

Panel established pursuant to Article 28.7 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership

**CANADA - DAIRY TRQ ALLOCATION MEASURES
(Complaint by New Zealand)**

(CDA-NZ-2022-28-01)

INITIAL WRITTEN SUBMISSION OF CANADA

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TABLE OF CASES REFERRED TO IN THIS SUBMISSION

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<i>Canada – Dairy</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products</i> , WT/DS103/AB/R , WT/DS113/AB/R , and Corr.1, adopted 27 October 1999, DSR 1999:V, p. 2057
<i>China – TRQs</i>	Panel Report, <i>China – Tariff Rate Quotas for Certain Agricultural Products</i> , WT/DS517/R and Add.1, adopted 28 May 2019
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<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R , adopted 20 May 1996, DSR 1996:I, p. 3
<i>US – Offset Act (Byrd Amendment)</i>	Appellate Body Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/AB/R , WT/DS234/AB/R , adopted 27 January 2003, DSR 2003:I, p. 375
<i>US – Large Civil Aircraft (2nd complaint)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R , adopted 23 March 2012, DSR 2012:I, p. 7
<i>US – Washing Machines</i>	Appellate Body Report, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</i> , WT/DS464/AB/R and Add.1, adopted 26 September 2016, DSR 2016:V, p. 2275

TABLE OF ABBREVIATIONS USED IN THIS SUBMISSION

ABBREVIATION	DEFINITION
CDC	Canadian Dairy Commission
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CUSMA	Canada-United States-Mexico Agreement
<i>CUSMA Dairy I</i>	<i>Canada – Dairy TRQ Allocation Measures (CDA-USA-2021-31-010)</i>
DIRA	<i>Dairy Industry Restructuring Act</i>
EEC	European Economic Community
EIPA	<i>Export and Import Permits Act</i>
FCFS	first-come, first-served
IARs	<i>Import Allocation Regulations</i>
ICL	<i>Import Control List</i>
ILA	<i>Import Licence Agreement</i>
IPRs	<i>Import Permit Regulations</i>
KORUS	<i>United States – Korea Free Trade Agreement</i>
OED	Oxford English Dictionary
TPP	Trans-Pacific Partnership Agreement
TRQ	tariff rate quota
VCLT	<i>Vienna Convention on the Law of Treaties</i>

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LIST OF EXHIBITS

CDA-1 (CONFIDENTIAL INFORMATION)	The Economics of Canada's CPTPP Dairy TRQ Fill Rates, Expert report of Dr. Pouliot (April 20, 2023)
CDA-1-1	CPTPP: Butter TRQ—Serial No. 1039 issued on May 1, 2021, available at < https://www.international.gc.ca/trade-commerce/controls-controles/notices-avis/1039.aspx?lang=eng >
CDA-1-2	Key dates and access quantities 2022-2023: TRQs for Supply-Managed Products, accessed 13 April 2023, < https://www.international.gc.ca/trade-commerce/controls-controles/trq-dates-ct.aspx?lang=eng >
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CDA-1-6	Some figures - Producteurs de Lait du Québec website at < https://lait.org/en/the-milk-economy/some-figures/ >
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CDA-1-12	Description of the logo, LOOK FOR THE BLUE COW LOGO, at < https://dairyfarmersofcanada.ca/en/blue-cow-logo >
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I. INTRODUCTION

1. This dispute concerns a challenge by New Zealand against Canada's allocation mechanism in relation to its tariff rate quotas ("TRQs") for dairy products under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP").

2. New Zealand wrongly attributes to Canada's allocation mechanism the fact that Canada's dairy TRQs are not all fully utilized. As Canada will demonstrate, there is simply a lack of demand for much of New Zealand's dairy products in Canada. New Zealand's theory that Canada's allocation mechanism purportedly "encourages chronic underfill" of Canada's dairy TRQs is premised on the extraordinary suggestion that Canada's pooling system is empowering processors to engage in anti-competitive behaviour to limit importation.¹ However, New Zealand has failed to provide any evidence to demonstrate such behaviour, let alone its contention that Canada's allocation mechanism encourages underfill.

3. In this submission, Canada will show that New Zealand misinterprets several provisions of the CPTPP by ascribing to them impermissibly broad meanings. The startling outcome of New Zealand's interpretations would be to prevent Canada from being able to administer its TRQs through an allocation mechanism of its choosing and to impose on Canada one preferred by New Zealand, such as a pro-rata system. New Zealand is asking the Panel to find that, under the CPTPP, Canada agreed to surrender its right to design and modify its allocation mechanisms by effectively granting a veto to CPTPP Parties over any requirements that Canada may seek to select when designing such mechanisms. This would plainly be a misreading of the provisions at issue.

4. Canada's CPTPP Tariff Schedule exhaustively sets out the concessions Canada has made with respect to the products at issue in this dispute. Importantly, Canada's Tariff Schedule does not contain any concessions identifying which actors in the supply chain for dairy products must have access to an allocation under a TRQ. Therefore, contrary to New Zealand's contention that Canada was required to have

¹ See first written submission of New Zealand, paras. 2 and 34 ("Canada makes its domestic dairy processors gatekeepers of their own competition. This encourages chronic underfill").

listed in its Tariff Schedule any condition, limit or eligibility requirement regarding access to an allocation,² Canada has discretion to determine its allocation mechanism. This includes determining who has access to allocations under a TRQ, subject only to the requirements on the administration of the TRQs set out in Section D: Tariff Rate Quota Administration of Chapter 2 of the CPTPP (“Section D”) and the concessions Canada made in its Tariff Schedule. Further, nowhere in Section D have the Parties undertaken any obligation prohibiting a Party from reserving or setting aside a portion of a TRQ for allocation (“pools”) among a particular group of market actors, e.g., processors.

5. Canada’s long-standing supply management system provides predictability and stability in the Canadian dairy market by carefully balancing production to meet market demand. One of the key pillars of this system is import controls, and Canada has maintained a transparent, well-functioning, TRQ system since 1995 to effectively manage market access in accordance with its international trade commitments. New Zealand is, or should be, fully aware of the policy objectives, outcomes and operation of Canada’s supply management and TRQ system. In the case of the CPTPP, Canada creates “pools” for processors under its dairy TRQs in pursuance of these objectives and outcomes.

6. Based on its misinterpretation of the provisions at issue in this dispute, New Zealand is contending that the common intention of the CPTPP Parties was to prohibit Canada from allocating its TRQs in a way that balances the market access granted to the Parties with Canada’s central policy objective in relation to its dairy industry, i.e., ensuring the predictability and stability of Canada’s dairy market. As demonstrated in this submission, New Zealand’s contention could not have possibly been Canada’s intention, nor the common intention of the Parties.

7. Canada has structured this submission as follows:

- Section II provides an overview of the factual background, in particular the structure and operation of the Canadian dairy market under a system of supply management, including the actors participating in the

² First written submission of New Zealand, paras. 83, 90, 98-99.

Canadian dairy supply chain. This section also provides an overview of Canada's TRQ commitments.

- Section III provides a description of the measures at issue in this dispute, namely Canada's Notices to Importers.
- Section IV refutes New Zealand's inaccurate description of Canada's pooling system and describes the economic rationale of market actors' decisions whether to import goods from New Zealand.
- Section V contains Canada's legal arguments with respect to each of New Zealand's claims, setting out New Zealand's errors in the interpretation of the provisions at issue. It explains why Canada's interpretation is the correct interpretation and why New Zealand's claims must fail.
- Section VI sets out Canada's conclusion and requested disposition of the matter.

II. FACTUAL BACKGROUND – CANADA'S DAIRY MARKET AND TRQs

A. THE CANADIAN DAIRY MARKET

8. Dairy production in Canada is predominantly for the domestic market. The domestic market for dairy products in Canada operates under a supply-managed framework based on three "pillars": (1) controlled production, (2) pricing mechanisms, and (3) controlled imports. These three pillars are fundamental to the stability and effectiveness of the supply management system³ and work together to balance supply with demand for dairy products within Canada. This dispute involves the third pillar, because New Zealand's claims lie at the intersection of Canada's TRQ commitments under the CPTPP, which provided new market access for imports into Canada's dairy market, and Canada's system of supply management.

9. Key objectives of supply management for dairy products are to ensure a balance between supply and demand and to provide the opportunity for a fair and predictable livelihood to dairy farmers (producers). This is done through domestic production quotas that are set to ensure an adequate and timely milk supply to meet

³ Library of Parliament, Background paper, Canada's Supply Management System, accessed 17 April 2023, <<https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2018-42-e.pdf>>, Exhibit CDA-3, p. 2

demand for dairy products across all domestic market segments (processing, further processing, food service and retail) while avoiding surplus and shortages. Market demand is calculated by the Canadian Dairy Commission (“CDC”) and production targets are established and adjusted monthly by provincial milk marketing boards.⁴ These targets take the form of domestic production quota allocation to producers. Producers operating under supply management plan their production based on their production quota, which aligns production with demand.

10. In the short term, the underlying economic and technical characteristics of milk production are difficult for producers to manage independently and can result in an unpredictable milk supply for processing activity in the absence of measures to manage domestic production and imports. A cow’s production of milk cannot be turned on and off like a faucet – it takes time to adjust.⁵ Any change in supply, absent a corresponding change in demand, will potentially result in excess supply and income losses. Because supply and demand are aligned under supply management, prices received by producers and the resulting revenue for producers are more stable, and losses from the disposal of surplus milk is prevented. Further, the overall environmental impact and food waste from dairy farming (i.e., water and animal feed, methane emissions from cattle, and carbon dioxide emissions from transportation) is reduced.

11. The underlying economic and technical characteristics of milk production are not unique to Canada. Many dairy producing countries, including New Zealand, have measures in place in an effort to reduce the volatility in milk prices associated with surplus milk production. In New Zealand, the market is dominated by a single dairy processor co-operative by the name of Fonterra, a near monopoly/monopsony, which

⁴ These quota adjustments take into account the quantity of dairy products that are imported into Canada under its trade agreements. These forecasts and adjustments are done so that Canadian milk production can meet demand in timely manner throughout the year.

⁵ Milk production is not easily adjustable in the short-term. Cows need to be milked daily in order to stay comfortable and healthy. A typical milk production cycle is comprised of a lactation period, which is expected to last 305 days, and a dry period of about 60-65 days. See Duration of milk production (305 days), Milk Production and Biosynthesis, Exhibit CDA-4.

Milk Production will also vary seasonally with higher production in the spring and lower production in the fall and winter. Increasing production requires an approximate two-year investment to breed cows, while decreasing production is limited mostly to culling cows. See, Progressive Dairy, Seasonality in milk production, Exhibit CDA-5.

processes 81% of the country's milk supply.⁶ Fonterra was created in 2001 by the *Dairy Industry Restructuring Act* ("DIRA"),⁷ and the operations of Fonterra are regulated under the DIRA, which, among other things, requires that Fonterra "must accept supply" at a price established in accordance with the farm gate milk price formula set out expressly in the DIRA.⁸ Fonterra also "must supply raw milk to independent processors" at a price determined based on the farm gate milk price formula provided under the DIRA. In short, Canada is not unique in regulating its dairy market to manage supply and reduce price volatility.

B. THE THREE PILLARS OF SUPPLY MANAGEMENT

12. Canada's supply management system for milk was initiated in the 1950s in response to an oversupply of butter in the Canadian market and emerging trade barriers in export markets that was hurting producer revenues. Supply management was designed to provide stability and predictability for producers who would otherwise be subjected to significant volatility in both the domestic and export markets. By the end of the 1980s, the three pillars of supply management were well established.

13. All three pillars are necessary to ensure the functioning of the dairy supply management system in Canada. While this dispute involves measures under the third pillar, an understanding of the other two pillars and the relationship between the three is necessary to understand the overall context of the dairy market in Canada, which informed both Canada's approach to negotiating the CPTPP and its subsequent TRQ allocation decisions for implementing the Agreement.

⁶ *The Dairy Sector in New Zealand-Extending the Boundaries*, accessed 10 April 2023, <<https://www.productivity.govt.nz/assets/Inquiries/frontier-firms/a977484e51/The-dairy-sector-in-NZ-TDB-Advisory.pdf>>, Exhibit CDA-1-19, p. 8.

⁷ Dairy Industry Restructuring Act 2001 ("DIRA"), accessed 13 April 2023 <<https://www.legislation.govt.nz/act/public/2001/0051/latest/whole.html#DLM106751>>, Exhibit CDA-6. Fonterra was created in 2001 as a result of a merger between the two largest processors at the time, the New Zealand Dairy Group and the Kiwi Dairy Co-operative, and the New Zealand Dairy Board, which was New Zealand's single-desk export monopoly established under the *Dairy Board Act of 1961*. An earlier proposal for a merger to create a similar amalgamation had been rejected by New Zealand's competition authority, the Commerce Commission. *Commission's preliminary determination says 'no' to dairy 'mega-merger'*, accessed 13 April 2023, <<https://comcom.govt.nz/news-and-media/media-releases/archive/commissions-preliminary-determination-says-no-to-dairy-mega-merger>>, Exhibit CDA-7, but the merger was subsequently authorized under the DIRA.

⁸ See DIRA, Exhibit CDA-6, ss. 73-85 (provisions in "New co-op must accept supply") and 150A-150C.

1. Pillar 1: Controlled Production of Milk

14. The first pillar of controlled production primarily involves producers (dairy farmers) operating the dairy farms that produce the raw milk used to make other dairy products. It also involves the CDC and provincial milk marketing boards.

15. One of the objectives of supply management is to provide the opportunity for a fair and predictable livelihood for producers by reducing price and market volatility. This is achieved through a system of milk production quotas under which producers sell their milk to provincial market boards based on the pricing mechanisms (the second pillar).

16. Provincial milk marketing boards⁹ are responsible for setting the production quotas and issuing them to individual producers.¹⁰ Based on the quota quantity a producer receives, the producer sells its raw milk production to the provincial milk marketing boards, which in turn sell to processors. As previously noted, milk production from a cow cannot be stopped or paused easily,¹¹ therefore, significant efforts are required to ensure that the quantity of production of milk by Canadian dairy farmers is within the quantity demanded by the marketplace.¹²

17. One of the CDC's roles is to ensure milk production is aligned with demand. The CDC calculates demand, referred to as Total Requirements,¹³ and it calculates

⁹ Milk marketing boards are provincially delegated bodies responsible for dairy marketing within their (provincial) jurisdictions. Responsibilities of Milk marketing boards may vary slightly from province to province but generally, these include: managing milk supply in the province, licensing producers and milk transporters, purchasing milk from producers, selling milk to processors, and coordinating milk transportation from farm to plant.

¹⁰ For example, see Dairy Farmers of Ontario, Quota and Milk Transportation Policies, Part I: Quota Policies, Section A: General Regulations and policies, accessed 18 April 2023, <https://new.milk.org/getattachment/Industry/Raw-Milk-Quality-Program-policy-book-updated/Quota-Policy-Book-2021_07_01.pdf?lang=en-US>, Exhibit CDA-8.

¹¹ See paragraph 12 above and fn. 5 about economic and technical characteristics of milk production.

¹² Ibid.

¹³ Total Requirements is a measure of demand for milk in Canada, expressed in kilograms of butterfat. Total Requirements is based on monthly figures, which quickly capture changes in demand. The calculation is based on a domestic disappearance model, which measures monthly variation in the amount of butterfat consumed in the country. The calculation takes into account: (1) domestic butterfat production; (2) imports of butter; (3) reported milk disposals by marketing boards, and (4) variation in butter stocks (opening vs. closing stocks).

supply, otherwise known as Total Production Quota, which is set monthly.¹⁴ The CDC uses the following equation to make these calculations:

$$\text{Total Production Quota} = \text{Total Requirements} - \text{Imports}$$

18. From this equation, it is clear that accurately forecasting imports is key to determining a Total Production Quota that reflects the quantity of Canadian milk production that is needed. Because the Total Requirements calculation is retroactive and thus based on data for the previous month, the CDC also has forecasting models based on historical import trends.

19. The timing of when imports enter the Canadian market matters, as it will directly impact the calculation of Total Production Quota. If the Total Production Quota cannot be accurately calculated, an imbalance between supply and demand will ensue. For example, an unexpected surge of imports in April, when milk production is seasonally high, will result in too much milk for the Canadian market, with the consequences of increased costs and lost revenue for producers as well as waste (disposal of excess milk).¹⁵ Likewise, overestimating the amount of imports in a given month will create a milk shortage in the Canadian market, which means lost market opportunities for producers and potential shortages for others in the supply chain.

2. Pillar 2: Pricing Mechanisms for Milk

a) Pricing Based on End-Use of Milk

20. Predictable imports and aligning production to meet demand all create a stable environment for the orderly marketing of raw milk, including stable prices and revenue that support planning and investment decisions for milk producers and

¹⁴ To assist the industry in planning for future production, the CDC maintains several forecasts based on econometric and non-econometric models. These include forecasts of Total Requirements and Total Production Quota. The results of these models are shared with the industry monthly and continuously monitored to ensure accuracy. Since the industry has adopted a monthly production quota system to ensure that markets are served on a more adequate and timely manner, production quota issued to producers are based on forecasts.

¹⁵ See fn.5, above.

processors.¹⁶ As part of the system, all raw milk produced in Canada must be sold by producers to the provincial milk marketing boards, which in turn sell this milk as the primary raw material input to processors.

21. Prices paid by processors and received by milk marketing boards vary depending on the milk’s end-use. For example, raw milk sold to make cheese has a different price than raw milk sold to make butter.

22. The Canadian dairy industry has organized these end-uses under the Harmonized Milk Classification System, which establishes various classes depending on how the milk is used.

Figure 1: Milk Classes

Classes	Examples of End Uses of Milk
1	Fluid milk and cream products
2	Ice cream, yogurt, sour cream
3	Cheese
4	Butter and skim milk powder
5	Dairy products for further processing (e.g., butter used to make croissants, cheese for frozen pizza)

23. As the above chart demonstrates, the Canadian dairy industry recognizes, through its organization of milk classes, the inherent differences between dairy processing and using dairy products for further processing.¹⁷ Milk used by processors to manufacture finished dairy products is priced in classes 1 to 4. Milk that goes into dairy products that are in turn used in further processing is priced in class 5. For example, milk used to make cheese for retail is billed in class 3, while milk used to make cheese for further processing, for example into pizza, is billed in class 5.

¹⁶ For dairy farmers, production planning includes investment decisions such as farm infrastructure and livestock rearing. For example, it takes a dairy cow two years from birth to begin producing milk. For dairy processors, planning includes investment decisions such as what products to produce and in what volume. For example, a processing company must decide whether to invest in facilities and/or capital equipment for cheese production or another dairy product as the market grows.

¹⁷ The first four classes are for processors that use the milk to make various types of dairy products and class 5 is for further processors that use the dairy products for further processing into other food products.

b) Processors and Their Role in Supply Management

24. Dairy processors play a key role in turning raw milk from the farm into dairy products that are ultimately sold to the consumers. Processors purchase raw milk from a provincial milk marketing board¹⁸ and then use it to manufacture different dairy products such as butter, cheese, yogurt, or ice cream.¹⁹ Processors then sell their products to further processors, distributors, food service operators, retailers, and, in some cases, directly to consumers.

25. Dairy processors, given their unique position in the dairy market, generally have a high level of knowledge regarding the full scope of dairy ingredients and products desired by consumers (by both final consumers and other processors and further processors) and the supply of ingredients and products domestically available in Canada. They are in a better position to serve the market with TRQs as they continually monitor the evolution of Canadian dairy demand (throughout the year) to ensure that the right dairy ingredients and products are produced and imported to meet overall demand in the Canadian economy (not limited to specific products or consumers).

26. In contrast, other segments of the dairy supply chain, such as retail and food service, do not have the same level of expertise in product selection and supply that considers overall dynamics in the dairy market, such as stocks, seasonal variations in production, and availability of dairy components/ingredients. For example, retailers sell a broad list of agricultural and non-agricultural products and services and are generally not focused on the overall stability of Canada's dairy market.

27. By being both on the demand and the supply side in the overall Canadian dairy market, import decisions made by dairy processors, while based on business considerations, are not necessarily narrowly focused only on their own market realities but also seek to minimize disruption to, and maintain the stability of, dairy supply management. In other words, processors' economic interests also align with those of milk producers in ensuring stability and predictability within the dairy supply

¹⁸ See fn. 9, above.

¹⁹ Government of Canada, Dairy Industry at a Glance, "Overview" and "Manufacturing of Dairy Products", accessed 18 April 2023, <<https://agriculture.canada.ca/en/sector/animal-industry/canadian-dairy-information-centre/dairy-industry>>, Exhibit CDA-9.

chain as a whole and in maintaining the balance between demand and supply within the overall Canadian market for dairy products that is essential to the functioning of the supply management system. By providing processors with a reserved portion of the TRQ, predictability is enhanced because imports under that portion of the TRQ will tend to follow the more stable import patterns of processors as they take into account domestic production.²⁰ Further, providing pools for others further downstream in the supply chain (further processors, distributors) allows for the total quantities that may be imported by each market actor over the course of a year to be known in advance, which assists with planning and forecasting the Total Production Quota on a monthly and annual basis.

28. While processors have an important role in the supply management system and the supply chain, because they purchase raw milk from the provincial marketing boards subject to the pricing mechanisms under supply management, processors have a limited ability to negotiate prices. As such, increases in raw milk prices in Canada will have a direct impact on the cost of production of processors.

29. At the same time, on the supply side, processors also sell into a concentrated retail market where they have limited ability to negotiate their sale price and pass on production cost increases, which can impact processors' profit margins.²¹ Processors and other suppliers pay retail fees to retailers such as grocery stores in exchange for the stocking of food products on shelves and associated costs. The largest processor represents no more than five percent of any retailer's Canadian shelf space.²² According to a Federal-Provincial-Territorial Working Group that studies the impact of retail fees, an increasing number of other fees, the manner in which retail fees are imposed and a lack of predictability and transparency has increased costs and can

²⁰ WTO Cheese Imports by Quarter, Exhibit CDA-10 (**CONFIDENTIAL INFORMATION**).

²¹ Government of Canada, Retail fees in the Canadian food industry, accessed 6 April 2023, <<https://agriculture.canada.ca/en/canadas-agriculture-sectors/sector-overviews-data-and-reports/retail-fees-issue-canadian-food-industry#Toc75955903>>, Exhibit CDA-11, pp. 2, 3 and 13.

²² Dairy Processors Association of Canada, Addressing Key Issues in Canada's Grocery Supply Chain Exhibit CDA-12 and Government of Canada, Retail fees in the Canadian food industry, accessed 6 April 2023, <<https://agriculture.canada.ca/en/canadas-agriculture-sectors/sector-overviews-data-and-reports/retail-fees-issue-canadian-food-industry#Toc75955903>>, Exhibit CDA-11, p. 13.

have other negative effects on producers, processors and independent retailers in the food supply chain.²³

30. The price the consumer pays for dairy products is set at the retail level, and depends on many factors such as manufacturing, transportation, distribution, storage, marketing and packaging costs throughout the supply chain.²⁴

31. As a result, processors are in a position where they effectively cannot negotiate prices with suppliers of inputs (producers via provincial milk marketing boards), and retail prices for the products they produce are set at the retail level by the retailers that wield a significant amount of leverage in the supply chain.

3. Pillar 3: Import Controls on Dairy Products

32. The third pillar of Canada's supply management system is import controls. Canada has granted preferential market access to its trading partners by establishing TRQs for these products under its trade agreements, which allow a specified quantity to enter Canada duty-free or at a low rate of duty. Otherwise, Canada normally applies very high tariff rates on out-of-quota imports of supply-managed products (dairy, poultry, and egg products). The administration of import controls provides Canada with detailed information regarding the quantities and types 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. Allocating TRQs to processors is necessary given their importance to predictability and stability in the purchase of domestic raw milk and supply of dairy products downstream and because of their more vulnerable position as they are limited in their ability to negotiate prices for their inputs as well as the prices of their products ultimately sold to consumers.

²³ Government of Canada, Retail fees in the Canadian food industry, accessed 6 April 2023, <<https://agriculture.canada.ca/en/canadas-agriculture-sectors/sector-overviews-data-and-reports/retail-fees-issue-canadian-food-industry#Toc75955903>>, Exhibit CDA-11, p. 2.

²⁴ Dairy Processors Association of Canada, Addressing Key Issues in Canada's Grocery Supply Chain, Exhibit CDA-12.

