

NAFTA Negotiations: Federal Register Docket Number 2017-0006

**Submission by the National Milk Producers Federation
And the U.S. Dairy Export Council**

In Response to

**Request for Comments on Negotiating Objectives Regarding Modernization of the North
American Free Trade Agreement with Canada and Mexico
June 12, 2017**

The National Milk Producers Federation (NMPF) and the U.S. Dairy Export Council (USDEC) appreciate the opportunity to present their views and input regarding objectives for negotiations on the modernization of the North American Free Trade Agreement (NAFTA).

NMPF is the national farm commodity organization that represents dairy farmers and the dairy cooperative marketing associations they own and operate throughout the United States. USDEC is a non-profit, independent membership organization that represents the export trade interests of U.S. milk producers, proprietary processors, dairy cooperatives, and export traders. The Council's mission is to build global demand for U.S. dairy products and assist the industry in increasing the volume and value of exports.

Executive Summary

As is described in detail below, NAFTA achieved substantial liberalization in dairy trade between the United States and Mexico, but left barriers on trade between the U.S. and Canada largely untouched. We agree that NAFTA could use a face lift and our industry looks forward to working with the Administration to explore ways to preserve and strengthen it. This approach should include trilateral elements where feasible and be complemented by bilateral work as necessary to address issues specific to one trading partner.

At the top of our list for NAFTA Modernization priorities would be:

- The decisive confrontation and resolution of nontariff concerns, including the removal of Canadian milk pricing classes 6 & 7, and the inclusion of Canadian dairy tariffs.
- With respect to Mexico and dairy trade, a modernization of NAFTA would best benefit from a focus on improving rules-based areas such as by introducing new commitments on geographical indications, as well as on sanitary and phytosanitary issues.

Benefits of Trade and NAFTA to U.S. Dairy Industry

Over the last several years, exports have become extremely important to the U.S. dairy industry. We've gone from exporting less than \$1 billion in 2000 to exporting a high of \$7.1 billion in 2014, before a dip in foreign demand dropped us to about \$5 billion in 2016.

The equivalent of one day's worth of milk production each week now gets turned into products that are exported all around the world. The expansion of U.S. dairy exports since 2004 has increased our farmers' milk prices by an average of \$1.25 a hundredweight. In other words, rising exports have increased farmers' milk sales income by roughly \$36 billion over what they would have gotten in that period if exports held steady from 2004.

Over the last two decades we have shifted from being a consistent net importer of dairy products to a significant net exporter. Over the past five years our cumulative exports were more than double our import total. The cumulative surplus over that five year period was nearly \$15 billion. A National Milk Producers Federation economic analysis in late 2015 calculated that U.S. free trade agreement dairy provisions have played a key role in that growth, generating an additional \$8.3 billion for the industry between 2004 and 2014.

Just as importantly, U.S. dairy exports support up to 100,000 American jobs and cover every state of the Union. Impairing these sales would therefore deliver a devastating employment hit not only to farmers, but also to workers in companies supplying inputs and services, and downstream processing plant jobs, as well as cities with large port facilities heavily dependent on trade.

Our NAFTA member partners, Mexico and Canada are our top two foreign markets, accounting for over a third of our global exports. It should be pointed out that our exports to Canada are in large part due to the fact that a sizable portion of our product shipped to Canada is for further processing and ultimate re-export outside of Canada, including back to the United States.

As will be described in greater detail in the following sections, NAFTA achieved substantial liberalization in dairy trade between the United States and Mexico, but left barriers on trade between the U.S. and Canada largely untouched. With Canada's restrictions already in place on our products being much stiffer than our tariffs on theirs, an imbalance in market access obligations in the sector has existed for over two decades. Moreover, Canada has taken additional steps over the years to limit imports whenever Canada's already highly restrictive import restrictions were deemed to be insufficiently limiting.

