AS DELIVERED

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

Canada — Dairy Tariff Rate Quota Measures

OPENING STATEMENT OF NEW ZEALAND

14 June 2023

I. INTRODUCTION

1. Chair, members of the Panel.

2. This case concerns Canada's administration of its 16 dairy TRQs under the CPTPP. In particular, Canada's restrictive quota pooling system.

3. This system directs quota *away* from importers that are *likely* to use it, and *towards* those who are *not*.

4. As New Zealand will explain today – this system is inconsistent with Canada's obligations under the CPTPP.

5. When the Parties entered into CPTPP, they had a legitimate expectation that they would be able to utilise fully, and benefit from, the market access agreed.

6. Instead, Canada has adopted a protectionist TRQ administration system that undermines that access, and reduces its value to CPTPP Parties.

7. New Zealand has brought this case to ensure Canada upholds the commitments it made when it entered into that Agreement.

8. New Zealand's opening statement will be structured in **three parts**:

   a. First, we provide a high level summary of the key issues in this case.

   b. Second, we provide an overview of the operation of Canada's quota pooling system.

   c. Third, we set out New Zealand's case under the six Articles in dispute.

9. New Zealand will provide some responses to questions from the Panel in the course of this Statement. We will provide further responses at the question and answer stage of the hearing.

10. Regarding the questions from the Panel on negotiating history –

11. As the Panel is aware, there is no agreed negotiating history for the provisions in issue in this dispute.

12. Nor has New Zealand identified any material in the negotiating history that we believe sheds light on the text at issue.

II. WHAT IS THIS CASE ABOUT?

13. Chair, members of the Panel,

14. This case is before you today because - having made commitments in the CPTPP to provide access to its dairy market in the form of tariff rate quotas - Canada has implemented these TRQs in a way that fundamentally undermines that access.

15. It has done this in three particular ways:

    a. it has limited access to its dairy TRQs substantially to processors, those whose products are in direct competition with imported products;

    b. it has divided all the quota under each TRQ into restrictive pools; and

    c. it has claimed an entitlement to define and redefine at will those who are eligible to receive quotas - *and* impose a blanket ban on retailers.

16. As we have explained in our written submissions - and will reiterate in this hearing - Canada's actions are in direct violation of its commitments under the CPTPP:

    a. to not limit access to any allocation to processors;

    b. to not introduce new restrictive measures without following an agreed process involving the other CPTPP Parties; and

    c. to not to exclude access to those who meet the eligibility requirements set out in its schedule.

17. This has also placed Canada in breach of other obligations under the CPTPP – obligations not to deny importers the opportunity to utilise TRQ quantities fully, obligations to allocate the amounts requested to the maximum extent possible, and obligations to ensure that its procedures for administering its TRQs are fair and equitable.

18. Canada attempts to justify its actions in two ways.

19. First by offering an unsupportable interpretation of what '*an* allocation' means.

20. An interpretation that has already been rejected by a panel under the USMCA case dealing with essentially the same facts and an identical provision.

21. Second, Canada attempts to elevate its ability to choose an allocation mechanism to an unfettered right that overrides the obligations in dispute.

22. If accepted, Canada's arguments would give Parties free reign to block access to quota, and leave CPTPP TRQs completely unprotected.

23. This cannot be accepted.

24. Chair, members of the Panel.

25. The resolution of this dispute therefore comes down to three key phrases:

'Utilisation of a TRQ'

26. The **first** is the phrase '**utilisation of a TRQ'**.

27. This phrase determines the scope of the obligations under both Article 2.29(1) and Article 2.29(2)(a).[1]

28. The utilisation of a TRQ includes three key steps: obtaining an allocation, importing goods into market, and claiming preferential tariff rates.

29. The key point is that the utilisation of a TRQ *includes* the step of obtaining an allocation.

30. An allocation is a portion or share of the quota. It is the basis on which preferential tariff treatment is granted. Without an allocation, an importer is not utilising a TRQ - they are just importing goods under standard tariff rates.

31. Articles 2.29(1) and 2.29(2)(a) both apply to the utilisation of a TRQ. This means they both apply to Canada's quota allocation system.

'Eligibility requirements'

32. The second key term is 'eligibility requirements'.

33. This term determines the nature of the obligation under Article 2.30(1)(a). It also confirms that Article 2.29(2)(a) applies to a Party's quota allocation system.

34. The meaning of 'eligibility requirements' is clear from the consistent use of the terms 'eligibility' and 'eligibility requirements' throughout both Section D, and Chapter 2 more broadly.