C. OTHER ACTORS PARTICIPATING IN THE CANADIAN DAIRY SUPPLY CHAIN

33. The rest of the supply chain moving downstream from producers and processors, are further processors, distributors, food service operators, retailers and ultimately consumers.

1. Further Processors

34. In the context of the dairy supply chain, further processors are generally entities that do not produce dairy products but rather incorporate dairy products as ingredients in the manufacturing of further processed food products. For example, a pizza manufacturer that uses cheese in the making of a frozen pizza is a further processor. Another example would be a baked goods manufacturer that uses butter in the production of croissants. In both cases, the dairy product purchased (cheese or butter) was manufactured by a processor and then transformed by the further processor into a further processed food product (frozen pizza or croissant). Further processors are, in this way, factually distinct from processors in the context of the dairy supply chain.

35. Consistent with this understanding, Notices to Importers issued by Global Affairs Canada provide a description of how Canada defines processors and further processors for the purposes of allocations under its TRQs.²⁵

2. Distributors

36. Distributors purchase dairy products, from processors and further processors, for resale to a third party. Specialized dairy distributors engage in the marketing, as well as the buying and selling, of dairy and food products but do not engage in the manufacturing of food products. Distributors are often the link between processors and further processors, on the one hand, and the food service operators and retailers that sell to the final consumer, on the other hand.

²⁵ For example, under the CPTPP Butter TRQ, “further processors” are described as an entity that “uses butter in your manufacturing operations and product formulation”. An example of a butter further processor would be an establishment that uses butter in the production of another good, such as an industrial baker who uses butter to make pastries. On the other hand, a processor is an entity that “that manufactures butter in your own provincially-licensed or federally-registered facility”. See Exhibit NZL-7.

3. Food Service Operators

37. The food service industry (e.g., restaurants) purchases dairy products from processors or distributors and therefore constitutes part of the demand that producers and processors have to supply. The food service industry may incorporate dairy products as part of, or as a complement to, their product offerings.

4. Retailers

38. Canada's food retail industry is divided into two major categories: (i) supermarkets and grocery stores; and (ii) general merchandisers such as warehouse clubs and supercentres. The Canadian supermarket and grocery store industry, which is the largest food retail channel in Canada, primarily sells grocery products, such as fresh and prepared meats, poultry and seafood, canned and frozen foods, fresh fruits and vegetables and dairy products. General merchandisers are comprised of establishments primarily engaged in retailing a general line of merchandise that may or may not include a general line of grocery items. They may sell apparel, home goods, furniture, and/or other products.

39. The food retail industry in Canada, like in some other countries²⁶, is concentrated. Three grocery and supermarket chains were responsible for an estimated 59% of grocery sales in 2021. Overall sales from supermarkets and other grocery stores totalled \$101.6 billion in 2022.²⁷ When considered on their own, two warehouse club and supercentre chains were responsible for about 17% of total grocery sales in Canada in 2021. As such, the top five retailers accounted for 76% of grocery sales to consumers within Canada in 2021.²⁸

²⁶ See for example, Bundeskartellamt, Food retail trade, accessed 20 April 2023, <https://www.bundeskartellamt.de/EN/Economicsectors/Food/food_node.html>, Exhibit CDA-13 and Australia Market Overview 2023, accessed 20 April 2023, <<https://www.huntexportadvice.com/post/australia-market-overview-2021#:~:text=%E2%80%8D-Market%20Share,10%25%20and%20Metcash%207%25>>, Exhibit CDA-14.

²⁷ Statistics Canada, *Monthly retail trade sales by province and territory (x 1,000)*, Table 20-10-0056-01, accessed, April 18, 2023, <<https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=2010005601>>, Exhibit CDA-15.

²⁸ United States Department of Agriculture, Foreign Agricultural Service, Retail Foods – Canada (14 July 2022), *Report highlights*, Exhibit CDA-16, p. 1.

40. Retailers in Canada with a high level of market share have greater power when negotiating product prices with their suppliers and can impose strict requirements on suppliers regarding the nature and level of supply (e.g., volume and packaging). In addition, suppliers may be required to pay a variety of fees (e.g., listing fees) and/or fines with limited avenues for recourse and redress of issues.

41. None of this should come as a surprise for New Zealand, which is itself currently attempting to resolve certain problems related to concentration in the New Zealand retail industry.²⁹

42. Under supply management, fees or partial fees cannot be passed from processors to producers since the cost of raw milk is subject to pricing mechanisms. Thus, processors under supply management have less flexibility to adjust their business practices when constraints are imposed by retailers. Dairy processors, in particular, have noted that the impact of contentious retail business practices on dairy processing investment and innovation is compounded given the nature of the supply management system, as well as the nature of their products, which are perishable and have high turnover rates.³⁰

43. Thus, Canada's decision to allocate its CPTPP dairy TRQs mainly to upstream players (i.e., processors and further processors) not only promotes Canada's supply management system by supporting predictability and stability in the Canadian dairy market, it also promotes a better balance between upstream and downstream players in the Canadian dairy supply chain. As the Dairy Processors Association of Canada has warned, any decision to extend TRQ eligibility to retailers "[i]ncrease[s] power imbalances between retailers/distributors and processors".³¹

²⁹ In 2022, the Government of New Zealand launched consultations regarding the enactment of a Grocery Code of Conduct that would aim to improve the current power imbalance between retailers and suppliers. Later in 2022, the Government of New Zealand introduced a bill in the New Zealand Parliament (the *Grocery Industry Competition Bill*) which would establish a binding grocery supply code to regulate trade practices between retailers and suppliers (among other measures).

³⁰ Government of Canada, Retail fees in the Canadian food industry, accessed 19 April 2023, <<https://agriculture.canada.ca/en/canadas-agriculture-sectors/sector-overviews-data-and-reports/retail-fees-issue-canadian-food-industry#Toc75955903>>, Exhibit CDA-11, p. 20.

³¹ Dairy Processors Association of Canada, "Dairy Import Permits", accessed 17 April 2023, <<https://www.dpac-atlc.ca/import-permits/>>, Exhibit CDA-17.

5. Consumers

44. Consumers represent the final downstream end of the supply chain for dairy products. Consumers purchase finished dairy products from a variety of entities such as grocery stores, warehouse/club stores, as well as specialty shops. Finished food products containing dairy products are sold through the food service industry in restaurants, bars, hospitals, schools, and retailers.

D. CANADA'S TRQs AND DOMESTIC REGIME FOR THE ADMINISTRATION OF TRQs

45. Canada has established TRQs for supply-managed dairy products under the WTO Agreement and three trade agreements including the CPTPP. Below, Canada will explain its TRQ commitments under the CPTPP, including the background to their negotiation as well as the manner in which the TRQs are implemented within Canada's domestic legal framework.

1. Canada's TRQs in the CPTPP

46. Under the CPTPP, Canada established 16 dairy TRQs that provide access to imports from all CPTPP Parties up to the total aggregate quantity of the TRQ.

47. The TPP is the predecessor agreement of the CPTPP. The TPP was signed on February 4, 2016,³² but never entered into force. The United States participated in the TPP negotiations and was one of its signatories, but withdrew from the agreement on January 30, 2017.³³ The three main interested parties that Canada negotiated the TRQs with were the United States, New Zealand and Australia. Thus, the total aggregate quantities for each of the 16 dairy TRQs primarily reflect the market access quantities negotiated with those three countries.

³² Global Affairs Canada, "Background on previous Asia-Pacific trade negotiations", accessed 6 April 2023, <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/aqr-acc/tpp-ptp/background_negotiations-contexte_negociations.aspx?lang=eng>, Exhibit CDA-18.

³³ See Letter from the United States Trade Representative to the TPP Depository, dated January 30, 2017, <<https://ustr.gov/sites/default/files/files/Press/Releases/1-30-17%20USTR%20Letter%20to%20TPP%20Depository.pdf>>, Exhibit CDA-19.

48. Following the withdrawal of the United States from the TPP, the other TPP signatories engaged in negotiations towards the CPTPP, and this agreement, which incorporates the TPP, was signed on March 8, 2018.³⁴ The CPTPP entered into force on December 30, 2018.³⁵ Canada's aggregate TRQ volume resulting from the negotiations with the United States, New Zealand and Australia remained unchanged in the CPTPP, meaning Canada did not reduce the aggregate TRQ volume despite the fact that dairy products from the United States would not be imported under the CPTPP. Canada later concluded the *Canada-United States-Mexico Agreement* ("CUSMA"), which included specific dairy TRQ access for imports from the United States.

49. Canada agreed to the obligations in the CPTPP on the understanding that they would preserve Canada's broad discretion to administer its TRQs, including its ability to design allocation mechanisms of its choosing. Accordingly, in implementing the CPTPP, Canada chose to reserve a portion of the TRQ for processors under all its dairy TRQs.

50. Canada's TRQs for dairy products under the CPTPP are set out in the Tariff Schedule of Canada, Appendix A (Tariff Rate Quotas), under Annex 2-D (Tariff Commitments) to Chapter 2 (National Treatment and Market Access for Goods) ("Canada's Schedule"). Canada's Schedule sets out the quantity of specified dairy products that may be imported duty-free within a 12-month quota year for each TRQ. Canada has made no commitments in its Schedule to ensure any importer group (processors, further processors, distributors, food service, or retailers) receives an allocation under the TRQs. Similarly, Canada has made no commitments in its Schedule to import products of a particular relative value (e.g., higher-value products) or to allow New Zealand exporters to sell products directly to Canadian retailers.

³⁴ See "About the Comprehensive and Progressive Agreement for Trans-Pacific Partnership", 6 April 2023, <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/background-document_information.aspx?lang=eng>, Exhibit CDA-20.

³⁵ The CPTPP entered into force on December 30, 2018 for those countries that had ratified the agreement (i.e., Canada, Australia, Japan, Mexico, New Zealand, and Singapore). See "About the Comprehensive and Progressive Agreement for Trans-Pacific Partnership", accessed 6 April 2023, <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/background-document_information.aspx?lang=eng>, Exhibit CDA-20.

51. To administer its TRQs, 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 the 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 to the discretion of the importing Party, in this case Canada, subject to consistency with the other provisions of the Agreement.

52. Canada's allocation mechanism is, in part, designed to ensure a degree of market predictability in terms of balancing supply with demand over the course of a quota year and from year to year. In a supply-managed market, this helps to limit market volatility across the supply chain and surplus disposal at the producer level. An allocation mechanism allowing for the establishment of "pools", including those for processors, helps to support such a predictable system. As previously noted, because of the underlying characteristics of milk production³⁶ processors are in a unique position within the Canadian dairy supply chain to take into consideration the balance between imports and domestic production to meet domestic demand.³⁷ Processors can fill gaps in supply by sourcing through both domestic milk production and imports and respond to overall consumer demand and trends because they are producing dairy products that will be sold to consumers. Establishing pools, including for processors, represents the balance struck between, on the one hand, increased dairy market access, and, on the other hand, the discretion to establish an allocation mechanism that ensures predictability and stability in the Canadian dairy market.

2. Canada's Domestic Legal Framework for the Administration of TRQs

53. Canada's import licensing regime for all TRQs is administered under the *Export and Import Permits Act* ("EIPA").³⁸

³⁶ Milk production is seasonal and cannot be turned on or off quickly. See footnote 5.

³⁷ For example, processors will import less when domestic milk production is high such as in the spring, and will import more when milk production is lower such as in the winter.

³⁸ For all products that are included on the *Import Control List*, (C.R.C., c. 604) ("ICL"), Exhibit CDA-21, which includes dairy products in items 117 to 134 and items 141 to 160, a permit issued by the Minister is required to import those goods into Canada, pursuant to EIPA, subsection 8(1), which states: "The Minister may issue to any resident of Canada applying therefor a permit to import goods included in

54. Under section 6.2 of the EIPA, the responsible Minister has a very broad discretion to determine an allocation mechanism and to issue allocations.³⁹ This includes broad discretion to determine the criteria for calculating an allocation, including establishing pools, as well as to decide which applicants are eligible to receive an allocation under the TRQ.

55. There are two main regulations that set out the rules and procedures applicable to import allocations and permits: the *Import Allocation Regulations* ("IARs") and the *Import Permits Regulations* ("IPRs").⁴⁰

56. The IARs define "applicant" as a resident of Canada who applies for an import allocation or a transfer and an "import allocation" as an allocation issued under subsection 6.2(2) of the EIPA – that is, an allocation issued to a resident of Canada who applies for it. The IARs also define transfers, which are the purchase, sale or rent of an import allocation with consent of the Minister pursuant to subsection 6.2(3) of the EIPA. Transfers allow an allocation holder to transfer all or part of its allocation to another allocation holder under the same TRQ⁴¹, for example if the original allocation holder will not be able to import up to its full allocation quantity. The IARs also set out the information that must be provided by the applicant in its application, the procedure for issuing or transferring an import allocation, and the considerations to be taken into account by the Minister when deciding whether to issue an import allocation or to consent to a transfer.

an Import Control List, in such quantity and of such quality, by such persons, from such places or persons and subject to such other terms and conditions as are described in the permit or in the regulations." Goods are added to the ICL pursuant to subsection 5(1) of the EIPA, which sets out the purposes for which the government can add goods to the ICL. Agricultural goods on the ICL are provided for under one of two types of tariff items: "within access commitment" or "over access commitment." Each item enumerated on the ICL has a dual tariff item number reflecting this and pursuant to subsection 10(2) of the *Customs Tariff Act*. Export and Import Permits Act (R.S.C., 1985, c. E-19), Exhibit CDA-22.

³⁹ Under section 6.2, the Minister may (1) determine import access quantities or the basis for calculating them; (2) establish a method for allocating the quantity to residents of Canada who apply for an allocation; and (3) issue an import allocation to any resident of Canada who applies for an allocation.

⁴⁰ Import Permits Regulations (SOR/79-5), Exhibit CDA-23 and Import Allocation Regulations (SOR/95-36), Exhibit CDA-24.

⁴¹ Global Affairs Canada, "General Information on the Administration of TRQs for Supply-Managed Products", Exhibit NZL-17.

57. The IPRs set out the information required for an import permit application, Ministerial obligations related to the issuance of permits, and information on shipping requirements and on replacing lost permits.

58. Finally, Canada's *General Information on Administration of TRQs for Supply-Managed Products*⁴² sets out general information regarding the administration of TRQs for all supply-managed products. The document sets out generally how an allocation works. The document provides that "an allocation" is "an amount of TRQ that is granted to an eligible applicant" and functions like an account, where once the applicant is granted an allocation it has the authority to request and be issued a shipment-specific import permit, which is required to import dairy products covered by the TRQ to be imported at the within access tariff rate. It also sets out general information on the transfer, return and under-utilisation of TRQ allocations.

E. CONCLUSION

59. As the above demonstrates, Canada's system for allocating TRQs for the dairy products at issue in this dispute is intended to maintain the stability and predictability of the supply-managed dairy market in Canada. Given the inherent difficulties in quickly increasing milk production in times of shortage or reducing milk production in times of surplus, import controls are essential to avoid major disruptions in the market. The system of creating pools reserved for specific segments of the dairy market, including for processors, helps with predictability in terms of the aggregate quantities to be imported by different market segments. Processors, given their unique position as both purchasers of raw milk from domestic suppliers and as suppliers of dairy products to the other parts of the supply chain, are well-positioned to play a key role in maintaining this stability and predictability. Canada's TRQ allocation mechanism reflects these objectives and the dynamics of the market. Contrary to New Zealand's contention, Canada did not give up its discretion to administer the TRQs established under the Agreement through an allocation mechanism of its choosing.

⁴² Ibid.

III. MEASURES AT ISSUE

60. Canada implements its TRQs through Notices to Importers, which are documents that set out the policies and practices regarding the administration of the TRQs, Canada's Notice follow the same basic structure.⁴³

61. New Zealand is challenging the establishment of pools within Canada's TRQs. The pools are established through the operation of sections 3 and 4 of each Notice to Importers.

62. Section 3 of each Notice to Importers provides that an applicant is eligible to apply for an allocation if they are a processor that processes or manufactures the products covered by the TRQ in question in its own provincially-licensed or federally-regulated facility or a distributor that buys the products covered by the TRQ and resells it to other businesses.⁴⁴ For those TRQs that establish a pool for further processors, a further processor that uses the products covered by the TRQ in their manufacturing operations or product formulations is also eligible to apply for an allocation.

63. Section 4 of each Notice to Importers sets out the basis for calculating each applicant's share of the TRQ, with each share coming from an applicant reserve or "pool" corresponding to the groups listed as eligible under section 3. For example, under the Cheeses of All Types TRQ, 85% of the in-quota quantity is reserved for allocation among processors on a market share basis based on the kilograms of cheese manufactured by the individual processor during the reference period. Each applicant that meets the requirements to apply for an allocation under the policy will be considered for an individual share from within the 85% of the volume reserved for processors (the processor pool) with the individual allocations distributed to applicants on a market share basis. This means that the quantity of kilograms manufactured of the products covered by the TRQ by each processor applicant is added up to determine the quantity of the total "market" for that TRQ. Each processor's production is then calculated as a percentage or share of the total market. Each applicant then receives that percentage or share of the total quantity in

⁴³ Global Affairs Canada, Notices to Importers, Exhibits NZL-1 – NZL-16.

⁴⁴ With the exception of the Industrial Cheese TRQ, which establishes a processor pool and further processor pool only.

the pool reserved for processors. For distributors, if 15% of the TRQ volume is reserved for distributors (the distributor pool), then each distributor receives an equal share of that 15% of the total volume.

64. Section 5 of each Notice to Importers also provides for transfers and returns as well as penalties for under-utilisation. The section of the Notices that addresses transfers must be read in conjunction with section 5 of *General Information on the Administration of TRQs for Supply-Managed Products*. The purpose of the transfer, return and under-utilisation mechanisms is to promote utilisation of the TRQs and ensure the allocated quantities ultimately go to those that will use them.

65. An allocation holder may make a request to transfer a portion of its allocation to other allocation holders within the same TRQ. Under the CPTPP dairy TRQs, if an allocation holder transfers a portion of their allocation, they are not eligible to receive transfers from other allocation holders within that TRQ year. An allocation holder that receives a transfer is not eligible to transfer any portion of their allocation that TRQ year. Without the ability to transfer portions of an allocation that cannot be used that year by the allocation holder, allocation holders would be forced to hold on to allocations that would go unused – unless they were returned, as discussed below – potentially lowering the rate of utilisation for the TRQ.

66. The Notices for the CPTPP dairy TRQs and the *General Information on the Administration of TRQs for Supply-Managed Products* also provide for returns of portions of allocations and impose under-utilisation penalties. If an allocation holder is unlikely or unable to use its full allocation, it can be returned without penalty before April 1 for TRQs allocated on a dairy year basis (August 1 to July 31) or September 1 for TRQs allocated on a calendar year basis.⁴⁵ Returned quantities are normally made available to eligible allocation holders within seven days of the return date and are redistributed to interested allocation holders that have not returned any portion of their allocation, in proportion to their initial allocation. If returned quantities still remain after this initial round of offers, these quantities are re-allocated on demand to any eligible allocation holder, including those that have

⁴⁵ Key dates and access quantities 2022-2023: TRQs for Supply-Managed Products, accessed 13 April 2023, <<https://www.international.gc.ca/trade-commerce/controls-controles/trq-dates-ct.aspx?lang=eng>>, Exhibit CDA-1-2.

returned initially and potentially new applicants that meet the eligibility criteria of the TRQ.

67. If an allocation holder uses less than 90%⁴⁶ or 95% of its allocation in a given year, as applicable, an under-utilisation penalty may be applied the following year to reduce the quantity of the allocation granted to that applicant. The allocation holder's utilisation rate is calculated by dividing the "Level of Use"⁴⁷ of the TRQ allocation by the "Total Allocation Granted"⁴⁸ to determine the percentage of the total allocation used. The percentage of the allocation not used is the under-utilisation rate. The penalty assessed in the following TRQ year is the pre-penalty allocation in kilograms multiplied by the under-utilisation rate. This quantity is then subtracted from the pre-penalty allocation amount.

68. Quantities returned by the return deadline and quantities transferred are considered "used" for the purpose of determining under-utilisation, thus providing an incentive for the allocation holder to return quantities that it knows will not be used before the return deadline or to transfer quantities to another allocation holder, if the quantity will not be used. The transfer and return policies provide flexibility to promote the utilisation of the TRQ by allowing for quantities that would otherwise not be used to be redistributed to others who are more likely to use them.

IV. NEW ZEALAND'S DESCRIPTION OF CANADA'S POOLING SYSTEM IS INACCURATE

69. In Section IV of its first written submission, New Zealand provides a flawed, inaccurate description of the operation of Canada's pooling system. New Zealand makes several conclusory statements unsupported by evidence, mischaracterizations of the pooling system, and unsubstantiated assertions of what New Zealand considers "likely" behaviour of various economic actors based on reasons they "could

⁴⁶ The minimum utilisation rate of 90% applies to the Ice Cream and Mixes TRQ and the Yogurt and Buttermilk TRQ.

⁴⁷ The level of use is comprised of the Permits used in kg + any returns made before the return deadline + transfers out in kg.

⁴⁸ The Total Allocation Granted is comprised of the initial allocation + transfers in + any reallocated returns received.

have” had. However, New Zealand’s assertions are variously inaccurate, false, misleading, and lacking any basis in evidence.

70. The flaws begin with New Zealand’s statements that processors are unlikely to be motivated to use TRQs to import products.⁴⁹ New Zealand states that processors “could have very strong reasons not to want Canada’s CPTPP TRQs to be utilised at all” and that processors in Canada act as “gatekeepers of their own competition”, which allegedly encourages underfill.⁵⁰ New Zealand couches these statements using words such as “likely” and “could have” to attempt to distract from the fact that it provides essentially no evidence in support of any of these assertions. The only support it provides is to refer to publicly available data on import volumes, which is not relevant to its points about the economic demand for imports.⁵¹ Economic factors other than the pooling system explain these import volumes, as Canada shows below. New Zealand’s statement about processors being “gatekeepers” is particularly egregious as it assumes collusion, a cartel, or other anti-competitive behaviour between processors in Canada. While there is a single dominant player in the dairy industry in New Zealand,⁵² processors in Canada’s market act competitively with multiple players acting independently in their own economic interests in competition with one another.

71. Canada consulted with two experts in relation to New Zealand’s trade of dairy products with Canada: Dr. Sébastien Pouliot and Dr. Al Mussell. Each of these experts have produced a detailed report that Canada has submitted as evidence in this dispute.⁵³ Dr. Pouliot is an economist with a PhD in agricultural and resource economics with extensive expertise in the agricultural sector and the Canadian dairy sector specifically.⁵⁴ Dr. Pouliot has also been retained as an expert by several

⁴⁹ First written submission of New Zealand, paras. 33-34.

⁵⁰ Ibid. para. 34.

⁵¹ First written submission of New Zealand, para. 34.

⁵² *The Dairy Sector in New Zealand - Extending the Boundaries*, October 2020, accessed 13 April 2023, <<https://www.productivity.govt.nz/assets/Inquiries/frontier-firms/a977484e51/The-dairy-sector-in-NZ-TDB-Advisory.pdf>>, Exhibit CDA-1-19, p. 8.

⁵³ The Economics of Canada’s CPTPP Dairy TRQ Fill Rates, Expert report of Dr. Pouliot (April 20, 2023) (“Dr. Pouliot’s Expert Report”), Exhibit CDA-1 (**CONFIDENTIAL INFORMATION**), The Economics of Canada’s CPTPP Dairy TRQ Fill Rates, Expert report of Dr. Mussell (April 20, 2023) (“Dr. Mussell’s Expert Report”), Exhibit CDA-2 (**CONFIDENTIAL INFORMATION**).

⁵⁴ Dr. Pouliot’s Expert Report, Exhibit CDA-1 (**CONFIDENTIAL INFORMATION**), paras. 20-21.

Members of the World Trade Organization and provided expert economic evidence in a number of WTO disputes.⁵⁵ Dr. Mussell is an economist and research lead at *Agri-Food Economic Systems*; he holds a doctorate in agricultural economics and has extensive research experience and expertise in agricultural policy and agricultural marketing, with expertise in the dairy sector specifically.⁵⁶ The two expert reports provide evidence of the economic basis for trade in dairy products between New Zealand and Canada and demonstrate the flawed economic conception held by New Zealand of this trade, including with respect to Canada's pooling system.