NAFTA has accomplished a great deal over the past two-plus decades, but it has also been overtaken by new, unanticipated forms of trade and trade problems. We agree that NAFTA could use a face lift and our industry looks forward to working with the Administration to explore ways to preserve and strengthen it. At the top of our list would be the decisive confrontation and resolution of nontariff concerns, including the removal of Canadian milk pricing classes 6 & 7, and the inclusion of Canadian dairy tariffs. With respect to Mexico and

dairy trade, a modernization of NAFTA would best benefit from a focus on improving rules-based areas such as by introducing new commitments on geographical indications, as well as on sanitary and phytosanitary issues.

In short, we support a modernization of NAFTA that is focused on preserving our open and dependable trade relationship with Mexico, on removing remaining barriers to trade and on including issues and sectors that were not covered, or not adequately covered, in the original agreement. We would strongly oppose a result that re-imposed tariffs or other trade-restrictive measures with our NAFTA partners. We must use this opportunity to move forwards, not backwards.

Likewise, the U.S. dairy industry would be irreparably harmed if the United States were to withdraw from NAFTA, thus forcing us to face much higher tariffs in the Mexican market and much greater competition from competitor nations with which Mexico has free trade or preferential trade agreements. We would therefore vigorously oppose U.S. withdrawal from the current agreement.

Mexico: Preserving An Open Market with a Reliable Trading Partner

Last year we shipped \$1.2 billion worth of dairy products to Mexico, up from just \$124 million in 1995. For much, if not all, of this we have NAFTA to thank. Mexico now is our largest export customer, by far. We ship almost twice as much to Mexico as we do to our next largest foreign market. Sales to China, our third largest export market, would need to roughly triple in order to match our current sales to Mexico, demonstrating just how irreplaceable the Mexican market is. Before NAFTA and before Mexico joined the predecessor to the WTO (the GATT) our only dairy-related exports to Mexico were some non-fat dry milk shipments for government feeding programs and a small number of breeding cattle.

NAFTA has been the driving force behind this remarkable growth and is the reason our share of Mexico's total dairy imports is 73% today. Our total dairy exports support some 100,000 jobs in the U.S. and our exports to Mexico support roughly a quarter of them. Preserving those sales is therefore essential not only to farmers, but also to workers in companies supplying inputs and services, and downstream processing plant jobs, as well as cities with large port facilities heavily dependent on trade. Those jobs are in virtually every state in the country.

We must stress that without NAFTA, the duty-free access we enjoy into Mexico could evaporate and be replaced by WTO MFN (or most-favored nation) tariff levels. This would dramatically undermine a core advantage of U.S. suppliers as the only major dairy supplier to Mexico currently benefiting from free trade. If our competitor countries (such as the EU or New Zealand) were to negotiate zero duty treatment in Mexico for their dairy products, our 73% share of the Mexican import market could wither away. That is what makes NAFTA absolutely essential for our industry.

Because of NAFTA and Mexico's commitment to a mutually beneficial trading relationship, we currently have very few trade problems with Mexico in dairy – it is our goal to use these discussions to help keep it that way. Our organizations have worked to forge a partnership with the Mexican dairy industry to expand dairy consumption in a way that benefits both countries. Our goal has not been to displace Mexican products, but rather to broaden overall demand for dairy in Mexico to the benefit of all of our producers.

Since 1994, Mexican milk production has increased by 58% which has helped meet the ever increasing demand of Mexican consumers and visitors to Mexico while at the same time continuing to provide market opportunities for American producers as well. Together, we have grown consumption at a reasonable price for both the Mexican and U.S. consumer.

Preventing New Barriers to Trade: Geographical Indications (GIs) and Common Names (CNs)

The GIs issue is of paramount concern in our largest and most diverse cheese export market. U.S. companies have for years been working with partners in the Mexican dairy industry to build the size and variety of cheese demand in Mexico. That is why the European Union's ongoing efforts to restrict competition in Mexico are so deeply concerning. There are multiple tracks on which this issue is advancing in Mexico currently and it is vital that through each avenue Mexico remain committed to upholding the prior market access opportunity rights it has already granted to the U.S. under NAFTA so that GIs are not wielded as a defacto barrier to trade that contracts market access opportunities for U.S. exports to our most important trading partner. Anything less is unacceptable.

