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)

REBUTTAL SUBMISSION OF CANADA

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TABLE OF ABBREVIATIONS USED IN THIS SUBMISSION

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CUSMA	Canada-United States-Mexico Agreement
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
EIPA	Export and Import Permits Act
FCFS	first-come first-served
GATT	General Agreement on Tariffs and Trade
KORUS	*United States – Korea Free Trade Agreement*
ILA	*Agreement on Import Licensing Procedures*
TRQ	tariff rate quota
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

LIST OF EXHIBITS

CDA-48	Statement of Anca Darbyshire, 30 May 2023
CDA-49	Statute of the International Court of Justice
CDA-50	Addendum to Dr. Pouliot's Expert Report (**CONFIDENTIAL INFORMATION**)
CDA-51	*Oxford English Dictionary*, OED online, "phrase", accessed 22 May 2023, <https://www.oed.com/view/Entry/142933?rskey=rHi3iA&result=1&isAdvanced=false#eid>
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I. INTRODUCTION

1. This dispute presents the Panel with two fundamentally different views regarding the scope and operation of the provisions of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP") concerning the administration of tariff rate quotas ("TRQ").

2. According to New Zealand, the market access for dairy products granted by Canada under the CPTPP can only be assured by giving the provisions at issue meanings that are contrary to the rules of treaty interpretation and would severely limit Canada's negotiated discretion to implement allocation mechanisms in accordance with its interests, contrary to Article 28.12.3.[1]

3. In contrast, Canada offers interpretations that are faithful to the text of the provisions at issue. Canada's interpretations are consistent with the fact that CPTPP reflects a carefully negotiated and balanced set of rights and obligations. Canada provided incremental market access for dairy products, including to New Zealand, over and above the market access already provided to the CPTPP Parties under Canada's World Trade Organization ("WTO") concessions. Canada also agreed to certain restrictions relating to how TRQ volumes are to be allocated but retained significant discretion to determine its allocation mechanism.

4. New Zealand takes issue in particular with "Canada's quota pooling system" and alleges that this system "encourage[s] chronic under-fill of its dairy TRQs".[2] The reality is that New Zealand aspires to attain higher export volumes to Canada, regardless of the market conditions and other factors that may explain New Zealand's dairy product import performance in Canada. In pursuit of this goal, New Zealand in effect asks this Panel to adopt whatever interpretations are necessary to improve its negotiated outcomes, by reading in new obligations that would place limits on the discretion of Canada and other CPTPP Parties to implement allocation mechanisms that distribute TRQ volumes in a manner that align with their interests and CPTPP rights.

[1] Article 28.12.3 provides, in relevant part: "The findings, determinations and recommendations of the panel shall not add to or diminish the rights and obligations of the Parties under this Agreement."
[2] Rebuttal submission of New Zealand, para. 51.

5. Canada provides detailed responses to New Zealand's rebuttal submission on a claim-by-claim basis below in Section III. However, as a preliminary matter, Canada calls attention to three critical flaws that underpin New Zealand's claims, namely: (A) New Zealand's failure to interpret the relevant provisions in accordance with the rules of interpretation under international law; (B) New Zealand's reliance on interpretations that result in absurd outcomes; and (C) New Zealand's disregard of key evidence on the record and failure to substantiate its claims with evidence.

A. NEW ZEALAND FAILS TO INTERPRET THE RELEVANT PROVISIONS IN ACCORDANCE WITH THE RULES OF INTERPRETATION UNDER INTERNATIONAL LAW

6. The Parties agree that, pursuant to Article 28.12.3, the Panel must interpret the Agreement in accordance with the rules of interpretation under international law as reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("VCLT"). Where the Parties depart from each other is in their approach to applying these rules and the need to do so consistently. Canada provides two examples below of these differences and will elaborate further on them later in this rebuttal submission.

7. First, Article 2.28 expressly provides that each Party shall implement and administer its TRQs in accordance with the WTO's *Agreement on Import Licensing Procedures* ("ILA"). The ILA is an agreement to which both New Zealand and Canada are Parties through their WTO Membership and thus the rules of the ILA have been agreed to by both countries.

8. Canada's resort to the ILA is straightforward. The ILA provisions Canada refers to in its initial written submission make a clear distinction between utilisation of, and application for, an allocation.[3] The ILA confirms Canada's position. In response, and notwithstanding the direct incorporation of the ILA into Chapter 2 of the CPTPP, New Zealand contends that the ILA's use of the term "utilization" has no bearing on the interpretation of that term in Article 2.29.[4]

[3] Initial written submission of Canada, para. 100.
[4] Rebuttal submission of New Zealand, para. 39. See also paras. 85-86.

9. By contrast, when discussing the relevance of Article XXXVII:1 of the General Agreement on Tariffs and Trade ("GATT") for purposes of the present dispute, New Zealand concedes that this obligation may have "a similar meaning" as Article 2.30.1(c).[5] This is despite the fact that Article XXXVII:1 has not been incorporated into the CPTPP – in direct contrast to the ILA – and that the text, context and object purpose of GATT Article XXXVII:1 is different from Article 2.30.1(c), as stated by New Zealand. New Zealand's position is thus internally inconsistent.

10. Second, in discussing Article 2.29.2(a), Canada relies on the *ejusdem generis* principle, submitting that the general phrase "a new or additional condition, limit or eligibility requirement" has to be understood in the context of the list of specific examples that are subsequently set out in that subparagraph. Canada makes the point that each of the items in the list (specification or grade, permissible end-use of the imported product or package size) relate to the utilisation of a TRQ to import goods, and none are conditions on an applicant's eligibility to apply for or receive an allocation in the event that an allocation mechanism is used. In contesting Canada's position, New Zealand ignores both its own authorities and those relied on by Canada.[6] Echoing its position with respect to the ILA, New Zealand again sacrifices principled, consistent and credible legal interpretations in favour of its ultimate goal of compelling Canada to adopt a "more flexible approach" to TRQ administration.[7]

B. NEW ZEALAND'S INTERPRETATIONS WOULD RESULT IN ABSURD OUTCOMES

11. The flaws in New Zealand's interpretation of the relevant provisions of the CPTPP are also evident from the absurd results those interpretations produce. For example, New Zealand argues that the terms "eligibility requirements", "eligible", and "eligibility", wherever they appear in Section D of Chapter 2 of the CPTPP, have the same, single meaning, namely the residency, activity and compliance requirements set out in paragraph 3(c) of Canada's Tariff Schedule.[8] Similarly, New

[5] Rebuttal submission of New Zealand, para. 154.
[6] See Section III.B.1.c), below.
[7] Rebuttal submission of New Zealand, para. 4.b.
[8] Including in Articles 2.12(6)(a)(ii), 2.12(6)(b), 2.12(7), 2.13(3)(c)(ii), 2.28(3), 2.29(2), 2.30(1)(a), and 2.30(1)(e). See Rebuttal submission of New Zealand, paras. 92 ("[t]he eligibility requirements set out in Canada's Schedule are therefore the 'eligibility requirements'" for the purpose of Articles 2.29(2) and 2.30(1)(a)), 66-67 ("the terms 'eligibility' and eligibility requirements' are references to the conditions that must be complied with to be eligible to apply and be considered for an allocation

Zealand interprets the term "utilisation" to mean "the entire process" for "obtain[ing] an allocation, bring[ing] product to market, then claim[ing] preferential treatment",[9] because "an importer cannot 'utilise' TRQ quantities fully without accessing an allocation".[10]

12. Taken to their logical conclusion, New Zealand's interpretations would result in every or any resident of Canada that applies for an allocation, is active in the Canadian dairy sector, and is compliant with the Export and Import Permits Act ("EIPA") and its regulations being granted an allocation. This is because, according to New Zealand's interpretations, Canada must make all such residents eligible for an allocation pursuant to Article 2.30.1(a) and paragraph 3(c) of Canada's Tariff Schedule, and, pursuant to Article 2.29.2(a), Canada cannot introduce any new condition, limit or eligibility requirements on the allocation of its TRQs among these residents. By its nature, allocating a TRQ entails applying some criteria established as part of the allocation mechanism. Insofar as these criteria constitute "condition[s], limit[s] or eligibility requirement[s]" according to New Zealand, the introduction of any criterion that has not been included in a Party's Schedule would be prohibited, except if introduced pursuant to subparagraphs (b), (c) and (d) of Article 2.29.2.

13. New Zealand's interpretations would render it impossible for Canada to administer its TRQs based on an allocation mechanism as Canada would be forced to consider an extremely high number of TRQ applications within a limited timeframe.[11] The high number of potential applicants would likely prevent Canada from complying with numerous obligations in Section D of Chapter 2.[12] Further, because Canada would be prohibited from introducing any new criteria for the allocation of its TRQs, it would be forced to grant allocations to potentially thousands of additional applicants. As a consequence, allocations would likely be very small, potentially in violation of the obligation to provide allocations in "commercially viable shipping quantities" under the first clause of Article 2.30.1(c).

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under a TRQ", which is "clear from the consistent use of the term 'eligibility' in Section D to refer to eligibility *to apply for an allocation*") (emphasis original).

[9] Rebuttal submission of New Zealand, para. 61. See also, ibid, para. 78.

[10] Ibid, para. 34.

[11] As explained in paragraph 157, below, New Zealand's interpretation would increase the number of potential eligible applicants by a factor of 25.

[12] See Section III.C.4, below.

14. As elaborated below, New Zealand's interpretations must be rejected as they are not supported by the text, context and purpose of the provisions. Canada's interpretations, on the other hand, are supported by the rules of interpretation under international law and provide a coherent reading of the relevant provisions, as will be explained in this submission.

C. NEW ZEALAND FAILS TO SUBSTANTIATE ITS CLAIMS WITH EVIDENCE

15. Finally, Canada shows in detail below that New Zealand's claims fail because they are not supported by evidence. As a prime example, one of New Zealand's central claims in its initial written submission was that Canada's TRQ system "encourages chronic underfill".[13] While submitting no evidence in this regard, New Zealand asserted that Canada's TRQ system "direct[s] access to TRQ quota away from importers that are likely to use it, and towards entities that are not".[14] In response, Canada submitted factual evidence, including two expert reports, showing that the alleged "underfill" is attributable to factors unrelated to Canada's TRQ administration. New Zealand has, in response, acknowledged that "trade is inevitably impacted by a range of different factors".[15] Thus, New Zealand effectively has conceded that there is no evidence to substantiate its claim that Canada's TRQ system "encourages chronic underfill".

16. New Zealand initially raised the factual issue of underfill but failed to substantiate a *prima facie* case based on evidence. Yet, in its rebuttal submission, New Zealand describes Canada's response and the economic evidence it provided pertaining to underfill as a "distraction".[16] However, New Zealand cannot be permitted to evade its obligations to prove its claims based on evidence.

D. STRUCTURE OF CANADA'S REBUTTAL SUBMISSION

17. Canada has structured this submission as follows:

- Section II responds to New Zealand's claim that Canada's practice of allowing quota to "move" from one pool to another when there are no eligible applicants within a pool is inconsistent with Canada's published

[13] First written submission of New Zealand, para. 3.
[14] Ibid, paras. 3 and 33 (emphasis removed).
[15] Rebuttal submission of New Zealand, para. 4.
[16] Ibid, para. 17.

documents on TRQ administration. As Canada demonstrates, Canada's practice is fully consistent with Canada's Notices to Importers.

- Section III responds to New Zealand's attempts to refute Canada's legal arguments as to why each of the six claims brought by New Zealand must fail. In doing so, Canada demonstrates that New Zealand has failed to establish any inconsistency with Canada's obligations.

- Section IV sets out Canada's conclusion and requested disposition of the matter.

II. CANADA'S POOLING SYSTEM ALLOWS QUOTAS TO MOVE BETWEEN POOLS

18. At various points in its initial written submission, New Zealand made the factually incorrect suggestion 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).[17] In response to New Zealand's unfounded assertion, Canada explained in its initial written submission that Canada's pooling system does not operate in this manner. Canada's pooling system simply serves to determine who will receive first access to Canada's TRQs during the initial round of allocation. If there are no eligible applicants within a particular pool, Canada will allow quota within that pool to "move" to eligible applicants within other pools.[18] Canada provided multiple examples of such a situation occurring since the entry into force of the CPTPP.[19]

19. In response, New Zealand now claims that because Canada's public documents on TRQ administration – including Canada's Notices to Importers – do not expressly mention the possibility for quota to move from one pool to another, Canada is "acting inconsistently with its own published policy".[20] New Zealand further claims that Canada has provided "no proof" that it allowed quota to move from one pool to another when there were no eligible applicants within a particular pool.[21]

20. At the outset, Canada notes that the question of whether Canada's approach is consistent with its Notices to Importers is ultimately not relevant for resolving the

[17] See, in particular, First written submission of New Zealand, paras. 35, 36, 119 and 125.
[18] Initial written submission of Canada, paras. 81 and 82.
[19] Ibid, paras. 83 to 85.
[20] Rebuttal submission of New Zealand, para. 14.
[21] Ibid, para. 15.

specific matter at issue in this dispute (namely, whether Canada's TRQ administration is consistent with the CPTPP obligations raised by New Zealand), as New Zealand itself recognizes.[22] But in any event, New Zealand's position is incorrect. While Canada's Notices to Importers do not expressly mention the possibility for quota to move from one pool to another, this does not mean that Canada's practice is inconsistent with its published policy. The purpose of Canada's Notices to Importers is to set out the responsible Minister's "policies and practices" for the administration of the relevant TRQ – as expressly noted in the beginning of each Notice to Importers.[23] In other words, Canada's Notices to Importers are intended to describe how the responsible Minister will normally exercise their discretion to administer Canada's TRQs.

21. As Canada explained in its initial written submission,[24] Section 4 of each Notice to Importers sets out the method for calculating individual quota allocations under the relevant TRQ, including Canada's practice of using pools for the allocation of its TRQs. However, Section 4 describes the Minister's normal approach in a specific factual situation – that is, the situation where there are eligible applicants in each one of the pools established by Canada. In other words, Section 4 is based on the factual assumption that there will be eligible applicants in each one of the pools. If there are no eligible applicants within a specific pool (a different factual scenario than the one contemplated in Section 4), the Minister's consistent practice has been to allow quota to move from one pool to another.

22. In its initial written submission, New Zealand also asserts that importers use Canada's Notices to Importers "as a basis for the quota requests that they make, and the import contracts that they enter into".[25] With this statement, New Zealand appears to be suggesting that by omitting to describe its practice in the Notices to Importers, Canada is somehow misleading eligible applicants because eligible applicants rely on the size of the pools to enter into import contracts. At the outset, Canada notes that an applicant will normally have received its allocation before the

[22] Rebuttal submission of New Zealand, para. 15.
[23] Each one of Canada's CPTPP Notices to Importers begins with a statement that the Notice "sets out the policies and practices pertaining to the administration of Canada's tariff rate quota" for the relevant product and "is provided pursuant to the authority of the *Export and Import Permits Act* ("EIPA") and its corresponding regulations".
[24] Initial written submission of Canada, para. 63.
[25] Rebuttal submission of New Zealand, para. 14.

opening of the quota year, thus allowing the applicant sufficient time to enter into import contracts with dairy suppliers in CPTPP countries. Furthermore, under Canada's practice of allowing quota to move from one pool to another, an eligible applicant can only receive more quota volume than what is described in Canada's Notices to Importers. For example, even if a distributor obtains a greater allocation under a particular TRQ because Canada allowed quota to move from the processor pool to the distributor pool, it will not be difficult for the distributor to re-contact the CPTPP exporter to request more dairy products. If the Canadian importer considers that the allocation is too large for its needs, the importer can always return that quantity before the return deadline without any penalty.[26]

23. With respect to New Zealand's statement that Canada has provided "no proof" for its examples of instances where Canada allowed quota to move from one pool to another,[27] Canada has filed a statement from one of its officials responsible for the administration of Canada's CPTPP dairy TRQs.[28] This statement shows that on 22 occasions since the entry into force of the CPTPP in 2018, Canada redistributed quota from one pool to another when there were no eligible applicants within a particular pool. New Zealand is thus incorrect in its assertion that Canada's practice of permitting quota in a pool to be granted to applicants from other pools is somehow "exceptional and arbitrary".[29] On the contrary, as Canada's statement demonstrates, Canada's practice is a consistent one that has been applied across the CPTPP TRQs for multiple quota years.

III. LEGAL ARGUMENTS

A. CANADA'S TRQ ADMINISTRATION IS CONSISTENT WITH ARTICLE 2.29.1

1. New Zealand errs in its interpretation because 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 granted to them

24. New Zealand's interpretation of the terms "importers", "TRQ quantities", and "utilise" in Article 2.29.1 fails to acknowledge the ordinary meaning of these words.

[26] For more information on Canada's return and reallocation mechanism, see, Initial written submission of Canada, paras. 66-68.
[27] Rebuttal submission of New Zealand, para. 15.
[28] Statement of Anca Darbyshire, 30 May 2023, Exhibit CDA-48.
[29] Rebuttal submission of New Zealand, paras. 13-15.

Instead, New Zealand jumps to conclusions that reflect the interpretive result that it desires. New Zealand also fails to acknowledge the meaning these words impart to one another in Article 2.29.1. Finally, New Zealand attempts to ignore relevant context in the rest of Section D that informs the meaning of the terms in Article 2.29.1. As a result, New Zealand's interpretation is flawed and contradictory. By contrast, Canada's interpretation is derived from the dictionary definitions of these terms acknowledged by both Parties, is supported by the context of Article 2.29.1, and is both internally consistent and aligned with the structure of Section D.

a) The structure of Articles 2.29 and 2.30 shows that Article 2.29 does not pertain to access to allocations

25. New Zealand's arguments on the interpretation of Article 2.29.1 fail to take into account the structure of the obligations contained in Section D. In respect of New Zealand's claims, the relationship between Articles 2.29 and 2.30 is particularly relevant. Article 2.29 establishes general rules applicable to utilisation of all TRQs for importation regardless of whether TRQ quantities are accessed on a first-come first-served ("FCFS") basis or through an allocation mechanism, while Article 2.30 establishes rules specifically applicable to allocation, where an allocation mechanism exists. New Zealand's arguments that Article 2.29.1 pertains to allocation are therefore inapposite.

26. More specifically, Articles 2.29.1 and 2.29.2 contain three references to "utilise" or "utilisation", all of which are directly linked to actual importation of goods. Articles 2.29.2(a) and (b) both refer to "utilisation of a TRQ for importation of a good", which makes clear that the term "utilisation" in those sentences refers to actual importation of products using the preferential tariff rate for in-quota goods. As discussed in Canada's initial written submission,[30] and below in this section,[31] "utilise" in Article 2.29.1 has the same meaning as in Article 2.29.2, which is rendering useful or converting to use the TRQ by importing goods – a point to which New Zealand agrees in its rebuttal submission.[32] As discussed later in this submission, the obligations in Article 2.29.2 all pertain to importation of goods under

[30] Initial written submission of Canada, para. 98.
[31] See Section III.A.1.d), below.
[32] Rebuttal submission of New Zealand, para. 33.

the TRQ.[33] The requirements in Article 2.29 are applicable to the importation of goods regardless of how the TRQ quantities were granted to importers, i.e., either on an FCFS basis or through an allocation mechanism, but they do not pertain to obtaining a quota allocation.

