

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

**CANADA - DAIRY TRQ ALLOCATION MEASURES
(Complaint by New Zealand)**

(CDA-NZ-2022-28-01)

**RESPONSES OF CANADA TO POST-HEARING WRITTEN QUESTIONS
FOR THE PARTIES FROM THE PANEL**

26 June 2023

LIST OF EXHIBITS

Exhibit #	Exhibit Name
CDA-65	Notice to Importers, CETA Cheese of All Types TRQ, Serial No. 993, October 1, 2020
CDA-66	Dairy – CETA Cheese Tariff Rate Quota (TRQ) (Items 141 to 157 on the Import Control List), Serial No. 895, August 1, 2017
CDA-67	Dairy – CPTPP Butter Tariff Rate Quota (TRQ), Serial No. 918, November 26, 2018
CDA-68	Dairy – CPTPP Cheeses of all Types Tariff Rate Quota (TRQ), Serial No. 919, November 26, 2018,
CDA-69	Dairy – CPTPP Concentrated Milk Tariff Rate Quota (TRQ), Serial No. 920, November 26, 2018
CDA-70	Dairy – CPTPP Cream Tariff Rate Quota (TRQ), Serial No. 921, November 26, 2018
CDA-71	Dairy – CPTPP Cream Powders Tariff Rate Quota (TRQ), Serial No. 922, November 26, 2018
CDA-72	Dairy – CPTPP Ice cream and mixes Tariff Rate Quota, Serial No. 923
CDA-73	Dairy – CPTPP Industrial Cheese Tariff Rate Quota (TRQ), Serial No. 924, November 26, 2018
CDA-74	Dairy – CPTPP Milk Tariff Rate Quota (TRQ), Serial No. 925, November 26, 2018
CDA-75	Dairy – CPTPP Milk Powders Tariff Rate Quota (TRQ), Serial No. 926, November 26, 2018
CDA-76	Dairy – CPTPP Mozzarella and Prepared Cheese Tariff Rate Quota (TRQ), Serial No. 927, November 26, 2018
CDA-77	Dairy – CPTPP Other Dairy Tariff Rate Quota (TRQ), Serial No. 928, November 26, 2018
CDA-78	Dairy – CPTPP Powdered Buttermilk Tariff Rate Quota (TRQ), Serial No. 929, November 26, 2018
CDA-79	Dairy – CPTPP Products of Natural Milk Constituents Tariff Rate Quota (TRQ), Serial No. 930, November 26, 2018,
CDA-80	Dairy – CPTPP Skim Milk Powders Tariff Rate Quota (TRQ), Serial No. 931, November 26, 2018
CDA-81	Dairy – CPTPP Whey Powders Tariff Rate Quota (TRQ), Serial No. 932, November 26, 2018
CDA-82	Dairy – CPTPP Yogurt and Buttermilk Tariff Rate Quota (TRQ), Serial No. 933, November 26, 2018

I. QUESTIONS FOR NEW ZEALAND AND CANADA:

1. The Panel seeks to understand the meaning of the term “shall allocate its TRQ each quota year” in paragraph 3(c) of Canada’s Schedule. Do the parties interpret the phrase “shall allocate” to *require* an allocation mechanism as defined in footnote 18 to Article 2.30 of the CPTPP?

1. Yes, Canada interprets paragraph 3(c) of its TRQ Appendix as requiring Canada to administer its TRQs through an allocation mechanism.
2. Footnote 18 to Article 2.30 defines the term “allocation mechanism” as “any system where access to the TRQ is granted on a basis other than first-come first-served”.¹ This definition makes clear that an “allocation mechanism” and a first-come, first-served (“FCFS”) system are mutually exclusive forms of TRQ administration under the Agreement.²
3. Article 2.28.3 provides context for interpreting the term “allocation mechanism”. This provision reads as follows:

The Party administering a TRQ shall publish all information concerning its TRQ administration, including the size of quotas and eligibility requirements; and, if the TRQ will be allocated, application procedures, the application deadline, and the methodology or procedures that will be used for the allocation or reallocation [...].³

4. This provision – and in particular the use of the word “if” in that provision – makes clear that a TRQ is not always “allocated”. Rather, a TRQ is only “allocated” when the Party is administering the TRQ through an allocation mechanism. In fact, Canada notes that the only other provisions in Section D in which the words “allocate” and “allocation” appear are those that expressly apply where a Party administers its TRQs through an allocation mechanism.
5. Turning to Canada’s TRQ Appendix, the chapeau to paragraph 3 of Canada’s TRQ Appendix provides that “Canada shall administer all TRQs provided for in this Agreement and set out in Section B of this Appendix according to the following provisions”.⁴ In this regard, the first sentence of paragraph 3(c) provides that “Canada shall allocate its TRQs each quota year

¹ Emphasis added.

