

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

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

**Third Party Written Submission of Australia  
1 May 2023**

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## CASES CITED IN THIS SUBMISSION

Short Title	Full Case Title and Citation
<i>Canada – Dairy</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products</i> , <a href="#">WT/DS103/AB/R</a> , <a href="#">WT/DS113/AB/R</a> , and Corr.1, adopted 27 October 1999, DSR 1999:V, p. 2057
<i>Canada - Dairy TRQ Allocation Measures</i>	USMCA Panel Report, <i>Canada – Dairy TRQ Allocation Measures</i> (CDA – USA – 31 – 010), December 20, 2021
<i>Canada – Periodicals</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , <a href="#">WT/DS31/AB/R</a> , adopted 30 July 1997, DSR 1997:I, p. 449
<i>China – IP Rights</i>	Panel Report, <i>China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights</i> , <a href="#">WT/DS362/R</a> , adopted 20 March 2009, DSR 2009:V, p. 2097
<i>China – Publications and Audiovisual Products</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , <a href="#">WT/DS363/AB/R</a> , adopted 19 January 2010, DSR 2010:I, p. 3
<i>China – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , <a href="#">WT/DS394/AB/R</a> / <a href="#">WT/DS395/AB/R</a> / <a href="#">WT/DS398/AB/R</a> , adopted 22 February 2012, DSR 2012:VII, p. 3295
<i>EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)</i>	Appellate Body Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i> , <a href="#">WT/DS27/AB/RW2/ECU</a> , adopted 11 December 2008, and Corr.1 / <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i> , <a href="#">WT/DS27/AB/RW/USA</a> and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165
<i>EC – Chicken Classification</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , <a href="#">WT/DS269/AB/R</a> , <a href="#">WT/DS286/AB/R</a> , adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157

<i>EC – Computer Equipment</i>	Appellate Body Report, <i>European Communities – Customs Classification of Certain Computer Equipment</i> , <a href="#">WT/DS62/AB/R</a> , <a href="#">WT/DS67/AB/R</a> , <a href="#">WT/DS68/AB/R</a> , adopted 22 June 1998, DSR 1998:V, p. 1851
<i>EC – Export Subsidies on Sugar</i>	Appellate Body Report, <i>European Communities – Export Subsidies on Sugar</i> , <a href="#">WT/DS265/AB/R</a> , <a href="#">WT/DS266/AB/R</a> , <a href="#">WT/DS283/AB/R</a> , adopted 19 May 2005, DSR 2005:XIII, p. 6365
<i>EC – Hormones</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , <a href="#">WT/DS26/AB/R</a> , <a href="#">WT/DS48/AB/R</a> , adopted 13 February 1998, DSR 1998:I, p. 135
<i>EC – IT Products</i>	Panel Reports, <i>European Communities and its member States – Tariff Treatment of Certain Information Technology Products</i> , <a href="#">WT/DS375/R</a> / <a href="#">WT/DS376/R</a> / <a href="#">WT/DS377/R</a> , adopted 21 September 2010, DSR 2010:III, p. 933
<i>EC – Salmon</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , <a href="#">WT/DS337/R</a> , adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , <a href="#">WT/DS316/AB/R</a> , adopted 1 June 2011, DSR 2011:I, p. 7
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , <a href="#">WT/DS50/AB/R</a> , adopted 16 January 1998, DSR 1998:I, p. 9
<i>India – Quantitative Restrictions</i>	Appellate Body Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , <a href="#">WT/DS90/AB/R</a> , adopted 22 September 1999, DSR 1999:IV, p. 1763
<i>Peru – Agricultural Products</i>	Appellate Body Report, <i>Peru – Additional Duty on Imports of Certain Agricultural Products</i> , <a href="#">WT/DS457/AB/R</a> and Add.1, adopted 31 July 2015, DSR 2015:VI, p. 3403
<i>Case Concerning Ahmadou Sadio Diallo</i>	<i>Republic of Guinea v Democratic Republic of the Congo</i> , Compensation (Judgment) [2012] ICJ Rep 324
<i>Siemens A.G. v Argentina</i>	<i>Siemens A.G. v Argentina</i> (Jurisdiction) (ICSID Arbitral Tribunal, Case No. ARB/02/8, 3 Aug. 2004)

<i>US – Anti-Dumping and Countervailing Duties (China)</i>	Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , <a href="#">WT/DS379/AB/R</a> , adopted 25 March 2011, DSR 2011:V, p. 2869
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , <a href="#">WT/DS213/AB/R</a> and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
<i>US – Line Pipe</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , <a href="#">WT/DS202/AB/R</a> , adopted 8 March 2002, DSR 2002:IV, p. 1403
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , <a href="#">WT/DS267/AB/R</a> , adopted 21 March 2005, DSR 2005:I, p. 3

**TABLE OF ABBREVIATIONS**

<b>Abbreviation</b>	<b>Full name and reference (where applicable)</b>
CoA	WTO Committee on Agriculture
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade 1994
ILA	Import Licensing Agreement
TRQ	Tariff rate quota
USMCA	United States-Mexico-Canada Agreement
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

