AGREEMENT BETWEEN THE UNITED STATES OF AMERICA, THE UNITED MEXICAN STATES, AND CANADA

PANEL ESTABLISHED PURSUANT TO ARTICLE 31.6

CANADA—DAIRY TARIFF-RATE QUOTA ALLOCATION MEASURES 2023

CDA-USA-2023-31-01

FINAL REPORT

November 10, 2023

Panel Members

Mateo Diego–Fernández (Chair)
Kathleen Claussen
Serge Fréchette

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GLOSSARY

Abbreviation	Definition
Agreement	Agreement between the United States of America, the United Mexican States, and Canada, which entered into force July 1, 2020
Canada—Dairy TRQs I	Canada—Dairy TRQ Allocation Measures (CDA-USA-2021-31-01)
CUSMA	Agreement between the United States of America, the United Mexican States, and Canada, which entered into force July 1, 2020
CETA	Canada – European Union Comprehensive Economic and Trade Agreement
EIPA	Canada's Export and Import Permits Act
ICCC	International Cheese Council of Canada
IWS	Initial Written Submission
Mexico	United Mexican States
MPC	Milk protein concentrate
Party/Parties[1]	Canada and the United States (as disputing Parties)
party/parties	Canada, Mexico and/or the United States (as Parties to the Agreement)
RC	Restaurants Canada
RCC	Retail Council of Canada
ROP	Rules of Procedure for Chapter 31 (Dispute Settlement), Annex III of the Agreement Free Trade Commission Decision No. 1, signed July 2, 2020
RS	Rebuttal Written Submission
TRQ	Tariff rate quota
SMP	Skim milk powder
United States	United States of America
USMCA	Agreement between the United States of America, the United Mexican States, and Canada, which entered into force July 1, 2020
VCLT	Vienna Convention on the Law of Treaties

[1] Mexico participated as a third Party in this dispute; however, for ease of reading, the Panel will refer to Canada and the United States as the "Parties". When the Panel intends to refer to all participating Parties, it will expressly refer to them as such.

I. INTRODUCTION

1. This dispute concerns several measures of Canada's dairy tariff rate quota ("TRQ") allocation system under the Agreement between the United States of America, United Mexican States, and Canada that entered into force on July 1, 2020 ("Agreement"). The United States of America ("United States") claims that these measures are inconsistent with multiple of Canada's obligations under the Agreement.

2. Four principal elements comprise the United States' claims: (i) Canada's restrictions on what type of entities may receive an allocation under its dairy TRQ allocation system; (ii) Canada's allocation of its dairy TRQs on a market share basis, and Canada's application of different criteria for different types of applicants; (iii) Canada's 12-month activity requirements on TRQ applicants and allocation holders; and, (iv) Canada's mechanism for the return and reallocation of unused dairy TRQ allocations.

3. The United States argues that these elements constitute breaches of certain of Canada's commitments under Canada's TRQ Appendix to Chapter 2 of the Agreement as well as certain of Canada's commitments under Chapter 3 of the Agreement.

II. PROCEDURAL BACKGROUND

4. The disputing Parties are the United States and Canada (together, the "Parties"). The United Mexican States ("Mexico") participated as a third Party.

5. The United States' claims arise under Appendix 2 ("Tariff Schedule of Canada – (Tariff Rate Quotas)") to Annex 2-B ("Tariff Commitments") of Chapter 2 ("National Treatment and Market Access for Goods") as well as under Annex 3-A ("Agricultural Trade Between Canada and the United States") of Chapter 3 ("Agriculture") of the Agreement.

A. The Consultations Requests

6. On May 25, 2022, the United States requested consultations with Canada pursuant to Articles 31.2 and 31.4 of the Agreement. The Parties held consultations on June 9, 2022.[2]

7. On December 20, 2022, the United States again requested consultations pursuant to Articles 31.2 and 31.4. The Parties again held consultations on January 17, 2023.[3]

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[2] United States IWS, para. 27.

[3] United States IWS, para. 28.

B. Establishment of the Panel

8. On January 31, 2023, the United States requested the establishment of a panel pursuant to Article 31.6.1(a).[4]

9. On February 8, 2023, pursuant to Article 31.14, Mexico requested to participate in the dispute as a third Party.

10. The Canadian Section of the Agreement Secretariat serves as the Secretariat in this dispute, consistent with Articles 2 and 3 of the Rules of Procedure for Chapter 31 (Dispute Settlement), Annex III of the Agreement Free Trade Commission Decision No. 1, signed July 2, 2020 ("ROP").

11. On February 2, 2023, pursuant to Article 31.9.1(a), the Parties agreed to a panel comprised of three members. On February 24, 2023, the Parties selected Mr. Mateo Diego-Fernández as the chair of the Panel. On March 13, 2023, pursuant to Article 31.9.1(d), Canada selected Ms. Kathleen Claussen and the United States selected Mr. Serge Fréchette to serve on the Panel.[5]

12. On March 16, 2023, the chair of the Panel informed the Secretariat that he would be assisted by Mr. Ismael Ortiz.

13. On March 20, 2023, in accordance with Article 18.2 of the ROP and after consulting the Parties, the Panel issued a timetable for this proceeding.

C. Written Submissions

14. The United States filed its initial written submission on March 20, 2023.

15. Canada filed its initial written submission on May 5, 2023.

16. The United States filed its rebuttal submission on June 2, 2023, and Canada filed its rebuttal submission on June 30, 2023.

17. Both Parties presented confidential information in their submissions. The Panel has not referred to any confidential information in this Report.

D. Non-Governmental Entities

18. Three non-governmental entities requested leave to submit written views in respect of the dispute. Those entities are the International Cheese Council of Canada ("ICCC"), the Retail Council of Canada ("RCC"), and Restaurants Canada ("RC").

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4 United States IWS, para. 29.

5 United States IWS, para. 30.

19. The Panel considered the merit of those requests per the requirements of Article 31.11 of the Agreement and of Article 20 of the ROP.

20. The Panel granted the requests of the ICCC and the RCC, having concluded that the content of their respective submissions was sufficiently connected to the content of the dispute and that they had provided the information required by Article 20 of the ROP.

21. The Panel found that the RC request did not explain how RC's submission would assist the Panel in the determination of "factual or legal issues related to the dispute by bringing a perspective, particular knowledge, or insight that is different from that of the participating Parties and why its views would be unlikely to repeat legal and factual arguments that a Party has made or is expected to make", as required by Article 20 of the ROP. Accordingly, the Panel denied RC's request.

22. On May 15, 2023, the ICCC and RCC filed their respective written submissions. Canada presented comments on the ICCC and RCC submissions on May 23, 2023. In an e-mail of the same date, the United States communicated to the Panel that it did not have specific comments on either submission.

23. The Panel has considered the submissions of the ICCC and the RCC in its analysis of the claims before it.

E. Hearing

24. On May 8, 2023, the Panel sought the views of all three participating Parties on the format for the hearing, including on the possibility of a video livestream of the hearing.

25. In response to the Panel's communication, on May 12, 2023, the United States indicated it did not consent to a video livestream "because such a webcast would present the risk of a viewer recording and then manipulating the exchanges" but that it would consent to an audio livestream open only to registered participants as well as posting "on the Internet (i) the as-delivered statements of the Parties, (ii) the written responses submitted by the Parties in response to the Panel's questions, and (iii) a transcript of the hearing, after such a transcript has been reviewed by the Parties".

26. The Panel distributed a revised draft hearing agenda to the Parties on June 6, 2023, once again seeking the Parties' views.

27. In a joint communication of June 23, 2023, the Parties expressed their agreement to offer a public viewing room with closed circuit audio and video feed during the hearing to "provide the opportunity for some members of the public to observe the hearing with both audio and video, while accounting for the concerns of the United States on the security and integrity of the broadcast of the proceedings".

28. The Panel held a hearing in Ottawa, Canada on July 19-20, 2023, with some representatives of the Parties joining via a virtual platform. Mexico also participated

virtually. The hearing also included a closed session that was not broadcast to the audio livestream or separate public room.

29. Annex I lists the participants in the hearing.

30. On July 24, 2023, the Panel issued written questions to the Parties.

31. On July 31, 2023, the Parties provided written responses to the Panel's questions. The Parties provided comments on each other's responses to the Panel's questions on August 8, 2023.

F. Post-Hearing

32. On August 16, 2023, and in accordance with Article 31.17.2 of the Agreement, the Panel communicated to the Parties that it would require additional time to prepare the Initial Report due to unforeseen exceptional circumstances. The Panel informed the Parties that it would issue its Initial Report no later than October 11, 2023, *i.e.*, 30 days following the originally anticipated date of presentation, per the terms of Article 31.17.2. On August 17, 2023, the Parties expressed their mutual agreement to the proposed modification of the period for the Panel to present its Initial Report.

33. On August 29, 2023, the Panel issued a revised timetable reflecting the agreed dates for the presentation of the Initial Report, comments on the Initial Report, and the presentation of the Final Report.

34. On September 22-24, 2023, the Panel held deliberations in Ottawa.

35. On September 25, 2023, the Panel sent additional written questions to the Parties pursuant to Article 22 of the ROP. These questions concerned the following remarks made by the United States in its closing statement of the hearing: "Importantly, and to be clear, the United States challenges Canada's measures on their face. Our claims are in the nature of 'as such' claims, not 'as applied' claims. The United States contends that Canada's measures themselves, as such, breach the USMCA".[6]

36. The Parties submitted their responses to these additional questions on September 27, 2023, as well as comments on each other's responses on September 29, 2023.

37. On October 11, 2023, the Panel issued its Initial Report to the Parties.

38. On October 26, 2023, the Parties submitted comments on the Panel's Initial Report. In its comments, the United States made a request for partial reconsideration.

39. On October 30, 2023, Canada provided, by e-mail communication, a comment on the United States' request for partial reconsideration.

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[6] Hearing Transcript, Day 2, p. 203.

40. On November 10, 2023, the Panel issued its Final Report to the Parties.

III. FACTUAL BACKGROUND

A. Canada's Dairy TRQs

41. At the heart of this dispute is a disagreement over how Canada allocates its dairy TRQs to eligible applicants each year. A TRQ is a "mechanism that provides for the application of a 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".[7]

42. Under the Agreement, Canada committed to establishing TRQs on 14 categories of dairy products: milk, cream, skim milk powder, butter and cream powder, industrial cheeses, cheeses of all types, milk powders, concentrated or condensed milk, yogurt and buttermilk, powdered buttermilk, whey powder, products consisting of natural milk constituents, ice cream and ice cream mixes, and other dairy.[8]

43. The Agreement sets out an increasing volume of product subject to the TRQ each year from 2020 until 2039. For example, for the Butter and Cream Powder TRQ, Appendix 2 "Tariff Schedule of Canada – TRQ," specifies annual increases such that, in 2020, the volume allocated to duty-free TRQ was 750 tons. That volume will gradually increase up to 5,121 tons in 2039.

44. Canada elects to use a market share allocation mechanism for its TRQs.[9] A market share mechanism is a method of apportioning a TRQ based on the eligible applicant's market activity relative to the market activity of all other applicants for that TRQ.[10]

45. Canada publishes online information about its TRQs in "Notices to Importers". Each Notice to Importers specifies what types of entities may apply for that particular TRQ. For the TRQs at issue in this dispute, the Notices state that the entities that are eligible are processors, distributors and, in some cases, further processors.[11]

46. The Notices to Importers define these groups for each of the 14 TRQs. For example, under the Butter and Cream Powder TRQ, a "processor" is an entity that "manufactures butter or cream powder in your own provincially-licensed or federally-registered

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7 Canada's TRQ Appendix, Section B.

8 Canada's TRQ Appendix, Section B.

9 Canada IWS, para. 2.

10 Hearing Transcript, Day 1, p. 100; Exhibits USA-01 – USA-14; Exhibit USA-18.

11 Exhibits USA-01 – USA-14.

facility", while a "further processor" is an entity that "uses butter and/or cream powder in your manufacturing operations and product formulation".[12]

47. Canada determines market activity differently for each category of applicant.[13] Processors' market activity is based on the kilograms of the TRQ product manufactured by the processor during the reference period.[14] Further processors' market activity is based on the kilograms of the TRQ product used in manufacturing further processed food products during the reference period.[15] Distributors' market activity is based on the kilograms of the TRQ product sold by the distributor during the reference period.[16] However, distributors must exclude from their market activity calculation products sold to other distributors, related persons, and consumers at the retail level.[17]

48. Once all eligible applicants have reported their activity volumes, those volumes are aggregated to determine the total market activity for the specific TRQ product under consideration. This cumulative figure serves as the denominator in the calculation for each eligible applicant's market share assessment. The applicant's market activity level as specified in its application is used as the numerator. This market share percentage is then applied to the volume of the TRQ, determining the specific amount of allocation for the TRQ accessible to the applicant.[18]

49. Finally, Canada's TRQ system also permits transfers and returns, and it imposes penalties for under-utilization. Allocation holders can return unused allocations without penalties either before April 1 (if the TRQ is administered on a dairy-year basis, August 1 to July 31) or September 1 (if the TRQ is administered on a calendar-year basis, January 1 to December 31).[19] These returned quantities are redistributed among holders based on their initial allocation proportions and any remaining quantities are then open for possible distribution to eligible applicants.[20] An allocation holder that uses less than 90 percent or 95 percent of their allocation (as applicable) may face penalties the following year.[21]

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12 Exhibit USA-02; Canada IWS, para. 39 and footnote 33.

13 United States IWS, para. 90 and section 4 (calculation of allocations) of each Notice to Importers, Exhibits USA-01 – USA-14.

14 United States IWS, para. 91 and section 4 (calculation of allocations) of each Notice to Importers, Exhibits USA-01 – USA-14.

15 United States IWS, para. 91 and section 4 (calculation of allocations) of each Notice to Importers, Exhibits USA-01 – USA-14.

16 United States IWS, para. 92 and section 4 (calculation of allocations) of each Notice to Importers, Exhibits USA-01 – USA-14.

17 United States IWS, para. 92 and section 4 (calculation of allocations) of each Notice to Importers, Exhibits USA-01 – USA-14.

18 Canada IWS, paras. 81–82.

19 Exhibit USA-10, Exhibit USA-18, Canada IWS, para. 85.

20 Exhibit USA-10, Exhibit USA-18, Canada IWS, para. 85.

21 Canada IWS, paras. 85–86.

B. *Canada—Dairy TRQs I*

50. This is the second dispute settlement panel established under the Agreement concerning measures related to Canada's dairy TRQ system.

51. On May 25, 2021, the United States requested the establishment of a dispute settlement panel ("*Canada—Dairy TRQs I*") to examine, among other claims, Canada's use of formal "pools" of dairy TRQ allocation reserved exclusively for processors.[22] On December 20, 2021, that panel found that Canada's practice of reserving TRQ pools exclusively for the use of processors was inconsistent with the Agreement.[23]

52. In May 2022, Canada issued new regulatory measures regarding its dairy TRQs under the Agreement. Canada instituted an activity-based market share calculation for different types of applicants (processors, distributors and, for some TRQs, further processors) as described above.[24] It is primarily these measures that are at issue in this dispute.

