

COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC  
PARTNERSHIP

Panel established pursuant to Article 28.7

**Canada – Dairy Tariff Rate Quota Allocation Measures**

(CDA-NZ-2022-28-01)

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**Final Report**

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5 September 2023

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## Abbreviations

<b>Abbreviation</b>	<b>Description</b>
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CUSMA	Canada-United States-Mexico Agreement
EIPA	Export and Import Permits Act of Canada
FCFS	First-come, first-served
GATT	General Agreement on Tariffs and Trade (1994)
ILA	WTO Agreement on Import Licensing Procedures
“Party”/“Parties”	Party/Parties to the CPTPP, as the case may be
disputing “party”/“parties”	New Zealand and Canada, as the case may be
TPP	Trans-Pacific Partnership
TRQ	Tariff rate quota
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

## I. Introduction

1. The dispute at issue in this Report concerns several claims by New Zealand that the system used by Canada for the administration of its tariff rate quotas (TRQs) on imports of dairy products is inconsistent with Canada's obligations under the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP). New Zealand asks the Panel to determine whether Canada's current allocation of dairy TRQs, as set forth under its Notices to Importers, is consistent with Canada's obligations under the CPTPP, particularly Articles 2.28(2), 2.29(1), 2.29(2)(a), 2.30(1)(a), 2.30(1)(b), and 2.30(1)(c), and with Canada's commitments in Annex 2-D (Tariff Commitments) to the CPTPP.

## II. Procedural History

2. On 12 May 2022, New Zealand requested consultations with Canada pursuant to Articles 28.3 and 28.5 of the CPTPP. Consultations between New Zealand and Canada (the "disputing parties") took place on 22 June 2022, but the consultations failed to resolve the matter.

3. On 7 November 2022, pursuant to Article 28.7 of the CPTPP, New Zealand requested the establishment of a Panel to examine the matter. In accordance with Article 28.9, on 9 March 2023, a Panel of three members was constituted as follows:<sup>1</sup>

Chair:	Jennifer Hillman
Panellists:	Petros C. Mavroidis Colleen Swords

4. On 20 March 2023, following consultations with the disputing parties, the Panel established a timetable for initial written submissions, rebuttal submissions, third-party submissions, a hearing, and the issuance of its Initial Report, which is included as *Annex A* to this Report, as it was observed. The disputing parties' submissions were submitted in accordance with this timetable.

5. Australia, Japan, Mexico, Peru, and Singapore provided notice of their interest in participating as third parties to this dispute, in accordance with Article 28.14 of the CPTPP. Australia filed its third-party submission on 1 May 2023, and Japan filed its submission on May 2. Mexico, Peru, and Singapore did not file written third-party submissions.

6. Non-governmental entities in Canada and in New Zealand sought permission to provide written views, pursuant to Article 28.13 of the CPTPP. On May 11, the Panel granted all non-governmental entities that filed for permission in a timely fashion leave to submit their written

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<sup>1</sup> With Mario R. Osorio Hernandez appointed as Assistant to the Panel.

views. By the May 19 deadline, the following non-governmental entities had submitted written views, which were commented on by the disputing parties on 2 June 2023:

Dairy Companies Association of New Zealand  
D. Tyers Food International Inc. and FoodTec Canada Inc.  
International Cheese Council of Canada  
Retail Council of Canada

7. On 14 and 15 June 2023, in accordance with the *Rules of Procedure* for Chapter 28 established under Article 28.13 of the CPTPP and consistent with the timetable set forth in *Annex A*, a hearing was held in Ottawa, Canada. Delegations of both disputing parties, and of Australia and Japan attended the hearing in person. Representatives of Mexico and Singapore participated remotely. Representatives of Peru did not appear at the hearing, neither in person nor remotely. All participating parties present at the hearing, whether in person or remotely, were given the opportunity to make opening statements and both disputing parties responded to questions from the Panel and made closing statements. Except for a session set aside for questions regarding confidential information contained in Canada's written submissions, the hearing was open to the public in an adjacent room and available for observation remotely.

8. As part of its initial written submissions, Canada submitted confidential material and related arguments including two economic studies by two outside experts.<sup>2</sup> The Panel asked questions concerning those studies of the disputing parties, including the study authors, during the portion of the hearing that was closed to the public. The Panel has not referred to any confidential information in its Report.

9. Pre-hearing written questions from the Panel were delivered to the disputing parties on 2 June 2023 with no requirement or expectation that the questions would be answered until the hearing. Post-hearing written questions from the Panel were delivered to the disputing parties on 19 June 2023.

10. New Zealand and Canada responded in writing to the Panel's written questions on 26 June 2023. Comments to the other disputing party's responses to written questions from the Panel were submitted by both New Zealand and Canada on 4 July 2023.

11. On 26 June 2023, New Zealand also filed a supplementary written submission responding to matters that arose during the hearing. Canada's comments to this supplementary submission were filed on 4 July 2023.

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<sup>2</sup> Initial Written Submission of Canada, Exhibits CDA-1 & CDA-2.

12. On 8 August 2023, the Panel presented its Initial Report to the disputing parties, pursuant to Article 28.17 of the CPTPP.<sup>3</sup> Both disputing parties provided their written comments to this Initial Report on August 23.

13. On 5 September 2023, the Panel presented its Final Report.

### III. Background

#### A. Treaty Provisions

14. The CPTPP was signed on 8 March 2018 and entered into force as between New Zealand and Canada on 30 December 2018. The CPTPP is the successor agreement of the Trans-Pacific Partnership (TPP) which included the United States as one of its members. The TPP was signed on 4 February 2016 but never entered into force following the United States' formal withdrawal from the TPP on 23 January 2017. The CPTPP provisions governing Tariff Rate Quota Administration (found in Articles 2.28 through 2.32) were not changed in any way from the text that was agreed upon in the TPP, nor was Annex 2-D (Tariff Schedule of Canada) or the TRQs that were set forth in Appendix A to that Tariff Schedule changed when the CPTPP superseded the TPP.<sup>4</sup>

15. The CPTPP contains in its Chapter 2 (National Treatment and Market Access for Goods) a Section D devoted to addressing the rules related to TRQs. Those provisions span five articles (2.28-2.32), with New Zealand raising claims under provisions included in the first three articles.

16. Section D opens with an Article entitled "Scope and General Provisions." These provisions require that all TRQs must be incorporated into a Party's<sup>5</sup> Schedule to Annex 2-D (Tariff Commitments), which Canada has done, and requires that TRQs be implemented and administered in accordance with Article XIII of the *General Agreement on Tariffs and Trade* (GATT) and the *Agreement on Import Licensing Procedures* (ILA) of the World Trade Organization (WTO) (Article 2.28(1)). The general provisions also include the requirement that any Party adopting TRQs ensure that its TRQ administrative procedures are "made available to the public, are fair and equitable, are no more administratively burdensome than absolutely necessary, are responsive to market conditions and are administered in a timely manner" (Article 2.28(2)). The final provision,

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<sup>3</sup> While the Panel was set to deliver its Initial Report on Monday, 7 August 2023, that day was a holiday in Canada and the Responsible Office was officially closed. As a result, pursuant to Rule 20 of the *Rules of Procedure* for Chapter 28, the Panel presented its Initial Report to the disputing parties on Tuesday, 8 August 2023.

<sup>4</sup> The Panel notes that Article 1: Incorporation of the Trans-Pacific Partnership Agreement of the CPTPP provides: "The Parties hereby agree that, under the terms of this Agreement, the provisions of the Trans-Pacific Partnership Agreement, done at Auckland on 4 February 2016 ("the TPP") are incorporated, by reference, into and made part of this Agreement mutatis mutandis, except for Article 30.4 (Accession), Article 30.5 (Entry into Force), Article 30.6 (Withdrawal) and Article 30.8 (Authentic Texts)."

<sup>5</sup> As indicated in the Abbreviations section of this Report, the terms "Party" and "Parties" are capitalised throughout the Report when referring to States (or separate customs territories) for which the CPTPP is in force.

Article 2.28(3), requires the publication of specific information, including the size of quotas, eligibility requirements, and certain allocation procedures and deadlines, on a public website 90 days prior to the opening of the TRQ.

17. Section D's second article, entitled Administration and Eligibility, begins with the requirements that Parties administer their TRQs "in a manner that allows importers the opportunity to utilise TRQ quantities fully" (Article 2.29(1)). It adds provisions prohibiting the introduction of a new or additional condition, limit, or eligibility requirement on the utilisation of CPTPP TRQs for the importation of a good and provides for a process to reach agreement should a Party wish to introduce such a new or additional limit, condition, or eligibility requirement (Article 2.29(2) (a)-(d)).

18. Section D also includes additional requirements on the domestic measures implementing a TRQ, most of which are contained in its third article (Article 2.30, entitled "Allocation"). Further requirements, that are not the subject of this dispute, are contained in Article 2.31 on "Return and Reallocation of TRQs" and Article 2.32 on "Transparency."

19. The CPTPP, Article 2.28(1), incorporates each Party's Tariff Schedules into the treaty as Annex 2-D (Tariff Commitments). As such, Canada's commitments in its Annex 2-D are part of the CPTPP treaty provisions relevant to this dispute. Included in Canada's Tariff Schedule is an Appendix A – Tariff Rate Quotas of Canada. Appendix A contains both a Section A, which includes general provisions applicable to all of Canada's TRQs and a Section B, which includes a set of specific TRQ commitments, noting the specific product at issue for each TRQ, the amount of that good that can enter free of duty under the TRQ each year (which increases for up to 19 quota years), and the fact that goods entered in excess of the in-quota quantity shall be subject to Canada's most-favoured nation rates of duty. Each TRQ designation also notes the tariff item numbers of the product to which the TRQ applies and the time frame on which the TRQ is allocated, either a calendar year (for 9 dairy TRQs) or a dairy year of August 1 – July 31 (for 7 dairy TRQs).

20. Paragraph 3 of the general provisions in Section A of the Appendix to Canada's Tariff Schedule includes the commitment by Canada that it will administer its TRQs through an import licensing system (para. 3(a)); that Canada reserves the right for the first seven years to allocate any TRQ through auctioning (para. 3(d)); and that Canada shall allocate its TRQs each quota year to eligible applicants, which are defined as a resident of Canada who is active in the applicable Canadian dairy, poultry or egg sector, as appropriate, and that is compliant with the Export and Import Permits Act (EIPA) and its regulations (para. 3(c)).

21. Section B of the Appendix to Canada's Tariff Schedule includes 16 separate TRQs in the dairy sector covering: milk; cream; skim milk powders; milk powders; cream powders; concentrated milk; yogurt and buttermilk; powdered buttermilk; whey powder; products consisting of natural milk constituents; butter; industrial cheese; mozzarella and prepared cheese; cheeses of all types; ice cream and mixes; and other dairy. Five of these TRQs contain requirements on the

permissible end-use of the imported product. Up to 85% of the TRQ quantities for milk are to be used for the importation of milk in bulk (not for retail sale) to be processed into dairy products used as ingredients for further food processing, with the remaining quantities to be used for the importation of any milk. Up to 30% of the TRQ quantities for yogurt and buttermilk, and 85% of the TRQ quantities for butter, are to be used for the importation of goods in bulk (not for retail sale) used as ingredients for further food processing. In addition, 100% of the TRQ quantities for industrial cheese are to be used for the importation of industrial cheese in bulk (not for retail sale) used as an ingredient for further food processing and 100% of the TRQ quantities for concentrated milk are to be used for the importation of concentrated milk destined for retail sale.

## **B. Canada's TRQ System**

22. As Canada administers its TRQs through an import licensing system, shipment-specific import permits are issued for all imports that draw upon the TRQ volumes. Canada limits the issuance of these import permits, and thus access to imports under the TRQs, to allocation holders, which are determined pursuant to Canada's allocation mechanism.<sup>6</sup>

23. Canada's allocation mechanism is based on a pooling system that reserves specific percentages of the TRQs for "processors," "further processors," and "distributors." The specific percentages reserved for each group or pool and the definition of who falls into which category of potential allocation holder are set forth in separate Notices to Importers for each of the 16 dairy TRQs.<sup>7</sup> These Notices are published by Global Affairs Canada and updated periodically. Nine of the Notices at issue in this dispute were published on 1 October 2020, seven were published on 1 May 2021.

24. Each Notice defines the product that it covers, the percentage of the quota that is allocated to each of the pools, and provides an "eligibility criteria" that is tied to the definition of the terms "processor," "further processor," or "distributor," stating that importers are eligible to apply for an allocation if they fit within the definition of a processor; where applicable, a further processor; or, where applicable, a distributor. The allocations in the Notices reserve between 80% and 85% of all dairy TRQs for processors, between 0% and 20% for further processors, and between 0% and 15% for distributors, depending on the TRQ in question.

25. The TRQ volumes for each of the 16 dairy products were primarily the result of TPP negotiations between Canada, the United States, New Zealand, and Australia.<sup>8</sup> Following the withdrawal of the United States from the TPP, Canada did not reduce the aggregate TRQ volumes

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<sup>6</sup> Initial Written Submission of Canada para. 51.

<sup>7</sup> First Written Submission of New Zealand, Exhibits NZL-1 to NZL-16.

<sup>8</sup> Initial Written Submission of Canada para. 47.



despite the fact that dairy products from the United States would not be imported under the CPTPP TRQs.<sup>9</sup>

26. While the Notices contain product-specific definitions of the terms “processor,” “further processor,” and “distributor,” in general, Canada has defined the terms as follows:

(a) “processors” covers entities that manufacture the product covered by the TRQ in their own provincially-licensed or federally-registered facility;

(b) “further processors” covers entities that use the product covered by the TRQ in their manufacturing operations or product formulation;

(c) “distributors” covers entities that buy the product covered by the TRQ and re-sell it to other businesses.<sup>10</sup>

27. The quota is allocated to processors and further processors on the basis of their market share during a representative period of time.<sup>11</sup> Once all requests for quota for a given TRQ have been received for all of those in a given pool (i.e., all of the processors or further processors), then the total amount of quota for that pool will be allocated to each of the applicants within the pool according to their market share calculated on the basis of all of those who have applied.<sup>12</sup> For distributors, the TRQ is allocated on an equal basis. Once all distributor applications have been received, the total amount of quota available under the distributor pool is divided by the number of distributor applicants, with each receiving the same amount of quota.<sup>13</sup> The allocations are not based on a requested amount of quota.<sup>14</sup>

28. Canada’s TRQ administration system also contains processes to redistribute unallocated quota. If there are no eligible applicants in one or two of the pools within a given TRQ, then the

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<sup>9</sup> Initial Written Submission of Canada para. 48.

<sup>10</sup> For example, in its Notice to Importers for Cream Powders, Canada provides the following specific definitions: Processor- an entity that manufactures cream powers in your own provincially-licensed or federally-registered facility; Further Processor-an entity that uses cream powers in its manufacturing operations and product formulations; Distributor—an entity that buys cream powders and re-sells it to other businesses. First Written Submission of New Zealand, Exhibit NZL-10.

<sup>11</sup> Official Transcript of the Hearing, Public Session of 14 June 2023 p. 116.

<sup>12</sup> Official Transcript of the Hearing, Public Session of 14 June 2023 p. 117. An exception to this general rule occurs if an applicant’s calculated market-share allocation is less than the minimum quantity the applicant indicated they would be willing to accept. In that instance, that particular applicant is simply excluded from the distribution of the quota within the applicable pool. Responses of Canada to Post-hearing Written Questions for the Parties from the Panel para. 15.

<sup>13</sup> Official Transcript of the Hearing, Public Session of 14 June 2023 pp. 60, 116-17.

<sup>14</sup> Requested amounts simply indicate minimum amounts the applicant is willing to accept. Official Transcript of the Hearing, Public Session of 14 June 2023 pp. 129-31. An exception to this rule occurs when there have been no applicants for a particular TRQ. In that instance, any eligible applicant that comes forward will receive the amount of allocation requested. Responses of Canada to Post-hearing Written Questions for the Parties from the Panel paras. 11, 13.

unclaimed quota is reallocated to the remaining pool or pools and made available to all applicants that fit within the definition of that pool or pools.<sup>15</sup> If there are no applicants for quota within any of the pools of a given TRQ, then the quota is opened to any applicants who meet the definition of the pool requirements (i.e., fit within the definition of processor, further processor or distributor, as applicable).<sup>16</sup> Under no circumstances is quota made available to any entity that does not fit within one of the requisite pools.<sup>17</sup>

29. Canada also permits entities that fall under more than one of its quota pools (i.e., processors that are also further processors, or processors that are also distributors) to choose which pool to apply under.<sup>18</sup> Each applicant can choose to apply for quota under only one pool category for each TRQ in a given quota year. Applicants that fit under more than one category can apply for quota under a different pool category in subsequent quota years.

30. Since the CPTPP has gone into effect, Canada's dairy TRQs have been largely underutilised, with the fill rates (the percentage of the quota that has been filled by imports) for the 2021-2022 for 13 of Canada's 16 dairy TRQs at 10% or below, with nine of those thirteen experiencing no imports at all under the TRQ.<sup>19</sup> The three products for which the quotas were much more heavily utilised in 2021-2022 are mozzarella and prepared cheese (62.4% fill rate), cheeses of all types (65.3 % fill rate) and butter (95.8% fill rate).<sup>20</sup> All 16 TRQs are subject to the same basic allocation system, including the reservations of 80% to 85% of quota for processors.

31. Canada indicated that its dairy market is based on a supply management system that rests on three "pillars:" (1) controlled production, (2) pricing mechanisms, and (3) controlled imports. That information is summarized below.<sup>21</sup>

(1) **Controlled Production.** Because milk production cannot be stopped or paused easily, significant efforts are required to ensure that the quantity of production of raw milk by Canadian dairy farmers is within the quantity demanded by the domestic market.

