AS DELIVERED

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)

OPENING STATEMENT OF CANADA AT THE HEARING

14 June 2023

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I. INTRODUCTION

1. Thank you Madam Chair and Members of the Panel. On behalf of the Government of Canada, I would like to express our appreciation for your time and effort in adjudicating this dispute – the first under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP").

2. We are here today because New Zealand and Canada have fundamentally different views about the scope and operation of key provisions of the CPTPP concerning the administration of tariff rate quotas ("TRQs").

3. New Zealand proposes overly broad legal interpretations of the provisions at issue as the only way to give effect to the market access for dairy products granted by Canada under the CPTPP. In contrast, Canada offers interpretations that are consistent with both the text of the provisions at issue and with the fact that the CPTPP reflects a carefully negotiated and balanced set of rights and obligations. In the CPTPP, Canada provided significant market access for dairy products, including to New Zealand, and agreed to certain restrictions relating to how TRQ volumes are to be allocated. Importantly, however, Canada retained significant discretion to determine its allocation mechanism.

4. The focus of New Zealand's challenge is precisely Canada's allocation mechanism – a pooling system – for its dairy TRQs. New Zealand contends that Canada's allocation mechanism encourages "chronic underfill" of these TRQs. Strikingly, New Zealand has adduced no evidence to support its contention. In contrast, Canada has submitted factual evidence, including two expert reports, showing that the alleged "underfill" is attributable to factors unrelated to Canada's TRQ administration. The reality is that imports do take place for dairy products that are in demand in Canada. To illustrate the point, Canada's CPTPP dairy TRQ for butter is almost 100% utilized each year – and that volume is made up almost entirely of imports from New Zealand. Yet, this TRQ is allocated using the same pooling system as the other CPTPP TRQs that have lower utilization rates.

5. Without evidence, New Zealand wrongly attributes low TRQ fill rates to Canada's TRQ administration policies. New Zealand now advances interpretations that do not reflect the negotiated outcomes of the CPTPP in an effort to compel

Canada to change these policies. In many material ways, the interpretations offered by New Zealand are clearly impermissible under Article 31 of the *Vienna Convention on the Law of Treaties* ("VCLT"), be it by conflating two different terms or by reading in or reading out terms from the relevant provisions. Those interpretations would place undue limits on the discretion of Canada and other CPTPP Parties to choose allocation mechanisms that reflect their policy choices. Canada allocates its dairy TRQs in line with its policy choices, while respecting its obligations under the Agreement. The CPTPP does not contain an obligation that requires the Parties to guarantee full utilization of their TRQs as an outcome regardless of market conditions and other factors affecting trade. TRQs are about providing opportunities for private market actors; TRQs do not guarantee trade flows in terms of actual import volumes.

6. Canada's pooling system is an important instrument for supporting the key policy objectives of Canada's supply management system. To summarize, those objectives are to carefully balance supply and demand with the goal of achieving predictability and stability in the Canadian market, to provide fair returns to producers, and to provide a safe and reliable supply of products to Canadians, at reasonable prices. Canada reserves a significant proportion of TRQ volumes to processors. This is because, from their unique position in the supply chain, they can best assure stability and predictability within Canada's supply management system. Processors know the specific dairy products and market, and their use of the TRQs is less likely to result in seasonal surpluses or shortages in the Canadian dairy market. At the same time, meaningful TRQ volumes are reserved for other groups, such as distributors. Therefore, Canada ensures that non-processors have access to allocations under its dairy TRQs, consistent with its CPTPP commitments.

7. Contrary to what New Zealand contends, Canada's pooling system does not make processors "gatekeepers of their own competition". Canada explained this in its submissions, with support from Dr. Pouliot's expert report. New Zealand wrongly assumes – again without evidence – that processors either engage in anti-competitive behaviour or have an economic interest not to import goods even when it is profitable to do so. Both assumptions are baseless. While there is a single dominant player in the dairy industry in New Zealand, processors in Canada's market act competitively with one another with multiple players acting independently in their own economic interests. They import dairy products when it makes sense from an

economic standpoint, as evidenced by the fact that certain TRQs covering products in demand in Canada are majority or entirely filled.

