

The First Challenge to Canada's Supply
Management System under *CUSMA*:
Tweaking the Supply Management System One
Dispute at a Time

La première contestation du système de gestion
de l'offre du Canada en vertu de l'*ACÉUM*:
ajuster le système de gestion de l'offre un
différend à la fois

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Abstract

In 2021, the United States challenged Canadian dairy import tariff rate quotas (TRQs) before the first state-to-state arbitration panel under Chapter 31 of the *Canada-United States-Mexico Agreement* (*CUSMA*). The panel held that the method of allocation of TRQs limited the US dairy industry's access to the Canadian market and therefore violated *CUSMA* provisions. However, the panel also acknowledged that the Canadian supply management system for dairy products is a unique regulatory

Résumé

En 2021, les États-Unis ont contesté les contingents tarifaires (CT) du Canada visant l'importation de produits laitiers devant le premier groupe spécial d'arbitrage entre États établi en vertu du chapitre 31 de l'*Accord Canada-États-Unis-Mexique* (*ACÉUM*). Le groupe spécial a conclu que la méthode d'attribution des CT limitait l'accès de l'industrie laitière américaine au marché canadien et violait donc les dispositions de l'*ACÉUM*. Toutefois, le groupe spécial a également

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framework for production control, pricing mechanisms, and import control. This article explores the case as a test of the functioning of the improved *CUSMA* dispute settlement process and of Canada's ability to protect its supply management system for dairy products from renewed pressure coming from its most important trade partner.

reconnu que le système canadien de gestion de l'offre de produits laitiers est un cadre réglementaire unique pour le contrôle de la production, les mécanismes d'établissement des prix et le contrôle des importations. Cet article traite ce différend de test du fonctionnement du processus amélioré de règlement des différends en vertu de l'*ACÉUM* ainsi que de la capacité du Canada à protéger son système de gestion de l'offre des produits laitiers contre les pressions renouvelées provenant de son plus important partenaire commercial.

Keywords: Canada-United States-Mexico Agreement; dairy products; dispute settlement; international trade law; state-to-state arbitration; supply management; tariff rate quotas; World Trade Organization.

Mots-clés: Accord Canada-États-Unis-Mexique; arbitrage d'État à État; contingents tarifaires; droit du commerce international; gestion de l'offre; Organisation mondiale du commerce; produits laitiers; règlement des différends.

INTRODUCTION

The first state-to-state arbitration panel established under Chapter 31 of the *Canada-United States-Mexico Agreement (CUSMA)*¹ has published the final report providing its assessment of Canada's allocations of dairy tariff rate quotas (TRQs).² The proceeding, initiated by the United States, challenged Canada's practice of allocating 85 to 100 percent of its fourteen dairy TRQs for "processors and further processors" as being inconsistent with its *CUSMA* obligations regarding the administration of TRQs.³ A TRQ is defined in *CUSMA* as "a mechanism that provides for the application of a

¹ *Canada-United States-Mexico Agreement*, 30 November 2018, online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng> (entered into force 1 July 2020) [*CUSMA*].

² *Re Dairy TRQ Allocation Measures* (2021), CDA-USA-21-31-01 (Ch 31 Panel), online: *World Trade Law* <[www.worldtradelaw.net/document.php?id=usmca31/canada-dairytrq\(usmca\).pdf](http://www.worldtradelaw.net/document.php?id=usmca31/canada-dairytrq(usmca).pdf)> [*Final Report*].

³ *CUSMA*, *supra* note 1, art 3.A.2.11 (b) (agreement not to "limit access to an allocation to processors" when administering an allocated TRQ); Article 3.A.2.11 (c) (agreement 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"); Articles 3.A.2.4 (b) and 3.A.2.11 (e) (agreement to provide "fair" and "equitable" procedures and methods for administering TRQs); and Article 3.A.2.6 (a) (together with its Schedule to Annex 2-B, Appendix 2, s A, para 3 (c)) (agreement not to "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").

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.”⁴ The United States claimed that, by allocating TRQs almost exclusively to processors and further processors, Canada was in effect limiting US dairy industry access to Canada's dairy market because the US suppliers could not directly access the Canadian market segment for non-producers except with a product that had been subject to high rates of duty. This practice, in the view of the United States, constituted a violation of *CUSMA*.

According to the Office of the US Trade Representative, Canada is the third largest export destination for US dairy products, and the United States expected that implementation of the *CUSMA* provisions would boost its dairy exports to Canada by US \$227 million.⁵ Canada, on the other hand, predicted that *CUSMA* would provide US dairy farmers with access to about 3.5 percent of Canada's CDN \$16 billion annual domestic dairy market.⁶ Therefore, for the United States, the regulation of Canada's dairy industry was one of the most important topics to be negotiated, and the Canadian supply management system was one of the greatest obstacles to its access to the Canadian dairy market.

After the *CUSMA* panel report was issued, the United States and Canada each announced that they had won the case.⁷ The decision handed down by the panel was final, as the *CUSMA* Chapter 31 dispute settlement procedure does not provide for an appeal. In March 2022, Canada released a proposal

⁴ *Ibid*, art 3.A.2.1.

⁵ Sharon Udasin, “US Dairy Industry Claims Victory over Canada in Trade Pact Dispute,” *The Hill* (23 February 2022), online: <www.thehill.com/policy/equilibrium-sustainability/588426-us-dairy-industry-claims-victory-over-canada-in-trade-pact>.

⁶ Hannah Jackson, “Should Canadians Worry About the Arrival of More U.S. Dairy under *CUSMA*?” *Global News* (8 July 2020) online: <www.globalnews.ca/news/7145001/us-dairy-canada-cusma/>. Note that predictions about the value of US dairy farmers' access to the Canadian market under *CUSMA* provided by the US and Canadian sources vary significantly. Some Canadian sources have estimated that increased market access by US dairy farmers could result in a \$100 million loss to Canadian dairy farmers. See James McCarten, “Canada's Dairy Industry Will Lose \$100M if *CUSMA* Takes Effect in July: Senator,” *Global News* (28 April 2020), online: <www.globalnews.ca/news/6880811/usmca-canada-dairy-losses-plett/>.

⁷ Global Affairs Canada, Statement, “Minister Ng and Minister Bibeau Welcome Canada-United States-Mexico Agreement Dispute Settlement Panel Report on Dairy Tariff Rate Quotas” (4 January 2022), online: <www.canada.ca/en/global-affairs/news/2022/01/minister-ng-and-minister-bibeau-welcome-canada-united-states-mexico-agreement-dispute-settlement-panel-report-on-dairy-tariff-rate-quotas.html>; Office of the United States Trade Representative, Press Release, “United States Prevails in *USMCA* Dispute on Canadian Dairy Restrictions” (4 January 2022), online: <www.ustr.gov/about-us/policy-offices/press-office/press-releases/2022/january/united-states-prevails-usmca-dispute-canadian-dairy-restrictions>.

for addressing the award,⁸ and Global Affairs Canada commenced industry consultations on the matter.⁹ The stakeholders — including not only the six main actors in Canada’s dairy market¹⁰ but also the Canadian public, provincial and territorial governments, national, provincial, territorial, and regional associations (including industry associations), owners of small- and medium-size businesses in the industry, and international trade partners — had until 19 April 2022 to submit their responses, comments, and suggestions to the government.¹¹ On 16 May 2022, Canada announced the final changes to its policies as a way of implementing the findings of the *CUSMA* panel and opened the application period for allocation of the 2022–23 dairy year TRQs.¹² The United States disapproved of those changes and announced its intention to challenge Canada’s “continuing failure to meet its *USMCA* [*CUSMA*] obligations.”¹³ In particular, the United States claimed that Canada’s new measures continued to violate its *CUSMA* obligations by denying dairy TRQ allocation access to all eligible applicants, such as retailers, food service operators, and other importers, and by failing to fully allocate its dairy TRQs at the beginning of the year.¹⁴

⁸ See Government of Canada, *Public Consultations: CUSMA Dairy Tariff Rate Quotas (TRQs) Panel Report Implementation – Proposed Allocation and Administration Policy Changes* (last modified 1 March 2022), online: <www.international.gc.ca/trade-commerce/consultations/TRQ-CT/cusma_dairy_changes-produits_laitiers_aceum_changements.aspx?lang=eng> [*Canada’s Proposal for Panel Report Implementation*].