IV. MEASURES AT ISSUE, TERMS OF REFERENCE, RULES OF INTERPRETATION, AND BURDEN OF PROOF

A. Measures at Issue

53. In this dispute, the United States challenges several measures concerning Canada's dairy TRQ allocation mechanism.

54. First among these measures are 14 Notices to Importers published by Canada on May 16, 2022.[25]

55. These Notices share a consistent format and include the following components:

- The specific products covered by the notice, with reference to the tariff item numbers;
- The requirement to be active in the Canadian food or agriculture sector at the time of application and to remain active during the quota year;
- The eligibility requirements to apply for an allocation (e.g., to be a processor or distributor, or under certain TRQs, a further processor);
- The calculation methodology for the individual allocations; and,
- The procedures and policies for transfers, returns, and under-utilization of

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22 Canada—Dairy TRQ Allocations Measures (CDA-USA-2021-31-01) ("*Canada—Dairy TRQs I*"), Final Report, December 20, 2021, para. 4.

23 *Canada—Dairy TRQs I*, Final Report, December 20, 2021, para. 167.

24 United States IWS, paras. 7–8.

25 Exhibits USA-01 – USA-14.

an allocation.[26]

56. Each Notice to Importers establishes the requirements for applications to an individual TRQ. For example, the Notices describe how applicants must demonstrate their activity in the Canadian food or agricultural sector, and what type of information will be required for that purpose.[27] The Notices also describe eligibility criteria for potential applicants.[28]

57. According to the United States, Canada's dairy TRQ allocation mechanism is also implemented through the following legal instruments:

- Comprehensive Review of the Allocation and Administration of TRQs for Dairy, Poultry and Eggs products – Phase II: Policy Options for the Administration of Supply-Managed TRQs, published on February 14, 2020.
- Public Consultations: CUSMA Dairy TRQs Panel Report Implementation – Proposed Allocation and Administration Policy Changes, published on March 1, 2022.
- 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), published on May 16, 2022.
- General Information on the Administration of TRQs for Supply-Managed Products, modified March 14, 2022.
- Key dates and access quantities 2022-2023: TRQs for Supply-Managed Products, modified on December 6, 2022.[29]

B. Terms of Reference

58. The Panel's terms of reference are provided in Article 31.7 of the Agreement. They are to:

> Examine, in light of the relevant provisions of [the Agreement], the matter referred to in the request for the establishment of the panel under Article 31.6 (Establishment of a Panel); and,
>
> Make findings and determinations and any jointly requested recommendations, together with its reasons therefor, as provided for in Article 31.17 (Panel Report).

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26 Exhibits USA-01 – USA-14.

27 Exhibits USA-01 – USA-14, section 2.

28 Exhibit USA-10, para. 3. In this particular Notice to Importers, "further processors" are listed as one of the three types of eligible applicants. In other Notices, such as Exhibit USA-01, further processors are not listed as eligible applicants.

29 United States' Panel Request, January 31, 2023.

C. Applicable Rules of Interpretation

59. Pursuant to Article 31.13.4 of the Agreement, the Panel shall interpret the Agreement in accordance with customary rules of interpretation of public international law, as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("VCLT"). Both Parties base their arguments on the text of the Agreement and refer to the customary rules of interpretation of public international law as embodied in Article 31 of the VCLT.[30] Article 31 of the VCLT provides, in primary part: "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 light of its object and purpose".

D. Burden of Proof

60. The Panel is further guided by Article 14.1 of the ROP which provides that:

> A complaining Party asserting that a measure of another Party is inconsistent with this Agreement, that another Party has failed to carry out its obligations under this Agreement, that a benefit the complaining Party could reasonably have expected to accrue to it is being nullified or impaired in the sense of Article 31.2(b) (Scope), or that there has been a denial of rights under Article 31-A.2 (Denial of Rights) or Article 31-B.2 (Denial of Rights), has the burden of establishing that inconsistency, failure, nullification or impairment, or denial of rights.

V. THE UNITED STATES' CLAIMS REGARDING CANADA'S TREATMENT OF CERTAIN TYPES OF TRQ APPLICANTS

A. Claims concerning Paragraph 3(c) of Section A of Canada's TRQ Appendix

61. At the core of the United States' objections to Canada's measures is a concern that Canada is not allocating its TRQs to certain categories of applicants that the United States believes the Agreement requires Canada to include.

62. The United States asks the Panel to find that Canada's measures are inconsistent with paragraph 3(c) of Section A of Canada's TRQ Appendix (hereinafter "Paragraph 3(c)").

63. Paragraph 3(c) provides:

> Canada shall allocate its TRQs each quota year to eligible applicants. An eligible applicant means an applicant active in the Canadian food or agriculture sector. In assessing eligibility, Canada shall not discriminate against applicants who have not previously imported the product subject to a TRQ.

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[30] United States IWS, para. 38; Canada RS, para. 12.

64. The United States argues that Canada's measures violate Paragraph 3(c) "because Canada is failing to allocate its TRQs each quota year to 'eligible applicants' within the meaning of that provision".[31]

65. Several different parts of Canada's measures address TRQ allocation and eligible applicants. In their most relevant part, Canada's measures state: "To be eligible, you must be active in the Canadian food or agriculture sector at the time of the application and must remain active regularly during the quota year".[32]

66. Canada's measures provide additional requirements for applicants, including that they "must, in addition, have been active regularly in the Canadian food or agriculture sector during the reference period".[33] The measures also state:

> You are eligible for an allocation if you are a: Processor . . . Further Processor . . . Distributor . . . Note: Companies that procure or sell [the product] on behalf of others without taking ownership of or financial responsibility for the product are not eligible for an allocation. Note: Retailers are not eligible for an allocation.[34]

67. Finally, with respect to allocation, the measures state that the "Minister will allocate 100% of the TRQ to processors, further processors and distributors on a market share basis".[35]

Arguments of the Parties

68. The United States' argument turns on the meaning of "eligible applicants" and its appearance in Paragraph 3(c).

69. Since Paragraph 3(c) "does not specify what it means to be 'active in the Canadian food or agriculture sector'",[36] the United States offers dictionary definitions of each of the terms in the phrase and reaches the conclusion that "entities that are 'active in the Canadian food or agriculture sector' might engage in a wide range of activities" such as manufacturing, processing, handling, buying and selling, among other activities related to food and agriculture.[37]

70. In the view of the United States, Canada cannot "categorically exclude types of entities . . . when those other types of entities meet the definition of 'eligible applicants'".[38]

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31 United States' Panel Request, January 31, 2023.

32 As an example, Exhibit USA-02, section 2.

33 As an example, Exhibit USA-02, section 2.

34 As an example, Exhibit USA-02, section 3.

35 As an example, Exhibit USA-02, section 4.

36 United States IWS, para. 51.

37 United States IWS, para. 53.

38 United States IWS, para. 61.

For example, the United States takes the view that retailers and food service operators also ought to be considered eligible applicants because, as Canada acknowledges, they are also active in the sector.[39]

71. Canada does not dispute the United States' reading of "active in the Canadian food or agricultural sector". Rather, Canada maintains that the Agreement does not obligate Canada to allocate its TRQs to every entity that is active in the Canadian food or agriculture sector.[40]

72. On this point, the United States agrees with Canada—to an extent. The United States "does not take the position that the second sentence of Paragraph 3(c) . . . 'exhaustively' defines who is eligible for an allocation".[41] The United States concedes that "Canada retains the right to impose certain general eligibility criteria 'that apply regardless of whether or not the importer utilizes the TRQ when importing the agricultural good' such as, for example, requiring that applicants make their applications in a certain manner, using a certain form, and by a certain date, and requiring that applicants be residents of Canada".[42]

73. Thus, the central disagreement between the Parties is about how much of a right Canada maintains in this regard. Since the Parties agree that Canada has discretion to choose not to allocate to certain applicants that may be active in the food or agricultural sector, the question posed to the Panel is whether that discretion includes the ability to specify that only processors, distributors, or further processors may apply.

74. The United States insists that Canada missteps with respect to Canada's choice to invite applications from only processors, further processors, and distributors, arguing that nothing in the Agreement empowers Canada to do so.[43] In the view of the United States, "[h]ad Canada wished to exclude particular importer groups from eligibility, provision for such an exclusion should have been incorporated into the Agreement".[44]

75. The United States points to Article 3.A.2.11(b) of the Agreement, which provides that a party shall ensure that "it does not allocate any portion of the quota to a producer group".[45] Since the Agreement mentions only producers and not other types of potentially active applicants, Canada cannot, in the view of the United States, exclude those other types of active applicants from its allocation at the eligibility stage.[46]

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39 United States IWS, para. 56.

40 Canada IWS, para. 88.

41 United States RS, para. 83.

42 United States RS, para. 83 (internal citation omitted).

43 United States RS, para. 84.

44 United States IWS, para. 62.

45 United States IWS, para. 62.

46 United States RS, para. 83.

76. By contrast, Canada argues that it is "entitled to limit eligibility for a TRQ allocation to a *subset* of these persons".[47] Canada relies on the context of Paragraph 3(c) as well as other provisions of the Agreement to find support for its interpretation. For one, Canada notes that Article 3.A.2.5 specifically anticipates that a party may impose additional eligibility requirements. That Article obliges parties to "publish . . . all information concerning [the party's] TRQ administration, including the size of quotas and eligibility requirements".

77. Canada also argues that the United States' argument requires reading in to the text language that is not there, such as the word "any" or "every", as in "Canada shall allocate its TRQs . . . to *every* eligible applicant. An eligible applicant means *any* applicant active [in the sector]".[48]

The Panel's analysis

78. The Panel, guided by the VCLT, begins its analysis with the ordinary meaning of the terms of Paragraph 3(c).

79. Paragraph 3(c) does two things. The first sentence of Paragraph 3(c) requires Canada to distribute the portions of its TRQs to entities or individuals that are "eligible applicants".[49] The second sentence of Paragraph 3(c) sets out that "eligible applicants" are entities or individuals that demonstrate a certain degree of activity—such as manufacturing, processing, handling, buying, selling, reselling, preparing, using or delivering—in Canada's food or agricultural sector.[50]

80. The Panel agrees with the United States that a proper reading requires putting the two sentences together; thus, Paragraph 3(c) provides that Canada is obligated in a quota year to allocate its TRQs to applicants that are active in the Canadian food or agricultural sector.[51]

81. The language of Paragraph 3(c) makes plain that Canada cannot allocate its TRQs to a manufacturer of furniture, for example, that exhibits no form of activity in the food or agricultural sector. That this is true is not at issue between the Parties.[52] The United States does not argue that Canada is presently allocating, or has previously allocated, Canada's TRQs to *ineligible* applicants.

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47 Canada IWS, para. 88 (emphasis in the original).

48 Canada IWS, para. 93.

49 United States IWS, para. 50.

50 United States IWS, para. 51.

51 Hearing Transcript, Day 1, p. 5.

52 United States IWS, para. 50-53; Canada IWS, para. 88; United States RS, para. 59.

82. The dispute between the Parties hinges instead on whether the language of Paragraph 3(c) requires Canada to consider the applications of any and all entities "active in the Canadian food or agricultural sector". We find it does not.

83. The Panel notes that the first sentence of Paragraph 3(c) contains the relevant obligation on Canada and, on its face, that obligation concerns Canada's allocation of its TRQs, not its application process nor any other aspect of its licensing system. That sentence on its own provides no guidance as to how Canada determines who receives an allocation, apart from limiting that universe of potential recipients to "eligible applicants".

84. The second sentence of Paragraph 3(c) deals with eligibility. The Panel agrees with the United States that the language of this sentence is silent as to the comprehensive content of eligibility.[53] But that silence does not have the effect the United States suggests. Nothing about the second sentence of Paragraph 3(c) restricts Canada's discretion to add further eligibility requirements with respect to individual TRQs. The Panel is not inclined to find limitations in the Agreement that are not plain on the face of the provision.

85. Further, the Panel finds it difficult to reconcile the open-ended eligibility text identified by the United States with the United States' view that Canada is constrained in other respects as to who it can find to be eligible. Although the United States takes the position that Canada can impose additional eligibility criteria beyond the requirement that the applicant be active in the relevant sector and beyond others that are named elsewhere in the Agreement,[54] elsewhere the United States argues that nothing permits Canada "to deny eligibility to certain categories of eligible applicants".[55] The United States then extends its eligibility arguments to allocation, claiming that "Canada does not have discretion to refuse to allocate its TRQs" to groups such as retailers.[56] In sum, the United States' position appears to be that the Agreement obligates Canada to allocate its TRQs to the eligible applicants that the United States has selected. The ordinary meaning of the text does not support such an interpretation.

86. Paragraph 3(c)'s silence about the comprehensive criteria for eligibility must be considered also in light of that subparagraph's context. When Paragraph 3 is read as a whole, it is clear to the Panel that the Paragraph is an explication of how *activity* by applicants in a quota year is an important and distinguishing component among those who may seek to apply for an allocation.

87. Paragraph 3 addresses how Canada shall administer all of its TRQs. Subparagraph (a) introduces that Canada will use an import licensing system. Subparagraph (b) defines the "quota year" for that system, specifying that the term "quota year" means "the 12-

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53 United States RS, para. 83 (quoted at paragraph 72, *supra*).

54 United States RS, para. 83 (quoted at paragraph 72, *supra*).

55 United States IWS, para. 63.

56 United States RS, para. 57.

month period over which a TRQ applies and is allocated". Subparagraph (c) then continues this discussion by requiring that Canada, *during each quota year*, will allocate its TRQs to applicants active in the relevant sector. Each of these subparagraphs contributes to the understanding of how Canada will administer its TRQs by setting out the timeline and information of relevance to potential applicants: they must be active in the sector in anticipation of that particular quota year.

88. The final sentence of subparagraph (c) is particularly informative: "In assessing eligibility, Canada shall not discriminate against applicants who have not previously imported the product". There, the text indicates that Canada will necessarily make an assessment concerning applicants' eligibility. This sentence commands Canada not to discriminate against applicants who have not previously imported the product subject to a TRQ. The sentence both confirms Canada's discretion and limits it with respect to activity. It is the only constraint on Canada's discretion regarding applicants that are active in the sector that appears in this Paragraph.

89. From this context, the Panel concludes that the second sentence of Paragraph 3(c) is part of a broader description as to how Canada allocates to applicants that Canada determines to be appropriately "active" within the meaning of Paragraph 3(c), a finding left to Canada's discretion within certain explicit bounds. The context supports the understanding that this sentence was not intended as a comprehensive articulation of who Canada must consider.

90. Other articles of the Agreement provide further context informing the Panel's interpretation, including the content of Article 3.A.2 to which Paragraph 3(c) is closely connected, and which contemplates additional eligibility requirements. Article 3.A.2.10, for example, discusses import performance as a potential eligibility criterion, as do Articles 3.A.2.7 and 3.A.2.5. That the Agreement recognizes that a party may add eligibility requirements to a TRQ lends credence to Canada's position that Paragraph 3(c) is merely the floor of eligibility, only removing from consideration any entity without activity in the appropriate sector. None of these other provisions makes reference to Paragraph 3(c) as comprising the complete content of eligibility requirements for Canada.

91. The Panel finds further support for Canada's interpretation when the Panel considers the Agreement as a whole as well as the Agreement's object and purpose. The Agreement grants considerable market access with respect to Canada's dairy sector. Those terms are clearly delineated in Canada's tariff schedule.[57] The major commitments made by Canada are those increasing volumes of TRQs from 2020 through subsequent years. Neither Party challenges that Canada has made such commitments. Further, the evidence before the Panel indicates that eligible applicants are applying and Canada is allocating its TRQs to them.

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[57] Paragraph 43, *supra*.