(2) **Pricing Mechanisms.** As part of Canada's system, all raw milk produced and marketed in Canada must be sold by producers to the provincial Milk Marketing Boards, which in turn sell this raw milk as the primary raw material input to processors.<sup>22</sup> Prices paid by processors and received by producers vary depending on how the milk is ultimately used (the milk's end-use).

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<sup>15</sup> Responses of Canada to Post-hearing Written Questions for the Parties from the Panel para. 9.

<sup>16</sup> Responses of Canada to Post-hearing Written Questions for the Parties from the Panel paras. 10-11.

<sup>17</sup> Responses of Canada to Post-hearing Written Questions for the Parties from the Panel paras. 9-14.

<sup>18</sup> Official Transcript of the Hearing, Public Session of 14 June 2023 pp. 126-27.

<sup>19</sup> First Written Submission of New Zealand para. 34.

<sup>20</sup> Initial Written Submission of Canada para. 73, noting that the figures are for calendar year 2021 for Mozzarella and Prepared Cheese and Cheese of all Types; and dairy year 2021-2022 for Butter.

<sup>21</sup> Initial Written Submission of Canada pp. 3-15.

<sup>22</sup> Initial Written Submission of Canada para. 20.

(3) **Controlled Imports.** Canada has granted preferential market access to its trading partners by establishing TRQs for supply-managed products under its trade agreements. The TRQs allow a specified quantity to enter Canada duty-free or at a low rate of duty. As a part of its import controls, Canada tracks the quantity of dairy products entering Canada to ensure that supply (domestic production plus imports) aligns with domestic demand under the production pillar.<sup>23</sup>

32. Canada considers that these three pillars are fundamental to the stability of the supply management system. Canada claims that the pooling system, with its reservation of a significant portion of all TRQ to processors, is an important instrument for ensuring stability and predictability in its dairy supply management system because processors are in a unique position to respond to overall consumer demand and guard against seasonal surpluses or shortages.<sup>24</sup>

33. Canada also notes that its pooling system and approach of reserving a major portion of its TRQs for processors has been a practice that dates back to 1995, when Canada created pools for processors and other industry groups under its WTO TRQ for chicken products.<sup>25</sup> Canada notes that it also administers its TRQs for certain dairy products under the *Canada-European Union Comprehensive Economic and Trade Agreement* using a similar pooling system to that at issue in this dispute, with that pooling system commencing in September 2017, prior to the entry into force of the CPTPP.<sup>26</sup>

#### **IV. Preliminary Considerations**

##### **A. Challenged Measures and the Panel's Terms of Reference**

34. Article 28.8 of the CPTPP provides that, in the absence of an agreement to the contrary by the disputing parties, the Panel's terms of reference shall be to examine the matter referred to in the request for the establishment of a Panel. In its request for the establishment of this Panel, New Zealand contended that Canada's system for administering its TRQs, particularly its practice of reserving the vast majority of its TRQ allocations for processors, falls short of Canada's commitments under the CPTPP, as reflected first, in Articles 2.28, 2.29, and 2.30 and second, in Paragraph 3(c) of Appendix A of Canada's Tariff Schedule.

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<sup>23</sup> Initial Written Submission of Canada para. 32.

<sup>24</sup> Initial Written Submission of Canada paras. 24-28; Opening Statement of Canada at the Hearing para. 6.

<sup>25</sup> Official Transcript of the Hearing, Public Session of 14 June 2023 p. 148; Responses of Canada to Post-hearing Written Questions for the Parties from the Panel paras. 25-26.

<sup>26</sup> Official Transcript of the Hearing, Public Session of 14 June 2023 p. 148; Responses of Canada to Post-hearing Written Questions for the Parties from the Panel paras. 27-29.

35. Specifically, New Zealand has claimed that Canada's measures, as set forth in its Notices to Importers, are inconsistent with several provisions of CPTPP, specifically Canada's obligation to:

(a) 'ensure that its procedures for administering its TRQs ... are fair and equitable' under Article 2.28(2);

(b) 'administer its TRQs in a manner that allows importers the opportunity to utilise TRQ quantities fully' under Article 2.29(1);

(c) not 'introduce a new or additional condition, limit or eligibility requirement on the utilisation of a TRQ for importation of a good, including in relation to specification or grade, permissible end-use of the imported product or package size, beyond those set out in its Schedule to Annex 2-D (Tariff Commitments)' under Article 2.29(2)(a);

(d) 'ensure that ... any person of a Party that fulfils [Canada's] eligibility requirements is able to apply and to be considered for a quota allocation under the TRQ' under Article 2.30(1)(a) and Paragraph 3(c) of Appendix A of Canada's Schedule to Annex 2-D;

(e) 'ensure that ... it does not ... limit access to an allocation to processors' under Article 2.30(1)(b);

(f) 'ensure that ... each allocation is made in commercially viable shipping quantities and, to the maximum extent possible, in the amounts that importers request' under Article 2.30(1)(c); and

(g) 'ensure that ... if the aggregate TRQ quantity requested by applicants exceeds the quota size, allocation to eligible applicants shall be conducted by equitable and transparent methods' under Article 2.30(1)(e).<sup>27</sup>

36. The Panel understands that New Zealand decided not to pursue its claim under Article 2.30(1)(e) and the Panel has not addressed it.

37. The Panel also notes that New Zealand has raised no claims under CPTPP Article 28.3(1)(c) that Canada's measures nullify or impair the benefits it could reasonably have expected to accrue to it under the CPTPP's Chapter 2 (National Treatment and Market Access for Goods).

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<sup>27</sup> Request for the Establishment of a Panel by New Zealand, 7 November 2022; First Written Submission of New Zealand para. 5.

## **B. Allocation of the Burden of Proof**

38. The CPTPP does not address the question of burden of proof explicitly, but its Rules of Procedures do. Articles 70, and 71 read:

70. A complaining Party asserting that a measure of the responding Party is inconsistent with its obligations under the Agreement, that the responding Party has otherwise failed to carry out its obligations under the Agreement, or that a benefit that the complaining Party could reasonably have expected to accrue to it is being nullified or impaired in the sense of Article 28.3.1(c) (Scope), shall have the burden of establishing such inconsistency, failure to carry out obligations, or nullification or impairment, as the case may be. In cases where the responding Party declines to participate in the panel proceeding, the panel shall only find that the complaining Party has satisfied its burden if the complaining Party establishes a *prima facie* case of such inconsistency, failure to carry out obligations, or nullification or impairment.

71. A disputing Party asserting that a measure is justified by an affirmative defence under the Agreement shall have the burden of establishing that the defence applies.<sup>28</sup>

39. It is thus for New Zealand, the complaining party, to make a *prima facie* case for each of the claims it has presented.

## **C. Legal Framework and Interpretative Constraints**

40. There is no disagreement between the disputing parties that the pertinent provisions of the CPTPP constitute the legal basis for the Panel to assess the validity of the claims presented by New Zealand. The CPTPP incorporates by reference, in its Article 2.28(1), the ILA and Article XIII of the GATT.<sup>29</sup>

41. In response to questions from the Panel, both disputing parties asserted that there is no agreed negotiating history for the treaty provisions at issue in this dispute and neither disputing party identified any relevant negotiating documents or contemporaneous statements that shed any light on the meaning of the provisions at issue.<sup>30</sup>

42. To interpret the legal framework, the Panel employed the general rule of interpretation embedded in Article 31.1 of the *Vienna Convention on the Law of Treaties* (VCLT), as required by Article 28.12(3) of the CPTPP. This rule reads as follows:

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<sup>28</sup> CPTPP arts. 70-71.

<sup>29</sup> In response to Panel's questions, the two parties confirmed that they agreed to this understanding.

<sup>30</sup> Official Transcript of the Hearing, Public Session of 14 June 2023, pp. 6, 127, 132-35; Opening Statement of New Zealand p. 3; Email to the Panel from Canada on behalf of both parties (12 June 2023 6:39 PM; FOR INPUT: Written Questions to the Parties Canada – Dairy Tariff-Rate Quotas Allocation Measures\_CDA-NZ-2022-28-01)

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.<sup>31</sup>

43. Article 32 of the VCLT leaves it to the discretion of the adjudicator to also have recourse to supplementary means of interpretation, when warranted. The negotiating record is the pre-eminent supplementary means. In light of both disputing parties' confirmation that there was no agreed negotiating record regarding the provisions that formed the crux of the present dispute, the Panel did not rely on Article 32 and makes no references to the negotiating record.

44. The Panel notes that the disputing parties have also employed the VCLT, including Article 31 in particular, in presenting divergent interpretations of the six provisions of the CPTPP that are the subject of this dispute. Dictionary definitions of the words in the disputed provision, the object and purpose of the agreement, the context of the provisions in question or their position within Section D, expectations of the negotiated concessions, all are used equally by both disputing parties in support of their conflicting interpretations.

45. For its part, the Panel has begun its assessment of each claim by examining the plain and ordinary meaning of the words used, recognizing that dictionary definitions provide the outer parameters of the meaning of words but must be accompanied by a careful review of the context in which the words are used. The context for purposes of treaties necessarily includes the object and purpose of the treaty as a whole, the language of the relevant chapter, section, and article, as well as the actual context within the phrase in which the words appear. As a result, the Panel has relied heavily in its decision on a holistic approach to the provisions in dispute, reading each within the context of each specific provision and of Section D as a whole.

46. The Panel is equally aware of the overarching goal of the CPTPP of improved market access through trade liberalization accompanied as it is by limitations to that access in the form of TRQs that were specifically agreed to by the Parties. The Panel has tried to strike a careful balance between the overarching goal of market access and the negotiated right to administer a TRQ.

47. The question was raised during the proceedings whether the text of the relevant provisions was symmetric across the different linguistic versions of the CPTPP. As per Article 30.7, the final text of the CPTPP had been authenticated in three different languages, namely, English, French, and Spanish. When responding to questions by the Panel, both disputing parties confirmed their understanding that Article 30.8 of CPTPP disposed of this issue. This provision reads as follows:

8. The English, Spanish and French texts of this Agreement are equally authentic. In the event of any divergence between those texts, the English text shall prevail.

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<sup>31</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 31.1.

48. Consequently, assuming a discrepancy indeed existed across the three authenticated versions, it is the English version that prevails. In light of Article 30.8, the Panel assessed the claims by New Zealand and the corresponding defences by Canada in light of the English version of the CPTPP text.

49. Finally, New Zealand contended that the decision by the Canada-United States-Mexico Agreement (CUSMA) panel in *Canada – Dairy TRQ Allocation Measures* is “highly pertinent” to this Panel’s determination, given the nearly identical provisions on limiting access to an allocation to processors (the “Processor Clause”) in the CUSMA and the CPTPP.<sup>32</sup> Canada responded that the CUSMA dairy panel determination is both not relevant to this Panel’s interpretation of the CPTPP Processor Clause and is flawed.<sup>33</sup> Australia, as a third-party participant, agreed with New Zealand that the CUSMA decision is highly pertinent because the obligation with respect to processors is identical in the two treaties, and because of the need to avoid contradictory decisions.<sup>34</sup> Another third party, Japan, cautioned the Panel to ensure that its decision was made in reliance on VCLT Articles 31 and 32.<sup>35</sup>

50. The Panel took note of the CUSMA panel report and found it to be informative, but notes that the CUSMA report is not binding on the Panel, nor have any of the provisions in CUSMA been incorporated into the CPTPP. The Panel conducted its own assessment of the claims made under the CPTPP following the requirements of Article 28.12(3) of the CPTPP to render determinations in accordance with Articles 31 and 32 of the VCLT. The Panel also noted its obligation under Article 28.12(3) to consider relevant interpretations in panel or Appellate Body reports of provisions of WTO Agreements that have been incorporated into the CPTPP. In this dispute, those provisions are limited to GATT Article XIII and the ILA.

51. Although the Panel reviewed in detail all of the written submissions of the participating parties and non-governmental entities, along with the arguments made during the oral hearing, the Panel has only set forth in its Report the contentions that were most salient to the resolution of this dispute.

## **V. Claims Concerning Article 2.30(1)(b)**

52. At the heart of this dispute is the question of whether Canada’s Notices to Importers reserving access to 80% to 85% of the 16 dairy TRQs to processors is consistent with Article 2.30(1)(b). To recall, 2.30(1)(b) requires any Party that chooses to employ an allocation mechanism to ensure that:

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<sup>32</sup> First Written Submission of New Zealand para. 56.

<sup>33</sup> Rebuttal Submission of Canada paras. 177-80.

<sup>34</sup> Third Party Written Submission of Australia para. 18.

<sup>35</sup> Third Party Written Submission of Japan para. 5.

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

53. There is no disagreement between the disputing parties that Canada has chosen to employ “an allocation mechanism” that meets the definition in Article 2.30: any system where access to the TRQ is granted on a basis other than first-come, first-served (FCFS).<sup>36</sup> Nor is there any dispute that no agreement has been sought or reached between the Parties that would fit under the phrase “unless otherwise agreed.”<sup>37</sup> Therefore, Canada, having opted to employ an allocation mechanism and in the absence of any agreement to the contrary, is obligated to comply with the limitations imposed on its allocation mechanism by Article 2.30(1)(b), including the requirement not to limit access to an allocation to processors.

54. Therefore, the dispute between the disputing parties is over exactly what is meant by the phrase “limit access to an allocation to processors” or, as New Zealand refers to it, the “Processor Clause.”<sup>38</sup> For New Zealand, “an allocation” refers to *any* allocation such that a Party will be in breach of Article 2.30(1)(b) if it limits access to one, several or all available allocations to processors and there is no dispute that Canada has initially reserved the vast majority of each TRQ’s volume to processors.<sup>39</sup>

55. For Canada, the Processor Clause prohibits a Party from confining the ability to obtain an allocation to processors; so long as Canada allows every eligible non-processor that applies access to an allocation, it is not in breach of Article 2.30(1)(b).<sup>40</sup> Canada contends that it complies with the Processor Clause because its pooling system simply reserves a certain volume or portions of its TRQ’s for processors, while ensuring that eligible non-processors are able to apply and receive an allocation.<sup>41</sup>

### **A. New Zealand’s Arguments**

56. Because Article 2.30(1) begins with the phrase “shall ... ensure,” New Zealand contends (and Canada accepts) that this is a positive obligation not to limit access. New Zealand then interprets the phrase “limit access to” to mean to restrict to *someone* (“processors”) the ability to

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<sup>36</sup> CPTPP art. 2.30, fn. 18.

<sup>37</sup> First Written Submission of New Zealand para. 65.

<sup>38</sup> While New Zealand discusses the other two clauses in 2.30.(1)(b), it concludes that “the present dispute is concerned primarily with Canada’s obligation to comply with the Processor Clause.” First Written Submission of New Zealand para. 61.

<sup>39</sup> First Written Submission of New Zealand paras. 7, 61.

<sup>40</sup> Canada’s Comments on the Supplementary Submission of New Zealand para. 9.

<sup>41</sup> Initial Written Submission of Canada para. 190; Canada’s Comments on the Supplementary Submission of New Zealand para. 11.



“obtain” or “acquire” *something* (“an allocation”).<sup>42</sup> Canada agrees with this interpretation of the phrase “limit access to.”<sup>43</sup>

57. New Zealand then argues that the key term under the Processor Clause is “*an* allocation,” which it contends must mean *any* allocation. It notes that the term “an” is defined as “something not specifically identified ... but treated as one of a class: one, some, any.” Therefore, for New Zealand, any allocation that is available under a TRQ is “an allocation.”<sup>44</sup>

58. New Zealand finds support for its interpretation that “an allocation” means “any allocation” in the other clauses in Article 2.30(1)(b). It starts with the immediately preceding phrase which prohibits Parties from “condition[ing] access to an allocation on the purchase of domestic production” (the “Domestic Production Clause”). New Zealand contends (and Canada acknowledges) that this Domestic Production Clause prohibition must apply to *any* allocation under a TRQ.<sup>45</sup> Any other interpretation would permit CPTPP Parties to impose domestic purchase requirements on at least *some* TRQ allocations, which cannot have been intended.<sup>46</sup> New Zealand notes that the entirety of 2.30(1)(b) is designed to prevent Parties from administering their TRQs in a protectionist manner. It further notes that the phrase “an allocation” also appears in Article 2.30(1)(d), which obliges Parties to ensure that “an allocation for in-quota imports is applicable to any tariff items subject to the TRQ and is valid throughout the TRQ year,” contending that “an allocation” must be interpreted as capturing *any* allocation. Any other interpretation would permit Parties to limit *some* allocations to certain tariff lines, and to grant *some* allocations for periods less than the full TRQ year.<sup>47</sup>

59. New Zealand further argues that a TRQ is effectively a collection of potential allocations that can be granted to specific applicants, and therefore the Processor Clause prohibits Parties from limiting access to *any* such allocations to processors. New Zealand then notes that at least one TRQ (industrial cheese) was *entirely* limited to processors or further processors, such that none of that TRQ was available for non-processors, and that 85% to 90% of the quota in the other 15 TRQs was limited to processors (including further processors).<sup>48</sup>

60. For New Zealand, both “processors” and “further processors” as they are defined in Canada’s Notices to Importers fall within the CPTPP meaning of “processors” in Article 2.30(1)(b) because both subject raw milk or other dairy inputs to a series of processes to manufacture a dairy product or a non-dairy product.<sup>49</sup>

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<sup>42</sup> First Written Submission of New Zealand para. 68.

<sup>43</sup> Initial Written Submission of Canada para. 192, fn. 177.

<sup>44</sup> First Written Submission of New Zealand para. 71.