⁹ Government of Canada, *Public Consultations: CUSMA Dairy Tariff Rate Quotas Panel Report Implementation* (last modified 2 March 2022), online: <www.international.gc.ca/trade-commerce/consultations/TRQ-CT/cusma_dairy-produits_laitiers_aceum.aspx?lang=eng>.

¹⁰ The six main actors are: (1) producers (dairy farmers); (2) processors (that purchase raw milk from producers and transform it into dairy products for consumers); (3) further processors (that further incorporate dairy products into their manufacture of further processed products); (4) distributors (that purchase and resell dairy products to third parties); (5) food service industry such as restaurants; and (6) retailers and grocery industry (such as supermarkets and grocery stores as well as warehouse clubs and super-centers). *Final Report*, *supra* note 2 at para 44.

¹¹ *Ibid.*

¹² Government of Canada, “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)” (last modified 16 May 2022), online: <www.international.gc.ca/trade-commerce/controls-controles/messages/2022-05-16-message-industry-industrie.aspx?lang=eng> [Government of Canada, “Message to Industry”].

¹³ Office of the United States Trade Representative, Press Release, “United States Initiates Second USMCA Dispute on Canadian Dairy Tariff-Rate Quota Policies” (25 May 2022), online: <www.ustr.gov/about-us/policy-offices/press-office/press-releases/2022/may/united-states-initiates-second-usmca-dispute-canadian-dairy-tariff-rate-quota-policies>.

¹⁴ *Ibid.* See also “US Request for Consultation with the Government of Canada Regarding Certain Measures Related to the Allocation of Canada’s Dairy Tariff-Rate Quotas” (25 May 2022) at paras 2, 5–3, online: <[www.ustr.gov/sites/default/files/enforcement/USMCA/US%20Cons%20Req.for.USTR.website%20\(1\).pdf](http://www.ustr.gov/sites/default/files/enforcement/USMCA/US%20Cons%20Req.for.USTR.website%20(1).pdf)> [“US Request for Consultations with Canada”].

This article first reviews the panel's report and then addresses Canada's proposed response and the United States's reaction to it. Next, it comments on the importance of this dispute in the context of the functioning of the *CUSMA* dispute settlement mechanism established in Chapter 31 and that of Canada's attempt to protect its dairy industry in the negotiation and performance of international trade treaties. It argues that, while the panel's final report does not challenge Canada's right to make TRQ allocations,¹⁵ it does question the basis on which such allocations are made.¹⁶ It also reveals that Canada's supply management system, introduced to provide stability for dairy farmers and consumers in Canada, remains a bone of contention between Canada and those of its trade partners that are major dairy exporters. Those trade partners, such as the European Union (EU), New Zealand, and Australia, have already sought, in their negotiation and implementation of international trade agreements with Canada, to influence how the supply management system functions.¹⁷ The Canadian federal government has agreed to compensate domestic dairy farmers for the potential losses they may sustain from trade liberalization resulting from various free trade agreements.¹⁸ This article concludes that, in the light of consistent pressure coming from foreign governments, on the one hand, and from the domestic dairy industry, on the other, the Canadian dairy supply management system is a topic that will continue to dominate discussions about concessions in trade negotiations

¹⁵ *Final Report*, supra note 2 at para 162.

¹⁶ The panel held that reserving access to 85–100 percent of tariff rate quotas (TRQs) to processors was inconsistent with art 3.A.2.11 (b) because it limited access to an allocation to processors. *Final Report*, supra note 2 at para 98.

¹⁷ See *Canada-European Union Comprehensive Economic and Trade Agreement*, 30 October 2016, ch 8, online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/o8.aspx?lang=eng> (provisionally applied 21 September 2017) [*CETA*]; *Report of the Third Meeting of the EU-Canada CETA Committee on Agriculture* (21–22 September 2020), online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/20200921_ceta_comm_agri-20200921_comite_agri_aecg.aspx?lang=eng>. See also Andy Blatchford, "Canada's Dairy Stance Frustrates TPP Talks, New Zealand Envoy," *Global News* (30 July 2015), online: <www.globalnews.ca/news/2141154/canadas-dairy-stance-frustrates-tpp-talks-new-zealand-envoy/>.

¹⁸ Marie-Claude Bibeau, Minister of Agriculture and Agri-Food: "Today's announcement shows how much our government respects our producers and believes in the supply management system. As promised, the compensation is deployed fully and fairly to allow everyone to make the best decisions based on the new market realities and their respective situations." See Government of Canada, News Release, "Government of Canada Announces Compensation for Supply-Managed Dairy Producers" (16 August 2019), online: <www.canada.ca/en/agriculture-agri-food/news/2019/08/government-of-canada-announces-compensation-for-supply-managed-dairy-producers.html>.

between Canada and other countries. It may force Canada to make other trade concessions that it might otherwise have avoided in order to keep the dairy supply management system in place. It predicts that any changes to the system will continue to be implemented in small increments rather than all at once.

THE FIRST *CUSMA* DISPUTE: CANADIAN DAIRY TRQ ALLOCATION MEASURES CHALLENGED

The final report by the panel on Canada's TRQs marks the first state-to-state dispute resolution process completed under *CUSMA* Chapter 31, which applies to disputes regarding the interpretation or application of *CUSMA*.¹⁹ This dispute settlement mechanism also applies when one party believes that a measure proposed or taken by another party in response to the alleged failure of the first party to carry out an obligation under *CUSMA* is, or would be, inconsistent with the second party's obligations under *CUSMA* and in the case of the nullification or impairment of benefits that a party could reasonably have expected under the agreement.²⁰ The *CUSMA* Chapter 31 provisions amend and replace those of Chapter 20 of its predecessor, the *North American Free Trade Agreement (NAFTA)*.²¹ Interestingly, the first state-to-state dispute settlement panel established under *NAFTA* in December 1996 also dealt with a US challenge to Canada's application of TRQs to imports of US agricultural products and its supply management measures for milk, eggs, broiler hatching eggs, chicken, and turkey.²²

Under *CUSMA*, Canada maintains a preferential in-quota tariff rate on fourteen different categories of dairy products: milk, cream, skim milk powder, butter and cream powder, industrial cheeses, cheeses of all other types, milk powders, concentrated or condensed milk, yogurt and buttermilk, powdered buttermilk, whey powder, products consisting of natural

¹⁹ *CUSMA*, supra note 1, art 31.1.

²⁰ *Ibid*, art 31.2.

²¹ *North American Free Trade Agreement*, 17 December 1992, Can TS 1994 No 2, (1993) 32 ILM 289 (entered into force 1 January 1994) [*NAFTA*]. The *NAFTA* Chapter 19 and Chapter 20 dispute settlement mechanisms were retained, and these chapters were renumbered in *CUSMA* as Chapters 10 and 31 respectively. *NAFTA* Chapter 19 provisions regulated appeals to binational *NAFTA* panels of domestic courts' decisions in anti-dumping and countervailing duty cases. Canada negotiated an opt-out of *NAFTA* Chapter 11 provisions that governed investor-state disputes. Therefore, *CUSMA* Chapter 14 now regulates the transition from *NAFTA* to *CUSMA* regarding investor-state claims with Annexes 14-D and 14-E applying only to the United States and Mexico.

