

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

Canada — Dairy Tariff Rate Quota Measures

**REPLY OF NEW ZEALAND TO THE RESPONSES OF CANADA TO POST-
HEARING WRITTEN QUESTIONS
FROM THE PANEL**

4 July 2023

QUESTION 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. New Zealand has already set out why ‘allocation’ is not limited to TRQs administered on a first-come first-served basis.
2. In its response Canada highlights Article 2.28(3), which obliges Parties to:

[P]ublish 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. Under Canada’s interpretation, the second half of Article 2.28(3), including the obligation to publish the date on which quota becomes available and the methodology and procedures for allocating it, would only apply to TRQs administered under an allocation mechanism. To the contrary, this obligation must apply to *all* TRQs, irrespective of whether they are administered on a first-come, first-served basis, or an allocation mechanism. Whatever methodology/procedure adopted – whether first-come, first-served or an allocation mechanism – this must be made public in order to inform importers of how to access quota. It does not make sense to suggest that a Party administering a TRQ on a first-come first-served basis would not be required to publish this fact, along with the date on which the quota year opens.
4. Canada further suggests that New Zealand’s interpretation of Article 2.29(2)(a) would ‘make it impossible for Canada to use an allocation mechanism’.¹ While it is not for New Zealand to identify for Canada the various ways in which it might administer its TRQs, it is not correct that Canada cannot adopt an allocation mechanism without breaching Article 2.29(2)(a). In New Zealand’s Rebuttal Submission, it noted three examples of allocation mechanisms that Canada could adopt: a pro-rata system, a licence on demand system, or auctioning (as reserved in Canada’s Schedule²).³ Each of these allocation mechanisms could be implemented without introducing new limits, conditions, and eligibility requirements.⁴ There may also be others.

¹ Response of Canada to Post-Hearing Written Questions for the Parties from the Panel, at para 7.

² Canada has reserved the right to use an auctioning system for the first seven years of CPTPP: Paragraph 3(d) of Canada’s Schedule.

³ Rebuttal Submission of New Zealand, at para 150.

⁴ As New Zealand noted in the hearing, Article 2.29(2)(a) does not capture all limits, conditions and eligibility requirements. Footnote 17 to Article 2.29(2)(a) notes that it does not apply to conditions, limits, or eligibility requirements that a Party also applies to out-of-quota imports (e.g. administrative requirements, customs requirements and health and safety regulations). Article 2.30(1) also expressly requires Parties to impose timeframes for certain stages in the quota allocation process – these would also fall outside of Article 2.29(2)(a): Hearing transcript, 15 June, from page 215, line 14.

5. Further, the fact that an allocation mechanism includes new limits, conditions, and eligibility requirements does not mean that Canada cannot adopt it. It simply means that Canada is required to go through the agreed process set out in Article 2.29(2)(b)-(c), and engage with any CPTPP Party with a 'demonstrable commercial interest' in the TRQ good,⁵ in order to do so. As explained in the hearing, this sets a balance between protecting the market access that was agreed between CPTPP Parties, and providing an avenue for Parties that are administering TRQs to introduce new measures.⁶

QUESTIONS FOR CANADA

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?

6. Canada states in its response that if there are no applicants for any of the pools available under a particular TRQ, Canada will 'normally' post the available quantities on GAC's website.⁷
7. Based on the evidence before the Panel, this has never occurred. Canada has provided information of 22 times where it says it received no eligible applicants to a pool.⁸ In each of these instances, quota was moved into another pool/pools that had received applications.⁹ It therefore follows that, based on the evidence provided, there has never been a situation in which no applications have been received into any of the pools under a TRQ.
8. In its response, Canada also expressly acknowledges that, even if it were to receive no applications into any of its pools – the new eligibility requirements that it introduced in its Notices to Importers (i.e. that an importer must be a processor, further processor

⁵ Under Article 2.29(2)(b) - (c), any Party with a demonstrable commercial interest in supplying the TRQ good in question can request consultations with the Party proposing to introduce a new limit, condition, or eligibility requirement. Following consultations, the measure can only be introduced if no Party with a demonstrable commercial interest in the good objects.

⁶ Hearing transcript, 15 June, from page 219, line 3.

⁷ Response of Canada to Post-Hearing Written Questions for the Parties from the Panel, at paras 11 and 12.

⁸ See the annex of the statement of Anca Darbyshire, 30 May 2023, Exhibit CDA-48.