8. It is simply not credible for New Zealand to suggest that Canada would have agreed to abandon its discretion to design its allocation mechanism in a manner that fulfils its policy objectives.

9. As Canada explained in its rebuttal submission, New Zealand's interpretation of the provisions at issue – taken to their logical conclusion – would lead to absurd results. In particular, New Zealand's interpretations of Articles 2.29.2(a) and 2.30.1(a) and paragraph 3(c) of Canada's TRQ Appendix, taken together, would require Canada to grant an allocation to every resident of Canada that (i) applies for an allocation, (ii) is active in the Canadian dairy sector, and (iii) is compliant with the *Export and Import Permits Act* ("EIPA") and its regulations. This would make it impossible for Canada to administer its TRQs based on an allocation mechanism, despite the fact that administering TRQs through an allocation mechanism is a possibility expressly contemplated in the CPTPP.

10. In contrast, Canada's interpretations give proper meaning to each of these provisions and of the terms used by the Parties in drafting those provisions. Further, Canada does not ascribe to any provision a vague and overarching function, such as what New Zealand does when interpreting the obligation for a Party in Article 2.28.2 to ensure that its procedures for administering its TRQs are fair and equitable.

11. In the remainder of this opening statement, Canada will address key points with respect to each provision under which New Zealand has made a claim of inconsistency. I will now turn the floor to my colleague, Ms. Meagan Vestby.

II. NEW ZEALAND HAS NOT DEMONSTRATED THAT CANADA'S DAIRY ALLOCATION MEASURES ARE INCONSISTENT WITH THE CPTPP

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

12. I will begin with Article 2.29.1. Canada's TRQ administration is consistent with Article 2.29.1 because Canada allows importers the opportunity to fully utilise the TRQ quantities that have been granted to them.

13. When properly interpreted, Article 2.29.1 requires a Party to allow an importer to make full use of its TRQ quantities when importing the goods. This means a Party cannot arbitrarily prevent a person who is importing goods from using the preferential tariff rate under a given TRQ for those imports.

14. New Zealand provided the relevant dictionary definitions of the key terms in Article 2.29.1. "Importer" means a person or enterprise bringing goods into the country and "utilise" means converting something to use. So, in this context, a TRQ quantity is utilised by converting it to use through the importation of goods. In contrast, a TRQ quantity is not utilised by receiving an allocation, because if no goods are imported, that quantity is not utilised. Thus, the scope of the obligation is that it pertains to importers bringing goods in, who must be given the opportunity to utilise the TRQ quantities fully, which is done by applying the in-quota tariff rate to importations.

15. New Zealand raises two claims under Article 2.29.1. First, it claims Canada limits quota utilisation because persons in one pool cannot access unallocated quota volumes in another pool. This claim should be rejected because it is based on a premise that is factually incorrect. Canada has shown that it permits quota from one pool to be redistributed to applicants in other pools.

16. New Zealand's second claim is that persons outside of a specified pool, such as retailers, have no opportunity to utilise TRQ quantities reserved for other groups, which leads to alleged underfill of the TRQs. This second claim clearly falls outside of the scope of Article 2.29.1. This provision only applies to importers, so it is not applicable to a person outside of a pool who is not importing goods.

17. While Canada's interpretation is based on the ordinary meaning of the terms, New Zealand offers an interpretation that deviates far from the treaty terms in order to expand the scope of the obligation. New Zealand asks the Panel to interpret "importers" to mean any eligible person who may apply for an allocation. This interpretation contradicts the meaning of the term "importer" that New Zealand itself provided.

18. New Zealand also misinterprets "TRQ quantities" as meaning the total quota quantity available under each TRQ, and New Zealand misinterprets the meaning of

"utilise" as meaning both obtaining an allocation and utilising it for importation. Clearly, this is not what the text of Article 2.29.1 says.

