

Pursuant to Articles 31.2 and 31.4 of the United States-Canada-Mexico Agreement (“USMCA”), the United States hereby requests consultations with the Government of Canada regarding certain measures of Canada related to the allocation of Canada’s dairy tariff-rate quotas (“TRQs”) under the USMCA (“dairy TRQ allocation measures”). The matter that is the subject of this request for consultations concerns perishable goods within the meaning of Article 31.4.5(a) of the USMCA.

The United States has previously raised concerns about Canada’s then-extant dairy TRQ allocation measures, and in December 2021, a USMCA dispute settlement panel found those measures to be inconsistent with Canada’s USMCA obligations.<sup>1</sup> Subsequently, Canada introduced changes to those measures in response to those adverse findings,<sup>2</sup> but, as discussed below, it appears that Canada’s current dairy TRQ allocation measures are inconsistent with Canada’s obligations under the USMCA.<sup>3</sup>

### **Canada Makes Certain Types of Importers, Including Retailers and Food Service Operators, Ineligible to Apply for USMCA Dairy TRQ Allocations**

1. Canada’s dairy TRQs set limits on the quantity of certain types of dairy products<sup>4</sup> that may be imported at a lower (within access) rate of duty. Through its dairy TRQ allocation measures, Canada denies access to TRQ allocations to all types of importers except for processors, further processors, and distributors. Canada has determined that other types of importers, including retailers and food service operators, are not eligible to apply for a TRQ allocation. These measures are reflected in the following legal instruments, operating separately or together with the Export and Import Permits Act (“EIPA”)<sup>5</sup> and any corresponding regulations:

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

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<sup>1</sup> *Canada – Dairy TRQ Allocation Measures* (CDA-USA-2021-31-010), Final Report of the Panel (December 20, 2021).

<sup>2</sup> See Public Consultations: CUSMA Dairy Tariff Rate Quotas (TRQs) Panel Report Implementation - Proposed Allocation and Administration Policy Changes (published March 1, 2022), available at [https://www.international.gc.ca/trade-commerce/consultations/TRQ-CT/cusma\\_dairy\\_changes-produits\\_laitiers\\_aceum\\_changements.aspx?lang=eng](https://www.international.gc.ca/trade-commerce/consultations/TRQ-CT/cusma_dairy_changes-produits_laitiers_aceum_changements.aspx?lang=eng); 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 May 16, 2022), available at <https://www.international.gc.ca/trade-commerce/controls-controles/messages/2022-05-16-message-industry-industrie.aspx?lang=eng>; Notices to Importers (published May 16, 2022), available at [https://www.international.gc.ca/trade-commerce/controls-controles/supply\\_managed-gestion\\_offre.aspx?lang=eng&type=Notice%20to%20importers#dataset-filter](https://www.international.gc.ca/trade-commerce/controls-controles/supply_managed-gestion_offre.aspx?lang=eng&type=Notice%20to%20importers#dataset-filter).

<sup>3</sup> This request for consultations is without prejudice to U.S. rights under the USMCA relating to the prior USMCA dispute settlement proceeding or the Final Report of the Panel, dated December 20, 2021.

<sup>4</sup> Butter and cream powder, cheeses of all types, concentrated or condensed milk, cream, ice cream and ice cream mixes, industrial cheeses, milk powders, milk, other dairy, powdered buttermilk, products consisting of natural milk constituents, skim milk powder, whey powder, and yogurt and buttermilk.

<sup>5</sup> Export and Import Permits Act (R.S.C., 1985, c. E-19), <https://laws-lois.justice.gc.ca/eng/acts/E-19/page-4.html#h-203129>.

<sup>6</sup> Available at [https://www.international.gc.ca/trade-commerce/consultations/TRQ-CT/cusma\\_dairy\\_changes-produits\\_laitiers\\_aceum\\_changements.aspx?lang=eng](https://www.international.gc.ca/trade-commerce/consultations/TRQ-CT/cusma_dairy_changes-produits_laitiers_aceum_changements.aspx?lang=eng).

