

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

Canada — Dairy Tariff Rate Quota Measures

FIRST WRITTEN SUBMISSION OF NEW ZEALAND

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TABLE OF CASES

Short Title	Full Case Title and Citation
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
<i>Canada - Dairy TRQ Allocation Measures</i>	USMCA Panel Report, <i>Canada – Dairy TRQ Allocation Measures</i> (CDA – USA – 31 – 010), December 20, 2021
<i>China - Publications and Audiovisual Products</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, 3
<i>EC – Chicken Cuts</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, 9157
<i>EC – Computer Equipment</i>	Appellate Body Report, <i>European Communities – Customs Classification of Certain Computer Equipment</i> , WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851
<i>EC – Export Subsidies on Sugar (Australia)</i>	Panel Report, <i>European Communities – Export Subsidies on Sugar, Complaint by Australia</i> , WT/DS265/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIII, 6499
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
<i>Japan – Alcoholic Beverages II</i>	Panel Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by Appellate Body Report WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, 125
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
<i>US – Gambling</i>	Panel Report, <i>United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services – Recourse to Article 21.5 of the DSU by Antigua and</i>

	<i>Barbuda</i> , WT/DS285/RW, adopted 22 May 2007, DSR 2007:VIII, 3105
<i>US – Offset Act (Byrd Amendment)</i>	Appellate Body Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, 375
<i>US – Section 211 Appropriations Act</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, p. 589
<i>US – Stainless Steel (Mexico)</i>	Appellate Body Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p. 513

TABLE OF ABBREVIATIONS

Abbreviation	Full name and reference (where applicable)
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
TRQ	Tariff rate quota
USMCA	United States-Mexico-Canada Agreement
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

LIST OF EXHIBITS

Exhibit No.	Description
NZL-1	CPTPP: Industrial Cheese TRQ – Serial No. 996, dated 1 October 2020
NZL-2	CPTPP: Whey Powder TRQ – Serial No. 1044, dated 1 May 2021
NZL-3	CPTPP: Yogurt and Buttermilk TRQ – Serial No. 1008, dated 1 October 2020
NZL-4	CPTPP: Cream TRQ – Serial No. 1041, dated 1 May 2021
NZL-5	CPTPP: Ice Cream and Mixes TRQ – Serial No. 1001, dated 1 October 2020
NZL-6	CPTPP: Skim Milk Powders TRQ – Serial No. 1052, dated 1 May 2021
NZL-7	CPTPP: Butter TRQ – Serial No. 1039, dated 1 May 2021
NZL-8	CPTPP: Milk Powders TRQ – Serial No. 1050, dated 1 May 2021
NZL-9	CPTPP: Other Dairy TRQ – Serial No. 1003, dated 1 October 2020
NZL-10	CPTPP: Cream Powders TRQ – Serial No. 1047, dated 1 May 2021
NZL-11	CPTPP: Products Consisting of Natural Milk Constituents TRQ – Serial No. 1006, dated 1 October 2020
NZL-12	CPTPP: Powdered Buttermilk TRQ – Serial No. 1004, dated 1 October 2020
NZL-13	CPTPP: Cheeses of All Types TRQ – Serial No. 995, dated 1 October 2020
NZL-14	CPTPP: Concentrated Milk TRQ – Serial No. 999, dated 1 October 2020
NZL-15	CPTPP: Milk TRQ – Serial No. 1048, dated 1 May 2021
NZL-16	CPTPP: Mozzarella and Prepared Cheese TRQ – Serial No. 997, dated 1 October 2020
NZL-17	General Information on the Administration of TRQs for Supply-Managed Products from Global Affairs Canada website < General Information on the Administration of Import Tariff Rate Quotas (TRQs) for Supply Managed Products (international.gc.ca) >.
NZL-18	Definition of “limit” (verb) from Oxford English Dictionary Online
NZL-19	Definition of “access” (verb) from Oxford English Dictionary Online
NZL-20	Fill-Rate Data for Canada’s CPTPP Dairy TRQs, quota year 4 (2021-2022)
NZL-21	Definition of “processor” from Oxford English Dictionary Online
NZL-22	Definition of “process” from Oxford English Dictionary Online
NZL-23	Definition of “allocation” from Oxford English Dictionary Online
NZL-24	Definition of “a/an” from Oxford English Dictionary Online
NZL-25	Definition of “new” from Oxford English Dictionary Online
NZL-26	Definition of “additional” from Oxford English Dictionary Online
NZL-27	Definition of “beyond” from Oxford English Dictionary Online

NZL-28	Definition of “limit” (noun) from Oxford English Dictionary Online
NZL-29	Definition of “condition” from Oxford English Dictionary Online
NZL-30	Definition of “prerequisite” from Oxford English Dictionary Online
NZL-31	Definition of “eligibility” from Oxford English Dictionary Online
NZL-32	Definition of “utilization” from Oxford English Dictionary Online
NZL-33	Definition of “fulfil” from Oxford English Dictionary Online
NZL-34	Definition of “utilize” from Oxford English Dictionary Online
NZL-35	Definition of “apply” from Oxford English Dictionary Online
NZL-36	Definition of “consider” from Oxford English Dictionary Online
NZL-37	Definition of “maximum” from Oxford English Dictionary Online
NZL-38	Definition of “extent” from Oxford English Dictionary Online
NZL-39	Definition of “extend” from Oxford English Dictionary Online
NZL-40	Definition of “administer” from Oxford English Dictionary Online
NZL-41	Definition of “importer” from Oxford English Dictionary Online
NZL-42	Definition of “quantity” from Oxford English Dictionary Online
NZL-43	Definition of “fully” from Oxford English Dictionary Online
NZL-44	Definition of “procedure” from Oxford English Dictionary Online
NZL-45	Definition of “fair” from Oxford English Dictionary Online
NZL-46	Definition of “equitable” from Oxford English Dictionary Online
NZL-47	Definition of “possible” from Oxford English Dictionary Online
NZL-48	Definition of “requirement” from Oxford English Dictionary Online
NZL-49	Import volumes for Butter TRQ, Cream TRQ, Cream Powder TRQ, Milk TRQ, Milk Powder TRQ, Skim Milk Powder TRQ and Whey Powder TRQ, quota Year 4, from Global Affairs Canada website < https://www.eics-scei.gc.ca/report-rapport/APRMT61C-D-DY-CPTPP-22.htm >
NZL-50	Import volumes for Concentrated Milk TRQ, Powdered Buttermilk TRQ, Products Consisting of Non-Milk Constituents (NMC) TRQ, Ice Cream and Mixes TRQ, Other Dairy TRQ and Yoghurt and Buttermilk TRQ, quota year 4, from Global Affairs Canada website < https://www.eics-scei.gc.ca/report-rapport/APRMT61C-D-CY-CPTPP.htm >
NZL-51	Import volumes for Cheese of All Types TRQ, Industrial Cheese TRQ and Mozzarella and Prepared Cheese TRQ, quota year 4, from Global Affairs Canada website < https://www.eics-scei.gc.ca/report-rapport/APRMT61C-C-CPTPP.htm >

I. INTRODUCTION

1. This dispute concerns Canada’s administration of its dairy tariff rate quotas (TRQs) under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Fundamentally, it is about Canada’s use of restrictive policies to block access to its TRQs and – ultimately – to prevent them from being used to import dairy products into its territory tariff free.
2. Since CPTPP came into force, Canada has been using a novel and restrictive quota ‘pooling’ system to administer its dairy TRQs. Under this system, Canada allocates all the quota available under each TRQ into up to three ‘pools’, which can only be accessed by certain entities (‘processors’, ‘further processors’, or ‘distributors’). These pools are used to direct access to TRQ quota *away* from importers that are *likely* to use it, and *towards* entities that are *not*. This encourages chronic underfill.¹
3. New Zealand will demonstrate that Canada’s pooling system is inconsistent with Canada’s obligations under CPTPP. It also undermines the TRQ market access that was negotiated under CPTPP, and has resulted in tangible losses for CPTPP Parties seeking to benefit from that access.
4. When CPTPP Parties entered into negotiations, there was an expectation that each party would offer access to its markets. Canada declined to open its dairy market fully, and CPTPP Parties had to settle for limited access in the form of TRQs. Having had to accept reduced access, CPTPP Parties rightly expected that they would be able to fully utilise and benefit from the market access that *was* agreed. Instead, Canada has adopted a TRQ administration system that undermines that access and reduces its value to CPTPP Party exporters. New Zealand has brought the present dispute to uphold the commitments that Canada made when it entered into CPTPP.

A. Summary of legal claims

5. New Zealand argues that Canada’s Notices to Importers are inconsistent with its obligations under:
 - a. Article 2.30(1)(b) because they limit access to an allocation to processors;
 - b. Article 2.29(2)(a) because they introduce new limits and eligibility requirements on the utilisation of Canada’s dairy TRQs;
 - c. Article 2.30(1)(a) because they exclude persons who fulfil Canada’s eligibility requirements from accessing an allocation;

¹ As discussed further in paragraph 33 below.

- d. Article 2.30(1)(c) because they do not ensure, to the maximum extent possible, that allocations are made in the amounts that importers request;
 - e. Article 2.29(1) because they do not administer Canada's TRQs in a manner that allows importers the opportunity to utilise TRQ quantities fully; and
 - f. Article 2.28(2) because they do not administer Canada's TRQs in a manner that is fair and equitable.
6. The basis for New Zealand's claims, including a full explanation of the legal interpretation of the relevant obligations, is set out later in these submissions.² Below is a high level summary of these claims.

Canada's CPTPP Notices to Importers are inconsistent with Article 2.30(1)(b) CPTPP because they limit access to an allocation to processors

7. Article 2.30(1)(b) requires Parties to ensure that they do not 'limit access to an allocation to processors'. As New Zealand will explain, *any* allocation available under a TRQ is 'an allocation' for the purposes of this obligation. This means that a Party will be in breach Article 2.30(1)(b) if it limits access to one, several, or indeed all available allocations to processors.³
8. Under Canada's quota pooling system, between 85%-100% of the quota allocations available under each of its 16 dairy TRQs are reserved exclusively for domestic dairy processors (under its 'processor' and 'further processor' quota pools). Access to these allocations is entirely limited to processors. This is a clear breach of Canada's obligations under Article 2.30(1)(b).⁴

Canada's CPTPP Notices to Importers are inconsistent with Article 2.29(2)(a) CPTPP because they introduce new limits and eligibility requirements on the utilisation of Canada's dairy TRQs

9. Article 2.29(2)(a) prohibits Parties from introducing new limits, conditions or eligibility requirements on the utilisation of a TRQ, beyond those set out in a Party's Schedule.⁵ This captures any new limit, condition or eligibility requirement that affects the ability of an importer to obtain a TRQ allocation, import product into the market, or claim tariff free entry on importation.⁶ This obligation is key, as measures of this kind could easily be used to undermine the ability of importers to access and use TRQs.

² Parts V-IX.

³ New Zealand's interpretation of Article 2.30(1)(b) is set out from paragraph 57 below.

⁴ New Zealand's application of Article 2.30(1)(b) is set out from paragraph 77 below.

⁵ Unless they complete the consultation and agreement process set out in Article 2.29(2)(b)-(c), see discussion at paragraph 83 below.

⁶ New Zealand's interpretation of Article 2.29(2)(a) is set out from paragraph 81 below.

10. Contrary to Article 2.29(2)(a), Canada's quota pooling system imposes both new limits *and* new eligibility requirements on the utilisation of its dairy TRQs:⁷

- a. New limits: Access to the quota contained in each of Canada's quota pools is limited to specific defined entities ('processors', 'further processors' or 'distributors'), and all other importers are effectively barred from accessing it. These are new limits on the utilisation of Canada's TRQs, and are clearly in breach of Article 2.29(2)(a).
- b. New eligibility requirements: The restrictions placed on access to Canada's quota pools are also expressed as eligibility requirements. In order to be eligible for a quota allocation, an importer must show that they are an entity that is eligible to access one of the available quota pools. If an importer does not fall within any of the available pools (each TRQ has between 2 – 3 pools), then they are not eligible to apply for quota under that TRQ. Further, retailers are expressly ineligible to apply for quota.⁸ These new eligibility requirements (that an importer fall within one of the available pools, and that they not be a retailer) are clearly in breach of Article 2.29(2)(a).

Canada's CPTPP Notices to Importers are inconsistent with Article 2.30(1)(a) CPTPP because they exclude persons who fulfil Canada's eligibility requirements from accessing an allocation

11. Article 2.30(1)(a) requires Parties to ensure that any person that fulfils their eligibility requirements is able to apply, and be considered, for a quota allocation. The interpretation of this obligation is straightforward – it simply requires that persons who meet the eligibility requirements set out in a Party's Tariff Schedule be permitted to apply, and be considered, for a quota allocation under all relevant TRQs.⁹
12. Canada has imposed additional eligibility requirements on all of its TRQs: requiring that an importer fall within one of the available quota pools, and that they not be a retailer. These requirements are not reflected in Canada's Tariff Schedule. Importers that meet the eligibility requirements that *are* set out in Canada's Tariff Schedule, but do not meet these *additional* requirements are not permitted to apply, or be considered for, quota under any of Canada's TRQs. This is clearly in breach of Canada's obligations under Article 2.30(1)(a).¹⁰

⁷ New Zealand's application of Article 2.29(2)(a) is set out from paragraph 95 below.

⁸ For a full breakdown of the pools that Canada has created under each TRQ, and the volume of quota under each pool, see Table 1 set out at paragraph 31 below.

⁹ New Zealand's interpretation of Article 2.30(1)(a) is set out from paragraph 100 below.