35. On every single occasion, the terms 'eligibility' and 'eligibility requirements' are used to refer to the requirements that an importer

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[1] Article 2.29(2)(a) refers to the 'utilisation of a TRQ for the importation of a good'. TRQs are a form of market access – the utilisation of a TRQ is always for the importation of goods. Article 2.29(1) refers to the 'utilisation of TRQ quantities'. TRQ quantities is a reference to the volume of quota available under a TRQ. In practice, a TRQ and the quota under it are one in the same. Article 2.29(1) refers to TRQ *quantities* to make it clear that importers must have the opportunity to utilise the total volume of quota under a TRQ, not just part of it. The same emphasis is reflected in the term 'fully'.

must meet in order to be eligible to apply for quota. Canada does not appear to dispute this.[2]

36. Article 2.29(2)(a) prohibits Parties from introducing new[3] eligibility requirements. As eligibility requirements are conditions imposed at the quota allocation stage - this confirms that Article 2.29(2)(a) applies to Canada's quota pooling system.

37. This also makes it clear that the eligibility requirements referred to in Article 2.30(1)(a) **must** be those set out in Canada's Schedule - Because Canada is prohibited from unilaterally introducing any other eligibility requirements beyond those in its schedule.[4]

38. If an entity - for example a retailer - meets the eligibility requirements under Canada's schedule, Canada must allow them to apply and be considered for quota.

'An allocation'

39. The **final** key term is '***an*** allocation'.

40. 'Allocation' means 'a potential share of the quota that may be granted to an individual applicant'.[5]

41. The key question is what does '***an*** allocation' mean.

42. '***An*** allocation' cannot mean '*every* allocation'. If it did, then Parties would be permitted to limit access to 99.99% of allocations to processors, provided they made a single allocation available to a non-processor.

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2 Canada's Rebuttal Submission, at paras 87–91.

3 The meaning of the term 'new' can be found in Article 2.29(2)(a) itself, which says 'no party shall introduce a new or additional condition, limit or eligibility requirement… beyond those set out in its Schedule to Annex 2-D'. Consequently, the scope of 'new' limits, conditions and eligibility are any limits, conditions and eligibility requirements that are not provided for in Parties' Schedules.

4 Without going through Article 2.29(2)(a).

5 New Zealand's First Written Submission, at para 70; Canada's First Written Submission, at para 194.

43. That is an absurd result that cannot have been intended by the Parties.

44. '***An*** allocation' must mean '*any* allocation'. A Party will breach the processor Clause if it limits access to one, several, or indeed all allocations to processors.

45. This was also the conclusion reached by the USMCA Panel in *Canada - Dairy TRQs*, in its consideration of the identical obligation under the USMCA. There the USMCA Panel described this conclusion as 'basic logic'.[6]

The rules under Section D apply to Canada's quota allocation system

46. A central theme running through each of these terms (and this dispute as a whole) is the question of **scope**. Specifically, whether the obligations in dispute apply to Canada's allocation mechanism.

47. As we will explain shortly – the text of each of the Articles in dispute makes it clear that they do apply to Canada's quota allocation mechanism.

48. Before we get to these arguments, however – it is helpful to consider this question from the perspective of a free trade agreement.

49. TRQs are a form of market access. The purpose of the rules in Section D is to *protect* that market access – so that CPTPP Parties can benefit from it.

50. It makes sense that these rules would apply to the whole of a Party's TRQ administration.

51. If a Party wants to restrict the utilisation of its TRQs – the easiest and most effective way to do that is by preventing importers from accessing quota.

52. This might be done through the design of a Party's allocation mechanism – or through the introduction of standalone restrictions.

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

53. Why have rules to protect TRQs – but give Parties free reign to restrict access to them?

54. It is the equivalent of placing something valuable in a safe, then leaving the door open.

55. It is simply not credible that this was what the Parties intended.

It is not possible to accurately measure demand in a closed and distorted market

56. Before moving on, we would like to take a brief moment to address the economic reports that Canada has submitted in this case.

57. New Zealand has set out in its Rebuttal Submission its views on the expert reports provided by Canada in its First Written Submission.[7]

58. Canada's dairy market is highly restrictive and largely closed to imports. It is simply not possible to measure demand for products that consumers have never been able to try.

59. That said, the non-governmental entity submissions filed in this dispute, *do* provide helpful insight into both:

    a. the demand for New Zealand product from Canada, and

    b. the interest from New Zealand industry in exporting into Canada.

60. The Dairy Companies Association of New Zealand (DCANZ) states that:[8]

> DCANZ Members are aware of significant interest in New Zealand dairy products in Canada … and [it] reject[s] Canada's claims that there is no demand for imports … New Zealand has over 130 markets globally and exports the full range of dairy products

[7] New Zealand's Rebuttal Submission, paras 4-7.
[8] DCANZ non-governmental entity submission, paras 4-6.

> covered by the CPTPP quotas. New Zealand's exports reflect the full 'bucket of milk' and are not constrained by distance.

