CANADA – DAIRY TRQ ALLOCATION MEASURES

(CDA-USA-2021-31-01)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA

October 25, 2021

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TABLE OF ABBREVIATIONS

Abbreviation	Definition
Agreement or CUSMA or USMCA	*United States-Mexico-Canada Agreement*
CPTPP	*Comprehensive and Progressive Agreement for Trans-Pacific Partnership*
ICCC	International Cheese Council of Canada
Party	USMCA Party
TRQ	Tariff-rate quota
WTO	World Trade Organization

TABLE OF EXHIBITS

Exhibit No.	Description
USA-19	CUSMA: Products Consisting of Natural Milk Constituents TRQ – Serial No. 1026, dated June 15, 2020
USA-20	CUSMA: Ice Cream and Ice Cream Mixes TRQ – Serial No. 1027, dated June 15, 2020
USA-21	CUSMA: Other Dairy TRQ – Serial No. 1028, dated June 15, 2020
USA-22	General Information on the Administration of TRQs for Supply-Managed Products
USA-23	Export and Import Permits Act (R.S.C., 1985, c. E-19)
USA-24	Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, vol. II
USA-25	Definition of "limit" from Oxford English Dictionary Online
USA-26	Definition of "access" from Oxford English Dictionary Online
USA-27	Definition of "allocation" from Oxford English Dictionary Online
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U.S. Rebuttal Submission	
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USA-37	USMCA Drafting Convention
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USA-39	Draft Articles on the Law of Treaties with commentaries (1966)

1. Good morning, Mr. Chairman and members of the Panel. On behalf of the U.S. delegation, I would like to begin by thanking the Panel and the staff assisting you for your work on this dispute.

I. Introduction

2. We are here today because Canada, through its administration of USMCA[1] dairy TRQs,[2] limits access to TRQ allocations exclusively to processors. The United States has shown in its written submissions that in doing so, Canada has breached several of its USMCA commitments.

3. The provisions on Canada's dairy TRQ administration were a particularly important outcome of the USMCA negotiations. The United States regrets that Canada has adopted measures that, as of day one of the Agreement, undermine this outcome. By doing so, Canada is denying the ability of U.S. dairy farmers, workers, and exporters to utilize the TRQs and realize the full benefit of the USMCA.

4. During the course of this hearing, we will further explain why Canada's measures are inconsistent with the Agreement and will address Canada's arguments made in its rebuttal submission.

5. First, Canada has proposed an interpretive approach that is flawed at its core. Canada seeks to turn upside down the customary rules of interpretation. Canada begins its interpretive process by positing the conclusion it desires, then reverse engineers the interpretive analysis to prove its point. Such an approach is entirely self-fulfilling, and is not permissible under

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[1] *United States-Canada-Mexico Agreement* (USMCA).

[2] Tariff-rate quotas (TRQs).

customary rules of interpretation. The United States has properly applied customary rules of interpretation and demonstrated the correct interpretive conclusions that result.

6. Second, Canada's interpretation of the "processor clause" in Article 3.A.2.11(b) of the USMCA cannot be reconciled with a correct application of customary rules of interpretation. Canada is critical of the United States for supposedly offering two different interpretations of the term "an allocation" in the processor clause. In reality, it is Canada that proposes multiple interpretations of that term, using them interchangeably where convenient. Indeed, Canada simultaneously offers competing and opposite interpretations, proposing that "an allocation" is both something that "may be granted" and at the same time something that already has been granted. These proposed interpretations are internally inconsistent and ultimately incoherent.

7. Third, Canada's interpretation of the obligations in Articles 3.A.2.4(b) and 3.A.2.11(e) is flawed. Contrary to what it asserts, Canada's measures are neither fair nor equitable. A system that predetermines that only one type of importer is eligible for a substantial portion of potential individual shares of the total quota cannot be considered fair and equitable. Canada's arguments to the contrary are unavailing.

8. Fourth, Canada's continued requests for the Panel to make a preliminary ruling with respect to claims that the United States has not pursued distract from the United States' actual claims. Canada reserves a substantial portion of quota exclusively for processors prior to applying the procedure for dividing up the quota into portions assigned to particular TRQ applicants. The issue in dispute under Article 3.A.2.11(c) of the USMCA is that by doing so, Canada fails to make allocations "to the maximum extent possible, in the quantities that the TRQ

applicant requests." That is the U.S. claim here, and the United States has supported that claim with evidence demonstrating that Canada is breaching Article 3.A.2.11(c).