¹⁰ New Zealand's application of Article 2.30(1)(a) is set out from paragraph 110 below.

Canada's CPTPP Notices to Importers are inconsistent with Article 2.30(1)(c) CPTPP because they do not ensure, to the maximum extent possible that allocations are made in the amounts that importers request

13. Article 2.30(1)(c) obliges Parties to ensure to the *maximum extent possible* that allocations under their TRQs are made in the amounts that importers request. This requires Parties to do everything within their power to grant TRQ quota allocations in the amounts requested by importers. The inclusion of the terms 'shall ensure' in Article 2.30(1)(c) indicates that this is a positive obligation. It is not enough to hope that this outcome will be achieved, it is a protection that must be given effect through the design and operation of a Party's TRQ allocation mechanism. In practice, the only circumstance in which an eligible importer should receive an allocation that is less than requested is where demand for quota from eligible applicants exceeds the total amount of quota available under the TRQ.¹¹
14. Canada's quota pooling system is inconsistent with Article 2.30(1)(c). Under this system, the amount of quota available under each 'pool' is fixed. If importers falling within a certain pool (e.g. the further processor or distributor pools) request more quota than is available under that pool, they will not receive allocations in the amounts requested. Instead, the quota will be divided between them on a market share or equal share basis.¹² This will occur irrespective of whether there is unallocated quota sitting in another pool (for example, the much larger processor pool). This is clearly in breach of Canada's obligations under Article 2.30(1)(c).¹³

Canada's CPTPP Notices to Importers are inconsistent with Article 2.29(1) CPTPP because they do not administer Canada's TRQs in a manner that allows importers the opportunity to utilise TRQ quantities fully

15. Article 2.29(1) obliges Parties to oversee and manage their TRQs in a way that allows all eligible importers the opportunity to access and use the quota available under each TRQ in its entirety. This requires that all eligible importers be able to access all quota, and that no eligible importer have the volume of quota they have requested reduced while there is still quota available.¹⁴ This is, at its heart, about ensuring that the market access that was negotiated under each TRQ can be enjoyed, in full, by those CPTPP Parties seeking to benefit from it.
16. The restrictive and compartmentalised nature of Canada's quota pooling system is inconsistent with Article 2.29(1). If an importer does not fall within a specified quota

¹¹ New Zealand's interpretation of Article 2.30(1)(c) is set out from paragraph 113 below.

¹² In the case of the further processor pool, quota is divided on a market share basis, for the distributor pool, quota is divided on an equal share basis (see under the 'Calculation of allocations' heading in each of Canada's Notices to Importers).

¹³ New Zealand's application of Article 2.30(1)(c) is set out from paragraph 125 below.

¹⁴ New Zealand's interpretation of Article 2.29(1) is set out from paragraph 127 below.

pool (in particular, retailers) they will have *no* opportunity to utilise *any* of Canada's TRQ quantities. Further, (as noted above) if importers that *do* fall within a pool request more quota than is available under it, they will not receive the amount of quota requested. Rather, the quota within the pool will be divided between them - irrespective of whether there is quota sitting in another pool (for example, the processor pool). This is clearly in breach of Canada's obligations under Article 2.29(1).¹⁵

Canada's CPTPP Notices to Importers are inconsistent with Article 2.28(2) CPTPP because they do not administer Canada's TRQs in a manner that is fair and equitable

17. Finally, Article 2.28(2) obliges Parties to ensure that the procedures for administering its TRQs are 'fair and equitable'. This obligation, and the rationale for including it in the text, is straightforward. It requires Parties to ensure that the way in which they manage and administer their TRQs - from the initial application stage to the return and reallocation of unused quota - is just, impartial and reasonable.¹⁶
18. The procedures for administering Canada's TRQs are not fair and equitable because:
 - a. They arbitrarily exclude persons that meet the eligibility requirements that were agreed between CPTPP Parties and set out under Canada's Tariff Schedule from applying for and being granted TRQ allocations. This is not just, impartial and reasonable.
 - b. They provide exclusive access to the vast majority of each TRQ to 'processors', being entities that domestically manufacture the product being imported under the TRQ. This constitutes discrimination in favour of Canada's domestic industry. This is not just, impartial and reasonable.
 - c. They direct the quota available under each TRQ towards low value bulk products, rather than high value imports by:
 - i. only granting distributors access to a small portion of each TRQ; and
 - ii. entirely excluding retailers from accessing allocations.

This is not just, impartial and reasonable.

This is clearly inconsistent with Canada's obligation under Article 2.28(2).¹⁷

¹⁵ New Zealand's application of Article 2.29(1) is set out from paragraph 138 below.

¹⁶ New Zealand's interpretation of Article 2.28(2) is set out from paragraph 140 below.

¹⁷ New Zealand's application of Article 2.28(2) is set out from paragraph 148 below.

B. Framework of submissions

19. The procedural background of this dispute is set out in Part II of these submissions. Part III provides an overview of Canada's dairy TRQ administration system, while Part IV explains the trade distortive incentives that it creates. While the claims made by New Zealand do not require a demonstration of trade effects, this broader context demonstrates how a failure to comply with the obligations under CPTPP can undermine the market access agreed between CPTPP Parties, and adversely affect the interests of those Parties seeking to benefit from it.
20. Part V of these submissions sets out the measures in issue and the terms of reference for this dispute. It then provides an overview of the standard of review and relevant rules of interpretation to be applied by the Panel. Parts VI-XI contain New Zealand's legal arguments, and explain how Canada's TRQ administration measures are inconsistent with the obligations set out in paragraph 5 above.
21. Finally, in Part XII, New Zealand will ask the Panel to find that Canada's measures are inconsistent with its obligations under CPTPP, and to recommend that Canada bring its measures into conformity with those obligations.

II. PROCEDURAL HISTORY

22. On 12 May 2022, New Zealand requested consultations with Canada pursuant to Articles 28.3 and 28.5 CPTPP, with regard to measures concerning the allocation of dairy TRQs under CPTPP. New Zealand and Canada held consultations on 22 June 2022 but these failed to resolve the matter.
23. On 7 November 2022, pursuant to Article 28.7 CPTPP, New Zealand requested the establishment of a panel to examine the matter. On 9 March, 2023 the Panel was composed.

III. FACTUAL BACKGROUND

24. CPTPP was signed on 8 March 2018, and came into force on 30 December 2018.¹⁸ It currently establishes a free trade area between New Zealand, Canada and eight other economies within the Indo-Pacific region.¹⁹
25. The rules applicable to the administration of Canada's TRQs under CPTPP are predominantly found in Section D ('Tariff Rate Quota Administration') of Chapter 2

¹⁸ CPTPP was signed by Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Viet Nam. It came into force initially as between Australia, Canada, Japan, Mexico, New Zealand and Singapore on 30 December 2018. It came into force for Viet Nam on 14 January 2019; for Peru on 19 September 2021; for Malaysia on 29 November 2022, and for Chile on 21 February 2023. CPTPP will enter into force for Brunei Darussalam 60 days after it completes its ratification process.

¹⁹ Australia, Japan, Mexico, Peru, Singapore, Viet Nam, Chile and Malaysia.

(‘National Treatment and Market Access for Goods’) of CPTPP.²⁰ Additional obligations are set out in Canada’s Tariff Schedule, in particular under Appendix A, CPTPP.²¹

26. CPTPP permits Parties to administer their TRQs through an ‘allocation mechanism’, which is defined as ‘any system where access to the TRQ is granted on a basis other than first-come first-served’.²² In doing so, however, CPTPP Parties must ensure that their allocation mechanism is consistent with their obligations under CPTPP, including the rules set out in Section D and that Party’s Tariff Schedule. As discussed further below, the allocation mechanism that Canada has adopted to administer its dairy TRQs is inconsistent with a number of these obligations.

A. Canada’s dairy TRQs

27. Under CPTPP, Canada maintains 16 TRQs on dairy products: Industrial Cheese; Whey Powder; Yogurt and Buttermilk; Cream; Ice Cream and Mixes; Skim Milk Powders; Butter; Milk Powders; Other Dairy; Cream Powders; Products Consisting of Natural Milk Constituents; Powdered Buttermilk; Cheeses of All Types; Concentrated Milk; Milk; and Mozzarella and Prepared Cheese.²³
28. Under each TRQ, Canada is required to allow CPTPP Parties to export a set volume of the relevant dairy product into Canadian territory tariff free each quota year. These quantities increase year on year, before plateauing after either 14 or 19 years (depending on the particular TRQ).²⁴ This means that the value of the market access Canada granted under its dairy TRQs will increase over time.

B. Canada’s Notices to Importers

29. Canada’s TRQ allocation system is implemented through a set of notices that are issued to importers and are updated periodically (Notices to Importers). These Notices set out the ‘policies and practices pertaining to the administration’ of each of Canada’s 16 dairy TRQs.²⁵ This includes policies and practices regarding who is permitted to apply for

²⁰ CPTPP, [Chapter 2 National Treatment and Market Access for Goods](#), ‘Section D – Tariff-Rate Quota Administration’, at page 2–26.

²¹ CPTPP, Annex 2-D Tariff Schedule of Canada, ‘[Appendix A - Tariff Rate Quotas of Canada](#)’.

²² CPTPP, [Chapter 2 National Treatment and Market Access for Goods](#), ‘Section D – Tariff-Rate Quota Administration’, Article 2.30, footnote 18.

²³ CPTPP, Annex 2-D Tariff Schedule of Canada, ‘[Appendix A - Tariff Rate Quotas of Canada](#)’.

²⁴ Canada’s TRQ for Milk, for example, permits duty-free entry for 8,333 metric tonnes (MT) of milk the first year. By the fifth year, the quota will have increased to 41,667 MT, and by the 19th year it will reach a maximum volume of 56,905 MT: CPTPP, Annex 2-D Tariff Schedule of Canada, ‘[Appendix A - Tariff Rate Quotas of Canada](#)’, at para 6.

²⁵ As set out in the headnote to each of Canada’s Notices to Importers [NZL-1] to [NZL-16].

quota under each of the TRQs, how quota is to be allocated between applicants, and the rules that apply once a quota allocation has been issued.²⁶

30. The most recent Notices to Importers issued by Canada for each of its dairy TRQs are:
- a. CPTPP: Industrial Cheese TRQ – Serial No. 996, dated 1 October 2020;²⁷
 - b. CPTPP: Whey Powder TRQ – Serial No. 1044, dated 1 May 2021;²⁸
 - c. CPTPP: Yogurt and Buttermilk TRQ – Serial No. 1008, dated 1 October 2020;²⁹
 - d. CPTPP: Cream TRQ – Serial No. 1041, dated 1 May 2021;³⁰
 - e. CPTPP: Ice Cream and Mixes TRQ – Serial No. 1001, dated 1 October 2020;³¹
 - f. CPTPP: Skim Milk Powders TRQ – Serial No. 1052, dated 1 May 2021;³²
 - g. CPTPP: Butter TRQ – Serial No. 1039, dated 1 May 2021;³³
 - h. CPTPP: Milk Powders TRQ – Serial No. 1050, dated 1 May 2021;³⁴
 - i. CPTPP: Other Dairy TRQ – Serial No. 1003, dated 1 October 2020;³⁵
 - j. CPTPP: Cream Powders TRQ – Serial No. 1047, dated 1 May 2021;³⁶
 - k. CPTPP: Products Consisting of Natural Milk Constituents TRQ – Serial No. 1006, dated 1 October 2020;³⁷
 - l. CPTPP: Powdered Buttermilk TRQ – Serial No. 1004, dated 1 October 2020;³⁸
 - m. CPTPP: Cheeses of All Types TRQ – Serial No. 995, dated 1 October 2020;³⁹
 - n. CPTPP: Concentrated Milk TRQ – Serial No. 999, dated 1 October 2020;⁴⁰
 - o. CPTPP: Milk TRQ – Serial No. 1048, dated 1 May 2021;⁴¹ and
 - p. CPTPP: Mozzarella and Prepared Cheese TRQ – Serial No. 997, dated 1 October 2020.⁴²

²⁶ Canada also provides general information on the administration of its TRQs on the Global Affairs Canada website:

²⁷ [NZL-17].

²⁸ [NZL-1].

²⁹ [NZL-2].

³⁰ [NZL-3].

³¹ [NZL-4].

³² [NZL-5].

³³ [NZL-6].

³⁴ [NZL-7].

³⁵ [NZL-8].

³⁶ [NZL-9].

³⁷ [NZL-10].

³⁸ [NZL-11].

³⁹ [NZL-12].

⁴⁰ [NZL-13].

⁴¹ [NZL-14].

[NZL-15].

C. Canada's quota 'pooling' system

31. Canada's Notices to Importers allocate all quota available under each of its 16 TRQs into up to three quota 'pools', which can only be accessed by certain entities ('processors', 'further processors', or 'distributors').⁴³ A breakdown of the pools created under each TRQ is set out in Table 1 below:

Table 1				
TRQ	'Processor' pool	'Further processor' pool	'Distributor' pool	Exhibit No.
Industrial Cheese	80%	20%	-	NZL-1
Whey Powder	80%	10%	10%	NZL-2
Yogurt and Buttermilk	80%	10%	10%	NZL-3
Cream	80%	10%	10%	NZL-4
Ice Cream and Mixes	80%	10%	10%	NZL-5
Skim Milk Powders	80%	10%	10%	NZL-6
Butter	80%	10%	10%	NZL-7
Milk Powders	80%	10%	10%	NZL-8
Other Dairy	80%	10%	10%	NZL-9
Cream Powders	80%	10%	10%	NZL-10
Products of Natural Milk Constituents	80%	10%	10%	NZL-11
Powdered Buttermilk	80%	10%	10%	NZL-12
Cheeses of All Types	85%	-	15%	NZL-13
Concentrated Milk	85%	-	15%	NZL-14
Milk	85%	-	15%	NZL-15
Mozzarella and Prepared Cheese	85%	-	15%	NZL-16

32. Access to each of these pools is reserved exclusively for 'processors', 'further processors' or 'distributors'.⁴⁴ If a prospective importer does not fall within the scope of one of the available pools, they are unable to access quota under that TRQ.⁴⁵ This means that 'distributors' are effectively blocked from accessing Canada's Industrial

⁴² [NZL-16].