61. In its NGE submission, the Retail Council of Canada (RCC) states that:[9]

> RCC believes that the allocation of…quota to retailers would ... ensure that quota is fully utilised to its potential.

62. The International Cheese Council of Canada (ICCC) states in its submission:[10]

> Contrary to Canada's claims that there is a lack of interest among Canadian importers in bringing product to Canada from New Zealand, ICCC members have a strong interest in importing the country's dairy products.

63. It is also worth noting that demand is not static. The level of demand within a certain market today could change in the future.

64. Canada is obliged to provide *all* CPTPP Parties with the opportunity to utilise its TRQs, not just New Zealand.

65. The obligations in dispute in this case are not contingent on demand. And they do not require proof of trade effects.

66. Canada cannot block access to its TRQs based on its unilateral assessment of whether there is demand for CPTPP product.

67. Canada is obliged to provide the market access agreed. It is for industry to decide whether to use it.

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9 RCC non-governmental entity submission, at page 1, para 1.
10 ICCC non-governmental entity submission, at page 5, bullet point 2.

III. OPERATION OF CANADA'S QUOTA POOLING SYSTEM

68. Under CPTPP, Parties can administer their TRQs either on a First-Come-First Served basis, or through an allocation mechanism.

69. Canada's allocation mechanism relies on a novel pooling system to allocate all of the quota under each TRQ into a set of up to three pools.

Canada allocates the majority of quota to domestic processors whose products would compete with it

70. The majority of each TRQ (80%-85%) is allocated to a pool reserved exclusively for what Canada refers to as 'processors'.

71. Canada's Notices to Importers define a 'processor' as an entity, based in Canada, that manufactures the same dairy product being imported under the TRQ.

72. This definition of a 'processor' does not capture all dairy processors. It *only* captures processors who actively produce the *very* product that will be imported under the TRQ.

73. These are – by definition – the entities who will be the most competitively exposed to imports coming in under the specific TRQ.

74. These are not entities who are likely to be strongly motivated to import product under the TRQs.

75. By reserving the majority of quota under each TRQ exclusively to these processors, Canada effectively makes them gatekeepers of their own competition.[11]

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[11] The International Cheese Council Canada (ICCC) also notes this point in its non-governmental entity submission. At page 5, point 3 of its Submission it states that 'GAC's approach of allocating 85 percent of the import quota to Canada's domestic processors compels New Zealand producers and processors to negotiate access to Canadian market with the very Canadian companies which whom their products would be in competition'.

The remaining pools are vanishingly small

76. Having allocated most of its quota to its domestic dairy processors, Canada then splits the remainder into either one or two further pools.

77. To access quota in these pools, an importer must be a 'further processor'[12] or a 'distributor'.[13]

78. These pools are vanishingly small – with most holding only 10% of the quota. If applications for quota **exceed** the amount of quota in these pools – applicants will not receive allocations in the amounts requested.[14]

Canada excludes all retailers from its TRQs

79. Canada's Notices to Importers expressly exclude retailers from applying for quota under all 16 of its dairy TRQs.[15]

80. Extraordinarily, this includes the Concentrated Milk TRQ - which is subject to an end-use restriction[16] requiring 100% of the quota to be imported for *retail sale*.

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12 A 'further processor' is defined under Canada's Notices to Importers as an entity that uses the product being imported under the TRQ to manufacture further food products: See 'Eligibility Criteria' in Canada's Notices to Importers. One exception is the Industrial Cheese quota, which defines a 'further processor' 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]**. As discussed later, 'Further processors' fall within the definition of 'a processor' for the purposes of the Processor Clause.

13 A 'distributor' is defined under Canada's Notices as an entity that on-sells the TRQ product to other businesses: See 'Eligibility Criteria' in Canada's Notices to Importers.

14 With the quota divided between applicants on an equal share or market share basis. In the case of the processor pool and further processor pools, 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).

15 The one exception is industrial cheese, which does not include an express exclusion. However, as 100% of this quota is for further processing and not for retail sale, an express exclusion would not make sense.

16 This end-use restriction is included in Canada's Schedule: paragraph 11(c)(i).

81. We will address this in detail later on – but it is worth noting here that Canada is not permitted under the eligibility requirements set out in its schedule,[17] and agreed between CPTPP Parties, to exclude retailers from accessing its TRQs.

82. In doing so, Canada has effectively cut a large portion of the import market out from utilising its dairy TRQs.

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

83. Turning now to discuss the Processor Clause under Article 2.30(1)(b).

84. The Processor Clause prohibits Parties from limiting access to an allocation to processors.

85. This is not a complex obligation.

86. A Party will breach Article 2.30(1)(b) if it limits access to one, several or indeed all allocations available under a TRQ to processors.

'An allocation' means any allocation

87. As previously noted, 'allocation' means a potential share of the quota that could be granted to an individual applicant.

