

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

Canada – Dairy Tariff Rate Quota Measures

CLOSING STATEMENT OF NEW ZEALAND

15 June 2023

1. Chair, Members of the Panel -
2. Everything we have heard over the past two days has only served to confirm that Canada has implemented its 16 dairy TRQs under the CPTPP in a way that fundamentally undermines the access that was negotiated.
3. Canada has failed to comply with its TRQ obligations in three particular ways:
 - a. it has limited access to its dairy TRQs substantially **to processors**, those whose products are in direct competition with imported products;
 - b. it has divided all the quota under each TRQ into **restrictive pools**; and it has
 - c. **excluded retailers** – entirely - from accessing quota under each of Canada’s TRQs.
4. Canada’s actions are in direct violation of its commitments under the CPTPP to:
 - a. not limit access to *any* allocation to processors;
 - b. not introduce new restrictive measures without following an agreed process involving the other CPTPP Parties; and
 - c. not to exclude access to those who meet the eligibility requirements *set out in its schedule*.
5. This has also placed Canada in breach of other obligations under the CPTPP – obligations not to deny importers the opportunity to utilise TRQ quantities fully, obligations to allocate the amounts requested to the maximum extent possible, and obligations to ensure that its procedures for administering its TRQs are fair and equitable.
6. New Zealand will conclude its participation in this hearing by commenting on **three** points that have been a focus of the discussion over the past two days:
7. **First** the extent to which the Panel can rely on the USMCA *Canada-Dairy TRQ* decision.

8. While the decision in that case is not binding on *this* Panel – it is *highly* pertinent.
9. It is highly pertinent *because* it is an example of how a panel dealing with the *same* problem, and *identical* language, approached the matter.
10. The practice of international courts and tribunals is to look at how bodies dealing with similar issues have addressed them.
11. A good example of this is the ICJ *Diallo* case¹, which is referred to by Australia in its Third Party Submission.
12. The panel in the present dispute – as an international tribunal tasked with the interpretation of an international agreement in accordance with the VCLT – is entitled to follow this practice as well. This is not controversial.
13. As Singapore noted yesterday, and I quote:

‘in a dispute involving identically–worded obligations in another treaty (*i.e.*, CUSMA), the Panel *can* take into account the legal analysis and conclusions in the CUSMA Panel Report’.²
14. Indeed, the need for coherence in the application of rules relating to trade *makes this an imperative*.
15. **Second**, Canada’s insistence that it has an ***unfettered right*** to adopt an allocation mechanism *of its choice*.
16. As we have seen over the past two days, Canada’s arguments on this have *fallen apart*. It does not have an unfettered right to create limits or ignore eligible importers at will.
17. Canada has not substantiated its claim that it entered into CPTPP on the understanding that it could administer its TRQs under a restrictive quota pooling system.

¹ *Republic of Guinea v Democratic Republic of the Congo, Compensation (Judgment)* [2012] ICJ rep 324.

² Singapore’s Third Party Statement, at para 14.

18. No - Canada *agreed* to the rules under CPTPP – and it *must* comply with them.
19. If Canada wanted the right to pool, it should have secured this in its schedule. It did not.
20. **Third**, Canada has tried to complicate this case by presenting considerable economic data, and suggesting that this case somehow requires proof that there is demand for *New Zealand* products.
21. Where New Zealand has highlighted the chronically low fill rates for Canada’s dairy TRQs – it has done so to provide context for the Panel – not to substantiate our claims.³
22. None of the claims that New Zealand has made require proof of trade effects -
23. *AND nothing* we have heard during the course of this hearing has changed that view.
24. The panel *does not need* to engage with the economic reports from the experts to determine this case.
25. Chair, members of the Panel.
26. The resolution of this dispute therefore comes down to three key phrases:
27. First, the **utilisation of a TRQ**. This includes three steps: obtaining an allocation, importing goods to market, and claiming preferential tariff treatment.
28. An importer cannot utilise a TRQ without obtaining an allocation.
29. Second, the term **‘eligibility requirements’**. This is used consistently *throughout* the Agreement.⁴
30. *In all instances*, it means the requirements that an importer must meet in order to be eligible to apply for quota.

³ New Zealand’s First Written Submission, at para. 7.

⁴ New Zealand’s Rebuttal Submission, at para 66.

31. In *this context*, the reference to 'eligibility requirements' in Article 2.29(2)(a) *must* have the same meaning as that in Article 2.30(1)(a).
32. This is because Parties are prohibited from unilaterally introducing *new* eligibility requirements - the eligibility requirements that an importer must meet under Article 2.30(1)(a) are those set out in a Party's Schedule (or introduced under Article 2.29(2)(b)-(c)).
33. Finally, the term '***an allocation***' in the Processor Clause under Article 2.30(1)(b). This means '*any allocation*'.
34. Any other interpretation would render the Processor Clause meaningless.

I. CONCLUSION

35. Chair, members of the Panel. This is the first dispute under CPTPP.
36. CPTPP is a trade liberalisation agreement.
37. The Preamble explains that its purpose includes to 'contribute to maintaining open markets, [and] increasing world trade'.⁵
38. Canada's Notices to Importers do the opposite of this. They *operate* to restrict access to Canada's TRQs, and prevent them from being used to import dairy products into Canada tariff free.
39. This is in violation of both the spirit of CPTPP and the six Articles under which New Zealand has made claims.
40. Canada's interpretation of the Agreement would set a dangerous precedent for future CPTPP compliance.
41. It would allow Parties to block access to quota and, in doing so, undermine the market access that was negotiated.
42. It would make a mockery of the rules that have been agreed.
43. As discussed during the final part of the question and answer session this morning, New Zealand has challenged three forms of Canada's conduct.

⁵ CPTPP, Preamble, at para 3.

- a. reserving quota exclusively for domestic dairy processors;
 - b. allocating the quota available under each TRQ into 'pools' that can only be accessed by certain types of importer; and
 - c. excluding retailers from accessing quota under each of Canada's TRQs.
44. To conclude New Zealand's participation in this hearing and, *hopefully*, on this matter, we respectfully request the Panel to find that the three forms of conduct identified by New Zealand are inconsistent with Canada's obligations under CPTPP.
45. Chair, members of the Panel, we thank you for the careful consideration of the issues in this dispute.
46. Thank you also to Canada and the third parties for their engagement; and to the Responsible Office for the support provided during the course of this proceeding.
47. This concludes New Zealand's closing statement.