9. Finally, Canada's explanation for why its set-asides of portions of the quota to processors are not an "additional condition, limit, or eligibility requirement on the utilization of a TRQ" is unconvincing. Canada excludes non-processors from the possibility of having any access to those reserved portions of the quota. By doing so, Canada is imposing an impermissible condition, limit, or eligibility requirement on the utilization of a dairy TRQ.

II. Canada's Interpretive Approach and Its Arguments Regarding the Use of Supplementary Means of Interpretation Are Inconsistent with Customary Rules of Interpretation of Public International Law

10. We will begin by discussing the proper application of the customary rules of interpretation of public international law that are applicable in this dispute. We do this first today because the interpretive approach to be taken is perhaps the most important, threshold issue that the Panel must resolve for itself.

11. And, much to our surprise, that issue appears to be in dispute. As we will explain, Canada's approach would have the Panel take the relevant customary rules of interpretation and apply them backwards. But such an approach is not permissible under the USMCA, which prescribes the particular interpretive rules that are to be applied.

12. Article 31.13.4 of the USMCA expressly directs that USMCA dispute settlement panels "shall interpret this Agreement in accordance with customary rules of interpretation of public international law, as reflected in Articles 31 and 32 of the *Vienna Convention on the Law of*

Treaties" ("Vienna Convention").[3] We emphasize that the customary rules of interpretation to which the Parties agreed in the USMCA are those reflected in Articles 31 and 32 of the Vienna Convention.

13. Article 31 of the Vienna Convention sets forth the "General rule of interpretation". The general rule in Article 31 is 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."

14. Article 32 of the Vienna Convention sets forth "Supplementary means of interpretation".[4] Article 32 "may" be applied only under certain conditions.[5] Article 32 specifies that:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (*a*) leaves the meaning ambiguous or obscure; or
>
> (*b*) leads to a result which is manifestly absurd or unreasonable.[6]

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[3] Underline added.

[4] Underline added.

[5] Underline added.

[6] Vienna Convention on the Law of Treaties, 1969, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (Exhibit CDA-98), p. 13 (underline added).

15. It is plain from the text of Articles 31 and 32 of the Vienna Convention that Article 31, the "general rule", is applied first. Article 32, the "Supplementary means of interpretation", is then applied, but only to "confirm" the meaning resulting from the application of the general rule, or to "determine the meaning" if application of the general rule fails to reveal the meaning. If a treaty interpreter applies the general rule of interpretation and is able to discern the meaning of the terms of the treaty, then the interpretive analysis is effectively concluded. There is no reason to continue on and apply the rule relating to supplementary means of interpretation that is set forth in Article 32 of the Vienna Convention unless to confirm the meaning that results from application of Article 31.

16. Canada, though, asks the Panel to apply Articles 31 and 32 of the Vienna Convention in reverse order. Canada has put before the Panel certain "background" information on the USMCA negotiations and the history of Canada's administration of dairy TRQs.[7] Canada offers these materials as support for a particular proposed interpretation of the USMCA provisions at issue in this dispute. Canada emphasizes that the goal of the interpretive exercise is to discern the common intention of the parties. And Canada contends that the so-called background materials it has compiled are relevant to determining the common intention of the parties.[8] Canada is wrong, for a number of reasons.

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[7] O. Dörr and K. Schmalenbach, Vienna Convention on the Law of Treaties: A Commentary 2nd edn. (Springer, 2018), (Exhibit CDA-96); Sinclair, Sir Ian, *The Vienna Convention on the Law of Treaties*, 2nd edition. Manchester: Manchester University Press, 1984 (Exhibit CDA-97); Statement of Aaron Fowler, Chief Agricultural Negotiator of Canada, signed on September 29, 2021 (Exhibit CDA-99).

[8] Canada's rebuttal submission, Section II.A.