88. The key term under the Processor Clause is '***an*** allocation'.

89. '***An*** allocation' must mean *any* allocation.

90. A TRQ is effectively a collection of potential allocations that can be granted to applicants.

91. Parties are not permitted to limit access to **any** of them to processors.

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17 Canada's Schedule states that an eligible applicant is a resident of Canada, active in the relevant industry and compliant with its Export and Import Permits Act and regulations: see paragraph 3(c).

An allocation does not mean every allocation

92. Canada argues that '***an*** allocation' means '*every* allocation'.

93. It suggests that the Processor Clause only prohibits Parties from limiting access to *every single allocation* to processors.

94. It would mean that a Party would be permitted to limit access to 99.99% of allocations to processors – and still not be in breach of the Processor Clause.

95. This would render the Processor Clause meaningless.

96. There is no material difference between limiting 99.99% of allocations to processors, and limiting 100% of allocations to processors.

97. To give the Processor Clause meaning, '***an*** allocation' must mean 'any allocation'.

This interpretation is supported by the Domestic Production Clause

98. Interpreting '***an*** allocation' as meaning *any* allocation is supported by the Domestic Production Clause, which immediately precedes the Processor Clause in Article 2.30(1)(b).

99. The Domestic Production Clause prohibits Parties from conditioning access to ***an*** *allocation* on the purchase of domestic production.

100. Canada accepts that the phrase '***an*** allocation' in the Domestic Production Clause must mean any allocation.

101. It is clear that a Party cannot impose domestic purchase requirements on ***any*** allocation.

102. The phrase '***an*** allocation' in the *Processor* Clause has the *same* meaning as in the Domestic Production Clause.

103. This is supported by:

    a. the close proximity between the two obligations;

b. the fact they both prohibit Parties from restricting access to allocations;[18]

c. and the use of the exact same phrase: 'access to an allocation' in both.

104. Indeed, this was the conclusion reached in the *Canada-Dairy TRQs* case under USMCA.

'An allocation' is also used to mean *any* allocation in Article 2.30(1)(d)

105. The phrase '***an*** allocation' is also used in Article 2.30(1)(d) to mean *any* allocation.

106. Article 2.30(1)(d) 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.

107. Again, '***an*** allocation' here must mean *any* allocation. Parties clearly cannot limit *any* allocation to particular tariff lines. It is also clear that Parties cannot grant *any* allocations for periods less than a full TRQ year.

108. Once again – this supports interpreting '***an*** allocation' in the Processor Clause as meaning *any* allocation.

All three Clauses in Article 2.30(1)(b) operate together to guard against protectionism

109. It is also important to consider how the Processor Clause fits within Article 2.30(1)(b) as a whole.

110. The *Processor* Clause, *Domestic Production* Clause, and *Producer* Clause *all* guard against protectionism.

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[18] The Domestic Production Clause prohibits the imposition of a specific condition, the Processor Clause prohibits the imposition of a specific limit.

111. They do this by preventing Parties from administering their TRQs in a manner that favours their domestic industry:

    a. The *Producer* Clause bans the grant of any portion of the quota to domestic producers.

    b. The *Domestic Production* Clause prohibits Parties from requiring importers to purchase domestic production to access quota.

    c. And the *Processor* Clause prohibits Parties from setting aside or reserving *any* allocation for its domestic processors.

112. The only way that the Processor Clause will effectively guard against protectionism – as it is so clearly intended to do – is if '***an*** allocation' is interpreted as meaning *any* allocation.

Relevance of the USMCA decision

113. Turning now to the USMCA decision in *Canada – Dairy TRQs.*

114. We note that this will respond in part to the Panel's specific question for New Zealand, and we will elaborate further this afternoon.

115. As in the present dispute, the Parties' arguments in the USMCA case focused on the meaning of the term '***an*** allocation'.

116. While that decision is not binding on *this* Panel - it sets out a compelling interpretation of the USMCA Processor Clause, which is highly pertinent to the present dispute.[19]

117. It is pertinent because it is an example of how a panel dealing with the *same* problem, and *identical* language, approached the matter.

118. Ultimately, however, it is for *this* Panel to decide how helpful the USMCA decision is for the assessment before it.

Application: Canada's quota pooling system is inconsistent with the Processor Clause under Article 2.30(1)(b)

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[19] Australia agrees: Third Party Written Submission of Australia at paras 18-19.

119. Turning now to the application of the Processor Clause to Canada's quota pooling system -

120. A 'processor' for the purposes of the Processor Clause is an entity that processes something.

121. Canada allocates **between 85%-100%** of the quota available under each of its TRQs to pools that can only be accessed by what it refers to as 'processors' and 'further processors'.

