

CANADA-UNITED STATES-MEXICO AGREEMENT
ARBITRAL PANEL ESTABLISHED PURSUANT TO ARTICLE 31

CANADA – DAIRY TRQ ALLOCATION MEASURES
(CDA-USA-2021-31-010)

Final Panel Report

December 20, 2021

Panel Members
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TABLE OF ABBREVIATIONS

Abbreviation	Definition
CDC	Canadian Dairy Commission
CETA	<i>Canada-European Union Comprehensive Economic and Trade Agreement</i>
CPTPP	<i>Comprehensive and Progressive Agreement for Trans-Pacific Partnership</i>
EIPA	<i>Export and Import Permits Act</i>
ICCC	International Cheese Council of Canada
Treaty or CUSMA or USMCA	<i>Canada-United States-Mexico Agreement/United States-Mexico-Canada Agreement</i>
Panel	Mr. Elbio Rosselli (Chair) Ms. Julie Bédard Mr. Mark C. Hansen
Parties	United States and Canada
TPP	<i>Trans-Pacific Partnership</i>
TRQ	Tariff Rate Quota
VCLT	<i>Vienna Convention on the Law of Treaties</i>
WTO	World Trade Organization

I. Introduction

1. The United States in this proceeding has asked this Panel to determine whether Canada's current practice of reserving 85 to 100% of 14 separate dairy tariff rate quotas ("TRQs") for "processors and further processors" is inconsistent with its obligations under the Canada-United States-Mexico Agreement/United States-Mexico-Canada Agreement (the "Treaty"), namely:

- Its commitment in Article 3.A.2.11(b) not to "limit access to an allocation to processors" when administering an allocated TRQ;
- Its commitment in Article 3.A.2.11(c) to ensure that in administering an allocated TRQ, "each allocation is made . . . to the maximum extent possible, in the quantities that the TRQ applicant requests";
- Its commitments in Articles 3.A.2.4(b) and 3.A.2.11(e) to provide "fair" and "equitable" procedures and methods for administering its TRQs; and
- Its commitment in Article 3.A.2.6(a) (together with its Schedule to Annex 2-B, Appendix 2, Section A, paragraph 3(c)) to not "introduce a new or additional condition, limit, or eligibility requirement on the utilization of a TRQ . . . beyond those set out in [Canada's] Schedule to Annex 2-B."

II. History of the Proceedings

2. On December 9, 2020, pursuant to Articles 31.2 and 31.4 of the Treaty, the United States requested consultations with Canada concerning the measures through which Canada allocates its dairy TRQs under the Treaty.

3. On December 21, 2020, the United States and Canada held consultations over videoconference. The Parties failed to reach a mutually satisfactory resolution to the dispute.

4. On May 25, 2021, the United States requested the establishment of a panel to examine the matter pursuant to Article 31.6.1 of the Treaty, which concerns perishable goods, with the terms of reference set out in Article 31.7 of the Treaty. The United States also proposed that, pursuant to Article 31.9.1(a) of the Treaty, the panel be comprised of three members.

5. Per Article 31.6.4 of the Treaty, a panel was established on May 25, 2021, the same day as the United States' request.

6. On May 31, 2021, the disputing Parties agreed to a three-member Panel. Pursuant to Article 31.9(b) of the Treaty, Mr. Elbio Rosselli was selected as the Panel Chair on June 16, 2021. On July 5, 2021, Ms. Julie Bédard and Mr. Mark C. Hansen were selected to serve as the other members of the Panel.¹

7. In an email dated July 9, 2021, the Secretariat informed the disputing Parties that the Panel sought their views on a timetable for the proceeding as required under Article 18.2 of the Rules of Procedure for Chapter 31. After receiving comments from the Parties, the Panel approved a final timetable on July 12, 2021.

8. The United States filed its Initial Written Submission on July 12, 2021, pursuant to Article 18 of the Rules of Procedure for Chapter 31. The submission came seven days following the date on which the last Panelist was selected.

9. On July 23, 2021, per Article 20.3 of the Rules of Procedure for Chapter 31, Patrick Pelliccione, Chairman of the International Cheese Council of Canada (“ICCC”), a non-governmental entity, formally requested leave on behalf of the ICCC to submit written views in the dispute.

10. In accordance with Article 20.3 of the Rules of Procedure for Chapter 31, after consultations and taking into consideration the comments expressed by the disputing Parties, on July 30, 2021, the Panel decided to grant the ICCC leave to submit written views in the dispute. The Panel also noted that one of the issues the ICCC requested to address, the issue of “how Canada should allocate and administer its TRQs,” fell outside of the Panel’s mandate.

11. The Panel accepted Canada’s request for an extension from August 12, 2021, to August 20, 2021, for Canada to file its written submission. Accordingly, Canada filed its Initial Written Submission on August 20, 2021, pursuant to Article 18 of the Rules of Procedure for Chapter 31.

¹ The following were appointed as Assistants to the Panelists: Mr. Aaron Murphy (Julie Bédard) and Ms. Ana Nikolic Paul (Mark C. Hansen).

12. On August 27, 2021, the ICCC filed its submission, providing written views on issues in the dispute.

13. On September 3, 2021, Canada filed comments on the submission of the ICCC.

14. Also on September 3, 2021, Canada filed a request for a preliminary ruling on whether the Panel's terms of reference include a claim regarding the consistency of Canada's dairy TRQ allocation measures with the first clause of Article 3.A.2.11(c) of the Treaty, which provides: "A Party administering an allocated TRQ shall ensure that . . . each allocation is made in commercially viable shipping quantities."

15. The United States filed its Rebuttal Submission on September 10, 2021, pursuant to Article 18 of the Rules of Procedure for Chapter 31. Paragraph 11 of the United States' Rebuttal Submission argued that it had not made and was not pursuing a claim under the first clause of Article 3.A.2.11(c).

16. On September 13, 2021, the Panel requested additional views from Canada in light of the United States' confirmation that it was not pursuing a claim under the first clause of Article 3.A.2.11(c). Canada provided further comments on September 15, 2021, and explained its view that a preliminary ruling was still necessary to clarify the scope of what was outside the Panel's jurisdiction in relation to the first clause of Article 3.A.2.11(c).² On September 28, 2021, the United States provided written comments as well, opposing Canada's request.

17. Canada filed its Rebuttal Submission on October 1, 2021, pursuant to Article 18 of the Rules of Procedure for Chapter 31.

18. On October 20, 2021, after noticing errors in Exhibits CAN-132 and CAN-134, Canada filed corrected versions of these Exhibits and promptly informed the Panel Chair of the correction via email.

² The United States confirmed on September 28, 2021, that it was not pursuing a claim under the first clause of Article 3.A.2.11(c) regarding "commercially viable shipping amounts." The Panel declines to issue a Preliminary Ruling because the point is moot and the argument is outside the Panel's Terms of Reference.

19. The Oral Hearing was held, as scheduled, in Ottawa, Canada, on October 25 and 26, 2021. Certain members of the Parties' delegations attended virtually.

20. In an email dated October 27, 2021, the Secretariat informed the Parties that the Panel did not have any additional questions following the Oral Hearing. The Secretariat also explained that the Panel was providing the Parties the opportunity to respond in writing to previous questions brought by the Panel or clarify responses provided during the Oral Hearing.

21. Pursuant to Article 18.2(g) and (h) of the Rules of Procedure for Chapter 31, on November 3, 2021, Canada provided written clarifications to responses provided during the Oral Hearing, and responded in writing to some of the Panel's written questions that were not discussed at the Oral Hearing.

22. Pursuant to Article 18.2(g) and (h) of the Rules of Procedure for Chapter 31, on November 10, 2021, the United States submitted comments to Canada's written responses.

23. The Panel met on October 25, 26, and 27, 2021, in person. The Panel members also communicated by end-to-end encrypted messaging. The Panel circulated drafts of its Initial Report for discussion and comment before completing the Initial Report, which was being presented to the Parties on November 24, 2021, as provided in Article 31.17 of the Treaty, in accordance with the schedule to which the Parties agreed by email submission to the Secretariat on November 5, 2021, and as announced by the Panel on November 15, 2021.

24. On December 9, 2021, the Parties submitted their comments to the Panel's Initial Report, as provided in Article 31.17 of the Treaty. The Panel took these comments under advisement and issued a Final Report on December 20, 2021.

III. Factual Background

A. Treaty Provisions

25. The Treaty was signed on November 30, 2018, which was followed by re-negotiations, resulting in the signing of the amended Treaty on December 10, 2019. The Treaty went into effect on July 1, 2020.

26. Under the Treaty, Canada maintains TRQs – a preferential tariff rate on a specified quantity of goods – on, *inter alia*, certain dairy products. As part of its tariff commitments set out in Treaty Chapter 2, Annex 2-B Tariff Commitments, Appendix 2: Tariff Schedule of Canada – (“Tariff Rate Quotas”), Canada has adopted TRQs on 14 different 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.³ The administration of these TRQs, and whether it is consistent with the Treaty, is the issue in this dispute.

27. As defined in the Treaty, a “tariff rate quota” 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.”⁴ Canada is permitted under the Treaty to distribute TRQ amounts pursuant to an “allocation mechanism.” An allocation mechanism is defined in the Treaty as “any system in which access to the tariff rate quota is granted on a basis other than first-come first-served.”⁵

28. Canada’s chosen allocation mechanism for the 14 dairy TRQs involves the establishment of “pools” or reserved amounts of the TRQs for “processors,” such that only processors, including further processors, have access to certain amounts defined in the TRQ Notices to Importers (from 85 to 100%). Other eligible TRQ applicants may apply only within their “pool” for the remaining TRQ amounts – up to 15%.⁶

29. The Parties dispute the meaning of five Articles in the Treaty: Articles 3.A.2.11(b), 3.A.2.11(c), 3.A.2.11(e), 3.A.2.4(b), and 3.A.2.6(a).

30. Article 3.A.2.11(b) provides that:

³ Canada Initial Written Submission at ¶ 5; U.S. Initial Written Submission at ¶ 16.

⁴ Treaty, Article 3.A.2.1.

⁵ *Id.*

⁶ Canada Initial Written Submission at ¶¶ 74-77; U.S. Initial Written Submission at ¶¶ 21-22.

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

(b) unless otherwise agreed by the Parties, it does not allocate any portion of the quota to a producer group, condition access to an allocation on the purchase of domestic production, or limit access to an allocation to processors.

31. The Parties agree that Article 3.A.2.11(b) can be divided into the following four clauses: (1) “Unless otherwise agreed by the Parties” (the “Agreement Clause”); (2) A Party shall ensure that “it does not allocate any portion of the quota to a producer group” (the “Producer Clause”); (3) A Party shall ensure that “it does not . . . condition access to an allocation on the purchase of domestic production” (the “Domestic Production Clause”); and, (4) A Party shall ensure that “it does not . . . limit access to an allocation to processors” (the “Processor Clause”).⁷

32. Article 3.A.2.11(c) provides that:

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

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

33. Article 3.A.2.11(e) provides that:

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

(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.

34. Article 3.A.2.4(b) provides that:

Each Party shall ensure that its procedures for administering its TRQs: . . .

(b) are fair and equitable.

35. Article 3.A.2.6(a) provides that:

⁷ Canada Initial Written Submission at ¶ 94; U.S. Initial Written Submission at ¶ 27.

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

(a) 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.

36. Additionally, the Parties also dispute the meaning of Section A of Appendix 2 to Canada's Tariff Schedule, which provides additional commitments regarding how Canada is required to administer its TRQs. In particular, it provides that Canada is required to administer its TRQs through an import licensing system and that Canada is required to allocate its TRQs to eligible applicants, which are defined as applicants active in the Canadian food or agriculture sector.

37. For each TRQ, Section B of Appendix 2 to Canada's Tariff Schedule sets out the following:

(1) the requirement that the originating goods covered by the TRQ shall be permitted duty-free entry into Canada in each quota year;

(2) a table that sets out the aggregate quantity in each quota year that receives the duty-free treatment gradually increasing over a specified period (e.g., 19 years);

(3) the tariff item numbers corresponding to the dairy products eligible for import under the TRQ;

(4) the type of year (i.e., calendar year or dairy year) on the basis of which the TRQ will be allocated.

