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

Canada — Dairy Tariff Rate Quota Measures

REBUTTAL SUBMISSION OF NEW ZEALAND

11 May 2023

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TABLE OF ABBREVIATIONS

Abbreviation	Full name and reference (where applicable)
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
FCFS	First-come, first-served
GATT	General Agreement on Tariffs and Trade
ILA	WTO Import Licensing Agreement
KORUS	Korea United States Free Trade Agreement
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-52	Definition of '*ejusdem generis*' from Black's Law Dictionary (Thomson Reuters, 9th ed, 2009), page 594.

I. INTRODUCTION

1. Canada's response to the claims made by New Zealand relies, almost entirely, on recrafting the obligations under Section D CPTPP so that they do not apply to Canada's quota pooling system. Indeed, the only obligation that Canada accepts in any way regulates its allocation mechanism is the Processor Clause – which Canada interprets as permitting it to allocate 99.9% of each TRQ to its own domestic dairy processors.

2. Not only is Canada's position unsupported by the text of the relevant articles (as discussed further in this rebuttal submission), it is simply not credible. When the Parties to CPTPP agreed TRQ market access, they also agreed on a set of rules that would protect that market access for CPTPP Parties seeking to benefit from it. Those rules – which include the obligations under the six articles that are subject of this dispute – regulate the *whole* of an importing Party's TRQ administration, including the design and operation of a Party's quota allocation system. To suggest that these rules do not apply to an importing Party's choice of allocation mechanism, is a nonsense.

3. Under the rules agreed, Parties are permitted to decide how to allocate their TRQs *subject to* the substantive obligations set out in Section D and relevant Parties' Schedules. This necessarily means that there will be quota allocation mechanisms that Parties cannot use. As demonstrated in New Zealand's first written submission, and expanded upon below, pooling is one such system.

The economic reports provided by Canada do not answer the issue raised by New Zealand and are irrelevant to the claims made

4. Canada appends two economic reports to its first written submission.[1] Both provide an overview of some of the factors that may impact dairy exports from New Zealand into Canada. Indeed, in a complex, largely closed, and highly distorted market like Canada's, trade is inevitably impacted by a range of different factors. However, a critical factor affecting the potential for dairy exports from New Zealand is Canada's TRQ administration. In its first written submission, New Zealand explained how Canada's quota pooling system, and the competitive interests that it engages, encourage chronic under-fill of its dairy TRQs. Neither of the economic reports submitted by Canada provide a response to this. In particular:

    a. Neither report addresses the question of whether *more* trade would occur under CPTPP dairy TRQs if Canada's TRQ administration was less restrictive and more aligned with the market liberalising object and purpose of CPTPP.

[1] The Economics of Canada's CPTPP Dairy TRQ Fill Rates, Expert report of Dr. Pouliot (April 20, 2023) **[CDA-1]**; The Economics of Canadian Dairy Imports Under CPTPP, Expert Report of Dr. Al Mussell (April 20, 2023) **[CDA-2]**.

b. Neither report provides evidence to counter New Zealand's position that a more flexible approach to TRQ administration would offer more options and greater opportunities for New Zealand *and* other CPTPP dairy exporters. This is despite Canada's dairy TRQs being open to *all* CPTPP Parties, and the clear interest from other CPTPP Parties in the Canadian dairy market.[2]

c. Much is made of the fact that New Zealand is very distant from Canada. It is true that distance is one of a range of factors that may influence dairy trade. Canada is not entitled, however, to decide whether or not CPTPP Parties' exporters *should* take advantage of the market access that was agreed. Canada is obliged to provide access to each of its 16 TRQs in full. It is for industry to decide, based on all relevant commercial factors, the extent to which it wants to take up those opportunities.

5. Outside of its TRQs, Canada's dairy market is effectively closed to imports.[3] This means that it is simply not possible to estimate accurately rates of demand for imported dairy products (including New Zealand imports) in this highly distorted market. Instead, in its first written submission, New Zealand has focused on the competitive drivers engaged by Canada's quota pooling system, the entities that have been effectively cut out of the system entirely, and the crushingly low rate of trade.

6. There is, however, an inherent contradiction in Canada's claim that there is a lack of demand for New Zealand dairy product in Canada, and its insistence that it must maintain its restrictive quota pooling system in order to protect its domestic supply management system from an influx of imports.[4] If it is true that there is a lack of demand for New Zealand dairy products, Canada could presumably remove its quota pooling system entirely without any adverse effect on its supply management system.

7. Finally, as noted in New Zealand's first written submission, none of the claims made by New Zealand require a demonstration of trade effects.[5] New Zealand has provided information regarding the commercial interests engaged by Canada's quota pooling system, and the fill rates across its TRQs, both to provide context, and to explain to the Panel why New Zealand was motivated to bring this dispute. As demonstrated in New Zealand's first written submission, and this rebuttal submission, it is clear that Canada's pooling system is in breach of CPTPP rules. This is the case irrespective of whether or not it has caused the under-fill that is currently being experienced.

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2 See, for example, Third Party Submission of Australia, at para 2.
3 Due to prohibitively high tariff rates, which Canada acknowledges in its first written submission, at para 32.
4 First Written Submission of Canada, at para 52.
5 First Written Submission of New Zealand, at para 19.

CPTPP Parties did not agree to Canada providing TRQ market access as merely a 'top up' to domestic production

8. In its first written submission, New Zealand explained how Canada's pooling system allocates the lion's share of quota available under each TRQ exclusively to domestic dairy processors and, in doing so, effectively makes them gatekeepers of their own competition.[6]

9. Canada all but confirms this in its first written submission where it acknowledges that its domestic dairy processors make TRQ import decisions based on 'business considerations' and 'their own market realities'.[7] Indeed, Canada explains the rationale for granting the vast majority of quota to domestic processors by highlighting the ability of domestic processors to 'balance between imports and *domestic production'*, and to 'fill *gaps* in supply'.[8]

10. Canada's dairy TRQs cannot be just a 'top up' mechanism to be utilised only when demand for dairy products exceeds domestic production. As set out in New Zealand's submission and the sections below, Canada is obliged to implement its TRQs in a manner that grants exporting CPTPP Parties meaningful market access. It is currently failing to do so.

New Zealand's claims are against Canada, not its domestic industry

11. Canada suggests that New Zealand's observation that its quota pooling system makes Canadian processors 'gatekeepers of their own competition' amounts to an allegation of collusion or cartel behaviour on the part of its domestic industry.[9]

12. This is incorrect. New Zealand has observed that actors within Canada's domestic dairy industry (like all commercial actors) will act in a manner that advances their own commercial interests. This is not an 'extraordinary' suggestion.[10] Indeed, as noted above, Canada itself acknowledges that its domestic dairy processors make import decisions based on 'business considerations' and 'their own market realities'.[11] To the contrary, what *is* extraordinary is the fact that Canada has adopted an allocation mechanism that directs TRQ import quota toward these entities whose commercial interests clearly suggest that they are unlikely to be motivated to use it.

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6 First Written Submission of New Zealand, at paras 33-34.
7 First Written Submission of Canada, at para 27.
8 First Written Submission of Canada, at para 52. Emphasis added.
9 First Written Submission of Canada, at para 2, 70.
10 First Written Submission of Canada, at para 2.
11 First Written Submission of Canada, at para 27.

Permitting quota from one pool to be granted to applicants in other pools on an exceptional and ad hoc basis is not consistent with Canada's obligations under CPTPP

13. Canada argues that its pools 'do not operate as rigid walls', but 'simply serve to determin[e] who will first receive access to Canada's TRQs during the initial round of allocation'.[12] Canada describes a handful of discrete instances in which it claims no applications for quota were received from processors, and quota from the processor pool was allocated to applicants from other pools.[13]

14. There is nothing in Canada's Notices to Importers, or its published guidance on the administration of its TRQs, that refers to quota from a processor pool being made available to applicants from other pools. It appears therefore that, in the instances that Canada refers to in these paragraphs, it was acting inconsistently with its own published policy. Policy, it is worth noting, that importers will necessarily use as a basis for the quota requests that they make, and the import contracts that they enter into.

15. Even if the instances Canada sets out are accurate (of which Canada provides no proof), this would have no effect on New Zealand's claims. As discussed further below, permitting quota from one pool to be granted to applicants in other pools on an exceptional and arbitrary basis is not consistent with the obligations that Canada is required to meet under CPTPP.[14]

II. 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

16. The interpretation of Article 2.29(1) need not be complicated in the way Canada suggests. The meaning of 'TRQ quantities' is clear. It means the total volume of quota available under any individual TRQ. It is not a quota allocation. It is also clear that Article 2.29(1) applies to a Party's quota allocation system. This is because an importer must obtain an allocation in order to 'utilise TRQ quantities'. If Article 2.29(1) did not apply to the allocation process, it could be easily circumvented by simply restricting importers' ability to access allocations. For example, by introducing pools.

17. Attempting to limit the obligation under Article 2.29(1) in the way Canada has done is not supported by the text, context or object and purpose of CPTPP. Nor, for the reasons noted in the introduction, should the economic analysis be allowed to become a distraction for the Panel. New Zealand's claim under Article 2.29(1) does not require a demonstration of trade effects.

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12 First Written Submission of Canada, at para 82.
13 First Written Submission of Canada, at paras 82-86.
14 See below at paragraph 46.

New Zealand's interpretation of 'TRQ quantities' is compatible with Article 2.30(2)

18. Canada argues that the phrase 'TRQ quantities' in Article 2.29(1) cannot mean the total quantity of quota available under each of the TRQs. It argues that, if the Parties had intended to refer to the total quantity under a TRQ they would have used the exact same language that is used in Article 2.30(2), namely 'quota quantity established in its Schedule to Annex 2-D (Tariff Commitments)'.[15]

19. The starting point for every interpretation is the ordinary meaning of the terms used. As set out in New Zealand's first written submission, the ordinary meaning of the term 'quantities' is '[a] specified or definite amount of an article or commodity'.[16] A 'TRQ' is a volume of product that a Party has agreed to permit to enter its territory on preferential tariff terms each year.[17] The ordinary meanings of the terms used therefore suggests that 'TRQ quantities' means the total volume of quota under the TRQ.

20. In its first written submission, New Zealand also set out how this interpretation is supported by context of Article 2.29(1) (in particular, its relationship with Article 2.29(2)(a)) and the object and purpose of CPTPP.[18]

21. The fact that the Parties used different language in Article 2.30(2) to refer to the total volume of quota under a TRQ does not affect this interpretation. Treaty drafters can use different language to provide greater clarity, or to emphasise a particular element in a provision. In each case, the text should be interpreted by reference to the ordinary meaning of the terms, in their context and in light of the object and purpose of the treaty.[19] Where the ordinary meaning of a term suggests a particular meaning, the use of different language to mean the same thing elsewhere in the agreement may be relevant context. Whether it has any impact on the interpretation of the text in issue will depend, however, on an assessment that takes into account all relevant interpretative tools.[20]

22. In the present instance, the ordinary meaning of the terms, their immediate context, and the object and purpose of CPTPP support interpreting the phrase 'TRQ quantities' in Article 2.29(1) as referring to the total quantity of quota available under a TRQ. The fact that the Parties used different language in Article 2.30(2) to refer to the total volume of quota under a TRQ does not alter this interpretation.

23. Indeed, there is good reason for Article 2.30(2) to use slightly different language. Article 2.30(2) sets out how Parties should calculate the volume of quota that must be made available under each individual TRQ in the year that CPTPP enters into force. The

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15 First Written Submission of Canada, at para 91.
16 Definition of "quantity" from Oxford English Dictionary Online **[NZL-42]**.
17 First Written Submission of New Zealand, at para 132.
18 First Written Submission of New Zealand, at paras 134-137.
19 Vienna Convention on the Law of Treaties (VCLT), Article 31(1).
20 Including the ordinary meaning of the terms used, all relevant context, the object and purpose of the Treaty and other principles of interpretation including the principle of effective interpretation the avoidance of absurd results.

calculation that parties must undertake involves the volume of quota set out in a Party's Schedule for each TRQ, and the number of months remaining in the quota year. Given the technical nature of this calculation, the use of the more specific term 'quota' and the express reference to the volumes set out in a Party's Schedule makes sense.