17. First, Canada's argument begs the question. Canada argues that it "was never Canada's intent to agree to obligations" that would prevent Canada from reserving pools of TRQ quantities for processors.[9] However, as Sinclair wrote in the treatise that Canada has put before the Panel, "a dispute as to treaty interpretation arises only when two or more parties place differing constructions upon the text; by doing so, they are in reality professing differing intentions in regard to that text".[10] The goal of the interpretive exercise is to discern the common intention of the Parties, as reflected in the text of the agreement that they reached.

18. Second, Articles 31 and 32 of the Vienna Convention are to be applied in a specific order, and that order cannot be reversed. The general rule is applied first and the supplementary means of interpretation are employed only in certain circumstances. This is clear from the text of Articles 31 and 32 of the Vienna Convention.

19. This understanding is also confirmed by the commentaries of the International Law Commission ("ILC"), which were produced at the time that the Vienna Convention rules were drafted. The ILC commentaries explain that "the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties."[11] Application of the customary rules of interpretation is the means by which the treaty interpreter discerns the common intention of the parties.

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[9] See, e.g., Canada's rebuttal submission, para. 7.

[10] Sinclair, Sir Ian, *The Vienna Convention on the Law of Treaties*, 2nd edition. Manchester: Manchester University Press, 1984 (Exhibit CDA-97), p. 131.

[11] Draft Articles on the Law of Treaties with commentaries (1966) ("ILC Commentaries") (Exhibit USA-39), p. 220 para. 11.

20. The treaty interpreter may not simply apply and accept a party's *post hoc* representations of its intentions as evidence, and such representations cannot alter the meaning of the terms of the treaty. As Sinclair notes, when a treaty interpreter "can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning."[12] Indeed, as noted in the ILC commentaries, "to adopt an interpretation which ran counter to the clear meaning of the terms would not be to interpret but to revise the treaty."[13] Logically, taking into account *post hoc* representations of a party's intent – with the near certainty of opposing representations by the disputing parties – could not possibly permit resolution of the interpretive dispute.

21. The terms of the treaty are the first and best evidence of the common intention of the parties. Accordingly, recourse to supplementary means of interpretation may only be had where the general rule of interpretation under Article 31 has already been applied. The idea of beginning the interpretive exercise with the supplementary means of interpretation under Article 32 was expressly contemplated, but ultimately rejected in the Vienna Convention. Indeed, the ILC commentaries note that the formulation of Article 31 provides the "primary criteria for interpreting a treaty."[14] Meanwhile, the word "supplementary", as used in the title of Article 32 ("Supplementary means of interpretation"), "emphasizes that article [32] does not provide for

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[12] Sinclair, Sir Ian, *The Vienna Convention on the Law of Treaties*, 2nd edition. Manchester: Manchester University Press, 1984 (Exhibit CDA-97), p. 127 (footnote omitted).

[13] ILC Commentaries (Exhibit USA-39), p. 219 para. 6 (underline added).

[14] ILC Commentaries (Exhibit USA-39), p. 223 para. 18.

alternative, autonomous, means of interpretation but only for means to aid an interpretation governed by the principles contained in article [31]."[15]

22. Determining the meaning of a treaty by recourse to supplementary means of interpretation is only possible where application of the general rule in Article 31 leaves the meaning "ambiguous or obscure", or gives a meaning which is "manifestly absurd or unreasonable". This, however, is the "exception".[16] Recourse to supplementary means of interpretation "must be strictly limited, if it is not to weaken unduly the authority of the ordinary meaning of the terms."[17]

23. By proposing to reverse the order of analysis prescribed by Articles 31 and 32 of the Vienna Convention, Canada is attempting to reopen questions that have been settled in customary international law for more than half a century.[18]

24. And Canada's reliance on a WTO dispute settlement report in the *Canada – Dairy* dispute is also misplaced. Canada highlights an observation in the appellate report that special care was needed to interpret the terms of the provisions that were in dispute, and that it was appropriate and necessary in that instance to draw upon factual and historical circumstances as supplementary means of interpretation.[19] However, the report also observed that the rules of interpretation set out in the Vienna Convention "call, in the first place, for the treaty interpreter

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[15] ILC Commentaries (Exhibit USA-39), p. 223 para. 19 (Articles 27 and 28 as referred to in the ILC Commentaries eventually became Articles 31 and 32, respectively, of the Vienna Convention).