38. In addition, four of the TRQs (Milk, Cream, Butter and Cream Powder, and Industrial Cheeses) in Section B of Appendix 2 to Canada's Tariff Schedule include end-use restrictions that

require a certain percentage of the TRQ to be used for processing into ingredients for further food processing, or used as ingredients for further food processing, and not for retail sale.⁸

B. Canada's Dairy Tariff Rate Quotas

39. To administer its dairy TRQ volumes, Canada uses an import licensing system. This system requires the issuance of shipment-specific import permits for all imports that draw upon the TRQ volumes. Canada limits issuance of these import permits, and thus access to imports under the TRQs, to allocation holders. The design of an allocation mechanism, including who may obtain an allocation, is left up to the discretion of the importing Party, in this case Canada, to determine, subject to compliance with the other provisions of the Treaty.⁹

40. On June 15, 2020, Global Affairs Canada published Notices to Importers concerning 14 TRQs for dairy products subject to the Treaty's TRQ commitments.¹⁰ On October 1, 2020 and May 1, 2021, Global Affairs Canada published revised Notices.¹¹ These Notices were

⁸ *E.g.*, Treaty, Chapter 2, Annex 2-B Tariff Commitments, Appendix 2: Tariff Schedule of Canada - (Tariff Rate Quotas), Section B, para. 5(b)(i) ("Up to 85 percent of the TRQ quantities set out in subparagraph (a) shall be for the importation of milk in bulk (not for retail sale) to be processed into dairy products used as ingredients for further food processing (secondary manufacturing)."); *id.* para. 9(b) ("Only goods in bulk (not for retail sale) used as ingredients for further food processing (secondary manufacturing) shall be imported under this TRQ."); *see also* Canada Initial Written Submission at ¶ 60; U.S. Initial Written Submission at ¶ 43.

⁹ Canada Initial Written Submission at ¶ 62.

¹⁰ CUSMA: Milk TRQ – Serial No. 1015, dated June 15, 2020 (Exhibit USA-1); CUSMA: Cream TRQ – Serial No. 1016, dated June 15, 2020 (Exhibit USA-3); CUSMA: Skim Milk Powder TRQ – Serial No. 1017, dated June 15, 2020 (Exhibit USA-5); CUSMA: Butter and Cream Powder TRQ-Serial No. 1018, dated June 15, 2020 (Exhibit USA-7); CUSMA: Industrial Cheeses TRQ-Serial No. 1019, dated June 15, 2020 (Exhibit USA-9); CUSMA: Cheeses of All Types TRQ-Serial No. 1020, dated June 15, 2020 (Exhibit USA-11); CUSMA: Milk Powders TRQ - Serial No. 1021, dated June 15, 2020 (Exhibit USA-12); CUSMA: Concentrated or Condensed Milk TRQ-Serial No. 1022, dated June 15, 2020 (Exhibit USA-14); CUSMA: Yogurt and Buttermilk TRQ-Serial No. 1023, dated June 15, 2020 (Exhibit USA-15); CUSMA: Powdered Buttermilk TRQ-Serial No. 1024, dated June 15, 2020 (Exhibit USA-16); CUSMA: Whey Powder TRQ-Serial No. 1025, dated June 15, 2020 (Exhibit USA-17); CUSMA: Products Consisting of Natural Milk Constituents TRQ-Serial No. 1026, dated June 15, 2020 (Exhibit USA-19); CUSMA: Ice Cream and Ice Cream Mixes TRQ-Serial No. 1027, dated June 15, 2020 (Exhibit USA-20); CUSMA: Other Dairy TRQ-Serial No. 1028, dated June 15, 2020 (Exhibit USA-21).

¹¹ CUSMA: Milk TRQ-Serial No. 1049, dated May 1, 2021 (Exhibit USA-2); CUSMA: Cream TRQ-Serial No. 1042, dated May 1, 2021 (Exhibit USA-4); CUSMA: Skim Milk Powder TRQ-Serial No. 1053, dated May 1, 2021 (Exhibit USA-6); CUSMA: Butter and Cream Powder TRQ-Serial No. 1040, dated May 1, 2021 (Exhibit USA-8); CUSMA: Industrial Cheeses TRQ-Serial No. 1031, dated October 1, 2020 (Exhibit USA-10); CUSMA: Milk Powders TRQ-Serial No. 1051, dated May 1, 2021 (Exhibit USA-13); CUSMA: Whey Powder TRQ-Serial No. 1045, dated May 1, 2021 (Exhibit USA-18).

promulgated pursuant to the *Export and Import Permits Act* (“EIPA”) and its corresponding regulations. Publication of the Notices opened the application period for access to allocations of Canada’s TRQs. Under the authority of the EIPA, a product that is subject to a TRQ can be imported only by someone who has a valid import permit. For all of Canada’s Treaty dairy TRQs, access to 80% or more of the total quota volume is reserved for “processors.” For 10 of the dairy TRQs, an additional 10 to 20% is reserved for “further processors.”¹² And, for 13 of the dairy TRQs, an additional 10 to 15% is reserved for distributors.

C. Canada’s Supply Management System

41. Canada has provided extensive information about the operation of the domestic market for dairy products in Canada and its supply-managed production and marketing framework that is based on three “pillars:” (1) controlled production, (2) pricing mechanisms, and (3) controlled imports. That information is summarized below.

(1) Controlled Production. Because milk production cannot be stopped or paused easily, significant efforts are required to ensure that the quantity of production of raw milk by Canadian dairy farmers is within the quantity demanded from the marketplace. The Canadian Dairy Commission (“CDC”) plays a role in ensuring milk production is aligned with demand. The CDC calculates demand, referred to as Total Requirements, and it calculates supply, otherwise known as Total Production Quota, which is set monthly.¹³

(2) Pricing Mechanisms. As part of Canada’s system, all raw milk produced and marketed in Canada must be sold by producers to the provincial Milk Marketing Boards, which in turn sells this raw milk as the primary raw materials input to processors. Prices paid by processors and received by producers vary depending on how the milk is ultimately used (the milk’s end-use). The Canadian dairy industry has organized these end-uses under the Harmonized Milk Classification System.¹⁴

¹² U.S. Initial Written Submission at ¶ 21.

¹³ Canada Initial Written Submission at ¶¶ 35-36; Canada Responses to Panel Questions at ¶¶ 3-4.

¹⁴ Canada Initial Written Submission at ¶¶ 40-42.

(3) Controlled Imports. Canada has granted preferential market access to its trading partners by establishing TRQs for supply-managed products under its trade agreements, which allow a specified quantity to enter Canada duty-free or at a low rate of duty. As a part of its import controls, Canada keeps track of the quantity of dairy products entering Canada. This information is used in calculating the Total Production Quota to ensure that supply (domestic production plus imports) aligns with domestic demand under the production pillar.¹⁵

42. Canada argues that these three pillars are fundamental to the stability of the supply management system and work together to balance supply and demand of dairy products within Canada. This dispute involves the intersection between Canada’s TRQ commitments under the Treaty, which provided significant additional access to Canada’s dairy market, and Canada’s system of supply management (in particular, the third pillar).¹⁶

43. By the end of the 1980s, the three pillars of supply management were well established; dairy farms became more specialized, earning most of their revenues from milk, and production levels and milk prices stabilized, allowing producers to invest in their farms. Further, the matching of supply and demand of milk provided predictable inputs for processing and the production of the various products ultimately provided to consumers.¹⁷

44. There are six main actors in Canada’s dairy market: (i) producers (dairy farmers), (ii) processors, (iii) further processors, (iv) distributors, (v) food service, and (vi) retailers. The first two – producers and processors – are on the “supply side” as they provide products to the others in the supply chain, while the others are on the “demand side,” including processors who are on the “demand side” with respect to producers.

(i) Producers. Dairy producers (farmers) sell raw milk to provincial milk marketing boards, which in turn sell raw milk for processing to licensed dairy processors for the

¹⁵ Canada Initial Written Submission at ¶ 44.

¹⁶ Canada Initial Written Submission at ¶ 15; Canada Responses to Panel Questions at ¶ 24.

¹⁷ Canada Initial Written Submission at ¶ 21.

manufacturing of dairy products. In 2020, the total net farm cash receipts in this sector was \$7.13 billion, from production at 10,095 dairy farms with 18,805 on-farm employees.¹⁸

(ii) Processors. Dairy processors play a key role in turning raw milk from the farm into dairy products for the consumer. Processors purchase raw milk from a provincial milk marketing board and then use it to manufacture different dairy products such as butter, cheese, yogurt, ice cream, etc. Processors then sell their products to further processors, distributors, food service, and retailers. The dairy processing sector directly employs over 24,500 Canadians and accounts for more than 15% of total food and beverage manufacturing sales, with \$17.3 billion in manufacturing sales of dairy products in 2020.¹⁹

(iii) Further Processors. Further processors are entities that do not produce dairy products but rather incorporate dairy products as ingredients in the manufacturing of further processed products.²⁰

(iv) Distributors. Distributors purchase food products, including dairy products, from the food manufacturing sector (e.g., processors and further processors), for resale to a third party.²¹

(v) Food Service. The food service industry (e.g., restaurants) purchases dairy products from processors or distributors and therefore constitute part of the demand for dairy products that requires supply from producers and processors.²²

(vi) Retailers. Canada's grocery retail industry is divided into two major categories: (1) supermarkets and grocery stores, and (2) warehouse clubs and supercenters. The Canadian supermarket/grocery store industry primarily sells food products, while the

¹⁸ Canada Initial Written Submission at ¶ 23.

¹⁹ Canada Initial Written Submission at ¶¶ 24-25; Canada Responses to Panel Questions at ¶¶ 5-6.

²⁰ Canada Initial Written Submission at ¶¶ 28-29.

²¹ Canada Initial Written Submission at ¶ 30.

²² Canada Initial Written Submission at ¶ 31.

warehouse club/supercenter industry is made up of large stores that primarily retail both grocery products and merchandise items (e.g., apparel, home goods, and furniture). Both categories of grocery retailers are heavily concentrated. The top five supermarkets and grocery retailers held an estimated 80% of the grocery market share of sales in 2020. The supermarket and grocery industry had sales of \$99.3 billion in 2020.²³

45. Canada notes that it has long taken the approach of administering its TRQs by reserving a portion of its TRQs for processors. The practice dates back to 1995, when Canada created pools for processors and other industry groups in administering the World Trade Organization (“WTO”) TRQ for Chicken and Chicken Products.²⁴

46. Under the *Canada-European Union Comprehensive Economic and Trade Agreement* (“CETA”), Canada established dairy TRQs for Cheese and Industrial Cheese for the first time under a free trade agreement. Since September 21, 2017, Canada has been administering these TRQs by reserving a portion of the Cheese TRQ for processors, while the entire Industrial Cheese TRQ is reserved for further processors.²⁵

47. Additionally, under the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (“CPTPP”), the successor of the *Trans-Pacific Partnership* (“TPP”), Canada established 16 dairy TRQs, which were also administered by reserving a portion of the TRQ for processors. The TPP was signed on February 4, 2016, with the United States as a signatory. On January 30, 2017, the United States withdrew from the agreement and the other TPP signatories engaged in negotiations towards the CPTPP, which was signed on March 8, 2018, and entered into force on December 30, 2018.²⁶

48. Canada maintains that its allocation mechanism is, in part, designed to ensure a degree of predictability for imports to avoid surges and excess domestic supply necessitating storage or

²³ Canada Initial Written Submission at ¶¶ 32-33.

²⁴ Canada Initial Written Submission at ¶ 45.

²⁵ Canada Initial Written Submission at ¶ 46.

²⁶ Canada Initial Written Submission at ¶¶ 47-48.

disposal, or unpredictable patterns of imports that cause disruptions to the milk production cycle and shortages. Consequently, Canada has established “pools,” including those for processors, to help with this effort. Canada further submits that processors are in a unique position within the Canadian dairy supply chain to balance imports with domestic production, fill gaps in supply, and respond to overall consumer demand and trends.²⁷

49. The Panel has considered all of Canada’s arguments and submissions in regard to its domestic dairy industry.

IV. Decision of the Panel

A. Preliminary Considerations

1. Burden of Proof

50. The Panel is guided by the Treaty Rules of Procedure for Chapter 31. Article 14.1 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.

51. Canada points out that, as complainant, the United States has the burden of establishing the inconsistencies alleged in its request for the establishment of a panel. The United States does not contest this point and the Panel therefore will hold the United States to its burden of proof.²⁸

²⁷ Canada Initial Written Submission at ¶ 63; Canada Responses to Panel Questions at ¶¶ 3-19.

²⁸ Canada Initial Written Submission at ¶ 235; U.S. Rebuttal Submission at ¶ 21.