122. These pools are set out on page 29 of New Zealand's First Written Submission.

123. Canada's Notices define a 'processor' as - an entity that manufactures the product being imported under the relevant TRQ.

124. These are entities that process things. They are therefore 'processors' for the purposes of the Processor Clause.

125. Again - Canada's Notices define a 'further processor' as - an entity that uses the product being imported under the relevant TRQ in its own manufacturing operations and product formulation.

126. Again - these are entities that process things. They are therefore 'processors' for the purposes of the Processor Clause.

127. It follows that *all* the allocations within Canada's processor *and* further processor pools are limited to 'processors'.

128. This is inconsistent with the Processor Clause contained in Article 2.30(1)(b).

V. 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

129. Turning to the obligation in Article 2.29(2)(a) -

130. This Article prohibits the unilateral introduction of new limits conditions and eligibility requirements that affect the utilisation of a TRQ for the importation of a good.

131. This means that Parties cannot introduce new limits, conditions and eligibility requirements that are not set out in their Schedule – unless they go through the process set out in 2.29(2)(b)-(c).

The utilisation of a TRQ for the importation of a good includes the process of obtaining an allocation

132. As noted at the beginning of our Statement - the key term here is the 'utilisation of a TRQ for the importation of a good'.

133. The utilisation of a TRQ for the importation of a good includes three steps:

    a. obtaining an allocation,

    b. importing product into market, and

    c. claiming preferential tariff treatment.

134. This is the same irrespective of whether a TRQ is administered on a First-Come First-Served basis, or under an allocation mechanism.

135. Canada has suggested that the prohibition in Article 2.29(2)(a) does not apply to a Party's allocation mechanism.

136. In doing so, it effectively swaps out the phrase 'utilisation of a TRQ for the importation of a good' - and replaces it with 'utilisation of *an allocation*'.

137. These are not the same things.

138. The utilisation of a *TRQ* for the importation of a good includes three steps: obtaining an allocation, importing product, and claiming preferential tariff treatment.

139. By comparison - the utilisation of *an allocation* only includes the last two steps.

140. To give effect to the *express* reference to the utilisation of a *TRQ* in Article 2.29(2)(a), it must be interpreted as applying to restrictions that affect *each* of the three steps involved in the *utilisation* of a TRQ.

141. This includes new limits, conditions, or eligibility requirements that affect allocation.

Canada does not have an unfettered discretion to restrict access to quota

142. The purpose of Article 2.29(2)(a) is to protect the market access agreed by CPTPP Parties.

143. To provide *effective* protection, it must apply to a Party's allocation mechanism.

144. If a Party wants to restrict the utilisation of its TRQs – the easiest and most effective way to do that is by preventing importers from accessing quota.

145. Canada argues that Article 2.29(2)(a) only prohibits Parties from introducing new restrictions on the actual importation process – this would not make sense.

146. Restrictions on *what* can be imported under a TRQ are irrelevant - if importers cannot access quota in the first place.

147. It does not make sense to have rules to protect TRQs – but give Parties free reign to restrict access to them.

148. In order to avoid such an absurd result – Article 2.29(2)(a) must apply to quota allocation.

'Eligibility requirements' are requirements that an importer must meet to be eligible for quota

149. Article 2.29(2)(a) prohibits the introduction of new eligibility requirements.

150. The meaning of 'eligibility' and 'eligibility requirements' is consistent throughout Section D and Chapter 2 more broadly.

151. In all instances, 'eligibility' and 'eligibility requirements' are used to refer to the requirements that an importer must meet in order to be eligible for a quota allocation.[20]

152. In this context, the term 'eligibility requirements' in Article 2.29(2)(a) – and the reference to 'eligibility' in the heading of Article 2.29 - must have the same meaning.

153. This confirms that Article 2.29(2)(a) applies to a Party's quota allocation system.

Measures not included in a Party's Schedule are 'new'

154. Turning to the process set out in Article 2.29(b)-(c) -

155. Article 2.29(2)(a) prohibits the introduction of 'new or additional' measures *beyond* those set out in a Party's Schedule.

156. If a Party wants to introduce any limits, conditions, or eligibility requirements that are *not* in their Schedule – they must go through the process set out in Article 2.29(2)(b)-(c).

157. This does not mean that Canada cannot introduce new measures.

158. It just means that Canada must go through the appropriate process to do so.

159. The process in Article 2.29(2)(b)-(c) - provides CPTPP Parties with an opportunity to consider and agree to any proposed new measures.

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[20] New Zealand Rebuttal Submission, at para 66.

160. This provides a layer of protection for the market access agreed.

161. If Canada wants to introduce new eligibility requirements – for example requiring that an importer be a processor, further processor or distributor - it must go through the process set out in Article 2.29(2)(b)-(c).

