCA Dairy TRQ Allocations Is Inconsistent with Article 3.A.2.6 of the USMCA**

240. 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”.

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<sup>292</sup> 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).

241. The word “administer” is defined, most relevantly, as “to perform or execute (a task, office, etc.)”, “to carry out or oversee the tasks necessary for the running of (an organization) or the effecting of (a state of affairs); to manage, run (an operation, affairs, etc.); to manage the affairs of (an institution, community, etc.)”.<sup>293</sup> The word “manner”, in the sense “relating to the way in which an action is performed”, means “[t]he way in which something occurs or is performed; a method of action; a mode of procedure.”<sup>294</sup> The word “allow” is defined, most aptly, as “to permit, enable”, “[t]o permit something to exist or occur; to provide the opportunity or right conditions for something; to make something possible”.<sup>295</sup> The dictionary defines “opportunity” as “a time, condition, or set of circumstances permitting or favourable to a particular action or purpose”.<sup>296</sup> “Utilize” is defined as “[t]o make or render useful; to convert to use, turn to account”.<sup>297</sup> And “fully” means “[i]n a full manner or degree; to the full; in (its) entirety or totality; completely, entirely; thoroughly, exactly, quite”.<sup>298</sup>

242. It follows from the above ordinary meaning analysis that the chapeau of Article 3.A.2.6 of the USMCA requires Canada to undertake efforts to make certain that it “carr[ies] out”, “runs”, and “oversees”<sup>299</sup> its USMCA dairy TRQs in a “way”<sup>300</sup> that “permit[s], enable[s]”, and “make[s] ... possible”<sup>301</sup> the “condition, or set of circumstances permitting or favourable to”<sup>302</sup> importers “render[ing] useful”, “convert[ing] to use”, or “turn[ing] to account”<sup>303</sup> the USMCA dairy TRQs “[i]n a full manner or degree; to the full; in (its) entirety or totality; completely, entirely”.<sup>304</sup>

243. Canada “administer[s] its [USMCA dairy] TRQs” by operationalizing and implementing the dairy TRQ allocation measures that it has adopted. Among other things, Canada administers its USMCA dairy TRQs by operating the return and reallocation mechanism set forth in the USMCA dairy TRQ allocation measures. For the same reasons given in the preceding subsection, the return and reallocation mechanism for Canada’s USMCA dairy TRQs does not

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<sup>293</sup> Definition of “administer” from Oxford English Dictionary Online (Exhibit USA-74).

<sup>294</sup> Definition of “manner” from Oxford English Dictionary Online (Exhibit USA-93).

<sup>295</sup> Definition of “allow” from Oxford English Dictionary Online (Exhibit USA-79).

<sup>296</sup> Definition of “opportunity” from Oxford English Dictionary Online (Exhibit USA-95).

<sup>297</sup> Definition of “utilize” from Oxford English Dictionary Online (Exhibit USA-105).

<sup>298</sup> Definition of “fully” from Oxford English Dictionary Online (Exhibit USA-89).

<sup>299</sup> Definition of “administer” from Oxford English Dictionary Online (Exhibit USA-74).

<sup>300</sup> Definition of “manner” from Oxford English Dictionary Online (Exhibit USA-93).

<sup>301</sup> Definition of “allow” from Oxford English Dictionary Online (Exhibit USA-79).

<sup>302</sup> Definition of “opportunity” from Oxford English Dictionary Online (Exhibit USA-95).

<sup>303</sup> Definition of “utilize” from Oxford English Dictionary Online (Exhibit USA-105).

<sup>304</sup> Definition of “fully” from Oxford English Dictionary Online (Exhibit USA-89).

“allow[] importers the opportunity to utilize TRQ quantities fully”.

244. As demonstrated above, the return and reallocation mechanism for Canada’s USMCA dairy TRQs 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 (fewer than four months at the end of the quota year). The mechanism does not make clear what volumes of TRQ allocations will be available for reallocation and what exactly the process and timing is for reallocating returned allocations. Furthermore, the under-utilization penalties incorporated into the return and reallocation mechanism, combined with the ability for allocation holders to freely transfer allocations, incentivizes certain allocation holders to hoard TRQ volumes throughout most of the quota year as they attempt to sell portions of their allocations rather than use them, returning any unused allocations late in the year, without penalty and severely limiting the opportunity of other importers to utilize the TRQs fully. Ultimately, there are numerous other ways in which Canada could administer its USMCA dairy TRQs – 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.

245. Accordingly, Canada is failing to undertake efforts to make certain that it “carr[ies] out”, “runs”, and “oversees”<sup>305</sup> its USMCA dairy TRQs in a “way”<sup>306</sup> that “permit[s], enable[s]”, and “make[s] ... possible”<sup>307</sup> the “condition, or set of circumstances permitting or favourable to”<sup>308</sup> importers “render[ing] useful”, “convert[ing] to use”, or “turn[ing] to account”<sup>309</sup> the USMCA dairy TRQs “[i]n a full manner or degree; to the full; in (its) entirety or totality; completely, entirely”.<sup>310</sup> 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.<sup>311</sup>

246. For these reasons, the return and reallocation mechanism for USMCA dairy TRQs that Canada has adopted and applies, through its dairy TRQ allocations measures, is inconsistent with Article 3.A.2.6 of the USMCA.

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<sup>305</sup> Definition of “administer” from Oxford English Dictionary Online (Exhibit USA-74).

<sup>306</sup> Definition of “manner” from Oxford English Dictionary Online (Exhibit USA-93).

<sup>307</sup> Definition of “allow” from Oxford English Dictionary Online (Exhibit USA-79).

<sup>308</sup> Definition of “opportunity” from Oxford English Dictionary Online (Exhibit USA-95).

<sup>309</sup> Definition of “utilize” from Oxford English Dictionary Online (Exhibit USA-105).

<sup>310</sup> Definition of “fully” from Oxford English Dictionary Online (Exhibit USA-89).

<sup>311</sup> USMCA, Article 3.A.2.6.



## IX. Conclusion

247. For the reasons set out above, 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 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.