⁴³ These pools are created under the 'Calculation of Allocations' heading in each of Canada's Notices to Importers.

⁴⁴ Both the use of pools to administer quota in this way, and the categorisation of importers as 'processors', 'further processors' and 'distributors' is unique to Canada.

⁴⁵ This is set out under the 'Eligibility Criteria' heading in each of Canada's Notices to Importers.

Cheese TRQ, and ‘further processors’ are blocked from accessing Canada’s Cheese of All Types, Concentrated Milk, Milk, and Mozzarella and Prepared Cheese TRQs. Dairy processors who do not meet the definition of ‘processor’ for a particular TRQ (i.e. because they process dairy products other than the one being imported – discussed further below⁴⁶) are also blocked from accessing quota (unless they also happen to be a further processor or a distributor). As discussed further below, retailers are completely blocked from accessing quota under all of Canada’s 16 TRQs.⁴⁷

IV. OPERATION OF CANADA’S POOLING SYSTEM

33. Canada’s quota pooling system channels access to quota under Canada’s dairy TRQs *away* from importers who are *likely* to use it, and *towards* those who are *not*. The lion’s share (80%-85%) of each TRQ is allocated to a pool reserved exclusively for what Canada’s Notices to Importers refer to as ‘processors’. Canada’s Notices define a ‘processor’ as an entity, based in Canada, that manufactures *the same dairy product being imported under the TRQ*.⁴⁸ Under the Notice to Importers for Canada’s Cream TRQ, for example, a ‘processor’ is someone who *manufactures cream* in Canada. Under the Notice for Canada’s Butter TRQ, a ‘processor’ is someone who *manufactures butter* in Canada.
34. Put differently, a ‘processor’ under Canada’s Notices to Importers is a Canadian dairy processor whose own product *will directly compete with product that is imported under the relevant TRQ*. These are not entities that are likely to be motivated to import under Canada’s dairy TRQs. Indeed, as entities that competitively benefit from Canada’s prohibitively high tariff rates, and the lack of any real import competition within the domestic dairy market, they could have very strong reasons not to want Canada’s CPTPP TRQs to be utilised at all. By reserving the vast majority of quota under each of its TRQs exclusively for these ‘processors’, Canada makes its domestic dairy processors gatekeepers of their own competition. This encourages chronic underfill. In the 2021-22 quota year,⁴⁹ for example, the fill rates for 13 of Canada’s 16 dairy TRQs were 10% or below, with nine of those thirteen at 0%.⁵⁰

⁴⁶ The definition of a ‘processor’ as an entity that manufactures the *same dairy product being imported under the TRQ* is discussed in paragraph 33 below.

⁴⁷ This is expressly stated in the second bullet point under ‘Distributor’ in the ‘Eligibility Criteria’ section in each of Canada’s Notices to Importers. See further the discussion in paragraph 37 below.

⁴⁸ The one exception to this is the Notice to Importers for Canada’s Milk TRQ, which defines a processor as an entity that ‘processes milk in your own provincially-licensed or federally-registered facility’: CPTPP: Milk TRQ – Serial No. 1048 [NZL-15].

⁴⁹ Under the terms of Canada’s CPTPP Tariff Schedule, the import year for 9 of Canada’s TRQs start on 1 January, the import year for the remaining 7 starts on 1 August: CPTPP, Annex 2-D Tariff Schedule of Canada, ‘[Appendix A - Tariff Rate Quotas of Canada](#)’.

⁵⁰ Rounded to the nearest 1%: Fill-Rate Data for Canada’s CPTPP Dairy TRQ’s, quota year 4 (2021-2022) [NZL-20]; based on Government of Canada TRQ import volume data: Import volumes for Butter TRQ, Cream TRQ, Cream Powder TRQ, Milk TRQ, Milk Powder TRQ, Skim Milk Powder TRQ and Whey Powder TRQ, quota Year 4 [NZL-49]; Import volumes for Concentrated Milk TRQ, Powdered Buttermilk TRQ, Products Consisting of Non Milk

35. Having allocated the vast majority of quota available under each TRQ to this processor pool, Canada's Notices to Importers slice up the small amount of quota left into one or two smaller quota pools (as illustrated by Figure 1 below, depicting Canada's Cream TRQ).⁵¹ These pools are limited both in respect of the volume of quota available under them, and the entities that can access them. As shown in Table 1 above, most of these pools contain only 10% of the total quota available under the TRQ,⁵² which in some cases amounts to as little as 10 MT of product.⁵³ Access to these pools is limited to either 'further processors' (defined in Canada's Notices to Importers as entities that use the product being imported under the TRQ to manufacture further food products⁵⁴) or 'distributors' (defined in Canada's Notices to Importers as an entity that on-sells the TRQ product to other businesses⁵⁵).
36. If applications for quota from one of these smaller pools exceeds the amount of quota in the pool, then the available quota is divided between applicants on either a market share⁵⁶ or equal share basis.⁵⁷ This will happen irrespective of whether there is quota remaining in other pools (e.g. in the processor pool). The limited size of these pools means that applicants could frequently be left with allocations that do not meet their needs.

Constituents (NMC) TRQ, Ice Cream and Mixes TRQ, Other Dairy TRQ and Yoghurt and Buttermilk TRQ, quota year 4 [NZL-50]; Import volumes for Cheese of All Types TRQ, Industrial Cheese TRQ and Mozzarella and Prepared Cheese TRQ, quota year 4 [NZL-51].

⁵¹ Five of Canada's TRQs only have two pools. As shown in Table 1 above at paragraph 31, these are: Industrial Cheese [NZL-1], Cheeses of all Types [NZL-13], Concentrated Milk [NZL-14], Milk [NZL-15], Mozzarella and Prepared Cheese [NZL-16].

⁵² For a full breakdown of the pools that Canada has created under each TRQ, and the volume of quota under each pool, see the table at paragraph 31.

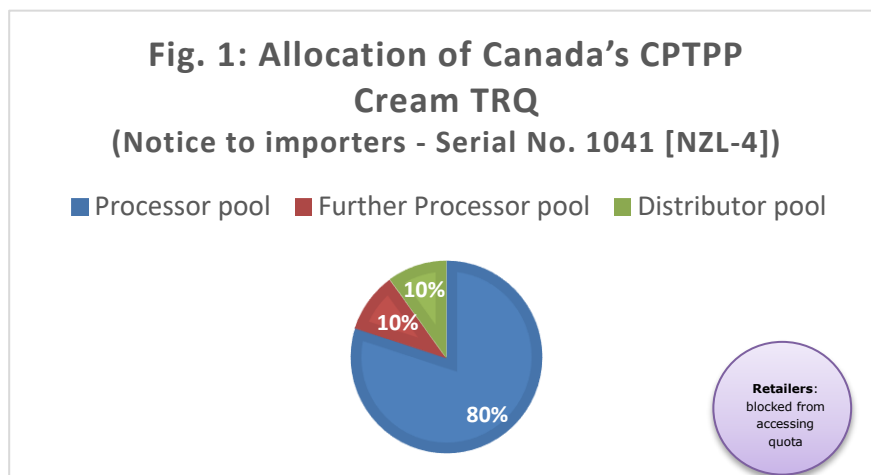
⁵³ Canada's total Cream Powders TRQ in year 2 was 101 MT. Canada's Notices to Importers allocated 10% of that to a pool accessible only by distributors: CPTPP, Annex 2-D Tariff Schedule of Canada, '[Appendix A - Tariff Rate Quotas of Canada](#)' at para 10, read with CPTPP: Cream Powders TRQ – Serial No. 1047 [NZL-10].

⁵⁴ 'Further processor' is defined in this way under the 'Eligibility criteria' heading in each of Canada's Notices to Importers. The one exception is the Notice to Importers for Canada's Industrial Cheese TRQ, which defines 'further processors' as an entity 'that uses cheese as an ingredient in the production of further processed food products': CPTPP – Industrial Cheese TRQ – Serial No. 996 [NZL-1].

⁵⁵ 'Distributor' is defined under the 'Eligibility criteria' heading in Canada's Notices to Importers.

⁵⁶ In the case of the further processor pool, quota is divided on a market share basis (see under 'Calculation of allocations' heading in each of Canada's Notices to Importers).

⁵⁷ In the case of the distributor pool, quota is divided on an equal share basis (see under 'Calculation of allocations' heading in each of Canada's Notices to Importers).



37. Canada's Notices to Importers expressly state that retailers are not eligible to be granted quota under any of Canada's 16 dairy TRQs.⁵⁸ Extraordinarily, this includes Canada's TRQ for Concentrated Milk, even though the relevant Notice to Importers requires that 100% of the quota be used to import product for retail sale.⁵⁹ Canada's Notices to Importers lock this key group of potential importers out from accessing quota and, in doing so, artificially reduce demand and increase the likelihood of underfill of its TRQs.
38. Each of the elements of Canada's pooling system discussed above (reserving the vast majority of each TRQ for 'processors' who are unlikely to want to use it; dividing the remaining quota into small and unworkable pools; and excluding retailers entirely from accessing quota) operate collectively to impede the use of Canada's dairy TRQs. As New Zealand will demonstrate, it is also contrary to the letter and spirit of the CPTPP.

V. PRELIMINARY CONSIDERATIONS

A. Measures in issue

39. The measures in issue in this dispute are certain policies and practices pertaining to the administration of Canada's CPTPP dairy TRQs contained in the Notices to Importers listed above at paragraph 30, and identified in the claims set out below.

⁵⁸ Canada's Notices state that 'retailers are **not** eligible to apply for an allocation' (emphasis in original). A 'retailer' is defined as 'an establishment that is primarily engaged in retailing food, and which buys [the product being imported under the TRQ] and sells it directly to final consumers': see bullet point 2 under 'Distributor' in the section titled 'Eligibility Criteria'. The one exception to this is the Notice to Importers for the Industrial Cheese TRQ. Under Canada's Tariff Schedule, 100% of the Industrial Cheese TRQ is to be imported in bulk for further processing (i.e. retail product cannot be imported under the TRQ at all): CPTPP, Annex 2-D Tariff Schedule of Canada, '[Appendix A - Tariff Rate Quotas of Canada](#)', at para 17(c)(i).

⁵⁹ CPTPP: Concentrated Milk TRQ – Serial No. 999 [NZL-14], see the third bullet point under the heading 'Allocation policy'. This end-use requirement for Canada's Concentrated Milk TRQ is permitted under Canada's Tariff Schedule: CPTPP, Annex 2-D Tariff Schedule of Canada, '[Appendix A - Tariff Rate Quotas of Canada](#)', at para 17(c)(i).

40. The Notices to Importers are issued pursuant to authority granted under the Export and Import Permits Act and its corresponding regulations.
41. In New Zealand's view, the practices of Canada in:
- a. reserving quota exclusively for domestic dairy processors;
 - b. allocating all the quota available under each TRQ into 'pools' that can only be accessed by certain types of importer;
 - c. excluding retailers from accessing quota under each of Canada's TRQs.

are all interrelated violations of Canada's obligations under CPTPP. An effective remedy to the current dispute requires a ruling on each of these practices, rather than a ruling on only one or some of them.

B. Terms of reference

42. Pursuant to Article 28.8 CPTPP, as New Zealand and Canada have not agreed on specific terms of reference for this dispute, the terms of reference of the Panel shall be to:
- (a) examine, in the light of the relevant provisions of CPTPP, the matter referred to in the request for the establishment of a panel under Article 28.7.1 (Establishment of a Panel); and
 - (b) make findings and determinations, and any jointly requested recommendations, together with its reasons therefore, as provided for in Article 28.17.4 (Initial Report).

C. Standard of review and rules of interpretation

43. Article 28.12 CPTPP sets out the function of a dispute settlement panel and the standard of review to be applied. The function of a panel is to make an objective assessment of the matter before it, including an examination of the facts and the applicability of and conformity with CPTPP, and to make the findings, determinations and recommendations as are called for in its terms of reference and necessary for the resolution of the dispute.⁶⁰
44. In carrying out its assessment, a panel shall interpret the provisions of CPTPP 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 (1969)* (VCLT).⁶¹

⁶⁰ CPTPP, [Chapter 28 Dispute Settlement](#), Article 28.12(1).

⁶¹ CPTPP, [Chapter 28 Dispute Settlement](#), Article 28.12(3).