[16] ILC Commentaries (Exhibit USA-39), p. 223 para. 19.

[17] ILC Commentaries (Exhibit USA-39), p. 223 para. 19.

[18] ILC Commentaries (Exhibit USA-39).

[19] Canada's rebuttal submission, para. 14 (citing *Canada – Dairy (AB)*, paras. 125-143).

to attempt to ascertain the ordinary meaning of the terms of the treaty in their context and in light of the object and purpose of the treaty, in accordance with Article 31(1) of the *Vienna Convention*."[20] The report determined that the language at issue there was "*not* clear on its face" and that the terms were "general and ambiguous".[21] For this reason, the report determined it was appropriate to turn to supplementary means of interpretation pursuant to Article 32 of the Vienna Convention.[22] But that is not the case here, and that WTO report offers no support for Canada's argument.

25. In this dispute, the United States has demonstrated that application of the general rule of interpretation leads to the conclusion that the terms in Article 3.A.2.11(b) of the USMCA require Canada to not "confine" or "restrict" to someone – that is, "processors" – "the right or opportunity to benefit from or use" something – being "a portion, a share; a quota". Thus, this provision is a prohibition on reserving a portion of quota for the exclusive use of processors or so-called "further processors", who are themselves also processors. Processors are eligible to apply for and receive shares of the quota on the same terms as other quota applicants, but cannot have exclusive access to a share of the quota. For example, a share that is a pool of allocations, or that is within a pool of allocations, cannot be set aside and reserved exclusively for processors.[23]

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[20] *Canada – Dairy (AB)*, para. 132.

[21] *Canada – Dairy (AB)*, para. 137.

[22] *Canada – Dairy (AB)*, para. 137.

[23] U.S. IWS, Section V; U.S. Rebuttal Submission, para. 15.

26. This is the conclusion that follows from a good faith analysis of the ordinary meaning of the terms of the USMCA in their context. And Canada has not established that the application of the general rule of interpretation leaves the meaning of the processor clause of Article 3.A.2.11(b) "ambiguous or obscure", or that it leads to a result which is "manifestly absurd or unreasonable".[24] Canada may not like the result of the correct interpretive analysis. But that does not make the result manifestly absurd or unreasonable.

27. Accordingly, there is no basis for the Panel to resort to supplementary means of interpretation to reach a conclusion about the meaning of Article 3.A.2.11(b) that contradicts the ordinary meaning of the terms, as Canada proposes. And certainly there is no basis for the Panel to begin its analysis by relying on supplementary means of interpretation, as Canada urges the Panel to do.

28. Third, the background material and the affidavit of a Canadian government official that Canada has put before the Panel would not be appropriate to use as supplementary means of interpretation even if there were some basis for the Panel to have recourse to supplementary means of interpretation.

29. Canada contends that the "scope of materials covered by Article 32 is very broad".[25] Of course, the breadth of materials that a treaty interpreter may consult is of little import where the meaning of the terms of the treaty is clear from application of the general rule. And beyond that, the scope of materials on which a treaty interpreter might rely as supplementary means is not at all unbounded.

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[24] Vienna Convention, Art. 32.

[25] Canada's rebuttal submission, para. 12 (footnote omitted).

30. As observed in the commentary that Canada has put before the Panel as Exhibit CDA-96, "**several conditions** must be fulfilled before the material in question can be considered travaux préparatoires."[26] Among these conditions is that "only material and processes **that can be objectively assessed** by an interpreter can qualify as preparatory work. They must be part of the outside world, so that people can take cognizance of them. Thus, individual thoughts, plans, recollections and memoirs in principle do not qualify; also, oral statements are difficult to evaluate, as long as they are not written down or cannot be corroborated by other evidence."[27] The material considered also "must be apt to **illuminate a common understanding** of the negotiating parties". Any "**documents from a unilateral source**, such as statements of individual governments or State representatives outside the treaty negotiations" can only be taken into account "if they were at some point introduced into the negotiation process … and did not remain unilateral hopes, inclinations or opinions."[28]

31. Canada also cites to the commentary of Sir Ian Sinclair in support of Canada's contention that "the circumstances of the treaty's conclusion and other supplementary means" can assist in the interpretation of terms in a treaty.[29] However, that same commentary first notes that the

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[26] O. Dörr and K. Schmalenbach, Vienna Convention on the Law of Treaties: A Commentary 2nd edn. (Springer, 2018) (Exhibit CDA-96), p. 621.

