



April 19, 2022

Supply-Managed Trade Controls Division
Global Affairs Canada
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To Whom It May Concern:

Thank you for providing stakeholders the opportunity to comment on Canada's public consultations on its Canada-United States-Mexico Agreement (CUSMA) dairy tariff rate quotas (TRQs) panel report implementation.

As you may know, the International Dairy Foods Association (IDFA) represents the United States' dairy manufacturing and marketing industry, which supports more than 3.3 million jobs that generate \$41.6 billion in direct wages and \$753 billion in overall economic impact. IDFA's diverse membership ranges from multinational organizations to single-plant companies, from dairy companies and cooperatives to food retailers and suppliers, all on the cutting edge of innovation and sustainable business practices. Together, they represent 90 percent of the milk, cheese, ice cream, yogurt and cultured products, and dairy ingredients produced and marketed in the United States and sold throughout the world.

IDFA is strongly opposed to Canada's compliance proposal as it does not resolve the fundamental complaint at the heart of the dispute. The CUSMA dispute panel found that Canada's exclusive reservation of access to the TRQs were part of its noncompliance (report paragraph 143), and by proposing to continue reserving quota access primarily to domestic processors through its sales criteria, Canada is continuing to ignore its commitments under CUSMA. Below please find an explanation of some of our priority concerns with the compliance proposal as written:

1. **Definitions of Market Activity and Sales:** IDFA has opposed the concept of quota allocation based on market share from the onset of USMCA entry into force. This proposed amendment to Canada's previous market share policies is not an improvement. One of the greatest metrics of an import's utility is its further processing (in the case of ingredients) or consumer consumption (in the case of finished goods). In this proposal Canada not only ignores such metrics, but defines market activity by all sales without distinguishing that these should be sales of imports.

In a system where processors and distributors were already required to be the sole importers of dairy into Canada under CUSMA, Canada's new proposed allocation policy under CUSMA creates a system where the TRQ allocation has no relation whatsoever to an applicant's actual use of or need for the import. This will inevitably foster poor TRQ administration outcomes such



as high rates of quota transfers, slow TRQ application and allocation that intensifies only in the 2-3 months before the reallocation deadline begins, and the setting aside of the majority of every TRQ for Canadian processors by default of Canada's proposed policy changes. Canada's market activity and sales definitions also appear to have significant potential to discriminate against new importers because there is no clear pathway for how they may be granted quota were they to meet eligibility criteria as required under CUSMA Article 3.A.2.10. Not only do these definitions for market activity and sales add an extra layer of distortion to Canadian TRQ administration policy, they exacerbate the very pooling Canada was charged by the dispute panel to change.

- 2. Continued Effect of Pooling Allocations:** Canada's consultation request states that the panel report gives Canada the discretion to manage its TRQ allocation policies under CUSMA in a manner that supports supply management. IDFA does not disagree with this conclusion; however, the panel report also did not indicate Canadian TRQ allocation policies must bolster its supply management, which is well supported by Canada's pricing policies and the related supply management commitments in CUSMA. In fact, the existence of Canada's need to support its supply management regime and its right to do so are unrelated to and do not negate Canada's ongoing obligation under CUSMA to administer its TRQs in a transparent, fair, and equitable manner (Article 3.A.2.4).

Ultimately, the effect of the market activity and sales definitions proposed under this consultation will continue to "ring-fence and limit" the vast majority of TRQ amounts to which only processors will have access – the very issue at the heart of the panel's ruling (report paragraph 163). The panel did not state the percentage part of the pooling was the violation, but rather the limitation of the access. Canada has effectively recreated the violation with this proposal by continuing to limit access to TRQs to only those processors or distributors who have the most sales – which will naturally be large Canadian dairy processors.

- 3. Limitations on Eligible Applicants:** The addition of "distributors" as eligible to apply for certain TRQs is an improvement, but an insufficient one. A broad swath of distributors injects a healthy foundation of experienced, motivated importers into the TRQ applicant pool. In our experience, distributors in Canada are experienced enough to be able to use the quota and build long-term, value-added, strategic growth around their imports due to their permanency and certainty as a consistent buyer. Where processors have little motivation to use a quota share once awarded – they may use it or may wait until the return date before surrendering it – distributors are motivated to use their awarded quota share fully by nature of their sales.