²² *Re Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products (United States v Canada)* (1996), CDA-95-2008-01 (Ch 20 Panel), online: <www.publications.gc.ca/collections/Collection/E100-2-1-95-2008-01E.pdf> [*NAFTA TRQ Final Report*].

milk constituents, ice cream and ice cream mixes, and other dairy products.²³ CUSMA permits Canada to administer the TRQs pursuant to an “allocation mechanism,” and Canada uses an import licensing system for that purpose. Under this system, pools or reserved amounts are established, and only processors, including further processors, have between 85 percent and 100 percent of each TRQ, leaving all other eligible TRQ applicants to apply for the remaining TRQ amounts—that is, up to 15 percent of the TRQ.²⁴ Applicants active in the Canadian food or agriculture sector are considered to be eligible applicants.²⁵ After Canada published notices to importers regarding the fourteen TRQs for dairy products,²⁶ it allocated 80 percent or more of each TRQ to “processors” on a market share basis in terms of the relative amounts that they had manufactured during the reference period.²⁷ An additional 10 percent was allocated to further processors on a market share basis, and another 10 percent was allocated to distributors on an equal share basis.²⁸ According to the notice to importers of 15 June 2020, “processors” eligible to apply for an allocation are those that manufacture skim milk powder in their own provincially licensed or federally registered facilities.²⁹ Eligible “further processors” are those that use skim milk powder as an ingredient in the production of further processed food products in their own provincially licensed or federally registered processing facilities.³⁰ Eligible distributors are those that buy skim milk powder and re-sell it to other businesses.³¹ According to this notice, “retailers are not eligible for an allocation.”³²

On 9 December 2020, pursuant to CUSMA Articles 31.2 and 31.4, the United States requested consultations with Canada regarding the Canadian dairy TRQ allocation measures. The four important points on the US agenda regarding the Canadian TRQ allocation measures were: (1) Canada is allocating TRQs to processors alone in violation of its commitment under

²³ CUSMA, *supra* note 1, Annex 2-B, Appendix 2.

²⁴ *Final Report*, *supra* note 2 at para 28.

²⁵ *Ibid* at para 36.

²⁶ Notices published on 15 June 2020; subsequently revised notices published on 1 October 2020 and 1 May 2021. See *ibid* at para 40.

²⁷ Government of Canada, *Notice to Importers—CUSMA: Skim Milk Powder TRQ*—Serial No 1017 (last modified 15 June 2020), online: <www.international.gc.ca/trade-commerce/controls-controles/notices-avis/1017.aspx?lang=eng> [Government of Canada, *Notice to Importers*].

²⁸ *Final Report*, *supra* note 2 at para 40.

²⁹ Government of Canada, *Notice to Importers*, *supra* note 27.

³⁰ *Ibid*.

³¹ *Ibid*.

³² *Ibid*.

Article 3.A.2.11(b); (2) Canada is failing in its commitment under Article 3.A.2.11(c) 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”; (3) Canada is not providing “fair” and “equitable” procedures and methods for administering its TRQs as required under Articles 3.A.2.4(b) and 3.A.2.11(e); and (4) Canada is introducing “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.”³³ When the consultations failed to resolve the dispute, the United States requested the establishment of a panel in accordance with *CUSMA* Article 31.6.1. That panel was established on 25 May 2021, the same day on which it was requested.³⁴

Although the central issue that the panel considered was whether Canada’s allocation mechanism, which reserved 85 percent to 100 percent of its dairy TRQs for processors, violated Article 3.A.2.11(b), it also reviewed in considerable detail the functioning of Canada’s supply management mechanism and its importance with respect to balancing the supply and demand for dairy products within Canada. The United States maintained that Canada’s allocation mechanism was inconsistent with *CUSMA* Article 3.A.2.11(b) because Canada limited access to an allocation to processors and “because access was limited to each specific allocation made from the reserved pools.”³⁵ The said provision requires that a “[p]arty administering the TRQs” — in this case, Canada and the United States — “shall ensure that ... 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.”³⁶ The United States claimed that *CUSMA* granted it access in all categories of dairy products captured by the TRQs.

Since dairy TRQs allow preferential (zero or low) customs duty on imports of products up to a permitted quantity, once that allocation cap is reached, Canada could raise the import duties to a much higher level. This action would make any import above the permitted quota economically inefficient. Since those TRQs were reserved mainly for Canadian dairy product manufacturers or manufacturers of other foods that incorporate dairy products (that is, processors and further processors) and use them to import lower value dairy products from the United States, the allocation system resulted in restricted access to the Canadian market for high value-added and finished US dairy products intended for sale directly to consumers. The United States

³³ *Final Report*, *supra* note 2 at para 1.

³⁴ *Ibid* at para 5.

³⁵ *Ibid* at para 63.

³⁶ *CUSMA*, *supra* note 1, art 3.A.2.11(b).

argued that it was not challenging Canada's general right to allocate TRQs "in the manner it desires" but only the inflexibility of the pool system that it had designed for allocation.³⁷ Canada argued that the United States failed to interpret the term "allocation" properly when it insisted that it was used in Article 3.A.2.11(b) to refer to a portion of the TRQ. It opined that *CUSMA*'s provisions meant that "a TRQ is not 'allocated' unless and until the shares of the in-quota quantity are allocated to individual applicants."³⁸ Rather, argued Canada, its allocation mechanism did not violate the *CUSMA* provisions because it did not limit access to processors only since it did allow access "for at least one non-processor to at least one allocation."³⁹ Therefore, Canada maintained that, "when the TRQ is viewed as a whole, access to an allocation [was] not ... limited to processors" but given to non-processors as well.⁴⁰

Canada also claimed that its practice of administering dairy TRQs by reserving a portion for allocation to processors was consistent with the administrative system that it utilizes under several other international trade agreements that predate *CUSMA* and that this allocation mechanism was established to "ensure a degree of predictability for imports" and in consideration of the fact that processors in Canada have "a unique position within the Canadian dairy supply chain to balance imports with domestic production, fill gaps in supply, and respond to overall consumer demand and trends."⁴¹ Canada also argued that, although its own notices to importers might seem to refer to a "pool" as an "allocation," these documents should not be used by the panel as conclusive evidence of the country's interpretation of the term because these notices were "policy documents" providing general information, not documents intended to have "the force of law."⁴² Hence, Canada claimed, it had administered its TRQs by establishing "pools" or reserved amounts for processors since 1995 when it created pools for processors in administering the World Trade Organization (WTO) TRQs for chicken and chicken products.⁴³

Canada also argued that it had established dairy TRQs for cheese and industrial cheese under the *Canada-European Union Comprehensive Economic and Trade Agreement (CETA)*⁴⁴ since 21 September 2017 and that, under the

³⁷ *Final Report*, *supra* note 2 at para 162.

³⁸ *Ibid* at para 85.

³⁹ *Ibid* at para 64.

⁴⁰ *Ibid*.

⁴¹ *Ibid* at para 48, n 27 (referring to Canada's initial written submission at para 63 and Canada's responses to panel questions at paras 3–19).

⁴² *Ibid* at para 92.

⁴³ *Ibid* at para 45.

⁴⁴ *Ibid* at para 46; *CETA*, *supra* note 17.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),⁴⁵ to the predecessor of which the United States had been a signatory in 2016, Canada had established sixteen dairy TRQs, each of which reserved a portion of the quota for processors.⁴⁶ Therefore, Canada argued, the panel should consider this historical context when interpreting the disputed *CUSMA* provisions and should view Canada's practice in the context of the importance of processors and the supply management system to the survival of its dairy industry.