'TRQ quantities' does not mean 'the specified amount [of a TRQ] allocated to individual importers'

24. Canada argues that 'TRQ quantities' in Article 2.29(1) must mean 'the specified amount [of a TRQ] allocated to individual importers'.[21]

25. 'The specified amount [of a TRQ] allocated to individual importers' is an allocation. The language used in Section D to refer to 'the specified amount allocated to individual importers' is, variously: 'an allocation; 'a quota allocation', and 'each allocation'.[22]

26. As noted above, in all instances, the text should be interpreted by reference to the ordinary meaning of the terms, in their context and in light of the object and purpose of the treaty.[23] Here, however, there is no support in the context, or object and purpose of CPTPP for an interpretation of 'TRQ quantities' to mean an allocation. In particular:

    a. The use of the term 'TRQ', which must refer to the TRQ as a whole, indicates that 'TRQ quantities' is a reference to the entire volume of each TRQ;

    b. The language used elsewhere in Section D to refer to an allocation (see above) bears no similarity at all to the phrase 'TRQ quantities' (i.e. this is not slightly different language, it is completely different language). This suggests 'TRQ quantities' was not intended to have the same meaning;

    c. The heading to Article 2.29 includes the term 'eligibility'. This makes it clear that Article 2.29 includes obligations that concern importers' eligibility to apply for, and receive, quota under a TRQ.[24] It would be unusual in this context for the first obligation under Article 2.29(1) to only apply to allocations that have *already* been granted;

27. All the above factors combined demonstrate that 'TRQ quantities' must mean the total quantity of quota available under each of the TRQs maintained by a Party. It follows that 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.[25]

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21 First Written Submission of Canada, at para 91.

22 Article 2.30(1)(a) uses 'a quota allocation under the TRQ'; Article 2.30(1)(b) uses 'an allocation'; Article 2.30(1)(c) uses 'each allocation'; Article 2.30(1)(d) uses 'an allocation'; and Article 2.30(3) uses 'a quota allocation'.

23 See discussion above from paragraph 21.

24 See the discussion below from paragraph 66 on the meaning of the term 'eligibility' in Article 2.29.

25 First Written Submission of New Zealand, from para 129.

An 'importer' under Article 2.29(1) is an importer that meets a Party's eligibility requirements

28. Canada argues that its interpretation of Article 2.29(1) (as only applying to importers who have already received an allocation[26]) is supported by the inclusion of the term 'importer' in the text. Canada agrees that the ordinary meaning of 'importer' is 'a person who, or company, enterprise, etc. which imports goods or commodities from abroad'.[27] It then asserts, however, that, in the context of Article 2.29(1), the term must mean 'the person, company or enterprise importing goods from abroad who is in a position to render useful *their specified amount of TRQ'*.[28] In other words, Canada interprets 'importer' as an importer who has received an allocation.

29. Canada's reasoning is flawed and circular. Canada does not explain why the term 'importer' should be read down from its ordinary meaning. It suggests that this interpretation follows from 'the ordinary meaning of the terms already discussed'.[29] Indeed, it appears that, having read down the term 'TRQ quantities' to mean 'the specified amount [of a TRQ] allocated to individual importers' (or, in order words, an allocation), Canada has proceeded to also read down the other terms contained in Article 2.29(1) (including the term 'importer') in an attempt to support this interpretation.[30] This is circular reasoning and it should not be accepted.

30. The reference to 'importers' in Article 2.29(1) does not affect the scope of the obligation. TRQs are a form of market access, they are necessarily concerned with the importation of goods by importers. The reference to 'importers' in Article 2.29(1) simply reflects this.[31]

31. As set out in New Zealand's first written submission, the ordinary meaning of the term 'importer' is broad, and would capture every importer in the world importing goods.[32] However, it would not make sense to interpret Article 2.29(1) as obliging Canada to allow all importers the opportunity to utilise its TRQs, as Canada's Schedule makes it clear that Canada is entitled to exclude those importers that do not meet its stated eligibility requirements. In this context, it is therefore clear that the term 'importer' must be a reference to those importers who are eligible to apply for quota under the eligibility requirements set out in Canada's Schedule.

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26 First Written Submission of Canada, at para 87.
27 First Written Submission of Canada, at para 94.
28 First Written Submission of Canada, at para 95.
29 First Written Submission of Canada, at para 95.
30 First Written Submission of Canada, at paras 92-95.
31 This is also true for the phrase 'for the importation of a good' in Article 2.29(2)(a), which Canada incorrectly argues supports its interpretation of Article 2.29(2)(a): First Written Submission of Canada, at para 98.
32 First Written Submission of New Zealand, at para 131.

New Zealand's interpretation of 'utilise' in Article 2.29(1) is consistent with Article 2.29(2)(a) and (b)

32. Canada argues that its interpretation of Article 2.29(1) (as only applying to importers who have already received an allocation[33]) is supported by the use of the phrase 'utilisation of a TRQ for the importation of a good' in Article 2.29(2)(a) and (b). Canada suggests that 'this confirms the meaning in Article 2.29(1) that to 'utilise' or 'utilisation' of the TRQ is for importing goods'.[34]

33. New Zealand agrees that to 'utilise' a TRQ, or the 'utilisation' of a TRQ, is for the importation of goods. TRQs are a form of market access, they are necessarily concerned with the importation of goods. As discussed below, however, the utilisation of a TRQ for the importation of a good necessarily *includes* the process of obtaining an allocation.[35]

34. In the context of Article 2.29(1), an importer cannot 'utilise' TRQ quantities fully without accessing an allocation. This is consistent with the ordinary meaning of the term 'utilise' as to '*render* [something] useful' or to '*convert* [it] to use'.[36] The inclusion of the phrase 'for the importation of a good' in Article 2.29(2)(a) and (b) does not provide any support for interpreting Article 2.29(1) as not applying to the quota allocation process.

New Zealand's interpretation of 'utilise' in Article 2.29(1) is consistent with Article 2.30(3)

35. Canada argues that its interpretation of Article 2.29(1) (as only applying to importers who have already received an allocation [37]) is supported by Article 2.30(3). It argues that Article 2.30(3) 'distinguishes the <u>utilisation</u> of an allocation from the <u>application</u> for an allocation'[38] and contradicts New Zealand's interpretation that 'utilise' captures both access to an allocation <u>and</u> use of an allocation'.[39]

36. Article 2.30(3) states that '[t]he Party administering a TRQ shall not require the re-export of a good as a condition for application for, or utilisation of, a quota allocation'. The ordinary meaning of the term 'utilisation' in Article 2.30(3) is the same as the ordinary meaning of 'utilise' in Article 2.29(1)[40] – that is, 'to make or render useful, to convert to use, turn to account'.[41] However, Article 2.30(3) is concerned with the utilisation of 'a

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33 First Written Submission of Canada, at para 87.
34 First Written Submission of Canada, at para 98.
35 See below at paragraph 61.
36 First Written Submission of New Zealand, at para 131. Canada agrees that this is the meaning of the term 'utilise': First Written Submission of Canada, at paras 90, 97.
37 First Written Submission of Canada, at para 87.
38 First Written Submission of Canada, at para 99. Emphasis in original.
39 First Written Submission of Canada, at para 99. Emphasis added.
40 And 'utilisation' in Article 2.29(2)(a).
41 Oxford English Dictionary Online, definition of 'utilize', entry 1 **[NZL-34]**.

quota allocation'. To render a quota allocation useful, an importer must be able to import goods into market and claim preferential tariff treatment.

37. Conversely, Article 2.29(1) is concerned with the utilisation of *'TRQ quantities'*. In order to utilise *'TRQ quantities'* for the importation of a good, an importer must obtain an allocation, bring product to market, then claim preferential tariff treatment.[42] The language used in Article 2.30(3) (which concerns utilisation of *an allocation*) is not relevant to the interpretation of the terms 'utilise' in Article 2.29(1) (which concerns the utilisation of *'TRQ quantities*').

The meaning given to the term 'utilise' in the Import Licencing Agreement is not a rule of international law and is not relevant to the interpretation of the term 'utilise' in Article 2.29(1)

38. Canada argues that the 'distinction between the application for an allocation and the utilisation of an allocation is also apparent from the WTO Import Licencing Agreement (ILA). It suggests that the ILA is relevant to the interpretation of Article 2.29(1) because Article 2.28(1) states that 'each Party shall implement and administer [TRQs] in accordance with …the Import Licencing Agreement'. It argues that this reference to the ILA in Article 2.28(1) makes the ILA 'relevant rules of international law applicable in the relations between the Parties' under Article 31.3(c) of the Vienna Convention on the Law of Treaties. Canada refers to the use of the term 'utilisation' and 'utilised' in Article 3.5(h) and (j) of the ILA, and suggests that this 'confirms that utilisation is a subsequent and distinct step that takes place after allocation has been issued'.[43]

39. Article 31.3(c) of the Vienna Convention on the Law of Treaties states that a treaty is to be interpreted in light of its context, including relevant *rules* of international law. New Zealand agrees that the rules set out in the ILA may be relevant to the interpretation of obligations contained in Section D, CPTPP. However, the specific meaning of the word 'utilise' in a particular provision of the ILA is not a 'rule of international law'.[44] It is simply the meaning that is given to that term in that context.[45] The meaning given to the term 'utilize' in the ILA accordingly has no bearing on the interpretation of the term 'utilise' in Article 2.29(1) of CPTPP.

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42 First Written Submission of New Zealand, at para 131.
43 First Written Submission of Canada, at para 100.
44 The Appellate Body has noted that the reference to 'rules of international law' in Article 31.3(c) 'corresponds to the sources of international law in Article 38(1) of the Statue of the International Court of Justice': Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, at para 308.
45 New Zealand notes, and agrees with, the Third Party Submission of Australia in this regard: Third Party Submission of Australia, at para 17.

Interpreting Article 2.29(1) as only applying to importers who have already received an allocation is not supported by the object and purpose of CPTPP

40. Canada argues that interpreting Article 2.29(1) as only applying to importers who have already received an allocation is supported by the object and purpose of CPTPP.[46]

41. This is incorrect. Paragraph 9 of the Preamble to TPP[47] states that the Parties:

> RECOGNISE their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals;

42. Paragraph 9 acknowledges that Parties have retained certain policy space, in particular under the exception provisions contained in CPTPP, to regulate in areas of specific public importance. Paragraph 9 does, not, however, suggest that Parties have an unfettered right to regulate, nor does it suggest that CPTPP Parties' regulatory interests trump the obligations contained in CPTPP. As Canada itself recognises, CPTPP Parties are entitled to regulate and administer their domestic systems *provided the specific rules in the CPTPP are observed*.[48] There is no basis on which to read down the obligation contained in Article 2.29(1) to accommodate Canada's domestic regulatory interests.

Permitting quota from one pool to be granted to applicants in other pools on an exceptional and ad hoc basis does not 'allow importers the opportunity to utilise TRQ quantities fully'

43. Canada states that New Zealand's claims under Article 2.29(1) 'do not account for the fact that unallocated TRQ quantities are not strictly limited by the pools'. It refers to three instances in which quota from the processor pool was allocated to applicants from other pools after no applications were received from processors.[49]

44. As set out above from paragraph 13, Canada's Notices to Importers do not provide for quota from one pool to be made available to importers that fall within another pool. Nor is it clear on what basis Canada decided on these select occasions to make an exception from its published policy.

45. As set out in New Zealand's first written submission, 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*.[50]

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46 First Written Submission of Canada, at para 101.
47 The Preamble to the TPP was incorporated into CPTPP under Article 1, CPTPP.
48 First Written Submission of Canada, at para 101.
49 First Written Submission of Canada, at paras 83-85, later referred to at paras 105 and 124.
50 First Written Submission of New Zealand, at para 133.