Article 31 of the Vienna Convention on the Law of Treaties

45. Article 31(1) of the VCLT states that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose'. The ordinary meaning of the text is the starting point for treaty interpretation. As the WTO Appellate Body has stated, it is a 'fundamental rule of treaty interpretation [that] a treaty interpreter read and interpret the words actually used'.⁶² The text of a treaty does not, however, exist within a vacuum. It must be interpreted in its context, and in light of the treaty's object and purpose.
46. The concept of 'context' here is broad, and encompasses other provisions of the treaty, its preamble, annexes, and other agreements or instruments that relate to the Treaty.⁶³ The object and purpose of a treaty can be discerned from its preamble and other treaty provisions. Consideration of the object and purpose of *specific treaty provisions* may also assist an interpreter in discerning the object and purpose of the *treaty as a whole*.⁶⁴ As the WTO Appellate Body has noted, 'to the extent that one can speak of the 'object and purpose of a treaty provision', it will be informed by, and will be in consonance with, the object and purpose of the entire treaty of which it is but a component'.⁶⁵
47. The requirement under Article 31 VCLT that a treaty be interpreted in good faith is linked to two important principles of treaty interpretation. The first is the principle of effective interpretation, which requires that all terms of a treaty be given meaning. Consistent with this principle, an interpreter must not adopt an interpretation that would render parts of a treaty inutile or redundant.⁶⁶ Under Article 31(3)(c), an interpreter must also take into account any relevant rules of international law.⁶⁷
48. The second principle is that a treaty must not be interpreted in a way that would lead to a result that is manifestly absurd or unreasonable – as such an outcome cannot have been intended by the parties.⁶⁸ Indeed, avoidance of an interpretation that would be manifestly absurd or unreasonable is one of the bases on which an interpreter can have recourse to supplementary means of interpretation under Article 32 VCLT.⁶⁹

⁶² Appellate Body Report, *EC – Hormones*, at para 181.

⁶³ Vienna Convention on the Law of Treaties (VCLT), Article 31(1).

⁶⁴ Appellate Body Report, *EC – Chicken Cuts*, at para 238.

⁶⁵ Appellate Body Report, *EC – Chicken Cuts*, at para 238.

⁶⁶ Panel Report, *US – Gambling*, at para 6.49; Appellate Body Report *Japan – Alcoholic Beverages II*, at para 24; Appellate Body Report, *Argentina – Footwear (EC)*, at paras 81 and 95; Appellate Body Report *Korea – Dairy*, at para 81; Appellate Body Report *US – Section 211 Appropriations Act*, at para 338; Appellate Body Report *US – Offset Act (Byrd Amendment)*, at para 271; Panel Report, *Export Subsidies on Sugar (Australia)*, at para 7.151.

⁶⁷ VCLT, Article 31(3)(c).

⁶⁸ Panel Report, *US – Gambling*, at para 6.49.

⁶⁹ VCLT, Article 32(b).

Article 32 of the Vienna Convention on the Law of Treaties

49. Article 32 VCLT sets out the supplementary means of interpretation. It states that an interpreter may have recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, either:
- a. to confirm the interpretation that has been reached as a result of the application of Article 31 VCLT; or
 - b. to determine the meaning of the treaty when the application of the approach set out in article 31 VCLT leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.
50. The supplementary means of interpretation set out in Article 32 can play an important role in supporting the primary rules of interpretation set out in Article 31. They are, however, ‘supplementary’, and do not provide an alternative approach to interpretation to that set out in Article 31.⁷⁰ There is good reason for this. As the International Law Commission notes, ‘preparatory work ... does not, in consequence, have the same authentic character as an element of interpretation. ... Moreover it is beyond question that the records of treaty negotiations are in many cases incomplete or misleading, so that considerable discretion has to be exercised in determining their value as an element of interpretation’.⁷¹ This is unquestionably so in the case of trade agreements (especially plurilateral ones, such as CPTPP) where parties engage in negotiations seeking to advance their own (frequently competing) trade interests, and what each party hoped to achieve is often quite different from the bargain that is actually agreed.
51. The purpose of treaty interpretation is to ascertain the *common* intention of the parties – not the intention of one party alone.⁷² Accordingly, the subjective or unilateral expectations of one, or some, of the parties can have no bearing on the interpretation process.⁷³ While supplementary materials may be of assistance in some cases, the terms of the treaty itself remain ‘the first and best evidence of the common intention of the parties’.⁷⁴

⁷⁰ USMCA Panel Report, *Canada – Dairy TRQ Allocation Measures*, at para 137.

⁷¹ Panel Report, *Japan - Alcoholic Beverages II*, at footnote 87, quoting from D. Rauschning and R. G. Wetzel, *The Vienna Convention on the Law of Treaties, Travaux Préparatoires* (Frankfurt: Alfred Metzner Verlag, 1978) at pages 252 and 255.

⁷² Appellate Body Report, *China - Publications and Audiovisual Products*, at para 405; Appellate Body Report, *EC – Computer Equipment*, at para 84.

⁷³ Appellate Body Report, *US – Stainless Steel (Mexico)*, at para 130.

⁷⁴ USMCA Panel Report, *Canada – Dairy TRQ Allocation Measures*, at para 137.

D. The USMCA Panel decision in *Canada – Dairy TRQ allocation Measures*

52. An obligation identical to the Processor Clause was recently considered by a USMCA Panel in *Canada – Dairy TRQ Allocation Measures*.⁷⁵ There, the US argued that the obligation to ‘not limit access to an allocation’ under USMCA (the USMCA Processor Clause) prohibited Canada from limiting access to *any* allocation to processors.
53. The Panel noted that the key point of difference between the Parties’ positions was the meaning of the phrase ‘an allocation’.⁷⁶ Finding that dictionary definitions alone were not capable of providing a sound basis for interpreting the phrase, the Panel considered its meaning in light of its context. It noted that the same phrase ‘an allocation’ appeared directly before the USMCA Processor Clause in the obligation to not ‘condition access to an allocation on the purchase of domestic production’ (the USMCA Domestic Production Clause). As it was not tenable that Canada would be permitted to impose a domestic purchase requirement on TRQ applicants, the Panel held that the phrase ‘an allocation’ in the USMCA Domestic Production Clause must mean *any* allocation.⁷⁷ The similarities in how the USMCA Processor and Domestic Production Clauses were structured, their close proximity, and ‘basic logic’, led the Panel to find that the phrase ‘an allocation’ in the USMCA Processor Clause must also have been meant to prohibit Parties from limiting access to *any* allocation.⁷⁸
54. The Panel found that this interpretation was supported by the object and purpose of the USMCA and additional principles of treaty interpretation. The purpose of USMCA was to ‘open markets to a greater degree than was the case before its effective date and under predecessor agreements’. The USMCA Processor Clause furthered this purpose by constraining Canada’s ability to deny access to non-processors.⁷⁹ Turning to the additional principles of treaty interpretation, the Panel noted that the alternative interpretation put forward by Canada (that the USMCA Processor Clause only prohibited parties from limiting access to *every* allocation to processors), would allow Canada to limit 99% of allocations to processors, provided it left at least 1 allocation available for non-processors. It found that such an interpretation would render the obligation meaningless,⁸⁰ would lead to absurd results and could not reasonably have been intended by the Parties to USMCA.⁸¹

⁷⁵ USMCA Panel Report, *Canada – Dairy TRQ Allocation Measures*.

⁷⁶ USMCA Panel Report, *Canada – Dairy TRQ Allocation Measures*, at para 103.

⁷⁷ USMCA Panel Report, *Canada – Dairy TRQ Allocation Measures* at para 114.

⁷⁸ USMCA Panel Report, *Canada – Dairy TRQ Allocation Measures* at para 115.

⁷⁹ USMCA Panel Report, *Canada – Dairy TRQ Allocation Measures* at para 117.

⁸⁰ USMCA Panel Report, *Canada – Dairy TRQ Allocation Measures* at para 125.

⁸¹ USMCA Panel Report, *Canada – Dairy TRQ Allocation Measures* at paras 124 - 125.

55. The Panel held that Canada's practice of reserving access to 85%-100% of its USMCA dairy TRQs exclusively to processors (including further processors) was inconsistent with the USMCA Processor Clause, and accordingly was in breach of USMCA.⁸²
56. The USMCA Panel's decision in *Canada – Dairy TRQ Allocation Measures* is specific to USMCA. While CPTPP is a separate treaty to USMCA, and accordingly requires an independent treaty interpretation, the parallels between the USMCA and CPTPP Processor Clauses (which, along with the surrounding obligations, are identical) make the decision of the USMCA Panel highly pertinent to this exercise.

VI. CANADA'S CPTPP NOTICES TO IMPORTERS ARE INCONSISTENT WITH ARTICLE 2.30(1)(B) CPTPP BECAUSE THEY 'LIMIT ACCESS TO AN ALLOCATION TO PROCESSORS'

57. All 16 of Canada's Notices to Importers reserve pools of quota exclusively for processors. This is inconsistent with Canada's obligation under Article 2.30(1)(b) CPTPP to 'ensure that ... it does not ... limit access to an allocation to processors'.
58. Article 2.30(1)(b) reads:

Article 2.30: Allocation¹⁸

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

(a)...

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

...

¹⁸ For the purposes of this section, 'allocation mechanism' means any system when access to the TRQ is granted on a basis other than first-come first-served.

59. Article 2.30(1)(b) contains three substantive obligations.⁸³ These require that Parties not:
- a. allocate any portion of the quota to a producer group (the 'Producer Clause');
 - b. condition access to an allocation on the purchase of domestic production (the 'Domestic Production Clause'), or
 - c. limit access to an allocation to processors (the 'Processor Clause').

⁸² USMCA Panel Report, *Canada – Dairy TRQ Allocation Measures* at para 98.

⁸³ As reflected by the use of the term 'shall', these are mandatory obligations.

60. These three obligations guard against protectionism by preventing CPTPP Parties from administering their TRQs in a manner that is designed to benefit their domestic industry, at the expense of CPTPP Parties seeking to utilise them.
61. The present dispute is concerned primarily with Canada's obligation to comply with the Processor Clause. A Party will breach the Processor Clause if they limit access to one, several, or indeed all allocations under a TRQ to processors.⁸⁴

A. Circumstances in which the Processor Clause will apply

62. The obligations under Article 2.30(1) (including the Processor Clause) will apply in the event that access under a TRQ is (a) subject to an allocation mechanism, and (b) the Parties have not reached an alternative agreement.
63. As noted above,⁸⁵ an 'allocation mechanism' is defined under CPTPP as 'any system where access to the TRQ is granted on a basis other than first-come first-served'.⁸⁶ This would include Canada's TRQ allocation system, which grants access to TRQ quota in accordance with the policies and practices set out in Canada's Notices to Importers.
64. The phrase 'unless otherwise agreed' in Article 2.30(1)(b) acknowledges that CPTPP Parties can agree to modify the obligations under Article 2.30(1)(b). There are two key ways in which the CPTPP parties can do so:⁸⁷ through the consultation and agreement process set out in Article 2.29(2)(b) and (c),⁸⁸ or through terms negotiated and inserted into a CPTPP Party's Schedule to Annex 2-D.
65. There is no agreement between CPTPP Parties that would alter or relieve Canada of the obligation under the Processor Clause and allow it to limit access to an allocation to processors. Canada's Tariff Schedule does not permit it to set aside any portion of its TRQs for processors, nor has Canada engaged in the Article 2.29(2)(b) and (c) process to obtain CPTPP Party agreement to allow it to impose the limits being imposed under the processor and further processor pools.
66. In short, the obligation under the Processor Clause (to not limit access to an allocation to processors) applies to Canada's dairy TRQ administration.

⁸⁴ As is the case under Canada's TRQ allocation mechanism, discussed below from paragraph 77.

⁸⁵ See paragraph 26 above.

⁸⁶ CPTPP, [Chapter 2 National Treatment and Market Access for Goods](#), 'Section D – Tariff-Rate Quota Administration', Article 2.30, footnote 18.

⁸⁷ That is, other than amending Article 2.30 itself.

⁸⁸ Discussed further below at paragraph 83. Article 2.29(2)(b) and (c) provide that Parties seeking to introduce new or additional conditions, limits or eligibility requirements on the utilisation of a TRQ must: notify other CPTPP Parties of their proposed new measure, and enter into consultations with any Party with a demonstrable interest in supplying the relevant good. The Party is only permitted to introduce the new condition, limit or eligibility requirement if (following consultations) no Party with a demonstrable interest in supplying the relevant good objects.

B. Ordinary meaning of the terms

67. The Processor Clause states that CPTPP Parties shall ensure that they do not ‘limit access to an allocation to processors’.
68. The terms ‘shall...ensure’ indicates that this is a positive obligation. To ‘limit’ is ‘[to] confine within limits, to set bounds to...; to bound, restrict.’⁸⁹ ‘Access’ is relevantly defined as ‘[t]o obtain, acquire; to get hold of [something]’.⁹⁰ The phrase ‘to limit access to’ therefore means ‘to restrict to *someone* (‘processors’) the ability to ‘obtain’ or ‘acquire’ *something* (‘an allocation’).⁹¹
69. A ‘processor’ is ‘[a] person who ... performs a process or processes something; *spec.* ... (b) a food processor.’⁹² To ‘process’ something is ‘[t]o subject to or treat by a special process; to operate on mechanically or chemically; *spec.* to preserve or alter (food, a foodstuff, etc.) in this way.’⁹³ The ordinary meaning of the term ‘processor’ would capture entities that process raw materials into other products (e.g. an entity that process raw milk to make cheese) as well as entities that carry out further processing later in the supply chain (e.g. an entity that uses milk to make cake, or eggs to make mayonnaise).
70. An ‘allocation’ is ‘[t]hat which is allocated to a particular person, purpose, etc.; a portion, a share; a quota’.⁹⁴ Here we are concerned with an allocation of a TRQ. As the Processor Clause is concerned exclusively with ‘*access to*’ an allocation (rather than allocations that have been granted), the term refers to a potential portion or share of the TRQ that may be granted to an applicant/applicants.
71. Finally, the Processor Clause requires that Parties not limit access to ‘*an*’ allocation to processors. The term ‘an’ is defined as ‘something not specifically identified ... but treated as one of a class: one, some, any’.⁹⁵ Put simply, *any* allocation that is available under a TRQ is ‘an allocation’. This means that a Party will be in breach of the Processor Clause if it limits access to one, several, or indeed all allocations under a TRQ to processors.