## I. INTRODUCTION

1. Australia considers that these proceedings initiated by New Zealand pursuant to Article 28.7 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) raise significant systemic issues concerning the substantive legal obligations and rights of CPTPP Parties<sup>1</sup> in relation to the administration of tariff rate quotas (TRQs).<sup>2</sup> It is fundamental to the rules-based trading system that free trade agreement (FTA) parties uphold their obligations, including in relation to market access. These obligations are carefully negotiated as part of reaching an agreement that balances the interests of, and is acceptable to, all FTA parties.
2. Australia is a global dairy exporter (\$3.6 billion in 2022) with an interest in securing and maintaining access to markets. Australia's dairy exports mainly flow to Asian markets, with Canada receiving just 0.5 per cent of Australia's total dairy exports in 2022. However, Canada is viewed as a potential market for export growth.<sup>3</sup> Since the CPTPP entered into force,<sup>4</sup> the value of Australian dairy exports to Canada has increased from \$2.1 million in 2018 to \$17.7 million in 2022. This represents a 745 per cent increase, albeit from a low base. This is mainly due to an increase of cheese exports which have rapidly increased from around \$14,000 in 2018 to \$12.5 million in 2022. Whey exports have also increased from \$1.9 million in 2018 to \$5 million in 2022. While there have been increases in Australia's dairy trade to Canada since CPTPP entered into force, demonstrating some success to date in liberalising trade, Australia is focussed on ensuring that the full benefits of trade liberalisation commitments under CPTPP are realised.
3. Australia's concerns with Canada's supply management system are well known.<sup>5</sup> Canada's supply management system is highly restrictive and protects Canada's dairy industry from competition. Australia does not dispute that Canada has a rationale behind its supply management system,<sup>6</sup> and its system of TRQ allocation that forms

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<sup>1</sup> As at May 2023, the CPTPP had entered into force for Australia, Canada, Japan, Mexico, New Zealand, Singapore, Vietnam, Peru, Malaysia and Chile. Brunei Darussalam was also one of the 11 original signatories, and the agreement will enter into force for that country 60 days after it completes its ratification processes. The United Kingdom is in the process of accession.

<sup>2</sup> In accordance with Articles 2.29 and 2.30 of the CPTPP.

<sup>3</sup> Australian Dairy Industry's submission to the Senate Foreign Affairs, Defence and Trade References Committee Inquiry regarding the TPP (2016), para. 17.

<sup>4</sup> The CPTPP entered into force for Australia and Canada on 30 December 2018.

<sup>5</sup> Australia's Question 104002 CoA Meeting 104, 27/03/2023 'Canada's review of the TRQ system'; Australia's Question 1016 CoA Meeting 101, 27/06/2023 'Canada's review of the TRQ system'; Australia's Question 10120, CoA Meeting 101, 27/06/2022 'Low fill rate of Canada's TRQs, including dairy TRQ'; Australia's Question 99099 CoA Meeting 99, 23/09/2021 'Canada's review of the TRQ system'; Australia's Question 96067 CoA Meeting 96, 30/11/2020, 'Low fill rate of Canada's TRQs, including dairy TRQ'; Australia's Question 92088 CoA Meeting 92 30/10/2019 'Canada's review of the TRQ system'; Australia's Question 91021 CoA 91 25/06/2019 'Low fill rate of Canada's TRQs, including dairy TRQ'; Australia's Question 87083 CoA 87, 11/06/2018 'Low fill rate of Canada's TRQs, including dairy TRQ'.

<sup>6</sup> As outlined in Canada's First Written Submission, paras. 12-32.

part thereof.<sup>7</sup> However, Australia does not accept Canada's view that its pooling system is consistent with the disciplines CPTPP Parties agreed to in relation to TRQ administration. Canada cannot, consistently with its CPTPP commitments, use its supply management system to subvert CPTPP market access outcomes.

4. Australia's submission will not speak to each and every one of New Zealand's claims. Rather, it will address:
  - Fundamental principles of treaty interpretation raised in both New Zealand's and Canada's submissions;
  - The overarching issue, relevant to several of New Zealand's claims, of whether CPTPP Parties intended retailers to have access to TRQs;
  - New Zealand's claim under Article 2.29(1);
  - New Zealand's claim under Article 2.30(1)(a); and
  - New Zealand's claim under Article 2.30(1)(b).

## II. TREATY INTERPRETATION

### A. ARTICLES 31 AND 32 OF THE VIENNA CONVENTION ON THE LAW OF TREATIES

5. Article 28.12(3) of the CPTPP requires a panel to interpret the provisions of the CPTPP in accordance with the rules of interpretation under international law as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).

#### Overview

6. In Australia's view, Articles 31 and 32 may be distilled into the following eight key points (in order of appearance):

#### *Article 31*

1. A treaty is to be interpreted in good faith.
2. The interpretative analysis is directed at establishing the ordinary meaning of a provision. The ordinary meaning is the starting point to any analysis.
3. The ordinary meaning is not to be established in isolation from its context.
4. The object and purpose of the treaty is also to be taken into account in interpreting a provision.
5. Agreements or instruments made in connection with the conclusion of a treaty form part of the context of the provision being interpreted.
6. Apart from context, subsequent agreements between the parties as to interpretation of a treaty and the practice of the parties in applying the treaty are to be taken into account as part of the interpretative analysis.

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<sup>7</sup> As outlined in Canada's First Written Submission, para. 59, "Canada's system for allocating TRQs for the dairy products at issue in this dispute is intended to maintain the stability and predictability of the supply-managed dairy market in Canada".



7. Treaties form part of the general body of international law and, as such, relevant rules of international law applicable in the relations between the parties also inform the interpretative analysis.