<sup>45</sup> Initial Written Submission of Canada para. 198.

<sup>46</sup> First Written Submission of New Zealand para. 72; Rebuttal Submission of New Zealand para. 121.

<sup>47</sup> First Written Submission of New Zealand para. 74.

<sup>48</sup> First Written Submission of New Zealand para. 79, table 2.

<sup>49</sup> First Written Submission of New Zealand para. 78; Rebuttal Submission of New Zealand para. 132.

61. Finally, New Zealand argues that accepting Canada’s interpretation—that “an allocation” means “every” allocation would lead to an “absurd result” and render the Processor Clause “virtually meaningless.”<sup>50</sup> Accepting Canada’s interpretation would mean that a Party would 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.<sup>51</sup>

## **B. Canada’s Arguments**

62. Canada’s principal objection to New Zealand’s interpretation lies with the phrase “an allocation” and with the interpretation of both words within that phrase. For Canada, the word “allocation” means a share of a TRQ that may be “granted to an individual applicant” that “provides the recipient certain rights, including the right to import [a] specified amount at the TRQ’s preferential rate.”<sup>52</sup> According to Canada, the term “allocation” does not simply refer to a “portion” or volume of the TRQ and the “size of an allocation is indeterminate and irrelevant for the meaning of the term as used in Section D.”<sup>53</sup> For Canada, this means that the Processor Clause does not concern the size of allocations or the proportionate amounts allocated to processors and non-processors, individually or as a group.<sup>54</sup> According to Canada, “allocation” cannot have the broader meaning suggested by New Zealand of “a portion of the TRQ that may be granted to applicants (plural)—such as a processor pool.”<sup>55</sup> For Canada, the distinction between an “allocation” and a “pool” turns on an “allocation” to a single applicant granting the right to import goods subject to the TRQ versus the reservation resulting from the pooling system, which creates an initially reserved volume of TRQ for a group of potential applicants, but does not grant anyone the right to import goods subject to the TRQ.<sup>56</sup>

63. Canada further contends that the word “an” in the phrase “an allocation” must mean “every” allocation, such that the prohibition in the Processor Clause only prevents a Party from limiting *all* allocations to processors. Based on dictionary definitions, Canada claims that the word “an” can mean a single but not specifically identified thing of a class, some of that thing, any or every of that thing.<sup>57</sup> Canada contends that in the context of the entirety of Article 2.30(1)(b), the intent of the Parties was that “an” means “every” in the Processor Clause.<sup>58</sup> Canada contrasts the use of “an allocation” in the Processor Clause with the prohibition not to allocate “any portion of

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<sup>50</sup> Rebuttal Submission of New Zealand para. 126.

<sup>51</sup> Rebuttal Submission of New Zealand para. 126.

<sup>52</sup> Closing Statement of Canada at Hearing para. 14.

<sup>53</sup> Rebuttal Submission of Canada para. 162.

<sup>54</sup> Rebuttal Submission of Canada para. 163.

<sup>55</sup> Initial Written Submission of Canada paras. 194-95.

<sup>56</sup> Opening Statement of Canada at the Hearing para. 55; Rebuttal Submission of Canada para. 164.

<sup>57</sup> Initial Written Submission of Canada para. 197.

<sup>58</sup> Initial Written Submission of Canada para. 197.

the quota to a producer group” (the “Producer Clause”) in the first phrase of Article 2.30(1)(b), arguing that if the Parties had meant to establish a similarly expansive prohibition against limiting access to “any” allocation to processors, they would have drafted the Processor Clause accordingly.<sup>59</sup>

64. Canada also contends that the term “processors” should be interpreted to refer to entities engaged in the transformation of raw milk into intermediary or finished dairy products covered by the dairy TRQs and that this group excludes “further processors.”<sup>60</sup> For Canada, “further processors” are entities that transform intermediary or finished dairy products produced by milk processors into other further processed food products not covered by the TRQ, such as frozen pizzas. Canada notes that, with the exception of the reference to using milk in bulk to be processed into dairy products, all of the references to processing in Appendix A to Canada’s CPTPP Tariff Schedule refer to “further food processing” such that there is a clear distinction between “processing” (using milk to make dairy products) versus “further processing” (using a dairy product to make another food product).<sup>61</sup>

65. Finally, Canada rejects New Zealand’s contention of an absurd result rendering the Processor Clause meaningless if “an allocation” was interpreted to mean “every allocation.” Canada contends that even if 85% of the total volume of a TRQ is initially reserved for processors, there is no limit on the number of distributors (or further processors) who could apply for and receive an allocation.<sup>62</sup> Canada also argues that other parts of Article 2.30(1) would impose constraints on limiting 99.99% of the quota to processors, as that would leave such a small volume for non-processors that a violation of Article 2.30(1)(c)’s requirement to make allocations in commercial viable quantities would be likely.<sup>63</sup>

### **C. The Panel’s Analysis**

66. The Panel finds that the pools created in Canada’s Notices to Importers, by reserving priority access to its 16 dairy TRQs to processors, are inconsistent with Canada’s obligation to “ensure that” “unless otherwise agreed by the Parties” Canada “does not” “limit access to an allocation to processors” under Article 2.30(1)(b).

67. The treaty provision at issue is Article 2.30(1)(b), particularly its final phrase or Processor Clause, which provides:

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<sup>59</sup> Initial Written Submission of Canada para. 200.

<sup>60</sup> Initial Written Submission of Canada para. 204.

<sup>61</sup> Rebuttal Submission of Canada para. 175.

<sup>62</sup> Rebuttal Submission of Canada para. 168.

<sup>63</sup> Rebuttal Submission of Canada para. 169.

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

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

68. The Panel begins its assessment by noting the context in which Article 2.30(1)(b) appears. Article 2.30 is the third of the five articles in Section D establishing disciplines on the operation of a country's TRQs. The CPTPP permits Parties to implement their TRQs through either a FCFS system or through an allocation mechanism, with certain provisions expressly directed at FCFS systems (Articles 2.32(3) and 2.32(4)), others expressly directed at allocation mechanisms (Articles 2.30(1), 2.31(1), 2.32(2), and 2.32(5)), and the remainder applicable to both FCFS and allocation mechanism systems. Because the CPTPP allows for the administration of TRQs through an allocation mechanism, some scope must be given for such an allocation mechanism to operate; failure to provide such scope would result in a de-facto limitation requiring use of FCFS systems only, in contravention of the CPTPP.

69. Article 2.30(1)(b) is one of the provisions expressly directed at allocation mechanisms and the disputing parties agree that Article 2.30(1)(b) constrains how Canada may exercise the discretion it has in establishing an allocation mechanism.<sup>64</sup> As such, the task before the Panel is determining whether Canada has exceeded the bounds of those constraints.

70. At the outset, the Panel notes its agreement with the disputing parties' interpretation of the beginning phrase of the Processor Clause – "limit access to" and finds that it means "to restrict" to *someone* (here, "processors") the ability to "obtain" or "acquire" *something* (here, "an allocation"). For New Zealand, the word "access" is significant, as it underscores that the Processor Clause is concerned with the *potential* to obtain quota, rather than with allocations that have already been granted.<sup>65</sup> What remains in dispute is the meaning of "an allocation" and the specific words "an" and "allocation."

71. The disputing parties presented competing dictionary definitions of the word "an". New Zealand, quoting the Oxford English Dictionary definition of "a" states that the term "an" is defined as "something not specifically identified ... but treated as one of a class: one, some, any" as the basis for its conclusion that *any* allocation that is available under a TRQ is "an allocation."<sup>66</sup> Canada, on the other hand, cites the Cambridge Dictionary and the need to cover the range of possible meanings of "an" to come to the conclusion that the word "an" can "mean a single but

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<sup>64</sup> Canada: "The function of 2.30.1 is to preserve a Party's administration discretion while establishing specific restrictions to that discretion." Initial Written Submission of Canada para. 201.

<sup>65</sup> First Written Submission of New Zealand para. 70.

<sup>66</sup> First Written Submission of New Zealand para. 71.

not specifically identified thing of a class, some of that thing, any or every of that thing.”<sup>67</sup> For Canada, context suggests that the intent of the Parties was that “an” means “every” in the Processor Clause.

72. For the Panel, it is clear that dictionary definitions alone do not provide a sound basis for interpreting the meaning of “an” allocation, so the Panel examined both disputing parties’ interpretations in the context of the Processor Clause. When the clause is read as constructed by New Zealand—that Parties may not unilaterally limit access to one, several or all potential portions or shares of the TRQ to processors—the Panel finds that reading to comport naturally with the plain meaning of the Processor Clause, which is to prevent a Party from restricting access to an allocation under the TRQ to processors. This does not operate to prohibit an actual allocation to a processor, but does operate to prohibit any mechanism that restricts access to all or any allocations to processors alone.

73. The Panel does not find persuasive Canada’s interpretation that “an” should be read as “every” such that the limitation in the Processor Clause is only that Canada may not reserve *all* of its dairy TRQs for processors. In coming to this conclusion, the Panel accepts Canada’s interpretation that the term “allocation” in the Processor Clause means a share of the TRQ that is or that may be granted to an individual applicant.<sup>68</sup> But the Panel disagrees with the implications Canada draws from this interpretation. For Canada, its interpretation means that the Processor Clause is not concerned with the cumulative amount or volume of a TRQ that may be allocated to processors and non-processors and that, accordingly, the Processor Clause is satisfied so long as at least one non-processor is able to obtain “an allocation” of any amount.<sup>69</sup> The Panel disagrees, finding that it is not enough for Canada to permit one or more non-processors to apply for and receive an allocation. Rather, the obligation under the Processor Clause is for Canada not to limit access to any allocation to processors. The Panel finds that Canada’s interpretation—that it will only breach the Processor Clause if it limited access to *every* allocation to processors is unsupported by the text, its context and the object and purpose of the CPTPP.

74. Canada’s interpretation of “an allocation” also rests on the distinction it draws between “an allocation” and a “pool” as that term is used in Canada’s allocation mechanism. Canada defines an “allocation” as noted above as a share of a TRQ that may be granted to an individual applicant to import a specific amount under the TRQ, while a “pool” is a reserved portion, or volume, of TRQ set aside for first access by a specified group within the dairy supply chain.<sup>70</sup> Canada suggests that because the “pool” only serves to give priority access to those in the pool, with unused quota redistributed to “others who are more likely to use them” and no limits on the number of allocation holders in the non-processor or, for example, distributor pool, that Canada does not act

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<sup>67</sup> Initial Written Submission of Canada para. 197.

<sup>68</sup> Rebuttal Submission of Canada para. 161.

<sup>69</sup> Rebuttal Submission of Canada para. 163.

<sup>70</sup> Rebuttal Submission of Canada para. 164.

inconsistently with the Processor Clause.<sup>71</sup> For the Panel, the distinction that Canada draws between pools and allocations is not determinative. While a pool reserving priority access may not be the same as an allocation to a single applicant, it nonetheless limits access to an allocation and is inconsistent with the Processor Clause.

75. While the Panel accepts that the Processor Clause does not require that a particular volume of quota be allocated to a particular number of non-processors, it does not accept Canada's interpretation that reserving priority access to TRQ allocations to processors while providing access to non-processors to some allocations from whatever is left over after the priority access to allocations for processors has been accounted for is consistent with the Processor Clause. Canada is simply not permitted to limit access to its TRQ allocations to processors in the first place.

76. Both disputing parties draw on the other restraints on allocation mechanisms contained in Article 2.30(1)(b) as the most appropriate context for interpreting the Processor Clause and the Panel agrees that these other phrases are indeed helpful context.

77. Canada relies most heavily on the prohibition on allocating "any portion of the quota to a producer group" (the Producer Clause), while New Zealand places more emphasis on the prohibition on conditioning access to an allocation on the purchase of domestic production (the Domestic Production Clause). Canada argues that the Producer Clause, like the Processor Clause, limits a Party's discretion to allocate its TRQs to a specific group of market actors and uses the term "any" to explicitly remove the discretion of a Party to allocate "any portion" of a quota to a producer group.<sup>72</sup> Canada contends that if the CPTPP Parties had intended a broad prohibition against limitation of access to processors, they would have chosen similarly preclusive language as that in the Producer Clause.

78. The Panel is not persuaded that the absence of the word "any" in the Processor Clause suggests that the constraint is something less than a prohibition on limiting access to any allocation to processors. The Producer Clause is a clear prohibition on allocating any amount of quota to a producer group; the Processor Clause is a prohibition on reserving or setting aside some or all of the quota exclusively for allocation to processors.

79. New Zealand, on the other hand, places its emphasis on the Domestic Production Clause's use of the term "an allocation" as necessarily implying a general obligation to refrain from making access to *any* allocation conditional on the purchase of domestic production. The Domestic Production Clause thus uses language very similar to the Processor Clause to reach the same end—restricting access to allocations. And Canada conceded that the term "an allocation" as used in the

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<sup>71</sup> Initial Written Submission of Canada para 68; Rebuttal Submission of Canada para. 164.

<sup>72</sup> Initial Written Submission of Canada para. 200.

Domestic Production Clause means that Canada could not condition access to *any* allocation based on the purchase of domestic production.<sup>73</sup>

80. For the Panel, the term “an allocation” has the same meaning –“any allocation”– in both the Domestic Production and the Processor Clause. The words used in both clauses are the same (“an allocation”) and the purpose of the two clauses is the same –limiting whether and how Canada can restrict access to allocations of TRQs. If Canada accepts that “an allocation” means “any allocation” for purposes of the Domestic Production Clause, it cannot insist on a totally different meaning –“every allocation”– the very next time the same phrase (“an allocation”) is used. Nor can Canada rely on the use of the word “condition” in one phrase and the word “limit” in the other to justify reading the term “an allocation” to mean two different things in the same sentence. The Panel interprets 2.30(1)(b) in a wholistic manner and finds that all three clauses amount to prohibitions worded in different ways because what is being prohibited is slightly different; a producer group cannot get an allocation (or any allocation) at all, whereas a processor can receive an allocation, but a Party is prohibited from limiting access to an allocation to processors.

81. In the context of the Producer Clause and the Domestic Production Clause, the Processor Clause is best understood as a prohibition on reserved access to TRQ allocations for processors. Canada is certainly still entitled to grant any TRQ amounts that it chooses to processors, consistent with its Section D obligations. What it is prohibited from doing is restricting access to some or all of its dairy TRQs only to processors.

82. The Panel believes this interpretation is consistent with the purpose and intent of the CPTPP. As set out in the Preamble, the object and purpose of CPTPP includes “promot[ing] further regional economic integration ...,” “enhanc[ing] opportunities for the acceleration of regional trade liberalisation and investment,” and “contribut[ing] to maintaining open markets, [and] increasing world trade...”.<sup>74</sup> It also includes “recogniz[ing] the inherent right to regulate, and resolv[ing] to preserve the flexibility of the Parties to set legislative and regulatory priorities.”<sup>75</sup> The Panel’s interpretation leaves Canada with the discretion to adopt and design its own allocation system and to make its own decisions as to who may obtain an allocation, while requiring that Canada exercise that discretion in a manner that is consistent with the limited market access commitments Canada made for its dairy market and with the constraints contained in Article 2.30(1).

83. The Panel’s interpretation would also ensure that the Processor Clause is given useful effect while avoiding an absurd result. Interpreting the Processor Clause as Canada suggests would permit a Party to reserve 99.9% of the allocations available under a TRQ for processors and still not be in breach of the limitations in the Processor Clause. The notion that an allocation mechanism

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<sup>73</sup> Initial Written Submission of Canada paras. 198-99.

<sup>74</sup> CPTPP pmbl., paras. 3, 4, 5.

<sup>75</sup> TPP pmbl., para. 9 (incorporated into CPTPP under CPTPP art. 1).

that provides access to non-processors to an allocation of only 0.01% of the total TRQ volume available is consistent with the market access commitments that were made and with the constraints on allocation mechanisms found in the Processor Clause is untenable. For the Panel, accepting Canada's interpretation would be an absurd result that gives the Processor Clause no meaningful effect.

84. In its claims of inconsistency with Article 2.30(1)(b), New Zealand has not questioned Canada's right to operate a supply management system. As such, the Panel is not ruling on the consistency of Canada's dairy supply management system with its CPTPP obligations, but on the scope of certain specific disciplines in the CPTPP for implementing Canada's dairy TRQs. New Zealand has also not claimed that processors should be eliminated from the list of eligible importers, and the Panel's ruling does not preclude Canada from allocating quota to its processors.

85. The Panel's conclusion that reserving access to specific percentages of its TRQs for processors is inconsistent with Canada's obligations under Article 2.30(1)(b) means Canada may continue to allocate TRQs to its processors, provided it does so consistently with its Section D obligations. What Canada may not do is reserve access to some or all of its dairy TRQ allocations only to processors.

## **VI. Claims Concerning Article 2.29(1)**

86. Article 2.29(1) of the CPTPP provides as follows:

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

87. The principal arguments concerning Article 2.29(1) centre on the correct meaning of "opportunity to utilise TRQ quantities." The question before the Panel is whether that phrase is a reference to the opportunity to utilise the entire TRQ amount available and the entire process for utilising it, including quota allocation, as New Zealand argues,<sup>76</sup> or whether it is a reference to a specific amount of quota that has been allocated to individual importers, which excludes the process of applying for quota, as Canada argues.<sup>77</sup>

88. New Zealand's interpretation of the scope of Article 2.29(1) sees the application process, in particular within the operation of the pooling system, as subject to the broad obligations of Article 2.29(1). Therefore, pooling that interferes with the opportunity to apply for an allocation for quota is contrary to the CPTPP. Under Canada's interpretation, the allocation mechanism is not covered by Article 2.29(1), as it only applies to the stage of importing after quota has already been

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<sup>76</sup> First Written Submission of New Zealand para. 132.