72. As an initial point, New Zealand's statement that Canadian firms would have strong reasons not to import dairy products even if it would be profitable to do so⁵⁷, is essentially saying that firms would act against their own economic self-interest by refraining from importing goods that they could sell at greater margins.⁵⁸ As Dr. Pouliot's expert report describes, the only way this makes economic sense is if there is a cartel or sustained collusion between allocation holders to lock imports out of the market.⁵⁹ Otherwise, if a firm can make greater profit by importing goods from New Zealand, it is in its economic self-interest to do so. However, there is absolutely no evidence of any cartel or collusion in the Canadian market. New Zealand's assertion is not only baseless, but also contrary to the basic economic interests of individual processors as market actors.⁶⁰ The fact that there are considerable imports under several TRQs also shows that New Zealand's argument that processors are "gatekeepers of their own competition" is devoid of merit.

73. In fact, the evidence shows that processors do import products from New Zealand when there is demand for imports of those products. In 2021-2022, for example, the fill rate for the Mozzarella and Prepared Cheese TRQ was 62.4%, the Cheeses of All Types TRQ was 65.3% filled, and the Butter TRQ was 95.8% filled.⁶¹ It

⁵⁵ Ibid, para. 22.

⁵⁶ Dr. Mussell's Expert Report, Exhibit CDA-2 (**CONFIDENTIAL INFORMATION**), para. 3.

⁵⁷ First written submission of New Zealand, para. 34.

⁵⁸ Dr. Pouliot's Expert Report, Exhibit CDA-1 (**CONFIDENTIAL INFORMATION**), para. 94.

⁵⁹ Ibid, paras. 95-96.

⁶⁰ Dr. Pouliot's Expert Report, Exhibit CAN-1 (**CONFIDENTIAL INFORMATION**), para. 104.

⁶¹ Exhibit NZL-20: Fill-Rate Data for Canada's CPTPP Dairy TRQs, quota year 4 (2021-2022).

These figures are for calendar year 2021 for Mozzarella and Prepared Cheese and Cheeses of all Types; and dairy year 2021-2022 for Butter.

is notable that the Butter TRQ uses a similar pooling structure to other TRQs with 80% being allocated to processors, 10% to further processors and 10% to distributors, yet this TRQ is essentially completely filled.⁶² This shows that the pooling system itself is not a barrier to imports.

74. New Zealand complains that fill rates for thirteen TRQs were 10% or below, and nine of those thirteen were at 0% in 2021-2022.⁶³ While New Zealand suggests, without evidence, that this is due to processors gatekeeping the competition, the evidence actually shows that other economic factors explain the fill rates of these TRQs, including lack of demand in Canada for imports of these products from New Zealand.

75. [REDACTED]

⁶² Exhibit NZL-7: CPTPP: Butter TRQ – Serial No. 1039, dated 1 May 2021.
⁶³ First written submission of New Zealand, para. 34.
⁶⁴ Dr. Pouliot's Expert Report, Exhibit CAN-1 (**CONFIDENTIAL INFORMATION**), paras. 134-135.
⁶⁵ Ibid, para. 136.
⁶⁶ Ibid, para. 137.
⁶⁷ Ibid, paras. 138-139, 159,167-168, 201. For Milk Powder and Cream Powder, there was no demand except for a short period of a few months in 2022.
⁶⁸ Ibid, paras. 138-139, 159, 167-168, 201. For Milk Powder and Cream Powder, there was no demand except for a short period of a few months in 2022.
⁶⁹ Dr. Pouliot's Expert Report, Exhibit CAN-1 (**CONFIDENTIAL INFORMATION**), paras.140-141.
⁷⁰ Ibid, para. 142.
⁷¹ Ibid, para. 145.
⁷² Ibid, para. 146.
⁷³ Ibid, para. 200.
⁷⁴ Ibid, para. 200.
⁷⁵ Ibid, paras.143-144, 202. Dr. Pouliot's report found that for powdered buttermilk, the protection rate is greater than zero for a few months, but otherwise smaller or equal to zero. This means there was only a brief period where it would have been economically viable to import New Zealand goods

[REDACTED]

76. [[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]]

77. These challenges are not unique to Canada as an export market. Indeed, New Zealand’s dairy exports (to all countries) reflect the difficulties of shipping perishable goods over long distances. New Zealand’s three main dairy exports, representing 68% of its total dairy exports in 2021-2022, were products with a longer shelf life (i.e., milk and cream powders and skim milk powders) and higher selling price (i.e., butter).⁸¹ On the other hand, more perishable products (i.e., milk and cream) represented only 14% of New Zealand’s total dairy exports during 2021-2022.⁸²

78. [[REDACTED]
[REDACTED]

in Canada. However, the report notes that the import demand is at best small as Canada is a net exporter of buttermilk and therefore the economics does not favour the import of powdered buttermilk. Regarding liquid buttermilk, New Zealand exports only small volumes of that product and it is not economically feasible to ship it over long distances because of its water content and perishability.

⁷⁶ Ibid, para. 204.
⁷⁷ Ibid, paras. 205-207, 214-215.
⁷⁸ Ibid, paras. 159, 181, 202, 204.
⁷⁹ Dr. Mussell’s Expert Report, Exhibit CDA-2 (**CONFIDENTIAL INFORMATION**), para. 42.
⁸⁰ Dr. Pouliot’s Expert Report, Exhibit CDA-1 (**CONFIDENTIAL INFORMATION**), paras 181, 190-192, 216.
⁸¹ UN Comtrade data, Exhibit CDA-25. The HS codes are 0402.21 and 0402.29 for Milk and Cream Powders, 0402.10 for Skim Milk Powders, and 0405.10, 0405.20 and 0405.90 for Butter. See also Shipping Indexes, Exhibit CDA-26 and UN Comtrade export data for New Zealand for dairy products, Exhibit CDA-27.
⁸² Ibid. The HS codes are 0401.10 and 0401.20 for Milk and 0401.40 and 0401.50 for Cream.

[REDACTED]

79. Furthermore, New Zealand focuses on the TRQ fill rates during 2021-2022, which overlaps with a period of extremely high ocean freight costs, labour shortages, and other supply chain disruptions following the re-opening of markets after the initial global shutdowns caused by the COVID-19 pandemic. Dairy industries across the world – including New Zealand⁸⁷ – were negatively impacted by this.⁸⁸ These are important considerations when determining the economic viability of shipping dairy products to Canada.

80. In sum, New Zealand's claims that Canada's pooling system "encourages chronic underfill" has no basis in reality. [[REDACTED]

[REDACTED]

⁸³ Dr. Pouliot's Expert Report, Exhibit CDA-1 (**CONFIDENTIAL INFORMATION**), paras. 11, 174-175, 211, 213.

⁸⁴ Fill-Rate Data for Canada's CPTPP Dairy TRQ's, quota year 4 (2021-2022), Exhibit NZL-20.

⁸⁵ UN Comtrade data, Exhibit CDA-25.

⁸⁶ Dr. Pouliot's Expert Report, Exhibit CDA-1 (**CONFIDENTIAL INFORMATION**), paras. 12, 147-149. Fill-Rate Data for Canada's CPTPP Dairy TRQ's, quota year 4 (2021-2022), Exhibit NZL-20.

⁸⁷ Various articles regarding the impact on the New Zealand dairy industry, Exhibit CDA-28. See also Dr. Pouliot's Expert Report, Exhibit CDA-1 (**CONFIDENTIAL INFORMATION**), paras. 189-190; Dr. Mussell's Expert Report, Exhibit CDA-2 (**CONFIDENTIAL INFORMATION**), paras. 8, 42, 77.

⁸⁸ Various articles regarding the impact on the US and European dairy industries and other articles regarding ocean freight rates, labour shortages and supply chain issues caused by COVID-19 shutdowns and subsequent market re-opening, Exhibit CDA-29. Dr. Mussell's Expert Report, Exhibit CDA-2 (**CONFIDENTIAL INFORMATION**), paras. 43, 77.

_____]]] Thus, even if
Canada's pooling system did not exist, there would be no increased demand for
these products from New Zealand.

81. Finally, at different places in its submission, New Zealand suggests that Canada's decision to reserve a portion of its CPTPP dairy TRQs for processors means that distributors will never have access to that portion of the quota (and vice-versa).⁹⁰ This reflects a factually incorrect understanding of Canada's quota pooling system.

82. Canada's pools do not operate as rigid walls between processors and distributors. Instead, Canada's pooling system simply serves to determine who will first receive access to Canada's TRQs during the initial round of allocation. If eligible processors apply for a share of their pool under a particular TRQ (i.e., 80 to 85% of the TRQ depending on the TRQ) during the initial round of allocation, then the other pools will not obtain any additional quantity (except through transfers and returns, as explained in further detail above in Section II.D). But if there are no processor applicants under a particular TRQ, Canada will allocate the available quantity to other eligible applicants, including those within other pools.

83. For example, for the Powdered Buttermilk TRQ, Canada has made the decision to reserve 80% of the TRQ for processors, 10% of the TRQ for distributors,

⁸⁹ Dr. Pouliot's Expert Report, Exhibit CDA-1 (**CONFIDENTIAL INFORMATION**), paras. 8, 95-96, 105.

⁹⁰ For example, New Zealand asserts that "[i]f applications for quota from one of these smaller pools exceeds the amount of quota in the pool, then the available quota is divided between applicants on either a market share or equal share basis. This will happen irrespective of whether there is quota remaining in other pools". Further, New Zealand states that "[i]f an importer receives an allocation that is less than they requested, despite there being quota still available (for example, if there is unused quota left in another quota 'pool'), the Party cannot be said to have done everything in its power to ensure that the allocation was made in the volume requested". Similarly, New Zealand claims that Canada issues TRQ allocations within each pool "irrespective of whether there is quota sitting in another pool". In connection with this, New Zealand claims that Canada's Notices to Importers "don't allow quota from one pool (e.g. the processor pool) to be granted to applicants under another pool (e.g. the distributor pool)". See, First written submission of New Zealand, paras. 35-36, 119, 125.

and 10% of the TRQ for further processors.⁹¹ For Quota Year 2021, only one distributor applied for a share of this TRQ. No processor or further processor applied for a share of the TRQ. Canada therefore allocated the entire TRQ quantity to the eligible distributor. Contrary to New Zealand's claim, Canada would not have allocated 10% of the TRQ to the eligible distributor while leaving 90% of the TRQ unallocated and unused.

84. Another example is the Ice Cream and Mixes TRQ, where Canada has made the decision to reserve 80% of the TRQ for processors, 10% of the TRQ for distributors, and 10% of the TRQ for further processors.⁹² For Quota Years 2019 to 2023, no further processor applied for a share of the TRQ. Canada therefore divided the further processor pool (i.e., 10% of the TRQ) equally between the two remaining pools.

85. Similarly, for the Cream Powders TRQ, Canada has made the decision to reserve 80% of the TRQ for processors, 10% of the TRQ for distributors, and 10% of the TRQ for further processors.⁹³ For the 2019-2020 Quota Year, only one eligible applicant applied for a share of the TRQ – specifically, a further processor. No eligible processor or distributor applied for a share of the TRQ. Canada therefore allocated the entire TRQ (i.e., 100% of the TRQ) to the further processor that had applied for a share of the TRQ.

86. In sum, New Zealand inaccurately portrays Canada's quota pooling system by suggesting that Canada does not allocate the quota within a particular pool if there are no applicants within that pool. In reality, Canada always attempts to fully allocate its CPTPP TRQs – including by allowing quota to move from one pool to another, provided the quota volume in the pool is not allocated during the initial round of allocation.

⁹¹ Exhibit NZL-12: Global Affairs Canada, "Notice to Importers No. 1004 – CPTPP Powdered Buttermilk TRQ", 1 October 2020.

⁹² Exhibit NZL-5: Global Affairs Canada, "Notice to Importers No. 1004 – Ice Cream and Mixes TRQ", 1 October 2020.

⁹³ Exhibit NZL-10: Global Affairs Canada, "Notice to Importers No. 1004 – Cream Powders TRQ", 1 October 2020.

V. LEGAL ARGUMENTS

A. Canada's TRQ administration is consistent with Article 2.29.1

87. New Zealand puts forward an expansive interpretation of the meaning of Article 2.29.1, arguing that it covers access to the entire TRQ for anyone who meets what New Zealand refers to as the eligibility requirements under the relevant Party's Schedule. However, New Zealand's interpretation goes far beyond the text of Article 2.29.1 and even beyond its own proposed definitions of the terms in that provision. Properly interpreted in accordance with Article 31 of the *Vienna Convention on the Law of Treaties* ("VCLT"), Article 2.29.1 concerns allowing importers that have received an allocation of a TRQ the opportunity to utilise it to import goods up to the amount of the allocation. Canada's Notices to Importers are consistent with its obligations under Article 2.29.1.

88. Even if the Panel were to accept New Zealand's interpretation that expands the scope of Article 2.29.1 to cover access to the entire TRQ, New Zealand has still failed to make a *prima facie* case of a violation of Article 2.29.1. New Zealand has not presented any evidence to support its claims that importers were not allowed the opportunity to utilise the total quota quantity established in the Schedule. In fact, the evidence shows that Canada's pooling system had no impact on the opportunity to import goods because for almost all the 16 TRQs, there are other economic factors causing the lack of demand for New Zealand dairy products in Canada.

1. Article 2.29.1 requires a Party to allow importers the opportunity to import goods up to the entire specified amount of the TRQ that has been allocated to them

a) New Zealand errs in its interpretation of Article 2.29.1

89. Article 2.29.1 reads: "Each Party shall administer its TRQs in a manner that allows importers the opportunity to utilise TRQ quantities fully." New Zealand argues that Article 2.29.1 should be interpreted expansively to allow "all importers the opportunity to access and use the quota available under each TRQ in its entirety".⁹⁴ However, there is no basis in the text for such an interpretation. New Zealand's interpretation is not consistent with the ordinary meaning of Article 2.29.1, nor does

⁹⁴ First written submission of New Zealand, para. 133.

it align with the definitions New Zealand itself provides for the terms in Article 2.29.1.

90. New Zealand provides a definition of “utilise” as “to make or render useful, to convert to use, turn to account”.⁹⁵ New Zealand also provides a definition of the term “quantity” as “a specified or definite amount of an article or commodity”.⁹⁶ Taking the words “utilise TRQ quantities” together, using New Zealand’s own definitions, the ordinary meaning is rendering useful or converting specified TRQ quantities to use.

91. New Zealand argues that the term “TRQ quantities” covers the total quantity of quota available under each of the TRQs maintained by a Party.⁹⁷ However, this interpretation is not consonant with Article 2.30.2, which uses a different phrase to denote precisely that. Article 2.30.2 twice uses the phrase “quota quantity established in its Schedule to Annex 2-D (Tariff Commitments)” to unambiguously refer to the total quantity of quota available under the TRQs as established in the Schedule. Had the Parties wanted Article 2.29.1 to refer to the total quota quantity under each of the TRQs, they could have used the exact same terminology as Article 2.30.2, but they did not. It is therefore clear that the ordinary meaning of “TRQ quantities” in Article 2.29.1 refers to something other than the total quantity established in the Schedule. Interpreted correctly, the term “TRQ quantities” in Article 2.29.1 means the specified amount allocated to individual importers.

92. This interpretation is supported by the rest of the text of Article 2.29.1. New Zealand, in its interpretation of the ordinary meaning of Article 2.29.1, omits any discussion of the word “opportunity”. “Opportunity” may be defined as “a time, condition, or set of circumstances permitting or favourable to a particular action or purpose”.⁹⁸ In the context of Article 2.29.1, “the opportunity” would thus signify an instance of a circumstance permitting a particular action.

⁹⁵ Ibid, para. 131, citing Exhibit NZL-34.

⁹⁶ Ibid, para. 132, citing Exhibit NZL-42.

⁹⁷ First written submission of New Zealand, para. 132.

⁹⁸ *Oxford English Dictionary*, OED Online, “opportunity, n.”, entry 1, accessed 28 March 2023, <<https://www.oed.com/view/Entry/131973>>, Exhibit CAN-30.

93. The text of Article 2.29.1 establishes that the person who is in the circumstance or position of being permitted to convert the specified amount of TRQ quantity to use is the importer, as it is “importers” who have “the opportunity to utilise TRQ quantities”.⁹⁹ An importer is in a condition or circumstance to render useful or convert to use a specified amount of TRQ quantity by importing products under an allocation. Thus, the specified amount of TRQ quantity in this case is the allocation granted to an importer, since that is the quantity consisting of a specified amount that has the potential to be imported (i.e., rendered useful) by an importer.

94. This interpretation is supported by the definition of “importer”, which New Zealand defines as “a person who, or company, enterprise, etc., which, imports goods or commodities from abroad”.¹⁰⁰ Canada concurs that this is the correct dictionary definition to be used as a starting point for the interpretation. However, New Zealand attempts to extend the meaning of “importer” to anyone who meets what New Zealand refers to as the eligibility requirements under a Party’s Schedule¹⁰¹, an interpretation that is not supported by the dictionary definition of the term. Nor is it supported by the text of Article 2.29.1, which does not refer to eligibility requirements or to a Party’s Schedule. The use of the word “importers” in Article 2.29.1 is deliberately narrower in scope than the range of persons who may meet the eligibility requirements for an allocation and, in accordance with the principle of effective treaty interpretation, the Parties’ decision to use that word must be ascribed meaning in interpreting Article 2.29.1.

95. The immediate context surrounding the word “importers” in Article 2.29.1 establishes that the importers must be allowed the opportunity to utilise TRQ quantities fully. Putting together the ordinary meaning of these terms already discussed, the “importer” in this context is the person, company or enterprise importing goods from abroad who is in a position to render useful their specified amount of TRQ, which an importer does by importing goods. The importer with the “opportunity to utilise TRQ quantities” is thus a person, company, or enterprise who

⁹⁹ Emphasis added.

¹⁰⁰ First written submission of New Zealand, para. 131, citing Exhibit NZL-41.

¹⁰¹ Ibid, para. 131.

has received a TRQ allocation and consequently has the opportunity to utilise it by importing goods.

96. The word “fully” that follows “utilise TRQ quantities” means that importers must have the opportunity to render useful their allocated amount of TRQ in its entirety, meaning they may import up to the limit of their specified allocation.

97. Therefore, based on the ordinary meaning of the terms in Article 2.29.1, the obligation on a Party is to administer its TRQs in a manner that allows importers the opportunity to render useful or convert to use TRQs by importing goods up to the entire specified amount of the TRQ that has been allocated to them.

b) Canada’s interpretation of Article 2.29.1 is supported by the context and the object and purpose of the CPTPP

98. Canada’s interpretation is supported by the broader context of Section D. Paragraphs 2.29.2(a) and (b) support Canada’s interpretation of Article 2.29.1. These two paragraphs establish rules on whether and how a Party may “introduce a new or additional condition, limit or eligibility requirement on the utilisation of a TRQ for importation of a good [...]”. They describe the utilisation of a TRQ as being for the importation of a good. This confirms the meaning in Article 2.29.1 that to “utilise” or “utilisation” of the TRQ is for importing goods. The specification of “for importation of a good” is apt in paragraphs 2.29.2(a) and (b) because they do not mention importers, in contrast to Article 2.29.1, where it is not necessary to mention “importation of a good” as there is no other logical interpretation of how TRQ quantities could be utilised by “importers” except by importation of goods.

99. Article 2.30.3 provides further support for Canada’s interpretation of Article 2.29.1. It reads: “The Party administering a TRQ shall not require the re-export of a good as a condition for application for, or utilisation of, a quota allocation.” This provision distinguishes the utilisation of an allocation from the application for an allocation. This contradicts New Zealand’s interpretation that “utilise” captures both access to an allocation and use of an allocation, since New Zealand’s interpretation of “utilisation” would render inutile the words “application for” in Article 2.30.3. Rather, this provision supports Canada’s harmonious interpretation that, under Article

2.29.1, to “utilise” the TRQ means to import goods in accordance with a specific allocation quantity.

100. The distinction between the application for an allocation and the utilisation of an allocation is also apparent in the *Import Licensing Agreement* (“ILA”). The ILA is relevant in this regard because Article 2.28.1 of the CPTPP states that “[e]ach Party shall implement and administer [TRQs] in accordance with Article XIII of GATT 1994, including [...] the Import Licensing Agreement”. This specific reference makes it “relevant rules of international law applicable in the relations between the parties”, as referred to in Article 31.3(c) of the VCLT. In particular, Article 3.5(h) of the ILA states that “when administering quotas, Members shall not prevent importation from being effected in accordance with the issued licenses, and shall not discourage the full utilization of quotas,”¹⁰² which confirms that utilisation is a subsequent and distinct step that takes place after allocation has been issued (which, temporally, takes place after an application for an allocation is made). Furthermore, Article 3.5(j) of the ILA provides that “in allocating licenses [...] consideration should be given as to whether licenses issued to applicants in the past have been fully utilized”,¹⁰³ which again confirms that utilisation and application for an allocation are distinct concepts.

101. Canada’s interpretation is also consistent with the object and purpose of the CPTPP. While New Zealand notes that one provision of the CPTPP Preamble refers to contributing to maintaining open markets and increasing world trade,¹⁰⁴ the Preamble of the TPP (incorporated by reference into, and made part of, the CPTPP¹⁰⁵) also recognizes the diversity of Parties’ economies,¹⁰⁶ the establishment of a legal and commercial framework of rules,¹⁰⁷ and the Parties’ inherent right to regulate and their flexibility to set legislative and regulatory priorities.¹⁰⁸ As set out in Section II.B of this submission, supply management in Canada is a long-standing system that Canada prioritizes in the public interest of maintaining predictability and stability in the dairy market. Considering that Section D of Chapter 2 establishes rules for TRQ administration of the market access granted to other Parties in sensitive industries,

¹⁰² Emphasis added.

¹⁰³ Ibid.

¹⁰⁴ First written submission of New Zealand, para. 136.

¹⁰⁵ CPTPP, Article 1.1.

¹⁰⁶ TPP, Preamble, para. 4.

¹⁰⁷ Ibid, para. 7.

¹⁰⁸ Ibid, para. 9.

including Canada's dairy industry, the interpretation put forward by Canada is entirely consistent with the object and purpose of the CPTPP, as the Parties retain their right to regulate and administer their domestic systems provided the specific rules in the CPTPP are observed.

2. New Zealand has failed to make a *prima facie* case that Canada did not allow importers the opportunity to utilise TRQ quantities fully

102. New Zealand presents two arguments alleging that Canada's TRQ administration is inconsistent with Article 2.29.1. The first is that, under all 16 of Canada's Notices to Importers, any applicant constitutes an "importer" and they are denied the opportunity to utilise TRQ quantities because they may be outside of a certain pool.¹⁰⁹ The second argument is that if importers in a pool request more quota than is available under that pool, they are not able to access unallocated quota in another pool.¹¹⁰

103. Both arguments fail in law and in fact.

a) New Zealand's allegations under Article 2.29.1 are based on a flawed legal interpretation and an incorrect premise

104. As discussed above, applicants for an allocation are not "importers" within the meaning of Article 2.29.1, regardless of whether or not they are in a pool, because they have not been granted an allocation and they are not in a position to utilise the TRQ by importing goods. Therefore, New Zealand's first argument fails on account of it being based on an incorrect interpretation of the plain meaning of the text.

105. With respect to New Zealand's second argument, it must fail because the premise of New Zealand's argument is factually incorrect. As discussed in Section IV of this submission, quota quantities reserved for a particular pool within a TRQ that are not initially allocated may be allocated to applicants in another pool. Canada would redistribute these quantities to endeavour to fully allocate the TRQ.

¹⁰⁹ First written submission of New Zealand, para. 138.

¹¹⁰ Ibid, para. 139.

106. Furthermore, any importers, who have necessarily received allocations, are not prevented from utilising them by importing goods up to the full amount of the allocation. New Zealand has presented no evidence that any importers have been denied the opportunity to make full use of their respective allocations by importing goods. Moreover, New Zealand's position that Article 2.29.1 requires unallocated quota in one pool to be granted to an importer who received an allocation under a different pool¹¹¹ is not consistent with the ordinary meaning of Article 2.29.1. The granting of allocations is not within the scope of Article 2.29.1. Rather, the obligation in Article 2.29.1 pertains solely to providing the opportunity to importers to fully utilise their respective allocations up to the full amount by importing up to their entire allocated quantity.

107. In view of the above, New Zealand has failed to present any evidence or make a *prima facie* case that Canada has acted inconsistently with Article 2.29.1.

b) In the alternative, if the term "TRQ quantities" refers to the total quantity of quota available under the TRQs, New Zealand did not present any evidence that importers were not allowed the opportunity to utilise TRQ quantities fully

108. Canada has demonstrated above that New Zealand's allegations of an inconsistency with Article 2.29.1 are based on an incorrect interpretation of the text. However, even if the Panel were to accept New Zealand's interpretation of Article 2.29.1 that the "TRQ quantities" refers to the total quantity of quota available under the TRQs, New Zealand has still failed to make a *prima facie* case that Canada's TRQ administration using the pooling system did not allow full utilisation of the TRQ amounts set out in Canada's Schedule.