27. This contrasts with Article 2.30, which contains rules that are only relevant where access to a TRQ is subject to an allocation mechanism, as set out in the *chapeau* of Article 2.30.1. In other words, these rules pertain to allocation, as specified by the heading of Article 2.30 itself. New Zealand's arguments that Article 2.29.1 applies to a Party's allocation system[34] amount to an improper reading-in of the word "allocation", as is made obvious by the existence of detailed rules on allocations immediately adjacent in Article 2.30. It is noteworthy that Article 2.29 never once uses the word "allocation", which the Parties have used explicitly in Article 2.30 when they intended to address the concept. The Panel must take into account the relevance of the structure of Articles 2.29 and 2.30 in interpreting the ordinary meaning of the terms used in Article 2.29.1.

b) "TRQ quantities" means the specified amounts allocated to individual importers

28. New Zealand argues that the term "TRQ quantities" in Article 2.29.1 means "the total volume of quota under the TRQ".[35] Despite New Zealand's insistence that text should be interpreted by reference to the ordinary meaning of the terms, New Zealand disregards the ordinary meaning by inventing its proposed meaning as being "the total quota volume". As Canada noted in its initial written submission, using the definition of "quantity" originally supplied by New Zealand,[36] a quantity is the "specified or definite amount of an article or commodity". Under the text of Article 2.29.1, those TRQ quantities have been granted to "importers",[37] so the ordinary meaning of "TRQ quantities" read in that immediate context is the specified or definite amounts of the TRQ granted to individual importers.

[33] See Section III.B, below.
[34] Rebuttal submission of New Zealand, para. 16.
[35] Ibid, para. 19.
[36] First written submission of New Zealand, para. 132; Initial written submission of Canada, paras. 90-91.
[37] See Section III.A.1.c), below, for Canada's discussion of the ordinary meaning of "importer".

29. New Zealand does not engage with its definition of "quantity" as the "specified or definite amount of an article or commodity" in concluding that "TRQ quantities" somehow means the total quota volume. Under New Zealand's interpretation, the word "quantities" is made redundant: New Zealand defines "TRQ" as the total volume of a product available for entry on preferential tariff terms, and in the following sentence it defines "TRQ quantities" as the same total volume.[38] The Panel should reject New Zealand's interpretation as one that is contrary to the principles of treaty interpretation and that would cause this redundancy.[39]

30. New Zealand dismisses the relevance of Article 2.30.2 in the interpretation of the term "TRQ quantities" in Article 2.29.1, arguing that "the phrase 'TRQ quantities' in Article 2.29(1) [refers] to the total quantity of quota available under a TRQ" without explaining how it arrives at that conclusion.[40] New Zealand's argument is plainly incorrect. Clearly, Article 2.30 as a whole is relevant context as a provision that, together with Article 2.29 and the rest of Section D, make up the CPTPP disciplines on TRQ administration. New Zealand acknowledges as much in referring to the provisions under Article 2.30, and even some provisions outside of Section D under Articles 2.12 and 2.13, when advancing its interpretation of Article 2.29.2(a).[41]

31. Of particular relevance to the current issue, Article 2.30.2 uses precise language to refer to the total available TRQ volume, namely "the quota quantity established in its Schedule to Annex 2-D". While New Zealand argues that there was good reason to use this language in Article 2.30.2 based on its supposed "technical nature"[42], it fails to explain why the same formulation of "the quota quantity established in its Schedule to Annex 2-D" was not used in Article 2.29.1 instead of "TRQ quantities" to indicate what it alleges is the same concept. Canada's interpretation, in contrast, respects that the reason for the use of different terms in Article 2.29.1 ("TRQ quantities") and Article 2.30.2 ("the quota quantity established in its Schedule to Annex 2-D") is to designate two different meanings. The phrase "the quota quantity established in its Schedule to Annex 2-D" in Article 2.30.2

[38] Rebuttal submission of New Zealand, para. 19.
[39] 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. See Appellate Body Report, *United States — Offset Act (Byrd Amendment)*, para. 271.
[40] Rebuttal submission of New Zealand, paras. 21-22.
[41] Ibid, paras. 66-67.
[42] Rebuttal submission of New Zealand, para. 23.

unambiguously means the total quantity of the TRQ, while in Article 2.29.1 the use of "TRQ quantities" held by importers means the specified amount granted to those importers.

32. New Zealand further argues that "TRQ quantities" in Article 2.29.1 cannot mean the specified amount granted to individual importers because, according to New Zealand, a specified amount granted to an importer is an allocation and the word "allocation" appears in Article 2.30.[43] In so arguing, New Zealand ignores the fact that Article 2.30 is applicable only "in the event that access to a TRQ is subject to an allocation mechanism". In contrast, Article 2.29 applies to all TRQs, whether administered on an FCFS basis or through an allocation mechanism. It is necessary then for "TRQ quantities" as used in Article 2.29.1, to encompass both the utilisation of a specified amount of quota allocated under an allocation mechanism and the utilisation of a specified amount of quota granted to an importer under an FCFS system. Article 2.29.1 could not logically use the word "allocation" in the place of "TRQ quantities" as the term has no meaning under an FCFS system. Therefore, the term "TRQ quantities" in Article 2.29.1 must capture specified amounts granted to individual importers regardless of whether they were granted through an allocation mechanism or on an FCFS basis.

c) "Importers" means a person who imports goods, and not just any person

33. The manner in which New Zealand ignores the ordinary meaning of terms and invents its own definitions is especially apparent in New Zealand's arguments on the meaning of "importers" in Article 2.29.1. New Zealand has put forward several contradictory definitions of "importers" over its two written submissions in this dispute.

34. In its initial written submission, New Zealand first defined "importer" as "a person who, or company, enterprise, etc., which, imports goods or commodities from abroad".[44] It then instantly discarded that definition, arguing that the term "importer" actually means (in a circular fashion) "all importers who meet the

[43] Ibid, paras. 24-26. All the instances cited by New Zealand in footnote 22 of its rebuttal submission are all found in Article 2.30.
[44] First written submission of New Zealand, para. 131.

eligibility requirements under the relevant Party's schedule, and are therefore eligible to receive quota under the TRQ",[45] despite the fact that neither New Zealand's proposed definition of "importer" nor Article 2.29.1 mention eligibility requirements. In its rebuttal submission, New Zealand devised a new definition of "importer", stating that the term "importers" in Article 2.29.1 "would capture every importer in the world importing goods", but then immediately acknowledged that "it would not make sense" to interpret Article 2.29.1 in the way that New Zealand had just proposed.[46] New Zealand therefore reverted to its fabricated definition that "importers" means "importers who are eligible to apply for quota under the eligibility requirements set out in Canada's Schedule".[47]

35. New Zealand's position avoids the proper approach to treaty interpretation which begins with the ordinary meaning of "importers". New Zealand ignored the very dictionary definition that it had originally supplied, namely of "a person who, or company, enterprise, etc., which, imports goods or commodities from abroad",[48] and instead jumped to a conclusion that yielded New Zealand's desired interpretative result. This is laid bare by New Zealand's baffling statement that "the reference to 'importers' in Article 2.29(1) does not affect the scope of the obligation."[49] Here, New Zealand is expressly asking the Panel to read the word "importers" out of the text and to ascribe no meaning to it. It is clearly impermissible under the rules of treaty interpretation to reduce a term to inutility.[50] Contrary to New Zealand's assertion, by the very nature of treaty interpretation, the scope of a treaty obligation is delineated by the choice of the words used, and an obligation pertaining to "importers" is different from an obligation that may pertain to any person eligible to apply for quota allocation.

36. Elsewhere in its rebuttal submission, New Zealand appears to understand that the CPTPP distinguishes between importers and applicants, as is also the case under the ILA which is incorporated by reference into the CPTPP. New Zealand's discussion

[45] Ibid, para. 131.
[46] Rebuttal submission of New Zealand, para. 31.
[47] Ibid.
[48] First written submission of New Zealand, para. 131, citing Exhibit NZL-41: Definition of "importer" from Oxford English Dictionary Online.
[49] Rebuttal submission of New Zealand, para. 30.
[50] 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 or inutility. See Appellate Body Report, *United States — Offset Act (Byrd Amendment)*, para. 271.

at paragraph 112 of its rebuttal submission argues that "applicants" for a quota allocation must be permitted to show activity other than as an "importer" for the purpose of Article 2.30.1(a). Yet, New Zealand argues that, for the purpose of interpreting Article 2.29.1, there is no distinction between an applicant and an importer, even though Article 2.29.1 specifically uses the term "importer". This contradiction in its own position makes clear that New Zealand understands that an "applicant" is obviously not synonymous with an "importer".

37. In light of the above, the Panel should rely on the dictionary definition of "importer" adopted by both Parties to this dispute: importer means "a person who, or company, enterprise, etc., which, imports goods or commodities from abroad".[51] This definition is reasonable, since, where an allocation mechanism exists, not everyone who is eligible to apply for a quota allocation actually applies for one, nor does everyone who has been granted a quota allocation necessarily use it to import goods.[52] By contrast, New Zealand's interpretation of the term "importer" would thus result in the absurdity of encompassing non-importers.

38. The interpretation of the term "TRQ quantities" and the scope of Article 2.29.1 is delineated by the ordinary meaning of "importer" because the obligation on a Party is to allow "importers" the opportunity to utilise TRQ quantities fully. This comports with Canada's interpretation of the term "TRQ quantities" as the specified amount granted to those who are in a condition or circumstance to render useful or convert to use a specified amount of TRQ quantity.[53] Read in this light, Article 2.29.1 is an obligation that pertains to "importers" and not to "applicants". This is supported by the meaning of "utilise TRQ quantities fully" as discussed above and in Canada's initial written submission.[54]

[51] First written submission of New Zealand, para. 131, citing Exhibit NZL-41: Definition of "importer" from Oxford English Dictionary Online.
[52] Under an FCFS system, a person is similarly an importer when they import goods or commodities from abroad.
[53] Initial written submission of Canada, para. 93.
[54] Ibid, paras. 89-97.

d) "To utilise" TRQ quantities means to import goods at the preferential tariff rate

39. New Zealand stated that it "agrees that to 'utilise' a TRQ, or the 'utilisation' of a TRQ, is for the importation of goods."[55] This is indeed consistent with the ordinary meaning of the word "utilise", that is, "to make or render useful, to convert to use, turn to account".[56] New Zealand's acknowledgement that to "utilise" a TRQ means the importation of goods is also consistent with the ordinary meaning of "utilise" in the context of Article 2.29.1, where it is specified that importers utilise, or render useful, the TRQ quantities they have been granted by importing goods.[57]

40. New Zealand's other arguments on the interpretation of "utilise" deviate from the ordinary meaning of this term in context by attempting to read into Article 2.29.1 requirements on the application for TRQ allocations. New Zealand argues that "utilise" also means "obtaining an allocation"[58] or "access to an allocation and use of an allocation"[59] because the "utilisation of a TRQ for the importation of a good necessarily includes the process of obtaining an allocation".[60] This argument cannot stand, as it is not supported by the ordinary meaning of "utilise" furnished by New Zealand nor by the text of Article 2.29.1, neither of which ever mention or use the terms "obtain", "access" or "allocation".

41. New Zealand's arguments on the interpretation of the phrase "utilise TRQ quantities" as including "obtaining an allocation" or "access to an allocation and use of an allocation" rely on its interpretation of the term "TRQ quantities" as meaning the total volume of TRQ, which is discussed above. If the term "TRQ quantities" is properly interpreted as referring to specified amounts allocated (or granted) to individual importers, New Zealand effectively states that Article 2.29.1 would not cover obtaining an allocation.[61]

[55] Rebuttal submission of New Zealand, para. 33.
[56] First written submission of New Zealand, para. 131, citing Exhibit NZL-34: Definition of "utilize" from Oxford English Dictionary Online.
[57] Initial written submission of Canada, para. 95
[58] Rebuttal submission of New Zealand, para. 33.
[59] Ibid, para. 36.
[60] Ibid, para. 33.
[61] Rebuttal submission of New Zealand, para. 64.

42. Further, as discussed above,[62] New Zealand's argument that the term "utilise" "necessarily includes the process of obtaining an allocation"[63] leads to internal inconsistency in Section D in the case where a Party does not use an allocation mechanism to administer its TRQs. For example, in an FCFS system, an importer utilises TRQ quantities without an allocation. As such, given that Article 2.29.1 applies whether or not an allocation mechanism exists, it is clear that the ordinary meaning of the term "utilise" was not intended to "necessarily" include access to an allocation. This is also the case with respect to Article 2.32.3, which requires a Party administering its TRQs using FCFS to publish "utilisation rates". This provision would not make any sense if "utilisation" meant "obtaining an allocation".

43. New Zealand argues that its interpretation of "utilise" as including both access to an allocation and use by importing goods is consistent with Article 2.30.3 because Article 2.30.3 uses the words "quota allocation" while Article 2.29.1 uses "TRQ quantities".[64] Canada has already explained above why "TRQ quantities" means the specified amount granted to individual importers, and that Article 2.29.1 applies whether access to the quota is granted through an FCFS system or an allocation mechanism. Article 2.30, in contrast, is only applicable when an allocation mechanism is used, so it is logical that it would use the term "quota allocation". Therefore, the distinction that New Zealand attempts to draw between Article 2.29.1 and Article 2.30.3 on the basis that the former is about the utilisation of TRQ quantities whereas the latter is about the utilisation of a quota allocation is a false one.

44. Further, New Zealand's arguments have no merit because it would not be logical for "utilise" to mean both "application for and utilisation" in Article 2.29.1, while in 2.30.3 the terms "application" and "utilisation" are spelled out separately. Rather, the distinction between "application" and "utilisation" in Article 2.30.3 makes clear that these are two different terms with distinct meanings. If the Parties had intended for both these concepts to be present in Article 2.29.1, the text could have included both of those words. Yet the Parties used solely the term "utilise", thus

[62] See paragraphs 25-26, 32, above.
[63] Rebuttal submission of New Zealand, para. 33.
[64] Ibid, paras. 36-37.

signifying that Article 2.29.1 only pertains to importation and not to application for an allocation.

45. In respect of the relevance of the meaning of the word "utilise" in the ILA, New Zealand ignores the fact that both Canada and New Zealand, as well as all other Parties of the CPTPP, are Members of the ILA. Thus, the terms "utilise" and "utilisation" used in the ILA reflect the common understanding of all the CPTPP Parties, such that when the same terms are used in the CPTPP, their meanings in the ILA are an informative interpretative tool for the Panel.

46. Moreover, the ILA is specifically incorporated into the CPTPP. Article 2.28.1 of the CPTPP requires the Parties of the CPTPP to implement and administer TRQs in accordance with, *inter alia*, the ILA. Article 2.28.1 also requires implementation and administration of TRQs in accordance with Article 2.12, which in turn prohibits the Parties of the CPTPP from adopting or maintaining a measure that is inconsistent with the ILA. In this context, the provisions of the ILA that Canada referred to in its initial written submission make a clear distinction between utilisation of, and application for, an allocation.[65] The provisions of the ILA confirm the interpretation that these concepts are distinct in the CPTPP.

47. While ignoring the direct relevance of the ILA to the provisions of the CPTPP at issue, New Zealand argues that the meaning of the word "utilise" in the ILA "is not a 'rule of international law'".[66] That is not the point. Canada recognizes that the ILA does not contain a definition of "utilise". However, the ILA does establish relevant rules of international law applicable between the Parties[67] pertaining to the administration and utilisation of quotas. Therefore, in accordance with Article 31.3(c)

[65] Initial written submission of Canada, para. 100.

[66] Rebuttal submission of New Zealand, para. 39. New Zealand cites as reference Appellate Body Report Body Report, *US – Anti-Dumping and Countervailing Duties (China),* para. 308. The Appellate Body report found that "the reference to 'rules of international law' in Article 31.3(c) 'corresponds to the sources of international law in Article 38(1) of the Statute of the International Court of Justice'". Yet, paragraph (a) of Article 38 of the Statute of the ICJ lists as a source of international law: "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states". See Statute of the International Court of Justice, art. 38 (1), Exhibit CDA-49.

[67] The CPTPP and the ILA are both "international conventions […] establishing rules expressly recognized by the contesting states", i.e., both Canada and New Zealand, in accordance with Article 38 of the Statute of the ICJ.

of the VCLT, the meaning of "utilise" in those rules must be taken into account in the interpretation of the same term in Section D of Chapter 2 of the CPTPP.

48. It is clear that the ILA rules are relevant between the Parties given that Article 2.28.1, including its reference to Article 2.12, requires TRQs to be implemented and administered in conformity with the ILA. In addition, the ILA rules cited by Canada in its initial written submission deal specifically with the administration of quotas, including allocation and utilisation of quotas[68], and the provisions of Section D of Chapter 2 of the CPTPP pertain to the same subject matter. Therefore, the Panel must take into account the meaning of "utilise" and "utilisation" in the ILA, where these terms as used in the ILA are clearly in reference to importation as a separate and distinct step from the application for, or allocation of, quota quantities. It would not make sense to apply a meaning of "utilise" in Article 2.29.1 to include application for an allocation when "utilise" as used in the same context in the ILA clearly treats "utilisation" and "allocation" as distinct concepts. Such a divergent interpretation would be especially problematic given that the CPTPP obligates the Parties to implement and administer TRQs in accordance with the ILA. Therefore, in accordance with Article 31.3(c) of the VCLT, the Panel should reject New Zealand's interpretation and instead interpret Article 2.29.1 in a manner that is harmonious with the context of the rules of the ILA.

e) New Zealand has failed to make a *prima facie* case because its arguments rely on a flawed interpretation and an incorrect factual premise

49. Canada has demonstrated in the preceding section and in its initial written submission[69] that Article 2.29.1, based on the ordinary meaning of its terms read in context, establishes an obligation pertaining to a person, company, or enterprise who has been granted a specified quota quantity and consequently has the opportunity to utilise it by importing goods. Article 2.29.1 requires Parties to provide the opportunity to importers to fully utilise TRQ quantities they have been granted by permitting them to import the entire granted quantities.[70] Based on the ordinary meaning, New Zealand's arguments that the exclusion of retailers from the Notices

[68] Initial written submission of Canada, para. 100.
[69] Ibid, paras. 89-101.
[70] Initial written submission of Canada, para. 106

to Importers is a violation of Article 2.29.1[71] must fail because retailers in Canada are not "importers" who have received "TRQ quantities" and therefore they could not have been denied an opportunity to "utilise" those quantities by importing goods as contemplated in this provision.

50. In addition, New Zealand's argument that importers in a pool requesting more quota than is available under that pool are not able to access unallocated quota in another pool is factually incorrect.[72] As explained in Canada's initial written submission and Section II of this submission, if there are no eligible applicants within a particular pool, Canada will allow quota within that pool to "move" to eligible applicants within other pools in order to endeavour to fully allocate the TRQ.[73] As such, New Zealand's argument on this issue relies on factually incorrect assumptions and therefore must fail.

51. Therefore, New Zealand has failed to make a *prima facie* case that Canada has acted inconsistently with Article 2.29.1.