The panel resolved the two countries' conflicting interpretations of Article 3.A.2.11 (b) by resorting to the general rules of treaty interpretation set out in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties (VCLT)*.⁴⁷ Article 31 of the *VCLT* requires 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," giving special meaning to a term "if it is established that the parties so intended."⁴⁸ In order to establish the ordinary meaning of the term "allocation," the panel considered each of the fourteen notices to importers that Canada had distributed in its implementation of *CUSMA*. In those notices, Canada referred to the pools as "allocations" for which access was limited to processors. According to the panel, those notices to importers had "legal value" and Canada had failed to provide any satisfactory explanation for the reference to pools as "allocations" at the oral hearing. Therefore, the panel held, the notices were "compelling evidence of the plain and ordinary meaning of the words used in Article 3.A.2.11 (b)."⁴⁹

In interpreting this provision, the panel also considered the "purpose" and the "intent" of *CUSMA*.⁵⁰ In so doing, the panel found that *CUSMA* "reflects an intent to open markets to a greater degree than was the case before ... and under predecessor agreements."⁵¹ Accordingly, the panel held that Article 3.A.2.11 (b) "unquestionably constrains Canada's ability to deny access to non-processors."⁵² Therefore, the panel concluded that the

⁴⁵ *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 8 March 2018, ch 9, online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng> (entered into force 30 December 2018) [*CPTPP*].

⁴⁶ *Final Report*, *supra* note 2 at para 47.

⁴⁷ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, Can TS 1980 No 37 (entered into force 27 January 1980).

⁴⁸ *Ibid*, art 31(1), (4).

⁴⁹ *Final Report*, *supra* note 2 at para 110.

⁵⁰ *Ibid* at para 117.

⁵¹ *Ibid*.

⁵² *Ibid*.

dispute was only about the extent to which Canada restricted dairy imports. The panel briefly considered the rationale for the use of supplemental means of interpretation outside of the text of a treaty under Article 32 of the *VCLT*.⁵³ Canada argued that the panel should consider the market background of its dairy industry in order to understand the important role that pools for processors play in Canada's dairy supply management system, particularly as a means for maintaining the system's stability.⁵⁴ In addition, Canada argued that the panel should take into consideration its practice under other free trade agreements of reserving TRQs exclusively for processors.⁵⁵

The panel's analysis drew several important conclusions. First, the panel noted Canada's administrative discretion in allocating the TRQs. It stated that only "the exclusive reservation of access to the TRQs ... violates the Treaty."⁵⁶ The panel also noted that the United States had conceded that Canada enjoys wide discretion in administering the TRQs, suggesting that, under a different system, the allocation of the same TRQ would mean that food processors could potentially be permissible.⁵⁷ In other words, the panel said that the real issue was whether Canada could preserve access to TRQs for the exclusive use of processors under Article 3.A.2.11(b).⁵⁸ The panel did not find Canada's evidence on its processor pools system in similar treaties like *CETA* and the *CPTPP* helpful for interpreting the relevant *CUSMA* provisions because the Canadian allocation system had never been challenged under those treaties since the United States is not a party to either of them and because even the *CPTPP*, the predecessor of which the United States had helped design and draft prior to withdrawing from it, was not a "reliable yardstick for determining the Parties' common intent" regarding Article 3.A.2.11(b).⁵⁹

Finally, while the panel held that Canada's reserving access to 85–100 percent of a TRQ for processors was inconsistent with *CUSMA*, the panel acknowledged the importance of processors in the Canadian dairy industry and the importance to Canada of a supply management system for dairy products.⁶⁰ Since the US claim had not challenged the system, the panel

⁵³ *Ibid* at paras 131–33.

⁵⁴ *Ibid* at para 139.

⁵⁵ *Ibid* at para 146.

⁵⁶ *Ibid* at para 143.

⁵⁷ *Ibid* at paras 143, 162 ("[i]n other words, it is the inflexible pool system Canada has designed here that is objectionable, not Canada's general ability to allocate its TRQs in the manner it desires" at para 162).

⁵⁸ *Ibid* at para 145.

⁵⁹ *Ibid* at para 150.

⁶⁰ *Ibid* at para 160.

made no ruling regarding its functioning. The panel's decision did not provide any opinion on any other arguments put forward by the parties or on different methods that Canada could use to modify its practice in order to comply with its *CUSMA* obligations. However, it stated in clear terms that Canada must adjust its system because it "cannot, in substance, ring-fence and limit to processors (and 'further processors' ...) a reserved 'pool' of TRQ amounts to which only processors have access."⁶¹

CANADA'S RESPONSE TO THE PANEL REPORT AND THE US REACTION TO THAT RESPONSE

On 1 March 2022, Canada released a proposal for allocation and administrative policy changes to address the panel's award.⁶² It outlined several changes to the dairy TRQ allocations that would not limit the allocations to processors alone but extend them to distributors. For example, the proposed new policy states that 85 percent of milk TRQs will no longer be allocated on a market share basis to processors importing milk in bulk, leaving 15 percent available to be imported by distributors on an equal share basis, but that 85 percent will be allocated on a market share basis to processors and distributors importing milk in bulk, with the remaining 15 percent being available on a market share basis to processors and distributors importing milk for any purpose. Similarly, 85 percent of the new proposed TRQ allocation for cream will be allocated on a market share basis to processors and distributors for importing cream in bulk to be processed into dairy products, and 15 percent will be allocated on a market share basis to processors and distributors importing cream for any purpose. As for cheeses of all types, Canada proposed to allocate 100 percent of the TRQs to processors and distributors on a market share basis. Considering the fact that distributors purchase foods from processors and further processors for resale to third parties rather than engage in processing themselves, these Canadian proposals do meet the requirements of Article 3.A.2.11(b) as they clearly do not limit any part of the TRQs to processors alone.

As previously mentioned, Canada also launched public consultations with stakeholders regarding the policy changes proposed in order to implement the panel's report. The deadline for stakeholders to respond was 19 April 2022. The Dairy Processors Association of Canada (DPAC) welcomed the final report, which recognized Canada's discretion in "designing and implementing its allocation mechanisms," and it confirmed its willingness to work

⁶¹ *Ibid* at para 163.

⁶² *Canada's Proposal for Panel Report Implementation*, *supra* note 8.

with the Government of Canada to find a means of resolving the dispute.⁶³ DPAC previously argued that, given Canada's commitment to provide its trading partners — under *CETA*, the *CPTPP*, and *CUSMA* — with “unprecedented access” to its domestic dairy market and the significant threat that these treaties pose to the Canadian dairy industry, a more comprehensive trade compensation program was needed in order to provide full and fair compensation for processors.⁶⁴

The first US reaction to Canada's proposal came from its dairy industry rather than from the US government. The National Milk Producers Federation (NMPF) and the US Dairy Export Council (USDEC) expressed particular dissatisfaction with Canada's public response to the panel's findings and rejected Canada's proposal to amend the allocation system. In their view, it is through new “proposed TRQ scheme changes” that Canada undermines fair, good faith implementation of *CUSMA*'s provisions regarding dairy imports.⁶⁵ The two organizations believe that the revision proposed by Canada to its import allocation system would not make it fair. As previously mentioned, the US trade representative, Katherine Tai, initially only commented on the dispute's outcome and not on the solution proposed by Canada. At that time, Tai claimed that the final report of the panel was a “historic win” for the United States and insisted that one of her priorities for the *USMCA* — as the United States refers to *CUSMA* — is to ensure “that American dairy farmers get the full benefit of the *USMCA* to market and sell their products in Canada.”⁶⁶

On 16 May 2022, following the completion of public consultations, Canada published its new *CUSMA* dairy TRQ allocations and relevant administrative policies. The Honourable Mary Ng, minister of international trade, export promotion, small business and development, announced that those changes would “fully comply with the panel's findings and its recognition that Canada has the full discretion to administer its TRQs under

⁶³ Dairy Processors Association of Canada (DPAC), “Statement on CUSMA Panel on Canada's TRQ Allocation Mechanisms” (5 January 2022), online: <www.dpac-atlc.ca/dpac-statement-on-cusma-panel-on-canadas-trq-allocation-mechanisms/>.