<sup>77</sup> Initial Written Submission of Canada para. 91.



allocated. Therefore, the clause only applies to ensure that an importer who has received an allocation is not prevented from actually importing the product.

89. Canada raises an additional claim that New Zealand has failed to demonstrate a causal connection between the actual rates of quota utilisation and the Canadian measures creating the pooling system that are claimed to be precluding full utilisation. Canada contends that factors extraneous to the pooling system are the cause of any underutilisation of the TRQ and that, in failing to contradict these claims, New Zealand has not met its burden of proof of a violation of Article 2.29(1).

#### **A. New Zealand's Arguments**

90. New Zealand contends that the reservation of a set percentage of quota allocations to “processors,” “further processors,” and/or “distributors” set forth in Canada’s Notices to Importers acts to impede the ability of importers to fully utilise the TRQs. For New Zealand, the restrictive and compartmentalized nature of Canada’s pooling system means that if you do not fall within the pool, you do not have the opportunity to utilise any TRQ quantity, let alone utilise the TRQ fully. New Zealand further contends that if you *do* fall within the pool, you only have access to the quota in that specific pool, not the full TRQ quantity, and the volume of quota you will be allocated will be based on a market share or equal share calculation, irrespective of how much quota you have requested.<sup>78</sup>

91. Critical to New Zealand’s claim is the meaning of the term “TRQ quantities,” which for New Zealand is a reference to the total volume of quota available under the TRQ for each dairy product.<sup>79</sup> The utilisation of TRQ quantities includes three steps: obtaining an allocation, importing product into market, and claiming preferential tariff treatment. Article 2.29(1) is about the opportunity to perform all three steps and if you cannot access an allocation at all, you have no opportunity to utilise TRQ quantities.

92. In making its claim under 2.29(1), New Zealand rejects Canada’s contention that its system of allowing unused quota to be moved from its original pool to one or both of the other pools included in the Notice to Importers allows for the full utilisation of the TRQ at issue. The fact that quota may be transferred between pools is not set forth in Canada’s Notices to Importers and permitting quota to be moved from one pool to applicants in other pools on an exceptional basis does not allow importers the opportunity to utilise quota fully.

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<sup>78</sup> First Written Submission of New Zealand para. 138-39.

<sup>79</sup> Rebuttal Submission of New Zealand para. 16.

93. New Zealand also notes the broad interpretation that should be given to the term “importers” as used in Article 2.29(1), contending it is a reference to all those importers who are eligible to apply for quota under the eligibility requirements in Canada’s Tariff Schedule.<sup>80</sup>

94. New Zealand argues that the economic data provided by Canada of significant underutilisation of the quotas and other economic factors such as distance, US dairy allocations in some TRQ categories, and consumer preference for domestic product should be ignored as the result of a highly distorted dairy market. New Zealand also contends that it is not obliged to demonstrate trade effects as a means of proving a violation of Article 2.29(1) as it is not claiming nullification and impairment of benefits.

## **B. Canada’s Arguments**

95. Canada argues that the term “TRQ quantities” in Article 2.29(1) means the specified amount allocated or granted to individual importers, not the full amount of the TRQ.<sup>81</sup> Therefore, Article 2.29(1) only applies to importers that have already been granted an allocation and the only way to utilise an allocation is to convert it to use by importing product. The scope of the obligation is thereby limited to prohibiting a Party from arbitrarily preventing a person who has obtained a quota allocation from importing goods using the preferential tariff rate under a given TRQ for those imports.<sup>82</sup> As Canada fully allocates its TRQs and importers with a TRQ allocation are able to utilise their allocation fully, Canada is providing the opportunity to utilise the TRQ fully and thus complies with the obligation.

96. Canada further argues that the structure of Articles 2.29 and 2.30 support this interpretation as Article 2.29 applies to use of the TRQ whether on a FCFS basis or by an allocation mechanism.<sup>83</sup> An allocation is only made if there is an allocation mechanism in place according to Canada. Therefore, Article 2.29 could not use the more limited word of allocation as this would prevent Article 2.29 from applying generally to all forms of accessing the TRQ including through a FCFS system.<sup>84</sup> As for “importers,” Canada posits that the correct meaning is a person /company etc who imports a good from abroad –in other words, the person or entity who renders useful their specified amount of TRQ, which is done by actually bringing in product. This means an importer who has already received an allocation.<sup>85</sup>

97. Canada contends that New Zealand has failed to make a *prima facie* case that it is the pooling system causing some of the dairy TRQs not to be utilised fully. Canada relies on the economic data and models noted above that suggest that other economic factors are what generate

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<sup>80</sup> Rebuttal Submission of New Zealand para. 31.

<sup>81</sup> Rebuttal Submission of Canada para. 31.

<sup>82</sup> Opening Statement of Canada at the Hearing para. 13.

<sup>83</sup> Rebuttal Submission of Canada para. 25.

<sup>84</sup> Rebuttal Submission of Canada para. 32.

<sup>85</sup> Rebuttal Submission of Canada para. 37-38.

a lack of demand for New Zealand product in some of the dairy categories and the resulting underfill.<sup>86</sup>

98. Canada responds regarding trade effects that New Zealand has failed to provide any evidence to dispel the evidence provided by Canada that Canada's pooling system has not had any effect on TRQ utilisation, particularly in light of high rates of utilisation of the TRQs for butter, cheeses of all types, and mozzarella and prepared cheeses.<sup>87</sup> As a result, Canada contends that New Zealand has failed to discharge its burden of proof as the complainant.

### **C. The Panel's Analysis**

99. The Panel finds that Canada's Notices to Importers are inconsistent with Article 2.29(1) as they result in the administration of the TRQs under an allocation mechanism which includes a pooling system that operates to limit the opportunity for otherwise eligible applicants to use the TRQs fully. The obligation is not to ensure that the TRQ quantities are fully used each year, but rather to design and operate a system of TRQ administration that allows for the possibility, the opportunity, of the TRQ quantities being taken up in their entirety.

100. The Panel notes that both disputing parties provided text and context-based interpretations of Article 2.29(1) that are internally consistent, even plausible; but both interpretations hinge on the interpretation of the term "TRQ quantities." The interpretation to be given to "utilise," "importers," "fully" in Article 2.29(1) all turn on this. We begin, therefore, by addressing the meaning of "TRQ quantities."

101. For Canada, "TRQ quantities" in Article 2.29(1) means "the specified or definite amounts of the TRQ granted to individual importers,"<sup>88</sup> in other words, a quota amount already allocated or granted under any individual TRQ. In contrast, for New Zealand "TRQ quantities" means "the total volume of quota available under any individual TRQ," not a single quota allocation.<sup>89</sup>

102. For its interpretation of "to utilise TRQ quantities" in Article 2.29(1) and of "the utilisation of a TRQ" in Article 2.29(2)(a), Canada relies largely on its understanding of the word "allocation" and its explanation for the absence of the word "allocation" in Article 2.29(1). Canada argues that the structure of Articles 2.29(1) and 2.30(1) together explains why the term "TRQ quantities" as used in Article 2.29(1) must mean already granted shares of the TRQ, in other words allocations. Specifically, Canada argues that Article 2.29(1) applies to TRQ's administered under a FCFS system or by an allocation mechanism. In Canada's view, a portion of a TRQ granted to an

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<sup>86</sup> Initial Written Submission of Canada paras. 111, 116, 119, 121.

<sup>87</sup> Initial Written Submission of Canada para. 115.

<sup>88</sup> Initial Written Submission of Canada para. 91; Rebuttal Submission of Canada para. 28.

<sup>89</sup> Rebuttal Submission of New Zealand para. 16.

individual importer is not an allocation if it is granted pursuant to a FCFS system.<sup>90</sup> Since Article 2.29(1) applies to the utilisation of all TRQs regardless of whether TRQ quantities are accessed on a FCFS basis or through an allocation mechanism as defined in the CPTPP, the use of a term such as “utilise an allocation” in Article 2.29(1) would have excluded an FCFS-obtained share of the TRQ. Hence, Canada suggests the use of the phrase “utilise TRQ quantities” was necessary to cover utilisation of the TRQ under both an FCFS and an allocation mechanism system.<sup>91</sup>

103. The Panel considers that Canada’s interpretation rests on a mistaken understanding of the word “allocation” or “allocate” within Section D. Accordingly, the Panel will first address this issue.

104. In the Panel’s opinion, when an importer obtains a share of a TRQ, an allocation is granted, whether the system used to do that granting is an FCFS system or an allocation mechanism.

105. The Panel adopts this view after a careful review of all the provisions in Section D. To start, Article 2.30 in footnote 18 states that “for purposes of this Section “allocation mechanism” means any system where access to the TRQ is granted on a basis other than first-come first-served.” This footnote does not define “allocation” or “allocate” alone. The Panel does not see any justification for automatically assuming that the word “allocation” on its own similarly excludes any FCFS-obtained quota share. There is an allocation under a FCFS system, it has just not been obtained through an allocation *mechanism* as defined in the CPTPP.

106. The Panel also finds support for this interpretation by carefully examining the use of the words “allocate” and “allocation” elsewhere in Section D. There are a number of provisions which apply to access to quota both under a FCFS system or, where specifically noted (Articles 2.30(1), 2.31(1), 2.32(2) and 2.32(5)), access to quota under an allocation mechanism alone.

107. Thus, using this broader understanding of the word allocation, there would be no reason for Article 2.29(1) to substitute “utilise TRQ quantities” for “utilise TRQ allocations” simply to avoid suggesting that Article 2.29(1) only applies when a Party uses an allocation mechanism as Canada has argued. Canada has highlighted that the word “allocate” cannot possibly refer to both FCFS and allocation mechanism systems because of the phrase in Article 2.28(3) “if the TRQ will be allocated application deadlines and procedures must be publicly available.” Canada posits that the word “if” indicates that a TRQ is not always allocated. Canada argued that it is only allocated when there is an allocation mechanism and not when a FCFS system is used as there is no allocation procedure or deadline to publish when using a FCFS system.<sup>92</sup>

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<sup>90</sup> Rebuttal Submission of Canada para. 32.

<sup>91</sup> Rebuttal Submission of Canada para. 32.

<sup>92</sup> Responses of Canada to Post-hearing Written Questions for the Parties from the Panel paras. 3-4.

108. For the Panel, there is another explanation for the use of the word “if” which is consistent with its use in Article 2.28(3) applying to all forms of allocations. The Panel notes that the provisions of Section D apply to all Parties who maintain TRQs. Therefore, Article 2.28(3) had to be drafted to accommodate the TRQs of all Parties as outlined in their Schedules to Annex 2-D. The Panel observes that the Tariff Schedule of Japan provides that they will administer the TRQ for some products through an FCFS import licensing procedure.<sup>93</sup> In this a case, an FCFS system would fall within the requirements of Article 2.28(3) for publishing certain information about its process and deadlines for applying for an import license on its designated publicly available website. Also, the Tariff Schedule of Mexico includes a TRQ quota on sugar that is only triggered when domestic demand requires it.<sup>94</sup> In other words, this TRQ may be allocated in some years and in other years not. Thus, in this case the requirement to publish information on the allocation process on a website would indeed be conditional, “if the TRQ would be allocated.” The Panel does not therefore consider that Article 2.28(3) is only applicable to a TRQ administered by an allocation mechanism.

109. In Canada’s interpretation, Article 2.29(1) applies to TRQs administered by a FCFS system or by an allocation mechanism. With this, the Panel agrees.

110. However, Canada further considers that Article 2.30 applies only to TRQs administered by an allocation mechanism.<sup>95</sup> The Panel does not accept this interpretation. By its terms, Article 2.30(1) applies only to TRQs administered by an allocation mechanism, but Articles 2.30(2) and (4), for example, contain no such limiting language and address constraints on the counting of quota either during the first year a quota is applied or in relation to comparable WTO TRQs, which are applicable to all TRQs, however administered. It would make no sense to say that the requirement in 2.30(4) that TRQ quota imported through an allocation mechanism, but not through a FCFS system cannot reduce the quantity of any other TRQ provided in the WTO or other agreements. Also, as the Panel observed, throughout Articles 2.31(1) and 2.32, the drafters specify when a provision only applies to a TRQ administered by an allocation mechanism or only to an FCFS-administered TRQ (e.g., Article 2.32(3))

111. Canada seeks to bolster its interpretation of “TRQ quantities” as used in Article 2.29(1) by contending that Article 2.30(2) twice uses the phrase “quota quantity established in its Schedule to Annex 2-D (Tariff Commitments)” to unambiguously refer to the total quantity of quota available under the TRQs as established in the Tariff Schedule. This is clearly a reference to the total quota volume which New Zealand says is meant by the term “TRQ quantities” in Article 2.29(1). For Canada, the absence of an express reference to a Party’s Tariff Schedule in Article 2.29(1) must be given meaning. The meaning that Canada ascribes is that “TRQ quantities” must be something

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<sup>93</sup> CPTPP, Annex 2-D, Appendix A: Tariff Rate Quotas of Japan, Section B para. 2, *inter alia*.

<sup>94</sup> CPTPP, Annex 2-D, Appendix A-2: Country Specific Allocation for Sugar of Mexico para. 1(a).

<sup>95</sup> Rebuttal Submission of Canada para. 25.

other than the total quantity of the TRQ, specifically each individual allocation that has already been granted to an importer.

112. In reviewing the two provisions the Panel joins New Zealand in observing that Article 2.29(1) is quite general in nature referring to TRQ quantities (plural) as they may vary from product to product and from year to year, whereas Article 2.30(2) is referring to a mathematical calculation required to determine how much of an annual quota should be made available during the first TRQ year that the CPTPP is in force. It would be reasonable for the drafters to emphasize the specific TRQ quantity they have in mind with the extra precision of a reference to the Tariff Schedule given that the beginning and ending of a quota year used by a CPTPP Party may not match the start date for the entry into force of the CPTPP. The Panel therefore finds that the failure to reference the Tariff Schedule with its specific quota volumes does not support the Canadian interpretation of “TRQ quantities.”

113. As further contextual argument, Canada notes that Article 2.30(3) refers to an *application* for a quota allocation as distinct from the *utilisation* of a quota allocation to support its interpretation that to utilise TRQ quantities in Article 2.29(1) is distinct from the stage of applying for quota.<sup>96</sup> For Canada, the phrase “to utilise a TRQ quantity fully” cannot include the separate application/allocation stage of quota administration. Canada further notes that in the ILA, the term utilisation is a subsequent and distinct step taking place after an allocation has been issued confirming that utilisation and application for a quota are distinct concepts.<sup>97</sup>

114. All these arguments fail to take into account that the term “utilise” is a verb so general in nature that, like a chameleon, it derives its meaning from its surroundings, usually a noun that identifies what is being utilised. It follows that the term “utilise” has quite a different scope depending on the breadth of the term that is being utilised. In Article 2.29(1) the noun being utilised is “TRQ quantities,” which the Panel accepts includes all stages that result in the utilisation of a TRQ quantity. In Article 2.30(3) the noun being utilised is a “quota allocation” which would be an individual share of quota, while in 2.29(2), what is being utilised is a TRQ for the importation of a good, which refers to importing a good subject to the in-quota tariff rate. And in the ILA, the noun being qualified also varies from article to article.

115. Similarly, the term “importers” is determined by the noun of what is being utilised. If what is being utilised is a specific quota allocation, “importers” would not be in the plural, it would need to be singular. In the Panel’s view, the plural use of “importers” reinforces the view that “TRQ quantities” is a reference to the entire volume of TRQ each year and not a single allocation to a single importer.

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<sup>96</sup> Rebuttal Submission of Canada para. 44.

<sup>97</sup> Initial Written Submission of Canada para. 100. The Panel recalls that the ILA is referred to in CPTPP art. 2.28(1).

116. Other terms in Article 2.29(1) also reinforce New Zealand’s broader interpretation of the meaning of “TRQ quantities.” Specifically, the references to “opportunity” and “fully” must be read in the broad and more general context of Article 2.29(1). The ordinary meaning of opportunity as provided by Canada is “a time, condition or set of circumstances permitting or favourable to a particular action or purpose.”<sup>98</sup> In the Panel’s view this reinforces New Zealand’s position that all stages of utilising the TRQ quantities, including the allocation phase, are covered by Article 2.29(1). Opportunity implies a potential to do something, not necessarily actually doing it. The potential to import, which applies to the entire TRQ, not each individual allocation granted, accords with a broader understanding of Article 2.29(1).

117. As for the use of the term “fully,” differing understandings of “TRQ quantities” result in differing interpretations of what it means to “utilise the TRQ quantities,” let alone to utilise fully. At a minimum, the word conveys a broader sense of scope for Article 2.29(1) than if it were not used at all.

118. To summarize, as the Panel finds that “TRQ quantities” refers to the entire quota quantity under each TRQ, the words “utilise” and “importers” must have a broad meaning as New Zealand contends. This approach is further reinforced by the reference to “opportunity” and “fully” in Article 2.29(1). The Panel accepts New Zealand’s interpretation that the ordinary meaning of “to utilise the TRQ quantities” must necessarily include the steps of obtaining a quota allocation, importing product, and claiming preferential tariff treatment on entry.<sup>99</sup>

119. Having decided that all stages, including that of applying for an allocation for the use of the total quantity of each TRQ are the subject matter of Article 2.29(1), the Panel turns to how Canada’s pooling system measures up under the obligation in Article 2.29(1) to “administer its TRQ in a manner that allows importers the “opportunity to utilise TRQ quantities fully.”