2. In the alternative, if the term "TRQ quantities" refers to the total quantity of quota available under the TRQs, New Zealand has failed to prove that importers were not allowed the opportunity to utilise TRQ quantities fully

52. Even if the Panel were to accept New Zealand's interpretation of "TRQ quantities" in Article 2.29.1 as referring to the total quantity of quota available under the TRQs, Canada has demonstrated that New Zealand failed to establish that Canada has acted inconsistently with Article 2.29.1.[74] In its rebuttal submission, New Zealand argues that it is not required to prove trade effects, and dismisses the evidence in the alternative argument in Canada's initial written submission, for two reasons. First, New Zealand asserts that the evidence is a "distraction".[75] Second, it contends that the expert reports submitted by Canada do not address "whether more trade would occur" if pooling did not exist.[76] The first argument is a reversal of New Zealand's position from its initial written submission and is incorrect in law. The

[71] Rebuttal submission of New Zealand, para. 87.
[72] First written submission of New Zealand, para. 139.
[73] See Section II, above, and Initial written submission of Canada, paras. 81-86, 105.
[74] Initial written submission of Canada, paras. 108-124.
[75] Rebuttal submission of New Zealand, para. 17.
[76] Ibid, paras. 4, 48-49.

second argument is demonstrably untrue. The evidence shows that Canada's pooling system had no effect on TRQ utilisation from New Zealand for the CPTPP dairy TRQs and that factors other than Canada's pooling system were the cause of the lack of demand for imports from New Zealand. New Zealand has thus failed to discharge its burden to establish a *prima facie* violation, and its attempt to shift the burden to Canada should be rejected.

a) The Panel must give proper weight to the evidence that the measure had no effect on TRQ utilisation

53. New Zealand argues it does not need to demonstrate trade effects to establish a *prima facie* violation of Article 2.29.1.[77] However, this is effectively saying that the Panel should find a violation based on a supposition when there is direct evidence to the contrary. The entire basis of New Zealand's claim under Article 2.29.1 is that persons outside of a pool such as retailers would import more goods if pooling did not exist, or that importers in one pool would import more goods if they could obtain unallocated quota in another pool.[78] Both of these allegations necessitate evidence showing that they are true, as the Party making a claim is bound to prove its validity and put forward sufficient evidence to demonstrate a violation.[79]

54. New Zealand makes a number of assertions unsubstantiated by evidence in relation to its claim under Article 2.29.1. In its initial written submission, New Zealand argues at length that Canada's pooling system "encourages chronic underfill".[80] New Zealand specifically alleges that persons falling outside of the pools have no opportunity to utilise "TRQ quantities" and that importers in a pool who request more quota than is available under it are impeded from utilising "TRQ quantities" fully if there is unallocated quota in another pool.[81] Thus, according to

[77] Ibid, para. 49.
[78] First written submission of New Zealand, paras. 2-4, 33-38, 138-139. Canada already addresses the argument about how it distributes any unallocated quota in a pool to applicants in other pools in Section II of this submission.
[79] Article 70 of the CPTPP Rules of Procedure sets out this rule on the burden of proof. See also Appellate Body Report, *US — Wool Shirts and Blouses*, p. 16.
[80] First written submission of New Zealand, paras. 2-4, 33-38, 138-139.
[81] Ibid, paras. 138-139.

New Zealand, Canada's TRQ system "direct[s] access to TRQ quota away from importers that are likely to use it, and towards entities that are not".[82]

55. These arguments are based on an assumption of a causal relationship between Canada's TRQ administration and the so-called "chronic underfill", and a speculation that TRQ utilisation would have been higher if the pooling system did not exist.[83] However, a violation of Article 2.29.1 cannot be established based on speculation. As New Zealand recognizes in its arguments,[84] Article 2.29.1 requires a Party to administer TRQs such that it allows importers economic opportunities for importation, but Article 2.29.1 provides no guarantee of actual imports since the utilisation of TRQs for importation of goods will depend on the economic decisions of importers. New Zealand even notes this in its rebuttal submission, stating that Article 2.29.1 is about allowing importers the opportunity to utilise TRQ quantities and "it is for importers to decide whether to take up that opportunity or not."[85] Canada provides this opportunity by fully allocating the total quota volume of all TRQs. If New Zealand considers that Canada's full allocation of all TRQ volumes is somehow not providing the opportunity for importers to utilise their allocations, it must provide evidence to show this is true.

56. There is no question that CPTPP rules allow Canada to maintain an allocation mechanism. Under an allocation mechanism, a Party has the right to determine how the aggregate TRQ volume is distributed. Further, the use of an allocation mechanism does not necessarily lead to lower utilisation of TRQ quantities. A Party alleging that an allocation mechanism does cause lower utilisation of TRQ quantities must prove that it does so. In this respect, the evidence submitted by Canada showing that its allocation mechanism had no effect on the level of utilisation of the TRQ quantities is highly relevant.

57. Canada recalls that the arguments raised by New Zealand itself rested on trade effects, namely "chronic underfill" allegedly caused by Canada's TRQ system.[86] Having made these allegations in its initial written submission, New Zealand now argues that it has no burden of proof because it is for Canada to disprove New

[82] Ibid, paras. 3 and 33 (emphasis removed).
[83] Ibid, paras. 2, 34, 37.
[84] Ibid, paras. 33-38.
[85] Rebuttal submission of New Zealand, para. 50.
[86] First written submission of New Zealand, paras. 33-38.

Zealand's unsupported assertions. Notwithstanding that Canada has done that already, New Zealand has done nothing in its rebuttal submission to address the fact that, as the complaining Party, it has failed to establish, even on a *prima facie* basis, that Canada's pooling system had any effect on TRQ utilisation for any of Canada's 16 CPTPP dairy TRQs. Moreover, setting aside the issue of burden of proof, Canada has presented extensive evidence affirmatively demonstrating that various factors other than Canada's administration of TRQs explain the utilisation rate for each of the TRQs. This evidence is highly relevant to showing that there was no violation of the requirement to allow importers the opportunity to utilise TRQ quantities fully.

58. The use of the word "fully" in Article 2.29.1 in conjunction with the word "opportunity" shows that an examination of the factual circumstances and the actual effects of a measure on utilisation is relevant. Canada recalls its initial written submission, which explained that "opportunity" may be defined as "a time, condition, or set of circumstances permitting or favourable to a particular action or purpose". In the context of Article 2.29.1, "the opportunity" thus signifies an instance of a circumstance permitting a particular action. There cannot have been a violation of the requirement to allow the opportunity to fully utilise TRQ quantities if the evidence shows that factors other than Canada's pooling system have caused New Zealand's alleged "underfill" of dairy TRQs. This evidence speaks precisely to New Zealand's argument that "it is for industry to decide, based on all relevant commercial factors, the extent to which it wants to take up those opportunities"[87], as it shows that those factors explain why industry has generally not taken up those opportunities.

59. Parallels can be drawn between Article 2.29.1 and the legal requirements for demonstrating a violation of Article XI:1 of the GATT 1994, where evidence on the effects of a measure is relevant. Article XI:1 reads as follows:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

[87] Rebuttal submission of New Zealand, para. 4.c.

60. As the Appellate Body explained,

> Article XI:1 refers to prohibitions or restrictions 'on the importation […] or on the exportation or sale for export'. Thus, in our view, not every condition or burden placed on importation or exportation will be inconsistent with Article XI, but only those that are limiting, that is, those that limit the importation or exportation of products.[88]

61. In *Indonesia – Import Licensing Regimes,* the panel cited the Appellate Body's finding that while a panel is not required to examine data on the trade effects of a measure in practice to show whether the effect of a measure is a restriction, it found that "where it exists, 'evidence on the observable effects of the measure should, obviously, be taken into consideration'".[89] Moreover, the Panel in that WTO dispute agreed with New Zealand's position on the relevance of data on the effect of a measure, finding that "the Panel may nonetheless use statistical data as evidence to inform its overall examination of whether a measure has a limiting effect."[90]

62. Like Article XI:1 of the GATT 1994, Article 2.29.1 also protects competitive opportunities, as the obligation is specifically on the Parties to administer their TRQs in a manner that allows importers the opportunity to utilise TRQ quantities fully. Therefore, similar to Article XI:1, evidence on whether the observable effect a measure has on the actual importation of products is relevant to whether there may be a violation of Article 2.29.1. As such, where such evidence does exist it must be taken into consideration and should be given weight.

b) The evidence shows that TRQ utilisation would not be higher absent Canada's pooling system

63. Canada provided the Panel detailed evidence in two expert reports showing that, in fact, economic factors other than Canada's TRQ administration explain the utilisation rates of each of the 16 TRQs.[91] New Zealand acknowledges the veracity of the reports' conclusions in stating that "trade is inevitably impacted by a range of

[88] Appellate Body Report, *Argentina – Import Measures*, para. 5.217.
[89] Appellate Body Report, *Peru – Agricultural Products*, para 5.56. Note, the cited quote pertained to Article 4.2 of the Agreement on Agriculture. However, it was found to be relevant to Article XI:1 of the GATT 1994 by the panel in *Indonesia – Import Licensing Regimes*. See *Indonesia – Import Licensing Regimes*, para. 7.50.
[90] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.50.
[91] Initial written submission of Canada, paras. 108-124.

different factors".[92] New Zealand only challenges the conclusions of the two expert economic reports in its rebuttal submission by incorrectly asserting that the reports do not address whether TRQ utilisation would be higher absent Canada's pooling system, and that "a more flexible approach to TRQ administration" would offer "greater opportunities" for New Zealand exporters.[93]

64. New Zealand's arguments that "more trade would occur" and that "greater opportunities" would exist for exports from New Zealand are describing trade effects. However, New Zealand has not substantiated these arguments with any evidence that TRQ utilisation would be higher if Canada's TRQs were administered differently. Considering these two arguments form the sole basis of New Zealand's claim of any causal link existing between Canada's pooling system and whether importers were not allowed the "opportunity" to utilise TRQs fully, New Zealand's lack of evidence supporting these claims means that it has failed to make a *prima facie* case.

65. Canada, however, has provided extensive evidence to show that, in fact, TRQ utilisation on dairy imports from New Zealand would be no different if Canada's pooling system did not exist. [[[redacted][4]]]

66. [[[redacted]]]

[92] Rebuttal submission of New Zealand, para. 4.
[93] Ibid, paras. 4.a-b.
[94] Dr. Pouliot's Expert Report, Exhibit CDA-1 **(CONFIDENTIAL INFORMATION)**, Table 8, Table 9, paras. 200, 211; Dr. Mussell's Expert Report, Exhibit CDA-2 **(CONFIDENTIAL INFORMATION)**, paras. 39, 49, 78-79, 82.
[95] Dr. Mussell's Expert Report, Exhibit CDA-2 **(CONFIDENTIAL INFORMATION)**, para. 78.
[96] Ibid, paras. 54, 77-78.
[97] Ibid, para. 82.

[redacted]]

67. Dr. Pouliot conducted a detailed economic analysis of each of the products subject to TRQs in Canada's Schedule. Canada's initial written submission summarizes the conclusions found for each of the products.[99] [redacted]]

68. In addition, Canada has submitted other positive evidence showing: [[redacted]

[98] Ibid.
[99] Initial written submission of Canada, paras. 75-80, 111-116, 119-124.
[100] [[Canada outlines in its initial written submission the conclusions of Dr. Pouliot's report on the products for which the protection rate is found to be zero, meaning there is a lack of demand for those products. It also outlines the other conclusions or situations where Dr. Pouliot is not able to reach a conclusion.]] See Initial written submission of Canada, paras. 111-115. See also Dr. Pouliot's Expert Report, Exhibit CDA-1 **(CONFIDENTIAL INFORMATION)**, Table 8, Table 9, paras. 200, 211.
[101] Dr. Pouliot's Expert Report, Exhibit CDA-1 **(CONFIDENTIAL INFORMATION)**, para. 7. See paras. 69-94 of Dr. Pouliot's Expert Report for the complete analysis.
[102] Dr. Pouliot's Expert Report, Exhibit CDA-1 **(CONFIDENTIAL INFORMATION)**, para. 7.
[103] Dr. Pouliot's Expert Report, Exhibit CDA-1 **(CONFIDENTIAL INFORMATION)**, para. 7.
[104] Initial written submission of Canada, para. 116; Dr. Pouliot's Expert Report, Exhibit CDA-1 **(CONFIDENTIAL INFORMATION)**, paras. 58-68.
[105] Initial written submission of Canada, para. 117; Dr. Mussell's Expert Report, Exhibit CDA-2 **(CONFIDENTIAL INFORMATION)**, paras. 78-79, 82.
[106] Initial written submission of Canada, para. 118.
[107] 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.

imports from New Zealand and therefore the TRQ fill rates.]] New Zealand does not dispute any of this evidence.

69. [[ ]] Canada asked Dr. Pouliot to review New Zealand's rebuttal submission and comment on New Zealand's statements in relation to his report, and Dr. Pouliot provided an addendum to his initial report.[109] [[

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70. [[

[108] Rebuttal submission of New Zealand, para. 4.
[109] Addendum to Dr. Pouliot's Expert Report, Exhibit CDA-50 **(CONFIDENTIAL INFORMATION)**.
[110] Addendum to Dr. Pouliot's Expert Report, Exhibit CDA-50 **(CONFIDENTIAL INFORMATION)**, paras. 4-6.
[111] Ibid, para. 5.
[112] Ibid, paras. 4-5.
[113] Ibid, para. 9.
[114] Ibid, paras. 3, 8; Dr. Pouliot's Expert Report, Exhibit CDA-1 **(CONFIDENTIAL INFORMATION)**, paras. 195-196.

[redacted]]

71. In addition to New Zealand's mischaracterisation of Canada's evidence, New Zealand repeats its assertion that processors act as gatekeepers to their own competition, again without providing any evidence to support it.[116] Canada notes that this too is describing an alleged trade effect that New Zealand fails to substantiate with any evidence. In response to the necessary implication of this assertion that processors are acting in collusion or as a cartel, New Zealand's response is simply to say New Zealand has "observed" that actors in Canada will act in their own commercial interest, implying that processors somehow have an economic interest not to import goods even when it is profitable to do so.[117] Once more, New Zealand's "observation" is not supported by any evidence. [[redacted]] Canada's administration allows the opportunity for importers to utilise the TRQ quantities fully.

72. In sum, while New Zealand asserts it does not need to prove trade effects, its claim that Canada's pooling system is in violation of Article 2.29.1 relies entirely on speculative (and unsubstantiated) trade effects of the measure. New Zealand has provided no evidence to support this claim, [[redacted]

[115] Addendum to Dr. Pouliot's Expert Report, Exhibit CDA-50 **(CONFIDENTIAL INFORMATION)**, para. 6.
[116] Rebuttal submission of New Zealand, para. 8
[117] Ibid, paras. 11-12.
[118] Dr. Pouliot's Expert Report, Exhibit CDA-1 **(CONFIDENTIAL INFORMATION)**, paras. 95-105.
[119] Addendum to Dr. Pouliot's Expert Report, Exhibit CDA-50 **(CONFIDENTIAL INFORMATION)**, paras. 12-15.
[120] Initial written submission of Canada, para. 115.

[redacted]]

Therefore, even if the Panel were to accept New Zealand's expansive interpretation of the text (which it should reject), New Zealand has nevertheless failed to establish that the measure at issue is inconsistent with Article 2.29.1.

B. CANADA'S TRQ ADMINISTRATION IS CONSISTENT WITH ARTICLE 2.29.2(a)

73. New Zealand requests the Panel to interpret the phrase "condition, limit or eligibility requirement on the utilisation of a TRQ for importation of a good" as including eligibility requirements on the allocation of a TRQ.[121] New Zealand's claim under Article 2.29.2(a) must fail because it is based on a flawed interpretation that impermissibly either adds the word "allocation" to the text of Article 2.29.2(a) or reads entire phrases out of that provision.[122] Contrary to New Zealand's contention, Article 2.29.2(a) does not cover every condition, limit or eligibility requirement related to the administration of Canada's TRQs.[123] Article 2.29.2(a) establishes obligations only on conditions, limits or eligibility requirements pertaining to the "utilization of a TRQ for importation of a good".

74. Properly interpreted, "conditions, limits or eligibility requirements" in Article 2.29.2(a) exclusively relate to the importation of products, such as how products imported under a TRQ may be used, not to who may receive an allocation. Canada's pooling system is consistent with Article 2.29.2(a) because it does not impose any conditions, limits or eligibility requirements on the utilisation of a TRQ for the importation of goods.

[121] First written submission of New Zealand, paras. 89-90; rebuttal submission of New Zealand, para. 51.

[122] As Canada explains below, New Zealand's interpretation reads out "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."

[123] Rebuttal submission of New Zealand, fn. 55. See also rebuttal submission of New Zealand, para. 78 where New Zealand argues Article 2.29.2(a) applies to "everything from quota allocation to the point at which product enters the relevant market".

1. New Zealand errs in its interpretation of "utilisation of a TRQ for the importation of a good"

a) The "utilisation of a TRQ for importation of a good" does not include the "allocation" of a TRQ

75. New Zealand argues that the "utilisation of a TRQ for importation of a good" means the "entire process" of obtaining an allocation, bringing the product into the market, and claiming preferential tariff treatment.[124] This overly broad interpretation of "utilisation of a TRQ for importation of a good" is based on an incorrect factual assumption and is not supported by the text of Article 2.29.2(a).

i) New Zealand's claim that it is not possible to utilise a TRQ without an allocation is factually incorrect

76. New Zealand claims that "it is simply not possible to utilise a TRQ without first obtaining an allocation".[125] This is based on an incorrect factual assumption. As Canada explained in its initial written submission, Article 2.29 applies to TRQ administration regardless of whether an allocation mechanism is used.[126] If a TRQ is administered through an FCFS system, the TRQ can be "utilised" without receiving an allocation because there are no allocations – licences are issued automatically when requested or imports are permitted until the total TRQ volume is exhausted. In other words, New Zealand is plainly wrong in claiming that "it is simply not possible to utilise a TRQ without first obtaining an allocation". [127]

77. Moreover, in the case of a TRQ that 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. For instance, a person who has received an allocation could decide not to import any products under the TRQ. In that case, there would be no "utilisation of the TRQ for importation of a good". This means that the key element in the phrase "on the utilisation of a TRQ for the importation of a good" is the action of actually importing a good under the TRQ. This is confirmed by the text and context of Article 2.29.2(a).

[124] Rebuttal submission of New Zealand, para. 61.
[125] Ibid, para. 51.
[126] See paragraphs 27-28, 34, above.
[127] Rebuttal submission of New Zealand, para. 51.

ii) New Zealand's interpretation of "utilisation" as including "allocation" is inconsistent with the text of Article 2.29.2(a) and the principle of effective interpretation

78. The general rule of treaty interpretation requires the Panel to ascribe meaning to all terms of the treaty.[128] As Canada has explained, the term "utilisation" in Article 2.29.2(a) must relate to the actual use of a TRQ for the importation of a good and does not include "allocation". To accept New Zealand's interpretation that "conditions, limits or eligibility requirements on the utilisation of a TRQ for the importation of a good" includes requirements on who is eligible for an allocation would require the Panel to either read the term "allocation" into Article 2.29.2(a) or read out the entire qualifier "on the utilisation of a TRQ for importation of a good" and the illustrative list that follows.[129]

79. First, 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. As Canada pointed out in its initial written submission, Article 2.29 applies to both TRQs administered by an allocation mechanism and those administered without an allocation mechanism, i.e., an FCFS system.[130] By contrast, Articles 2.30 and 2.31 only apply when the TRQ is administered by an allocation mechanism. Article 2.30.3 makes clear the distinction between "a condition for application for […] a quota allocation" or "a condition for […] utilisation of […] a quota allocation".[131] When the Parties wanted an obligation to apply both to the allocation of a TRQ as well as to the utilisation of a TRQ, they were explicit in referring to both the terms "allocation" and "utilisation". As another example, in Article 2.31.2, each Party is required to publish "information concerning amounts allocated" and "quota utilisation rates". If, as New Zealand claims "utilisation of a TRQ" includes "allocation", then the reference to "amounts allocated" in Article 2.31.2 would be superfluous.[132] As explained in Section III.A.1.d), above, it is not logical for "utilisation" to mean both allocation of a TRQ and utilisation of a

[128] See Appellate Body Report, *EC – Hormones*, para. 181, where the Appellate Body stated "the fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, and not the words which the interpreter may feel should have been used" (emphasis added).
[129] Canada addresses the illustrative list starting at para. 97, below.
[130] See paragraph 76, above.
[131] Initial written submission of Canada, para. 157.
[132] Rebuttal submission of New Zealand, para. 61.

TRQ for importation of a good in Article 2.29, while in other Articles the terms "allocation" and "utilisation" very clearly have separate and distinct meanings.

80. New Zealand's contention that the references to "allocation" and "utilisation" in Article 2.30.3 are not relevant to the interpretation of the term "utilisation" in Article 2.29.2(a) because Article 2.30.3 involves utilisation of an allocation and Article 2.29.2(a) involves utilisation of a TRQ is incorrect.[133] In order to utilise an allocation or utilise a TRQ, importers must import products under the TRQ; the only difference is that Article 2.29.2(a) also covers utilisation of a TRQ when there are no allocations (i.e., FCFS).

81. Further, as noted by Canada in its initial written submission, footnote 17 to Article 2.29.2(a) supports this interpretation.[134] To recall, 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.