92. The implementation and administration of that market access system is left to Canada within tightly circumscribed parameters that the Agreement sets out. Canada by no means has unfettered discretion; rather, Canada, like all parties to the Agreement, is subject to the many disciplines of Chapters 2 and 3. For example, Canada must not limit access to an allocation to processors, and it must not allocate any portion of a quota to a producer group.[58] Canada must ensure that its procedures for administering its TRQ system are transparent, fair, and equitable.[59] Canada must administer its TRQs in a manner that allows importers the opportunity to utilize the TRQ quantities fully.[60] There is no question that Canada has committed to undertake its design and operation of the TRQ system under strict limitations.

93. But there is also no question that Canada has some flexibility in its implementation of that system. Not every term is defined and not every procedure is delineated by the Agreement. The Panel finds insufficient support from the language's broader context, and the object and purpose of the Agreement, that a limitation on Canada's discretion of the type the United States suggests is implicit in the text of Paragraph 3(c).

94. The Panel likewise finds unpersuasive the United States' contention that Canada is obligated "to allocate its TRQs to any and all eligible applicants"[61] in the absence of the terms "any" or "all" in the text of the provision. In the view of the Panel, an interpretation of the terms of Paragraph 3(c) consistent with the principles of the VCLT prohibits reading either of those words into the language of the Agreement.

95. Finally, the Panel notes that, in response to the Panel's request, the United States offered as evidence e-mails exchanged among the Agreement negotiators to support the United States' position on this claim.[62] The Panel has examined those e-mails and finds that they provide scarce direction in confirming the meaning of the text before it.

96. Accordingly, the Panel concludes that, based on the above, it is unable to identify an inconsistency with Paragraph 3(c) in Canada's measures with respect to Canada's treatment of certain types of TRQ applicants.

B. Claims concerning Article 3.A.2.6(a)

97. A further question posed by the United States to the Panel is whether Canada's measures violate Article 3.A.2.6(a) by imposing a new "condition, limit, or eligibility requirement on the utilization" of the TRQs.[63]

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58 Article 3.A.2.11(b).

59 Article 3.A.2.4(a)-(b).

60 Article 3.A.2.6.

61 United States RS, para. 53.

62 Exhibit USA-120 (Confidential); Exhibit USA-121 (Confidential).

63 United States IWS, para. 66.

98. Article 3.A.2.6(a) provides:

> Except as provided in subparagraph (b) and (c), no Party shall introduce a new or additional condition, limit, or eligibility requirement on the utilization of a TRQ for importation of an agricultural good, including in relation to specification or grade, permissible end-use of the imported product, or package size beyond those set out in its Schedule to Annex 2-B (Tariff Commitments). For greater certainty, paragraph 6 shall not apply to conditions, limits, or eligibility requirements that apply regardless of whether or not the importer utilizes the TRQ when importing the agricultural good.

Arguments of the Parties

99. The United States argues that Canada's measures impermissibly add requirements beyond those in Annex 2-B of Canada's Tariff Schedule by demanding "that the applicant for and recipient of" a TRQ allocation be a processor, distributor, or, in some cases, further processor.[64] According to the United States, Canada did not follow the process set out by Article 3.A.2.6 that would have been necessary for the introduction of requirements that do not appear in Canada's Tariff Schedule.[65]

100. To elaborate on its position that Article 3.A.2.6(a) prohibits Canada from imposing these requirements, the United States turns to Article 3.A.2.7 which provides: "Notwithstanding paragraph 6, a Party shall not implement a condition, limit, or eligibility requirement: regarding the quota applicant's nationality, or headquarters location; or requiring the quota applicant's physical presence in the territory of the Party . . .". The United States contends that the term "[n]otwithstanding" links Article 3.A.2.6(a) to Article 3.A.2.7 "and is contextual support for interpreting the phrase 'condition, limit, or eligibility requirement on the utilization of a TRQ' as relating, *inter alia*, to the status of the applicant (*e.g.*, as a processor, distributor, or further processor) and the applicant's eligibility for a TRQ allocation".[66]

101. Canada responds by arguing that the Agreement distinguishes between allocation and use. In Canada's view, Article 3.A.2.6(a) prohibits a party only from "introducing new or additional conditions, limits, or eligibility requirements relating to how importers use a TRQ to import goods after TRQ quantities have been granted" and not allocation for potential use of the TRQ.[67] The "utilization" of a TRQ "for importation of an agricultural good" is carried out only by an importer, in Canada's view, whereas Canada's requirement that an applicant be a processor, distributor, or further processor pertains to applicants.[68] To Canada, requiring TRQ allocation holders to be processors,

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64 United States IWS, paras. 74–75.

65 United States IWS, para. 67.

66 United States IWS, para. 71.

67 Canada IWS, para. 121.

68 Canada IWS, para. 121.

distributors, or further processors does not concern how holders may use TRQ allocations after they have been granted; thus, the United States' claim is inapposite.

102. Canada also takes the position that interpreting "eligibility requirement" in light of the phrase "on the utilization of a TRQ for importation of an agricultural good" reveals that the requirements must relate to the eligibility of products to be imported, not to individuals who receive an allocation.[69] In Canada's view, "the requirements concern *what* may be imported under the TRQ, not *who* may import under the TRQ".[70]

103. Finally, Canada rejects the United States' contextual argument and claims that Article 3.A.2.7 creates a separate obligation referring to different conditions, limits, or eligibility requirements than those intended by Article 3.A.2.6(a).[71]

The Panel's analysis

104. There are two principal questions before the Panel in respect of the United States' claims about Article 3.A.2.6(a) and Canada's requirements that applicants be processors, distributors, or further processors. First is whether Article 3.A.2.6(a) applies to requirements concerning applicant type or status. Second, if so, then do Canada's measures contradict Article 3.A.2.6(a) by imposing an additional condition, limit, or requirement? The Panel reaches only the first question and finds that Article 3.A.2.6(a) does not encompass requirements of the type Canada has imposed, namely that an applicant be a processor, further processor, or distributor.

105. For the Panel, the critical phrase in Article 3.A.2.6(a) is "on the utilization of a TRQ for importation of an agricultural good".[72] The Panel begins with the interpretation of this phrase to determine whether Canada's constraints on applicants about their type or status are captured.

106. As the Parties agree, the ordinary meaning of "utilization of a TRQ for importation" is the action of importers making use of the TRQ volume they have been granted.[73] Thus, the inquiry before the Panel is what is included among conditions, limits, or eligibility requirements on *use* of a TRQ.

107. Of greatest relevance to the Panel's analysis is the Parties' differing views with respect to which eligibility requirements, if any, pertain to use. While Canada finds that such eligibility requirements are significantly circumscribed, the United States maintains that "[l]ogically, a condition, limit, or eligibility requirement that governs applying for and being granted an allocation of TRQ volume is a condition, limit or eligibility

69 Canada IWS, para. 135.

70 Canada IWS para. 135 (emphasis in the original).

71 Canada IWS, para. 144.

72 Article 3.A.2.6(a).

73 United States IWS, para. 69; Canada IWS, para. 129.

requirement on the utilization of the TRQ".[74] Put differently, to the United States, requiring that an applicant meet a qualification to apply, such as that at issue set by Canada, has the effect of being a requirement on use.

108. While the Panel finds some support for the United States' two-step analysis, the application of its argument has the potential to extend the meaning of Article 3.A.2.6(a) far beyond what the plain meaning of the provision suggests. If the Panel were to adopt the United States' reading, then the phrase "on the utilization of a TRQ for importation" would add little. In essence, nearly any eligibility requirement added by a party at the application stage would have an impact on potential use. The Panel is unpersuaded that the language of Article 3.A.2.6(a) has the reach that the United States claims.

109. The Panel is further guided by the illustrative list in Article 3.A.2.6(a). The subparagraph offers the following examples: "including in relation to a specification or grade, permissible end-use of the imported product, or package size". None of these examples comes close to the requirements at issue before the Panel. These examples, rather, deal with the status of the goods and their importation, just as the first half of the sentence likewise indicates.

110. The Panel reaches this conclusion not only from the ordinary meaning of the text of Article 3.A.2.6(a) but also from its greater context. The Panel notes that Article 3.A.2.6(a) is the first of several provisions that follow a *chapeau* which states that "[e]ach Party shall administer its TRQs in a manner that allows importers the opportunity to utilize TRQ quantities fully". This *chapeau* lends further support for the conclusion that Article 3.A.2.6 is generally concerned with importation rather than eligibility of applicants.

111. Article 3.A.2.7 also provides context, as the United States argues, and it mentions Article 3.A.2.6. But here the Panel agrees with Canada that the "notwithstanding paragraph 6" language of Article 3.A.2.7 is intended to draw a clear line as to what parties cannot add under any circumstances, and is not easily read to associate its content with Article 3.A.2.6. That Article 3.A.2.7 is set apart from Article 3.A.2.6 indicates that it covers new content concerning applicants, as compared to the content of Article 3.A.2.6, which deals with goods.

112. In light of this analysis, guided by Article 31 of the VCLT, the Panel concludes that Article 3.A.2.6(a) can be best interpreted by referring to conditions, limits, and eligibility requirements that pertain to the importation of goods, rather than to the status of applicants that may apply.

113. Based on the above, the Panel concludes that it does not have sufficient support to find that Canada's measures are inconsistent with Article 3.A.2.6(a) by requiring an applicant to be a processor, distributor, or further processor.

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74 United States IWS, para. 69.

VI. THE UNITED STATES' CLAIMS REGARDING CANADA'S USE OF A MARKET SHARE ALLOCATION SYSTEM WITH DIFFERENT CRITERIA FOR DIFFERENT TYPES OF APPLICANTS

114. The United States also challenges the market share basis used by Canada in its dairy TRQs allocation regime, as well as Canada's application of different criteria to different types of eligible applicants for the allocation.

115. These basic facts are not in dispute: It is not contested that Canada's measures with respect to the allocation of its dairy TRQs are based on a market share approach and use different criteria to determine the market share of each type of eligible applicant. The Panel described these features above.[75]

116. The United States makes several different claims concerning the market share basis of Canada's dairy TRQ regime under various provisions of the Agreement. The Panel will take up each of those claims separately in the same order as that adopted by the United States.

A. Claims concerning Article 3.A.2.11(b)

117. In its relevant part, Article 3.A.2.11(b) reads as follows:

> A Party administering an allocated TRQ shall ensure that:
>
> . . .
>
> (b) unless otherwise agreed by the Parties, it does not . . . limit access to an allocation to processors.

118. This part of Article 3.A.2.11(b) is referred to by the Parties as the "processor clause".[76]

Arguments of the Parties

119. The Unites States argues that Canada's dairy TRQ allocation measures are inconsistent with Article 3.A.2.11(b) because, by using a market share basis and applying different criteria to different types of eligible applicants, Canada limits access to an allocation to processors.[77]

120. According to the United States, Canada's measures effectively "delegate to processors the ability to set their own market share and TRQ volume, as well as that of

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75 Paragraphs 44–48, *supra*.

76 United States IWS, para. 97; Canada IWS, para. 160.

77 United States IWS, para. 95.

distributors".[78] The United States is of the view that, in substance and in effect, Canada's measures limit to processors a pool of TRQ amounts to which only processors have access.[79]

121. The United States argues that "[d]ue to the design and operation of Canada's measures, processors have the ability to create and determine for themselves the size of pools of TRQ volumes to which only processors have access. Processors do this by choosing to whom they will sell and to whom they will not sell their dairy products".[80]

122. The United States supports its position by presenting to the Panel documents that show an exchange of information between processors and retailers on product availability, a practice that could facilitate bypassing wholesalers,[81] as well as an analysis that discusses the integration of the retailing and wholesaling functions as an important cost-saving opportunity.[82] The United States also points to public statements by Saputo and Agropur, two major processors, indicating that only a small proportion of their production goes to distributors.[83]

123. The United States also submits estimated allocation results for seven of Canada's 14 TRQs for which it could obtain information.[84] To the United States, these estimations show a high percentage of TRQ volumes being allocated to processors. In the view of the United States, these estimations indicate that Canada "has preserved for processors exclusive access to very large portion of the USMCA dairy TRQs".[85]

124. In response, Canada argues that the United States' position is based on an improper interpretation of Article 3.A.2.11(b). According to Canada, "the United States' claim of violation is based on the erroneous understanding that the term 'allocation' refers to any 'portion' of a TRQ (i.e., an indeterminate volume of the TRQ) and that anything that restricts non-processors' ability to use TRQ volume is a 'limit' on 'access to an allocation'".[86]

125. Canada argues that:

> [p]roperly interpreted, the Processor Clause prohibits a Party from restricting the opportunity to obtain an 'allocation' (i.e., a share of the TRQ that may be

78 United States RS, para. 205.

79 United States IWS, para. 95.

80 United States IWS, para. 112.

81 Exhibit USA-43.

82 Exhibit USA-71.

83 Exhibits USA-53 and USA-55.

84 United States IWS, para. 120; Exhibit USA-28.

85 United States IWS, para. 121.

86 Canada IWS, para. 162.

allocated to a particular applicant) exclusively to processors. The Processor Clause does not guarantee allocation of a particular volume to non-processors, it simply requires that such applicants are able to apply and receive allocations from the total TRQ quantity.[87]

126. Canada explains that the use of different criteria for the calculation of market shares for different types of eligible applicants is aimed at preventing the inclusion of distorting sales in the calculation of the market shares of the applicants.[88]

127. Canada rejects the United States' argument that the allocation measures effectively delegate to processors the ability to establish a pool of TRQ allocation that distributors cannot access.[89]

128. Finally, Canada contests that the market information filed by the United States supports the United States' arguments concerning the commercial practices of processors.[90] Canada argues that this information points to a far more complex competitive environment than the United States would have the Panel believe.[91]

The Panel's analysis

129. The Parties agree that Article 3.A.2.11(b) means that Canada cannot limit access to an allocation to processors.[92] As presented by the United States, the debate is about whether the design and operation of the measures has the effect of limiting access to an allocation to processors.

130. In the opinion of the Panel, the answer to this question lies in the interpretation of the phrase "limit access to an allocation to processors" in Article 3.A.2.11(b) and its constituting terms.

131. The Parties do not debate the meaning of the term "limit". The United States indicates that the term means "to confine within limits, to set bounds to . . . ; to bound, restrict".[93] Canada does not provide a definition for the term, but it accepts that the processor clause is intended to prevent a party from restricting the ability to apply for and obtain quota allocation.[94] Therefore, there is a convergence of views between Parties that "limit" means "restrict".

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87 Canada IWS, para. 164.

88 Canada IWS, paras. 177–182.

89 Canada IWS, paras. 183–184.

90 Canada IWS, paras. 184–185.

91 Canada IWS, para. 186.

92 United States IWS, para. 94; Canada IWS, para. 164.

93 United States IWS, para. 100.

94 Canada IWS, para. 166.

132. As for the term "access", the United States refers to the definition of the noun and suggests that it means "the right or opportunity to benefit from or use a system or service".[95] For its part, Canada refers to the verb "access", which is "to obtain, acquire: to get hold of something".[96] Common to these definitions is the idea that the term means the right or opportunity to obtain or acquire something. When put in the context of the phrase in which the term is used, the Panel agrees with Canada that it is about the right or opportunity to obtain or acquire an allocation.