Ongoing WIPO Lisbon Agreement Concerns:

Mexico has seen a wave of GI applications through its membership in the WIPO Lisbon Agreement. These include cheeses such as asiago and gorgonzola, which the U.S. has not only exported to Mexico in significant quantities, but essentially created the market for in the past few years. Their registration by the Mexican Intellectual Property office despite U.S. objections to the protection of both GIs in advance of the one year deadline and the fact that the U.S. is the primary exporter of these products to Mexico are very concerning examples of the deeply flawed Lisbon Agreement and Mexican processes.

Upon receiving rejection notices in response to our filings last year, we filed legal challenges in Mexico objecting to the lack of due process provided for the consideration of these terms in light of their existing prior use in Mexico. To date, a Mexican court has ruled that the private sector's interests were not properly safeguarded in how it handled the GI consideration for gorgonzola, however the court shirked its duty to reverse course at this stage. As a result, we are appealing this decision. We are still awaiting the asiago court hearing's results and anticipate that this court will take the facts into account and uphold the constitutional protections for the Mexican and foreign private sectors.

Mexico's handling of Lisbon Agreement applications has posed serious concerns regarding the legality of its process in light of Mexico's WTO and NAFTA market access commitments. In addition to generating results entirely out of alignment with the market situation in Mexico, Mexico's process for handling Lisbon Agreement applications displays a shocking lack of due process and transparency that is in urgent need of reform.

Proposed Mexican Legislation on GIs

We commend Mexico for recognizing, albeit belatedly, this lack of due process and transparency and moving earlier this year to address that short-coming through the introduction of domestic legislation to create a system for GI applications, evaluation and oppositions within Mexico. Further improvements are needed to this initial draft, however, in order to sufficiently safeguard the use of common names.

EU-Mexico FTA Negotiations

In parallel to this, Mexico has been negotiating an FTA expansion since last year with the European Union that is intended to incorporate GI provisions. As it seeks to do through all its FTAs, the EU has been attempting to use that process to impose de facto barriers to trade and competition on various common name products that the EU falsely claims as GIs.

Mexico is also simultaneously negotiating with the EFTA bloc of countries, which includes Switzerland. The latter group seeks to restrict the use of country names. Given the extensive common usage of country names (e.g. Swiss cheese, Greek yogurt, Italian sausage, French dressing, Belgian waffles, Canadian bacon, etc.), a blanket ban on their use without clear exceptions provided for common usage would be entirely inappropriate.

It is essential that ongoing engagement with Mexico and NAFTA modernization discussions make it clear that the U.S. is vehemently opposed to the imposition of any new restrictions on the market access opportunities for U.S. products relying on common names. We must require that Mexico uphold the letter and spirit of its NAFTA market access commitments in order to ensure it does not impair the value of its prior market concessions to the U.S.

Restoring Access for Raw Milk for Pasteurization

The U.S. has been blocked from exporting raw milk for pasteurization to Mexico since mid-2012. By way of background, the U.S. had shipped raw milk for pasteurization to Mexican dairy processors for many years without problem prior to a sudden change in regulatory requirements in 2012 at which time Mexico began refusing to allow the product to enter.

Mexican processors pasteurized this milk upon receipt and used it both for fluid drinking milk and to make value-added products, such as cheese. The import value of raw milk for pasteurization into Mexico fluctuated greatly in the years preceding the market closure for this product since Mexican demand for it was based on the availability of domestically produced milk. Mexican processors used the U.S. exports of raw milk for pasteurization not to displace local production but rather largely to supplement it, particularly in times of production shortfalls in Mexico due to drought conditions or other factors resulting in lower milk production than normal by Mexican farms. We encourage the U.S. to restore access for this product to the Mexican market.

Canada: Removing Trade-Distorting Policies and Opening a Sheltered Market

Canada's continuing efforts to use policy tools to undermine access to its market and impair the value of concessions for products containing dairy that Canada has granted to the U.S. and other trading partners are a very deep concern that absolutely requires a solution through the NAFTA modernization discussions. This opportunity cannot be squandered.

