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

Canada — Dairy Tariff Rate Quota Measures

SUPPLEMENTARY SUBMISSION OF NEW ZEALAND

June 2023

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1. New Zealand thanks the Panel for the opportunity to provide a short statement clarifying the relationship between the three forms of conduct that New Zealand has challenged, and the six Articles in dispute.

2. As noted in our written submissions, and during the hearing, New Zealand has challenged three forms of Canada's conduct:

    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.

Article 2.30(1)(b)

3. Article 2.30(1)(b) prohibits Parties from limiting access to an allocation to processors.

4. New Zealand's claim is that Canada limits access to *all* of the allocations contained in the processor and further processor pools under each of its TRQs to processors.[1]

5. Reserving quota for domestic dairy processors is one of the three forms of conduct that New Zealand has challenged in this dispute.

Article 2.29(2)(a)

6. Article 2.29(2)(a) prohibits the unilateral introduction of new limits, conditions, and eligibility requirements on the utilisation of a TRQ for the importation of a good.

7. New Zealand has two claims under this Article.

8. New Zealand claims that *each* of the pools created under Canada's 16 TRQs are a new '**limit'**. This is because all of the quota contained in them is limited to the relevant entity (i.e. processor, further processor, or distributor).

9. New Zealand further claims that the pools under each TRQ *collectively* create a new **eligibility requirement** for that TRQ. This is because an importer must be a processor, further processor, or distributor (as relevant) in order to be eligible to apply for quota under that TRQ.

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[1] See Table 2 at page 29 of New Zealand's First Written Submission. This is unaffected by Canada's claimed practice of moving quota between pools. Canada *only* allows quota to be moved out of a pool if no applications at all are received into that pool (i.e. if there are *no processors willing to take it*). Indeed, in the hearing Canada described this as a 'right of first access' (Transcript, June 14, page 150, line 24). This is inconsistent with the Processor Clause.

10. Allocating all of the quota under each TRQ into pools that can only be accessed by certain types of importer is one of the three forms of conduct that New Zealand has challenged in this dispute.

Article 2.30(1)(a)

11. Article 2.30(1)(a) obliges Parties to allow persons that meet their eligibility requirements to apply and be considered for quota.

12. New Zealand's claim is that Canada does not allow persons, such as retailers, that meet the eligibility requirements in its schedule to apply and be considered for quota. Instead, Canada requires importers, *in addition to the eligibility requirements in its schedule*, also to be a processor, further processor, or distributor (as relevant) in order to be eligible to apply for quota under that TRQ.

13. Excluding retailers from accessing quota under each of Canada's TRQs is one of the three forms of conduct that New Zealand has challenged in this dispute.

Article 2.30(1)(c)

14. Article 2.30(1)(c) obliges Parties to ensure, to the maximum extent possible, that importers obtain allocations in the amounts requested.

15. During the course of the hearing Canada disclosed that it:

    a. Does <u>not</u> ask applicants to request how much quota they want*;* and

    b. Allocates *all* of the quota under each pool on a market share or equal share basis, *irrespective of how much applicants want and can use.*

16. Canada has completely disregarded its obligation under Article 2.30(1)(c). Instead of making allocations based on the amounts requested (as required under Article 2.30(1)(c)), Canada grants allocations based entirely upon the completely different metric of market share and equal share.[2]

17. New Zealand's claim is that this is inconsistent with Article 2.30(1)(c) because, as applicants have no opportunity to request the amount of quota that they want, <u>no allocations</u> are being made in the amounts that importers have requested. Some applicants will receive more quota than they want and are prepared to use (resulting in underfill). Other applicants will have their allocations reduced, despite wanting and being able to use more quota.[3]

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[2] Quota within the Processor and Further Processor pools is divided based on 'market share'; quota within the distributor pool is divided based on 'equal share': see under 'Calculation of allocations' heading in each of Canada's Notices to Importers.

[3] New Zealand's Opening Statement, at para 230-236.

18. Allocating all of the quota under each TRQ into pools that can only be accessed by certain types of importer is one of the three forms of conduct that New Zealand has challenged in this dispute.

Article 2.29(1)

19. Article 2.29(1) obliges Parties to allow eligible importers the opportunity to utilise TRQ quantities fully.

20. New Zealand's claim is that *no* importers have the opportunity to utilise TRQ quantities fully under its quota pooling system because:

    a. Importers that fall within a pool only have the opportunity to utilise the quota in *that* pool. They have no opportunity to utilise quota in *other* pools.[4]

    b. Importers who meet the eligibility requirements in Canada's schedule, but do not fall within a pool, have no opportunity to utilise any of the quota in any pool.

21. The effect of each of the three forms of conduct that New Zealand has challenged in this dispute is that importers do not have the opportunity to utilise TRQ quantities fully. An effective remedy to the current dispute, however, requires a ruling that each form of conduct is in and of itself (i.e. not just its effect) inconsistent with CPTPP rules.

Article 2.28(2)

22. Article 2.28(2) obliges Parties to ensure that their procedures for administering their TRQs are fair and equitable. This is a standalone claim. A finding that Canada has breached Article 2.28(2) is not contingent on a finding of breach under any other claim.

23. Canada's pooling system is not fair and equitable for the reasons set out in paragraph 149 of New Zealand's first written submission. Each of these reasons is linked to one of the three forms of conduct that New Zealand has challenged in this dispute.

24. A finding under Article 2.28(2) *alone*, however, will not resolve this dispute. In order to resolve this dispute, the Panel needs to make findings on whether *each* of the forms of conduct challenged by New Zealand are permitted under CPTPP.

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[4] This is unaffected by Canada's claimed practice of moving quota between pools when no applications are received. Canada *only* allows quota to be moved out of a pool if no applications at all are received into that pool (i.e. if there are no importers within that pool that are willing to take it). Further, if quota is moved into another pool, that quota is then only available to importers that are eligible to apply for quota from *within that pool*. This does not allow importers the opportunity to utilise TRQ quantities fully.