² In the WTO context, it is also recognized that there are no allocations under a FCFS system. See Exhibit CDA-39, Table 2 (“Categories of Principal Tariff Rate Quota Administration Methods”), p. 4.

³ Emphasis added.

⁴ Emphasis added.

to eligible applicants”.⁵ The use of the word “shall” in paragraph 3(c) makes clear that this is a binding obligation.

6. Based on the above, Canada’s obligation to “allocate its TRQs” means that Canada must administer its TRQs through an allocation mechanism. If Canada were to decide to administer its TRQs on an FCFS basis, Canada would not be “allocating” its TRQs within the meaning of Section D. This binding commitment to use an allocation mechanism, combined with the limited constraints that Section D places on the design of a Party’s allocation mechanism, made it clear to the other CPTPP Parties that Canada would use an allocation mechanism to administer all its TRQs and that Canada would retain significant discretion to determine its allocation mechanism.

7. New Zealand’s overly broad interpretation of Article 2.29(2)(a) would make it impossible for Canada to use an allocation mechanism to the extent that any such system imposes “a condition, limit or eligibility requirement on the utilisation of a TRQ”, within the meaning that New Zealand ascribes to this phrase. New Zealand’s interpretation would negate both Canada’s commitment under paragraph 3(c) of Canada’s TRQ Appendix to administer its TRQs through an allocation mechanism and Canada’s corollary discretion to determine which allocation mechanism it may use. New Zealand’s interpretation would effectively force Canada to use an FCFS system, in contravention of paragraph 3(c) of Canada’s TRQ Appendix – a result that may please New Zealand but that would be inconsistent with the negotiated outcome and the common intention of the Parties.

8. In contrast, Canada has provided a harmonious interpretation of all the provisions at issue in this dispute, including Articles 2.29.2(a) and 2.30.1(a) and paragraph 3(c) of Canada’s TRQ Appendix, which gives proper meaning to each of them without giving rise to any conflict.

⁵ Emphasis added.

II. QUESTIONS FOR CANADA:

1. As we understand it, if there are no eligible applicants in a single pool for a given TRQ, then that pool's allocation is transferred to the other pool or pools within that TRQ. Are we correct to understand that when this happens, the availability of the quota in these other pools remains limited to the members of that pool or pools (i.e., processors or further processors or distributors)? In other words, those who were not included in the original pools (for example, retailers) are not eligible to apply for a quota allocation of this redistributed quota?

9. Yes, in the situation described by the Panel, the availability of the quota remains limited to persons who meet the eligibility criteria identified in Section 3 of Canada's Notices to Importers and who identify themselves as belonging to one of the eligible categories (i.e., processors, further processors and distributors). The reserved quantity from a pool for which there are no applicants is divided between the remaining groups of eligible applicants by redistributing the amount equally between the remaining pools. None of the redistributed amount is made available to persons that fall outside of Canada's eligibility criteria.

2. Are we correct in our understanding that when there are no eligible applicants in any of the pools for a given TRQ—no applicants whatsoever—and Canada then posts the availability of the TRQ on the Global Affairs Canada (GAC) website, that any entity that meets the eligibility criteria in Paragraph 3(c) of Canada's Tariff Schedule (Appendix A, Annex 2D), including, for example, potentially retailers, can apply for that quota? If that is correct, how many instances have there been in which TRQs have been allocated to entities that do fall within any of Canada's pools (i.e., who are not processors, further processors or distributors)? When in the timeline of the TRQ process does the posting to the GAC website take place?