#### Article 32

8. Where the interpretative analysis leads to a meaning which is ambiguous or obscure, or a result that is absurd or unreasonable, the treaty interpreter may refer to materials supplementary to the treaty in order to determine the meaning. The treaty interpreter may also have recourse to such materials to confirm the meaning arrived at through the interpretative analysis.
7. Article 31 VCLT sets out the steps for an interpretative analysis of a treaty provision and Article 32 provides an additional step to be taken if an Article 31 analysis is not conclusive or is to be confirmed. To this extent, there is a hierarchy of analysis between Articles 31 and 32, with analysis under the former having primacy.
8. While the provisions of Article 32 VCLT are not engaged by Canada's submissions, Australia notes its support for New Zealand's submissions regarding the role of Article 32. The means of interpretation set out in Article 32 can play an important role in supporting the primary rules of interpretation set out in Article 31. However, such means are "supplementary" and do not provide an alternative approach to interpretation to that set out in Article 31.<sup>8</sup>

#### Object and purpose – Article 31(1)

9. In this dispute, New Zealand and Canada have both referred throughout their submissions to various clauses from the CPTPP Preamble as providing guidance as to the treaty's object and purpose.
10. Tribunals are guided by the preambular language of a treaty in determining its object and purpose under Article 31(1) VCLT.<sup>9</sup> While treaty preambles can also reflect the parties' intention to preserve their inherent regulatory rights, they do not impart new rights upon parties.
11. The CPTPP Parties expressly agree, by its Preamble, to *inter alia*, "contribute to maintaining open markets, increasing world trade, and creating new economic opportunities...", "promote further regional economic integration...", "enhance opportunities for the acceleration of regional trade liberalisation and investment"<sup>10</sup> and to "[promote] economic integration to liberalise trade and investment..." while "contribut[ing] to the harmonious development and expansion of world trade..."<sup>11</sup>. Considering this language, Australia agrees with both New Zealand and Canada that

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<sup>8</sup> New Zealand's first written submission, para. 50.

<sup>9</sup> See for example, *Siemens A.G. v Argentina* (Jurisdiction) (ICSID Arbitral Tribunal, Case No. ARB/02/8, 3 Aug. 2004), para. 81.

<sup>10</sup> CPTPP Preamble, paras. 3, 4 and 5.

<sup>11</sup> CPTPP Preamble, paras. 1, 17.

the CPTPP is a trade liberalising agreement,<sup>12</sup> reflecting an intention to grant greater access to markets between CPTPP Parties and reduce barriers to trade.

12. The object and purpose of the CPTPP is tempered by the preambular affirmation of the "importance of [Parties'] right[s] to regulate in the public interest"<sup>13</sup>, and a recognition of the Parties' "inherent right to regulate...to preserve the flexibility of the Parties to set legislative and regulatory priorities..."<sup>14</sup> This is supported by an illustrative list of public welfare objectives,<sup>15</sup> reflecting widely accepted "general exceptions"<sup>16</sup> to trade agreements, which maintain parties' right to regulate for public policy objectives such as health and the environment. Australia notes that none of the examples of public welfare objectives in the Preamble relates to protecting domestic industries. This language on the Parties' right to regulate has a balancing effect on the objective of trade liberalisation. It ensures that treaty interpreters do not only focus on trade liberalisation without taking into account the broader perspective of public welfare. Conversely, the express recognition of the inherent right to regulate within the treaty Preamble should not undermine substantive treaty obligations. Any such interpretation would render the treaty inutile.
13. In applying the object and purpose of the CPTPP to the ordinary meaning of its articles, Parties are therefore entitled to expect an interpretation that promotes greater trade liberalisation and access to markets between Parties, subject to the Parties' legitimate right to regulate. However, that recognised right to regulate must be applied in manner consistent with the obligations of the CPTPP. It does not support new and independent rights such as the right to protect domestic industry.

**Relevant rules of international law applicable in the relations between the parties – Article 31(3)(c)**

14. The common intention of the parties to a treaty may also be ascertained by reference to relevant rules of international law. Whilst contextual, this is a separate and distinct interpretive method to the "context" in Article 31(2) VCLT.
15. Australia agrees that treaties can be a potential source of international law under Article 31(3)(c) of the VCLT, together with other sources of law set out in Article 38(1) of the Statute of the International Court of Justice. However, the application of international law to the interpretation of treaties under Article 31(3)(c) VCLT is conditioned by two additional requirements: any rule must be "relevant" and also "applicable in the relations between the parties". Mere reference to a secondary treaty within a primary treaty does not on its own satisfy these conditions.

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<sup>12</sup> New Zealand's first written submission, para. 76. See also Canada's first written submission, para. 183.

<sup>13</sup> CPTPP Preamble, para. 6.

<sup>14</sup> CPTPP Preamble, para. 9.

<sup>15</sup> "public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals".

<sup>16</sup> Originally finding expression in GATT Article XX.

16. In particular, "relevance" under Article 31(3)(c) requires that the rule that is being applied should "concern the same subject matter as the treaty terms being interpreted".<sup>17</sup> In practice, panels have assessed the context and substance of the terms being considered; mere commonality of language or similarity of subject matter is not necessarily sufficient.<sup>18</sup>
17. Australia submits that on the facts of this matter, Canada is misguided in its recourse to the Import Licensing Agreement (ILA) under Article 31(3)(c) VCLT, in support of its interpretation of Article 2.29(1) of the CPTPP. Canada's textual analysis of the word "utilise" in the context of quotas within Articles 3(5)(h) and (j) of the ILA does not establish a *relevant rule* of international law in the sense of Article 31(3)(c) VCLT, nor even any determinative principle of interpretive guidance. Those provisions of the ILA merely establish certain standards of conduct in administering quotas, with a specific but non-exclusionary reference to the particular matter of issued licenses in subparagraph (h). Whilst similar in certain terminology, these paragraphs are specific to their context and do not substantively "speak to"<sup>19</sup> the interpretation of the word "utilise" in the context of Article 2.29(1) of the CPTPP, nor in fact support any clear or mandatory bifurcation of the terms "access" and "utilise". In any event, the interpretation of the term "utilise" submitted by New Zealand as incorporating both "access" and "use", is not inconsistent with those provisions of the ILA as they apply to the implementation and administration of TRQs and as incorporated through Article 2.28.1 CPTPP.