82. Footnote 17 only makes sense if the reference to "utilisation of a TRQ for the importation of a good" means conditions, limits or eligibility requirements that apply or will apply when the allocation holder is actually importing the good under the TRQ (including under an FCFS system, for example). If the conditions, limits or eligibility requirements apply to the good whether or not the importer utilises the TRQ when importing it, for example general requirements, such as sanitary requirements, then Article 2.29.2(a) is not applicable.

83. If the Parties had intended for "allocation" to be captured by Article 2.29.2(a), based on the drafting of other Articles that address both allocation and utilisation, the Parties would have included the term allocation so that the Article 2.29.2(a) would read:

> Except as provided in subparagraphs (b) and (c), no party shall introduce a new or additional condition, limit or eligibility requirement on the [allocation of a TRQ or] utilisation of a TRQ for importation of a good, including in relation to specification or grade, permissible end-

[133] Ibid, paras. 36-37, 84.
[134] Initial written submission of Canada, paras. 146-148.

> use of the imported product or package size, beyond those set out in its Schedule to Annex 2-D (Tariff Commitments).[135]

84. However, Article 2.29.2(a) does not include a reference to allocation, despite the fact that elsewhere in Section D, obligations that do apply to both allocation and utilisation explicitly use both terms.

b) New Zealand's interpretation that "eligibility requirements" under Article 2.29.2(a) refers to those applying for an allocation is incorrect as it ignores the qualifier "on the utilisation of a TRQ for importation of a good" and the illustrative list

85. New Zealand also attempts to support its interpretation that Article 2.29.2(a) includes requirements regarding eligibility for allocation of a TRQ on the basis that the term "eligibility requirement" always refers to eligibility of individual applicants applying for an allocation.[136] However, in making this argument, New Zealand completely ignores the text and context of Article 2.29.2(a). As Canada argued in its initial written submission, each term in the phrase "condition, limit or eligibility requirement" imparts meaning to the others.[137] Notably, New Zealand implicitly recognizes that these terms are not mutually exclusive by defining "eligibility" as a type of "condition".[138] Further, these terms appear together in Article 2.29.2 and do not appear together in this manner anywhere else in the Agreement.

86. Moreover, the terms "condition", "limit" and "eligibility requirement" cannot be interpreted in isolation because all three terms are qualified by the phrase "on the utilization of a TRQ for importation of a good". As such, "condition, limit or eligibility requirement" must be interpreted together as generally covering the array of restrictions that a Party could impose "on the utilization of a TRQ for importation of a good" – that is, in respect of actual utilisation of the TRQ for importation including under an FCFS system with no "allocations".

[135] Emphasis added.
[136] Rebuttal Submission of New Zealand, paras. 65-68.
[137] Initial written submission of Canada, para. 135.
[138] 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).

87. New Zealand argues that, in Article 2.29.2(a), "'eligibility requirements' are references to the conditions that must be complied with to be eligible to apply and be considered for an allocation" because the term "eligibility" is used consistently in Section D with this meaning.[139] However, the term "eligibility requirement" is used differently in Article 2.29.2(a) than elsewhere in Section D or elsewhere in the Agreement. Thus, while New Zealand provides examples of other provisions using the words "eligibility" and "eligible" in Chapter 2, these examples support Canada's position that the meaning of "eligibility" in Article 2.29.2(a) and the other instances of its use depend on how "eligibility" is qualified by the specific text and context of each of those obligations.[140]

88. First, in contrast to Article 2.29.2(a), the use of "eligibility" and "eligible" in Article 2.30 is specifically qualified as pertaining to the eligibility of a person to apply for an allocation. In Article 2.30.1(a), the "eligibility requirements" are limited to whether a person is "able to apply and be considered for a quota allocation under the TRQ". In Article 2.30.1(e), "eligible" is qualified by "applicants". The use of "eligibility" in Article 2.30 is consistent with the function of that provision, which sets out obligations related to allocations. By contrast, Article 2.29.2(a) qualifies "eligibility" differently, tying it explicitly to utilisation of a TRQ for importation of a good.

89. Second, the general transparency and publication requirements in Article 2.28.3 also includes a reference to "eligibility requirements". However, the term "eligibility requirements" in Article 2.28.3 is used without any qualification, and therefore would cover any "eligibility requirements" within Section D.

90. Third, the use of the terms "eligible" and "eligibility" in Articles 2.12 and 2.13 is limited to conditions for obtaining an import license. Again, the text of those provisions specifically qualifies what "eligibility" pertains to, but differs from the specific qualification under Article 2.29.2(a) which ties "eligibility" to the actual utilisation of a TRQ. Therefore, New Zealand's attempt to draw a parallel between Articles 2.12 and 2.13 and Article 2.29.2(a) is without merit.[141]

[139] Rebuttal Submission of New Zealand, para. 66.
[140] Ibid, paras. 66.a-c, 67.a-d.
[141] Rebuttal submission of New Zealand, para. 67.

91. In each of the provisions identified above where the terms "eligible" or "eligibility" appear, they are used differently than in Article 2.29.2(a), either because they have different qualifiers or no qualifiers at all. Therefore, contrary to New Zealand's contention, there is no single, consistent use of those terms in Chapter 2.[142] In fact, the provisions identified by New Zealand serve to highlight the specific context of Article 2.29.2(a) and the necessity to take this specific context into account in interpreting the provision. The term "eligibility requirement" in Article 2.29.2(a) - which appears with the terms "condition" and "limit" and is qualified by the phrase "on the utilization of a TRQ for importation of a good" - should therefore be interpreted as covering product-focused requirements that must be met for a good to be eligible for actual importation under a TRQ.

92. New Zealand's interpretation, if not requiring reading in "allocation", would otherwise require reading out the phrase "on the utilisation of a TRQ for the importation of a good" along with the illustrative list that follows. New Zealand is quite clear in its rebuttal submission that the effect of its interpretation of Article 2.29.2(a) would be the same as if the phrase simply read:[143]

> 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).

93. In its rebuttal submission, New Zealand states:

> Article [2.29(2)(a)] does not require Parties to have anticipated and included in their Schedule every possible limit condition or eligibility requirement that they might ever wish to impose. If a Party wants to introduce a new limit, condition, or eligibility requirement, they can do so through the consultation and agreement process set out in Article 2.29(2)(b)-(c). What Article 2.29(2)(a) prohibits is the unilateral imposition of new limits, conditions, or eligibility requirements. [144]

94. Further, New Zealand states:

[142] Ibid, para. 66.
[143] Ibid, para. 51, fn. 55.
[144] Rebuttal submission of New Zealand, para. 53.

> If Parties wanted to implement limits, conditions, or eligibility requirements without going through the Article 2.29(2)(b)-(c) process, however, then it is correct that these would have to be included in their Schedules.[145]

95. It is clear from these two statements that New Zealand's interpretation of 2.29.2(a) would mean that neither Canada nor any other Party is permitted to impose any limits, conditions or eligibility requirements at all (whether on allocation or utilisation or any other aspect) that are not already set out in their Schedule, without going through the Article 2.29.2(b) and (c) consultation process.[146] The only way to read Article 2.29.2(a) that broadly is to read out the qualifier that applies to "condition, limit or eligibility requirement" (i.e., read out the phrase "on the utilisation of a TRQ for importation of a good") and read out the accompanying the illustrative list.

96. New Zealand is trying to give Article 2.29.2(a) an interpretation that fits New Zealand's view that it has an effective veto on any conditions, limits or eligibility requirements that are not contained in a Party's Schedule. To be clear, the only way this can be achieved is by impermissibly reading in "allocation" to Article 2.29.2(a) or impermissibly reading out the qualifier "on the utilisation of a TRQ for the importation of a good" and the illustrative list so that there is no qualification to "condition, limit or eligibility requirement".

c) The illustrative list supports Canada's interpretation of "condition, limit or eligibility requirement"

97. The illustrative list in Article 2.29.2(a) is strong support for Canada's interpretation that Article 2.29.2(a) concerns the importation of products, such as how products imported under a TRQ may be used, not to who may receive an allocation because each of the requirements listed pertains to goods, not to individuals. New Zealand raises three arguments in an attempt to rebut Canada's position that the illustrative list in Article 2.29.2(a) is important context for

[145] Ibid, para. 54.
[146] Ibid.

interpreting the scope of the obligation.[147] Canada addresses these arguments in turn.

98. First, New Zealand argues that conditions, limits or eligibility requirements in relation to specification or grade, permissible end-use of the imported products or package size are "not necessarily measures that could only be imposed at the importation stage".[148] New Zealand's argument about the timing of when a measure is applied misses the point because the timing does not alter the nature of the measure. If, as New Zealand suggests, a Party were to introduce a new requirement on importers to provide proof of import contracts for goods of a certain specification or grade in order to be eligible for an allocation, Article 2.29.2(a) would be engaged regardless of when the condition or requirement was imposed, because this would be a condition on the utilisation of a TRQ for importation of a good. In any event, New Zealand's example has no basis in reality. There would be no reason for a Party to disguise a condition on the utilization as a condition on the allocation because the condition on the utilization could not be enforced, unless the allocation letter explicitly specified that the importer must comply with the condition (i.e., that imported goods must be of a certain specification or grade), in which case the condition would no longer be disguised.

99. Second, New Zealand argues that there is no basis for applying the *ejusdem generis* principle to Article 2.29.2(a).[149] According to New Zealand, the principle only applies "where a <u>single</u> general term follows a <u>list</u> of specific items."[150] The phrase "single general term" is at best ambiguous but the emphasis placed by New Zealand on "single" and use of the word "term" suggests, pursuant to New Zealand's argument, that the "general" element of the principle has to be a single word. This is inconsistent with the Black's Law Dictionary definition of the principle that New Zealand itself put forward, as that definition refers to a "general word or phrase," and not a "general term".[151] A phrase is "a small group or collocation of words expressing a single notion, or entering with some degree of unity into the structure

[147] Rebuttal submission of New Zealand, paras. 71-78.
[148] Ibid, para. 73. See also rebuttal submission of New Zealand, para. 69.
[149] Rebuttal submission of New Zealand, para. 75.
[150] Ibid, para. 75 (emphasis in original).
[151] Ibid, para. 74, Exhibit NZL-52: Black's Law Dictionary (Thomson Reuters, 9th ed, 2009), p. 594. The Appellate Body considered an earlier but similar version of Black's in *US – Large Civil Aircraft (2nd Complaint)*, para. 615, fn. 1290.

of a sentence; a common or idiomatic expression".[152] The words "condition, limit, or eligibility requirement" in Article 2.29.2(a) is a phrase because it expresses a single notion, that is the array of restrictions that a Party could impose "on the utilisation of the TRQ for the importation of a good".[153] In any event, the use of the conjunction "or" between "condition, limit or eligibility requirement" means that each of these terms are followed by three examples of the same class.[154]

100. Each of the items in the illustrative list relates to the use of a TRQ for importation of a good, and none relate to an applicant's eligibility to apply for or receive an allocation. As Canada explained, the commonality among the items in the illustrative list is their product-focused nature.[155] The illustrative list supports Canada's interpretation that the phrase "condition, limit or eligibility requirement" in Article 2.29.2(a) only covers product-focused requirements for the importation of goods under a TRQ.

101. Third, New Zealand argues that the terms "limit, condition or eligibility requirement" must be interpreted in light of all relevant context and that, accordingly, the term "eligibility requirement", in light of the relevant context, is a reference to the requirement that an applicant must meet in order to be eligible to apply for an allocation.[156] Here, New Zealand's arguments simply mirror arguments it made earlier and that Canada rebutted in Section III.B.1.b), above.

2. Canada's interpretation would neither create a "loophole" nor provide "unfettered discretion" to Parties regarding how to allocate their TRQs

102. New Zealand argues that Canada's interpretation would create a "loophole for importing Parties seeking to restrict the use of their TRQs"[157] and would provide

[152] *Oxford English Dictionary*, OED online, "phrase", accessed 22 May 2023, <https://www.oed.com/view/Entry/142933?rskey=rHi3iA&result=1&isAdvanced=false#eid>, Exhibit CDA-51.
[153] Initial written submission of Canada, para. 135.
[154] That is, a "condition" "in relation to specification or grade, permissible end-use of the imported product or package size"; a "limit" "in relation to specification or grade, permissible end-use of the imported product or package size"; or an "eligibility requirement" "in relation to specification or grade, permissible end-use of the imported product or package size".
[155] Initial written submission of Canada, paras. 144-145.
[156] Rebuttal submission of New Zealand, para. 77.
[157] Ibid, paras. 69-70.

"unfettered discretion" to Parties regarding how to allocate their TRQs.[158] This is incorrect in all respects.

103. With respect to the alleged loophole, New Zealand asserts that "all a Party will have to do [to restrict the use of its TRQs] is to make sure that any new limits, conditions and eligibility requirements that they introduce apply at the allocation stage".[159] New Zealand then provides two hypothetical examples in an attempt to demonstrate its point. Both of New Zealand's examples infer that a Party would act in bad faith to circumvent its CPTPP obligations. Canada rejects this presumption, as Parties are presumed to act in good faith in respecting their international obligations.[160]

104. As explained above, the examples provided by New Zealand are conditions, limits or eligibility requirements on the utilisation of a TRQ but applied at the time of quota allocation. The timing of when a measure applies does not alter the nature of the measure. Therefore, if a Party were to take the measures described by New Zealand, Article 2.29.2(a) would be engaged regardless of when the requirement was imposed or how the measures were characterized by the Party taking them. A panel would have to make its own objective assessment and find that the condition was on the "utilization of a TRQ for the importation of a good".[161]

105. With respect to the alleged unfettered discretion, New Zealand asserts that Canada's interpretation "would effectively give importing Parties a carte blanche to undermine and restrict access to TRQs through the quota allocation process".[162] This argument is effectively the same as New Zealand's argument regarding an alleged "loophole" and should be similarly rejected.

106. Canada's interpretation would not create unfettered discretion. New Zealand's argument plainly ignores that Article 2.30 sets out limits on a Party's discretion to establish eligibility requirements for the allocation of its TRQs. Under Article 2.29.2(a), a Party could not introduce a product-focused condition, limit or eligibility

[158] Ibid, paras. 52-57.
[159] Ibid, para. 69.
[160] VCLT, art. 26.
[161] See CPTPP, Article 28.12.1.
[162] Rebuttal submission of New Zealand, para. 57.

requirement on the utilisation of a TRQ in the guise of an eligibility requirement for an applicant to be considered for an allocation.

C. CANADA'S ALLOCATION MECHANISM IS CONSISTENT WITH ARTICLE 2.30.1(a)

107. In its rebuttal submission, New Zealand continues to misinterpret Article 2.30.1(a) as requiring Canada to follow the "eligibility requirements" set out in paragraph 3(c) of Canada's Tariff Schedule. As Canada explained in its initial written submission, this is not the correct way to interpret Article 2.30.1(a). As the text and context of Article 2.30.1(a) make clear, Article 2.30.1(a) requires Canada to adhere to its own eligibility requirements – that is, those chosen by Canada as part of its allocation mechanism – during the quota allocation period. In parallel to Article 2.30.1(a), paragraph 3(c) of Canada's Tariff Schedule sets out the minimum requirements that any person must meet in order to receive an allocation under Canada's CPTPP TRQs. Below, Canada first explains the proper relationship between Article 2.29.2, Article 2.30.1(a) and paragraph 3(c) of Canada's Tariff Schedule. Then, Canada demonstrates that: (1) New Zealand's interpretation of Article 2.30.1(a) and paragraph 3(c) of Canada's Tariff Schedule – as elaborated upon in New Zealand's rebuttal submission – is not supported by the text and context of those provisions; (2) Canada's interpretation is consistent with the object and purpose of the CPTPP; and (3) New Zealand's interpretation of Article 2.30.1(a) and paragraph 3(c) would lead to a manifestly absurd or unreasonable result.

1. The relationship between Article 2.29.2, Article 2.30.1(a) and paragraph 3(c) of Canada's Tariff Schedule

108. In the section of its rebuttal submission that deals with Article 2.30.1(a), New Zealand begins by providing an incorrect overview of the relationship between Article 2.29.2(a), Article 2.30.1(a), and paragraph 3(c) of Canada's Tariff Schedule. To assist the Panel in its assessment and to correct New Zealand's erroneous depiction of the relationship among these provisions, Canada explains below the function of each of those provisions and the correct relationship among them.

109. **Article 2.29.2(a)** prohibits a Party from introducing "a new or additional condition, limit or eligibility requirement on the utilisation of a TRQ for importation of a good" beyond those set out in the Party's Tariff Schedule. As Canada explained

above,[163] Article 2.29.2(a) expressly covers conditions, limits and eligibility requirements "on the utilisation of a TRQ for importation of a good". In other words, Article 2.29.2(a) specifically and exclusively applies to conditions, limits and eligibility requirements that are product-focused in nature.

110. Unlike some of the other provisions in Section D, Article 2.29.2 is a general prohibition that applies regardless of whether the Party administers its TRQs through an FCFS system or through an allocation mechanism. To impose a restriction covered by that provision, the Party must consult and obtain the approval of the other Parties in accordance with the process described in subparagraphs (b) to (d) of Article 2.29.2. By requiring any new product-focused restriction to be approved by the other CPTPP Parties, Article 2.29.2 limits a Party's ability to impose new restrictions on the utilisation of a TRQ.

111. In parallel to Article 2.29.2, **Article 2.30.1(a)** provides that "in the event that access under a TRQ is subject to an allocation mechanism", 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". Contrary to Article 2.29.2, Article 2.30.1(a) specifically and exclusively applies in the situation where the Party administers its TRQs through an allocation mechanism. In this regard, the definition of "allocation mechanism" in footnote 18 to Article 2.30 recognizes that a Party can adopt "any system where access to the TRQ is granted on a basis other than first-come first-served". In deciding how to grant "access" to a particular TRQ, the Party will necessarily have to decide <u>who</u> has access to the TRQ.

112. Article 2.30.1(a) does not contain any reference to the Party's Tariff Schedule. Instead, Article 2.30.1(a) refers to "the importing Party's eligibility requirements". As Canada explained in its initial written submission,[164] the use of the possessive form in Article 2.30.1(a) indicates that this provision covers the Party's <u>own</u> eligibility requirements. In other words, Article 2.30.1(a) covers the "eligibility requirements" that a Party establishes as part of its allocation mechanism. The function of Article 2.30.1(a) is thus to ensure transparency and predictability in the allocation of a

[163] See Section III.B, above.
[164] Initial written submission of Canada, para. 169.

Party's TRQs: Article 2.30.1(a) ensures that the Party will actually apply its established eligibility requirements and will not arbitrarily deviate from them during the quota application period.

113. In connection with Article 2.30.1(a), **paragraph 3(c) of Canada's Tariff Schedule** limits Canada's discretion to establish eligibility requirements for the allocation of its CPTPP dairy TRQs.[165] Paragraph 3(c) does this by preventing Canada from issuing TRQ allocations to persons who are not active in the Canadian dairy sector and who are not compliant with the EIPA and its regulations. Paragraph 3(c) further restricts Canada's discretion by preventing Canada from limiting TRQ eligibility exclusively to persons that have previously imported the product subject to the TRQ. However, nothing in paragraph 3(c) prohibits Canada from further refining the universe of eligible applicants to certain market actors – provided these market actors are active in the Canadian dairy sector and are compliant with the EIPA and its regulations.

2. New Zealand has failed to establish that its interpretation of Article 2.30.1(a) and paragraph 3(c) of Canada's Tariff Schedule is supported by the text and context of those provisions

a) New Zealand's attempt to interpret Article 2.30.1(a) based on the text of Article 2.29.2 is manifestly incorrect

114. As Canada explained in its initial written submission, the text of Article 2.30.1(a) contains no reference to a Party's Tariff Schedule.[166] Instead, Article 2.30.1(a) refers to "the importing Party's eligibility requirements". The use of the possessive form in Article 2.30.1(a) indicates that the phrase "eligibility requirements" in that provision is a reference to the Party's <u>own</u> eligibility requirements – that is, those established by the Party as part of its allocation mechanism.