109. New Zealand's interpretation that Article 2.29.1 "obliges Parties to oversee and manage their TRQs in a way that allows all importers the opportunity to access and use the quota available under each TRQ in its entirety" necessarily entails a factual examination of whether any importers were denied the opportunity to import products. Yet, New Zealand's argument is based entirely on conjecture. New Zealand has not presented any evidence in support of its claims that importers were not

¹¹¹ First written submission of New Zealand, para. 139.

allowed the opportunity to utilise the total quota quantity or to prove that the situation would be any different absent Canada's pooling system.

110. [[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]] New Zealand's claims that importers were denied opportunity to import goods are unfounded.

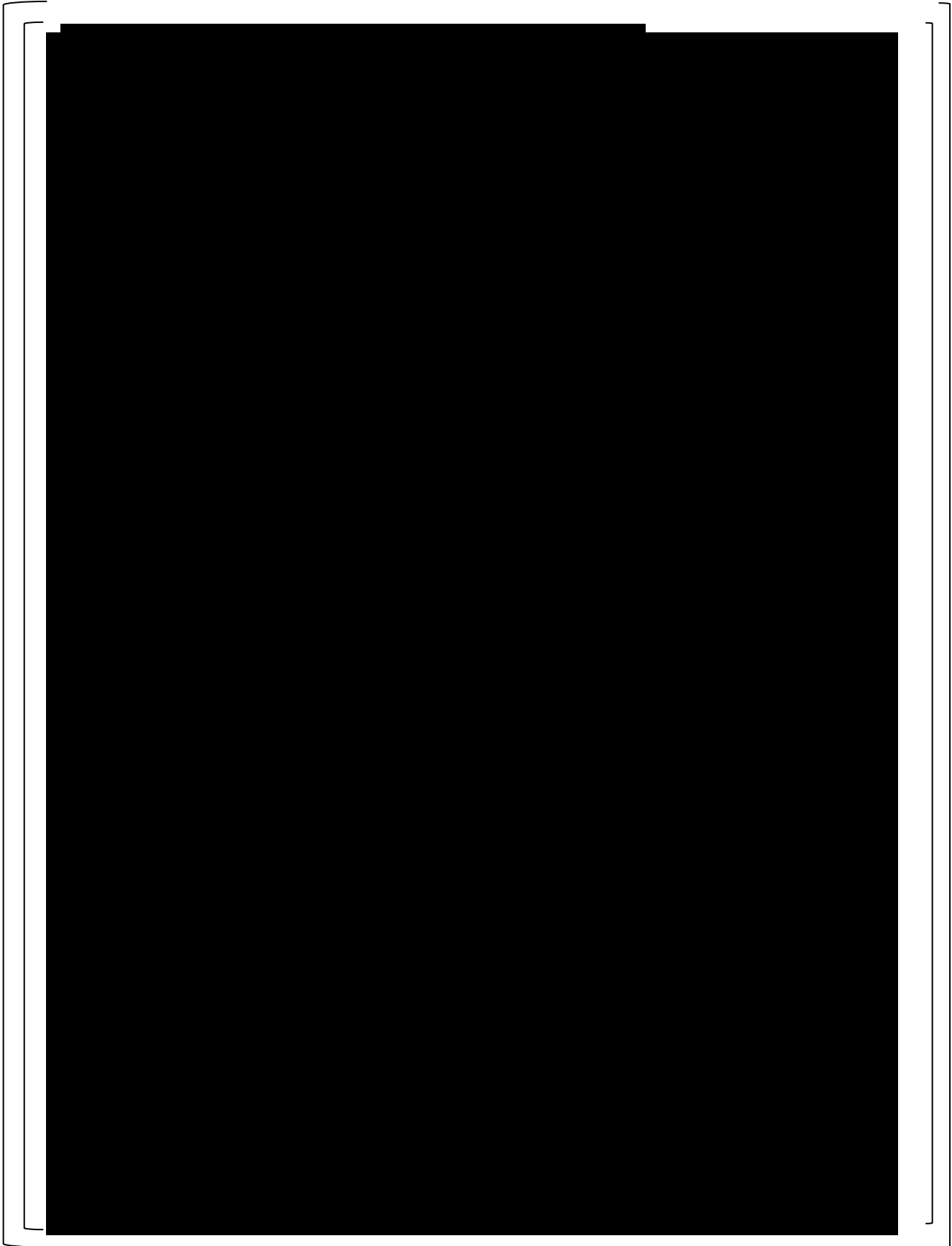
111. Dr. Pouliot conducted an empirical analysis of each of the 16 CPTPP TRQs to provide an economic explanation for the fill rates of each of the TRQs.¹¹² Dr. Pouliot analyzed prices to determine whether the importation of each product from New Zealand could be profitable. If TRQs are not filled even though import prices are higher in Canada than export prices from New Zealand and the difference cannot be otherwise explained, the conclusion would be that the "protection rate" is greater than zero and something other than normal conditions of supply and demand is preventing imports from New Zealand. However, if prices are lower or equal in Canada, then there is no further economic advantage to import more from New Zealand. In other words, where a protection rate is greater than zero, this means that the import of a product could be profitable, while in all other situations there is no additional profit to be made from importing and thus no incentive to import.¹¹³ Quotas that are not filled and have a protection rate that is zero (i.e., imports from New Zealand are not profitable) are simply in low demand.

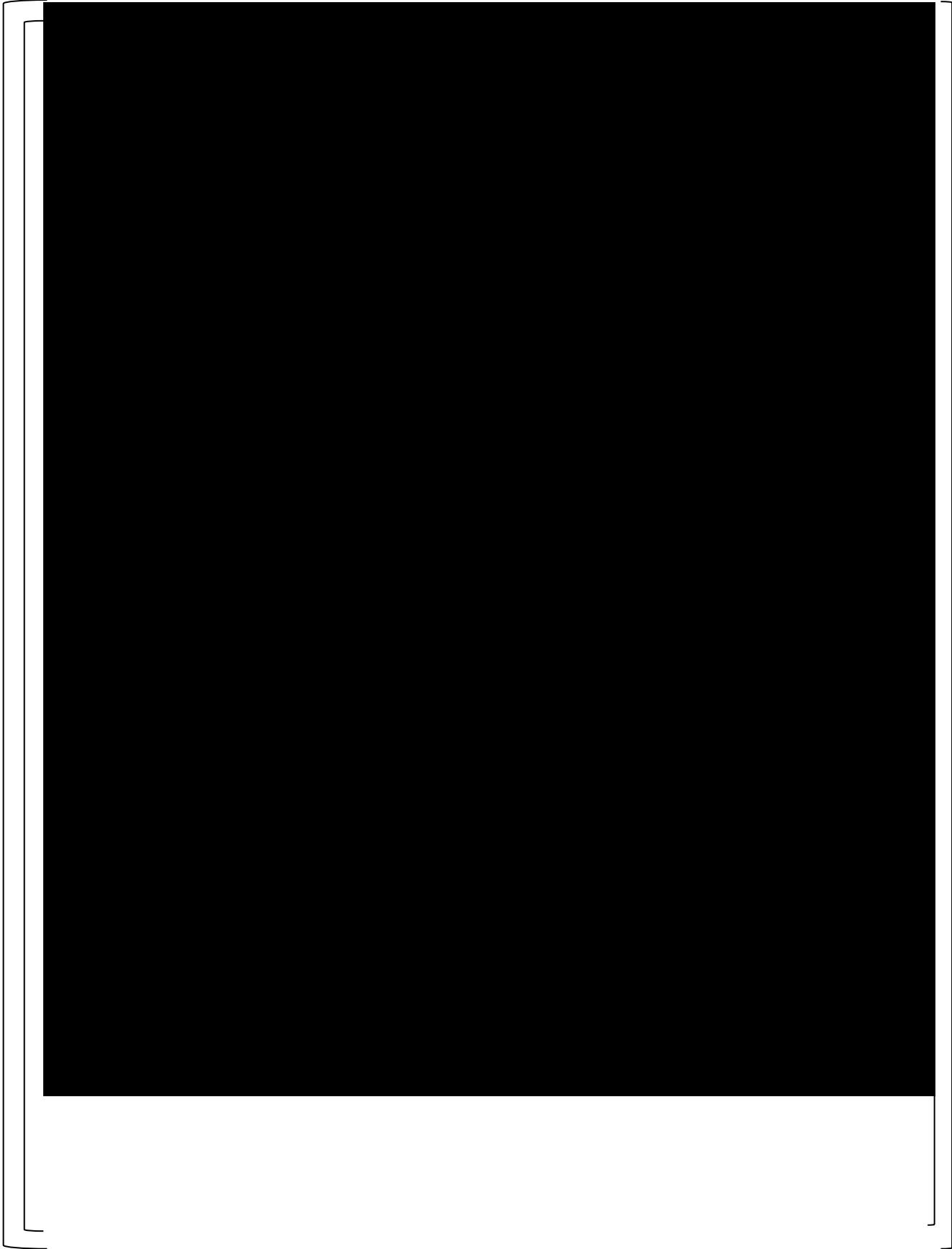
112. [[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]]

¹¹² Dr. Pouliot's Expert Report, Exhibit CDA-1 (**CONFIDENTIAL INFORMATION**), para. 106.

¹¹³ Ibid, paras. 49-50.

¹¹⁴ Ibid, Table 8, Table 9, paras. 200, 211.







113. [[
[Redacted text block consisting of approximately 13 lines of blacked-out text]

¹¹⁵ Buttermilk and Powdered Buttermilk are separate TRQs but are grouped together under the same HS code at HS6, which is why they are examined together in Dr. Pouliot’s empirical analysis. Dr. Pouliot’s Expert Report, Exhibit CDA-1 (**CONFIDENTIAL INFORMATION**), para. 110, Table 3, paras. 143-144.

¹¹⁶ Dr. Pouliot’s Expert Report, Exhibit CDA-1 (**CONFIDENTIAL INFORMATION**), para. 202.

[REDACTED]

114. [[REDACTED]
[REDACTED]
[REDACTED]]

115. It is notable that, while Canada's administration of the CPTPP dairy TRQs is conducted in the same manner for all the TRQs, the Butter TRQ is essentially fully filled and the Cheeses of All Types and Mozzarella and Prepared Cheese TRQs are mostly filled. This shows that, contrary to New Zealand's claim, Canada's TRQ administration, including pooling, allows the opportunity for importers to utilise the TRQs fully. [[REDACTED]

[REDACTED]
[REDACTED]] Therefore, it is reasonable and predictable that importers are able to fully utilise the TRQ by importing butter from New Zealand. [[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]] However, under all

¹¹⁷ Dr. Pouliot's Expert Report, Exhibit CDA-1 (**CONFIDENTIAL INFORMATION**), Appendix A, Table A-1. Exhibit NZL-20.

¹¹⁸ CPTPP and CUSMA permits – Dairy Products, 2019 through 2023, accessed 17 April 2023, <https://www.international.gc.ca/trade-commerce/controls-controles/supply_managed-gestion_offre.aspx?lang=eng&type=Utilization%20Tables#data>, Exhibit CDA-31.

¹¹⁹ Dr. Mussell's Expert Report, Exhibit CDA-2 (**CONFIDENTIAL INFORMATION**), paras. 25, 30, 39, 49; Dr. Pouliot's Expert Report, Exhibit CDA-1 (**CONFIDENTIAL INFORMATION**), paras. 118-119, 192, Table 7.

TRQs, importers are allowed the opportunity to utilise them to import goods if they decide that it is profitable for them to do so.

116. There are additional factors that contribute to the lack of demand for imports of New Zealand dairy products in Canada. The evidence shows that there is significant consumer preference for Canadian-made dairy products and that Canadian consumers discount imported dairy products in comparison.¹²⁰ For example, Canadian consumers on average were willing to pay an additional \$2.29 for a 2-litre carton of 100% Canadian milk and an additional \$1.56 for a 2-litre carton of 100% Canadian ice cream for products indicating Canadian origin compared to products with foreign origin.¹²¹ In another study, the discount Canadian consumers attached to New Zealand or Australian origin products was even greater.¹²²

117. In addition, New Zealand's dairy exports are dominated by dried milk powders high in non-fat solids, such as skim milk powder and whole milk powder. Skim milk powder is entirely composed of non-fat solids and whole milk powder, while containing butterfat, contains significant non-fat solid components. These main exports of New Zealand are not well-aligned with demand in Canada due to the domestic structural surplus in non-fat solids.¹²³

118. Furthermore, New Zealand restricts its dairy exports through the use of an export licensing scheme under the DIRA.¹²⁴ The DIRA also creates a near monopoly/monopsony dairy processor, Fonterra, which accounts for over 80 % of

¹²⁰ Dr. Pouliot's Expert Report, Exhibit CDA-1 (**CONFIDENTIAL INFORMATION**), paras. 58-68.

¹²¹ Dr. Pouliot's Expert Report, Exhibit CDA-1 (**CONFIDENTIAL INFORMATION**), para. 63.

¹²² For ice cream, Canadian consumers discounted New Zealand/Australian origin products by between -\$2.28 and -\$2.39. For yogurt, Canadian consumers discounted New Zealand/Australian origin products by between -\$2.65 and -\$2.98. Dr. Pouliot's Expert Report, Exhibit CDA-1 (**CONFIDENTIAL INFORMATION**), para. 64.

¹²³ Dr. Mussell's Expert Report, Exhibit CDA-2 (**CONFIDENTIAL INFORMATION**), paras 78-79, 82.

¹²⁴ Under section 26 of New Zealand's DIRA, the rights to export dairy products to designated markets, which include Canada, are vested in the Government of New Zealand, and such rights are allocated in accordance with the rules contained in Schedule 5B of the DIRA. Among others, Schedule 5B requires: (i) minimum export volume of 20 tonnes; and (ii) the quota to be allocated based on the "percentage of total milk solids collected by eligible participants" from dairy farmers in New Zealand during the prescribed period, with the minimum requirement of 0.1 percent to be eligible to receive an allocation. DIRA, Exhibit CDA-6.

the milk collected in New Zealand.¹²⁵ The DIRA along with the privileged status of Fonterra and its co-operative structure creates a lack of flexibility in the New Zealand dairy industry which could affect New Zealand exporters' ability to access new opportunities like those in Canada under the CPTPP.¹²⁶ This underscores the fact that TRQ utilisation is affected by multiple factors other than Canada's administration of its TRQs.

119. Finally, with New Zealand being nearly on the opposite side of the globe to Canada, transportation costs and very long shipping times are an important factor to be considered as further reducing demand, as well as supply chain difficulties occurring in recent years.¹²⁷ [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]] Importation of these products into Canada from New Zealand is infeasible due to product perishability or high water content.

¹²⁵ Industry Regulations, accessed 14 April 2023, <<https://www.fonterra.com/nz/en/investors/farmgate-milk-price/industry-regulations.html>>, Exhibit CDA-32. Fonterra was created in 2001 as a merger of two largest dairy cooperatives in New Zealand at the time (the New Zealand Dairy Group and the Kiwi Dairy Co-operative) with New Zealand Dairy Board ("NZDB"), which was New Zealand's single-desk export monopoly established under *Dairy Board Act*. The merger was preliminarily rejected by the Commerce Commission of New Zealand based on consideration of anti-competition law, but was later authorized under the *DIRA*. Commission's preliminary determination says 'no' to dairy 'mega-merger', 27 August 1999, accessed 14 April 2023, <<https://comcom.govt.nz/news-and-media/media-releases/archive/commissions-preliminary-determination-says-no-to-dairy-mega-merger>>, Exhibit CDA-7. See also, *The Dairy Sector in New Zealand-Extending the Boundaries*, accessed 10 April 2023, <<https://www.productivity.govt.nz/assets/Inquiries/frontier-firms/a977484e51/The-dairy-sector-in-NZ-TDB-Advisory.pdf>>, Exhibit CDA-1-19.

¹²⁶ As set out in *The Dairy Sector in New Zealand-Extending the Boundaries*, accessed 10 April 2023, <<https://www.productivity.govt.nz/assets/Inquiries/frontier-firms/a977484e51/The-dairy-sector-in-NZ-TDB-Advisory.pdf>>, Exhibit CDA-19, p. 13: "The co-operative structure however may well have impeded Fonterra's ambitious international growth plans. Fonterra's growth strategy required access to significant amounts of capital. As a supplier-owned cooperative, Fonterra's access to capital was constrained. Furthermore, arguably the priority for its limited capital tended to be given to building new factories to process the growing milk volumes rather than to market development and creating consumer brands. At least in part, the priority given to growing milk volumes reflected the requirement under DIRA (removed from June 2023) for Fonterra to accept virtually all milk."

¹²⁷ Dr. Mussell's Expert Report, Exhibit CDA-2 (**CONFIDENTIAL INFORMATION**), para. 39; Dr. Pouliot's Expert Report, Exhibit CDA-1 (**CONFIDENTIAL INFORMATION**), paras. 155-160.

¹²⁸ Ibid, para. 39.

¹²⁹ Dr. Pouliot's Expert Report, Exhibit CDA-1 (**CONFIDENTIAL INFORMATION**), paras. 9, 159, 180.

120. On the latter point, it must be noted that the TRQs in Canada's Schedule were negotiated under the TPP, the predecessor agreement of the CPTPP, where the United States was one of the main Parties engaged in negotiating the TRQs in order to guarantee access to the Canadian market for its own exports. As described in Section II.D of this submission, Canada's Schedule remained unchanged from that which was agreed under the TPP with the United States as a party. Therefore, after the United States withdrew from the TPP, the remaining Parties to the CPTPP had full access to the same TRQs, but without having to compete against imports from a major supplier, the United States.

121. Moreover, the United States' influence on the CPTPP's dairy TRQs is in fact one of the contributing factors for the low fill rates for many dairy product categories, as seen in Table 3 below. The drop in utilisation from 2019 to 2020 under the CPTPP for Products Consisting of Natural Milk Constituents, Milk Powders and Cream Powders is apparent, as once the U.S. supply became available under the new CUSMA TRQs, there was little need for New Zealand origin product. For perishable products or those with high transportation costs such as Milk, Cream, Yogurt and Buttermilk, and Ice Cream and Mixes, the significantly shorter shipping time and distance from the United States allows for the CUSMA quotas to be utilised. Again, this shows that the lack of utilisation of the CPTPP quotas is due to economic factors and not Canada's administration.

Table 3: Comparing CPTPP and CUSMA Dairy TRQ Fill Rates (%)¹³⁰

TRQ	CPTPP	CUSMA	CPTPP	CUSMA	CPTPP	CUSMA	CPTPP	CUSMA
Calendar year (Jan 1 to Dec 31)	2019		2020		2021		2022	
Products Consisting of NMC	5%	N/A	1%	92%	2%	95%	0%	55%
Cheeses of All Types	57%	N/A	61%	94%	65%	93%	66%	88%
Industrial Cheese	12%	N/A	6%	49%	10%	48%	1%	45%
Mozzarella and Prepared Cheese ¹³¹	44%	N/A	51%	N/A	62%	N/A	60%	N/A
Ice Cream and Mixes	3%	N/A	1%	90%	3%	54%	2%	24%
Other Dairy	0%	N/A	0%	80%	0%	35%	0%	5%
Yogurt and Buttermilk	0%	N/A	0%	34%	0%	23%	0%	29%
Powdered Buttermilk	0%	N/A	0%	0%	0%	8%	0%	12%
Concentrated Milk	0%	N/A	0%	2%	0%	7%	0%	5%
Dairy year (Aug 1 to July 31)	2019-2020		2020-2021		2021-2022		2022-2023	
Butter ¹³²	94%	37%	92%	99%	96%	93%	55%	61%
Cream	0%	21%	23%	97%	0%	81%	0%	30%
Milk Powders	27%	2%	9%	92%	10%	69%	12%	42%
Milk	0%	43%	0%	82%	0%	57%	0%	2%
Whey Powder	0%	0%	0%	46%	0%	39%	0%	26%
Skim Milk Powders	0%	4%	0%	19%	0%	8%	0%	3%
Cream Powders	12%	N/A	0%	N/A	0%	N/A	0%	N/A

122. Indeed, as the CPTPP dairy TRQs were negotiated with United States' dairy exports chiefly in mind, it stands to reason that certain TRQs, especially those for perishable dairy products or requiring high transportation costs, would remain unfilled by the remaining CPTPP Parties.

123. [REDACTED]

¹³⁰ CPTPP and CUSMA permits – Dairy Products, 2019 through 2023, accessed 17 April 2023, <https://www.international.gc.ca/trade-commerce/controls-contrôles/supply_managed-gestion_offre.aspx?lang=eng&type=Utilization%20Tables#data>, Exhibit CDA-31. Note that the 2022-2023 year is still ongoing. Data retrieved on April 17, 2023. Note that the CUSMA dairy year 2019-2020 was just 1 month (i.e., July 2020).

¹³¹ This TRQ does not exist under CUSMA.

¹³² CUSMA has a TRQ for both Butter and Cream Powder. It has been included under "Butter" in the table above.

[REDACTED]

Considering New Zealand presented no evidence that there was any demand for its products or any missed opportunity, it failed to make a *prima facie* case that importers falling outside the eligibility criteria set out in the Notices to Importers were denied any opportunity to utilise TRQs fully.

124. This is similarly the case with respect to New Zealand's argument that if importers falling within a pool request more quota than is available under it they will not receive the amount of quota requested and the quota will be divided on a market share or equal share basis irrespective of whether there is unallocated quota in another pool.¹³⁴ Even using New Zealand's flawed interpretation of the obligation in Article 2.29.1, this argument is based entirely on a hypothetical scenario. New Zealand has presented no evidence that this situation ever occurred. It also has not demonstrated that any importers could have imported a greater quantity of goods than the quantity that was allocated and that at the same time there was unallocated quantity in another pool. Moreover, New Zealand's argument does not account for the fact that unallocated TRQ quantities are not strictly limited by the pools, as discussed in Section IV of this submission. [REDACTED] and with New Zealand presenting no evidence that any importer was denied the opportunity to fully utilise total TRQ quantities, New Zealand has failed to make a *prima facie* case that Canada's administration of its TRQs is inconsistent with the requirements of Article 2.29.1.

¹³³ Dr. Pouliot's Expert Report, Exhibit CDA-1 (**CONFIDENTIAL INFORMATION**), paras. 195-196

¹³⁴ First written submission of New Zealand, para. 139.

B. Canada's TRQ administration is consistent with Article 2.29.2(a)

125. New Zealand puts forward an overly broad interpretation of Article 2.29.2(a) in support of its claim that Canada is prohibited from imposing any condition, limit or eligibility requirement not listed in Canada's Schedule to Annex 2-D.¹³⁵ By the very terms of Article 2.29.2(a), however, the only conditions, limits or eligibility requirements covered by this provision are those on the "utilisation of a TRQ for importation of a good". Accordingly, New Zealand's claims fall outside the scope of Article 2.29.2(a) because this provision, properly interpreted, only prohibits a Party from introducing new or additional conditions, limits or eligibility requirements relating to how importers may use a TRQ to import goods after TRQ quantities are granted.

126. Canada's pooling system does not concern how an allocation holder may use its TRQ allocation for the importation of a good. Thus, Canada's pooling system is not inconsistent with Article 2.29.2(a) because it does not impose any conditions, limits or eligibility requirements on the utilisation of a TRQ.

1. Article 2.29.2(a) prohibits a Party from introducing new or additional conditions, limits or eligibility requirements on the utilisation of a TRQ for importation of a good

a) New Zealand errs in its interpretation

127. New Zealand contends that Canada's pooling system is inconsistent with Article 2.29.2(a) on two grounds: first, New Zealand argues that the fact that the in-quota quantity in each of the pools can only be accessed by specific entities imposes a limit on the utilisation of a TRQ; second, New Zealand asserts that requiring applicants to be processors, further processors, or distributors, while excluding retailers, imposes an eligibility requirement on the utilisation of a TRQ.¹³⁶

128. Not only is New Zealand wrong as a matter of fact that in-quota quantity in each of the pools can only be accessed by specific entities,¹³⁷ these two alleged grounds of violations are simply not the types of requirements covered by Article

¹³⁵ First written submission of New Zealand, paras. 9 and 90.

¹³⁶ Ibid, para. 10.

¹³⁷ See Section IV.