19. Canada has demonstrated in its alternative argument that if the Panel accepts New Zealand's expansive interpretation, New Zealand has failed to prove that Canada's pooling system is inconsistent with Article 2.29.1. Under New Zealand's erroneous interpretation where "utilise" means obtain an allocation, it would be sufficient for Canada to satisfy the obligation by fully allocating the TRQs, which Canada does.

20. Even if we ignore New Zealand's contradictory position on the meaning of "utilise", New Zealand's interpretation turns the obligation Article 2.29.1 into a provision about competitive opportunities. Despite Canada's full allocation of each TRQ, New Zealand argues that opportunities for utilisation would have been greater absent Canada's pooling system. Specifically, New Zealand complains that there would have been more imports if retailers had access to pools. However, under that interpretation, there cannot have been a violation if the measures at issue did not cause lower TRQ utilisation in any way. And this is exactly what the evidence shows: Canada's pooling system had no effect on the level of imports.

21. Under this line of argument from New Zealand, it is important to look at the evidence pertaining to each of the 16 Notices to Importers, which are all separate measures in New Zealand's claim. For many of these products, there is no economic reason to import from New Zealand. For example, fluid milk is perishable and almost entirely composed of water, so it's not feasible nor economically viable to ship halfway across the world. There could not have been greater utilisation when imports would never have been possible.

22. Conversely, the TRQ for butter is essentially completely filled every year. For this measure, New Zealand's claim that Canada violated its obligation to allow the opportunity to fully utilise the total TRQ is also without merit. And this is because, effectively, the TRQ was fully utilized.

23. Canada submitted evidence for all 16 TRQs showing that the fill rates New Zealand takes issue with about are attributable to other economic factors. The fill rates are not affected by Canada's pooling system.

24. In sum, Canada's interpretation of Article 2.29.1 is based on the ordinary meaning of the terms. The Panel should reject New Zealand's claims for being outside of the scope of this obligation. But, even if the Panel accepts New Zealand's interpretation, it should still reject New Zealand's claim that Canada's pooling system violated Article 2.29.1 for any of the 16 Notices to Importers. And this is because the evidence is clear that Canada's pooling system had no effect on importers' opportunity to utilise their TRQ quantities.

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

25. Turning to Article 2.29.2(a), Canada's TRQ administration is consistent with this provision because the measures at issue are simply not the type of condition, limit or eligibility requirements covered by the provision.

26. New Zealand alleges that Canada's pooling system and the requirement that applicants be processors, further processors and distributors to have access to the TRQs violate Article 2.29.2(a).

27. But Article 2.29.2(a) creates a prohibition on Parties to introduce a new or additional condition, limit or eligibility requirement that specifically regards the use of the TRQ for importing a good, beyond what is set out in the Parties' Schedules, and outside of the consultation process that is contemplated in subparagraphs (a) and (b).

28. By the very terms of the provision, this obligation only applies to conditions, limits or eligibility requirements on "the utilization of a TRQ for the importation of a good". Therefore, to resolve this claim, the Panel must decide two key issues:

i) First, what is the meaning of the phrase "on the utilisation of a TRQ for the importation of a good"; and

ii) And second, how does the meaning of this phrase inform what conditions, limits, or eligibility requirements are covered by the provision?

29. One of the grounds of New Zealand's challenge under this claim is about the exclusion of retailers from TRQ access. New Zealand has characterized Canada's measure as an "eligibility requirement" for the purposes of this provision. New

Zealand is impermissibly trying to fit Canada's measures within the scope of Article 2.29.2(a). To make the connection between this provision and Canada's measures, New Zealand asks this Panel to adopt an overly broad interpretation so that this provision would cover all – or in New Zealand's own words – "every" condition, limit or eligibility requirement possible that relates to the administration of a TRQ.

30. New Zealand's interpretation is incorrect – New Zealand ignores entire portions of the text, it requires the Panel to misinterpret the term "utilisation" as including "allocation", and it ignores the relevant context informing the interpretation of "condition, limit or eligibility requirement". In doing so, New Zealand distorts the meaning and the function of Article 2.29.2(a).