2. Interpretive Principles

52. In this section, the Panel sets out the general legal framework for the interpretation of the provisions under which the United States has brought claims.

53. The Treaty instructs that the Panel must interpret the text “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*.”²⁹ The Parties agree that the Vienna Convention is the appropriate interpretive guide for resolving this dispute.³⁰

54. The principal rule of the Vienna Convention’s interpretive methodology is Article 31(1), providing: “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.”³¹

55. As the WTO Appellate Body has stated, the touchstone of analysis under Article 31 is that the “interpretation must be based above all upon the text of the treaty.”³² The Panel must therefore start by identifying the plain and ordinary meaning of the words used. In doing so, the Panel will take into consideration the meaning actually to be attributed to each of the terms of the relevant provisions by looking at the text as a whole, examining the context in which the words appear, and considering them in the light of the object and purpose of the treaty to best illuminate the provision’s plain and ordinary meaning.³³

56. Context refers to “reading words in their immediate surroundings” and can encompass other provisions of the treaty – its preamble, annexes, and other agreements.³⁴ In this proceeding,

²⁹ Treaty, Article 31.13.4.

³⁰ Canada Initial Written Submission at ¶ 13; U.S. Initial Written Submission at ¶ 25.

³¹ Vienna Convention on the Law of Treaties Art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 (“VCLT”).

³² *Japan – Taxes on Alcoholic Beverage*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, (4 October 1996) at 11.

³³ *US – Section 301 Trade Act*, WT/DS152/R, (27 January 2000) at ¶ 7.22; *US – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, (27 January 2003) at ¶ 248.

³⁴ *US – Section 301 Trade Act*, WT/DS152/R, (27 January 2000) at ¶ 7.22; *US – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, (27 January 2003) at ¶ 248.

the Panel has looked to context from other provisions and other clauses in Article 3.A.2.11(b), including in particular the wording and structure of the “Producer Clause” and “Domestic Production Clause” to aid in interpreting its disputed adjacent clause, the “Processor Clause.”³⁵

57. The Panel must also consider the “object and purpose” of the Treaty, including the Processor Clause.³⁶

58. Interpretation under Article 31 is also guided by longstanding and foundational rules of treaty interpretation.³⁷ The first key principle applied by the Panel is that “[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”³⁸ This can also be understood as the interpreter’s obligation to “give meaning and effect to all the terms of the treaty,”³⁹ and reject interpretations that “deprive [the provision] of effectiveness.”⁴⁰ Effectiveness must be achieved through an interpretation that gives full meaning to all provisions of a treaty,⁴¹ beyond purely nominal effectiveness.

59. A second key principle applied by the Panel is that interpretation must be designed to “ascertain the ‘common intention’ of the parties, not the intention of [one party] alone.”⁴² In these

³⁵ Treaty, Article 3.A.2.11(b).

³⁶ The Panel takes note of the position of the United States, which suggested at the Oral Hearing that trying to discern the purpose of particular treaty provisions rather than the treaty as a whole is “dangerous territory” that “might have undue influence . . . on [the] reading of the terms in the clause.” See Transcript of Panel Hearing on October 25, 2021 (“Day 1 Tr.”) at 148:1-149:24 (Can.).

³⁷ VCLT, Article 31:3(c) (listing as a factor of interpretation “relevant rules of international law applicable in the relations between the parties”).

³⁸ *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/9, (20 May 1996) at 23.

³⁹ *Korea – Dairy*, WT/DS98/AB/R, (12 January 2000) at ¶ 80.

⁴⁰ *US – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, (27 January 2003) at ¶ 271.

⁴¹ *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, (14 December 1999) at ¶ 95 (endorsing an interpretation by the panel that ensured certain safeguard measures were “given their full meaning and their full legal effect”). Cf. *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, (3 March 2005) at ¶ 522 (affirming the panel’s interpretation that allowed a provision to be read to give “full and effective meaning to all of [a treaty’s] terms”).

⁴² *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, (19 January 2010) at ¶ 405 (explaining that ascertaining the common

proceedings, this means that unilateral evidence of intention, either of the United States or Canada, is insufficient for interpretation of treaty provisions.⁴³

60. At the outset, the Panel notes that it believes that both Parties have maintained their positions in good faith. The Panel's decision does not suggest that either side's interpretation is not in good faith.

61. The Panel has determined that its analysis of Article 3.A.2.11(b)'s Processor Clause produces a clear, unambiguous, and rational result under Article 31. Because Canada has, however, urged the Panel to consider materials relevant to the Article 32 analysis, and devoted a substantial part of their submissions and arguments to these materials, the Panel has considered them to confirm its interpretation under Article 31, and will set forth its conclusions about them *infra*. The Article 32 materials do not change the Panel's decision about the meaning of the Processor Clause.

B. The Issue in Dispute

62. The Parties' central area of disagreement is whether Canada's allocation mechanism limiting access to 85 to 100% of the 14 dairy TRQ amounts to processors (including further processors) is consistent with Article 3.A.2.11(b). The Parties advance conflicting interpretations of the clause.

63. The United States maintains that Canada has "limited access to an allocation" to processors, because both the initial 85 to 100% set aside in reserved pools is an "allocation" that is limited to processors (and further processors), and because access is limited to each specific allocation made from the reserved pools.

intention of the parties is the key focus of treaty interpretation under both Article 31 and Article 32 of the Vienna Convention).

⁴³ *In re Cross-Border Trucking Services*, USA-MEX-98-2008-01, Final Panel Report (February 6, 2001) (noting that the Panel "declines to examine the motivation for the U.S. decision to continue the moratorium on cross-border trucking services and investment; it confines its analysis to the consistency or inconsistency of that action with NAFTA.").

64. Canada maintains that it has *not* limited access to an allocation to processors, because it has allowed access for at least one non-processor to at least one allocation. It further maintains that the creation of the pools cannot itself be an allocation because only a specific grant to a specific recipient can be an allocation, and that grants of allocation from within the pools are not inconsistent with Article 3.A.2.11(b). Canada argues this is because when the TRQ is viewed as a whole, access to an allocation has not been limited to processors: ergo, at least one allocation has been made available to non-processors.

65. It should be noted that the Panel has duly considered all of the arguments raised by the Parties in their submissions, made at the Oral Hearing, and in post-hearing supplemental responses to Panel questions, even if some of the arguments are not explicitly addressed in this Initial Report.

1. The United States' Interpretation

66. The United States argues that the term “allocation” in the Processor Clause refers to a portion of the quota. Read in context, the phrase “not . . . limit access to an allocation to processors” means to not “confine” or “restrict” to someone (“processors”), “the right or opportunity to benefit from or use” something (“a portion, a share; a quota”). This provision is a prohibition on reserving a portion of the quota for the exclusive use of processors.⁴⁴

67. According to the United States, Canada violates the Processor Clause because by setting aside and reserving portions of Canada’s TRQs for the exclusive use of processors, Canada has limited access to an allocation to processors. While processors are eligible to apply for and receive portions of the quota on the same terms as other quota applicants under the United States’ interpretation, they cannot have exclusive access to a portion of the quota.⁴⁵

68. Based on the dictionary definition of “allocation,” the United States first posits that the term can refer to either a procedure for dividing up a quota or a portion of the quota. However, contextual evidence suggests the term refers to a “portion of the quota.”

⁴⁴ U.S. Initial Written Submission at ¶ 50.

⁴⁵ U.S. Initial Written Submission at ¶ 51.

69. First, the United States argues that the structure and immediate context of the three clauses in Article 3.A.2.11(b) suggest “an allocation” means a portion of the TRQ. The first clause requires that a Party “does not allocate any portion of the quota to a producer group.” In that clause, the verb “to allocate” means to assign a portion of a TRQ. The next two clauses use different verbs (condition, limit) with “access to an allocation.” In these clauses, the TRQ has been “allocated” – that is, assigned into portions – and the commitment relates to providing “access” to those portions. The most natural reading of the provision is that “an allocation” is the result of “allocat[ing] any portion of the quota.”⁴⁶

70. Second, the United States suggests that reading the term “allocation” in the Processor Clause of Article 3.A.2.11(b) as meaning “portion” would logically reflect an agreement by the Parties that processors may apply for and receive a portion of the TRQ, but may not be granted special access to a portion of the TRQ that has been set aside for them prior to administering the procedure for dividing up the quota into portions assigned to particular quota applicants.⁴⁷

71. Third, the United States contends that interpreting the clause differently would be at odds with Article 3.A.2.11(c), which requires that the Parties ensure each allocation is made, to the maximum extent possible, in the quantities that the TRQ applicant requests. Interpreting the term “allocation” to allow for a system that designates 85% of the allocation to one importer group cannot be said to ensure to the maximum extent possible that allocations are in the quantities requested. Instead, it is likely that many TRQ applicants would be denied the quantities requested under such a system.⁴⁸

72. Fourth, the United States notes that Section B of Appendix 2 to Canada’s Tariff Schedule provides end-use restrictions for milk, cream, and butter and cream powder, where “up to 85%” of the quota must be for importation in bulk (not retail sale) to be processed into dairy products used as ingredients for further processing. These end-use restrictions were agreed upon by the Parties and represent the extent to which Canada may deviate from the prohibition on additional

⁴⁶ U.S. Initial Written Submission at ¶ 38.

⁴⁷ U.S. Initial Written Submission at ¶¶ 39-41.

⁴⁸ U.S. Initial Written Submission at ¶ 42.

conditions, limits, or eligibility requirements in Article 3.A.2.6(a). If an allocation was understood in a way that would allow dairy TRQs (for all products in addition to milk, cream, and butter and cream) to be set aside for processors, that would render the carve-outs in Canada's Tariff Schedule "inutile." Canada could administer TRQs with and without carve-outs the same.⁴⁹

73. The United States further submits that Canada's proposed interpretation contradicts its own Notices to Importers, which state that 80% or more of the quota "*is allocated to processors.*" Thus, in Canada's own words, the "pool" is itself an "allocation." The United States also points to the EIPA, the law pursuant to which Canada's Notices to Importers are promulgated, and states that the law makes reference to "import access quantities" in the context of describing how the Minister allocates the quota to different importer groups. Consequently, the United States asserts that Canada's own laws contradict its interpretation of the term "an allocation."⁵⁰

74. The United States argues that if Canada's proposed interpretation were accepted, it would lead to the conclusion that the pools Canada creates are groups of shares of quota that may be granted to individual applicants. In other words, the pools are filled with allocations, by Canada's own definition of the term "allocation." Therefore, because only processors can apply for and receive an individual allocation from a specific pool, with respect to each allocation in the pool reserved for processors, Canada is "limit[ing] access" to each individual allocation in the pool "to processors."⁵¹

75. The United States also notes that the dictionary definition of "an" (provided by Canada) provides that the word can mean "any." The United States cites other dictionary definitions to the same effect. There would be severe implications if Canada's interpretation is accepted. For example, if there were 1,000 allocations, Canada could, from the outset, reserve 999 of them for processors, leaving only one allocation available for a non-processor.⁵²

⁴⁹ U.S. Initial Written Submission at ¶¶ 43, 48.

⁵⁰ U.S. Rebuttal Submission at ¶ 34.

⁵¹ U.S. Rebuttal Submission at ¶ 41.

⁵² U.S. Rebuttal Submission at ¶¶ 37-38.

76. Finally, the United States suggests that the dictionary definition of “processor” in Article 3.A.2.11(b) includes “further processors.”⁵³ The United States cites the dictionary definition of “processor” as “[a] person or thing which performs a process or processes something; spec. . . . (b) a food processor.”⁵⁴ Looking to the dictionary definition, the United States explains that the term “processor” does not denote only the initial processing of a good or set a finite limit on the number of times a good is processed before it is considered something other than a “processor.”⁵⁵

2. Canada’s Interpretation

77. Canada argues that in the Processor Clause, the term “allocation” should be understood as a share of an in-quota quantity that may be granted to an individual applicant. Properly interpreted, the Processor Clause prohibits a Party from restricting *only* to processors the possibility of obtaining “an allocation,” i.e., at least one share of an in-quota quantity that may be granted to an individual applicant. Accordingly, if it is possible for a single non-processor to receive “an allocation,” then there is no inconsistency with the Processor Clause.⁵⁶

78. Canada contends that the United States incorrectly interprets the Processor Clause as prohibiting Canada from reserving “any portion” of the TRQs for processors.⁵⁷ The United States further errs by failing to consider the determiner “an” with the noun “allocation.”⁵⁸

79. Canada agrees with the United States that the ordinary meaning of the term “limit access to” is “to restrict” to *someone* (“processors”) the “opportunity to benefit from or use” *something* (“an allocation”). Similar to the United States’ position, Canada argues that based on the dictionary definitions, allocation could refer to either a process or the outcome or result of the

⁵³ U.S. Rebuttal Submission at ¶¶ 52-53.