[165] Paragraph 3(c) of Canada's Tariff Schedule 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."

[166] Initial written submission of Canada, para. 168.

115. In response, New Zealand contends that since Article 2.29.2 includes the words "eligibility requirement" and contains a direct reference to the Party's Tariff Schedule, it follows that the reference to "eligibility requirements" in Article 2.30.1(a) "must [also] be" a reference to the Party's Tariff Schedule.[167]

116. New Zealand continues to offer no credible explanation as to why the reference to the Party's Tariff Schedule in Article 2.29.2 should be imported into Article 2.30.1(a). Contrary to New Zealand's contention, the fact that the term "eligibility requirement" appears in two separate provisions in Section D of Chapter 2 does not automatically mean that this term must have the same meaning in both provisions. As Canada has already explained,[168] the text of Article 2.29.2 expressly states that this provision only governs eligibility requirements "on the utilisation of a TRQ for importation of a good". By contrast, Article 2.30.1(a) clearly applies to the allocation of TRQs. This is made clear not only by the title of Article 2.30 – "Allocation" – but also by the words "to apply and to be considered for a quota allocation under the TRQ" in Article 2.30.1(a).

117. New Zealand's assertion is also contradicted by WTO jurisprudence. New Zealand contends that the meaning of the term "eligibility requirements" in Article 2.30.1(a) is "clear from Article 2.29(2)(a), which immediately precedes Article 2.30(1)(a)".[169] However, it is well established that a term in a treaty provision can have a different meaning than the same term in another provision of the same treaty depending on the context in which the term is used and other interpretative elements. For example, in *EC – Asbestos*, the WTO Appellate Body was called upon to interpret the term "like products" in GATT Article III:4, which also appears in Article III:2 of that same agreement. Despite the fact that the same term is used in both paragraphs, the Appellate Body found that this term does not have exactly the same meaning in GATT Article III:4 as in GATT Article III:2.[170]

118. In short, the context in which the term "eligibility requirements" is used in Article 2.30.1(a) indicates that it has a different meaning than the term "eligibility requirement" in Article 2.29.2(a). New Zealand offers no credible argument to the

[167] Rebuttal submission of New Zealand, para. 97.
[168] See Section III.B, above.
[169] Rebuttal submission of New Zealand, para. 98.
[170] Appellate Body Report, *EC – Asbestos*, paras. 94-96.

contrary. New Zealand's attempt to use the reference to "eligibility requirement" in Article 2.29.2(a) to interpret the term "eligibility requirements" in Article 2.30.1(a) is therefore inapposite.

b) New Zealand's interpretation of paragraph 3(c) of Canada's Tariff Schedule is not supported by the text of that provision

119. As Canada explained in its initial written submission, the text of paragraph 3(c) does not provide that "any" or "every" Canadian resident that is active in the Canadian dairy sector must be eligible to apply and be considered for a quota allocation under Canada's CPTPP dairy TRQs.[171] This supports the understanding that paragraph 3(c) does not exhaustively set out who is eligible to apply and be considered for an allocation under Canada's CPTPP dairy TRQs.

120. In response, New Zealand argues that "[t]he definition of an eligible applicant in Canada's Schedule is not itself an obligation" but that it instead "records the eligibility requirements that Canada can apply when allocating its TRQs".[172] According to New Zealand, Article 2.30.1(a) then requires Canada to allow persons that meet the definition of "eligible applicant" to apply and be considered for an allocation. Thus, according to New Zealand, there was no need to state that "any" or "every" resident of Canada that is active in the Canadian dairy sector must be eligible to apply and be considered for a quota allocation under Canada's CPTPP dairy TRQs, "because this is the effect of the obligation set out in Article 2.30(1)(a)".[173]

121. New Zealand's position is incorrect. It is self-evident that the second sentence of paragraph 3(c) does not create a stand-alone obligation. Instead, the term "eligible applicant", which appears in the first sentence of paragraph 3(c), is defined by the second sentence of paragraph 3(c). The second sentence of paragraph 3(c) is thus inextricably linked with, and must be read together with, the first sentence of paragraph 3(c).

122. It is noteworthy that the first sentence does not refer to the opportunity for a person to "apply and be considered" for an allocation. Instead, the first sentence

[171] Initial written submission of Canada, para. 177.
[172] Rebuttal submission of New Zealand, paras. 94 and 115.
[173] Ibid, para. 103.

provides that Canada "shall allocate" its TRQs in each quota year to "eligible applicants". The use of the words "shall allocate" indicates that Canada is required to issue TRQ allocations only to persons who meet the definition of "eligible applicants", and not to other persons. New Zealand concedes this when it states, in its rebuttal submission, that the first sentence of paragraph 3(c) "prohibits Canada from allocating quota to persons who do not meet its eligibility criteria, and prevents importers who have no involvement in the relevant industry [from] obtaining quota simply as a rent seeking exercise".[174]

123. Thus, when the first and second sentences of paragraph 3(c) are read together, they indicate that the function of paragraph 3(c) is to ensure that Canada designs its eligibility requirements in a manner that results in the issuance of TRQ allocations only to residents of Canada that are active in the Canadian dairy sector and that are compliant with the EIPA and its regulations.

124. Through its proposed interpretation of Article 2.30.1(a) and paragraph 3(c), New Zealand effectively seeks to draw a direct link between the second sentence of paragraph 3(c) and Article 2.30.1(a). But neither the text of Article 2.30.1(a) nor the text of paragraph 3(c) contains any such link. If the Parties had wanted to ensure that Canada would allow any person that meets the definition of "eligible applicant" in the second sentence of paragraph 3(c) to apply and be considered for a quota allocation, they could have simply drafted paragraph 3(c) in the following manner, without the first and third sentences:

> For purposes of Article 2.30.1(a), Canada shall ensure that any resident of Canada that is 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, is eligible to apply and be considered for a quota allocation.

125. This would have been a much more direct way to achieve the result that New Zealand now seeks through its proposed interpretation of Article 2.30.1(a) and paragraph 3(c). The fact that the Parties did not draft paragraph 3(c) in this manner shows that the Parties did not want Article 2.30.1(a) and paragraph 3(c) to be interpreted in the manner advocated by New Zealand.

[174] Ibid, para. 95.

126. New Zealand's position that it was not necessary to use the words "any" or "every" in paragraph 3(c) is also belied by the Tariff Schedule of other CPTPP Parties. For example, paragraph 4(c) of Viet Nam's Tariff Schedule provides that Viet Nam must administer TRQ-VN1 "through an annual auction, which shall take place in the first quarter of each year". In connection with this, subparagraph 4(d)(i) of Viet Nam's Tariff Schedule provides: "Any entity registered as a trader in accordance with Viet Nam's laws shall be eligible to receive a quota allocation through the auction". Like Canada, Viet Nam is bound by Article 2.30.1(a). Yet the Parties still felt the need to include the word "any" in subparagraph 4(d)(i) in order to make clear that every registered trader must be eligible to apply and be considered for a quota allocation under Viet Nam's TRQs. By contrast, the Parties did not use similar language in Canada's Tariff Schedule, showing that it does not exhaustively set out who is eligible to apply and be considered for a quota allocation.

c) The KORUS is relevant for the interpretation of Article 2.30.1(a) and paragraph 3(c) of Canada's Tariff Schedule

127. In its initial written submission, Canada explained that if the CPTPP Parties had wanted paragraph 3(c) to exhaustively set out who may apply and be considered for a quota allocation under Canada's CPTPP TRQs, they would have drafted paragraph 3(c) in a similar manner to Article 3.2.2(b) of the *United States – Korea Free Trade Agreement* ("KORUS"), which provides that "[u]nless the Parties otherwise agree, any processor, retailer, restaurant, hotel, food service distributor or institution, or other person is eligible to apply and be considered for a quota allocation".

128. In response, New Zealand argues that the KORUS is not relevant for the interpretation of Article 2.30.1(a) because "the eligibility requirements that Parties are entitled to apply under Article 2.30(1)(a) differ between Parties", while the KORUS is a "bilateral agreement" and thus "materially different".[175]

129. New Zealand's position is incorrect. Before addressing New Zealand's position in more detail, it is useful to reproduce the text of Article 2.32.2(b) of KORUS in full:

[175] Rebuttal submission of New Zealand, para. 110.

> Each Party shall ensure that:
>
> […]
>
> (b) any person of a Party that fulfills the importing Party's legal and administrative requirements shall be eligible to apply and to be considered for a quota allocation under the Party's TRQs. 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. Any fees charged for services related to an application for a quota allocation shall be limited to the actual cost of the service rendered […].

130. The phrase "[u]nless the Parties otherwise agree, any processor, retailer, restaurant, hotel, food service distributor or institution, or other person is eligible to apply and be considered for a quota allocation" in Article 2.32.2(b) of the KORUS is directly preceded by a sentence that is substantially equivalent to CPTPP Article 2.30.1(a). The phrase "eligible to apply and to be considered" appears in both sentences, which makes clear that the "eligibility" at issue in these two provisions is the same. Thus, when reading these two sentences together, the clear effect of KORUS Article 2.32.2(b) is that each KORUS Party must ensure that <u>every</u> "processor, retailer, restaurant, hotel, food service distributor or institution, or other person" is eligible to apply and be considered for a quota allocation under the Party's TRQs.

131. Canada does not contest that the CPTPP Parties' eligibility requirements "differ between the Parties".[176] However, this is not relevant to the specific question at issue – that is, why paragraph 3(c) omits language that specifies who is eligible to apply and be considered for a quota allocation under Canada's TRQs. The fact that the second sentence in KORUS Article 2.32.2(b) was included directly in Article 2.32.2(b) – and not in each Party's Tariff Schedule – simply reflects the fact that in the case of KORUS, that sentence applies to both the United States and South Korea.

132. Thus, New Zealand's argument that the CPTPP Parties have "separate Schedules"[177] with differing eligibility requirements does not detract from the fact that the CPTPP Parties could have followed a similar approach to that taken by the

[176] Rebuttal submission of New Zealand, para. 110.
[177] Ibid, para. 110.

United States and South Korea in the KORUS. If the CPTPP Parties had wanted paragraph 3(c) to be exhaustive, they could have drafted paragraph 3(c) by simply including a phrase similar to the second sentence of KORUS Article 2.32.2(b). But the CPTPP Parties did not draft paragraph 3(c) in this manner.

d) Canada's interpretation of Article 2.30.1(a) does not create any conflict with Article 2.29.2

133. In its initial written submission, Canada explained that the function of Article 2.30.1(a) is to ensure that the Party administering an allocated TRQ complies with the eligibility requirements that it has chosen as part of its allocation mechanism and does not arbitrarily deviate from those eligibility requirements during the quota application period.[178] In response, New Zealand argues that Canada's interpretation of Article 2.30.1(a) would create a "direct conflict" with Article 2.29.2.[179]

134. Canada's interpretation of Article 2.30.1(a) does not create any conflict with Article 2.29.2. The "conflict" perceived by New Zealand only arises due to New Zealand's own misinterpretation. As explained above in Section III B.1.b) above, New Zealand relies on the phrase "eligibility requirements […] to apply and to be considered for a quota allocation under the TRQ" in Article 2.30.1(a) in order to read in the words "to apply and to be considered" into the concept of "eligibility requirement" in Article 2.29.2(a).[180] But in interpreting the "eligibility requirements" in Article 2.30.1(a), New Zealand then relies on its position that "[u]nder Article 2.29(2)(a), the Parties are prohibited from introducing new or additional eligibility requirements beyond those set out in their Schedules" and therefore "the reference to 'eligibility requirements' in Article 2.30.1(a) must be a reference to eligibility requirements contained in a Party's Schedule".[181] It is unsurprising that New Zealand considers that Canada's interpretation of Article 2.30.1(a) creates a conflict with Article 2.29.2(a) when New Zealand impermissibly equates "eligibility requirements […] to apply and to be considered for a quota allocation" in Article 2.30.1(a) with the concept of "eligibility requirement on the utilisation of a TRQ for importation of a good" in Article 2.29.2(a).

[178] Initial written submission of Canada, paras. 169 to 172.
[179] Rebuttal submission of New Zealand, para. 97.
[180] Ibid, para. 66.
[181] Rebuttal submission of New Zealand, para. 97.

135. As Canada explained above, New Zealand's interpretation is simply not credible. Article 2.29.2 concerns the utilisation of a TRQ – that is, it concerns "conditions, limits or eligibility requirements" that a Party applies in respect of the actual importation of products under the TRQ.[182] By contrast, Article 2.30.1(a) clearly applies to the allocation of a Party's TRQs. Canada's interpretation is based on a proper reading of the text of the Agreement – in particular the term "utilisation" in Article 2.29.2(a) and the term "quota allocation" in Article 2.30.1(a) – in light of its context and its object and purpose, while New Zealand's reasoning is entirely circular. When each provision is correctly interpreted in accordance with its proper function, no conflict arises. On the contrary, both provisions function harmoniously together.

e) New Zealand's interpretation of Article 2.30.1(a) would create a redundancy with Article 2.29.2

136. According to New Zealand, Article 2.29.2(a) prohibits a Party from introducing any new or additional eligibility requirements in relation to the allocation of a TRQ beyond those set out in the Party's Tariff Schedule, while Article 2.30.1(a) obligates the Party to allow any person that meets the Party's eligibility requirements – that is, the eligibility requirements set out in the Party's Tariff Schedule or introduced in accordance with the process set out in Articles 2.29.2(b) and (c) – to apply and be considered for an allocation.[183] The result is that under New Zealand's interpretation, a Party that introduces an eligibility requirement in relation to the allocation of its TRQs "will breach both Article 2.29(2)(a) and Article 2.30(1)(a)".[184]

137. New Zealand's position is incoherent. If Article 2.29.2(a) already prohibits a Party from introducing any new or additional eligibility requirement regarding who may apply and be considered for a TRQ (as New Zealand contends), it is not clear why the Parties would have chosen to repeat that same obligation in Article 2.30.1(a). Contrary to New Zealand's interpretation and consistent with the principle of effective treaty interpretation, Article 2.29.2 and Article 2.30.1(a) are intended to serve different functions. As Canada explained in its initial written submission, the function of Article 2.30.1(a) relates to transparency and predictability it ensures that

[182] See Section III.B, above.
[183] Rebuttal submission of New Zealand, paras. 89-90.
[184] Ibid, para. 91.

the Party administering an allocated TRQ will actually apply the eligibility requirements that it has communicated to the public in accordance with Article 2.28.3.[185]

138. New Zealand concedes that its interpretation creates a "degree of overlap"[186] between these two provisions but attempts to overcome this deficiency by stating that the real function of Article 2.30.1(a) is to "preven[t] CPTPP Parties from impeding the ability of eligible applicants to apply for quota through means other than the introduction of new eligibility requirements (for example, if a Party imposed an arbitrary ban on a specific importer who was otherwise eligible to apply)".[187]

139. New Zealand's position here is internally inconsistent. In its initial written submission, New Zealand clearly stated that Canada's decision to limit TRQ eligibility to processors, distributors and further processors is a "new eligibility requirement" that falls within the scope of Article 2.29.2(a).[188] Thus, if the function of Article 2.30.1(a) is to prohibit a Party from impeding the ability of eligible applicants to apply for quota through means other than the introduction of new eligibility requirements, then it follows that – according to New Zealand's own logic – Canada's decision to limit TRQ eligibility to processors, distributors and further processors does not fall within the scope of Article 2.30.1(a). As such, New Zealand's interpretation cannot stand.

f) New Zealand's interpretation is not supported by the third sentence of paragraph 3(c)

140. The third sentence of paragraph 3(c) provides:

> 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.

141. As Canada explained in its initial written submission,[189] this sentence supports the understanding that paragraph 3(c) only sets parameters on Canada's right to establish eligibility requirements for the allocation of its TRQs, because it recognizes

[185] Initial written submission of Canada, paras. 171-172.
[186] Rebuttal submission of New Zealand, fn. 95 to para. 91.
[187] Rebuttal submission of New Zealand, para. 91, fn. 95 (emphasis added).
[188] First written submission of New Zealand, para. 97.
[189] Initial written submission of Canada, paras. 179-181.

that Canada is allowed to refine the universe of eligible applicants to certain market actors. Indeed, 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). The inclusion of the third sentence therefore supports the understanding that in exercising its discretion to establish 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.

142. In response, New Zealand argues that the third sentence in paragraph 3(c) is intended to prevent Canada from "interpret[ing] the requirement that importers be 'active in the applicable […] sector' […] as requiring applicants to be active in that sector as an importer".[190] In other words, according to New Zealand, "quota applicants must be permitted to show 'activity' in the relevant industry in ways other than proving a history of importing the relevant good".[191]

143. New Zealand's position is again internally inconsistent. Under New Zealand's interpretation, the second sentence of paragraph 3(c) sets the "the eligibility requirements that CPTPP Parties agreed Canada could impose on importers seeking allocations under its TRQs".[192] In other words, according to New Zealand, the second sentence of paragraph 3(c) exhaustively defines who is eligible to apply and be considered for an allocation under Canada's TRQs – without any opportunity for Canada to refine the universe of eligible applicants to certain market actors. But according to New Zealand, even though the second sentence of paragraph 3(c) is exhaustive, the Parties still felt the need to prohibit Canada from "interpreting" the second sentence in a particular manner. This is an inherently contradictory position. If the second sentence were truly exhaustive, there would have been no need to include the third sentence, as Canada would already be prohibited from "interpreting" the second sentence as it deems fit.

144. New Zealand's interpretation of the third sentence of paragraph 3(c) only makes sense if this sentence is read as a "for greater certainty" provision – that is, if the third sentence is read as clarifying that the term "active" in the second sentence

[190] Rebuttal submission of New Zealand, para. 95 (emphasis removed). See also paras. 111 and 112.
[191] Ibid, para. 111.
[192] Ibid, para. 92.

does not refer to import activity. But the third sentence in paragraph 3(c) does not begin with the words "for greater certainty" – instead, it begins with the words "[i]n assessing eligibility". If the third sentence of paragraph 3(c) was merely intended to be a clarification provision, the Parties would have used the words "for greater certainty" in the beginning of that sentence, as they did elsewhere in the Agreement – but they did not.[193] Therefore, the Panel should reject New Zealand's interpretation of the third sentence of paragraph 3(c).

g) Canada's interpretation of Article 2.30.1(a) would not give Canada "free rein" to choose any eligibility requirement that it deems fit

145. In its rebuttal submission, New Zealand contends that Canada's interpretation of Article 2.30.1(a) would give Canada unfettered discretion to choose any eligibility requirement that Canada deems fit.[194] Relatedly, New Zealand argues that Canada relies on the definition of "allocation mechanism" in footnote 18 to Article 2.30 in order to "read down" its substantive obligations under Section D (Tariff Rate Quota Administration) of Chapter 2 – including Canada's obligation under Article 2.30.1(a).[195]

146. Neither of these two assertions is correct. Canada does not rely on footnote 18 to diminish its obligations under Section D. Footnote 18 recognizes that Canada (or any other CPTPP Party) is allowed to administer its TRQs through an allocation mechanism, within the bounds of the Agreement. The natural corollary of this is that unless Section D expressly prohibits Canada from allocating its TRQs in a particular manner, Canada retains the discretion to allocate its TRQs in that manner.

147. Thus, contrary to New Zealand's suggestion, Canada does not contest that Section D imposes constraints on Canada's right to design an allocation mechanism for the administration of its CPTPP TRQs. However, where the Parties diverge is on the nature and scope of these constraints.

[193] For examples of other relevant provisions in the Agreement that use the words "for greater certainty", see Article 2.29.2(a), fn. 17 and Article 2.30.4, fn. 19.

[194] See, in particular, New Zealand's Rebuttal Submission, para. 96, where New Zealand states that "Canada argues that it has discretion to introduce any new eligibility requirements on the allocation of its TRQs, as it sees fit". See also Rebuttal submission of New Zealand, para. 106, where New Zealand states that Canada's interpretation "would give Canada unfettered discretion to limit access to its TRQs, including by excluding eligible importers with a genuine interest in importing the goods in question".