31. The function of this Article is to prevent Parties from introducing requirements on the goods subject to the TRQ that make importing difficult or uneconomical and therefore, impact the utilization of the TRQ. You may be wondering what is a requirement on utilization? For an example of a requirement on utilization, we can look to the illustrative list in the provision itself, which identifies requirements that relate to specification or grade, permissible end-use, or package size. As a practical example, this provision would prohibit Parties from introducing a new requirement that cheese imported under the Cheeses of All Types TRQ must be in a certain size package. This would be an eligibility requirement on the utilisation of the TRQ for the importation of cheese. Only cheese that meets the package size requirement would be eligible to be imported under the TRQ and be eligible to benefit from the preferential TRQ tariff rate. Preventing the unilateral imposition of these types of conditions, limits or eligibility requirements is the function of Article 2.29.2(a).

32. As explained in Canada's submissions, when properly interpreted, Article 2.29.2(a) covers product-focused conditions, limits and eligibility requirements related to the actual importation of goods under the TRQ. Contrary to New Zealand's interpretation, this provision does not cover every single eligibility requirement possible, and it does not cover requirements on who can access a TRQ.

33. This is the correct interpretation of Article 2.29.2(a) for two reasons. First, the term "utilisation" must relate to the actual use of a TRQ for importing a good and benefiting from the preferential tariff rate associated with the TRQ. In this context, therefore, the term "utilisation" requires the actual import if a good; it does not

mean "applying for and receiving an allocation". As Canada explained in its rebuttal submission, New Zealand's claim that it is not possible to utilise a TRQ without first obtaining an allocation is factually incorrect. If a TRQ is administered on a first-come first-served basis under this system, the TRQ can be utilised without receiving an allocation because there are no allocations. If a TRQ is administered by an allocation mechanism, the issuance of an allocation does not equate to any actual use of the TRQ for importation of a good. In addition, the manner in which the Parties have used both the terms "utilisation" and "allocation" throughout Section D demonstrates that the Parties intended these terms to have distinct meanings.

34. Second, the phrase "condition, limit or eligibility requirement" is qualified by the additional phrase "on the utilisation of a TRQ for the importation of a good". This qualification is important because it requires interpreting the requirements at issue as covering product-focused requirements that must be met for a good to benefit from the TRQ preferential tariff treatment at the time that it's actually being imported. Put another way, this provision covers requirements on what goods may be imported under the TRQ or how goods imported under the TRQ may be used, but is does not cover who may access a TRQ allocation.

35. Canada's interpretation is confirmed by context: the examples provided in the illustrative list in the provision itself all speak to product-focused requirements. Further, the other uses of the term "eligibility" in Section D confirm the specific context in which the term "eligibility requirement" is used in Article 2.29.2(a).

36. For these reasons, Canada's exclusion of retailers from eligibility is not an "eligibility requirement on the utilisation of a TRQ for the importation of a good" within the meaning of Article 2.29.2(a). As such, New Zealand's claim under this provision must fail.

C. Canada's TRQ administration is consistent with Article 2.30.1(a)

37. Turning now to Article 2.30.1(a). New Zealand argues that Canada's Notices to Importers are inconsistent with this provision because they limit TRQ eligibility to processors, further processors and distributors. However, New Zealand's position is based on an incorrect understanding of Article 2.30.1(a). Contrary to New Zealand's claim, Canada's Notices to Importers are fully consistent with Article 2.30.1(a)

because the market actors who are eligible under these Notices are all active in the Canadian dairy sector. Additionally, in the process of allocating its TRQs, Canada ensures that any eligible applicant is able to apply and be considered for an allocation.