133. Concerning the term "allocation", the United States submitted that one meaning of the term is "that which is allocated to a particular person, purpose, etc.; a portion, a share, a quota".[97] Both Parties agree that, in context, the relevant meaning of the term is in reference to what is being allocated and not to the allocation process itself.[98] The United States argues that, in context, the term "allocation" means a "portion" of the quota.[99] Canada argues that this definition is reductive, focusing only on the object of the allocation, i.e., a "portion" or volume of the quota, thereby ignoring the broader meaning suggested by the phrase "that which is allocated to a particular person" in the definition.[100] Instead, Canada argues that the term "allocation" should be understood to mean a "share of a TRQ that may be 'allocated to a particular applicant'". [101]

134. The Panel does not believe that it has to resolve this debate about whether the term "allocation" concerns an indefinite volume of TRQ or a share of the quota that may be allocated to a particular applicant. As will be demonstrated below, the difference in meaning does not affect the Panel's conclusion on the consistency of Canada's measures with Article 3.A.2.11(b).

135. With these definitions in mind, the Panel will analyze Canada's measures and determine whether anything on their face or in their design or operation limits access to an allocation to processors.

136. The Panel first examines whether, on their face, the measures limit access to an allocation to processors. In that respect, it is clear to the Panel that the language of the measures accommodates applicants other than processors. Each Notice to Importers states that "[y]ou are eligible for an allocation if you are a: processor . . . [or a] distributor".[102] Some TRQs indicate also that "further processors" are able to apply.[103]

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95 United States IWS, para. 100.

96 Canada IWS, para. 169.

97 United States IWS, para. 101.

98 United States IWS, para. 102; Canada IWS, para. 167.

99 United States IWS, para. 102.

100 Canada IWS, para. 167.

101 Canada IWS, para. 168.

102 Exhibit USA-01, as an example.

103 Exhibit USA-02, as an example.

On their face, the measures specify that distributors, and further processors in some cases, have an opportunity to obtain or acquire an allocation of the TRQ.

137. Nothing else in the language of the Notices to Importers imposes any limit on access by those two groups of applicants that are not processors (i.e., distributors and further processors). Likewise, the policy document entitled "General Information on the Administration of TRQs" refers back to the Notices to Importers when discussing who may be eligible to receive an allocation.[104]

138. The Panel therefore concludes that the plain language of the measures does not limit access to an allocation of the TRQ to processors. On the contrary, the measures allow access to an allocation to distributors and in some cases to further processors also.

139. The United States' contention goes beyond the text of the measures, however. It concerns their "design and operation". As mentioned above, the United States argues that "[d]ue to the design and operation of Canada's dairy TRQ allocation measures, processors have the ability to create and determine for themselves the size of pools of TRQ volume to which only processors have access".[105]

140. This argument rests on two aspects of Canada's allocation regime: (i) the exclusion of additional market participants—apart from distributors and further processors—from the list of eligible applicants, and (ii) the use of a market share-based allocation mechanism using different criteria for the allocation to different types of eligible applicants. The Panel has dealt with the issue of the exclusion of certain market participants from the list of eligible applicants.

141. The second aspect of Canada's TRQ regime that is part of the design and operation of the mechanism that, according to the United States, limits access to an allocation to processors is the use by Canada of different criteria for the determination of the market shares of the different types of applicants.

142. The United States does not challenge the use of a market share-based allocation mechanism *per se*. The United States recognizes that the Agreement does not prescribe precisely the type of allocation mechanism that can be used by Canada.[106] The United States also recognizes that Canada has a degree of discretion to formulate and apply its allocation mechanism, but the United States points out that the Agreement sets out a host of rules with which Canada must comply when formulating and applying whatever allocation mechanism Canada chooses.[107]

143. The Panel is left with the following question: whether Canada by designing an allocation mechanism that uses different criteria to determine the activity level of the

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104 Exhibit USA-18, para. 2.1 and 2.2.

105 United States IWS, para. 112.

106 Hearing Transcript, Day 1, p. 8.

107 United States RS, paras. 218–220.

different types of eligible applicants, and ultimately their market shares, operates in such a way as to "limit access to an allocation to processors".

144. Important to the Panel is that nothing in the language of Article 3.A.2.11(b) prohibits the use of different criteria for the allocation of TRQ quantities to different types of eligible applicants.

145. The measures deploy a calculation method that uses two critical points of information to derive the market share of the applicant. The method uses the market activity level of the individual applicant as the numerator for the calculation and it uses the total market activity reported by all applicants as the denominator. For the market activity level, applicants are asked to provide the volume of product produced, used or sold, depending on the type or category of applicant concerned.[108]

146. The United States suggests that it is in the selection of different criteria for the different types of applicants that the measures are inconsistent with the Agreement. To the United States, by using volume produced for processors, volume used for further processors, and volume sold for distributors, Canada designed a mechanism that operates in such a manner as to allow processors to skew the results of the allocation. The United States argues that this approach allows processors get a large portion of the allocation that is exclusive to them and could lead to distributors getting a significantly smaller share of that allocation.

147. It is the understanding of the Panel that the measures invite applicants to report their market activities but the volume of product that an applicant reports—or put differently, the amount the applicant has manufactured, processed, or sold—is a representation of the business activity of the applicant during the reference period. The applicant's business activity is largely the product of commercial decisions made by the applicant and subject to market conditions, as with any rational economic agent.

148. The evidence filed by the United States about the Canadian market in which the measures operate and about various commercial practices or strategies that have been or that could be adopted by certain players of the industry does not support the proposition that the measures "delegate" processors authority to manage their production and sales to maximize the size of their allocation and minimize that of the distributors. The Panel finds nothing persuasive in that material to support the proposition that the measures "deputize" processors or "delegate" to processors the ability to bypass distributors to dictate the outcome of the allocation exercise.[109]

149. As for the estimations produced by the United States, they do show that the method for calculating the market shares can result in high volumes of products being allocated to processors, but they also demonstrate that distributors have access and have received an allocation of the TRQs. In themselves, these estimations do not establish that the

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108 Exhibits USA-01 and USA-56.

109 United States IWS, para. 95; United States RS, para. 205.

measures limit access to an allocation to processors. They may simply, as suggested above, reflect how the Canadian dairy market operates in view of the relative role played by the various actors of the industry.

150. Moreover, none of the data supplied by the Parties on this question reflects outcomes "guaranteed" by the measures. In that sense, they have nothing in common with the guaranteed "pool" of allocation that was examined by the panel in *Canada—Dairy TRQs 1*.[110] Considering that the market activity level reported by each applicant is related to business decisions the applicant makes, it follows that the allocation results could vary significantly year to year depending on market dynamics and market conditions. Depending on business opportunities, processors could theoretically get a smaller proportion of the TRQ allocation, while further processors and distributors could get a larger share of the allocation. Canada's method of allocation allows for this.

151. Finally, the Panel agrees with Canada that TRQ volumes that Canada has allocated to processors alone, are not, in themselves, evidence that the measures limit access to that allocated volume in contravention of Article 3.A.2.11(b). Such an allocation result is nothing but the consequence of the application of a market share-based allocation mechanism. As stated earlier, such an allocation mechanism is not prohibited under the Agreement and the Panel does not read such an obligation in the Agreement.

152. The above demonstrates that Canada's allocation measures by selecting and applying different criteria for the allocation of its TRQs to different types of applicants do not "limit access to an allocation to processors", either on their face or in their design and operation. The language makes clear that distributors, and further processors in certain circumstances, have the opportunity to obtain or acquire an allocation for each of the 14 TRQs that are the object of Canada's commitments. Further, the design and operation of the measures and in particular the use of different criteria for purposes of determining allocations do not guarantee any specific volumes of quota allocation to processors nor limit the size of the allocation to which distributors can have access.

153. In conclusion, on the basis of the above, the Panel finds that Canada's measures, by using a market share allocation system and different criteria for different types of applicants, are not inconsistent with Article 3.A.2.11(b) of the Agreement.

B. Claims concerning Article 3.A.2.4(b)

154. Article 3.A.2.4(b) reads as follows:

> 4. Each Party shall ensure that its procedures for administering its TRQs:
>
> . . .
>
> (b) are fair and equitable;

[110] *Canada—Dairy TRQs I*, Final Report, December 20, 2021, paras. 98-167.

Arguments of the Parties

155. According to the United States, Canada's dairy TRQ allocation measures heavily favor processors over other types of dairy TRQ applicants and therefore are inconsistent with Article 3.A.2.4(b) as Canada has not ensured that its procedures for administering its TRQs are fair and equitable.[111]

156. On this claim, the Parties' principal disagreement is with respect to the phrase "procedures for administering its TRQs".

157. The United States argues that the term "procedure" is defined as "the established or prescribed of way of doing something", "[a] particular course or mode of action".[112] As applied here, the United States contends that the phrase "procedures for administering its TRQ" in Article 3.A.2.4(b) comprises procedures for granting access to the TRQ.[113] Those procedures for granting access include the different criteria Canada applies to different types of applicants as explained above. According to the United States, processors receive an advantage as a result of Canada's use of what the United States considers to be "procedures" within the meaning of Article 3.A.2.4(b).[114]

158. In response, Canada argues that the criteria used for the allocation of TRQs are not "procedures" for administering TRQs and that, consequently, the United States' claim falls outside the scope of the Article.[115] Canada argues that properly interpreted, the phrase "procedures for administering its TRQs" refers to Canada's way of doing something to operate its allocation mechanism.[116] Canada claims that its interpretation is supported by the context of the phrase and is consistent with the object and purpose of the Agreement.[117]

159. Canada argues that the United States' claim relates rather to the "design" of the allocation mechanism, not to the "procedures" for its administration.[118] Canada considers the eligibility requirements and criteria for the determination of market activity to relate to substance, not to procedure.[119] In Canada's view, the United States has not demonstrated that Article 3.A.2.4(b) imposes substantive obligations.[120]

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111 United States IWS, para. 123.

112 United States IWS, para. 124.

113 United States RS, para. 254.

114 United States IWS, paras. 127–132.

115 Canada IWS, para. 188.

116 Canada IWS, para. 195.

117 Canada IWS, paras. 197–210.

118 Canada IWS, para. 196.

119 Canada IWS, para. 187.

120 Canada RS, paras. 181–186.

The Panel's analysis

160. The task before the Panel in addressing this claim is to determine the scope of application of Article 3.A.2.4(b). The Panel must determine whether the phrase "procedures for administering its TRQ" covers the application of the criteria used by Canada for the allocation of its TRQs among different types of eligible applicants. The Panel is of the view that the phrase does not cover the application of those criteria.

161. The United States argues that the term "procedure" means "the established or prescribed way of doing something".[121] Canada agrees that the ordinary meaning of the term "procedures" includes "the established or prescribed way of doing something".[122] Given the remainder of the phrase and this agreed definition, it is clear to the Panel that "procedures for administering its TRQs" refers to the process that is involved in that administration.

162. In the opinion of the Panel, the process involved in administration of TRQs is distinct from the design of the mechanism through which the allocation occurs. The process for administration refers to something other than the substantive elements that a party adopts in its allocation mechanism. The Panel concludes that the criteria that are used by Canada for determining the market shares for eligible applicants are part of its design of its mechanism and not part of the procedures for administering its TRQs.

163. The Parties have debated whether the other provisions within Article 3.A.2.4 provide contextual support for their arguments and whether those obligations included positive, substantive obligations versus procedural obligations. Resolving those disagreements is not necessary for the interpretation exercise conducted by the Panel. Nothing in the immediate context of the text examined changes anything regarding the conclusion of the Panel. Whether the other obligations listed in the article are substantive or procedural in nature does not alter the Panel's finding about the question posed, i.e., whether the criteria are "procedures" within the meaning of the *chapeau* of Article 3.A.2.4.

164. On the basis of the above, the Panel concludes that Article 3.A.2.4(b) does not apply to the criteria used by Canada for the allocation of its TRQs. Consequently, the Panel need not examine whether Canada has ensured that the measures are "fair and equitable".

C. Claims concerning Article 3.A.2.11(e)

165. Article 3.A.2.11(e) provides:

> A Party administering an allocated TRQ shall ensure that:
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> . . .

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121 United States IWS, para. 124.

122 Canada IWS, para. 192.

(e) if the aggregate TRQ quantity requested by applicants exceeds the quota size, allocation to eligible applicants shall be conducted by equitable and transparent methods.

Arguments of the Parties

166. This claim turns on the Parties' differences concerning the phrase "equitable and transparent methods".

167. The United States argues that Canada's use of a market share basis for the allocation of its dairy TRQs and the use of different criteria for different types of applicants are not equitable.[123] According to the United States, Canada's methods are unduly favorable to processors and unduly adverse to the interests of non-processors in violation of Article 3.A.2.11(e).[124]

168. Drawing on dictionary definitions of the term "equitable", the United States argues that Canada's measures are not characterized by equity and fairness, are not free from bias, and do not provide an equal chance of success to all applicants.[125] Accordingly, the United States takes the view that Canada has not ensured that Canada conducts its TRQ allocation through equitable methods.

169. Canada argues that the United States' claim must fail because the criteria that are used by Canada for determining market activity levels and market shares of eligible applicants fall outside the scope of Article 3.A.2.11(e).[126] In simple terms, Canada argues that the criteria are not "methods".[127] Canada argues also that, even if these criteria and its market share approach were determined to be "methods" for the purpose of the Article, Canada's criteria and approach are "equitable".[128]

The Panel's analysis

170. The Panel will first examine the scope of application issue raised by Canada.

171. The question here is whether the criteria used by Canada in the allocation of its TRQs constitute "methods" within the meaning of Article 3.A.2.11(e). The United States did not provide a definition for the term "methods". Canada argues that "method" is "a way

123 United States IWS, para 137.

124 United States IWS, para.137.

125 United States IWS, paras. 137–141.

126 Canada IWS, para. 221.

127 Canada IWS, paras. 217–221.

128 Canada IWS, paras. 222–232.

of doing anything, esp. according to a defined and regular plan; a mode of procedure in any activity, business, etc.".[129]

172. The Panel finds that the first part of Canada's definition is the most relevant considering the phrase within which the term "methods" appears. In the context of the phrase "allocation to eligible applicants shall be conducted by equitable . . . methods", the term "methods" refers to the "ways" in which Canada administers its TRQs.

173. The Panel found in its analysis of the previous claim that the meaning of the term "way" describes a process for doing something. The Panel also found that the process through which a party awards an allocation is distinct from the rules and requirements that it applies or implements. Those two previous findings are equally applicable here.

174. The Panel is of the view that, when considered in context, "methods" should be understood to refer to processes. The allocation methods referred to in Article 3.A.2.11(e) are different from the rules and requirements that they apply or implement.

175. The criteria used by Canada for the allocation of the TRQs fall into the latter category and are not the allocation methods. This conclusion is coherent with the conclusion drawn by the Panel when interpreting the term "procedure" while examining the previous claim.

176. For these reasons, the Panel concludes that the claim of the United States falls outside the scope of application of Article 3.A.2.11(e). The Panel does not need to examine whether the use of different criteria is equitable.

D. Claims concerning Article 3.A.2.11(c)

177. The United States argues that Canada's measures are inconsistent with Article 3.A.2.11(c) of the Agreement because "Canada's measures contain no safeguards to ensure that each allocation is made in commercially viable shipping quantities" as required by the text of the Article.[130]

178. Of greatest relevance here, Canada's applications for its TRQs ask the applicant to confirm whether "[i]f the market share calculation based on [the applicant's] application does not result in an allocation of 20,000 kg or greater," the applicant would be willing to "accept a lesser amount based on [the applicant's] market share calculation".[131]

179. Article 3.A.2.11(c) provides:

> A Party administering an allocated TRQ shall ensure that:

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129 Canada IWS, para. 217.

130 United States IWS, para. 142.

131 Exhibit USA-65, p. 15.

. . .

(c) each allocation is made in commercially viable shipping quantities and, to the maximum extent possible, in the quantities that the TRQ applicant requests.