⁸⁹ Oxford English Dictionary Online, definition of ‘limit’ (verb) entry 1.a [NZL-18].

⁹⁰ Oxford English Dictionary Online, definition of ‘access’ entry 1.a [NZL-19].

⁹¹ In interpreting the same obligations found under the USMCA, the Panel in *Canada – Dairy TRQ Allocation Measures* similarly interpreted this phrase as: “‘to restrict’ to *someone* (‘processors’) the ‘opportunity to benefit from or use’ *something* (‘an allocation’)”.

⁹² Oxford English Dictionary Online, definition of ‘processor’ [NZL-21].

⁹³ Oxford English Dictionary Online, definition of ‘process’ entry 3.a [NZL-22].

⁹⁴ Oxford English Dictionary Online, definition of ‘allocation’ entry 3.b [NZL-23].

⁹⁵ Oxford English Dictionary Online, definition of ‘a’, entry I.1 (note inflections – before a vowel sound ‘a’ is ‘an’) [NZL-24].

C. This interpretation is supported by the context to the Processor Clause

72. This interpretation is supported by the context of the Processor Clause, in particular the Domestic Production Clause, which immediately precedes the Processor Clause in Article 2.30(1)(b).⁹⁶ The Domestic Production Clause prohibits Parties from ‘condition[ing] access to *an allocation* on the purchase of domestic quota’.⁹⁷ Clearly, this prohibition must apply to any allocation under a TRQ. Any other interpretation would permit CPTPP Parties to impose domestic purchase requirements on at least some TRQ allocations, which cannot have been intended. The similarity between the nature of the obligation under the Processor Clause and the Domestic Production Clause (prohibiting Parties from restricting access to allocations), their placement in direct proximity to each other, and the use of the exact same language (‘access to an allocation’) provides strong contextual support for interpreting ‘an allocation’ consistently across both clauses. This was also the conclusion that was reached by the Panel in *Canada – Dairy TRQ Allocation Measures* in its interpretation of the USMCA Processor Clause.⁹⁸
73. The purpose of both the Processor Clause and the Domestic Production Clause (and the Producer Clause, that also sits under Article 2.30(1)(b)) is to guard against protectionism. They prevent Parties from administering their TRQs in a manner that favours their domestic industry at the expense of CPTPP exporting Parties who are seeking to benefit from the TRQs. The Processor Clause does this by making sure that Parties cannot set aside or reserve any quota exclusively for Processors, while the Domestic Production Clause does this by making sure that Parties cannot require importers to purchase domestic production in order to access quota.
74. The phrase ‘an allocation’ also appears in Article 2.30(1)(d), which obliges Parties to ensure that ‘an allocation for in quota imports is applicable to any tariff items subject to the TRQ and is valid throughout the TRQ year’. Here again, ‘an allocation’ must be interpreted as capturing *any* allocation that is granted under the TRQ. Any other interpretation would permit Parties to limit *some* allocations to certain tariff lines, and to grant *some* allocations for periods less than the full TRQ year. This would render the

⁹⁶ In *Canada – Dairy TRQ Allocation Measures* at paras 112-115, Canada argued that the text of the Producer Clause under USMCA provided more relevant context to the interpretation of ‘an allocation’ in the Processor Clause. The Producer Clause states that Parties shall not ‘allocate any portion of the quota to a producer group’. Canada argued that, if the drafters had intended ‘an allocation’ in the Processor Clause to mean ‘any allocation’, then they would have used the term ‘any’, as they did in the Domestic Production Clause. This was rejected by the USMCA Panel, which noted that there was no similarity between the language used in the Producer Clause and that used in the Processor Clause (the producer clause, for example, uses ‘portion of the quota’ rather than ‘allocation’). The Panel also noted that the nature of the two obligations was different, while the Producer Clause set out an outright ban on allocations to Producers, the Processor Clause concerned the restriction of ‘access’ to an allocation. In both respects the Panel found that the Domestic Production Clause provided more relevant and helpful context to the interpretation of ‘an allocation’ under the Processor Clause.

⁹⁷ Emphasis added.

⁹⁸ USMCA Panel Report, *Canada – Dairy TRQ Allocation Measures*, at para 115.

obligation under Article 2.30(1)(d) largely meaningless, and permit parties to engage in protectionist practices, which cannot have been intended by the drafters. This provides further contextual support for interpreting ‘an allocation’ under the Processor Clause as meaning *any* allocation.

D. This interpretation is supported by the object and purpose of CPTPP

75. Interpreting the Processor Clause as prohibiting Parties from limiting access to *any* allocation to domestic processors is also supported by the object and purpose of CPTPP.
76. As set out in the Preamble, the object and purpose of CPTPP includes ‘promot[ing] further regional economic integration ...’, ‘enhanc[ing] opportunities for the acceleration of regional trade liberalisation and investment’, and ‘contribut[ing] to maintaining open markets, [and] increasing world trade...’.⁹⁹ CPTPP is a trade liberalisation agreement. It reflects an intention to grant greater access to markets between CPTPP Parties, in line with the substantive obligations set out in the text, and the specific market access commitments set out in its schedules. Interpreting the Processor Clause in a manner that prevents Parties from undermining the TRQ market access they have granted through the use of restrictive TRQ allocation mechanisms is consistent with this object and purpose.

E. Canada’s Notices limit access to between 85% - 100% of the allocations available under each of its TRQs to processors

77. Canada’s Notices to Importers allocate between 85% and 100% of the quota available under each of its 16 dairy TRQs to pools that are reserved exclusively for processors or further processors.
78. Canada’s Notices to Importers define a ‘processor’ as an entity ‘that manufactures [the dairy product that the TRQ is for – e.g. butter] in your own provincially-licenced or federally registered facility’.¹⁰⁰ These are entities that subject raw milk or other dairy inputs to a series of processes to manufacture the relevant dairy product. They fall within the meaning of ‘processors’ within the Processor Clause. ‘Further processors’ are defined in Canada’s notices as an entity ‘that uses [the dairy product that the TRQ is for – e.g. butter] in your manufacturing operations and product formulation’.¹⁰¹ Again,

⁹⁹ Trans-Pacific Partnership (TPP), [Preamble](#), at paras 3, 4 and 5 (incorporated into CPTPP under Article 1, CPTPP).
¹⁰⁰ This definition is set out under the ‘Eligibility Criteria’ heading in all but one of Canada’s 16 Notices to Importers. The one exception is the Notice for Industrial Cheese [NZL-1], which describes a ‘processor’ as an entity ‘[t]hat manufactures cheese for use as an ingredient in the production of further processed food products’. This definition would also fall within the meaning of ‘processors’ under Article 2.30(1)(b).

¹⁰¹ This is set out under the ‘Eligibility Criteria’ heading in all but one of Canada’s 16 Notices to Importers. The one exception is the Notice for Industrial Cheese [NZL-1], which describes a ‘further processor’ as an entity ‘that uses cheese as an ingredient in the production of further processed food products, other than cheese, in your manufacturing

these entities fall within the meaning of ‘processors’ under the Processor Clause.¹⁰²

79. Table 2 below shows the exact percentages of each TRQ that are reserved exclusively for processors and further processors under each of Canada’s 16 TRQs:

Table 2				
TRQ	% allocated to ‘processors’	% allocated to ‘further processors’	Total % allocated to processors ¹⁰³	Exhibit No.
Industrial Cheese	80%	20%	100%	NZL-1
Whey Powder	80%	10%	90%	NZL-2
Yogurt and Buttermilk	80%	10%	90%	NZL-3
Cream	80%	10%	90%	NZL-4
Ice Cream and Mixes	80%	10%	90%	NZL-5
Skim Milk Powders	80%	10%	90%	NZL-6
Butter	80%	10%	90%	NZL-7
Milk Powders	80%	10%	90%	NZL-8
Other Dairy	80%	10%	90%	NZL-9
Cream Powders	80%	10%	90%	NZL-10
Products of Natural Milk Constituents	80%	10%	90%	NZL-11
Powdered Buttermilk	80%	10%	90%	NZL-12
Cheeses of All Types	85%	-	85%	NZL-13
Concentrated Milk	85%	-	85%	NZL-14
Milk	85%	-	85%	NZL-15
Mozzarella and Prepared Cheese	85%	-	85%	NZL-16

operations and product formulation’. This definition would also fall within the meaning of ‘processors’ under Article 2.30(1)(b) of CPTPP.

¹⁰² In the USMCA case *Canada – Dairy TRQ Allocation Measures* at para 126, Canada argued that ‘further processors’ under its Notices to Importers are not ‘processors’ for the purposes of the USMCA Processor Clause. The USMCA Panel rejected this argument, finding that there was no basis for such a distinction in the terms of the USMCA Processor Clause. The Processor Clause under CPTPP applies to a range of TRQs maintained by CPTPP Parties, including TRQs for non-dairy products such as eggs (Canada itself maintains TRQs for eggs: CPTPP, Annex 2-D Tariff Schedule of Canada, ‘[Appendix A - Tariff Rate Quotas of Canada](#)’, at para 25). If the term ‘processor’ in the Processor Clause were to be interpreted as not capturing further processors, it would be incapable of applying to the administration of TRQs for those products (such as eggs) that are only ever processed into other food products. There is no basis for suggesting that the scope of the Processor Clause was intended to be limited in this manner.

¹⁰³ For those TRQs where less than 100% is allocated to processors (being the combined total of the ‘processor’ pool and the ‘further processor’ pool), the balance is reserved for distributors under a separate distributor pool. For the total breakdown of each TRQ see Table 1 at paragraph 31 above.

80. The only entities that can access these allocations are processors. Entities that fall outside of these definitions (including retailers and distributors) are excluded from accessing the allocations contained in the ‘processor’ and ‘further processor’ pools. This is clearly in violation of Canada’s obligation under the Processor Clause contained in Article 2.30(1)(b).

VII. CANADA’S CPTPP NOTICES TO IMPORTERS ARE INCONSISTENT WITH ARTICLE 2.29(2)(A) CPTPP BECAUSE THEY INTRODUCE NEW LIMITS AND ELIGIBILITY REQUIREMENTS ON THE UTILISATION OF CANADA’S DAIRY TRQS

81. All 16 of Canada’s Notices to Importers introduce new limits and eligibility requirements on the utilisation of a TRQ beyond those set out in Canada’s Schedule to Annex 2-D. This is inconsistent with Canada’s obligations under Article 2.29(2)(a).
82. The text of Article 2.29(2)(a) reads:

Article 2.29: Administration and Eligibility

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

2. (a) 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)

...

A. Circumstances in which Article 2.29(2)(a) will apply

83. Article 2.29(2)(a) prohibits the introduction of new or additional conditions, limits or eligibility requirements, ‘except as provided in subparagraphs (b) and (c)’. Under those paragraphs, a Party seeking to introduce a new limit condition or eligibility requirement must notify other CPTPP Parties of their intention to do so, and undertake consultations with any CPTPP Party with an interest in exporting the goods affected by the new measure. The party will only be permitted to introduce the new measure if (following consultations) no CPTPP Party with a demonstrable commercial interest in supplying the relevant good objects to its introduction.¹⁰⁴

¹⁰⁴ CPTPP, [Chapter 2 National Treatment and Market Access for Goods](#), ‘Section D – Tariff-Rate Quota Administration’, Article 2.29(2)(c).

B. Ordinary meaning of the terms

84. Article 2.29(2)(a) prohibits Parties from introducing ‘a new or additional condition, limit, or eligibility requirement on the utilisation of a TRQ for the importation of a good...beyond those set out in [the party’s] Schedule to Annex 2-D (Tariff Commitments).
85. The terms ‘new’, ‘additional’ and ‘beyond’ have similar meanings. ‘New’ refers to something ‘that has not previously existed’.¹⁰⁵ ‘Additional’ means something ‘[th]at is in addition to something else; added, extra’.¹⁰⁶ ‘Beyond’ means ‘in addition, besides, over and above’.¹⁰⁷ The prohibition in Article 2.29(2)(a) therefore captures limits, conditions and eligibility requirements ‘in addition’ to or ‘over and above’ ‘those set out in [the relevant CPTPP Party’s] Schedule to Annex 2-D (Tariff Commitments)’.¹⁰⁸
86. The term ‘limit’ means ‘[a]ny of the fixed points between which the possible or permitted extent, amount, duration, range of action, or variation of anything is confined; a bound which may not be passed, or beyond which something ceases to be possible or allowable’.¹⁰⁹
87. The term ‘condition’ means ‘[s]omething demanded or required as a prerequisite to the granting or performance of something else; a provision, a stipulation’.¹¹⁰ A ‘prerequisite’ is ‘a thing required as a prior condition’.¹¹¹
88. ‘Eligibility’ means ‘the condition of being eligible for an office or position; entitlement to be considered or chosen for a position, award, or other benefit, usually through the fulfilment of specified criteria.’¹¹² A ‘requirement’ is ‘[so]mething called for or demanded; a condition which must be complied with.’¹¹³ ‘Eligibility requirements’ are therefore the conditions that must be met or complied with in order to be considered or chosen for a particular benefit. In the context of Article 2.29(2), they are the conditions that must be complied with to be eligible to apply and be considered for an allocation under a particular TRQ.
89. ‘Utilisation’ means ‘[th]e action of utilizing; the fact of being utilized.’¹¹⁴ ‘Utilise’ means ‘to make or render useful, to convert to use, turn to account’.¹¹⁵ The thing being utilised here is ‘a TRQ for the importation of goods’. This, coupled with the reference

¹⁰⁵ Oxford English Dictionary Online, definition of ‘new’, entry A.I.1.a [NZL-25].