Application: Canada's quota pooling system introduces new limits and eligibility requirements

162. Turning to the application of Article 2.29(2)(a) to Canada's quota pooling system -

163. Canada allocates 100% of the quota under each of its TRQs into two or three pools.

164. Each of these pools is a *new* 'limit' on the utilisation of that TRQ for the importation of goods.

165. This is because access to the quota in each pool is limited to a particular type of entity.

166. In particular:

a. All 16 TRQs have a 'processor' pool. These are all *new* limits.

b. Twelve of Canada's TRQs have a 'further processor' pool. These are all *new* limits.

c. Fifteen of Canada's TRQs have a 'distributor' pool. These are all *new* limits.

167. In addition - the pools created under each of Canada's TRQs have the collective effect of introducing a **new eligibility requirement**.

168. This is because 100% of the quota under each TRQ is allocated into the pools.

169. An importer must fall within one of the available pools in order to be eligible for quota. This is a *new* eligibility requirement.

170. Indeed, each of Canada's Notices contain an 'eligibility criteria' section, where they state that an importer will only be eligible to apply for quota if they are a processor, further processor or distributor – as relevant.[21]

171. In particular:

a. For 11 of Canada's TRQs an importer must be a 'processor', 'further processor', or 'distributor' to be eligible for quota.[22] These are *new* eligibility requirements.

b. For four of Canada's TRQs an importer must be a 'processor', or 'distributor' to be eligible for quota.[23] These are *new* eligibility requirements.

c. For Canada's Industrial Cheese TRQ, an importer must be a 'processor', or 'further processor' to be eligible for quota.[24] This is a *new* eligibility requirement.

172. None of these limits or eligibility requirements are set out in Canada's schedule.

173. *None of them* were introduced under Article 2.29(2)(b)-(c).

174. They are *all* inconsistent with Article 2.29(2)(a).

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21 Under the heading 'eligibility criteria'. Some of Canada's TRQs only have two pools. Here an importer must be one of the two entities.

22 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]**.

23 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]**.

24 Under the 'Eligibility Criteria' heading: CPTPP: Industrial Cheese TRQ – Serial No. 996 **[NZL-1].**

III. 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

175. Turning to the obligation under Article 2.30(1)(a) -

176. This obligation is simple.[25]

177. It obliges Parties to allow persons who meet the eligibility requirements set out in their schedules to apply and be considered for a quota allocation.

A Party's 'eligibility requirements' are those set out in its Schedule

178. The key term under Article 2.30(1)(a) is 'eligibility requirements'.

179. In particular, Article 2.30(1)(a) refers to '*the importing* Party's eligibility requirements'.

180. An importing Party's eligibility requirements are the eligibility requirements that are set out in its Schedule.[26]

181. This is because they are the *only* eligibility requirements that a Party is allowed to apply.

182. If a Party introduces any *other* eligibility requirements they will be in breach of Article 2.29(2)(a).[27]

Application: Canada's Notices exclude persons that meet Canada's eligibility requirements from applying and being considered for an application

183. To conclude on this Article - Canada's Schedule states that:

> 'An eligible applicant means a resident of Canada, active in the applicable Canadian dairy, poultry or egg sector, as relevant,

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25 As such, while this claim is central to New Zealand's case, it can be set out succinctly.
26 Or introduced through the process set out in Article 2.29(2)(b)-(c).
27 That is, unless they go through the process set out in Article 2.29(2)(b)-(c).

and that is compliant with the Export and Import Permits Act and its regulations.'

184. These are Canada's eligibility requirements.

185. Canada does not permit people who meet these eligibility requirements to apply and be considered for an allocation.

186. Instead - *in addition to these requirements* – for each of its TRQs, Canada requires that applicants *also* be a processor, further processor or distributor.

187. Applicants who meet the eligibility criteria in Canada's schedule - but do not meet these additional eligibility criteria are not able to apply and be considered for quota.

188. *This* is inconsistent with Article 2.30(1)(a).

IV. 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

189. Turning to the obligation under Article 2.29(1) – which obliges Parties to administer their TRQs in a manner 'that allows importers the opportunity to utilise TRQ quantities fully'.

190. This obligation is about *opportunity*.

191. If importers have the opportunity to utilise all of the quota under each TRQ fully, then the TRQs are more likely to be filled.

192. It is for a Party to provide importers with the *opportunity* to utilise TRQ quantities. It is for importers to decide whether to take that opportunity up.

193. The reference to 'TRQ *quantities*', and the term 'fully', emphasise that importers must have the opportunity to utilise <u>all</u> of the quota

available under each TRQ – not just part of it - not just a portion in a pool – but *all* of it.

194. An importer will have no *opportunity* to utilise TRQ quantities if they cannot access an allocation.

The utilisation of TRQ quantities includes the process of obtaining an allocation

195. As noted at the beginning of our Opening Statement, the key term here is the 'utilis[ation of] TRQ quantities'.

196. 'TRQ quantities' means the total volume (or quantity) of quota under a TRQ.