180. As discussed above,[132] Canada allocates its TRQs on a market share basis. However, Canada does not necessarily allocate according to an applicant's market share where the market share calculation would result in an allocation of less than 20,000 kg.[133] In those instances, Canada relies on the applicant's representation on its application as to whether the applicant would accept an allocation of less than 20,000 kg.[134] Should the applicant indicate that it wishes to receive that allocation despite it falling under 20,000 kg, Canada will so allocate.[135]

Arguments of the Parties

181. The United States takes the position that the Article imposes several obligations on Canada. The United States maintains that the first clause of the Article "imposes an absolute requirement: Canada is obligated to *ensure* that *each and every allocation* is made in commercially viable shipping quantities".[136] In the view of the United States, Canada breaches the Agreement if "any allocation is made in quantities that are not commercially viable shipping quantities".[137]

182. The Parties concur that the Agreement does not define "commercially viable shipping quantities". The United States takes issue with the fact that the measures "suggest that Canada itself may have a sense of what would be a commercially viable shipping quantity".[138] The United States argues that "it is self-evident as a matter of commercial logic that the quantity that is commercially viable for shipping, i.e., that would be profitable or otherwise make business sense, may vary from importer to importer and transaction to transaction".[139] By asking applicants to confirm that they will accept an allocation in an amount less than 20,000 kg, the United States argues, "Canada is asking the applicants to confirm that they will accept an allocation in an amount that does not constitute a commercially viable shipping quantity".[140]

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132 Paragraphs 44–48, *supra*.

133 United States IWS, para. 146; Canada IWS, para. 249.

134 United States IWS, para. 146; Canada IWS, para. 249.

135 Canada IWS, para. 249.

136 United States IWS, para. 144 (emphasis in the original).

137 United States IWS, para. 144.

138 United States IWS, para. 146.

139 United States IWS, para. 145; United States RS, para. 326.

140 United States IWS, para. 148.

183. Canada responds that Article 3.A.2.11(c) does not establish a single numerical threshold for Canada's TRQs. Canada emphasizes that "commercially viable" modifies "shipping quantities" and not "allocation".[141] To Canada, what constitutes a "commercially viable shipping quantity" is highly variable and context-specific.[142] In sum, Canada argues that the United States' claims are about incentives and lack evidence to show that allocation holders have not imported products because their allocation was too small to justify the cost of shipping.[143]

184. The United States also claims that Canada's measures violate the second clause of Article 3.A.2.11(c) which provides that Canada "shall ensure that . . . each allocation is made . . . to the maximum extent possible, in the quantities that the TRQ applicant requests". The United States takes the position that Canada acts inconsistently with this requirement because it does not ask TRQ applicants what quantity of quota volume they are seeking.[144]

185. The United States acknowledges that Canada's measures ask the applicant to "report the volume of its market activity, which . . . is used to determine the applicant's volume of TRQ allocation".[145] However, in the view of the United States, that "report" is insufficient to constitute a "request by the applicant for a particular volume of TRQ allocation".[146]

186. The United States is of the view that Canada makes allocations "without any regard for the wishes of TRQ applicants"[147] and, thus, falls short of its obligation to "put in a high degree of effort to achieve the aim of granting to TRQ applicants quota volume in the quantities requested".[148]

187. Canada argues that it makes "serious efforts to ensure that each allocation is made in the quantities requested by the TRQ applicant".[149] Canada notes that, by choosing to administer its TRQs through a market share allocation mechanism, the market share approach demands that it make allocations according to a methodology—one that involves calculations using the information provided by each applicant. Put differently, in Canada's view, in applying its market share methodology to each application, Canada makes each allocation in quantities requested by the TRQ applicant and according to their market share.

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141 Canada IWS, para. 237.

142 Canada IWS, para. 240.

143 Canada IWS, para. 247.

144 United States IWS, para. 156.

145 United States IWS, para. 87.

146 United States IWS, para. 156.

147 United States IWS, para. 158.

148 United States IWS, para. 154.

149 Canada IWS, para. 251.

The Panel's analysis

188. The Panel agrees with the United States' view that a commercially viable shipping quantity will vary from applicant to applicant and possibly from transaction to transaction.[150] But that that is so does not favor the United States' argument regarding any inconsistency by Canada.

189. The Panel finds it reasonable to conclude that, if the nature of a commercially viable shipping quantity is variable and relative, the applicant itself is best positioned and perhaps uniquely positioned to articulate what would constitute a commercially viable shipping quantity in respect of its allocation and that, on that basis, it will make a rational business decision. And that is precisely what Canada requests of the applicant.

190. By asking the applicant to indicate whether it would accept an allocation of less than 20,000 kg, Canada is not itself determining what constitutes a commercially viable shipping quantity. Rather, Canada ensures, as the Agreement requires, that it does not make any allocations that are not in commercially viable shipping quantities.

191. Thus, the Panel finds, based on the above, that Canada's measure is not inconsistent with the terms of the Agreement in this respect. Canada confirms that it is allocating a commercially viable shipping quantity by asking the applicant what it is willing to accept.

192. The Panel turns then to the United States' claim that Canada's measures violate the second clause of Article 3.A.2.11(c) which provides that Canada "shall ensure that . . . each allocation is made . . . to the maximum extent possible, in the quantities that the TRQ applicant requests".

193. The dispute on this issue turns on what form an applicant's "request" must take, or, more precisely, the wording through which a party must enable an applicant to make a request. The United States insists that Canada must provide a means for applicants to request any quantity of their choosing. Canada asserts that by collecting information from applicants who are seeking an allocation, that effectively constitutes a request.

194. Neither Party takes up the definition of "request" or "requests" but both refer to the term as meaning "to ask for something". The Panel agrees. The Panel finds that the measures in question, inviting applications from applicants seeking TRQ allocations and requiring them to supply market share information, provide the opportunity for applicants to ask for quantities of a particular volume. By applying for an allocation, a TRQ applicant is requesting an allocation of a particular quantity, even if that quantity is bounded by the terms Canada has set. It follows that "the quantity that the applicant requests" is the volume of market activity relative to the overall market of those seeking an allocation.

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150 United States IWS, para. 145.

195. The Panel's interpretation of "quantities that the TRQ applicant requests" is further informed by the context. The remainder of the Article and the surrounding provisions do not add any additional specificity or restrict Canada's formulation of its applications with respect to applicant requests. Consequently, nothing in the Agreement demands that Canada use a particular form of request or require that Canada formulate its measure with any particular wording.

196. Thus, the Panel turns to the question as to whether, treating the application as the applicant's request, Canada is ensuring that "each allocation is made . . . to the maximum extent possible, in the quantities that the TRQ applicant requests".[151]

197. The Parties are of similar mind with respect to the significant effort commanded by "to the maximum extent possible" in the Article language. The Panel once again agrees.

198. The Panel finds that by applying its market share allocation mechanism Canada's measures appear to make allocations "to the maximum extent possible" in the quantities the TRQ applicant requests. Canada's allocation mechanism is designed to grant allocations according to market share and that is the information in the requests that Canada receives. The exception in Canada's market share approach to allocation is with respect to market shares that would result in allocations of fewer than 20,000 kg. As addressed above, Canada's measures make this exception so that Canada may act consistently with the first clause of Article 3.A.2.11(c).

199. The Panel has no difficulty concluding, accordingly, that Canada's allocation mechanism is consistent with the second clause of Article 3.A.2.11(c).

E. Claims concerning Article 3.A.2.10

200. Article 3.A.2.10 provides:

> If a TRQ is administered by an allocation mechanism, then the administrating Party shall provide that the mechanism allows for importers that have not previously imported the agricultural good subject to the TRQ (new importers), who meet all eligibility criteria other than import performance, to be eligible for a quota allocation. The Party administering the TRQ allocation mechanism shall not discriminate against new importers when allocating the TRQ.

Arguments of the Parties

201. The United States argues that Canada's requirement that an applicant demonstrate a history of market activity prevents a new entrant to the market, who is necessarily also a new importer, from receiving any TRQ allocations, in violation of Article 3.A.2.10.[152] According to the United States, Canada's market share allocation system also

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151 Article 3.A.2.11(c).

152 United States IWS, para. 160.

discriminates against those new entrants when compared with the treatment of eligible applicants who receive an allocation of the TRQ in violation of Article 3.A.2.10, second sentence.[153]

202. Canada responds by arguing that, properly interpreted, Article 3.A.2.10 requires a party administering an allocated TRQ to: (i) permit access to the TRQ to applicants that have never previously imported the product subject to the TRQ, provided the applicant meets the party's other eligibility requirements, and (ii) design and operate its mechanism in a manner that provides no less favorable treatment to new importers as compared to established importers.[154]

203. Canada argues that, taken to its logical conclusion, the United States' argument would transform Article 3.A.2.10 into a complete prohibition against the use of a market share allocation mechanism.[155] Canada is of the view that Article 3.A.2.1 recognizes Canada's right to select its preferred allocation mechanism.[156] A market share allocation mechanism necessarily implies that there will be a need for the party administering such a regime to consider the applicant's market activity over a defined period of time.[157]

204. Canada contends that its measures do not tie eligibility to receive an allocation to import performance.[158] Rather, according to Canada, the measures require the demonstration of a certain history of market activity within the relevant product market.[159]

205. Concerning the non-discrimination obligation contained in the second sentence of the provision, Canada maintains that the discipline does not apply to entities that are not similarly situated and that the treatment afforded under the provision to importers with a demonstrated history of market activity cannot be compared with that of importers that do not have a demonstrated history of market activity.[160]

206. Finally, Canada provides an example of a new importer with a demonstrated history of market activity but with no previous relevant import experience to show that the design and operation of its measures are such that the new importer would receive an allocation. This, according to Canada, demonstrates that the measures allow for new

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153 United States IWS, paras. 169–172.

154 Canada IWS, para. 277.

155 Canada IWS, para. 270.

156 Canada IWS, para. 278.

157 Canada IWS, para. 279.

158 Canada IWS, para. 285.

159 Canada IWS, para. 286.

160 Canada IWS, paras. 288–289.

importers to receive an allocation and do not accord less favorable treatment to new importers when compared with that accorded to experienced importers.[161]

The Panel's analysis

207. The Panel will take each of the United States' two claims in turn, beginning with the ordinary meaning of the terms in the first sentence of Article 3.A.2.10.

208. The first sentence states that "new importers" must be eligible so long as they meet all other eligibility criteria unrelated to import performance. The Panel agrees with Canada that the phrase "who meet all eligibility criteria other than import performance" accommodates criteria such as market activity in the sector. As discussed earlier in this Report, the Agreement provides in Paragraph 3(c) that "eligibility" must include a showing that the applicant is "active" in the relevant sector.

209. In the opinion of the Panel, that language makes clear that the obligation to provide for a mechanism that allows new importers to be eligible for a quota allocation is in respect of new importers that "meet all eligible requirements, other than import performance". It follows therefore, that the obligation requiring the party administering the allocation mechanism to allow new importers to be eligible for a quota allocation applies only in situations where such new importers meet the eligibility requirements other than import performance.

210. With respect to the second sentence of Article 3.A.2.10, Canada's measures do not distinguish between new importers and new market entrants. New importers may apply by demonstrating their activity in the Canadian food or agricultural sector, just like other applicants. Canada imposes no additional requirements that would render new importers ineligible or any requirements that appear, to the Panel, to discriminate against new importers.

211. In that respect, the Panel is satisfied that the measures do not discriminate as between new importers that meet all eligibility requirements. Applicants that meet all eligibility requirements are all provided with an opportunity to obtain an allocation. The measures also do not discriminate between such importers and experienced importers. Canada provided a convincing example of how the application of the measures is not discriminatory as between importers that are similarly situated. The Panel is not convinced that Canada's measures discriminate in the manner prohibited by the language of the second sentence of Article 3.A.2.10.

212. In light of the arguments before it, the Panel finds that Canada's market share allocation system is not inconsistent with Article 3.A.2.10 of the Agreement.

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[161] Canada IWS, paras. 291–292.

F. Claims concerning Article 3.A.2.6(a)

213. For ease of reference, Article 3.A.2.6(a) provides:

> Except as provided in subparagraph (b) and (c), no Party shall introduce a new or additional condition, limit, or eligibility requirement on the utilization of a TRQ for importation of an agricultural good, including in relation to specification or grade, permissible end-use of the imported product, or package size beyond those set out in its Schedule to Annex 2-B (Tariff Commitments). For greater certainty, paragraph 6 shall not apply to conditions, limits, or eligibility requirements that apply regardless of whether or not the importer utilizes the TRQ when importing the agricultural good.

Arguments of the Parties

214. The United States argues that Canada's administration of its TRQs contravenes Article 3.A.2.6(a) for two reasons.

215. First, the United States argues that by limiting or conditioning eligibility for an allocation to prior market activity, Canada's measures introduce a new condition, limit, or eligibility requirement on the use of its dairy TRQs in contravention of Article 3.A.2.6(a).[162]

216. Second, repeating its argument that Canada's measures "limit to processors pools of TRQ allocations to which only processors have access,[163] the United States argues that, by using a market share basis for the allocation of TRQs and by excluding potential users from the list of eligible applicants for an allocation, Canada introduces a new condition, limit or eligibility requirement on who may receive and ultimately utilize a dairy TRQ allocation in contravention of Article 3.A.2.6(a).[164]

217. According to the United States, "[n]othing in Annex 2-B of Canada's Tariff Schedule memorializes any agreement by the Parties that Canada may impose a condition, limit, or eligibility requirement on the utilization of its USMCA dairy TRQs that the recipient of the TRQ allocation must demonstrate activity during a prior reference period, or that an applicant must be a processor to be eligible to access certain pools of USMCA dairy TRQ allocations".[165]

218. In response, Canada argues that its measures are not the type of measures covered by Article 3.A.2.6(a).[166] Canada states that "the only conditions, limits or eligibility

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162 United States IWS, para. 175.

163 United States IWS, para. 176.

164 United States IWS, para. 177.

165 United States IWS, para. 180.

166 Canada IWS, para. 294.

requirements covered by the provision are those on the 'utilization of a TRQ for importation of a good'".[167] Canada argues that the market activity requirement and the exclusion of certain potential TRQ users are requirements in respect of the eligibility of applicants for an allocation and not requirements that pertain to "how importers may use their TRQ quantities after allocation have been granted".[168]

The Panel's analysis

219. Canada argues that the discipline of Article 3.A.2.6(a) does not apply to the aspects of the measures that are the object of the Unites States' challenge. Therefore, the Panel must first determine whether the discipline applies.

220. The Panel has found earlier what it considers to be the scope of application of Article 3.A.2.6(a).[169] That finding is linked to the meaning of the phrase "on the utilization of a TRQ for importation of an agricultural good".[170] After examining the meaning of that phrase, in its context, the Panel concluded that Article 3.A.2.6(a) can best be interpreted as referring to conditions, limits and requirements that pertain to the importation of goods rather than the status of those who apply for an allocation.[171]

221. That finding remains unchanged. The Panel has extensively examined already in the context of other claims the various aspects of the Canadian measures that are the object of this claim under Article 3.A.2.6(a): the market activity requirement, the use of a market share approach for the allocation of TRQs, and the exclusion of certain potential TRQ users from the list of eligible applicants. The Panel is convinced that none of those relates to the importation and utilization of TRQ goods. They rather relate to the status of the applicant for an allocation.

222. For these reasons, the Panel concludes that Article 3.A.2.6(a) does not apply to the aspects of the measures that are the object of the United States' challenge under this Article.