## **B. RELEVANCE OF USMCA DISPUTE**

18. A USMCA panel recently considered an identical obligation to the CPTPP Processor Clause (defined below), which is the subject of one of New Zealand's claims in this dispute.<sup>20</sup> New Zealand, while acknowledging that the panel's decision in that dispute is specific to the USMCA, submits that its decision is "highly pertinent" to the present dispute.<sup>21</sup> Australia agrees. While the Panel is not bound by that decision, the textual analysis by the USMCA panel should be considered by the Panel for two reasons:

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<sup>17</sup> Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 308; *EC and certain member States – Large Civil Aircraft*, para. 846, cited with approval in Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, para. 5.101 and fn. 291.

<sup>18</sup> See for example, Appellate Body Report, *EC – Large Civil Aircraft*, paras. 849 – 851 and fn. 1929.

<sup>19</sup> Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, para 5.101.

<sup>20</sup> USMCA Panel Report, *Canada – Dairy TRQ Allocation Measures*.

<sup>21</sup> New Zealand's first written submission, para. 56.

(i) international law is a single unified legal system, which should avoid as far as possible contradictory judicial decisions;<sup>22</sup> and (ii) the obligation at issue<sup>23</sup> is identical.

19. Consistent application and interpretation of international law preserves its predictability and ability to provide effective guidance to States. In Australia's view, this means that identical obligations in two different treaties with parties in common,<sup>24</sup> which have the same surrounding text, structure and overall purpose (to further liberalise trade) are more likely than not to have the same meaning. If this Panel were to reach a different conclusion on the meaning of the Processor Clause, this would raise significant questions about how the same words, in very similar treaties, both aimed at liberalising trade, could have a different meaning. Further, the USMCA panel's analysis was, in Australia's view, legally sound.

### III. TRQ ADMINISTRATION: CPTPP PARTIES INTENDED RETAILERS TO HAVE ACCESS TO TRQS

20. An overarching issue, of relevance to several of New Zealand's claims, is whether CPTPP Parties intended retailers to have access to TRQs.<sup>25</sup> Canada's practice of excluding retailers from accessing quota under each of its TRQs is one of the alleged interrelated CPTPP violations on which New Zealand has requested a ruling from the Panel.<sup>26</sup> In support of New Zealand's request, Australia submits that the CPTPP text makes clear that the Parties intended retailers to have access to the dairy TRQs and therefore Canada has an obligation to open these TRQs to retailers.
21. The word "retail" is used in five of Canada's 16 dairy TRQs: milk, concentrated milk, yoghurt and buttermilk, butter, and industrial cheese.<sup>27</sup> Of the five TRQs that mention retail, three specify a percentage that is not for retail sale;<sup>28</sup> one is exclusively for goods for retail sale;<sup>29</sup> and one excludes goods for retail sale.<sup>30</sup> In summary, the text envisages goods entering the retail market under the TRQs and the text specifies when certain goods will be excluded from that market.

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<sup>22</sup> Such an approach finds support in international jurisprudence, including: The ICJ in the Case Concerning Ahmadou Sadio Diallo (*Republic of Guinea v Democratic Republic of the Congo*), Compensation (Judgment) [2012] ICJ Rep 324 at 8 which stated "International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law and *each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions.*" (emphasis added)

<sup>23</sup> The so-called 'Processor Clause' – Article 2.30(1)(b) of the CPTPP; Article 3.A.2.11(b) of the USMCA.

<sup>24</sup> While New Zealand is not a party to the USMCA, all three USMCA Parties (Canada, Mexico and the United States) were parties to the Trans-Pacific Partnership (TPP), the vast majority of the text of which is incorporated into CPTPP under Article 1 of the CPTPP.

<sup>25</sup> The practice of excluding retailers is most relevant to New Zealand's claims under Article 2.30(1)(a) and (b); Article 2.29 (1) and (2)(a) and Article 2.28(2).

<sup>26</sup> New Zealand's first written submission, para. 41.

<sup>27</sup> Canada's CPTPP TRQs are contained in its Annex 2-D Appendix A to CPTPP Chapter 2.

<sup>28</sup> Milk, yoghurt and buttermilk and butter.

<sup>29</sup> Concentrated milk.

<sup>30</sup> Industrial cheese.

22. In Australia's view this leads to three conclusions: (i) for the five dairy TRQs that mention retail sale there are specific requirements; (ii) for the 11 dairy TRQs which do not specify treatment of goods with regards to a particular market, it should be inferred that these are by default open to the retail market;<sup>31</sup> and (iii) retailers, as the major player in goods destined for retail sale, should have access to all except one of Canada's dairy TRQs (industrial cheese, which is specifically closed to the retail market). If Canada could exclude retailers for any and all of its dairy TRQs, either in particular percentages or entirely, it would render the carve outs referred to above inutile – the implication would be that Canada would not need them.
23. The following text which appears in Canada's Notices to Importers for its dairy TRQs (except industrial cheese) specifically excludes retailers from applying for an allocation.<sup>32</sup>

Retailers are **not** eligible to apply for an allocation. A retailer is an establishment that is primarily engaged in retailing food, and which buys [dairy product] and sells it directly to final consumers.<sup>33</sup>

24. This explicit exclusion of retailers is in direct breach of Canada's CPTPP obligations. For the reasons given in paragraph 22, Canada's dairy TRQs (with the exception of the industrial cheese TRQ) must be read as being accessible to retailers.<sup>34</sup>