[195] Rebuttal submission of New Zealand, paras. 100 and 101.

148. New Zealand is also wrong to suggest that Canada's interpretation of Article 2.30.1(a) would give Canada "free rein" to choose any eligibility requirement that it deems fit for the allocation of its TRQs. As noted above, Canada recognizes and accepts that Section D imposes limits on Canada's right to design an allocation mechanism for the administration of its CPTPP TRQs – including on Canada's right to establish eligibility requirements for the administration of those TRQs. In particular, Section D limits Canada's discretion to establish eligibility requirements for the allocation of its CPTPP TRQs in five important ways:

1. Canada cannot design its eligibility requirements in a manner that results in the issuance of an allocation to a producer group, as required by the first clause of Article 2.30.1(b);

2. Canada cannot design its eligibility requirements in a manner that restricts access to an allocation only to persons that have previously purchased Canadian products, as required by the second clause of Article 2.30.1(b);

3. Canada cannot design its eligibility requirements in a manner that restricts access to an allocation exclusively to processors, as required by the third clause of Article 2.30.1(b);

4. Canada cannot design its eligibility requirements in a manner that limits access to its TRQs exclusively to persons that have previously imported the product subject to the TRQ, as required by the third sentence of paragraph 3(c); and

5. perhaps most importantly, Canada cannot design its eligibility requirements in a manner that results in the issuance of allocations to persons that are not active in the applicable Canadian dairy, poultry or egg sector, as required by paragraph 3(c) of Canada's Tariff Schedule.

149. New Zealand's claim that Canada's interpretation of Article 2.30.1(a) would give Canada "unfettered discretion" to establish any eligibility requirement that it deems fit for the allocation of its TRQs is thus plainly incorrect. On the contrary, under Canada's own interpretation of Article 2.30.1(a), Canada's discretion to establish eligibility requirements for the allocation of its TRQs is still constrained in several important ways. These constraints are based on the actual text of Section D, unlike New Zealand's arguments that attempt to expand the scope of Section D far beyond the ordinary meaning of its terms.

3. Canada's interpretation is consistent with the object and purpose of the CPTPP

150. In its initial written submission, Canada explained that its interpretation of Article 2.30.1(a) is consistent with the CPTPP's objective of trade liberalization while preserving the Parties' right to regulate.[196] Canada's interpretation prevents persons that are not connected in any way to the production, distribution or sale of dairy products from receiving an allocation under Canada's dairy TRQs. This, in turn, promotes greater utilisation of Canada's TRQs. In response to Canada's position, New Zealand argues that Canada's obligation not to issue TRQ allocations to persons outside the Canadian dairy sector is "not in dispute" and that Canada's interpretation is not trade facilitative.[197]

151. Contrary to New Zealand's assertion, the scope of paragraph 3(c) is very much at issue in this dispute. In Canada's view, the fundamental purpose of paragraph 3(c) is to exclude certain persons from accessing Canada's dairy TRQs – namely, persons that are not active in the applicable Canadian dairy, egg or poultry sector. For example, Canada's interpretation of paragraph 3(c) ensures that no TRQ allocation is issued to a commercial fisherman, a car manufacturer or an investment firm. As New Zealand recognizes in its rebuttal submission,[198] this diminishes the potential for rent-seeking behaviour, which in turn increases the potential for greater TRQ utilization rates.

152. New Zealand is thus wrong to suggest that Canada's interpretation is "not trade facilitative".[199] On the contrary, Canada's interpretation facilitates and expands trade in dairy products between Canada and New Zealand by ensuring that the persons who receive an allocation under Canada's dairy TRQs are well-placed to use the imported dairy products as part of their already-established business activities.

[196] Initial written submission of Canada, para. 184.
[197] Rebuttal submission of New Zealand, para. 106.
[198] Rebuttal submission of New Zealand, para. 105.
[199] Ibid, para. 106.

4. New Zealand's interpretation of Article 2.30.1(a) and paragraph 3(c) would lead to a manifestly absurd or unreasonable result

153. Article 31.1 of the VCLT requires the treaty interpreter to interpret the treaty "in good faith". One of the corollaries of this requirement is that a treaty should not be interpreted in a manner that leads to a result that is manifestly absurd or unreasonable.[200] As Canada explains below, New Zealand's interpretation is not only contradicted by the text and context of Article 2.30.1(a) and paragraph 3(c), it would also lead to a manifestly absurd or unreasonable result.

154. New Zealand argues that the definition of "eligible applicant" in the second sentence of paragraph 3(c) "records the eligibility requirements that Canada can apply when allocating its TRQs".[201] New Zealand further asserts that, in connection with paragraph 3(c), Article 2.30.1(a) obligates Canada to allow any person that meets the definition of "eligible applicant" to apply for and be considered for an allocation.[202] While New Zealand never explains (in either of its two submissions) how it interprets the second sentence of paragraph 3(c), the logical conclusion of New Zealand's position is that Canada would be required to permit access to its CPTPP dairy TRQs to <u>any</u> resident of Canada that is active in the Canadian dairy sector.

155. Canada notes that in addition to retailers and food service operators, the following entities all sell or serve dairy or dairy-containing products to recipients of their services: hospitals; educational institutions (e.g., schools and universities); child daycares; nursing facilities; and entities providing community services (e.g., food banks). On the face of New Zealand's interpretation, all of these entities (and potentially others) would become eligible for a TRQ allocation under Canada's CPTPP dairy TRQs.

156. As of June 2022, Canada had approximately 115,934 retailers and food service operators – namely 26,849 food and beverage stores; 71,006 food services and drinking places; 10,179 entities providing accommodation services (e.g.,

[200] Panel Report, *US – Gambling*, para. 6.49; Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 945, fn. 2127.
[201] Rebuttal submission of New Zealand, para. 94.
[202] Ibid, para. 103.

hotels); 6,666 general merchandise stores; and 1,234 entities providing community services (e.g., foodbanks).[203] Similarly, as of June 2022, Canada had approximately 15,197 entities providing educational services; 1,095 hospitals; 11,177 nursing and residential care facilities; and 13,822 entities providing child daycare services.[204] In total, therefore, there were approximately 157,225 entities selling or serving dairy or dairy-containing products to customers, patients or students in Canada as of mid-2022. Under New Zealand's interpretation of Article 2.30.1(a) and paragraph 3(c), all of these entities would become eligible to apply and be considered for a TRQ allocation under Canada's CPTPP dairy TRQs.

157. Under Canada's current eligibility criteria, there are approximately 6,900 potential eligible applicants – namely 397 dairy processors, 6,165 further processors and 338 distributors.[205] Thus, compared to the current universe of potential eligible applicants, New Zealand's interpretation of Article 2.30.1(a) and paragraph 3(c) would increase the number of potential eligible applicants by a factor of 25. New Zealand's interpretation would therefore make it extremely difficult for Canada to administer its CPTPP dairy TRQs in a manner compatible with the following obligations in Section D:

- the obligation to ensure that a Party's procedures are "administered in a timely manner" under Article 2.28.2, as Canada would simply not have time to examine and process all potential TRQ applications within a reasonable timeframe;

- the obligation to ensure that "each allocation is made in commercially viable shipping quantities" under Article 2.30.1(c), as the high number of eligible applicants could lead to minuscule TRQ allocations;

- the obligation to ensure that "quota allocation takes place no later than four weeks before the opening of the quota period" under Article 2.30.1(g), as the high number of eligible applicants would likely make it extremely difficult for Canada to issue every individual TRQ allocation four weeks before the opening of the quota period;

- the obligation to ensure that "there is a mechanism for the return and reallocation of unused allocations in a timely and transparent manner that provides the greatest possible opportunity for the TRQ to be filled"

[203] Food or Agriculture Sector - North American Industry Classification System Business Count, Exhibit CDA-52.
[204] Ibid.
[205] Food or Agriculture Sector - North American Industry Classification System Business Count, Exhibit CDA-52.

under Article 2.31.2, as the high number of TRQ allocations would likely make it extremely difficult for Canada to reallocate returned quantities in a timely fashion; and

- the obligation to publish "the name and address of allocation holders on […] [the Party's] designated publicly available website" under Article 2.32.4, as the high number of allocation holders would likely make it extremely difficult for Canada to publish information on every TRQ allocation holder in a timely and accurate manner.

158. In sum, New Zealand's interpretation of Article 2.30.1(a) and paragraph 3(c) must fail, as it would effectively preclude Canada from administering its CPTPP dairy TRQs in a manner consistent with its obligations under Section D, which by implication would negate Canada's right to administer its CPTPP dairy TRQs through an allocation mechanism. This is a manifestly absurd or unreasonable result. Contrary to New Zealand's interpretation, the CPTPP Parties must have intended that Canada would be able to refine the universe of eligible applicants to certain market actors, thus allowing Canada to administer its TRQs through an allocation mechanism.

D. CANADA ADMINISTERS ITS DAIRY TRQs IN CONFORMITY WITH ARTICLE 2.30.1(b)

159. In its rebuttal submission, New Zealand continues to misinterpret Article 2.30.1(b).[206] New Zealand argues that Canada will contravene this provision "if it limits access to one, several or all allocations under a TRQ to Processors."[207] New Zealand misunderstands the scope of the Processor Clause and its claim of violation relies on an impermissibly broad interpretation of the term "allocation". Put simply, New Zealand has failed to show that Canada's measures have limited access to any "allocation" to processors.

160. Canada addresses below the arguments raised by New Zealand in the order they appear in its rebuttal submission. First, Canada demonstrates that the term "allocation" refers to the concept of a share of the TRQ that is, or that may be,

[206] Canada and New Zealand agree that Article 2.30.1(b) contains three substantive requirements. In addition to the Processor Clause (which requires that a Party ensure that it does not "limit access to an allocation to processors"), Article 2.30.1(b) requires that a Party ensure "it does not allocate any portion of the quota to a producer group" (the "Producer Clause") and that it does not "condition access to an allocation on the purchase of domestic production" (the "Domestic Production Clause"). See First written submission of New Zealand, para. 59 and Initial written submission of Canada, fn. 175.

[207] Rebuttal submission of New Zealand, para. 116.

granted to an individual applicant rather than a portion or amount of the TRQ's volume. Second, Canada shows that the term "an allocation" means "every allocation" such that the Processor Clause prohibits a Party from reserving access to allocations exclusively for processors. Third, Canada demonstrates that its interpretation gives the Processor Clause *effet utile* and does not produce the absurd results alleged by New Zealand. Fourth, Canada shows that its interpretation of the Processor Clause conforms to the object and purpose of the CPTPP and the function of Article 2.30.1 while New Zealand's interpretation ignores and undermines the discretion reserved for Parties to administer TRQs using an allocation mechanism of their choosing. Fifth, Canada shows that the language used in its Schedule supports the conclusion that further processors in Canada's dairy supply chain are not "processors" for the purposes of the Processor Clause. Finally, Canada demonstrates that the CUSMA Dairy I panel report is of limited value, at most, to this Panel which must conduct its own VCLT interpretation of the CPTPP Processor Clause.

1. The meaning of "allocation" is a share of a TRQ that may be allocated to individual applicants rather than a portion or volume of TRQ quantity

161. In its initial written submission, Canada demonstrated that the term "allocation", interpreted in context, means a share of a TRQ that may be allocated to a particular applicant rather than an indeterminate portion, or volume, of TRQ that may be allocated to applicants, plural (as suggested by New Zealand).[208] In its rebuttal submission, New Zealand fails to identify any context suggesting an alternative interpretation and appears to concede that an allocation is the share granted to an individual applicant.[209] However, New Zealand argues that before allocations have been granted, their size is "necessarily indeterminate" and that an entire TRQ or an entire pool could be "an allocation" as the entire TRQ or pool "could theoretically be granted to a single applicant".[210] Based on this reasoning, New Zealand argues that the meaning of "allocation" is academic because Canada will

[208] Initial written submission of Canada, para. 195, responding to New Zealand's assertion that an "allocation" can refer to "a potential portion or share of the TRQ that may be granted to an applicant/applicants" (see First written submission of New Zealand, para. 70 (emphasis added)).

[209] For example, New Zealand states that an allocation is a potential portion "that may be granted to an applicant" (see Rebuttal submission of New Zealand, first subheading on p. 35). Similarly, New Zealand notes that the size of allocations are indeterminate "[b]efore allocations have been granted to individual applicants" and argues that an allocation could be equivalent to the entire TRQ or an entire pool if "granted to a single applicant" (see Rebuttal submission of New Zealand, para. 119).

[210] Rebuttal submission of New Zealand, para. 119.

have breached the Processor Clause regardless of whether processor and further processor pools are "an allocation" in and of themselves or whether the pools are made up of indeterminate allocations.[211] This conclusory statement is fundamentally flawed and based on New Zealand's misunderstanding of the term "allocation".

162. Canada agrees that the size of "allocation[s]" are indeterminate before they are granted. However, New Zealand appears to confuse the size or volume of an "allocation" actually granted (or theoretically granted) with the meaning of the term "allocation" in the Processor Clause. Throughout Section D, the term "allocation" is used to refer to the concept of a share that is, or that may be, granted to an individual applicant regardless of volume. Article 2.30.1(c) provides context demonstrating that the concept of an "allocation" is distinct from a given allocation's volume or TRQ volumes in general. It requires that "each allocation is made in commercially viable shipping quantities and, to the maximum extent possible, in the amounts that importers request."[212] Clearly, 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. Thus, the size of an allocation is indeterminate and irrelevant for the meaning of the term as used in Section D – the rights and obligations associated with an "allocation" (such as the exclusive right to use the allocation to import the associated volume of qualifying goods at a preferential duty rate) attach regardless of an allocation's volume or potential volume.

163. This means that the Processor Clause is not concerned with the amount or volume of a TRQ that may be allocated to individual applicants or the cumulative amount or volume allocated to processors and non-processors. It simply requires that a Party ensure that it does not "limit access to an allocation to processors."[213] The Processor Clause is otherwise silent with regard to the allocations that non-processors must be able to access. This contrasts with the immediate context provided by the Producer Clause, which provides that a Party shall ensure that it

[211] Ibid, para. 120.
[212] Article 2.30.1(c) is the only obligation in Section D that pertains to the size or amount of TRQ allocations.
[213] New Zealand and Canada agree that "access" refers to the right to obtain or acquire something – here an "allocation". See First written submission of New Zealand, para. 68 and Initial written submission of Canada, fn. 177.

does "not allocate any portion of the quota to a producer group",[214] clearly indicating that no amount of the quota may be allocated to a producer group. Accordingly, the Processor Clause simply requires that non-processors are able to obtain "an allocation". If the Parties had intended to prohibit a Party from limiting access to a certain volume of the TRQ to processors, they would not have used the phrase "access to an allocation" in the Processor Clause. Instead, they could have used language similar to that used in the Producer Clause, and prohibited a Party from limiting access to "any portion of the quota" to processors.

164. In contrast to an "allocation", a pool is a reserved portion, or volume, of TRQ quantity set aside for first access by a specified group within the dairy supply chain. Persons from the specified group may apply for an allocation and the amount of that allocation will normally[215] be calculated from the amount reserved in the pool. In and of itself, this reserved volume does not limit the number of allocations available to potential applicants covered by the pool or the number of allocations available to applicants covered by other pools. For example, even if the quota volume initially set aside under the processor pool in Canada's Cheeses of All Types TRQ is allocated among processors, any and every eligible distributor that applies for an allocation can receive "an allocation" calculated from the quota volume set aside under the distributor pool. In this example, the size of each allocation available to distributors will be limited by the fact that the quota volume set aside under the processor pool will be allocated among processor(s). However, this does not violate the Processor Clause because it contains no obligations with regard to the size of allocations – it only disciplines a Party's ability to limit access to allocations.

2. The term "an allocation" in the Processor Clause means "every" allocation

165. New Zealand's claim that the phrase "an allocation" means "any allocation" relies heavily on the context provided by the Domestic Production Clause while dismissing the context provided by the Producer Clause. In its rebuttal submission, New Zealand acknowledges that the Domestic Production Clause and the Processor

[214] Emphasis added.
[215] As noted in Initial submission of Canada, if there is no demand for allocations from a pool, the quantity of that pool will be made available to applicants in other pools. See Initial written submission of Canada, paras. 81-85 and fn. 182.

Clause "do not operate in exactly the same manner" but argues that these "obligations are not dissimilar".[216] In fact, none of the substantive obligations in Article 2.30.1(b) are dissimilar, hence their grouping in the same subparagraph. Each of these obligations restrict the Parties' discretion to determine who may obtain an allocation and provide context when interpreting the other obligations in Article 2.30.1(b).

166. In Canada's view, the Producer Clause provides the most relevant context as, like the Processor Clause, it concerns the access a Party may or may not provide to a group of market actors within the supply chain.[217] In the Producer Clause, the Parties use the term "any" to clearly establish a prohibition on allocating "any portion of the quota to a producer group". If the Parties similarly intended to prohibit a Party's ability to limit access to "any" allocation to processors, they would have stated so.

3. Interpreting the Processor Clause as prohibiting Parties from limiting access to allocations exclusively to processors does not render the clause meaningless or produce absurd results

167. New Zealand contends that interpreting the term "an allocation" to mean "every allocation" would be an absurd result that renders the Processor Clause "virtually meaningless" because Canada would be permitted to allocate 99.9% of allocations to processors.[218]

168. New Zealand's concern is purely hypothetical and lacks merit. As demonstrated in Section III.D.1, Canada's measures do not limit access to allocations – let alone 99.9% of allocations – to processors. The pooling system sets aside a percentage of a TRQ's volume for first access by specified persons[219] but allows any number of eligible processors and non-processors to apply for and receive an allocation. For example, Canada's Cheeses of All Types TRQ reserves 85% of the aggregate TRQ volume for processors. However, the Cheeses of All Types TRQ does

[216] Rebuttal submission of New Zealand, para. 122.
[217] Conversely, the Domestic Production Clause concerns the ability of individual applicants to obtain an allocation, regardless of their role in the supply chain. See Initial written submission of Canada, para. 198.
[218] Rebuttal submission of New Zealand, para. 126.
[219] As explained in Initial written submission of Canada, a pool reserves a volume of the TRQ for a specified group of actors in the initial round of allocation. However, if there are no applicants from the specified group, Canada will allocate the available quantity to other eligible applicants, including those within other pools. See Initial written submission of Canada, paras. 81-85.

not limit access to 85% of allocations to this group. Any number of distributors may apply and receive "an allocation".

169. Assuming, *arguendo*, a modified hypothetical in which a Party limited access to 99.9% of a TRQ's volume to processors, this would still not amount to a breach of the Processor Clause, in and of itself. However, this hypothetical scenario focusses on the Processor Clause in isolation, ignoring other obligations in Section D that operate to significantly reduce the likelihood of such a skewed division of a TRQ's volume occurring. For instance, Article 2.30.1(c) requires a Party to ensure that "each allocation is made in commercially viable shipping quantities […]." Assuming that any number of non-processors may apply and receive an allocation (as is the case under Canada's measures), the administering Party would likely face challenges ensuring that each allocation granted to non-processors is made in commercially viable shipping quantities if only 0.1% of the TRQ volume is available to this group of applicants.[220]

170. Turning to whether Canada's interpretation renders the Processor Clause meaningless, New Zealand appears to confound the purported utility of a treaty provision, from a trade policy perspective, with the rule of treaty interpretation that terms must be given *effet utile*. Whether a provision would be deprived of *effet utile*, as a treaty interpretation matter, requires determining whether a certain interpretation would render a treaty provision redundant or of no legal effect.[221] The Processor Clause is not deprived of *effet utile* simply because New Zealand considers that it is less useful from a trade policy standpoint than what it had hoped for. Under Canada's interpretation, the Processor Clause is not "virtually meaningless" from a legal perspective – rather, it has *effet utile* in prohibiting Parties from limiting the ability to obtain allocations exclusively to processors.