⁶⁴ DPAC, “Compensating Dairy Processors Harmed by Trade Agreements,” online: <www.dpac-atlc.ca/trade/>.

⁶⁵ “Enough is enough. U.S. dairy producers are sick and tired of Canada's game playing on dairy market access. From their irrelevant celebration that the panel upheld Canada's right to retain a supply management system ... to the continual efforts to undermine established trade commitments ... this pattern of behaviour has gone on too long.” See US Dairy Export Council, Press Release, “USDEC and NMPF Slam Canadian Proposal on USMCA Dairy Market Access” (3 March 2022), online: <www.usdec.org/newsroom/news-releases/news-releases/news-release-3/3/2022>.

⁶⁶ Katherine Tai, “USMCA Priorities for the United States in 2022” in Brookings Institute, *USMCA Forward 2022*, Doc 18-22 (28 February 2022) at 21; online: <www.brookings.edu/blog/up-front/2022/02/28/usmca-priorities-for-the-united-states-in-2022/>.

CUSMA in a manner that supports Canada's supply management system for dairy.⁶⁷ Canada claimed that the new *CUSMA* dairy TRQ policies removed all allocation holder pools under all *CUSMA* dairy TRQs and included distributors as eligible applicants under the *CUSMA* industrial cheese TRQs.⁶⁸

Shortly after Canada announced its new dairy TRQ policies, on 25 May 2022, the United States requested consultations with the Government of Canada under Articles 31.2 and 31.4 of *CUSMA*. The United States now claimed that the new measures, which limit dairy TRQ allocations to processors, further processors, and distributors, but exclude retailers, food service operators, and other types of importers, are inconsistent with Article 3.A.2.6(a) of *CUSMA*, which prohibits the parties from introducing new or additional conditions, limits, or eligibility requirements on the utilization of TRQs, beyond those set out in the schedules to Annex 2-B.⁶⁹ The United States also argued that Canada's measure that uses a twelve-month market activity requirement to establish applicants' eligibility to apply for TRQ allocations is inconsistent with Article 3.A.2.6(a) of *CUSMA* as well as with paragraph 3(c) of Chapter 2, Annex 2-B, Appendix 2 of *CUSMA*.⁷⁰ At the time of writing this article, Canada had not responded to the US request for consultations.

THE FIRST TEST OF *CUSMA*'S STATE-TO-STATE DISPUTE SETTLEMENT PROCEDURE UNDER CHAPTER 31 PASSED

The final report of the panel in *Dairy TRQ Allocation Measures* serves as an important confirmation of the workability and efficiency of the state-to-state dispute settlement procedure under *CUSMA* Chapter 31, which has modified to some extent *NAFTA*'s Chapter 20 state-to-state mechanism by ensuring greater transparency with respect to hearings and a speedier procedure. For example, the new Chapter 31 provisions eliminate the possibility for a party to block the process by not nominating panellists.⁷¹ In this first test of the *CUSMA* procedure, the parties' initial step was to seek resolution of the

⁶⁷ Government of Canada, *Statement by Minister Ng on Dairy Tariff Rate Quota Policies under CUSMA* (last modified 16 May 2022), online: <www.canada.ca/en/global-affairs/news/2022/05/statement-by-minister-ng-on-dairy-tariff-rate-quota-policies-under-cusma.html>.

⁶⁸ Government of Canada, "Message to Industry," *supra* note 12.

⁶⁹ "US Request for Consultations with Canada," *supra* note 14 at para. 2.

⁷⁰ *Ibid* at para. 4.

⁷¹ Jennifer Hillman, "A Serious Enforcement Mechanism Will Require Major Changes to USMCA's Dispute Settlement Provisions," *International Economic Law and Policy Blog* (30 September 2019), online: <www.ielp.worldtradelaw.net/2019/09/usmca-a-serious-enforcement-mechanism-will-require-serious-changes-to-usmcas-dispute-settlement-prov.html>.

dispute through a consultation process, as set out in Articles 31.1 and 31.4 of *CUSMA*. The parties agreed on a three-member panel in accordance with Article 31.11.1(a),⁷² and the panel released its unanimous decision on 20 December 2021, almost seven months after its formation. In other words, over two hundred days elapsed from the date that the panel was established to when its final report was issued. Under Article 31.17.1 of *CUSMA*, a panel has 150 days from the date of the appointment of the last panellist within which to issue its initial report and an additional 30 days after that within which to present its final report.⁷³ The 150-day period that is allowed for the initial report under *CUSMA* is longer than the ninety days that had been allowed under *NAFTA*. However, considering the complexity of this dispute and the number of documents that the panel needed to review, it is questionable whether the longer period allowed under *CUSMA* will be sufficient for panels facing new complex issues.

CUSMA panels now also permit submissions from non-government entities.⁷⁴ It is noteworthy that the International Cheese Council of Canada (ICCC), an organization of Canadian cheese importers that has been criticizing the Canadian dairy supply management system for over four decades, submitted its written views in this dispute. Such submissions will provide an important opportunity for stakeholders in any industry affected by a dispute to express their positions regarding the relevant treaty provisions, and they may also be of assistance to a panel as it evaluates arguments on what are often very complex issues. However, in this case, the text of the final report indicates that the panel reviewed the ICCC's written submission, but that it did not consider the ICCC's request to examine the issue of how Canada should allocate TRQs because the issue fell outside of the panel's mandate.⁷⁵ The ICCC subsequently supported the panel's findings regarding Canada's violation of *CUSMA* and objected to Canada's proposed changes to the current allocation of TRQs in response to the panel's findings. It claimed that the proposal, if implemented, would negatively affect Canadian cheese importers and consumers.⁷⁶

⁷² *CUSMA*, *supra* note 1, art 31.11.1(a) (“[t]he panel shall comprise five members, unless the disputing Parties agree to a panel comprised of three members”).

⁷³ *Ibid*, art 31.17.1 (“[t]he panel shall present an initial report to the disputing Parties no later than 150 days after the date of the appointment of the last panelist. In cases of urgency related to perishable goods, the panel shall endeavour to present an initial report to the disputing Parties no later than 120 days after the date of the appointment of the last panelist”).

⁷⁴ *Ibid*, art 31.11.1(e).

⁷⁵ *Final Report*, *supra* note 2 at para 9.

⁷⁶ International Cheese Council of Canada, Press Release, “Canadian Cheese Importers Object to Canada's Proposal to Come into Compliance with CUSMA Report” (4 January 2022),

CUSMA's Chapter 31 already seems to be more extensively utilized by the three parties than its predecessor, *NAFTA* Chapter 20, had been.⁷⁷ In addition to this case, Canada requested a panel in a case challenging the US safeguard measures on crystalline silicon photovoltaic cells in June 2021.⁷⁸ In 2022, Mexico also launched a request for consultations regarding the United States's restrictive interpretation of the treaty rules on calculating regional value content when applying the automotive rules of origin. In contrast, *NAFTA* Chapter 20's state-to-state dispute settlement procedure was only used three times, including when the United States challenged Canada's TRQs on agricultural products. This use of the *CUSMA* Chapter 31 procedure by all three states in the early days of the treaty's application is a sign of their confidence in this dispute settlement mechanism, and it implicitly acknowledges the need for final and binding resolution of trade issues that arise among them. The three countries' need to find a means to resolve their trade disputes is particularly acute now that the effectiveness of the WTO's dispute settlement system has been compromised by the United States's refusal to appoint members of the WTO Appellate Body, making it unlikely that either Canada or Mexico would seek resolution of trade disputes with the United States through that system.