⁵⁴ *Id.* (citing definition of “processor” from Oxford English Dictionary Online).

⁵⁵ U.S. Rebuttal Submission at ¶ 53.

⁵⁶ Canada Initial Written Submission at ¶ 86.

⁵⁷ Canada Initial Written Submission at ¶ 98.

⁵⁸ Canada Initial Written Submission at ¶¶ 116-118.

process. Canada’s interpretation corresponds to the second meaning: “That which is allocated to a particular person, purpose, etc.; a portion, a share; a quota.”⁵⁹

80. Canada argues that the ordinary meaning of the phrase “an allocation” supports its position that an allocation is a share of an in-quota quantity that may be granted to an individual applicant. The definition of allocation mechanism, as used in the Treaty, can be understood as a system in which the opportunity to use (“access”) the TRQ is given to someone (“granted”) on a basis other than first-come first-served. Considering both the dictionary definition of “allocation” and the Treaty’s definition of the term “allocation mechanism,” an allocation is the specific share of a particular recipient entity or person. Canada’s formulation appropriately reflects the fact that the allocation is not yet granted to someone, rather, the Processor Clause is about the possibility of receiving such a share.⁶⁰

81. Contrary to the United States’ argument, Canada claims that the portion of a TRQ reserved for processors cannot be “an allocation” based on the ordinary meaning of that term, because that portion is not – and is not intended to be – allocated to a particular person. Canada suggests that portion of a TRQ is properly understood as a “proportion” or “fraction” of a TRQ, which does not correspond to the meaning of the term “allocation,” as an allocation requires the portion to be assigned to someone.⁶¹

82. Furthermore, Canada argues that the United States ignores that “an” does not equal “any.” The dictionary definition of “an” can mean a single but not specifically identified thing of a class, or any in the sense of everything of the type referred to in a given sentence. Notably, in the Processor Clause, the Parties chose to use the word “an” – unlike the Producer Clause, where the Parties use the word “any.” The choice of the word “an” in the Processor Clause means “an

⁵⁹ Canada Initial Written Submission at ¶¶ 97, 105, 108.

⁶⁰ Canada Initial Written Submission at ¶¶ 98-107.

⁶¹ Canada Initial Written Submission at ¶ 112.

allocation” is a single allocation, or single share of a TRQ that may be granted to a particular applicant.⁶²

83. If the United States’ interpretation were adopted, Canada contends it would mean that Canada cannot set aside a single allocation that may be granted under a TRQ exclusively for processors, and that non-processors must have access to every single allocation that may be granted under a TRQ.⁶³

84. Canada also points to contextual elements to support its interpretation. First, Canada argues the portion of a TRQ reserved for processors cannot be an “allocation.”⁶⁴ This is demonstrated by the use of the term “any portion of the quota” in the Producer Clause. The United States wrongly suggests that “an allocation” is shorthand for “any portion of the quota.” However, if the Parties wanted to prohibit a Party from limiting access to a portion of the TRQ to processors, they would have used the same language in the Processor Clause.⁶⁵

85. Canada argues that the United States wrongly asserts that in the Domestic Production Clause and in the Processor Clause “the TRQ has been ‘allocated’ – that is, assigned into portions – and the commitment relates to providing ‘access’ to those portions.”⁶⁶ However, as other provisions in the Treaty confirm, a TRQ is not “allocated” unless and until the shares of the in-quota quantity are allocated to individual applicants.⁶⁷

86. Second, according to Canada, “an allocation” cannot mean “any allocation.” In other provisions of the Treaty, including Article 3.A.2, the Parties used “any” when clearly intending to refer to “every member of the class or group.”⁶⁸ Canada contrasts the hypothetical statements that:

⁶² Canada Initial Written Submission at ¶¶ 114-117.

⁶³ Canada Initial Written Submission at ¶ 90.

⁶⁴ Canada Initial Written Submission at ¶¶ 121-122.

⁶⁵ Canada Initial Written Submission at ¶ 123.

⁶⁶ Canada Initial Written Submission at ¶ 124.

⁶⁷ *Id.*

⁶⁸ Canada Initial Written Submission at ¶¶ 125-128.

“Gate-keepers shall not limit access to a fishing permit to club members” with “Gate-keepers shall not limit access to any fishing permit to club members.” Canada therefore submits that only the latter means non-club members must have access to all the permits.⁶⁹

87. Canada also rebuts the contextual arguments of the United States as follows.

88. First, the United States erroneously uses the term “special access” when referring to the TRQ pool for processors. The pool for processors does not constitute “special access” as there are pools for other groups as well, such as distributors. Furthermore, the Processor Clause is not a non-discrimination provision.⁷⁰

89. Second, the United States incorrectly attempts to impute notions of substantive “fairness” and “equity” as relevant context. However, the decision to set aside a portion of the quota is a substantive policy decision distinct from procedures or methods of administering the TRQs as governed by Articles 3.A.2.4(b) and 3.A.2.11(e).⁷¹

90. Third, Article 3.A.2.11(c)’s heed to “ensure that . . . each allocation is made . . . to the maximum extent possible,” is not relevant context, and is an attempt by the United States to obtain through these proceedings that which it did not secure through negotiations.⁷²

91. Fourth, there are problems with the United States’ conclusion that, because Canada did not reserve the right in its Tariff Schedule pursuant to Article 3.A.2.6(a) to set aside a portion of each TRQ for processors, it is now prohibited from making such set-asides. Canada has not yielded rights or made concessions in its Tariff Schedule with respect to its ability to grant allocations to processors under its allocation mechanism. A tariff schedule is not an instrument to “reserve” (or “withhold”) a right if that right is not yielded in the schedule in the first place. The United States erroneously equates a set-aside for processors with an end-use restriction: The set-asides for

⁶⁹ Canada Initial Written Submission at ¶¶ 130-131.

⁷⁰ Canada Initial Written Submission at ¶ 135.

⁷¹ Canada Initial Written Submission at ¶ 136; Canada Responses to Panel Questions at ¶ 47.

⁷² Canada Initial Written Submission at ¶ 139.

processors are a feature of Canada’s allocation mechanisms to designate who can import the goods, not which products are imported or how imports are used. Canada has the discretion to design its allocation mechanism in the manner it deems best for its commercial industrial policy objectives.⁷³

92. Canada argues that the Notices to Importers do not signal that Canada considers a pool to be an allocation. Canada’s use of the term “allocated” in the Notices means that a certain percentage of a TRQ volume is set aside, or reserved, for certain groups for the purpose of calculating individual allocations that will be issued, as the title – “[c]alculation of allocations” – indicates. Canada also argues these Notices are “policy documents” for publication and general information, and do not have the “force of law.”⁷⁴

93. Canada submits the United States has a flawed understanding of what a set-aside or reserved pool of TRQ volume is in contrast to what an allocation is. Pools are not collections of individual allocations simply waiting to be distributed. Neither the overall within-access TRQ volume itself (i.e., in-quota quantity) nor any pool that may have been established constitute an allocation to an individual applicant. According to Canada, a pool is simply a *proportion* (expressed in percentage) of an in-quota quantity – i.e., a determined volume – reserved for applicants that may apply for an allocation from one part or another of a particular segment of the Canadian market.⁷⁵

94. Canada also argues that the United States’ interpretation uses an incorrect reference point for determining whether Canada limits access to an allocation. The United States uses a set-aside or reserved pool of TRQ volume as the “reference” for application of Article 3.A.2.11(b), rather than the TRQ volume as a whole. However, the introductory paragraph of Article 3.A.2.11 and language in Article 3.A.2.11(a) suggest the correct reference point for determining whether a Party administering a TRQ “limits access to an allocation” is the TRQ volume as a whole.⁷⁶

⁷³ Canada Initial Written Submission at ¶¶ 140-143.

⁷⁴ Canada Rebuttal Submission at ¶ 51.

⁷⁵ Canada Rebuttal Submission at ¶¶ 54-57.

⁷⁶ Canada Rebuttal Submission at ¶¶ 58-60.

95. At the hearing, Canada stated that the United States was not without recourse if Canada's allocation mechanism is ruled to be consistent with the Treaty, but the United States remains dissatisfied with the result.⁷⁷ The United States has recourse, according to Canada, to the non-breach dispute settlement provisions, as articulated in Article 31.2(c), which apply:

when a Party considers that a benefit it could reasonably have expected to accrue to it under . . . Chapter 3 (Agriculture) . . . is being nullified or impaired as a result of the application of a measure of another Party that is not inconsistent with this Agreement.⁷⁸

96. Canada further argues that pools are the only allocation mechanism that properly ensures predictability and stability to Canada's supply management system.⁷⁹ Beginning in 2019, the Canadian government commenced a comprehensive review of the allocation and administration of all tariff rate quotas for supply-managed products, including those that could be implemented under the Treaty. As the comprehensive review was still ongoing when the Treaty entered into force, Canada implemented the policies set out in the Notices to Importers at issue in this dispute, rejecting mechanisms based on historical imports, auctions/lotteries, pro-rata shares, on-demand shares, and market-share/equal-share.⁸⁰ Canada also surveyed relevant industry groups, and found a preference for a market-share or equal-share allocation mechanism.⁸¹ Canada explains that separate pools for processors and distributors cater to this preference by creating a market-share approach in the pool for processors and further processors, and an equal-share approach in the pool for distributors.⁸² Canada therefore argues that the inadequacy of other mechanisms and inability to mix methods for allocation without pools means that separate pools for processors and

⁷⁷ Transcript of Panel Hearing on October 26, 2021 ("Day 2 Tr.") at 64:12-64:16 (Can.); Canada Responses to Panel Questions at ¶¶ 37-38.

⁷⁸ Treaty, Article 31.2(c).

⁷⁹ Canada Responses to Panel Questions at ¶ 12.

⁸⁰ Canada Responses to Panel Questions at ¶¶ 19-30.

⁸¹ Canada Responses to Panel Questions at ¶ 15.

⁸² Canada Responses to Panel Questions at ¶¶ 16-17.

distributors is the *only* allocation mechanism adequate to serve the country’s legitimate need for stability and predictability.⁸³

97. Finally, Canada explains that the allocation measures specifically reference “further processors” in creating TRQ pools⁸⁴ and argues that because Article 3.A.2.11(b) only references “processors” and not “further processors,” the clause does not apply.⁸⁵ Canada first argues that the term “processors” in the Processor Clause does not encompass “further processors” for whom some TRQ pools have been created because the United States’ dictionary definition is not dispositive of the meaning of the term “processors.”⁸⁶ Canada instead offers that the term “further processors” has a distinct meaning when properly understood in the context of Canada’s dairy supply chain.⁸⁷ Canada looks not to any dictionary definition, but rather the market-specific nature of the terms “processor” and “further processor.”⁸⁸

C. The Panel’s Analysis

98. The Panel finds that Canada’s acknowledged practice of reserving access to 85 to 100% of 14 separate dairy TRQs exclusively to processors (including further processors), is inconsistent with Article 3.A.2.11(b) for it fails to “ensure that,” “unless otherwise agreed by the Parties,” Canada “does not . . . limit access to an allocation to processors.” No one other than processors has access to, or can apply for, these allocations. Hence access is limited to processors, which is not permitted by the Treaty.

⁸³ Canada Responses to Panel Questions at ¶ 31.

⁸⁴ Canada Initial Written Submission at ¶¶ 74-76.

⁸⁵ Canada Initial Written Submission at ¶ 119.

⁸⁶ *Id.*

⁸⁷ Canada Initial Written Submission at ¶¶ 146-47.

⁸⁸ Canada Rebuttal Submission at ¶¶ 86-87.

1. Article 31 of the Vienna Convention on the Law of Treaties

99. The Panel bases its ruling on Article 31 of the Vienna Convention. The Panel believes that its analysis of Article 3.A.2.11(b)'s Processor Clause produces a clear, unambiguous, and rational result under Article 31.