¹⁰⁶ Oxford English Dictionary Online, definition of ‘additional’, entry A [NZL-26].

¹⁰⁷ Oxford English Dictionary Online, definition of ‘beyond’, entry A.2 [NZL-27].

¹⁰⁸ CPTPP, [Chapter 2 National Treatment and Market Access for Goods](#), ‘Section D – Tariff-Rate Quota Administration’, Article 2.29(2)(a).

¹⁰⁹ Oxford English Dictionary Online, definition of ‘limit’ (noun), entry 1.a [NZL-28].

¹¹⁰ Oxford English Dictionary Online, definition of ‘condition’, entry I.1.a [NZL-29].

¹¹¹ Oxford English Dictionary Online, definition of ‘prerequisite’, entry A [NZL-30].

¹¹² Oxford English Dictionary Online, definition of ‘eligibility’, entry 2.a [NZL-31].

¹¹³ Oxford English Dictionary Online, definition of ‘requirement’, entry 3.b [NZL-48].

¹¹⁴ Oxford English Dictionary Online, definition of ‘utilization’ [NZL-32].

¹¹⁵ Oxford English Dictionary Online, definition of ‘utilize’, entry 1 [NZL-34].

to ‘eligibility requirements’, makes it clear that the ‘utilisation’ of a TRQ includes everything from quota allocation to the point at which product enters the relevant market.

90. CPTPP Parties are therefore prohibited from introducing limits, conditions or eligibility requirements that affect the ability of an importer to obtain a TRQ allocation, import product into the market, or claim preferential tariff treatment, over and above those set out in a Party’s Tariff Schedule (except through the process set out in Article 2.29(2)(b) and (c)).

C. This interpretation is supported by the context of Article 2.29(2)(a)

91. The context of Article 2.29(2)(a) supports interpreting the term ‘utilisation’ as encompassing: (a) the ability of an importer to obtain a TRQ allocation, (b) import product into the market, and (c) claim preferential tariff treatment on importation.
92. The heading of Article 2.29(2)(a) includes the term ‘eligibility’. As both of the obligations that sit under Article 2.29 concern the ‘utilisation’ of TRQs, it is clear that the ‘utilisation’ of a TRQ includes the ability to obtain/access a quota allocation. Similarly, the examples of possible new conditions, limits or eligibility requirements listed in Article 2.29(2)(a) (including measures relating to ‘specification or grade, permissible end use...or package size’), make it clear that ‘utilisation’ also extends to the use of a TRQ to bring actual goods into the country. Finally, as the obligation is concerned with the utilisation of ‘a TRQ’ (being a form of preferential tariff market access) it is clear that ‘utilisation’ also extends to the ability to claim preferential treatment on entry.

D. This interpretation is supported by the object and purpose of CPTPP

93. This interpretation is supported by the object and purpose of CPTPP. The Preamble explains that the purposes of CPTPP include to ‘contribute to maintaining open markets, [and] increasing world trade...’¹¹⁶ and to ‘establish a predictable legal and commercial framework for trade and investment through mutually advantageous rules’.¹¹⁷ As noted above, CPTPP is a trade liberalisation agreement. It reflects an intention to grant greater access to markets between CPTPP Parties, in line with the substantive obligations set out in the text, and the specific market access commitments set out in its schedules.
94. Interpreting Article 2.29(2)(a) in a manner that limits the ability of CPTPP Parties to alter the terms on which they provided the market access agreed under the Treaty, and

¹¹⁶ CPTPP, [Preamble](#), at para 3.

¹¹⁷ TPP, [Preamble](#), at para 7 (incorporated into CPTPP under Article 1, CPTPP).

requires them to instead consult and seek agreement from other CPTPP Parties, is consistent with these purposes.

E. Canada's Notices are inconsistent with Article 2.29(2)(a) in two ways

Canada's Notices impose new limits on the utilisation of its dairy TRQs

95. Canada's Notices to Importers are inconsistent with Article 2.29(2)(a) because they introduce new limits on the utilisation of its CPTPP TRQs. Specifically:
 - a. All 16 of Canada's Notices to Importers allocate between 80%-85% of the total quota to 'processors'.¹¹⁸ These are 'limits' on the utilisation of the TRQ as they prevent entities other than 'processors'¹¹⁹ from being able to access or use any of that quota to import product into Canada.
 - b. Twelve of Canada's Notices to Importers allocate between 10%-20% of the total quota to 'further processors'.¹²⁰ These are 'limits' on the utilisation of the TRQ as they prevent entities other than 'further processors'¹²¹ from being able to access or use any of that quota to import product into Canada.
 - c. Fifteen of Canada's Notices to Importers allocate between 10%-15% of the total quota to 'distributors'.¹²² These are 'limits' on the utilisation of the TRQ as they prevent entities other than 'distributors'¹²³ from being able to access or use any of that quota to import product into Canada.

¹¹⁸ Under the 'Calculation of Allocations' heading: [NZL-1] to [NZL-16].

¹¹⁹ Defined in Canada's Notices to Importers as entities 'that manufacture [the relevant TRQ product] in your own provincially-licensed or federally registered facility': see paragraph 33 above.

¹²⁰ Under the 'Calculation of Allocations' heading: CPTPP: Industrial Cheese TRQ – Serial No. 996 [NZL-1]; CPTPP: Whey Powder TRQ – Serial No. 1044 [NZL-2]; CPTPP: Yogurt and Buttermilk TRQ – Serial No. 1008 [NZL-3]; CPTPP: Cream TRQ – Serial No. 1041 [NZL-4]; CPTPP: Ice Cream and Mixes TRQ – Serial No. 1001 [NZL-5]; Skim Milk Powders TRQ – Serial No. 1052 [NZL-6]; CPTPP: Butter TRQ – Serial No. 1039 [NZL-7]; CPTPP: Milk Powders TRQ – Serial No. 1050 [NZL-8]; CPTPP: Other Dairy TRQ – Serial No. 1003 [NZL-9]; CPTPP: Cream Powders TRQ – Serial No. 1047 [NZL-10]; CPTPP: Products Consisting of Natural Milk Constituents TRQ – Serial No. 1006 [NZL-11]; CPTPP: Powdered Buttermilk TRQ – Serial No. 1004 [NZL-12].

¹²¹ Defined in Canada's Notices to Importers as entities that use the TRQ product in their 'manufacturing operations and product formulations': see paragraph 35 above.

¹²² Under the 'Calculation of Allocations' heading: CPTPP: Whey Powder TRQ – Serial No. 1044 [NZL-2]; CPTPP: Yogurt and Buttermilk TRQ – Serial No. 1008 [NZL-3]; CPTPP: Cream TRQ – Serial No. 1041 [NZL-4]; CPTPP: Ice Cream and Mixes TRQ – Serial No. 1001 [NZL-5]; Skim Milk Powders TRQ – Serial No. 1052 [NZL-6]; CPTPP: Butter TRQ – Serial No. 1039 [NZL-7]; CPTPP: Milk Powders TRQ – Serial No. 1050 [NZL-8]; CPTPP: Other Dairy TRQ – Serial No. 1003 [NZL-9]; CPTPP: Cream Powders TRQ – Serial No. 1047 [NZL-10]; CPTPP: Products Consisting of Natural Milk Constituents TRQ – Serial No. 1006 [NZL-11]; CPTPP: Powdered Buttermilk TRQ – Serial No. 1004 [NZL-12]; CPTPP: Cheeses of All Types TRQ – Serial No. 995 [NZL-13]; CPTPP: Concentrated Milk TRQ – Serial No. 999 [NZL-14]; CPTPP: Milk TRQ – Serial No. 1048 [NZL-15]; CPTPP: Mozzarella and Prepared Cheese TRQ – Serial No. 997 [NZL-16].

¹²³ Defined in Canada's Notices to Importers as an entity that on-sells the TRQ product to other businesses: see paragraph 35 above.

96. These are all ‘new or additional’ limits. Canada’s Tariff Schedule does not include any terms that permit Canada to impose these limits.¹²⁴ Nor were any of these new limits introduced following the consultation and agreement process set out in Article 2.29(2)(b) and (c). Each limit is therefore clearly in violation of Canada’s obligations under Article 2.29(2)(a).

Canada’s CPTPP Notices to Importers introduce new eligibility requirements on the utilisation of its dairy TRQs

97. Canada’s Notices to Importers are inconsistent with Article 2.29 because they introduce new eligibility criteria, requiring that applicants be a particular type of business entity in order to apply for an allocation. Specifically:
- a. Eleven of Canada’s Notices to Importers require that an applicant be a ‘processor’, a ‘further processor’ or a ‘distributor’ in order to be eligible for an allocation.¹²⁵ These Notices also expressly state that ‘retailers are not eligible to apply for an allocation’.¹²⁶ These are eligibility requirements on the utilisation of a TRQ because only importers that meet these requirements are permitted to apply for and be granted quota.
 - b. Four of Canada’s Notices to Importers require that an applicant be either a ‘processor’ or a ‘distributor’ in order to be eligible for an allocation.¹²⁷ These Notices also expressly state that ‘retailers are not eligible to apply for an allocation’.¹²⁸ These are eligibility requirements on the utilisation of a TRQ because only importers that meet these requirements are permitted to apply for and be granted quota.
 - c. Canada’s Notice to Importers for Industrial Cheese requires that an applicant be a ‘processor’ or a ‘further processor’ in order to be eligible for an

¹²⁴ Where Canada did negotiate permitted limits, these were recorded in its Tariff Schedule. These include, for example, permitted end-use limits on a percentage of the product imported under four of its TRQs: Milk, Butter, Concentrated Milk and Industrial Cheese: CPTPP, Annex 2-D Tariff Schedule of Canada, ‘[Appendix A - Tariff Rate Quotas of Canada](#)’, at para 6(c)(i) (Milk TRQ); para 16(c)(i) (Butter TRQ); para 11(c)(i) (Concentrates Milk) and para 17(c)(i) (Industrial Cheese).

¹²⁵ Under the ‘Eligibility Criteria’ heading: CPTPP: Whey Powder TRQ – Serial No. 1044 [NZL-2]; CPTPP: Yogurt and Buttermilk TRQ – Serial No. 1008 [NZL-3]; CPTPP: Cream TRQ – Serial No. 1041 [NZL-4]; CPTPP: Ice Cream and Mixes TRQ – Serial No. 1001 [NZL-5]; Skim Milk Powders TRQ – Serial No. 1052 [NZL-6]; CPTPP: Butter TRQ – Serial No. 1039 [NZL-7]; CPTPP: Milk Powders TRQ – Serial No. 1050 [NZL-8]; CPTPP: Other Dairy TRQ – Serial No. 1003 [NZL-9]; CPTPP: Cream Powders TRQ – Serial No. 1047 [NZL-10]; CPTPP: Products Consisting of Natural Milk Constituents TRQ – Serial No. 1006 [NZL-11]; CPTPP: Powdered Buttermilk TRQ – Serial No. 1004 [NZL-12].

¹²⁶ This is set out in Canada’s Notices to Importers under the heading ‘Eligibility Criteria’ and the subheading ‘Distributor’.

¹²⁷ Under the ‘Eligibility Criteria’ heading: CPTPP: Cheeses of All Types TRQ – Serial No. 995 [NZL-13]; Concentrated Milk TRQ – Serial No. 999 [NZL-14]; CPTPP: Milk TRQ – Serial No. 1048 [NZL-15]; CPTPP: Mozzarella and Prepared Cheese TRQ – Serial No. 997 [NZL-16].

¹²⁸ This is set out in Canada’s Notices to Importers under the heading ‘Eligibility Criteria’ and the subheading ‘Distributor’.

allocation.¹²⁹ These are eligibility requirements on the utilisation of a TRQ because only importers that meet these requirements are permitted to apply for and be granted quota.

98. All of these eligibility requirements are ‘new’ or ‘over and above’ those set out in Canada’s Tariff Schedule. Appendix A of Canada’s Tariff Schedule sets out the eligibility requirements that it is permitted to impose on its TRQs. It states that ‘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’.¹³⁰ Canada’s Tariff Schedule accordingly does not permit it to impose eligibility requirements based on the type of business that an applicant is involved in.
99. None of these eligibility requirements were introduced following the consultation and agreement process set out in Article 2.29(2)(b) and (c). They are new eligibility requirements clearly in violation of Canada’s obligations under Article 2.29(2)(a).

VIII. CANADA’S CPTPP NOTICES TO IMPORTERS ARE INCONSISTENT WITH ARTICLE 2.30(1)(A) CPTPP BECAUSE THEY EXCLUDE PERSONS WHO FULFIL CANADA’S ELIGIBILITY REQUIREMENTS FROM ACCESSING AN ALLOCATION

100. All 16 of Canada’s Notices to Importers are inconsistent with Article 2.30(1)(a) because they exclude persons who fulfil Canada’s eligibility requirements from applying, and being considered, for a quota allocation under the relevant TRQ.
101. Article 2.30(1)(a) reads:

Article 2.30: Allocation¹⁸

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

(a) any person of a Party that fulfils the importing Party’s eligibility requirements is able to apply and be considered for a quota allocation under a TRQ.

...

102. Canada’s CPTPP dairy TRQs are subject to an allocation mechanism.¹³¹ The obligations set out in Article 2.30(1)(c) therefore apply.

¹²⁹ Under the ‘Eligibility Criteria’ heading: CPTPP: Industrial Cheese TRQ – Serial No. 996 [NZL-1].