CANADA'S SUPPLY MANAGEMENT SYSTEM FOR DAIRY AND RESISTANCE TO TRADE LIBERALIZATION

For most countries, regardless of how much agriculture contributes to their total gross domestic product (GDP), protection for agricultural industries has been an important issue in their negotiation of international trade agreements. Many developed countries have established mechanisms for the protection of domestic farmers from cheap imports, providing them with subsidies and imposing high tariffs on agricultural products coming from other countries.⁷⁹ They justify these measures on the grounds of

online: <www.internationalcheesecouncil.ca/news/international-cheese-council-of-canada-welcomes-cusma-dispute-panel-findings/>.

⁷⁷ There are three *NAFTA* panel reports circulated under Chapter 20, including *NAFTA TRQ Final Report*, *supra* note 22. See "NAFTA Chapter 20 Panel Reports," online: *World Trade Law* <www.worldtradelaw.net/databases/nafta20.php>.

⁷⁸ *RE Crystalline Silicon Photovoltaic Cells Safeguard Measure (Mexico and Canada v United States)* (2022), US-CDA-2021-31-01 (Ch 31 Panel), online: <www.can-mex-usa-sec.org/secretariat/disputes-litges-controversias.aspx?lang=eng>. The final report in favour of Canada was issued by the panel on 15 February 2022. The panel found that the US imposition of a safeguard tariff on Canadian solar products constituted a violation of Articles 10.21 and 2.4.2 of *CUSMA* and that Canada should be given tariff-free access to the US market.

⁷⁹ For example, in 2012, tariffs on dairy products coming into Canada were in excess of 200 percent. See Sylvain Charlebois, Jean-Luc Lemieux & Simon Somogyi, *Supply*

protecting domestic agricultural markets from instability in global market prices and of ensuring food security.⁸⁰ Therefore, it has always been difficult to negotiate international rules for regulating trade in agricultural products at the global, regional, and even bilateral levels. Consequently, these international treaties often give significant deference to governments to protect domestic agricultural policies. Even when dispute settlement bodies find that domestic policies are inconsistent with international treaty rules, governments of developed countries such as Canada and the United States have enough institutional knowledge and capacity to comply with those decisions in a way that is the least damaging to their domestic agricultural policy goals.⁸¹ In other words, these policies are tweaked, rather than changed, one dispute at a time.

Canada is not a major dairy exporter in the global market, and the Canadian dairy industry is focused on the domestic market. A unique supply management system had been in operation in Canada at the provincial level before the country started negotiating free trade agreements with other countries.⁸² The goal had been to regulate domestic milk prices by keeping them high in order to secure a fair price for milk for Canadian dairy producers and to ensure the supply of dairy products at prices that were affordable to consumers and food processors.⁸³ The system was seen as one of the means of controlling the effects of trade liberalization by the welfare state that was built on the ideals of embedded liberalism.⁸⁴ While it remains popular with Canadian dairy farmers because it provides them with a more stable income, it is criticized by some Canadian economists for harming consumers, who pay a high price for milk products, and by Canadian cheese importers, who seek to bring more foreign products to Canadian consumers.⁸⁵

Management 2.0: A Possible Roadmap for the Canadian Dairy Industry (Dalhousie University Agri-Food Analytics Lab and University of Guelph Arrell Food Institute, 15 October 2020) at 17, online: <[cdn.dal.ca/content/dam/dalhousie/pdf/sites/agri-food/Agri-Food%20Supply%20Management%202.0%20Report%20\(Dairy\)%202020%20EN.pdf](http://cdn.dal.ca/content/dam/dalhousie/pdf/sites/agri-food/Agri-Food%20Supply%20Management%202.0%20Report%20(Dairy)%202020%20EN.pdf)>.

⁸⁰ Fiona Smith, "Brexit as Trade Governance" (2019) 20 *JWIT* 654 at 658.

⁸¹ Jaqueline D Krikorian, *International Trade Law and Domestic Policy: Canada, the United States and the WTO* (Vancouver: UBC Press, 2012).

⁸² See Conner Peta, "Canada's Supply Management System and the Dairy Industry in the Era of Trade Liberalization: A Cultural Commodity?" (2019) 49:4 *American Rev Can Studies* 547 at 550–52.

⁸³ Krikorian, *supra* note 81 at 180.

⁸⁴ Peta, *supra* note 82 at 552.

⁸⁵ Mario Dumais & Youri Chassin, "Canada's Harmful Supply Management Policies, Ideas for a More Prosperous Society" (June 2015), online: <www.iedm.org/sites/default/files/pub_files/lepinto515_en.pdf>; International Cheese Council of Canada, *Submission to the Standing Committee on International Trade* (16 December 2020), online: <www.ourcommons.ca/Content/Committee/432/CIIT/Brief/BR11101620/br-external/TheInternationalCheeseCouncilof%20Canada-e.pdf>.

The supply management system is based on the functioning of its three pillars: (1) controlled production; (2) pricing mechanisms; and (3) controlled imports.⁸⁶ Controlled production ensures that the quantity of raw milk produced by Canadian farmers corresponds to domestic demand. The pricing mechanism is based on administered pricing established by provincial milk marketing boards that buy all of the raw milk produced and marketed in Canada and then sell raw milk to processors. The third pillar is Canada's import controls on the quantity of dairy products entering the country from trade partners that have been granted preferential market access by receiving TRQs.

Canada has been defending its supply management system for dairy and some other agricultural products in bilateral, regional, and multilateral trade negotiations since this system was instituted at the national level in 1972.⁸⁷ As previously mentioned, the primary argument for protecting the supply management system in trade negotiations was food security. However, some scholars have argued that the federal government had to take into consideration other reasons for protecting the system when approaching trade agreement negotiations, such as the complexity of Canadian federalism, the importance in federal politics of swing rural votes in Quebec and Ontario, and the cultural significance of the dairy industry in Canada.⁸⁸

In the early days, the supply management system worked by making dairy producers pay compensation to exporters and food processors for high prices and ensuring that they remained competitive domestically and internationally.⁸⁹ The system was dependent upon import controls being in compliance with the international trade rules against import prohibitions and restrictions set out in the 1947 *General Agreement on Tariffs and Trade (GATT)*.⁹⁰ Under Article XI:2(c)(i) of the *GATT*, import quotas on

⁸⁶ *Final Report*, *supra* note 2 at para 41.

⁸⁷ The supply management mechanism originated at the provincial level in the 1960s. Charlebois, Lemieux & Somogyi, *supra* note 79 at 7.

⁸⁸ Since the 1990s, Dairy Farmers of Canada have pursued both the economic argument and the cultural significance of dairy production argument. During that period, television advertisements in Canada claimed that "every time a dairy farm dies, part of Canada dies too." See Peta, *supra* note 82 at 555. In 2017, more than 82 percent of Canadian dairy farms were located in either Quebec or Ontario (*ibid* at 549). Charlebois, Lemieux, and Somogyi also report that the Agri-Food Analytics Lab National Survey, conducted in 2019, revealed that most respondents agreed that "dairy farming is an important part of what it means to be a Canadian." See Charlebois, Lemieux & Somogyi, *supra* note 79 at 13.

⁸⁹ Peta, *supra* note 82.