100. Article 3.A.2.11(b) of the Treaty provides:

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

(b) unless otherwise agreed by the Parties, *it does not* allocate any portion of the quota to a producer group, condition access to an allocation on the purchase of domestic production, or *limit access to an allocation to processors*.⁸⁹

a) Ordinary Meaning of the Words

101. Canada and the United States agree that the ordinary meaning of the term “limit access to” is “to restrict” to *someone* (“processors”) the “opportunity to benefit from or use” *something* (“an allocation”).⁹⁰ The Parties further agree that the term “allocation” as used in Article 3.A.2.11(b) does not refer to the process or procedure for dividing the quota into portions (verb form of “allocate”) but instead refers to the grant of quota amounts (noun form).⁹¹

102. As the United States notes in its Rebuttal Submission, the United States and Canada also appear to agree on the dictionary definition of the term “allocation”: “That which is allocated to a particular person, purpose, etc.; a portion, a share; a quota.”⁹²

103. Where the Parties’ interpretations diverge is the interpretation of “an allocation.” The United States argues, in substance, that its plain and ordinary meaning in Article 3.A.2.11(b) is any grant of a TRQ quota amount, i.e., Canada cannot reserve for processors or limit access to

⁸⁹ Treaty, Article 3.A.2.11(b) (emphasis added).

⁹⁰ Canada Initial Written Submission at ¶ 97; U.S. Initial Written Submission at ¶ 32.

⁹¹ Canada Initial Written Submission at ¶¶ 105,108; U.S. Initial Written Submission at ¶ 37.

⁹² Definition of “allocation” from Oxford English Dictionary Online, entry 3.b. Quoted in U.S. Rebuttal Submission at ¶ 32; Canada Initial Written Submission at ¶ 103.

processors for any such allocation. Canada rejoins that the plain and ordinary meaning of “an allocation” is “a share of an in-quota quantity that may be granted to an individual applicant” or in substance “one allocation,” such that it may not limit access to one allocation to processors. If access to one allocation has not been limited to processors, Canada argues, the Processor Clause has been satisfied. Thus, “[i]f it is at all possible for a non-processor to receive ‘an allocation’, then the U.S. arguments must fail.”⁹³

104. The Panel begins with the dictionary definition. As the Parties have recognized with their submissions from multiple sources, the word “an” can mean: (1) “a single thing or person that has not been mentioned before, especially when you are not referring to a particular thing or person,” or (2) “any or every thing or person of the type you are referring to.”⁹⁴

105. In its Initial Written Submission, Canada argues “the Parties chose to use the word “an”, rather than the word “any”, . . . the choice of the word “an” as the determiner for “allocation” in the processor clause naturally means a single allocation – that is, a single share of a TRQ that may be granted to a particular applicant.”⁹⁵ The United States notes that the terms “an” and “any” may be substitutable in certain situations, but that either interpretation requires that “a Party administering its TRQs shall not limit access to a single share or multiple shares of the TRQ to processors.”⁹⁶ In its Rebuttal Submission, Canada acknowledges that the word ‘an’ can mean “*inter alia*, ‘any or every thing or person of the type you are referring to’”, and argues that, in the context of the Processor Clause, the word “an” means “every”, or “all”, not “any.”⁹⁷

106. Thus, the dictionary definitions alone do not provide a sound basis for deciding which interpretation of the Processor Clause best fits the plain and ordinary meaning of the words “an allocation.”

⁹³ Canada Initial Written Submission at ¶ 133.

⁹⁴ Canada Initial Written Submission at ¶ 115 (emphasis omitted).

⁹⁵ Canada Initial Written Submission at ¶ 116 (emphasis omitted).

⁹⁶ U.S. Rebuttal Submission at ¶¶ 37, 40.

⁹⁷ Canada Rebuttal Submission at ¶ 63 (emphasis omitted).

107. The Panel believes, however, that the most natural reading of the words comports with the interpretation that the clause is intended to prevent limitation of access generally to processors, and not merely to a single allocation.

108. Inserting the constructions offered by the Parties illustrates the point. When the clause is read as “does not . . . limit access to any allocation to processors” (the United States’ construction), it has coherence and flows naturally.⁹⁸ When the clause is read as “does not . . . limit access to a single allocation to processors” (Canada’s construction in its Initial Written Submission), the clause remains ambiguous and arguably still supports the United States’ interpretation.⁹⁹ That is, if Canada cannot limit access to “one allocation,” that can be read to mean that it cannot limit access, period. Any single allocation that is limited to processors is “one allocation” and cannot be squared with the plain and ordinary meaning of the clause even as Canada construes it.

109. Canada’s alternative construction (offered in its Rebuttal Submission and at the hearing) that “an” means “every” or “all” would, if accepted over the dictionary definitions that precede it, provide support for Canada’s argument that its TRQ allocation mechanism is consistent with the Treaty because it “does not . . . limit access to every allocation” or “all allocation[s]” to processors.¹⁰⁰ However, the Panel notes that Canada’s alternative construction is in tension with the definition that it originally tendered, and is not simply an elaboration of a prior submission. What’s more, while Canada’s second offering may be textually coherent, context clues reveal that “every” or “all” is a less persuasive reading than “any”, as outlined in detail below.

110. The Panel’s interpretation is also supported by Canada’s use of the word “allocation” in official implementation documents. Canada has stated, in the legal Notices issued by the government in its implementation of the Treaty, that the pools themselves are “allocations” for which access is limited to processors. Each of Canada’s 14 official Notices to Importers describe the fixed pools of TRQ amounts reserved exclusively for processors as “allocated to

⁹⁸ See U.S. Rebuttal Submission at ¶¶ 37, 40.

⁹⁹ Canada Initial Written Submission at ¶ 116 (emphasis omitted).

¹⁰⁰ Canada Rebuttal Submission at ¶ 63 (emphasis omitted); Day 1 Tr. at 116:24-117:14 (Can.).

processors.”¹⁰¹ Canada had no satisfactory explanation for this at the Oral Hearing. It noted that “it’s unfortunate that these terms were used in the [N]otices, but again, these are of no legal value.”¹⁰² Later, Canada added that the Notices in fact *do* have “legal value” but not “force of law.” However characterized, the Notices are compelling evidence of the plain and ordinary meaning of the words used in Article 3.A.2.11(b).

b) Context

111. The Panel next turns to relevant context. While the entire Treaty and related materials may be searched for context, and in many instances the Parties have pointed to provisions throughout the four corners of the document, the Parties have relied most heavily on the context provided by the immediately adjacent language of Article 3.A.2.11(b). The Panel is likewise convinced that this is the most helpful context for interpretation of the Processor Clause.

112. Canada relies on the Producer Clause and argues that if the Parties had intended a broad prohibition against limitation of access to Processors, they would have chosen language similar to the preclusive language of the Producer Clause, which provides that Canada cannot “allocate any portion of the quota to a producer group.”¹⁰³ This language, however, is not similar to the language used in the Processor Clause, and it addresses a different requirement: the outright ban on

¹⁰¹ CUSMA: Milk TRQ – Serial No. 1015, dated June 15, 2020 (Exhibit USA-1); CUSMA: Milk TRQ-Serial No. 1049, dated May 1, 2021 (Exhibit USA-2); CUSMA: Cream TRQ – Serial No. 1016, dated June 15, 2020 (Exhibit USA-3); CUSMA: Cream TRQ-Serial No. 1042, dated May 1, 2021 (Exhibit USA-4); CUSMA: Skim Milk Powder TRQ – Serial No. 1017, dated June 15, 2020 (Exhibit USA-5); CUSMA: Skim Milk Powder TRQ-Serial No. 1053, dated May 1, 2021 (Exhibit USA-6); CUSMA: Butter and Cream Powder TRQ-Serial No. 1018, dated June 15, 2020 (Exhibit USA-7); CUSMA: Butter and Cream Powder TRQ-Serial No. 1040, dated May 1, 2021 (Exhibit USA-8); CUSMA: Industrial Cheeses TRQ-Serial No. 1019, dated June 15, 2020 (Exhibit USA-9); CUSMA: Industrial Cheeses TRQ-Serial No. 1031, dated October 1, 2020 (Exhibit USA-10); CUSMA: Cheeses of All Types TRQ-Serial No. 1020, dated June 15, 2020 (Exhibit USA-11); CUSMA: Milk Powders TRQ - Serial No. 1021, dated June 15, 2020 (Exhibit USA-12); CUSMA: Milk Powders TRQ-Serial No. 1051, dated May 1, 2021 (Exhibit USA-13); CUSMA: Concentrated or Condensed Milk TRQ-Serial No. 1022, dated June 15, 2020 (Exhibit USA-14); CUSMA: Yogurt and Buttermilk TRQ-Serial No. 1023, dated June 15, 2020 (Exhibit USA-15); CUSMA: Powdered Buttermilk TRQ-Serial No. 1024, dated June 15, 2020 (Exhibit USA-16); CUSMA: Whey Powder TRQ-Serial No. 1025, dated June 15, 2020 (Exhibit USA-17); CUSMA: Whey Powder TRQ-Serial No. 1045, dated May 1, 2021 (Exhibit USA-18); CUSMA: Products Consisting of Natural Milk Constituents TRQ-Serial No. 1026, dated June 15, 2020 (Exhibit USA-19); CUSMA: Ice Cream and Ice Cream Mixes TRQ-Serial No. 1027, dated June 15, 2020 (Exhibit USA-20); CUSMA: Other Dairy TRQ-Serial No. 1028, dated June 15, 2020 (Exhibit USA-21).

¹⁰² Day 1 Tr. at 105:25-106:1 (Can.).

¹⁰³ Treaty, Article 3.A.2.11(b).

allocations in any amount to Producers. The Panel is not persuaded that the failure to use this language in the Processor Clause aids in the interpretation of that clause.

113. By contrast, the Domestic Purchaser Clause uses language very similar to the Processor Clause and for a similar purpose – not restricting allocations, per se, but restricting *access* to allocations. It reads: Canada may not “condition access to an allocation on the purchase of domestic production;”¹⁰⁴ the key word, here as in the Processor Clause, is “access.” If “an allocation” were read here as Canada reads it in the Processor Clause, it would read as follows: Canada may not “condition access to every allocation on the purchase of domestic production.”

114. Canada recognized at the Oral Hearing that this interpretation would make no sense and conceded that, in this clause immediately preceding the Processor Clause, Canada could not condition access to *any* allocation based on purchase of domestic production.¹⁰⁵ Here, “an allocation” can only mean “any allocation” as Canada simply cannot impose a domestic purchase requirement on eligible TRQ applicants.

115. The Panel agrees with Canada that a contrary interpretation of the Domestic Purchaser Clause does not make sense. And basic logic prevents the Panel from finding that the Parties meant the polar opposite when they used the same words immediately following the Domestic Purchaser Clause, in a clause that was likewise directed to limitations on access to TRQ amounts. Canada’s arguments as to why those clauses serve different purposes are unpersuasive. The use of the word “condition” versus “limit” in those two clauses does not warrant reading the term “an allocation” to mean two different things in the same sentence. In context, the two clauses serve the same purposes: putting a limit on whether and how Canada can restrict *access* to allocation of TRQ amounts.

116. Because this context from within the same Treaty subparagraph strongly supports the Panel’s interpretation, the Panel has found it unnecessary to discuss the more remote context argued by the Parties, which would not change the Panel’s interpretation. In context, the Processor Clause is best understood to be an outright prohibition on exclusive, reserved *access* for

¹⁰⁴ *Id.*

¹⁰⁵ Day 1 Tr. at 115:20-116:6 (Can.).

processors. While Canada argued that this interpretation would mean that Canada cannot *grant* any TRQ quota amount to processors, that is incorrect. Under the Panel’s decision, Canada is not restricted in the amount of quota it grants to processors; it is restricted in its ability to ring-fence all or any part of a TRQ quota and permit *access* only to processors. The Panel addresses later the distinction between the access to the TRQs and their ultimate allocation and explains the Panel’s view that Canada’s administrative discretion in allocating the TRQs is not at issue in this case (*see* para. 139 *et seq.*).

c) Purpose and Intent of the Treaty

117. As the Preamble to the Treaty explains, the Parties resolved to promote trade between the signatory states by creating “freer, fairer markets,” and “incentivizing the production and sourcing of goods and materials in the region.”¹⁰⁶ In substance, the Treaty reflects an intent to open markets to a greater degree than was the case before its effective date and under predecessor agreements. In this dispute, Canada acknowledges that the “function” of the Processor Clause “has to be in accordance with the object and purpose of the treaty.”¹⁰⁷ The Processor Clause unquestionably constrains Canada’s ability to deny access to non-processors, in furtherance of a more open trade relationship. The dispute is only the degree to which Canada is restricted. The trade liberalization background of the Treaty, while not definitive, serves to confirm the interpretation of the Processor Clause reached by consideration of the plain and ordinary meaning and the surrounding context.¹⁰⁸

d) Useful Effect

118. The Panel also finds that Canada’s interpretation of the Processor Clause would give that clause no effect, which violates Article 31 interpretative principles.