VII. THE UNITED STATES' CLAIMS REGARDING CANADA'S 12-MONTH ACTIVITY REQUIREMENTS

223. The next set of claims brought by the United States relates to how Canada's measures demand that TRQ applicants establish that they have been active in the Canadian food or agricultural sector.

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167 Canada IWS, para. 294.

168 Canada IWS, para. 195.

169 Paragraphs 104–113, *supra*.

170 Paragraphs 104–113, *supra*.

171 Paragraphs 104–113, *supra*.

224. Canada's measures require applicants to "demonstrate[e] activity regularly during the reference period and throughout/during the quota year".[172] The measures also state, separately, that this requirement "is normally understood to mean that you are able to demonstrate activity in the relevant Canadian sector on a monthly basis".[173] Canada considers this requirement an eligibility requirement.[174] Canada states that applicants "must be active" in the sector "at the time of the application" and "must, in addition, have been active regularly" in the sector "during the reference period".[175]

225. The Parties do not dispute the factual predicate for the United States' claim. Canada's measures require that, to be eligible for an allocation, an applicant must demonstrate activity during each of the 12 relevant months: both during the reference period (the 12 months preceding the beginning of the application period) and during the following quota year (the 12 months to which the TRQ applies). Rather, the Parties diverge with respect to whether these particular requirements are consistent with the terms of the Agreement.

226. The United States raises three claims of inconsistency surrounding the 12-month activity obligations imposed by the measures. First, the United States argues that Canada breaches Section A, Paragraph 3(c) of Canada's TRQ Appendix by requiring a showing of activity in each of the 12 months of the reference period and activity in each of the 12 months of the quota year.[176] Second, the United States contends that the measures are inconsistent with Article 3.A.2.6(a) of the Agreement because they introduce new conditions, limits, or eligibility requirements on who may apply for, receive, and ultimately utilize a dairy TRQ allocation.[177] Third, the United States maintains that imposing "an historical 12-month activity requirement" is inconsistent with Article 3.A.2.10 of the Agreement because it discriminates against new importers.[178] The Panel will take up each of these allegations in turn.

A. Claims concerning Paragraph 3(c) of Section A of Canada's TRQ Appendix

227. The United States' first claim turns on whether Canada's requirement that applicants demonstrate activity on a monthly basis, both before and after the start of the quota year, is a permissible standard for "active".

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172 Exhibit USA-18, para. 2.2.

173 Exhibit USA-18, para. 2.2.

174 Exhibit USA-2, para. 2, as an example.

175 Exhibit USA-2, para. 2, as an example.

176 United States IWS, paras. 192.

177 United States IWS, para. 197.

178 United States IWS, para. 203.

Arguments of the Parties

228. Both Parties turn to the definition of "active" and find common ground. They agree that "active" suggests a significant degree of activity, not just the presence of some limited activity.[179]

229. With that meaning in mind, the United States agrees that the standard Canada has set—that "an applicant must demonstrate relevant market activity during all 12 months of a 12-month period[180]—falls within the meaning of "active" as intended by Paragraph 3(c).[181] The United States argues, however, that Canada must do more.

230. In the view of the United States, Canada's requirement is "overly restrictive and arbitrary".[182] The United States acknowledges that Canada "may need to apply some administrative judgment when assessing eligibility, i.e., when assessing whether an applicant is 'active'".[183] However, the United States contends that Canada must "allow for the possibility that applicants demonstrating 'different degrees of activity' can meet the requirement to be "active".[184] In essence, the United States asks the Panel to find that Canada's measures breach the Agreement if they do not conform with many permissible interpretations of the term "active". The United States takes the position that "active" can have many meanings and Canada must accommodate them rather than select from among them.[185]

231. Canada argues that its 12-month activity requirements "constitute[] a reasonable interpretation" of the term "active" and that should be sufficient for purposes of the Paragraph 3(c).[186] Canada further argues that if the parties to the Agreement "had wanted to set a specific time period for who is 'active' . . . they would have done so explicitly".[187] In the absence of any greater specificity, each party has the discretion to implement the activity requirement in a way that is consistent with the meaning of "active", according to Canada.[188] That the term "active" encompasses different degrees of activity does not, in Canada's view, require each party to accommodate more than one such degree.[189]

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179 United States IWS, para. 51; Canada IWS, para. 301.

180 United States RS, para. 390.

181 United States RS, para. 374.

182 United States IWS, para. 195.

183 United States RS, para. 58.

184 United States RS, para. 393.

185 United States IWS, para. 191.

186 Canada IWS, para. 297.

187 Canada IWS, para. 303.

188 Canada IWS, para. 304.

189 Canada IWS, paras. 303–304.

The Panel's analysis

232. The Panel begins with the ordinary meaning of "active" and adopts the definition shared by the Parties: "participating or engaging in a specified sphere of activity, [especially] to a significant degree".[190] Nothing about the context of Paragraph 3(c) or the object and purpose of the Agreement alters that interpretation. There is no further specificity in the Agreement limiting that meaning. Rather, as the Parties agree: "active" encompasses engagement in activity "to a significant degree".[191]

233. As the United States suggests, the correct analysis, after first ascertaining the meaning of the obligation, is to then assess whether the measures at issue meet the requirements of the provision.[192]

234. Like the Parties, the Panel finds that requiring an entity to demonstrate activity monthly over 12 months—whether before or after the application—is appropriately considered "active". For the Panel, this conclusion is sufficient to discharge its review of this claim. The Panel is not convinced that Canada must accommodate multiple concepts of "active" in its measures.

B. Claims concerning Article 3.A.2.6(a)

235. Again, for ease of reference, Article 3.A.2.6(a) provides:

> Except as provided in subparagraph (b) and (c), no Party shall introduce a new or additional condition, limit, or eligibility requirement on the utilization of a TRQ for importation of an agricultural good, including in relation to specification or grade, permissible end-use of the imported product, or package size beyond those set out in its Schedule to Annex 2-B (Tariff Commitments). For greater certainty, paragraph 6 shall not apply to conditions, limits, or eligibility requirements that apply regardless of whether or not the importer utilizes the TRQ when importing the agricultural good.

Arguments of the Parties

236. The United States makes two allegations concerning Canada's breach of Article 3.A.2.6(a) as that Article relates to the activity requirements imposed by Canada on applicants.

237. One of the United States' allegations regarding Article 3.A.2.6(a) concerns Canada's requirement that applicants demonstrate activity in all 12 months preceding their application. A second allegation pertains to Canada's eligibility requirement that an applicant must remain active regularly during the quota year.

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190 United States RS, para. 386; Canada IWS, para. 301.

191 Canada IWS, para. 301; United States RS, paras. 386 and 388.

192 United States RS, para. 384.

238. Each allegation relies on the language of the measures, specifically the Notices to Importers that set out "policies and practices" relevant to each TRQ. Again, Canada's measures state, in relevant part:

> To be eligible, you must be active in the Canadian food or agriculture sector at the time of the application and must remain active regularly during the quota year. Note: You must, in addition, have been active regularly in the Canadian food or agriculture sector during the reference period.[193]

239. The United States' argument concerning the two allegations is the same. The United States maintains that Canada's imposition of each of the two 12-month activity eligibility requirements constitutes "a new 'demand' or 'requirement'" on the utilization of a TRQ not found in Annex 2-B of Canada's Tariff Schedule.[194] Here, the United States links up eligibility and utilization: "If a particular entity is not eligible to apply for . . . a TRQ allocation, there is no way that entity could render useful a TRQ application".[195]

240. By contrast, Canada argues that its "measures relating to who receives a TRQ allocation are simply not the type of measures covered by Article 3.A.2.6(a)".[196] According to Canada, the Article restricts only conditions, limits, or eligibility requirements "relating to how importers may *use* a TRQ to import goods after TRQ quantities have been *granted*".[197] In Canada's view, the 12-month activity requirements "relate[] to who may apply for TRQ allocation", not to "the utilization of the TRQ, that is whether the products an allocation holder may seek to import meet the conditions, limits or eligibility requirements to be imported under the TRQ".[198]

The Panel's analysis

241. As discussed above, the Parties, and the Panel, agree that the Agreement is silent with respect to what type or degree of activity constitutes "active" for purposes of Paragraph 3(c).

242. The Panel views Canada's requirement that applicants be active regularly during the reference period and during the quota year as Canada's implementation of the "active" eligibility requirement. Accordingly, the Panel does not find any basis by which to consider Canada's activity requirement to be a "new" eligibility requirement of any type. To the contrary, this is the one eligibility requirement that Paragraph 3(c), which

193 Article 3.A.2.6(a).

194 United States IWS, paras. 184, 200.

195 United States IWS, para. 200.

196 Canada IWS, para. 307 (emphasis in the original).

197 Canada IWS, para. 308 (emphasis in the original).

198 Canada Answers to Panel Questions, July 31, 2023, para. 36.

is part of Annex 2-B, compels: that the applicant be active in the Canadian food or agricultural sector.

243. The Panel concludes, based on the above, that Canada's measures requiring applicant activity regularly during the reference period and activity during the quota year are not inconsistent with Article 3.A.2.6(a).

C. Claims concerning Article 3.A.2.10

244. The United States further argues that Canada's measures violate Article 3.A.2.10 of the Agreement because, in the view of the United States, the 12-month requirements deny eligibility to new entrants to the dairy market, which necessarily are also new importers, and also discriminate against such new importers.[199]

245. For ease of reference, Article 3.A.2.10 provides:

> If a TRQ is administered by an allocation mechanism, then the administering Party shall provide that the mechanism allows for importers that have not previously imported the agricultural good subject to the TRQ (new importers), who meet all eligibility criteria other than import performance, to be eligible for a quota allocation. The Party administering the TRQ allocation mechanism shall not discriminate against new importers when allocating the TRQ.

Arguments of the Parties

246. The United States makes two claims concerning Canada's measures as they relate to the 12-month activity requirements and Article 3.A.2.10. First, the United States contends that Canada denies new importers eligibility, contrary to the first sentence of the Article. The primary contention of the United States is that because an applicant "must engage in relevant activity during every single month of a prior 12-month reference period", "if an applicant has no prior history of 'market activity', *e.g.*, no history of selling the dairy product subject to the TRQ, then Canada's dairy TRQ measures deny such an applicant eligibility".[200]

247. Second, the United States takes the view that Canada also discriminates against new importers in violation of the second sentence of the Article. The United States maintains that "[a] new entrant to the dairy market, which necessarily is a new importer, that is wrongly denied eligibility for a USMCA dairy TRQ allocation plainly is treated less favorably than other importers . . . as the new entrant is shut out of the allocation process altogether".[201]

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199 United States RS, para. 406.

200 United States IWS, para. 205.

201 United States IWS, para. 208.

248. Canada argues that the United States misunderstands Canada's measures. Canada asserts that the measures do not require an applicant to have previously imported the product subject to the TRQ to be eligible.[202] Rather, Canada's measures "simply require TRQ applicants to demonstrate that they were active within the Canadian food or agriculture sector during every month of the 12-month reference period".[203]

249. In Canada's view, the Article accommodates its measure because of the phrase "who meet all eligibility criteria other than import performance". Canada contends that "even when a TRQ applicant is a 'new importer', the TRQ applicant must still meet Canada's other eligibility requirements . . . including Canada's 12-month activity requirement".[204] To Canada, the United States "falsely equat[es]" "new importers" with "new market entrants".[205]

250. Canada contends that rather than treat new importers apart, the measures expressly treat them the same with respect to eligibility, and for the same reason, they do not discriminate against new importers.[206]

The Panel's analysis

251. The Panel recalls that the United States raised the same objection on different grounds that the Panel reviewed earlier in this Report. As discussed above, the United States contended that Canada acted inconsistently with the Article as a consequence of Canada's market share approach and application of different criteria to different applicants.[207]

252. In its analysis, the Panel found that the phrase "who meet all eligibility criteria other than import performance" accommodates criteria such as market activity in the sector. The Panel also concluded that the Agreement provides in Paragraph 3(c) that "eligibility" must include a showing that the applicant is "active" in the relevant sector. From this context, the Panel finds that the phrase "who meet all eligibility criteria other than import performance" necessarily includes the criterion of being active in the relevant sector and, therefore, Canada must require some activity for an applicant to be eligible.

253. Accordingly, nothing about Canada's requirement that an applicant "engage in relevant activity during every single month of a prior 12-month reference period" disallows a new importer from eligibility. This requirement merely subjects the applicant to the activity criterion that the Agreement commands.

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202 Canada IWS, para. 311.

203 Canada IWS, para. 311.

204 Canada IWS, para. 315.

205 Canada RS, para. 251.

206 Canada IWS, para. 317.

207 Paragraphs 207–212, *supra.*

254. Likewise, the Panel has concluded that Canada imposes no requirements that appear, to the Panel, to discriminate against new importers. Nothing about the Parties' arguments in their discussions of the 12 month-activity requirements alters the Panel's determinations here.

255. Thus, the Panel is not convinced, based on the above, that Canada's activity requirements are inconsistent with Article 3.A.2.10.

VIII. THE UNITED STATES' CLAIMS REGARDING CANADA'S MECHANISM FOR RETURN AND REALLOCATION OF UNUSED ALLOCATIONS

256. The United States raises two claims concerning Canada's mechanism for return and reallocation of unused allocations within its TRQ regime.

257. The measures at issue provide that the reallocation of unused portions of the TRQs takes place on the first day of the ninth month of the quota year and that they will normally be made available seven days after the return date to eligible allocation holders, who have not returned any portion of their allocation, in proportion to their initial allocation, or on demand if quantities still remain after the first offer.[208] In particular, the mechanism works in the following manner:

    i. Within seven days upon the expiry of the return date, allocation holders who have not returned any quantities receive a notice by e-mail with the total available quantities for reallocation and are provided five to seven days to indicate interest in receiving a reallocation.[209]

    ii. Any quantities remaining after this initial reallocation are published online, are accessible to any eligible applicant, and are reallocated on demand.[210]

258. First, the United States claims that Canada violates Article 3.A.2.15 of the Agreement because "it does not ensure that there is a mechanism for the return and reallocation of unused allocations in a timely and transparent manner that provides the greatest possible opportunity for the TRQ to be filled".[211]

259. Article 3.A.2.15 provides:

> If a TRQ is administered by an allocation mechanism, then the administering Party shall ensure that there is a mechanism for the return and reallocation of unused allocations in a timely and transparent manner that provides the greatest possible opportunity for the TRQ to be filled.

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208 Canada IWS, paras. 322 and 339.

209 Canada IWS, para. 339.

210 Canada IWS, para. 339.

211 United States IWS, paras. 21 and 210.

260. Second, the United States claims that Canada's measures violate Article 3.A.2.6 of the Agreement because Canada is not administering its TRQs in a manner that allows importers the opportunity to utilize TRQ quantities fully.[212]

261. Article 3.A.2.6 provides, in relevant part:

> Each Party shall administer its TRQs in a manner that allows importers the opportunity to utilize TRQ quantities fully.

262. The Panel will take up each of the issues comprising the United States' arguments about Canada's return and reallocation mechanism in turn.

A. Claims concerning Article 3.A.2.15

a. *Whether Canada Ensures that There is a Mechanism for the Return and Reallocation of Unused Allocations in a Timely Manner*

263. First, the United States contends that Canada has failed to ensure that there is a mechanism for return and reallocation of unused allocations in a timely manner.