⁹⁰ Dale E McNiel, "The NAFTA Panel Decision on Canadian Tariff-Rate Quotas: Imagining a Tariffing Bargain" (1997) 22 *Yale J Intl L* 345 at 348; Allan Willis & Michael G Woods, "The NAFTA Panel Decision on Supply Management: Gamble or Bargain?" (1997) 35 *Can YB Intl L* 81 at 85; *General Agreement on Tariffs and Trade*, 30 November 1947, 55 *UNTS* 194, *Can TS* 1948 No 31 (provisionally applied 1 January 1948) [*GATT*].

agricultural or fisheries products meeting specified conditions could be useful to the enforcement of governmental measures and therefore exempt from the general prohibitions on quantitative restrictions in Article XI:1.⁹¹ During the 1970s, the restrictions imposed by the Canadian supply management system on the import of dairy products were not challenged by other *GATT* contracting parties. Although the supply management program for eggs was challenged, the working party “did not come to any conclusion” as to its inconsistency with Article XI:2(c)(i).⁹²

When Canada and the United States concluded a bilateral free trade agreement in 1987, they did not agree to eliminate import quotas on agricultural products, but they agreed that they would progressively eliminate all customs duties on goods originating in the territory of the other party while affirming each party's right to use quantitative import restrictions that were *GATT* consistent.⁹³ In 1989, a *GATT* panel found that Canada's restrictions on the importation of ice cream and yogurt, imposed in conjunction with its domestic milk supply management program, were inconsistent with Article XI:1 but could be justified under the provisions of Article XI:2(c)(i).⁹⁴ However, the panel declined to rule on whether the supply management system for dairy *per se* met the requirements for the Article XI:2(c)(i) exception. Canada did accept the panel's report but maintained its ice cream and yogurt quotas in anticipation of the outcome of the Uruguay Round negotiations, during which Canada proposed amendments to the treaty that would permit it to maintain the right to use absolute import quotas, thereby protecting its supply management system.⁹⁵

As previously mentioned in this article, the US government challenged Canada's supply management system under the *NAFTA* Chapter 20 dispute settlement mechanism. This challenge coincided with the creation of the WTO and the introduction of the new rules on tariffication under the WTO

⁹¹ *GATT*, *supra* note 90, art XI:2(c)(i). Dale McNiel argues that *GATT* panels applied many conditions to the exceptions in their rulings in the late 1980s that made an import restriction very difficult to justify under this provision. McNiel, *supra* note 90 at 351.

⁹² *Canada – Import Quotas on Eggs (Complaint by the United States)* (1976), GTT L/4279 (Working Party Report), online: <www.wto.org/english/tratop_e/dispu_e/gatt_e/75eggquo.pdf>.

⁹³ Chapter 7: Agriculture, Article 710: International Obligations in *Canada-United States Free Trade Agreement*, 12 December 1987–2 January 1988, Can TS 1989 No 3, (1988) 27 ILM 281, online: <www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusfta-e.pdf> (entered into force 1 January 1989; suspended 1 January 1994).

⁹⁴ *Canada-Import Restrictions on Ice Cream and Yoghurt (Complaint by the United States)* (1989), GTT Doc L/6568, online: <www.wto.org/english/tratop_e/dispu_e/gatt_e/88icecrm.pdf>.

⁹⁵ McNiel, *supra* note 90 at 353.

Agreement on Agriculture,⁹⁶ whereby WTO members were allowed to replace the existing non-tariff barriers by TRQs providing access at lower tariff rates for imports up to specified levels and applying higher tariffs to imports in excess of those levels. In 1997, Allan Willis and Michael Woods commented on the case in great detail in this journal.⁹⁷ For the purpose of this article, it will only be mentioned that the dispute clearly illustrated the complexities surrounding the negotiation of states' multiple trade obligations, some of which are at the multilateral level and others at the regional and bilateral levels.

In the 1995 case, the United States claimed that the new tariffs imposed by Canada violated the latter's *NAFTA* obligation not to raise tariffs, but Canada maintained that the new tariffs were justified under the WTO *Agreement on Agriculture*. The panel accepted the Canadian interpretation of the relationship between the obligations set out in the WTO *Agreement on Agriculture*, which had come into force in 1995, and in *NAFTA*, which had come into force in 1994. Canada's interpretation of the two sets of rules was based on Article 30(3) of the *VCLT*, which posits that a conflict should be resolved by applying the "later-in-time" rule. This meant that the provisions of the *Agreement on Agriculture*, which came into force in 1995, prevailed over those of *NAFTA*, which came into force in 1994. The outcome was important to Canada because the new TRQs for agricultural products adopted pursuant to the *Agreement on Agriculture* formed a part of its modified supply management system; thus, the system remained unchanged after the panel's decision.

Jacqueline Krikorian's research on the challenges that Canada has faced in preserving its domestic policy goals as it negotiates international trade treaties reveals that Article 9.1 (c) of the *Agreement on Agriculture* was drafted to target the Canadian supply management scheme.⁹⁸ Krikorian has argued that, in response to this WTO rule, Canada introduced a new system — the National Milk Marketing Plan — which led to the creation of a new non-governmental body — the Canadian Milk and Supply Management Committee — to oversee the new "pooling" system. The new system was created in consultation with the dairy industry, and the producers' levy and milk

⁹⁶ *Agreement on Agriculture*, 15 April 1994, 1867 UNTS 410 (entered into force 1 January 1995) [*Agreement on Agriculture*]; *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154 (entered into force 1 January 1995).

⁹⁷ Willis & Woods, *supra* note 90.

⁹⁸ *Agreement on Agriculture*, *supra* note 96, art 9.1 ("[t]he following export subsidies are subject to reduction commitments under this Agreement: ... (c) payments on the export of an agricultural product that are financed by virtue of governmental action, whether or not a charge on the public account is involved, including payments that are financed from the proceeds of a levy imposed on the agricultural product concerned or on an agricultural product from which the exported product is derived"). See Krikorian, *supra* note 81 at 180.

pricing systems that were in place at the time were abolished. All milk produced was pooled and classified according to its end use, and the new committee set the prices for each category. The milk prices for dairy exports were lower than those for products destined for the Canadian market.⁹⁹

The United States challenged the changes effected by Canada before a WTO panel in 1998 as inconsistent with Article 9.1(c) of the *Agreement on Agriculture*.¹⁰⁰ Krikorian has found that, from the time that the *Agreement on Agriculture* was implemented in US legislation, the US dairy industry mobilized US government trade officials to monitor the functioning of the new Canadian system.¹⁰¹ New Zealand, another major dairy exporter, also brought a complaint against Canada on similar grounds, and the two complaints were consolidated by the WTO's Dispute Settlement Body.¹⁰² The main claim made by the United States and New Zealand was that the supply management system allowed Canada to exceed the legitimate export subsidy levels set out in the schedules to the *GATT* 1994 and that Canada was in breach of Article 9.1(c) of the *Agreement on Agriculture*.¹⁰³ The panel agreed with the claimants, and Canada appealed its decision.¹⁰⁴

⁹⁹ *Ibid.*

¹⁰⁰ *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products (Complaint by the United States)* (1999), WTO Doc WT/DS103 (Appellate Body Report), online: <www.wto.org/english/tratop_e/dispu_e/cases_e/ds103_e.htm> [*Canada – Measures Affecting Dairy Products*]. The panel was established in March 1998 at the second request of the United States, and the report was circulated to the World Trade Organization (WTO) members in May 1999.

¹⁰¹ *Ibid.*

¹⁰² *Canada – Measures Affecting Dairy Exports (Complaint by New Zealand)* (1999), WTO Doc WT/DS113/AB/RW (Appellate Body Report), online: <www.wto.org/english/tratop_e/dispu_e/cases_e/ds113_e.htm>. New Zealand requested consultations with Canada on 29 December 1997 and requested the establishment of a panel on 12 March 1998. The Dispute Settlement Body (DSB) decided on 25 March 1998 to have this request and the request by the United States in *Canada – Measures Affecting Dairy Products* examined by a single panel.

¹⁰³ *General Agreement on Tariffs and Trade*, 15 April 1994, 1867 UNTS 157 (entered into force 1 January 1995) [*GATT* 1994].