2.29.2(a). New Zealand's flawed interpretation of Article 2.29.2(a) derives from its overly broad reading of the phrase "on the utilisation of a TRQ for importation of a good". New Zealand effectively contends that any condition, limit or eligibility requirement pertaining to the application for an allocation is a condition, limit or eligibility requirement on the utilisation of a TRQ.¹³⁸ This interpretation is contrary to the general principle of treaty interpretation set out in Article 31 of the VCLT because it ignores the meaning of the term "utilisation" and renders the phrase "of a TRQ for the importation of a good" meaningless.

129. New Zealand's interpretation of Article 2.29.2(a), taken to its logical conclusion, would have required CPTPP Parties to include in their respective Schedules all conditions, limits or eligibility requirements they could possibly require, should they ever decide to administer their TRQs through either a first-come, first-served ("FCFS") system or an allocation mechanism. This interpretation entails that the Parties ought to have determined – before the conclusion of the CPTPP negotiations – both what their allocation mechanism, if any, would be, as well as any conditions, limits or eligibility requirements that would apply to the administration of their TRQs. According to New Zealand's interpretation, each Party would have surrendered its right to design or modify its FCFS system or allocation mechanism by effectively giving a veto to other Parties over any requirements that the Party may impose because the modification procedure in subparagraphs (b) and (c) of Article 2.29.2 requires the consent of all interested Parties. This interpretation – which would gravely and unduly restrain the Parties in the administration of their TRQs – is inconsistent with the text and context of Article 2.29.2(a) and with the object and purpose of the CPTPP.

130. If a condition, limit or eligibility requirement is not "on the utilisation of a TRQ for importation of a good," it falls outside the scope of this provision and there can be no violation of Article 2.29.2(a). Canada sets out below the correct interpretation of Article 2.29.2(a).

¹³⁸ Emphasis added.

**i) The ordinary meaning of the phrase
“condition, limit or eligibility requirement on
the utilisation of a TRQ for importation of a
good”**

131. Article 2.29.2(a) provides:

Except as provided in subparagraphs (b) and (c), no party shall introduce a new or additional condition, limit or eligibility requirement on the utilisation of a TRQ for importation of a 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-D (Tariff Commitments).¹³⁹

132. Given that the phrase “on the utilisation of a TRQ for importation of a good” qualifies the meaning of the terms “condition, limit or eligibility requirement”, Canada addresses the meaning of that phrase first.

133. Canada agrees that “utilisation” means “the action of utilizing; the fact of being utilized”¹⁴⁰ and “utilise” means “to make or render useful, to convert to use, turn to account”.¹⁴¹ “[T]he utilisation of a TRQ for importation of a good” must therefore mean to make or render a TRQ useful for importation of a good. The Oxford English Dictionary defines “use” as “the act of putting something to work, or employing or applying a thing, for any (esp. a beneficial or productive) purpose.”¹⁴² As such, “utilisation of a TRQ” means the use of a TRQ for importing a good under a TRQ.

134. Based on these dictionary definitions, the term “utilisation” very clearly speaks to the actual importation of products benefitting from the preferential market access provided under a TRQ. The dictionary definition of the term “utilisation” read along with the phrase “of a TRQ for importation of a good” makes it apparent that there is a distinction between allocation for potential use and the actual use of the

¹³⁹ Emphasis added.

¹⁴⁰ First written submission of New Zealand, para. 89, fn. 114.

¹⁴¹ Ibid, para. 89, fn. 115.

¹⁴² *Oxford English Dictionary*, OED online, “use, n.”, accessed 3 April 2023, <<https://www.oed.com/view/Entry/220635?rskey=tL0sLc&result=1&isAdvanced=false#eid>>, Exhibit CDA-33.

TRQ once allocated.¹⁴³ The “utilisation” of a TRQ “for importation of a good” is carried out only by an importer who has received a TRQ quantity and who subsequently actually uses it to import goods.

135. Turning to the meaning of the terms “condition, limit or eligibility requirement”, New Zealand implicitly recognizes that these terms are not mutually exclusive and each of these terms imparts meaning to one another.¹⁴⁴ As such, these three terms generally cover the array of restrictions that a Party could impose “on the utilisation of a TRQ for importation of a good”.

136. Canada agrees that “condition” means “[s]omething demanded or required as a prerequisite to the granting or performance of something else; a provision, a stipulation”¹⁴⁵ and that “limit” means “[a]ny of the fixed points between which the possible or permitted extent, amount, duration, range of action, or variation of anything is confined; a bound which may not be passed, or beyond which something ceases to be possible or allowable”.¹⁴⁶

137. Regarding the meaning of “eligibility requirement”, Canada notes that the meaning of “eligibility” includes “the condition of being eligible for an office or position; entitlement to be considered or chosen for a position, award, or other benefit, usually through the fulfilment of specified criteria”¹⁴⁷ and that “requirement” means “something called for or demanded; a condition which must be complied with”.¹⁴⁸ Accordingly, New Zealand asserts that “eligibility requirements” are “the conditions that must be met or complied with in order to be considered or chosen for

¹⁴³ Not all applicants who receive an allocation actually use it to import goods under a TRQ. Allocation holders may transfer or return their allocations.

¹⁴⁴ New Zealand refers to “eligibility requirements” as “the conditions that must be met or complied with in order to be considered or chosen for a particular benefit”. See first written submission of New Zealand, para. 88 (emphasis added). See also Appellate Body Reports, *EC – Chicken Cuts*, para. 193, and *US – Gasoline*, pp. 21-22, where the Appellate Body, in interpreting the introductory paragraph (“*the chapeau*”) of GATT Article XX, found that the terms “arbitrary discrimination”, “unjustifiable discrimination” and “disguised restriction” on international trade may be read side-by-side and that they impart meaning to one another. See also Appellate Body Report, *Canada – Dairy*, para. 134, where the Appellate Body, in interpreting the phrase “terms and conditions” in Canada’s Tariff Schedule stated that “the phrase ‘terms and conditions’ is a composite one which, in its ordinary meaning, denotes the imposition of qualifying restrictions or conditions”.

¹⁴⁵ First written submission of New Zealand, para. 87, fn. 110.

¹⁴⁶ *Ibid.*, para. 86, fn. 109.

¹⁴⁷ *Ibid.*, para. 88, fn. 112 (emphasis added).

¹⁴⁸ First written submission of New Zealand, para. 88, fn. 113 (emphasis added).

a particular benefit".¹⁴⁹ Canada agrees with this meaning, but only to the extent that the conditions are on the utilisation of a TRQ for the importation of a good. To be clear, there is nothing in the ordinary meaning of the terms "eligibility requirements" that "makes clear" that the term "utilisation" in Article 2.29.2(a) should be conflated with "allocation", according to New Zealand's central contention.¹⁵⁰

138. Reading the phrase "condition, limit or eligibility requirement on the utilisation of a TRQ for importation of a good" in its entirety, the eligibility requirements covered under Article 2.29.2(a) must relate to the actual use of a TRQ when importing a good.

139. New Zealand's interpretation effectively ignores the terms "for importation of a good" when attempting to give meaning to the terms "eligibility requirement" and "on the utilisation of a TRQ". As a result, New Zealand erroneously assumes that the eligibility requirements covered under Article 2.29.2(a) can be understood as who may apply for and receive an allocation.¹⁵¹ However, the text of Article 2.29.2(a) does not support this interpretation. The eligibility requirements covered by Article 2.29.2(a) are those about the actual use of a TRQ for importation of a good, i.e., requirements that must be met for goods to be imported.¹⁵² Eligibility requirements on who may apply for an allocation are distinct from the requirements that condition the actual use of a TRQ for importation of a good.

140. Further, New Zealand's failure to give proper meaning to the terms of Article 2.29.2(a) is apparent when it asserts that the "thing being utilised here" (i.e., "a TRQ for the importation of goods") coupled with the reference to "eligibility requirement" "makes it clear that the 'utilisation' of a TRQ includes everything from quota allocation to the point at which product enters the relevant market".¹⁵³ However, New Zealand does not explain how this is the necessary conclusion of its interpretation. Interpreting Article 2.29.2(a) so that any limit or eligibility requirement on who may obtain an allocation is also a limit or eligibility requirement

¹⁴⁹ Ibid, para. 88 (emphasis added).

¹⁵⁰ Ibid, para. 89.

¹⁵¹ This is made clear when New Zealand asserts: "[i]n the context of Article 2.29.2(a), [the eligibility requirements] are the conditions that must be complied with to be eligible to apply and be considered for an allocation". See the first written submission of New Zealand, para. 88 (emphasis added).

¹⁵² Emphasis added.

¹⁵³ First written submission of New Zealand, para. 89.

on the utilisation of a TRQ would run contrary to the principle of effective treaty interpretation by reading out the words “for importation of a good”.

ii) Relevant context supports Canada’s interpretation of Article 2.29.2(a)

141. A contextual analysis supports interpreting Article 2.29.2(a) as only prohibiting a Party from introducing new or additional conditions, limits or eligibility requirements relating to how a TRQ may be used for the importation of goods once the allocations have been granted.

(a) The illustrative list in Article 2.29.2(a)

142. Article 2.29.2(a) sets out an illustrative list of the types of conditions, limits or eligibility requirements covered under this provision. This list is highly relevant to interpreting the obligation. Article 2.29.2(a) provides in the relevant part: “[...] on the utilisation of a TRQ for importation of a good, including in relation to specification or grade, permissible end-use of the imported product or package size [...]”.

143. The *ejusdem generis* doctrine provides that, “when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed”.¹⁵⁴ The WTO Appellate Body has stated that the “doctrine would equally apply to situations where the general word or phrase precedes the specified list”,¹⁵⁵ which is the case in Article 2.29.2(a), where the general phrase “conditions, limits and eligibility requirements on the utilisation of a TRQ for importation of a good” precedes the illustrative list.

144. Each of the items in the list relates to the use of a TRQ allocation to import goods, and none are conditions on an applicant’s eligibility to apply for or receive an allocation. The commonality among the items in the illustrative list is their product-focused nature (i.e., specification or grade, permissible end-use of the imported product, or package size). These conditions are all related to the products and their importation into the market when an allocation is being utilised (i.e., they do not

¹⁵⁴ Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, p. 7, fn. 1290 to para. 615 (quoting from the Black’s Law Dictionary, Seventh Edition).

¹⁵⁵ *Ibid.*

relate to the eligibility of an individual for a TRQ allocation at the time when the TRQ is being allocated).

145. Thus, the context provided by the illustrative list, in light of the *ejusdem generis* doctrine contradicts New Zealand's interpretation that the scope of Article 2.29.2(a) must cover "everything",¹⁵⁶ including conditions related to an applicant's eligibility to apply for and receive an allocation. Instead, this context provides support for Canada's interpretation that the conditions, limits or eligibility requirements covered by Article 2.29.2(a) are those relating to how a TRQ may be used after the allocations have been granted.

(b) The footnote to Article 2.29.2(a)

146. Footnote 17 states:

For greater certainty, this paragraph shall not apply to conditions, limits or eligibility requirements that apply regardless of whether or not the importer utilises the TRQ when importing the good.

147. This footnote confirms Canada's interpretation that the term "utilisation" in Article 2.29.2(a) means the actual use of a TRQ when importing a good. The phrase "regardless of whether or not the importer utilises the TRQ when importing the good" makes clear, the only way to "utilise" a TRQ is when an importer actually imports a good under a TRQ. This context supports Canada's interpretation that Article 2.29.2(a) only covers conditions, limits and eligibility requirements on the use of a TRQ for importing a good, and not on the allocation of a TRQ.

148. Further, the phrase "for greater certainty" supports Canada's interpretation that the scope of Article 2.29.2(a) is narrower than the interpretation put forward by New Zealand. Footnote 17 confirms that the scope of Article 2.29.2(a) does not extend to any and all applicable requirements. For example, sanitary requirements on dairy products are not covered under Article 2.29.2(a) because they apply regardless of whether or not an importer utilises a TRQ when importing a dairy product. The broad scope of the footnote contrasts with the narrow scope of Article

¹⁵⁶ First written submission of New Zealand, para. 89.

2.29.2(a). This undermines New Zealand's interpretation that Article 2.29.2(a) covers all requirements, including those relating to who may apply for an allocation and how a TRQ may be used for importing goods.¹⁵⁷

(c) The order of the obligations in Section D

149. The fact that Article 2.29.2(a) does not prohibit a Party from imposing a condition, limit or eligibility requirement on who may apply for a TRQ allocation is consistent with the structure of the obligations in Section D since this provision appears before Article 2.30, which deals specifically with allocations.

150. The obligations in Section D contemplate the administration of TRQs via two separate systems: either on a FCFS basis, or through an allocation mechanism. The obligation in Article 2.29.2(a) applies to all TRQs, whether administered on a FCFS basis or through an allocation mechanism. On the other hand, Article 2.30.1 deals exclusively with "TRQ[s] [...] subject to an allocation mechanism".¹⁵⁸

151. Therefore, the fact that Article 2.30 appears after Article 2.29 supports Canada's interpretation because the Agreement addresses the means of creating an allocation mechanism, including eligibility requirements for allocations, separately, beginning at Article 2.30 and thereafter. In other words, Article 2.29 sets out the broad obligations applying to the administration of all TRQs, whereas Article 2.30 details the specific obligations related to allocations under an allocation mechanism.

152. Contrary to what New Zealand argues, the mere presence of the term "eligibility" in the heading does not support New Zealand's interpretation that the term "utilisation" in Article 2.29.2(a) necessarily includes who may receive a TRQ allocation.¹⁵⁹ The term "eligibility" in the heading speaks to the product-focused nature of the requirements covered in Article 2.29.2(a), which must be satisfied for goods to be imported into the market when a TRQ is utilised. There is nothing in the heading that suggests giving "eligibility requirement" in Article 2.29.2(a) a broader meaning. In contrast, Article 2.30, titled "Allocation", addresses eligibility

¹⁵⁷ See the first written submission of New Zealand at para. 89 where New Zealand states "eligibility requirements" on the "utilization" includes "everything from quota allocation to the point at which product enters the relevant market" (emphasis added).

¹⁵⁸ Footnote 18 to Article 2.30 defines "allocation mechanism" as any system where access to the TRQ is granted on a basis other than FCFS.

¹⁵⁹ First written submission of New Zealand, para. 92.

requirements on who may apply and receive a quota allocation, and this provision applies only if a Party uses an allocation mechanism to administer its TRQs.

153. By starting with general obligations applicable to all TRQ utilisation followed by the specific obligations applicable only when an allocation mechanism is used, the order and function of Articles 2.29 and 2.30 support the interpretation that Article 2.29.2(a) only covers conditions, limits and eligibility requirements on the utilisation of a TRQ and not on the allocation of a TRQ.¹⁶⁰

(d) Article 2.29.1

154. Article 2.29.1 requires a Party to administer its TRQs “in a manner that allows importers the opportunity to utilise TRQ quantities fully”.

155. This obligation also relates to the utilisation of a TRQ. As Canada elaborates in Section V.A.1, above, the obligation on a Party in Article 2.29.1 is to administer its TRQs in a manner that allows importers the opportunity to use TRQs by importing goods up to the entire in-quota volume that has been granted to them. Article 2.29.1 imposes no obligation regarding who may apply for a TRQ allocation because the obligation applies to importers, who are necessarily only those applicants who have successfully received a TRQ allocation; and consequently, have the opportunity to utilise the TRQ by importing goods. Similarly, the phrase “for the importation of a good” in Article 2.29.2(a) confirms that the requirements covered therein must relate to the actual use of a TRQ when importing a good. The context provided by Article 2.29.1 supports Canada’s interpretation that Article 2.29.2(a) does not cover conditions, limits or eligibility requirements related to an applicant’s eligibility to apply for and receive an allocation.

¹⁶⁰ Emphasis added.

(e) Article 2.30.3

156. Article 2.30.3 provides support for Canada's interpretation of Article 2.29.2(a) for the same reason it provides support for Canada's interpretation of Article 2.29.1, as Canada outlined above.¹⁶¹

157. Article 2.30.3 distinguishes the utilisation of an allocation from the application for an allocation.¹⁶² This contradicts New Zealand's interpretation that "utilisation" captures both access to an allocation and use of an allocation, since New Zealand's interpretation of "utilisation" would render inutile the words "application for" in Article 2.30.3.¹⁶³ Rather, this provision supports Canada's interpretation that, under Article 2.29.2(a), a condition, limit or eligibility requirement on the "utilisation" of a TRQ does not include the "allocation" of a TRQ. Such conditions, limits or eligibility requirements cover how a TRQ may be used to import goods once allocations have been granted.

(f) The Import Licensing Agreement

158. As Canada elaborates in Section V.A.1.b, above, the ILA constitutes context for interpreting Article 2.29.2(a) as "relevant rules of international law applicable in the relations between the parties" under Article 31.2(c) of the VCLT given that Article 2.28.1 of the CPTPP states that "[e]ach Party shall implement and administer [TRQs] in accordance with Article XIII of GATT 1994, including [...] the Import Licensing Agreement". In this regard, the text of Articles 3.5(h) and (j) of the ILA distinguishes between licenses "issued" and "utilisation" of quotas, which provides support for Canada's interpretation that the terms "allocation" and "utilisation" have distinct meanings.

iii) Canada's interpretation is supported by the object and purpose of the CPTPP

159. As discussed in Section V.A.1.b, above, the object and purpose of the CPTPP includes contributing to maintaining open markets and increasing world trade.

¹⁶¹ See Section V.A.1.b of this submission.

¹⁶² Emphasis added.

¹⁶³ Ibid.

However, this must be tempered by the Parties' recognized and inherent right to regulate and their flexibility to set legislative and regulatory priorities.

160. New Zealand's interpretation of Article 2.29.2(a) is inconsistent with Canada's ability to regulate and the preservation of Canada's flexibility to set regulatory priorities. As discussed above, according to New Zealand's interpretation, each Party would have surrendered its right to design or modify its FCFS system or allocation mechanism by effectively giving a veto to other CPTPP Parties over any requirements that the Party may impose. This interpretation would gravely and unduly restrain the CPTPP Parties in the administration of their TRQs and is therefore inconsistent with the object and purpose of the CPTPP. Conversely, Canada's interpretation is entirely consistent with the object and purpose of the CPTPP, as the Parties retain their right to regulate and administer their domestic systems, provided the specific rules in the CPTPP are adhered to, including those dealing with eligibility requirements conditioning the access to an allocation under an allocation mechanism, as set out in Article 2.30.1 (discussed in Sections V.C and V.D, below).

C. Canada's decision to limit TRQ eligibility to certain market actors is consistent with Article 2.30.1(a)

161. New Zealand errs by interpreting Article 2.30.1(a) as effectively meaning that all Canadian residents that are active in the Canadian dairy sector must be eligible to apply and to be considered for a quota allocation under Canada's dairy TRQs.

162. Under Article 2.30.1(a), Canada has discretion to establish eligibility requirements for the allocation of its dairy TRQs. However, in establishing its eligibility requirements, Canada must comply with the parameters set by paragraph 3(c) of Canada's Tariff Schedule. That is, Canada must ensure that it only issues TRQ allocations to residents of Canada that are active in the Canadian dairy sector and that are compliant with the EIPA and its regulations. So long as Canada allocates its dairy TRQs to Canadian residents that are active in the Canadian dairy sector, Canada is entitled to limit TRQ eligibility to a subset of these residents. Once Canada has exercised its discretion to establish eligibility requirements in accordance with the parameters set by paragraph 3(c), Article 2.30.1(a) requires Canada to apply its chosen eligibility requirement during the quota application period.

163. Below, Canada explains the correct interpretation of Article 2.30.1(a). Then, Canada explains the correct interpretation of paragraph 3(c) of Canada's Tariff Schedule. Finally, Canada demonstrates that Canada's dairy TRQ allocation measures are consistent with paragraph 3(c) and Article 2.30.1(a).

1. Article 2.30.1(a) recognizes Canada's discretion to set eligibility requirements for the allocation of its CPTPP TRQs

164. New Zealand's claim that Canada's CPTPP Notices to Importers are inconsistent with Article 2.30.1(a) is based on an incorrect understanding of this provision that fails to recognize Canada's discretion to establish eligibility requirements for the allocation of its CPTPP dairy TRQs. As Canada explains below, Article 2.30.1(a) is not intended to remove Canada's discretion to establish eligibility requirements by compelling Canada to exclusively follow the requirements set out in paragraph 3(c) of Canada's Tariff Schedule. Instead, Article 2.30.1(a) is intended to ensure that the CPTPP Party will apply its chosen eligibility requirements during the quota application period. Any person that meets the Party's chosen requirements must be able to apply and be considered for an allocation.

165. Article 2.30.1(a) states as follows:

In the event that access under a TRQ is subject to an allocation mechanism, each importing Party shall ensure that: [...] (a) any person of the other Party that fulfils the importing Party's eligibility requirements is able to apply and be considered for a quota allocation under the TRQ.

166. As a result of its flawed interpretation of Article 2.29.2(a), New Zealand also misinterprets Article 2.30.1(a). According to New Zealand, Article 2.29.2(a) prohibits a Party from introducing any eligibility requirement beyond those set out in the Party's Tariff Schedule. Based on this incorrect interpretation of Article 2.29.2(a), New Zealand concludes that an importing Party's "eligibility requirements" regarding who may apply and be considered for an allocation must similarly – and exclusively –

be found in the Party's Schedule, unless the Party follows the consultation and agreement process set out in Article 2.29.2(b) and (c).¹⁶⁴

167. However, as Canada demonstrated above, Article 2.29.2(a) does not govern any and all eligibility requirements, but only those on the utilisation of a TRQ for importation of a good. Eligibility requirements on who may apply and be considered for an allocation do not pertain to the actual use of a TRQ for importation of a good. These requirements therefore fall outside the scope of Article 2.29.2(a).¹⁶⁵ In contrast to Article 2.29.2(a), Article 2.30.1(a) clearly relates to the allocation of TRQs. This is made clear not only by the title of Article 2.30 – "Allocation" – but also by the words "is able to apply and to be considered for a quota allocation under the TRQ" in that provision. Article 2.29.2(a) is simply not relevant for the interpretation of Article 2.30.1(a) because it addresses a different type of eligibility requirement. New Zealand's attempt to use Article 2.29.2(a) as context for interpreting Article 2.30.1(a) is therefore inapposite.

168. Further, contrary to New Zealand's claim, the text of Article 2.30.1(a) does not in any way refer to a Party's Tariff Schedule. New Zealand's interpretation therefore reads into Article 2.30.1(a) a reference to a Party's Schedule that is simply not in the text. New Zealand offers no credible basis for reading Article 2.30.1(a) in this manner.

169. Instead of referring to a Party's Schedule, Article 2.30.1(a) refers to "the importing Party's eligibility requirements". The use of the possessive form in this provision indicates that the phrase "eligibility requirements" is a reference to the Party's own eligibility requirements – that is, those established by the Party as part of its allocation mechanism. Article 2.30.1(a) therefore acknowledges that the Party administering a TRQ has the discretion to establish eligibility requirements for the allocation of the TRQ, but the Party must enable anyone who fulfils those requirements to apply and to be considered for a quota allocation under that TRQ.

¹⁶⁴ First written submission of New Zealand, para. 107. See also, para. 110 ("Canada has not introduced any new or additional eligibility requirements through the consultation and agreement process set out in Article 2.29(2)(b) and (c)").

¹⁶⁵ See Section V.B of this submission.

170. The context of Article 2.30.1(a) confirms that the importing Party is allowed to set eligibility requirements as part of the allocation of its TRQs. Footnote 18 to Article 2.30.1 defines the term “allocation mechanism” as “any system where access to the TRQ is granted on a basis other than first-come first-served”. This definition recognizes that a CPTPP Party can adopt a system other than FCFS – subject to the Party’s relevant obligations under Section D. In deciding how to grant “access” to a particular TRQ, the Party will necessarily have to decide who has access to the TRQ.

171. In addition, Article 2.28.3 provides that “[t]he Party administering a TRQ shall publish all information concerning its TRQ administration, including the size of quotas and eligibility requirements; and, if the TRQ will be allocated, application procedures, the application deadline, and the methodology or procedures that will be used for the allocation or reallocation, on its designated publicly available website at least 90 days prior to the opening date of the TRQ concerned”.¹⁶⁶ In other words, under Article 2.28.3, the importing Party must choose its allocation mechanism (including who is eligible for the relevant TRQ) at least 90 days prior to the opening of the quota period for the relevant TRQ.