Arguments of the Parties

264. The United States' challenge that Canada's return and reallocation mechanism is not made in a timely manner is based on the premise that establishing a return date on the first day of the ninth month is too late during the quota year for purposes of Article 3.A.2.15.[213] The United States argues that the procedure to reallocate returned quotas takes "weeks" after the return date, leading to an "iterative process of multiple offers and decisions" reducing substantially the four-month period that importers have available to use the unused portions between the initiation of the reallocation procedure and the end of the year.[214]

265. In the United States' opinion, the process for reallocating unused allocations takes too long after the already late return date.[215] This process substantially reduces the short period of four months in which importers can use the unused portions of TRQ quotas.[216]

266. In addition, according to the United States, the period of "normally" seven days expressed in Canada's allocation measures, leaves unclear the timing of reallocation.[217] In the view of the United States, the term "normally" suggests the timing may differ

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212 United States IWS, para. 22, 210.

213 United States IWS, para. 211.

214 United States IWS, para. 213.

215 United States IWS, para. 213.

216 United States IWS, para. 213.

217 United States IWS, para. 213.

depending on circumstances unknown to the applicants.[218] Also, the United States asserts, the reference to a "first offer" suggests the possibility of an iterative process of multiple offers that could take days or weeks.[219] The United States contends that all these uncertainties generate doubt about the process, the timing, and the volume of TRQ allocations that might potentially be available for reallocation, and therefore, render Canada's measures inconsistent with Article 3.A.2.15 of the Agreement. [220]

267. Further, the United States claims that "Canada could do more, and Article 3.A.2.15 of the USMCA obligates Canada to do more".[221] The United States draws a comparison with how Canada has designed return and reallocation mechanism for cheeses and industrial cheese under the Canada – European Union Comprehensive Economic and Trade Agreement ("CETA"), which sets a return date one month earlier during the quota year,[222] as well as the present Agreement's export quotas on skim milk powder ("SMP") and milk protein concentrate ("MPC"), which set an initial return date on the last day of the sixth month of the quota year, that is two months earlier than the return date for the mechanism under challenge in this dispute.[223]

268. As a factual matter, Canada argues that rather than taking "weeks to complete", as the United States asserts, its return and reallocation process typically takes only 14 days to complete.[224] Consequently, eligible applicants have almost four months to apply for and use reallocated quantities.[225]

269. As a legal matter, Canada argues that the text of the Article does not prescribe the exact timing or way Canada must carry out returns and reallocations. Canada responds that the term "timely" must be interpreted based on its ordinary meaning and read in the context of Canada's dairy market and allocation holders' ability to import products from the United States.[226] In this context, Canada notes that six of the top 10 dairy-producing states in the United States share borders with Canada, allowing for the possibility of same-day deliveries.[227] Moreover, Canada highlights that Canada's return dates offer one additional month for the use of reallocations compared to the United States' import licensing regime for dairy products.[228]

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218 United States IWS, para. 213.

219 United States IWS, para. 213.

220 United States IWS, para. 224.

221 United States IWS, para. 226.

222 United States IWS, para. 227.

223 United States IWS, para. 230.

224 Canada IWS, para. 324.

225 Canada IWS, para. 324.

226 Canada IWS, para. 333.

227 Canada IWS, para. 334.

228 Canada IWS, para. 335.

270. Canada further argues that the return and reallocation mechanisms mentioned by the United States in the context of Canada's other TRQ systems and Canada's export threshold measures are not comparable with the one at hand,[229] and in any event do not constitute evidence of non-conformity with the Agreement. In Canada's view, the United States misunderstands its measures.[230]

The Panel's analysis

271. The first question before the Panel is whether Canada has ensured that there is a mechanism for the return and reallocation of unused allocations in a timely manner.

272. The Panel sees nothing in the current return and reallocation mechanism that leads it to consider that Canada's measures are not "[o]ccurring, done, or made at a fitting, suitable, or favorable time; opportune, well-timed, seasonable", or "[o]f an action or circumstance: done or occurring sufficiently early or in good time; prompt".

273. The Panel remains unconvinced that the explanations offered by the United States demonstrate that Canada's measures are, on their face, inconsistent with Article 3.A.2.15 of the Agreement.

274. The comparison with the TRQs under CETA and the export measures for SMP and MPC show that there are other ways of administering TRQs and that return dates indeed can, in some circumstances, be set at an earlier date during the quota year, but that is not evidence that Canada administers its TRQs under the Agreement in a manner that it is not "timely".

275. The Panel therefore concludes that the United States has not shown that Canada's measures are inconsistent with Article 3.A.2.15 of the Agreement for not providing a mechanism for return and reallocation "in a timely . . . manner".

b. *Whether Canada Ensures that There is a Mechanism for the Return and Reallocation of Unused Allocations in a Transparent Manner*

276. The Panel now turns to the United States' claim that Canada's measures are not in conformity with Article 3.A.2.15 of the Agreement because they do not ensure that Canada's mechanism for return and reallocation of unused allocations is administered in a transparent manner.

Arguments of the Parties

277. According to the United States, Canada's measures leave out considerable detail and as a result are not sufficiently transparent. The United States claims that the information published by Canada on the utilization rates of its dairy TRQs is insufficient to

229 Canada IWS, para. 348.

230 Canada IWS, para. 324.

communicate to importers how much unused TRQ volume will be returned and available for reallocation.[231] For example, the United States contends that it is unclear from the measures what volumes of TRQ allocations will be available for reallocation and what exactly the process and timing are for reallocating returned allocations.[232] The United States alleges that importers are informed within seven days not of the total volume of returned TRQ allocations that is available but only the amount offered to them individually.[233] Finally, the United States argues that, "after the first offer", the importer "cannot know the timing of any [further] potential offer"[234] or whether and how much additional TRQ reallocation volume might later become available, generating uncertainty among importers.[235]

278. Canada claims that it administers its return and reallocation mechanism for unused portions of the TRQ in a transparent manner since, in Canada's view, the relevant Notices to Importers disclose a straightforward and simple process in which return and reallocation take place.[236] In response to the United States' arguments that there is no clarity on the "iterative process of multiple offers and decisions" that may take place,[237] Canada asserts that there is only one initial offer and, if that is not filled, the remaining quantity is available on demand.[238] Canada further notes that, at the time of the initial offer, the only information available to Canada—and therefore the only information it could share—is the quantities returned by the return date. Canada states that it cannot provide information on whether and how much additional reallocation quantities might be offered at a later date. According to Canada, this information depends on the uptake of the initial offer, which can only be known after the initial offer expires.[239]

The Panel's analysis

279. Both Parties agree that the term "transparent" is defined as "[f]rank, open, candid, ingenuous", or "[e]asily seen through, recognized, understood, or detected; manifest, evident, obvious, clear".[240] The disagreement turns on whether Canada's measures meet that standard.

280. The Panel notes that all 14 TRQ Notices to Importers published by Canada state that return and reallocation is initiated on the first day of the ninth month of the quota

231 United States IWS, para. 224.

232 United States IWS, para. 238.

233 United States IWS, para. 224.

234 United States IWS. para. 224.

235 United States IWS, para. 224.

236 Canada IWS, para. 339.

237 United States IWS, para. 213.

238 Canada IWS, para. 324; Hearing Transcript, Day 1, p. 76.

239 Canada IWS, para. 342.

240 United States IWS, para. 218; Canada IWS, para. 328.

year.[241] These Notices to Importers state that reallocations will be made available "normally" seven days after the return date to eligible allocation holders, who have not returned any portion of their allocation, in proportion to their initial allocation, or on demand if quantities still remain after the first offer.[242]

281. In the Panel's view, the information contained in the TRQ notices provides sufficient detail to allow importers to know what to expect from potential reallocations. Canada clearly sets the *return date* and gives approximations of the expected *date for reallocation* as well as the *quantities that importers can expect to receive*. Canada clarifies that non-reallocated quantities will be made *available on demand*. Therefore, the Panel fails to see how these measures are not transparent, i.e. "[f]rank, open, candid, ingenuous", or "[e]asily seen through, recognized, understood, or detected; manifest, evident, obvious, clear".[243]

282. For these reasons, the Panel finds that the United States has not shown that Canada's measures are inconsistent with Article 3.A.2.15 of the Agreement for not providing a mechanism for return and reallocation "in a . . . transparent manner".

c. *Whether Canada Ensures that There is a Mechanism that Provides the Greatest Possible Opportunity for the TRQs to be Filled*

283. The Panel now turns to the United States' claim that Canada has not ensured that there is a mechanism for return and reallocation that provides the greatest possible opportunity for the TRQ to be filled as required by Article 3.A.2.15.

Arguments of the Parties

284. According to the United States, the term "greatest possible opportunity" indicates that in adopting and implementing a mechanism for return and reallocation of unused allocations, Canada is obligated to put in a high degree of effort to achieve the aim of the TRQ being filled, but Canada falls short of doing so.[244]

285. The United States argues that the return and reallocation mechanisms for export quotas on SMP and MPC provide a greater opportunity for the export quota to be filled than the return and reallocation mechanisms maintained for Canada's dairy TRQs under the Agreement.[245] An earlier return date along the lines of these export quotas would, in the United States' opinion, result in a greater opportunity for the quotas to be filled.

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241 Exhibit USA-019 provides a copy of the "Key dates and access quantities 2023-2024: TRQs for Supply-Managed Products", which includes, among other information, the return date. For example, the Notice for Butter and Cream Powder TRQ states April 1 as the return deadline, and for the Cheeses of All Types TRQ, the deadline is September 1.

242 Exhibits USA-01 – USA-14.

243 United States IWS, para. 218.

244 United States IWS, para. 220.

245 United States IWS, para. 236.

286. The United States also points to the fact that Canada considered other options for the return and reallocation mechanism, which would have provided a greater opportunity for the dairy TRQ to be filled, but Canada decided against them.[246] For instance, in February 2020, Canada sought public comment on a proposed system that would impose penalties—in the form of reduced allocations—on allocation holders who return 20 percent or more of their initial allocation for two consecutive years.[247]

287. The United States also notes that Canada's return and reallocation policies allow allocation holders to seek monetary value through transfer mechanisms, which, in the opinion of the United States, leads to "rent-seeking" behavior, and deters participants from returning their allocations.[248] According to the United States:

> there is an incentive for eligible entities to apply for TRQ allocations even if they have no intention of using the allocation to import dairy products. Under Canada's USMCA dairy TRQ allocation measures, an entity eligible for USMCA dairy TRQ allocations can get an allocation, wait throughout the TRQ year for opportunities to transfer portions of the allocation for payment, seeing what the market will bear. If there is any allocation left unsold, the allocation holder can return the unused allocation by the return date late in the quota year, incur no penalty, and then start over again in a few months with a new allocation when the next quota year begins. [249]

288. Canada argues that the United States provides "no actual evidence" [250] to demonstrate that different or more restrictive policies on returns and reallocations would necessarily provide greater opportunities for the TRQs to be filled. For example, Canada contends that it maintains its export duty measures on SMP and MPC in a vastly different context than its dairy TRQ under the Agreement. In Canada's opinion, these differences make a direct comparison of the return and reallocation policies under the two measures inapposite.[251]

289. Canada argues that the United States' claims that Canada "could do better" by adopting provisions contained in other instruments do not establish that Canada's measures are inconsistent with the Agreement.[252] Canada further argues that the United States does not offer any specific set of changes on how it "could do more",[253] nor does the United States provide any evidence that changes to Canada's current policies (whether they may be "earlier return dates, clearer reallocation procedures, different transfer rules,

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246 United States IWS, para. 237.

247 United States IWS, para. 237.

248 United States IWS, para. 234; United States RS, para. 479.

249 United States IWS, para. 234; United States RS, para. 479.

250 Canada IWS, para. 360.

251 Canada IWS, paras. 351-352.

252 Canada IWS, para. 346.

253 Canada IWS, para. 346.

and stricter under-utilization penalties") would be both "possible and would result in fillings of the TRQ quota".[254]

290. In Canada's view, Article 3.A.2.15 must be interpreted harmoniously with Article 3.A.2.6, namely with the obligation to administer TRQs in a manner that allows importers the opportunity to utilize TRQ quantities fully.[255] To Canada, the measures at issue provide the appropriate incentive for the return of unused dairy TRQ allocations.[256]

291. Canada rejects as irrelevant the United States' assertions concerning the transfer of allocations by participants. Canada contends that what is at issue in this context are Canada's return and reallocation policies, not Canada's transfer rules.[257]

The Panel's analysis

292. Before entering into the Panel's reasoning, the Panel clarifies that it agrees with Canada—and the United States concurs[258]—that Canada's "transfer" policies are not before the Panel.[259]

293. The Panel agrees with the United States that the phrase "the greatest possible opportunity" requires Canada to put in a high degree of effort to achieve the aim of the TRQ being filled. The Panel also finds that the phrase "shall ensure" requires a considerable effort on behalf of the Party administering the TRQ to obtain a specific result. These terms, however, do not give the Panel much guidance on the precise contours of the Article 3.A.2.15 obligation.

294. What is clear is that Article 3.A.2.15 does not require Canada to ensure that the TRQs are actually filled, but rather to ensure "the greatest possible opportunity for the TRQ to be filled".

295. To address this point, the Panel recalls that Canada has undertaken steps to ensure that the TRQs are filled. For instance, it established under-utilization penalties for its dairy TRQs and it evaluated alternative policy choices in reaching its present design, which it decided not to implement.

296. Where the Parties fundamentally disagree is in respect of whether another approach would provide a still greater opportunity for the TRQs to be filled than the approach used by Canada in its measures. Both Parties speculate as to whether setting up stricter

254 Canada IWS, para. 346.

255 Canada IWS, para. 329.

256 Canada IWS, para. 363.iii.

257 Canada IWS, paras. 330, 331 and 357.

258 United States RS, para. 448.

259 Canada IWS, para. 330.

penalties would create greater incentives or disincentives to utilize the TRQs fully. Both provide views on actual utilization rates under different mechanisms, particularly regarding SMP and MPC, as compared to Canada's TRQs under this Agreement. Based on the information provided, the Panel cannot reach a definitive answer.

297. The mandate of the Panel is to determine whether the measures before it demonstrate that Canada has acted inconsistently with its obligation to "ensure that there is a mechanism for the return and reallocation of unused allocations in a timely and transparent manner that provides the greatest possible opportunity for the TRQ to be filled". It is not the role of this Panel to speculate on the potential effects of other institutional arrangements.

298. The Panel has reviewed the evidence presented that showed recent fill rates for each of the 14 TRQs. While these figures reveal that the TRQs have varying degrees of use, the Panel is not in a position to determine whether these variations can be attributed to Canada's return and reallocation mechanism, especially given that the Panel has already found that the United States has not demonstrated that Canada is at fault in the two previous aspects (whether Canada has ensured that its return and reallocation mechanism is administered in a timely and transparent manner).

299. Hence, on the information provided, the Panel is not in a position to conclude that Canada's measures are inconsistent with Article 3.A.2.15.

B. Claims concerning Article 3.A.2.6

300. Lastly, the Panel will consider the United States' claim that Canada's return and reallocation mechanism is inconsistent with the *chapeau* of Article 3.A.2.6.

301. Again, the *chapeau* of Article 3.A.2.6 provides: "Each Party shall administer its TRQs in a manner that allows importers the opportunity to utilize TRQ quantities fully".

Arguments of the Parties

302. In the view of the United States, "the return and reallocation mechanism for Canada's USMCA dairy TRQs sets a return date that is late in the quota year, leaving only a short and uncertain window of time for importers to use reallocated TRQ volume".[260] The United States takes issue with several features of Canada's return and reallocation process, all of which the United States says "incentivizes certain allocation holders to hoard TRQ volumes throughout most of the quota year as they attempt to sell portions of their allocations rather than use them, returning any unused allocations late in the year, without penalty and severely limiting the opportunity of other importers to utilize the TRQs fully".[261]

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260 United States IWS, para. 244.