46. Permitting quota from one pool to be granted to applicants in other pools on an exceptional and arbitrary basis does not allow importers the opportunity to utilise TRQ quantities fully, and is not consistent with Canada's obligation under Article 2.29(1).

Establishing a breach of Article 2.29(1) does not require a demonstration of trade effects

47. In the alternative, Canada argues that, if the obligation in Article 2.29(1) extends to cover access to the entire TRQ, New Zealand has failed to establish a *prima facie* case of breach, It argues that New Zealand has not provided evidence that Canada has not granted importers the opportunity to access the entire TRQ because 'there are other economic factors causing the lack of demand for New Zealand dairy products in Canada'.[51]

48. As set out at paragraph 4 above, the evidence provided by Canada regarding the demand for New Zealand dairy products in the Canadian market does not address whether Canada's quota pooling system encourages underfill of its TRQs.

49. Further, New Zealand is not required to prove trade effects in order to show that Canada has breached its obligation under Article 2.29(1). Article 2.29(1) requires Canada to administer its TRQs in a manner that allows importers the *'opportunity'* to access TRQ quantities.

50. The ordinary meaning of the term 'opportunity' is 'a time, condition, or set of circumstances permitting or favourable to a particular action or purpose".[52] Article 2.29(1) requires CPTPP Parties to allow importers the *opportunity* to utilise TRQ quantities fully. It is for importers to decide whether to take up that opportunity or not.

III. 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

51. Article 2.29(2)(a) [53] ensures that Parties do not introduce new or additional conditions, limits or eligibility requirements on the utilisation of a TRQ for the importation of a good beyond those set out in Parties' Schedules.[54] Canada attempts to get around this by arguing that the "utilisation of a TRQ" only captures the moment that goods are actually imported. That approach incorrectly limits the term "utilisation". It is simply not possible to utilise a TRQ without obtaining an allocation.[55] Canada's interpretation

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51 First Written Submission of Canada, at para 88.

52 *Oxford English Dictionary*, OED Online, "opportunity, n.", entry 1 [**CDA-30**].

53 New Zealand sets out the relationship between Article 2.30(1)(a), 2.29(2)(a) and the eligibility requirements in Canada's Schedule in paragraphs 88-95.

54 Or as agreed under Article 2.29(2)(b)-(c) or, to the extent it is relevant, Article 2.30(1)(b) which prohibits certain conduct 'unless otherwise agreed'.

55 As noted in New Zealand's first written submission, utilising a TRQ for the importation of a good includes obtaining a TRQ allocation, importing product into the market and claiming preferential tariff treatment: First Written Submission of New Zealand, at para 89-90.

would provide it with unfettered discretion to impose new limits, conditions or eligibility requirements on the quota allocation process. This would effectively grant it a carte blanche to restrict access to (and therefore use of) its TRQs. That would be an absurd result in an agreement that specifically aims to liberalise trade and improve market access.

CPTPP Parties do not have an unfettered discretion to decide how they allocate quota under their TRQs

52. Canada argues that the interpretation of Article 2.29(2)(a) set out in New Zealand's first written submission would have required CPTPP Parties to include in their respective Schedules 'all conditions, limits or eligibility requirements they could possibly require, should they ever decide to administer their TRQs through either a first-come, first-served (FCFS) system or an allocation mechanism.' This, Canada contends, would 'gravely and unduly restrain the Parties in the administration of their TRQs'.[56]

53. This is incorrect. Article 2.29(1)(a) does not require Parties to have anticipated and included in their Schedule every possible limit condition or eligibility requirement that they might ever wish to impose. If a Party wants to introduce a *new* limit, condition, or eligibility requirement, they can do so through the consultation and agreement process set out in Article 2.29(2)(b)-(c).[57] What Article 2.29(2)(a) prohibits is the *unilateral* imposition of new limits, conditions, or eligibility requirements.

54. If Parties wanted to implement limits, conditions, or eligibility requirements *without* going through the Article 2.29(2)(b)-(c) process,[58] however, then it is correct that these would have to be included in their Schedules.

55. Canada set out a range of limits, conditions and eligibility requirements in its Schedule. Specifically, it indicated that it:

    a. would be using an import licensing system to administer its TRQs;[59]

    b. would impose the following eligibility requirements on access to an allocation:[60]

        i. an applicant must be a resident of Canada;

        ii. an applicant must be active in the applicable Canadian dairy, poultry or egg sector;

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56 First Written Submission of Canada, at para 129.
57 Or, to the extent it is relevant, Article 2.30(1)(b), which prohibits certain actions 'unless otherwise agreed'.
58 Or, to the extent it is relevant, Article 2.30(1)(b), which prohibits certain actions 'unless otherwise agreed'.
59 Annex 2-D Tariff Schedule of Canada, 'Appendix A - Tariff Rate Quotas of Canada', at para 3(a).
60 Annex 2-D Tariff Schedule of Canada, 'Appendix A - Tariff Rate Quotas of Canada', at para 3(c).

iii. an applicant must be compliant with the *Export and Import Permit Act* and its regulations.

c. reserved the right to use an auctioning system for 'no more than the first 7 years';[61]

d. reserved the right to allocate a portion of each TRQ (not to exceed 10%) in priority for the importation of goods in scarce supply.[62]

e. imposed end-use restrictions for five dairy TRQs (Milk, Butter, Yoghurt and Buttermilk, Concentrated Milk, and Industrial Cheese).[63]

56. If Canada wishes to introduce any new or additional limits, conditions, or eligibility requirements, it is required to go through the consultation and agreement process set out in Article 2.29(2)(b)-(c).[64]

57. The requirement to go through the process set out in Article 2.29(2)(b)-(c) in order to introduce new or additional limits, conditions, or eligibility requirements is not 'unduly' restrictive.[65] It is unsurprising that having negotiated and agreed market access in the form of TRQs, CPTPP Parties would put in place rules to prevent exporting Parties from unilaterally imposing limits or conditions on that market access. Indeed, interpreting Article 2.29(2)(a) in the manner proposed by Canada would effectively give importing Parties a carte blanche to undermine and restrict access to TRQs through the quota allocation process. That is an absurd result that the Parties cannot have intended.

The interpretation of Article 2.29(2)(a) proposed by Canada is not supported by the object and purpose of CPTPP

58. Canada argues that its interpretation of Article 2.29(2)(a) (i.e. as only capturing measures relating to how a TRQ may be used after allocations have been granted[66]) is supported by the object and purpose of CPTPP 'as the Parties retain their right to regulate and administer their domestic systems, provided the specific rules in the CPTPP are adhered to…'.[67]

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61 Annex 2-D Tariff Schedule of Canada, 'Appendix A - Tariff Rate Quotas of Canada', at para 3(d).

62 Annex 2-D Tariff Schedule of Canada, 'Appendix A - Tariff Rate Quotas of Canada', at para 3(e).

63 For the Milk, Butter, Yoghurt and Buttermilk, and Industrial Cheese TRQs. These end-use restrictions permit Canada to require *up to* a stated percentage of the total TRQ to be for the importation of product in *bulk* (i.e. not for retail sale) to be used in further food processing. For the Concentrated Milk TRQ, the end use restriction is slightly different. It states that only product destined for retail sale shall be imported under the TRQ. This means this end-use restriction is mandatory and applies to 100% of the quota. Annex 2-D Tariff Schedule of Canada, 'Appendix A - Tariff Rate Quotas of Canada', at para 6(c)(i) (Milk); para 11(c)(i) (Concentrated Milk); para 12(c)(i) (Yoghurt and Buttermilk); para 16(c)(i) (Butter); para 17(c)(i) (Industrial Cheese). Canada also maintains an end-use restriction on its egg TRQ: para 25(c)(i).

64 Or, to the extent it is relevant, Article 2.30(1)(b), which prohibits certain actions 'unless otherwise agreed'.

65 As Canada claims in its First Written Submission of Canada, at para 129.

66 First Written Submission of Canada, at para 145.

67 First Written Submission of Canada, at para 160.

59. As set out above from paragraph 41, paragraph 9 of the Preamble to TPP acknowledges that Parties have retained certain policy space, in particular under the exception provisions contained in CPTPP, to regulate in areas of particular public importance. Paragraph 9 does, not, however, suggest that Parties have an unfettered right to regulate, nor does it provide a basis (as Canada suggests) for reading down the obligations contained in CPTPP. Indeed, as Canada itself recognises, a Party's ability to adopt an allocation mechanism to administer its TRQs is *subject to* the obligations set out in Section D and elsewhere in CPTPP.[68] When CPTPP Parties agreed to the obligations set out in CPTPP, they necessarily accepted that this would have an impact on how they could regulate the market access that they had negotiated – indeed that was the point.

New Zealand's interpretation of Article 2.29(2)(a) does not render the phrase 'for the importation of a good' meaningless

60. Canada argues that the interpretation of Article 2.29(2)(a) set out in New Zealand's first written submission 'renders the phrase 'of a TRQ for the importation of a good' meaningless.[69]

61. This is incorrect. As noted above,[70] TRQs are a form of market access, they are necessarily concerned with the importation of goods. In order to utilise a TRQ for the importation of a good, however, an importer must obtain an allocation, bring product to market, then claim preferential tariff treatment – this entire process describes the utilisation of a TRQ for the importation of a good.

The 'utilisation of a TRQ for the importation of a good' is <u>not</u> the same as the utilisation of an allocation

62. Canada agrees that the ordinary meaning of the term 'utilise' is 'to make or render useful, to convert to use, to turn to account',[71] and that 'the utilisation of a TRQ for the importation of a good, must mean to make or render useful a TRQ for importation of a good'.[72] Canada then asserts, however, that 'based on these dictionary definitions, the term "utilisation" very clearly speaks to *the actual importation of products* benefitting from the preferential market access under a TRQ'.[73]

63. This is incorrect. Article 2.29(2)(a) refers to 'the utilisation of a *TRQ* for the importation of a good'. 'A TRQ' is a volume of product that a party has agreed to allow to enter its territory with preferential tariff treatment. In order to 'render useful' a TRQ, an importer must first obtain an allocation. Once an importer has obtained an allocation, it can then

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68 First Written Submission of Canada, at para 160, see also para 170.
69 First Written Submission of Canada, at para 128, and para 140.
70 See discussion above from paragraph 30 in respect of the term 'importer' in Article 2.29(1).
71 First Written Submission of Canada, at para 133.
72 First Written Submission of Canada, at para 133.
73 First Written Submission of Canada, at para 134.

use that allocation to import product into the Canadian market, and claim preferential tariff treatment. Canada's interpretation of 'utilise' skips over the quota allocation process entirely.

64. Canada's interpretation of Article 2.29(2)(a) would make sense if Article 2.29(2)(a) concerned the utilisation of an *allocation* for the importation of a good. But that is not what the text says – Article 2.29(2)(a) refers to the utilisation of 'a *TRQ'*. Here Canada's arguments mirror the arguments it has made under Article 2.29(1), where it suggests that the term 'TRQ quantities' should be interpreted as effectively meaning an allocation that has been granted to an importer. Under both Articles, Canada has sought to read <u>out</u> the clear reference to a 'TRQ' in order to suggest that the obligation will not apply to its allocation mechanism. Its interpretation in both instances is unsupported by the text, its context and the object and purpose of CPTPP.