⁹ Exhibit CDA-48 states that 'where there are no eligible applicants within a particular pool associated with a TRQ, Canada's consistent policy is to allow quota to move from that pool *to the other pool(s) with eligible applicants*' (para 3). In each of the 22 instances listed in the annex to CDA-48, quota was moved into another pool/pools: see the far right column titled 'pools to which quota was moved'.

or distributor), would continue to apply.¹⁰ In other words, even when no applications at all are received from within Canada's pools, persons who meet the eligibility requirements in Paragraph 3(c) of Canada's Tariff Schedule, but are not a processor, further processor, or distributor (e.g. retailers) will continue to be completely excluded from applying for quota.

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?

9. In its response, Canada states that, if there are no applicants for any of the pools available under a particular TRQ, Canada will ‘normally’ post the available quantities on GAC's website. Canada says that ‘at this stage in the process, Canada's pooling system no longer applies’.¹¹
10. As noted above, on the evidence before the Panel, there has never been a situation in which no applications have been received into any of the pools under a TRQ. Even in this purely hypothetical situation, however, it is not correct that Canada's pooling system would ‘no longer apply’. An importer would still need to fall within one of Canada's pools (i.e. be a processor, further processor, or distributor) in order to apply for quota. Other entities (e.g. retailers) who meet the eligibility requirements in Paragraph 3(c) of Canada's Tariff Schedule, but do not fall within a pool would still be excluded.

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

11. Canada states in its response that there is no express provision prohibiting Canada from using a pooling system for its CPTPP TRQs in Section D or in Canada's TRQ Appendix.¹²
12. Canada is prohibited from pooling¹³ under the Articles in Section D that are in dispute in this case. These rules apply to all CPTPP Parties and all quota administration systems. It would have been unnecessary to include a further provision expressly prohibiting pooling in either Section D, or in Canada's Schedule. Including an express prohibition would also have created uncertainty as to the application of the rules in Section D to other quota administration systems that were not also subject to an express prohibition.

¹⁰ Response of Canada to Post-Hearing Written Questions for the Parties from the Panel, at para 10.

¹¹ Response of Canada to Post-Hearing Written Questions for the Parties from the Panel, at para 13.

¹² Response of Canada to Post-Hearing Written Questions for the Parties from the Panel, at para 26.

¹³ Whether in law (as under Canada's current quota allocation system) or in fact.

13. If Canada wanted to administer its TRQs through quota pools, it needed to secure a reservation permitting it to do so in its Schedule (as it did for auctioning¹⁴). As Canada accepted during the course of the hearing, it did not do so.
14. In its response, Canada also commented on other instances in which it has used variations of pooling to allocate quota.
15. As New Zealand noted in the hearing, Canada's previous use of pooling for WTO quotas was for chicken, not dairy products. This was only one of a wide range of different approaches to TRQ administration that Canada has used to administer its WTO TRQs. As is clear from the explanation set out in Canada's response, it also differed in a number of ways to the pooling system that Canada is using currently under CPTPP.
16. Canada has also commented on its use of pooling under CETA.¹⁵ As Canada says, it first started implementing pooling for its CETA TRQs in September 2017, when CETA provisionally entered into force. The text of TPP (including Section D, and Canada's Schedule) was concluded and signed on 4 February 2016. That text was not reopened when TPP was incorporated into CPTPP. The entire text of TPP (including Section D and Canada's Schedule) was incorporated in full, unaltered, into CPTPP.¹⁶ CPTPP was signed on 8 March 2018, and came into force on 30 December 2018.

¹⁴ Paragraph 3(d) of Canada's Schedule states that 'Canada reserves the right to allocate any TRQ or portion of a TRQ through auctioning for no more than the first seven quota years after entry into force of the Agreement for Canada'. The use of the language 'reserves the right' makes it clear that this is a reservation, permitting Canada to use auctioning for a limited period of time only. Outside of this, auctioning would be inconsistent with Canada's obligations under CPTPP, including Article 2.29(2)(a).

¹⁵ Response of Canada to Post-Hearing Written Questions for the Parties from the Panel, from para 27.

¹⁶ The entirety of TPP was incorporated by reference into CPTPP. See Article 1:
<https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/Comprehensive-and-Progressive-Agreement-for-Trans-Pacific-Partnership-CPTPP-English.pdf>