For years, Canada has intentionally evaded its dairy commitments, using one policy or regulatory tool after another to chip away at access granted. For a developed country that should be one of the reliable trading partners, investing in shipping to Canada can be a game of roulette for U.S. dairy companies given that they never know when Canada will bow to political pressure and intentionally shift the rules of the game to disadvantage U.S. companies.

Given this deliberate creation of an environment of policy uncertainty in the Canadian market, there can be no clarity on whether or not current dairy sales to Canada – nor new sales established under the NAFTA modernization process – will be allowed by Canada to take place in the future without addressing this underlying problem of Canada's habitual use of policy tools to distort trade. As noted below, our industry seeks parity with the vast majority of the rest of the U.S. economy that enjoys open access to the Canadian market; yet addressing the consistent and deliberate use of nontariff policy tools to act as barriers to trade is the foremost priority since it is only by resolving this issue that U.S. exporters can have a realistic expectation of utilizing negotiated access opportunities into Canada.

It is critical that the U.S. pursue an aggressive strategy to curb Canada's ongoing and intentional impairment of the value of dairy concessions to the U.S. and disregard of its trade commitments to the harm of U.S. dairy farmers and exporters. Otherwise, Canada's new policies will chip away not only at the current trade surplus with Canada but also at our trade surpluses to other markets that import milk powder as well.

Removing Class 6 and 7 Milk Pricing Schemes to Preserve U.S. Bilateral and Global Exports

A key focus area for Canada over the past year has been new policy schemes designed to negatively impact U.S. exports in two key ways: 1) undercut U.S. exports to Canada particularly of ultra-filtered milk, a product which enjoys duty-free access under NAFTA and had seen growing sales in recent years; and 2) undercut U.S. and other commercial dairy suppliers on global milk powder markets.

In the spring of 2016, the province of Ontario approved a special Class 6 milk class for ingredient usage that was intentionally designed to force out competition from U.S. imports and provide a policy incentive for Canadian processors to use domestic dairy instead. Subsequently, Canada moved to expand this program through the National Ingredients Strategy and implement a Class 7 milk class across the country. Class 7 began to be implemented across Canada in February 2017.

Class 7 establishes a new ingredient milk class to be priced at the lowest of the US, EU and Oceania price for solids-not-fat for 7 years and then adds onto that a very generous processor “make-allowance” adjustment that in practice leads to the offering of Canadian product at prices that can be far below even the lowest of prevailing world commodity prices. Reports to date from various markets around the world indicate that product is being offered even below the lowest world market price. This below cost pricing avenue applies to the manufacture of skim milk powder (SMP), whole milk powder (WMP), milk protein concentrate (MPC), ultra-filtered milk (UFM) and similar dairy protein products.

This recently introduced provision of below market price milk for the production of the listed dairy products provides an incentive to substitute those products for their imported counterparts in Canada while enabling the export of Canada’s structural surplus of SMP at below the cost of production. It flies in the face of common sense that a country with one of the world’s highest milk prices would be offering a commodity product at levels far below those offered by all other major dairy suppliers.

This type of mismatched result can only be achieved through government policies designed to put a thumb on the scale of global milk powder commerce. As a result, these pricing schemes have already harmed U.S. exports to Canada of ultra-filtered milk and have begun facilitating the dumping of milk powder onto the commercial global markets on which the U.S. so strongly relies. This is the latest in a series of narrowly targeted milk classes that have been created over the past few years specifically in order to displace imports, with the added harm of now also displacing U.S. exports to other markets.

Canada is not alone in having different classes for milk usage. However the way Canada has utilized its milk class system is unique and very problematic. Canada’s milk class system is regularly evolving in order to constrain imports and in some cases provide an incentive to export. Canada’s “Special Milk Class Permit Program” was created in 1995 and provides lower-

priced fluid milk to Canadian processors for use in certain specifically defined groups of products.

These special pricing classes are put in place by the Canadian Milk Supply Management Committee (CMSMC), whose voting members are provincial boards and provincial governments and which is responsible for policy determination and supervision of the provisions of the National Milk Marketing Plan. Use of these pricing classes has been wielded to the detriment of U.S. suppliers of a variety of dairy or dairy- containing products. The way in which Canada is operating its milk class pricing system indicates an intent to erect trade barriers and distort global markets.