The terms 'eligibility' in the heading to Article 2.29 and 'eligibility requirements' in Article 2.29(2)(a) concern eligibility to apply for a quota allocation

65. Canada argues that the term 'eligibility requirements' in Article 2.29(2)(a) 'must relate to the actual use of a TRQ when importing a good' and not to the requirements that must be met in order to be eligible to apply for an allocation.[74] It further argues that the inclusion of the term 'eligibility' in the heading to Article 2.29 'speaks to the product focused nature of the requirements covered in Article 2.29(2)(a), which must be satisfied for goods to be imported into the market when a TRQ is utilised'.[75]

66. There is nothing in the text of Article 2.29(2)(a) that supports Canada's interpretation of 'eligibility requirements' or 'eligibility'. As set out in New Zealand's first written submission, the terms 'eligibility' and 'eligibility requirements' are references to the conditions that must be complied with to be eligible to apply and be considered for an allocation under a TRQ. This is clear from the consistent use of the term 'eligibility' in Section D to refer to eligibility *to apply for an allocation*. Specifically, (in addition to Article 2.29(2)), the term 'eligible'/'eligibility' appears in:

    a. Article 2.28(3) which requires Parties to publish its <u>eligibility</u> requirements. Canada agrees that 'eligibility requirements' here is a reference to the requirements that must be met in order to be <u>permitted to apply</u> for quota. [76]

    b. Article 2.30(1)(a), which requires that importers who fulfil a Party's '<u>eligibility</u> requirements' are able to <u>apply and be considered</u> for a quota allocation. Canada

74 First Written Submission of Canada, at paras 138-139.
75 First Written Submission of Canada, at para 152.
76 Canada describes the reference to eligibility requirements' in Article 2.28(3) as setting out 'who is eligible for the relevant TRQ': First Written Submission of Canada, at para 171.

agrees that 'eligibility requirements' here is a reference to the requirements that must be met in order to be permitted to apply for quota.[77]

c. Article 2.30(1)(e), which requires allocation to eligible applicants to be conducted by equitable and transparent means.

67. Elsewhere in Chapter 2, CPTPP, the terms 'eligible' and 'eligibility' are also consistently used to refer to the eligibility of individual importers to apply for the right to import goods:

a. Article 2.12(6)(a)(ii), Chapter 2, CPTPP ('Import Licencing') refers to 'conditions on eligibility for obtaining a licence to import any product';

b. Article 2.12(6)(b), Chapter 2, CPTPP ('Import Licencing') refers to 'licence-eligibility';

c. Article 2.12(7), Chapter 2, CPTPP ('Import Licencing') refers to the 'eligibility of persons to make an application' for a licence; and

d. Article 2.13(3)(c)(ii), Chapter 2, CPTPP ('Import Licencing') refers to 'any criteria an applicant must meet to be eligible to apply for a licence'.

68. Nowhere in Section D, or Chapter 2 more broadly, are the terms 'eligibility' / 'eligible' / 'eligibility requirements' used in a manner that would support Canada's interpretation.

The interpretation of Article 2.29(2)(a) proposed by Canada would create a loophole for importing Parties seeking to restrict the use of their TRQs

69. Interpreting Article 2.29(2)(a) as only prohibiting the introduction of new measures relating to how an allocation can be used *after it is granted*,[78] will render the prohibition largely meaningless in practice. All a Party will have to do is make sure that any new limits, conditions and eligibility requirements that they introduce apply at the allocation stage. For example, if a Party wanted to impose a restriction on the specification or grade of products imported under the TRQ (one of the examples listed in Article 2.29(2)(a)), it could do so by simply requiring importers to hold advance import contracts for goods of a certain specification as a condition to access quota. Similarly, if a Party wanted to impose an end-use restriction (another example listed in Article 2.29(2)(a)), they could do so by conditioning access to an allocation on importers undertaking to only import product for a particular purpose (e.g. in bulk).

70. The ability to craft almost any restriction into an allocation measure demonstrates the artificial nature of the division that Canada attempts to draw (at multiple places in its submission) between allocation and other aspects of a Party's TRQ administration. There

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77 Canada describes the reference to eligibility requirements in Article 2.30(1)(a) as a meaning 'eligibility requirements for the allocation of the TRQ': First Written Submission of Canada, at para 169.

78 First Written Submission of Canada, at para 145.

is no sound reason why CPTPP Parties would have sought to prevent the introduction of restrictive measures affecting the use of TRQs for the actual importation of goods, while permitting new restrictions to be imposed at the earlier allocation stage. Indeed, doing so would undermine the ability of Article 2.29(2)(a) to provide meaningful protection for the TRQ market access agreed.

New Zealand's interpretation is consistent with the list set out in Article 2.29(2)(a)

71. Article 2.29(2)(a) states that:

> …(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)

72. Canada argues that the illustrative list contained in Article 2.29(2)(a) supports its interpretation of Article 2.29(2)(a) (as only capturing measures that take effect after allocation has occurred). It suggests that none of the examples listed are requirements that an importer would need to meet to be eligible for an allocation, and that the obligation in Article 2.29(2)(a) cannot therefore have been intended to capture limits, conditions or eligibility requirements that are built into a Party's allocation mechanism. In support of this argument, Canada points to the *ejusdem generis* doctrine.[79]

73. This is incorrect. There are three reasons for this. First, the measures listed in Article 2.29(2)(a) are not necessarily measures that could only be imposed at the importation stage. As discussed above at paragraph 69, restrictions on 'specification or grade, permissible end-use of the imported product or package size' could *equally* be given effect to at the allocation stage. A Party could, for example, require importers to provide proof of import contracts for goods of a certain specification or grade in order to be eligible for an allocation.

74. Second, Canada's interpretation is not supported by the *ejusdem generis* principle. *Ejusdem generis* is a principle of interpretation that may apply when a general term follows a list of more specific terms. [80]

> *Ejusdem generis* [Latin "of the same kind or class"] (17c) 1. A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed. For example, in the phrase 'horses, cattle, sheep, pigs, goats, or any other farm animals' - despite its seeming breadth - would

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79 First Written Submission of Canada, at paras 142-145.

80 *Black's Law Dictionary* (Thomson Reuters, 9th ed, 2009), at page 594 **[NZL-52]**.

probably be held to include only four legged, hoofed mammals typically found on farms, and thus would exclude chickens.

75. There is no basis for applying the *ejusdem generis* principle to Article 2.29(2)(a). The principle applies where a *single* general term follows a *list* of specific terms. The similarities between the multiple specific terms listed provides a basis for presuming that the more general term was also intended to fall within the same 'kind or class'. Article 2.29(2)(a) does not, however, contain a general term and a list of specific terms. Rather, Article 2.29(2)(a) refers to *three* types of measure ('limit', 'condition', and 'eligibility requirement'). One of the measures ('eligibility requirement') is not a general term, but rather a specific reference to the requirements that an applicant must meet in order to be eligible to apply for a quota allocation.[81] These terms are then followed by a list of only three examples.[82] With the same number of examples as 'general terms',[83] there is no basis on which to presume that the general terms were intended to be read as being of the same kind.

76. Finally, even if the *ejusdem generis* principle were to be applied, it would not provide support for Canada's interpretation of Article 2.29(2)(a) as only capturing measures that are applied on the actual importation of goods. As noted above, while the examples listed could refer to conditions imposed at the importation stage, they could just as easily be crafted into measures applied at the allocation stage.[84]

77. Third, the terms 'limit, condition, and eligibility requirement' must be interpreted in light of *all* relevant context. This includes the other references in Section D (and Chapter 2 more broadly) to the term 'eligibility' and 'eligibility requirement'. As set out above, this context makes it clear that the term 'eligibility requirement' is a reference to the requirements that an applicant must meet in order to be eligible to apply for an allocation.[85]

78. As set out in New Zealand's first written submission, Article 2.29(2)(a) applies to new limits, conditions and eligibility requirements that impact everything from quota allocation to the point at which product enters the relevant market.[86]

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81 See the discussion above from paragraph 66.

82 Canada has noted that the Appellate Body has suggested that the *ejusdem generis* rule may also be applied in situations where a general term *is followed by* a list of specific terms (*US – Large Civil Aircraft (2nd Complaint)* at footnote 1290 to para 615). New Zealand does not consider that this will be appropriate in all instances, but notes that this question does not need to be resolved in the present dispute. For the reasons set out above, it is clear that the principle does not apply irrespective of the ordering of the terms.

83 Noting that, as flagged above, 'eligibility requirements' is not in fact a general term.

84 See above at paragraph 69.

85 See from paragraph 66-68.

86 First Written Submission of New Zealand, at para 89.

The footnote to Article 2.29(2)(a) does not assist in interpreting the scope of Article 2.29(2)(a)

79. Canada argues that its interpretation of Article 2.29(2)(a) is supported by the footnote to Article 2.29. The footnote states that '[f]or greater certainty, this paragraph shall not apply to conditions, limits, eligibility requirements that apply regardless of whether or not the importer utilises the TRQ when importing the good'. Canada argues that the phrase 'regardless of whether an importer utilises the TRQ when importing the good' indicates that the only way to 'utilise' a TRQ is when an importer actually imports a good under a TRQ.[87]

80. Canada's arguments here are unclear. The fact that Article 2.30(1) sets out obligations that are *specific* to the allocation of quota under an allocation mechanism, does not preclude other provisions from *also* setting out obligations that regulate how parties allocate quota.

The order of the Articles in Section D supports interpreting Article 2.29(2)(a) as applying to measures affecting quota allocation

81. Canada argues that its interpretation of Article 2.29(2)(a) is supported by the fact that Article 2.29(2)(a) appears before Article 2.30 in Section D. In support of this proposition, Canada points to the fact that Article 2.30, which follows Article 2.29, deals specifically with allocations. It suggests that this indicates that 'Article 2.29 sets out the broad obligations applying to the administration of all TRQs, whereas Article 2.30 details the specific obligations related to allocations under an allocation mechanism'. [88]

82. Canada's arguments here are unclear. The fact that Article 2.30(1) sets out obligations that are *specific* to the allocation of quota under an allocation mechanism, does not preclude other provisions from *also* setting out obligations that regulate how parties allocate quota.

New Zealand's interpretation of Article 2.29(2)(a) is consistent with Article 2.30(3)

83. Canada argues that its interpretation of Article 2.29(2)(a) is supported by Article 2.30(3). Canada's arguments here mirror those made in support of its interpretation of Article 2.29(1) (which are set out at paragraph 35 above).[89]

84. As set out above from paragraph 36, the language used in Article 2.30(3) (which concerns utilisation of *a quota allocation*) is not relevant to the interpretation of the terms 'utilise' and 'utilisation' in Articles 2.29(1) and 2.29(2)(a) (which concern the utilisation of 'a *TRQ'/ 'TRQ* quantities').

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87 First Written Submission of Canada, at para 147.
88 First Written Submission of Canada, at para 149-151.
89 First Written Submission of Canada, at para 156-157.

The meaning given to the term 'utilise' in the Import Licencing Agreement is not a rule of international law and is not relevant to the interpretation of the term 'utilisation' in Article 2.29(2)(a)

85. Canada argues that the use of the term 'utilize' in several provisions of the ILA supports its interpretation of Article 2.29(2)(a).

86. As set out above from paragraph 38, the meaning given to the term 'utilise' in the Import Licencing Agreement is not a rule of international law for the purposes of Article 31.3(c) of the Vienna Convention on the Law of Treaties, and is not relevant to the interpretation of the term 'utilise' in Article 2.29(2)(a).

IV. 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

87. Article 2.30(1)(a) obliges Canada to ensure that any person or entity that meets the eligibility requirements set out in its Schedule (or agreed under Article 2.29(2)(b)) is able to apply and be considered for a quota allocation. Its purpose is to ensure that eligible importers are not prevented from accessing quota. It is not, as Canada contends, merely concerned with transparency and predictability.[90] Canada's exclusion of eligible applicants – in particular its blanket exclusion of all retailers – is clearly in breach of Article 2.29(1).

The relationship between Article 2.30(1)(a), Article 2.29(2) and the eligibility requirements set out in Canada's Schedule

88. Canada and New Zealand both refer to the relationship between Article 2.29(2)(a), Article 2.30(1)(a), and the eligibility requirements that are set out in paragraph 3(c) of Canada's Schedule in their written arguments.[91] To assist the Panel in its assessment, an overview of the function of each of these provisions is set out below.

89. Article 2.29(2)(a) prohibits the introduction of 'new or additional limits, conditions, or eligibility requirements on the utilisation of a TRQ for the importation of a good' beyond those set out in a Party's Schedule, *unless* a Party introduces them through the consultation and agreement process set out in Article 2.29(2)(b)-(c).[92] Article 2.29(2) therefore contains both a prohibition on the *unilateral* introduction of new limits, conditions and eligibility requirements, *and* a pathway to introduce them (provided

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90 First Written Submission of Canada, at para 172.