261 United States IWS, para. 244.

303. In response, Canada insists that the United States has failed to make a *prima facie* case and argues that, when rightly interpreted and considered, Canada's return and reallocation mechanism: i) is carried out sufficiently early to allow the full use of allocated and any reallocated TRQs; ii) follows a straightforward and transparent process; and, iii) incentivizes the return of unused dairy TRQ allocations, and in a manner that provides the greatest possible opportunity for their utilization.[262]

304. Canada contends that a harmonious reading of Article 3.A.2.6 and Article 3.A.2.15 must be considered in the context of Canada's dairy market and allocation holders' ability to import from the United States. Accordingly, in Canada's view, Canada's return and reallocation mechanism is designed in such a manner to receive returns sufficiently early, follows a straightforward and transparent process, and incentivizes the return of unused allocations, providing the greatest possible opportunity for their utilization.[263]

The Panel's analysis

305. The Panel is unpersuaded by the United States' argument concerning Article 3.A.2.6. The Panel concluded above that Canada has ensured that there is a mechanism for return and reallocation of unused allocations in a timely manner. That mechanism facilitates a sufficiently timely return and reallocation for the primary purpose of enabling importers the opportunity to utilize the TRQs fully.

306. Even if the Panel were to accept the United States' position that there are other ways in which Canada *could* incentivize importers to utilize the TRQs fully, these are irrelevant to the Panel's determination here. The obligation on Canada is only to administer its TRQs in such a way that gives importers (i.e., operators that already have received an allocation) a chance to utilize the TRQ quantities fully. Nothing about Canada's measures suggests otherwise.

307. For these reasons, the Panel does not find Canada's measures to be inconsistent with the *chapeau* of Article 3.A.2.6.

IX. CONCLUSION

308. The Panel has considered the arguments of the Parties based on the text of the Agreement and has interpreted the Agreement in accordance with Article 31 of the VCLT: based on the ordinary meaning of the terms of the Agreement in their context and in light of the Agreement's object and purpose.

309. With respect to United States' claims concerning Canada's treatment of certain types of TRQ applicants, the Panel has found, based on the arguments presented and the

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262 Canada IWS, para. 363.

263 Canada IWS, para. 345.

Panel's analyses above, that Canada's measures are not inconsistent with Paragraph 3(c) of Section A of Canada's TRQ Appendix or with Article 3.A.2.6(a) of the Agreement.

310. With respect to the United States' claims concerning Canada's use of a market share allocation system with different criteria for different types of applicants, the Panel has found, based on the arguments presented and the Panel's analyses above, that Canada's measures are not inconsistent with Articles 3.A.2.11(b), 3.A.2.4(b), 3.A.2.11(e), 3.A.2.11(c), 3.A.2.10, or 3.A.2.6(a).

311. With respect to the United States' claims concerning Canada's 12-month activity requirements, the Panel has found, based on the arguments presented and the Panel's analyses above, that Canada's measures are not inconsistent with Paragraph 3(c) of Section A of Canada's TRQ Appendix or with Article 3.A.2.6(a) or with Article 3.A.2.10.

312. With respect to the United States' claims concerning Canada's mechanism for return and reallocation of unused allocations, the Panel is unable to find, based on the arguments presented and the Panel's analyses above, that Canada's measures are inconsistent with Article 3.A.2.15 or with Article 3.A.2.6.

X. SEPARATE OPINION REGARDING THE TREATMENT OF CERTAIN TYPES OF IMPORTERS, INCLUDING RETAILERS AND FOOD SERVICE OPERATORS UNDER CANADA'S DAIRY TRQ ALLOCATIONS

313. I respectfully disagree with the majority opinion regarding the consistency of Canada's treatment of certain types of importers, including retailers and food service operators, under Canada's dairy TRQ allocations. This opinion is related to the United States' claim under Paragraph 3(c) of Section A of Canada's TRQ Appendix under the Agreement, as well as all the claims by the United States related to the use of a market share basis to determine dairy TRQ allocations to the extent that Canada's eligibility criteria -and the consequent market allocations –are limited to processors, distributors, and, in some cases, further processors and exclude all other eligible applicants.

314. It is clear from the face of the measures -and Parties do not contest- that Canada's measures exclude retailers and food service operators, among others, from being eligible.

315. The relevant provision reads as follows:

> Canada shall administer all TRQs provided for in this Agreement and set out in Section B of this Appendix according to the following provisions:
>
> . . .

(c) Canada shall allocate its TRQs each quota year to eligible applicants. An eligible applicant means an applicant active in the Canadian food or agriculture sector. In assessing eligibility, Canada shall not discriminate against applicants who have not previously imported the product subject to a TRQ.

316. According to the majority opinion, the dispute between the Parties refers to whether the language of Paragraph 3(c) requires Canada to *consider the applications of any and all entities* "active in the Canadian food or agricultural sector", including retailers and food service operators. It is my opinion that it does.

317. Pursuant to Article 31(1) of the VCLT: "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".

318. From the plain language of the first sentence of Paragraph 3(c), Canada is obligated to allocate its TRQs to "eligible applicants". Nothing in the text of that provision qualifies the term "eligible applicants". While I agree with the majority that Paragraph 3(c) does not include the terms "any" or "all", neither does it contain the term "some" or any other qualifier that would permit Canada to deviate from the central obligation, which is to "allocate its TRQs each quota year to eligible applicants". Moreover, the term "shall" at the beginning of the first sentence reflects that the obligation is binding on Canada and does not give space for discretionary application of the rule.[264]

319. The second sentence of Paragraph 3(c) clarifies that an eligible applicant is an applicant who is active in the Canadian food or agriculture sector. As the majority pointed out, it refers to entities or individuals that demonstrate a certain degree of activity—such as manufacturing, processing, handling, buying, selling, reselling, preparing, using or delivering—in Canada's food or agriculture sector. There is nothing in this sentence to allow Canada to *restrict* this universe of entities or individuals to "processors, further processors, or distributors" exclusively. In this context, the Parties have contested the relevance of the term "an" in the phrase "an eligible applicant" in order to explain the obligation of the first sentence of such paragraph.[265] However, this discussion does not alter the nature of the obligation. If the term "one" were to be included instead of "an" in the second sentence of Paragraph 3(c), it would only denote that the qualification refers to a singular entity that is eligible to apply for the TRQ, whereas the first sentence contains the term "applicants" in plural. In other words, whether the definition be singular or plural is irrelevant. What is relevant is that the first sentence of Paragraph 3(c) requires Canada to allocate its TRQs to applicants active in the Canadian food or agriculture sector, and nothing in the language of this provision restricts this obligation.

320. The third sentence prohibits Canada from discriminating against applicants who have not previously imported the product subject to a TRQ. This informs the scope of

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264 United States, IWS, para. 50.

265 Canada IWS, paras. 92–93; United States RS, paras. 60–61.

Canada's obligations because it clarifies that lack of import history cannot be considered as lack of activity in the Canadian food or agriculture sector. This concept is repeated in Article 3.A.2.10.

321. Other elements of the Agreement also provide immediate context for the appropriate interpretation of this provision.

322. For example, Section B of Canada's TRQ Appendix provides specific carve-outs relating to end-uses. They establish express limitations to importers and prohibit importation of certain portions of the TRQs for uses other than those specified therein. This is the case of the TRQs for milk, cream, butter and cream powder, or industrial cheeses. These limitations have expressly been negotiated and incorporated in the Agreement. In fact, they explicitly state that portions of the TRQ cannot be imported for retail sale. A *contrario sensu* reading of these provisions is that products outside these express limitations could in fact be imported for retail sale. It follows logically that the general rule is that there is not an ex-ante prohibition on the importation for retail sale.

323. Also, the producer clause of Article 3.A.2.11(b) prohibits Canada to allocate any portion of the quota to a producer group or to limit access to processors. If Canada had the discretion to choose from the universe of eligible applicants, these provisions would not be necessary.

324. Article 3.A.2.11 requires parties to ensure that "any person of the other Party that fulfills the importing Party's eligibility requirements is able to apply and be considered for a quota allocation under the TRQ". This is an indication that Parties cannot place burdens on persons of the other Party that fulfill the eligibility requirements, which in this case are to be active in the Canadian food or agriculture sector.

325. Article 3.A.2.15 requires Canada to administer its return and reallocation mechanism in a timely and transparent manner that provides the greatest possible opportunity for the TRQ to be filled. While I do agree with the Panel's findings with respect to that provision, it provides context that Canada is expected to provide the greatest possible opportunity for the TRQs to be filled. The ex-ante exclusion of retailers and food service operators, among others, from obtaining TRQ allocations, hinders the possibility of fulfilling this provision.

326. Canada argues that it is allowed to apply and consider criteria other than the applicant's activity within the Canadian food or agriculture sector.[266] I agree. As we have discussed above, there are certain criteria that give context for this obligation in the Agreement itself, but the Agreement also allows parties to set out criteria of an administrative nature that are necessary for the administration of the TRQs. In this context, Article 3.A.2.4(b) requires Canada to administer its TRQs using clearly specified timeframes, administrative procedures, and requirements. Article 3.A.2.4(d) allows it to establish

266 Canada IWS, para. 99.

"necessary burdens" in the administration of the TRQs. Thus, for example, requiring that, to apply for any type of import license, an applicant fills the forms in a certain manner and submits them on a certain date is not expressly stated in the Agreement, but these requirements enable the proper administration of the TRQs as provided in Article 3.A.2.4.

327. Following the same logic, the obligation provided in Article 3.A.2.5 to "publish . . . all information concerning [the Party's] TRQ administration, including the size of quotas and eligibility requirements" does not, in my opinion, permit Canada to introduce additional eligibility criteria. It simply imposes an administrative obligation that allows users to know the size of the quota, the eligibility criteria and other aspects of the TRQ administration. In fact, both, the size of the quota, as well as eligibility criteria, are established in the Agreement.

328. The object and purpose of the Agreement is inextricably linked to market access. The majority itself recognizes that. There is an express provision in the Agreement that relates to its object and purpose. Article 10.10.2.d.(ii) states: "the object and purpose of this Agreement and this Chapter, which is to establish fair and predictable conditions for the progressive liberalization of trade between the Parties to this Agreement while maintaining effective and fair disciplines on unfair trade practices, such object and purpose to be ascertained from the provisions of this Agreement, its preamble and objectives, and the practices of the Parties". This provision is an express statement of the object and purpose of the entire Agreement and refers to fair and predictable conditions for the progressive liberalization of trade between the Parties.

329. In this sense, unilateral interpretations that restrict Canada's commitments to grant TRQs on various dairy products and in quantities that increase year after year render these commitments irrelevant if "eligible applicants" do not have access to them and, as a result, the quantities cannot be filled.

330. In sum, Canada's measures create an ex-ante exclusion of entities that are "active in the Canadian food and agricultural sector" which is not authorized by the Agreement. This ex-ante exclusion colors the way Canada administers its dairy TRQs. Besides, the limitations contained in Canada's 14 Notices to Importers, by establishing a market share basis, are also in violation of the Agreement to the extent that they do not allow for other participants other than processors, further processors, and distributors to obtain TRQ allocations based on their market share for the simple reason that there are no criteria to determine their share of the market.

331. Lastly, as stated before, the shortcomings in the filling of the quotas are largely influenced by Canada's ex-ante exclusion of eligible applicants, such as retailers and food service operators, from the possibility to apply for TRQs.

332. I therefore believe that Canada's measures are inconsistent with Paragraph 3(c) for excluding ex-ante potential applicants who are indeed active in the Canadian food or agriculture sector, as well as with Article 3.A.2.11(b) to the extent that they grant access

only to processors, distributors, and, in some cases, further processors and exclude all other eligible applicants, such as retailers and food service operators, among others.

ANNEX I. LIST OF HEARING PARTICIPANTS

The Panel

- Mateo Diego–Fernández (Chair)
- Kathleen Claussen
- Serge Fréchette

Assistant to the Chair

- Ismael Ortiz

United States

- J. Daniel Stirk, Office of the United States Trade Representative
- Molly Hofsommer, Office of the United States Trade Representative
- Grace Yanagawa, Office of the United States Trade Representative
- Leslie Yang, Office of the United States Trade Representative
- John Corrigan*, Office of the United States Trade Representative
- William Shpiece*, Office of the United States Trade Representative
- Randall Olivier*, Office of the United States Trade Representative
- Nancy Kao, United States Department of Agriculture
- James Klepek, United States Department of Agriculture
- Katherine Nishiura, United States Department of Agriculture
- Mary Ellen Smith, United States Department of Agriculture
- Tyler Babcock, United States Department of Agriculture
- Mihai Lupescu, United States Department of Agriculture

Canada

- Stacy-Paul Healy, Global Affairs Canada – Trade Law Bureau
- Jean-Sébastien Lord, Global Affairs Canada –Trade Law Bureau
- Rosa Kang, Global Affairs Canada –Trade Law Bureau
- Brendan Robertson, Global Affairs Canada –Trade Law Bureau
- Meagan Vestby, Global Affairs Canada –Trade Law Bureau
- Félix Gagnon, Global Affairs Canada –Trade Law Bureau
- Christiane Schuchhardt, Global Affairs Canada –Trade Law Bureau
- Karolina Grzanka, Global Affairs Canada –Trade Law Bureau
- Peter Lee, Global Affairs Canada – Trade Law Bureau
- Ann Marie Broadbent*, Global Affairs Canada – Supply-Managed Trade Controls Division
- Todd Hunter, Global Affairs Canada – Supply-Managed Trade Controls Division
- Blair Hynes, Global Affairs Canada – Supply-Managed Trade Controls Division
- Anca Darbyshire, Global Affairs Canada – Supply-Managed Trade Controls Division
- Adey Bailey*, Global Affairs Canada –Supply-Managed Trade Controls Division
- Evelyne Goulet, Global Affairs Canada – Supply-Managed Trade Controls Division
- Annie Cao, Global Affairs Canada – Supply-Managed Trade Controls Division

- Utkan Oktay*, Global Affairs Canada – Supply-Managed Trade Controls Division
- Kanwal Kochhar, Agriculture and Agri-Food Canada
- Ian Widgett, Agriculture and Agri-Food Canada
- Isabelle Michaud-Germain, Agriculture and Agri-Food Canada
- Alessandro Longo*, Agriculture and Agri-Food Canada
- Karl Blume*, Agriculture and Agri-Food Canada
- Karl Dupuis*, Agriculture and Agri-Food Canada
- Yomara Calderon*, Agriculture and Agri-Food Canada
- Paul Conlin, Conlin Bedard LLP
- Christopher Cochlin, Cassidy Levy Kent
- Matthew Kronby, Borden Ladner Gervais

Mexico

- Arturo Juárez Juárez*, Ministry of Economy
- Luis Fernando Muñoz Rodríguez*, Ministry of Economy
- Oscar Manuel Rosado Pulido*, Ministry of Economy
- Alejandro Rebollo Ornelas*, Ministry of Economy

Canadian Section of the Secretariat

- Sean Clark, Secretary
- Guillaume Cliche, Deputy Secretary
- Chadi Awad, Registrar
- Goethie Darenoncourt, Deputy Registrar
- Micheline Seguin, Senior Coordinator Officer
- Johanne Fernie, Coordinator Officer

Names with * indicate those who participated via the virtual platform.