Given the harm already unfolding as a result of Canada's actions, we strongly urge the U.S. to secure an immediate halt of Canada's Class 6 and 7 pricing schemes, subsequently using NAFTA discussions to fully resolve the concerns presented by this new approach of not only targeting import displacement but also working to undercut global milk powder markets.

NAFTA's Unfinished Business: Exorbitant Canadian Dairy Tariffs

Canada's market for imported dairy products is tightly restricted in virtually all product areas. Canada's over-quota tariffs for the vast majority of dairy products are roughly 200 – 300%. In addition, Canada has WTO authorized safeguards on many dairy products in order to additionally ensure controls on these imports.

Although TPP would have allowed some additional TRQ access for dairy products, the amounts negotiated were quite small. Moreover, and most deeply disturbing, was the fact that before the ink was even dry on the TPP text, the previous Canadian government was already proposing the pursuit of policies to undermine what little market access was nominally achieved in TPP.

We see NAFTA modernization discussions as the last opportunity to address just that type of unfinished business in order to truly open up the North American market. Our government officials have been grappling with this challenge for many years in various contexts including the Uruguay and Doha Rounds and TPP without real success. Therefore, such access must be very clearly spelled out within the agreement given Canada's clear track record for working to evade market access commitments (as noted in this document). The use of very specific tariff reduction formulas and tariff-rate quotas throughout the transition period towards elimination of tariffs is a necessary element but even more fundamental are true disciplines to ensure that access in name equates to access in reality.

Despite Canada's exorbitant tariff barriers, trade data currently show Canada ranking as our 2nd largest export market (2016). Although on paper it appears that we run a notable surplus in dairy trade with Canada, we view this trade data as misleading, given that many of these U.S. exports enter Canada under some form of an import for re-export program. Canadian companies wanting to fill their idle capacity have used re-export or duty relief programs which

permit the duty-free import of ingredients provided that finished goods comprising the same level of milk components are ultimately exported from Canada. This type of trade, while valuable, is notably different from most other U.S. dairy exports which are not generally used as inputs into dairy products imported back into the U.S.

It is also important to point out that a portion of those exports have been in the form of the few product categories that face low (i.e. less than 10%) WTO tariff rates and for which the U.S. enjoys a 0% tariff under NAFTA. These instances, limited though they are in the Canadian dairy schedule, accounted for a growing portion of our exports to Canada on a value basis over recent years, until Canada recently decided to change the rules of the game.

We have listed below several examples of how Canada has worked to undermine even the limited amount of access it provides through its NAFTA and WTO commitments.

Heading Off Threats to Duties Relief Program and Import for Re-Export Program

As noted above, a sizable portion of current U.S. dairy exports to Canada are believed to enter under the current Duties Relief Program and Import for Re-Export Programs whereby a processor is able to import dairy ingredients duty-free provided that the final product in which they are used is subsequently exported. Elimination or significant contraction of these programs would create substantial disruptions in U.S.-Canadian trade.

Immediately following the close of TPP negotiations, the Canadian government pledged to exclude supply-managed products from the Government of Canada's Duties Relief Program and this concept has continued to be discussed as a possibility. In fact, the Canadian House of Commons has been conducting a review of the re-export programs. The government has been aiming to formulate recommendations early this summer and then advance that work, if any changes to legislation or regulations were recommended, by the Fall.

The lack of transparency into these programs has made it challenging to gather data to fully understand how they are functioning but the information that is available indicates they are a key avenue currently for dairy sales to Canada, meaning that shifts in the programs would have impacts of those companies that have established sales in good faith expecting the regulations to continue as they now stand.

Additional Examples of Prior Market Restrictions Imposed by Canada

As noted above, Canada has displayed a habitual pattern of working to actively curtail dairy imports. Some prior examples of this deeply problematic and willful disregard for its trade commitments are listed below.

