

Intelligence MEMOS



From: Jon Johnson
To: Canadian Trade Watchers
Date: December 11, 2023
Re: CUSMA AND DAIRY – ROUND TWO

Shortly after CUSMA came into effect in 2020, the US challenged Canadian practices in administering the tariff rate quotas (TRQs) for the 14 dairy products that comprise Canada's dairy supply management system. Under a TRQ, a limited volume of the product in question is admitted duty free. Imports exceeding those volumes are subject to a prohibitive duty rate.

The panel [found](#) that Canada's practice of limiting access only to processors (to the exclusion of other industry participants) for 85 to 100 percent of the 14 dairy TRQs violated Canada's CUSMA obligations.

Canada revised its dairy TRQs. However, the revisions did not satisfy the US government, which requested consultations on May 25, 2022. A new panel was formed and a final [report](#) was issued on November 10 and upheld Canada's positions.

The US argued that Canada was failing to allocate TRQs to eligible applicants, namely those active in the Canadian food or agricultural sector. The panel found that Canada was complying with this requirement.

The US argued that Canada's revised dairy measures violated CUSMA requirements by imposing new conditions on utilization of the TRQs, namely that the recipient be a processor, distributor, or further processor. The panel did not accept the US position.

The US argued that, by using a market share basis and different criteria to different types of eligible applicants, Canada violated the CUSMA requirement not to limit access to an allocation to processors. The panel found that Canada's practices did not violate this CUSMA requirement.

The US argued that Canada failed to comply with the CUSMA requirement that its procedures for administering its TRQs be fair and equitable because Canada's procedures favour processors over other types of applicants. The panel did not accept the US argument, even though an applicant need only be active in the Canadian food or agriculture sector, which could include a wide range of industry participants besides processors.

The US argued that Canada's procedures violated the CUSMA requirement that allocation to eligible applicants be equitable and transparent if the aggregate TRQ quantity requested exceeded the quota size. The panel did not find a violation.

The US argued that Canada's procedures failed to ensure that each allocation be made in commercially viable shipping quantities and, to the maximum extent possible, in the quantities requested by the applicant. The panel found that Canada's allocation system was consistent with CUSMA requirements.

The US argued that Canada's 12-month activity requirements breached CUSMA requirements respecting new entrants. The panel found that the Canadian rules did not contravene this provision.

The US argued that Canada's procedures breached a CUSMA requirement respecting imposition of new conditions. The panel found that this provision did not apply.

The panel was not convinced by the US argument that Canada's procedures breached the CUSMA rules respecting return and reallocation of unused allocations.

In short, the panel did not accept any US arguments.

One panel member issued a separate opinion challenging the majority findings. The separate opinion pointed out that the expression "eligible applicants" is not qualified in the CUSMA text and cannot be restricted to "processors, further processors, or distributors exclusively." The separate opinion contained other useful observations, such as the lack of an import history on the part of an applicant cannot be held to be a lack of activity in the Canadian food and agriculture sector.

Global Affairs Canada welcomed the decision, pointing out in its press release that there is no appeal from CUSMA dispute settlement.

The US reaction has been strongly negative. US Trade Representative Katherine Tai expressed disappointment, as have various members of Congress and administration officials.

The Canadian dairy industry should not push its luck.

Bill C-282 (passed by the House of Commons and awaiting Senate approval) would remove discussion of Canada's supply management measures by prohibiting increases in tariff rate quotas for supply managed products (including dairy) and reductions in tariffs on these products when imported in excess of applicable tariff rate quotas.

Removing dairy, poultry and its supply-managed cousins from any talks would likely imperil CUSMA extension when it comes up for renewal in 2026, as pointed out in a recent CD Howe Intelligence [Memo](#). This should be a major concern for Canadian producers of supply managed products. While CUSMA will not self-destruct in 2026 if agreement is not reached, non-agreement will set the stage for CUSMA to self-destruct in 2036.

In any event, the US can withdraw from CUSMA on six months notice, which could be a real threat if a new US administration takes over after the 2024 election.

If Ottawa wishes to salvage supply management, it could start by getting rid of Bill C-282 and paying attention to the points raised in the separate opinion, such as with restricting "eligible applicants" to "processors, further processors, or distributors exclusively."

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