172. Thus, Article 2.30.1(a) is fundamentally about transparency and predictability: it ensures that the CPTPP Party will apply the eligibility requirements that it has communicated to the public in accordance with Article 2.28.3. Any person that meets the Party’s chosen requirements must be able to apply and be considered for an allocation. For example, it would be a violation of Article 2.30.1(a) for a Party to publicly declare that distributors are eligible to receive a TRQ allocation, but then arbitrarily change course during the quota application period and refuse to consider valid applications from eligible distributors.

2. Paragraph 3(c) of Canada’s Schedule establishes parameters on Canada’s right to decide who is “eligible” for the allocation of its dairy TRQs

173. New Zealand further erroneously claims that Canada’s Notices to Importers are inconsistent with Article 2.30.1(a) because they require “that, in addition to

¹⁶⁶ Emphasis added.

meeting the eligibility requirements set out in [paragraph 3(c) of] Appendix A, all applicants must also be a particular type of business entity in order to apply for an allocation".¹⁶⁷

174. New Zealand's claim reflects an incorrect understanding of Article 2.30.1(a) and paragraph 3(c) of Canada's Tariff Schedule. Contrary to New Zealand's contention, paragraph 3(c) does not exhaustively define who is "eligible" to apply for an allocation under Canada's CPTPP TRQs. Paragraph 3(c) reads as follows:

Canada shall allocate its TRQs each quota year to eligible applicants. An eligible applicant means a resident of Canada, active in the applicable Canadian dairy, poultry or egg sector, as appropriate, and that is compliant with the *Export and Import Permits Act* and its regulations. In assessing eligibility, Canada shall not discriminate against applicants who have not previously imported the product subject to a TRQ but who meet the residency, activity and compliance criteria.

175. The correct interpretation of paragraph 3(c) is that it prevents Canada from establishing eligibility requirements that result in the issuance of allocations to applicants who are not "eligible applicants" within the meaning of paragraph 3(c). In other words, in exercising its discretion to decide who is "eligible" for an allocation under Canada's dairy TRQs (which is recognized in Article 2.30.1(a), as Canada explained above), Canada is required to select from a specific category of market actors – namely, Canadian residents that are active in the Canadian dairy sector and that are compliant with the EIPA and its regulations. Canada is not entitled to select market actors from outside this category (e.g., a Canadian cattle rancher or a Canadian meat processor).¹⁶⁸ But so long as the market actors chosen by Canada remain within the limits of paragraph 3(c), nothing prevents Canada from imposing additional requirements for the allocation of its TRQs – including by limiting TRQ eligibility to specific market actors.¹⁶⁹

¹⁶⁷ New Zealand First Written Submission, para. 111 (emphasis added).

¹⁶⁸ Emphasis added.

¹⁶⁹ As explained in further detail below, the only exception to this is that Canada may not limit TRQ eligibility to entities that have previously imported the product subject to the TRQ, as provided in the third sentence of paragraph 3(c).

a) The text of paragraph 3(c) does not provide that all residents of Canada active in the Canadian dairy sector must be eligible to apply and to be considered for a TRQ allocation

176. Pursuant to the first sentence of paragraph 3(c), Canada must “allocate its TRQs each quota year to eligible applicants”. The second sentence of paragraph 3(c) defines the term “eligible applicant” as “a resident of Canada, active in the applicable Canadian dairy, poultry or egg sector, as appropriate, and that is compliant with the *Export and Import Permits Act* and its regulations”.

177. The text of paragraph 3(c) does not provide that “any” or “every” resident of Canada that is active in the Canadian dairy sector must be eligible to apply and to be considered for a quota allocation under Canada’s CPTPP TRQs. This stands in contrast to Article 2.30.1(a), which expressly states that the importing Party must ensure that “any person of a Party that fulfils the importing Party’s eligibility requirements is able to apply and to be considered for a quota allocation under the TRQ”. Had the Parties wanted to exhaustively set out who may apply and be considered for a quota allocation under Canada’s CPTPP TRQs, they could have followed an approach similar to that taken by the United States and South Korea in the *United States – Korea Free Trade Agreement* (“KORUS”) – but they did not. Article 3.2.2(b) of KORUS provides as follows:

Unless the Parties otherwise agree, any processor, retailer, restaurant, hotel, food service distributor or institution, or other person is eligible to apply and to be considered to receive a quota allocation.

178. As Canada explained above, Article 2.30.1(a) recognizes Canada’s discretion to establish eligibility requirements for the allocation of its CPTPP TRQs. When read in the light of Article 2.30.1(a), the inclusion of the term “eligible applicants” in paragraph 3(c) indicates that this provision sets out the basic requirements that any entity must meet in order to be “eligible” for an allocation under Canada’s CPTPP TRQs. Put differently, paragraph 3(c) does not remove Canada’s discretion to establish additional eligibility requirements for the allocation of its CPTPP dairy TRQs. But in designing and applying its eligibility requirements, Canada has committed to ensure that TRQ allocations are only issued to residents of Canada that are active in the Canadian dairy sector and that are compliant with the EIPA and its regulations.

In other words, Canada has committed to ensure that no TRQ allocation is issued to an entity that does not meet the threshold requirements set out in paragraph 3(c).

b) Canada's interpretation of paragraph 3(c) is supported by the context of that provision

179. Canada's interpretation of paragraph 3(c) is supported by the third and final sentence in paragraph 3(c), which states that "[i]n assessing eligibility, Canada shall not discriminate against applicants who have not previously imported the product subject to a TRQ but who meet the residency, activity and compliance criteria". This provision prevents Canada from limiting TRQ eligibility to applicants that have a history of importing the product subject to the TRQ.

180. If paragraph 3(c) exhaustively defined who is eligible for an allocation under Canada's TRQs, there would have been no need to include this final sentence in paragraph 3(c), as Canada would already be prevented from restricting TRQ eligibility to established importers. The fact that the Parties included this final sentence under paragraph 3(c) indicates that in the absence of that sentence, Canada would have been allowed to exclude new importers from TRQ eligibility.

181. The final sentence of paragraph 3(c) is therefore an implicit recognition that paragraph 3(c) does not prevent Canada from refining the universe of eligible applicants to certain market actors – provided these market actors are "residents of Canada active in the [...] Canadian dairy [...] sector". Put differently, the third sentence of paragraph 3(c) recognizes that, in exercising its discretion to establishing eligibility requirements for the allocation of its CPTPP TRQs, Canada is allowed to apply and consider criteria other than the residency, activity and compliance criteria.

182. Canada's interpretation of paragraph 3(c) is also supported by Article 2.30.1(a) itself. It is well-established that the provisions of a treaty should not be interpreted in such a manner as to reduce parts of the treaty to redundancy.¹⁷⁰ If the Panel accepts New Zealand's interpretation of Article 2.30.1(a), this would mean that paragraph 3(c) and Article 2.30.1(a) have functionally the same purpose and effect – that is, both provisions would require Canada to ensure that any resident of Canada

¹⁷⁰ Appellate Body Report, *United States — Offset Act (Byrd Amendment)*, para. 271.

that is “active in the [...] Canadian dairy [...] sector” is eligible to receive a TRQ allocation under Canada’s CPTPP TRQs. By contrast, Canada’s interpretation is harmonious and does not lead to redundancy between these provisions: paragraph 3(c) establishes parameters on Canada’s right to establish eligibility requirements for the allocation of its CPTPP TRQs, while Article 2.30.1(a) ensures that Canada adheres to its chosen eligibility requirements during the quota application period.

c) Canada’s interpretation is supported by the object and purpose of the CPTPP

183. As New Zealand notes in its first written submission,¹⁷¹ the CPTPP is a trade-liberalizing agreement that seeks to promote and expand commercial exchanges between the CPTPP Parties. This is confirmed by the TPP’s Preamble (which has been incorporated into the CPTPP),¹⁷² which states that one of the TPP’s objectives is to “establish a comprehensive regional agreement that promotes economic integration to liberalise trade and investment”.

184. Canada’s interpretation of paragraph 3(c) is entirely consistent with the CPTPP’s overall objective of trade liberalization and expansion. While Canada has not fully liberalized trade in dairy products between itself and the other Parties, Canada’s interpretation of paragraph 3(c) expands and facilitates this trade by excluding certain market actors from Canada’s dairy TRQs – namely, entities that are not in any way connected to the production, distribution or sale of dairy products.¹⁷³ This ensures that TRQ allocations will only be issued to entities that use or sell dairy products as part of their business activities, which in turn promotes greater utilisation of Canada’s dairy TRQs. However, so long as the eligible entity is involved in the dairy sector, nothing prevents Canada from establishing further eligibility criteria for the allocation of its CPTPP TRQs.

¹⁷¹ First written submission of New Zealand, paras. 76, 93, 108, 123, 136 and 147.

¹⁷² Article 1.1 of the CPTPP provides that “[t]he Parties hereby agree that, under the terms of this Agreement, the provisions of the Trans-Pacific Partnership Agreement, done at Auckland on 4 February 2016 (“the TPP”) are incorporated, by reference, into and made part of this Agreement mutatis mutandis, except for Article 30.4 (Accession), Article 30.5 (Entry into Force), Article 30.6 (Withdrawal) and Article 30.8 (Authentic Texts)”.

¹⁷³ Emphasis added.

3. Canada's Notices to Importers are fully consistent with Article 2.30.1(a)

185. For the reasons explained above, New Zealand errs when it contends that, under Article 2.30.1(a), an importing Party's "eligibility requirements" are exclusively those set out in that Party's Tariff Schedule and that Canada's Notices to Importers are therefore inconsistent with Article 2.30.1(a) because they require applicants to be a particular type of market actor in order to apply and to be considered for a quota allocation.¹⁷⁴

186. Article 2.30.1(a) recognizes Canada's discretion to establish eligibility requirements for the allocation of its CPTPP TRQs. However, in establishing those eligibility requirements, Canada must comply with the parameters set by paragraph 3(c) of Canada's Tariff Schedule. Once Canada has exercised its discretion to establish eligibility requirements for the allocation of its dairy TRQs (within the parameters set by paragraph 3(c)), Article 2.30.1(a) requires Canada to apply its eligibility requirements during the quota application period by ensuring that any person that meets Canada's eligibility requirements is able to apply and to be considered for a quota allocation under the relevant TRQ.

187. In the present case, Canada's Notices to Importers are fully consistent with Article 2.30.1(a) and paragraph 3(c) of Canada's Tariff Schedule. Canada's Notices to Importers provide that the following market actors are eligible to apply for a TRQ allocation under some or all of Canada's 16 CPTPP dairy TRQs: processors, distributors and further processors. All of these market actors use or sell dairy products as part of their business activities. These market actors are therefore "active in the [...] Canadian dairy [...] sector" within the meaning of paragraph 3(c). In turn, this means that the market actors chosen by Canada for the allocation of its dairy TRQs have been appropriately selected within the parameters of paragraph 3(c).

188. Further, Canada has ensured that any entity that fulfils its eligibility requirements is able to apply and to be considered for a quota allocation. New Zealand has not established that Canada has failed to consider valid TRQ applications

¹⁷⁴ First written submission of New Zealand, paras. 104, 106, 107 and 111.

from any eligible processor, further processor or distributor when allocating its dairy TRQs. Nor has New Zealand established that Canada has allowed Canadian residents that are not “active in the [...] Canadian dairy [...] sector” to receive a TRQ allocation under its dairy TRQs. For these reasons, New Zealand’s claim that Canada’s dairy TRQ allocation measures are inconsistent with Article 2.30.1(a) must fail.

D. Canada administers its dairy TRQs in conformity with Article 2.30.1(b)

1. Article 2.30.1(b) does not prohibit Canada from creating pools for processors

189. New Zealand argues that a Party’s obligation to ensure that it does “not limit access to an allocation to processors” under Article 2.30.1(b) (the “Processor Clause”) prohibits it from restricting access to “one, several, or indeed all allocations under a TRQ to processors”.¹⁷⁵ New Zealand’s expansive interpretation of the Processor Clause would significantly undermine the discretion reserved for Parties to administer TRQs by an allocation mechanism of their choosing. As demonstrated below, New Zealand errs in its interpretation of Article 2.30.1(b) in two ways: first, New Zealand attributes an incorrect meaning to the terms “an”, “allocation” and “processors”, ignoring relevant context; and second, New Zealand’s interpretation is contrary to the function of Article 2.30.1 and the object and purpose of the CPTPP.

190. Properly interpreted, the Processor Clause prohibits a Party administering its dairy TRQs through an allocation mechanism from limiting the opportunity to receive “an allocation” exclusively to dairy processors. In other words, the Processor Clause requires that non-processors (including “further processors”) are able to apply and receive an allocation. Canada complies with this obligation because its pooling system simply reserves portions of each TRQ’s in-quota quantity for processors and non-processors and ensures that non-processors are able to apply and receive an allocation.

¹⁷⁵ First written submission of New Zealand, para. 71. Canada agrees that Article 2.30.1(b) contains three substantive requirements. See First written submission of New Zealand, para. 59. In addition to the Processor Clause, Article 2.30.1(b) contains the following substantive obligations:

- a Party shall ensure “it does not allocate any portion of the quota to a producer group” (the “Producer Clause”); and
- a Party shall ensure that it does not “condition access to an allocation on the purchase of domestic production” (the “Domestic Production Clause”).

a) Interpreted correctly, the Processor Clause prohibits a Party from restricting the opportunity to receive “an allocation” exclusively to processors

191. Article 2.30.1(b) provides:

In the event that access under a TRQ is subject to an allocation mechanism, each importing Party shall ensure that:

[...]

(b) unless otherwise agreed, 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.¹⁷⁶

192. In order to assess New Zealand’s claim, it is necessary to establish the meaning of the phrases “limit access”,¹⁷⁷ “an allocation” and “processors”, in their context and in light of the object and purpose of the CPTPP and the function of Article 2.30.1.¹⁷⁸ A contextual interpretation of the Processor Clause indicates that the Parties’ common intention was to prevent a Party from limiting access to TRQ allocations exclusively to processors. In other words, Parties agreed to permit non-processors to acquire allocations but did not undertake any commitments to ensure a specific degree of market access for such entities.

i) The meaning of “an allocation” is “every” share of a TRQ that may be allocated to individual applicants

193. Turning to the interpretation of the phrase “an allocation”, New Zealand submits that the CUSMA panel’s decision in *Canada – Dairy TRQ Allocation Measures*

¹⁷⁶ Emphasis added.

¹⁷⁷ Canada agrees that the term “limit” is relevantly defined as; “[t]o confine within limits, to set bounds to [...]; to bound, restrict” and that “access” is relevantly defined as “[t]o obtain, acquire; to get hold of [something].” See First written submission of New Zealand, para. 68; Exhibit NZL-18; and Exhibit NZL-19. Together, the ordinary meaning of the phrase “limit access to” is “to restrict” the ability to “obtain” or “acquire” something, here “an allocation”.

¹⁷⁸ While Article 31 of the VCLT refers to the object and purpose of a treaty as a whole, the WTO Appellate Body has recognized that the “function” of particular provisions are relevant when interpreting terms and phrases. For example, in *US – Washing Machines*, the Appellate Body considered that interpreting the terms of a provision in light of its function ensures that meaning and effect are given to that provision. See Appellate Body Report, *US – Washing Machines*, fn. 164.

(CDA-USA-2021-31-010) ("*CUSMA Dairy I*") is "highly pertinent" to this Panel's interpretation, while recognizing that the CPTPP is a separate treaty requiring independent treaty interpretation. The panel's determination in *CUSMA Dairy I* focused on the disputed meaning of the term "an allocation". However, the determination and the analytical approach followed by that panel is not binding on this Panel,¹⁷⁹ which must conduct its own VCLT analysis of the phrase "an allocation" under the CPTPP's Processor Clause. Furthermore, if the Panel considers that the *CUSMA Dairy I* decision is at all relevant to its analysis, the Panel should closely appraise the persuasive value of that determination. Analytical and interpretive issues in the *CUSMA Dairy I* report (including with regard to the panel's VCLT Article 31 analysis) compromise its value when interpreting the terms "an" and "allocation" – both of which must be given meaning in the Processor Clause.

194. Beginning with the term "allocation", Canada agrees that the relevant dictionary definition is: "[t]hat which is allocated to a particular person, purpose, etc.; a portion, a share; a quota".¹⁸⁰ However, New Zealand suggests that an "allocation" can refer to "a potential portion or share of the TRQ that may be granted to an applicant/applicants".¹⁸¹ New Zealand appears to be arguing that an allocation can be the share of a TRQ granted to an individual applicant or some other portion of the TRQ that may be granted to applicants, plural – such as a processor pool.¹⁸² The imprecise nature of New Zealand's interpretation mirrors that of the panel in *CUSMA Dairy I*, which failed to clearly identify the meaning of the term "allocation". In that case, the panel simply noted that Canada and the United States appeared to agree

¹⁷⁹ The *CUSMA Dairy I* panel report is not relevant to the interpretation of Article 2.30.1(b). The CPTPP and the CUSMA are different agreements and New Zealand is not party to the latter. While the language of the provisions at issue may be similar, there is no legal basis for the Panel to follow the interpretation of the panel in the *CUSMA Dairy I* determination. Indeed, the CPTPP Parties explicitly address when a panel shall consider the interpretations of non-CPTPP bodies and there is no reference to interpretations of panels established under other free trade agreements, other than the WTO Agreement. (See Article 28.12.3: "With respect to any provision of the WTO Agreement that has been incorporated into this Agreement, the panel shall also consider relevant interpretations in reports of panels and the WTO Appellate Body adopted by the WTO Dispute Settlement Body.")

¹⁸⁰ Exhibit NZL-23: Definition of "allocation" from Oxford English Dictionary Online.

¹⁸¹ First written submission of New Zealand, para. 70 (emphasis added).

¹⁸² Contrary to New Zealand's assertion, a pool is not "an allocation" but a reserved amount of TRQ quantities made available to certain classes of eligible applicants, such as processors or distributors. Eligible applicants may apply for and receive an allocation of the reserved quantity within a pool. Furthermore, if there isn't demand for allocations under a specific pool, Canada reassigns quantity reserved under that pool to another pool. See Section IV, above.

on the definition noted above.¹⁸³ However, the dictionary definition of a term is simply the starting point of the VCLT analysis and the meaning of “allocation” was contested by the disputing Parties. The United States submitted that an allocation was a “portion” of the TRQ, using the term loosely to construe a pool itself as an “allocation” while at other times characterizing individual shares granted to specific individuals as an “allocation”.¹⁸⁴ In contrast, Canada was clear that an “allocation”, interpreted in context, must refer to “a share of an in-quota quantity that may be granted to an individual applicant”.¹⁸⁵ The panel failed to clearly establish the meaning of “allocation”, leading to an analysis that uses “an allocation” to mean either a pool or an individual share of the TRQ at various points.¹⁸⁶

195. In the present proceedings, New Zealand’s interpretation also broadens the meaning of “allocation” and ignores relevant context. For instance, Article 2.30.1(a) provides that “[...] any person of a Party that fulfils the importing Party’s eligibility requirements is able to apply and to be considered for a quota allocation under the TRQ”.¹⁸⁷ Article 2.30.1(a) strongly indicates that an “allocation” of the quota is the share that may be awarded to a person who applies for such an allocation. This is confirmed by other provisions, such as Article 2.32.2, which specifies that, “the name and address of allocation holders shall be published on the designated publicly available website”.¹⁸⁸ This is a clear indication that “an allocation” is granted to an individual “holder” capable of being named and located. Accordingly, the term “allocation” does not refer to an indeterminate “portion” of the TRQ, such as a processor pool. Instead, an “allocation” properly means a “share of a TRQ that may allocated to a particular applicant.”

196. Turning to the determiner in the Processor Clause, New Zealand presents a selective definition of “an” as: “something not specifically identified [...] but treated

¹⁸³ CUSMA Final Panel Report, *Canada – Dairy TRQ Allocation Measures* (CDA-USA-2021-31-010), 20 December 2021, para. 102.

¹⁸⁴ For example, see CUSMA Final Panel Report, *Canada – Dairy TRQ Allocation Measures* (CDA-USA-2021-31-010), 20 December 2021, paras. 70-74.

¹⁸⁵ CUSMA Final Panel Report, *Canada – Dairy TRQ Allocation Measures* (CDA-USA-2021-31-010), 20 December 2021, para. 77.

¹⁸⁶ See, for example, CUSMA Final Panel Report, *Canada – Dairy TRQ Allocation Measures* (CDA-USA-2021-31-010), 20 December 2021, paras. 98, 110, 120, 163.

¹⁸⁷ Emphasis added.

¹⁸⁸ Emphasis added.

as one of a class: one, some, any".¹⁸⁹ This definition alone does not cover the range of possible meanings of "an" in the Processor Clause. The Cambridge Dictionary defines the word "an", in relevant part, as follows:

a

determiner
(also an)

A1

used before a noun to refer to a single thing or person that has not been mentioned before, especially when you are not referring to a particular thing or person:

[...]

A1

used to mean any or every thing or person of the type you are referring to [...].¹⁹⁰

197. Based on dictionary definitions, the word "an" can mean a single but not specifically identified thing of a class, some of that thing, any or every of that thing. However, context suggests that the intent of the Parties was that "an" means "every" in the Processor Clause.

198. New Zealand focuses on the Domestic Production Clause of Article 2.30.1(b) as context for the Processor Clause and argues that the phrase "an allocation" should be interpreted consistently in both provisions to mean "any allocation".¹⁹¹ However, it is well established that a phrase can have a different meaning where context and the function of the provisions in question suggest a different meaning.¹⁹² That is the

¹⁸⁹ First written submission of New Zealand, para. 71. See also Oxford English Dictionary Online, definition of 'a', entry I.1, Exhibit NZL-24.

¹⁹⁰ Cambridge Dictionary Online, "a" (an), accessed 10 March 2023, <<https://dictionary.cambridge.org/us/dictionary/english/a>>, Exhibit CDA-34 (emphasis added).

¹⁹¹ First written submission of New Zealand, para. 72. New Zealand also argues that Article 2.30.1(d) provides context for the Processor Clause and suggests that "an" means "any" because the only possible interpretation of the phrase "an allocation" in Article 2.30.1(d) is "any obligation". However, in Canada's view, interpreting "an allocation" to mean "every allocation" in 2.30.1(d) leads to an equally natural reading and gives effect to that obligation.

¹⁹² For example, it is now well-established that the term "like" products in Article III:2 of the GATT 1994 has a narrower meaning than the same term in Article III:4 of the same Agreement. See Appellate Body Reports, *EC – Asbestos*, paras. 94-99; and *US – Clove Cigarettes*, fn. 323 to para. 143.

case here.¹⁹³ The Domestic Production Clause restricts a Party's ability to "condition access to an allocation on the purchase of domestic production". The verb "condition" means "[t]o subject to something as a condition; to make dependent on a condition to be fulfilled; to make conditional on".¹⁹⁴ Accordingly, the Domestic Production Clause establishes a general obligation to refrain from making access to a TRQ dependent or conditional on something, here an individual applicant's performance of a specific act, that is, the purchase of domestic production.¹⁹⁵ Accordingly, in the context of the Domestic Production Clause, use of "an" does not create ambiguity; if any applicant is denied access to an allocation because they did not buy domestic goods, the Party administering the TRQ has "condition[ed] access to an allocation on the purchase of domestic production" contrary to the Domestic Production Clause.

199. In contrast, the Processor Clause restricts a Party's discretion to "limit" access to "an allocation" to a class of market actors (processors), irrespective of any action on the part of individual members of that class. Here, the use of "an" cannot be presumed to mean "any" as New Zealand suggests.

200. The Producer Clause – like the Processor Clause – limits a Party's discretion to allocate its TRQs to a specific group of market actors and, given this function, provides relevant context. The Producer Clause uses the term "any" to explicitly remove the discretion of a Party to allocate "any portion" of a quota to a producer group (such that a producer group cannot access any allocation).¹⁹⁶ If the Parties had meant to establish a similarly expansive prohibition against limiting access to

¹⁹³ The *CUSMA Dairy I* panel considered that the purpose of the Producer Clause was "the outright ban on allocations in any amount to Producers" while the purpose of the Domestic Production Clause and the Processor Clause was "not restricting allocations, *per se*, but restricting *access* to allocations" (emphasis original). The CUSMA panel provided no analysis or explanation of what distinguishes between "not restricting allocations, *per se*" and "restricting access to allocations". See CUSMA Final Panel Report, *Canada – Dairy TRQ Allocation Measures* (CDA-USA-2021-31-010), paras. 112-113. In Canada's view, the CUSMA panel established a false dichotomy. The more appropriate view is that the function of CUSMA Article 3.A.2.11(b) and CPTPP Article 2.30.1(b) is to establish specific restrictions on a Party's discretion to control who can receive an allocation, as specified therein. As will be discussed further below, the Processor Clause and Producer Clause both restrict a Party's ability to control what type of market actor receives TRQ allocations.