Products Standards:

In 2007 Canada altered its cheese standards in order to more tightly restrict the range of permissible ingredients in standardized cheeses sold in Canada. The regulatory changes placed percentage limits on the amount of non-fluid dairy ingredients used in standardized cheeses that could be incorporated in the product from non-fluid sources.

These changes were prompted by pressure from Canadian dairy farmers to find a way to restrict imports of U.S. milk protein concentrates (and to a lesser extent other dried protein imports such as casein/caseinates). Canada undertook a WTO Article 28 tariff renegotiation to allow it to raise tariffs on imports from other sources, but NAFTA prevented this from applying to products from the U.S. The new cheese standards were explicitly discussed by the Canadian legislature as providing a way to also limit imports of these products from the U.S.

Our industry and the U.S. government undertook ample efforts to prevent this action, arguing that it was an impairment of concessions granted the U.S. under NAFTA, but we were ultimately unsuccessful in preventing the changes from taking effect. The changes have adversely affected not only opportunities for imported dried ingredients but also imposed additional requirements on imported cheeses, since all cheeses sold in Canada were required to document compliance with the requirements.

Over the past several years, Canada considered further restricting access to its market for inputs into cheese-making by contemplating a shift in what types of products would be deemed to be ingredients for the purposes of the cheese standards definitions and thereby subject to a cap on their level of usage in cheese-making. It also was reportedly considering yogurt standards shifts to similarly restrict trade.

Ultimately it appears that the Canadian farmers opted to pursue Class 6 and 7 rather than continue down this avenue; but the goal was clearly aimed at a similar end – eroding Canadian demand for U.S. dairy inputs.

Tariff Reclassification:

In 2013 Canada enacted a law that reversed multiple rulings by the Canadian Border Services Agency (which had been upheld by Canada's International Trade Tribunal) that imports of a food preparation product containing mozzarella, pepperoni, oil and spices were being properly imported from the U.S. under the appropriate duty-free tariff line (1601.00.90.90). This law was in direct conflict with multiple Canadian Customs rulings that determined that the product was correctly classified. By reclassifying the cheese portion of the products from that tariff line into one with a duty of over 200%, the intent and effect of the legislation was to block all imports of these food preparation products from the U.S. This action thereby impaired the value of U.S. market access secured for that tariff line under NAFTA.

Limiting “Cross-Border” Shopping & Other Artificial Constraints on Commercial Sales:

Although the Uruguay Round of multilateral trade agreement under the World Trade Organization (WTO) is not an FTA, it is worth noting that in that agreement, Canada obligated itself to provide a TRQ to allow access for 64,500 MT of fluid milk (0401.10.1000) but then also banned commercial shipments from making use of this TRQ. To our knowledge, Canada does not track cross-border shoppers in order to ensure compliance with its WTO obligation but instead simply asserts that cross-border shoppers between the U.S. and Canada fill this TRQ. Our industry continues to believe this is a grievous distortion of the access Canada committed to provide for fluid milk.

Similarly, Canada restricts access to its 484 MT TRQ for ice cream to imports in retail size containers. This is another measure intended to restrict the full range of permissible commercial options and instead narrowly channel purchases into only one segment of the marketplace.

We note these Uruguay Round concerns here since they help to illuminate a consistent and deeply problematic pattern of Canada systemically working to undermine the value of its trade concessions.

Erection of Defacto Barriers to Trade Through Misuse of Geographical Indications

In its FTA with the EU (“CETA”), Canada completely disregarded its own intellectual property laws and agreed to GI registrations that, once implemented, will impose new restrictions on the use of a number of generic cheese names. The fact that it also intends to grandfather prior usage (primarily by Canadian companies) of those terms demonstrates the generic nature of the names concerned. These trade restrictions resulted from a process whereby Canada permitted the EU FTA GI provisions to bypass Canada’s normal IP review procedures. The grandfathering provisions and the evasion of Canada’s IP process signal the objective of the measures, which are clearly intended to protect EU and grandfathered Canadian companies from legitimate competition from imported products.