120. As described by Canada in its written submissions and in responses to questions at the hearing and subsequently in writing, the pools operate as compartments for priority access to the TRQ for processors, or further processors, and in some cases distributors. While the size of each compartment is not rigid since there are opportunities for quota to be shifted from one pool to another when quota is returned or there are no applicants in a given pool, at no stage is any importer other than a processor, further processor, or distributor permitted to apply for an allocation.<sup>100</sup>

121. Furthermore, and as described by Canada, the operation of the pools follows various steps beginning with the issuance of shipment-specific imports permits, which are limited to allocation holders that fit within at least one of the pools.<sup>101</sup> Canada notes that its system includes the ability

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<sup>98</sup> Initial Written Submission of Canada para. 92.

<sup>99</sup> First Written Submission of New Zealand para. 131.

<sup>100</sup> Responses of Canada to Post-hearing Written Questions for the Parties from the Panel paras. 9-14.

<sup>101</sup> Initial Written Submission of Canada para. 51.

for allocation holders to transfer a portion of their allocation to other allocation holders within the same TRQ, but that doing so makes them ineligible to receive transfers from other allocation holders, and also includes a process for the return and reallocation of unused quota.<sup>102</sup> Within the pools, Canada allocates quota to processors and further processors by dividing up the total amount of quota available in each pool under a specific TRQ among all applicants in that pool according to their market share and without regard to the level of demand for quota.<sup>103</sup> Distributors, on the other hand, receive an allocation that is based on dividing the total quota available for the distributor pool into equal shares based on the number of distributor applicants, again without regard to the amount of quota sought.<sup>104</sup> The timing and the process for reallocating unused quota and for moving quota from one pool to another carries with it separate timing and procedural constraints, but as noted above, under no circumstance are importers who do not fit into the pools established for each of the 16 TRQs given the opportunity to utilise that TRQ quantity.<sup>105</sup>

122. All of these operate as constraints that collectively undermine Article 2.29(1). The Panel stresses that the words “opportunity” and “fully” point to a broad meaning for Article 2.29(1) and to give them meaning, a Party who has an allocation mechanism must design and operate it in a way that does not unduly impose impediments that would prevent full usage of the TRQ quantity of a product. To be clear, the Panel is not requiring that a Party ensure that each of its TRQ quantities be fully filled each year. But, the opportunity to fill them must not be undermined by an overly compartmentalized and complicated system as is the case with Canada’s current allocation mechanism.

123. The Panel is inspired in its understanding of the scope of Article 2.29(1) by the broader treaty context regarding TRQs which represents a balance in the CPTPP between enhanced market access and the negotiated right to limit access via the quantity of a TRQ. The words of Article 2.29(1) must be intended to operate to prevent a Party from undermining use of the full TRQ amounts via administrative or eligibility restrictions that operate to limit the full usage of the TRQ amount. At the same time, it is clear that Section D permits some discretion to a Party to implement its TRQ via an allocation mechanism of its choosing. Interpreting Article 2.29(1) narrowly as only applying to those who have already obtained a quota would undermine this right. Interpreting Article 2.29(1) broadly in a manner that requires a Party to allow large numbers of applicants to apply potentially all at once equally undermines the CPTPP’s authorization of allocation mechanisms.

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<sup>102</sup> Initial Written Submission of Canada paras. 64-66.

<sup>103</sup> Official Transcript of the Hearing, Public Session of 14 June 2023 p. 116-17, 129-31.

<sup>104</sup> Official Transcript of the Hearing, Public Session of 14 June 2023 p. 116-17, 129-31. An exception to this rule occurs when there have been no applicants for a particular TRQ. In that instance, any eligible applicant that comes forward will receive the amount of allocation requested. Responses of Canada to Post-hearing Written Questions for the Parties from the Panel paras. 11, 13.

<sup>105</sup> Responses of Canada to Post-hearing Written Questions for the Parties from the Panel paras. 9-14.



124. New Zealand's interpretation of Article 2.29(1) that includes the allocation phase of quota usage is more consistent with the liberalizing objective of the CPTPP. Canada's interpretation is more consistent with the right recognized in the CPTPP to establish an allocation mechanism of a Party's choosing. The challenge is how to interpret Article 2.29(1) in a manner that respects the clear intention of the CPTPP to permit various systems of allocation mechanisms, while also not permitting an overly restrictive system that prevents even the opportunity to import up to the full amount of the TRQ duty free. The current operation of the pools in Canada's allocation mechanism oversteps the bounds of what is permissible.

125. In addition, Canada argues that even if the Panel accepts New Zealand's interpretation of the scope of Article 2.29(1) as including the allocation process and thus Canada's pooling system, there is no link between pooling and the fact that some TRQs are underfilled significantly. That some TRQs operating with a pooling system (for example, the butter TRQ) are fully filled is proof that there is no causal link between quota utilisation and the pooling system. Indeed, Canada has provided extensive research papers<sup>106</sup> that suggest that factors such as distance to market, the perishable nature of the product, transport delays caused in part by COVID, consumer preferences for domestic product and competition from other dairy exporters are the reason for lower fill rates for certain TRQs. Furthermore, Canada contends that New Zealand must demonstrate a *prima facie* case that it is pooling, not these other factors that lead to underfill.

126. New Zealand is clear that it is not arguing that Canada's measures are causing a nullification and impairment of benefits under the Agreement. Nor is it required to do so. Article 28 of the CPTPP allows a Party to initiate a dispute when a Party considers that an actual or proposed measure of another Party is or would be inconsistent with an obligation of the CPTPP irrespective of whether the measure is causing a loss of access. This makes sense given that it is impossible to prove what market access would have occurred if it were not for any particular measure. In other words, New Zealand's challenge is not based on a claim that the pooling system is the cause of its limited access to the Canadian market; it is challenging the Canadian pooling system as depriving its importers of the opportunity to utilise TRQ quantities fully.

127. This is what New Zealand has alleged. Proof of a causal link between a loss of benefits and the measure of a Party that infringes the CPTPP is only required when a Party is making a case in which it does not allege that a measure of another Party is inconsistent with the Agreement, but nevertheless its benefits are impaired.

128. Furthermore, the obligation in Article 2.29(1) is not one of result, that is full utilisation of the TRQ, but rather it is one of "opportunity" to utilise fully. To be clear, the Panel does not find that Article 2.29(1) creates an obligation to ensure that the entire TRQ is used by importers. Underfill of a quota can be caused by many factors as Canada highlights. However, Article 2.29(1) is about the opportunity to utilise TRQ quantities fully and not about actual full utilisation.

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<sup>106</sup> Initial Written Submission of Canada, Exhibits CDA-1, CDA-2.

## VII. Claims Concerning Article 2.30(1)(a)

129. Also in dispute are the “eligibility criteria” provisions in each of Canada’s 16 Notices to Importers that limit eligibility to apply for a quota allocation to processors, or further processors or distributors. For New Zealand, the inclusion of such additional eligibility requirements and the resulting exclusion of those that are not processors, further processors, or distributors is inconsistent with Article 2.30(1)(a). For Canada, the Notices are part and parcel of its right to design and implement an allocation mechanism, including eligibility requirements for who is eligible to apply for a quota allocation, of its choosing, subject to the constraints of Section D, including, in particular Article 2.30(1).

130. To recall, Article 2.30(1)(a) provides:

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

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

131. There is no disagreement between the disputing parties that Canada has chosen to employ “an allocation mechanism” that meets Article 2.30(1)’s definition.<sup>107</sup> New Zealand’s complaint is that in doing so, Canada is not permitted under Article 2.30(1)(a) to impose any eligibility requirements on who can apply for a quota allocation beyond those set out in the CPTPP, specifically in Appendix A of Canada’s Annex 2-D Tariff Schedule, which does not include references to processors, further processors, or distributors.

132. Canada asserts that Article 2.30(1)(a)’s restrictions on eligibility criteria are tied to Canada’s own domestic requirements. While acknowledging that Canada must comply with Paragraph 3(c) of its Tariff Schedule, Canada contends that the discretion it is provided under the CPTPP when designing and implementing an allocation mechanism allows it to impose additional requirements, provided they are consistent with the constraints contained in Section D, particularly Article 2.30(1).<sup>108</sup>

133. Therefore, the basic question before the Panel is whether the eligibility requirements established in the CPTPP (set out in Appendix A to Canada’s Tariff Schedule) constitute the entirety of criteria that Canada is permitted to employ in deciding who is eligible to apply for a quota allocation or whether Article 2.30(1)(a)’s reference to “the importing Party’s eligibility

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<sup>107</sup> CPTPP, art. 2.30, fn. 18.

<sup>108</sup> Rebuttal Submission of Canada paras. 145-48.

requirements” provides a degree of discretion to Canada to go beyond what is in its CPTPP Tariff Schedule.

### **A. New Zealand’s Arguments**

134. For New Zealand, Canada’s obligation under Article 2.30(1)(a) is to allow all persons who meet the eligibility requirements set out in Appendix A to Canada’s Tariff Schedules to apply and be considered for a quota allocation.<sup>109</sup> New Zealand reads the reference in Article 2.30(1)(a) to “eligibility requirements” to mean *only* the eligibility requirements that are set out in Canada’s Tariff Schedule.

135. New Zealand then examines Canada’s Tariff Schedule, particularly Paragraph 3(c) of Appendix A, and finds that Canada has limited itself to employing three eligibility criteria, limiting eligible applicants for quotas to 1) residents of Canada, 2) who are active in the applicable Canadian dairy sector, and 3) who are compliant with the EIPA and its regulations. For New Zealand, any attempt by Canada to add new or additional eligibility requirements would be inconsistent with both Article 2.30(1)(a) and Article 2.29(2)(a).<sup>110</sup>

136. New Zealand then examines Canada’s 16 Notices to Importers, noting that 11 of them require that an applicant be a “processor,” a “further processor,” or a “distributor” in order to be eligible for an allocation, four require that an applicant be either a “processor” or a “distributor” while one Notice limits eligible applicants to those that are a “processor” or a “further processor.”<sup>111</sup> New Zealand then concludes that applicants that meet the eligibility criteria under Canada’s Appendix A such as retailers, but do not meet these additional eligibility criteria contained in Canada’s Notices to Importers, are not able to apply for or be considered for a quota allocation, which for New Zealand is contrary to Canada’s obligation under Article 2.30(1)(a).

### **B. Canada’s Arguments**

137. For Canada, the important interpretative element is what is meant by the phrase “fulfils the importing Party’s eligibility requirements” in Article 2.30(1)(a). Canada notes that Article 2.30(1)(a) does not contain any reference to a Party’s Tariff Schedule; it refers only to the importing Party’s eligibility requirements, which Canada interprets to be the eligibility requirements established by the Party as part of its discretion to employ an allocation mechanism rather than a FCFS system.<sup>112</sup> For Canada, the use of the possessive “Party’s eligibility requirements” indicates

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<sup>109</sup> Rebuttal Submission of New Zealand paras. 87, 93; Opening Statement of New Zealand paras. 176-77.

<sup>110</sup> Rebuttal Submission of New Zealand para. 91.

<sup>111</sup> First Written Submission of New Zealand para. 111.

<sup>112</sup> Initial Written Submission of Canada para. 164; Opening Statement of Canada at the Hearing para. 38.

that Article 2.30(1)(a) covers the Party's own eligibility requirements established as part of its own allocation mechanism.<sup>113</sup>

138. In discussing the eligibility criteria that are contained in Paragraph 3(c) of Appendix A to Canada's Tariff Schedule, Canada contends that the requirements contained therein are the mandatory minimum but not the only criteria that Canada may apply. Canada accepts that it is not entitled to select market actors that do not meet the Paragraph 3(c) criteria, but so long as the market actors chosen by Canada remain within the limits of Paragraph 3(c), nothing prevents Canada from imposing additional criteria for who is eligible to apply for an allocation of its TRQs – including by limiting TRQ eligibility to specific market actors such as processors, further processors, and distributors.<sup>114</sup>

139. Canada finds support for its interpretation that the three criteria in Paragraph 3(c) are not exhaustive in the final sentence in Paragraph 3(c), which states that “[i]n assessing eligibility, Canada shall not discriminate against applicants who have not previously imported the product subject to a TRQ but who meet the residency, activity and compliance criteria.” For Canada, if Paragraph 3(c) exhaustively defined who is eligible for an allocation, there would have been no need to include this final sentence in Paragraph 3(c), as Canada would already be prevented from restricting TRQ eligibility to established importers.<sup>115</sup>

140. Canada also notes that Paragraph 3(c) does not contain the word “any” or “every” in its Tariff Schedule commitment to “allocate its TRQs each quota year to eligible applicants,” meaning that it has not committed to permit *every* resident of Canada active in the dairy sector who is compliant with the EIPA to apply for a quota allocation.

141. Canada finds support for its contention that it retained discretion to administer its TRQs using sub-limits by noting it could not administer its TRQ system effectively or consistently with other obligations in Section D if it was required to permit all residents of Canada active in the dairy sector to apply for a quota allocation. Canada presented data that under its current eligibility criteria, there are approximately 6,900 potential eligible applicants – 397 dairy processors, 6,165 further processors, and 338 distributors. But if Canada were not permitted to utilise the eligibility criteria included in its Notices to Importers, it would increase the number of eligible allocation applicants by a factor of 25 and that these hundreds of thousands of additional applicants would make it impossible for Canada to administer its TRQs in a timely manner or to meet other requirements, such as the Article 2.32(4) obligation to publish on its website the name and address of all allocation holders.

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<sup>113</sup> Rebuttal Submission of Canada para. 112.

<sup>114</sup> Initial Written Submission of Canada para. 175.

<sup>115</sup> Initial Written Submission of Canada para. 180.

142. Finally, Canada responds to New Zealand’s contention that the term “eligibility requirement” must have the same meaning in Article 2.30(1)(a) as it does in Article 2.29(2)(a) by noting that the two provisions are directed at entirely different entities—with Article 2.29(2)(a) focused on the conditions, limits, or eligibility requirements for *goods* to enter a market subject to the lower tariff rates of a TRQ, while Article 2.30(1)(a) is directed at *who* is eligible to apply for a quota allocation.

### C. The Panel’s Analysis

143. The Panel finds that Canada’s inclusion of additional criteria for eligible applicants for a quota allocation within its Notice to Importers falls within the discretion provided to Parties employing an allocation mechanism and is not inconsistent with Canada’s obligations under Article 2.30(1)(a).

144. Article 2.30(1)(a) provides:

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

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

145. New Zealand’s claim that, by including eligibility criteria in its Notices to Importers that go beyond the requirements contained in Canada’s Tariff Schedule, Canada has breached Article 2.30(1)(a), rests on two basic propositions, both of which the Panel rejects: 1) that Article 2.30(1)(a)’s reference to “eligibility requirements” must be read as a reference to a Party’s Tariff Schedule as the exclusive source elucidating such requirements, and 2) that the term “eligibility requirements” must have the same meaning in Article 2.30(1)(a) that it does in Article 2.29(2)(a).

146. For the Panel, the critical phrase for interpretation is “the importing Party’s eligibility requirements,” as there is no disagreement in the context of Article 2.30(1)(a) as to the meaning of the term “fulfils” (to achieve, to realize (a purpose, plan, end); to satisfy, to meet (a requirement, condition, standard, etc.); to perform (a function)).<sup>116</sup> Nor is there any disagreement as to what it means to apply and to be considered for a quota allocation under the TRQ. Therefore, the question before the Panel is whether “the importing Party’s eligibility requirements” must be read as New Zealand suggests, to conclude that Article 2.30(1)(a) obliges importing CPTPP Parties to ensure that any person or entity that meets the eligibility requirements *set out in that Party’s Tariff Schedule* is able to apply and to be considered for a quota allocation.

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<sup>116</sup> First Written Submission of New Zealand para. 104, quoting Oxford English Dictionary Online, definition of ‘fulfil’, entry 4.c (Exhibit NZL-33).

147. Considering Article 2.30(1)(a) in the context of other provisions of Article 2.30, the Panel considers that the absence of any reference in Article 2.30(1)(a) to the Party's Tariff Schedule is significant. If the Parties had intended for the Tariff Schedule to be the one and only place where a Party that has chosen to employ an allocation mechanism must set down its eligibility requirements, a specific reference to the Tariff Schedule needed to have been included.

148. Throughout the entirety of the Section D provisions governing TRQs, the text draws a distinction between the Tariff Schedule (Schedule to Annex 2-D (Tariff Commitments)) and the information and procedures for administering the TRQs. For example, the opening paragraph makes it clear that all TRQs—meaning the tariff rates for those goods that enter within the quota amount, the tariff rates applicable to out-of-quota goods, and the quantity of the quota for each item subject to a TRQ—must be spelled out in a Party's Schedule and included in Annex 2 to the CPTPP (Article 2.28(1)). The explicit references to a Party's Tariff Schedule in Article 2.30(2)'s requirements applicable during the first year of a TRQ are directly tied to quota *amounts* (the Party shall make available to quota applicants . . . *the quota quantity* established in its Schedule to Annex 2-D (Tariff Commitments))” and “The Party shall make available *the entire quota quantity* established in its Schedule to Annex 2-D (Tariff Commitments). . . .” Similarly, footnote 19 to Article 2.30(4), when it explains the rights of Parties to apply different in-quota rates of customs duties to CPTPP Parties than it does under the WTO, references a Party's Schedule to Annex 2-D (Tariff Commitments) as the place where the in-quota tariff rates will be set out.