¹⁹⁴ *Oxford English Dictionary*, OED online, "condition, *v.*", accessed 15 March 2023, <<https://www.oed.com/view/Entry/38551?rskey=XUT1OK&result=2&isAdvanced=false#eid>>, Exhibit CDA-35. See paragraph 138 for the definition if "condition" as a noun.

¹⁹⁵ Emphasis added.

¹⁹⁶ Emphasis added.

“any” allocation to processors, they would have drafted the Processor Clause accordingly. Thus, context suggests that the Processor Clause should be interpreted as restricting a Party’s discretion to limit access to every allocation that may be issued under a given TRQ to processors.¹⁹⁷

ii) The CPTPP’s object and purpose and the function of Article 2.30.1 confirm Canada’s interpretation of “an allocation”

201. Canada’s interpretation is also consistent with the object and purpose of the CPTPP and the function of the Article 2.30.1. While part of the object and purpose of the CPTPP is trade liberalization, the TPP preamble also recognizes the Parties’ inherent right to regulate and resolves to “preserve the flexibility” of Parties to set regulatory priorities.¹⁹⁸ Furthermore, Article 2.30.1 is premised upon the Parties’ retaining discretion to administer TRQs by an allocation mechanism of their choosing.¹⁹⁹ This discretion is particularly important because CPTPP Parties agreed to maintain TRQs in sectors that they did not agree to fully liberalize and require flexibility to regulate.²⁰⁰ Thus, the function of Article 2.30.1 is to preserve a Party’s administrative discretion while establishing specific restrictions to that discretion. Accordingly, the obligations under Article 2.30.1 should not be interpreted so broadly as to undermine that discretion.

202. New Zealand’s interpretation of the Processor Clause would significantly undermine Canada’s discretion to administer dairy TRQs in accordance with its regulatory priorities for the supply management system. On the other hand, interpreting the Processor Clause as a prohibition on limiting all allocations

¹⁹⁷ Ibid.

¹⁹⁸ TPP Preamble, para. 9.

¹⁹⁹ In particular, the chapeau to Article 2.30.1 indicates that “[i]n the event that access under a TRQ is subject to an allocation mechanism”, the importing Party shall comply with the requirements of the enumerated subparagraphs. Meanwhile, an “allocation mechanism” is defined broadly as “any system where access to the TRQ is granted on a basis other than first-come first-served” (see fn 18 to Article 2.30). Accordingly, Article 2.30.1 provides Parties the discretion to determine the allocation mechanism they will use to administer a TRQ subject to the specific obligations established by the article.

²⁰⁰ As noted by New Zealand, Canada did not agree to “open” or fully liberalize its dairy sector in CPTPP negotiations. See First written submission of New Zealand, para. 4. Under Appendix A to Tariff Schedule of Canada - (Tariff Rate Quotas), Canada agreed to establish TRQs for 20 categories of goods. The TRQs in Canada’s schedule pertain exclusively to dairy, poultry or eggs – each of which are supply-managed products in Canada. As balancing supply and demand is a key pillar of supply management, Canada’s practice is to agree only to limited liberalizing disciplines concerning supply-managed goods.

exclusively to processors preserves Canada's flexibility to administer TRQs in manner conducive to the functioning of its supply managed dairy sector while ensuring that non-processors are able to access TRQs.

iii) Context confirms that "processors" refers to processors of dairy products

203. Finally, turning to the term "processors", the Oxford English Dictionary provides the following definition; "[a] person who [...] performs a process or processes something; [...] a food processor".²⁰¹ The dictionary definition alone is insufficient to clarify the scope of the term "processors" in the Processor Clause.

204. In the context of a dairy TRQ, the term "processors" should be interpreted to refer to entities engaged in the transformation of raw milk into intermediary or finished dairy products covered by the TRQ. This group excludes "further processors", i.e., entities that transform intermediary or finished dairy products produced by milk processors into other further processed food products not covered by the TRQ, such as frozen pizzas. This interpretation reflects distinctions drawn by the Parties in Section B of Appendix A (Tariff Schedule of Canada – (Tariff Rate Quotas)). For example, Article 6(c) to Canada's Appendix A indicates that up to 85% of Canada's Milk TRQ "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)". This provision clarifies that processing in the context of dairy refers to processing raw milk into dairy products and reinforces the conclusion that "processors" means the persons performing this activity. Such dairy products could later be used as ingredients for further food processing (or secondary manufacturing) – an activity that is clearly distinct from processing under the CPTPP.²⁰² If the Parties intended Article 2.30.1(b) to apply to both processors and further food processors, they would have stated so.

²⁰¹ First written submission of New Zealand, para. 69. See also Oxford English Dictionary Online, definition of 'processor', Exhibit NZL-21.

²⁰² New Zealand argues that if the term "processor" in the Processor Clause is interpreted to exclude further processors, "it would be incapable of applying to the administration of TRQs for those products (such as eggs) that are only ever processed into other food products." See first written submission of New Zealand, fn. 102. This assertion is factually inaccurate and ignores the fact that eggs are processed into products such as liquid whole eggs, dried whole eggs, liquid yolk, dried yolk, liquid egg white, dried egg white, etc. – products produced by egg processors.

205. In sum, properly interpreted, the Processor Clause does not prohibit Canada's pooling system which allows non-processors (including further processors) to apply for and receive allocations of TRQ quantity.

E. Canada's quota pooling system is consistent with Article 2.30.1(c)

206. New Zealand errs when it claims that Canada's quota pooling system is inherently inconsistent with Article 2.30.1(c) because it limits the quantity of quota available for distributors.²⁰³ This claim is based on an incorrect understanding of Article 2.30.1(c). Article 2.30.1(c) does not apply to Canada's decision to reserve a portion of its CPTPP dairy TRQs for processors. Rather, this provision applies when Canada is carrying out its allocation mechanism – that is, when Canada is issuing individual allocations to specific TRQ applicants in accordance with its chosen allocation mechanism.

207. Accordingly, the correct way to interpret Article 2.30.1(c) is that this provision only applies with respect to the portion of the TRQ that is available to a particular type of TRQ applicant – that is, it applies within the pool that Canada has established for a particular type of TRQ applicant. In this regard, Canada makes serious efforts to ensure that, within each pool created for its CPTPP dairy TRQs, TRQ applicants receive quota volume in the amounts they have requested. In addition, Canada makes serious efforts to ensure that successful TRQ applicants have an opportunity to receive additional TRQ quantities through Canada's transfer and return mechanisms.

1. New Zealand errs in its interpretation of Article 2.30.1(c)

208. New Zealand claims that Article 2.30.1(c) "requires the Parties to use their powers to the greatest, or maximum extent possible, to make allocations in the amounts requested by importers".²⁰⁴ According to New Zealand, Article 2.30.1(c) "doesn't just oblige Canada to try to make allocations in the amounts requested by

²⁰³ First written submission of New Zealand, para. 125.

²⁰⁴ First written submission of New Zealand, para. 118.

importers, or do so if it fits within its wider allocation policy".²⁰⁵ Rather, according to New Zealand, Article 2.30.1(c) "must be given effect through the design and operation of a Party's TRQ allocation mechanism".²⁰⁶ New Zealand's interpretation of Article 2.30.1(c) is incorrect because it is supported neither by the text of Article 2.30.1(c) nor its context and because it would lead to an absurd or aberrant result.

a) New Zealand's interpretation is not supported by the text of Article 2.30.1(c)

209. New Zealand's interpretation of Article 2.30.1(c) ignores the text of that provision. The text of Article 2.30.1(c) makes clear that this provision does not apply to the "design" of a Party's allocation mechanism. Article 2.30.1(c) begins with the words "each allocation". The Oxford English Dictionary defines the word "each" as follows:

Used to give the same sense in relation to individual members of an identifiable set as all or both before a plural noun give in relation to the aggregate: every (individual of a definite group) regarded or treated separately.²⁰⁷

210. The use of the phrase "each allocation" in the beginning of Article 2.30.1(c) therefore indicates that this provision was not intended to create obligations with respect to the administration of the TRQ as a whole. Rather, the use of the word "each" suggests that Article 2.30.1(c) is intended to create obligations with respect to the issuance of individual allocations to specific TRQ applicants.

211. This interpretation is further supported by the use of the word "made" in Article 2.30.1(c). In the context of Article 2.30.1(c), the word "made" is clearly intended to convey that the importing Party must provide each individual allocation "in commercially viable shipping quantities and, to the maximum extent possible, in the amounts that importers request". The word "made" in Article 2.30.1(c) should therefore be understood as synonymous with "issued" or "granted". This further confirms that the obligation in Article 2.30.1(c) applies after the importing Party has chosen its allocation mechanism, when the importing Party is in the course of

²⁰⁵ Ibid.

²⁰⁶ Ibid, para. 120.

²⁰⁷ *Oxford English Dictionary*, OED online, "each, adj. and pron.", accessed 30 March 2023 <<https://www.oed.com/view/Entry/58924?redirectedFrom=each#eid>>, Exhibit CDA-36 (emphasis added).

granting individual TRQ allocations to specific TRQ applicants pursuant to that mechanism.

212. Moreover, Canada notes that Article 2.30.1(c) ends with the words “in the amounts that importers request”. The use of the word “request” again confirms that Article 2.30.1(c) only applies following the opening of the quota application period – i.e., after the importing Party has begun receiving TRQ applications from eligible TRQ applicants. At that point in time, the importing Party has necessarily already chosen its allocation mechanism.

213. In short, the text of Article 2.30.1(c) makes clear that this provision does not apply to the design of a particular allocation mechanism by the CPTPP Party. In this sense, Article 2.30.1(c) is similar to other subparagraphs in Article 2.30.1 that apply with respect to the issuance of individual allocations to specific TRQ applicants. For example, Article 2.30.1(g) provides that the importing Party “shall ensure that [...] quota allocation takes place no later than four weeks before the opening of the quota period”. This obligation applies when the administering Party is at the step of issuing individual allocations to eligible TRQ applicants.

b) New Zealand’s interpretation is not supported by the context of Article 2.30.1(c)

214. Canada notes that, under Article 2.30.1(e), the Party administering an allocated TRQ is required to ensure that “if the aggregate TRQ quantity requested by applicants exceeds the quota size, allocation to eligible applicants shall be conducted by equitable and transparent methods”.²⁰⁸ This obligation specifically applies in the event that “the aggregate TRQ quantity requested by applicants exceeds the quota size”.

215. If the Parties had wanted to ensure that an applicant would receive less than what they wanted only “where demand for quota from eligible applicants exceeds the amount of quota available under the TRQ” (as New Zealand claims in its

²⁰⁸ Emphasis added.

submission),²⁰⁹ the Parties could have used similar language to the one found in Article 2.30.1(e). For example, the Parties could have drafted Article 2.30.1(c) to say that “each importing Party shall ensure that each allocation is made in the amounts that importers request, unless the aggregate TRQ quantity requested by applicants exceeds the quota size”.²¹⁰ The Parties instead chose to use the phrase “to the maximum extent possible” in Article 2.30.1(c) and this phrase must be afforded meaning.

216. Furthermore, it is presumed that different provisions in the same treaty should not be interpreted in a manner that creates a conflict between them.²¹¹ However, New Zealand’s proposed interpretation of Article 2.30.1(c) would accomplish exactly that – it would create a conflict with Article 2.30.1(b).

217. Article 2.30.1(b) provides that “[i]n the event that access under a TRQ is subject to an allocation mechanism, each importing Party shall ensure that [...] unless otherwise agreed, 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”. The phrase “unless otherwise agreed” clearly indicates that the importing Party is allowed to allocate the TRQ in a manner prohibited by Article 2.30.1(b) with the consent of the other CPTPP Parties – as New Zealand recognizes in its first written submission.²¹²

218. New Zealand argues that Canada is in violation of Article 2.30.1(b) because Canada sets aside a portion of its CPTPP dairy TRQs for the exclusive use of dairy processors.²¹³ Even assuming *arguendo* that New Zealand’s interpretation of Article 2.30.1(b) is correct, Canada could still set aside 85% of a particular CPTPP dairy TRQ for processors if it obtained the consent of the other CPTPP Parties prior to doing so.

²⁰⁹ See First written submission of New Zealand, para. 119: “The only circumstance in which an eligible importer should receive an allocation that is less than they requested is where demand for quota from eligible applicants exceeds the amount of quota available under the TRQ”. See also para. 125, where New Zealand claims that Canada’s CPTPP Notices to Importers are inconsistent with Article 2.30.1(c) because “[i]f importers falling within a certain pool (e.g. further processors and distributors) request more quota than is available under it, they will not receive allocations in the amounts that they have requested”.

²¹⁰ Emphasis added.

²¹¹ Panel Report, *Indonesia – Autos*, para. 14.28.

²¹² First written submission of New Zealand, para. 64.

²¹³ *Ibid*, paras. 57-80.

219. However, under New Zealand's interpretation of Article 2.30.1(c), this set-aside would never be permissible, because it would contravene Canada's obligation to ensure that "each allocation is made [...] to the maximum extent possible, in the amounts that importers request" – even if Canada has obtained the express consent of the other CPTPP Parties. Put differently, according to New Zealand's interpretation, Article 2.30.1(c) is drafted in such a way that it both permits Canada to set aside a certain portion of its CPTPP TRQs for processors (with the consent of the other CPTPP Parties) but also prohibits Canada from doing so. New Zealand's interpretation not only runs afoul of the presumption against conflict between different provisions of the same treaty, it would also render the words "unless otherwise agreed by the Parties" in Article 2.30.1(b) meaningless.

c) New Zealand's interpretation of Article 2.30.1(c) would negate Canada's right to choose its preferred allocation mechanism for the administration of its CPTPP TRQs

220. According to New Zealand's interpretation of Article 2.30.1(c), a CPTPP Party is only allowed to issue TRQ allocations that are less than what eligible applicants request when the quota is oversubscribed.²¹⁴ Taken to its logical conclusion, New Zealand's interpretation effectively means that in order for Canada to comply with Article 2.30.1(c), Canada must allow each eligible TRQ applicant to request its preferred quantity. If the aggregate quantity requested by TRQ applicants does not exceed the size of the quota, then Canada must ensure that each TRQ applicant receives its preferred quantity. If the aggregate quantity requested by TRQ applicants does exceed the size of the quota, then Canada must presumably divide the total quota volume in proportion to the quantity requested by each TRQ applicant.

221. In effect, what New Zealand is demanding is that Canada administer its CPTPP dairy TRQs based on a "pro-rata" allocation mechanism.²¹⁵ While Canada does

²¹⁴ First written submission of New Zealand, para. 119.

²¹⁵ To illustrate the operation of a "pro-rata" allocation mechanism, Canada provides the following example. Suppose that the available volume for the TRQ is 100 metric tonnes (MT). Suppose further that the Party administering the allocated TRQ receives applications from two different eligible TRQ applicants, as follows: Company A requests 40 MT and Company B requests 20 MT. Given that the total requested quantity does not exceed the total quantity of the quota, both companies will receive the quantity they

administer some of its WTO TRQs pursuant to a pro-rata allocation mechanism,²¹⁶ this is only one method of administering a TRQ among many different allocation mechanisms.²¹⁷ The obligations contained in Article 2.30.1 only apply “[i]n the event that access under a TRQ is subject to an allocation mechanism”.²¹⁸ Footnote 18 to Article 2.30.1 defines the term “allocation mechanism” as “any system where access to the TRQ is granted on a basis other than first-come first-served”. The use of “an” and “any” in these two provisions clearly implies the existence of multiple different “systems” that Canada could use to administer its TRQs.

222. However, New Zealand’s interpretation of Article 2.30.1(c) would effectively force Canada to administer all its CPTPP TRQs pursuant to one particular allocation mechanism (i.e., a pro-rata allocation mechanism). In other words, New Zealand’s position is that the CPTPP recognizes Canada’s right to choose its preferred allocation mechanism for the administration of its TRQs²¹⁹ but also compels Canada to opt for one particular allocation mechanism in order to comply with its obligations under Article 2.30.1(c). This is an inherently contradictory position.

223. To further illustrate the absurdity of New Zealand’s position, Canada notes that under paragraph 3(d) of its TRQ Schedule, Canada has reserved “the right to

requested. But suppose instead that the Party administering the allocated TRQ receives applications from three different eligible TRQ applicants, as follows: Company A requests 80 MT; Company B requests 60 MT; and Company C requests 20 MT. In this example, the total requested quantity amounts to 160 MT (80 + 60 + 20 = 160), which exceeds the total quantity of the quota. Of this 160 MT, Company A has requested 50% (80 ÷ 160 = 0.5), Company B has requested 37.5% (60 ÷ 160 = 0.375), and Company C has requested 12.5% (20 ÷ 160 = 0.125). Therefore, under a “pro-rata” allocation mechanism, Company A will receive 50 MT, Company B will receive 37.5 MT, and Company C will receive 12.5 MT.

²¹⁶ For example, in the case of Canada’s WTO Powdered Whey TRQ, Canada asks eligible TRQ applicants to specify (in their application) the quantity they are looking to receive. If the total quantity requested by all TRQ applicants exceeds the quantity of the TRQ, Canada provides individual allocations on a pro-rata basis – i.e., in proportion to the quantity requested by each TRQ applicant. See: Global Affairs Canada, “Notice to Importers No. 1046 – WTO: Powdered Whey TRQ”, accessed 30 March 2023, <<https://www.international.gc.ca/trade-commerce/controls-controles/notices-avis/1046.aspx?lang=eng>>, Exhibit CDA-37.

²¹⁷ Other possible allocation mechanisms include: equal-share; market-share; previous year’s utilisation; auctioning; historical; and hybrid. See: Global Affairs Canada, “Tariff rate quotas explained – Frequently Asked Questions”, accessed 30 March 2023, <<https://www.international.gc.ca/trade-commerce/consultations/TRQ-CT/dpe-lvo-questions.aspx?lang=eng>>, Exhibit CDA-38. For more information on the different possible methods of administering a TRQ, see: World Trade Organization, “Tariff Quotas: Administration Methods, Fill Rates and Notification Practices”, 7 September 2022, G/AG/W/183/Rev.2, Exhibit CDA-39.

²¹⁸ Emphasis added.

²¹⁹ New Zealand First Written Submission, para. 26: “CPTPP permits Parties to administer their TRQs through an ‘allocation mechanism’, which is defined as ‘any system where access to the TRQ is granted on a basis other than first-come first-served’”.

allocate any TRQ or portion of a TRQ through auctioning for no more than the first seven quota years after entry into force of the Agreement for Canada” (i.e., until 2024/2025).²²⁰ Under an auctioning mechanism, “[i]mporters’ shares are allocated, or licences issued, largely on the basis of an auctioning or competitive bid system”.²²¹ There are multiple auctioning methods available for TRQ administration, but the end-result is normally that the highest bidder(s) will receive an allocation, while other bidders may not receive an allocation.

224. Under New Zealand’s interpretation of Article 2.30.1(c), Canada cannot design an allocation mechanism that results in allocations that are less than what applicants requested. However, the very nature of an auctioning system means that low bidders (who are otherwise considered eligible to receive a share of the available TRQ volume) may not receive an allocation. Thus, under New Zealand’s interpretation, Canada would be prohibited from allocating its TRQs through an auctioning system – even in the seven years after entry into force of the CPTPP for Canada. New Zealand’s interpretation of Article 2.30.1(c) would therefore render paragraph 3(d) of Canada’s Tariff Schedule inutile.

225. If the Parties had wanted to ensure that Canada would administer its dairy TRQs pursuant to one particular allocation mechanism (e.g., a pro-rata allocation mechanism), the Parties would have stated this expressly in Canada’s Schedule. An example of such an express requirement can be found in paragraph 4(a) of Viet Nam’s Tariff Schedule, which provides that Viet Nam will administer TRQ-VN1 (Used Vehicles with an Engine Capacity Less Than or Equal to 3000 Cubic Centimetres) “through an annual auction, which shall take place in the first quarter of each year”. Similarly, paragraph 2(d) in Section B of Japan’s Tariff Schedule provides that TWQ-JPN2 “shall be administered by Japan through a FCFS import licensing procedure pursuant to which a certificate of tariff rate quota shall be issued by Japan”. By

²²⁰ For Canada, the CPTPP entered into force in 2018. Canada’s CPTPP TRQs are administered based on three different “quota years”: some dairy TRQs are administered on a dairy-year basis (August 1 – July 31), Canada’s Turkey TRQ is administered based on the turkey marketing year (May 1 – April 30), and the other remaining TRQs are administered on a calendar-year basis (January 1 – December 31). Given these different quota years, Canada’s right to allocate its CPTPP dairy TRQs through an auctioning mechanism will expire at different times depending on the TRQ. For calendar-year TRQs, Canada’s right to allocate through auctioning will expire at the end of the 2024 calendar year. For dairy-year TRQs, Canada’s right to allocate through auctioning will expire at the end of the 2024-2025 dairy year.

²²¹ World Trade Organization, “Tariff Quotas: Administration Methods, Fill Rates and Notification Practices”, 7 September 2022, G/AG/W/183/Rev.2, Exhibit CDA-39.

contrast, Canada's Tariff Schedule does not require Canada to administer its CPTPP TRQs pursuant to any particular allocation mechanism.

2. Article 2.30.1(c) requires Canada to make serious efforts to ensure that, within each pool, each allocation is made in the amounts that importers request

226. Canada will now set out the correct interpretation of Article 2.30.1(c). This provision requires Canada to make serious efforts to ensure that, within each pool, each allocation is provided in the amounts requested by eligible TRQ applicants. Below, Canada first explains the nature of the obligation contained in the second clause of Article 2.30.1(c). Then, Canada shows that it makes serious efforts to ensure that, within each pool, each allocation is provided in the amounts requested by eligible TRQ applicants.

a) Article 2.30.1(c) requires Parties to make serious efforts to ensure that each allocation is provided in the amounts requested by the TRQ applicant

227. Article 2.30.1(c) provides that "[i]n the event that access under a TRQ is subject to an allocation mechanism, each importing Party shall ensure that [...] each allocation is made [...], to the maximum extent possible, in the amounts that importers request". This is a best-efforts obligation that does not require Canada to provide each TRQ applicant with their preferred quantity of the quota.

228. The phrase "shall ensure [...] to the maximum extent possible" in Article 2.30.1(c) is very similar to the language found in the heading of GATT Article XXXVII(1), which reads as follows:

The developed [country Members] shall to the fullest extent possible – that is, except when compelling reasons, which may include legal reasons, make it impossible – give effect to the following provisions [...].²²²

229. GATT Article XXXVII(1) was interpreted by a GATT panel in *EEC – Apples I (Chile)*. In that case, the European Economic Community ("EEC") had imposed import restrictions on apples from Chile. In Chile's view, the EEC's restrictions were inconsistent with paragraph (b) of GATT Article XXXVIII(1), which provides that

²²² General Agreement on Tariffs and Trade, Article XXXVII(1), Exhibit CDA-40.

"[t]he developed contracting parties shall to the fullest extent possible [...] refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less-developed contracting parties".²²³ In response to Chile's argument, the GATT panel stated the following:

Although the EEC measure did affect the ability of a developing country to export into the EEC market, the Panel noted that the EEC had taken certain actions, including bilateral consultations in order to avoid suspending imports of apples from Chile. After a careful examination, the Panel could not determine that the EEC had not made serious efforts to avoid taking protective measures against Chile. Therefore the Panel did not conclude that the EEC was in breach of its obligations under [GATT Article XXXVIII(1)(b)].²²⁴

230. Given that the terms "fullest extent" and "maximum extent" are effectively synonymous, the above suggests that whenever a treaty provision requires a party to achieve a certain objective "to the maximum extent possible", the party will be in compliance with the provision if it demonstrates that it has made "serious efforts" to achieve the specified objective. Importantly, however, such a treaty provision does not require the party to actually achieve that objective.

231. Based on the above, the correct way to interpret Article 2.30.1(c) is that it requires the Party administering an allocated TRQ to make serious efforts to provide each allocation "in the amounts that importers request". Importantly, however, this provision does not require the administering Party to achieve the result of providing each TRQ applicant with its preferred quantity of the quota.

b) Canada makes serious efforts to ensure that, within each pool, eligible TRQ applicants receive their preferred quantity of the quota

232. Canada's discretion to choose its preferred allocation mechanism for the administration of its dairy TRQs includes the right to decide which groups of

²²³ Emphasis added.