We strongly reject Canada’s actions as being inconsistent with their NAFTA and WTO obligations. We urge negotiators to pursue a pledge from Canada to hold U.S. products harmless from the imposition of these barriers to trade. Just as NAFTA prevented Canada from hiking tariffs on U.S. MPC and UFM exports to Canada when it created a MFN TRQ for those products, the U.S. should invoke the fact that NAFTA provided a reasonable basis that the ability to access the Canadian market should not be made more onerous than it was at the time NAFTA was negotiated.

In addition, numerous questions and uncertainties remain due to Canada’s shirking of its duty to provide clarity to the marketplace on how a number of the specific CETA provisions will operate in practice and how companies can ensure they comply with the provisions. Those

require clear answers so that purchasers in Canada can have confidence in continuing to source from U.S. suppliers.

Finally, we note that there is an ongoing effort in Canada to create a trademark for a term that CETA grandfathered, despite the fact that leaked government documents during the negotiations indicated that this cheese was a “customary term”, present in Canada, in production in Canada and in production in third parties. Certainly, it would be entirely inappropriate for Canada to now grant a trademark for a term that the government so recently recognized as in common use in Canada.

Over-Arching Trade Issues

Improving Upon the WTO-Plus SPS Agreement

In recognition of the growing impact that SPS measures were having on agricultural trade, USDEC and NMPF helped spear-head the agricultural industry’s effort to advocate for “WTO-plus” SPS provisions in the Trans Pacific Partnership (TPP) negotiations. The goal throughout that process was to strengthen the existing WTO SPS commitments in order to address the escalating threat that unwarranted and sudden SPS measures were beginning to pose to U.S. agricultural exports. On the whole, the TPP SPS chapter made significant strides forward in addressing this critical issue and we viewed it as a very positive element of that agreement.

While we have few current SPS issues in dairy trade with Canada and Mexico, we believe that it is critical that the NAFTA modernization effort incorporate the work done in this area within TPP and build further upon that base of “WTO SPS-Plus” commitments. This is essential to guard against the prospect of future problems and also to ensure that the updated NAFTA text can serve as a strong model for future U.S. bilateral FTAs as well.

In addition to enforceable dispute settlement provisions, below is a summary of some of the most significant provisions in this area and the degree of progress made in TPP. Again, we urge the Administration to use that TPP language as a starting point and move further towards the assurances of even stronger and more predictable trade conditions.

For instance, framework for further enhancing the SPS measures in regards to pathogens, residues, diseases and pests, should include:

- Collaboration between the exporting and importing countries to establish import tolerances and / or registration of products based upon scientific principles to assure compliance with domestic food safety standards.
- The recognition of and acceptance of safety standards and controls as above is to protect human, animal or plant life and health and to facilitate trade.

Establishing Fair Due Process Systems and Market Access Safeguards for Common Names Through Text on Geographical Indications (GIs)

As noted above, there are unique situations on GIs and Common Names issues with both Mexico and Canada that need to be dealt with appropriately on a bilateral basis. In addition to those efforts, however, it is essential that the NAFTA modernization efforts incorporate text on the issue of GIs and common names, in keeping with the Trade Promotion Authority directive to address this issue and the Administration's intention to modernize the agreement as it relates to more recently emerged intellectual property issues.

In order to build upon the progress made to date with our trading partners on this issue, we encourage the Administration to use the TPP text on GIs as a starting point and further improve upon that to preserve U.S. market access opportunities for common name products despite foreign governments' efforts to misuse GIs to erect barriers to those products.

Prior to that text, U.S. FTAs were virtually silent on the issue of GIs with the primary relevant text simply focusing on the first-in-time, first-in-right principle as it relates to registered trademarks vs. subsequently filed GIs. There was in particular a vacuum regarding the critical question of how countries should consider applications for GIs and how the issue of common or generic usage of a term should factor into that process in order to avoid negatively impacting the rights of stakeholders in the country of application as well as other trading partners. Those GI provisions therefore broke new ground by tackling these topics and for the first time establishing a more equitable international model for how to approach the issue of GI registrations that differed from the fundamentally flawed EU approach where it effectively pressures its trading partners into horse-trading protection for specific GIs in exchange for gains for its trading partners in other areas such as market access.