119. Canada conceded at the Oral Hearing that its interpretation would mean that Canada could allocate 1,000 TRQ amounts, reserving access to 999 such allocations for processors only.

¹⁰⁶ Preamble to the Treaty. *See generally*, U.S. Initial Written Submission at 1-2.

¹⁰⁷ Day 1 Tr. at 145:8-146:18 (Can.).

¹⁰⁸ *See, e.g., In the Matter of Cross-Border Trucking Services*, USA-MEX-98-2008-01, (6 February 2001) at ¶ 219 (looking to NAFTA’s preamble as evidence of “purpose” for the treaty as a whole under Article 31 analysis); *Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, (23 September 2002) at ¶ 204 (looking to the Agreement on Agriculture’s preamble as evidence of the object and purpose of the treaty under Article 31).

Canada's candid concession as to its interpretation established that the Processor Clause would have no useful effect if that interpretation were accepted. Preserving access for .1% of a TRQ amount does not rise to the level of useful effect.

120. When asked what useful effect preserving access for a single non-processor applicant would have, as a practical matter, Canada could point to none, and instead observed that the United States had certain rights under different provisions of the Treaty (non-breach dispute provisions) that it could invoke.¹⁰⁹ However, the existence of other mechanisms does *not* bear on whether the Treaty provision at issue has useful effect. This is a fundamental consideration in the Panel's view.

121. Furthermore, while Canada concedes that it cannot limit access to 100% of TRQ amounts to processors; it has no satisfactory answer as to why 99.9% is not materially the same as 100% in this context. Canada also argues that this is only a theoretical situation, as it has not in fact limited access to virtually all of the allocations to processors.¹¹⁰ However, this is not relevant because the Panel should not uphold an interpretation of the Treaty that would be inconsistent with the natural meaning of the provision and would deny it useful effect. The Panel finds that what Canada would or would not do does not answer the question of what the Treaty permits Canada to do.

122. Canada also argues that other provisions of the Treaty would guard against this hypothetical scenario. But according to Canada, those same Treaty provisions are inapplicable to "policy decisions" underlying the administration of the TRQs.¹¹¹ And in any event, they do not shed light on the meaning of Article 3.A.2.11(b), which must have meaning on its own.

123. Canada's parallel argument – that preventing Canada from reserving even a single allocation for processors would deprive the Processor Clause of proper meaning or utility – is an overstatement. Canada can grant access to the entire TRQ amounts to processors, and can even

¹⁰⁹ Day 2 Tr. at 64:12-16 (Can.).

¹¹⁰ Canada Initial Written Submission at ¶ 138.

¹¹¹ Canada Initial Written Submission at ¶ 137; Canada Rebuttal Submission at ¶ 88; Canada Responses to Panel Questions at ¶¶ 44-47. For example, Canada suggested that the "commercially viable quantities" provision (Section 1 (c)) provides protection. But Canada elsewhere argued that shipping quantities as small as 100 kilogram were commercially viable. Canada Rebuttal Submission at ¶ 129. Regardless, a single allocation to a non-processor, even in a larger amount, does not establish useful effect for the Processor Clause.

allocate substantial TRQ amounts to processors, as the United States repeatedly conceded.¹¹² Reading the clause to prevent limitation of access to other eligible applicants does not deprive it of meaning: it *gives* it meaning, whereas Canada’s polar opposite construction deprives it of anything more than nominal effect.

e) Avoidance of Absurd Results

124. It is canonical that the Panel should take care to ensure that its consideration of the Article 31 factors does not result in a construction that would be “absurd.”¹¹³ The Panel believes that preventing Canada from barring access to all but processors for all or substantially all of the in-quota quantity of Canada’s dairy TRQs is actually a logical result that gives the most natural reading to the words chosen by the Parties. It prevents Canada from limiting *access* to processors and entirely shutting out *ab initio* all other eligible applicants. This is a sensible result, particularly when coupled with the uncontested fact of Canada’s substantial discretion to *award* TRQ amounts to processors with limitations only as provided elsewhere in the Treaty.

125. The Panel likewise finds that Canada’s interpretation – allowing Canada to limit materially *all* access to processors alone – would create an absurd result because it would deprive the Processor Clause of any real meaning.

¹¹² U.S. Rebuttal Submission at ¶ 27; *see* Day 1 Tr. at 122:22-123:6 (U.S.):

[T]here’s nothing in the agriculture chapter that prevents Canada from granting allocations to processors, so without setting aside ahead of time and pre-determining the outcome, in theory what Canada – one option that Canada could do is have everybody on equal footing and be able to apply for a certain quantity from within the TRQ. And whether that ends up with 80 to 90 percent of the TRQ volume going to processors, if that’s the end result, that doesn’t, on its face, conflict with the processor clause in 3.A.2.11(b).

See also Day 2 Tr. at 30:18-19 (U.S.) (Canada has “pretty wide discretion in administering its dairy TRQs.”); *id.* at 59:13-16 (U.S.) (“[T]here is no doubt that there are plenty of options available to Canada for administering its TRQs that would not breach the USMCA.”).

¹¹³ *See Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, (14 April 1999) at ¶ 5.4 (explaining the general principle that “the interpreter must avoid interpreting the treaty in a way that would lead to a manifestly absurd or unreasonable result”) (citing I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2d rev. ed. (Manchester U.K.: Manchester University Press: 1984) at 120).

f) Whether Processors Includes “Further Processors”

126. Finally, for purposes of this ruling the Panel finds that “processors” as that term is used in Article 3.A.2.11(b) are entities engaged in the act of processing, using the dictionary definition of the word. A “processor” is “[a] person who or thing which performs a process or processes something; spec. . . . (b) a food processor.”¹¹⁴ While “further processors” may be different from initial processors, and indeed while initial processors may be different from each other as well, the common thread here is that all of them are engaged in “processing.” Article 3.A.2.11(b) makes no distinction between or among processors and further processors. The phrase itself demonstrates that further processors are processors – and Article 3.A.2.11(b) does not narrow or distinguish between the type of processors subject to the restrictions of that section.

g) Conclusion

127. Under Article 31 of the Vienna Convention, the Panel finds that Canada’s practice of limiting *access* to an allocation to processors for 85 to 100% of 14 dairy TRQs is inconsistent with Article 3.A.2.11(b) of the Treaty.

2. Article 32 of the Vienna Convention on the Law of Treaties

128. As discussed above, the Panel interprets this Treaty “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.”¹¹⁵

129. Article 32 of the Vienna Convention allows recourse to “supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion,” in two distinct instances: to “confirm the meaning resulting from the application of [A]rticle 31,” or to “determine the meaning when the interpretation according to [A]rticle 31:

¹¹⁴ U.S. Rebuttal Submission at ¶¶ 52-53 (citing definition of “processor” from Oxford English Dictionary Online).

¹¹⁵ See Treaty, Article 31.13.4.

(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”¹¹⁶

130. Article 32 regulates “what information and material outside the text of a treaty can be brought into the process for interpreting it, and how this is done.”¹¹⁷ It has a very broad scope,¹¹⁸ reaching not only preparatory work and the circumstances of the Treaty’s conclusion but also other supplementary means that can shed light on the Treaty’s meaning.

a) The Parties’ Submissions on the Use of Article 32

131. The Parties strongly disagree on whether the Panel should use Article 32 to resolve this dispute.¹¹⁹ Canada has offered a slate of evidence it suggests the Panel may consider under Article 32 in order to discern the meaning of the Processor Clause in Article 3.A.2.11(b) of the Treaty. It cites authorities suggesting the Panel has “certain flexibility in considering relevant supplementary means in a given case,”¹²⁰ that the decision to do so “basically depends on the assessment of the interpreter,”¹²¹ and that “there are scarcely any clear limits” in taking relevant evidence into account under Article 32.¹²²

132. Canada submits that the United States’ strict opposition to Article 32’s liberal use “would have the Panel assess the treaty terms in isolation without regard to the relevant context and

¹¹⁶ VCLT, Article 32.

¹¹⁷ O. Dörr and K. Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* 2d ed. (Springer, 2018), Exhibit CDA-96 at 617.

¹¹⁸ Day 1 Tr. at 69:5-14 (Can.).

¹¹⁹ The Parties do not, however, disagree as to the purposes for which Article 32 may be used generally. *See* Day 1 Tr. at 8:23-9:2 (U.S.) (“Article 32, the supplementary means of interpretation is then applied, but only to confirm the meaning resulting from the application of the general rule, or to determine the meaning if application of the general rule fails to reveal the meaning.”); Day 1 Tr. at 71:1-7 (Can.) (“Just to respond to the U.S.[’s] last point, the language of 32 allows a party to resort to supplementary means of interpretation in two situations. It either allows a party to confirm the meaning resulting from the application of 31 or to determine the meaning when the application of 31 results in a meaning that’s unreasonable or absurd.”).

¹²⁰ Canada Rebuttal Submission at ¶ 12 n.12 (citing Appellate Body Report, *EC – Chicken Cuts* at ¶ 283).

¹²¹ *Id.* (emphasis omitted) (citing O. Dörr and K. Schmalenbach at 627 (Ex. CDA-96)).

¹²² *Id.*

circumstances in which they were agreed to,” a far too limited approach for a case such as this, where the central terms of the dispute suggest multiple conflicting readings.¹²³ To that end, Canada urges the Panel to consider the factual and historical background on offer, which demonstrates that Canada “had no intention whatsoever to forego its long-standing practice of creating ‘pools’ for processors” when it entered the Treaty.¹²⁴

133. The United States urges a plain reading of the Treaty text itself and contends that Article 32 may be applied only under certain conditions, and in this dispute Canada has not provided evidence that those conditions exist. According to the United States, the Treaty – in particular the Processor Clause in Article 3.A.2.11(b) – is clear enough as written, informed by the immediate context and related provisions found elsewhere in the Agricultural Chapter. In any event, the United States suggests that Canada’s evidence does not fall within the scope of Article 32.¹²⁵ According to the United States, the evidence amounts to counsel’s accounts of internal reasoning, and a party’s reasons for its actions “cannot change the ordinary meaning of the terms read in their context, nor can they alter the object and purpose of the treaty.”¹²⁶ Canada’s arguments that the United States was (or should have been) aware of Canada’s long-standing pools practice are, to the United States, irrelevant to the task at hand. With a satisfactory interpretation under Article 31 and no ambiguity to resolve, the United States submits that the Panel need not invoke Article 32.¹²⁷

¹²³ Canada Rebuttal Submission at ¶ 14. Canada also says the U.S. has tried and failed here before. In *Canada-Dairy*, a WTO dairy dispute between the Parties, the U.S. peddled a strictly textual approach that ignored “relevant and important factual background in which market access was agreed to by Canada.” The Appellate Body disagreed, emphasizing that “special care must be taken to interpret the terms of the provisions that were in dispute,” including by considering “the factual and historical circumstances of Canada’s market access regime at the time of the negotiations, as supplementary means of interpretation.” *Id.* The U.S. says this is a misreading of *Canada-Dairy*.

¹²⁴ Canada Rebuttal Submission at ¶ 15.

¹²⁵ *See* Day 1 Tr. at 166:6-11 (U.S.).

¹²⁶ U.S. Rebuttal Submission at ¶ 15.

¹²⁷ *See* Day 1 Tr. 9:3-10 (U.S.) (“If a treaty interpreter applies the general rule of interpretation and is able to discern the meaning of the terms of the treaty, then the interpretive analysis is effectively concluded. There is no reason to continue on and apply the rule relating to supplementary means of interpretation that is set forth in Article 32 of the Vienna Convention, unless to confirm the meaning that results from the application of Article 31.”).

b) The Panel’s Decision on the Use of Article 32

134. While the Panel has reached a clear reading of the Processor Clause under Article 31, the Vienna Convention allows use of supplemental means of interpretation to “confirm the meaning resulting from the application of [A]rticle 31.”¹²⁸ The Parties offer opposing interpretations for supposedly clear text, and their strongly held yet divergent views require the Panel to make a rigorous case for its own decision. The purpose of treaty interpretation is to discern the common intent of the authoring parties, which requires the interpreter “to bear constantly in mind the historical background against which the treaty has been negotiated . . . in seeking to determine the reality of the situation which the parties wished to regulate by means of the treaty.”¹²⁹ The Panel has endeavored to discern that intent under Article 31, and now seeks to confirm that interpretation under Article 32.¹³⁰ The Panel is free to consider Canada’s Article 32 evidence for that purpose.