²²⁴ GATT Panel Report, *EEC – Apples I (Chile)*, para. 4.23 (emphasis added). By contrast, in the subsequent case of *EEC – Dessert Apples (Chile)*, the GATT panel found that the EEC "had [not] made appropriate efforts to avoid taking protective measures on apples originating in Chile". See: GATT Panel Report, *EEC – Dessert Apples*, para. 12.32.

importers will receive in-quota quantities, and in what proportion (subject to Canada's obligations under Article 2.30). If the Parties had wanted to limit this right by requiring Canada to make available a certain portion of its dairy TRQs for a particular group of importers (e.g., distributors or retailers), they would have stated so explicitly in Appendix A of Canada's Tariff Schedule.²²⁵ Yet the Parties did not include any such provision in Canada's Tariff Schedule. Therefore, so long as Canada complies with its substantive obligations under Article 2.30, Canada remains free to set aside a portion of its TRQs for a particular group of importers (e.g., processors).²²⁶

233. Given that Canada's discretion to choose an allocation mechanism includes the right to set aside a portion of the TRQ for a particular group of importers, and given further that Article 2.30.1(c) only applies when Canada is issuing individual allocations to specific TRQ applicants in accordance with its chosen allocation mechanism (as Canada explained above), it follows that Canada's decision to reserve a portion of its CPTPP dairy TRQs for processors must necessarily be taken into account in determining the scope of Canada's obligations under Article 2.30.1(c). Put differently, Canada's obligation to provide each allocation "to the maximum extent possible, in the amounts that importers request" is bounded by Canada's quota pooling system.

234. The ordinary meaning of the word "possible" provides further support for this interpretation. The ordinary meaning of the word "possible" is defined as follows: "[t]hat is capable of being; that may or can exist, be done, or happen (in general, or in given or assumed conditions or circumstances); that is in a person's power, that a person can do, exert, use, etc."²²⁷ As this definition makes clear, the scope of what

²²⁵ For example, under the CUSMA, Canada expressly agreed to make available "[t]hirty percent of import licenses for shell egg imports" under the TRQ for "Eggs and Egg Products" (TRQ-CA16) to "new importers". Similarly, paragraph 4 of Section B of Annex 2-B of the Comprehensive Economic and Trade Agreement expressly provides that "[t]he tariff rate quota allocation method will allow for new entrants each year. During the phase-in period from Year 1 to Year 5, at least 30 per cent of the tariff rate quota will be available to new entrants every year. After the end of the phase-in period from Year 6 and in subsequent years, at least 10% of the tariff rate quota quantity will be available for new entrants". These provisions demonstrate that if the CPTPP Parties had wanted to obligate Canada to make available a certain portion of its CPTPP dairy TRQs for a particular group of importers, they would have stated so explicitly in Canada's Tariff Schedule.

²²⁶ For example, Canada could not design an allocation mechanism that reserves a certain portion of a particular TRQ for a producer group, because Article 2.30.11(b) expressly states that the CPTPP Party administering an allocated TRQ must "not allocate any portion of the quota to a producer group".

²²⁷ Exhibit NZL-47: Definition of "possible" from Oxford English Dictionary Online.

is “possible” in a particular situation must be assessed by reference to the “given or assumed conditions or circumstances” of that situation.

235. In the situation where a Party has decided to administer its dairy TRQs through the use of a pooling system, the existence of the pools is a “condition or circumstance” that must necessarily be taken into consideration in determining what is “possible” for the Party under Article 2.30.1(c). For example, in the situation where Canada has made the decision to reserve 85% of a particular CPTPP dairy TRQ for processors, it would not be “possible” for Canada to provide each TRQ applicant with its preferred quantity of the total quota, because doing so would completely ignore Canada’s decision to reserve a portion of the TRQ for processors – which is made before the issuance of any individual allocation to a specific TRQ applicant.

236. Therefore, the correct way to interpret Canada’s obligation to provide each allocation “to the maximum extent possible, in the amounts that importers request” is that this obligation only applies within the “pool” that Canada has established for a particular type of TRQ applicant. In other words, Article 2.30(1)(c) does not apply with respect to the total quantity of quota volume, but only with respect to the portion of the quota that is available to a particular type of TRQ applicant.

237. For all of Canada’s dairy TRQs except one,²²⁸ 80 to 85% of the TRQ is allocated to processors on a market share basis, while 10 to 15% of the TRQ is allocated to distributors on an equal share basis. In the process of granting individual allocations to eligible TRQ applicants within each of these two “pools”, Canada makes serious efforts to ensure that eligible TRQ applicants receive an allocation in the amounts that they have requested.

238. With respect to the processor pool, processors who apply for an allocation are required to indicate in their application the minimum quantity of quota they would be willing to accept.²²⁹ Canada then calculates each eligible processor’s market share

²²⁸ For the Industrial Cheese TRQ, 80% of the TRQ is allocated to processors, while 20% of the TRQ is allocated to further processors. Distributors are not eligible for an allocation. For more information, see: Global Affairs Canada, “Notices to Importers No. 996 – CPTPP Industrial Cheese TRQ”, 1 October 2020, Exhibit NZL-1.

²²⁹ Global Affairs Canada, Notices to Importers, Exhibits NZL-1 to NZL-16, Section 2.

allocation based on the amount (in kilograms) of the relevant dairy product that the processor manufactured or processed during the reference period.²³⁰

239. If the processors' calculated market share allocation is equal to or greater than 20,000 kilograms, the processor will receive that allocation.²³¹ If the processor's calculated market share allocation is less than 20,000 kilograms, the processor will receive that allocation only if the calculated market share allocation is equal to or greater than the minimum quantity specified in the processor's application. In other words, Canada will only allocate a quantity of less than 20,000 kilograms if the processor itself has indicated that it would be willing to accept a quantity below that volume. By doing so, Canada prevents the issuance of allocations of less than 20,000 kilograms to processors who would not want to use or import a quantity below that volume.

240. As regards the distributor pool, Canada divides the available portion of the TRQ equally between all eligible distributors who have applied for an allocation. For example, in the case of the Cheeses of All Types TRQ (TRQ-CA14), Canada made the decision to reserve 15% of the TRQ for distributors in Quota Year 2022 (January 1, 2022 – December 31, 2022).²³² This means that, for Quota Year 2022, Canada set aside a total quantity of 453,150 kg for distributors for import under the CPTPP Cheeses of All Types TRQ.²³³ When Canada opened applications for this TRQ for Quota Year 2022, Canada received applications from 51 eligible distributors, which means that Canada issued an allocation of 8,885 kg to each distributor.²³⁴

241. The procedures described above demonstrate that, within each pool, Canada makes serious efforts to provide individual allocations in the quantities requested by TRQ applicants. For the processor pool, Canada ensures that no processor receives an allocation that it would not be willing to import or use. In this way, Canada ensures that each allocation is as close as possible to the processor's needs. As for

²³⁰ Ibid, Section 4.

²³¹ Ibid, Section 2.

²³² Under paragraph 3(b) of Appendix A to Canada's Schedule, the term "quota year" is defined as "the 12-month period over which a TRQ applies and is allocated". In this regard, paragraph 19(d) of Canada's Schedule specifies that the Cheeses of All Types TRQ will be allocated "on a calendar year basis".

²³³ Information on Quantities Allocated to Distributors in Quota Years 2022-2023 and 2023 233 under Canada's CPTPP dairy TRQs, Exhibit CDA-41.

²³⁴ Ibid.

the distributor pool, Canada divides the available quantity of the quota equally between eligible distributors, thereby ensuring that each distributor receives the maximum quantity that Canada is able to issue within that pool.

F. Canada's procedures for administering its TRQs are fair and equitable as required by Article 2.28.2

242. New Zealand challenges Canada's decisions to establish certain eligibility requirements and to create a pool for processors as "procedures" that are not "fair" and "equitable". In doing so, New Zealand misinterprets the scope of Article 2.28.2 as applying to all aspects of Canada's TRQ system – including who may be eligible to access its TRQs – and fails to give any meaning and effect to the phrase "procedures for administering its TRQs".²³⁵

243. Section D of Chapter 2, titled "Tariff Rate Quota Administration", encompasses five articles (2.28 to 2.32) and includes various obligations that govern how a Party may administer its TRQs. Broadly speaking, these obligations consist of two types. The first type governs how a Party may design its TRQ system, such as eligibility requirements on who may have access to its TRQs.²³⁶ The second type governs a Party's procedures for administering its TRQs in order to ensure that applicants are able to participate meaningfully in a Party's chosen TRQ system.²³⁷

244. As Canada demonstrates, Article 2.28.2 applies – expressly – to a Party's procedures for administering its TRQs. New Zealand's claim of violation must fail because its allegations relate to the design of Canada's allocation mechanism, not its procedures for administering its TRQs, and therefore fall outside the scope of Article 2.28.2.

²³⁵ Emphasis added.

²³⁶ For example, under Article 2.30.1(b), each Party is prohibited from allocating any portion of the quota to a producer group, conditioning access to an allocation on the purchase of domestic production or limiting access to an allocation to processors, unless otherwise agreed by the Parties.

²³⁷ Examples include obligations in Articles 2.31.2, 2.32.2, and Article 2.32.5, which impose certain publication requirements.

1. **Article 2.28.2 requires each Party to ensure that its procedures for administering its TRQs are fair and equitable**
 - a) **The ordinary meaning of a Party's "procedures for administering its TRQs"**

245. Article 2.28.2 states:

Each Party shall ensure that its procedures for administering its TRQs are made available to the public, are fair and equitable, are no more administratively burdensome than absolutely necessary, are responsive to market conditions and are administered in a timely manner.²³⁸

246. The obligations in Article 2.28.2 apply expressly and only to a Party's "procedures for administering its TRQs". Thus, the scope of Article 2.28.2 is limited by the meaning of this phrase.

247. Starting with the ordinary meaning of the term "procedures", Canada agrees that it means: "the established or prescribed way of doing something".²³⁹ The term "for" means: "[w]ith a view to; with the object or purpose of"; and "in order to".²⁴⁰ In turn, the term "administer" means: "to manage or supervise the execution, use, or conduct of";²⁴¹ "to control the operation or arrangement of something".²⁴²

248. Therefore, under Article 2.28.2 by its ordinary meaning, a Party must ensure that its "established or prescribed way of doing something" "in order to" "manage [...] the [...] use [...] of" or "to control the operation [...] of" its TRQs satisfies the five listed requirements.

249. Unlike Article 2.30, which applies specifically to the administration of TRQs by an allocation mechanism as distinct from a FCFS system, Article 2.28.2 applies

²³⁸ Emphasis added.

²³⁹ Exhibit NZL-44: Definition of "procedure" from Oxford English Dictionary Online.

²⁴⁰ *Oxford English Dictionary*, OED online, "for", entries IV.8.a, IV.9.a and IV.11.a(a), accessed 17 April 2023, <<https://www.oed.com/view/Entry/72761?rskey=vwx8jN&result=2&isAdvanced=false#eid>>, Exhibit CDA-42.

²⁴¹ *Merriam Webster Dictionary Online*, Est. 1828, "administer", accessed 18 April 2023, <<https://www.merriam-webster.com/dictionary/administer>>, Exhibit CDA-43.

²⁴² *Cambridge Dictionary*, "administer", accessed 18 April 2023, <<https://dictionary.cambridge.org/dictionary/english/administer>>, Exhibit CDA-44.

regardless of whether a Party is managing the use of or controlling the operation of its TRQs on a FCFS basis or through an allocation mechanism.

250. Canada administers its CPTPP dairy TRQs through an allocation mechanism. Therefore, as applied to Canada's measures, the phrase "procedures for administering its TRQs" is referring to Canada's established way of doing something in order to operate its allocation mechanism. Among other things, Canada's "procedures" – its established way of doing something – in order to operate its allocation mechanism, must be "fair" and "equitable".

251. New Zealand's interpretation of Article 2.28.2 is incorrect because it fails to give meaning and effect to the term "procedures" in Article 2.28.2, contrary to the principle of effective interpretation. In fact, in a number of places in its submission, in referring to Article 2.28.2, New Zealand omits the word "procedures" and describes Article 2.28.2 as requiring Canada to "administer" its TRQs in a fair and equitable manner.²⁴³ By reading out the term "procedures" from Article 2.28.2, New Zealand misinterprets this provision as imposing a broader requirement on a Party to ensure that its *administration* of its TRQs (i.e., how it manages the use of or controls the operation of its TRQs) – not its "procedures" for administering its TRQs – is "fair and equitable". Yet, had the Parties intended, as suggested by New Zealand, to apply Article 2.28.2 broadly to a Party's administration of its TRQs in all respects, they would not have expressly limited its scope to the "procedures" for doing so. As discussed below, the narrower scope of Article 2.28.2 stands in contrast with the scope of other provisions in Section D, which, as made clear by their text, apply more broadly to a Party's administration of its TRQs.

²⁴³ Heading of Section XI.D of first written submission of New Zealand states: "Canada's Notices to Importers do not administer Canada's dairy TRQs in a manner that is fair and equitable" (emphasis added). See also para. 145, where New Zealand states: "Article 2.28(2) therefore obliges CPTPP Parties to ensure that they manage their TRQs [...] in a manner that is just, impartial and reasonable" (emphasis added). See also para. 149, where New Zealand describes the obligation in Article 2.28.2 as "Canada's obligation to administer its TRQs in a manner that is fair and equitable" (emphasis added).

b) Context supports Canada's interpretation

252. Article 2.28.2 contains four other obligations in addition to the obligation on a Party to ensure that its procedures for administering its TRQs are fair and equitable. Under these obligations, Canada is also required to ensure that its procedures are:

- "made available to the public" (first clause);
- "no more administratively burdensome than absolutely necessary" (third clause),
- "responsive to market conditions" (fourth clause), and
- "administered in a timely manner" (fifth clause).

253. In concrete terms, these obligations require Canada to: publish information related to seeking an allocation; not request information from applicants unnecessary to making decisions on allocations; establish deadlines – for returning unused TRQ quantities, for example – by taking into account market conditions; and make decisions on allocations in a timely manner.

254. These obligations – which are all, by their nature, procedural – are important context for understanding the meaning of the phrase "procedures for administering its TRQs" in Article 2.28.2. They address a Party's established way of doing something in order to operate its allocation mechanism. They do not concern the design of the allocation mechanism to which the procedures apply, including eligibility for TRQs. That design is governed by other provisions in Section D.

255. The context provided by Articles 2.28.1 and 2.28.3 also supports Canada's interpretation of Article 2.28.2. They state in relevant part:

1. Each Party shall implement and administer its tariff-rate quotas (TRQs²⁴⁴) in accordance with Article XIII of GATT 1994, including its interpretative notes, the Import Licensing Agreement and Article 2.12 (Import Licensing). [...]

²⁴⁴ Footnote omitted.

[...]

3. The Party administering TRQ shall publish all information concerning its TRQ administration, including the size of quotas and eligibility requirements;²⁴⁵ [...]

256. The first sentence of Article 2.28.1 states that a Party must “administer its tariff-rate quotas” in accordance with the provisions and treaties specified in Article 2.28.1, without any mention of procedures. Similarly, the first clause of Article 2.28.3 states that a Party must publish “all information” concerning its “TRQ administration, including [...] eligibility requirements”. In contrast to Article 2.28.2, these articles demonstrate that where the Parties intended the obligation to apply more broadly to a Party’s administration of its TRQs and not just to the procedures for operating it, the Parties referred to TRQ administration generally without any qualifiers.

257. New Zealand indicates that the context of Article 2.28.2 supports its interpretation that Article 2.28.2 applies broadly to a Party’s administration of its TRQs because there are other obligations in Section D that provide “guidance” on what is, and is not, a fair and equitable administration of TRQs.²⁴⁶ As an example of such an obligation, New Zealand points to Article 2.30.1(b), which essentially prohibits, amongst other things, a Party from designing an allocation mechanism in which a “producer group” may be eligible to receive an allocation, without agreement of the Parties.²⁴⁷ This argument is without merit. That there are obligations in Section D such as Article 2.30.1(b) that discipline the design of a Party’s allocation mechanism provides no support for the assertion that Article 2.28.2 applies to more than the procedural aspects of TRQ administration. To the contrary, that there are other provisions that govern non-procedural aspects of TRQ administration further supports Canada’s interpretation that Article 2.28.2 is focused exclusively on a Party’s procedures for administering its TRQs.

²⁴⁵ Emphasis added.

²⁴⁶ First written submission of New Zealand, para. 146.

²⁴⁷ Ibid, para. 146, fn. 171.

c) The CPTPP's object and purpose supports Canada's interpretation

258. The object and purpose of the CPTPP includes, as set out in the Preamble, "establish[ing] a predictable legal and commercial framework for trade and investment through mutually advantageous rules"²⁴⁸ and "promot[ing] transparency, good governance and the rule of law".²⁴⁹ Canada's interpretation of Article 2.28.2 is consistent with this object and purpose.

259. The function of the second clause in Article 2.28.2, which requires each Party to ensure that its "procedures" for administering its TRQs are "fair" and "equitable"²⁵⁰, is to ensure procedural fairness for applicants seeking a TRQ quantity. This principle is also sometimes referred to as a principle of "natural justice" or as a form of "due process".²⁵¹

260. Procedural fairness is concerned with ensuring the fairness and equity of the procedures by which a decision is made. It requires compliance with two basic rules: the "hearing rule" and the "bias rule". In *Legal Principles in WTO Disputes*, Mitchell explains these rules as follows:

The hearing rule requires a decision-maker to provide to persons whose interests may be adversely affected by a decision an opportunity to present their case.²⁵²

The bias rule precludes a decision-maker from acting in circumstances in which a fair-minded observer would have a reasonable apprehension of bias, arising for example from the decision-maker's interest in the

²⁴⁸ TPP, Preamble, para. 7.

²⁴⁹ Ibid, para. 14.

²⁵⁰ Definitions of "equitable" include: "Of actions, arrangements, decisions, etc.: That is in accordance with equity; fair, just, reasonable." See Exhibit NZL-46.

²⁵¹ Public Consultation and Decision-making in Local Government, Part 2: Application of Administrative Law, <<https://oag.parliament.nz/1998/public-consultation/part2.htm#:~:text=This%20ground%20requires%20decision%20makers,free%20from%20bias%20and%20predetermination>>, Exhibit CDA-45, "Fairly". See Andrew D. Mitchell, *Legal Principles in WTO Disputes*, Cambridge University Press, February 2010, Chapter 5, "Due Process", Exhibit CDA-47, pp. 145-147. Cornell Law School, Legal Information Institute, accessed 21 April 2023, <https://www.law.cornell.edu/wex/procedural_due_process>, "Procedural due process", Exhibit CDA-46.

²⁵² See Andrew D. Mitchell, *Legal Principles in WTO Disputes*, Cambridge University Press, February 2010, Chapter 5, "Due Process", Exhibit CDA-47, pp. 147-148.

outcome. [...] This rule is based on the maxim [...] [that] no one can be a judge in his own cause.²⁵³

261. New Zealand's governmental website similarly provides that procedural fairness requires "parties be given adequate notice and an opportunity to be heard" (hearing rule) and "decisions be made free from bias and predetermination" (bias rule).²⁵⁴

262. In a TRQ administration context, procedural fairness requires officials operating an allocation mechanism to provide applicants seeking a TRQ quantity with an opportunity to submit relevant information (hearing rule) and an unbiased – whether actual or apparent – assessment of their application done in accordance with the established rules (bias rule). Through these procedural safeguards, procedural fairness ensures that eligible applicants can reasonably participate in a Party's chosen TRQ system to obtain an allocation. In turn, it promotes the legitimacy and validity of decisions made on individual allocations.

263. This understanding is supported by the WTO panel report in *China – TRQs*, where the panel also found the procedural aspect of fairness in a TRQ administration context to require compliance with the hearing rule and the bias rule. The WTO panel found that an aspect of China's administration of its TRQs was not "fair" because China had essentially not complied with these rules.²⁵⁵

²⁵³ Ibid.

²⁵⁴ Public Consultation and Decision-making in Local Government, Part 2: Application of Administrative Law, <<https://oag.parliament.nz/1998/public-consultation/part2.htm#:~:text=This%20ground%20requires%20decision%20makers,free%20from%20bias%20and%20predetermination>>, Exhibit CDA-45, "Fairly".

²⁵⁵ In *China – TRQs*, one of the obligations at issue was paragraph 116 of China's Working Party Report, which states in relevant part:

The representative of China stated that upon accession, China would ensure that TRQs were administered on a transparent, predictable, uniform, fair and non-discriminatory basis using clearly specified timeframes, administrative procedures and requirements that would provide effective import opportunities; that would reflect consumer preferences and end-user demand; and that would not inhibit the filling of each TRQ. Panel Report, *China – TRQs*, para. 7.3 (emphasis added).

The WTO panel found that an aspect of China's TRQ administration was not "fair" as required by paragraph 116 given China's "public comment process". This process allowed "entities with conflicting interests to comment on the information provided by applicants but [did] not clarify whether those applicants or other interested parties ha[d] an opportunity to learn about such comments and to rebut

264. Article 2.28.2 should similarly be understood to require officials to provide procedural fairness by meeting the hearing rule and the bias rule.

265. Consistent with the Preamble, procedural fairness requires officials to make decisions in accordance with established rules, which supports a predictable legal and commercial framework for trade and promotes the rule of law. Canada's understanding of Article 2.28.2 therefore accords with the object and purpose of the CPTPP.

2. New Zealand has not made a *prima facie* case that Canada's procedures for administering its TRQs fail to provide procedural fairness

266. New Zealand has not provided any argument or evidence to establish that Canada's procedures for administering its TRQs fail to provide procedural fairness.

267. The procedures for administering Canada's TRQs allow applicants to submit relevant information and have their requests decided in accordance with the applicable rules established in Canada's domestic system.

268. Specifically, the procedures for administering Canada's TRQs – which are made available to the public through the Notices to Importers – provide applicants with an opportunity to submit relevant information through their applications, seek clarifications, and submit any additional information, as appropriate.

269. In addition, these procedures require applications to be assessed and decisions to be made in accordance with the established rules. These rules include those set out in the IPRs²⁵⁶, the IARs,²⁵⁷ the Notices to Importers, and the *General*

them." In other words, by failing to provide applicants with an opportunity to respond to concerns about their application, China had failed to comply with the "hearing rule". See Panel Report, *China – TRQs*, para. 7.84.

The WTO panel also found that China had violated the same obligation in para. 116 given the disparity between what is written in its legal instruments and what the authorities did in practice. In essence, China had failed to comply with the "bias rule" as its authorities did not follow established rules, giving rise to an appearance of bias. One of the definitions of the term "fair" that the panel relied on in making this finding was "in accordance with the rules or standards." See Panel Report, *China – TRQs*, paras. 7.46, 7.70, 7.110, and fn. 138.

²⁵⁶ Import Permits Regulations, Exhibit CDA-23

²⁵⁷ Import Allocation Regulations, Exhibit CDA-24 in Canada's initial written submission.

*Information on the Administration of TRQs for Supply-Managed Products.*²⁵⁸ In this way, Canada ensures that its procedures for administering its TRQs are fair and equitable.

270. Therefore, New Zealand's claim of violation under Article 2.28.2 must fail.

VI. CONCLUSION

271. For the reasons set out above, Canada respectfully requests that the Panel reject New Zealand's claims in their entirety. More specifically, Canada requests that the Panel find that New Zealand has failed to establish that Canada's dairy TRQ allocation measures are inconsistent with Canada's obligations to:

- "administer its TRQs in a manner that allows importers the opportunity to utilise TRQ quantities fully", as set out in Article 2.29.1;
- not "introduce a new or additional condition, limit or eligibility requirement on the utilisation of a TRQ for importation of a 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-D (Tariff Commitments)", as set out in Article 2.29.2(a);
- ensure that "any person of a Party that fulfils the importing Party's eligibility requirements is able to apply and to be considered for a quota allocation under the TRQ", as set out in Article 2.30.1(a);
- ensure that it does not "limit access to an allocation to processors", as set out in Article 2.30.1(b);
- ensure that "each allocation is made [...], to the maximum extent possible, in the amounts that importers request", as set out in Article 2.30.1(c); and,
- ensure that "its procedures for administering its TRQs [...] are fair and equitable", as set out in Article 2.28.2.

²⁵⁸ Global Affairs Canada, *General Information on the Administration of TRQs for Supply-Managed Products*, Exhibit NZL-17