38. Article 2.30.1(a) states that when a Party administers a TRQ through an allocation mechanism, the 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 an allocation under the TRQ. The provision does not contain any reference to a Party's Tariff Schedule. It only refers to the importing Party's eligibility requirements. Therefore, the plain reading of Article 2.30.1(a) is that it refers to the Party's own eligibility requirements. That is, Article 2.30.1(a) refers to the eligibility requirements established by the Party as part of its allocation mechanism.

39. The function of Article 2.30.1(a) is to ensure transparency and predictability. It ensures that the Party will adhere to 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. Importantly, the Party cannot arbitrarily deviate from its chosen eligibility requirements during the quota application period.

40. In parallel to Article 2.30.1(a), paragraph 3(c) of Canada's Tariff Schedule provides that Canada must allocate its TRQs to "eligible applicants". The second sentence in paragraph 3(c) defines an "eligible applicant" as a resident of Canada that is active in the Canadian dairy sector and that is compliant with the EIPA and its regulations. Paragraph 3(c) does not exhaustively set out who is eligible to apply and be considered for an allocation under Canada's TRQs. The text of paragraph 3(c) does not say that any or every person active in the Canadian dairy sector must be eligible to apply and be considered for a quota allocation. If the Parties had wanted any person active in the Canadian dairy sector to be eligible for an allocation, they would have stated this expressly in paragraph 3(c), just as the United States and Korea did as part of the KORUS. But the Parties did not do this.

41. When properly interpreted, paragraph 3(c) prevents Canada from granting allocations to persons that are not active in the Canadian dairy sector and that are not compliant with the EIPA and its regulations. In other words, paragraph 3(c) sets

out the threshold requirements that any person must meet in order to be eligible for an allocation. If a person does not meet these threshold requirements set out in paragraph 3(c), Canada cannot issue an allocation to that person. This understanding is supported by the third sentence of paragraph 3(c), which recognizes Canada's discretion to narrow the universe of eligible applicants to certain market actors. The Parties would have had no need to reference import history in the third sentence if import history was not a potential eligibility criterion for a given allocation mechanism.

42. The function of paragraph 3(c) is to prevent Canada from issuing allocations to persons who are not eligible applicants. In the process of establishing its eligibility requirements, Canada is required to select from a specific category of market actors. Canada is not entitled to select market actors from outside this category, such as rent-seekers with no association to the Canadian dairy sector. But so long as the market actors chosen by Canada are selected from within the universe established under paragraph 3(c), nothing prevents Canada from imposing additional requirements to further narrow the scope of eligible applicants under its TRQs.

43. In short, paragraph 3(c) establishes the outer parameters of Canada's right to set eligibility requirements for the allocation of its TRQs, while Article 2.30.1(a) ensures that Canada adheres to its chosen eligibility requirements during a given quota application period. Canada's interpretation reflects a harmonious reading of these two provisions. By contrast, under New Zealand's interpretation, Canada would have no ability to refine the universe of eligible applicants, which would increase the universe of eligible applicants to more than 150,000 entities. The high number of eligible applicants would make it extremely difficult for Canada to comply with numerous obligations in Section D. In turn, this would negate Canada's right to administer its TRQs through an allocation mechanism. This would also lead to an administrative morass negatively impacting TRQ access and utilization. This is an absurd result that could not have been intended by the Parties.

44. For these reasons, New Zealand's claim under this provision must also fail.

45. I will now turn the floor to my colleague, Mr. Brendan Robertson.

D. Canada's TRQ administration is consistent with Article 2.30.1(b)

46. Turning to Article 2.30.1(b), Canada's measures, including the pools for processors and further processors, are consistent with Canada's obligations under the Processor Clause.

47. The Processor Clause prohibits a Party from limiting the ability to obtain an allocation exclusively to processors. Canada complies with the Processor Clause because its Notices to Importers permit every eligible non-processor that applies to obtain an allocation. Canada has not limited access to allocations to processors.

48. New Zealand asserts that the panel report in *Canada – Dairy TRQ Allocation Measures* or "CUSMA Dairy" is "highly pertinent" to this Panel's interpretation. To be clear, the CUSMA Dairy report concerns a different treaty, between different Parties and although it may deal with a similar provision, it is not binding on the Parties to this dispute. This Panel must conduct its own interpretation under the VCLT pursuant to Article 28.12.3 of the CPTPP.