It is critical to continue to reinforce through all avenues that GIs are a type of intellectual property and as such should not be permitted to evade similar types of due process procedures required of other types of IP. This will be relevant as the U.S. continues to build upon this text to further tackle the EU's aggressive agenda to limit competition from other suppliers in common food categories. The next iteration of U.S. FTA text on this issue of such sizable importance to U.S. exports should include even stronger provisions safeguarding the use of common names. We would be happy to provide the Administration with confidential recommendations on this point.

Additional Intellectual Property and Technical Barriers to Trade Protections

In addition, NAFTA should include WTO-plus provisions to protect registered trademarks and branding elements of legally traded products from de facto confiscation or restrictions due to application of SPS and/or TBT measures. Towards this end, the United States should strengthen requirements for technical barriers to trade (TBTs) and any restrictions on intellectual property rights, to insist that all policies instituted by our trading partners (and, increasingly,

recommended by international organizations like the World Health Organization) are based on scientific evidence, achieve a legitimate objective, and do not unjustifiably discriminate against processed foods.

NAFTA and other U.S. trade agreements should make clear that restrictions on marketing, branding, and registered intellectual property rights (icons, logos, mascots, colors and markings) of foods and beverages are inconsistent with existing international obligations, unjustifiably limit the use of lawfully registered trademarks and legally marketed products, and represent disguised barriers to trade.

Preserving Dairy Rules of Origin (ROO) Approach to Uphold Integrity of NAFTA Benefits

We strongly urge USTR to preserve the underlying concept that was at the core of the current rules of origin for dairy content governing U.S.-Mexico dairy trade and ensure that new dairy trade terms with Canada are also governed by the same philosophy. The driving goal in NAFTA dairy-specific ROO was to seek to ensure that high dairy-content products traded under the agreement were being produced from milk from the exporting country. As such, for instance, the U.S. cannot import milk powder from Europe to make cheese and ship that to Mexico; and vice versa. The open trade is between our dairy sectors; not between us and the rest of the world, particularly for a product that is easily traded in ingredient form.

Reports indicate, however, that this underlying NAFTA dairy ROO principle is being violated through the exploitation of various lines excluded from those product specific ROO. For instance, CBP has ruled that a product can enter the U.S. under 1806.20.83 and benefit from FTA preferences despite having a dairy content of 97% and a minimal amount of chocolate liquor flavor added regardless of the origin of the dairy content in the product, being required only to meet the general much more permissive ROO in the agreement. Likewise under 2106.90.64 a product that is 99% milk fat and 1% or less vanilla can enter duty-free, again regardless of the origin of the dairy content in the product (up to the general NAFTA ROO limits). Given that the lines more clearly defined as dairy such as those for cheese, butter and yogurt, all require the product to be made from dairy from the exporting country, it defies logic why these types of extremely high dairy content products would not likewise be subject to that same NAFTA principle in order to provide for consistent rules regarding the origin of dairy products benefiting from the agreement.

We will provide further detail to the Administration on this point on a confidential basis. The tariff lines cited here are provided as examples of the issue; not an exhaustive list of lines for which this issue is relevant.

In addition to these types of moves towards greater consistency in the dairy ROO, we would also encourage negotiators to examine how to improve the process for investigating potential ROO violations in order to make it easier to chase down potential violations of the ROO. In our view, these measures are a critical element of the agreement and ensuring that the free trade

in dairy established by NAFTA is indeed with our NAFTA partners and not with other non-Parties to the agreement is a vital part of ensuring this remains such a strongly successful FTA.

Summary:

Improvements to NAFTA that prioritize our positive trade relationship with Mexico and address Canada's flouting of its trade commitments to us can be achieved and are worth pursuing. This is an essential agreement that the United States dairy industry, and in fact the broader economy, cannot do without. It is because NAFTA is so important that this modernization effort is so valuable. We support the Administration's recognition that trade agreements need updating over time. We are committed to working with the Administration to make improvements to this critically important FTA so that it can continue to deepen our trade relationships throughout North America.

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