#### **IV. ARTICLE 2.29(1) OF THE CPTPP – THE OPPORTUNITY TO UTILISE TRQ QUANTITIES FULLY**

25. New Zealand contends that Canada's CPTPP Notices to Importers are inconsistent with Article 2.29(1) CPTPP because they do not administer Canada's TRQs "in a manner that allows importers the opportunity to utilise TRQ quantities fully".
26. Canada's response to this claim appears to be two-pronged. First, in Canada's view, Article 2.29(1) only concerns allowing importers that have received an allocation of a TRQ the opportunity to utilise it to import goods up to the amount of the allocation,<sup>35</sup> as opposed to allowing importers generally the opportunity to utilise the entire TRQ quantity. The second prong of Canada's argument is that, even accepting New Zealand's interpretation of the provision, Canada attributes the low fill-rate of several of its dairy TRQs to "other economic factors causing the lack of demand for New Zealand dairy products in Canada", rather than Canada's pooling system.<sup>36</sup> Canada therefore concludes that its pooling system has not robbed importers of the opportunity to utilise

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<sup>31</sup> Given retailers are not explicitly excluded, as they are for the industrial cheese TRQ.

<sup>32</sup> This appears as a note to the definition of 'distributor' in the notice of importation.

<sup>33</sup> Emphasis in original.

<sup>34</sup> The only instance where this expression would be consistent with CPTPP obligations is for the industrial cheese TRQ which specifically excludes retailers.

<sup>35</sup> Canada's first written submission, para. 87.

<sup>36</sup> Canada's first written submission, para. 88.

the relevant TRQ quantities fully. Australia will address each of these arguments in turn.

### Scope of Article 2.29(1)

27. Article 2.29(1) of the CPTPP provides:

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

28. The key difference in New Zealand and Canada's interpretation of this clause relates to what "TRQ quantities" means. New Zealand considers that this refers to "the total quantity of quota available under each of the TRQs maintained by a Party".<sup>37</sup> Canada argues that it is only an importer who has been granted an allocation who will have an "opportunity" to import, and that therefore "TRQ quantities" only refers to a specified TRQ quantity granted to an individual importer under an allocation.<sup>38</sup>
29. Implicit in this distinction are differing interpretations of "importers". New Zealand argues "importers" refers to all importers who meet the eligibility requirements under the relevant Party's schedule,<sup>39</sup> and who are therefore eligible to receive quota under the TRQ. As New Zealand elaborates, an importer's utilisation "... captures the use of a thing and the ability to access or "convert it" to use".<sup>40</sup> Conversely, Canada argues an importer must be "in a condition or circumstance to render useful or convert to use a specified amount of TRQ quantity by importing products under an allocation".<sup>41</sup>
30. Australia supports New Zealand's interpretation of Article 2.29(1), which is in accordance with the ordinary meaning of the clause in its context and in light of the object and purpose of the CPTPP.<sup>42</sup> "TRQ quantities" are just that – the quantities available under any individual TRQ, consistent with a party's Schedule. "Importers" refers to anyone who could import the relevant product, i.e. anyone who meets the Party's eligibility criteria (assuming they have any) as reflected in the TRQ Appendix to the Party's goods schedule.
31. There is nothing in the text of Article 2.29(1) which supports the qualifications Canada has read into the article. As Canada interprets the provision, it would read "Each Party shall administer its TRQs in a manner that allows importers *who have been granted a TRQ allocation* the opportunity to utilise *the quantity provided under that allocation* fully."

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<sup>37</sup> New Zealand's first written submission, para. 132.

<sup>38</sup> Canada's first written submission, para. 91.

<sup>39</sup> In Canada's case these eligibility requirements are set out in Appendix A to its Annex 2-D Tariff Elimination Schedule ('Canada's TRQ Appendix').

<sup>40</sup> New Zealand's first written submission, para. 131.

<sup>41</sup> Canada's first written submission, para. 93.

<sup>42</sup> Consistent with Article 31 of the VCLT.

32. In addition to reading in qualifications which do not exist in the text of Article 2.29(1), Australia submits that Canada's interpretation is not supported by the context of Article 2.29. Firstly, as Canada recognises,<sup>43</sup> Article 2.29 relates to all TRQs – both those with an allocation mechanism and those on a first come-first served basis. However Canada's interpretation would only make sense in relation to TRQs administered through an allocation mechanism. Secondly, Article 2.29(1) places guardrails around how Parties administer their TRQs, including in relation to eligibility, to avoid such administration being used to subvert market access commitments. Canada's reading would render Article 2.29(1) virtually meaningless, producing the tautological result that a Party is restrained from preventing an individual importer to whom it has granted an allocation from using that allocation.
33. Australia does not support Canada's interpretation, nor does Australia agree that New Zealand's interpretation that the provision relates to the entire TRQ is "expansive".<sup>44</sup>

### **The "opportunity"**

34. The second prong of Canada's response takes an *arguendo* approach to New Zealand's interpretation of "TRQ quantities", shifting its focus to the "opportunity" Article 2.29(1) addresses.
35. New Zealand's submission refers to the "restrictive and compartmentalised nature of Canada's quota pooling system" as being inconsistent with Article 2.29(1).<sup>45</sup> As New Zealand highlights, importers who meet the eligibility requirements set out in Canada's schedule, but who do not fall within a certain pool, have *no opportunity* to utilise the quota *within that pool*. Importers that do not fall within any pool (e.g. retailers) have *no opportunity* to utilise *any* of Canada's TRQ quantities.<sup>46</sup> New Zealand submits this pooling system "encourages chronic underfill" rates for 13 of Canada's 16 dairy TRQs.<sup>47</sup>
36. Canada, on the basis of two confidential expert reports it commissioned on New Zealand's trade in dairy products with Canada (by Dr. Sébastien Pouliot and Dr. Al Mussell respectively<sup>48</sup>) argues that the low fill rates are not due to Canada's pooling system but rather "other economic factors... including a lack of demand in Canada for imports of these products from New Zealand".<sup>49</sup> Australia will not comment on the soundness of the conclusions in these expert reports.
37. Australia notes that a CPTPP Party is not required to fill its TRQ quotas to comply with 2.29(1). Rather, the emphasis is on providing the *opportunity* for importers to utilise TRQs fully. Australia agrees with New Zealand that this opportunity for eligible

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<sup>43</sup> See Canada's first written submission, para. 151.