10. In the situation where there are no applicants whatsoever for a particular TRQ, Canada does not make the quota available to any person that meets the threshold requirements set out in paragraph 3(c) of Canada's TRQ Appendix. Instead, even when there are no applicants during the application period, Canada's chosen eligibility criteria – as described in Section 3 of Canada's Notices to Importers – continue to apply.

11. To be more specific, when there are no applicants for a particular TRQ at the end of the application period, Canada will normally post the available quantities on GAC's website. This is normally done no later than within the first two weeks of the quota year. Once the quantities have been posted, eligible persons can then contact GAC by email to apply for a share of the available quantities. After GAC has confirmed that the person is eligible to receive an allocation, GAC will send an email to the person confirming that they are eligible and that they have been issued an allocation in the quantity requested. This mechanism remains in place

until the TRQ has been fully allocated or until the end of the quota year (if the quota is not fully allocated before the end of the quota year).

3. What exactly is meant by the term of “any applicant to come forward” in line 5 of page 129 of the oral hearing transcript of June 14, 2023? What restrictions, if any, are there on who qualifies as an applicant at this stage in the process?

12. Please refer to Canada’s answers to Question 1 and Question 2 (above). When there are no applicants for a particular TRQ at the end of the application period, Canada will normally post the available quantities on the GAC website. This is normally done no later than within the first two weeks of the quota year. Once the quantities have been posted, eligible persons can then “come forward” by contacting GAC to apply for a share of the available quantities.

13. At this stage in the process, Canada’s pooling system no longer applies. In other words, when Canada posts the available quantities on the GAC website, there is no longer any quantity “reserved” for a particular class of market actors. For example, if a distributor applies for 50% of the total quantity of the quota at this stage in the process, Canada will issue that quantity to the distributor.

14. However, Canada’s eligibility criteria – as described in Section 3 of Canada’s Notices to Importers – continue to apply. In other words, at this stage in the process, eligibility for an allocation continues to be limited to processors, further processors and distributors.

4. The Panel seeks clarification of the representations in Paragraph 66 of Canada’s Initial Written Submission. Who is eligible to apply for quota that has been returned after the initial round of offers of returned quota to interested allocation holders? Who is included in the final phrase of that paragraph: “potentially new applicants that meet the eligibility criteria of the TRQ”? Is that quota available to entities that do not fall within any of Canada’s pools (i.e., who are not processors, further processors or distributors)?

15. Reallocations are only issued to persons that meet Canada’s eligibility criteria (as described in Section 3 of Canada’s Notices to Importers) – namely processors, further processors and distributors. The phrase “potentially new applicants that meet the eligibility criteria of the TRQ” in paragraph 66 of Canada’s initial written submission therefore refers to the following two categories of persons:

1. persons that meet Canada’s eligibility criteria but who did not apply for an allocation during the application period and therefore did not receive an allocation during the initial round of allocation; and

2. persons that meet Canada's eligibility criteria and did apply for an allocation during the application period but who were not issued an allocation for one reason or another (e.g., because their calculated market-share allocation was lower than the minimum quantity that they indicated they would be willing to accept in their TRQ application form).

5. Given that Section D (Articles 2.28-2.32 of CPTPP) includes all provisions governing tariff quota administration, the panel seeks clarification of which provisions of Section D Canada believes are applicable to its pooling system?

16. Section D contains three types of provisions: (1) provisions that apply to all TRQs regardless of whether access to a TRQ is granted on a FCFS basis or through an allocation mechanism (such as Article 2.29); (2) provisions that apply exclusively in respect of TRQs administered through an allocation mechanism (such as Article 2.30.1); and (3) provisions that apply exclusively in respect of TRQs administered on a FCFS basis (such as Article 2.32.3).

17. Canada's dairy TRQs are subject to an allocation mechanism within the meaning of footnote 18 to Article 2.30 because Canada maintains a system where access to these TRQs is granted on a basis other than FCFS. "Pooling" is a component of Canada's allocation mechanism. Therefore, in general, Canada's pooling system is subject to the provisions of Section D that apply in respect of TRQs administered through an allocation mechanism, as well as to the provisions in Section D that apply to all TRQs regardless of whether access to a TRQ is granted on an FCFS basis or through an allocation mechanism.