- 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;<sup>7</sup> and
- C. The following Notices to Importers concerning Canada’s USMCA dairy TRQs:<sup>8</sup>
- i. CUSMA: Cream TRQ – Serial No. 1071, dated May 16, 2022;
  - ii. CUSMA: Butter and Cream Powder TRQ – Serial No. 1073, dated May 16, 2022;
  - iii. CUSMA: Milk TRQ – Serial No. 1075, dated May 16, 2022;
  - iv. CUSMA: Milk Powders TRQ – Serial No. 1076, dated May 16, 2022;
  - v. CUSMA: Skim Milk Powder TRQ – Serial No. 1077, dated May 16, 2022;
  - vi. CUSMA: Whey Powder TRQ – Serial No. 1078, dated May 16, 2022;
  - vii. CUSMA: Cheeses of All Types TRQ – Serial No. 1079, dated May 16, 2022;
  - viii. CUSMA: Industrial Cheeses TRQ – Serial No. 1080, dated May 16, 2022;
  - ix. CUSMA: Concentrated or Condensed Milk TRQ – Serial No. 1081, dated May 16, 2022;
  - x. CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1082, dated May 16, 2022;
  - xi. CUSMA: Other Dairy TRQ – Serial No. 1083, dated May 16, 2022;
  - xii. CUSMA: Powdered Buttermilk TRQ – Serial No. 1084, dated May 16, 2022;
  - xiii. CUSMA: Products Consisting of Natural Milk Constituents TRQ – Serial No. 1085, dated May 16, 2022; and
  - xiv. CUSMA: Yogurt and Buttermilk TRQ – Serial No. 1086, dated May 16, 2022.

2. Canada’s measures, which exclude retailers, food service operators, and other types of importers (other than processors, further processors, and distributors), appear to be inconsistent with paragraph 3(c) of Section A of Canada’s TRQ Appendix<sup>9</sup> because Canada is failing to allocate its TRQs each quota year to “eligible applicants” within the meaning of that provision. Additionally, it appears that the measures are inconsistent with Article 3.A.2.6(a) of the USMCA because they “introduce a new or additional condition, limit, or eligibility requirement on the

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<sup>7</sup> Available at <https://www.international.gc.ca/trade-commerce/controls-controles/messages/2022-05-16-message-industry-industrie.aspx?lang=eng>.

<sup>8</sup> See Supply-managed tariff rate quotas (TRQs), available at [https://www.international.gc.ca/trade-commerce/controls-controles/supply\\_managed-gestion\\_offre.aspx?lang=eng&type=Notice%20to%20importers#data](https://www.international.gc.ca/trade-commerce/controls-controles/supply_managed-gestion_offre.aspx?lang=eng&type=Notice%20to%20importers#data).

<sup>9</sup> USMCA, Chapter 2, Annex 2-B, Appendix 2, Section A, paragraph 3(c).

utilization of a TRQ” that is “beyond those set out in [Canada’s] Schedule to Annex 2-B.”

### **Canada Restricts Access to its Dairy TRQs by Imposing 12-Month Activity Requirements for Applicants and Recipients**

3. Canada allocates its product-specific dairy TRQs among applicants using a market share calculation for all applicants. Canada uses a 12-month reference period to calculate market activity for the purpose of determining market share, and Canada requires that applicants must be active during all 12 months of the reference period to be eligible to apply for a TRQ allocation. Canada also requires that TRQ allocation recipients must remain active during all 12 months of the quota year. These measures are reflected in the following legal instruments, operating separately or together with the EIPA and any corresponding regulations:

- A. 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;<sup>10</sup>
- B. Public Consultations: CUSMA Dairy Tariff Rate Quotas (TRQs) Panel Report Implementation - Proposed Allocation and Administration Policy Changes, published on March 1, 2022;<sup>11</sup>
- C. 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;<sup>12</sup>
- D. General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022;<sup>13</sup>
- E. Key dates and access quantities 2022-2023: TRQs for Supply-Managed Products, modified on May 16, 2022;<sup>14</sup> and
- F. The following Notices to Importers concerning Canada’s USMCA dairy TRQs:<sup>15</sup>
  - i. CUSMA: Cream TRQ – Serial No. 1071, dated May 16, 2022;
  - ii. CUSMA: Butter and Cream Powder TRQ – Serial No. 1073, dated May 16, 2022;

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<sup>10</sup> Available at [https://www.international.gc.ca/trade-commerce/consultations/TRQ-CT/policy\\_administration-politiques\\_administration.aspx?lang=eng](https://www.international.gc.ca/trade-commerce/consultations/TRQ-CT/policy_administration-politiques_administration.aspx?lang=eng).

<sup>11</sup> Available at [https://www.international.gc.ca/trade-commerce/consultations/TRQ-CT/cusma\\_dairy\\_changes-produits\\_laitiers\\_aceum\\_changements.aspx?lang=eng](https://www.international.gc.ca/trade-commerce/consultations/TRQ-CT/cusma_dairy_changes-produits_laitiers_aceum_changements.aspx?lang=eng).

<sup>12</sup> Available at <https://www.international.gc.ca/trade-commerce/controls-controles/messages/2022-05-16-message-industry-industrie.aspx?lang=eng>.

<sup>13</sup> Available at [https://www.international.gc.ca/trade-commerce/controls-controles/notices-avis/trq\\_info\\_ct.aspx?lang=eng](https://www.international.gc.ca/trade-commerce/controls-controles/notices-avis/trq_info_ct.aspx?lang=eng).

<sup>14</sup> Available at <https://www.international.gc.ca/trade-commerce/controls-controles/trq-dates-ct.aspx?lang=eng>.

<sup>15</sup> See Supply-managed tariff rate quotas (TRQs), available at [https://www.international.gc.ca/trade-commerce/controls-controles/supply\\_managed-gestion\\_offre.aspx?lang=eng&type=Notice%20to%20importers#data](https://www.international.gc.ca/trade-commerce/controls-controles/supply_managed-gestion_offre.aspx?lang=eng&type=Notice%20to%20importers#data).

- iii. CUSMA: Milk TRQ – Serial No. 1075, dated May 16, 2022;
- iv. CUSMA: Milk Powders TRQ – Serial No. 1076, dated May 16, 2022;
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- vi. CUSMA: Whey Powder TRQ – Serial No. 1078, dated May 16, 2022;
- vii. CUSMA: Cheeses of All Types TRQ – Serial No. 1079, dated May 16, 2022;
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- xiii. CUSMA: Products Consisting of Natural Milk Constituents TRQ – Serial No. 1085, dated May 16, 2022; and
- xiv. CUSMA: Yogurt and Buttermilk TRQ – Serial No. 1086, dated May 16, 2022.

4. Canada’s measures, which impose activity requirements, appear to be inconsistent with paragraph 3(c) of Section A of Canada’s TRQ Appendix<sup>16</sup> because Canada is failing to allocate its TRQs each quota year to “eligible applicants” within the meaning of that provision. The measures also appear to be inconsistent with Article 3.A.2.6(a) of the USMCA because they “introduce 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.”

### **Canada Has Failed to Fully Allocate Its Calendar Year 2022 USMCA Dairy TRQs**

5. Canada has not allocated the quantities it committed to provide under each USMCA calendar year 2022 dairy TRQ. In December 2021, Canada communicated by email that it would allocate only one quarter of the quantities under each respective USMCA dairy TRQ at the beginning of 2022, and would take a decision regarding the potential allocation of the remaining three quarters of the TRQ quantities at a later date. In March 2022, Canada communicated by email that it would release an additional “four months” of TRQ volume.<sup>17</sup> On May 16, 2022, Canada placed a Message to Industry on a Canadian government website explaining that “a decision regarding the potential allocation of the previously unallocated quota

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<sup>16</sup> USMCA, Chapter 2, Annex 2-B, Appendix 2, Section A, paragraph 3(c).