[27] O. Dörr and K. Schmalenbach, Vienna Convention on the Law of Treaties: A Commentary 2nd edn. (Springer, 2018) (Exhibit CDA-96), p. 621 (Bold in original, underline added).

[28] O. Dörr and K. Schmalenbach, Vienna Convention on the Law of Treaties: A Commentary 2nd edn. (Springer, 2018) (Exhibit CDA-96), p. 621 (Bold in original).

[29] Canada's rebuttal submission, para. 12 (citing Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edition. Manchester: Manchester University Press, 1984 (Exhibit CDA-97), p. 141).

"ordinary meaning of a treaty provision should in principle be the meaning which would be attributed to it at the time of the conclusion of the treaty."[30]

32. None of the material that Canada asks the Panel to rely on as supplementary means of interpretation – and, in reality, Canada asks the Panel to rely on Canada's background materials as the primary means of interpretation – but none of that material meets the criteria described in the treatises that Canada has put before the Panel.

33. The so-called "background" material Canada has provided comes from a unilateral source, the Government of Canada. The materials have been compiled well after the conclusion of the negotiations, and for the purpose of this dispute, which concerns the diverging views of the Parties about the correct interpretation of the Agreement. There is no indication that the background materials "were at some point introduced into the negotiation process".[31] The background material and discussion in Canada's written submissions appear to be, at most, the "unilateral hopes, inclinations or opinions"[32] of Canada.

34. And the affidavit that Canada put on the record of its Chief Agricultural Negotiator regarding his recollections of what happened during the negotiations likewise can have no relevance to the interpretation of the terms in dispute.[33] As we just noted, one of Canada's

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[30] Canada's rebuttal submission, para. 12 (citing Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edition. Manchester: Manchester University Press, 1984 (Exhibit CDA-97), p. 124.

[31] O. Dörr and K. Schmalenbach, Vienna Convention on the Law of Treaties: A Commentary 2nd edn. (Springer, 2018) (Exhibit CDA-96), p. 621 (Bold in original).

[32] O. Dörr and K. Schmalenbach, Vienna Convention on the Law of Treaties: A Commentary 2nd edn. (Springer, 2018) (Exhibit CDA-96), p. 621 (Bold in original).

[33] Statement of Aaron Fowler, Chief Agricultural Negotiator of Canada, signed on September 29, 2021 (Exhibit CDA-99).

treatises explains that "individual thoughts, plans, recollections and memoirs in principle do not qualify" as preparatory work.[34] The affidavit is from a unilateral source, prepared long after the conclusion of the negotiations, and necessarily it was never introduced into the negotiation process. In short, under customary rules of interpretation, the affidavit simply can shed no light at all on the meaning of the terms of the Agreement.

35. Thus, even if the Panel were in a position to take into account supplementary means of interpretation here, the materials Canada has placed before the Panel would not assist the Panel in its task of discerning the meaning of the terms of the Agreement.

36. Lastly, while we have demonstrated that Canada's proposed interpretive approach must be rejected because it is contrary to customary rules of interpretation, the United States also wishes to highlight some of the stark implications of Canada's interpretive approach. Canada's proposed interpretation would lead to manifestly absurd or unreasonable results, if it would not actually reduce the processor clause entirely to inutility.

37. Under Canada's proposed approach, the processor clause of Article 3.A.2.11(b) only requires Canada to provide to non-processors access to some non-zero fraction of the total quota amount. Perhaps one percent. Perhaps one tenth or one one-hundredth of a percent – or less. If that is the correct interpretation, what value does the processor clause have? Canada goes on at length about what Canada would never have agreed to. Why does Canada think that the United States agreed to a rule that, in effect, does nothing?

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[34] O. Dörr and K. Schmalenbach, Vienna Convention on the Law of Treaties: A Commentary 2nd edn. (Springer, 2018) (Exhibit CDA-96), p. 621.