¹⁰⁴ *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Notification of an Appeal by Canada under Paragraph 4 of Article 16 of the Understanding Rules and Procedures Governing the Settlement of Disputes (DSU)* (1999), WTO Doc WT/S103//6;WR/DS113//6, online: <www.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/103-6.pdf&Open=True>. The DSB adopted the Appellate Body and panel reports on 27 October 1999. Subsequently, New Zealand launched two compliance proceedings. On 9 May 2003, Canada and New Zealand finally reached a mutually agreed solution under Article 3.6. of the *Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 to the Marrakesh Agreement Establishing the World Trade Organization)*, 15 April 1994, 1869 UNTS 401 (entered into force 1 January 1995). See the WTO's summary of the proceedings in *Canada – Measures Affecting Dairy Products*, *supra* note 100.

The Appellate Body reversed some of the panel's findings but upheld most of them, the most important of which was that Canada had violated Articles 3.3 and 8 of the *Agreement on Agriculture* with respect to the export subsidies listed in Article 9.1 (c). In response to the report, Canada deregulated dairy exports, but the supply management system remained in place for domestic milk sales, thus separating its domestic and international dairy sales.¹⁰⁵ This response did not satisfy the United States and New Zealand. Two rounds of compliance hearings followed in 2001, and the Dispute Settlement Body ruled against Canada in January 2003. In the end, on 9 May 2003, Canada, New Zealand, and the United States informed the Dispute Settlement Body that they had reached an agreement regarding this dispute.¹⁰⁶ While the WTO decision was criticized in Canada, especially because the Appellate Body had undertaken a total cost-of-production analysis in order to determine whether Canadian dairy exports were being subsidized more than permitted — a new standard to which the WTO members had not agreed — Canada did make changes to its regulation of dairy exports. Again, the supply management system, embedded in social issues that were important to Canada's policy objectives, remained unchanged, and the changes made to the export regulation were expected to affect less than 2 percent of Canada's dairy production in value.¹⁰⁷

During the *CUSMA* negotiations, both Canada and the United States indicated that the dairy industry was one of the most difficult areas to regulate. As previously mentioned, in *CUSMA*, Canada agreed to allow increased dairy market access for US exporters. It was estimated that these concessions would amount to 3.59 percent of the Canadian dairy market and that they would decrease the income of Canadian dairy farmers¹⁰⁸ and weaken the import control pillar of supply management in Canada.¹⁰⁹ It took only sixty days after *CUSMA*'s coming into force for 114 members of the House of Representatives to send a written complaint regarding Canada's administration of TRQs to the then US trade representative Robert Lightizer and the US secretary of agriculture Sonny Perdue and to request the immediate opening of the consultation process under the agreement's

¹⁰⁵ Krikorian, *supra* note 81 at 181.

¹⁰⁶ *Canada – Measures Affecting Dairy Products*, *supra* note 100.

¹⁰⁷ Krikorian, *supra* note 81 at 183.

¹⁰⁸ Jackson, *supra* note 6. According to *CUSMA*, Canada will increase its dairy import quotas by 500 percent in the sixth year after *CUSMA* comes into force and then provide a 1 percent annual incremental increase until the nineteenth year. See Khamla Heminthavong, *Canada's Supply Management System* (Background Paper), Doc 2018-42-E (Ottawa: Library of Parliament, 2018) at 6.

¹⁰⁹ Heminthavong, *supra* note 108 at 7.

dispute settlement provisions.¹¹⁰ The following month, on 25 August 2020, twenty-five US senators sent a similar written complaint to Lighthizer and Perdue.¹¹¹ Therefore, the US request in May 2021 for the establishment of the panel to examine Canada's allocation of dairy TRQs did not come as a surprise to agricultural policy analysts and international trade experts.

CONCLUSIONS

At this early stage, it is difficult to assess the full impact of this first *CUSMA* Chapter 31 award. Time and again, the Canadian government has heralded its ability to protect its supply management system for dairy products. Similar to previous *NAFTA* and *WTO* awards, the *CUSMA* award will have limited effect on the system because the panel did not need to make a direct determination of the system's effect on Canada's implementation of *CUSMA* and because the award provided Canada with considerable deference as to the methods of implementation of the report's recommendations. As Krikorian has argued, because international dispute settlement bodies often have limited capacity to influence domestic policy matters, their decisions allow states to pursue the same policy goals by changing only the tools and mechanisms of implementation.¹¹² The new US request for dispute settlement consultation regarding Canada's modified dairy TRQ allocation measures submitted on 25 May 2022 indicates that the US government is not satisfied with Canada's response to the first panel decision and the relevant changes to its dairy TRQ policies. At the same time, Canada's message to industry regarding these changes reveals Canadian concerns regarding certain US policies proposed in the Build Back Better bill and suggests that its dairy TRQ policies and the 2022 calendar year dairy TRQ allocation may be subject to further changes.¹¹³

According to some economists and agricultural policy experts, the interests of the supply-managed dairy industry have weighed too heavily in Canada's trade negotiations, especially in recent years, when *CETA*, the *CPTPP*, and *CUSMA* were negotiated.¹¹⁴ In 2018, when all three of those

¹¹⁰ Western Dairy Council, "US Expresses Concerns in the First 60 Days of CUSMA" (September 2020), online: <www.westerndairyCouncil.com/news/category/all>.

¹¹¹ *Ibid.*

¹¹² Krikorian, *supra* note 81 at 197.

¹¹³ "Please note that given Canada's deep concerns with the discriminatory electric vehicle tax credits proposed in the Build Back Better bill under U.S. Congress consideration, a decision regarding the potential allocation of the previously unallocated quota under the 2022 CUSMA calendar year dairy TRQs will be taken as the issue evolves, but not later than July 31. Any previously allocated and unused quota under the 2022 CUSMA calendar year dairy TRQs will remain valid until December 31, 2022." See Government of Canada, "Message to Industry," *supra* note 12.

¹¹⁴ Scott Biden, Allan P Ker & Stephen Duff, "Impacts of Trade Liberalization in Canada's Supply-Managed Dairy Industry" (2020) 51 *Agricultural Economics* 535.

trade agreements were signed, Canada's dairy sector contributed only 0.9 percent to its total GDP¹¹⁵ or CDN \$6.2 billion.¹¹⁶ In 2020, 18,805 employees worked on 10,095 dairy farms, while 24,500 employees worked in dairy processors.¹¹⁷ At least one study has shown that, although *CETA*, the *CPTPP*, and *CUSMA* have increased the supply of dairy imports, that increase has not been matched by an increase in consumer demand for dairy products.¹¹⁸ As public discourse about the need to change the system mounts, the Canadian government continues to fight off pressures from its trade partners in the form of expensive disputes before international trade panels and to pay its way out of the need to modify an agricultural policy that protects specific agricultural industries.¹¹⁹ The first state-to-state dispute settlement process under *CUSMA* Chapter 31 has provided Canada with a reliable path by which to proceed towards that goal for now.

¹¹⁵ *Ibid* at 536.

¹¹⁶ Producteurs de lait du Québec, *Supply Management and Trade Agreements* (2018) at 1, online: <www.lait.org/wp-content/uploads/2018/SUPPLY_MANAG_ANG.pdf>.

¹¹⁷ *Final Report*, *supra* note 2 at para 44 (Quebec's milk producers claim that the dairy industry created eighty-three thousand jobs in 2018).

¹¹⁸ Biden, Ker & Duff, *supra* note 114 at 551. But see the summary of the impact of the three agreements on the dairy sector that is provided by Quebec's milk producers: "Once *CETA* (+1.4% access), the *CPTPP* (+3.1%) and the *CUSMA* (+3.9%) are fully implemented in 2024, Canada will import around 18% of its milk production, which equals \$1.3 billion in annual lost sales for producers alone." Producteurs de lait du Québec, *supra* note 116.

¹¹⁹ Charlebois, Lemieux & Somogyi, *supra* note 79, propose a twenty-year plan for modernization of the supply management system by gradually reducing tariffs, allowing more imports, providing for a voluntary buy-out for struggling farmers, and creating much bigger producers in the market.