<sup>44</sup> Canada's first written submission, para. 87.

<sup>45</sup> New Zealand's first written submission, para. 138.

<sup>46</sup> New Zealand's first written submission, para. 138.

<sup>47</sup> New Zealand's first written submission, para. 2.

<sup>48</sup> Exhibit CDA-1 and Exhibit CDA-2.

<sup>49</sup> Canada's first written submission, para. 74. See also para. 88.

importers under a Party's schedule to utilise TRQ quotas fully necessarily includes the opportunity for those importers to access the TRQs.<sup>50</sup> There can be no utilisation without access.

38. Australia agrees with Canada that the absence of fully utilised TRQs is not conclusive evidence that Canada's TRQ administration is inconsistent with Article 2.29(1). While high fill rates would be clear evidence that importers indeed had the opportunity to utilise the full quantity, the opposite is not the case.<sup>51</sup> However, whether more New Zealand dairy products would in fact enter the Canadian market if Canada administered its TRQs in a less restrictive manner is of little relevance to whether its administration provides the *opportunity* for them to enter, up to the quantities available under any individual TRQ.
39. Canada has been very open that import controls comprise one of the three pillars of its dairy supply management system, including the aggregate quantities to be imported by different market segments.<sup>52</sup> It therefore is inherent to Canada's own case that it does in fact restrict the opportunity for eligible importers to utilise its dairy TRQs fully, contrary to Article 2.29(1).

#### **V. ARTICLE 2.30(1)(A) OF THE CPTPP – ABILITY FOR ELIGIBLE PERSONS TO APPLY AND BE CONSIDERED FOR A QUOTA ALLOCATION**

40. Article 2.30(1) of the CPTPP provides:

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;

41. New Zealand claims Canada has breached Article 2.29(1)(a) because its Notices to Importers exclude persons who fulfil Canada's eligibility requirements from applying, and being considered, for a quota allocation under the relevant TRQ.<sup>53</sup> Canada's Notices require that, in addition to meeting the eligibility requirements set out in Canada's TRQ Appendix, all applicants must also be a particular type of business entity in order to apply for an allocation (i.e. "processors", "further processors" or "distributors").<sup>54</sup>

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<sup>50</sup> New Zealand's first written submission, para. 131.

<sup>51</sup> i.e. underfill does not necessarily mean there has been a lack of opportunity – it could be due to the kinds of "other economic factors" Canada has referred to in its expert reports. See Canada's first written submission, para. 88.

<sup>52</sup> Canada's first written submission, paras. 32 and 59.

<sup>53</sup> New Zealand's first written submission, para. 100.

<sup>54</sup> New Zealand's first written submission, para. 111.



42. New Zealand and Canada appear to agree that Canada's eligibility requirements must be consistent with Canada's TRQ Appendix.<sup>55</sup> The general eligibility requirements for TRQ utilisation as specified in paragraph 3(c) of Canada's TRQ Appendix:

Canada shall allocate its TRQs each quota year to eligible applicants. An eligible applicant means a **resident of Canada, active in the applicable Canadian dairy, poultry or egg sector**, as appropriate, and that is **compliant with the Export and Import Permits Act and its regulations**. In assessing eligibility, Canada shall not discriminate against applicants who have not previously imported the product subject to a TRQ but who meet the residency, activity and compliance criteria.<sup>56</sup>

43. Where New Zealand and Canada diverge is whether the eligibility requirements in Canada's TRQ Appendix are a floor or a ceiling. That is, whether: (i) as New Zealand contends, Canada cannot introduce new or additional eligibility requirements to those in its TRQ Appendix without following the requisite procedure set out in Article 2.29(b) and (c);<sup>57</sup> or (ii) as Canada contends, it is free to introduce new or additional eligibility requirements, so long as they "comply with the parameters" in its TRQ Appendix.<sup>58</sup> Canada's reasons that so long as it allocates its dairy TRQs to Canadian residents that are active in the Canadian dairy sector, it is entitled to limit TRQ eligibility to a "subset" of these residents.<sup>59</sup> Canada adds that Article 2.30(1)(a) then "requires Canada to apply its chosen eligibility requirement during the quota application period".<sup>60</sup>
44. Australia supports New Zealand's interpretation of Article 2.30(1), which is consistent with a VCLT Article 31 analysis of the provision<sup>61</sup> and supports the CPTPP's object and purpose.<sup>62</sup> There is no basis in the text for Canada's argument that it can add additional eligibility requirements so long as they do not contradict the eligibility requirements in its TRQ Appendix. There is also no textual basis in Article 2.30(1)(a) for Canada's assertion that it is only bound by its eligibility requirements during a particular TRQ application period, and may change them at will between periods. This does however serve to give the provision some meaning – without this flourish, Canada's interpretation would render the provision completely inutile.
45. Australia does not agree with Canada that the eligibility requirements set out in paragraph 3(c) of its TRQ Appendix are merely "threshold requirements",<sup>63</sup> and that that Canada's definition of "An eligible applicant" in paragraph 3(c) being "a resident

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<sup>55</sup> New Zealand's first written submission, para. 104; Canada's first written submission, para. 162.