49. Furthermore, should the Panel consider the report relevant, certain interpretive deficiencies in the CUSMA Dairy panel report undermine any persuasive value it may have regarding the meaning of the Processor Clause. For instance, the panel failed to clearly establish the meaning of the disputed term "allocation", simply noting that Canada and the United States agreed on the relevant dictionary definition. Determining the meaning of "allocation" is of fundamental importance to establishing the scope of the Processor Clause as it is the thing that Parties cannot limit access to. Relatedly, the panel relied on the use of the term "allocated" in Canada's CUSMA Notices to Importers in its VCLT Article 31 analysis of the ordinary meaning of the treaty phrase "an allocation". It provided no explanation or justification for why these documents were relevant to its ordinary meaning analysis under Article 31. They were not.

50. By using the Notices as an inappropriate shortcut, the panel reached conclusions about the CUSMA consistency of Canada's measures without properly establishing the scope of the Processor Clause.

51. Turning to the meaning of allocation, properly interpreted, "allocation" refers to the concept of a share of TRQ that may be granted to individual applicants. An allocation permits the recipient to import a specified volume of covered goods under the TRQ. However, the term "allocation" is not shorthand used to refer to a specific volume of a TRQ. Similarly, the volume associated with an allocation is irrelevant to understanding the meaning of the term as used in Section D.

52. Canada has pointed to numerous provisions that provide context and confirm this interpretation:

i) For instance, Article 2.32.2 requires that the name and address of allocation holders be published. This indicates that an allocation is something that may be granted to a specific individual applicant.

ii) Article 2.30.1(c) provides context demonstrating that the term "allocation" does not simply mean TRQ volume. It requires that "each allocation is made in commercially viable shipping quantities". The term "allocation" must mean something other than an amount or quantity of the TRQ if Article 2.30.1(c) requires that "each allocation" be of a certain quantity.

53. So what is the significance of this? It means that the Processor Clause concerns the ability of non-processors to obtain allocations. However, it does not contain obligations with regard to the size of allocations that non-processors receive.

54. New Zealand argues that the meaning of "allocation" is largely academic because Canada will have breached the Processor Clause regardless of whether processor pools are "an allocation" themselves or whether the pools are made up of allocations. This is incorrect. The meaning of "allocation" is fundamental to determining the scope of the Processor Clause. And New Zealand appears to confuse the amount of an "allocation" actually or theoretically granted with the meaning of the term "allocation".

55. Now, this goes to Question 5 from the Panel which asks about the legal difference between a 'pool' and an 'allocation'. In contrast to an allocation, a pool is a specific volume of TRQ initially reserved for a specified group from which the permitted volume associated with individual allocations will be calculated if there are applicants under the pool. In itself, a pool provides no applicant from the specified group the ability to import any product under the TRQ in any amount.

56. Importantly, the Processor Clause does not prohibit reserving access to TRQ volumes for various groups. It simply requires that non-processors be able to get an allocation, while at the same time Article 2.30.1(c) disciplines the size of allocations. If the Parties had intended to prohibit establishing set-aside pools of reserved TRQ volumes, they would not have limited the scope of the Processor Clause to prohibiting a Party from limiting "access to an allocation". Instead, similar to the Producer Clause, they would have prohibited limiting access to "a portion of the quota" to processors. This would have prevented any amount from being reserved.

57. The context provided by the Producer Clause is also highly relevant when interpreting the determiner "an" in the Processor Clause. The Producer Clause prohibits a Party from allocating any portion of the quota to a producer group. In turn, this prohibits a producer group from obtaining an allocation. In contrast, the Processor Clause prohibits a Party from limiting the ability to obtain allocations to processors alone but does not prohibit processors from obtaining allocations. Accordingly, the Processor Clause must be interpreted as restricting a Party's ability to limit access to "every" allocation to processors to ensure that both processors and non-processors are able to obtain allocations.