38. WTO adjudicators have often noted commentary of the ILC that interpretation should give meaning and effect to the terms employed by the parties, and ought not to reduce phrases or clauses to inutility.[35] Canada's proposed interpretation of the processor clause gives it no effect.

39. In sum, the United States has demonstrated that Canada's proposed interpretive approach is contrary to customary rules of interpretation of public international law. Indeed, Canada's approach turns the customary rules on their head. The Panel should decline Canada's invitation to misapply the rules of interpretation in this dispute.

III. Canada's Administration of its Dairy TRQs Is Inconsistent with Article 3.A.2.11(b) of the USMCA Because Canada Reserves a Portion of Those TRQs for Processors

40. We now turn to the proper interpretation of the processor clause in Article 3.A.2.11(b). The processor clause in 3.A.2.11(b) prohibits Canada from reserving a pool of shares exclusively for processors. This is the conclusion that follows from a proper application of customary rules of interpretation, as the United States has demonstrated.

41. And this result is far more logical than the interpretation put forward by Canada. In Canada's view, the purpose of the processor clause is to make clear that Canada may not reserve 100 percent of the quota for processors. But, under Canada's theory, the processor clause allows Canada to reserve up to 99 percent or more of the quota for processors.[36] The result of Canada's proposed interpretation is that the prohibition in the processor clause essentially does nothing. Canada posits that "had the Parties agreed to prohibit a Party administering a TRQ from

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[35] *See, e.g.*, *United States – Standards for Reformulated and Conventional Gasoline,* WT/DS2/AB/R, at 23 (adopted 20 May 1996) (*US – Gasoline (AB)*.

[36] Canada's IWS, paras. 132-133.

reserving a portion of a TRQ for processors, they would have said so explicitly."[37] But this is precisely the prohibition that is in the processor clause of Article 3.A.2.11(b), which is revealed by a proper application of customary rules of interpretation, as the United States has shown.

42. Canada criticizes the United States for purportedly relying upon two different interpretations of Article 3.A.2.11(b). But this is not the case. Indeed, it is Canada that has put forward two conflicting interpretations of the terms of the processor clause. In Canada's initial written submission, Canada argues that the definition of "an allocation" means that the relevant "share" in question is one "that may be granted to an individual applicant".[38] Canada reverses its position in its rebuttal submission. In the rebuttal submission, Canada insists that its own domestic law "reflects the understanding that an 'allocation' is an in-quota quantity that is 'issued'."[39] These two interpretations are entirely incompatible.

43. The U.S. position has not changed. Canada's reserved pools are, in and of themselves, allocations, as the United States has demonstrated.[40] The Panel may alternatively determine, however, that the pools are in fact groups of potential shares.[41] That is, the reserved pools of TRQ quantities are filled with multiple allocations. In either case, the United States wins its claim.

44. This is because, under either factual framing, Canada predetermines who may apply for and receive certain allocations. The allocations in the processor pool, individually and

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[37] Canada's rebuttal submission, para. 49.

[38] Canada's IWS, paras. 86, 106 fn. 82.

[39] Canada's rebuttal submission, para. 51.

[40] U.S. IWS, paras. 39-41.

[41] U.S. rebuttal submission, paras. 6 and 35.

collectively, can only be applied for and received by processors. Under either understanding, Canada is limiting access to an allocation to processors in precisely the way that is envisioned by – and prohibited by – the processor clause of Article 3.A.2.11(b).

45. Canada's assertion that the United States has chosen the wrong reference point in its interpretation of the processor clause is also unavailing. Specifically, Canada argues that the correct reference point for determining whether a Party has breached its commitment under the processor clause is the TRQ volume as a whole.[42] That is, Canada asserts that the obligation in the processor clause merely restricts Canada from granting 100 percent of the quota to processors. Canada attempts to find support for this assertion in Articles 3.A.2.11 and 3.A.2.11(a). But Canada merely quotes those articles, without actually explaining how the language in them supports its argument. And Canada's point is not self-evident.

46. Meanwhile, Canada ignores the closer and far more relevant context provided by the domestic production clause. The domestic production clause, which immediately precedes the processor clause in the very same sentence, uses phrasing that is nearly identical to the language used in the processor clause. That is, both phrases concern "access to an allocation". These clauses both establish a prohibition on limiting or conditioning access to an allocation. And both clauses use the word "an" before the term "allocation" to express that a Party is prohibited from limiting access to or conditioning access to even a single allocation within the quota.