¹³⁰ CPTPP, Annex 2-D Tariff Schedule of Canada, ‘[Appendix A - Tariff Rate Quotas of Canada](#)’, at para 3(c).

¹³¹ As set out in paragraph 63 above.

A. Ordinary meaning of the terms

103. Article 2.30(1)(a) requires relevant importing Parties to ensure that ‘any person of a Party that fulfils the importing Party’s eligibility requirements is able to apply and be considered for a quota allocation under a TRQ’.
104. To ‘fulfil’ something is to ‘achieve, to realize (a purpose, plan, end); to satisfy, *to meet (a requirement, condition, standard, etc.)*; to perform (a function).’¹³² As discussed above, ‘eligibility requirements’ are the conditions that must be met or complied with in order to apply and be considered for an allocation under a CPTPP TRQ.¹³³ They are set out in the importing Party’s Tariff Schedule, and a Party cannot introduce new or additional eligibility requirements unless they go through the consultation and agreement process set out in Article 2.29(b) and (c).¹³⁴
105. To ‘apply’ means ‘[t]o put oneself forward formally as a candidate for a position ... to submit an application to do something....’¹³⁵ To ‘consider’ means ‘[t]o take into practical consideration or regard.’¹³⁶
106. Article 2.30(1)(a) therefore obliges all importing CPTPP Parties to ensure that any person or entity that meets the eligibility requirements set out in that Party’s Tariff Schedule is able to put themselves forward, and be taken into consideration, for an allocation under the relevant TRQ.

B. This interpretation is supported by the context of Article 2.30(1)(a)

107. This interpretation is supported by context of Article 2.30(1)(a), in particular the obligation under Article 2.29(2)(a) not to introduce new eligibility requirements beyond those set out in a Party’s Tariff Schedule without the agreement of CPTPP Parties.¹³⁷ This makes it clear that the eligibility requirements set out in a Party’s schedule are the only eligibility requirements that the Party is permitted to apply (unless it goes through the consultation and agreement process set out in paragraphs (b) and (c) of that Article).

C. This interpretation is supported by the object and purpose of CPTPP

108. This interpretation is supported by the object and purpose of CPTPP. The Preamble explains that the purposes of CPTPP include to ‘contribute to maintaining open markets,

¹³² Oxford English Dictionary Online, definition of ‘fulfil’, entry 4.c [NZL-33]. Emphasis added.

¹³³ See paragraph 88 above.

¹³⁴ This is clear from the prohibition under Article 2.29(2)(a) on introducing new or additional eligibility requirements on the utilisation of a TRQ.

¹³⁵ Oxford English Dictionary Online, definition of ‘apply’, entry 13.d [NZL-35].

¹³⁶ Oxford English Dictionary Online, definition of ‘consider’, entry 7 [NZL-36].

¹³⁷ Unless they are consulted and agreed by other CPTPP Parties: Article 2.29(2)(c).

[and] increasing world trade...’¹³⁸ and to ‘establish a predictable legal and commercial framework for trade and investment through mutually advantageous rules’.¹³⁹ CPTPP is a trade liberalisation agreement. It reflects an intention to grant greater access to markets between CPTPP Parties, in line with the substantive obligations set out in the text, and the specific market access commitments set out in its schedules.

109. Interpreting Article 2.30(1)(a) in a manner that requires CPTPP Parties to grant the market access that was negotiated, on the terms set out under their Tariff Schedule (including the eligibility requirements), is consistent with these purposes.

D. Canada’s Notices to Importers exclude persons that meet the eligibility requirements set out in its Tariff Schedule from applying and being considered for an allocation

110. Canada’s eligibility requirements are set out in Appendix A of its Annex 2-D Tariff Schedule. Paragraph 3(c) of Appendix A states that:

‘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.’

Canada has not introduced any new or additional eligibility requirements through the consultation and agreement process set out in Article 2.29(2)(b)-(c).

111. Canada’s Notices to Importers for each of its 16 TRQs require that, *in addition* to meeting the eligibility requirements set out in Appendix A, all applicants must also be a particular type of business entity in order to apply for an allocation. Specifically (as set out in 97 above):

- a. Eleven of Canada’s Notices to Importers require that an applicant be a ‘processor’, a ‘further processor’ or a ‘distributor’ in order to be eligible for an allocation.¹⁴⁰ These Notices also expressly state that ‘retailers are not eligible to apply for an allocation’.¹⁴¹

¹³⁸ CPTPP, [Preamble](#), para 3.

¹³⁹ TPP, [Preamble](#), para 7 (incorporated into CPTPP under [Article 1, CPTPP](#)).

¹⁴⁰ CPTPP: Whey Powder TRQ – Serial No. 1044 [NZL-2]; CPTPP: Yogurt and Buttermilk TRQ – Serial No. 1008 [NZL-3]; CPTPP: Cream TRQ – Serial No. 1041 [NZL-4]; CPTPP: Ice Cream and Mixes TRQ – Serial No. 1001 [NZL-5]; Skim Milk Powders TRQ – Serial No. 1052 [NZL-6]; CPTPP: Butter TRQ – Serial No. 1039 [NZL-7]; CPTPP: Milk Powders TRQ – Serial No. 1050 [NZL-8]; CPTPP: Other Dairy TRQ – Serial No. 1003 [NZL-9]; CPTPP: Cream Powders TRQ – Serial No. 1047 [NZL-10]; CPTPP: Products Consisting of Natural Milk Constituents TRQ – Serial No. 1006 [NZL-11]; CPTPP: Powdered Buttermilk TRQ – Serial No. 1004 [NZL-12].

¹⁴¹ See the section in the TRQ Notice titled ‘Eligibility Criteria’, under the subheading ‘Distributor’.

- b. Four of Canada's Notices to Importers require that an applicant be either a 'processor' or a 'distributor' in order to be eligible for an allocation.¹⁴² These Notices also expressly state that 'retailers are not eligible to apply for an allocation'.¹⁴³
- c. Canada's TRQ Notice for Industrial Cheese requires that an applicant be a 'processor' or a 'further processor' in order to be eligible for an allocation.¹⁴⁴

112. Applicants that meet the eligibility criteria under Canada's Appendix A, but do not meet these additional requirements are not able to apply for or be considered for a quota allocation under Canada's Notices to Importers. This is clearly inconsistent with Canada's obligation under Article 2.30(1)(a).

IX. CANADA'S CPTPP NOTICES TO IMPORTERS ARE INCONSISTENT WITH ARTICLE 2.30.(1)(C) CPTPP BECAUSE THEY DO NOT ENSURE, TO THE MAXIMUM EXTENT POSSIBLE THAT ALLOCATIONS ARE MADE IN THE AMOUNTS THAT IMPORTERS REQUEST

113. All 16 of Canada's Notices to Importers are inconsistent with Article 2.30(1)(c) because they do not 'ensure to the maximum extent possible that allocations are made in the amounts that importers request'.

114. Article 2.30(1)(c) reads:

Article 2.30: Allocation¹⁸

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

...

(c) each allocation is made in commercially viable shipping quantities and, to the maximum extent possible, in the amounts that importers request;

...

115. Canada's CPTPP dairy TRQs are subject to an allocation mechanism.¹⁴⁵ The obligations set out in Article 2.30(1)(c) therefore apply.

¹⁴² CPTPP: Cheeses of All Types TRQ – Serial No. 995 [NZL-13]; CPTPP: Concentrated Milk TRQ – Serial No. 999 [NZL-14]; CPTPP: Milk TRQ – Serial No. 1048 [NZL-15]; CPTPP: Mozzarella and Prepared Cheese TRQ – Serial No. 997 [NZL-16].

¹⁴³ This is set out in Canada's Notices to Importers under the heading 'Eligibility Criteria' and the subheading 'Distributor'.

¹⁴⁴ CPTPP: Industrial Cheese TRQ – Serial No. 996 [NZL-1].

¹⁴⁵ As set out in paragraph 63 above.

A. Ordinary meaning of the terms

116. Article 2.30(1)(a) requires relevant importing Parties to ensure that ‘each allocation is made ... to the maximum extent possible, in the amounts that importers request’.
117. The phrase ‘shall ensure’ signals that this is a positive obligation. The ordinary meaning of the term ‘maximum’ is ‘greatest’¹⁴⁶ or ‘[t]he highest possible magnitude or quantity of something which is attained, attainable, or customary; an upper limit of magnitude or quantity’.¹⁴⁷ ‘Extent’ means ‘the limit to which anything extends’,¹⁴⁸ while ‘extend’ means ‘[t]o stretch out’¹⁴⁹ or to ‘[t]o strain the capacity of’.¹⁵⁰ ‘Possible’ means ‘[t]hat is capable of being; that may or can exist, be done, or happen...; that is in a person's power.’¹⁵¹
118. Article 2.30(1)(c) imposes a high standard. It doesn’t just oblige Canada to *try* to make allocations in the amounts requested by importers, or do so if it fits within its wider allocation policy. Article 2.30(1)(c) requires that Parties use their powers to the greatest, or maximum extent possible, to make allocations in the amounts requested by importers. Put differently, Article 2.30(1)(c) obliges Parties to do everything within their power to grant TRQ quota allocations in the amounts requested by importers.
119. The only circumstance in which an eligible importer should receive an allocation that is less than they requested is where demand for quota from eligible applicants exceeds the amount of quota available under the TRQ. If 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.
120. The inclusion of the phrase ‘to ensure’ in Article 2.30(1)(c) again indicates that this is a positive obligation. It is not enough to hope that it will be achieved, it is a protection that must be given effect to through the design and operation of a Party’s TRQ allocation mechanism.

B. This interpretation is supported by the context to Article 2.30(1)(c)

121. The obligation to ‘*ensure*’ allocations are made ‘to the *maximum* extent possible’ under Article 2.30(1)(c) can be compared to other provisions under Chapter 2 that only require Parties to achieve a particular outcome to ‘to the extent possible’. Article 2.8(6), for example, obliges Parties to adopt procedures that provide for the release of goods that

¹⁴⁶ Oxford English Dictionary Online, definition of ‘maximum’ entry B [NZL-37].

¹⁴⁷ Oxford English Dictionary Online, definition of ‘maximum’, entry A.II.3 [NZL-37].

¹⁴⁸ Oxford English Dictionary Online, definition of ‘extent’, entry II.4.c [NZL-38].

¹⁴⁹ Oxford English Dictionary Online, definition of ‘extend’, entry I [NZL-39].

¹⁵⁰ Oxford English Dictionary Online, definition of ‘extend’, entry I.1.c [NZL-39].

¹⁵¹ Oxford English Dictionary Online, definition of ‘possible’, entry A.1 [NZL-47].

enter their territory accompanying persons seeking temporary entry ‘to the extent possible’. Similarly, Article 2.13(4) obliges Parties to provide certain information relevant to its export licencing procedures ‘to the extent possible’.

122. The inclusion of the additional terms ‘ensure’ and ‘maximum’ in Article 2.30(1)(c) clearly shows that this was intended to be a high standard, requiring Parties to do everything within their power to grant TRQ quota allocations in the amounts requested.

C. This interpretation is supported by the object and purpose of CPTPP

123. This interpretation is supported by the object and purpose of CPTPP. The Preamble explains that the purposes of CPTPP include to ‘establish a predictable legal and commercial framework for trade and investment through mutually advantageous rules’.¹⁵² CPTPP is a trade liberalisation agreement. It reflects an intention to grant greater access to markets between CPTPP Parties, and a key part of that is providing the certainty needed to allow that market access to be utilised in practice.
124. Granting allocations in the quantities requested by importers is trade facilitative. It allows importers to plan, and provides them with the certainty needed to carry out business. This certainty contributes to efficient and effective trade. The objective and purpose of CPTPP therefore supports interpreting it in a way that requires CPTPP Parties to act in a manner that facilitates and encourages efficient trade.

D. Canada’s Notices do not ensure, to the maximum extent possible, that allocations are made in the volumes requested by importers

125. Canada’s quota pooling system is inconsistent with Article 2.30(1)(c). Under Canada’s Notices to Importers, the amount of quota available under each ‘pool’ is fixed. The pools available for further processors and distributors are small. The division of quota between pools in this way significantly impedes Canada’s ability to make allocations in the amounts requested by importers. If importers falling within a certain pool (e.g. further processors or distributors) request more quota than is available under it, they will not receive allocations in the amounts that they have requested. Instead, the quota will be divided between them on a market share or equal share basis. This will occur *irrespective* of whether there is quota sitting in another pool (for example, the much larger processor pool). In fact, Canada’s Notices guarantee this outcome. They don’t allow quota from one pool (e.g. the processor pool) to be granted to applicants under another pool (e.g. the distributor pool).

¹⁵² TPP, [Preamble](#), para 7 (incorporated into CPTPP under Article 1, CPTPP).

126. As noted above, the obligation under Article 2.30(1)(c) is a positive obligation, and importing Parties must do everything within their power to meet it – including in how they structure and design their allocation mechanisms. By adopting an allocation mechanism that limits Canada’s ability to grant allocations in the volumes requested from the outset, Canada has failed to meet the standard required by Article 2.30(1)(c).

X. CANADA’S CPTPP NOTICES TO IMPORTERS ARE INCONSISTENT WITH ARTICLE 2.29(1) CPTPP BECAUSE THEY DO NOT ADMINISTER CANADA’S TRQS IN A MANNER THAT ALLOWS IMPORTERS THE OPPORTUNITY TO UTILISE TRQ QUANTITIES FULLY

127. All 16 of Canada’s Notice to Importers are inconsistent with Article 2.29(1) because they do not administer Canada’s TRQs in a manner that allows importers the opportunity to utilise Canada’s dairy TRQ quantities fully.