[220] Article 28.3.1(c) permits Parties to seek redress for the nullification of benefits they expected under Chapter 2 (National Treatment and Market Access for Goods) as "a result of the application of a measure of another Party that is not inconsistent with this Agreement." While Canada takes no position on whether reserving access to 99.9% of a TRQ's volume to Processors would satisfy the conditions for establishing an Article 28.3.1(c) challenge, a concerned Party could seek redress for the nullification of benefits it expected under the Processor Clause even where the obligation has not been breached.

[221] See Appellate Body Report, *EC – Asbestos*, para. 115.

4. Canada's interpretation of the Processor Clause conforms with the object and purpose of CPTPP and the function of Article 2.30.1

171. Canada demonstrated that its interpretation of the Processor Clause conforms to the object and purpose of the CPTPP and the function of Article 2.30.1 by providing increased market access to eligible non-processors while preserving Parties' discretion to regulate TRQs in sectors that they did not agree to fully liberalize.[222] In response, New Zealand argues that paragraph 9 of the Trans-Pacific Partnership Preamble does not "suggest that Parties have an unfettered right to regulate"[223] and the fact that Parties are permitted to administer TRQs through an allocation mechanism "does not, however, mean that they can do whatever they want without restraint".[224]

172. Contrary to New Zealand's mischaracterization, Canada was clear when stating that "the function of Article 2.30.1 is to preserve a Party's administrative discretion while establishing specific restrictions to that discretion".[225] Article 2.30.1 carefully balances Parties' discretion with a set of specific restrictions on how they may exercise it. The fact that the Parties retained administrative discretion is key because the Parties agreed to provide limited market access via TRQs in sectors that they did not agree to fully liberalize and where they require flexibility to regulate.

173. New Zealand appears to have no response to Canada's position that the obligations in Article 2.30.1 should be interpreted in a manner that preserves the discretion reserved for Parties to adopt allocation mechanisms of their choosing. In the absence of unambiguous language, this Panel should not adopt an interpretation of the Processor Clause that significantly undermines Canada's discretion to administer TRQs in a manner conducive to the functioning of its supply management system for the dairy sector.[226] Accordingly, it should reject New Zealand's interpretation.

[222] Initial written submission of Canada, paras. 201-202.
[223] Rebuttal submission of New Zealand, para. 129.
[224] Rebuttal submission of New Zealand, para. 130.
[225] Initial written submission of Canada, para. 201.
[226] Note that Article 28.12.3 requires that the "findings, determinations and recommendations of the panel shall not add to or diminish the rights and obligations of the Parties under this Agreement."

5. Further processors are not "processors" for the purposes of the Processor Clause

174. New Zealand asserts that it is "clear" that further processors are "processors" for the purposes of the CPTPP. New Zealand's interpretation is based on its view that Canada's Schedule "expressly use[s] the term 'processing' to describe the process of turning a bulk product into another food".[227]

175. This is misleading. The only time Appendix A to Canada's Schedule refers to processing, as opposed to "further food processing", is when it refers to using milk in bulk "to be processed into dairy products".[228] Otherwise, Appendix A to Canada's Schedule uses the term "further food processing" to refer to turning product subject to the TRQ into another food product.[229] Thus, "processing" refers to the act of processing a dairy product while the term "further food processing" is consistently used to describe the act of using a dairy product (or eggs in the case of TRQ-CA20) to produce another food product.

176. Given that Appendix A to Canada's Schedule consistently uses "further food processing" to denote an activity distinct from "processing", the Parties would have specified that the Processor Clause applies to persons carrying out further food processing if that was their intention. They did not.

6. The CUSMA Dairy I determination is not relevant to the interpretation of the CPTPP Processor Clause and is flawed

177. As Canada noted in its initial written submission, this Panel must conduct its own VCLT analysis of the CPTPP's Processor Clause. Neither the analytical approach nor the determination of the CUSMA Dairy I panel are binding in this dispute.[230]

[227] Rebuttal submission of New Zealand, para. 132.
[228] Article 6(c)(i) of Appendix A to Tariff Schedule of Canada - (Tariff Rate Quotas) (emphasis added).
[229] For example, Article 12(c)(i) provides that up to "30 per cent of the TRQ quantities set out in subparagraph (a) shall be for the importation of goods in bulk (not for retail sale) used as ingredients for further food processing (secondary manufacturing)." See also Articles 16(c)(i), 17(c)(i) and 25(c)(i) of Appendix A to Tariff Schedule of Canada - (Tariff Rate Quotas).
[230] Initial written submission of Canada, para. 193.

178. New Zealand relies selectively on the CUSMA Dairy I decision[231] and contends that it "sets out a robust interpretation of the [CUSMA] Processor Clause" that may provide helpful guidance to the Panel.[232] Characterizing the CUSMA Dairy I panel's interpretation as "robust" is curious given that the panel did not clearly identify the meaning of the disputed term "allocation".

179. Furthermore, the CUSMA Dairy I panel's VCLT analysis is flawed. The panel relied on the terms "allocation" and "allocated" in Canada's CUSMA Notices to Importers as part of its VCLT Article 31 analysis of the ordinary meaning of the phrase "an allocation" in the CUSMA Processor Clause. The panel concluded that "the Notices are compelling evidence of the plain and ordinary meaning of the words used in [the Processor Clause]" but provided no explanation or justification for why these documents were relevant to its Article 31 analysis.[233] They were not.

180. If the Panel considers the CUSMA Dairy I report at all relevant, it should exercise caution and closely appraise what assistance, if any, the panel report provides in assessing New Zealand's claims under Article 2.30(1)(b), especially taking into account analytical and interpretive issues that compromise its persuasive value.

E. CANADA'S POOLING SYSTEM IS CONSISTENT WITH THE SECOND CLAUSE OF ARTICLE 2.30.1(c)

1. Article 2.30.1(c) does not apply to the design of a Party's allocation mechanism

181. As Canada explained in its initial written submission, Article 2.30.1(c) does not apply to the design of an allocation mechanism.[234] In response, New Zealand

[231] New Zealand ignores the fact that the panel in CUSMA Dairy I considered that Canada had broad discretion to administer its TRQs, subject only to the specific disciplines of the Agreement. See e.g. CUSMA Final Panel Report, *Canada – Dairy TRQ Allocation Measures* (CDA-USA-2021-31-010), 20 December 2021, para 159: "Canada has significant discretion in designing and implementing its allocation mechanisms. The Treaty itself explicitly recognizes this in Article 3.A.2. The Panel agrees with Canada that 'the design of an allocation mechanism, including who may obtain an allocation, is left up to the discretion of the importing Party, in this case Canada, to determine, subject to consistency with the other provisions of the Agreement'". The CUSMA Dairy I panel also noted that the United States recognized Canada's broad discretion in administering its TRQs, see para. 124, noting "the uncontested fact of Canada's substantial discretion to award TRQ amounts to processors with limitations only as provided elsewhere in the Treaty."

[232] Rebuttal submission of New Zealand, para. 135.

[233] See CUSMA Final Panel Report, *Canada – Dairy TRQ Allocation Measures* (CDA-USA-2021-31-010), 20 December 2021, para. 110.

[234] First written submission of New Zealand, paras. 227-231.

argues that Article 2.30.1(c) represents the outcome that the Party must achieve and that there is nothing in Article 2.30.1(c) to suggest that the only point in time when the Party must achieve this outcome is when granting allocations to specific eligible applicants.[235]

182. New Zealand's position actually supports Canada's interpretation of Article 2.30.1(c). The Party's obligation under the second clause of Article 2.30.1(c) is to ensure that each specific allocation provided to an eligible applicant is made "to the maximum extent possible, in the amounts that importers request". But Article 2.30.1(c) does not prescribe any specific methodology for ensuring that each eligible applicant receives, "to the maximum extent possible", its requested quantity of the quota. In particular, Article 2.30.1(c) does not require the CPTPP Party to design its allocation mechanism in any particular way for the purpose of ensuring that each eligible applicant receives, "to the maximum extent possible", its requested quantity of the quota.

183. Rather, in line with the definition of "allocation mechanism" in footnote 18 to Article 2.30.1, the Party maintains the discretion to adopt the allocation mechanism of its choosing for the administration of its CPTPP TRQs. However, in the process of issuing TRQ allocations to specific eligible applicants in accordance with its chosen allocation mechanism, the CPTPP Party must make serious efforts to provide each specific TRQ allocation in the quantities requested by the eligible applicant.

184. Contrary to New Zealand's assertion, the text of Article 2.30.1(c) does indicate that this obligation only applies when the importing Party is at the point of granting individual allocations. As Canada explained in its initial written submission,[236] Article 2.30.1(c) expressly begins with the words "each allocation is made". The use of these words in the beginning of Article 2.30.1(c) indicates that Article 2.30.1(c) applies after the importing Party has chosen its allocation mechanism, when the importing Party is in the course of granting individual TRQ allocations to specific eligible applicants in accordance with its chosen allocation mechanism. This is further confirmed by the words "in the amounts that importers request" at the end of Article 2.30.1(c), which indicate that Article 2.30.1(c) only

[235] Rebuttal submission of New Zealand, para. 138.
[236] Initial written submission of Canada, paras. 209-211.

applies following the opening quota application period – i.e., after the importing Party has chosen its allocation mechanism.[237] Had the Parties wanted Article 2.30.1(c) to apply to the design of a Party's allocation mechanism, they would have included a general provision to this effect elsewhere in Section D – as they did, for example, with Article 2.28.1, Article 2.30.3 and Article 2.31.1.

185. Canada does not disagree with New Zealand that Article 2.30.1(c) is concerned with the outcome of Canada's TRQ allocations. Importantly, however, it is up to the Party administering the TRQ to decide how to best achieve that outcome. To establish that Canada is in violation of Article 2.30.1(c), New Zealand must therefore demonstrate that the outcome intended by Article 2.30.1(c) has not been achieved – that is, that when issuing TRQ allocations to specific eligible applicants in accordance with its allocation mechanism, Canada failed to make serious efforts to provide each eligible applicant with its requested quantity of the quota. In fact, New Zealand recognizes in its rebuttal submission that "the obligations in Article [2.30.1(c)] require consideration on an allocation-by-allocation basis (considering importers will likely request different amounts)".[238] Yet, New Zealand has produced no evidence related to any individual allocations. Since New Zealand has not demonstrated that Canada failed to make serious efforts to provide specific eligible applicants with their requested quantity of the quota, it follows that – according to New Zealand's own logic – New Zealand has not established that Canada is in violation of Article 2.30.1(c).

2. Canada's interpretation of Article 2.30.1(c) does not create a "loophole" within Article 2.30.1(c)

186. In response to Canada's position that Article 2.30.1(c) only applies when the Party administering an allocated TRQ is issuing individual TRQ allocations to specific eligible applicants in accordance with its chosen allocation mechanism, New Zealand argues that Canada's interpretation would create a "loophole" within Article 2.30.1(c).[239]

187. New Zealand's position is incorrect. As Canada explained in its initial written submission, the proper way to interpret Article 2.30.1(c) is that it applies when the

[237] Ibid, para. 212 (emphasis added).
[238] Rebuttal submission of New Zealand, fn. 141.
[239] Ibid, paras. 140-142.

Party is administering its allocation mechanism – that is, when the Party is issuing individual allocations to specific eligible applicants in accordance with its chosen allocation mechanism.[240]

188. New Zealand is therefore wrong to suggest that Canada's interpretation of Article 2.30.1(c) would allow Canada to escape its obligations under that provision. Contrary to New Zealand's assertion, Canada's interpretation of Article 2.30.1(c) still affords substantial meaning to that provision. More specifically, Canada must make serious efforts to ensure that each allocation is provided in the amounts requested by the eligible applicant (within the limits of what is "possible" under Canada's chosen allocation mechanism). In the case of Canada's pooling system, this means that Canada must make serious efforts to ensure that, within each pool, each allocation is provided in the amounts requested by eligible applicants.

3. New Zealand's response to Canada's alternative language supports Canada's interpretation of Article 2.30.1(c)

189. In its initial written submission, New Zealand claimed that "[t]he 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".[241] With this statement, New Zealand was clearly implying that the main objective of the phrase "to the maximum extent possible" in the second clause of Article 2.30.1(c) is to ensure that when the TRQ is undersubscribed, each eligible applicant will receive the quantity of the quota that it has requested – as confirmed by multiple statements in New Zealand's initial written submission.[242]

190. In light of New Zealand's position, Canada explained in its initial written submission that if the Parties had wanted to ensure that an applicant would receive

[240] Initial written submission of Canada, paras. 209-213.
[241] First written submission of New Zealand, para. 119.
[242] For example, New Zealand stated 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". See First written submission of New Zealand, para. 119 (emphasis added). New Zealand also stated that "Canada's pooling system is inconsistent with Article 2.30.1(c) because quota is divided "irrespective of whether there is quota sitting in another pool (for example, the much larger processor pool)". First written submission of New Zealand, para. 125. Canada has separately rebutted this assertion. See Section II, above.

less than what they wanted only in this circumstance, the Parties would have used language similar to that found in Article 2.30.1(e). For example, the text in Article 2.30.1(c) could have been drafted to state 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".[243]

191. However, in its rebuttal submission, New Zealand appears to contradict its initial position. New Zealand now concedes that the second clause of Article 2.30.1(c) was not solely intended to apply in situations where the TRQ is undersubscribed and that this clause of Article 2.30.1(c) still applies when the TRQ is oversubscribed.[244] As Canada explains below, New Zealand's recognition that Article 2.30.1(c) continues to apply when the TRQ is oversubscribed supports Canada's interpretation of Article 2.30.1(c).

192. At the outset, Canada notes that Article 2.30.1(c) clearly cannot be interpreted as requiring a Party to "re-design" its allocation mechanism when a TRQ becomes oversubscribed. This is because there is no way for the Party to know in advance whether a TRQ will be oversubscribed or undersubscribed. The Party can only acquire this information after the opening of the quota application period, once it has begun receiving quota applications from eligible applicants. In this regard, Canada notes that under Article 2.28.3, the importing Party is required to publish "information concerning its TRQ administration", including the "methodology […] that will be used for the allocation", at least 90 days prior to the opening date of the TRQ concerned. In other words, under Article 2.28.3, the Party must choose its allocation mechanism at least 90 days prior to the opening of the quota year and must publish that allocation mechanism so that potential applicants can become acquainted with it. At that point in time, the Party does not have any way of knowing if the TRQ will be oversubscribed or not, as the Party has not yet begun receiving applications.

193. Thus, New Zealand's statement that the second clause of Article 2.30.1(c) continues to apply when the TRQ is oversubscribed clearly cannot mean that Canada must "re-design" its allocation mechanism during the quota application period to

[243] Initial written submission of Canada, para. 215.
[244] See New Zealand's Rebuttal submission, para. 144, where New Zealand states that Canada's alternative language "would not have the same effect as the obligation that is set out in Article 2.30(1)(c)" because Canada's language means that the obligation "would cease to apply as soon as there was more demand than there was quota available".

account for the fact that the TRQ is oversubscribed. This would require Canada to modify its allocation mechanism midway through the quota application period, which would place Canada in violation of its obligation under Article 2.28.3.

194. Given the above, there are only two ways in which New Zealand's position – that is, that the second clause of Article 2.30.1(c) continues to apply when the TRQ is oversubscribed – would not conflict with Article 2.28.3. Under a first possible interpretation, Article 2.30.1(c) would require Canada to design its allocation mechanism in a manner that accounts in advance for the possibility that the TRQ might be oversubscribed and ensures that in this situation, each eligible applicant is issued a TRQ quantity in proportion to the quantity that they have requested. This is a pro-rata system. As Canada explained in its initial written submission [245] and as Canada further explains below,[246] this would contradict Canada's right to adopt its preferred allocation mechanism for the administration of its CPTPP TRQs, which is expressly recognized by the definition of "allocation mechanism" in footnote 18 to Article 2.30.1.

195. The second possible way in which New Zealand's interpretation of Article 2.30.1(c) can function harmoniously with Article 2.28.3 is if the phrase "to the maximum extent possible" is interpreted as including Canada's chosen allocation mechanism – as advocated by Canada. In other words, whenever the TRQ is oversubscribed, Canada must make serious efforts to ensure that each eligible applicant receives an allocation in the amounts they have requested, within the limits of what is possible for Canada to achieve under its chosen allocation mechanism. Thus, New Zealand's position that the second clause of Article 2.30.1(c) continues to apply when the TRQ is oversubscribed actually supports Canada's interpretation of Article 2.30.1(c).

4. New Zealand's interpretation of Article 2.30.1(c) is not compatible with Article 2.30.1(b)

196. As Canada explained in its initial written submission, New Zealand's interpretation of Article 2.30.1(c) would create a conflict with Article 2.30.1(b). Article 2.30.1(b) states that the Party administering an allocated TRQ must ensure

[245] Initial written submission of Canada, paras. 220-225.
[246] See Section III.E.6, below.

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".[247] Even assuming, *arguendo*, that Article 2.30.1(b) prohibits Canada from setting aside a portion of its TRQs for the exclusive use of processors (as New Zealand contends), the phrase "unless otherwise agreed" indicates that the CPTPP Parties could agree to allow Canada to set aside a certain portion of its TRQ for processors. 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".[248]

197. In response, New Zealand argues that its interpretation does not create a conflict because under the VCLT, "all treaties must be interpreted in their context".[249] According to New Zealand, the context of Article 2.30.1(c) includes the ability for the CPTPP Parties to agree to conduct that would otherwise be inconsistent with Article 2.30.1(b).[250] New Zealand therefore argues that "Article 2.30(1)(c) must be interpreted as obliging Parties to ensure to the maximum extent possible that allocations are made in the amounts requested, subject to any agreement between the Parties under Article 2.30(1)(b) or Article 2.29(2)(b)-(c)".[251]

198. New Zealand's position is incorrect for three reasons. First, as Canada explained above, Article 2.29.2 concerns the utilisation of a TRQ – that is, it concerns "conditions, limits or eligibility requirements" that a Party applies in respect of the actual importation of products under the TRQ.[252] Article 2.29.2 is therefore simply not relevant for the purpose of interpreting the obligations in Article 2.30.1, which clearly concern the allocation of a Party's TRQs – as made clear by the title of Article 2.30 itself.

199. Second, New Zealand's position that any agreement between the CPTPP Parties under Article 2.30.1(b) would form part of the "context" for interpreting and

[247] Emphasis added.
[248] Initial written submission of Canada, paras. 216-219.
[249] Rebuttal submission of New Zealand, para. 147.
[250] Ibid, para. 148.
[251] Ibid, para. 148 (emphasis removed).
[252] See Section III.B, above.

applying Article 2.30.1(c) is not supported by the text of Article 2.30.1(b). The phrase "unless otherwise agreed by the Parties" appears in the beginning of Article 2.30.1(b). However, under New Zealand's interpretation, that phrase would effectively be moved from the beginning of Article 2.30.1(b) to the chapeau of Article 2.30.1. If the Parties considered that Article 2.30.1(c) would prohibit a Party from administering its TRQs through the use of a pooling system, then they would have placed the phrase "unless otherwise agreed" in the chapeau of Article 2.30.1, as this would have allowed the Parties to deviate from Article 2.30.1(b) as well as Article 2.30.1(c) – both of which prohibit a Party from using a pooling system according to New Zealand. But the Parties did not place the phrase "unless otherwise agreed" in the chapeau of Article 2.30.1 – rather, they specifically placed it in the beginning of Article 2.30.1(b). The fact that the Parties placed this phrase in the beginning of Article 2.30.1(b) indicates that they did not consider that Article 2.30.1(c) would apply to the design of an allocation mechanism, including Canada's decision to administer its TRQs through a pooling system.

200. Finally, New Zealand contends that "[t]he fact that such limits will need to be taken into account in applying Article 2.30(1)(c) is acknowledged by the phrase 'to the maximum extent possible'".[253] With this statement, New Zealand effectively concedes that in determining what is "possible" for a Party under Article 2.30.1(c), it is necessary to take into account any "limit" on a Party's ability to issue the exact quantity requested by each eligible applicant. This supports Canada's view that in determining what is "possible" for Canada under Article 2.30.1(c), it is necessary to take into account the allocation mechanism chosen by Canada, which includes a pooling system.