91 First Written Submission of New Zealand, at paras 107, 110; First Written Submission of Canada at paras 164-167, 181-182.

92 Or, to the extent it is relevant, Article 2.30(1)(b), which prohibits certain actions 'unless otherwise agreed'.

CPTPP Parties agree). As noted above, the 'eligibility requirements' referred to in Article 2.29(2)(a) are the requirements that an importer must meet in order to access an allocation of quota.[93]

90. Article 2.30(1)(a) obliges Parties to allow a person of a Party that 'fulfils the importing Party's eligibility requirements' to apply and be considered for an allocation. As discussed further below,[94] the reference to 'eligibility requirements' here is a reference to any eligibility requirements that are set out in a Party's Schedule, or introduced through the process set out in Article 2.29(2)(b)-(c). This is because the prohibition on introducing 'new or additional' eligibility requirements under Article 2.29(2)(a) means that Parties are prohibited from applying any other eligibility requirements.

91. A Party will breach *both* Article 2.29(2)(a) and Article 2.30(1)(a) if it introduces an eligibility requirement that is not set out in its Schedule or agreed under Article 2.29(2)(b)-(c).[95]

92. Paragraph 3(c) of Canada's Schedule states that '[a]n eligible applicant means a resident of Canada, active in the applicable Canadian dairy … sector … and that is compliant with the *Export and Import Permits Act* and its regulations'. These are the eligibility requirements that CPTPP Parties agreed Canada could impose on importers seeking allocations under its TRQs.[96]

93. Canada has not introduced any further eligibility requirements under the process set out in Article 2.29(2)(b)-(c). The eligibility requirements set out in Canada's Schedule are therefore the 'eligibility requirements' that are to be taken into account when assessing whether Canada has complied with its obligations under Article 2.29(2)(a) and Article 2.30(1)(a).

94. The definition of an eligible applicant in Canada's Schedule is not itself an obligation. It records the eligibility requirements that Canada can apply when allocating its TRQs. These eligibility requirements are then used when applying obligations that refer to CPTPP Parties' eligibility requirements to Canada (such as Article 2.29(2)(a) and Article 2.30(1)).

95. Paragraph 3(c) of Canada's Schedule does, however, set out two specific obligations relating to how Canada allocates its quota. First, the first sentence of paragraph 3(c) states

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93 See above from paragraph 65.

94 See below from paragraph 96.

95 While this means there is a degree of overlap between the obligations in Article 2.29(2)(a) and Article 2.30(1), both perform independent functions. The prohibition in Article 2.29(2)(a) applies to new limits and conditions (as well as eligibility requirements), and provides a pathway (through Article 2.29(2)(b)-(c)) for the introduction of new limits, conditions and eligibility requirements. The obligation in Article 2.30(1)(a) prevents CPTPP Parties from impeding the ability of eligible applicants to apply for quota through means other than the introduction of new eligibility requirements (for example, if a Party imposed an arbitrary ban on a specific importer who was otherwise eligible to apply). Article 2.30(1)(a) also obliges Parties to 'consider' applications received from eligible applicants. This means that they cannot reject eligible applications without actively considering their merit.

96 See above from paragraph 55.

that 'Canada shall allocate its TRQs each quota year to eligible applicants'. This prohibits Canada from allocating quota to persons who do not meet its eligibility criteria, and prevents importers who have no involvement in the relevant industry obtaining quota simply as a rent seeking exercise. Second, the final sentence of paragraph 3(c) states that Canada shall 'not discriminate against applicants who have not previously imported the product…'. This makes it clear that Canada is not permitted to interpret the requirement that importers be 'active in the applicable … sector' (set out earlier in paragraph 3(c)) as requiring applicants to be active in that sector *as an importer*. In other words, importers must be permitted to show 'activity' in the relevant industry in ways other than proving a history of importing the relevant good.

'Eligibility requirements' in Article 2.30(1)(a) refers to the eligibility requirements that are set out in a Party's Schedule, or introduced through the process set out in Article 2.29(2)(b)-(c)

96. Canada argues that it has discretion to introduce any new eligibility requirements on the allocation of its TRQs, as it sees fit. It argues the term 'eligibility requirements' in Article 2.30(1)(a) is simply a reference to the eligibility requirements that it has chosen, and published, in a given quota year.[97] In support of this interpretation, Canada notes that Article 2.30(1)(a) does not explicitly refer to CPTPP Parties' Schedules. It suggests that the term cannot be interpreted as a reference to the eligibility requirements set out in Parties Schedules without an express reference.[98] It also suggests that the use of the phrase 'the importing Party's eligibility requirements' in Article 2.30(1) 'is a reference to the Party's own eligibility requirements – that is, those established by the Party as part of its allocation mechanism.[99]

97. Canada's interpretation would create a direct conflict between Article 2.30(1)(a) and Article 2.29(2)(a). Under Article 2.29(2)(a), Parties are prohibited from introducing new or additional eligibility requirements beyond those that are set out in their Schedules, unless they go through the process set out in Article 2.29(2)(b)-(c).[100] It follows that the reference to 'eligibility requirements' in Article 2.30(1)(a) must be a reference to eligibility requirements contained in a Party's Schedule, or introduced through the process set out in Article 2.29(2)(b)-(c).

98. The fact that Article 2.30(1)(a) does not explicitly refer to CPTPP Parties' Schedules and the process for agreeing new eligibility requirements set out in Article 2.29(2)(b)(c) does not alter this interpretation. Such a reference would be unnecessary, as the meaning of

97 First Written Submission of Canada, at para 162.
98 First Written Submission of Canada, at para 168.
99 First Written Submission of Canada, at para 169. Emphasis in original.
100 Or, to the extent it is relevant, Article 2.30(1)(b), which prohibits certain actions 'unless otherwise agreed'.

the term is clear from Article 2.29(2)(a), which immediately precedes Article 2.30(1)(a).[101]

99. The inclusion of the possessive phrase 'the importing Party's eligibility requirements' in Article 2.30(1) is consistent with this interpretation. As set out in New Zealand's first written submission, a Party's eligibility requirements are set out in its Schedule (or agreed under Article 2.29(2)(b)-(c)).[102] Parties are not permitted to have other eligibility requirements.

The definition of an 'allocation mechanism' in footnote 18 cannot be used to read down the substantive obligations in Section D

100. Canada argues that its interpretation of Article 2.30(1)(a) is supported by the definition of an 'allocation mechanism' set out in footnote 18 to Article 2.30. Canada notes that the definition of an allocation mechanism 'recognises that a CPTPP Party can adopt a system other than [first come first served] – subject to the Party's relevant obligations under Section D'.[103] Canada suggests that this recognises that it is Canada's 'right'[104] to 'decide <u>who</u> has access to the TRQ'.[105]

101. Section D recognises that CPTPP Parties can elect to administer their TRQs through an allocation mechanism. This is reflected in the definition of an 'allocation mechanism' in footnote 18, as well as other references to allocation mechanisms in Section D.[106] The fact that CPTPP Parties are *permitted* to administer their TRQs through an allocation mechanism does not, however, mean that they have an unfettered discretion to do so. As Canada itself recognises, a Party's ability to adopt an allocation mechanism to administer its TRQs is *subject to* the obligations set out in Section D and elsewhere in CPTPP[107] – this includes the clear obligation under Article 2.30(1)(a) to allow importers that meet that Party's eligibility requirements to apply for access to an allocation.

The eligibility requirements set out in Canada's Schedule are not minimum requirements

102. Canada argues that the eligibility requirements set out in its Schedule are a minimum requirement. It argues that 'so long as Canada allocates its dairy TRQs to Canadian residents that are acting in the Canadian dairy sector, Canada is entitled to limit TRQ eligibility to a <u>subset</u> of those residents'.[108] Canada suggests that this interpretation is

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101 See also the discussion from paragraph 21 above.
102 First Written Submission of New Zealand, at para 104.
103 First Written Submission of Canada, at para 170.
104 First Written Submission of Canada, heading to paras 173, 182, 222, 232-233.
105 First Written Submission of Canada, at para 170, emphasis in original.
106 A number of provisions in Section D refer to an allocation mechanism, including Article 2.30(1), Article 2.31(1), Article 2.32(2) and Article 2.32(5).
107 First Written Submission of Canada, at para 170, see also para 160.
108 First Written Submission of Canada, at paras 162, 175.

supported by the fact that paragraph 3(c) of its Schedule does not expressly state that '"any" or "every" resident of Canada that is active in the Canadian dairy sector must be eligible to apply and to be considered for a quota allocation under Canada's CPTPP TRQs'.[109]

103. Paragraph 3(c) of Canada's Schedule does not state that '"any" or "every" resident of Canada that is active in the Canadian dairy sector must be eligible to apply and to be considered for a quota allocation under Canada's CPTPP TRQs because this is the effect of the obligation set out in Article 2.30(1)(a). Article 2.30(1)(a) obliges Parties to allow eligible importers to apply and be considered for a quota allocation. In Canada's case, an eligible importer is a person who meets the eligibility requirements that are set out in paragraph 3(c) of its Schedule. It is unnecessary to restate the obligation that is created under Article 2.30(1)(a) in Canada's Schedule.

The interpretation of paragraph 3(c) of its Schedule proposed by Canada is not supported by the object and purpose of CPTPP

104. Canada argues that its interpretation of paragraph 3(c) of its Schedule (i.e as setting out minimum eligibility requirements only[110]) is supported by the object and purpose of CPTPP. It refers to the trade liberalisation objectives of CPTPP and suggests that its interpretation 'expands and facilitates this trade' by preventing entities not involved in the dairy industry from obtaining quota. This, it suggests, 'in turn promotes greater utilisation of Canada's dairy TRQs.'[111]

105. As set out above, New Zealand agrees that Canada's Schedule prohibits it from granting quota to applicants who do not meet its eligibility requirements, thereby reducing the scope for rent seeking behaviour. New Zealand agrees that this is consistent with the object and purpose of CPTPP.[112]

106. That obligation is, however, not in dispute. What is in dispute is the obligation under Article 2.30(1)(a) to ensure that applicants who meet the eligibility criteria set out in Canada's Schedule (or agreed under Article 2.29(2)(b)-(c)) are able to apply and be considered for quota. Canada's interpretation of Article 2.30(1)(a) is not trade facilitative. To the contrary, it would give Canada unfettered discretion to limit access to its TRQs, including by excluding eligible importers with a genuine interest in importing the goods in question.

107. As set out in New Zealand's first written submission, the object and purpose of CPTPP supports interpreting Article 2.30(1)(a) in a manner that requires CPTPP Parties to grant

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109 First Written Submission of Canada, at para 177.
110 First Written Submission of Canada, at para 162.
111 First Written Submission of Canada, at para 184.
112 See above at paragraph 95.

the market access that was negotiated, on the terms set out under their Tariff Schedule (including any relevant eligibility requirements).

The obligation under Article 3.2.2(b) of the Korea United States Free Trade Agreement (KORUS) is not relevant to the interpretation of Article 2.30(1)(a)

108. Canada argues that, 'had the Parties wanted to exhaustively set out who may apply and be considered for a quota allocation under Canada's CPTPP TRQs, they would have followed an approach similar to that taken in Article 3.2.2(b) of the Korea United States Free Trade Agreement (KORUS).

109. Article 3.2.2(b) of the Korea United States Free Trade Agreement (KORUS) states:

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

110. New Zealand does not argue that Article 2.30(1)(a) CPTPP should be interpreted as having the same meaning as Article 3.2.2(b) KORUS. Article 2.30(1)(a) CPTPP requires that any person who meets the eligibility requirements set out in a Party's Schedule (or agreed between the Parties under Article 2.29(2)(b)-(c)) can apply and be considered for a quota allocation. Parties negotiated the eligibility requirements that they would apply when negotiating their separate Schedules. Unlike Article 3.2.2(b) KORUS, the eligibility requirements that Parties are entitled to apply under Article 2.30(1)(a) differ between Parties. The obligation in Article 3.2.2(b) KORUS (a bilateral agreement) is materially different to the obligation set out in Article 2.30(1)(a) and is not relevant to its interpretation.