<sup>17</sup> While the precise quantity was not specified, this may indicate an intent to allocate one-third of the TRQ quantities.

under the 2022 CUSMA calendar year dairy TRQs will be taken as the issue evolves, but not later than July 31.”<sup>18</sup> Canada stated publicly that it allocated only part of the TRQs, and decided not to allocate the full TRQs, due to its purported “deep concerns” with legislation pending before the U.S. Congress.<sup>19</sup> These measures (Canada’s partial allocation of USMCA calendar year 2022 dairy TRQs or its decision not to allocate fully the calendar year 2022 dairy TRQs), or Canada’s failure to allocate fully each USCMA calendar year 2022 dairy TRQ, are reflected in the following documents, operating separately or together with the EIPA and any corresponding regulations:

- A. Letter from Deputy Prime Minister and Minister of Finance, Chrystia Freeland, and Minister of International Trade, Export Promotion, Small Business and Economic Development, Mary Ng, to Senator Charles Schumer, *et. al.*, dated December 10, 2021,<sup>20</sup>
- B. Correspondence from the Government of Canada to industry and to the Government of the United States expressing or confirming Canada’s partial allocation of the calendar year 2022 dairy TRQs; and
- C. 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 by Global Affairs Canada on May 16, 2022.<sup>21</sup>

6. With respect to each USMCA calendar year 2022 dairy TRQ, Canada’s measures appear to be inconsistent with the following USMCA provisions: Article 3.A.2.11(g) of the USMCA because Canada has failed to allocate the quota no later than four weeks before the opening of the quota period; Article 3.A.2.12 of the USMCA because Canada has failed to make available to applicants the entire quota quantity beginning on the first day of the TRQ year; Article 3.A.2.11(d) of the USMCA because Canada has failed to ensure that an allocation for in-quota imports is valid throughout the TRQ year; and Article 3.A.2.6 of the USMCA because Canada has failed to administer its TRQs in a manner that allows importers the opportunity to utilize TRQ quantities fully, including by introducing a new or additional limit on the utilization of a TRQ.

7. Additionally, Canada’s measures appear to be inconsistent with the following provisions relating to transparency and notice: Articles 3.A.2.4(a), (c), and (f) of the USMCA because Canada has failed to ensure that its procedures for administering its TRQs are transparent, use

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<sup>18</sup> 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 May 16, 2022), available at <https://www.international.gc.ca/trade-commerce/controls-controles/messages/2022-05-16-message-industry-industrie.aspx?lang=eng>.

<sup>19</sup> 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 May 16, 2022), available at <https://www.international.gc.ca/trade-commerce/controls-controles/messages/2022-05-16-message-industry-industrie.aspx?lang=eng>.

<sup>20</sup> Published at <https://www.politico.com/f?id=0000017d-a665-dac5-abff-a76dd7050000>.

<sup>21</sup> Available at <https://www.international.gc.ca/trade-commerce/controls-controles/messages/2022-05-16-message-industry-industrie.aspx?lang=eng>.

clearly specified timeframes, administrative procedures, and requirements, and are administered in a timely manner; Article 3.A.2.5 of the USMCA because Canada failed to publish, on its designated website and at least 90 days prior to the beginning of the TRQ year, all information concerning its TRQ administration; and Articles 3.A.2.9(a)-(c) of the USMCA because Canada has failed, prior to any change to its allocation mechanism, to follow specified procedures for making a change to its allocation mechanism, such as publishing for public comment the proposed regulations or policies containing all of its procedures for the allocation and use of the TRQ, taking any comments into account, and adopting, implementing, and publishing the final regulations or policies on its designated website at least 90 days prior to the beginning of each TRQ year.<sup>22</sup>

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<sup>22</sup> Alternatively, through its failure to take necessary action, it appears that Canada has otherwise failed to carry out obligations required by the USMCA provisions referenced in this paragraph and the preceding paragraph.