18. However, when applying a particular provision in Section D to specific measures, it is necessary to consider the terms and scope of the particular provision to determine which elements of a measure the provision actually governs. For example, the obligation for a Party under Article 2.28.2 to ensure that its "procedures" for administering its TRQs are fair and equitable applies in respect of Canada's pooling system, but the terms of the provision limit its scope to the procedures for administering its TRQs. As Canada has set out in its submissions, this obligation is about procedural fairness and requires officials operating Canada's pooling system to provide eligible applicants with an opportunity to submit relevant information and to provide them with an unbiased decision that is made in accordance with the established rules. By the very terms of the provision, its scope does not extend to the substantive (or design) aspects of allocation mechanisms, such as Canada's decision to create pools. Rather, the provision applies to the procedures used to operate the allocation mechanism.

19. Similarly, Article 2.29.2(a) applies in respect of Canada's pooling system, but by the very terms of the provision, this provision only applies to the extent that Canada's pooling system introduces a new or additional condition, limit or eligibility requirement "on the utilisation of a TRQ for the importation of a good". As Canada noted in its submissions, because the eligibility requirements and purported limit challenged by New Zealand are not the types of limits or requirements covered by Article 2.29.2(a), this provision does not actually govern the challenged requirements and purported limit. The terms "utilisation" and "allocation" are distinct terms with discrete meanings under the Agreement; Article 31 of the VCLT prevents one from being conflated with the other.

20. Likewise, Canada has also explained that other provisions under which New Zealand has made claims – namely Articles 2.29.1, 2.30.1(a) and 2.30.1(c) – do not actually govern the challenged aspects of Canada's measures under the very terms of these provisions. So while these provisions may apply in respect of allocation mechanisms, they do not apply to Canada's measures as challenged by New Zealand and Canada's measures are not inconsistent with any of these other provisions.

21. Furthermore, while the Processor Clause of Article 2.30.1(b) applies in respect of Canada's pooling system and governs the substantive aspects of an allocation mechanism, including the establishment of the pools themselves, this provision does not prohibit pooling. Canada has demonstrated that the Processor Clause requires that a Party ensure that it does not confine the ability to obtain "allocation[s]" to processors. In other words, a Party must permit non-processors to apply for allocations and grant allocations to any non-processors that apply and satisfy applicable requirements. However, the Processor Clause contains no requirements with regard to the size of allocations (a matter governed by Article 2.30.1(c), which provides that allocations must be made in commercially viable shipping quantities). Canada's pooling system complies with the Processor Clause because every distributor and further processor that applies for an allocation, and satisfies Canada's requirements, is granted an allocation.

22. Beyond the provisions under which New Zealand has made claims, there are other provisions in Section D that apply in respect of Canada's pooling system and that would govern specific elements of that system. For example, the Producer Clause in Article 2.30.1(b) would prohibit Canada from making producer groups eligible to apply for an allocation and

would prohibit Canada from establishing a pool for producer groups, since the Producer Clause prohibits Parties from allocating any portion of the quota to a producer group.

23. Another example of a provision that would apply in respect of Canada's pooling system and may govern specific elements of that system is the first clause of Article 2.30.1(c), which obligates a Party administering a TRQ through an allocation mechanism to ensure that each allocation is made in commercially viable shipping quantities. In theory, this provision could prohibit Canada from establishing pools so small as to prevent the making of allocations in commercially viable shipping quantities. However, New Zealand has made no such claim and, in any event, Canada's pooling system is consistent with this provision because the pools are sufficiently large to ensure that each allocation is made in commercially viable shipping quantities.

6. When did Canada adopt and begin using the pooling system for its dairy TRQs that is the subject of New Zealand's challenge?

24. Canada will address the Panel's question by describing its long-standing practice of using "pools" under three separate trade agreements: (1) the World Trade Organization ("WTO") Agreement; (2) the Comprehensive Economic and Trade Agreement ("CETA") between Canada and the European Union; and (3) the CPTPP.

