

Before the 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 Oral Statement of Australia

As delivered

14 June 2023

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I. INTRODUCTION

1. Thank you Chair, Members of the Panel. Australia welcomes the opportunity to present its views.
2. The CPTPP is a trade liberalising agreement. Its market access outcomes are the core element of a complex deal across a broad spectrum of topics. The Tariff Rate Quotas (commonly referred to as "TRQs") agreed reflect the intention of Parties to reduce barriers to trade. TRQs are a fundamental part of the Agreement's overall value.
3. In this dispute, the parties disagree on the interpretation of rules that govern the TRQ market access agreed by CPTPP Parties. This has implications not only for Canada's dairy TRQs, but will also influence how other CPTPP Parties administer their respective TRQs. Interpretation of these provisions is of great importance.

II. TREATY INTERPRETATION

4. This dispute hinges on the proper application of treaty interpretation rules. Australia's written submission outlined eight key points on Articles 31 and 32 of the Vienna Convention. To summarise – ordinary meaning is the correct starting point, as informed by a balanced assessment of the context of the relevant text and object and purpose of the treaty overall. A treaty interpreter must look for the *ordinary* meaning, not an *extraordinary* meaning based on a selective application of context, object and purpose.
5. Article 31(2) makes clear that only certain materials are relevant to 'context': namely, materials made in connection with the conclusion of the treaty that take the form of either an agreement between all the parties relating to the treaty or an instrument by one or more parties accepted by the other parties as related to the treaty. Australia is not aware of any contextual materials that meet these criteria for the obligations at issue.
6. Once an Article 31 analysis is complete, Article 32 provides that a treaty interpreter may use supplementary materials, such as negotiating history, to *confirm* its interpretation resulting from that analysis. Alternatively, where the outcome of the Article 31 analysis is ambiguous, obscure, absurd or unreasonable, Article 32 allows recourse to supplementary materials in order to *determine* its interpretation. In Australia's view, all the provisions at issue in this dispute are capable of interpretation under Article 31 and there is no need to have recourse to Article 32.

III. INTERPRETATION OF CPTPP OBLIGATIONS

7. For the following reasons, we do not consider that the circumstances in this case support Canada's treaty interpretation. In Australia's view, the correct application of the rules of treaty interpretation leads to the following conclusions: first, the CPTPP TRQ rules are straightforward; second, the eligibility requirements are clear; and third, there is no overriding right to protect domestic industry. I will address each of these in turn.

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A) The TRQ rules are straightforward

8. Chapter 2 Section D is titled ‘Tariff-Rate Quota Administration’ and contains five articles. These rules are general in nature and cover the *whole* of an importing Party’s TRQ administration, except where otherwise specified. Arguments by Canada that seek to qualify or limit the scope of the obligations beyond what is written are a legal fiction. Australia provides three examples in support of this statement.
9. First, Article 2.29(1) is the headline obligation in an article entitled "Administration and eligibility". This is CPTPP Parties' commitment to ensuring their TRQ administration supports their full use – in accordance with the purpose of the CPTPP as a trade liberalising agreement with TRQs as an essential element. The structure of the article and its placement within Section D does not support an interpretation that this paragraph should be read more narrowly as only being concerned with ensuring that importers *who had already received* a TRQ allocation were able to use that allocation.
10. Second, arguments which rely on artificial distinctions between the stages of TRQ administration create absurd results. For example, limiting the scope of the obligation in Article 2.29(2)(a) to *actual importation* (as opposed to an earlier allocation stage) would allow a Party to impose a restriction on the utilisation of a TRQ *at any time prior* to that. This interpretation strains the entire framework of Article 2.29, requiring the reading-down of words which are otherwise plain and unambiguous in the context of TRQ administration, such as "importer". This would also have serious adverse implications for the utility of TRQ commitments in FTAs generally.
11. Third, suggestions that the Parties accepted certain inherent conditions or limitations associated with Canada's supply management system or existing TRQ administration as part of the CPTPP TRQs are without basis. The CPTPP TRQs were created by the Agreement, they did not exist before. Their existence, parameters and rules for their administration are set out in the Agreement.

B) The eligibility requirements are clear

12. One example is the eligibility requirements. CPTPP Parties expect that a person who meets the eligibility requirements as set out in the treaty text *will in fact be eligible* as an importer. For Canada’s TRQs, these eligibility requirements are specified in paragraph 3(c) of Canada’s TRQ Appendix. There is nothing in that paragraph that permits a further limiting of eligibility based on the type of entity. The avenue available to CPTPP Parties for varying those eligibility requirements is to follow the procedure in Article 2.29(2)(b) and (c), an option Canada has not pursued.
13. Australia disagrees with Canada's implicit assertion that modification of eligibility requirements at any time prior to *actual importation* is permitted under Article 2.29(2). As previously mentioned, Australia finds no support in the ordinary meaning, context, object or purpose of the Agreement to distinguish between the stages of *allocation* and *subsequent usage* of a TRQ.

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14. In Australia's view, permitting Canada to introduce additional eligibility requirements beyond what was agreed risks rendering certain negotiated outcomes meaningless. It also sets a dangerous precedent for implementation of commitments by CPTPP Parties both present and future.

C) There is no right to protect domestic industry

15. Furthermore, suggestions that a CPTPP Party has a recognized right to protect its domestic industry are without basis in the Agreement. CPTPP's Preamble balances the intention of a trade liberalising agreement with the Parties' right to regulate for *legitimate* public policy objectives such as health and the environment. There is no reference to protecting domestic industry. In any case, a right to regulate must be applied in a manner consistent with the obligations of the treaty. This in no way supports a right to protect domestic industry through protectionist TRQ allocation mechanisms that undermine market access commitments made by the Parties.

IV. CONCLUSION

16. Finally, while not legally binding, the Panel should consider the findings of the USMCA panel. This dispute cannot be divorced from near identical claims and obligations in another forum where Canada's approach to TRQ administration has already been found to be in breach of trade rules.

17. In summary, Australia submits that the CPTPP TRQ rules are straightforward. A plain reading of the text supports a compelling interpretation. Market access commitments, including the TRQ provisions in the CPTPP, are designed to liberalise trade. Canada's approach to TRQ administration does not honour those commitments.

18. Australia thanks the Panel for the opportunity to present these views.