149. These references to the Tariff Schedules and the rates of duty and quota amounts applicable over a 19-year period stand in contrast to the treaty text references to information and administrative procedures regarding the implementation of the TRQs (“Each Party shall ensure that its procedures for administering its TRQs are made available to the public. . . .” “The Party administering a TRQ shall publish all information concerning its TRQ administration . . . on its designated publicly available website at least 90 days prior to the opening date of the TRQ” (Article 2.28)). These provisions on administrative procedures do not reference the Tariff Schedule and do not appear to contemplate that all such provisions would be included in Parties' Tariff Schedules. The fact that the Parties are given the time up until 90 days before a given quota-year opens to publish their eligibility requirements and application procedures and deadlines suggests agreement that administrative procedures and the timing of quota administration requires more flexibility than 19-year Tariff Schedules can provide.

150. Importantly for the Panel is the requirement in Article 2.28(3) that “the Party administering a TRQ shall publish its TRQ administration, including the size of quotas and eligibility requirements on its designated publicly available website at least 90 days prior to the opening date of the TRQ concerned.” The inclusion of “eligibility requirements” in the list of what Parties must post on-line under a 90-day time frame suggests that the Parties did not contemplate that Tariff Schedules would be the only place where eligibility requirements would be set forth. Article 2.28(3)'s requirement that application processes, deadlines, and methodologies must be published at least 90 days prior to the opening date of a quota suggests that those type of administrative and procedural details would not be bound into a Party's Tariff Schedule. The decision before the

Panel is whether the additional eligibility criteria in Canada’s Notice to Importers are more akin to the types of procedural and administrative details that Parties, particularly Parties choosing to employ an allocation mechanism, have some leeway to determine on an annual basis or whether they lie closer to the tariff rates and quota amounts that must be bound into a Party’s Tariff Schedule.

151. Canada claims that the possessive “Party’s eligibility requirements” in Article 2.30(1)(a) and the discretion provided to Parties using an allocation mechanism, entitle it to determine the details of the eligibility criteria within its allocation mechanism for itself. The Panel agrees that the use of the possessive “Party’s” in Article 2.30(1)(a) must be given meaning. It is a singular “Party” whose eligibility requirements must be adhered to, which suggests that the CPTPP Parties were providing some leeway for those individual Parties that chose to employ an allocation mechanism to craft their own eligibility requirements, subject always to the abiding constraints in Section D, including the publication requirements noted in Article 2.28(3) and the substantive constraints of Article 2.30(1).

152. Nor does the Panel find that the specific text in Canada’s Tariff Schedule commits Canada to opening its TRQ application process to every resident of Canada active in the relevant dairy sector. Paragraph 3(c) states that “Canada shall allocate its TRQs each quota year to eligible applicants. An eligible applicant means a resident of Canada, active in the applicable Canadian dairy, poultry or egg sector ... that is compliant with the [EIPA].” For the Panel, the absence of the word “any” or “every” before the phrase “eligible applicants” provides Canada with some measure of discretion to add further details to who is an eligible applicant, provided it does so consistent with its Section D obligations.

153. To accept New Zealand’s argument that Canada can add nothing to the eligibility limitations provided in its Tariff Schedule would be to deprive Canada of the discretion that it has under Section D to determine the details of its allocation mechanism, including eligibility requirements, application procedures, application deadlines, and application methodologies, so long as its allocation system is consistent with the requirements of Section D and those details are published at least 90-days in advance of the opening of a given TRQ period.

154. In coming to its conclusion that Canada’s Notices to Importers are not inconsistent with Article 2.30(1)(a), the Panel notes that it is not suggesting that Canada, or any Party using a TRQ allocation mechanism, has unfettered discretion to adopt any manner of eligibility criteria that it wants under the guise of the possessive “importing Party’s eligibility requirements.” Canada is subject to all the disciplines in Section D, only one of which is a prohibition on limiting access to the TRQ to processors. In addition, Canada cannot adopt eligibility criteria that would contravene the requirements in its Tariff Schedule, such as excluding access to persons who have not previously imported the product subject to the TRQ or permitting access to those who are not Canadian residents active in the dairy sector and compliant with the EIPA.

155. The Panel’s examination of the second proposition underlying New Zealand’s claims under Article 2.30(1)(a)—that the term “eligibility requirements” in Article 2.30(1)(a) must have the same meaning and be referring to the same eligibility requirements as Article 2.29(2)(a) is set forth below in its assessment of New Zealand’s separate claims that Canada’s Notice of Importers are inconsistent with Article 2.29(2)(a).

### **VIII. Claims Concerning Article 2.29(2)(a)**

156. New Zealand contends that the Notices to Importers are inconsistent with Article 2.29(2)(a) because access to the quota within each pool is limited to a particular type of entity (“processors,” “further processors,” or “distributors”), and because the requirement that an entity fit within one of the pools in order to be able to access quota has the effect of introducing a new eligibility requirement.

157. Canada’s contention is that its pooling system as set forth in its Notices to Importers falls outside of the scope of 2.29(2)(a) because that system is directed at who can apply for and receive a quota allocation, while 2.29(2)(a) speaks to what goods may be imported under a TRQ once a quota allocation has been granted.

158. Thus, the dispute over the meaning of Article 2.29(2)(a) is two-fold: whether the application for an allocation phase of TRQ administration is included within the scope of “utilisation of the TRQ for importation of a good” as used in Article 2.29(2)(a) and whether the provision disciplines all conditions, limits, and eligibility requirements that a Party applies, or only those that are product-focused. Therefore, the dispute is over the scope and applicability of Article 2.29(2)(a) to Canada’s pooling system and the meaning of the phrase “utilisation of a TRQ for the importation of a good.”

159. Article 2.29(2)(a) provides:

Article 2.29: Administration and Eligibility

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(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).<sup>17</sup>

160. Article 2.29(2)(a) includes a footnote that reads:

For greater certainty, this paragraph shall not apply to conditions, limits or eligibility requirements that apply regardless of whether or not the importer utilises the TRQ when importing the good. (footnote 17)



## A. New Zealand's Arguments

161. New Zealand contends that each of Canada's pools (processor, further processor, and distributor) as set out in Canada's Notices to Importers introduce new limits and eligibility requirements on the utilisation of a TRQ beyond those set out in Canada's Tariff Schedule to Annex 2-D. The pools created under the Notices for each of Canada's 16 dairy TRQs are each a new limit on the utilisation of that TRQ because they prevent entities other than those in the pool from being able to access or use the quota.<sup>117</sup>

162. New Zealand also considers that these limits have the collective effect of introducing new eligibility requirements because they require quota applicants to be a particular type of business and that requirement was not included in Canada's Annex 2-D Tariff Schedule.<sup>118</sup>

163. New Zealand argues that the phrase "utilisation of a TRQ for the importation of a good" applies to all phases of the process of utilising a quota: obtaining an allocation, importing the product into market, and claiming preferential treatment.<sup>119</sup> Therefore, Canada's Notices to Importers, which address the eligibility to apply for a quota allocation are part of obtaining an allocation and are included within the ambit of Article 2.29(2)(a)'s prohibition on new limits. If Canada wished to introduce its pooling system as part of its allocation mechanism, it was required to use the process for the introduction of new limits and eligibility requirements set out in Article 2.29(2)(b)-(c).<sup>120</sup>

164. For New Zealand, the term "eligible" and "eligibility" are used consistently in Section D to refer to the eligibility of importers to apply for an allocation.<sup>121</sup> Thus, the reference to "utilisation of a TRQ" in Article 2.29(2)(a) must mean that the scope of the provision includes the allocation phase. Eligibility for an allocation is a people-focused term so the provision must apply to more than product-focused conditions, limits, and eligibility requirements.

165. For New Zealand, the relationship between Articles 2.29 and 2.30 means that the reference in Article 2.30(1)(a) to "eligibility requirements" is a reference to the eligibility requirements set out in a Party's Tariff Schedule or introduced through the Article 2.29(2) consultation and agreement process; there can be no other eligibility requirements.

166. Finally, New Zealand argues that Canada's limited interpretation of the scope of Article 2.29(2)(a) as applying only to how an allocation can be used *after* it is granted would create a

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<sup>117</sup> First Written Submission of New Zealand para. 95; Opening Statement of New Zealand para. 164.

<sup>118</sup> First Written Submission of New Zealand para. 97; Opening Statement of New Zealand para. 167.

<sup>119</sup> First Written Submission of New Zealand para. 90.

<sup>120</sup> First Written Submission of New Zealand paras. 96, 99; Opening Statement of New Zealand paras. 155-59.

<sup>121</sup> Rebuttal Submission of New Zealand para. 66.

loophole that renders the prohibition on imposing new conditions, limits, eligibility requirements largely meaningless.<sup>122</sup>

## **B. Canada's Arguments**

167. Canada argues that New Zealand's claims fall outside the scope of Article 2.29(2)(a) altogether. According to Canada, Article 2.29(2)(a) is applicable only to product-focused conditions, limits, and eligibility requirements and only those that relate to the actual use of a TRQ when importing a good.

168. Canada explains the term "utilisation of a TRQ for the importation of a good" does not include the allocation phase of TRQ administration because the word "utilisation" in this context emphasizes the actual use of the TRQ for the importation of a good.<sup>123</sup>

169. This interpretation of the scope of Article 2.29(2)(a) is supported by the items in the illustrative list it provides (specification or grade, end use, package size), which are all product focused. Furthermore, because Canada's pooling system in its Notices to Importers are entirely directed at who is eligible to apply for a quota and not any product-focused requirements, the pooling system falls outside the scope of 2.29(2)(a).

170. Canada considers that utilisation of the TRQ does not always require an allocation because there is no allocation when a FCFS system is used to import a product using the TRQ duty-free treatment. The act of allocating does not take place in a FCFS system as it automatically permits importation (or licenses for importation) to the first goods to arrive. Since Article 2.29 applies to all TRQ administration systems, the phrase "utilisation of the TRQ for importation of a good" must be a reference to importation under an FCFS system or an allocation mechanism. The allocation phase does not take place under a FCFS system so the only way Article 2.29(2)(a) could apply to both systems is if the allocation phase is not included in the phrase "utilisation of a TRQ for the importation of a good."

171. Article 2.29(2)(a) does not expressly refer to "an allocation" and that term should not be read into the phrase "utilisation of a TRQ for the importation of a good" such that the allocation process is subject to this provision.<sup>124</sup>

172. The term "eligibility requirement" is qualified by the phrase "on the utilisation of a TRQ for the importation of a good" and thus should be interpreted as covering product-focused requirements that must be met for a good to be eligible for actual importation.<sup>125</sup> "Eligibility"

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<sup>122</sup> Rebuttal Submission of New Zealand para. 69.

<sup>123</sup> Rebuttal Submission of Canada para. 77.

<sup>124</sup> Rebuttal Submission of Canada para. 84.

<sup>125</sup> Rebuttal Submission of Canada para. 91.

means different things in Article 2.29(2)(a) than elsewhere in Section D depending on how it is qualified in the specific text and the overall context of each obligation.<sup>126</sup>

### C. The Panel's Analysis

173. The Panel finds that Canada's Notices to Importers are not inconsistent with Article 2.29(2)(a) because they do not introduce new limits or eligibility requirements on the utilisation of Canada's dairy TRQs for the importation of a good that fall within the scope of this provision. For the reasons set out below, the Panel finds that Article 2.29(2)(a) applies to product-focused requirements on the use of the TRQ for the actual importation of goods, not to person-focused eligibility requirements applicable to who may apply for an allocation. Product-focused requirements, such as those end-use requirements that Canada has set out in its Tariff Schedule, Appendix A and replicated in its Notices to Importers, would fall within the scope of Article 2.29(2)(a), but they are not the subject of this dispute.

174. The Panel begins by examining the context in which the constraints in Article 2.29(2) appear, within Article 2.29 and in relationship to Article 2.30(1)(a), both positioned as they are in Section D. The Panel considers that Section D is structured such that each numbered paragraph is distinct, albeit in the same general category established by the title of the Article, from the numbered paragraphs that follow. To the extent that a particular numbered paragraph includes additional obligations or requirements, they are included in lettered subparagraphs rather than as new numbered paragraphs such that each paragraph does not have overlapping obligations.

175. Viewed with this structure in mind, it is clear that the obligation in Article 2.29(1) to allow importers the opportunity to fully utilise TRQ quantities and 2.29(2)'s prohibition on introducing new limits, conditions, or eligibility requirements must be distinct and therefore should set out different obligations. If New Zealand's interpretation were accepted, Articles 2.29(1) and 2.29(2)(a) would be covering virtually the same territory. They would both be requiring a Party to only use the eligibility of person requirements set out in that Party's Tariff Schedule to allow as much of the product subject to a TRQ to be imported as possible. This is effectively saying the same thing twice and not giving distinct meaning to each Article.

176. Turning to the meaning of certain individual words of Article 2.29(2)(a), the Panel notes that there is not a significant difference between the disputing parties on the definitions applicable to each; rather the disagreement is over what the meaning of specific words is in the context of this provision and in the context of Article 2.29 and Section D as a whole.

177. Thus "new, additional and beyond" (over and above, added extra), "limit" (a bound which may not be passed or beyond which something ceases to be possible), "condition" (something

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<sup>126</sup> Rebuttal Submission of Canada para. 87.

demanded or required as a prerequisite to the granting of something), “eligibility” and “requirement” (conditions that must be met or complied with in order to be considered or chosen for a particular benefit), “utilisation” (the fact of being utilised which means to make or render useful) are largely accepted as the meaning of individual words, with Canada stressing what New Zealand has noted that “condition, limit or eligibility requirement” are not mutually exclusive. As such, they apply to “the array of restrictions that a Party could impose on the utilisation of a TRQ for the importation of a good.”<sup>127</sup>

178. Where the disputing parties diverge is what these terms mean when put together in Article 2.29(2)(a) and when seen in the light of Section D as a whole —most importantly, whether the scope of Article 2.29(2)(a) extends to include eligibility requirements on the allocation phase of the TRQ process and whether the conditions, limits, and eligibility requirements are restricted to those that are product-focused.

179. With respect to applicability of Article 2.29(2) to the allocation phase, the Panel does not consider that the phrase “utilisation of a TRQ for importation of a good” necessarily includes the allocation phase of the TRQ process. The Panel concluded above that “the opportunity to utilise TRQ quantities fully” in Article 2.29(1) should be interpreted broadly to include all stages of the process for receiving an allocation and importing a good under a TRQ. However, the Panel considers that Article 2.29(2) is a distinct obligation, with its focus on the actual stage of importation, which can be seen most clearly by the addition of the words “for importation of a good” after utilise/utilisation of the TRQ.

180. Unlike Article 2.29(1), Article 2.29(2)(a) does not use the term “opportunity” to utilise a TRQ, but rather the actual utilisation of it to import a good subject to the in-quota rates of duty, along with an illustrative list of product-focused characteristics applicable to goods—specification or grade, permissible end-use of the imported product, or package size. These product-related items in the illustrative list are applicable at the importation stage of the TRQ process, not at the allocation stage. Moreover, footnote 17’s explicit exclusion of conditions, limits, or eligibility requirements that apply regardless of whether a product is seeking tariff-free treatment under a TRQ is clearly not a reference to any allocation stage.

181. The Panel would note that while New Zealand is correct that you cannot bring product in under TRQ without an allocation (defined as a share of the TRQ assigned to an importer), it is not correct to conclude as New Zealand does that every time the words “utilisation of the TRQ” appear they must refer to all three stages of the TRQ process (obtaining an allocation, importing goods into market, and claiming preferential tariff rates). Clearly, if the utilisation of the TRQ is followed with words specific to one or the other stages of TRQ use, then the term “utilise” is circumscribed. For example, one could imagine a provision, “To ensure full utilisation of a TRQ a Party must not close its ports of entry for products imported under a TRQ for unreasonable periods of time.” In

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<sup>127</sup> Initial Written Submission of Canada para. 135.

such a clause, utilisation has nothing to do with the allocation phase. As the Panel has noted, there are several references in Article 2.29(2)(a) that suggest “utilisation of a TRQ” in Article 2.29(2)(a) does not include the allocation process.

182. The second major difference between the disputing parties’ interpretation is over whether the reference in Article 2.29(2)(a) to conditions, limits, and eligibility requirements is solely product-focused. The Panel approaches its interpretation of this aspect of 2.29(2)(a) bearing in mind the fundamental question of how it is distinct from or provides additional obligations to what is already covered in Article 2.29(1). Otherwise, Article 2.29(2)(a) would be either redundant or a subset of Article 2.29(1) which it cannot be given the structure followed in Section D as outlined above in paragraph 174.

183. Canada’s interpretation permits the two articles to remain distinct and cover different territory because Article 2.29(1) addresses obligations relating to persons – importers – and Article 2.29(2)(a) addresses obligations relating to the importation of goods. Persons (importers) are the key focus at the application phase and thus the reference to the utilisation of TRQ quantities in Article 2.29(1) would need to apply to the allocation stage. However, Article 2.29(2)(a) applies to the good imported and thus the focus is on the actual importation phase. This understanding of the scope of the two articles conforms with the structure of Section D that the Panel observes.

184. For the Panel, Article 2.29(2)(a)’s product focus can be discerned from the phrase “utilisation of a TRQ for importation of a good,” followed by the illustrative list of product-focused characteristics that are applicable to goods, not persons—specification or grade, package size, permissible end uses. That Article 2.29(2) refers to product-focused characteristics is further reinforced by footnote 17, which the disputing parties agree is intended to exclude from coverage generally applicable product-focused requirements presumably such as phytosanitary regulations.<sup>128</sup> Indeed, one of the examples specified in Article 2.29(2)(a) of a condition, limit, or eligibility requirement is “permissible end-use.” In Canada’s Tariff Schedule for milk, TRQ-CA1, there is an end-use requirement that:

Up to 85 per cent of the TRQ quantities set out in subparagraph (a) shall be for the importation of milk in bulk (not for retail sale) to be processed into dairy products used as ingredients for further food processing (secondary manufacturing).

