CANADA – DAIRY TRQ ALLOCATION MEASURES

(CDA-USA-2021-31-01)

CLOSING STATEMENT
OF THE UNITED STATES OF AMERICA

October 26, 2021

Mr. Chairman and members of the Panel:

1. The United States would like to thank once again the Panel and the staff assisting you for your work on this dispute.

2. We have covered a lot of ground in the written submissions and during the exchanges over the past two days. Ultimately, though, the question before the Panel is straightforward: does Canada's TRQ administration, in which it sets-aside substantial portions of its TRQs for the exclusive access of processors, including further processors, and excludes otherwise eligible applicants, such as retailers, breach the provisions of the USMCA about which the United States has brought claims. As the United States has explained, a proper application of the customary rules of interpretation reveals that the answer to that question is yes.

3. Over the past two days, Canada has made arguments, which actually sound more like testimony, that Canada never would have agreed to certain obligations. However, the goal of the interpretive exercise is to discern the common intention of the Parties. And the Panel has available to it Agreement text, which is the best evidence available to discern the common intention of the Parties.

4. The common intention of the Parties is revealed based on a good faith analysis of the ordinary meaning of the terms of the treaty in their context and in light of the object and purpose of the treaty. The background documents submitted by Canada do not speak to the common intention of the Parties. At most, they indicate Canada's intention, which is clear enough based on Canada's arguments. And background documents that indicate Canada's own intention cannot be used to alter or revise the ordinary meaning of the terms of the agreement.

5. The United States appreciates the questions from the Panel over these two days, and the Panel's attempts to tease out the legal arguments being put forward by the Parties. It has become quite evident that Canada's proposed interpretation is not an interpretation at all, but rather an attempt to work backwards from the outcome it prefers in order to achieve a result that is not supported by the terms of the Agreement.

6. This morning, the Panel posed a question to Canada regarding the "purpose" of Canada's practice of reserving pools for processors. Respectfully, as the United States has explained, the "purpose", which is subjective to Canada, is not relevant to the interpretation of the terms the Parties agreed to. The Parties explicitly set out that the interpretation is to be made "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*". As we have explained, an interpretation using this prescribed approach leads to the conclusion that reserving shares, in any amount, that are exclusively accessible to processors plainly is in breach of Article 3.A.2.11(b).

7. But we also acknowledge that the Panel expressed interest in whether Canada has other options available to it in order to achieve the stated purpose of the processor pools. The United States has made clear that we are not seeking to eliminate all of Canada's discretion in administering its TRQs. But that discretion is not unbounded, and is confined by the obligations in the Agreement that Canada agreed to during the negotiations. And in fact, as we have mentioned, we believe that other options do exist.

8. For example, Canada could administer its TRQs "on-demand". Under this method, applicants contact the Government of Canada to ensure that they meet the eligibility and activity requirements of the TRQ, and if they do, an allocation is issued. But if this leads to the TRQ

being oversubscribed, then Canada could turn to an allocation mechanism that bases grants of TRQ share on purchases of the TRQ product.

9. Canada could also use auctions. Or a lottery.

10. But, by listing these available options, the United States is not suggesting that Canada's TRQ administration would, in every instance, comply with Canada's other USMCA obligations beyond the processor clause in Article 3.A.2.11(b). The development of the procedure for administering Canada's TRQs is part and parcel of Canada's TRQ administration. And it is not impervious to a challenge of Canada's USMCA obligations under the Agriculture Chapter, as Canada has asserted. Based on the factual circumstances, it could be that Canada is not, to the maximum extent possible, allocating its TRQs in the quantities that the TRQ applicant requests. And the facts might also reveal that Canada's TRQ administration is not fair and equitable.

11. Any different allocation mechanism would need to be considered on case-by-case basis. But there is no doubt that there are plenty of options available to Canada for administering its TRQs that would not breach the USMCA.

12. As the United States has demonstrated, Canada's Notices to Importers and Canada's administration of its dairy TRQs are inconsistent with:

- Article 3.A.2.11(b) because they limit access to an allocation to processors;
- Articles 3.A.2.4(b) and 3.A.2.11(e) because Canada's administration of its dairy TRQs is not "fair" and "equitable;
- Article 3.A.2.11(c) because Canada does not allocate its TRQs, to the maximum extent possible, in the quantities that the TRQ applicant requests; and

- Article 3.A.2.6(a), read together with Section A, paragraph 3(c), of Canada's Tariff Schedule, because by reserving portions of the quota for processors, Canada has introduced an "additional condition, limit or eligibility requirement on the utilization of a TRQ".

Accordingly, the United States continues to respectfully request that the Panel find that Canada has breached its obligations under the USMCA.

13. Mr. Chairman, members of the Panel, this concludes our closing statement, and we thank you again for your attention.