128. Article 2.29(1) reads:

Article 2.29: Administration and Eligibility

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

...

A. Ordinary meaning of the terms

129. Article 2.29(1) requires Parties to ‘administer [their] TRQs in a manner that allows importers the opportunity to utilise TRQ quantities fully’.
130. The ordinary meaning of the term ‘administer’ is broad – it can mean ‘[t]o give, supply, or furnish to a person or (occasionally) thing’,¹⁵³ or to ‘to carry out or oversee the tasks necessary for the running of (an organization) or the effecting of (a state of affairs); to manage, run (an operation, affairs, etc.); to manage the affairs of (an institution, community, etc.)’.¹⁵⁴ As noted above, a TRQ is a form of market access that obliges Parties to allow set volumes of product into their territory tariff free.¹⁵⁵
131. ‘An ‘importer’ is ‘a person who, or company, enterprise, etc., which, imports goods or commodities from abroad...’.¹⁵⁶ Here, this means all importers who meet the eligibility requirements under the relevant Party’s schedule, and are therefore eligible to receive quota under the TRQ. To ‘utilise’ something means ‘to make or render useful, to convert to use, turn to account’.¹⁵⁷ This captures the use of a thing and the ability to

¹⁵³ Oxford English Dictionary Online, definition of ‘administer’, entry 2.a [NZL-40].

¹⁵⁴ Oxford English Dictionary Online, definition of ‘administer’, entry 1.a [NZL-40].

¹⁵⁵ See paragraph 28 above.

¹⁵⁶ Oxford English Dictionary Online, definition of ‘importer’, entry 1 [NZL-41].

¹⁵⁷ Oxford English Dictionary Online, definition of ‘utilize’, entry 1 [NZL-34].

access or ‘convert it’ to use. In order for an importer to utilise a Party’s TRQs, for example, the importer must be able to obtain a TRQ allocation, import product into the market, and claim preferential treatment on entry.

132. The ordinary meaning of the term ‘quantity’ is ‘[a] specified or definite amount *of* an article or commodity’.¹⁵⁸ Here we are concerned with ‘TRQ quantities’, which covers the total quantity of quota available under each of the TRQs maintained by a Party. Finally, the term ‘fully’ means ‘[i]n a full manner or degree; to the full; in (its) entirety or totality; completely, entirely; thoroughly, exactly, quite.’¹⁵⁹
133. Article 2.29(1) therefore obliges Parties to oversee and manage their TRQs in a way that allows all importers the opportunity to access and use the quota available under each TRQ in its entirety.

B. This interpretation is supported by the context of Article 2.29(1)

134. This interpretation is supported by the context to Article 2.29(1), in particular the obligation that directly follows it under Article 2.29(2). As discussed above, Article 2.29(2) prohibits parties from introducing limits, conditions, or eligibility requirements that affect the ability of an importer to access and use a TRQ,¹⁶⁰ over and above those set out in a Party’s Tariff Schedule (unless Parties first complete the consultation and agreement process that is set out in Article 2.29(2) (b) and (c)).
135. The obligations under Article 2.29(1) and Article 2.29(2) operate hand in hand. Article 2.29(1) sets out the overarching obligation to allow importers to access and use the full amount of quota available under each TRQ. Article 2.29(2) then makes sure that measures that could impede this are not introduced unless other CPTPP Parties have been consulted and agreed to their introduction. Both obligations operate jointly to provide meaningful protection to the TRQ market access negotiated between the Parties.

C. This interpretation is supported by the object and purpose of CPTPP

136. This interpretation is also supported by the object and purpose of CPTPP. As set out in the Preamble, the object and purpose of CPTPP includes ‘contribut[ing] to maintaining open markets, [and] increasing world trade...’.¹⁶¹ CPTPP is a trade liberalisation agreement. It reflects an intention to grant greater access to markets between CPTPP

¹⁵⁸ Oxford English Dictionary Online, definition of ‘quantity’, entry I.1.a [NZL-42].

¹⁵⁹ Oxford English Dictionary Online, definition of ‘fully’, entry 1 [NZL-43].

¹⁶⁰ That is, to obtain a TRQ allocation, import product into the market, or claim tariff free entry on importation: see from paragraph 84 above.

¹⁶¹ CPTPP, [Preamble](#), at para 3.

Parties, in line with the substantive obligations set out in the text, and the specific market access commitments set out in its schedules.

137. Interpreting Article 2.29(1) in a manner that requires Parties to administer their TRQs in a manner that allows all importers the opportunity to access and use them in their entirety is consistent with these purposes.

D. Canada's Notices to Importers do not administer its TRQs in a manner that allows importers the opportunity to utilise TRQ quantities fully

138. The restrictive and compartmentalised nature of Canada's quota pooling system means that it is inconsistent with Article 2.29(1). Under Canada's Notices to Importers, all of the quota available under each TRQ is allocated to a system of quota pools that can only be accessed by certain types of importers. Importers who meet the eligibility requirements set out in Canada's schedule, but do not fall within a certain pool have no opportunity to utilise the quota within that pool. Importers that do not fall within any pools (in particular, retailers) have *no* opportunity to utilise *any* of Canada's TRQ quantities. This alone amounts to a breach of Article 2.29(1), as Article 2.29(1) obliges Canada to allow *all* eligible importers the opportunity to utilise TRQ quantities fully.
139. The compartmentalised nature of Canada's quota pooling system also impedes the ability of importers to utilise its TRQ quantities fully. As noted above, if importers that *do* fall within a pool request more quota than is available under it, they will not receive the amount of quota requested.¹⁶² Rather, the quota within the pool will be divided between them on either a market share or equal share basis. This will occur irrespective of whether there is unallocated quota sitting in another pool (for example, the processor pool). Again, this falls short of Canada's obligation to administer its TRQs in a manner that allows importers the opportunity to utilise TRQ quantities fully, and is inconsistent with Article 2.29(1).

XI. CANADA PROCEDURES FOR ADMINISTERING ITS CPTPP TRQS ARE INCONSISTENT WITH ARTICLE 2.28(2) CPTPP BECAUSE THEY DO NOT ADMINISTER CANADA'S TRQS IN A MANNER THAT IS FAIR AND EQUITABLE

140. Canada's procedures for administering its CPTPP TRQs, as set out in its Notices to Importers, are not fair and equitable and are, accordingly, inconsistent with Canada's obligation under Article 2.28(2).

¹⁶² See discussion above from paragraph 125.

141. Article 2.28(2) reads:

Article 2.28: Scope and General Provisions

...

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

142. Article 2.28 contains several substantive obligations. For the purposes of the present dispute we are concerned primarily with Canada's obligation to ensure that the procedures it uses for administering its TRQs are 'fair and equitable'.

A. Ordinary meaning of the terms

143. A 'procedure' is 'the established or prescribed way of doing something'.¹⁶³ The ordinary meaning of 'administer' is broad – it can mean '[t]o give, supply, or furnish to a person or (occasionally) thing',¹⁶⁴ or to 'to carry out or oversee the tasks necessary for the running of (an organization) or the effecting of (a state of affairs); to manage, run (an operation, affairs, etc.); to manage the affairs of (an institution, community, etc.)'.¹⁶⁵ The 'procedures for administering' a Party's TRQs include all of the procedures applicable to the oversight and management of its TRQs. This includes the rules that determine who can access TRQs, how and when applicants should apply for allocations, how those allocations are granted as between applicants, on what terms, the entry of quota product, and how any residual or returned quota is managed.

144. The ordinary meaning of 'fair' is '[w]ith justice or fairness; honestly, impartially; in accordance with what is right, honourable, or legitimate'.¹⁶⁶ 'Equitable' has a similar meaning. It is defined as describing actions, arrangements or decisions that are 'fair, just, [and] reasonable'.¹⁶⁷

145. Article 2.28(2) therefore obliges CPTPP Parties to ensure that they manage their TRQs, from the initial application stage to the return and reallocation of unused quota, in a manner that is just, impartial and reasonable.

¹⁶³ Oxford English Dictionary Online, definition of 'procedure', entry 1.a [NZL-44].

¹⁶⁴ Oxford English Dictionary Online, definition of 'administer', entry 2.a [NZL-40].

¹⁶⁵ Oxford English Dictionary Online, definition of 'administer', entry 1.a. [NZL-40].

¹⁶⁶ Oxford English Dictionary Online, definition of 'fair', entry 4 [NZL-45].

¹⁶⁷ Oxford English Dictionary Online, definition of 'equitable', entry 1.a. [NZL-46].

B. The context to Article 2.28(2) supports this interpretation

146. The context to Article 2.28 provides clear guidance on what is, and is not, fair and equitable for the purposes of Article 2.28(2). This includes that Parties:

- a. *are to* facilitate the ability of other CPTPP Parties' to access and use TRQs fully,¹⁶⁸ in a manner that is open and transparent;¹⁶⁹ and
- b. *are not to* unduly limit the ability of CPTPP Parties to access or use TRQs,¹⁷⁰ or favour the interests of their domestic industry over the interests of CPTPP Parties seeking to utilise them.¹⁷¹

A Party that administers its TRQs in a manner that falls short of this standard will be in breach of its obligation to ensure that its procedures for administering its TRQs are fair and equitable.

C. This interpretation is supported by the object and purpose of CPTPP

147. The purpose of CPTPP, as set out in the Preamble, includes 'contribut[ing] to maintaining open markets, [and] increasing world trade...' ¹⁷² and 'establish[ing] a predictable legal and commercial framework for trade... through mutually advantageous rules.'¹⁷³ CPTPP is a trade liberalisation agreement. Under its terms, CPTPP Parties agreed to grant access to their own markets, in return for access to the markets of other CPTPP Parties. Interpreting the 'fair and equitable' obligations under Article 2.28(2) in a manner that requires Parties to facilitate and not restrict other CPTPP Parties' ability to utilise the market access that was negotiated is consistent with this object and purpose.

¹⁶⁸ See Article 2.29(1)(a) (obligation to allow importers the opportunity to utilise TRQ quantities fully); Article 2.30(1)(a) (obligation to ensure that persons who meet the Party's eligibility requirements are able to apply and be considered for a quota allocation); Article 2.30(1)(c) – (d) (requirement that allocations are made in commercially viable amounts, are applicable to all relevant tariff lines, and are valid throughout the year); and Article 2.31 (opportunity to put in place a reallocation mechanism that provides the greatest possible opportunity for the TRQ to be filled).

¹⁶⁹ See Article 2.28(3)(obligation to publish relevant information); Article 2.30(1)(e) (obligation to apportion quota in a manner that is equitable and transparent); and Article 2.32 (transparency obligations).

¹⁷⁰ See Article 2.29(2) (prohibition on introducing new or additional condition, eligibility requirement or limit without the approval of other CPTPP Parties); and Article 2.30(1)(b) (prohibition from limiting access to an allocation to processors).

¹⁷¹ Article 2.30(1)(b) (Producer Clause, Domestic Production Clause and Processor Clause all prevent CPTPP Parties from administering their TRQs in a manner that is designed to benefit their domestic industry at the expense of CPTPP Parties seeking to utilise them), Article 2.30(3) (prohibition on requiring re-export).

¹⁷² CPTPP, [Preamble](#), at para 3.

¹⁷³ TPP, [Preamble](#), at para 7 (incorporated into CPTPP under CPTPP Article 1(1)).

D. Canada's Notices to Importers do not administer Canada's dairy TRQs in a manner that is fair and equitable

148. Canada's Notices to Importers set out the way in which it administers its TRQs, including the creation of the quota pools, the procedures for determining who is eligible to apply for and be granted an allocation, and the basis on which allocations will be granted as between applicants.
149. These procedures fall short of Canada's obligation to administer its TRQs in a manner that is fair and equitable because:
- a. They arbitrarily exclude persons that meet the eligibility requirements agreed between CPTPP Parties and set out under Canada's Tariff Schedule from applying for and being granted TRQ allocations. This is not just, impartial and reasonable.
 - b. They provide exclusive access to the vast majority of each TRQ to 'processors', being entities that manufacture the product being imported under the TRQ. This constitutes discrimination in favour of Canada's domestic industry. This is not just, impartial and reasonable.
 - c. They direct the quota available under each TRQ towards low value bulk products, rather than high value imports by:
 - i. only granting distributors access to a small portion of each TRQ; and
 - ii. entirely excluding retailers from accessing allocations.

This is not just, impartial and reasonable.

150. Canada's Notices to Importers are accordingly inconsistent with Canada's obligation under Article 2.28(2) to ensure that the procedures it uses for administering its TRQs are 'fair and equitable'.

XII. CONCLUSION

151. For the reasons set out above, New Zealand respectfully asks that the Panel find that Canada's measures are inconsistent with its obligations to:
- a. 'ensure that ... it does not ... limit access to an allocation to processors' under Article 2.30(1)(b);
 - b. not 'introduce 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 its Schedule to Annex 2-D (Tariff Commitments)' under Article 2.29(2)(a);

- c. ‘ensure that ... any person of a Party that fulfils the importing Party’s eligibility requirements is able to apply and be considered for a quota allocation under a TRQ’ under Article 2.30(1)(a);
 - d. ‘ensure that ... each allocation is made ... to the maximum extent possible, in the amounts that importers request’ under Article 2.30(1)(c);
 - e. ‘administer its TRQs in a manner that allows importers the opportunity to utilise TRQ quantities fully’ under Article 2.29(1); and
 - f. ‘ensure that its procedures for administering its TRQs ... are fair and equitable’ under Article 2.28(2).
152. New Zealand further asks that the Panel recommend that Canada bring its relevant policies and practices pertaining to the administration of its TRQs, as set out in its Notices to Importers, into conformity with these obligations.