135. The Vienna Convention should not, in the Panel’s view, be read to strictly limit the *type* of evidence that may be considered. As long as a proper purpose is identified, the Panel may consider materials relevant to the issues in dispute.¹³¹ Article 32 expressly refers only to the preparatory work of the treaty and to the circumstances of its conclusion, but inserts the word “including” – meaning that the list is illustrative, not exhaustive.¹³² “[N]o would-be interpreter of a treaty,

¹²⁸ VCLT, Article 32.

¹²⁹ *EC-Chicken Cuts* (Panel Report) at n.568 (citing Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 2d ed. (1984) at 141).

¹³⁰ “Confirming” the meaning of a provision under Article 32 is not simply an exercise in reinforcing the Panel’s already-existing opinion. The Article 32 process also “entails the option of not confirming and the possibility of transforming the exercise into one where the preparatory work leads to a revisiting of the application of the general rule to find a permissible interpretation, which is then confirmed. The investigation may also lead to the conclusion that there is an ambiguity that has hitherto gone unnoticed.” O. Dörr and K. Schmalenbach at 629 (Ex. CDA-96).

¹³¹ O. Dörr and K. Schmalenbach at 627 (Ex. CDA-96).

¹³² See O Dörr and K. Schmalenbach at 620 (Ex. CDA-96); *EC-Chicken Cuts* at ¶ 283 (“We stress, moreover, that Article 32 does not define exhaustively the supplementary means of interpretation to which an interpreter may have recourse. It states only that they *include* the preparatory work of the treaty and the circumstances of its conclusion. Thus, an interpreter has a certain flexibility in considering relevant supplementary means in a given case so as to assist in ascertaining the common intentions of the parties.”).

whatever his doctrinal point of departure, will deliberately ignore any material which can usefully serve as a guide towards establishing the meaning of the text which he is confronted.”¹³³

136. The range of materials available for consideration under Article 32 is quite broad. O. Dörr and K. Schmalenbach describe this as follows:

Any material that was not *stricto sensu* part of the negotiating process, but played a role because it covers the substance of the treaty and the negotiators were able to refer to it, can thus be introduced into the process of interpretation as other “supplementary means”. Documents or facts may be considered that are sufficiently closely connected to the preparation of the treaty and have, therefore, in the eyes of the interpreter, a direct bearing on the interpretation. This includes . . . documents originating from independent bodies, such as the ILC, and preparatory work on treaties that are identical or similar to the one under consideration.¹³⁴

137. Nevertheless, there is a distinct evidentiary hierarchy under the Vienna Convention. Article 32 plays a supporting role in treaty interpretation, subsidiary to the Article 31 analysis. As Canada’s own authorities suggest, Article 32 evidence is “considered to be considerably less reliable” than the text of the Treaty itself and other forms of evidence available under Article 31. The Panel agrees with the United States that the terms of the Treaty “are the first and best evidence of the common intention of the parties.”¹³⁵ Evidence submitted under Article 32 therefore should be viewed carefully and should not be used to override the plain meaning of the Treaty.¹³⁶

¹³³ *EC-Chicken Cuts* (Panel Report) at n.571 (citing Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 2d ed. (1984) at 116).

¹³⁴ O. Dörr and K. Schmalenbach at 627 (Ex. CDA-96).

¹³⁵ Day 1 Tr. at 11:22-23 (U.S.).

¹³⁶ O. Dörr and K. Schmalenbach at 618 (Ex. CDA-96).

c) Canada's Article 32 Evidence

138. To the Panel's eyes, Canada's Article 32 evidence raises four separate arguments:

(i) *The importance of pools for processors in Canada's dairy management system*

139. Canada is seeking to protect its supply management system for dairy products, as outlined *supra*. Canada submits that fresh milk's high perishability requires carefully calibrated production to ensure an efficient market and decent returns for participants.¹³⁷ Provincial milk marketing boards do this by calculating total production quota each month – if this calculation is faulty, it generates an imbalance between supply and demand. This system is important because, according to Canada, “[t]he underlying economic characteristics of milk production are difficult for producers to manage independently and would otherwise result in unpredictable raw milk supply for processing activity.”¹³⁸

140. Processors are central to this. Their dual roles as both purchasers and sellers of dairy products help guard against both market saturation and undersupply. Sensitive to the vagaries of season and need, processors have a history of predictable and well-structured import practices,¹³⁹ which provide the basis for forecasting, calculating, and issuing total production quota to dairy farmers.¹⁴⁰ Reserving TRQ pools for processors moderates market unpredictability and allows for more accurate forecasts.¹⁴¹

141. Thus, Canada claims that reserving TRQ pools for processors is a key aspect of maintaining overall system stability. While a variety of allocation mechanisms may exist, the pools system

¹³⁷ Canada Responses to Panel Questions at ¶ 2.

¹³⁸ Canada Initial Written Submission at ¶ 17.

¹³⁹ Canada notes that “on a year-to-year basis, processors consistently imported 27% or 28% of their total annual volume of imports in the first quarter, 22% to 25% in the second quarter, 21% to 26% in the third quarter and 22% to 27% in the fourth quarter from 2016 to 2020.” Canada contrasts this with distributor and retailer imports, which have much higher variations – those variations cause disruptions across the dairy market, possibly resulting in “large-scale waste of raw milk and loss of producer revenues – the very situation that supply management is intended to prevent.” *See* Canada Responses to Panel Questions at ¶ 8.

¹⁴⁰ Canada Responses to Panel Questions at ¶ 6.

¹⁴¹ Canada Responses to Panel Questions at ¶ 9.

ensures that Canada can use a mixed allocation methodology where warranted (as it does under the Treaty).¹⁴²

142. Canada suggests that such market background is critical to discerning the intent, motivation, and understanding of each Party in agreeing to the provisions at issue.¹⁴³ Namely, “it could not have been the common intention of the Parties to significantly restrict Canada’s administrative discretion in the manner claimed by the United States.”¹⁴⁴ Canada, in its own words, “would never have agreed to bargain away” the right to favor processors in its allocation mechanisms by reserving TRQ pools for their exclusive use.

(ii) *The Panel’s analysis*

143. At the outset, the Panel notes that Canada’s administrative discretion in allocating the TRQs is not at issue here. Rather it is the exclusive reservation of *access* to the TRQs that violates the Treaty. Insofar as the actual allocation of the TRQs is concerned, the United States has conceded that Canada enjoys significant discretion in how it administers its TRQs.¹⁴⁵ At the Oral Hearing, the United States also suggested that the substantive result (i.e., 80% or more of the TRQ allocated to processors or further processors) is not *prima facie* problematic:

- “Another note, that the U.S. – Canada’s criticism of the U.S. interpretation that as a factual matter one percent of the total quota could not be reserved for processors, you know, there’s nothing under the U.S. interpretation that would prevent Canada from providing the same access – the same eligibility to volume from within the quota as any other importer group. The limitation is strictly on having a reserved portion for that importer group.”¹⁴⁶
- “The processor clause in and of itself is an obligation not to limit any portion of the quota to processors. And any – if Canada employed a system that effectively ended

¹⁴² In Canada’s words, the Treaty TRQ allocations “combine[] a market-share approach (within pools for processors and further processors) with an equal-share approach (within pools for distributors).” See Canada Response to Panel Questions at ¶ 18.

¹⁴³ Canada Rebuttal Submission at ¶ 11.

¹⁴⁴ Canada Rebuttal Submission at ¶ 13.

¹⁴⁵ See Day 2 Tr. at 58:8-10 (U.S.); U.S. Rebuttal Submission at ¶ 24; U.S. Initial Written Submission at ¶ 1.

¹⁴⁶ Day 1 Tr. at 68:11-19 (U.S.).

with the same result . . . while on its face it may look as though the methods that it used to get there would not necessarily be in conflict with a specific obligation such as the processor clause, we've also brought claims under the fair and equitable treatment provisions in the USMCA and you'd have to start taking a look at the specific facts that apply to the situation that ended with that result. So as we said before, there's no issue with Canada implementing a policy that gives certain pools to particular groups.”¹⁴⁷

144. The text of the Treaty bears this up. Article 3.A.2 empowers Canada to administer its TRQs by an “allocation mechanism” – meaning “any system in which access to the tariff rate quota is granted on a basis other than first-come first-served” – of its choosing. That right is only bounded by the limitations set forth in the Treaty itself, limitations that Canada agreed to when it signed the Treaty.

145. The real issue is whether, in the exercise of its administrative discretion, Canada can pre-reserve or block the access to TRQs (in any amount) exclusively for the use of processors under the plain language of Article 3.A.2.11(b).

(iii) Canadian practice under other free trade agreements

146. Canada argues that it has long reserved TRQ pools exclusively for processors, and that this practice has never once fallen afoul of Canada's commitments in prior free trade agreements, including CETA and the CPTPP. The practice dates from at least 1995, when Canada created pools for processors and other industry groups under its WTO TRQ for Chicken and Chicken Products.¹⁴⁸ Canada places great emphasis on the CPTPP, a re-branding of the TPP, which the United States negotiated and signed before later withdrawing. The CPTPP's provisions on TRQ allocation mechanisms are, Canada notes, nearly identical to those in the Treaty. Indeed, the CPTPP sets forth “all the obligations at issue in this dispute, in the same or very similar language.”¹⁴⁹

¹⁴⁷ Day 1 Tr. at 133:9-23 (U.S.).

¹⁴⁸ See Day 1 Tr. at 46:8-14 (Can.).

¹⁴⁹ See Canada Initial Written Submission at ¶ 49.

147. Canada submits that it sought the same leeway in both agreements, reserving for itself considerable discretion on how to allocate its TRQs and consenting only to the (fairly gentle) textual limits its preferred interpretation suggests. Under the CPTPP, Canada established 16 dairy TRQs – all administered by reserving a portion of the TRQ for processors.¹⁵⁰ This additional evidence, suggests Canada, confirms its interpretation of the Treaty’s Article 3.A.2.11(b).

(iv) *The Panel’s analysis*

148. Evidence from different but similar treaties (like CETA and the CPTPP) is admissible under Article 32, to be sure.¹⁵¹ But the evidence Canada adduces here is unhelpful to its case.

149. For one, Canada’s processor pools system has apparently gone unchallenged to date.¹⁵² Canada’s statements regarding the meaning of similar provisions in the CPTPP thus capture its own interpretation, unbuttressed by additional evidence proving *common* intent. The United States is also not a party to either CETA or the CPTPP. Though it participated in the TPP’s design and drafting, the United States withdrew from that agreement and is not bound by its terms. Canada has offered no evidence that the United States communicated a different position regarding its processor pools during the TPP negotiations than the one it now holds under this Treaty.

150. Furthermore, even assuming that Canada’s commitments in other treaties suggest that it consistently sought to preserve its discretion in administering TRQs under those treaties,¹⁵³ that is some way off from proving that the Parties to this Treaty both intended Article 3.A.2.11(b) to

¹⁵⁰ Canada Initial Written Submission at ¶ 47 (citing Ex. CDA-30, “CPTPP TRQs reserving a portion of the TRQ for processors.”)

¹⁵¹ See O. Dörr and K. Schmalenbach at 624 (Ex. CDA-96) (“It is submitted that material relating to earlier or similar treaties is not *stricto sensu* preparatory work, but may, again, be considered other supplementary means under Art. 32.”).

¹⁵² See, e.g., Day 2 Tr. at 38:8-13 (Mr. Hansen) (“Can I just add a slightly additional question? How do we know what the TPP means if no one has ever challenged the clause there? In other words, I think all you have is this language in there and no ones ever brought an action. But what significance is that[?].”).

¹⁵³ See Canada Initial Written Submission at ¶ 53 (“Based on this understanding – that the TRQ administration provisions in Article 3.A.2 would preserve Canada’s discretion in administering the TRQs, which accords with the understanding that Canada had of the corresponding obligations in the CPTPP – Canada granted significant TRQ volumes for dairy products, under [the Treaty], to the United States.”).

permit policies reserving exclusive quota for processors. As such, the CPTPP is not a reliable yardstick for determining the Parties' common intent regarding this Treaty's Processor Clause.