1. WTO TRQs

25. When the WTO Agreement on Agriculture entered into force in 1995, Canada converted its import quotas into TRQs. At the time, Canada made the choice to administer some of its new WTO TRQs through a pooling system. This was notably the case for Canada's WTO Chicken TRQ. Since the entry into force of the WTO Chicken TRQ in 1995, TRQ eligibility under this TRQ has normally been limited to the following five importer groups: (1) traditional importers;⁶ (2) processors; (3) processors of products not on Canada's *Import Control List*; (4) distributors; and (5) food service operators. While certain aspects of Canada's allocation mechanism for the WTO Chicken TRQ have changed on various occasions since 1995 (in particular the size of the pools and the criteria for calculating allocations), Canada has

⁶ The term "traditional importers" refers to importers who had the right to import supply-managed products before the entry into force of the WTO Agreement on Agriculture in 1995.

continuously used a pooling system to administer this WTO TRQ. This remains the case to this day and all WTO Members are well aware of this allocation mechanism.

26. Canada notes that at the hearing, New Zealand confirmed that it was aware of Canada's use of a pooling system for its WTO Chicken TRQ.⁷ Yet New Zealand did not seek any express provision restricting Canada's right to use a pooling system for its CPTPP TRQs – neither in Section D nor in Canada's TRQ Appendix. This stands in contrast to, for example, the restriction placed by the CPTPP Parties on Canada's right to use an auctioning system for more than seven years after entry into force of the CPTPP.⁸

2. CETA TRQs

27. The CETA predates the CPTPP; it was signed on 30 October 2016 and entered into force provisionally on 21 September 2017. The CETA established two dairy TRQs for Canada: (1) a Cheese TRQ; and (2) an Industrial Cheese TRQ. Canada administers the CETA Cheese TRQ through a pooling system.

28. To be more specific, TRQ eligibility under the CETA Cheese TRQ is limited to three classes of market actors: processors, distributors and retailers. This TRQ includes two "pools": (1) a pool of 50% of the TRQ volume that is reserved for processors; and (2) a pool of 50% of the TRQ volume that is reserved for distributors and retailers.⁹ Both pools are further divided into two "sub-pools": (1) a pool of 30% of the TRQ volume that is reserved for small and medium enterprises; and (2) a pool of 20% of the TRQ volume that is reserved for large enterprises.

29. Canada announced that it would use the pooling system described above through a Notice to Importers published on the GAC website on 1 August 2017.¹⁰ Canada then applied this system during the first CETA quota year (i.e., the 2017 calendar year), which began on 21 September 2017.¹¹ Canada has maintained the same pooling system since then.

⁷ CPTPP Dairy Hearing Transcripts, June 14 (Day 1), p. 156, lines 21 and 22: "New Zealand was aware of the WTO pooling that Canada was using in relation to chicken [...]".

⁸ See paragraph 3(d) of Canada's TRQ Appendix.

⁹ Notice to Importers, CETA Cheese of All Types TRQ, Serial No. 993, October 1, 2020, Exhibit CDA-65.

¹⁰ Notice to Importers, Dairy – CETA Cheese Tariff Rate Quota (TRQ), Serial No. 895, August 1, 2017, Exhibit CDA-66.

¹¹ Paragraph 1 of Annex 2-A (Tariff Elimination) of CETA defines the term "Year 1" as "the period of time beginning on the date of entry into force of this Agreement and ending on December 31 of the same calendar year

3. CPTPP TRQs

30. The CPTPP was signed on 8 March 2018. Following the CPTPP's signing, Canada held public consultations from 9 July 2018 to 31 August 2018 regarding the administration and allocation of Canada's new TRQs under the CPTPP. Following these public consultations, Canada's chosen allocation mechanism – including Canada's use of a pooling system – was published on the GAC website on 26 November 2018 via Notices to Importers for each of the CPTPP dairy TRQs.¹² The CPTPP then entered into force on 30 December 2018, meaning Canada's pooling system first began applying at the end of the 2018 calendar year (for TRQs administered on a calendar-year basis) and midway through the 2018-2019 dairy year (for TRQs administered on a dairy year basis).¹³ Canada has maintained this pooling system since then.

that this Agreement enters into force". Paragraph 6 of Annex 2-A further specifies that "[f]or the administration in Year 1 of each tariff rate quota established under this Agreement, the Parties shall calculate the volume of that tariff rate quota by discounting the prorated volume corresponding to the period running between January 1 and the date of entry into force of this Agreement. This calculated in-quota quantity shall be made available on the date this Agreement enters into force."