New Zealand's interpretation of Article 2.30(1)(a) is consistent with the obligation to not discriminate against new entrants set out in Canada's Schedule

111. Canada argues that its interpretation of Article 2.30(1)(a) is supported by the obligation in paragraph 3(c) in Canada's Schedule to 'not discriminate against applicants who have not previously imported the product subject to a TRQ but who meet the residency, activity and compliance criteria'. Canada argues that 'if paragraph 3(c) [of Canada's Schedule] exhaustively defined who is eligible for an allocation under Canada's TRQs, there would have been no need to include this final sentence in paragraph 3(c)'.[113]

112. This is incorrect. One of the eligibility requirements set out in Canada's Schedule requires that importers be 'active in the applicable Canadian dairy, poultry or egg sector'. The obligation to 'not discriminate against applicants who have not previously imported the product…' makes it clear that Canada is not permitted to interpret this 'activity' requirement as requiring applicants to have been active in the relevant industry *as an*

[113] First Written Submission of Canada, at para 180.

importer. In other words, quota applicants must be permitted to show 'activity' in the relevant industry in ways other than proving a history of importing the relevant good. There is no inconsistency between this requirement and the obligation under Article 2.30(1)(a).

Article 2.30(1)(a) and the eligibility requirements set out in Canada's Schedule perform separate functions

113. Canada argues that New Zealand's interpretation of Article 2.30(1)(a) would mean that Article 2.30(1)(a) and para (c) of Canada's Schedule would have functionally the same effect.[114]

114. This is incorrect. As set out from paragraph 90 above, Article 2.30(1)(a) obliges Parties to allow persons that meet an importing Party's eligibility requirements to apply and be considered for an allocation. A Party will breach Article 2.30(1)(a) if it introduces a new eligibility requirement that is not set out in its Schedule or introduced under the process set out in Article 2.29(2)(b)-(c).

115. The definition of an eligible applicant in Canada's Schedule is not itself an obligation. It records the eligibility requirements that Canada can apply when allocating its TRQs. These eligibility requirements are then used when applying obligations that refer to CPTPP Parties' eligibility requirements to Canada, including Article 2.30(1)(a). If a Party wants to add to these eligibility requirements it must go through the process outlined under Article 2.29(2)(b)-(c).

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

116. The Processor Clause in Article 2.30(1)(b) requires Canada to ensure that it does not 'limit access to an allocation to processors'. Properly interpreted, the term 'an' in the Processor Clause means 'any' allocation. This is not a complex obligation. Canada will be in breach of the Processor Clause if it limits access to one, several or all allocations under a TRQ to Processors.

117. Canada's alternative interpretation – that it will only breach the Processor Clause if it limits access to *every single* allocation to Processors – is unsupported by the text, its context and the object and purpose of CPTPP. Moreover, it would lead to the absurd situation in which Canada would be permitted to limit access to 99.99% of allocations to processors, provided it granted a single allocation to a non-processor. Such an interpretation would render the Processor Clause virtually meaningless.

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[114] First Written Submission of Canada, at para 182. An overview of the relationship between Article 2.30(1)(a), Article 2.29(2)(a) and para 3(c) of Canada's Schedule is set out above from paragraph 88.

An allocation is a potential portion or share of the TRQ that may be granted to an applicant

118. Canada argues that New Zealand's interpretation of the term 'allocation' as 'a potential portion or share of the TRQ that may be granted to an applicant/applicants'[115] is imprecise. It suggests that by referring to a 'share *or* portion' of the quota, 'New Zealand appears to be arguing that an allocation can be a share of the TRQ granted to an individual applicant, or some other portion of the TRQ that may be granted to applicants, plural'.[116] Canada argues that 'allocation' means 'a share of in-quota quantity that may be granted to an individual applicant'.[117]

119. The Processor Clause is concerned only with 'access' to quota allocations. Before allocations have been granted to individual applicants, their size is necessarily indeterminate. The entire TRQ could be 'an allocation' (as the entire TRQ could theoretically be granted to a single applicant), each of the pools could be 'an allocation' (as, again, the entire pool could be granted to a single applicant), or each of the pools could contain a number of allocations.

120. For the purposes of this dispute, however, this point is largely academic. If Canada's processor and further processor pools are 'an allocation' in and of themselves, then Canada has breached the Processor Clause.[118] Equally, if Canada's processor and further processor pools are made up of smaller indeterminate sized allocations, then Canada will still be in breach of the Processor Clause.[119]

The term 'an allocation' in the Processor Clause means 'any' allocation

121. Canada acknowledges that the term 'an allocation' in the *Domestic Production* Clause in Article 2.30(1)(b) must mean '*any* allocation'. It argues, however, that the same language ('an allocation') in the *Processor* Clause has a different meaning, because the obligations contained in the two clauses do not operate in the same way.[120] Canada notes that the *Producer* Clause at the start of Article 2.30(1)(b) includes the term 'any', and suggests that the Parties would have expressly referred to 'any allocation' in the *Processor* Clause if they had intended it to prohibit Parties from limiting access to any allocation to processors. [121]

122. As set out in New Zealand's first written submission, the use of the term 'an allocation' to refer to *any* allocation in the Domestic Production Clause strongly supports interpreting 'an allocation' in the Processor Clause as having the same meaning. Contrary to Canada's

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115 First Written Submission of New Zealand, at para 70.
116 First Written Submission of Canada, at para 194.
117 First Written Submission of Canada, at para 194.
118 Because access to the processor and further processor pools is limited to processors.
119 Because access to all of the allocations contained in both pools is limited to processors.
120 First Written Submission of Canada, at para 198-199.
121 First Written Submission of Canada, at para 200.

position, the two obligations are not dissimilar. While they do not operate in exactly the same manner, both prohibit Parties from restricting access to allocations. This, combined with their placement in direct proximity to each other, and the use of the exact same phrase ('access to an allocation') provides strong contextual support for interpreting 'an allocation' consistently across both clauses.[122]

123. The use of the term 'any' in the Producer Clause at the start of Article 2.30(1)(b) does not affect this interpretation. The fact that the Parties used the term 'any' in the Producer Clause, does not mean that they could not have used the term 'an allocation' in the Processor Clause to mean 'any allocation'. As Canada itself acknowledges, the Parties clearly used the term 'an allocation' in the Domestic Production Clause to mean *any* allocation.[123]

Interpreting the Processor Clause as only prohibiting Parties from limiting access to 'every' allocation to processors would lead to absurd results and render the Processor Clause meaningless

124. Canada argues that the term 'an allocation' in the Processor Clause must mean 'every allocation'. It argues that a Party will only breach the Processor Clause if it limits *every* allocation available under a TRQ to Processors.[124]

125. It is not tenable that 'an allocation' in the Processor Clause was intended by the Parties to mean 'every allocation'. As set out in New Zealand's first written submission, an interpreter must not adopt an interpretation that would render parts of a treaty meaningless, or that would result in an outcome that is manifestly absurd or unreasonable.[125]

126. If the term 'an allocation' in the Processor Clause is interpreted as 'every' allocation, all that a Party would have to do to comply with the Processor Clause is make a *single* allocation available to a non-processor. Put another way, a Party would be permitted to allocate 99.9% of the allocations available under a TRQ to processors, and still not be in breach of the Processor Clause. This is an absurd result. It would also render the Processor Clause virtually meaningless. A Party would, for example, not be in breach if it limited access to 999 out of 1000 allocations to processors, but would be in breach if it limited access to the whole 1000 – despite the fact that, from a market access perspective, there is no material difference between the two.

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122 First Written Submission of New Zealand, at para 72.
123 First Written Submission of Canada, at para 198.
124 First Written Submission of Canada, at para 197.
125 First Written Submission of New Zealand, at para 48.

127. In short, interpreting 'an allocation' as 'every allocation' would render the Processor Clause virtually meaningless and result in an outcome that is manifestly absurd. This cannot have been intended by the Parties.

Interpreting the Processor Clause as only prohibiting Parties from limiting access to 'every' allocation to processors is not supported by the object and purpose of CPTPP

128. Canada argues that the object and purpose of CPTPP supports its interpretation of 'an allocation' in the Processor Clause as meaning 'every allocation'. It points, in particular, to paragraph 9 of the Preamble of TPP. Canada suggests that 'Article 2.30(1)(a) is premised upon the Parties retaining discretion to administer TRQs by an allocation of their choosing'.[126]

129. Interpreting 'an allocation' as meaning 'every allocation' is not supported by the object and purpose of CPTPP. As set out above from paragraph 41, paragraph 9 of the Preamble to TPP acknowledges that Parties have retained certain policy space, in particular under the exception provisions contained in CPTPP, to regulate in areas of particular public importance. Paragraph 9 does, not, however, suggest that Parties have an unfettered right to regulate, nor does it provide a basis (as Canada suggests) for reading down the obligations contained in CPTPP. When CPTPP Parties agreed to the obligations set out in CPTPP, they necessarily accepted that this would have an impact on how they could regulate the market access that they had negotiated – indeed that was the point.

130. Section D recognises that CPTPP Parties can elect to administer their TRQs through an allocation mechanism. This is reflected in the definition of an 'allocation mechanism' in footnote 18, as well as other references to allocation mechanisms in Section D.[127] The fact that CPTPP Parties are *permitted* to administer their TRQs through an allocation mechanism does not, however, mean that they can do whatever they want without restraint. As Canada itself recognises, a Party's ability to adopt an allocation mechanism to administer its TRQs is *subject to* the obligations set out in Section D and elsewhere in CPTPP[128] – not the other way around.

Further processors are 'processors' for the purpose of the Processor Clause

131. Canada argues that the dictionary definition of 'processor' is insufficient to clarify the scope of the term 'processors' in the Processor Clause. It suggests that the reference to 'further food processing' in Canada's Schedule supports interpreting 'processors' in the Processor Clause as not including further processors.[129]

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126 First Written Submission of Canada, at para 201.
127 A number of provisions in Section D refer to an allocation mechanism, including Article 2.30(1), Article 2.31(1), Article 2.32(2) and Article 2.32(5).
128 First Written Submission of Canada, at para 170.
129 First Written Submission of Canada, at para 204.

132. As set out in New Zealand's written submissions, it is clear that further processors are 'processors' for the purposes of CPTPP.[130] The references to further processing in the end-use requirements contained in Canada's Schedule supports this interpretation. The end-use requirements expressly use the term 'processing' to describe the process of turning a bulk product into another food. It logically follows that the entities that carry out this further processing are 'processors'. There is nothing in CPTPP that suggests that the Parties intended the term 'processor' to have a narrower meaning.

The USMCA decision provides helpful guidance to the Panel

133. Canada argues that the USMCA Panel decision in *Canada – Dairy TRQs* is 'not relevant to the interpretation of Article 2.30(1)(b)'.[131] It states that, 'if [this] Panel considers that the …decision is at all relevant to its analysis, the Panel should closely appraise the persuasive value of that determination' in light of 'analytical and interpretive issues' in the report.[132]

134. As set out in New Zealand's first written submission, the USMCA Panel focused its analysis on the term 'an allocation' in the USMCA Processor Clause (which is identical to the CPTPP Processor Clause). The Panel noted that the exact same language was used in the USMCA Domestic Production Clause to mean 'any allocation'.[133] 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.[134] The USMCA Panel rejected the alternative interpretation put forward by Canada in that dispute – that the phrase 'an allocation' should be interpreted as meaning 'every allocation'. It noted that such an interpretation would allow Canada to limit 99% of allocations to processors, provided it left at least one allocation available for non-processors. It found that such an interpretation would render the obligation meaningless, would lead to absurd results and could not reasonably have been intended by the Parties to USMCA.[135]

135. Canada does not provide any detail of the 'analytical and interpretative' issues that it alleges are contained in the USMCA report, other than suggesting that its definition of the term 'allocation' was imprecise,[136] and disagreeing with the USMCA's Panel's view of the relationship between the USMCA Producer Clause and the USMCA Processor and Domestic Production Clauses.[137] These points appear to simply reflect the fact that the

130 First Written Submission of New Zealand, at para 69.
131 First Written Submission of Canada, at footnote 179 to para 193.
132 First Written Submission of Canada, at para 193.
133 USMCA Panel Report, *Canada – Dairy TRQ Allocation Measures* at para 114.
134 USMCA Panel Report, *Canada – Dairy TRQ Allocation Measures* at para 115.
135 USMCA Panel Report, *Canada – Dairy TRQ Allocation Measures* at paras 124 - 125.
136 First Written Submission of Canada, at para 194.
137 First Written Submission of Canada, at footnote 193 to para 198.