(v) *Canada's understanding of Article 3.A.2.11(b) during Treaty negotiations*

151. Canada claims that, during Treaty negotiations, it communicated to the United States that the Treaty permitted Canada's existing system of reserving TRQ pools exclusively for processors. But Canada offers no evidence that the specific issue was raised, debated, and settled during the Treaty talks themselves. Instead, Canada says it "made it clear to the United States at various levels, including at the level of the Chief Agricultural Negotiator, that it would be important for Canada to ensure that any deal preserves the broad discretion of its Minister responsible for administering the TRQs under the *Export and Import Permits Act*."¹⁵⁴

152. Canada's chief piece of evidence here is a statement by its Chief Agricultural Negotiator, Mr. Aaron Fowler, saying that he communicated to his United States counterparts that the Minister of International Trade has very broad discretion to determine an allocation method and to issue allocations and that Canada would not accept in the Treaty to unduly fetter the discretion of the Minister of International Trade. He further testified to the fact that Canada's ability to accept granting significant TRQ volumes to the United States was conditional on Canada's ability to mitigate the impact of increased imports on the sector. Additionally, Mr. Fowler stated that he told the United States that Canada would seek to maintain the overall integrity of its supply management system (including the "three pillars" of production controls, pricing mechanisms, and import controls) and also sought to replicate the TPP's provisions in the area of TRQ administration.¹⁵⁵

(vi) *The Panel's analysis*

153. Mr. Fowler admits that Canada's first clear communication of its position – that the Treaty "allows Canada to create pools reserved to processors and only prohibits a Party from issuing

¹⁵⁴ See Canada Initial Written Submission at ¶ 52.

¹⁵⁵ Ex. CDA-99 at ¶ 3.

allocations under a TRQ exclusively to processors” – occurred on April 1, 2020, in response to the United States raising the practice as a concern.¹⁵⁶ Nothing in the record suggests otherwise, as neither Canada nor the United States has offered additional contemporaneous evidence regarding the Treaty negotiations. Indeed, the Panel notes that neither Party has offered any evidence properly considered as *travaux préparatoires*, the most common type of evidence considered by international tribunals under Article 32 of the VCLT.¹⁵⁷ At the Oral Hearing, the United States indicated it believes that no such evidence exists.¹⁵⁸ As it stands, there is no evidence that Canada communicated its interpretation of Article 3.A.2.11(b) to the United States during the negotiations. Mr. Fowler’s statement indicates that Canada generally desired to maintain broad discretion to administer dairy TRQs, and makes reference to the TPP text regarding TRQ administration, but it does not provide a specific interpretation of the provision at issue. Mr. Fowler’s statement, therefore, does not establish the common intent of the Parties.

(vii) *While the United States knew of Canada’s pools system, it did not raise it as an objection during Treaty negotiations*

154. The United States has admitted it “was aware” of Canada’s pools-for-processors practice during the Treaty negotiations.¹⁵⁹ Canada claims that awareness proves both Parties understood

¹⁵⁶ Ex. CDA-99 at ¶ 5.

¹⁵⁷ The Panel does not consider Mr. Fowler’s statement *travaux préparatoires*, since “only material and processes that can be objectively assessed by an interpreter can qualify as preparatory work.” Ex. CDA-99 at 621. Mr. Fowler’s statement purports to capture oral assertions made during the Treaty negotiations, but “oral statements are difficult to evaluate, as long as they are not written down or cannot be corroborated by other evidence.” *Id.* However, even unilateral acts, instruments or statements of individual negotiating parties may be useful to discerning common intent – the Panel considers Mr. Fowler’s evidence in that spirit, though it finds the evidence unilluminating. *See EC - Chicken Cuts* at ¶ 289.

¹⁵⁸ *See* Day 1 Tr. at 161:16-24 (U.S.) (“I think we would have struggled intellectually to [submit historical evidence] because I’m not aware of documentary evidence from the negotiations that would be relevant. And I’m sure if it existed, Canada would have gleefully offered it up already with the other information it has provided to you. And I don’t think that the United States would have engaged in the production of evidence the way Canada has done with the kind of an affidavit from someone who was there, precisely for the reasons that those treaties get into.”); *id.* at 167:6-10 (U.S.) (“But, you know, where is this documentary evidence of what we both intended at the time when we agreed to these words? I’m not sure that’s there. I’m not sure that exists. So you’re left with the words themselves.”).

¹⁵⁹ *See* Day 1 Tr. at 172:3-8:

(Ms. Bédard): “And I’m focusing on the first one for a second, which is the claim of an established practice in Canada. Did the United States know about this Canadian practice?”

Article 3.A.2.11(b) to permit the practice. The United States raised no objections during the Treaty negotiations and made no move when the text was reopened for supplemental negotiations. The United States certified Canada’s compliance with the Treaty to the United States Congress during the ratification processes.¹⁶⁰ All along, the United States was “aware of Canada’s long-standing practice of creating ‘pools’ for processors, including under the CPTPP.”¹⁶¹ It was also “aware of Canada’s position that it could only provide significant TRQ volumes on the condition that Canada was able to maintain its administrative discretion.”¹⁶² Despite this, the United States waited until April 1, 2020 – after signature, and after Canada’s Notices to Importers had already been published – to protest that Canada’s pools practice violated Article 3.A.2.11(b). With this knowledge in hand, Canada suggests that the United States’ protest here is an attempt to “obtain through litigation what it failed to obtain through the [Treaty] negotiations.”¹⁶³

(viii) The Panel’s analysis

155. The Panel notes that Canada has not formulated a standard for any “duty to object” or “silence equals consent” under public international law with regards to treaty practice. Without more, Canada has not proved that the United States’ silence establishes that the Parties’ common understanding of the Processor Clause comports with Canada’s own interpretation, which contravenes the text’s plain meaning.

156. The plain meaning also cannot be overturned by the United States’ certification to its Congress of Canada’s compliance with the Treaty. As the United States explained during the Oral Hearing, certification is made to the whole of the Treaty, not just to the specific provisions at issue here.¹⁶⁴ Certification is also driven by broad-based political considerations, which render it a poor fit for deducing a Party’s understanding of individual Treaty provisions. Additionally, in the

(U.S.): “We were aware of Canada’s practice under the WTO and other agreements, yes.”

¹⁶⁰ See Canada Initial Written Submission at ¶ 57.

¹⁶¹ Canada Rebuttal Submission at ¶ 9.

¹⁶² *Id.*

¹⁶³ See Canada Initial Written Submission at ¶ 2.

¹⁶⁴ Day 2 Tr. 31:24-32:19 (U.S.).

certification itself, the United States stated that “Canada and Mexico have taken measures necessary to comply with those provisions that are to take effect on the date of entry into force of [the Treaty].”¹⁶⁵ It did not state that Canada was currently in full compliance, merely that Canada had the laws in place to comply with the Treaty.

157. For the above reasons, the Panel is not persuaded that Canada’s interpretation of Article 3.A.2.11(b) captures the *common intent* of both Parties. Rather, the evidence tends to illustrate either (1) Canada’s own general positions during Treaty negotiations or (2) Canada’s past practices under separate trade agreements not involving the United States. There is no evidence that Canada specifically communicated its understanding of Article 3.A.2.11(b) to the United States while the Parties were still bargaining. Neither is there any evidence suggesting both Parties considered Canada’s interpretation (that Article 3.A.2.11(b) allowed Canada to limit access to TRQ quantities exclusively for processors) viable or applicable. The evidence appears to be more general in nature about the discretion that Canada enjoys, and this discretion certainly exists with respect to the ultimate allocation of the TRQs and is not the subject of the Panel’s decision, as the Panel explains further below.

158. The purpose of treaty interpretation is to discern the common intent of the authoring parties, and no evidence that Canada submits here gives the Processor Clause a meaning different from its ordinary reading. Under the terms of the Treaty, Canada cannot “limit access to an allocation” only to processors.

3. Canada’s Administrative Discretion Under the Treaty

159. The Panel’s ruling here is limited only to the facts of this case. The current Canadian system, which sets aside significant TRQ volumes only for processors, does not pass muster under the Treaty. However, nothing in the Panel’s ruling constrains Canada’s discretion to administer its TRQ however it wants, within the Treaty’s set limits. Quite the contrary – Canada has significant discretion in designing and implementing its allocation mechanisms. The Treaty itself explicitly recognizes this in Article 3.A.2. The Panel agrees with Canada that “the design of an

¹⁶⁵ See Letter from United States Trade Representative to U.S. Congress (April 24, 2020) (Ex. CDA-38).

allocation mechanism, including who may obtain an allocation, is left up to the discretion of the importing Party, in this case Canada, to determine, subject to consistency with the other provisions of the Agreement.”¹⁶⁶

160. The Panel takes seriously Canada’s statements regarding the importance of processors in the Canadian dairy industry. The Panel does not question Canada’s interests in regulating supply and demand within its dairy industry, including by striving to ensure predictability in imports.

161. Canada suggests that it has considered market-share, equal-share, historical, pro-rata, first-come first-served, on demand, and auctioning/lottery methodologies, as well as combinations of these.¹⁶⁷ There are, in Canada’s eyes, problems with each approach. Market-share policies, for example, could give small actors too-small shares, while equal-share policies would saddle them with too much. Historical policies do not work for new TRQ access like the Treaty provides. Auctions and lotteries invite too much unpredictability, as do pro-rata access and on demand approaches.

162. According to the United States, under a different system, allocation amounts for processors as high as 85% of TRQ totals could potentially be permissible, subject to the facts and circumstances surrounding the allocation and Canada’s compliance with other sections of the Treaty. In the words of the United States, it is “not seeking to eliminate all of Canada’s discretion in administering its TRQs.”¹⁶⁸ In its written submissions, the United States expressly states “that it is not challenging Canada’s right to maintain its supply management system” and that the Treaty “provides Canada with the discretion to administer the dairy TRQs through a system other than one in which access is granted on a first-come first-served basis.”¹⁶⁹ In other words, it is the inflexible pool system Canada has designed here that is objectionable, not Canada’s general ability to allocate its TRQs in the manner it desires.

¹⁶⁶ Canada Initial Written Submission at ¶ 62.

¹⁶⁷ See Canada Responses to Panel Questions at ¶ 15.

¹⁶⁸ See Day 2 Tr. at 58:8-10 (U.S.).

¹⁶⁹ See U.S. Rebuttal Submission at ¶ 24; U.S. Initial Written Submission at ¶ 1.

163. The Panel expresses no opinion on these different methods and the substantive result achieved by Canada's current allocation procedures in terms of the percentage of TRQ quantities that are ultimately awarded to processors. All the Panel decides today is that Canada cannot, in substance, ring-fence and limit to processors (and "further processors," which are processors for purposes of the Processor Clause) a reserved "pool" of TRQ amounts to which only processors have access. In Canada's own official words, in 14 separate Notices to Importers, Canada has *allocated* 85% or more of the amounts in each instance to processors. For each TRQ, Canada has limited access to an allocation to processors, which is inconsistent with the Treaty.

4. The Parties' Remaining Arguments

164. The Parties raise a series of further arguments, including whether Canada's practices are inconsistent with:

- Its commitment in Article 3.A.2.11(c) to ensure that in administering an allocated TRQ, "each allocation is made . . . to the maximum extent possible, in the quantities that the TRQ applicant requests";
- Its commitment in Article 3.A.2.4(b) to "ensure that its procedures for administering its TRQs . . . are fair and equitable";
- Its commitment in Article 3.A.2.11(e) to ensure that in administering an allocated TRQ, "allocation to eligible applicants shall be conducted by equitable and transparent methods"; and
- Its commitment in Article 3.A.2.6(a) (together with its Schedule to Annex 2-B, Appendix 2, Section A, paragraph 3(c)) to not "introduce a new or additional condition, limit, or eligibility requirement on the utilization of a TRQ . . . beyond those set out in [Canada's] Schedule to Annex 2-B."

165. For reasons of judicial economy, the Panel need not answer those questions today. For purposes of this proceeding, it is enough that Canada's current practice of reserving TRQ pools for processors is inconsistent with Article 3.A.2.11(b).

166. The Panel also notes that its Terms of Reference do not include:

- Whether Canada's chosen allocation mechanism allows shipments to be made in "commercially viable" quantities under Article 3.A.2.11(c).

The Panel therefore lacks the jurisdiction to entertain this claim.

V. The Panel's Findings

167. For the reasons set forth above, the Panel finds that Canada's practice of reserving TRQ pools exclusively for the use of processors is inconsistent with Canada's commitment in Article 3.A.2.11(b) of the Treaty not to "limit access to an allocation to processors." The Panel makes no findings on the remainder of the Parties' arguments.