However, the addition of distributors alone without retailers distorts the ability of IDFA members to sell to the markets of interest to them. By nature of their business model, distributors provide their services for an added layer of cost. Distributors also typically serve business-to-business



ingredient channels, so the addition of distributors does very little to expand imports beyond what Canada already permits—ingredients for processing. Finally, distributors do not consistently work with retailers—in many cases larger retailers will use their own distribution channels, further skewing the ability of imported products to reach retailers’ warehouses.

These disadvantages raise one of the largest concerns for IDFA members: retailers as eligible applicants. Retailers are an important import party for U.S. exporters because they have the opportunity to build brands and relationships that can result in stable business for U.S. exporters; they already purchase significant quantities of U.S. dairy exports for other markets; and they inject greater flexibility into the Canadian import market. All importers have a role to play in creating an effective import market, thereby allowing the market to function rationally.

The panel found that “Canada’s exclusive reservation of access to the TRQs” violated CUSMA obligations, the point of this ruling being that Canada is not to designate specific portions toward any particular segment of possible importers (report paragraph 143). However, by excluding a full segment of applicants, Canada is perpetuating the policy of reserving TRQ pools (in the case of retailers, a zero percentage pool). It would be an unnecessarily conservative interpretation of the Panel’s statement that “an allocation mechanism...is left to the discretion of the importing Party to determine” as wholesale license for Canada to prevent entire sectors from becoming importers (report paragraph 159). A more appropriate interpretation would be that Canada has the right to implement eligibility requirements for applicants across all segments, as it currently does, rather than exclude entire segments of potential importers. As the panel noted, the United States objected to “the inflexible pool system Canada designed here...not Canada’s general ability to allocate its TRQs” (report paragraph 162).

The notion that Canada cannot or will not give the United States retailer access to its TRQs is a false narrative that Canada’s other trade agreements dispels. Canada, having the discretion to allocate affirmed by the USMCA panel, clearly exercises its discretion by allowing retailers direct TRQ allocations with other trade agreement partners. These terms need not be outlined in the agreement for Canada to exercise its discretion, as they were not in Canada’s other agreements. IDFA further notes that Canada’s exclusion of retailers as eligible applicants is inconsistent with a TRQ administration that is fair, equitable, and responsive to market conditions (CUSMA Articles 3.A.2.4(b) and (e), respectively).

4. **Lack of Transparency and Market Distortion:**

There seems no legitimate rationale for the kinds of TRQ administration and allocation policies outlined in Canada’s CUSMA proposal except to further limit quota being granted to applicants. This is untenable when the purpose of a TRQ in and of itself is to create guardrails around import quantities. Ultimately, Canada’s attempts to regulate imports by interfering with the natural business relationships that a government cannot possibly have insight into creates a



system of non-transparent distortion that can easily be manipulated. What methods does Canada have for measuring sales? How will Canada verify the authenticity of information submitted by applicants? How will Canada ensure quota is not being transferred on a black market for a profit by those not incentivized to use it themselves? IDFA would argue that Canada realistically has no ability to verify such data or outcomes, and therefore should reconsider its allocation policy approach such that retailers, distributors, processors and further processors can simply compete for quota naturally, without market activity/shares/sales measurements.

Changing allocation policy is just one way Canada could improve the transparency of its TRQ administration. Because persistent TRQ underfill has been a problem under CUSMA and clearly signals that the TRQs are not functioning as intended, IDFA previously suggested requiring Canada to transparently publish annual reporting with opportunity for stakeholder consultations that outlines the rationale for consistently underfilled TRQs. Now seeing Canada's CUSMA proposal and the ways in which it potentially decreases market transparency, IDFA suggests that Canada institute transparent reporting at each step in its TRQ administration. For example, Canada could transparently publish the number of new entrant applications, type of entrants, and amount of quota requested and granted each year to help guide bilateral discussions on Canada's TRQ administration compliance. Or for transfers, Canada could publish the number or percentage of quota transfers being initiated each quota year, and whether the transfers are being consistently initiated year-on-year by the same importer (e.g. as a money-making scheme). Above and beyond the transparency provisions in CUSMA in Article 3.A.2 providing for notice and comment on proposed administration changes, the transparency of ongoing administration practices will provide the data required to ensure CUSMA trade obligations are being adequately met.

For the above reasons, IDFA respectfully and strongly requests that Canada reconsider its CUSMA compliance proposal and re-enter good faith negotiations with the United States government over the status of its compliance with the CUSMA dispute panel report and its other CUSMA commitments.

Please do not hesitate to contact me should you wish to discuss these comments.

Sincerely,

Becky Rasdall
Vice President, Trade Policy and International Affairs