USMCA Panel disagreed with Canada's case. To the contrary, the USMCA Report sets out a robust interpretation of the USMCA Processor Clause, and may provide helpful assistance to the Panel in assessing the claims set out in the current dispute.

VI. 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

136. The function of Article 2.30(1)(c) is to ensure that Parties administer their TRQs in a way that means – to the maximum extent possible – allocations are made in the volumes requested. It is simply not credible to suggest (as Canada does) that this obligation only applies at the time that a Party is actually granting quota to individual applicants, and not to the *design* of that mechanism. As Canada's own allocation mechanism demonstrates, by the time a Party starts *granting* allocations, the volume of those allocations may be almost entirely predetermined by the terms of its allocation mechanism. Article 2.30(1)(c) cannot be interpreted in a way that, not only departs from the clear meaning of the text, but also allows Canada to thwart the obligation entirely.

Article 2.30(1)(c) applies to Canada's allocation mechanism

137. Canada argues that Article 2.30(1)(c) only applies when a Party 'is issuing individual allocations to specific TRQ applicants in accordance with its chosen allocation mechanism', and does not need to be taken into account when a Party is designing its allocation mechanism.[138] Canada suggests that this interpretation is supported by the language used in Article 2.30(1)(c). It argues that the use of the term 'each allocation' 'indicates that this provision was not intended to create obligations with respect to the administration of the TRQ as a whole'.[139] It argues that the use of the term 'made' 'further confirms that the obligation…applies after the importing Party has chosen its allocation mechanism, when the importing Party is in the course of granting individual TRQ allocations to specific TRQ applicants'.[140]

138. Under Article 2.30(1)(c) Parties must ensure that 'each allocation is made … to the maximum extent possible, in the amounts that importers request'. That 'each allocation is made … in the amounts that importers request' is the *outcome* that Parties are seeking to achieve when they fulfil their obligation under Article 2.30(1)(c). There is nothing in

138 First Written Submission of Canada, at para 206.
139 First Written Submission of Canada, at para 210.
140 First Written Submission of Canada, at para 211.

Article 2.30(1)(c) to suggest, however, that the only time that Parties are required to take steps *to achieve this outcome* is at the point they are granting allocations.[141]

139. To the contrary, the inclusion of the language 'ensure … to the maximum extent possible' in Article 2.30(1)(c), makes it clear that Parties are required to do everything within their power – while designing their allocation mechanism *and* when implementing it – to achieve this outcome.[142]

Canada's interpretation would create a loophole within Article 2.30(1)(c)

140. If the obligation in Article 2.30(1)(c) were to be interpreted as applying only at the time that Parties are granting allocations, then Parties could easily avoid it by imbedding restrictions on the amount that importers can request into their allocation mechanism.

141. Indeed, depending on the allocation mechanism that a Party adopts, there may be very little discretion left at the actual allocation stage for Parties to influence the volume of quota included in each allocation. Canada's allocation mechanism is a good example of this. Canada's allocation mechanism allocates 100% of the quota under each TRQ into up to three pools. The amount of quota that any single importer can receive is limited to that pool. Canada's allocation mechanism then provides rules for how quota is to be divided between applicants within each of its pools. In the distributor pool, for example, quota is divided between applicants on an equal share basis.[143] The amount of quota that any single importer can receive is therefore limited to its particular share of that pool. This means that, by the time Canada actually comes to grant its allocations, the amount of quota that an applicant will receive is already completely predetermined by the rules set out in Canada's allocation mechanism.

142. In order to give the obligation in Article 2.30(1)(c) practical meaning, and avoid the creation of a loophole that Parties can easily avoid, it is clear that it must apply to the design and operation of a Party's allocation mechanism.

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141 The use of the language 'each allocation' does not alter this interpretation. Section D uses a range of slightly different phrases to refer to 'allocations': Article 2.30(1)(a) uses 'a quota allocation under the TRQ'; Article 2.30(1)(b) uses 'an allocation'; Article 2.30(1)(c) uses 'each allocation'; Article 2.30(1)(d) uses 'an allocation'; and Article 2.30(3) uses 'a quota allocation'. The use of 'each allocation' in Article 2.30(1)(c) may reflect the fact that, unlike the other obligations in Article 2.30, the obligations in Article 2.30(c) require consideration on an allocation-by-allocation basis (considering importers will likely request different amounts).

142 See the discussion below at paragraph 145.

143 In the case of the processor 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).

The alternative wording suggested by Canada at paragraph 215 of its submission does not reflect the obligation set out in Article 2.30(1)(c)

143. In its first written submission, New Zealand observed that the obligation in Article 2.30(1)(c) means that '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.[144] Canada argues that, if this had been intended by the Parties, they would have drafted Article 2.30(1)(c) to read:[145]

> 'each importing Party shall ensure that each allocation is made in the amounts that importers request, unless the aggregate TRQ quantity requested by applicants exceeds the quota size'

144. Contrary to Canada's claim, this language would not have the same effect as the obligation that is set out in Article 2.30(1)(c). In particular, the inclusion of the phrase 'unless the aggregate TRQ quantity requested by applicants exceeds the quota size' would mean that the obligation would cease to apply as soon as there was more demand than there was quota available. Parties in such circumstances would be free to grant allocations in whatever amounts they wanted, ignoring the volumes requested by importers completely.

145. The inclusion of the phrase 'to the maximum extent possible' in Article 2.30(1)(c) reflects the intention of the Parties to impose a high standard on Parties administering TRQs, while also acknowledging that the capped volume of each TRQ means that it will not always be possible to grant allocations in the volumes requested.

Article 2.30(1)(c) is compatible with Article 2.30(1)(b)

146. Canada argues that New Zealand's interpretation of Article 2.30(1)(c) conflicts with Article 2.30(1)(b) (which contains the Processor Clause). It notes that Article 2.30(1)(b) opens with the phrase 'unless otherwise agreed', which means that the Parties could theoretically agree to allow an importing Party to limit access to an allocation to processors. It argues, however, that this would never be permissible if Article 2.30(1)(c) is interpreted as applying to a Party's allocation mechanism – because limiting access to processors would contravene the obligation to ensure, to the maximum extent possible, that allocations are made in the amounts requested.[146]

147. Under the Vienna Convention on the Law of Treaties, all treaties must be interpreted in their context. In the case of Article 2.30(1)(c), this context includes not only the ability of the Parties to agree to conduct that would otherwise be inconsistent with

144 First Written Submission of New Zealand, at para 119.
145 First Written Submission of Canada, at para 215.
146 First Written Submission of Canada, at para 219.

Article 2.30(1)(b), but also the ability of the Parties to agree to the introduction of new limits, conditions and eligibility requirements through the process set out in Article 2.29(2)(b)-(c).

148. In this context, Article 2.30(1)(c) must be interpreted as obliging Parties to ensure to the maximum extent possible that allocations are made in the amounts requested, *subject to* any agreement between the Parties under Article 2.30(1)(b) or Article 2.29(2)(b)-(c). This means that any new limits, conditions or eligibility requirements agreed between the Parties would be taken into account in the same way as the limits that are already contained in a Party's Schedule (e.g. the total TRQ cap, and any relevant end use restrictions). The fact that such limits will need to be taken into account in applying Article 2.30(1)(c) is acknowledged by the phrase 'to the maximum extent possible'.

Article 2.30(1)(c) does not require Canada to adopt a pro-rata allocation system

149. In its first written submission, New Zealand notes that the effect of Article 2.30(1)(c) is that 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.[147] Canada argues that this would mean that any time that the aggregate quantities requested by applicants exceeded supply, Canada 'must presumably divide the total quota volume in proportion to the quantity requested by each TRQ applicant'. It suggests that 'in effect, New Zealand is demanding that Canada administer its CPTPP dairy TRQs based on a pro-rata allocation mechanism'.[148] Canada suggests that New Zealand's interpretation of Article 2.30(1)(c) is therefore inconsistent with its reserved right to auction in its Schedule,[149] and would prohibit it from 'design[ing] an allocation mechanism that results in allocations that are less than what applicants requested'.[150]

150. It is not for New Zealand to identify for Canada the various ways in which it might administer its TRQs. It is not correct, however, that the only allocation mechanism that would comply with the obligation under Article 2.30(1)(c) is a pro-rata system. Where a TRQ is oversubscribed, Canada could, for example, allocate quota between applicants on a licence on-demand basis, whereby allocations are granted (in the amounts requested) based on the order in which they are received, until the quota is exhausted. As noted earlier, Canada has also reserved the right in its Schedule to use an auctioning system for the first 7 years. Both of these systems could be implemented in a manner that would comply with Article 2.30(1)(c).

147 First Written Submission of New Zealand, at para 119.
148 First Written Submission of Canada, at para 221.
149 First Written Submission of Canada, at para 223.
150 First Written Submission of Canada, at para 224.

151. Nor is it correct that Article 2.30(1)(c) prevents Canada from implementing an auctioning system, or that it prohibits it from ever granting allocations in amounts that are less than importers have requested. Canada could, for example, implement a system whereby quota is auctioned off to the highest bidder, with bids being filled (in the volumes requested) by order from the highest bid to the lowest. In the event that a TRQ received more bids than the volume of quota available, some of the lower bids would not receive an allocation. As noted above,[151] the phrase 'to the maximum extent possible' in Article 2.30(1)(c) reflects the intention of the Parties to impose a high standard on Parties administering TRQs, while *also* acknowledging that the capped volume of each TRQ means that it will not always be possible to grant allocations in the volumes requested.

Article 2.30(1)(c) does not merely require Parties to make 'serious efforts' to grant applications in the volumes requested

152. Canada argues that the phrase 'shall ensure…to the maximum extent possible' in Article 2.30(1)(c) should be interpreted as requiring only that Parties make 'serious efforts' to grant allocations in the volumes importers have requested.[152] In suggesting this interpretation, Canada refers only to the GATT Panel decision in *EEC – Apples (Chile I)* where the Panel applied the obligation in GATT Article XXXVII(1) that Members 'to the fullest extent possible …. give effect to the following provisions…'.[153] In that case, the GATT Panel stated:

> After careful examination, the Panel could not determine that the EEC had not made serious efforts to avoid taking protective measures… Therefore the Panel did not conclude that the EEC was in breach of its obligations under [GATT Article XXXVII(1)(b)].[154]

153. The GATT Panel's assessment in *EEC – Apples (Chile I)* does not assist the interpretation of the phrase 'ensure … to the maximum extent possible' in Article 2.30(1)(c). There are several reasons for this. First, the GATT Panel does not set out its interpretation of the phrase 'to the fullest extent possible' in its decision. Nor is it safe to assume that its reference to 'serious efforts' in its findings reflects that interpretation. Indeed, in applying the same obligation in the subsequent case of *EEC – Dessert Apples,* the GATT Panel records its finding by stating that it 'could not find that the EEC had made *appropriate efforts* to avoid taking protective measures on apples originating in Chile'.[155] It appears that in both instances, rather than reflecting the Panel's interpretation of the threshold imposed by GATT Article XXXVII(1), the language used by the Panel simply reflects its view of whether a breach had occurred.