<sup>56</sup> Emphasis added.

<sup>57</sup> New Zealand's first written submission, para. 104.

<sup>58</sup> Canada's first written submission, para. 162.

<sup>59</sup> Canada's first written submission, para. 162.

<sup>60</sup> Canada's first written submission, para. 162.

<sup>61</sup> As outlined in New Zealand's first written submission, paras. 103-106.

<sup>62</sup> As discussed at paras. 9 -13 above.

<sup>63</sup> Canada's first written submission, para. 178.

of Canada, active in the... Canadian dairy... sector" does not mean that "any" or "every" Canadian resident active in the Canadian dairy sector need be eligible to apply and be considered.<sup>64</sup> CPTPP parties reasonably expect that a person who fulfills the eligibility requirements that have been negotiated and reflected in the treaty text will in fact be eligible, without having to meet additional eligibility requirements. In fact, that is the very purpose of Article 2.30(1)(a).

46. In Australia's view, permitting Canada to introduce additional eligibility requirements to what was negotiated, restricting those who can apply for and be considered for a quota allocation, would set a dangerous precedent for compliance with CPTPP TRQ market access commitments.

## VI. ARTICLE 2.30(1)(B) OF THE CPTPP – PROCESSOR CLAUSE

47. An important issue in this case relates to the proper interpretation of the phrase "an allocation" for the purposes of Article 2.30(1)(b) CPTPP, known as the "Processor Clause".
48. Article 2.30(1)(b) CPTPP provides that:

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

[...]

(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**.<sup>65</sup>

49. Australia supports New Zealand's interpretation of the Processor Clause. That is, *any* allocation that is available under a TRQ is "an allocation" for the purposes of the Processor Clause.<sup>66</sup> As such, a CPTPP Party will breach the Processor Clause if it limits access to *any* allocation under a TRQ to processors.
50. On the other hand, Canada asserts that "an allocation" should be interpreted to mean *every* allocation that may be granted under a TRQ.<sup>67</sup> Australia does not support Canada's interpretation of the Processor Clause, as it is not consistent with a VCLT Article 31 analysis and would produce absurd results, rendering the provision inutile.

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<sup>64</sup> Canada's first written submission, para. 177.

<sup>65</sup> Emphasis added.

<sup>66</sup> New Zealand's first written submission, paras. 71 – 76.

<sup>67</sup> Canada's first written submission, paras. 191 – 202.

51. Australia considers that, consistently with Article 31 of the VCLT, the phrase "an allocation" in the Processor Clause should be interpreted in accordance with the ordinary meaning of the phrase in its context and in light of the object and purpose of the CPTPP.
52. Australia agrees with New Zealand that the term "an" is relevantly defined as "something not specifically identified ... but treated as one of a class: one, some, *any*".<sup>68</sup> While this definition of "an" is not exhaustive, it is the most appropriate. Australia notes Canada's position that "an" could also be defined "to mean any or every thing or person of the type you are referring to".<sup>69</sup> However, as Australia argues below, the context of the overall obligation in Article 2.30(1) and the object and purpose of the CPTPP confirm CPTPP Parties' intention was for "an allocation" to mean "any allocation" for the purposes of the Processor Clause.
53. Australia agrees with New Zealand and Canada that the most relevant definition of "allocation" is "[t]hat which is allocated to a particular person, purpose, etc.; a portion, a share; a quota".<sup>70</sup> Australia further supports New Zealand's position<sup>71</sup> that, given the Processor Clause deals with "access to" an allocation of a TRQ and not an allocation that has been granted, the term "allocation" refers to "a *potential* portion or share of the TRQ that may be granted to an applicant/applicants".<sup>72</sup> New Zealand does not provide an imprecise interpretation of "allocation", as argued by Canada.<sup>73</sup> The Processor Clause functions to limit CPTPP Parties' ability to restrict *access to* allocations under a TRQ to processors. As such, New Zealand's interpretation of "an allocation" as "one, several or indeed all allocations" that are available to an applicant or applicants under a TRQ, aligns with the proper function of the Processor Clause.
54. As such, in light of the ordinary meaning of the terms "an" and "allocation", the phrase "an allocation" should be interpreted to mean *any* potential allocation of a TRQ to processors and not *every* allocation under a TRQ that may be granted to processors, as contended by Canada. If the Parties had meant to establish such a narrow prohibition against limiting access to *every* allocation to processors, they would have given effect to that intention and drafted the Processor Clause accordingly.
55. New Zealand's interpretation of "an allocation" in the Processor Clause is supported by the context of the overall obligation in Article 2.30(1). Australia notes that the Processor Clause is surrounded by other obligations that are designed to prevent CPTPP Parties from administering their TRQs in a manner that favours their domestic industry at the expense of CPTPP exporting Parties<sup>74</sup> seeking to benefit from the TRQs. In this regard, Australia disagrees with Canada's view<sup>75</sup> that the Domestic Production Clause has a

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<sup>68</sup> Oxford English Dictionary Online, definition of 'a', entry I.1 (emphasis added).

<sup>69</sup> Canada's first written submission, paras. 196-197.

<sup>70</sup> Oxford English Dictionary Online, definition of 'allocation', entry 3.b. New Zealand's first written submission, para. 70; Canada's first written submission para. 194.

<sup>71</sup> New Zealand's first written submission, para. 70.

<sup>72</sup> New Zealand's first written submission, para. 70.