Given that the CETA entered into force provisionally on 21 September 2017, Canada pro-rated the quantity of the TRQ for the remaining 102 days of the calendar year (from 21 September 2017 to 31 December 2017) and issued allocations based on that (reduced) quantity. Canada and the European Union agreed that the TRQ would open on October 2, 2017 instead of September 21, 2017, to provide sufficient time to receive and assess the applications. However, the pro-rated volumes were calculated on the basis of the opening date of September 21, 2017.

¹² Dairy – CPTPP Butter Tariff Rate Quota (TRQ), Serial No. 918, November 26, 2018, Exhibit CDA-67; Dairy – CPTPP Cheeses of all Types Tariff Rate Quota (TRQ), Serial No. 919, November 26, 2018, Exhibit CDA-68; Dairy – CPTPP Concentrated Milk Tariff Rate Quota (TRQ), Serial No. 920, November 26, 2018, Exhibit CDA-69; Dairy – CPTPP Cream Tariff Rate Quota (TRQ), Serial No. 921, November 26, 2018, Exhibit CDA-70; Dairy – CPTPP Cream Powders Tariff Rate Quota (TRQ), Serial No. 922, November 26, 2018, Exhibit CDA-71; Dairy – CPTPP Ice cream and mixes Tariff Rate Quota, Serial No. 923, November 26, 2018, Exhibit CDA-72; Dairy – CPTPP Industrial Cheese Tariff Rate Quota (TRQ), Serial No. 924, November 26, 2018, Exhibit CDA-73; Dairy – CPTPP Milk Tariff Rate Quota (TRQ), Serial No. 925, November 26, 2018, Exhibit CDA-74; Dairy – CPTPP Milk Powders Tariff Rate Quota (TRQ), Serial No. 926, November 26, 2018, Exhibit CDA-75; Dairy – CPTPP Mozzarella and Prepared Cheese Tariff Rate Quota (TRQ), Serial No. 927, November 26, 2018, Exhibit CDA-76; Dairy – CPTPP Other Dairy Tariff Rate Quota (TRQ), Serial No. 928, November 26, 2018, Exhibit CDA-77; Dairy – CPTPP Powdered Buttermilk Tariff Rate Quota (TRQ), Serial No. 929, November 26, 2018, Exhibit CDA-78; Dairy – CPTPP Products of Natural Milk Constituents Tariff Rate Quota (TRQ), Serial No. 930, November 26, 2018, Exhibit CDA-79; Dairy – CPTPP Skim Milk Powders Tariff Rate Quota (TRQ), Serial No. 931, November 26, 2018, Exhibit CDA-80; Dairy – CPTPP Whey Powders Tariff Rate Quota (TRQ), Serial No. 932, November 26, 2018, Exhibit CDA-81; Dairy – CPTPP Yogurt and Buttermilk Tariff Rate Quota (TRQ), Serial No. 933, November 26, 2018, Exhibit CDA-82.

¹³ As Canada explained in its initial written submission, some CPTPP dairy TRQs are administered on a calendar-year basis (1 January – 31 December), while others are administered on a dairy-year basis (August 31 – July 31). In this regard, CPTPP Article 2.30.2 provides that "[d]uring the first TRQ year that this Agreement is in force for a Party, if less than 12 months remain in the TRQ year on the date of entry into force of this Agreement for that Party, the Party shall make available to quota applicants, beginning on the date of entry into force of this Agreement for that Party, the quota quantity established in its Schedule to Annex 2-D (Tariff Commitments), multiplied by a fraction the numerator of which shall be a whole number consisting of the number of months remaining in the TRQ year on the date of entry into force of this Agreement for that Party, including the entirety of the month in which this Agreement enters into force for that Party, and the denominator of which shall be 12".

As noted above, the CPTPP entered into force on 30 December 2018. Thus, for the CPTPP dairy TRQs administered on a calendar-year basis, Canada pro-rated the quantity of the TRQ for the month of December and issued allocations based on that (reduced) quantity. For the CPTPP dairy TRQs administered on a dairy-year basis,

Canada pro-rated the quantity of the TRQ for the remaining eight months of the dairy year (December to July) and issued allocations based on that (reduced) quantity.