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151 See above at paragraph 145. This was also noted in the First Written Submission of New Zealand, at para 119.
152 First Written Submission of Canada, at para 230.
153 First Written Submission of Canada, at paras 228-230.
154 GATT Panel Report, *EEC – Apples I (Chile)*, at para 4.23.
155 GATT Panel Report, *EEC – Dessert Apples*, at para 12.32. Emphasis added.

154. Second, the language in Article 2.30(1)(c) CPTPP (including the use of the term 'ensure' and 'maximum'), its context, and the object and purpose of CPTPP differs from that of GATT Article XXXVII(1). This does not mean that the two obligations cannot have a similar meaning. Rather, it means that the brief comments made by the panel in *EEC – Apples (Chile I)* do not assist in determining whether that is the case.

Canada does not have a right to decide which groups of importers will receive in-quota quantities, and in what proportion

155. Canada asserts that its 'discretion to choose its preferred allocation mechanism … includes the right to decide which groups of importers will receive in-quota quantities, and in what proportion'. [156] It states that, if the Parties wanted to require Canada to make available a certain portion of its dairy TRQs for a particular group of importers (e.g. distributors or retailers) they would have stated so explicitly in Appendix A of Canada's Schedule.[157]

156. Article 2.30(1)(c) does not require Canada to make available a certain portion of its dairy TRQs for a particular group of importers (e.g. distributors or retailers). As set out in New Zealand's first written submission and this rebuttal submission, however, excluding certain groups of importers from accessing Canada's TRQs (including distributors and retailers) is inconsistent with a number of Canada's other obligations under CPTPP. The Parties did not need to include express reference to this in Canada's Schedule in order for those obligations to apply.

VII. 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

157. Article 2.28(2) is clear: the way a Party administers its TRQs must, amongst other things, be fair and equitable. That necessarily involves consideration of the design of a Party's allocation mechanism. The text provides no basis for carving a party's allocation mechanism out of the scope of Article 2.28(2). Nor does the text, context, or object and purpose support limiting the obligation to a mere obligation of due process or natural justice in the way Canada suggests. It is simply 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.

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156 First Written Submission of Canada, at para 232.
157 First Written Submission of Canada, at para 232.

Section D does not distinguish between obligations that concern the design of a Party's TRQ policy and its 'procedures for administering its TRQs'

158. Canada argues that the obligations included in Article 2.28(2), including the obligation to ensure that its procedures for administering its TRQs are 'fair and equitable', does not apply to the design of its TRQ allocation mechanism. In support of this, Canada argues that the obligations in Section D can be divided into two groups: those that 'govern how a Party may design its TRQ system' and those that 'govern a Party's procedures for administering its TRQs in order to ensure that applicants are able to participate meaningfully in a Party's chosen TRQ system'.[158]

159. The distinction that Canada attempts to draw between obligations that 'govern how a Party may design its TRQ system' and its 'procedures for administering its TRQs' is baseless. In addition to Article 2.28(2), Canada provides three examples of obligations that it says fall into this latter category:[159]

    a. Article 2.31(2) obliges Parties to 'publish on a regular basis…all information concerning amounts allocated, amounts returned and, if available, quota utilisation rates. …[and] amounts available for reallocation and the application deadline…'

    b. Article 2.32(2) states that 'the name and address of allocation holders shall be published…'

    c. Article 2.32(5) states that where a TRQ is administered by an allocation mechanism, Parties 'shall publish a notice to that effect…'

    All of these provisions are transparency provisions, requiring Canada to publish certain information on its website. None of them contain the term 'procedures'. They do not provide any basis on which to read down the obligations in Article 2.28(2) as not applying to the design of a Party's TRQ system.

The obligations in Article 2.28(2) apply to the design of Canada's TRQ allocation mechanism

160. Canada argues that its interpretation of the 'fair and equitable' obligation (as not applying to the design of its TRQ allocation mechanism) is supported by its context. In particular, Canada points to the other four obligations contained in Article 2.28(2). These obligations oblige Parties to ensure that their procedures for administering its TRQs are:

    a. 'made available to the public';

    b. 'no more administratively burdensome than absolutely necessary';

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158 First Written Submission of Canada, at para 243.
159 First Written Submission of Canada, at footnote 237 to para 243.

c. 'responsive to market conditions'; and

d. 'administered in a timely manner'.

161. Canada restates these obligations as narrower, more specific obligations that relate only to the implementation of a Party's TRQ system. It states that:

a. 'made available to the public' requires Canada to 'publish information related to seeking an allocation;

b. 'no more administratively burdensome than absolutely necessary' requires Canada to 'not request information from applicants unnecessary to making decisions on allocations';

c. 'responsive to market conditions' requires Canada to 'establish deadlines … by taking into account market conditions'; and

d. 'administered in a timely manner' requires Canada to 'make decisions on allocations in a timely manner'. [160]

Canada then asserts that these re-drafted formulations provide contextual support for its interpretation of the 'fair and equitable' obligation.[161]

162. Canada's reasoning is both flawed and circular. New Zealand does not disagree that the obligations set out in Article 2.28(2) might well require Parties to 'publish information related to seeking an allocation; not request information from applicants unnecessary to making decisions on allocations; establish deadlines … by taking into account market conditions; and make decisions on allocations in a timely manner'. There is, however, nothing in the text of Article 2.28(2) to suggest that these are the *only* things that a Party must do to comply with these obligations.

163. It is not credible to read down the obligations contained in Article 2.28(2), then assert that they provide support for *also reading down* the obligation that Parties ensure their procedures for administering their TRQs are fair and equitable.

The language used in Article 2.28(1) and Article 2.28(3) does not provide contextual support for reading down the fair and equitable obligation in Article 2.28(2)

164. Canada argues that its interpretation of Article 2.28(2) (as not applying to the design of a Party's quota allocation system and being limited instead to an obligation to provide due process or natural justice[162]) is supported by the language used in Articles 2.28(1) and 2.28(3). Canada points to the fact that neither of these obligations includes the term

160 First Written Submission of Canada, at para 253.
161 First Written Submission of Canada, at para 254.
162 First Written Submission of Canada, at paras 259-260.

'procedures'. It suggests that this indicates that these obligations are intended to apply to the whole of a Party's administration, but that Article 2.28(2) is not.[163]

165. Articles 2.28(1) and 2.28(3) read:

> **Article 2.28(1)** Each Party shall implement and administer its tariff-rate quotas (TRQs244) in accordance with Article XIII of GATT 1994, including its interpretative notes, the Import Licensing Agreement and Article 2.12 (Import Licensing). […]
>
> […]
>
> **Article 2.28(3)** The Party administering TRQ shall publish all information concerning its TRQ administration, including the size of quotas and eligibility requirements; […]

166. Articles 2.28(1) and 2.28(3) both differ from Article 2.28(2) (and each other) in the way in which they are structured and the tense of the terms chosen. As set out in New Zealand's first written submission, the term 'procedures' simply means 'the established or prescribed way of doing something'. Neither Article 2.28(1) nor Article 2.28(3) includes the term 'procedures' because it was not needed. By comparison, the term 'procedures' is necessary in Article 2.28(2) because it obliges each Party to ensure that its 'procedures for administering its TRQs are made available to the public'. It would not have made grammatical sense for Article 2.28(2) to oblige Parties to ensure that their '*TRQ administration* was made available to the public'. There is nothing to suggest that the fact that Article 2.28(1) and Article 2.28(3) do not include the term 'procedures' has any bearing on the scope of the obligation in Article 2.28(2).[164]

Interpreting Article 2.28(2) as not applying to the design of a Party's allocation mechanism is not consistent with the object and purpose of CPTPP

167. Canada argues that its interpretation of Article 2.28(2) (as not applying to the design of a Party's allocation mechanism and being limited instead to an obligation to provide due process or natural justice[165]) is supported by the object and purpose of CPTPP. Canada notes that the Preamble to CPTPP includes 'establishing a predictable legal and commercial framework for trade and investment through mutually advantageous rules', and promoting transparency, good governance and the rule of law'.[166] Canada suggests

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163 First Written Submission of Canada, at paras 255-256.

164 At para 257 of its First Written Submission, Canada refers to New Zealand's discussion of the type of conduct that is fair and equitable under Article 2.28(2). Canada argues that the obligations referred to in that section do not provide contextual support for New Zealand's interpretation of Article 2.29(2) as applying to the design of a party's quota allocation system. Canada misunderstands this section of New Zealand's submission. The discussion of the type of conduct that will be fair and equitable, set out at para 146 of New Zealand's First Written Submission, relates to the *legal standard* imposed by the fair and equitable obligation under Article 2.28(2), not its *scope*.

165 First Written Submission of Canada, at paras 259-260.

166 First Written Submission of Canada, at para 258.

that requiring officials to 'make decisions in accordance with established rules, which supports a predictable legal and commercial framework for trade and promotes the rules of law,' is consistent with these purposes.

168. New Zealand agrees that requiring Parties to follow rules of natural justice and due process is consistent with the object and purpose of CPTPP. However, it is not consistent with the object and purpose of CPTPP to interpret Article 2.28(2) as *being limited* to natural justice and due process, and not applying also to the design of a Party's quota allocation system. Put another way, interpreting Article 2.28(2) as *permitting* Parties to design their quota allocation system in a manner that is *unfair* and *inequitable* does not support the object of 'establishing a predictable legal and commercial framework for trade', or 'promoting transparency, good governance and the rule of law'.

The fair and equitable obligation in Article 2.28(2) is not limited to procedural fairness

169. Canada argues that the function of the fair and equitable obligation in Article 2.28(2) is to 'ensure procedural fairness' for applicants seeking a TRQ quantity. It equates the obligation with an obligation to comply with natural justice or due process.[167] Canada suggests that this interpretation is supported by the Panel decision in *China – TRQs*. Canada says that the Panel in that decision 'found the procedural aspect of fairness in a TRQ administration context to require compliance with the hearing rule and bias rule'.[168]

170. There is nothing in the text of Article 2.28(2) to suggest that the obligation that Parties ensure that their procedures for administering their TRQs are fair and equitable is limited to an obligation to afford applicants due process or natural justice.[169]

171. Nor is Canada's interpretation supported by the Panel decision in *China – TRQs.* *China – TRQs* concerned the obligation in paragraph 16 of China's Working Party Report to 'ensure that TRQs were administered on a …fair …basis'. The Panel interpreted this obligation as containing two discrete elements. It required 'China to administer its TRQs through an underlying set of rules or principles that are impartial and equitable',[170] and it required China's 'relevant authorities to administer TRQs in accordance with the applicable rules and standards.'[171] Indeed, the Panel's interpretation of the obligation is not dissimilar from the interpretation of Article 2.28(2) set out in New Zealand's first written submission as requiring CPTPP Parties 'to ensure that they manage their TRQs,

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167 First Written Submission of Canada, at para 259-260.
168 First Written Submission of Canada, at para 263.
169 Canada's interpretation is not supported by the Panel decision in *China – TRQs.*
170 Panel Report, *China – TRQs*, at para 7.9, para 7.32, para 7.66, para 7.84, and para 7.110. The Panel applied these two elements of the obligation separately, see for example: para 7.46, para 7.70.
171 Panel Report, *China – TRQs*, at para 7.9, para 7.32, para 7.66, para 7.84, and para 7.110. The Panel applied these two elements of the obligation separately, see for example: para 7.46, para 7.70.

from the initial application stage to the return and reallocation of unused quota, in a manner that is just, impartial and reasonable'.[172]

172. In its first written submission, Canada does not refer at all to the Panel's *interpretation* of the 'fairness' obligation in *China – TRQs*. Instead, it refers only to certain elements of China's TRQ administration that were found by the Panel to be in breach of the obligation.[173] Those findings are necessarily directed at the particular factual circumstances in dispute in that case, and are clearly not reflective of the whole scope of the obligation imposed under paragraph 16.

[172] First Written Submission of New Zealand, at para 145.
[173] First Written Submission, at footnote 255 to para 263.