185. At the hearing, Canada pointed out that this was an end-use requirement and contrasted that with the pooling system that deals with who has access to the TRQ.<sup>129</sup> Similar product-focused size or end-use requirements are included in Canada’s Tariff Schedule for yogurt and buttermilk,

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<sup>128</sup> Initial Written Submission of Canada para. 148; Official Transcript of the Hearing, Public Session of 14 June 2023 p. 216.

<sup>129</sup> Official Transcript of the Hearing, Public Session of 14 June 2023 pp. 137-40.

concentrated milk, industrial cheese, and butter. Under Canada’s interpretation of Article 2.29(2)(a) it was required to include such requirements in its Tariff Schedule and did so.

186. We note that at least one other party at the negotiating table also included a product-focused requirement in its Tariff Schedule. While the United States did not become a Party to the CPTPP, its draft of its TRQ Tariff Schedule includes a labelling requirement for use of the TRQ for the importation of organic butter for the country-specific TRQ for New Zealand that provides:

(c) The United States shall require that, in order to be eligible to be imported into the United States free of duty pursuant to this paragraph, a good be labeled as “organic” and meet the requirements set out in U.S. regulations to be sold, labeled, or represented as “organic” in the United States, including those requirements related to the certification of operations involved in the production or handling of the good.<sup>130</sup>

187. These examples illustrate that parties negotiating the provisions of the TPP that became the CPTPP considered that there was a place in the Tariff Schedules for limits, conditions, or eligibility requirements that relate only to product characteristics and not to the person importing the product. The Panel does not therefore agree with New Zealand’s central premise that eligibility is used throughout Section D to refer to the eligibility of individual importers and not to product-focused eligibility requirements.

188. The Panel notes that these end-use requirements were also included in Canada’s Notices to Importers but were set forth in a separate section from the Notices’ “eligibility criteria” which apply to persons (“You are eligible to apply if you are a [processor] [further processor] [distributor]”). As such, both Canada’s Tariff Schedule and its Notices to Importers include separately denoted eligibility requirements for products to be imported and for persons to apply for a quota allocation.

189. Furthermore, the specific reference in Article 2.29(2)(a) to the Tariff Schedule further grounds the product-focus of the provision. Tariff Schedules are about products, tariff levels for the product, and in the case of TRQs, what quantity of product can be imported at preferential tariff rates. None of these key attributes of a TRQ are person-focused.

190. The distinctions noted above between the scope of Articles 2.29(1) and 2.29(2) underscore the product-focus of Article 2.29(2). The use of the word “opportunity” in Article 2.29(1) refers to rights that must be granted to persons, specifically importers, to have the opportunity to utilise TRQ quantities fully. Opportunity is necessarily a person-focused possibility. Goods do not have opportunities.

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<sup>130</sup> TPP, Annex 2-D, Appendix A: Tariff Rate Quotas of the United States para. 34(c).

191. The *ejusdem generis* principle does not strictly apply in the way Article 2.29(2)(a) is drafted as it is a series of words further elaborated upon by a list of specific examples, nor is it necessary to utilise *ejusdem generis* to conclude that Article 2.29(2)(a) addresses product-focused characteristics applicable at the time of importing the product, which is necessarily after an allocation has taken place.

192. In examining the words “eligibility requirement” or “eligibility requirements” as they appear in three paragraphs of Section D (Article 2.28(3), Article 2.29(2), and Article 2.30(1)), the Panel notes that the term “eligibility requirements” appears by itself in Articles 2.28(3) and Article 2.30(1), whereas throughout Article 2.29(2), the term “eligibility requirement” always appears as part of the phrase “condition, limit or eligibility requirement.” The phrase must be given meaning, including the meaning that each term imparts to the other, and must be read in the context of the phrase “on the utilisation of a TRQ for the importation of a good” since that is what the “condition,” “limit,” or “eligibility requirement” applies to.

193. For the Panel, the terms “condition,” “limit,” and “eligibility requirement” are not mutually exclusive. As New Zealand noted, “eligibility requirements” means *conditions* that must be met or complied with in order to be considered or chosen for a particular benefit.<sup>131</sup> But at the same time, they cannot be read as meaning the exact same thing, or else there would be no reason to consistently include all three terms in Article 2.29(2). For the Panel, the use of these three terms as qualified by “on the utilisation of a TRQ for the importation of a good” means that the Parties intended to capture the variety of forms and wide array of restrictions that can be imposed on the importation of goods qualifying under a specific TRQ, as noted in the illustrative list included in Article 2.29(2).

194. Moreover, in comparing the terms “eligibility requirement” or “eligibility requirements” in the three paragraphs of Section D in which the terms appear (Article 2.28(3), Article 2.29(2), and Article 2.30(1)), the Panel notes that both the context and the use of the plural—“eligibility requirements” in Articles 2.28(3) and 2.30(1) in contrast to the use of the singular “eligibility requirement” in Article 2.29(2) suggest that the phrases do not have the same meaning in the context of Article 2.29(2)’s reference to the utilisation of a TRQ for the importation of a good. Article 2.29(2) is addressed to the requirements related to the importation of a good under a single TRQ, while the references in Article 2.28(3) and 2.30(1)(a) are tied to the process for administering and allocating quotas, with the reference in Article 2.30(1)(a) expressly tied to eligibility for who is eligible to apply for a quota allocation under any or all of the quotas (“any person of a Party that fulfils the importing Party’s eligibility requirements...”), and include a presumption that there will be more than one requirement for eligibility.

195. For the Panel, it makes sense that “eligibility requirement” in Article 2.29(2) would be used with a direct reference to a Party’s Tariff Schedule, since Article 2.29(2) is about the importation

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<sup>131</sup> First Written Submission of New Zealand para. 88; Rebuttal Submission of New Zealand para. 66.

of a good and Tariff Schedules are the place in which Parties are required to set forth their tariffs (and in the case of TRQs, quota levels) for specific goods. The absence of a reference to a Party's Tariff Schedule in Article 2.30(1)(a) is equally sensible, as that provision is not tied to any specific good or any tariff or quota level.

196. The Panel finds further support for its interpretation that the term “eligibility requirement” means one thing in the context of the importation of a good under Article 2.29(2) and a different thing in the context of specifying who is eligible to apply for a quota allocation under Article 2.30(1)(a), in the unnecessary redundancy that would be created if the terms were interpreted to have the same meaning. The Parties would not have needed to include Article 2.30(1)(a) if the only eligibility requirements that must be adhered to were those in a Party's Tariff Schedule or those introduced and adopted under Article 2.29(2)'s consultation and agreement provisions.

197. New Zealand rejects the possibility of eligibility requirements ever applying to a product and considers it an inherently person-applicable issue.<sup>132</sup> The Panel does not agree. Eligibility and eligibility requirements are not terms restricted to persons, nor are they clearly a discrete set of characteristics always separate from “conditions.” In the Panel's view, conditions and eligibility requirements are often synonymous.

198. The Panel also considers that goods may have eligibility requirements attached to the import of the product using the TRQ. The CPTPP text references specifications, grades, and package sizes as examples.<sup>133</sup> The Panel notes that a number of CPTPP Parties negotiated country-specific TRQs and set up country-specific eligibility requirements within their TRQ Schedules. To be eligible for a country specific TRQ, the *product* must meet the relevant rules of origin, not the importer. As such, rules of origin are clearly a product-focused requirement. The Panel does not therefore agree with New Zealand's central premise that eligibility is used throughout Section D to refer only to the eligibility of individual importers and therefore its use in Article 2.29(2)(a) must mean that Article 2.29(2)'s prohibition on new conditions, limits, or eligibility requirements applies to Canada's Notice to Importers.

199. The implications of the Panel's interpretation that Article 2.29(2)(a), including its use of the term “eligibility requirement” is product-focused, while the term “eligibility requirements” as it appears in Articles 2.30(1) and 2.28(3) and implicitly in Article 2.29(1) is person-focused, is that the person-focused eligibility criteria contained in Canada's Notices to Importers fall outside the scope of the goods-focused Article 2.29(2)(a) prohibition on new or additional eligibility requirements.

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<sup>132</sup> Rebuttal Submission of New Zealand paras. 66-68; Opening Statement of New Zealand para. 35.

<sup>133</sup> CPTPP art. 2.29(2)(a); Opening Statement of Canada at the Hearing para. 31.



## **IX. Remaining Claims Concerning Articles 2.28(2) and 2.30(1)(c)**

200. In light of the Panel's conclusions with respect to Articles 2.29(1) and 2.30(1)(b) that Canada has acted inconsistently with its obligations to allow importers the opportunity to utilise TRQ quantities fully and not to limit access to an allocation to processors, the substantive issues raised by New Zealand regarding the inconsistencies of Canada's measures with its CPTPP obligations have been addressed. It is not necessary for the resolution of this dispute for the Panel to address the remaining claims made by New Zealand under Articles 2.28(2) and 2.30(1)(c).

## **X. Conclusion of the Panel**

201. With respect to New Zealand's claims under Article 2.30(1)(b), the Panel finds that the pools created in Canada's Notices to Importers, by reserving priority access to its 16 dairy TRQs to processors, are inconsistent with Canada's obligation under Article 2.30(1)(b) to ensure that, unless otherwise agreed by the Parties, Canada does not limit access to an allocation to processors.

202. With respect to New Zealand's claims under Article 2.29(1), the Panel finds that Canada's Notices to Importers are inconsistent with Article 2.29(1) as they result in the administration of the TRQs under an allocation mechanism which includes a pooling system that operates to limit the opportunity for otherwise eligible applicants to use the TRQs fully.

203. With respect to New Zealand's claims concerning Article 2.30(1)(a), the Panel finds that Canada's inclusion of additional criteria for eligible applicants for a quota allocation within its Notice to Importers falls within the discretion provided to Parties employing an allocation mechanism and is not inconsistent with Canada's obligations under Article 2.30(1)(a).

204. With respect to New Zealand's claims concerning Article 2.29(2)(a), the Panel finds that Canada's Notices to Importers are not inconsistent with Article 2.29(2)(a) because they do not introduce new limits or eligibility requirements on the utilisation of Canada's dairy TRQs for the importation of a good that fall within the scope of this provision.

205. With respect to New Zealand's claims concerning Article 2.28(2) and Article 2.30(1)(c), the Panel finds that, in light of its conclusions that Canada has acted inconsistently with its obligations under Articles 2.29(1) and 2.30(1)(b), it is not necessary for the resolution of this dispute for the Panel to address the claims under Article 2.28(2) or Article 2.30(1)(c).

## **XI. Separate Opinion Regarding the Consistency of “Eligibility Requirements”**

206. I respectfully disagree with the majority opinion regarding the consistency of Canada’s eligibility requirements with the relevant provisions of the CPTPP, namely, Articles 2.29(2)(a) and 2.30(1)(a). I will present my thoughts with respect to both of these provisions in sequence, as the reasoning that I develop with respect to the first applies to the second claim as well. With respect to each claim, I will first briefly recap the claims and arguments advanced by the disputing parties that have already been presented above, before moving to provide my assessment thereof.

### **A. Claims and Arguments Concerning Article 2.29(2)(a)**

207. New Zealand, recall, has submitted two claims under Article 2.29(2)(a). First, that Canada has modified the eligibility requirements as they had been reflected in Appendix A of its Tariff Schedule, and, second, that it had also introduced new limits by allocating a certain percentage of the TRQs to the specified categories of eligible importers (processors, further processors, and distributors only).<sup>134</sup> Canada’s promise under the CPTPP had been reflected in Paragraph 3(c) of Appendix A:

(c) Canada shall allocate its TRQs each quota year to eligible applicants. An eligible applicant means a resident of Canada, active in the applicable Canadian dairy, poultry or egg sector, as appropriate, and that is compliant with the Export and Import Permits Act and its regulations.

208. New Zealand contends that Canada is in violation of Article 2.29(2)(a) of CPTPP,<sup>135</sup> but concedes that Canada retained the right to modify its original promise, and could have lawfully introduced “new” and/or “additional” limits, conditions, and eligibility requirements. To do this however, it should have followed the procedures established in Article 2.29(2)(b)-(d). Since Canada had not done so, it was in violation of Article 2.29(2)(a).<sup>136</sup>

209. Canada has argued that the New Zealand claim is not germane to the scope of Article 2.29(2)(a). In Canada’s view, this provision is concerned with the utilisation, and not with the allocation of TRQs, as its scope extends to the conditions under which the actual importation of goods will take place, and does not at all address the question of the eligibility of candidates to import: Article 2.29(2)(a) includes eligibility requirements relating to products imported under the

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<sup>134</sup> Canada has 16 TRQs in place, and they are all but five allocated to three categories of eligible importers, processors, further processors, and distributors. The distributor pool does not participate in the allocation of the TRQ for Industrial Cheese. The further processors pool does not participate in the allocation of the TRQs on Cheeses of All Types, Concentrated Mil, Milk, and Mozzarella and Prepared Cheese. The percentage of allocation for processors varies between 80-85%, for further processors, between 10-20%, and for distributors, between 10-15%.

<sup>135</sup> First Written Submission of New Zealand paras. 95, 97.

<sup>136</sup> First Written Submission of New Zealand para. 96, 99.

TRQs, and not to (potential) importers.<sup>137</sup> In other words, unlike Article 2.29(1), which is addressed to importers, Article 2.29(2)(a) concerns eligibility requirements germane to products only. Canada offered a concrete product-specific requirement to make the case that eligibility is not confined to persons (importers): package size.<sup>138</sup>

## 1. The Relevant Legal Provision

210. Article 2.29(2)(a) reads:

(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.

211. Canada's is a scope argument, in the sense that, in its view, the scope of Article 2.29(2)(a) does not address importer-related eligibility requirements as New Zealand has argued to be the case. Is it the case?

## 2. Analysis

212. First, I find it appropriate to place Article 2.29(2)(a) within its natural context, Section D of Chapter 2 of the CPTPP (entitled "Tariff Rate Quota Administration"), which comprises Articles 2.28-2.32.<sup>139</sup> The CPTPP system for administering TRQs shares with the ILA the same overarching objective: to strive to fully utilise the amounts committed in the TRQ. Sharing the same objective is the natural consequence of the explicit acknowledgment in Article 2.28(1) that Parties must implement and administer their TRQs in accordance with the ILA.

213. Article 2.28 is entitled "Scope and General Provisions", Article 2.29, "Administration and Eligibility", and Article 2.30, "Allocation". The obligations included in Article 2.28 are of generic nature (as the title of the Article indicates), and they are further detailed in the provisions that immediately follow. By virtue of Article 2.28, CPTPP signatories must adopt fair and equitable procedures, and ensure transparency with respect to the size of quotas, the eligibility requirements, and, in case the TRQ is allocated, the deadlines, the procedures for application, and the

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<sup>137</sup> Initial Written Submission of Canada para. 139.

<sup>138</sup> Initial Written Submission of Canada paras. 142-45, 147-48, 154-55; Opening Statement of Canada at the Hearing para. 31.

<sup>139</sup> The last two Articles (2.31 and 2.32) are entitled "Return and Reallocation of TRQs" and "Transparency," respectively, and are of no concern to the present dispute, as New Zealand has not presented claims under any one of these two provisions.

methodology for allocation and reallocation. Article 2.29(1) requests from CPTPP signatories to administer the quotas agreed:

... in a manner that allows importers the opportunity to utilise TRQ quantities fully.

214. To understand what “full utilisation” refers to, one needs to understand the function of TRQs. A TRQ establishes a limit on the quantity of a product that may be imported at a lower rate of duty, and places no limit on the amount of goods that may be imported at a higher rate. “Full utilisation” then, can only refer to the amount of goods imported at the lower duty, as there is no quantitative limit regarding the quantities imported at the higher rate of duty.

215. How “full utilisation” will be achieved, is further detailed in Article 2.29(2). This provision recognizes that contracting Parties know best what leads to full utilisation of TRQs, by acknowledging the role of contractual autonomy, as the explicit reference in Article 2.29(2)(a) to Schedule to Annex 2-D denotes. This Schedule includes all tariff commitments entered by CPTPP signatories. The assumption is that the agreed commitments, if administered in fair and equitable manner, will lead to full utilisation of the agreed TRQs. It is thus, not for anyone else (including the adjudicator) to second-guess the Parties’ appraisal regarding how full utilisation of the quota would take place. To be sure, there are corrective mechanisms, as original aspirations might prove futile over time. Article 3.5(j) of the ILA for example, which is legally relevant for the CPTPP by virtue of Article 2.28(1), requests from signatories to consider the import performance of applicants, and even consider the issuance of licences to new importers when (re-) allocating TRQs. But these are mere corrective mechanisms of a bargain that has been struck between the CPTPP signatories.

216. Consequently, Article 2.29(2)(a) is an expression of “pacta sunt servanda” (agreements must be kept), the foundational maxim of customary international law which has been embedded in Article 26 of the VCLT. It requests from CPTPP signatories to not undo unilaterally their promise. Recall, as per Article 2.28(1), all TRQs have been incorporated into the CPTPP. The negotiated TRQs, in other words, are integral part of the CPTPP.

217. There is thus, a logical sequence between Articles 2.28, 2.29(1), and 2.29(2): fair and equitable administration of TRQs entails the obligation to provide importers with the opportunity to utilise the TRQ fully, which requires from signatories to avoid the introduction of new or additional conditions, limits, and/or eligibility requirements. There is no overlap between 2.29(1) and 2.29(2) either. The first states the overall objective (full utilisation of TRQs), whereas the latter states that to do so, the contractual autonomy of CPTPP signatories must be preserved, and immunized against the risk of unilateral amendments. In fact, 2.29(2)(b)-(d) reinforce this conclusion, as they add a mechanism guaranteeing that rights of affected Parties have not been overlooked, whenever a change of the agreed terms is contemplated.