5. New Zealand's interpretation of Article 2.30.1(c) is not compatible with its interpretation of Article 2.29.2(a), Article 2.30.1(a) and paragraph 3(c) of Canada's Tariff Schedule

201. As Canada explained above,[254] under New Zealand's interpretation of Article 2.30.1(a) and paragraph 3(c), the number of potential eligible applicants for Canada's dairy TRQs would increase by a factor of 25 – namely, from approximately 6,900 eligible applicants under Canada's current allocation mechanism to

[253] Rebuttal submission of New Zealand, para. 148.
[254] See Section III.C.4, above.

approximately 157,225 eligible applicants under New Zealand's interpretation of Article 2.30.1(a) and paragraph 3(c).

202. At the same time, under New Zealand's interpretation of Article 2.30.1(c), Canada must "do everything within [its] power to grant TRQ quota allocations in the amounts requested by importers".[255] However, because of New Zealand's interpretation of Article 2.29.2(a) and Article 2.30.1(a), Canada would have no ability to refine the universe of eligible applicants to a smaller fraction of the 157,225 eligible applicants – thus meaning that any eligible applicant who submits a valid TRQ application form would be entitled to receive an allocation under Canada's CPTPP dairy TRQs. Thus, New Zealand's combined interpretation of Article 2.29.2(a), Article 2.30.1(a) and paragraph 3(c) would only make it more difficult for Canada to design an allocation mechanism under which each eligible applicant receives an allocation in the amounts that they have requested.

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

203. In its initial written submission, Canada explained that New Zealand's interpretation would negate Canada's right to administer its TRQs through the allocation mechanism of its choosing, as it would effectively force Canada to administer its TRQs through a pro-rata system.[256] In response, New Zealand argues that "[i]t is not correct […] that the only allocation mechanism that would comply with the obligation under Article 2.30(1)(c) is a pro-rata system" [257] and identifies two other systems that Canada could use to administer its CPTPP TRQs when a TRQ is oversubscribed: a licence on-demand system and an auctioning system.[258]

204. New Zealand's arguments here do not advance its position. As Canada explained in its initial written submission,[259] 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". 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

[255] First written submission of New Zealand, para. 118.
[256] Initial written submission of Canada, paras. 220-225.
[257] Rebuttal submission of New Zealand, para. 150.
[258] Ibid, para. 151.
[259] Initial written submission of Canada, para. 221.

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.

205. However, under New Zealand's interpretation of Article 2.30.1(c), Canada would only be allowed to administer its CPTPP TRQs pursuant to a very limited number of "systems". If the Parties had wanted Canada to administer its CPTPP TRQs pursuant to a limited number of allocation mechanisms, they would have identified these allocations mechanisms expressly in Canada's Tariff Schedule – as they did in Viet Nam's Tariff Schedule[260] and in Japan's Tariff Schedule.[261]

206. New Zealand's position is also not supported by the specific examples that it provides of systems that Canada could use to administer its TRQs in a manner compatible with Article 2.30.1(c). With respect to New Zealand's example of a licence on demand system, New Zealand describes this system as a system "whereby allocations are granted (in the amounts requested) based on the order in which they are received, until the quota is exhausted".[262] It is difficult to see how such a system would be materially different from an FCFS system, under which products are permitted entry until such time as the TRQ is filled. Thus, New Zealand is effectively arguing that in order for Canada (or any other CPTPP Party) to comply with Article 2.30.1(c), Canada would have to renounce its right to administer its TRQs through an allocation mechanism altogether. Moreover, under New Zealand's hypothetical system, a single applicant could request the entire TRQ quantity at 12:01 AM on the first day of the application period, and this single applicant would receive the entire TRQ quantity. It is difficult to see how such a system would be compatible with New Zealand's position that Article 2.30.1(c) requires Canada to "do everything within [its] power to grant TRQ quota allocations in the amounts requested by importers".[263]

[260] See, for example, paragraph 4(a) of Viet Nam's Tariff Schedule, which provides that Viet Name will administer TRQ-VN1 (Used Vehicles with an Engine Capacity Less Than or Equal to 3000 Cubic Centimeters) "through an annual auction, which shall take place in the first quarter of each year".

[261] See, for example, paragraph 2(d) of Japan's Tariff Schedule, which provides that TWQ-JPN2 "shall be administered by Japan through a first-come, first-served import licensing procedure pursuant to which a certificate of tariff rate quota shall be issued by Japan".

[262] Rebuttal submission of New Zealand, para. 150.

[263] First written submission of New Zealand, para. 118.

207. With respect to New Zealand's example of an auctioning system, Canada notes that pursuant to paragraph 3(d) of Canada's Tariff Schedule, Canada's right to administer its TRQs through an auctioning mechanism will expire in 2024/2025. Thus, out of the two possible allocation mechanisms proposed by New Zealand in its rebuttal submission, one will expire in the next quota year while the other would effectively force Canada to adopt an FCFS system and abandon its right to administer its TRQs through an allocation mechanism.

208. Canada further notes that New Zealand's example of an auctioning system is flawed. New Zealand explains that Canada could design an auctioning mechanism compatible with Article 2.30.1(c) by "implement[ing] a system whereby quota is auctioned off to the highest bidder, with bids being filled (in the volumes requested) by order from the highest bid to the lowest".[264] Thus, it appears that under New Zealand's hypothetical example, eligible applicants would be able to request a particular quantity and place a bid on that quantity. Even if one accepts that New Zealand's hypothetical system could function in practice, a single bidder could still request the entire TRQ volume and that applicant would receive the entire TRQ volume, while lower bidders would not receive any quantity of the TRQ. Again, it is difficult to see how such a system would be compatible with New Zealand's position that Article 2.30.1(c) requires Canada to "do everything within [its] power to grant TRQ quota allocations in the amounts requested by importers".[265]

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

209. In its initial written submission, Canada explained that, consistent with the GATT panel's findings in *EEC – Apples (Chile I)*, the phrase "to the maximum extent possible" in Article 2.30.1(c) should be interpreted as meaning that Canada must make serious efforts to provide each allocation in the amounts that eligible applicants request.[266]

[264] Rebuttal submission of New Zealand, para. 151.
[265] First written submission of New Zealand, para. 118.
[266] Initial written submission of Canada, paras. 227-231.

210. In response, New Zealand argues that Canada's reliance on *EEC – Apples (Chile I)* is incorrect because: (1) the GATT panel in *EEC – Apples (Chile I)* did not interpret the phrase "to the fullest extent possible" in GATT Article XXXVII:1, but merely explained "its view of whether a breach had occurred";[267] and (2) the text, context and object and purpose of GATT Article XXXVII:1 differs from that of Article 2.30.1(c).[268]

211. New Zealand's position is incorrect. With respect to New Zealand's first point, the GATT panel in *EEC – Apples (Chile I)* found that the EEC was not in breach of its commitments under GATT Article XXXVII:1 because it had made "serious efforts" to avoid taking protective measures.[269] While this may not be a comprehensive interpretation of the phrase "to the fullest extent possible" as it appears in GATT Article XXXVII:1, the panel's reasoning clearly illustrates that when a Party makes "serious efforts" to achieve a particular objective, that Party will be in compliance with its obligation to achieve that objective "to the fullest extent possible".

212. With respect to New Zealand's second point, there is no material difference between the phrase "to the maximum extent possible" and the phrase "to the fullest extent possible". While Canada does not contest that the context and the object and purpose of GATT Article XXXVII:1 differ from those of Article 2.30.1(c), the similar language used in both provisions is a useful reference for the purpose of interpreting the nature of Canada's obligation under Article 2.30.1(c).

F. CANADA'S PROCEDURES FOR ADMINISTERING ITS TRQs ARE FAIR AND EQUITABLE AS REQUIRED BY ARTICLE 2.28.2

213. New Zealand seeks to rebut Canada's arguments on Article 2.28.2 by making a number of conclusory, unsupported and erroneous allegations.

214. New Zealand begins by suggesting that transparency provisions are not procedural requirements and that to be characterized as such requirements, the term "procedure" must appear in the provision.[270] New Zealand then falsely equates giving meaning and effect to the term "procedures" in Article 2.28.2 with "reading

[267] Rebuttal submission of New Zealand, para. 153.
[268] Ibid, para. 154.
[269] GATT Panel Report, *EEC – Apples I (Chile)*, para 4.23.
[270] Rebuttal submission of New Zealand, para. 159.

down" the obligations in Article 2.28.2.[271] New Zealand goes on to effectively ask the Panel, without any credible explanation, to accept its contention that there is no difference in scope between an obligation that applies to a Party's "administration of its TRQs" and an obligation that applies more narrowly to a Party's "procedures" for administering its TRQs.[272] Moreover, New Zealand misrepresents Canada's interpretation of Article 2.28.2, as permitting the Parties to administer their TRQs unfairly and inequitably.[273] New Zealand also misunderstands Canada's reliance on the WTO panel decision in *China – TRQs* as support for Canada's position on what procedural fairness entails in a TRQ administration context.

215. Canada addresses New Zealand's arguments in the order they appear.

1. Section D consists of two types of obligation

216. Canada explained in its initial written submission that Section D consists of obligations that govern a Party's design of its TRQ system, on the one hand, and obligations that govern a Party's procedures for administering its TRQ system, on the other hand.[274] Where a Party is administering its TRQs through an allocation mechanism, the first type of obligation imposes limitations on how a Party may design its allocation mechanism. The second type of obligation imposes procedural requirements – or procedural safeguards – that govern the conduct of a Party operating its allocation mechanism to ensure that eligible applicants may participate fully and fairly in a Party's allocation mechanism. As examples of the second type of obligation, Canada referred to Articles 2.31.2, 2.32.2, and Article 2.32.5.[275]

217. New Zealand claims that the distinction Canada has drawn between the two types of obligation – those that govern the "design" and others that govern the "procedures" – is "baseless" because the articles Canada has pointed to as examples of procedural requirements are "transparency provisions" and they do not mention the term "procedures".[276] In other words, New Zealand suggests that transparency

[271] Ibid, paras. 162-163.
[272] Rebuttal submission of New Zealand, para. 166.
[273] Ibid, para. 168.
[274] Initial written submission of Canada, para. 243.
[275] Ibid, fn. 237. Other procedural requirements include Article 2.30.1(f), which requires each importing Party to ensure that applicants have at least four weeks after opening of the quota period to submit their applications.
[276] Rebuttal submission of New Zealand, para. 159.

provisions are not procedural requirements and that obligations that do not expressly mention the term "procedures" cannot be procedural requirements. This is incorrect.

218. Contrary to New Zealand's arguments, transparency obligations set out in Articles 2.31.2, 2.32.2 and 2.32.5, and also in 2.28.2, are procedural requirements, regardless of whether they contain the term "procedures". Unlike obligations that govern how a Party may design its allocation mechanism, procedural requirements discipline a Party's established way of doing something in order to operate its allocation mechanism.[277] In the case of Articles 2.31.2, 2.32.2 and 2.32.5, these provisions require a Party, in its operation of an allocation mechanism, to provide a degree of transparency by publishing certain information. These requirements have nothing to do with how a Party may design its allocation mechanism, such as its decisions on whether to establish certain eligibility requirements or to create a pool for applicants from particular industry groups. Rather, these provisions provide procedural safeguards. New Zealand's contention – that the distinction Canada has drawn is "baseless" because Canada has pointed to transparency provisions and they do not expressly refer to "procedures" – is without any merit.

2. The obligations in Article 2.28.2 do not apply to the design of a Party's allocation mechanism

219. Canada has previously explained that the other obligations in Article 2.28.2 – which are all, by their nature, procedural – provide important context for the interpretation that all the obligations in Article 2.28.2 apply to a Party's procedures for operating its allocation mechanism rather than governing its design.[278] New Zealand concedes that the obligations set out in Article 2.28.2 "might well require Parties" to conduct themselves in a manner described by Canada.[279] New Zealand nevertheless contends, without any credible explanation, that "Canada's reasoning is both flawed and circular" in its reliance on the other provisions of Article 2.28.2 as providing contextual support for Canada's interpretation.[280] New Zealand does not even attempt to explain how the other obligations in Article 2.28.2 – such as the obligations on a Party to ensure that "its procedures for administering its TRQs" are "no more administratively burdensome than absolutely necessary" and "administered

[277] Initial written submission of Canada, para. 252.
[278] Initial written submission of Canada, paras. 252-254.
[279] Rebuttal submission of New Zealand, para. 162.
[280] Ibid, para. 162.

in a timely manner" – would apply to a Party's design of its allocation mechanism. New Zealand effectively begins with an assumption that Article 2.28.2 must apply to all aspects of TRQ administration. It then asserts that giving meaning to the qualifying term "procedures" in Article 2.28.2 by taking into account the unifying characteristics of all the obligations in that article, as Canada has done, would result in "read[ing] down the obligations contained in Article 2.28(2)".[281] These allegations do not provide any basis for dismissing the important context provided by the obligations in Article 2.28.2.

3. Article 2.28.1 and Article 2.28.3 provide context that supports Canada's interpretation of Article 2.28.2

220. In response to Canada's argument that New Zealand's interpretation fails to give any meaning and effect to the term "procedures" in Article 2.28.2, New Zealand asserts that it made "grammatical sense" to include the term "procedures" in Article 2.28.2 given one of the obligations included therein.[282] New Zealand is falsely presenting a choice exclusively between the actual text of the provision and the text of the provision with the term "procedures" removed. If the Parties intended to convey that Article 2.28.2 applies to substantive "rules",[283] they could have drafted the provision in any number of different ways. That they did not must be given meaning.

221. New Zealand's related assertion that "[t]here is nothing to suggest that the fact that Article 2.28(1) and Article 2.28(3) do not include the term 'procedures' has any bearing on the scope of the obligation in Article 2.28(2)" is also not credible.[284] New Zealand is effectively asking the Panel to accept that there is no difference in scope between a Party's "procedures for administering its TRQs" and a Party's "administration of its TRQs". This interpretation is plainly contrary to the rules of treaty interpretation.

[281] Rebuttal submission of New Zealand, para. 163.
[282] Ibid, para. 166.
[283] See First written submission of New Zealand, paras. 142-143.
[284] Rebuttal submission of New Zealand, para. 166.

4. Canada's interpretation of Article 2.28.2 is consistent with the object and purpose of the CPTPP

222. New Zealand misrepresents Canada's interpretation of Article 2.28.2 as "*permitting* Parties to design their quota allocation system in a manner that is *unfair* and *inequitable*".[285] Based on this false premise, New Zealand contends that Canada's interpretation of Article 2.28.2 would be inconsistent with the object and purpose of the CPTPP.

223. Canada interprets Article 2.28.2, which applies expressly to "procedures", as being aimed at ensuring procedural fairness in a TRQ administration context, which in turn contributes to the CPTPP's object and purpose of establishing a predictable legal and commercial framework for trade and promoting the rule of law.[286] Contrary to what New Zealand has stated, Canada does not in any way interpret Article 2.28.2 as permitting a Party to design its allocation mechanism in a manner that is unfair and inequitable. Canada's position is simply that Article 2.28.2, as made evident by its text and context, requires procedural fairness.

224. In insisting that Article 2.28.2 must apply to the design of a Party's allocation mechanism, New Zealand offers no credible explanation as to why interpreting Article 2.28.2 as being focused on procedural fairness would undermine the object and purpose of establishing a predictable legal and commercial framework for trade and promoting the rule of law. A predictable framework for trade in a TRQ administration context may be established if a Party administers its TRQs in the manner that it has publicly set out to do and it treats all eligible applicants "in a way that is expected"[287] by following the established rules. This manner of administration, in turn, promotes the rule of law, "the principle whereby all members of a society (including those in government) are considered equally subject to publicly disclosed legal codes and processes."[288] This predictability and respect for the rule of law is achieved by requiring procedural fairness.

[285] Ibid, para. 168 (emphasis in original).
[286] Initial written submission of Canada, paras. 258-265.
[287] The OED defines "predictable" as "acting in a way that is expected or easy to predict." See *Oxford Online Dictionary*, OED online, "predictable", accessed 26 May 2023, <https://www.oed.com/view/Entry/149857?redirectedFrom=predictable#eid >, Exhibit CDA-53.
[288] *Oxford English Dictionary*, OED online, "rule of law", accessed 26 May 2023, <https://www.oed.com/view/Entry/277614?redirectedFrom=rule+of+law#eid> , Exhibit CDA-54.

225. Furthermore, in misrepresenting Canada's interpretation as permitting a Party to design its allocation mechanism in a manner that is unfair and inequitable, New Zealand completely disregards other obligations in Section D that govern the design of an allocation mechanism. As discussed in Section III.C.2.g), with respect to the design of Canada's eligibility requirement for the allocation of Canada's CPTPP TRQs alone, Canada's discretion is limited in significant ways. New Zealand's disregard for the other obligations in its rebuttal submission stands in contrast with its suggestion in its initial written submission that there are a number of provisions in Section D that go to ensuring that a Party's allocation mechanism is not unfair and inequitable as they provide "clear guidance on what is, and is not, fair and equitable".[289]

226. There is no basis for New Zealand's allegations that Canada's interpretation of Article 2.28.2 as requiring procedural fairness is inconsistent with the object and purpose of the CPTPP.

5. Article 2.28.2 requires procedural fairness

227. New Zealand concludes its submissions on Article 2.28.2 by making two additional points: first, "[t]here is nothing in the text of Article 2.28(2)" to suggest that this provision is aimed at procedural fairness and does not apply to the design of a Party's allocation mechanism;[290] and second, Canada's interpretation of Article 2.28.2 is not supported by the WTO panel decision in *China – TRQs*.[291]

228. Regarding New Zealand's first point, as addressed above, it is simply wrong to state that there is "nothing in the text" which suggests that Article 2.28.2 is about procedural fairness.[292]

229. Regarding New Zealand's second point, New Zealand misunderstands Canada's reliance on the WTO panel decision in *China – TRQs*. This decision concerned the obligation in paragraph 116 of China's Working Party Report that

[289] First written submission of New Zealand, para. 146.
[290] Rebuttal submission of New Zealand, para. 170. While New Zealand refers to "natural justice or due process" in this paragraph, as noted in Canada's initial submission, the principle of procedural fairness is also sometimes referred to as a principle of "natural justice" or as a form of "due process." See Initial written submission of Canada, para. 259.
[291] Rebuttal submission of New Zealand, paras. 171-172.
[292] Article 2.28.2 expressly applies to "procedures". All the obligations in Article 2.28.2 are procedural requirements. See Sections III.F.2 and III.F.3, above.

requires China to "ensure that TRQs were administered on a […] fair […] basis".[293] Unlike Article 2.28.2, which specifically applies to a Party's "procedures" for administering its TRQs, the text of paragraph 116 indicates that the obligation would apply more broadly to a Party's TRQ administration. To the extent that the WTO panel interpreted paragraph 116 – as New Zealand suggests[294] – as applying to the design of a Party's allocation mechanism as well as its procedures for administering its TRQs, that interpretation may find support in the text of paragraph 116, but it does not in the text of Article 2.28.2.

230. Canada referred to the decision in *China – TRQs* to demonstrate how another panel had in effect applied the concept of procedural fairness in a TRQ administration context as requiring compliance with the "hearing rule" and the "bias rule".[295] This supports Canada's arguments about what procedural fairness entails in the context of the administration of Canada's CPTPP TRQs.

IV. CONCLUSION

231. For the reasons set out above and in Canada's initial written submission, Canada respectfully requests that the Panel reject New Zealand's claims in their entirety. More specifically, Canada again 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);

[293] See Panel Report, *China – TRQs*, para. 7.3. See also, Rebuttal submission of New Zealand, para. 171.
[294] Rebuttal submission of New Zealand, para. 171.
[295] Initial written submission of Canada, paras. 262-265.

- 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.