<sup>73</sup> Canada's first written submission, para. 194.

<sup>74</sup> For example, Article 2.30.1(b) (Domestic Production Clause).

<sup>75</sup> Canada's first written submission, paras. 198 – 199.

different function to the Processor Clause such that the meaning of the phrase "an allocation" would have a different meaning in each clause. The Domestic Production Clause and Processor Clause have similar functions in restraining CPTPP Parties' ability to limit access to allocations under a TRQ. As such, the only reasonable interpretation of the Processor Clause is one that aligns with the context of the overall obligation in Article 2.30(1).

56. New Zealand's interpretation of 'an allocation' in the Processor Clause is consistent with the object and purpose of the CPTPP. As discussed at paragraph 13 above, the object and purpose of the CPTPP, as set out in the Preamble, emphasises trade liberalisation. While the Preamble also recognises Parties' "right to regulate" for certain public welfare objectives, this must be applied in a manner consistent with the obligations of the CPTPP. Australia agrees that CPTPP Parties are afforded some discretion in administering their TRQs. However, CPTPP Parties could not have reasonably intended for that discretion to extend to permitting Parties to adopt protectionist TRQ allocation mechanisms which significantly undermine the value of those market access commitments.
57. Australia submits that the negotiated carve-outs in Canada's TRQ Appendix, as well as the phrase "unless otherwise agreed" in Article 2.30(1)(b), appropriately provide Canada with discretion and flexibility in setting its regulatory priorities in a way that does not undermine its market access commitments. Australia is not aware of any agreement between CPTPP Parties that would modify Canada's obligations under the Processor Clause, including in a way that would allow Canada to limit access to any allocation under a TRQ to processors. If Canada had intended to preserve its discretion to administer TRQs in this way, it would have done so through the consultation and agreement process outlined in Article 2.29(2)(b) and (c), or through terms negotiated and inserted into Canada's TRQ Appendix. Canada has not done so.
58. If the Panel accepted Canada's interpretation of the Processor Clause, a CPTPP Party would be permitted to limit 99 per cent of its allocations under a TRQ to processors, provided at least one allocation remained available for non-processors. Canada's interpretation would lead to manifestly absurd results that undermine the utility of the Processor Clause. Therefore, in Australia's view, Canada's interpretation could not have been reasonably intended by CPTPP Parties.

## VII. CONCLUSION

59. New Zealand's claims in this dispute raise important questions regarding how Parties are held to account for their FTA commitments. TRQs are only valuable to FTA partners if they are accessible. For this reason, the CPTPP contains specific obligations delineating the latitude Parties have when administering access to them.
60. In this submission, Australia has outlined its understanding of fundamental questions of treaty interpretation under the VCLT. The ordinary meaning is the starting point to

any treaty analysis, and that meaning is not to be established in isolation from its context. The object and purpose of the treaty is also to be taken into account. Australia agrees with both principal parties that the CPTPP's Preamble makes clear that it is a trade liberalising agreement. While the Preamble does recognise Parties' legitimate right to regulate, this does not confer new rights upon Parties that do not appear in the text of the FTA.

61. Australia has also suggested that the Panel should consider the findings of the analogous USMCA case as highly pertinent, though not binding. The "Processor Clause" obligations at issue are identical. International law is a single unified legal system, which should avoid as far as possible contradictory judicial decisions.
62. In relation to the overarching issue of Canada's practice of excluding retailers from accessing quota under its TRQs, one of the interrelated violations under CPTPP on which New Zealand requests a ruling, Australia submits that the CPTPP text makes clear that the Parties intended retailers to have access to the dairy TRQs (excluding industrial cheese). As a result, Canada has an obligation to open these TRQs to retailers.
63. Australia has addressed how Canada's dairy TRQ administration undermines its obligation under Article 2.29(1) to administer its TRQs in a manner that allows importers the opportunity to utilise TRQ quantities fully. Canada's view that the provision only concerns importers that have already received an allocation of a TRQ finds no basis in the text, reading in qualifications that simply are not there. It is not supported by the context of Article 2.29, which both relates to TRQs administered through an allocation system and those administered on a first come-first served basis, as it only makes sense in relation to TRQs administered through an allocation mechanism. It would also render the provision meaningless. Australia agrees with New Zealand's interpretation, that Article 2.29(1) concerns the opportunity for any importers meeting Canada's eligibility criteria under its TRQ Appendix to utilise the total quantity of quota available under each of its TRQs. The *opportunity* for those importers to utilise the TRQ quantities fully is what matters, not whether they in fact do so.
64. Canada's approach to Article 2.29(1)(a) similarly reads in qualifications which do not exist in the text, in order to argue that: (i) its eligibility requirements as reflected in its TRQ Appendix are a floor, rather than a ceiling, on what it can require; and (ii) that the provision effectively resets at the start of each new quota application period. Australia agrees with New Zealand that CPTPP Parties could not have intended such a result, which undermines both the purpose of the provision and the treaty's trade liberalisation objectives.
65. In applying a VCLT Article 31 analysis to CPTPP Article 2.30(1)(b), Australia submits it is clear that "an allocation" is intended to refer to *any* allocation rather than *every* allocation. This interpretation is consistent with: the ordinary meaning of "an"; the trade

liberalising object and purpose of the treaty as a whole; and the context of the overall obligation in Article 2.30(1), which disciplines Parties from administering their TRQs in a manner which favours domestic industry at the expense of CPTPP exporting Parties. Canada's proposed interpretation would undermine the utility of the Processor Clause and produce an absurd result, again undermining the treaty's trade liberalisation objectives.

66. Australia thanks the Panel for the opportunity to submit these views.