47. Canada, however, posits that these two clauses, which contain the exact same words, have different meanings.[43] Canada argues that the rule in the domestic production clause is that

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[42] Canada's rebuttal submission, para. 60.

[43] Canada's rebuttal submission, paras. 62-69.

Canada can never – not even in a single instance – "condition access to an allocation" on the purchase of domestic production. Any other reading of that clause, in Canada's view, "would produce an absurd result".[44] The United States agrees.

48. However, Canada's argument that there is some context and background that could justify an opposite interpretation of the same terms in the processor clause has no merit.[45] Contrary to Canada's interpretation of the domestic production clause, Canada argues that the same terms in the processor clause lead to an interpretation where Canada can almost always "limit access to an allocation" to processors. It is highly illogical that identical terms in the same sentence would have opposite meaning.

IV. Canada's Administration of its Dairy TRQs Is Inconsistent with Articles 3.A.2.4(b) and 3.A.2.11(e) of the USMCA Because it is Not "Fair" and "Equitable"

49. The United States has demonstrated that a proper interpretation of the terms of Articles 3.A.2.4(b) and 3.A.2.11(e) leads to the conclusion that the procedures and methods for administering Canada's TRQs must be "free from bias" and not "unduly favourable or adverse to anyone".[46]

50. Contrary to what Canada has argued, the United States does not seek to read the terms "procedures" and "methods" out of these provisions.[47] The United States agrees that the ordinary meaning of these terms, based on their dictionary definitions, reflects that a "procedure"

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[44] Canada's rebuttal submission, para. 67.

[45] Canada's rebuttal submission, paras. 66, 69.

[46] Definition of "fair" from Oxford English Dictionary Online, entries 14.a and 14.b (Exhibit USA-29).

[47] Canada's IWS, para. 171; Canada's rebuttal submission, para. 96.

is "a way" or a "method of doing something" or a "process".[48] And a "process" is defined as "a series of actions that you take in order to achieve a result".[49]

51. Canada has a particular "way of doing" its dairy TRQs, which involves "a series of actions" taken "in order to achieve a result." Specifically, Canada has created a system in which, prior to any applications being received, Canada sets aside a substantial share of potential individual shares of the total quota exclusively for processors. Doing so restricts the eligibility of other potential users of the quota to even apply for a share from within the pool. By applying such "procedures" and "methods" in the administration of its dairy TRQs, Canada is not operating its TRQ system in a way that is "equitable" or "fair".[50]

52. Following Canada's argument would lead to the result that a Party could use procedures and methods for administering its TRQs to predetermine the outcome of the allocation process. Canada would be permitted to create and impose eligibility requirements that plainly favor a particular importer group.

53. Canada looks for support in the WTO dispute settlement report in *China – TRQs*, which Canada cites as an example of the application of a procedural fairness standard in a TRQ administration context.[51] Specifically, Canada highlights findings that China did not follow the rules and standards set out in the relevant legal instruments. As such, "China had also failed to

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[48] U.S. rebuttal submission, paras. 55-57; OED, Oxford English Dictionary, "procedure", (Exhibit CDA-66); Cambridge Dictionary, "procedure", (Exhibit CDA-67).

[49] U.S. rebuttal submission, paras. 55-57; Definition of "process" from Oxford English Dictionary Online (Exhibit CDA-69); Definition of "method" from Oxford English Dictionary Online (Exhibit CDA-70); Definition of "method" from Merriam-Webster Dictionary (Exhibit CDA-71).

[50] U.S. rebuttal submission, para. 46.

[51] Canada's rebuttal submission, para. 103.

safeguard the applicants' right to an unbiased decision."[52] Canada merely restates these findings, but does not elaborate further how these findings apply in the context of the USMCA provisions at issue in this dispute, nor how the findings support Canada's argument.

54. Through the processor restrictions, Canada impermissibly prevents access to the reserved portions by other importer groups. As a result, Canada breaches its obligation to provide "fair" and "equitable" treatment in the administration of its TRQs.