58. In conclusion, New Zealand has failed to show that Canada's processor pool limits any eligible non-processor's ability to obtain an allocation.

E. Canada's TRQ administration is consistent with Article 2.30.1(c)

59. Next, New Zealand argues that Canada's decision to create "pools" for processors contravenes the second clause of Article 2.30.1(c), because Canada fails to ensure that each allocation is made, to the maximum extent possible, in the amounts requested by importers. This is an erroneous interpretation of the second clause of Article 2.30.1(c).

60. Contrary to New Zealand's contention, Canada's pooling system is fully consistent with the second clause of Article 2.30.1(c). This obligation does not apply to the design of a Party's allocation mechanism. Article 2.30.1(c) begins with the words "each allocation is made". This indicates that Article 2.30.1(c) was intended to create obligations with respect to the issuance of individual allocations to specific TRQ applicants. It was not intended to create obligations with respect to the

administration of the TRQ as a whole. Further, Article 2.30.1(c) ends with the word "request". This indicates that Article 2.30.1(c) only applies following the opening of the quota application period, when the importing Party has begun receiving TRQ applications from eligible TRQ applicants. At that point in time, the importing Party has necessarily already designed its allocation mechanism.

61. New Zealand's contention that Article 2.30.1(c) applies to the design of a Party's allocation mechanism would lead to absurd results. Under this interpretation, Canada would effectively be forced to administer its TRQs on a "pro-rata" basis. But this is only one allocation mechanism among many others. If the Parties had wanted to ensure that Canada would administer its TRQs only through a pro-rata allocation mechanism, they would have stated this expressly in Canada's Tariff Schedule. They did not.

62. Thus, the correct way to interpret Article 2.30.1(c) is that it applies after the importing Party has chosen its allocation mechanism, when the importing Party is in the course of granting individual allocations to specific applicants in accordance with its chosen mechanism. In other words, in the process of implementing its chosen allocation mechanism, the Party must make serious efforts to ensure that each allocation is provided in the amounts requested by the importer.

63. In the present case, Canada has made the decision to administer its TRQs through a pooling system. This is a valid allocation mechanism for purposes of the CPTPP. Indeed, the Agreement recognizes Canada's right to administer its TRQs through the allocation mechanism of its choosing. This includes the right to decide which importer groups will receive in-quota quantities, and in what proportion. Nothing in the CPTPP limits Canada's right to establish pools for the administration of its TRQs. 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, they would have stated so explicitly in Canada's Tariff Schedule.

64. When the second clause of Article 2.30.1(c) is interpreted in the proper manner as explained by Canada, the logical consequence is that this provision does not apply to Canada's decision to reserve a portion of its TRQs for preferential access by processors. Instead, this provision only applies with respect to the portion of the TRQ that is available to a particular type of TRQ applicant. In other words, Article

2.30.1(c) only 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, eligible applicants receive an allocation in the amounts that they have requested. For the processor pool, Canada ensures that no processor receives an allocation that it would not be willing to accept. In this way, Canada ensures that each allocation is as close as possible to the processor's needs. As for the distributor pool, Canada divides the available quantity of the quota equally between eligible distributors, thereby ensuring that all distributors each receive the maximum quantity that Canada is able to issue within that pool.

F. Canada's procedures for administering its TRQs are consistent with Article 2.28.2

65. The last provision at issue in this dispute is Article 2.28.2. Canada's procedures for administering its TRQs are consistent with Article 2.28.2 because they provide procedural fairness. New Zealand fails in its claim because the measures at issue – Canada's decisions to create a pool for processors and to exclude retailers from being eligible to access Canada's dairy TRQs – are not "procedures" and are therefore not governed by this provision.

66. Article 2.28.2 applies to the procedural aspects of TRQ administration. In other words, it imposes procedural safeguards to ensure the fair and equitable treatment of applicants seeking a TRQ quantity by officials administering a Party's TRQs. Therefore, under Canada's interpretation, Article 2.28.2 would not apply to its decisions to create pools and impose certain eligibility requirements.