197. The utilisation of TRQ quantities includes three steps:

a. obtaining an allocation,

b. importing product into market, and

c. claiming preferential tariff treatment.

198. An importer cannot utilise TRQ quantities without obtaining an allocation.

199. Canada has incorrectly suggested that 'TRQ quantities' means 'the specified amount allocated to individual importers'. [28]

200. But – 'the specified amount [of a TRQ] allocated to individual importers' is *consistently* referred to under CPTPP as *an allocation*.

201. Canada seeks to exchange the *clear* reference to the utilisation of *TRQ* quantities in the text, and replace it with the utilisation of *an allocation*.

202. Article 2.30(1)(a) does <u>not</u> refer to the utilisation of *an allocation*. It refers to the utilisation of TRQ quantities.

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[28] Canada's First Written Submission, at para 91.

203. To try to support this argument, Canada suggests that Article 2.29(1) cannot use the language 'allocation' because it applies to TRQs that are administered on a First-Come First-Served basis.

204. However, importers have to obtain an allocation irrespective of whether a TRQ is allocated First-Come First-Served, or under an allocation mechanism.

205. When a TRQ is administered on a First-Come First-Served basis, an importer obtains an allocation automatically when they reach the border (provided there is quota left).

206. Indeed, Canada accepted this in its First Written Submission, when it defined 'TRQ quantities' in Article 2.29(1) as the 'specified amount *allocated* to individual importers''.[29]

Article 2.29(1) does not require proof of trade effects

207. Canada cannot block access to its TRQs based on its unilateral assessment of whether there is demand for CPTPP product or not.

208. Article 2.29(1) does not require proof of trade effects.

209. Article 2.29(1) obliges Canada to allow importers the *opportunity* to utilise TRQ quantities fully.

210. It is for Canada to provide this opportunity.

211. It is for importers to decide whether to take it up.

Application: Canada's quota pooling system is inconsistent with Article 2.29(1)

212. Turning to the application of Article 2.29(1) to Canada's quota pooling system -

213. Canada allocates all of the quota under each of its TRQs into pools.

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[29] Canada's First Written Submission, at para 91. See also paras 92, 95, and 97.

214. No importers are given the opportunity to utilise TRQ quantities fully.

215. This is because:

a. Importers that do fall within a pool - only have the opportunity to utilise the quota in *that* pool.

b. Importers that do not fall within *any* pool - for example retailers - do not have the opportunity to utilise *any* of the quota in *any* pool.

216. This is inconsistent with Article 2.29(1).

V. 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

217. Turning to Article 2.30(1)(c) -

218. This Article requires Parties to ensure, to the *maximum extent possible*, that allocations are granted in the amounts that importers request.

219. The phrase 'shall ensure' – in Article 2.30(1)(c) signals that this is a positive obligation.

220. Parties cannot just hope that it will be achieved. It must be given effect *through* the design and operation of a Party's TRQ allocation mechanism.

221. 'To the maximum extent possible' – makes it clear that Parties must do *everything in their power* to grant allocations in the amounts requested.

222. It imposes a high standard on Parties - while acknowledging that the capped volume of each TRQ means that it will not always be possible to grant the amounts requested.

223. The only situation in which an importer should receive less quota than they requested - is where demand for quota exceeds the quota available. [30]

224. A Party cannot say that it was not 'possible' to grant an allocation in the amount requested if there is quota still available.

225. This can be compared with other obligations under CPTPP that only oblige parties to achieve an outcome 'to the extent possible'.[31]

Application – Canada's Notices will result in allocations being reduced even when there is quota still available

226. Turning to the application of Article 2.30(1)(c) to Canada's quota pooling system -

227. Canada's quota pools are fixed. This *guarantees* that importers will not receive allocations in the amounts requested, even when there is quota left in other pools.

228. This is not affected by Canada's claim that it allows quota to be moved between pools.

229. Canada says that this only happens when no applications are received into a pool.

230. This suggests that Canada *always* allocates all of the quota available in a pool to applicants.

231. If only one application is received – presumably, that application would be allocated all of the quota in the pool.

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30 Or if the Party has introduced a limit (either through their schedule or under Article 2.29(2)(b)) that affects their ability to grant allocations in the amounts requested. Canada has not agreed any such limit.

31 For example, Article 2.8(6) obliges parties to adopt procedures for the release of goods that enter with persons seeking temporary entry 'to the extent possible'. And Article 2.13(4) obliges parties to prove certain information relevant to its export licencing procedures 'to the extent possible'.

232. This would happen irrespective of how much that single applicant has requested and can use.

233. This can only contribute to under-fill. If applicants receive *more* quota than they are prepared to use, that quota will *not* be utilised.