V. Canada Does Not Allocate its TRQs, to the Maximum Extent Possible, in the Quantities that the TRQ Applicant Requests, Inconsistent with Article 3.A.2.11(c)

55. The United States has demonstrated that Canada's measures eliminate the possibility that Canada could allocate its TRQs, to the maximum extent possible, in the quantities that the TRQ applicant requests, as required by Article 3.A.2.11(c).

56. This is the practical effect of reserving a substantial majority of the TRQ for one importer group, processors, and leaving a small portion of the TRQ for non-processor importers, with that small portion divided equally among all non-processor applicants. Canada is breaching Article 3.A.2.11(c) because there is far more that Canada could do to ensure that it grants TRQs in the amounts that applicants request.

57. Canada now makes a legal argument regarding the ordinary meaning of the term "commercially viable", and asserts that it is "futile to attempt to identify a specific quantity below which any allocation should be considered 'commercially non-viable'".[53] This line of argument is beside the point.

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[52] Canada's rebuttal submission, para. 104 (citing *China – TRQs (Panel)*, fn. 138) (footnote omitted).

[53] Canada's rebuttal submission, para. 126.

58. As the United States has explained, we are not claiming that Canada has breached the first clause of Article 3.A.2.11(c). The U.S. claim is that Canada is failing to ensure that, to the maximum extent possible, it grants TRQ allocations in the quantities that the TRQ applicant requests, as required by the second clause of Article 3.A.2.11(c).

59. Canada appears to make its arguments concerning commercial viability as part of its attempt to dismiss the statements of the ICCC.[54] The ICCC represents distributors of dairy products. The ICCC has attested that those distributors are not receiving the TRQ quantities that they requested. Canada cites to import permit data to show that TRQ allocation holders "frequently undertake shipments of less than 3,000 kg",[55] which are thus, in Canada's view, commercially viable. Again, Canada's factual assertion ignores the actual obligation that is in dispute.

60. Canada is required, to the maximum extent possible, to allocate its TRQs in the quantities that an applicant requests. The data put on the record by Canada merely shows the quantity of quota share that has been granted to particular importer groups.[56] The fact that some amount of TRQ volume has been granted to importers does not address whether quota share is granted in quantities that applicants are requesting. More relevant would be data that tracked the applications made by importers, including what quantities were requested and whether such requests were granted, in full or in part. Such data would be far more useful in determining

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[54] International Cheese Council of Canada (ICCC).

[55] Canada's rebuttal submission, para. 128.

[56] Information on Quantities Allocated to Distributors in Quota Year 2021 under Canada's CUSMA dairy TRQs (Exhibit CDA-88); "Shipment Data for Canada's CUSMA Dairy TRQs in Dairy Year 2020-2021 and Calendar Year 2021" (Exhibit CDA-132).

whether Canada allocates its TRQs, to the maximum extent possible, in the quantities that an applicant requests.

61. Based on logic and the ICCC's statements, it appears that Canada routinely does not grant allocations to distributors in the quantities requested. At most, Canada reserves 15 percent of a given TRQ for distributors. And within that relatively smaller pool for distributors, shares are granted on an equal share basis pursuant to Canada's notices to importers. The ICCC's submission demonstrates that the small pool, compounded by Canada's basis for distribution from within the pool, necessarily prevents Canada from granting allocations to distributors in the quantities requested.

62. On the other hand, the vast majority of the volume in Canada's TRQs is reserved for processors, including further processors. These huge pools are distributed to processors on a market share basis. Therefore, it is much more likely that processors could receive the full amount of quota that they request.

63. In sum, the different treatment of processors versus distributors – for processors, a large pool distributed on a market share basis, and for distributors, a very small pool distributed on an equal share basis – results in distributors routinely not receiving the quantities of TRQ requested. Canada could do more to grant distributors the quantities of TRQ that they request. Canada most certainly has not taken steps to ensure that, to the maximum extent possible, applicants are granted allocations in the quantities requested.

64. Accordingly, Canada has breached Article 3.A.2.11(c) of the USMCA.

VI. Conclusion

65. As we have demonstrated in the U.S. written submissions and this opening statement, 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.

66. Mr. Chairman, members of the Panel, this concludes our opening statement. We thank you for your attention and look forward to answering any questions you may have.