67. According to New Zealand, however, Article 2.28.2 applies to both the procedural aspects of TRQ administration as well as its substantive aspects. In other words, according to New Zealand, Article 2.28.2 would govern all aspects of TRQ administration whether they are procedural or not.

68. Therefore, under this claim, the issue before the Panel is whether the scope of Article 2.28.2 extends to the non-procedural aspects of TRQ administration.

69. As Canada explained in its written submissions, New Zealand's interpretation of Article 2.28.2 fails in two critical respects. First, it reads out the term "procedures" from Article 2.28.2. In fact, New Zealand goes as far as indicating that there is no

distinction between an obligation that applies to a Party's "procedure" for administering its TRQs" and a Party's "administration of its TRQs". New Zealand's interpretation is clearly contrary to the rules of treaty interpretation. A treaty interpreter must give meaning and effect to all the terms of the treaty. This means that there must be a distinction in scope between an obligation that applies expressly to a Party's "procedures" and an obligation that does not.

70. New Zealand's interpretation is also undermined by the other provisions in Section D. These other provisions – notably Articles 2.28.1 an 2.28.3 – demonstrate that where the Parties intended to refer broadly to both the procedural and substantive aspects of TRQ administration, they used the phrase TRQ administration, or its variation, without any mention of procedures.

71. Second, New Zealand completely disregards the important context provided by the other obligations in Article 2.28.2. Under this article, a Party is not only required to ensure that its procedures for administering its TRQs are fair and equitable. A Party must also comply with the other obligations, such as the obligations to ensure that its procedures for administering its TRQs are no more administratively burdensome than absolutely necessary and administered in a timely manner. These are all clearly procedural requirements that do not apply to the design of an allocation mechanism. The obligation at issue in this dispute must be understood in light of these other procedural requirements in Article 2.28.2. In insisting on its interpretation, New Zealand disregards this important context without offering any credible explanation.

72. When the text of Article 2.28.2 is interpreted by giving meaning to all of its terms and interpreted in its context, it becomes evident that the obligation at issue is aimed at ensuring procedural fairness in a TRQ administration context. Procedural fairness in this context requires officials operating an allocation mechanism to provide eligible applicants with an opportunity to submit relevant information and to provide them with an unbiased decision that is made in accordance with the established rules. Through these procedural safeguards, Article 2.28.2 seeks to ensure that eligible applicants can fairly and equitably participate in a TRQ system of a Party's design and have an opportunity to obtain an allocation.

73. In Section D, the Parties agreed to a number of obligations that apply to a Party's design of an allocation mechanism that constrain a Party's discretion in important ways. They include provisions such as Articles 2.30.1(b) and 2.30.3. However, Article 2.28.2 is not one of those provisions, as made clear by its text and context. Accordingly, New Zealand's claim under Article 2.28.2 must fail because it is out of scope.

74. I will now turn the floor back over to Mr. Lord.

III. CONCLUSION

75. In conclusion, again, in Canada's view this dispute comes down to a fundamental difference in views of what the market access provisions of the CPTPP do: the TRQs create opportunities for imports at preferential tariff rates up to the specified volumes. These provisions do not guarantee those volumes of imports, nor could they. From there, the provisions on the administration of TRQs reflect a careful balancing of rights and obligations. New Zealand is asking the Panel to adopt interpretations that create outcomes that were not negotiated and are not reflected in the Agreement. Canada's interpretations reflect the detailed and careful drafting of the treaty in recognition of Parties' fundamental right to adopt allocation mechanisms that meet their needs while at the same time honour the commitments made in the text of the Agreement.

76. With that said, we look forward to the Panel's questions later today. I take this opportunity to mention that Dr. Pouliot and Dr. Mussell are with us today and are available to address any question the Panel may have on their respective expert reports that Canada has submitted in this dispute.

77. Thank you.