234. That quota will also *not* be able to be used by applicants in other pools, who have had their applications reduced.

235. In *each* of these situations, importers are not getting allocations in the amounts requested to the maximum extent possible.

236. This is not consistent with Article 2.30(1)(c).

VI. CANADA'S 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

237. Turning to Article 2.28(2) -

238. This Article requires Parties to ensure that their procedures for administering their TRQs are fair and equitable.

239. This is not a complex obligation – the term 'procedures' isn't intended to have any special or technical meaning.

240. Article 2.28(2) simply requires that a Party administer their TRQs in a way that is fair and equitable – from the allocation of quota, through to granting preferential tariff treatment at the border.

241. This shouldn't be controversial.

242. It makes sense that, having negotiated market access in the form of TRQs, the Parties would want to ensure that they are administered in a way that is fair and equitable.

243. It is not credible to suggest that CPTPP Parties intended to allow *any* aspect of the administration of a Party's TRQs to be *unfair or inequitable.*

Application: The procedures set out in Canada's notices are not fair and equitable.

244. Turning to the application of Article 2.28(2) to Canada's quota pooling system -

245. Canada's Notices set out the procedures for the administration of its 16 dairy TRQs.

246. This includes the allocation of quota into pools, eligibility requirements, and the basis on which allocations will be granted as between applicants.

247. These procedures are not fair and equitable. Why? :

a. Because they arbitrarily exclude persons who meet the eligibility requirements agreed between CPTPP Parties - and set out under Canada's Tariff Schedule - from applying for and being granted TRQ allocations; and

b. Because they provide exclusive access to the vast majority of each TRQ to Canada's domestic dairy 'processors'. This is discrimination in favour of Canada's domestic industry; and

c. Because they direct the quota available under each TRQ towards low value bulk products, rather than high value imports. They do this by:

i. only granting distributors access to a small portion of each TRQ; and

ii. entirely excluding retailers from accessing allocations.

248. This is inconsistent with Article 2.28(2).

VI. CONCLUSION

249. Chair, members of the Panel, to conclude New Zealand's opening statement -

250. CPTPP is a trade liberalisation agreement.

251. The Preamble explains that its purpose includes to 'contribute to maintaining open markets, [and] increasing world trade'.[32]

252. Canada's Notices to Importers do the opposite of this. They *operate* to restrict access to Canada's TRQs, and prevent them from being used to import dairy products into Canada tariff free.

253. This is in violation of both the spirit of CPTPP and the six Articles under which New Zealand has made claims.

254. Canada's interpretation of the Agreement would set a dangerous precedent for future CPTPP compliance.

255. It would allow Parties to block access to quota and, in doing so, undermine the market access that was negotiated.

256. It would make a mockery of the rules that have been agreed.

257. Canada has tried to complicate this case by presenting considerable economic data, and suggesting that the case somehow requires proof that there is demand for *New Zealand* products.

258. This, despite the fact that Canada's dairy TRQs are not country specific – they are instead owed to *all* CPTPP Parties.

259. The Panel should not allow this to be a distraction from the real issues in dispute.

260. None of the claims that New Zealand has made require proof of trade effects.

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[32] CPTPP, Preamble, at para 3.

261. We have also heard from industry (in the non-governmental entity submissions), that there is both demand for New Zealand products in Canada, and a commercial interest in exporting them.

262. At its heart, the question for the Panel is a simple one - do CPTPP rules grant Canada an unfettered discretion to block access to quota under its dairy TRQs?

263. The answer is plainly 'no'.

264. As New Zealand noted at the beginning of this Statement, New Zealand has challenged three forms of Canada's conduct.

    a. reserving quota exclusively for domestic dairy processors;
    b. allocating the quota available under each TRQ into 'pools' that can only be accessed by certain types of importer; and
    c. excluding retailers from accessing quota under each of Canada's TRQs.

265. New Zealand has referred to the decision in *Canada – Dairy TRQs* in its arguments. We note, however, that the USMCA Panel only made findings on *one* of these forms of conduct – the reservation of quota exclusively for processors.

266. The additional arguments that New Zealand has made in *this* dispute were either not before the USMCA Panel, or in respect of which judicial economy was exercised.

267. In order to resolve *this* dispute, the Panel must make findings on all three forms of conduct that New Zealand has challenged.

268. Let me conclude by making New Zealand's final submission -

269. On the basis of the written submissions provided, and the statements made in this hearing, New Zealand respectfully requests that the Panel find that Canada's measures are inconsistent with:

    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;

d. 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;

e. 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; and

f. Article 2.28(2) because they do not administer Canada's TRQs in a manner that is fair and equitable.

270. Chair, members of the Panel, this concludes New Zealand's opening statement.

271. Thank you for your attention.