218. The analysis so far explains the relationship between the three provisions of interest to the present dispute, but does not provide the definitive answer to our question whether “eligibility

requirements” should be understood as importer- or product-focused. In what follows I explain, why Canada’s understanding of the term “eligibility requirements” in Article 2.29.2(a) presents the adjudicator with various interpretative problems, and hence must be discarded.

219. First, even though there is no agreed definition of the term in CPTPP, “eligibility requirements” have consistently been understood as importer-focused in the ILA, which, recall, is legally relevant. All ILA provisions that include reference to the term, leave no one in doubt that “eligibility requirements” are importer-focused, and nowhere in the body of ILA is “eligibility” linked to products. Here are the relevant ILA provisions:

Art. 1.4:

The rules and all information concerning procedures for the submission of applications, including the eligibility of persons, firms and institutions to make such applications

Art. 2.2(i):

any person, firm or institution which fulfils the legal requirements of the importing Member for engaging in import operations involving products subject to automatic licensing is equally eligible to apply for and to obtain import licences

Art. 3.5(e):

any person, firm or institution which fulfils the legal and administrative requirements of the importing Member shall be equally eligible to apply and to be considered for a licence.

220. Second, Canada itself, in its Notices to Importers, the unilateral acts that is, that it has issued in accordance with Article 2.28(3), which concern the administration of its TRQs, has consistently referred to the three categories of importers mentioned above (processors; further processors; distributors) and to nothing else, under the heading “Eligibility Requirements.” In fact, in all Notices to Importers for all TRQs that constitute the subject-matter of the present dispute, the term “Eligibility Requirements” covers importers only, and none of them addresses products. Consider for example, section 3 of Canada’s Notice to Importers for Cream Powders TRQ, Serial no. 1047,<sup>140</sup> which includes under the heading “Eligibility Criteria” the following words:

You are eligible to apply for an allocation.

221. The three categories, namely, “processors,” “further processors,” and “distributors” follow, and then what follows is the calculation of allocations for each group. The same is true for all TRQs (Other Dairy, 1003, October 1, 2020; Milk Powder, 1050, May 1, 2021; Butter, 1039, May 1, 2021; Skim Milk Powder, 1052, May 1, 2021; Ice Cream and Mixes, 1001, October 1, 2020;

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<sup>140</sup> First Written Submission of New Zealand, Exhibit NZL-10 p. 2.

Creams, 1041, May 1, 2021; Yoghurt and Butter Milk, 1008, October 1, 2020; Whey Powder, 1044, May 1, 2021; Industrial Cheese, 996, October 1, 2020; Mozzarella and Prepared Cheese, 997, October, 2020; Milk, 1048, May 1, 2021; Concentrated Milk, 909, October 1, 2020; Cheese of All Types, 995, October 1, 2020; Powdered Buttermilk, 1004, October 1, 2020; Cream Powders, 1047, May 1, 2021; Products Consisting of Natural Milk Constituent, 1006, October 1, 2020). The wording of the latter Notice is quite telling, and very much representative of the wording of all Notices:

To be eligible, you must be active in the Canadian products of natural milk constituents industry at the time of application, and must remain active regularly during the quota year. Note: You must, in addition, have been active regularly in the products of natural milk constituents industry during the reference period. Individual applicants and related persons applicants are eligible for only one allocation.

222. Nothing in any of the Notices to Importers quoted above suggests that the eligibility requirements are linked to the actual utilisation of goods. In fact, whenever I observe reference to categories beyond the three categories appearing in Canada’s pooling system, I consistently notice a reference to importers (persons), and not to products. Most TRQs refer to the three categories already mentioned (processors; further processors; distributors). TRQ 1003 goes one step further, and explicitly excludes other agents active in the dairy market, when stating:

Retailers are not eligible to apply for an allocation.

223. The reference to retailers is, of course, a reference to importers and not to products. Canada argued that eligibility requirements do not have to be exclusively importer-oriented, and even offered package size as illustration for a product-focused eligibility requirement. Even though, in principle, package-size could come under “limits” and “conditions,” the fact of the matter is that it is a theoretical example. Nowhere do the various Notices to Importers for all Canada’s TRQs for dairy products under the CPTPP refer to requirements to this effect. In fact, they all refer exclusively to the three categories of importers, namely, “processors,” “further processors,” and “distributors.” Through its unilateral measures thus, adopted following the advent of the CPTPP, Canada showed its understanding to the effect that the scope of “eligibility requirements” is limited to importers.

224. Third, the immediate context lends no support to Canada’s argument. The term “eligibility requirements” is mentioned in Articles 2.28(3), 2.29(2), and 2.30(1)(a). The first (of these three provisions) is a transparency obligation, and nothing beyond that. It binds the discretion of CPTPP signatories, no matter whether “eligibility requirements” are product- or producer-focused. The second, as per Canada’s argument is product-focused. The third, concerns allocation of the TRQs to eligible importers. In Canada’s view, Article 2.29, which mentions “Eligibility Requirements” in its title, regulates product-specific eligibility requirements, whereas Article 2.30 which is entitled “Allocation” includes importer-specific eligibility requirements. But how will allocation ever take place, in the event a CPTPP signatory has implemented an allocation mechanism, unless

eligibility of importers has been first addressed? The logical construction of Article 2.30 should be that eligibility requirements for importers must have been decided before allocation takes place. This has happened already at the moment of signing the CPTPP, and the quoted Paragraph 3(c) is evidence to that. Article 2.29(2)(a) –which recall, applies across all TRQs irrespective whether they are administered on a FCFS basis, or through an allocation mechanism– requires from Canada to avoid unilaterally altering the agreed eligibility requirements that have been reflected in Paragraph 3(c), as already argued. And then, Article 2.30 then, requires from Canada to allocate while observing the agreed eligibility requirements. Furthermore, for Canada to be right, the same term, “eligibility requirements,” must have a different meaning in the two provisions. But Article 2.30(1)(a) starts with the words “any person of a Party that fulfils the importing Party’s eligibility requirements.” Article 2.30(1)(a) is context to Article 2.29(2)(a) and provides thus, guidance for the understanding of the disputed term. The words “any person” clearly suggest that the term “eligibility requirements” is importer-focused.

225. Fourth, if Canada’s interpretation was retained, then what is the scope of the terms “limits” and “conditions”? The quintessential principle of the VCLT system is the principle of effective treaty interpretation (*ut regis valeat quaem pereat*). Over-extending the scope of “eligibility requirements” would entail an automatic reduction of the scope of the other terms, and could even spell their redundancy. Of course, “limits” and “conditions” refer to the product and not the importers, and issues like Canada’s example could conceivably come under these terms.

226. Fifth, Canada’s preferred interpretation, to the effect that Article 2.29(1) is addressed to importers, whereas Article 2.29(2)(a) to products only, should be discarded for one additional reason. Article 2.29(2) includes four subparagraphs which constitute a continuum fleshing out a mechanism for deviating from the original promise with respect to new or additional conditions, limits, or eligibility requirements. Negotiations with affected Parties must be undertaken, and, assuming no objections have been raised, the new or additional conditions, limits, or eligibility requirements can be entered. If Canada’s interpretation were retained, then only product-focused eligibility requirements (assuming they exist) could be the subject-matter of subsequent modifications. Eligibility requirements regarding importers could never change, as Article 2.29(1) does not know of a mechanism comparable to that embedded in Article 2.29(2)(b)-(d). Nowhere does the CPTPP system suggest anything along these lines. The system provided in Article 2.29(2)(b)-(d) was designed to allow for modifications with respect to eligibility requirements, as well as the terms and conditions for importing the goods coming under the TRQs.

227. The majority opinion mentions “origin” as an eligibility requirement. But rules of origin are not negotiated between the CPTPP signatories. There is a specific Chapter (Chapter 3) which regulates origin in detail. Unless if a good meets the requirements specified therein, it can never profit from preferential treatment under the CPTPP rules. Nowhere does Chapter 3 provide for a mechanism à la Article 2.29(2)(b)-(d) to re-negotiate commitments entered. Indeed, Paragraph 4 of Annex 2-D, which reflects Canada’s promise to its CPTPP signatories with respect to the administration of its TRQs, unambiguously states that it covers “originating goods,” meaning of course, as defined in Chapter 3. In similar vein, the majority equates the reference in the body of

Article 2.29(2)(a) to grade, end-use, and package size to eligibility requirements, without explaining why this reference should not be understood as specification of “terms” or “conditions.” But even if these three terms should be understood as “eligibility requirements,” quod non, the term “including” preceding the terms “grade,” “end-use,” and “package size” clearly suggests that what follows is not an exhaustive list. The legislative intent must have been hence, that terms, conditions, and eligibility criteria, beyond the three mentioned, cannot be, in principle, unilaterally modified. To establish change/modification we need to compare current practice to the promise embedded in the Schedule in Annex 2-D (Tariff Commitments). Canada’s Schedule in Annex 2-D includes Paragraph 3(c), which, as already explained, acknowledges the right to import dairy products under the 16 TRQs to any person residing in Canada, active in the dairy, poultry, or egg sector, and not only to processors, further processors, and distributors. Canada’s measures fall short of the content of Paragraph 3(c).

228. Finally, Canada has also claimed that Paragraph 3(c) is a minimum condition, that Canada anyway must respect, but, because it is a minimum condition only, it retained the discretion to add requirements, as long as the minimum condition has been respected. There is nothing in the language of CPTPP that supports this view. Nowhere does the CPTPP suggest that importer-focused eligibility requirements constitute a minimum condition, and, consequently, nowhere does the CPTPP authorize unilateral action in this respect. Trade agreements are meant to provide certainty for conducting international trade transactions. Certainty is served when the promise has been kept. Accepting Canada’s interpretation would be tantamount to accepting that New Zealand and the other CPTPP signatories had conceded to uncertainty. This cannot be. In fact, the whole system of 2.29(2) aims to achieve the opposite objective: it is an insurance policy against unilateral modifications of promises to administer TRQs under CPTPP.

229. For all these reasons, Canada’s interpretation cannot be retained. The term “eligibility requirements” appearing in Article 2.29(2)(a) concerns importers only.

230. Compared to its promise under CPTPP, as reflected in Paragraph 3(c) of Appendix A, Canada, through the pooling system, has reduced the number of eligible candidates. In that document, Canada had stated that it would be providing access to all agents headquartered in Canada, that were active in the dairy market, as long as they were in compliance with the Canadian EIPA. There are various economic agents that belong to this category, but not to the pooling system. In fact, the Notices to Importers exclude either distributors or further processors from some allocations. For example, further processors are not eligible for allocations under TRQ (999) for Concentrated Milk.

231. Canada thus, has introduced new eligibility requirements in a manner inconsistent with its obligations under Article 2.29(2)(a) of the CPTPP.

232. The second question is whether Canada has added a new limit beyond those set out in its Schedule to Annex 2-D (Tariff Commitments). Yes, it did. I explained when citing Paragraph 3(c) of Appendix A, that Canada had not included any quantitative limits for eligible importers of its



sixteen TRQs. It simply mentioned that agents established in Canada, active in the dairy product market, and in line with the EIPA, would be eligible importers. Subsequently, when issuing its Notices to Importers, Canada reserved fixed percentages for each of the three types of importers featured in its pooling system. It thus, introduced a new limit. Consequently, the New Zealand claim in this respect, must be upheld as well.

233. The above nevertheless, is not the end of the story. Canada could, in principle, have justified the deviation from its original promise as embedded in Paragraph 3(c) with respect to both legs of the claim presented by New Zealand. In fact, Canada advanced arguments to this effect. It stated on different occasions in its pleadings (and during the discussions before the Panel), that it had made its concessions on the understanding that it kept wiggle room to add to the eligibility requirements included in Paragraph 3(c) of Appendix A.<sup>141</sup> It could not however, point to an explicit understanding to this effect between it and the other CPTPP signatories, when prompted to do so by the Panel. Eventually, Canada admitted that it was its own understanding that it retained wiggle room, and that CPTPP signatories had not conceded as much. In this vein, I note that Annex 2-D has two sections. In Section B, all Canada's TRQs are presented. In Section A, Canada's horizontal (e.g., applicable to all TRQs) promise regarding their administration has been included. One can read that Canada has reserved its right to auction TRQs, or to favour the sale of goods in short supply. Nowhere do I observe a reservation regarding "eligibility requirements." Canada simply did not reserve its rights in this respect.

234. Canada also stated that nothing constrains it (or any other CPTPP signatory) to exercise its discretion when a treaty is silent on an issue. But the CPTPP text is not silent at all on this issue. The Agreement includes in-built safeguards. Recall the discussion about Article 2.29(2)(b)-(d), which allows CPTPP signatories to consult and modify agreed concessions. Canada could have used this mechanism to add new eligibility requirements, following consultations and agreement with its partners. It chose not to do so.

235. Canada has also stated that, were New Zealand's interpretation of Article 2.29(2)(a) to be accepted, the Panel would be placing an untenable stranglehold on domestic regulators. This argument as well should be rejected. For starters, the CPTPP allows for exceptions based on "public order" concerns. Article 29.1(1) (Chapter 29) explicitly incorporates the list of general exceptions appearing in Article XX of GATT. Canada pointed to none. Additionally, and if necessary, recourse could have been made to Article 30.2 of the CPTPP, which provides signatories with wiggle room to amend the CPTPP. This has not happened either. Canada did not point to any change of circumstances either. It did not. In fact, providing evidence would have been hard, as its Notices to Importers for the sixteen TRQs are dated either October 2020, or May 2021, which is only a few months before the dispute was initiated, and only a few months after the CPTPP had entered into force (30 December 2018). No major imbalance occurred during this short period.

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<sup>141</sup> Official Transcript of the Hearing, Public Session of 14 June 2023 pp. 35-39, 51, 144-46.

236. Under the circumstances, the New Zealand claim under Article 2.29(2)(a) should be upheld on both counts. Canada has acted inconsistently with Article 2.29(2)(a) by imposing new limits, and by introducing new eligibility requirements.

### **B. Claims and Arguments Concerning Article 2.30(1)(a)**

237. Canada's measures are not congruous with the letter and the spirit of Article 2.30(1)(a) either. The term "eligibility requirements," it is true, is not defined in Article 2.1 of the CPTPP, where some other terms have been defined. Inclusion of a term in Article 2.1, guarantees that it will be understood in the same way across provisions, unless, of course, if the definition itself provides for a differentiated meaning across provisions. But exclusion should not automatically lead the interpreter to the opposite conclusion either. This is so, because inclusion of a term in the "Definitions" list might be justified on other grounds, such as an idiosyncratic understanding of the term, a need for clarity as some terms are not self-defining at all, etc.

238. With this in mind, I ask if the term "eligibility requirements" should be understood in different ways across the provisions of the CPTPP discussed in this award. I believe that this should not be the case. As already explained, the term "eligibility requirements" focuses on importers, whereas the terms "limits" and "conditions" on the good described in each TRQ. In fact, I have cited the various provisions of the ILA to drive home the point that the commonplace understanding of the term "eligibility requirements" concerns importers only. If the CPTPP signatories had intended to depart from this understanding of the term, they would of course have mentioned it, especially since they acknowledged the relevance of the ILA. They did not intend however, to understand "eligibility requirements" in idiosyncratic manner.

239. Nothing in the CPTPP system suggests that the framers intended to provide the term "eligibility requirements" with a different meaning across the different provisions either. Had the framers intended this to be the case, they would have clearly expressed their intentions, and they would not have left it to the imagination of adjudicators to do so. This term concerns importers only in Article 2.30(1)(a), as it does in Article 2.29(2)(a). The context to both provisions, as already argued, clearly supports this understanding of the term "eligibility requirements."

240. And of course, it is the agreed "eligibility requirements" that matter, and not those introduced by Canada after the CPTPP had entered into force. The direct consequence of Canada's introduction of the pooling system, is that some of the importers (those who are active in the Canadian dairy market, and are not processors, further processors, and/or distributors) will not be allocated any quantities of goods covered in Canada's 16 TRQs.

241. Finally, I do not think that the interpretation of Article 2.28(3) should lead to the opposite conclusion. What Canada must publish (and thus, make its international commitments transparent to the economic agents residing in its sovereignty) is the agreed balance of rights and obligations under the CPTPP. In other words, the term "publish" appearing in Article 2.28(3) does not entail that Canada has discretion to introduce new eligibility requirements.

242. Consequently, Canada's measure restricting access to the TRQs to processors, further processors, and distributors only, are inconsistent with its obligation under Article 2.30(1)(a) as well.

## **XII. Annex**

### **A. Timetable of the Dispute under CPTPP Chapter 28 (As Observed)**

**20 March 2023** - Initial written submission of the complaining party (New Zealand)

**21 April 2023** - Initial written submission of the responding party (Canada)

**2 May 2023** - Written submission of any third party

**5 May 2023** - Request of non-governmental entities in Canada and in New Zealand to submit written views

**11 May 2023** - Rebuttal submission of the complaining party

**19 May 2023** - Submission of written views of any non-governmental entity

**31 May 2023** - Rebuttal submission of the responding party

**2 June 2023** - Delivery to disputing parties of pre-hearing written questions

**14-15 June 2023** - Hearing

**19 June 2023** - Delivery to disputing parties of post-hearing written questions

**26 June 2023** - Submission of a disputing party's supplementary written submission responding to any matter that arose during the hearing, along with responses to written questions from the Panel

**4 July 2023** - Submission of a disputing party's comments on any supplementary written submission or any responses to written questions by another disputing party

**8 August 2023** - Initial Panel Report to disputing parties

**23 August 2023** - Written comments of disputing parties to the Initial Panel Report

**5 September 2023** - Final Panel Report to disputing parties